IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA209/2022
[2024] NZCA 154

BETWEEN	PETER ERIC THORNLEY AND ROLIEN YOLANDA VAN HOUTEN First Appellants
	JAMES RICHARD RUITERMAN Second Appellant
AND	GRAEME REYNOLD FORD, NGAIRE DAWN FORD AND STEPHEN REYNOLD FORD, AS TRUSTEES OF THE FOOTBRIDGE FAMILY TRUST First Respondents
	PAPA PUTAIAO LIMITED (IN LIQUIDATION) Second Respondent

Hearing:	12 September 2023
Court:	Brown, Mallon and Wylie JJ
Counsel:	A E Simkiss for Appellants D G Hayes for Respondents
Judgment:	9 May 2024 at 12.15 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The costs order in the High Court is set aside. The case is remitted back to the High Court to reassess costs in light of this judgment.

C The first respondents must pay the appellants costs for a standard appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] This appeal concerns the purported termination of an equitable easement granting the right to convey water where the pipes for that conveyance were located in a different position from that described in the registered legal easement.

[2] Peters J in the High Court dismissed a claim brought by the beneficiaries of the equitable easement (the appellants in this appeal) because at one point the burdened land was transferred from one of the first respondents, Dr Graeme Ford, to the Ford family trust which initially had independent trustees,[1] before returning to the first respondents as trustees of the family trust.[2] The Judge held that the transfer to the independent trustees defeated the equitable easement.

[3] Subsequent to the High Court decision, the burdened land was sold and the appellants obtained a registered legal easement in respect of the true position of the pipes through negotiations with the new owners. Despite this development, the

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1 The Ford family trust was named the "Footbridge Family Trust".
2 *Thornley v Ford* [2022] NZHC 667 [judgment under appeal].

appellants maintain their appeal. The first respondents, who owned the burdened land at the relevant time, contend the appeal is moot.

[4] The issue on appeal, if it is to be considered, is whether the appellants continued to have the benefit of the equitable easement despite the transfer to the independent trustees either because: the registered easement can be said to have been misdescribed and so excepted from the principle of indefeasibility; or because Dr Ford remained bound by the equitable easement, despite the intervening period when the independent trustees were the registered proprietors, so that it was enforceable against him when he reacquired the burdened land.

Background facts

[5] Dr Ford purchased land on 7 December 1979. That land was subject to an easement registered on the same day in favour of neighbouring land. Pursuant to the easement, the neighbouring land was entitled to draw water from the Hingaia stream and to convey the water by underground pipe across the portion of Dr Ford's land marked A on a plan attached to the registered easement (the 1979 Easement).[3]

[6] The easement had been agreed between Bridge City Lands Ltd (Bridge City), the former owner of Dr Ford's land, and the owners of the neighbouring land at that time, Mr and Mrs Palmer (who owned one parcel of land) and Mr Law (who owned another parcel of land). A memorandum of transfer was executed by these parties on 20 November 1979. As relevant it provided:[4]

> AND WHEREAS the Transferor has agreed to grant to the first transferees and the second transferee the right to draw and convey water as is more particularly hereinafter set forth such right to be appurtenant to the second land and the third land …
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> … DOTH HEREBY TRANSFER AND GRANT to the first transferees and the second transferee and their respective executors administrators and assigns the full free uninterrupted and unrestricted right liberty and privilege from time to time and at all times to take and draw water in such quantities as they or either of them shall reasonably require from the stream shown on Deposited

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3 See [8] below.

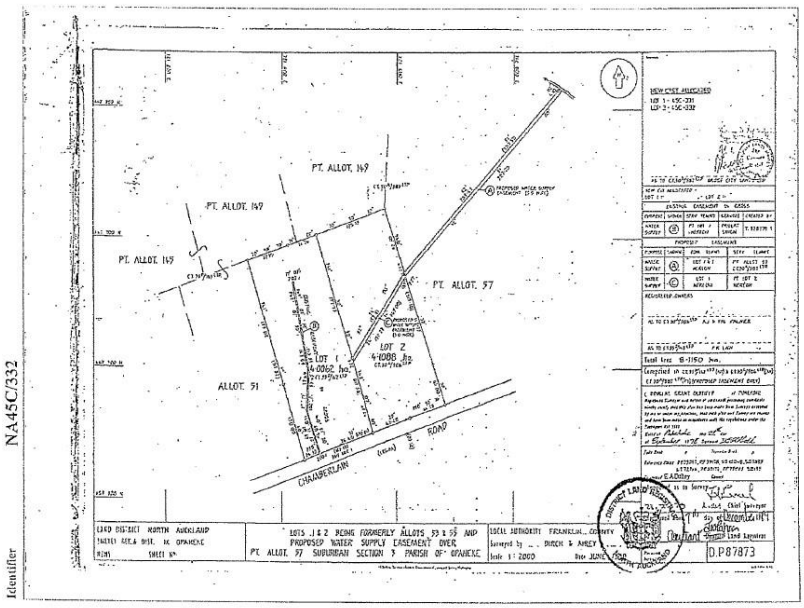
4 The "first land" refers to the lot owned by Bridge City Lands Ltd which is the "transferor", the "second land" refers to the lot owned by Mr and Mrs Palmer who are referred to as the "first transferees", and the "third land" refers to the lot owned by Mr Law who is referred to as the "second transferee".

> Plan 87873 and to convey and lead the same in a free and unimpeded flow by underground pipe through and across that portion of the first land marked "A" on Deposited Plan 87873 and also the further right to install a pump upon the said portion of the first land marked "A" on Deposited Plan 87873 for the pumping of water for the aforesaid purposes and also the further full free uninterrupted and unrestricted right liberty and privilege for the first transferees and the second transferee and their respective executors administrators and assigns and all persons authorised by them or either of them at all reasonable times to enter upon and walk over that part of the first land marked "A" on Deposited Plan 87873 for the purpose of laying, inspecting, repairing, renewing, relaying, cleansing and maintaining the said pipe and the said pump and ancillary equipment required to obtain water from the stream and convey the same as aforesaid …

[7] This memorandum of transfer, referred to as "Transfer 815636.5", was registered on 7 December 1979 at 10.30 am. The certificate of title for Lot 2 Deposited Plan 87873, being the land owned by Mr and Mrs Palmer, recorded this interest as follows:

> Appurtenant hereto is a water easement over the part Allotment 57 Suburban Section 3 Parish of Opaheke (C.T. 46C/44) marked A on Plan 87873 created by Transfer 815638.5.

[8] The title for Deposited Plan 87873 showed area A as follows:



[9] The title of the land owned by Mr Law, depicted as Lot 1 in the above plan, recorded the interest in the same terms. The title of the land owned by Bridge City, depicted as Pt Allot 57 in the above plan, similarly recorded the easement "over the part marked A on Plan 87873".

[10] Dr Ford was informed of this agreement during his negotiations to buy the land from Bridge City. Bridge City's solicitors provided Dr Ford with the proposed terms and the route of the easement that had been agreed to. Dr Ford's purchase of the former Bridge City property was, as noted, registered on the same date as the registration of the easement and was subject to it.

[11] In the early 1980s water pipes were laid across and under Dr Ford's land to supply water from the stream to the land owned by the Palmers and the land owned by Mr Law. By agreement between Mr Palmer and Dr Ford, the pipes were partly laid in a different route than the registered 1979 Easement. The precise location of the pipes as agreed between Mr Palmer and Dr Ford was no longer known by them.

[12] Mr Palmer's evidence was that the water supply was to irrigate his kiwifruit, avocado and tamarillo orchard. He arranged for a contractor to carry out the work installing the pipes and took out a loan to pay for it. However, part of the planned route went through basalt rock which was "extremely difficult … or perhaps impossible to get through". At the same time Dr Ford was also digging a trench for his pipes for water from the stream for the orchard he was establishing. Mr Palmer asked Dr Ford if his pipes could go into the same trench and Dr Ford said that would be "fine". Nothing was said about the legal implications of changing the route of the pipes and Mr Palmer did not understand that his legal rights had changed.

[13] Dr Ford's evidence was essentially the same. He agreed to changing the route to help Mr Palmer because it was a good neighbourly thing to do. His recollection was that he had not dug the trenches for his own pipes at this stage but he was able to assist by identifying a route that would not strike rock. They did not discuss the legal position and "[n]either of [them] thought [they] were creating a new easement through the property".[5]

[14] Mr Palmer and Dr Ford also agreed to replace the pump shed for the water and to move it to a new location. The existing pump shed was old and it was agreed that

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5 Dr Ford's son, Stephen Ford, gave similar evidence about how the route was determined. He recalled being present at the time. Dr Ford's evidence was that his son was 13 or 14 years old and was "in the vicinity".

a new pump shed would be built by contractors at a "lower location so the pumps would not have to lift so high". The Palmers met the cost of pipes, pumps and equipment servicing their land, and shared the cost of building the pump shed with Dr Ford. The evidence of both Mr Palmer and Dr Ford was that nothing further was discussed between them about the easement. They got on well as neighbours and there were no issues.

[15] The Palmers sold their land in 1988 to Mr Thomas and Ms Crowley. Mr Palmer did not recall the details of this sale other than that it was sold through his father-in-law and neighbour, Mr Law, who was a real estate agent. The land changed ownership again in 1994, 1995 and 2005. On 1 July 2009 it was sold by its then owner to Peter Thornley and Rolien van Houten (the first appellants).

[16] There was no evidence from the owners of the land between the Palmers and the first appellants. For the first appellants, the evidence was given by Ms van Houten. At the time they purchased the property it had olive trees. Mr Thornley and Ms van Houten purchased the property as a place to live and also to grow lettuce and herbs. The vendor told them there was an easement to draw water. Nothing was mentioned about whether there was a legal easement or where the pipes were laid. Prior to the purchase, Mr Thornley and Ms van Houten's lawyers in Ashburton advised them that there was a legal easement for water. Because the easement was properly recorded on the title, no concerns were raised. They would not have purchased the land if there was not a legal right to be supplied with water.

[17] Mr Law subdivided his land and sold one of the titles to James Ruiterman (the second appellant) on 9 November 1989. He purchased the land for use as a kiwifruit orchard.[6] Mr Ruiterman's evidence is that he dealt with Mr Law when he purchased the land. Mr Law told him there was a legal easement to supply water to the orchard and that everything was correct. He was not told that the pipes were laid on a different path to the registered easement. As with his neighbours, Mr Ruiterman would not have purchased the land if it did not have a water supply to his orchard. He explained that for this size of lot he needed to demonstrate its economic viability by

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6 He also sold the other title to a third party in 1990 but this title is not relevant to the matter before this Court.

planting many tamarillo trees and kiwifruit and for that he needed water. He also said that if he was told he would have to re-lay his pipes in accordance with the legal easement, then he would not have bought the property. He was a young man and he would not have wanted the hassle.

