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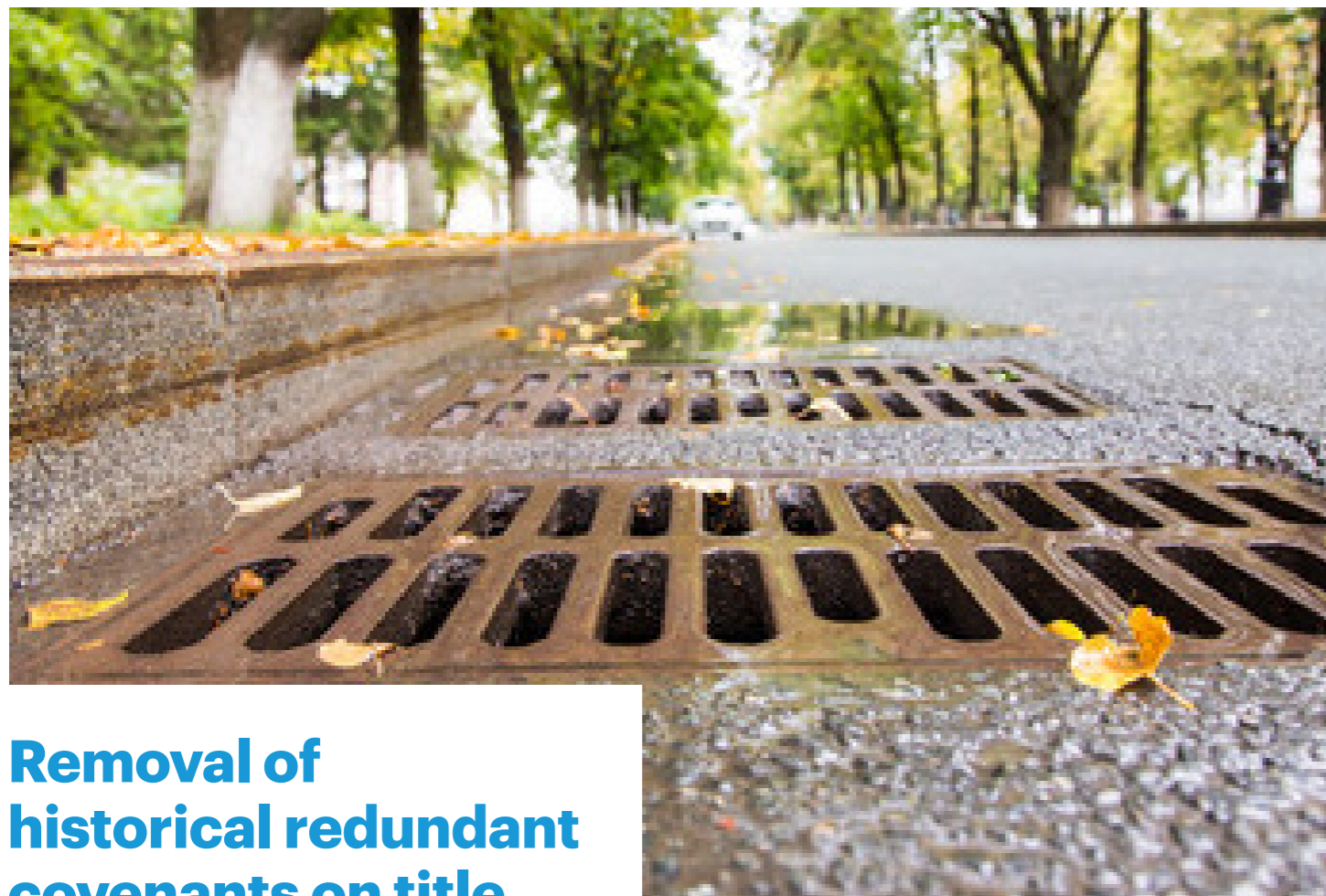
2019 Property wrap up

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**2019 brought about significant case law directed at the provisions of the Property Law Act 2007 (PLA) and ironing out some of the finer points to the standard form ADLS agreement for sale and purchase of real estate. The Anderson Lloyd Property team have summarised some key cases below.**





