# Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd

Court of Appeal CA159/2017; [2018] NZCA 248
27 March; 13 July 2018
Kós P, Brown and Gilbert JJ

*Property law – Lease – Tenancy in common – Transfer of property – Arrangement between parties involved sale of undivided share of fee simple to whole of allotment – Whether a "subdivision" – Whether sale of part of allotment – Whether arrangement altered use of land or resulted in intensification of land use – Nature of encumbrances – "Subdivision" – "Allotment" – Resource Management Act 1991, s 218.*

*Statutes – Interpretation – Whether sale of undivided share of fee simple was a subdivision of land – Section 218 of the Resource Management Act 1991 restricted means of subdivision – Meaning of statutory text should be cross checked against purpose – Purpose of s 218 of the RMA to regulate land transactions – Section 218 only concerned with land transactions likely to intensify use of land and services or impair amenities – "Subdivision" – "Allotment" – Resource Management Act 1991, s 218.*

Telecommunication companies typically built cellphone towers on other people's land. Rather than buy land, they leased part of the landowner's fee simple estate. Clearspan Property Assets Ltd made a business of taking over telecommunication companies' leases by acquiring an undivided share of the fee simple as tenant in common with the landowner. Clearspan's share would be proportionate to the area the telecommunication company leased of the whole fee simple. Clearspan and the landowner entered into mutual covenants providing for exclusive use areas. Each party agreed not to go onto the exclusive use area of the other. Clearspan's exclusive use area was the land leased to the telecommunication company.

One such transaction involved Spark New Zealand Trading Ltd in respect of a lease Telecom New Zealand Ltd (Spark's predecessor) had entered into in 1997. The lease was for 42.5 $m^2$ being part of some commercial land owned by "the Goldwaters". The lease permitted Spark to install and access a cellphone antennae tower and associated equipment. In 2008, the Goldwaters transferred an undivided 5.25 per cent interest in the fee simple to Clearspan. The Goldwaters and Clearspan became tenants in common of the land and two new certificates of title were issued. Each title had an encumbrance in respect of the parties' exclusive use areas. Clearspan's exclusive use area was the 42.5 $m^2$ occupied by Spark (being 5.25 per cent of the whole allotment). The combined transaction between the Goldwaters and Clearspan was described as "the arrangement".

Spark said the arrangement was a "subdivision of land" for the purposes of s 218 of the Resource Management Act 1991 (the RMA) and thereby subject to RMA restrictions. Clearspan said it was not a subdivision but the sale of an undivided share of the fee simple of the whole allotment. Spark successfully applied to the Environment Court for declarations that the arrangement was a subdivision. The Environment Court considered that the clear intent and effect of the arrangement was to achieve a subdivision under s 218(1)(a)(ii). On appeal the High Court held the arrangement was not a subdivision because the sale was for a percentage of the fee simple of the "whole" allotment, not a sale for "part" of the fee simple. The concept of fee simple carried exclusive right to possess, use, enjoy and alienate the land. A tenancy in common provided an equal right to occupy, use and enjoy the land. Spark appealed. The sole issue was whether the arrangement was a "subdivision of land" for the purposes of s 218 of the RMA.

**Held:** 1 The arrangement did not fall within the meaning of "subdivision" in s 218 of the RMA. Section 11(1) prohibited a subdivision of land if it did not satisfy one of the six specified means of subdivision set out in s 218(1)(a) and (b). If Parliament had intended arrangements outside the meanings in s 218(1) to fall within the meaning of subdivision, it could have said so. Rather than strictly defining the "means" of subdivision the definition could have: "included" the criteria set out in s 218(1)(a) and (b); included an anti-avoidance clause, an inclusive clause embracing other arrangements, or a deeming provision (see [12], [13], [17], [18], [23]).

*Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) applied.

