IN THE SUPREME COURT OF NEW ZEALAND SC 84/2016

**BETWEEN** **GREEN GROWTH NO.2 LIMITED**
Appellant

**AND** **QUEEN ELIZABETH THE SECOND NATIONAL TRUST**
Respondent

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| Hearing: | 13 February 2018 |
| Coram: | Elias CJ<br>William Young J<br>Glazebrook J<br>O'Regan J<br>Ellen France J |
| Appearances: | N R Campbell QC and W A McCartney for the Appellant<br>R J B Fowler QC, F B Q Collins and P B Kirby for the Respondent |

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**CIVIL APPEAL**

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**MR CAMPBELL QC:**
May it please the Court, Campbell for the appellant with Mr McCartney.

**ELIAS CJ:**
Thank you, Mr Campbell and Mr McCartney.

**MR FOWLER QC:**
May it please the Court, Fowler for the respondent together with Mr Collins and Mr Kirby.

**ELIAS CJ:**
Thank you, Mr Fowler, Mr Collins, Mr Kirby.

Yes, Mr Campbell.

**MR CAMPBELL QC:**
Your Honours, there are two broad questions before the Court, both concerning an open space covenant that is notified on the title to the appellant's land in favour of the respondent.

The first broad question arises from the respondent's claim that the covenant should be rectified, and the question is whether rectification is available against the appellant, notwithstanding its registered estate under the Land Transfer Act.

On that issue, the Court of Appeal, held that rectification was available, because the Court viewed section 62 of that Act as protecting only against adverse claims – that was the first limb of the Court's reasons – and the Court went on to hold that the particular claim for rectification that the respondent trust was making was not adverse to the appellant, Green Growth's, interests.

On that particular issue, Green Growth says firstly that the Court of Appeal misconstrued section 62 of the Land Transfer Act, so that's a legal question for the Court. Green Growth says that section 62 is not limited or qualified in the way that the Court of Appeal held.

And even if that legal argument is not accepted, Green Growth says that the Trust's claim to rectification was in any case adverse to Green Growth and so satisfied the qualification that the Court of Appeal read into section 62.

**ELIAS CJ:**

Mr Campbell, are you also going to deal with whether section 62 is engaged by rectification, in any event?

**MR CAMPBELL QC:**

No.

**ELIAS CJ:**

All right.

**MR CAMPBELL QC:**

Well, I'm going to be addressing that issue in the context of the Court of Appeal's re –

**ELIAS CJ:**

It's just that the Court of Appeal has imposed a particular lens on this. I'm not sure that it won't be necessary to go a bit further than that, that is, that it only protects against adverse claims.

**MR CAMPBELL QC:**

Well, Your Honour's question perhaps is going to be addressed in relation to the second aspect of the Court of Appeal's reasoning, which was that the claim to rectification was not adverse to Green Growth. So in that sense –

**ELIAS CJ:**

Yes, and in that sense doesn't engage section 62.

**MR CAMPBELL QC:**

Yes, which was the Court of Appeal's second part of its reason.

**ELIAS CJ:**

Yes, I see. That's fine.

**O'REGAN:**
Mr Campbell, can you just lift the microphone up a bit? Thank you.

**MR CAMPBELL QC:**
So that's the first broad issue, and that reflects the Trust's claim in the High Court that the covenant should be rectified.

The second broad issue, which captures the second and third issues that this Court granted leave on, broadly concerns whether regardless of whether the covenant should be rectified or not, should that covenant remain on the title? And Green Growth first says that because the covenant was improperly executed under the general law, it's not valid and binding as against Green Growth as a successor in title, and notification of the covenant on the title doesn't cure that invalidity.

So on that particular point, the Court of Appeal agreed that the covenant was invalid under the general law as against Green Growth, but the Court of Appeal held that notification of the covenant had the same effect as registration of any instrument under the Land Transfer Act, in particular that it attracted the protection of indefeasibility and so the notification cured the invalidity in the covenant, and Green Growth challenges the Court of Appeal's reasoning that notification is effectively the same as registration, and attracts indefeasibility.

The other aspects of that second broad issue, namely whether the covenant should be removed, engages section 81 of the Land Transfer Act. Green Growth says that for various reasons the entry of the notification of the covenant was wrongfully obtained and it should be removed.

So those – the second and third issues on which leave was granted by this Court, of course, reflect the counterclaims that Green Growth brought in the High Court.

**WILLIAM YOUNG J:**

It would be logical to deal with the counterclaim first, wouldn't it? Not much point discussing whether we should rectify or interpret something that's of no effect.

**MR CAMPBELL QC:**

Well, I'm very happy to deal with it.

**WILLIAM YOUNG J:**

The case seems to me to have been dealt with back-to-front but …

**ELIAS CJ:**

It might be a question of best point first, however.

**MR CAMPBELL QC:**

Well, Your Honour, I dealt with it in that way only to reflect the –

**WILLIAM YOUNG J:**

That's the way the Courts below dealt with it.

