

Court rejects application to remove approved land covenants

Hürlimann v Lilley [2023] NZCA 173

This case considers whether the court has discretion to modify or extinguish land covenants if they had been reasonably consented to.

The Appellant, Mr Hürlimann, agreed to purchase a lifestyle property in Mr and Mrs Lilleys' four lot subdivision. Clause 23 of the agreement provided that prior to settlement the Lilleys would not register any land covenants over the property without Mr Hürlimann's consent and he could cancel the agreement if he did not consent.

The Lilleys provided Mr Hürlimann with proposed restrictive covenants to provide for design requirements and that only a new residential home could be built on the property. Mr Hürlimann sought advice from his lawyer and approved the registration of the first set of covenants.

In the lead-up to settlement the relationship between the parties deteriorated when the Lilleys proposed the registration of a second set of covenants, which would prevent any dwelling being built on the property.

Following settlement, Mr Hürlimann then issued proceedings in the High Court seeking declarations for both sets of restrictive land covenants. The Lilleys then elected not to register the second set of covenants.

Mr Hürlimann argued the agreement did not allow the registration of the covenants, he was under duress when he agreed to the first set of covenants due to pressure from the Lilleys and that the Lilleys had engaged in an abuse of discretionary contractual power. Mr Hürlimann sought an order under section 317 of the Property Law Act 2007 to extinguish the covenants. The Court ruled against Mr Hürlimann on all his arguments.

Mr Hürlimann appealed to the Court of Appeal on the grounds the High Court was wrong in refusing to exercise its power under section 317 of the Property

Law Act 2007 and that it was "just and equitable" for the Court to extinguish or modify the land covenant.

The Court reviewed the two-step approach in *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 which is commonly adopted in assessing whether to vary land covenants under section 317. The Court was satisfied there was no error in the High Court's approach to its application of section 317.

Mr Hürlimann also argued the restrictive covenants were inherently inequitable and arbitrary, as the Lilleys had not registered any restrictive covenants against the other titles created by the subdivision, and the Lilleys imposed the covenants for a collateral purpose – to force him to cancel the agreement to purchase the land.

The Court rejected these arguments and stated the Lilleys were free to deal with the remaining lots however they saw fit and that Mr Hürlimann had expressly agreed to the covenants being registered against his title. The Court noted he had every right to cancel the agreement under clause 23 but elected to continue with the purchase.

The Court dismissed the appeal and allowed the restrictive covenants to remain on Mr Hürlimann's title.

Key takeaway point:

A buyer that consents to the registration of land covenants and receives legal advice throughout the process is unlikely to find sympathy with the Court to then apply to vary those previously approved land covenants.