[18] Dr Ford's land also went through several transfers. He transferred the land to the independent trustees of his family trust on about 30 July 1996 (that is, after Mr Ruiterman purchased part of Mr Law's land and before Mr Thornley and Ms van Houten purchased what had been the Palmers' land). Dr Ford and Ngaire Ford, his wife, were the principal beneficiaries of the trust. Following the retirement of the independent trustees and their replacement with Dr Ford and Mrs Ford in 1997, the land was transferred to Dr Ford and Mrs Ford in their capacity as trustees of the family trust on 26 August 1999 (that is, after both the first and second appellants had purchased their land). The land was subdivided into two lots in April 2007 with Dr Ford's son, Stephen Ford, taking transfer of one of the lots with the family trust retaining the balance lot (over which both the legal easement and the pipes as actually laid lay).

[19] Throughout the period of the various transfers of Dr Ford's land and of the neighbouring land ultimately to the first and second appellants, no issue concerning the easement appears to have arisen. This changed in around October 2016 when Dr Ford informed Mr Thornley that the pipes did not follow the route of the registered 1979 Easement and threatened to cut off the appellants' water supply.

[20] This change in position arose because Dr Ford believed that Mr Thornley and Ms van Houten were using the water for commercial purposes, namely to water the microgreens they were growing on their property, when they did not have a resource consent to do so. Mr Thornley and Ms van Houten denied doing so and said they were using rainwater from a tank for the microgreens. They told Dr Ford that they were only using the water from the stream for their domestic use. Dr Ford did not believe them. Although he did not tell Mr Thornley or Ms van Houten of this, Dr Ford complained to Auckland Council (the Council) about Mr Thornley and Ms van Houten's water use because he did not accept that rainwater from the tank was sufficient to water the microgreens. The Council decided no action was required.

[21] Around the same time, Dr Ford told Mr Thornley and Ms van Houten about plans he had to develop his land. These plans were not clear to Ms van Houten but she understood Dr Ford wanted assistance with them. She said this ended up being rolled up with the other issues with their microgreens and the easement. Dr Ford gave evidence that he was developing a science research centre and wanted to make sure that the pipes as laid did not interfere with those plans.

[22] From Ms van Houten's perspective things subsequently settled down after Dr Ford's initial threat to cut off the water. Dr Ford did not take any steps to cut off the water, although he maintained that he had a right to do so. However, Dr Ford's evidence is that he raised the subject with Mr Thornley many times after October 2016 because he did not believe Mr Thornley and Ms van Houten. He also said he was continually telling them the easement was in the wrong place.

[23] In early 2017 Dr Ford also raised issues about water with Mr Ruiterman. One issue was a "pin prick hole" in a tank causing a "fine jet of water" to leak. Mr Ruiterman had it fixed but Dr Ford still had issues, deeming it "unsafe", noting his development plans and informing Mr Ruiterman that the easement was in the wrong place and the pipe would have to be moved.

[24] Matters came to a head in February 2019. Dr Ford's evidence is that he went over to see Mr Thornley because he believed he could see a hose in their water tank and was suspicious that they were pumping water into the tank from the stream. He looked at the hose and told Mr Thornley that what he was doing was "totally illegal". Mr Thornley "just lost it" and assaulted him. A complaint to the police was made but no charges were laid.

[25] On about 18 February 2019 Dr Ford cut off the water supply to the appellants' land. This led to the appellants bringing a High Court claim and seeking an interim injunction for the restoration of the water supply. The High Court made consent orders on 8 March 2019 for restoring the water supply. There were delays in this occurring leading to the appellants obtaining a further High Court order on 13 March 2019 permitting them to undertake the necessary work for restoration to occur.

[26] In the early part of 2019 Dr Ford, who continued to believe that Mr Thornley and Ms van Houten were using the water from the stream to water their microgreens without a resource consent, again complained to the Council. The Council arranged for independent testing of the water sources at the property to be carried out. The Council advised Dr Ford on 17 June 2019 that the results of the testing had concluded that the stream water was only being used for domestic purposes associated with the dwelling. Dr Ford's evidence at trial was that he still did not believe this. He had used his own scientists to conduct tests and considered his tests to be superior to those tests arranged by the Council.[7]

[27] On 30 April 2019 Dr Ford's son, Stephen, was added as a trustee of the family trust. In late 2020 Stephen began taking steps to acquire the family land. He incorporated the second respondent, Papa Putaiao Ltd (PPL), of which he was the sole director and shareholder, and arranged finance. This finance included a loan of approximately $1.1 million from the trustees of the family trust to PPL. By an agreement dated 21 January 2021, the trustees of the family trust agreed to sell the land to PPL. The sale was settled on 26 January 2021. On 24 March 2021 the High Court made an order joining PPL as a defendant to the High Court claim.[8]

[28] The respondents (including the new owner PPL) refused to agree to having the current route of the pipes surveyed and the legal easement amended to record the route. The appellants proceeded to trial seeking an order to that effect and other orders.

High Court proceeding

[29] The statement of claim in its final form pleaded three causes of action:

(a) Rectification:

(i) The parties to the 1979 Easement had a common continuing intention that the pipeline route would be consistent with that easement.

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7 Details of these tests were not provided in discovery.

8 *Thornley v Ford* [2021] NZHC 611 [joinder decision].

(ii) However, the pipeline could not be laid within the route described in the 1979 Easement.

(iii) By mistake, the 1979 Easement was not consistent with the pipeline route.

(iv) The original parties to the 1979 Easement had the right to claim rectification of the 1979 Easement and the appellants obtained that right when they took title to their land.

(b) Equitable easement:

(i) The rights granted by the servient tenement to the appellants or their predecessors in title had the essential characteristics of an easement, were supported by valuable consideration, and had been performed by all parties since approximately 1979.

(ii) The transfer of the servient land from the first respondents (the trustees of the family trust) to the second respondent (PPL) was a scheme designed to defeat the unregistered equitable easement, the second respondent was not a bona fide purchaser for value without notice, and the second respondent acted fraudulently as defined in s 6 of the Land Transfer Act 2017 (the 2017 LTA) and took title to the servient land subject to the equitable easement.

(c) Equitable estoppel:

(i) At all relevant times the appellants and the first respondents had a common understanding that the appellants would have an indefeasible right to water supply by way of an easement passing over the respondents' land.

(ii) By their words and conduct the first respondents represented that the appellants have a present and indefeasible right to water

supply by way of an easement passing over the first respondents' land and that, since late 2016, they would not insist on strict adherence to the route of the 1979 Easement.

(iii) The appellants reasonably believed that they had a present and indefeasible right to water supply by easement and that, since late 2016, the first respondents would not insist on strict adherence to the route of the 1979 Easement and the appellants relied on the above understandings and representations.

(iv) The appellants would suffer serious detriment if the respondents were permitted to act contrary to the parties' common understanding and the appellants' belief.

(v) It would be unconscionable for the respondents to assert that the appellants do not have an indefeasible right to water supply by way of an easement passing over the servient land and to insist on strict adherence to the route of the 1979 Easement.

(vi) The second respondent took title to the servient land subject to the unregistered equitable easement (for the same reasons outlined at (b)(ii)).

[30] The respondents' statement of defence pleaded that:

(a) There was no mistake for the purposes of rectification because the pipeline was deliberately placed in its current location at the request of Mr Palmer and without payment of consideration.

(b) There was no equitable easement because the arrangement between Mr Palmer and Dr Ford as to the location of the pipeline was personal to them and no consideration was given.

(c) As to equitable estoppel:

(i) There was no common understanding because the appellants were unaware that the pipeline was placed outside the route of the 1979 Easement until the dispute over water use arose.

(ii) There was no representation as Dr Ford's conduct was only to reject any right to use the pipes.

(iii) The appellants have not suffered serious detriment because they have an indefeasible easement registered on the title.

[31] The Judge found against the appellants on their claim for rectification.[9] The Judge noted that the appellants had not pressed this claim at trial.[10] The Judge accepted the respondents' submission that there was "no evidence of the required mistake between the parties to the memorandum of transfer 815638.5".[11]

[32] The Judge was satisfied that the agreement between Dr Ford and Mr Palmer to vary the route of the pipes and the location of the pump house gave rise to an equitable easement on the terms set out in the 1979 Easement but varied as to location of the pipe and pump house.[12] The real question was whether the equitable easement was extinguished when Dr Ford transferred the land or by subsequent transfers. The Judge determined that it was extinguished when Dr Ford transferred the land to the independent trustees of his family trust because there was no evidence that those trustees knew of the equitable interest.[13]

[33] This meant that the equitable easement claim failed.[14] However, in case the Judge was wrong about why the claim failed, she went on to address the submission that the equitable easement was not defeated by the trustees' transfer of the burdened

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9 Judgment under appeal, above n 2, at [41].
10 At [41].
11 At [41].
12 At [46]. The Judge noted this "was not seriously disputed". There was no dispute on appeal that an equitable easement was created at this point.
13 At [64].
14 At [65].

land to PPL in January 2021. The Judge's view was that the equitable easement would not have been defeated by this transfer because land transfer fraud was established. This was because:

(a) As PPL's director, Stephen Ford's knowledge could be attributed to PPL and Stephen Ford had consistently referred to himself as the owner of the land in contemporaneous correspondence and in evidence.[15]

(b) Stephen Ford knew at the time of the transfer that the appellants were pursuing their claim to an equitable easement and that the Court had made orders by consent requiring the maintenance of the appellants' supply.[16]

(c) The transfer was motivated by an intention to defeat the appellants' interest because his evidence that he gave no thought to the litigation was implausible and inconsistent with his contemporaneous correspondence.[17]

[34] Finally, the Judge rejected the estoppel claim. Although when the appellants had purchased their land they knew of and relied on the 1979 Easement as securing water supply to their land and had no reason to believe the pipes were not located other than in accordance with 1979 Easement, their belief did not emanate from any representation from the respondents.[18] The most that could be said was that the respondents were silent.[19] Dr Ford did not have a duty to warn the appellants prior to their purchase as there was no evidence that he knew of their intended purchase or that he fostered a belief that the location of the pipes was in accordance with the 1979 Easement prior to their purchase.[20]

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15 At [68].
16 At [70].
17 At [71]–[79].
18 At [85].
19 At [85].
20 At [87].

[35] The Judge discussed the ongoing supply of water to the appellants as follows:

> [91] It is, of course, open to the plaintiffs, or one of them, to appeal this judgment. It is also open to them, appeal or no appeal, to commence an investigation as to what would be required to relocate the necessary infrastructure in area A. If the plaintiffs, or one of them, were ultimately to conclude they wished to undertake that work, then all things being equal, and provided they acted with reasonable expedition, they could expect orders to ensure the continuation of their supply in the intervening period. The plaintiffs may have other options of water supply which they might prefer to investigate.
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> [92] I shall allow the plaintiffs a period of three months to consider their position and communicate their intentions to the Court. Any appeal would, of course, need to be filed within 20 working days.
>
> [93] The status quo is to prevail in the meantime. The existing injunction remains in force and continues to bind all parties pending further order of the Court.
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> [94] I reserve leave to apply.