2 The arrangement was not a "subdivision of land" for the purposes of s 218 of the RMA. The arrangement involved the sale of an undivided share in the fee simple of the whole allotment coupled with personal covenants. It was not a sale of the "fee simple to part of the allotment". The meaning of a statutory text may appear plain in isolation of the statute's purpose but that meaning should always be cross checked against purpose. The lease by the Goldwaters to Spark did not qualify as a subdivision. The lease did no more than create an interest in the allotment. The arrangement did not alter the use of the land or result in intensification of land use. Section 218 focused on the regulation of subdivisions, particularly the intensity and scale of use of the land. The purpose of s 218 was to regulate land transactions that risked intensifying the use of land and services, and of impairing amenities. Section 218 was not concerned with land transactions unlikely to intensify development. Neither the original lease entered by Spark, nor the arrangement between the Goldwaters and Clearspan would facilitate intensified development (see [21], [22], [24], [28]).

3 The issue in applying the plain meaning of s 218(1)(a)(ii) to the arrangement, was the legal effect of the arrangement. The transfer of an undivided interest in the land (thereby producing a tenancy in common) did not involve disposing of the fee simple of part of the land. There was no sale or offer of sale of part of the allotment. Rather, the arrangement involved the sale of an undivided share of the fee simple to the whole of the allotment, coupled with lawful encumbrances and personal covenants. Section 218 could only be applied to the arrangement as a result of the encumbrances and personal covenants. Encumbrances continue in effect until discharged. They are a form

of statutory mortgage (charge) on the land. They do not create or transfer an estate in land. The personal contractual arrangements embodied in the encumbrances did not destroy the tenancy in common. Exclusive use covenants, involving a conditional waiver of part of a tenant in common's rights of possession, were an accepted conveyancing device. The covenants did not change the fact that each party owned the entire undivided fee simple, in proportion to their share (see [16], [25], [26], [27]).

*Keir v Law* (2001) 4 NZ ConvC 193,306 considered.

**Result:** Appeal dismissed.

**Observation:** It is possible that the arrangement could be a lease within the scope of s 218(1)(a)(iii) of the RMA, but if it were, ss 210 and 212 of the Property Law Act 2007 would take it outside s 218(1)(a)(iii) (see [29]).

**Other cases mentioned in judgment**

*Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

*Horokiwi Holdings Ltd v Registrar-General of Land* [2008] NZCA 233, [2009] NZRMA 40.

*Mawhinney v Waitakere City Council* [2009] NZCA 335.

*Nyberg v Handelaar* [1892] 2 QB 202 (CA).

**Appeal**

This was an appeal by Spark New Zealand Trading Ltd against a decision of Palmer J [2017] NZHC 277, (2017) 19 ELRNZ 682, determining that an arrangement between the owners of the land over which Spark held a lease, and Clearspan Property Assets Ltd, the respondent, was not in the nature of a subdivision. The Environment Court [2016] NZEnvC 115, had previously declared that the arrangement was a subdivision.

*ME Casey QC* for Spark New Zealand Trading Ltd.

*DJ Chisholm QC* and *JC Brabant* for Clearspan Property Assets Ltd.

*Cur adv vult*

The judgment of Kós P, Brown and Gilbert JJ was delivered by

**Kós P.**

**[1]** Telecommunication companies like the appellant, Spark, typically build cellphone towers on other people's land. Rather than buy land, they lease part of the landowner's fee simple estate. The respondent, Clearspan, has made a business of taking over these leases by acquiring an undivided share of the fee simple as tenant in common, its share being proportionate to the area the telecommunication company leases of the whole fee simple. Clearspan and the landowner (now tenant in common to Clearspan) enter into mutual covenants providing for exclusive use areas. Each agrees not to go onto the exclusive-use area of the other. Clearspan's exclusive use area is the land leased to the telecommunication company. By aggregating numerous sites upon which cell towers are constructed, Clearspan has superior bargaining power as compared with individual, disparate sole owners of the land. Some telecommunication companies do not like this change.

