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COVENANTS IN GROSS – EFFECTIVE PROTECTION FOR OPEN SPACE?

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Abstract

The Supreme Court in *Green Growth No 2 Ltd v The Queen Elizabeth The Second National Trust* treated a covenant in gross as an 'indefeasible' equitable interest. The enactment of land transfer reforms in 2018 went further. They settled the debate about whether covenants in gross were recognised in New Zealand law and extended the concept to private individuals.

To protect open space values (such as native bush, areas with high ecological or cultural values) restrictive and positive covenants can be agreed between landowners, and covenants in gross can be agreed between a landowner or a developer and a local authority or an organisation such as the Queen Elizabeth The Second National Trust or the Department of Conservation. The challenge for landowners and their advisors today is which form of protection will achieve the best outcome for the land in the long-term.

This paper takes an initial view on how likely we are to see covenants in gross under the Property Law Act used to protect open space. It suggests the Property Law Act will be less effective compared with other protection methods in light of recent cases; the broader discretion given to the judiciary through the reform of the land transfer system; and the prospect of significant urban development pressures. It concludes that legislative reform is needed to strengthen the consideration of open space values where change or removal of covenants in gross is sought.

This paper reflects the author's opinions and suggestions and does not represent Government policy or the views of any government agency or other organisation. All citations and references to electronic sources were accurate at the time of writing.

Word length

The text of this paper (excluding abstract, table of contents, annexes and bibliography) is approximately 6,745 words.

Subjects and Topics

Covenants in gross, covenants, indefeasibility, equitable interest, encumbrance.

Contents

I Introduction

Reforms to the land transfer system through the Land Transfer Act 2017 (LTA) (the Reforms) provided statutory acknowledgement of covenants in gross through amendments to the Property Law Act 2007 (PLA).[1] This paper takes an initial view on the merits of using covenants in gross under the PLA to protect open space in the face of significant urban development pressure. The implications for open space protection are seen in the context of recent cases such as *Green Growth No 2 Ltd v The Queen Elizabeth The Second National Trust,*[2] and *Re Barfilon Investments Ltd*.[3] Potential options for legislative reform are also identified that aim to provide additional factors for consideration where change or removal of covenants in gross is sought.

A The Importance of Open Space

'Open space' can encompass concepts captured in s 6 of the Resource Management Act 1991 (RMA) to preserve natural character, outstanding natural features, areas of significant indigenous vegetation, habitats of indigenous fauna, and areas of cultural significance.[4] Also relevant is the concept of "in situ conservation" within Article 2 of the United Nations Convention on Biodiversity (to which New Zealand is a signatory):[5]

> … the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.

In this paper, a broad definition of open space is used based on s 2 of the Queen Elizabeth The Second National Trust Act 1977 (QEIIA):

[1] Land Transfer Act 2017, s 116; Property Law Act, ss 307A, 307F.

[2] *Green Growth No. 2 Limited v Queen Elizabeth The Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 [*Green Growth*].

[3] *Re Barfilon Investments Ltd, L& W Rising Ltd, Burberry Developments Ltd and Burberry Road 32 Limited* [2019] NZHC 780 [*Barfilon*].

[4].Matters of national importance, Resource Management Act, ss 6(a)–(g).

[5] United Nations Convention on Biological Diversity, 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993), art 2.

> **open space** means any area of land or body of water that serves to preserve or to facilitate the preservation of any landscape of aesthetic, cultural, recreational, scenic, scientific, or social interest or value

Protecting open space, to either enhance values or prevent their decline, generally requires a long-term commitment from a landowner, and successors in title — over decades. For many years, covenanting in some form to effect open space protection has been used by local authorities and organisations such as the Queen Elizabeth The Second National Trust (the Trust) and the Department of Conservation through Ngā Whenua Rāhui kawnata.

B Core Themes

Covenants in gross have been described as both a "dangerous advancement" for blurring the lines between contract law and property law and widening the interests that can be recognised under the Torrens system;[6] and as a welcome addition to the property tools available.[7]

This paper takes a slightly different view and examines the use of covenants in gross compared with other mechanisms in the context of open space protection. It looks to consider whether recent cases provide clarity or create further uncertainty through two core themes. Firstly, as a tool to protect open space, the robustness of covenants in gross under the PLA compared with those created through other statutory means, such as the RMA, the QEIIA, the Reserves Act 1977 (RA) or the Conservation Act 1987 (CA).

[6] See Ben France-Hudson "The Recognition of Covenants in Gross in New Zealand: A Dangerous Advancement?" in Ben McFarlane and Sinead Agnew (eds) *Modern Studies in Property Law: Volume 10* (Hart Publishing, Oxford, 2019) 187-206. See also Natasha Lea "A Gross Oversight? An analysis of the statutory introduction of covenants in gross and their potential threat to the boundaries of property law" (L.L.B (Hons) Dissertation, University of Otago, 2018).

[7] Thomas Gibbons "Covenants in Gross and Encumbrances Under the New Land Transfer Act" in David Grinlinton and Rod Thomas (ed) *Land Registration and Title Security in the Digital Age* (Informa Law, London, 2020) 172 at 183.

Secondly, how judicial discretion might be applied when landowners seek to rectify, modify or extinguish a covenant in gross through s318D of the PLA.

II Protecting Open Space

A Forms of Covenants

A covenant is a promise to do something (positive) or not to do something (restrictive):[8]

> Covenants are contractual in origin, and as a matter of contract, bind only the party who gave the promise (the covenantor) and are enforceable only by the party who received it (the covenantee).

At common law, the benefit of a covenant in gross can only be enforced under contractual principles.[9] However, amendments to the LTA and PLA since 1908 have progressively recognised some interests as equitable, for example positive and restrictive covenants,[10] and now covenants in gross through the Reforms.[11] Covenants in gross are equitable interests in land, which are enforceable by the covenantee and binding on successors.[12]

Positive and restrictive covenants relating to land[13] are typically made between owners of one landholding (servient land) for the benefit of another landholding (dominant land). For example, an owner (covenantor) promises to keep trees and buildings under a certain height. The dominant land and its owner (the covenantee) benefits directly by not having views from their property obscured.

[8] The UK Law Commission *Easements, Covenants and Profits À Prendre Consultation Paper No 186* (2015) at [1.9].

[9] Including privity of contract.

[10] Property Law Act 1908; Property Law Act 1952, ss 126, 126A; Property Law Act 2007, s 303.

[11] Land Transfer Act 2017, s 116; Property Law Act 2007, ss 307A-307F, 318A-318E.

[12] Property Law Act 2007, ss 307B, 307C.

[13] Property Law Act 2007, s 4, definitions of "positive covenant" and "restrictive covenant".