[36] Subject to those matters, the Judge dismissed the claim. The Judge also said:

> [96] The defendants, as the successful parties, are entitled to an award of costs and disbursements. Absent agreement, the parties may submit memoranda.

[37] The parties were unable to agree costs. This led to a further judgment which determined items in dispute in relation to costs.[21] Amongst other things:

(a) The Judge rejected the first respondents' claim for increased costs. That claim had been made because the first respondents had proposed that the parties agree a new route for the easement with all costs for the new route to be borne by the appellants. The Judge regarded the proposal as a sensible one as the evidence at trial indicated it would have been vastly cheaper than litigating.[22] Nevertheless, this was not a basis for increased costs as it was not an offer of settlement and there was no guarantee it would have achieved settlement.[23]

(b) The Judge accepted the appellants' claim for reduced costs because of the transfer of the land to PPL. The Judge was satisfied that it caused

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21 *Thornley v Ford* [2023] NZHC 1257 [costs judgment].
22 At [13].
23 At [14].

a significant increase in the appellants' costs and reduced the award of costs in the respondents' favour by 20 per cent because of this.[24]

[38] As at 13 September 2023, the parties were close to agreeing costs in favour of the first respondents of $34,933.60.

Notice of appeal

[39] The notice of appeal set out the following grounds of appeal:

> (a) The High Court erred in finding that the transfer of the land described in title NA46C/44 (Land) in July 1996 extinguished the equitable easement benefitting the land now owned by the appellants (Equitable Easement);
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> (b) The High Court erred in finding that the transferees of the Land in August 1997 [the date the independent trustees retired from the family trust and were replaced with Dr Ford and Mrs Ford] took title free from the Equitable Easement;
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> (c) The High Court erred in not finding that the title of each owner of the Land since the pipes were laid was subject to the easement that was omitted, misdescribed or incorrectly described in the record of title; and
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> (d) The High Court erred in finding that the respondents were not estopped from insisting that the pipes on the Land conveying water to the appellants' land and the pumphouse on the Land be situated in accordance with the registered easement.

Negotiations securing legal easement

[40] Following delivery of the High Court substantive judgment and the filing of the notice of appeal in this Court, the burdened land was sold by mortgagee sale. The mortgagee sale was completed on 9 December 2022 and PPL was placed in liquidation in March 2023. The appellants learned of the proposed sale in October 2022 and reached agreement with the purchaser also on 9 December 2022 for the grant of a new easement over the existing route of the pipes and facilities and the surrender of the existing easement at the appellants' costs.

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[24] At [16]–[17].

[41] Prior to the hearing of this appeal, the counsel for the first respondents filed a memorandum submitting that the appeal was now moot because of these developments.[25] The appellants did not agree that it was moot and submitted that the respondents could raise this argument at the appeal hearing. In the absence of agreement between the parties as to whether the appeal was moot, the appeal hearing proceeded.

[42] At the appeal hearing counsel for the appellants informed the Court that the liquidators of PPL had consented to "this matter proceeding" but would not participate in the proceeding. The liquidators have not filed anything in this Court.

Appeal

Relief

[43] In the High Court the pleaded relief sought by the appellants was as follows:

(a) On the rectification cause of action: rectification of the 1979 Easement so that it is consistent with the physical route at the second respondent's cost, plus increased or indemnity costs.

(b) On the equitable easement cause of action: an order that there is an equitable easement consistent with the current location that is subject to the same terms as the 1979 Easement that the appellants may register or protect by way of a caveat, plus increased or indemnity costs.

(c) On the estoppel causes of action: an order that the appellants are entitled to an easement consistent with the current location of the pipes that is subject to the same terms as the 1979 Easement that the appellants may register or protect by way of a caveat, plus increased or indemnity costs.

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[25] Mr Hayes was also counsel for PPL in the High Court and in this Court prior to its liquidation. It appears he no longer represents the second respondent.

[44] Because the appellants now have a registered legal easement for the conveyance of water over the pipes in their existing position, the relief sought from this Court is as follows:

(a) a declaration that all owners of the land having the legal description of Lot 2 Deposited Plan 380570 identified as 322637 (burdened land) since 7 December 1979 took their title subject to the misdescribed easement registered on that day (the 1979 Water Easement);

(b) a declaration that the respondents are:

(i) estopped from asserting that the appellants do not have a present and indefeasible right to water supply by way of an easement passing over the burdened land; and

(ii) estopped from asserting their strict legal rights as to the route of the easement shown in the 1979 Water Easement.

Mootness

[45] The traditional position was that an appeal would not be heard "where the substratum of the … litigation between the parties ha[d] gone and there [was] no matter remaining in actual controversy and requiring decision".[26] However, whether to entertain a moot appeal is now a matter of discretion rather than jurisdiction.[27] In exercising this discretion, the courts generally do not decide appeals where the decision will have no practical effect on the rights of the parties before the court in relation to what was in issue between them in lower courts.[28] This policy of restraint reflects the adversarial nature of the appellate process, the need for economy in the

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[26] *Finnigan v New Zealand Rugby Union Inc (No 3)* [1985] 2 NZLR 190 (CA) at 199 per Richardson J.

[27] See for example: *Attorney-General v David* [2002] 1 NZLR 501 (CA); *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 (HL) at 456–457 per Lord Slynn; *R v Gordon-Smith* [2008] NZSC 56, [2009] 1 NZLR 721 at [16]; and *Baker v Hodder* [2018] NZSC 78, [2019] 1 NZLR 94 [*Baker v Hodder* (SC)] at [32]. The discretion was considered limited to "public law cases" but that is no longer the case.

[28] *Gordon-Smith v R*, above n 27, at [16]; and *Baker v Hodder* (SC), above n 27, at [32].

use of the limited resources of appellate courts and that advisory opinions are generally not within the court's proper role in the system of government.[29]

[46] As to when the discretion should be exercised to hear a moot appeal, in *Baker v Hodder* the Supreme Court said:[30]

> [33] … It is not possible to state a "test" governing the exercise of the discretion, or to give a comprehensive statement of the circumstances in which it might properly be exercised. All that can be said is that, in light of the considerations underlying the policy of restraint, a decision to hear a moot appeal should be made only in exceptional circumstances. These might be found in the circumstances of the particular case (for example, serious procedural unfairness at the first hearing) or the broader public interest (for example, where an important legal point is raised).

[47] In *Baker v Hodder*, shareholders were in dispute over whether to sell a farm which was the primary asset of the company. The shareholders wishing to sell the farm successfully obtained from the High Court relief under s 174 of the Companies Act 1993 requiring the farm to be sold. This Court declined to hear the appeal on the basis that the appeal was moot because by then the farm had been sold.[31] The Supreme Court allowed the appeal.

[48] In exercising its discretion to hear the appeal, the Supreme Court considered that this Court should have determined the appeal because: there remained a real dispute about costs;[32] there were issues of fairness arising from the procedure adopted in the High Court;[33] there was a proper concern as to whether the decision could affect the ability of the party against whom the relief was ordered to pursue a future claim against the other shareholders who had sought that relief;[34] there were important company law issues at stake that could affect future transactions;[35] as the parties were ready to argue the appeal, the Judges would have already read the written submissions, and the appeal was on a confined point, this Court's resources would not have been

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29 *Gordon-Smith v R*, above n 27, at [18]; and *Baker v Hodder* (SC), above n 27 at [32]. The Supreme Court in both cases referred to the policy factors outlined in *Borowski v Canada (Attorney General)* [1989] 1 SCR 342 at 358–363.

30 *Baker v Hodder* (SC), above n 27.

31 *Baker v Hodder* [2017] NZCA 355 [*Baker v Hodder* (CA)].

32 *Baker v Hodder* (SC), above n 27, at [36]–[39].

33 At [43].

34 At [41].

35 At [42].

stretched;[36] and there was nothing about the case that gave rise to any issue of sensitivity in relation to the Court's proper role.[37]

[49] In this case, the appellants contend that the legal issues raised are of general and public importance. They say that the effect of the High Court's decision is that a purchaser of land cannot rely on a registered easement for the conveyance of water if the pipes are not laid in accordance with the title even if the easement was registered and the pipes were laid decades ago. They say this is contrary to the policy and specific sections of the Land Transfer Act 1952 (the 1952 LTA) and the 2017 LTA and good conscience.

[50] The appellants also say that the award of costs "adds weight to the case for hearing a substantive appeal even if the relief originally sought in the proceeding is no longer available".[38] The appellants say they are "ordinary working people" for whom the costs order is not a modest figure. Moreover, if they were successful on the appeal, scale costs in the High Court on a 2B basis would be approximately $72,000 without any uplift for the conduct relation to the sale to PPL. The potential financial impact of success on this appeal is therefore at least $100,000.

[51] We have decided that it is appropriate to consider the substantive appeal grounds. We agree that the outcome of the appeal may be financially important to the appellants, particularly if it leads to the costs order made in the High Court being set aside and an order in the appellants' favour. We also agree that it is fair to the appellants to determine an aspect of their claim that was not directly addressed by the Judge (as we discuss below).[39] Whether the appellants had enforceable rights in respect of the easement is also likely to have importance beyond this case where the registered easement for a conveyance of services does not match the actual location of the conveyance.

[52] While we have decided that it is appropriate to consider the appeal, we consider the relief sought is not appropriate. Declaratory relief is unnecessary in relation to the

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36 At [44].
37 At [44].
38 At [37].
39 See below at [57]–[62].

parties (they are moot except in relation to costs and declaratory relief is not necessary for any costs implications to be addressed). It is not necessary more generally because the Court's decision on the appeal grounds is sufficient to the extent that the legal issues have relevance beyond this case.

[53] We therefore proceed to consider the grounds of appeal and whether to allow or dismiss the appeal on those grounds. The grounds concern: whether the registered easement was "misdescribed" in terms of s 62(b) of the 1952 LTA; whether the Judge erred in finding that the equitable easement was extinguished by transfer of the land to the independent trustees or was not "reawakened" when the land was transferred back to the first appellants; and whether the Judge erred in finding that the appellants were estopped from insisting that the pipes conveying the water to their land be situated in accordance with the registered easement.

Was there a "misdescription" of the easement?

[54] Subject to some exceptions, a registered proprietor of land is protected from claims of a competing owner and against encumbrances, liens, estates and interests that do not appear on the register.[40] This is commonly referred to as the principle of indefeasibility and is given effect in large part by ss 62 and 182 of the 1952 LTA and the successor provisions in the 2017 LTA.[41] It is the 1952 LTA that as relevant to this appeal applied in this case.[42]

[55] Section 62 of the 1952 LTA provides:

> **62 Estate of registered proprietor paramount**
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> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest

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40 See generally Elizabeth Toomey "The Land Transfer System" in Elizabeth Toomey (ed) *New Zealand Land Law* (3rd ed, Thomson Reuters, Wellington, 2017) at [2.2]; and DW McMorland and others *Hinde, McMorland and Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [9.007].

