IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2018-419-000166
[2018] NZHC 2938

IN THE MATTER	of ss 316 and 317 Property Law Act 2007
AND	
IN THE MATTER	of an application by STONEHILL TRUSTEE LIMITED for an Order Extinguishing or Modifying Land Covenants
BETWEEN	STONEHILL TRUSTEE LIMITED Applicant
AND	NEW ZEALAND INDUSTRIAL PARK LIMITED First Respondent
	YE QING Second Respondent

Hearing:	29 and 31 October 2018
Appearances:	S L Robertson QC for the Applicant D T Broadmore and HCMS Snell for the Respondents
Judgment:	13 November 2018

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Tuesday, 13 November 2018 at 2:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:	Buddle Findlay, Auckland Bay Law Office, Auckland
Counsel:	S Robertson QC, Auckland

Introduction

[1] The applicant, Stonehill Trustee Limited (Stonehill), owns a 28-hectare block of land in McDonald Road, Pokeno (the property). It has agreed to sell the property to Synlait Milk Limited (Synlait). Synlait has begun to build a large milk treatment plant on the property. As part of the sale and purchase agreement, Stonehill agreed to procure the surrender of two land covenants which restrict development of the property.

[2] Stonehill now applies under ss 316 and 317 of the Property Law Act 2007 to extinguish the two covenants. In the alternative, it applies to modify the covenants so as to remove the restrictions on the development of the property.

[3] The application is opposed by the first respondent, the owner of a neighbouring property which has the benefit of the two covenants, New Zealand Industrial Park Limited (NZIPL). The second respondent, Ye Qing, is the sole director of NZIPL.

Factual background

[4] The two covenants were created in April 1998 and August 2000 over two small separate rural parcels of land of 4.1 hectares and 5.6 hectares in McDonald Road owned by a Pokeno builder and his wife. The benefited land was immediately adjacent to the burdened land and was owned by Winstone Aggregates Limited (Winstone).

[5] The benefited land totalled 141.87 hectares in the 1998 covenant and slightly more, 155.94 hectares, in the 2000 covenant. It was, however, essentially the same land. It was zoned Aggregate Extraction and Rural.

[6] In May 1998, Winstone applied for resource consents to develop a quarry on the benefited land to exploit a basalt rock resource. The burdened land was immediately adjacent to that part of the benefited land on which it was proposed that top soil would be stripped and stockpiled, overburden deposited, drains and tracks formed, earthworks undertaken and water managed (described as proposed landform).

[7] The April 1998 covenant came about when Winstone agreed to withdraw its application for an enforcement order preventing the Pokeno builder from erecting a house on land in vicinity of the quarry land and in further consideration of the provisions contained in an agreement between the two land owners.

[8] The August 2000 covenant came about in consideration for the transfer to the Pokeno builder of the burdened land. Both covenants provided that the burdened land was to be used only for the purpose of grazing and/or lifestyle farming. They specifically provided that no additional houses were to be erected on the burdened land. In addition, the covenants prohibited the owner of the burdened land from making any submissions against Winstone's application for resource consents or any claim against the quarry operator.

[9] After a heavily contested application process, which took some years, the Environment Court eventually permitted the granting of the necessary resource consents to Winstone to develop the quarry by judgment dated April 2002.[1] However, Winstone never went ahead with its plans to develop the quarry. The resource consents have now expired.

[10] Significant changes have also occurred in Pokeno since the covenants were agreed upon. The appropriateness of Pokeno as a growth node was first established through the Franklin District Growth Strategy 2007, which encouraged further detailed investigations of the growth potential of the area. This further investigation was undertaken through the Pokeno Structure Planning process by a consortium of landowners, including Winstone.

[11] The Pokeno Structure Plan was adopted by Franklin District Council in October 2008 and a recommendation was released on Plan Change 24 by an independent panel of decision-makers in 2010. The Pokeno Structure Plan envisaged the urban expansion of Pokeno from a village of approximately 500 people to an urban village of approximately 5,000 people, a town centre, public open space and reserves

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1 *Winstone Aggregates Ltd v Franklin District Council* Environment Court Auckland A80/02, 17 April 2002.

and approximately 80 hectares of industrial land. Plan Change 24 became fully operative in September 2012.