In contrast, a covenant in gross requires a covenantor to do something or refrain from doing something "in relation to the covenantor's land" that "benefits another person, but is not attached to other land."[14] They are equitable interests in land, which are enforceable by the covenantee and binding on successors.[15] Until the Reforms, covenants in gross were not recognised in the PLA.[16]

Encumbrances are a form of interest recognised in the land transfer system that, in effect, create covenants in gross.[17] By placing a security, a financial instrument, over the land under s 66 of the LTA which is executed under ss 100 (3)–(4), an encumbrance takes effect as a charge under s 79 of the PLA. It is therefore registrable and treated as a statutory form of mortgage with binding obligations.[18]

Encumbrances have been used in this way for many years, for example by local authorities consenting land developments, as a way to secure a "de facto" form of covenants in gross.[19] The effect is to bind third parties to obligations that would not otherwise be registrable (or passed on to successors in title) under the LTA.[20]

[14] Property Law Act 2007, s 307A; a person or entity is named as the covenantee.

[15] Sections 307B, 307C.

[16] Or in New Zealand law, see *ANZCO Foods Waitara Ltd v AFFCO New Zealand Ltd [2006] 3 NZLR 351* [*ANZCO*] at [76(e)] per William Young J, "… New Zealand legislation appears to have been predicated on the assumption that restrictive covenants in gross cannot be effected".

[17] Property Law Act 2007, s 4, definition of "encumbrance" includes a mortgage, a trust securing the payment of money, or a lien.

[18] See also Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, 2017) at 836; and Rod Thomas and Polina Kozlova "Personal Obligations Made Binding on Future Landowners in New Zealand – the Unstable Edifice that is *Jackson Mews v Menere*" (2019) NZ L Rev 455; (April 2019) Social Science Research Network <www.ssrn.com> at 4.

[19] William Young J *ANZCO* above n 16 at [52].

[20] See Natasha Lea, above n 6 at 18; and discussion of rentcharges in Alana Fisher (ed*) Legal and Equitable Interests in Land* (online ed, Thomson Reuters) at [PL6 (3)].

B Comparing Tools to Protect Open Space

There are at least 12 mechanisms that can be used to protect open space, each with advantages and disadvantages from a landowner and legal perspective. Of these, eight can be created through statutes other than the PLA, seven of which are covenanting options (referred to as "statutory covenants"). These statutory covenants are recognised as interests in land for the purposes of the LTA: they run with the land and bind successors; they are either noted or registered on the record of title; and most require a local authority or government agency to either take ownership, responsibility for or act as covenantee.

Some of these tools have been used for many years, created using the RA for protected private land agreements; the RMA for consent notices and esplanade strips;[21] the QEIIA for open space covenants;[22] and the CA for covenants and Ngā Whenua Rāhui kawenata.[23] In addition, the PLA provides for restrictive and positive covenants;[24] encumbrances;[25] and now covenants in gross (referred to as "PLA covenants in gross").[26] Annex 2 details the key features of each tool.

A rudimentary analysis of the protection tools in Figure 1 shows a general trend of likely effectiveness and flexibility in the long term from bottom left (weakest) to top right (strongest). The statutory covenants and encumbrance mechanism (centre and top right quadrant) will likely be more robust in the face of challenge, and therefore result in greater protection of open space values in the long-term, compared with general

[21] Resource Management Act 1991, ss 221-224; consent notices are created as a 'charge', capable of registration under s118 of the Land Transfer Act 2017, and therefore covenants in gross within them bind successors in title; ss229 - 235, esplanade strips are registrable interests and can be created on subdivision or by separate agreement and must be assessed against their purpose if modification or removal is sought.

[22] Queen Elizabeth The Second National Trust Act 1977, s 22.

[23] Conservation Act 1987, ss 27, 27A.

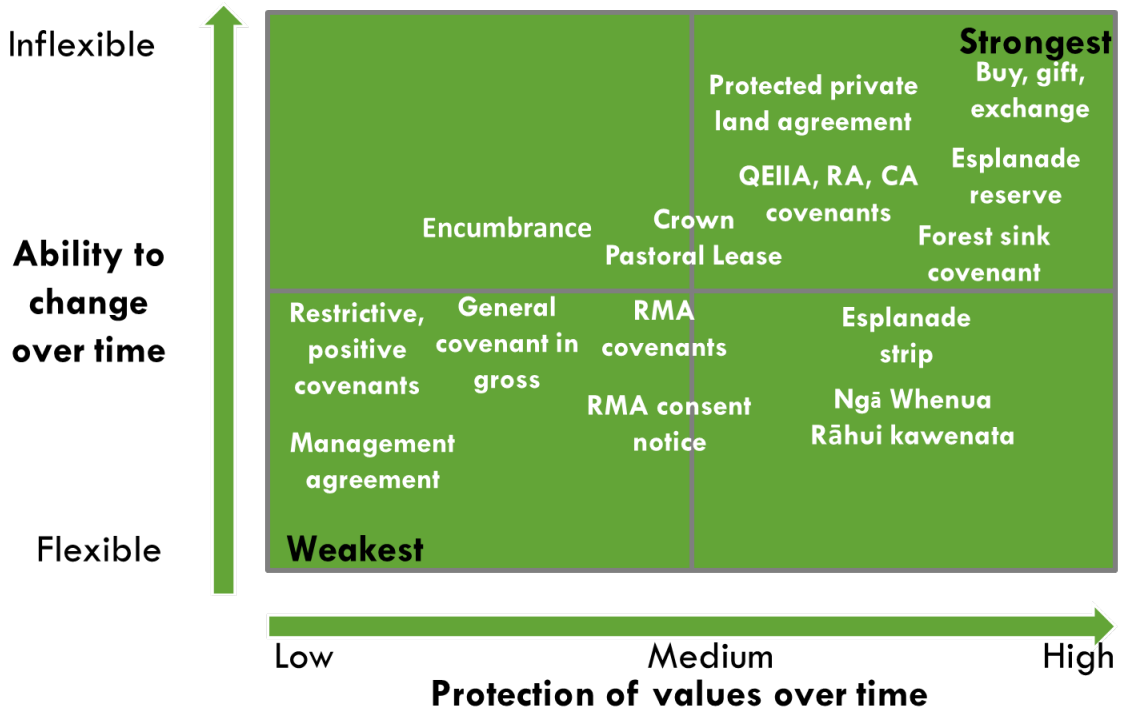
[24] Property Law Act 2007, ss 301-307.

[25] Property Law Act 2007 s 79, and Land Transfer Act 2017, ss 66, 100.

[26] Property Law Act 2007, ss 301-307, 307A-307F.

covenants and PLA covenants in gross (more bottom left quadrant) where the framework to consider modification and rectification is perhaps subject to greater judicial discretion. Encumbrances sit roughly in the middle between the weakest and strongest.

