

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV2008-404-7865**

UNDER the Declaratory Judgments Act 1908  
IN THE MATTER OF an application for a declaratory judgment  
BETWEEN OMAHA BEACH RESIDENTS SOCIETY  
INCORPORATED  
First Applicant  
AND GNS TRUST LIMITED  
Second Applicant  
AND TOWNSEND BROOKER LIMITED  
First Defendant  
AND WILLIAMSON LIMITED  
Second Defendant  
AND PAMELA RASPE  
Third Defendant  
AND OMAHA PARK LIMITED  
Fourth Defendant

Hearing: 20 July 2009

Appearances: Mr R Brabant for applicants  
Mr D J Neutze for defendants

Judgment: 30 July 2009 at 4.20 pm

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**JUDGMENT OF LANG J**

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*This judgment was delivered by me on 30 July 2009 at 4.20 pm, pursuant to Rule 11.5  
of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

[1] Some time ago a company called Omaha Beach Limited developed the residential subdivision that is now the popular coastal resort of Omaha South. It did so by subdividing a large parcel of land that it owned into numerous smaller sections.

[2] Not surprisingly, the proposed subdivision attracted opposition from several quarters. These included the first to fourth defendants, who own a large parcel of land to the south of the proposed subdivision. They objected to the application for resource consent to the proposed subdivision. When the Rodney District Council ultimately granted the application, they appealed to the Environment Court against that decision.

[3] The defendants ultimately reached an accommodation with Omaha Beach limited that included the abandonment of their appeal. As part of the settlement Omaha Beach Limited agreed that all of the land that was to comprise the subdivision would have a restrictive covenant registered against it. That covenant is the subject of the present proceeding.

[4] Omaha Beach Limited created the restrictive covenant by executing a Memorandum of Transfer in favour of the defendants. A copy of that memorandum is annexed to this judgment for convenience. The operative clause of the memorandum is clause 2.1, which provides as follows:

The Transferor [Omaha Beach Limited] (or any successors in title to the Transferor) shall not object or submit to any local authority having jurisdiction over the Covenanting Lot in respect of any application by the Transferee or any third party for resource consent or plan change relating to the property which is located within a radius of 5 kilometres from the southern most point of the land comprised in Certificate of Title 132D/499 (North Auckland Registry).

[5] The Memorandum of Transfer defined “the Transferee” as being the first to third defendants in their capacities as registered proprietors of the “Benefiting Lots” described in the Second Schedule to the memorandum. The Second Schedule contains the legal description of the parcels of land that the defendants own.

[6] Every parcel of land in the Omaha South development (as listed in the First Schedule to the Memorandum) is a “Covenanting Lot” for the purposes of the restrictive covenant.

[7] The restrictive covenant purports to significantly restrict the ability of landowners in the Omaha South development to exercise their statutory rights under the Resource Management Act 1991 (“the Act”). It prohibits them from lodging objections, or making submissions in respect of, any application for a resource consent or plan change in relation to any property that lies within a 5 kilometre radius of the southernmost point of a prescribed parcel of land. This prohibition applies not only to applications lodged by the owners of the Benefiting Lots but also to those lodged by any third party.

[8] The present proceeding arose as a result of a review that the Rodney District Council initiated in respect of its Transitional District Plan 1993. That plan is the district scheme that was promulgated under the provisions of the Town and Country Planning Act 1977. It is deemed to be a district plan under the Resource Management Act 1991 by virtue of s 373 of that Act.

[9] The review of the Transitional District Plan 1993 led the Council to publicly notify its Proposed District Plan 2000. Under this plan the Council sought to create an East Coast Rural Zone, in which the subdivision of land would be tightly controlled so as to protect the rural character of the zone. The defendants’ land lies within the proposed East Coast Rural Zone.

[10] Omaha Park Limited lodged a submission in respect of the proposed classification so far as it affected the defendants’ land. The submission opposed the creation of the East Coast Rural Zone in respect of that land. It sought to change the zoning of the land to a special zone called the “Omaha Park Special Zone”. In this zone a range of conservation, recreational, commercial, residential, visitor accommodation and agricultural activities would be permitted.

[11] The Council issued a decision rejecting that submission. Omaha Park Limited has now appealed to the Environment Court against the Council’s decision.

[12] The First Applicant, Omaha Beach Residents Society, is a Society that was incorporated as part of the subdivision and development of the Omaha South land. All landowners in the Omaha South development are required to belong to it. The Society is charged by its constitution with taking any action that may reasonably be expected to promote the health, safety, welfare or wellbeing of members of the Society.

[13] The Society wishes to provide funding for submissions that are to be made by a resident's association, Omaha Beach Community (Inc), in opposition to aspects of Omaha Park's appeal at the hearing before the Environment Court. It was not sure whether the restrictive covenant operated to prevent it from taking that step. For that reason it issued the present proceeding seeking a declaration that the restrictive covenant does not apply to the notification by a local authority of a new proposed District Plan under the First Schedule to the Act.