## Removal of historical redundant covenants on title

### Yoursection Limited [2019] NZHC 1825

Yoursection Limited (**Yoursection**) applied to extinguish a 110 year old covenant to “keep drains clear” (**Covenant**) pursuant to sections 136 and 317 of the Property Law Act 2007 (**PLA**). Yoursection’s first ground for the application was that the Covenant could not be enforced. The High Court considered whether the express words of the Covenant, that it benefitted “Messrs Rainey and Ferguson and their executors and administrators” (**Beneficiaries**), meant the Covenant could not be enforced because the definition did not expressly include successors in title.

The High Court concluded this ground could not be used to remove the Covenant, because it did not accept Yoursection’s argument that if “successors” were to be included as a beneficiary then it would have been expressly stated in the Covenant. However, Yoursection also argued the Covenant had become redundant, pursuant to section 317(1)(a) of the PLA which provides a covenant can be modified or extinguished (wholly or in part) due to a change in circumstances the court considers relevant since its creation.

The changes in circumstances the High Court considered relevant included the absence of contact in respect of the Covenant and that Christchurch City Council (**Council**) had taken on the obligation to maintain the drain and would continue to do so following the intended subdivision. The court subsequently ordered for the Covenant to be extinguished, subject to Council confirming they had no issues with this order and would continue to be responsible for the maintenance of the drain.



#### Key takeaway points:

1. **Section 317(1)(a) of the PLA can be used to remove historical covenants that are no relevant to the property.**
2. **“Successors” can be bound by a covenant without the phrase being expressly stated on the covenant if there is still an intention to do so present in the circumstances.**

## Removal of more recent covenants due to change of circumstances

### New Zealand Industrial Park Limited v Stonehill Trustee Limited [2019] NZCA 147

Stonehill Trustee Limited (**STL**) was attempting to modify two restrictive covenants (**the Covenants**) pursuant to section 317 of the Property Law Act 2007 (**PLA**) so that they no longer applied to STL. The Covenants prohibited the objection to proposed quarry operations on the land owned by New Zealand Industrial Park Limited (**NZIPL**), by the owner of the adjacent land, now owned by STL, together with restricting the development of the STL land.

STL had entered into an agreement for the sale and purchase of real estate including a condition that the Covenants be removed from the title. However, the removal was opposed by NZIPL. The High Court initially allowed the Covenants to be modified on the basis that the use of the affected land had changed from what was foreseeable at the time the Covenants were registered and modifying the Covenants would not cause injury to NZIPL. This was based in part on the fact that a quarry had never been established on the land owned by NZIPL that benefitted from the Covenants, together with a significant industrial and residential development in the surrounding area. However, the Court of Appeal overturned the High Court decision and the Covenants were reinstated.

The decision of the High Court was on the basis that the continuing enforcement of the covenant was found to not impede on the reasonable use of STL’s land in a way that was different or could not have been reasonably foreseen at the time of Covenants were created and NZIPL would suffer intangible injury if the Covenants were modified. The Court of Appeal further found there had not been enough change in the surrounding circumstances since the Covenants were established to justify modification under section 317(1) (a) of the PLA. The Court of Appeal provided guidance on the assessment to be undertaken under section 317(1)(a),



namely that change is assessed at the time the covenants are made compared to when the PLA application is lodged. Further, changes in the applicant’s personal circumstances and the future use of the land are irrelevant, and a change in the land’s zoning alone will not be enough to justify removal or modification. While increased development in a neighbourhood may be a significant change, it may not be if it cannot be shown the developmental change was not contemplated by the parties that entered into the covenant.



#### Key takeaway points:

**A successful application for the modification or extinguishment of a covenant under section 317(1)(a) of the PLA requires a significant amount of change and in particular, the applicant will need to show the change is something the original creators of the covenant could not have foreseen when it was created.**



## Wanting to remove dirt mounds from your neighbour's property? The PLA says only if its effect is both adverse and undue

### **Speargrass Holdings Limited v Queenstown Lakes District Council [2018] NZHC 1009**

Speargrass Holdings Limited (**Speargrass**) applied under section 333 of the Property Law Act 2007 (**PLA**) for the removal of a human-made earth mound situated along the boundary of its property on neighbouring land.