Figure 1 Perceptions of open space protection methods – compiled from analysis of statutes included in Annex 1.



Note that a Ngā Whenua Rāhui kawenata under s 77A of the RA or s 27A of the CA have greater flexibility compared with protected private land agreements or QEII covenants in that there is formal opportunity for review at the end of the term, taking in a different cultural perspective and recognising that values can change over time.

C Covenants in Gross v Encumbrances - the Rationale for the Reforms

At this point, an overview of the commentary around the introduction of PLA covenants in gross is useful background for considering the merits of options to protect open space.

The Reforms settled the question of whether covenants in gross were recognised in New Zealand law[27] and extended the concept to private individuals. They put covenants in gross on the same footing as positive and restrictive covenants,[28] while retaining the option to continue using encumbrances to do the same (rejecting the Law Commission's recommendations to limit the use of encumbrances to financial obligations).[29] Not only did the Reforms provide broad powers for the court to modify or remove covenants in gross under s318D of the PLA (which mirrored the existing provisions under s 317 regarding easements, and restrictive and positive covenants) but also broadened powers of the court to consider whether an easement, covenant or covenant in gross is contrary to public policy or rule of law and for "any other reason it is just and equitable".[30]

The acknowledgement of covenants in gross is a result of many years of debate on reform of the land transfer system – which continues today. Of relevance is the debate about the use of encumbrances versus PLA covenants in gross to secure obligations.

The Government's policy intent was that regularising the use of covenants in gross would be cheaper and pose less risk for the Registrar than having to interpret each encumbrance to distinguish whether the primary purpose was to secure financial obligations or collateral covenants. It was also assumed PLA covenants in gross would be preferred to using encumbrances. This was a pragmatic approach; there was no need to replace encumbrances. They had been used extensively for many years and had a continuing role in property arrangements.[31]

[27] Overriding the approach in *ANZCO*, above n 16.

[28] Refer Land Transfer Act 2017, s116. Compare positive and restrictive covenants provisions in Property Law Act 2007, ss 301-307, 313 – 317 with provisions for covenants in gross in ss 307A-307F, 318A -318E.

[29] See discussion of the 'touch and concern test' in equity in Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [7.48]; and recommendations R22-25 at 68.

[30] Property Law Act 2007, ss 318D(1)(f)-(g) and 317(1)(e)-(f).

[31] Hon Louise Upston, seeking Cabinet approval for 'minor changes' to policy decisions in "Land Transfer Bill Minor Changes to 2010 Policy Decisions and Additional Policy Decisions" at [27-30, 53(2)-(4)].

A range of commentators have challenged this stance leading to debates on the role of contract law principles versus property law principles. The Law Commission concluded that encouraging an ever increasing range of non-land related obligations is detrimental and will undermine the property law principles underpinning the Torrens land transfer system.[32] More recently, Ben France-Hudson sees covenants in gross as a "dangerous advancement" that will lead to uncertainties. For example, the final drafting of s 307A that defines covenants in gross does not provide an explicit 'touch and concern' test. This might allow for covenants in gross to include obligations only distantly related to the land itself and will create "a wide range of interpretative possibilities".[33] There are also calls for the use of a test (a legal metric) to maintain a conservative and restrictive approach to the definition of covenants in gross.[34]

In contrast, Thomas Gibbons sees that conceptually, PLA covenants in gross should be welcomed as a flexible tool for landowners compared with encumbrances because encumbrances are "blunter" tools, less subject to judicial oversight, and will have more legal certainty than covenants in gross – and therefore harder to change over time.[35]

The irony is, because an encumbrance (a financial mechanism) is recognised as a legal interest in the land as opposed to equitable interest, it therefore might have greater advantages for protecting open space values in the long-term compared with a PLA covenant in gross. This might be especially important in light of recent cases such as *Green Growth* and *Barfilon,* where the effect of notation of PLA covenants in gross under the LTA is somewhat uncertain; and given the discretion the courts have when considering matters of interpretation, rectification and modification.

[32] Law Commission, above n 29 at [7.1-7.62] includes a full history of the debate and the context for the reforms.

[33] Ben France-Hudson, above n 6 at 187 and 204.

[34] Natasha Lea, above n 6 at 47 – 50; and see Ben France-Hudson "Judicial Interpretation of Torrens Registered Documents" in David Grinlinton and Rod Thomas (ed) *Land Registration and Title Security in the Digital Age* (Informa Law, London, 2020) 315 at 333.

[35] Thomas Gibbons, above n 7 at 184.

III The Effect of Notation Under the LTA

Ordinarily, the purpose of notation of a covenant is to ensure that third parties dealing or proposing to deal with the land are formally made aware of it as an interest in the land.[36] It is provided for through the interaction of provisions in the LTA with either the PLA or another statute. Many of the statutes that create open space protections mirror the same language used in the QEIIA regarding notation and have been updated to reference the latest LTA provisions (see Annex 1 for notes on each statute).

Green Growth[37] provides a useful lens through which to consider how the LTA provisions might be applied today. The case highlights for landowners and their advisors what might happen in future if the covenant terms are challenged and what type of instrument might be needed to protect the values that are being considered. The effect of notation under the LTA 1952 was key to unpicking the matters presented to the Supreme Court and to consider the decisions of the lower courts that tested the relevance of contract law and property law principles.

It was held that the Trust had an indefeasible interest as there is no contrary indication in the QEIIA (such as in s 307 of the PLA regarding restrictive and positive covenants) that would mean notification would not fully engage ss 33-35 of the LTA 1952.[38] The analysis focused on the definitions of "registered proprietor", "dealing" and "instrument". Their Honours were careful to clarify that it was by operation of the LTA 1952 and the QEIIA (s 22), not the PLA, that an interest was created that runs with the land and binds successors.[39] However, the Court, mindful of the Reforms in train, expressed hesitant

[36] Hinde McMorland and Sim *Land Law in New Zealand* (online ed, Lexis Nexis) at [17.031].

[37] *Green Growth,* above n 2.

[38] *Green Growth*, above n 2 at [35-45] per William Young and O'Regan JJ; and Elias J at [112]. Their Honours' assessment revolved around the definitions of registered proprietor, dealings and instrument.