[12] After deciding not to proceed with its plans to develop the quarry, Winstone sold the benefited land, not as a whole, but in parcels. The Pokeno builder also sold the burdened land. Approximately 41.7 hectares of the benefited land was rezoned Industrial 2. The burdened land was also rezoned Industrial 2.

[13] In July 2013, Winstone surrendered the April 1998 covenant to the extent of 0.8 hectares to allow for expansion of McDonald Road. The burdened land, being 9.7 hectares minus 0.8 hectares surrendered for expansion of McDonald Road, was then combined with the 41.7 hectares of the benefited land and subdivided into two lots, one of approximately 22.6 hectares and the other of approximately 28 hectares.

[14] A large concrete pipe manufacturing plant, operated by Hynds Pipe Systems Limited, has been established on the 22.6-hectare lot (the Hynds property). The 28-hectare lot is now owned by Stonehill and is the land upon which the Synlait plant is being built. The burdened land is mostly in the Stonehill property, but does extend into the Hynds property. Of the 28 hectares owned by Stonehill, less than a quarter is now subject to the two covenants. That means that Stonehill is not restricted in the development of three quarters of its property.

[15] In its application for resource consent, Winstone had proposed that the Stonehill and Hynds properties would not only be used for topsoil stripping and stockpiling and overburden depositing, but also as a processing area which was to include a workshop, fuel storage, staff facilities, rail siding, stockpiles and aggregate distribution.

[16] In addition, another 27.4-hectare plot zoned Aggregate Extraction has been sold to Grander Investments Limited. This means that of the original benefited land of between 141.87 hectares and 155.94 hectares, approximately 69.1 hectares or about half of the benefited land has been sold off. Stonehill now owns approximately 8 hectares of the burdened land and 20 hectares of the benefited land. The burdened land, although initially immediately adjacent to the quarry land owned by Winstone,

is now some distance away from the land owned by NZIPL, which is objecting to the removal of the covenants.

The law

[17] The application is made in reliance on ss 316 and 317 of the Property Law Act 2007:

> **316 Application for order under section 317**
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> (1) A person bound by an easement, a positive covenant, or a restrictive covenant (including a covenant expressed or implied in an easement) may make an application to a court for an order under section 317 modifying or extinguishing that easement or covenant.
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> (2) That application may be made in a proceeding brought by that person for the purpose, or in a proceeding brought by any person in relation to, or in relation to land burdened by, that easement or covenant.
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> (3) That application must be served on the territorial authority in accordance with the relevant rules of court, unless the court directs otherwise on an application for the purpose, and must be served on any other persons, and in any manner, the court directs on an application for the purpose.
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> **317 Court may modify or extinguish easement or covenant**
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> (1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—
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> (a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:
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> (i) the nature or extent of the use being made of the benefited land, the burdened land, or both:
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> (ii) the character of the neighbourhood:
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> (iii) any other circumstance the court considers relevant; or
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> (b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
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> (c) every person entitled who is of full age and capacity—
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> (i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or

(ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled.

(2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[18] Stonehill relies on s 317(1)(a), (b) and (d).

[19] Section 317(1)(a) provides the Court may extinguish a covenant if it is satisfied it ought to be extinguished because of a change since its creation in: (i) the nature or extent of the use being made of the benefited land and/or the burdened land; (ii) the character of the neighbourhood; and (iii) any other circumstance the Court considers relevant.[2] Stonehill relies on each of these sub-sections.

[20] The "real question" is whether by reason of any change of the kind mentioned, the covenant should be modified.[3] The focus is not on the fact of change, but rather on its impact from the point of view of making it appropriate to modify the covenant.[4] As John Hansen J said in *Luxon v Hockey*:[5]

> The change in use of land is most likely to be relevant where it has altered the benefit or burden following from the continuation of the covenant. The focus should be on the effect of the covenant if it is not modified or extinguished, rather than the effect of such a modification: *Heaton v Loblay* (1960) 77 WN (NSW) 140 at 141–142. The most common justification for modification will be where the change in use is such that the benefit or burden flowing from the covenant is totally disproportionate to that envisaged when the covenant was created: *Manuka Enterprises Ltd v Eden Studios Ltd* [1995] 3 NZLR 230 at 234.