41 The primary provision giving effect to this principle in the Land Transfer Act 2017 [2017 LTA] is s 51. Sections 63, 64, 75 and 183 of the Land Transfer Act 1952 [1952 LTA] and s 44 and the definition of "fraud" in s 6 of the 2017 LTA are also part of the scheme of indefeasibility of title.

42 The position is not as clear in relation to the transfer to PPL. But the transfer to PPL is not relevant to the issues before us.

> in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—
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> (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
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> (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
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> (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

[56] Section 182 of the 1952 LTA provides:

> **182 Purchaser from registered proprietor not affected by notice**
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> Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire into or ascertain the circumstances in or the consideration for which that registered owner or any previous registered owner of the estate or interest in question is or was registered, or to see to the application of the purchase money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.

[57] The appellants contend that the exception to indefeasibility set out in s 62(b) of the 1952 LTA applies.[43] The High Court judgment did not directly address this provision despite it being raised by the appellants.

[58] The appellants say that the relevance of s 62 became apparent when the first respondents sold the burdened land to PPL in January 2021 and advised the appellants that their equitable interest had "evaporate[d]". As noted, the appellants were granted leave to amend their claim to join PPL and plead that the transfer had been made with the intention to defeat their unregistered interest.[44] While the amended pleading did

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43 See above at [55].
44 Joinder decision, above n 8.

not refer to s 62, in opening at trial the appellants contended that the exception in s 62 of the 1952 LTA "as regards the omission or misdescription of any … easement" applied. They contended this meant that the respondents' indefeasible title was subject to the misdescribed easement on the title.

[59] The appellants' closing submissions presented at the end of the trial on 10 June 2021 did not refer to this provision. The respondents' submissions did not refer to it either. However, by memorandum dated 11 June 2021, counsel for the appellants advised that, due to "hasty editing", the closing submissions had omitted a part of its case. The memorandum attached the paragraphs that should have been included. In these paragraphs, the exception in s 62(b) of the 1952 LTA for misdescriptions of easements was relied on in support of the submission that all purchasers of the servient land took their title subject to the appellants' equitable easement. These submissions included reference to authorities in support of this submission.

[60] The respondents filed submissions in reply dated 15 June 2021. They submitted that there was no misdescription in the 1979 Easement because this recorded the agreement the parties to the easement made. They submitted that the exception did not apply to equitable easements.

[61] The Judge did not refer to the s 62(b) submission in her decision. The closest the Judge came to indicating that s 62 of the LTA may have been considered was as follows:[45]

> [49] There is no dispute that, absent fraud, a registered proprietor takes title free of any unregistered interest, in this case the equitable easement that I have found existed. Fraud in this context equates to actual knowledge of, or wilful blindness to, the existence of the unregistered interest, coupled with an intention that registration will defeat that interest. Such intention must be present at the time of registration, as opposed to subsequently. These matters are now provided for in ss 6, 51 and 52 of the Land Transfer Act 2017, but nothing turns on those provisions themselves or their predecessors. The principle is well established.

[62] The appellants took that as a decision rejecting the s 62 argument, albeit without reasons, and that therefore an appeal rather than an application for recall was

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[45] Judgment under appeal, above n 2 (footnotes omitted).

the appropriate course. It is, however, not clear from this paragraph of the judgment that the Judge had turned her mind specifically to whether the exception in s 62(b) of the 1952 LTA applied as the paragraph is directed to the fraud exception and not the other exceptions in s 62 of the 1952 LTA or the equivalent exception in s 52 of the 2017 LTA. If the Judge did consider s 62(b) of the 1952 LTA, she did not explain why she determined it was inapplicable.

[63] The appellants submit the exception applies here because: the legal easement was created after the servient land was brought under the 1952 LTA; the registered easement contains a misdescription of the location of the infrastructure and equipment; and "misdescribed" or "incorrectly described" should be interpreted to mean just what they say. The appellants submit that the purpose of the exception is to protect the beneficiary of a registered easement which ought to be correct from losing their established use because it is not correct. The appellants submit that this is particularly so in a case where the only way to discover that the pipes through which the water is conveyed have been laid in a different area to the route as shown on the registered easement is by digging up the ground.

[64] The appellants further submit that if the owner of the burdened land relied on the route as shown on the registered easement and wishes to insist on the route as so shown, they may apply under the Property Law Act 2007 to modify the easement.[46] Conversely, the appellants do not have standing to make such an application.[47] The appellants say that in this way s 62(b) of the 1952 LTA, which would protect their legal right to the conveyance of water in the pipes as laid, complements the right the owner of the burdened land would have to modify that legal right so that the conveyance accords with the intended route as registered.

[65] As is discussed in *Sutton v O'Kane*, the exception has existed since it was first enacted as s 46 of the Land Transfer Act 1870 and goes back to a time when

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46 Property Law Act 2007, s 317.

47 Only the owner of burdened land can apply to modify or extinguish an easement under ss 316 and 317 of the Property Law Act: see *Harnden v Collins* [2010] 2 NZLR 273 (HC) at [54] and [57].

comparatively little land had been brought under the land transfer system.[48] In that context, an easement in existence at the time land was brought under the Land Transfer Act system was not destroyed by its omission or misdescription from the title for the land when it was brought under the Act.[49] In this context, it did not matter why the easement was not included on the issue titled as "omission" was held to simply mean "left out" or "not there" without any qualification as to why that was.[50]

[66] *Sutton v O'Kane* concerned land already registered under the 1952 LTA at the time of an intended grant of a right of way.[51] The owner of the land wished to subdivide the land into two lots and to create a right of way over lot 2 in favour of lot 1.[52] The deposited plan for the subdivision was endorsed with the consent of the Council to the subdivision and to the making of the right of way shown on the plan. Section 90A of the 1952 LTA enabled the creation of an easement instrument for the right of way that could be registered under that Act, but the owner did not take that step. The right of way was, however, formed and paved over lot 2 providing access to lot 1.[53]

[67] When the owner sold lot 2 to the purchaser (the first purchaser) the memorandum of transfer referred to the property being subject to the Council's conditions of consent to the granting or reserving of the right of way as endorsed on the plan.[54] The memorandum of transfer was signed by the owner/vendor but not by

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48 *Sutton v O'Kane* [1973] 2 NZLR 304 (CA), at 315 per Wild CJ. The origins of the exception were explored by Priestly JA in *Dobbie v Davidson* (1991) 23 NSWLR 625 in the context of an almost identical provision contained at the time in s 42(1) of the Real Property Act 1900 (NSW). Priestly JA explained that the exception has its origins in an amendment introduced shortly after the enactment of the original Torrens statute in South Australia, the Real Property Act 1858 (SA) and there was a "very direct line of descent from the first four South Australian Statutes" to the exception in the New South Wales Act, and therefore, it can be inferred, to the New Zealand Land Transfer Acts.

49 *Carpet Import Co Ltd v Beath & Co Ltd* [1927] NZLR 37 (SC) involved a right of way created by reservation over land that had been used for some 20 years before the servient tenement was brought under the Land Transfer Act 1885 in 1909. In the circumstances of the case, though the right of way was being used, there was no machinery in the Land Transfer Act 1915 [the 1915 LTA] for the easement to be registered against the servient tenement. The Court held the omission to show the easement on the certificate of title as an outstanding interest did not have the effect of destroying the easement, relying on the omission exception to indefeasibility contained in s 58 of the 1915 LTA. See also *Dobbie v Davidson*, above n 48, at 650–651 per Priestly JA.

50 See *Dobbie v Davidson*, above n 48, at 630–633 per Kirby P and 647 per Priestly JA.

51 *Sutton v O'Kane*, above n 48.

52 At 307. The facts are contained substantially in the headnote.

53 At 331 per Turner P.

54 At 308–309.

the purchaser of lot 2.[55] No memorial of a right of way easement was entered when the memorandum of transfer to the first purchaser was entered on the title to lot 2.[56]

[68] Lot 1 was sold to the O'Kanes. The agreement for sale and purchase described the purchase of lot 1 "together with the right of way" but the memorandum of transfer registered on the title for lot 1 made no mention of it.[57] However, the first purchasers understood the right of way existed and no issue arose with the O'Kanes' use of it.[58]

[69] A few years later the first purchaser sold lot 2 to the Suttons. The Suttons had inspected the property before their purchase. It was obvious from that inspection that a right of way was in use — the paved roadway across lot 2 was partly bounded by a fence and led from the street to "the expensive garage" on lot 1.[59] The land agent who sold the property also told the Suttons of the existence of the right of way.[60] For about a year, the Suttons acquiesced to the O'Kanes' use of the driveway but became unhappy about it and more so when Mr O'Kane planned to sell lot 1 to a purchaser to whom Mrs Sutton objected.[61] Following investigations of the legal position, the Suttons gave notice that the access was to be closed. It appears this meant that Mr O'Kane could not sell lot 1 to the intended purchaser and that any sale would be at a seriously diminished value.

[70] Mr O'Kane contended that the right of way was an equitable easement that was not defeated by the sale of lot 2 to the Suttons because, having purchased the land with knowledge of the right of way, their repudiation of it amounted to fraud. Alternatively, he claimed that the right of way was an "omission" under s 62(b) of the 1952 LTA. Both claims ultimately failed.

[71] In rejecting the case as one of "omission" of the easement, this Court rejected the argument that the District Land Registrar should have recorded memorials of the right of way on both lots. This was because the right of way was a mutual grant that

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55 At 317 per Turner P.
56 At 309.
57 At 309.
58 At 309.
59 At 331 per Turner P.
60 At 331–332 per Turner P.
61 At 310. At some point Mr O'Kane acquired a full interest in the legal title so was the only plaintiff in the proceeding: see at 308.

required the signature of the transferee of lot 2 as well as the transferor.[62] This meant that the right of way had not been "created" under the Act and therefore was not an "omission created in … any land" under s 62(b) of the 1952 LTA.

[72] As Wild CJ explained:[63]

> … Speaking broadly, those three exceptions [s 62(a) to (c)] together cover comprehensively *the forms of error that may occur in compiling the register*. It is noteworthy that the first and the third both refer to registration, and their operation plainly depends on there having been registration: their purpose is to protect or enable correction of something effected by registration. The second exception in para (b) contains no express reference to registration, but in my view the context points strongly, at least in regard to rights of way or other easements arising since the land affected was brought under the Act, to those in contemplation being only such as have been created by registration or are capable of being notified on the register. …

[73] The Chief Justice went on to explain his reasons for why the second exception was also about an omission or misdescription in the compilation of the register:[64]

> … Apart from the fact that (b) is placed between paras (a) and (c) both of which, as I have just said, relate to registration, I have two reasons for that view. In the first place, since the word "misdescription" in para (b) can only refer to misdescription on the register, it is logical to assume that the word "omission", with which it is linked, means omission of something capable of being entered on the register. Having regard to the use of similar language in s 90(1), I think that the words "created in" in para (b) mean that any right of way or other easement to which they refer must have been created under the Act. I think, therefore, that the purpose of the additional words "or existing upon" can only be to safeguard interests which affected the land before it was brought under the Act. In this connection it is of some significance that those words go back to a time when comparatively little land had been brought under the land transfer system. They have formed part of the section since it was first enacted as s 46 of the Land Transfer Act 1870. Secondly, due regard must be had to the opening words of s 62 which, when read with the definition of "estate or interest" in s 2, are in my view wide enough to embrace every estate or interest, legal or equitable. The purpose of s 62 is to put all such estates or interests aside in favour of the register—but subject to the exceptions mentioned which I think, in the case of rights of way or other easements arising since the land affected was brought under the Act, include only those which have been registered or are capable of being notified on the register.