[39] At [30, 46] per William Young and O'Regan JJ.

views that there might be a different interpretation of notification under the QEIIA versus the PLA in the interactions with the LTA.[40]

Dr McMorland asserts that it is "strongly arguable" that the conclusion reached in *Green Growth* that notation of the open space covenant under the QEIIA attracted protection of indefeasibility is not applicable to covenants noted under the PLA 1952 or the PLA 2007 in terms of the LTA.[41] Others suggest that the focus should be on addressing the correct treatment of the original parties to an instrument and not taking a narrow view of issues of indefeasibility.[42]

A An Alternative View – the Process of Notation Involves Registration

Examining the policy intent more closely, the Reforms arguably aimed to clarify the process, if not the meaning, of 'notation' and 'registration' in the land transfer system. The policy intent set out by the Law Commission is quite clear: covenants in gross should run with the burdened land, be assignable to a new covenantee, and notifiable on the record of title, not registered. They should not be "fully" indefeasible.[43] This indicated that notification should support the Torrens mirror and curtain principles, and that some aspects of indefeasibility should apply for equitable interests recorded in the register compared with other 'unregistered' interests.

The comment in *Green Growth* that registration and notification are used interchangeably,[44] could apply equally to either the LTA 1952 or the later LTA as there

[40] At [30-31] per William Young and O'Regan JJ.

[41] Don McMorland "*Green Growth* in a wider context" [2019] NZLJ 168 at 169 and 171. See also Patrick Shanahan-Pinker "*Green Growth No 2 Limited v Queen Elizabeth the Second National Trust* [2018] NZSC 75" [2018] NZLJ 311; and Hinde McMorland and Sim, above n 36.

[42] Ben France-Hudson, above n 34 at [316].

[43] Law Commission, above n 29 at [7.37].

[44] *Green Growth*, above n 2 at [43] per William Young and O'Regan JJ, noting Wylie J's comments in the earlier judgments of the High Court and Court of Appeal.

is little to distinguish them in terms of actual process – and possibly effect. The provisions in the LTA and logic for this suggestion are summarised as follows.

Notation under the LTA involves a defined registration process through a combination of ss 12, 22, 24, 116, and 73 and the Land Transfer Regulations 2018 that records the interest on the record of title and assigns ownership of that interest.

Under s 12 of the LTA, a record of title forms part of the register which, under subs (2) must comprise (emphasis added):

> (a) a unique identifier for the record of title:
> (b) a description of the land to which the record of title relates:
> (c) a description of the type of estate or interest in the land:
> (d) *a reference to any instrument* or other matter creating the estate or interest or subdividing the land:
> (e) a reference to any record of title or any former document of title from which the record of title derives:
> (f) *the name of the registered owner of the estate or interest*:
> (g) *for each registered or noted instrument* affecting the estate or interest,—
> (i) *a unique identifier*; and
> (ii) *a description of the type of instrument*; and
> (iii) the date and time of its registration or notation and any other information necessary to determine its priority:

Section 116 requires a covenant instrument to be used to note a covenant in gross on the register.

Section 73 requires a transfer instrument to be used to register the transfer of an estate or interest; with subs (4)(c)(i) clarifying that to "avoid doubt" a transfer instrument may also be used in order to (emphasis added):

> (c) *note* on the register under section 116—

(i) a covenant to which section 307 or 307F of the Property Law Act 2007 applies, *on registration of a transfer instrument* that transfers an estate or interest in land and provides for the covenant; or
(ii) the assignment of the benefit of a covenant in gross to which section 307F of the Property Law Act 2007 applies.

Under s 24, an instrument (a document in paper or electronic form or a caveat document) has no effect to create, transfer or otherwise affect an estate or interest in land until it is "registered".

Therefore, it could be interpreted that a covenant in gross is registered, because a transfer instrument must be used, and must be registered. The effect is to "register" the notation of the interest recorded in the covenant instrument, which "registers" the owner of that interest on the record of title, who becomes the registered owner of the interest.

It is therefore possible to agree with Dr McMorland[45] that the treatment of the open space covenant in *Green Growth* should apply irrespective of the PLA 1952 or the PLA 2007 in terms of either the LTA 1952 or LTA 2017 – but on the basis that the finding in *Green Growth* was appropriate. If there really isn't a distinction between registration and notation under the LTA, there is no need to construct such a distinction for covenants in gross or other forms of covenant when they are likely to have the effect of registration and be similarly interpreted by the courts.[46]

Drawing on the LTA and *Green Growth*, the implication is that covenants in gross should therefore be afforded at least some of the protections of indefeasibility. Any defects in execution or notification of a covenant (either statutory covenants or PLA covenants) would not be able to defeat the covenantee's interest except where an entry on the record of title has been made in error or fraudulently.[47]

[45] Don McMorland, above n 41 at 169.

[46] See discussion of interpretation of a document before and after registration as a "distinction without a difference" in Ben France-Hudson, above n 34 at 329.

[47] *Green Growth*, per Elias CJ at [113]; recognised through s 6(2)(b) LTA.

IV Uncertainties in the Interpretation, Modification and Removal of Covenants in Gross

The Reforms effectively extend to private individuals the recognition of statutory covenants in gross already afforded to local authorities, government and non-governmental agencies[48] and provide a framework through s 318D of the PLA to consider modification and extinguishment of covenants in gross.[49] *Green Growth* has also usefully restated the rules of interpretation of instruments recorded in the register.[50]

What remains relevant is how covenants in gross will actually be considered if challenged under s 318D. *Green Growth* has highlighted uncertainties in the land transfer system that will have implications for how landowners and their advisors craft instruments designed to protect open space. The tensions remain between the property law desire for certainty and the contract law desire to seek true meaning of a document.[51]

A Grounds for Challenging Covenants

In challenging a covenant in gross that was designed to protect open space, the argument is likely to revolve around testing the technical defects in the construction of the covenant and how the extrinsic evidence in a particular situation might be fairly considered – both require elements of judicial discretion. Two factors are relevant.

Firstly, a shift in responsibility from the Registrar to the judiciary. The 2017 reforms reinforced the 'administrative' rather than 'quasi-judicial' powers of the Registrar. The LTA limits circumstances within which the Registrar can alter the register except in the

[48] Natasha Lea, above n 6 at 16.

[49] Section 318D and other key sections of the Property Law Act are provided in Annex 1.

[50] *Green Growth,* per William Young and O'Regan JJ at [74].

[51] Ben France-Hudson, above n 34 at 323.

case of manifest injustice[52] and to adjust compensation for loss of estate or interest.[53] There is no direct equivalent in the 2017 statute to s 81 in the 1952 Act. The remit has therefore been given to the judiciary to determine whether a title should be amended, leaving the Registrar to focus on administration. While this is in line with the Law Commission's recommendations,[54] it also directly contradicts the significant and extensive powers to correct and cancel entries in the register that the courts have previously attributed to the Registrar.[55]

Secondly, ss 317 and 318D of the PLA have been designed to provide broad powers to the court to modify or extinguish easements, positive and restrictive covenants, and covenants in gross. In what could be termed a pragmatic or legal realism-inspired approach, the provisions create the opportunity for parties to the covenant to table the context for the covenant (or easement) and allow the court to assess the fairness of the effect of the decisions it is asked to consider.[56] In particular, the grounds for challenge in s 318D cover factors such as change in circumstances, the degree that reasonable use is impeded, and the level of injury to the parties. Section 318D mirrors s 317 in all respects except for s 318D(1)(b) which allows the court to consider the circumstances if the covenantee cannot be found. The breadth of this power is shown in s 318D(1)(f)-(g) and s 317 (e)-(f)[57] which gives the court discretion to consider if the easement or covenant is contrary to "public policy" or rule of law or for "any other reason".

