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Is an arbitration clause binding on future landlords and tenants?

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A BATTLE BY SUPERMARKET HEAVY-weights, Woolworths and Foodstuffs, over a use restriction has produced a recent judgment of interest to commercial property lawyers.

In *Wai-iti Developments Limited*[1] *v General Distributors Limited*[2] [2019] NZHC 1656, the High Court had to consider whether it had jurisdiction to hear a dispute concerning a use restriction that would have prevented Foodstuffs from developing and operating a Pak 'n Save on its land (Pak 'n Save Site) which adjoins Woolworths' adjoining leased premises (Countdown Site). Woolworths argued that the Court did not have jurisdiction and that the matter had to be referred to, and determined by, arbitration. Foodstuffs argued that the parties were not bound to have the matter determined by arbitration and that, instead, the Court had jurisdiction to determine the matter.

Some key points and learnings for property lawyers are set out below. First, however, I will outline the salient facts.

Background facts

The Pak 'n Save Site and Countdown Site, in Highland Park, Pakuranga, Auckland, adjoin each other. In 1990, an earlier owner of the Countdown Site (Gildex Systems Ltd) entered into a 'deed to grant easements' (Deed Covenant) with the then owner of the Pak 'n Save Site (Highland Village Ltd) which prohibited the use of the Pak 'n Save Site for:

> 'the retail of foodstuffs or dry groceries in competition with the business of Gildex or its lessee from time to time having a Gross Lettable Area equal to or exceeding 20% of the Gross Lettable Area of the Specialty Shops situated on the [proposed Pak 'n Save Site]'.

The Deed Covenant also required the parties to register an encumbrance against their respective titles to secure the obligations of the Deed Covenant. An encumbrance was (and is) registered and provides that:

> '[Highland Village] will for itself and the successor in title to the [proposed Pak 'n Save site] keep and perform all the covenants contained and set out in the *Deed…provided* that the Secured Covenants shall be enforceable only against the owners and occupiers for the time being of the [proposed Pak 'n Save site] (and not otherwise against Highland Village and its successors in title at such time as they case to be the owners of occupiers of the [proposed Pak 'n Save site]).'

> "A good reminder of the importance … of considering whether any covenants are not intended to bind subsequent parties.

Countdown acquired the Countdown Site in 1993. In February 1998 it created a lease (with itself as both landlord and tenant) (Lease) and, on the same day, executed a transfer of the freehold to a company called Iraklis Twenty Three Ltd. Countdown has, since then, continued to remain in occupation of the Countdown Site and operates the Countdown supermarket under the Lease.

The Lease contains an obligation on the landlord to ensure that the registered proprietor of the Pak 'n Save site complies with all of its obligations under the Deed Covenant. The Lease also contains the following arbitration clause:

> 'That if there shall be any difference dispute or disagreement as to the interpretation, application or extent of this lease or any clause thereof then the matter shall be determined by arbitration and any reference in this lease to arbitration shall mean a reference to two arbitrators or their umpire in the manner provided and with the powers conferred by the Arbitration Act 1908' (Arbitration Clause).

Foodstuffs purchased the Countdown Site in June 2018. There was no formal transfer of the landlord's covenants under the Lease and Foodstuffs therefore argued that it was not bound by the Arbitration Clause because this is not a covenant touching or concerning the land.

Covenants touching and concerning the land

The Property Law Act 2007 introduced a statutory regime regarding the burden of landlord's covenants running with the reversion.[3] However, the Lease predates the operation of that regime as it was entered into before 1 January 2008. Accordingly, the Court had to follow the common law position which is that the burden of any covenant entered into by the vendor of a reversionary interest would only bind transferees of that interest if and to the extent that the covenant could be said to 'touch and concern' the land.

The most commonly cited authority to determine whether a covenant touches or concerns the land is *P & A Swift Investments*

v Combined English Stores Group[4]. The test is:

(i) If it benefits only the landlord for the time being, and if separated from the land ceases to be of benefit to the covenantee (or as applied to the lessor's covenant, if it benefits only the lessee for the time being, and if separated from the term ceases to be of benefit to the covenantee);

(ii) If it affects the nature, quality, mode of user or value of the land; and

(iii) It is not expressed to be personal.

Neither Foodstuffs nor Woolworths were able to point to a case where the above test had been applied in relation to an arbitration clause, so this was a novel question for the Court.

The Court undertook a *prima facie* review of the law and determined that it is arguable that the arbitration clause touches and concerns the land, because it is either:

- Interlinked with other lease covenants; or
- It affects the landlord and tenant in their normal capacity.

Interlinking with other lease covenants

The Court noted that the Arbitration Clause supports the performance of the landlord's and tenant's covenants throughout the term of the Lease, and is inextricably related to the performance of other covenants in the Lease. It further regarded that obligations that relate to and support a covenant which itself touches and concerns the land should also be regarded as touching and concerning the land. In addition, the Court considered that the Arbitration affects the value of the leasehold estate, in that it provides certainty as to the mechanism through which disputes can be determined.

Affecting the landlord and tenant in their normal capacity

The Court further considered that, if a covenant affects the landlord in its normal capacity as landlord of the subject land or the tenant in its normal capacity as tenant, then it should be regarded as touching and concerning the land.

It followed that the Court determined that it was at least arguable that the Arbitration Clause was binding on the parties. However, it considered that the arbitrator was in a better place to assess and make a final decision on the outcome. Therefore, the outcome was that the matter was stayed and referred to arbitration.

Commentary

This case provides a good reminder of the importance, when acting for either landlord or tenant, of considering whether any covenants are not intended to bind subsequent parties. If it is intended that certain covenants only bind the original named parties, then the fact that such covenants are personal only to those parties should be expressly stated. ■

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1. Wai-iti Developments Ltd (first plaintiff) and Foodstuffs North Island Ltd (second plaintiff) both referred generally in this article as 'Foodstuffs'.
2. General Distributors Ltd (first defendant) and Woolworths New Zealand Ltd (second defendant) both referred generally in this article as 'Woolworths'.
3. Section 231 Property Law Act 2007
4. [1989] AC 632 (HL) at 642

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