[14] The Second Applicant, GNS Trust Limited, owns land in the Omaha South development. It is therefore a successor in title to Omaha Beach Limited, the Transferor named in the Memorandum of Transfer that created the restrictive covenant. It was included as an applicant in the present proceeding to prevent the defendants from contending that, because it does not own land that is subject to the restrictive covenant, the Society lacks the necessary standing to seek declaratory relief. As it turns out, the defendants do not take that point.

### **The scope of this proceeding**

#### *The claims by the applicants*

[15] The statement of claim contains three causes of action. The first of these seeks a declaration that the covenant is unenforceable because it is contrary to public policy and to s 27 of the New Zealand Bill of Rights Act 1990. The applicants no longer pursue this cause of action.

[16] The second cause of action alleges that the covenant is not enforceable in relation to the appeal that Omaha Park Limited has lodged with the Environment

Court. That issue has now been resolved by the defendants' concession that the covenant does not apply to the appeal.

[17] Given that concession it is not presently necessary for the Court to make any order or declaration in relation to this cause of action. Should Omaha Park Limited change its stance in relation to this issue, however, the applicants have leave to apply for relief in the form of a declaration that the covenant does not operate to prevent the applicants from becoming involved in the appeal process.

[18] This leaves only the final cause of action, which seeks a declaration to the effect that the covenant is unenforceable against the current owners of the Omaha South land because it is a covenant in gross.

#### *The counterclaim*

[19] The first declaration that the defendants seek is a declaration that the applicants are not entitled to participate in the appeal to the Environment Court by Omaha Park Limited. Given the concession to which I have referred above, the defendants no longer seek this declaration.

[20] Secondly, the defendants seek a declaration that the covenant is a restrictive covenant that is enforceable against the current owners of the Omaha South land.

[21] In summary, the only relief that both the applicants and the defendants seek is a declaration as to the enforceability of the covenant. They seek that relief, however, in the absence of any live dispute regarding the manner in which the covenant might apply. I make that observation because there is, at present, no application by any party for a resource consent or plan change that might bring the covenant into play. This is a factor that assumes considerable significance in determining whether the Court should grant the relief that the parties seek.

#### **Issues**

[22] Two principal issues were the subject of argument at the hearing. These were:

1. Is the covenant a covenant in gross?
2. Should any declaration be made?

**1. *Is the covenant a covenant in gross?***

[23] Broadly speaking, a covenant in gross is one that fails to sufficiently define or describe the property (generally referred to as the “dominant tenement”) that is to receive the benefit of a restrictive covenant: *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd* [2006] 3 NZLR 351 at 362 (CA); *Myers Park Apartments Ltd v Sea Horse Investments Limited* HC AK CIV 2004 404 7180 Venning J 24 July 2006.

[24] Such a covenant can be enforced as between the original parties to the instrument that created the covenant. Until recently, it was a matter of debate in New Zealand as to whether such a covenant ran with the land so as to bind subsequent owners who were not party to the original instrument. Doubt surrounding this issue existed because in *Staples and Co (Ltd) v Corby* (1899) 17 NZLR 734 the Court of Appeal held that the burden of a restrictive covenant in gross could run with the land. In doing so it relied upon several English authorities that were later overruled or held to have been wrongly decided.

[25] This issue has relevance in the present case, because Omaha Beach Limited (the Transferor under the Memorandum of Transfer) has now sold all of its land to third parties such as the second applicant. For that reason the covenant will not bind the current owners of the land formerly owned by Omaha Beach Limited if it is a covenant in gross.

[26] In the *ANZCO* case the Court of Appeal declined (at 367) to follow *Staples v Corby* on this point. For this reason *Staples v Corby* can no longer be regarded as being good law in this country. I therefore take the present law to be that a restrictive covenant in gross does not bind subsequent owners of the land bearing the burden of the covenant. It follows that the restrictive covenant will be unenforceable in the present case if the Memorandum of Transfer failed to sufficiently identify the land that was to receive the benefit of the covenant.

[27] The applicants contend that that is the case. They say that the restrictive covenant did not adequately define or describe the land that was to receive the benefit of the covenant. As a result, they argue that the covenant is a covenant in gross and that the defendants cannot enforce it against them.

[28] The defendants disagree. They contend that, when the Memorandum of Transfer is read as a whole, it identifies the land owned by the first to third defendants as being the land that is to receive the benefit of the covenant. They say that it is necessary in this context to have regard to the description of the “Transferee” in the Memorandum of Transfer. The “Transferee” is described as the registered proprietors of defined parcels of land. That land is, in turn, described in the Memorandum of Transfer as “The Benefiting Land”. Taken together, the defendants contend that it is reasonably clear that the Memorandum of Transfer provides for the defendants’ land to receive the benefit of the covenant.