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62 At 314 per Wild CJ, 317–318 per Turner P and 339 per Richmond J.
63 At 315 (emphasis added).
64 At 315–316.

[74] Richmond J similarly explained:[65]

> I preface what I am about to say with the comment that I have not been able to satisfy myself as to the exact purpose of the Legislature in including s 62(b) in the [1952 LTA]. In those circumstances I can only give to the words in question the ordinary natural meaning which they seem to me to require in their context. Section 62 is dealing with the title to land which has been brought under the Act. In that context I think that the words "created in" should *prima facie* be given the meaning of created in a manner which is effective under the Act, that is to say by registration under the Act or, at the very least, by the production to the Registrar for registration of a registrable document. It is to be noted that the same word is used in s 90 which prescribes the use of a memorandum of transfer when any right of way or other easement "is intended to be created." That being the *prima facie* meaning of the words "created in", I would not feel justified in giving them the more liberal construction urged upon us by Mr Marquet when to do so would be to enlarge the effect of an exception to the basic principle of indefeasibility of title. Moreover, as was pointed out by Mr Arthur and Mr Blank, it would be a strange consequence if an Act which in s 90 prescribes a particular method of creating an easement should at the same time give effect to all manner of informal easement created in circumstances where the parties could have created a registrable interest. Having reached this conclusion I am not prepared to give to the other words presently in question, namely "existing upon", such a wide meaning as to bring within s 62(b) equitable easements which could have been made the subject of registration if created in proper form. I think that these particular words were inserted in the Act to provide in particular for easements acquired by prescription or other means prior to the land being brought under the Act. Whatever their exact purpose they should not in my view be so interpreted as to derogate from the effect of the words "created in" as regards easements arising by agreement of the parties subsequent to the servient tenement being brought under the Act.

[75] In short, the exception was not intended to apply to an equitable easement that could have been registered but never was.[66] Such an inroad to the principle of indefeasibilty was not what was intended by the exception, when the LTA provided the machinery to create a registerable interest.[67]

[76] A clear case of the application of the exception for an omitted easement arose in *Millns v Borck*.[68] In that case, when a parcel of land was subdivided, a right of way was created over lots 8 and 9 in favour of lot 7 and a memorial of that right of way was recorded on the certificate of title for that parcel of land.[69] When new certificates of title for the lots were issued, the right of way was recorded on lots 8 and 7 but not

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65 At 349. Turner P agreed with the reasons given by Richmond J: see at 319–320.
66 At 316 per Wild CJ and 349–350 per Richmond J.
67 At 314–316 per Wild CJ and 349–350 per Richmond J.
68 *Millns v Borck* [1986] 1 NZLR 302 (HC).
69 At 303–304.

on lot 9 through an error by the Registrar.[70] A subsequent purchaser of lot 9 had no knowledge of the right of way in favour of lot 7.[71]

[77] The High Court held this was an omission under s 62(b) of the 1952 LTA (in this case by non-performance or neglect of action or duty by the Registrar) and that the exception was designed to provide for human error.[72] The Judge said:[73]

> I believe the exception of an omitted easement is recognition by the legislature that in the case of a legal and registered right-of-way the interest thereunder of the proprietor of the dominant tenement is not to be defeated by an omission by the Registrar to enter such interest upon a new certificate of title to the servient tenement issued by him under s 93. It is in the interests of the integrity of the register that the indefeasibility of the registered interest of the registered proprietor of the dominant tenement should not be subverted by an omission by one charged with the performance of a statutory duty to notify such easement on the servient tenement. ...

[78] The Judge went on to find that s 62(b) prevailed over s 182 of the 1952 LTA in this kind of case.[74] As the Judge explained, the Registrar had the power to correct the error and the purchaser was not left without a remedy:[75]

> … In this situation s 62(b) prevails over s 182 but the Act does not leave the purchaser otherwise protected by s 182 without a remedy as by s 172(a) any person who sustains loss or damage through an omission of the Registrar or of any of his officers or clerks in the execution of their respective duties may bring an action against the Crown for recovery of damages. ... Where such an omission has been held by the Court to have occurred the Registrar has power under s 80 to correct the error and supply the omission. …

[79] *Sutton v O'Kane* and *Millns v Borck* were both cases about whether an interest was not registered because of an "omission". The appellants referred to a decision of the Māori Land Court as the only New Zealand authority concerning "misdescription".[76] The case concerned a 1976 order of the Māori Land Court that provided for a roadway from land later purchased by Mr Shaw to the wharf. The roadway as depicted was not surveyed and for that reason the 1976 order was never

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70 At 304 and 306.
71 At 304–305.
72 At 312.
73 At 311–312.
74 At 312. Section 182 of the 1952 LTA is quoted above at [56]. As the Judge noted at 308, this issue had been left open by the full court in *Carpet Import Co Ltd v Beath & Co Ltd*, above n 49, at 60 and by Richmond J in *Sutton v O'Kane*, above n 48, at 351.
75 At 312.
76 *Shaw – Tauwhao Te Ngare Block* (2005) 81 Tauranga MB 8 (81 T 8).

perfected by signature and sealing. The roadway actually created did not follow the line of the roadway.

[80] The Judge suggested that the 1976 order might be within s 62(b) of the 1952 LTA. But the Judge did not elaborate as to why that was. The Judge went on to find that the Court could not grant Mr Shaw's application for recognition of the roadway actually used. However, the Judge also held that Mr Shaw retained an interest in the road line as shown on the 1976 order and could have that surveyed, and proceeded to have the 1976 order signed and sealed. We infer, therefore, that this was not viewed as a misdescription case. Rather, the 1976 order was for a right of way on the route depicted in the order that still could be perfected. In our view, the case does not support the appellants' argument.

[81] We acknowledge the difficulty for purchasers to discover in advance of purchasing land when pipes conveying water to that property are not laid in the same place as that recorded on the title. As noted in the present case, Mr Palmer was unaware that the agreement he reached with Dr Ford had legal implications. In particular, we understand his evidence to be that he was unaware that the altered route meant that he had an equitable easement over the new route that could be defeated if Dr Ford's land was sold to a purchaser without fraud.[77]

[82] We also acknowledge that Mr Thornley and Ms van Houten took reasonable care when they purchased the land. They instructed a lawyer. The lawyer investigated the title and identified that there was a registered easement for water. There appears to have been nothing to put them on notice that the pipes conveying the water to the property were not in the place described on the registered easement. It is not clear that Mr Thornley and Ms van Houten would have had any claim against the vendors for misrepresentation — the evidence does not indicate that the vendors advised them that the easement to draw water was correctly recorded on the title; and it is also not clear that it would have been reasonable for Mr Thornley and Ms van Houten to rely on anything the vendors may have said as they had instructed a lawyer to investigate the position on their behalf.[78]

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77 Under s 62 of the 1952 LTA and s 52(1)(a) of the 2017 LTA.

78 Any steps Mr Ruiterman took prior to buying the property are not clear.

[83] However, in light of the case law we have discussed, we are not persuaded that s 62(b) of the 1952 LTA was intended to apply to an easement that was correctly recorded on the title at the time it was recorded, and that was "misdescribed" only in the sense that the owners of the burdened and benefitted land subsequently agreed to a different location for the easement and could have but did not have the varied easement registered. Such an approach could, in our view, undermine an objective of the land transfer system to, as best as possible, provide a true account of interests on the title through the register.[79] It appears that the problem arose here because, with the intended sale of the land to Dr Ford, the 1979 Easement was registered (to ensure the Palmers had a legal easement in place) before it was known whether the intended route for the easement was feasible. It may be that in other cases, the feasibility of the route will have been investigated (and possibly also constructed) before the easement is registered, or the easement will be formally varied if in construction it becomes apparent that the route must be varied.

Did the equitable easement survive?

[84] As noted above, the Judge found that the agreement to vary the route for the pipes to convey the water gave rise to an equitable easement but this was extinguished when the land was transferred to the independent trustees of the family trust.[80] On appeal, the appellants submit that their equitable interest was not defeated by the transfer of the land to the trustees (and the subsequent changes in trustees). Further, even if it was defeated by the transfer to the independent trustees, the Judge erred in not holding that the equitable interest "bounced back" when Dr Ford became a trustee in 1997.

[85] We start our assessment of this submission by considering the nature of an equitable easement. An equitable easement most commonly arises by agreement, and where the subject of the agreement has the essential characteristics of an easement, is supported by valuable consideration and there is a sufficient record in writing or a

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79 See D W McMorland and others *Hinde, McMorland and Sim Land Law in New Zealand*, above n 40, at [8.004]; and s 3 of the 2017 LTA.

80 Judgment under appeal, above n 2, at [46]–[47] and [64].

sufficient act of part performance.[81] In this case the Judge was satisfied that these elements were satisfied as follows:[82]

> [46] I am satisfied, and it was not seriously disputed, that the agreement between Dr Ford and Mr Palmer to vary the route of the pipes and location of the pumphouse gave rise to an equitable easement, that easement being on the terms of the registered easement subject to the variation in the location of the infrastructure. The agreement had the essential characteristics of an easement that the Court of Appeal identified. The required "valuable consideration" may comprise either a benefit to the promisor, Dr Ford, or detriment to the promisee, Mr Palmer. In my view there was both. There was benefit to Dr Ford in that Mr Palmer contributed to the cost of the trench to the point it ceased to carry both sets of pipes, and they shared the cost of the pumphouse. There was detriment to Mr Palmer in that he contributed to those costs, and bore the cost of the laying of the pipes thereafter, rather than bearing the cost of laying the pipes and locating the pumphouse in area A. The laying of the pipes, construction of the pumphouse, and the subsequent drawing of water also constitute part performance.
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> [47] Other matters indicative of an easement are the omission of any time limit on the agreement; the installation of semi-permanent infrastructure underground; and the subject matter of the easement, namely water supply required for the use of the benefitted land.

[86] As summarised by this Court in *Street v Fountaine*, once created between the parties to the grant, an equitable easement is proprietary:[83]

> An equitable easement creates an interest in land which is registerable (but not registered), but can nevertheless be protected by a caveat. Successors in title obtain the benefit of, and are subject to the burden of, an easement subject to the usual rules as to indefeasibility of title if the easement is not protected by the registration of a caveat.