[21] And as the learned authors of *Hinde McMorland & Sim* note:[6]

> Though it should not be regarded as a prerequisite to making an order, the most common justification for doing so would be evidence that the relative advantages and disadvantages flowing from the easement or covenant have

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2 See generally *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [17.032].

3 *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115.

4 *Jansen v Mansor* (1995) 3 NZ ConvC 192,111 (CA) at 192,115.

5 *Luxon v Hockey* (2003) 5 NZCPR 125 (HC) at [14].

6 *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [17.032].

> become totally disproportionate by reason of changes which have occurred since its creation.

[22] Section 317(1)(a)(ii) refers to the character of the neighbourhood. I adopt the following statement from *Hinde McMorland & Sim*:

> What constitutes a neighbourhood depends upon the facts of each case, with the servient tenement itself perhaps being a part of its own neighbourhood, and the character of a residential area derives from the style, appearance and arrangement of the houses, and from the social customs of the inhabitants. Increased density of development, particularly if increasing the burden imposed by the covenant on the servient land, could be a sufficient change in the character of the neighbourhood. The neighbourhood may extend not only to any lots entitled to the benefit of the easement or covenant, but also to other lots within a reasonable radius of the burdened land.

[23] Section 317(1)(a)(iii) is a general provision that allows the Court to consider any other circumstances it deems relevant.

[24] Turning to s 317(1)(b), Stonehill says the continuation in force of the covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the covenant at the time of its creation.

[25] This ground envisages situations where the reasonable user of the land subject to a covenant is impeded by the existence of that covenant because of a change of circumstances which could not have been reasonably foreseen by the original parties.[7] This change will necessarily result in the covenant being a greater burden to the proprietor of the servient tenement.[8]

[26] Section 317(1)(d) allows the Court to extinguish a covenant if it is satisfied that the proposed extinguishment will not substantially injure any person entitled. The focus is on the effect of extinguishment — whether it will substantially injure the owner of the dominant land. This ground also covers the case of a "proprietorially speaking, frivolous objection".[9]

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7 *Harvey v Hurley* (2000) 9 NZCPR 427 (CA) at [27].
8 *Harvey v Hurley* (2000) 9 NZCPR 427 (CA) at [27].
9 *Ridley v Taylor* [1965] 1 WLR 611 (CA) at 622.

[27] Even if one or more of the grounds just discussed are established, the Court has a discretion in deciding whether to extinguish a covenant. Factors often relevant to the exercise of that discretion include:[10]

(a) Sanctity of contract.[11] This is particularly relevant where the applicant is the original covenantor or where the original covenantee is still the owner of the benefited land.

(b) The expropriation of private property or proprietary rights.[12]

Discussion

[28] I am of the view that the two covenants should, in effect, be extinguished for the following reasons.

[29] First, there has been a change since the creation of the covenants in the nature or extent of the use being made of the benefited land and the burdened land.[13] Three substantial parcels totalling approximately 69 hectares of the benefited land have been sold off. The Stonehill and Hynds properties will now not be used for the purpose of a quarry. A third parcel of land has been sold to Grander Investments Limited. Its plans are not known.

[30] The Waikato Council is currently undertaking a review of the operative Waikato District Plan (Franklin Section) and the Waikato District Plan (Waikato Section) to combine the two plans into a single operative district plan for the Waikato District. The proposed Waikato District Plan 2018 (PWDP) was notified in July 2018. Submissions closed in October 2018. The PWDP proposes to rezone the benefited land (apart from the Stonehill and Hynds properties) as Rural. Within the Rural zone, the PWDP provides for extractive industry as a discretionary activity. The PWDP does not include a specific zone for aggregate extraction.

