IN THE SUPREME COURT OF NEW ZEALAND

SC 84/2016
[2017] NZSC 127

BETWEEN	GREEN GROWTH NO. 2 LIMITED Applicant
AND	QUEEN ELIZABETH THE SECOND NATIONAL TRUST Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	N R Campbell QC and W A McCartney for Applicant F B Collins for Respondent
Judgment:	28 August 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is granted on the following questions (*Green Growth No. 2 Limited v Queen Elizabeth the Second National Trust* [2016] NZCA 308):

(a) Was rectification available against Green Growth No. 2 Ltd as a successor in title?

(b) Does an improperly executed covenant that is notified (but not registered) bind successors in title?

(c) Was there a wrongful entry on the register under s 81 of the Land Transfer Act 1952?

B The application is otherwise dismissed.

REASONS

Introduction

[1] Mr Russell owned land in the Coromandel, held in two titles: a title covering 404 hectares and one covering 207 hectares.[1] He entered into open space covenants with regard to the land with the Queen Elizabeth the Second National Trust (the Trust).[2] Such covenants are deemed to be an interest in land for the purposes of the Land Transfer Act 1952.[3] The Queen Elizabeth the Second National Trust Act 1977 (the National Trust Act) provides that the District Land Registrar shall, on the application on the Trust's Board, enter a notification of the covenant.[4]

[2] Mr Russell died in 2003.[5] This application concerns the covenant recorded in 1997 against the title to the 404 hectares. The registered proprietor of that land is the applicant (Green Growth). The covenant had a definition of a "protected area" which referred to an aerial photograph to be attached to the covenant. No aerial photograph was attached and part of the definition was left blank.

[3] In 2012 the Trust sought rectification of the covenant. The Trust's position is that the inclusion of the clause relating to a protected area was mistakenly left in when the covenant was altered[6] and that it did not reflect the common intention of the Trust and Mr Russell.

[4] The Trust succeeded in the High Court[7] and an appeal against that decision was dismissed by the Court of Appeal.[8] Green Growth seeks leave to appeal against that decision.

---

1 These were adjoining blocks of land.

2 Such covenants are designed to protect the open space values of an area of land and water and come under the Queen Elizabeth the Second National Trust Act 1977 [the National Trust Act].

3 National Trust Act, s 22(6).

4 Section 22(7).

5 The High Court had this date as 2002.

6 See below at [6]–[15].

7 *Queen Elizabeth the Second National Trust v Green Growth No 2 Ltd* [2014] NZHC 3275, (2014) 15 NZCPR 785 (Wylie J) [*Green Growth* (HC)]. A summary judgment application had, however, been dismissed in 2012: see at [9]–[11].

8 *Queen Elizabeth the Second National Trust v Green Growth No 2 Ltd* [2016] NZCA 308, [2016] 3 NZLR 726 (Randerson, Stevens and Wild JJ) [*Green Growth* (CA)].

[5] The original application for leave to appeal was filed on 2 August 2016. On 2 November 2016, the Land Transfer Bill 2016, which was to repeal the Land Transfer Act 1952, had passed its second reading. A minute was sent to the parties asking for submissions on the Bill once it was passed. The Bill eventually passed and all submissions have now been received.

Background

[6] The first signed version of the covenant covered both blocks of land. The operative clause in the Second Schedule provided that nothing could be done on the land that materially altered the appearance or condition of the land or which was prejudicial to the land as an area of open space.

[7] The third schedule provided for an area not exceeding 40 hectares to be a management area (most of which was intended to be on the 404 hectare block[9]). Subdivision was possible in this area as long as nothing was done to disturb the protected area. This was defined in cl 1 of the covenant as meaning an area of native trees shown on an attached aerial photograph.

[8] At the time the first version of the covenant was signed in October 1996, the aerial photograph had not been obtained and there were blanks in the covenant relating to the identification of the management area and the protected area.

[9] The original covenant was then split into two different covenants. With regard to the 207 hectare block, the new covenant allowed subdivision of the whole of that block into 20 hectare lots. This was done because Mr Russell's rest home was pursuing outstanding fees and subdivision made the land more saleable to meet those fees.[10]

[10] With regard to the larger block, an amended third schedule was prepared, reducing the proposed management areas to 20 hectares and removing the ability to subdivide. The evidence was that this was a trade-off for the ability to subdivide the

---

9 *Green Growth* (HC), above n 7, at [41].
10 At [40].

whole of the 207 hectare block.[11] The owner was, however, permitted to erect dwellings and ancillary buildings.