[87] Absent the operation of the Land Transfer Acts, an equitable interest in land could be enforced against all persons except a bona fide purchaser for value without notice of the interest. As discussed in *Hinde, McMorland and Sim Land Law in New Zealand*:[84]

> It is against conscience for persons to buy property when they know that it is held on trust for another, or that it is affected by another's equitable interest, unless they are prepared to recognise that trust or other equitable interest … It was thus established that equitable rights are good against all persons except

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81 *Street v Fountaine* [2018] NZCA 55, (2018) 19 NZCPR 236 at [48]–[50].

82 Judgment under appeal, above n 2 (footnote omitted).

83 At [45]. See also DW McMorland and others *Hinde, McMorland and Sim Land Law in New Zealand* above n 40, at [16.009].

84 DW McMorland and others *Hinde, McMorland and Sim Land Law in New Zealand*, above n 40, at [4.021]–[4.022] (footnotes omitted).

> a bona fide purchaser of a legal estate for value without knowledge (or, to use the technical term, notice) of those equitable rights, and persons claiming under such a purchaser. By contrast legal, as opposed to equitable, rights are good against all the world.
>
> …
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> Notice simply means knowledge. The doctrine of notice was evolved as a means of protecting the owners of equitable interests in land. The principle is that an equitable interest can be enforced against a bona fide purchaser for value of a legal estate in land only if that purchaser has notice of the equitable interest. Hence equitable interests are secure only if the equitable owner can, to use the technical term, fix a purchaser of the land with notice of the equitable interest.

[88] The authors go on to explain that equity developed the concept of constructive notice:[85]

> … [I]t is obvious that equitable interests would have been so insecure as to be almost worthless if the Court of Chancery had made it easy for purchasers to acquire legal estates without notice, for example, by making no inquiries or by shutting their eyes to the facts. So it was decided that equitable interests would be enforced not only against those purchasers who did in fact know of them but also against those who would have known of them if they had made all the inquiries that a prudent purchaser would have made. … In this way the doctrine of constructive notice was worked out. Its effect is that purchasers of land are affected by notice of any instrument, fact or thing which would have come to their knowledge if such inquiries and inspections had been made as ought reasonably to have been made by them.

[89] The authors further explain that the uncertainty created by constructive notice was one of the reasons for the adoption of the Torrens system and the requirement of fraud rather than mere notice:[86]

> The doctrine of notice, especially the concept of constructive notice, introduced an element of uncertainty into land titles. There was always the possibility that purchasers of land would unexpectedly find that their titles were affected by equitable interests of which they were unaware but of which they were deemed to have constructive notice.
>
> The uncertainty and danger caused by the doctrine of constructive notice was one of the reasons for the adoption of the Torrens system of registration of title (often known in New Zealand as the Land Transfer system). …
>
> The [1952 LTA] accordingly aims to protect the purchaser from a registered proprietor against the operation of the doctrine of notice unless the purchaser himself or herself has been guilty of fraud — indeed the Act goes so far as to say that "knowledge that any … trust or unregistered interest is in existence shall not of itself be imputed as fraud".

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85 At [4.023] (footnotes omitted).
86 At [4.024] (footnotes omitted).

[90] Against that background we now consider the statutory scheme. We have set out s 182 of the 1952 LTA in full above.[87] Its effect is to remove the position at equity under which notice, including constructive notice, was sufficient to bind a purchaser to an equitable interest in land. The key parts of s 182 for present purposes are that:

> [e]xcept in the case of fraud, no person … taking … a transfer from the registered proprietor … shall be affected by notice, direct or constructive, of any trust or unregistered interest …

[91] We have also set out s 62 of the 1952 LTA in full above.[88] It (and similarly its successor in the 2017 LTA) is the key section "from which the quality of indefeasibility now stems".[89] For present purposes, the key parts of s 62 are that:

> … the registered proprietor of land … shall, except in the case of fraud, hold the same subject to such … interests as may be notified on the … register … but absolutely free from all other … interests whatsoever …

[92] Similarly, s 51 of the 2017 LTA provides that the registered owner's title "is free from" interests that are not registered or noted on the register, subject to limited exceptions and the court's "*in personam* jurisdiction". While s 62 of the 1952 LTA did not specifically refer to the in personam jurisdiction, case law made it clear that this remained.[90] As it was put in *Regal Castings Ltd v Lightbody*, it is "a moot point" whether the in personam exception to indefeasibility "is a true exception as opposed to being simply a situation which the indefeasiblity principle does not reach".[91]

[93] Under this appeal ground, the question is whether registration of a title that is not vitiated by fraud extinguishes all adverse unregistered interests or merely allows the registered proprietor not to give effect to those interests. And even if its effect is to extinguish the interest as against that registered proprietor, the question is whether the equitable interest subsists as against the grantor of that interest so that, in a case where the grantor resumes ownership of the land following an intervening period when

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87 See above at [56].

88 See above at [55].

89 DW McMorland and others *Hinde, McMorland and Sim Land Law in New Zealand*, above n 40, at [9.009] (footnotes omitted).

90 See *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078; *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [21]–[22] per Elias CJ, at [78] per Blanchard and Wilson JJ and [147]–[156] per Tipping J; and *C N and N A Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at 711–712.

91 *Regal Castings Ltd v Lightbody*, above n 90, at [147] per Tipping J. Blanchard and Wilson JJ at [78] agreed with the reasons given by Tipping J.

the burdened land was owned by a third party, the grantor remains bound to the grant he or she made.

[94] A similar issue arose in *Kinara Trustee Ltd v Infinity Enterprises NZ Ltd*.[92] That case involved a right of way created as part of a subdivision that was not registered when it passed into new ownership. Ultimately, Kinara Trustee Ltd (Kinara) held the land which had the benefit of the right of way and Infinity Enterprises NZ Ltd (Infinity) held the burdened land. Prior to Infinity's ownership, the previous owners of the burdened land had allowed the right of way to continue to be used apart from one period when the owner of the burdened land dug up the right of way (and subsequently reinstated it after an arbitration process).[93] Kinara requested that Infinity allow it to register the right of way but Infinity refused as it had plans to develop the property. Proceedings in the High Court followed.

[95] In discussing the effect on the purchasers of the burdened land who had allowed the right of way to continue to be used, Duffy J in the High Court said:[94]

> [69] I acknowledge that there may be a hypothetical question as to whether transfer to a registered proprietor who obtained indefeasible title would only put the equitable easement in an unenforceable dormant state from which it might be re-awakened if the property was purchased by a future successor in title who knew enough about the easement's history to satisfy the fraud exception in s 182. I find it hard to see how such knowledge could survive the interruption caused by an intervening purchaser with an indefeasible title. But even if, in principle, such knowledge did survive, I think the better legal view is that once there has been a purchase with indefeasible title this will extinguish any equitable easement that might otherwise have survived. This is because an indefeasible title is one that is free from all interests and encumbrances other than those registered against the title. Once a purchaser acquires such title it would necessarily follow that any prior existing equitable easements that cannot qualify for recognition under one of the s 182 exceptions must necessarily be extinguished or permanently severed from the title. Such an outcome seems to me to be a logical consequence of the indefeasibility principle.

[96] Duffy J went on to find that Infinity was nevertheless estopped from denying the use of the driveway (estoppel being an in personam claim to which, as discussed, the principle of indefeasibility did not extend).

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92 *Kinara Trustee Ltd v Infinity Enterprises NZ Ltd* [2019] NZHC 1526, (2019) 20 NZCPR 318 [*Kinara* (HC)].

93 At [30]–[31].

94 Footnote omitted.

[97] On appeal, this Court referred to Duffy J's discussion of whether an adverse interest could survive intermediate purchasers if they had not asserted indefeasibility of title.[95] The Court expressed a preference for Duffy J's conclusion about this but did not need to take the point further.[96] The Court went on to find that there was no estoppel. Kinara sought leave to appeal to the Supreme Court. While accepting that some aspects of Kinara's grounds of appeal involved unresolved issues, the Court declined leave because it was satisfied that, even if Kinara had an equitable easement, all that was alleged against Infinity did not amount to fraud.[97]

[98] The other case relied on as bearing on the issue is *Potts v Anderson (No 1)*.[98] In that case, Mr Potts benefitted from an equitable easement granted in 1991 allowing him to pump water from the property of his neighbours, the Andersons.[99] The easement had been relied upon until 2003, when a trespass notice was issued by the Andersons following a conflict between the neighbours.[100] Importantly, the Andersons claimed that the easement had been extinguished when title was transferred to themselves and a trustee company as trustees of their family trust in 1999.[101]

[99] In the High Court, Miller J considered that the action of the Andersons breached the terms of the easement as agreed between the parties in 1991. The Judge regarded the agreement to grant the easement to be a personal obligation that was not defeated by indefeasibility.[102] He concluded:

> [67] The first cause of action rests on an equitable obligation admittedly assumed by the Andersons. Indefeasibility of title protects from equitable encumbrances a registered proprietor who has no personal liability in respect of them. Mr Goldsbury contended that the enforceability of the easement in equity was affected by the change in the Andersons' capacity from beneficial owners to trustees. But there was no evidence of competing equities in the form of conflicting obligations to beneficiaries of the family trust. In any event, the Andersons transferred the land to the trustees with knowledge of Mr Potts' interest and the intention of honouring it. There was no suggestion that it was not within their power to comply with the easement after 1999.

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95 *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd* [2020] NZCA 309, [2020] 3 NZLR 626 [*Kinara* (CA)] at [58]–[64].
96 At [64].
97 *Kinara Trustee Ltd v Infinity Enterprises NZ Ltd* [2020] NZSC 131, (2020) 21 NZCPR 616 [*Kinara* (SC)] at [13].
98 *Potts v Anderson (No 1)* HC Whanganui CIV-2003-483-304, 5 April 2005.
99 At [2].
100 At [2].
101 At [3].
102 At [67].

> [68] The defence founded on indefeasibility accordingly fails. It is not necessary to deal with the question whether there was fraud in fact …

[100] In this case, Peters J discussed both *Kinara* and *Potts v Anderson*.[103] The Judge went on to say that, as far as she could ascertain, to the extent the court had previously determined that an equitable interest survived intermediate transfers of the burdened land, the transferees had taken title with notice of the claimed interest.[104]

[101] The Judge concluded:

> [64] Ultimately, I am not persuaded that the equitable easement survived Dr Ford's transfer of the land to [the independent trustees]. There is no evidence that [the independent trustees] knew of the equitable interest. There is also no suggestion that the transfer was motivated by any intention to defeat that interest. The position might be different if, for instance, the transfer to the trustees had not brought about any change in the beneficial interest in the land, but it did. Likewise, it may be that Dr Ford's powers under the trust deed as it stood at the time meant that he retained virtual control of the land. However, as I have said, I do not have a copy of the deed. Another matter I consider relevant is that [the independent trustees] mortgaged the land to the ASB. In my view, this makes the transfer to [the independent trustees] more akin to a transfer to a purchaser at arm's length, as opposed possibly to a purchase by trustees with vendor finance.