**[2]** Spark says such an arrangement is a "subdivision of land" for the purposes of s 218 of the Resource Management Act 1991 (the RMA). If the

arrangement is a subdivision, the regulatory requirements of the RMA would apply. Clearspan disagrees. It says the arrangement is not a subdivision, but simply the sale of an undivided share of the fee simple of the whole allotment, beyond the scope of s 218.

**[3]** Spark applied to the Environment Court, successfully, for declarations that the arrangement was a subdivision.[1] On appeal to the High Court, Palmer J disagreed and held it was not a subdivision.[2] Spark now appeals having been granted leave to do so.[3] The sole issue we have to decide is whether the arrangement, described in more detail immediately below, is "a subdivision of land" for the purposes of s 218 of the RMA.

**The arrangement**

**[4]** In November 1997, Telecom New Zealand Ltd, Spark's predecessor, entered into a lease of part of some commercial land in Mt Roskill owned by some people called the Goldwaters. The Goldwaters' land was 809 $m^2$ in area. The lease was for just 42.5 $m^2$ of that area, involving part of the yard at the back of the property. The lease permitted Spark to install and access a cellphone antennae tower and associated equipment.

**[5]** In December 2008, the Goldwaters transferred an undivided 5.25 per cent interest in the fee simple to Clearspan.[4] The result was to make Clearspan and the Goldwaters tenants in common of the land to the extent of their respective shares. It also resulted in the issue of two new certificates of title. One records Clearspan as registered proprietor of a 5.25 per cent share of the fee simple estate in the land, with an encumbrance registered in favour of the Goldwaters. The other certificate of title records the Goldwaters as registered proprietors as to a 94.75 per cent share of the fee simple estate, with an encumbrance registered in favour of Clearspan.

**[6]** Each registered memorandum of encumbrance binds future owners. Clause 5 of each identically provides:

> In the event the Encumbrancee transfers or alienates the land in the Encumbrancee's Certificate of Title the Encumbrancee will transfer this memorandum of encumbrance to the same party who acquires an interest in the Encumbrancee's Certificate of Title.

**[7]** Each encumbrance incorporates a reciprocal deed of covenant in favour of the other tenant in common. In the covenant in favour of Clearspan, the Goldwaters agree:

> ... the Covenantor, its tenants, agents, licensees and invitees will not at any time use, occupy, enter or remain upon the Exclusive Use Area to the intent that the Covenantee will at all times be entitled to exclusive use, occupation and enjoyment of the Exclusive Use Area.

---

1 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2016] NZEnvC 115 [Environment Court judgment]. Vodafone NZ Ltd applied alongside Spark, and Kordia Ltd also joined an appeal to the High Court. They are not parties to this appeal, however.

2 *Clearspan Property Assets Ltd v Spark New Zealand Trading Ltd* [2017] NZHC 277, (2017) 19 ELRNZ 682 [High Court judgment].

3 *Spark New Zealand Trading Ltd v Clearspan Property Assets Ltd* [2017] NZCA 352.

4 42.5 $m^2$ being 5.25 per cent of 809 $m^2$: see [4] above.

Clause 2.2 provides that Clearspan may grant rights over the exclusive use area. The Goldwaters have the same rights in respect of the balance of the land. As Palmer J observed:[5]

> Effectively, each agrees not to exercise their right of possession over the other's covenanted area.

**[8]** The lease was not assigned, possibly because its fixed term had expired. Nonetheless Spark continues to use the land as informal tenant or licensee of, now, Clearspan. Precisely which is neither apparent on the record nor material.

**[9]** For simplicity we call the combined transaction, described in [5]–[8] above as "the arrangement".

**Statutory scheme**

**[10]** The High Court judgment sets out the legislative history covering the regulation of subdivisions.[6] It is unnecessary to repeat it here. Section 11(1) of the RMA prohibits a subdivision of land, within the meaning of s 218, unless it is permitted by a plan or resource consent, or in certain other specified circumstances. It is common ground that none of those exceptions apply. If the arrangements here are a subdivision, they will contravene the RMA.