[29] In considering this issue I consider that it is relevant to bear in mind the context in which the covenant came to be given. That occurred as part of the settlement of the Environment Court appeal that the defendants had lodged against the Council’s decision to grant a resource consent to Omaha Beach Limited in order to enable it to proceed with the Omaha South development.

[30] The evidence in this case confirms that the primary reason for the covenant was to prevent both Omaha Beach Limited, and subsequent owners of its land, from taking steps in the future to prevent the defendants from developing their own land. That type of outcome is not particularly surprising given the issues that were at stake for both parties at the time that the covenant came to be given.

[31] The authorities make it clear that the absence of any express reference to the land to be benefited will not necessarily vitiate the covenant. Where the evidence establishes that one landowner has clearly intended to provide another landowner with the benefit of a restrictive covenant, the Court will do its best to give effect to that intention. If necessary it will have regard to extrinsic evidence in order to ascertain the identity of the land that is to receive the benefit of the covenant: *Marten*

*v Flight Refuelling Ltd* [1962] Ch 115; *Thomson v Potter* (1980) 1 NZCPR 170 at 176.

[32] In *Thomson v Potter* Bisson J referred (at 176) to the following passage from the speech of Lord Wilberforce in *Miles v Easter* [1933] Ch 611 at 703:

... the Court's opinion was that the existence and situation of the land to be benefited need not be indicated in the conveyance, provided that it could be otherwise shown with reasonable certainty, and the natural interpretation to place on those latter words is, first, that they may be so shown by evidence dehors the deed, and, secondly, that a broad and reasonable view may be taken as to the proof of the identity of the lands. This general approach would, I think, be consistent with the equitable origin and character of the enforcement of restrictive covenants, which should not, I think, be constricted by technicalities derived from the common law of landlord and tenant.

[33] Bisson J was satisfied that the evidence in the case before him showed with "reasonable certainty" that the plaintiffs intended to impose a restrictive covenant on a particular section in a subdivision. It also showed that the covenant was to be for the benefit of all other lots in the subdivision that enjoyed a view of a harbour over the top of the section that was subject to the covenant. As a result, the Court held that the covenant applied for the benefit of all sections that had a view of the harbour over the top of the section that was subject to the covenant.

[34] In the present case I accept that the wording of the covenant is very wide. Nevertheless I consider that it is at the very least arguable that both Omaha Beach Limited and the defendants intended that the defendants' land was to take the benefit of the covenant. I draw that conclusion by reading the Memorandum of Transfer as a whole. It defines the "Transferee" as being the owners of the "Benefiting Lots" and the Second Schedule provides the legal descriptions of those lots. Those legal descriptions are of the parcels of land that the defendants own. I also bear in mind the factual circumstances that existed at the time that the covenant was created.

[35] That being the case, I consider that it is well arguable that the covenant is not a covenant in gross. It may fairly be taken that the lands owned by the defendants were to receive the benefit of the restrictive covenant. As a result, it may operate to bind successors in title to the land originally owned by Omaha Beach Limited. I



deliberately refrain from making an actual determination on this point because of the conclusion that I have reached in relation to the second issue. I also deliberately leave open the extent to which the covenant may be enforceable in so far as it relates to applications lodged by parties other than the owners of the defendants' land.

**2. *Should any declaration be made?***

[36] My conclusion in relation to the above issue means that it would be inappropriate for me to make the declaration that the applicants seek. I do not consider that the defendants should be prevented at this stage, on the basis of this aspect of the argument advanced by the applicants, from relying upon the covenant in respect of future applications for resource consent or plan change in relation to their own land. How much further the covenant might be held to be effective remains a matter of conjecture and can only realistically be determined on a case by case basis.

[37] I now need to consider the application by the defendants for a declaration that the covenant is enforceable against all persons who now own the land that was formerly owned by Omaha Beach Limited.

[38] As both counsel acknowledged, the remedy of declaration is discretionary in nature. The Court is not obliged to issue a declaration even if the necessary grounds have been made out. In particular, the Court will decline to issue a declaration in circumstances where there is no genuine dispute between the parties. It will not answer abstract questions in anticipation of an actual controversy. Neither is it part of the Court's function to issue judgments that operate merely to provide the parties with guidance or assistance for the future: *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 at 85.

[39] These factors persuade me that it would be inappropriate in the present case to make the declaration that the defendants seek. I have reached this conclusion for three reasons. The first is the fact that there is at present no actual controversy between the parties. What they are effectively seeking is guidance for the future.

Until such time as a dispute arises, it would not, in my view, be appropriate to attempt to define the extent to which the covenant might be enforceable.