[102] It transpires that there was a misunderstanding about whether the Judge had been provided with the deed for the family trust when the independent trustees were appointed. Earlier, the Judge had said:[105]

> [56] As Ms Simkiss submits, the difference between *Kinara* and the present case is that [the independent trustees] took a transfer in their capacity as trustees, and as trustees of a trust settled by and closely connected to Dr Ford, a party to the agreement giving rise to the equitable interest. Before I address this point further, I should say that I would have been assisted by having a copy of the original trust deed for the [family trust]. That, however, is not able to be found, and the only document available to me is a later, amended version of the deed executed on 19 July 2006.
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> [57] What can safely be said, however, is that Dr and Mrs Ford were/are the principal beneficiaries of the [the family trust], and their children, thus [Stephen Ford] and his siblings, and grandchildren were also beneficiaries. Dr Ford also set out in a statement of wishes that the trustees were to give principal consideration to his and Mrs Ford's interests and, as noted, he and Mrs Ford were subsequent transferees of the land. Accordingly, if the

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103 Judgment under appeal, above n 2, at [51]–[61].

104 At [62], citing *Merrie v McKay* (1897) 16 NZLR 124 (SC) at 126; and *McCrae v Wheeler* [1969] NZLR 333 at 334 and 336.

105 Judgment under appeal, above n 2.

> equitable easement simply went into abeyance on the transfer to [the independent trustees], it might have been "re-awakened" subsequently.

[103] As the Judge noted, she had the 2006 version of the deed but not the earlier one. While the decision was reserved, on 4 February 2022 the Judge requested that an earlier copy of the trust deed be provided. It was not received in response to this request and so the Judge proceeded to release the judgment on 1 April 2022. On that same day the appellants filed a memorandum noting that counsel for the respondents had, on 16 February 2022, advised counsel that a copy of the earlier deed had been located, but it appeared that it had not been forwarded to the Court. In response, the Judge issued a minute dated 4 April 2022 noting that, having now reviewed the earlier deed, it would not have affected her decision.

[104] The 1995 trust deed was not included in the case on appeal in this Court, although the amended 2006 deed was. Under the 2006 deed Dr Ford was the settlor of the family trust and the trustees were Dr Ford and Mrs Ford. It identified two categories of "primary beneficiaries": "principal beneficiaries"; and "other primary beneficiaries". Dr Ford and Mrs Ford were the principal beneficiaries.[106] Dr Ford was named as an "initial protector" and Mrs Ford as a "subsequent protector".[107] Dr Ford as settlor had the right to appoint and remove protectors, including subsequent protectors.

[105] Importantly, the 2006 trust deed provided that the trustees, during the lifetime of the principal beneficiaries (Dr Ford and Mrs Ford), shall:

> … allow the Trust's share in the residence or residences from time to time owned by the Trust to be occupied by the Principal Beneficiaries, on such terms as the Trustees in their absolute discretion decide, if that is the wish of the Principal Beneficiaries.
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> …

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[106] "Other primary beneficiaries" included Stephen and four other named persons, as well as "any other child or children, grandchild or grandchildren or other descendants of the named other primary beneficiaries" and other persons added by the trustees as a primary beneficiary. The deed also included "secondary beneficiaries", which included any persons added as such, and any other descendants of the named secondary beneficiaries. In all cases "precluded persons" were excluded.

[107] The protector had the power to resolve disputes between trustees and appoint and remove any trustee from office. All powers were to be exercised honestly and in good faith for the benefit of the primary beneficiaries.

> Shall ensure that the Principal Beneficiaries enjoy the lifestyle to which they are, in the Trustees opinion, accustomed. …

[106] Accordingly, the 2006 deed provided Dr Ford and Mrs Ford with an enforceable interest in the possession of the land.[108] Given that it was viewed by the Judge, we have obtained the earlier deed from the High Court file. It is in different terms to the 2006 deed. Dr Ford was amongst the list of discretionary beneficiaries. As settlor he also had the power to remove any trustee and to appoint himself as trustee. The 1995 deed did not, however, appear to entitle Dr Ford and Mrs Ford to occupy the property. However, it is clear that they did in fact continue to do so. There was no evidence, however, as to the basis for that occupation although it can be inferred that it was with the agreement of the independent trustees.

[107] Turning to the issue of whether a contingent equitable obligation of Dr Ford subsisted, we start with the words of s 62 of the 1952 LTA. They provide that the title of the registered proprietor is held subject to the interests (et cetera) notified on the register "but absolutely free from all other … interests". To be "free" of such interests connotes not being subject to such interests rather than that such interests are terminated. The same is true of its successor in s 51 of the 2017 LTA. As it was put in *Frazer v Walker*, "registration is effective to vest and divest title and to protect the registered proprietor against adverse claims".[109] In other words, it is protective against a claim that relies on the interest rather than bringing the subsisting interest to an end.

[108] Moving then to the purpose of the provision, the paramountcy of the register that s 62 of the 1952 LTA (and its successor) gives provides certainty for those dealing with the registered proprietor as to the interests to which a title is subject without having to investigate its history. Its purpose is not to preclude the enforcement of rights that exist personally against the registered proprietor.[110] The in personam jurisdiction is a jurisdiction to which the principle of indefeasibility — to which s 62

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108 See Lynton Tucker, Nicholas Le Poidevin and James Brightwell *Lewin on Trusts* (20th ed, Sweet & Maxwell, London, 2020) at [1–048]: "[a]n interest vested in possession confers an immediate right to present enjoyment of the property". That is as opposed to the interests of the object of a discretionary trust, who has no property interest in the trust property because they may not be favoured by the holder of the power. See also Geraint Thomas and Alastair Hudson *The Law of Trusts* (2nd ed, Oxford, 2010) at [7.47] where the authors state that interests in possession are "regarded generally as being 'proprietary'".

109 *Frazer v Walker*, above n 90, at 1078.

110 See, for example, *Golding v Tanner* (1991) 56 SASR 482 at 489.

gives effect — does not reach. The in personam jurisdiction exists because the legislation operates alongside traditional common law and equitable doctrines that continue to apply unless and to the extent that the legislation has provided otherwise.[111]

[109] As it was put by Blanchard J writing extrajudicially:[112]

> It can never have been the intention of the framers of the Land Transfer Act that a registered proprietor would be able to use the acquisition of an indefeasible title as a means of sharp practice. That would undermine public confidence, particularly where, as the framers of the legislation may not have anticipated, many valuable interests are never registered, for example long-term leases of portions of commercial buildings. The registration process protects against the infirmities of your predecessor's title but not against those which you yourself create or accept by your words or conduct. It can surely not have been intended that someone could use registration to avoid obligations which were personally assumed or incurred. Having said that, there must still be more than a mere rival claim to an adverse title. The personal claim must be able to be sheeted home to some act of the registered proprietor which gives rise to a cause of action.

[110] It is clear that the equitable easement was enforceable against Dr Ford at least up until the point he transferred his land to the independent trustees of his family trust. Having granted the proprietary interest, he could be held to his grant. The Judge found that the grant was unenforceable against the independent trustees on the basis that there was no evidence the independent trustees were aware of it and nor was their evidence during this period that Dr Ford retained virtual control of the land under the trust. We do not need to revisit that finding although we note that Dr Ford retained possession of the land, continued to give effect to the equitable easement and had some control over the operation of the trust through the power he held to remove a trustee and appoint himself.

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111 This is the effect of the recognition in *Frazer v Walker*, above n 90, at 1078–1079 that claims of a personal nature founded in law or equity against a registered proprietor are unaffected by registration.

112 Peter Blanchard "Indefeasibility under the Torrens System in New Zealand" in David Grinlinton (ed) *Torrens in the Twenty-first Century* (LexisNexis, Wellington, 2003) at 47. See also, *Trouton v Trouton* [2022] QSC 210 at [101], quoting A Wallace, M Weir and L McCrimmon *Real Property Law in Queensland* (5th ed, Lawbook Co, Sydney, 2015) at [10.330]: "[r]egistered proprietors cannot rely on the protection indefeasibility of title confers to escape obligations personally incurred by them".

[111] However, it does not follow that, because the equitable easement was unenforceable against the independent trustees had they wished to assert their right to be free of the easement, it was no longer enforceable against Dr Ford in the event that he resumed control of the property. In our view, there is nothing in the words of s 62 of the 1952 LTA nor its purpose that requires that conclusion. Section 62 provides for a registered proprietor to be free from an equitable easement that is not on the register. Where, however, the registered proprietor is the party that granted the equitable easement, equity holds the registered proprietor to their obligation for so long as the proprietor remains in a position to give effect to it. Equity, which acts on the conscience of Dr Ford, is indifferent to whether there was an intervening period when independent trustees held the land and might have but did not assert a right to be free of the easement granted.

[112] We recognise that the transfer from the independent trustees was to Dr Ford and Mrs Ford as the new trustees of the family trust appointed in 1997. Mrs Ford did not grant the equitable easement because she was not the registered proprietor when the equitable easement was agreed to. She did, however, become one of the registered proprietors in 1999, as a trustee of the family trust. There is no evidence that she then took issue with the equitable easement. As in *Potts v Anderson*, there is no suggestion in the evidence that it was not within the power of Dr Ford and Mrs Ford to comply with the equitable easement that Dr Ford had agreed to, nor that she in any way considered that she was not bound by it along with her husband.

[113] Further, as a trustee, Mrs Ford must have agreed to the 2006 amendments to the trust deed that gave her and her husband the right to occupy the land affected by the equitable easement and that conferred on Dr Ford more extensive control over the trust. Dr Ford became the "protector" under the trust with the power to resolve disputes between the trustees and to appoint or remove a trustee. He was the person who informed the appellants in October 2016 that the easement did not follow the 1979 Easement, who threatened to cut off the water supply and who made the complaints to the Council. There is no evidence suggesting that Mrs Ford dissented from these steps.

[114] Rather, the evidence is that Mrs Ford was involved in the trust and supported Dr Ford's position. For example, there were email communications from Mrs Ford in October 2016 to Ms van Houten on behalf of her husband. In one of those emails Mrs Ford described herself as the "Honourable Secretary". In his evidence Dr Ford described his wife as "a very integral part" of the trust, that she kept the records and had "a very good grip" on what was going on, and that they made an "excellent team". Dr Ford also gave evidence that Mrs Ford was involved in the later arrangements to transfer the property to PPL, which the Judge held to be a fraud that could not defeat the equitable interest had it subsisted despite the intermediate period when the property was held by the independent trustees. In any event, Mrs Ford was one of the registered proprietors holding an interest in the property as a trustee and so she must have agreed to them.[113]

[115] We acknowledge the view expressed in *Kinara* in this Court that an equitable easement may be extinguished when the burdened land is transferred. However, that view was not a concluded one because it was not necessary to decide the point. Similarly, the Supreme Court's decision to decline leave does not assist on this point because leave was declined on the basis that the in personam claim at issue was an estoppel that was not established on the facts. Importantly, it was not a case where the beneficiary of an equitable easement sought to hold the grantor of that easement to its grant. Infinity was a later purchaser and independent of the grantor.