**[11]** Section 218 provides:

> **218 Meaning of subdivision of land**
>
> (1) In this Act, the term subdivision of land means—
>
> (a) *the division of an allotment*—
>
> (i) by an application to the Registrar-General of Land for the issue of a separate certificate of title for any part of the allotment; or
>
> (ii) by the *disposition by way of sale or offer for sale of the fee simple to part of the allotment*; or
>
> (iii) by a lease of part of the allotment which, including renewals, is or could be for a term of more than 35 years; or
>
> (iv) by the grant of a company lease or cross lease in respect of any part of the allotment; or
>
> (v) by the deposit of a unit plan, or an application to the Registrar-General of Land for the issue of a separate certificate of title for any part of a unit on a unit plan; or
>
> (b) an application to the Registrar-General of Land for the issue of a separate certificate of title in circumstances where the issue of that certificate of title is prohibited by section 226,—
>
> and the term **subdivide land** has a corresponding meaning.
>
> (2) In this Act, the term **allotment** means—
>
> (a) any parcel of land under the Land Transfer Act 1952 that is a continuous area and whose boundaries are shown separately on a survey plan, whether or not—
>
> (i) the subdivision shown on the survey plan has been allowed, or subdivision approval has been granted, under another Act; or
>
> (ii) a subdivision consent for the subdivision shown on the survey plan has been granted under this Act; or

---

5 High Court judgment, above n 2, at [7].
6 At [10]–[12].

(b) any parcel of land or building or part of a building that is shown or identified separately—
(i) on a survey plan; or
(ii) on a licence within the meaning of Part 7A of the Land Transfer Act 1952; or
(c) any unit on a unit plan; or
(d) any parcel of land not subject to the Land Transfer Act 1952.
(Emphasis added.)

**[12]** In *Waitakere City Council v Kitewaho Bush Reserve Co Ltd*, a High Court decision, Randerson J noted that the subdivision of land "is not merely an exercise of drawing lines on a plan but has ramifications for the environment which are properly to be considered under district plans and decisions made under the RMA".[7] Subdivisions have physical effects, including more intensive use of land than previously. They can impact on infrastructure services and might also create relevant precedent effects.[8]

**[13]** In *Horokiwi Holdings Ltd v Registrar-General of Land*, this Court noted that s 11 is "quite specific" in its exclusion of transactions from RMA controls over subdivisions.[9] In that case the particular transaction did not fall within the s 11(1) exception. This Court emphasised there the need to "focus on the words used in the RMA and the statutory purpose".[10] And, in *Mawhinney v Waitakere City Council* we observed that "subdivision is not a purely technical matter and ... the Council is entitled to consider an application [for subdivision consent] in light of the impact the subdivision will have on the management of associated resources".[11]

## Judgments below

*Environment Court*

**[14]** The Environment Court decision, delivered by Judges B P Dwyer and J A Smith, focused on s 218(1)(a)(ii).[12] It addressed the question whether a division of an allotment had occurred as a result of: (a) disposition; (b) by way of sale; and (c) for the fee simple to part of the allotment. The Environment Court was satisfied that (a) and (b) were met. The real issue was as to (c). The arrangement involved more than a disposition of "simply an inchoate share as tenants in common in the fee simple".[13] The Court said the question was whether, on a proper construction of the entire arrangement, a disposition of rights sufficient to see the sale of a fee simple to part of that allotment had occurred in terms of s 218(1)(a)(ii) of the Act.[14] It concluded that, in combination, the clear intent and effect of the arrangement was to achieve a subdivision under s 218(1)(a)(ii). It concluded:[15]

---

7 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 (HC) at [102].
8 At [99].
9 *Horokiwi Holdings Ltd v Registrar-General of Land* [2008] NZCA 233, [2009] NZRMA 40 at [29].
10 At [37].
11 *Mawhinney v Waitakere City Council* [2009] NZCA 335 at [27].
12 Environment Court judgment, above n 1, at [16]–[17]. The Court considered s 218(1)(a)(iii) was inapplicable: at [49]–[51]. We reconsider that question below, at [29]–[30].
13 At [22].
14 At [25].
15 At [43].

the agreements have derogated from the unity of possession fundamental to a tenancy in common, and led not only to a partition of the land and creation of a new allotment under the RMA, but a disposition by offer of sale of part of the fee simple.