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10 *Hinde McMorland and Sim Land Law in New Zealand* (online looseleaf ed, LexisNexis) at [17.036].
11 *Harnden v Collins* [2010] 2 NZLR 273 (HC) at [24].
12 *Harnden v Collins* [2010] 2 NZLR 273 (HC) at [24].
13 Property Law Act 2007, s 317(1)(a)(i).

[31] In its submissions on the PWDP, NZIPL recorded the current use of its property as a pastoral farm. It sought a change of zoning to Residential on the basis of a comprehensive and integrated residential development, which it called Havelock Village. Specifically, it sought the extension of the existing Residential zone of Pokeno in a southerly direction to encompass its property subject to site specific provisions that gave effect to a masterplan for residential development of the property. It said that this development would unlock enhanced recreation and leisure opportunities through to the Waikato River.

[32] It was only in the event that NZIPL's proposal for residential development was not accepted that NZIPL opposed the proposed Rural zoning and sought, in the alternative, that the Aggregate Extraction zone remain in place. In the hearing before me, Mr Ye said that he was exploring the possibility of making another application for resource consents to develop a quarry which would, of necessity, be of a much smaller scale than Winstone's proposal given the sell-off of half the land intended to be used for the quarry. He mentioned the possibility of a quarry both to supply local needs for aggregate and as a tourist attraction for visitors to an ecotourism resort he was developing on land nearer the Waikato River.

[33] There was much debate in the hearing before me as to difficulties of securing the resource consents necessary to develop any type of quarry on NZIPL's property. It is, however, unnecessary for me to determine whether NZIPL would be able to obtain consent. I have no doubt, however, that obtaining resource consent for aggregate extraction would be significantly more difficult than it previously was, due to the sensitivity of Pokeno residents to the effects of such activities.

[34] Much of the benefited land will never be developed as a quarry. The preferred option of the owner of the remaining benefited land, NZIPL, is to develop a residential village yielding 1,025 lots and housing approximately 2,800 people.

[35] NZIPL only opposes Stonehill's application to keep its options open. Although Mr Ye says that he has spoken to people about the possibility of developing a quarry, NZIPL has no present plans to do so. To be fair, it has not had the time to do so having only settled the purchase of its property on 1 October 2018.

[36] The use of the burdened land has also changed beyond recognition. It is now zoned Industrial 2. The covenants describe a use of the burdened land in a manner quite inconsistent with its present zoning and actual use. There is no grazing and/or lifestyle farming. There is not a sheep in sight. The covenants did not envisage the creation of large scale factories, which are permitted in an Industrial 2 zone. The covenants specifically prohibit only an "additional dwelling" being erected on the land.

[37] Second, the character of the neighbourhood has changed dramatically.[14] No longer a village of 500 surrounded by dairy farms and a vineyard, Pokeno has undergone significant growth since the covenants were agreed upon. Its population is currently estimated at around 3,000, but it could soar to 12,000 by 2045 according to Statistics NZ. New residential subdivisions have sprung up with a thousand new lots sold.

[38] A large infant formula milk factory operated by a Chinese company, Yashili, has been established just across McDonald Road from the Synlait plant under construction. There are plans to expand the Yashili factory on land to the south west, the corner of which touches the NZIPL property. On land immediately to the west of the Yashili extension, Winston Nutritional Ltd is also planning its own milk products plant. The construction of the Synlait plant is in keeping with other developments in the vicinity, none of which are restricted by any covenant designed to benefit a proposed quarry. I acknowledge that a covenant should not necessarily be modified because commercial activities could be carried out on adjacent properties that would have a significant effect on the benefited land, but it can be a factor.

[39] A further plan change (Plan Change 21) has led to a Residential zone for a former vineyard to the north west, which again borders the NZIPL property. Hence, NZIPL's submission on the PWDP that the existing Residential zone of Pokeno should be extended in a southerly direction to encompass its property. Although NZIPL says that it could still make application for resource consents to develop a quarry if its property was rezoned Residential, it would be even more difficult to obtain consent.

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[14] Property Law Act 2007, s 317(1)(a)(ii).