[116] Although there are factual differences with *Potts v Anderson*, we consider that holding Dr Ford to his grant is consistent with it.[114] It is consistent with the scope of the in personam jurisdiction in that:[115]

(a) it holds Dr Ford to the equitable obligation he made when granting the easement over his land;

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113 We note that for a brief period in 2019 (after the water supply had been cut off and the appellants commenced their claim in the High Court) a third trustee was added to the family trust who was subsequently replaced by Stephen Ford. We do not regard those later arrangements as impinging on the in personam claim against Dr Ford.

114 *Potts v Anderson (No 1)*, above n 98.

115 See generally *Regal Castings Ltd v Lightbody*, above n 90, at [157]–[160] per Tipping J.

(b) it would be unconscionable if Dr Ford were released from the equitable obligation, when all that changed was internal arrangements he made to administer his affairs through a family trust knowing of the obligation he had undertaken, and when the appellants had no warning of the trust arrangements (something that would have enabled them to lodge a caveat to protect their interest); and

(c) for the reasons explained, it is not contrary to the principle of indefeasibility as given effect to in s 62 of the 1952 LTA or other objectives of the Torrens land transfer system.

[117] We therefore allow the appeal on this ground. Given this conclusion, it is not necessary to consider the estoppel ground. However, the Judge rejected the claim to an estoppel without directly addressing the time at which the appellants claimed the representation arose. We therefore consider it is appropriate to address this ground.

An estoppel?

[118] The appellants submit the Judge erred in finding that it was not unconscionable for the respondents to insist on their strict legal rights. They submit this was because the Judge considered it was essential that the belief or expectation relied upon by the appellants emanate from the respondents. They say this is not a correct interpretation of the law. They also say that the Judge failed to make an assessment of unconscionability at all which they say is the central question.

[119] On the estoppel claim, the Judge began first by setting out the elements of an estoppel claim, namely that: (1) a belief or expectation has been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged; (2) the belief or expectation has been reasonably relied on by the party alleging the estoppel; (3) detriment will be suffered if the belief or expectation is departed from; and (4) it would be unconscionable for the party to whom the estoppel is alleged to depart from the belief or expectation.[116]

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[116] Judgment under appeal, above n 2, at [82], citing James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [19.2].

[120] In relation to the second element — reasonable reliance — the Judge accepted that when the appellants each purchased their land (Mr Ruiterman in 1989 and Mr Thornley and Ms van Houten in 2009) they knew of the registered easement and relied on it as securing water supply to their land, knew that water was being supplied to their land, and were not told and had no reason to believe that some of the pipes and the pumphouse were located other than in accordance with the registered easement.[117]

[121] The Judge, however, identified that the requirement in the first element — concerning the creation of a belief or expectation — was crucial. She concluded the requirements of the element were not met. Her reasons were as follows:[118]

> [85] However … the plaintiffs must establish that their belief, that is their belief that their supply was derived in accordance with the registered easement, emanated in some way from the defendants, and I do not consider they are able to do so. The most that can be said is that the defendants were silent, and even that puts to one side that Dr Ford alone was the registered proprietor of the burdened land as of 1989 when Mr Ruiterman purchased.
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> [86] A representation … may be made by silence. In *Infinity Enterprises NZ Ltd v Kinara Trustee Ltd*, the Court of Appeal said that estoppel by silence or acquiescence may protect a party who relies on a belief or expectation fostered by the silence of another in circumstances rendering it unconscionable for the silent party to resile from that fostered belief or expectation. The Court of Appeal also said the crucial issue is whether the silent party had a duty to warn the mistaken party of its mistaken assumption.
>
> [87] I do not consider it can be said that the trustees (or Dr Ford) fostered the plaintiffs' belief or that they had a duty to warn the plaintiffs prior to their purchases. There is no evidence that Dr Ford or the defendants even knew of the plaintiffs' intention to purchase. Nor did the plaintiffs make any submission as to how such a warning could be given.

[122] Having decided against the appellants on the first requirement, the Judge did not go on to consider the third and fourth elements of estoppel.

[123] The appellants' submission is that the Judge's reasons failed to recognise that estoppel may arise against a party even if that party is not the source of the other party's mistaken belief or is even aware of it. Rather, it is sufficient that the party had some role in the other party's mistaken belief or expectation and stood by in circumstances

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117 At [83].
118 Footnotes omitted.

where it is unconscionable for the party to resile from that belief or expectation held by the other party.[119]

[124] As the Judge recognised in her reasons, in *Kinara* this Court accepted that silence could give rise to an estoppel when the silent party has a duty to warn the mistaken party.[120] The duty arises where a reasonable third party would expect a person, acting honestly and reasonably to bring the true facts to the attention of the party known to be under a mistake as to their respective rights and obligations.[121] Relationship-based factors that may support the existence of a duty to speak could arise: where the silent party has invited the other to repose trust and confidence in them; where prior communications between the parties gave rise to the duty; and where past dealings between the parties support reasonable (but erroneous) assumptions.[122]

[125] This Court's decision in *Kinara* does not suggest that the duty to speak can arise if the person said to have that duty does not know of the other person's mistake. The Court in fact said "[d]uties to warn mistaken parties are not owed to the world at large".[123] The Judge rejected the estoppel claim on this basis.[124] Although it is not entirely clear from the Judge's reasons, it appears that the Judge's focus was on Dr Ford's knowledge prior to the purchase of the land by Mr Ruiterman in 1989 and by Mr Thornley and Ms van Houten in 2009. As the Judge found that Dr Ford did not know the appellants were purchasing their land, Dr Ford could not have known they were mistaken about the pipes being in a different position than the registered easement and the legal implications of that.

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119 The appellants refer to the discussion in Every-Palmer "Equitable Estoppel", above n 116, at [19.2.1].

120 Judgment under appeal, above n 2, at [86], citing *Kinara* (CA), above n 95, at [99]. This Court in *Kinara* (CA) largely adopted the discussion of estoppel by acquiescence in Every-Palmer "Equitable Estoppel", above n 116, at [19.5].

121 *Kinara* (CA), above n 95, at [102], adopting the test articulated in *Tradax Export SA v Dorada Compania Naviera SA* [1982] 2 Lloyd's Rep 140 (QB) at 157.

122 At [103], referring to the discussion in Every-Palmer "Equitable Estoppel", above n 116, at [19.5.4].

123 At [103]. See also Every-Palmer "Equitable Estoppel", above n 116, at [19.5.4], which refers to case law on tortious duties to support this proposition.

124 Judgment under appeal, above n 2, at [87].

[126] The Judge appears not to have explicitly addressed whether a duty to speak could have arisen subsequent to the purchase of the land by the appellants. The appellants' pleading was based on a representation made by the respondents "since late 2016". The respondents' closing submissions in the High Court responded to that allegation. They submitted that there was no evidence of any such representation apart from silence and only actions contrary to any such representation which led to the appellants seeking the injunction. They also submitted that the only detriment they suffered was in buying the property on the understanding the water was supplied pursuant to a legal easement (that is, well before 2016) and anything after that was to their benefit in the sense that for many years they had the use of the pipes to convey the water.

[127] The Judge's approach may have reflected the fact that the appellants' submissions about when the representation was made and the detriment that was suffered were a little unclear. Their opening submissions simply stated that "there was a continuum of conduct from 1980 which was relied on and gives rise to an estoppel". The appellants' closing submissions appeared to base the duty to speak on Dr Ford: having the knowledge from 1980 that the route of the pipes to convey the water under the registered easement was not where the pipes were laid; having the ability to correct the registered easement as to the route of the pipes as laid; and saying nothing over many years (and indeed cooperating over routine matters such as maintenance) so as turn the silence into a representation that was unconscionable to resile from.

[128] The appellants further submitted that it does not necessarily matter if Dr Ford was not responsible for the appellants' mistaken belief if he subsequently confirmed it by his conduct (here silence over many years). In support of this submission, the appellants rely on *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* and *Amalgamated Investment & Property Co Ltd (In liquidation) v Texas Commerce International Bank Ltd*.[125] As we understand the argument, Dr Ford (and his family trust) are to be taken as knowing that all future purchasers would reasonably assume

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[125] *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897 (Ch); and *Amalgamated Investments and Property Co Ltd v Texas Commerce Commission International Bank* [1982] QB 84 (CA).

that the pipes were laid in accordance with the registered easement and he has a duty to speak to correct this.

[129] However, if Dr Ford did not know a purchase was taking place, there is the question of how he was to speak or warn the appellants before the appellants committed to their purchases. That appears to be what the Judge meant when she noted that the appellants had not made any submission as to how such a warning could be given.

[130] If the duty to warn is said to arise subsequent to the purchase, then the question is when that duty arose. The appellants contended that this was from 2016.[126] In that case, it is unclear what the detriment would be.[127] The appellants submit they would not have purchased the land had they known the true position. As described above, their evidence supports that submission. Mr Ruiterman, for example, was a young man purchasing a kiwifruit orchard who needed a secure supply of water. But this detriment could only follow from a duty to speak prior to the purchase and this was not alleged nor, as the Judge found, one that could arise.

[131] The loss of water supply is said to be a detriment. However, that was a consequence of the conveyance over the pipes as laid being an equitable easement. The consequence that it could come to an end if the burdened land was transferred to a third party (here, the independent trustees) arose from the moment the appellants purchased the land. To found a detriment for estoppel purposes, the duty to speak would need to arise before the easement became unenforceable through the transfer to a registered proprietor who was not bound by the unregistered interest pursuant to s 62 of the 1952 LTA.

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126 It was not argued that the duty to warn the appellants arose before the land was transferred to the independent trustees so that they could lodge a caveat in respect of the equitable easement prior to that transfer. We therefore do not consider this further.

127 The absence of an expected benefit is not, itself, sufficient — some sort of "change of position" is required: *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674 per Dixon J. See generally Piers Feltham and others *Spencer Bower: Reliance-Based Estoppel* (5th ed, Bloomsbury Professional, Haywards Heath, 2017) at [1.64]–[1.67] and [5.41]–[5.62]; Ben McFarlane *The Law of Proprietary Estoppel* (2nd ed, Oxford University Press, Oxford, 2020) at 237–239; *Hutchinson v Steria Ltd* [2006] EWCA Civ 1551, All ER (D) 349 (Nov) at [125] per Lord Neuberger; *Fisher v Brooker* [2009] UKHL 41, [2009] 1 WLR 1764; *Wham-O MFG Co v Lincoln Industries Ltd* [1984] 1 NZLR 641 (CA) at 671; and *Sidhu v Van Dyke* [2014] HCA 19, (2014) 251 CLR 505 at [92]–[93].

[132] Accordingly, we are satisfied that the claimed estoppel is not established.

Result

[133] The appeal is allowed.

[134] The costs order in the High Court is set aside. The case is remitted back to the High Court to reassess costs in light of this judgment.

[135] The first respondents are ordered to pay the appellants costs for a standard appeal on a band A basis together with usual disbursements.

Solicitors:
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