[52] Land Transfer Act 2017, s 55.

[53] Land Transfer Act 2017, s 68.

[54] Law Commission, above n 29 at [2.48-2.50] and R8 at 15, concluded the High Court is the best forum to consider corrections to the Register.

[55] McGechan J provides a detailed history of s 81 powers in *Housing Corporation of New Zealand v the Maori Trustee* [1988] 2 NZLR 662 at 48.

[56] See discussion of policy implications and post-modern legal approaches in Jacinta Ruru, Paul Scott and Duncan Webb "The Nature of Law" in *The New Zealand Legal System; Structures and Processes* (6th edition, Lexis Nexis New Zealand Ltd, 2016) 9 at 26-30.

[57] Sections 317 (e)-(f) were added through the Reforms under the Land Transfer Act 2017.

B Perceptions and Influences

In light of recent cases such as *Barfilon* and *Wilkinson* where restrictive covenants were successfully removed, there could be a perception that it is becoming easier to modify or remove restrictive covenants which do not fit in with a developer's ambitions. This could influence the way covenants in gross are considered in future, particularly where there are pressures to intensify urban development.

In *Green Growth*, Glazebrook J noted the courts need to interpret a covenant, consider its purpose, the statute that created it, whether it achieves the objectives of the covenant and whether it is workable.[58] This echoes the approach taken previously in *Big River Paradise Ltd v Robin Lance Congreve and Others*[59] where it was seen important to consider the intent of the framers of a covenant and its underlying scope;[60] and that they would be unlikely to create an instrument that risks future change by processes they have no control over (such as future change in statutes).[61]

In contrast, in more recent cases, when considering modification and extinguishment of covenants under the PLA, it seems that a narrow approach to "public policy", as expressed through housing initiatives, district plan policies and rules affecting that affect adjoining areas, is sufficient to override the original intent of the parties to a covenant.[62]

In *Barfilon*,[63] covenants were removed that restricted development of small or low-cost dwellings in an area approved for housing through the Housing Accords and Special Housing Act 2013. The Court accepted there was sufficient change in circumstances to

[58] *Green Growth*, above n 2 at [154].

[59] *Big River Paradise Ltd v Robin Lance Congreve and Others* [2008] NZCA 78, [2008] NZLR 402 [*Big River Paradise*]; see also *Big River Paradise Ltd v Robin Lance Congreve and Others* [2008] NZSC 51.

[60] *Big River Paradise*, above n 59 at [15] per William Young P.

[61] At [30] per William Young P.

[62] For example, the Housing Accords and Special Housing Areas (Auckland) Order 2013, and the National Policy Statement on Urban Development 2020.

[63] *Barfilon,* above n 3.

warrant removal of the covenant because of recent changes to the district plan, a Special Housing Area was in place, and the covenant was in place from 1995. In exercising its discretion, the High Court determined the covenant would impede the reasonable use of the burdened land.[64] While the grounds were argued on the basis of change since the restrictive covenants were created (s 317(1)(a) PLA), Gault J commented on the inevitability of development, and applied what amounts to a public policy argument — that the public interest in housing outweighs the property right of the covenant.[65]

Drawing on *Barfilon* in *Wilkinson v Campbell and O'Mahoney,*[66] a covenant restricting building height was "deleted and substituted" based on the support of adjoining owners, and alignment with the current district plan.[67]

As RMA district and regional plans and policies change, and mechanisms through the Urban Development Act 2020 (UDA) begin to be used, for example, by Kainga Ora, in areas of high urban expansion in New Zealand, developers might be emboldened to challenge protections on open space with the aim of testing how permissive the judiciary's approach might be. This is especially relevant under the UDA, as there are only very narrowly defined exclusions to the wide-ranging powers that can be used by government agencies to acquire private land for a range of specified works which may include housing, urban renewal, reserve or public space, and associated community facilities and infrastructure. The exclusions in s 256 relate to ensuring that covenants are honoured under the Heritage New Zealand Pouhere Taonga Act 2014, s22 of the QEIIA and "conservation interests".[68] Another element of the UDA is the preparation of development plans under Part 2 for specified developments that provide the planning policies and rules for a designated project or area. It is the Minister of Conservation that comments on and can require conditions relating to "conservation interests" (ss 72(8)-

[64] *Barfilon* at [33, 45] per Gault J.

[65] *Barfilon* at [56] per Gault J.

[66] *Wilkinson v Campbell and O'Mahoney* [2020] NZHC 159 [*Wilkinson*].

[67] *Wilkinson* at [38] per Clark J.

[68] Urban Development Act 2020, s 256 (2)(d)(ii)(C).

(9)). This potentially limits the role of the Minister of Conservation as advocate to land over which the Crown has a direct interest as either landowner or covenantee (s 72(10)).

We can take this as an indicative approach to what "public policy" intent might be considered in a challenge to a PLA covenant in gross under s 318D. It suggests that in using a PLA covenant in gross (or secured through a consent notice under the RMA) to protect open space values, a landowner's intent is likely to be considered secondary to the desire of a developer, a local authority or government agency to intensify urban development. In effect, this could be seen as supporting the approach in *Green Growth* that only instruments "notified" under a statute such as the RA, CA or QEIIA would be deemed to be "registered" – and therefore protect the intent of the original parties.

Despite this, it will be interesting to see if the judiciary would see "public policy" differently if it was argued in a s 318D application: that open space values expressed through means other than through primary or secondary legislation (including district plan zoning policies and rules) should be taken into account.[69] This would require considering what "public policy" means. In plain terms this might be something like:[70]

> ….the actions, objectives, and pronouncements of governments on particular matters ….It may relate to the principles and priorities which a government adopts in relation to an issue, and not to their translation into action.

Public policy might include a National Policy Statement under the RMA for indigenous biodiversity;[71] or a Conservation Management Strategy that notes the importance of supporting management of particular habitats in an area across private and publicly held

[69] Noting that ss 68(2) and 76(2) of the RMA gives rules in regional and district plans the "force and effect" of a regulation, but that other regulations will prevail if the rules are inconsistent with them.

