# Balancing Competition and Corporate Strategy in the Realm of Restrictive Land Covenants: Commerce Commission v NGB Properties Limited [2023] NZHC 2005

The High Court ruling in *Commerce Commission v NGB Properties Limited* [2023] NZHC 2005 has brought land covenants to the forefront of New Zealand's commercial landscape. This landmark case has significant implications for what has, up until now, been a reasonably common use of land covenants, and sheds light on the interplay between competition law and property rights.

*Case Summary*

The case involved two adjoining properties. Bunnings Limited (*Bunnings*) owned one of the properties (*Gilmore Site*). While the Gilmore Site was big enough for a Bunnings home improvement store, it fell short of the size required for a Bunnings Warehouse. To establish a Bunnings Warehouse and to effectively compete with the Mitre 10 MEGA store, situated a mere 500 metres from the Gilmore Site, Bunnings would have needed to acquire the property adjoining the Gilmore Site.

To prevent this, NGB Properties Limited (*NGB*), a company related to the owner of the Tauranga Mitre 10 MEGA, acquired the property adjoining the Gilmore Site. NGB then proceeded to further protect its interests by registering on the title an encumbrance containing a land covenant.

This covenant included a statement which provided that the owner of the land would not use any portion of the property for the purpose of carrying out the business of a hardware and home improvement retail store.

The Commerce Commission (*Commission*) received a complaint about NGB's acquisition of the property adjoining the Gilmore Site and registration of the encumbrance against the title, and opened an investigation.

Following the Commission's investigation, NGB accepted that the covenant contained in the encumbrance had the purpose of substantially lessening competition in the relevant market. Accordingly, NGB acknowledged that it had breached section 28 of the Commerce Act 1986 (*Act*). Section 28 prohibits the requiring, giving, carrying out, or enforcing of a covenant that has the purpose, effect, or likely effect of substantially lessening competition in a market.

When considering the appropriate penalty, Cooke J noted that, as the encumbrance was registered to impede Bunnings and other potential competitors from competing with the nearby Mitre 10 MEGA,

it was important to impose a penalty that would serve as an effective deterrent to others.

Cooke J determined that, as no actual commercial gain arose from the offending, the maximum penalty imposable was $10 million. He then considered the following mitigating factors / factors which lessened the seriousness of the offending, before accepting the parties' proposed penalty of $500,000:

- **Section 28(4) of the Act rendered the encumbrance unenforceable as its purpose was to substantially lessen competition.** Although accepting the Commission's argument that removing the encumbrance would be costly and not necessarily straightforward, Cooke J determined that this ability to apply for removal must reduce the significance of the breach.
- **NGB was unaware that the encumbrance was unlawful.** Although Cooke J acknowledged that a significant penalty should be imposed to bring light to the illegitimacy of such conduct, he took the view that NGB's ignorance made the offending less serious.
- **As NGB removed the encumbrance as soon as it became aware of its breach, and as it sold the property without the covenant, it did not benefit from the covenant nor did any anti-competitive effect arise from it.**
- **NGB co-operated with the Commission, was a first-time offender, and took steps to address its breach (by removing the encumbrance and selling the property).**

*Significance*

This case is important in the context of managing competitive behaviour. Not only does it mark the first instance where the court has imposed a penalty for a breach of section 28 of the Act but, coupled with the following recent developments, it also sends a clear signal that there has been a tightening of competitive levers within the retail sector:

- the recent enactment of the Commerce (Grocery Sector Covenants) Amendment Act 2022 (amending the Commerce Act), which outlaws land covenants and exclusive lease covenants in the retail grocery sector;
- the Commission's recent market studies into the retail fuel market, the competition for residential building supplies, and the retail grocery market; and
- the Ministry of Business, Innovation and Employment's recent public consultation into the effects of anti-competitive land covenants (which was initiated following the Commission recommending an economy-wide review of, among other things, the use of land covenants).

*Key Takeaways*

Landowners should be careful when considering the use of land covenants (whether registered in covenant instruments, leases or encumbrance instruments). Whilst land covenants will still have their place (e.g. for maintaining aesthetic similarities within in a subdivision), landowners should now, more than ever, bear in mind the fact that they cannot be used for the purpose of substantially lessening competition.

What will be considered as "substantially lessening competition" will of course depend on the particular circumstances of each case. As a starting point, the following points have been noted by the Commission in March 2023 guidance as being more likely to cause a substantial effect on competition:

- if the land covenant has a broader scope and/or a longer duration;
- if the land covenant has the effect of strengthening or reinforcing barriers to entry or expansion by competitors; and
- if the existing competition in the relevant market is already limited.

*Seek Legal Advice*

If you have any concerns over the potential anti-competitive effect of a land covenant, whether on your property or someone else's, we would be pleased to advise.