[40] Third, as to any other circumstances that the Court consider relevant,[15] I am of the view that the utility of the covenants has been seriously compromised by the rezoning of the burdened land, its merger with a large parcel of the benefited land and its subdivision into two lots of 22.6 hectares and 28 hectares. The covenants will now have virtually no effect on any new application for resource consents to develop a quarry.

[41] Hynds has established a large concrete pipe manufacturing operation on the part of its property not subject to the covenants. Although Synlait has now begun to build a milk treatment plant on land which is subject to at least one covenant, it is legally able to build the plant on any part of the other three quarters of the property, which would make it much closer to NZIPL's property. That is because the covenants affect only the northern most part of the Stonehill property. NZIPL's property borders the south west boundary of the Stonehill property.

[42] Furthermore, because the covenants only apply to a quarter of the Stonehill property and even less of the Hynds property, both property owners are still able to make submissions against any application for resource consents and claim against the quarry operator, both of which are prohibited by the covenants. The covenants also do not apply to an adjoining landowner, Grander Investments Ltd, which has a 27.4-hectare land holding. Although only 18 to 20 years old, it is my assessment that the covenants are now of little or no effect. They are of no practical value.

[43] Fourth, the continuation in force of the covenants would impede the reasonable use of the burdened land in a different way or to a different extent from that which could reasonably have been foreseen by the original parties to the covenants at the time of their creation.[16]

[44] At the time of creation of the covenants the original parties only ever foresaw the use of the burdened land as grazing or lifestyle farming. Although the impediment remains the same in its terms — the land is to be used only for the purpose of grazing and/or lifestyle farming and "no additional dwelling" is to be erected on the land —

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15 Property Law Act 2007, s 317(1)(a)(iii).
16 Property Law Act 2007, s 317(1)(b).

the extent of the impediment is now very different. The retention of eight hectares of grazing land with a few sheep on it in the middle of an 80-hectare Industrial 2 zone containing large 40-metre-high processing plants and warehouses is not only incongruous, but also would have been beyond the reasonable foreseeability of the parties to the covenants.

[45] The covenants were thought to be necessary at that time to ensure that rural activities on 9.7 hectares of immediately adjacent land would enable aggregate extraction activities to be undertaken by Winstone on its land in a way that minimised the risk of reverse sensitivity effects. Since 2000, the planning framework has changed significantly. Plan Change 24 created the Industrial 2 zone as a buffer between the land zoned Aggregate Extraction and Residential. The Industrial zone, in effect, now fulfils the purpose of the covenants.

[46] Fifth, I am of the view that substantial injury will not be caused to NZIPL if the covenants are extinguished.[17] There will certainly be no injury of a physical kind such as noise or traffic. Nor will there be any injury of an intangible kind such as impairment of views, intrusion on privacy, unsightliness or alteration to the character or ambience of the neighbourhood.[18] Any injury would therefore have to be of an economic kind.

[47] Counsel for NZIPL submits that the covenants were a key part of Mr Ye's decision to purchase the NZIPL property and, therefore, would have impacted on the purchase price. The price paid by NZIPL for the property is, however, not disclosed nor is there any expert evidence of the value of the property with or without the benefit of the covenants.

[48] The covenants only apply to about a quarter of Stonehill's property and a large plant could be built much closer to NZIPL's property. As noted above, I am of the view that the covenants are not of any practical value. They would have no effect whatsoever on Waikato Council's decision on any application for resource consent to

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17 Property Law Act 2007, s 317 (1)(d).

18 *Luxon v Hockey* (2005) 5 NZCPR 125 (HC) at [35], citing *Morgensen v Portuland Developments Pty Ltd* [1983] NSW ConvR 56,855 at 56,856.

develop a quarry lodged by NZIPL. With respect to Mr Ye, I disagree with his stated beliefs that it would become more difficult to obtain resource consents to develop a quarry if the covenants were extinguished or modified. No injury has been demonstrated.

[49] I am, therefore, of the view that Stonehill has established the grounds set out in ss 317(1)(a)(i) to (iii), 317(1)(b) and 317 (1)(d), each of which provides a basis for the Court to modify or extinguish the covenants.