*High Court*

**[15]** Palmer J concluded the disposition by sale was not of "the fee simple to part of the allotment" in terms of s 218(1)(a)(ii). The concept of fee simple is "the largest estate known to the law", carrying exclusive right to possess, use, enjoy and alienate the land.[16] A tenancy in common, however, provides "unity of possession", that is, the equal right to occupy, use and enjoy the land.[17] The arrangement here involves co-ownership of the fee simple of the whole, and not "part of", the allotment.[18]

**[16]** Clearspan and the original land owners negotiated a further set of contractual arrangements replicating most of the characteristics as if each held a fee simple estate in part of the land, but not all.[19] Fundamental conceptual differences lie between an estate in land compared with an interest in land supplemented by personal contractual arrangements. An encumbrance is a statutory mortgage only and does not create or transfer an estate in land.[20] The personal contractual arrangements embodied in the encumbrances did not destroy the tenancy in common despite it creating a heavy contradictory overlay.[21] While the arrangement is an "artificial contrivance" designed to avoid regulatory requirements, it was not a subdivision.[22]

**[17]** "Subdivision" is defined exclusively to "mean", rather than "include", six specified means of subdivision in s 218(1)(a) and (b).[23] Parliament could have made that list non-exhaustive, but it had not. Instead, the definition provides relative certainty by reference to certain specific means of subdivision using different legal techniques in relation to "part of the allotment".[24] Parliament did not intend arrangements outside those specified meanings to fall within the meaning of "subdivision".[25]

**[18]** The arrangement therefore did not fall within the meaning of "subdivision" in s 218. Nor did it alter the use of land or result in the intensification of land use that accompanies residential subdivision, the wider concerns of the RMA to protect or preserve land not applying here.[26]

*Submissions*

**[19]** We summarise here only the essential points counsel advanced. For Spark, Mr Casey QC submits the arrangement constitutes a subdivision because the sale is of the fee simple. The fee simple rights and interests in distinct and defined portions of the land were divided by way of deeds of covenant. The intention and effect of those covenants was to divide the fee simple rights in the

---

16 G W Hinde and others *Principles of Real Property Law* (2nd ed, LexisNexis, Wellington, 2014) at [3.004(a)] as cited in High Court judgment, above n 2, at [48].
17 High Court judgment, above n 2, at [48].
18 At [48].
19 At [50].
20 At [50].
21 At [50].
22 At [52].
23 At [56].
24 At [57].
25 At [58].
26 At [56].

allotment between co-owners as to each of the delineated parts. Further, what was sold was "part of the allotment". While the sale of a fee simple interest as tenant in common does not constitute a subdivision, the arrangement here went further and provides reciprocal covenants relating to specific parts of the land registered on the title using encumbrance instruments. The intention of the arrangement was plain: the tenants in common intended that all the incidents of exclusive ownership and possession of the respective exclusive use areas should remain vested in perpetuity in each of them respectively to the exclusion of the other. The covenants destroyed the unity of possession and completely divided the rights in the land. They conferred on each of the owners all the incidents of fee simple ownership of their exclusive use areas. There was no right for either owner to do anything in relation to the other's exclusive use area. The exclusive use provision is absolute. The right otherwise available to one tenant in common to grant rights over the whole land is abrogated.

**[20]** For Clearspan, Mr Chisholm QC submits that the arrangement involves the sale of an undivided share of the fee simple to the whole of the allotment, coupled with personal covenants. That constitutes neither a "division" of an allotment nor a transfer of anything resembling the "fee simple" to part of that allotment. We will refer to Mr Chisholm's arguments in more detail in our reasoning below.