[11] This amended schedule was signed[12] by Mr Russell (at the same time as the replacement covenant for the second block). An aerial photograph was shown to him outlining the proposed management area (which was in the area of the old homestead that had burned down some years before). The signed covenants and the marked up aerial photograph were sent to the Trust and signed on behalf of the Trust. The covenant was also signed as correct by the manager of the Trust.

[12] An issue arose with the District Land Registrar who considered a survey was required as the management area was not sufficiently defined to create a "whole of title" covenant. The Trust did not wish to pay for a survey and a revised third schedule was prepared, removing any reference to the management area. That revised schedule provided for the construction of one dwelling and ancillary buildings after consultation with the Trust as to where they were to be built. The definition of protected area was, however, left in. The Trust maintains that this was in error.

[13] The revised third schedule was given to Mr Russell by a Mr Parr, which was the way the Trust communicated with Mr Russell. An accompanying letter said that the changes were made "in an attempt to meet your future needs".

[14] Mr Parr's evidence was that he had not noticed the now-redundant reference to the protected area and that he had talked through the changes in the third schedule with Mr Russell. Mr Russell initialled the revised third schedule but this was not witnessed. It was not put to Mr Parr that he should have told Mr Russell that the reason for the change was so that the Trust could avoid survey costs.[13]

[15] The amended third schedule was sent back to the Trust and then initialled by the Trust and inserted into the already-signed covenant in replacement for the previous third schedule. The covenant was not re-signed as correct after the revised

---

11 At [40].
12 And, as the High Court accepted, witnessed: at [54].
13 *Green Growth* (CA), above n 8, at [43].

third schedule was inserted. The amended covenant was entered on the title on 24 July 1997.

First ground

[16] The first proposed ground of appeal is that the Trust had not furnished the necessary "convincing proof" that the common intention of the Trust and Mr Russell was that the covenant should apply to all of the land. This is because the Trust had misrepresented the reason for the change to the third schedule. Green Growth says that, contrary to the Court of Appeal's finding,[14] it was not obliged to put the untruth to Mr Parr.[15]

[17] The Court of Appeal expressed its agreement with the reasons given by Wylie J for holding that it was the common intention that the revised third schedule apply to all of the land.[16] In particular, it noted that the relaxation of the covenant for the smaller block "was a key reason, discussed and agreed between Mr Parr and Mr Russell, for the more restrictive terms of the final version of the covenant related to the larger block".[17] That the point was not put to Mr Parr was thus not the sole (or even a major) reason that the Court of Appeal dismissed this ground of appeal.

[18] The proposed appeal point relates only to the (unusual) facts of this case and there were concurrent findings in the courts below. It does not raise any point of general or public importance. Nor is there any risk of a miscarriage of justice in the sense required in a civil case.[18]

[19] This ground therefore does not meet the criteria for leave to appeal.

Result

[20] The criteria for leave is met on the other three grounds. The application for leave to appeal is therefore granted on the following questions:

---

14 *Green Growth* (CA), above n 8, at [55].

15 As noted above at [13], Mr Parr was the person who communicated with Mr Russell on the Trust's behalf.

16 *Green Growth* (CA), above n 8 at [56].

17 At [55].

18 See *Junior Farms Ltd v Hampton Securities Ltd (in liquidation)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [5].

(a) Was rectification available against Green Growth as a successor in title?

(b) Does an improperly executed covenant that is notified (but not registered) bind successors in title? [19]

(c) Was there a wrongful entry on the register under s 81 of the Land Transfer Act 1952?

[21] When addressing these questions, the parties should also address the position under the Land Transfer Act 2017.

[22] The application is otherwise dismissed.

Solicitors:
Carson Fox Bradley Limited, Auckland for Applicant
Gibson Sheat, Wellington for Respondent

[19] In particular Green Growth has indicated that it will argue that an improperly executed covenant does not meet the requirements in the National Trust Act and that it could not be indefeasible, even if (which is disputed) notification would normally mean indefeasibility.