[70] Richard Wilson "Policy Analysis as Policy Advice" in Robert E Goodin, Michael Moran and Martin Rein (ed) *The Oxford Handbook of Public Policy* (online ed, Oxford University Press, 2009) 152 at 154.

[71] Currently under development, see Ministry for the Environment *Draft National Policy Statement for Indigenous Biodiversity – Proposals for Consultation* (November 2019).

land;[72] or if a local authority's policy or strategy notes the importance of supporting private landowners to maintain and enhance open space values through using covenants (as opposed to it being included as an explicit regulatory rule in a district or regional plan under Part 5 of the RMA).

It could be seen as an idealistic view, but it seems particularly unreasonable and unfair that the intent of a previous landowner could be so easily dismissed, just because it was not a protection under the QEIIA, the RA or CA (which might not always be the best option for a landowner). This would be especially disheartening if the successor in title, despite having full knowledge of the restrictions of a covenant in gross at the time of acquiring the land, promoted changes to district and regional plans, but had absolutely no intention of honouring those covenants.

What is clear is that in the future, the judiciary is likely to be called on to determine and resolve the public policy conflicts between the desire to protect open space values and the need for housing and urban development – through interpreting the instrument, the context for its creation, and considering the impact of modifying or extinguishing a covenant.

V Strengthening Protection of Open Space through Covenants in Gross

Apart from paying closer attention to details in the drafting and execution of documentation, the lessons from *Green Growth*,[73] *Barfilon*,[74] and *Big River Paradise*[75] show that a landowner needs to be clear about the effect of the covenant and record it in the instrument at the time it is created. The merits of statutory protection offered by any

[72] For example Department of Conservation *Conservation Management Strategy for Auckland 2014-2024* (November 2014).

[73] *Green Growth* above n 2.

[74] *Barfilon,* above n 3.

[75] *Big River Paradise*, above n 59. See also *Kaimai Properties Limited v Queen Elizabeth The Second National Trust* [2019] NZHC 1591 [*Kaimai*].

particular method will need to be compared, along with the costs and time it takes to put into effect (for example, costs could include survey definition, legal advice and fencing).

Using registered encumbrances, as was seen in *ANZCO,* might remain effective and useful alternatives to covenants in gross.[76] They are enforceable through the terms of the mortgage under s 104 of the PLA 1952 (now s 203 of the PLA 2007), but cannot be modified or extinguished under s 126G (now s 317) of the PLA 2007. They can bind successors more strictly in contract compared with a restrictive covenant or PLA covenant in gross.[77]

As seen in *Barfilon*, significant weight is given to "public interest" factors and the effect of district plans and legislation to support urban development when covenants are challenged. This might not be so useful if the outcome of long-term protection of open space is desired through covenants in gross. We may see RMA methods (other than esplanade strips) more likely to be challenged in quite short timeframes (less than 10 years) compared with say covenants secured under the CA and the RA.

Of the 12 or so mechanisms, the weakest in terms of protection of values over time are seen as the most flexible and subject to challenge, whereas the strongest are statutory covenants that interact directly with the LTA as opposed to the PLA.

The prudent advice to offer a landowner seeking to protect land in the long term, would be to use a strong mechanism and work with a covenantee like the Trust. This would also ensure that the landowner can draw on sound management advice and support to manage the area in the long-term and to enhance the open space values.

[76] *ANZCO*, above n 16 at [121] per Anderson P, Glazebrook and William Young JJ.

[77] See *New Zealand Land Law*, above n 18; and Alana Fisher (ed*) Modification or extinguishment of covenants and easements* (online ed, Thomson Reuters) at [CN5.01 (4)].

It is suggested that for the PLA covenants in gross to be effective in protecting open space, specific provision in the land transfer system is needed that:

(a) Provides for a class of covenant as an 'open space covenant' (similar to the classes of easements in Schedule 5 of the Land Transfer Regulations; or s 229 of the RMA for esplanade strips).
(b) Considers the effect of a claim to modify or extinguish the covenant in gross against the stated purpose.
(c) Clarifies that covenants in gross to protect open space are treated as registered interests for the purposes of the LTA.

VI Conclusions

Providing for covenants in gross in the PLA can be viewed as complementing the range of open space protection mechanisms that are available.

Despite *Green Growth* and the Reforms, uncertainties remain around notation, interpretation, rectification and modification of covenants within the land transfer system. Responsibility now lies more fully with the judiciary about how much weight will be given to the intent to protect open space values and the property principles and doctrines that underpin the Torrens system in New Zealand (for example, indefeasibility, the mirror principle, touch and concern and numerous clausus).[78] This is especially important in light of the progressive broadening of the scope of the Courts to modify and extinguish easements and covenants.[79]

Assuming the pressure to build housing continues at pace, there is concern that the risk to protected open space will increase. The introduction of PLA covenants in gross has not

[78] See Ben France-Hudson, above n6; Rod Thomas and Polina Kozlova, above n 18; and Natasha Lea, above n 6.

[79] *Barfilon,* above n 3 at [22] per Gault J; and noted in *Wilkinson,* above n 66 at [18] per Clark J.

ameliorated this risk, and it could be inferred that the enactment of the UDA has increased the risk.

It seems that public policy might hold more weight where an open space covenant exists which has been secured through a statute other than the PLA. It also suggests that even if the clear purpose of a covenant in gross is to "to protect the environmental value of the land" in perpetuity,[80] it will not be enough for a private landowner to state this intent in the instrument for it to deliver the envisaged protection in the long-term. Arguably, these combined developments might merely encourage landowners to use methods other than the PLA to protect open space values.

On balance, it might be wiser to consider further reform to consolidate and strengthen the approach to using covenants in gross that protect open space directly in the core statutes of the land transfer system. Taking a more restrictive approach, as suggested by Natasha Lea and Ben France-Hudson,[81] might also be appropriate to generate greater protections for open space through the PLA.

[80] *Kaimai Properties Limited v Queen Elizabeth The Second National Trust* [2019] NZHC 1591 at [52].

[81] See Ben France-Hudson, above n 34 at 329; and Natasha Lea, above n 6 at 47.

ANNEX 1 Options for Open Space Protection

Information sourced from legislation and a range of documents including:

Department of Conservation *A guide to the planning and management of restoration projects* (2001) <www.doc.govt.nz>.

QEII National Trust Annual Report 2019 (QEII National Trust, 2019)

<www.qeiinationaltrust.org.nz>.

Note that protection of places and buildings by a heritage protection authority under the Resource Management Act 1991 is not considered in this analysis.