[50] NZIPL submits, however, that the Court should not exercise its discretion in this case to modify or extinguish the covenants. It submits that the covenants were only agreed upon 18 to 20 years ago and have a term of up to 200 years. Moreover, Stonehill acquired the property knowing it was subject to the covenants, while Synlait (with Stonehill's consent) has started to build a plant on part on the burdened land in knowing breach of the covenants. Stonehill has therefore made a business decision to act unlawfully.

[51] Although the covenants were only agreed upon 18 to 20 years ago, they are now of no practical value because of changes in zoning, merger of the burdened and benefited land and its subdivision. It is because of their lack of utility that the situation has developed the way that it has, with the Synlait plant now being built on part of the burdened land. There has, however, been no deliberate decision to act unlawfully.

[52] Mr Peter Bishop, one of the two directors of Stonehill, when asked whether he was aware of the covenants on the title, said "Yeah, probably not as aware as I should've been, but they were there, yeah." Stonehill's original intention was to build an industrial park on the property by putting a road through it and subdividing it into hectare blocks. I infer from his evidence when the property was further subdivided, the issue of the covenants would then be dealt with. Instead, Synlait approached Stonehill and signed an agreement to purchase the property six months after it was bought by Stonehill. Mr Bishop candidly acknowledged that he did not obtain any legal advice before he signed the agreement with Synlait. The agreement with Synlait included an obligation on the part of Stonehill to procure the removal of the covenants. Negotiation with the previous owner of NZIPL's land, Havelock Bluff Limited, came

to nothing because they were in the process of selling it to NZIPL. In the meantime, Synlait has proceeded with construction of the plant, notwithstanding that it has not yet settled on the purchase.

[53] In those circumstances, I am not prepared to find that Stonehill has acted in a manner which would disentitle it to relief under the Property Law Act.

Result

[54] For the reasons stated, there will be an order that land covenants D284105.4 and D541257.6 be modified so that they no longer apply to an estate in fee simple, Lot 1, Deposited Plan 463893 as comprised in Certificate of Title Identifier 614849. In effect, they are extinguished in respect of the Stonehill property.

[55] Counsel for NZIPL requested a further hearing on compensation for NZIPL if the Court was to make an order extinguishing or modifying the covenants. He relied on s 317(2), which provides:

> **317 Court may modify or extinguish easement or covenant**
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> …
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> (2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

[56] Counsel for Stonehill objected to a further hearing on the issue of compensation on the basis that such a request was not contained in NZIPL's notice of opposition and, although it was mentioned in counsel's written submissions, there was no evidential basis advanced for any award of compensation.

[57] My preliminary view on the issue of compensation is that it is not warranted, largely because of the decision of the original owner of the benefited land not to proceed with development of the quarry and instead be part of the process by which a substantial part of its land was rezoned Industrial 2, the burdened land was merged with part of the benefited land and then subdivided. Winstone obviously saw more value in selling off the land in parcels rather than as a whole, with a view to

development of a quarry for which resource consents were held. Through that process the covenants became of no practical value.

[58] These are, however, only my initial thoughts. As I did not give counsel the opportunity to make submissions, I will grant leave for counsel to file further submissions on the issue of reasonable compensation by **10 December 2018**. Unless I am persuaded that an oral hearing is required, I will then determine the issue of reasonable compensation on the papers.

Costs

[59] Although NZIPL sought costs in its written submissions, the issue of costs was not argued before me. Although costs are normally awarded to the successful party, I am of the view that NZIPL has not acted unreasonably in trying to preserve its proprietary rights. Stonehill offered to pay NZIPL's legal costs if it agreed to the removal of the covenants. I also note clause 7 of Schedule 3 to the covenants, which provides that the covenantor (Stonehill) is to pay the covenantee's (NZIPL) solicitors' legal costs and disbursements directly or indirectly attributable to the enforcement of the covenants.

[60] If costs cannot be agreed between the parties, submissions are to be filed also by **10 December 2018**.

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Woolford J