Supreme Court of New Zealand
Te Kōti Mana Nui

20 December 2016

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

ESCROW HOLDINGS FORTY-ONE LIMITED AND KALLINA LIMITED v DISTRICT COURT AT AUCKLAND, BODY CORPORATE 341188, GEORGE VICTOR WILKINSON AND JEREMY KAY COLLINGE AND OTHERS, AUCKLAND COUNCIL AND CHANG TJUN CHONG AND OTHERS

(SC 108/2015) [2016] NZSC 167

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz.

In 1987, the Auckland City Council (the Council) granted the then-owner of a site on Hargreaves Street in College Hill, Auckland, consent to subdivide the property into three lots: Lots 1, 2 and 3. In 1988 a subsequent owner, who had acquired a part interest in Lot 1, applied to divide Lot 1 into two new lots, Lots 4 and 5. The Council approved the further subdivision on the condition that the proposed Lot 4 would be jointly owned by the owners of Lots 2 and 3 and would be used only for car parking and associated access for those lots.

In accordance with the Council's requirements, the owner of Lot 2 and one undivided half share in Lot 4, and the owners of Lot 3 and the other undivided half share in Lot 4, executed an encumbrance in which they covenanted with the Council not to let Lot 4 be used for any purpose other than car parking or access for Lots 2 and 3. They also entered into a deed of covenant in which they allocated parking spaces on Lot 4 to Lots 2 and 3, agreed to meet the operating expenses and outgoings for the car park and covenanted not to allow Lot 4 to be used for any purpose other than car parking for Lots 2 and 3. In addition, the title to

one half share in Lot 4 was amalgamated with the title to Lot 2 and the title to the other half share was amalgamated to the title to Lot 3.

In 2005, the then-owner of the amalgamated interest in Lot 2 and half of Lot 4 applied to the Council to have the amalgamation condition cancelled. The Council granted the application and the title was de-amalgamated. Lot 2 was then converted into a residential unit title development, now controlled by the Body Corporate 341188 (Body Corporate) and the half share in Lot 4 was acquired by subsequent owners. A number of unit owners from Lot 2 understood that they had acquired rights to parking spaces in the building on Lot 4.

In 2011, the owners of Lots 3 and 4 (the appellants in these proceedings) filed an originating application in the District Court for an order extinguishing all the covenants contained in the deed of covenant, without serving the Body Corporate. Following receipt of a consent memorandum from the Council, the District Court made an order extinguishing the covenants. In 2012, the appellants advised the Body Corporate that as a result of the de-amalgamation of Lots 2 and 4 and the extinguishment order, the Lot 2 unit owners could no longer access the parking spaces on Lot 4 without payment. The Body Corporate brought proceedings seeking to quash the extinguishment order and claiming that they were entitled to park on Lot 4 and to go onto it for that purpose.

The High Court quashed the extinguishment order, but found against the unit owners on their claim in relation to Lot 4, holding that they had no positive rights of access to, or use of, Lot 4 for parking. The Court of Appeal overturned the High Court's decision on this point, finding that the unit title holders on Lot 2 were entitled to utilise the parking spaces on Lot 4, pursuant to the encumbrance and the deed of covenant.

This Court granted leave on the question of whether the deed of covenant, when read alongside the encumbrance, conferred on the registered proprietors of Lot 2 the exclusive right to access and use the parking spaces allocated to Lot 2 under the deed of covenant.

The appellants submitted that the Court of Appeal had failed to give effect to the plain language of the deed of covenant which was negative and did not confer positive rights of access or parking on Lot 4 to Lot 2. The respondents supported the reasoning of the Court of Appeal.

The Supreme Court has unanimously dismissed the appeal.

The Court found that both the encumbrance and the deed of covenant were designed to ensure that the Council's requirements concerning the provision of parking for Lots 2 and 3 were met. The language of the deed did not require commonality of ownership and was expressed in perpetual terms. Therefore, following the de-amalgamation of Lots 2 and 4 the deed of covenant remained operative. Such operation could continue, however, only on a meaningful basis. An interpretation of the deed of covenant which required the owner of Lot 2, following

de-amalgamation, to pay for the upkeep and operation of the parking building on Lot 4 without any entitlement to access or use of the building could not have been intended. The Court concluded therefore that the appellants can be prevented, by injunction if necessary, from denying the owners of Lot 2 the use of, and therefore access to, their designated parking spaces in the parking building on Lot 4.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921