RA – Reserves Act 1977

CA – Conservation Act 1987

QEIIA – Queen Elizabeth the Second National Trust Act 1977

LTA – Land Transfer Act 2017

RMA – Resource Management Act 1991

CCRA – Climate Change Response Act 2002

FA - Forests Act 1949

PFSI - Forests (Permanent Forest Sink) Regulations 2007

PWA - Public Works Act 1981

CPLA – Crown Pastoral Land Act 1998

LA -Land Act 1948

LGA - Local Government Act 1974

PLA – Property Law Act 2007

Protection mechanisms	**Statutory tool**	**Legal / formal protection?**	**Public / private?**	**Registrable / Noted on record of title?**	**Binding on successors? Y/N**	**Agencies typically involved**					**Covenantee Public / private?**	**Duration? Perpetuity / specific term**	**Public access? Required?**	**Comment**
						DoC	**Local authority**	**QEII Trust**	**Nga Whenua Maori kawenata**	**Other Crown agency**				
Selling / gifting / exchange of land	RA, LTA, PLA, PWA, LGA, RMA	Y	Both	Results in registrable transfer of ownership	Y	Y	Y	Y		Y	n/a	n/a	Usually	Not a covenant mechanism, but a transfer of title – therefore binding on successors. Widely used by local authorities to acquire new recreation and local purpose reserves on medium and large-scale development.
Conservation / open space covenants	ss 27, 27A CA	Y	Both	Noted	Both	Y	N	N	Y		Public	Perpetuity or specific term	Optional; required in some cases	CA has provision for conservation covenants for general and Māori land or Crown land leased to Māori (Ngā Whenua Rāhui kawenata) in favour of the Minister of Conservation; the instrument is lodged with Registrar for noting on the record of title. Ngā Whenua Rāhui kawenata are usually for 25 years, on a renewable basis and can therefore be more flexible over time for landowners. Can attract support in terms of funding and management advice/services.

Protection mechanisms	Statutory tool	Legal / formal protection?	Public / private?	Registrable / Noted on record of title?	Binding on successors? Y/N	Agencies typically involved					Covenantee Public / private?	Duration? Perpetuity / specific term	Public access? Required?	Comment
						DoC	Local authority	QEII Trust	Nga Whenua Maori kawenata	Other Crown agency				
	s77, 77A RA	Y	Both	Noted	Both	Y	Y	N	N		Public	Perpetuity or specific term	Optional; required in some cases	Similar to the CA, the RA has provision for covenants for general and Māori land (Ngā Whenua Rāhui kawenata) requires an agreement between private land owner and Minister / local authority who apply to Registrar to note the covenant on the title; allows land to be administered under RA and provisions enforced. Ngā Whenua Rāhui kawenata are usually for 25 years, on a renewable basis and can therefore be more flexible over time for landowners. Can attract support in terms of funding and management advice/services.
	s221 RMA	Y	Both	Registrable	Y	N	Y	N	N		Public	Perpetuity or specific term	Optional; required in some cases	RMA allows for consent notices to be registered on the record of title as a 'charge' which is a registrable interest in land for purposes of s51 LTA and a covenant running with the land and binding successors; consent notice and include requirements to create restrictive, positive or covenants in gross. RMA also provides for heritage orders (Pt 8 RMA, a planning tool that works like a 'designation' in a regional district plan to protect specific values.
	s22 QEII	Y	Both	Noted	Both	Y	N	Y	N		Public	Perpetuity or specific term	Optional; agreed in some cases	QEII open space covenants are covenants in gross, run with and bind successors; an interest in land for purposes of LTA; QEII applies to the Registrar who must note the covenant on the register.

Protection mechanisms	Statutory tool	Legal / formal protection?	Public / private?	Registrable / Noted on record of title?	Binding on successors? Y/N	Agencies typically involved					Covenantee Public / private?	Duration? Perpetuity / specific term	Public access? Required?	Comment
						DoC	Local authority	QEII Trust	Nga Whenua Maori kawenata	Other Crown agency				
Protected private land agreement	ss 18-21, 76 RA	Y	Both	Noted s 76(6) RA	Both	Y			Y		Public	Perpetuity or specific term	Required	Effectively classifies land as reserve under the RA; gazetted interest, noted on title; only binds successors if the agreement between landowner and Minister of Conservation intends it and the gazette notice declaring the protected private land agreement is lodged with the Registrar to be noted on the register; it is not always an interest that runs with and binds the land. Often used to secure funding support and set out terms for management advice and services; allows area to be administered as a reserve and enforced using RA.t
Management agreement	n/a	N	Both	n/a	N	Y	Y	Y		Y	Public	Specific term	Optional	Often used to secure funding support and set out terms for management advice and services.
Esplanade reserve	Ss 229, 230, 236, 237 RMA	Y	Public	Registrable	Y	Y	Y				Public	Perpetuity	Required	Results in registrable transfer of ownership to local authority; land held as reserve under RA.
Esplanade strip	ss 229 - 231, 232-, 235, Sch 10 RMA	Y	Both	Registrable	Y		Y				Public	Perpetuity	Public can be excluded	Creates registrable interest in favour of local authority. Similar to a memorandum of encumbrance, binding on successors and mortgagees. Requires all parties having a registered interest in the land to give consent on the instrument. Registered owner of land can apply to vary or cancel the instrument creating the strip (s 234). Public access can be created by easement.
Consent notice	RMA	Y	Both	Registrable	Both		Y				Public	Duration of the consent issued by the local authority that can be in perpetuity	Optional	Creates interest in land that runs with the land – registered as a ‘charge’ on the land.
Forest sink covenant	CCRA FA PFSI	Y	Private	Registrable	Y					Y	Public	Perpetuity		If registered, creates interest in land that runs with the land. Can be requirement for funding support as part of forest management and extension services.

Protection mechanisms	Statutory tool	Legal / formal protection?	Public / private?	Registrable / Noted on record of title?	Binding on successors? Y/N	Agencies typically involved					Covenantee Public / private?	Duration? Perpetuity / specific term	Public access? Required?	Comment
						DoC	Local authority	QEII Trust	Nga Whenua Maori kawenata	Other Crown agency				
Crown pastoral lease - protective measures	CPLA, LA	Y	Public	?	Y					Y	Public			CPLA s40 'protection mechanism' for tenure review; Crown interests under Land Act 1948. Allows range of support and obligations to be agreed to in the lease/licence or tenure review process.
Covenant in gross - general	LTA, PLA	Y	Both	Noted	Both		Y				Both			Creates interest in land that runs with the land if the terms of the covenant are explicit.
Memorandum of encumbrance	PLA, LTA	Y	Both	Registrable	Both						Both			Creates interest in land that runs with the land. Used extensively with mortgage/financial securities that contain collateral covenants eg in multi-unit developments and retirement villages to bind parties to particular obligations such as provision of service.
Restrictive / positive covenant	PLA, LTA	Y	Both	Noted	Both		Y				Both			Creates interest in land that runs with the land if the terms of the covenant are explicit.