**Analysis**

**[21]** We consider the arrangement involves the sale of an undivided share in the fee simple of the whole allotment, coupled with personal covenants. But we consider that it cannot be described as a "subdivision of land" for the purposes of s 218, because the sale was not "of the fee simple to part of the land". We can be relatively brief in explaining that conclusion. We make four points.

**[22]** First, we start with the approach required to statutory construction in this appeal. Palmer J referred to the Supreme Court decision in *Commerce Commission v Fonterra Cooperative Group Ltd* that "[e]ven if the meaning of the text may appear plain in isolation of purpose that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5 [of the Interpretation Act 1999]".[27] As the Judge noted, the potential effects of inappropriate subdivision of land provide a potential reason for Parliament to provide an expansive definition of "subdivision" in the RMA.[28] Mr Casey submitted the Judge unduly played down the importance of a purposive approach. We do not agree with that stricture. The starting point is the text of the statute. As the passage just cited from *Fonterra* makes plain, purpose is a necessary cross-check. In that respect the text here is relatively crystalline, or "tight" as Palmer J put it.[29] Parliament has chosen transactional language in s 218(1) that contains precise metes and bounds. Not every "division of an allotment", or interest created in land, qualifies. Only certain specific forms of lease qualify under s 218(1)(a)(iii) and (iv). A lease by the Goldwaters to Spark for 30 years, for instance, would not qualify as a subdivision. Only transactions involving a distinct certificate of title or a unit plan (or an application therefor)

---

27 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].
28 High Court judgment, above n 2, at [54].
29 At [56].

under ss 218(1)(a)(i), (v) and 218(b). And, in s 218(1)(a)(ii), only a disposition by sale "of the fee simple to part of the allotment" qualifies. On its face those words require more than the mere creation of an interest in that allotment.

**[23]** Secondly, we agree with Palmer J's observation that it would have been a straightforward task for Parliament to have included a non-exhaustive verb such as "includes" rather than "means", an anti-avoidance clause, an inclusive clause embracing "any other arrangement with similar substance and effect", or a deeming provision. As he said, it did none of these things.[30] The primary inference to be drawn is that it did so deliberately. And, that in doing so, Parliament would have recognised: that (a) a significant number of transactions creating an interest in land would not fall within its definition; and (b) persons dealing in land might structure their affairs to avoid falling within the definition. In not adopting any of the precautionary drafting measures discussed, Parliament must be taken to have been content with that prospect.

**[24]** Thirdly, it is reasonably clear to us why Parliament chose a precise transactional definition in s 218(1). It was not seeking to capture each and any interest created in land, but only those transactions with material environmental implications. As Randerson J observed in *Kitewaho*, subdivisions have physical effects, including more intensive use of land and communal infrastructure services, and precedent effects.[31] It is these matters, in particular the intensity and scale of use of land, that the RMA regulation of subdivisions is concerned with and which s 218 focuses upon. It does so by regulating certain land transactions; those that carry the greater risk of intensifying the use of land and services, and of impairing amenities. Typically, district plans establish land use controls governing minimum lot sizes and the density of occupation thereof. The concern of s 218 is not therefore with land transactions unlikely to intensify development, and thereby neither increase the density of occupation nor impact adversely on infrastructure and other amenities. The reasonably short-term lease originally entered by Spark was not s 218's concern, because it did not affect these considerations. Nor, it might be thought, would a transaction not materially different in its *environmental* implications from that lease. Neither that lease nor the arrangement between the Goldwaters and Clearspan would in practice facilitate intensified development.

**[25]** Fourthly, we turn then to the application of the plain meaning of s 218(1)(a)(ii) to this arrangement. The issue here is the legal effect of the arrangement entered. If we have a criticism of the analysis in the Environment Court, and of Mr Casey's argument, it is that they focused unduly upon perceived purpose (being to avoid the application of s 218) rather than the legal effect of the arrangement.