The statutory test pursuant to section 333 requires the application to relate to an erected structure or a growing tree. The Court of Appeal held human-made earth mounds came within the definition of a "structure" under section 4 of the PLA, as the broad definition was intended to encompass any human-made works or planting introduced on a property, which might give rise to adverse effects on neighbouring properties.

However, the Court of Appeal was concerned that this finding would enable any earthworks on residential property to be removed under section 333 of the PLA where they have the capacity to unduly affect neighbouring land in one of the ways described under section 335 of the PLA.

The Court of Appeal consequentially held that the human-made earth mound could not be removed because while it was adverse to Speargrass' view, it decided against setting a precedent for whether it was undue. Therefore, the Court of Appeal refrained from extending the jurisdiction under section 333 and concluded the issue was best dealt with the procedures pursuant to the Resource Management Act 1993.



#### Key takeaway point:

**Human-made earth mounds come within the definition of "structure" under the PLA allowing them to be removed. However, such structures will only be capable of removal on a residential property where they have an undue and adverse effect on neighbouring properties.**



## Disclosure of information during due diligence

### **Sullivan v Wellsford Properties Ltd [2019] NZCA 168**

Port Albert Investments Limited (**Port Albert**) was the nominee of Sullivan in respect of the purchase of a commercial property from Wellsford Properties Limited (**Wellsford**) under a standard form ADLS agreement for sale and purchase of real estate (9th edition) (**Agreement**).

The Agreement also included a bespoke due diligence clause within the further terms which included an undertaking of the vendor to provide the purchaser with any information held relating to the property relevant to the due diligence investigation. The commercial property involved in the transaction was subject to a dispute with a tenant, Caltex No 8 Limited in respect of the allocation of the property's operating expenditure and Wellsford did not disclose this during due diligence (the **Dispute**).

The outcome of the Dispute was a reduction to the amount of operating expenses paid by Caltex No 8 Limited which was not disclosed by Wellsford prior to settlement and as a result, Port Albert received a lower net income from the property than it anticipated. The Court of Appeal held the failure to disclose the Dispute was a breach of the obligation in the due diligence clause on the vendor to disclose pertinent information predominantly because Port Albert and Sullivan had repeatedly enquired into how operating expenditure was recovered from tenants during their due diligence investigation.

Therefore, a tenant challenging the allocation of operating expenditure was material and relevant information. The Court of Appeal further held Wellsford's shareholder and director, Garry Hannam, was personally liable for this breach. This was because Garry was directly involved in the facilitating the omission, which was misleading and deceptive.



#### Key takeaway points:

**When specific information on a property is requested in the course of carrying out a due diligence investigation on a property, that information becomes material and relevant, to which the vendor should disclose the relevant information to a purchaser to fulfil due diligence requirements.**



## Written building reports required to justify cancellation

### Strack v Grey [2018] NZHC 1254

Mr Grey was purchasing a property from the Stracks pursuant to a standard form ADLS agreement for the sale and purchase of real estate (9th edition) (**Agreement**). Mr Grey cancelled the Agreement two days after signing the Agreement because he heard comments made by the valuer about the low quality of the property's installation.

However, the Stracks subsequently cancelled the Agreement claiming Mr Grey's original repudiation was a breach of contract, as the repudiation was not based on any written report pursuant to clause 9.3 of the Agreement. The High Court held that in order for purchasers to successfully cancel a sale and purchase agreement on the basis of the building report condition, purchasers have to be able to provide the vendor with a written report that the repudiation is based on, at the vendor's request.

An additional requirement for a successful repudiation was that a building report needs to contain something more than addressing the theoretical risks and the mitigating measures taken at the particular property. Mr Grey's reliance on an oral report meant he could not meet those requirements. The court subsequently held Mr Grey had wrongfully repudiated the Agreement.