ANNEX 2 Key statutory provisions

A Property Law Act 2007

Sections 307A–307F, 317 and 318D:

307A Covenants in gross

In sections 307B to 307F and 318A to 318E, **covenant in gross** means a covenant that—

(a) is expressed in an instrument coming into operation on or after the commencement of this section; and

(b) requires the covenantor to do something, or to refrain from doing something, in relation to the covenantor's land; and

(c) benefits another person, but is not attached to other land.

307B Construction of covenant in gross

(1) A covenant in gross is enforceable by—

(a) the covenantee; and

(b) persons claiming through the covenantee.

(2) A covenant in gross binds—

(a) the covenantor; and

(b) the covenantor's successors in title; and

(c) persons claiming through the covenantor or the covenantor's successors in title.

(3) Subsections (1) and (2) are subject to any contrary intention that appears in the instrument in which the covenant is expressed.

(4) For the purposes of this section,—

(a) the covenantor's successors in title include an occupier for the time being of the burdened land:

(b) a covenant in gross that requires the covenantor to refrain from doing something may relate to a subject matter not in existence when the covenant is made.

307C Legal effect of covenant in gross

(1) A covenant in gross is binding in equity on—

(a) every person who becomes the owner of the burdened land,—

(i) whether by acquisition from the covenantor or from any of the covenantor's successors in title; and

(ii) whether or not for valuable consideration; and

(iii) whether by operation of law or in any other manner; and

(b) every person who is for the time being the occupier of the burdened land.

(2) A covenant in gross ceases to be binding on a person referred to in subsection (1) when that person ceases to be the owner or occupier of the burdened land, but

without prejudice to that person's liability for breach of the covenant arising before that person ceased to be the owner or occupier of the land.

(3) Subsections (1) and (2) are subject to any contrary intention that appears in the instrument in which the covenant is expressed.

(4) The benefit of a covenant in gross is capable of being assigned.

(5) This section overrides any other rule of law or equity, but is subject to sections 307D and 307E.

307D Whether, and to what extent, administrator bound by covenant in gross

(1) This section applies to an administrator of the estate of a person who was bound, at the time of that person's death, by a covenant in gross.

(2) The administrator is bound by the covenant—
   (a) only if assets of the estate are available in the administrator's hand for meeting the obligations under the covenant; and
   (b) if so, only to the extent that they are so available.

307E How rights under covenant in gross rank in relation to other unregistered interests

(1) The rights under a covenant in gross rank, in relation to all other unregistered interests affecting the same land, as if the covenant were an equitable and not a legal interest.

(2) The ranking, under subsection (1), of rights under a covenant in gross is subject to the effect of the notation of the covenant, under section 307F, in the register kept under section 9 of the Land Transfer Act 2017.

307F Notation of covenants in gross

(1) This section applies to a covenant in gross that burdens land under the Land Transfer Act 2017.

(2) The Registrar may note on the record of title created under section 12 of the Land Transfer Act 2017 for the land burdened by a covenant in gross all or any of the following:
   (a) a covenant to which this section applies:
   (b) an instrument purporting to affect the operation of a covenant noted under paragraph (a):
   (c) a modification or revocation of a covenant noted under paragraph (a).

(3) A covenant noted under subsection (2) is an interest noted on the register to which section 52(1)(b) of the Land Transfer Act 2017 applies.

(4) Notation of a covenant under subsection (2) makes the covenant an interest of the kind specified in subsection (3), but does not in any other way give the covenant any greater operation than it would otherwise have.

(5) **Covenant**, in subsections (3) and (4), includes an instrument purporting to modify the operation, and a modification or revocation, of a covenant noted under subsection (2)(a).

317 Court may modify or extinguish easement or covenant

(1) On an application (made and served in accordance with section 316) for an order under this section, a court may, by order, modify or extinguish (wholly or in part) the easement or covenant to which the application relates (the easement or covenant) if satisfied that—

(a) the easement or covenant ought to be modified or extinguished (wholly or in part) because of a change since its creation in all or any of the following:

(i) the nature or extent of the use being made of the benefited land, the burdened land, or both:

(ii) the character of the neighbourhood:

(iii) any other circumstance the court considers relevant; or

(b) the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or

(c) every person entitled who is of full age and capacity—

(i) has agreed that the easement or covenant should be modified or extinguished (wholly or in part); or

(ii) may reasonably be considered, by his or her or its acts or omissions, to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or

(d) the proposed modification or extinguishment will not substantially injure any person entitled; or

(e) in the case of a covenant, the covenant is contrary to public policy or to any enactment or rule of law; or

(f) in the case of a covenant, for any other reason it is just and equitable to modify or extinguish the covenant, wholly or partly.

(2) An order under this section modifying or extinguishing the easement or covenant may require any person who made an application for the order to pay to any person specified in the order reasonable compensation as determined by the court.

318D Court may modify or extinguish covenant in gross

(1) On an application (made and served in accordance with section 318C) for an order under this section, a court may, by order, modify or extinguish (wholly or partly) the covenant to which the application relates if satisfied that—

(a) the covenant ought to be modified or extinguished (wholly or partly) because of a change since its creation in all or any of the following:

(i) the nature or extent of the use being made of the burdened land:

(ii) the character of the neighbourhood:

(iii) any other circumstances the court considers relevant; or

(b) after reasonable inquiries have been made, the covenantee cannot be found;

or

(c) the continuation of the covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original covenantor and covenantee at the time of its creation; or

(d) every person entitled who is of full age and capacity—

(i) has agreed that the covenant should be modified or extinguished (wholly or partly); or

(ii) may reasonably be considered, by act or omission, to have abandoned, or waived the right to, the covenant, wholly or partly; or

(e) the proposed modification or extinguishment will not substantially injure any person entitled; or

(f) the covenant is contrary to public policy or to any enactment or rule of law; or

(g) for any other reason, it is just and equitable to modify or extinguish the covenant, wholly or partly.

(2) An order under this section modifying or extinguishing the covenant may require the applicant for the order to pay to any other person specified in the order reasonable compensation as determined by the court.

(3) Nothing in this section limits or affects the operation of any other enactment or rule of law under which a covenant in gross may be—

(a) declared void or voidable; or

(b) set aside, cancelled, or extinguished; or

(c) modified or varied.

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Natasha Lea "A Gross Oversight? An analysis of the statutory introduction of covenants in gross and their potential threat to the boundaries of property law" (L.L.B (Hons) Dissertation, University of Otago, 2018).

2 Seminars and Conferences

Ben France-Hudson and Robbie Muir "Continuity and Change – the Land Transfer Act 2017" Property Law Conference, Change: It's Inevitable! (New Zealand Law Society, June 2018).