[40] Secondly, the declaration that the defendants seek would have a very wide effect. It would operate to bind numerous landowners who have not yet had a direct opportunity to make submissions regarding the extent to which (if at all) the covenant should apply to their land. Whilst I accept that the first applicant represents all landowners in Omaha South to some extent, I have no knowledge of the extent to which individual landowners have been involved in the present proceeding.

[41] I am conscious of the fact that matters are at a relatively early stage so far as Omaha Park Limited is concerned. If its appeal is unsuccessful, the enforceability of the restrictive covenant may become a moot issue. If, on the other hand, it succeeds with its appeal to the Environment Court, it is likely that there will be downstream consequences. At some stage in the future it is likely that Omaha Park Limited, or one or more of the defendants individually, will apply for a resource consent in respect of a proposed activity. That activity may have the potential to significantly affect landowners in the Omaha South development. At that point individual landowners in Omaha South are likely to seek to oppose the application. They may feel aggrieved if they discover at that point that they are prevented from doing so by a judgment of this Court to which they were not a party and in relation to which they had no direct input.

[42] The third factor is that I consider that there is potentially another argument open to the applicants. It relates to the fundamental issue of whether the covenant is, in legal terms, a restrictive covenant that creates a burden on the land formerly owned by Omaha Beach Limited.

[43] The argument for the defendants on this point is that the owners of that land would ordinarily have been entitled to exercise their legal rights in order to ensure that they can continue to fully enjoy the use of their land. These include the rights created by the Resource Management Act 1991. It creates the right to object to, and make submissions in respect of, proposals by third parties that potentially affect (in

environmental terms) the ability of landowners to enjoy their land. The covenant operates to remove those rights. As a result, the defendants contend that the covenant affects the manner in which landowners in Omaha South may use their land and it creates a burden on the land.

[44] There is, however, another argument. The learned authors of Hinde, McMorland & Sim, *Land Law in New Zealand* provide the following description of a restrictive covenant:

A restrictive covenant is a promise or agreement made by the owner of the servient land with the owner of the dominant land that the covenantor **will not do some act in relation to the servient land which he or she could otherwise do**. If the promise is negative in substance and benefits the dominant land, it will run with the servient land in equity, thus constituting an equitable interest in that land which binds the covenantor's successors in title who take with notice of it. (Emphasis added)

[45] It can be argued that the restrictive covenant in this case does not operate to restrict the manner in which the current owners of the Omaha South land use their land at all. It does not prevent them from carrying out any activity on their land or even from applying for a resource consent or plan change in relation to their own land. The only restriction that the covenant imposes is in relation to applications that relate to land owned by others. Viewed in that way, the covenant may not be a burden on the Omaha South land.

[46] This issue is so finely balanced that I consider that it would be inappropriate to determine it in the absence of a controversy between two parties who have a vested interest in the outcome.

## **Result**

[47] For these reasons I decline to issue any declaration at all. The issues that the proceeding raises should in my view fall to be determined in the event that the defendants endeavour to enforce the covenant against one or more of the persons who currently own the land formerly owned by Omaha Beach Limited.

[48] The claim and counterclaim are accordingly dismissed.

## **Costs**

[49] Given that honours have been shared reasonably evenly, my initial impression is that costs should lie where they fall. In the event that either counsel advocates a different approach, a memorandum to that effect (of no more than five pages in length) should be filed and served within 14 days. Thereafter memoranda in opposition and reply should be filed and served at intervals of five and seven days respectively.

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Lang J

Solicitors:  
Grove Darlow & Partners, Auckland  
Brookfields, Auckland  
Counsel:  
Mr R Brabant, Auckland

Annexure Schedule

TRANSFER

Dated

11/06/01

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of

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Pages



Continuation of "Transferee"

TOWNSEND BROOKER LIMITED as registered proprietor of Benefiting Lots A and B.

WILLIAMSON LIMITED as registered proprietor of Benefiting Lots C and D.

Pamela RASPE as registered proprietor of Benefiting Lot E.

**COVENANTS**

1. DEFINITIONS

1.1 In this Transfer:

- (a) "Covenanting Lot" means those lots described in the First Schedule.
- (b) "Benefiting Lots" means those lots described in the Second Schedule.
- (c) "Land" the Covenanting Lots in the Second schedule.

2. COVENANTS

- 2.1 The Transferor (or any successor in title to the Transferor) shall not, and shall not procure any third party to, object or submit to any local authority having jurisdiction over the Covenanting Lot, in respect of any application by the Transferee or any third party for a resource consent or plan change relating to any property which is located within a radius of 5 kilometres of the southern most point of the land comprised in Certificate of Title 132D/499 (North Auckland Registry). This covenant shall bind the Transferor and its successors in title to the Covenanting Lot and shall apply to any present, future or proposed application by the Transferee or any third party.

If this Annexure Schedule is used as an expansion of an instrument, all signing parties and either their witnesses or their solicitors must put their signatures or initials here.