#### Key takeaway point:

**If a purchaser is wanting to successfully repudiate a sale and purchase agreement based on a building report, the report needs to be written and it must go further in addressing the risks, mitigating measures and the evidence of the problem than a basic report.**

## Sunset dates for subdivision completion

### Ke Ling v Northwest Developments Limited [2019] NZCA 630

Ke Ling (**Ling**) entered into an agreement for the sale and purchase of real estate (**Agreement**) with Northwest Developments Limited (**Northwest**). To mitigate the risk of a pending subdivision, the Agreement contained a sunset clause establishing that if a new record of title was not issued by 31 March 2018, either party could terminate the contract via written notice (**Sunset Clause**).

The Sunset Clause was subject to a right for Northwest to extend the sunset date by 6 months if it had submitted a survey plan to LINZ for approval and provided written notice to Ling. Northwest exercised this right which extended the sunset date to 31 September 2018. However, Northwest could not obtain consents under the submitted plan so submitted a new plan (**Second Plan**). A new record of title was issued on 11 September 2018 on the basis of the Second Plan. Subsequently, Ling refused to settle, claiming Northwest's extension of time under the Sunset Clause was invalid because the wording in the Sunset Clause, "the survey plan", meant that the condition required the submitted survey plan to be the same plan on which record of title was issued.

Therefore, Ling argued that when Northwest submitted the Second Plan, it could no longer rely on the extended sunset date. However, both the High Court and Court of Appeal disagreed with Ling and specific performance was ordered to complete settlement.

The Court of Appeal confirmed the principles of interpretation set out in **Firm P1 Ltd v Zurich Australian Insurance Ltd** applied to the Agreement. This test assesses what the words mean objectively in light of all the background knowledge that was reasonably available to the parties in their situation at the time the contract was made. Both courts found it was common background knowledge of the parties that the purpose of the Sunset Clause was to mitigate risk of subdivision not occurring. Therefore, the Sunset Clause required Ling and Northwest to have certainty as to their rights as of 31 March 2018. Due to the interest in certainty, the extension needed to be valid and remain valid once the right was exercised by Northwest, and could not become invalid due to subsequent changes to the circumstances.



#### Key takeaway point:

**Where the meaning of a contract is in dispute, to give meaning to the contract the courts will look at the objective meaning of the words along with the parties' background knowledge surrounding the agreement. This can include information that was reasonably available to those parties at the time the contract was made. Further, New Zealand courts continue to favour interpreting sale and purchase agreements in a way that gives rise to commercial certainty for the parties.**

## Our Property team

Anderson Lloyd has specialist expertise in all aspects of commercial property law. Our clients include commercial property investors, institutional landlords, financiers, local authorities, national franchises, Government and Crown-owned entities, local authorities and owners and developers of retail premises and retirement villages.

**Our commercial property expertise includes:**

- property due diligence
- acquisitions and divestments
- commercial leasing
- property syndication
- subdivisions
- Building Act and regulatory compliance
- Public Works Act matters

Anderson Lloyd also has a highly experienced residential property legal team that can expertly advise on all residential property matters.

**Our residential property lawyers are experts in:**

- buying and selling residential property including family homes, retirement village units and apartments
- leasing matters including contracts
- conveyancing law
- general property issues, including easements, covenants and subdivisions



**Robert Huse**  
Partner, Queenstown  
p: 03 450 0746  
robert.huse@al.nz



**Mike Kerr**  
Partner, Christchurch  
p: 03 335 1256  
mike.kerr@al.nz



**Sharon Knowles**  
Partner, Dunedin  
p: 03 467 7178  
sharon.knowles@al.nz



**Kerry O'Donnell**  
Partner, Queenstown  
p: 03 450 0729  
kerry.odonnell@al.nz



**Alan Paterson**  
Partner, Auckland  
p: 09 338 8310  
alan.paterson@al.nz



**Vanessa Robb**  
Partner, Dunedin  
p: 03 471 5430  
vanessa.robb@al.nz



**Dan Williams**  
Partner, Auckland  
p: 03 338 8320  
dan.williams@al.nz