**[26]** It is common ground that the transfer of an undivided interest in the land (thereby producing a tenancy in common) does not involve disposing of the fee simple to part of the land. Here there was no sale or offer of sale of "the fee simple [estate] to part of the allotment". Rather, the arrangement involved the sale of an undivided share of the fee simple to the *whole* of the allotment, coupled with lawful encumbrances and personal covenants. Nor does the latent right then to apply for division of the land as between the tenants in common, under ss 339–343 of the Property Law Act 2007, affect the common ownership status of the land.

---

30 At [56].
31 *Waitakere City Council v Kitewaho Bush Reserve Co Ltd*, above n 7, at [99].

**[27]** The application of s 218 to the arrangement can therefore arise only, if at all, as a result of the encumbrances and personal covenants. Spark submits those "in effect" or "in substance" dispose of the fee simple to a portion of the allotment. We do not agree. It is common ground that the encumbrances continue in effect until discharged but create no estate or interest in land. They are a form of statutory mortgage (charge) *on* the land only.[32] We accept Mr Chisholm's submission that the covenants associated with the encumbrance are personal in nature, do not run with the land and are vulnerable to discharge or deregistration in the usual way of such charges.[33] Exclusive use covenants, involving a conditional waiver of part of a tenant in common's rights of possession, are a now familiar conveyancing device. They were discussed by the High Court in 2001 in *Keir v Law*.[34] That decision held that such arrangements neither effect a division of the land nor destroy the inherent unity of possession of the owners in common.[35] Rather the covenants reinforce that unity because their effectiveness depends on the common consent of the landowners.[36] Regardless of the covenants, each remains owner of the entire undivided fee simple, in proportion to their share. As Mr Chisholm submitted, both remain jointly and severally liable to third parties in respect of the whole fee simple for local body rates, land taxes, common law nuisance, *Rylands v Fletcher* liability, and RMA and Building Act 2004 liabilities.[37]

*Conclusion*

**[28]** For these four reasons we conclude that the arrangement is not a "subdivision of land" for the purposes of s 218, because the sale was not "of the fee simple to part of the allotment".

**A supplementary point**

**[29]** In the course of argument we raised the possibility that the arrangement might instead be a lease within the scope of s 218(1)(a)(iii) of the RMA. An argument along those lines had been advanced by Spark in the Environment Court. That Court held the arrangement was not a lease.[38] The argument was not advanced in the High Court or before us. We invited counsel to consider the point further and file written submissions, which we duly received. Neither party seeks to take that point further. In any event, it is now clear to us that even if the arrangement were a lease the effect of ss 210 and 212 of the Property Law Act would take it outside s 218(1)(a)(iii) of the RMA.

**[30]** We need deal with this point no further.

**Result**

**[31]** The question of law on which leave was granted is answered no.

**[32]** The appeal is dismissed.

**[33]** Counsel were agreed that costs for a complex appeal were appropriate, whatever the outcome, that being the position taken below. But for that we would have awarded costs for a standard appeal on a band A basis. The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

---

32 Land Transfer Act 1952, ss 2 and 100 (applicable here); and Property Law Act 2007, s 79.
33 Land Transfer Act, ss 97(3); and Property Law Act, s 203.
34 *Keir v Law* (2001) 4 NZ ConvC 193,306.
35 At [18].
36 *Nyberg v Handelaar* [1892] 2 QB 202 (CA) at 205.
37 The covenants acknowledge continuing joint rating liability.
38 Environment Court judgment, above n 1, at [49]–[51].

**Orders**

(A) The question of law on which leave was granted is answered as follows:

Is the arrangement described at [5]–[8] of this judgment a subdivision for the purposes of s 218 of the Resource Management Act 1991?

No.

(B) The appeal is dismissed.

(C) The appellant must pay the respondent costs for a complex appeal on a band B basis and usual disbursements. We certify for second counsel.

Solicitors for Spark New Zealand: *MinterEllisonRuddWatts* (Auckland).
Solicitors for Clearspan Property: *Brown Partners* (Auckland).

*Reported by:* Edith PA Shelton, *Barrister*