**MR CAMPBELL QC:**

And because the Trust was the plaintiff in the High Court, so that was its first claim. But I'm happy to deal with it the other way around. I don't anticipate that the Court's going to make a ruling on the second and third issues to relieve me from having to articulate the issue, in any event.

**ELIAS CJ:**

To prevent your argument, no.

**MR CAMPBELL QC:**

I think before turning to my written submissions, it may be helpful just to take Your Honours to the various iterations of the covenant.

**ELIAS CJ:**

Why wouldn't you start with the one that's operative?

**MR CAMPBELL QC:**

Well, I'll take you to that just so it's …

**ELIAS CJ:**

Yes, but shouldn't you start with that? Because don't we have to decide to what extent we need to go behind that? I know it's there as a matter of background but it does seem to me that this was the covenant that your clients acquired the land on the basis of.

**MR CAMPBELL QC:**

I accept that, Your Honour. The only reason in the context of this appeal for looking at the previous iterations is to show the way in which the third iteration was invalid and one can really only see that by comparing the second and the third, because the third iteration was an alteration to the second, and it's helpful to contrast them. And I'm happy to just deal with that when I come to the second issue about invalidity of the covenant, and the third issue about wrongful entry under section 81.

In terms of rectification, it's unnecessary to look behind – as Your Honour says – the notified covenant.

**GLAZEBROOK J:**

Can I just ask you before I forget and so that you can think about it, what is alleged to have been invalid is the schedule and the execution of the schedule, not the execution of the main body of the deed. So can you deal with why the wrong execution of the schedule in your submission makes the whole thing invalid which – as I understand it – is your submission?

**MR CAMPBELL QC:**

To be clear, it's not just the wrongful execution of the third schedule, but it's also the manner in which it was presented for rectification.

**GLAZEBROOK J:**

No, no. Sorry, I'm using that as shorthand and there's probably two questions in that. I realise that you're probably relying on the way it was presented as separate from what the validity of the deed was. So my question goes back to what is the effect on a deed if you invalidly exercise or if you amend it by agreement, which is not a deed.

**MR CAMPBELL QC:**

In that case, the amendment will be effected *inter partes*, so between the Trust and Mr Russell. So that's –

**GLAZEBROOK J:**

Well, it's only really going to be able to be effected *inter partes* unless it's registered, in any event, isn't it?

**MR CAMPBELL QC:**

I'm not sure that's correct, Your Honour. So long as if Mr Russell was still the owner of the land, it could potentially – and this hasn't had to be explored in any detail – it could have been enforced against Mr Russell regardless of the …

**GLAZEBROOK J:**

Absolutely. But it wouldn't be enforceable against anybody other than the parties.

**MR CAMPBELL QC:**

That's correct.

So the effect – really talking about the general law, Your Honour, of the invalid execution of the third schedule – is that that final iteration of the covenant would be effected *inter partes*. It's not effected as against anybody else such a successor in title. To anticipate, of course, I have to deal with the notification question and the effect of that.

**GLAZEBROOK J:**

Exactly. That's all the – so you accept it would be valid *inter partes*.

**MR CAMPBELL QC:**

Yes. Does that answer your question, Your Honour?

**GLAZEBROOK J:**

It does, in fact, because that's what I'd assumed as well and so it all comes down to the notification issue.

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

And that's what your submissions address, in any event?

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

Fine. I wasn't sure whether you were saying it was invalid per se, which is why I asked the question.

**MR CAMPBELL QC:**

No. I think even in front of the Court of Appeal that was the basis upon which the submissions were made. We were not suggesting invalidity *inter partes*.

**GLAZEBROOK J:**

I thought that was the argument about the deed in the Court of Appeal and the High Court to say that it wasn't a proper deed because the schedule hadn't been exercised, hadn't been witnessed properly as a deed.

**MR CAMPBELL QC:**

Yes, but Your Honour, in order for the third iteration to be binding on Mr Russell it did not have to be in the form of a deed. It could have just been a contract, and so execution only went to whether it was a deed or not.

**GLAZEBROOK J:**

All right. Thank you. Sorry – so that argument that it wasn't executed properly, I thought that meant that it wasn't – that while it might have been a covenant that was *inter partes*, it wasn't a covenant that was properly executed under the Act.

**MR CAMPBELL QC:**

No. The position of Green Growth was and remains that it would be effected as between the Trust and Mr Russell –

**GLAZEBROOK J:**

Under the Act.

**MR CAMPBELL QC:**

Well, potentially effected as a contract.

**GLAZEBROOK J:**

Under the Act.

**MR CAMPBELL QC:**

No, simply as a contract between parties.

**GLAZEBROOK J:**

No, I'm not talking about the Land Transfer Act. So it wouldn't have been a covenant under the Act, the QEII Act.

**MR CAMPBELL QC:**

No, it would not have been.

**GLAZEBROOK J:**

Okay. Well, that's what I'd understood the argument to be.

**MR CAMPBELL QC:**

Yes, but that wouldn't have mattered as between Mr Russell and the Trust.

**GLAZEBROOK J:**

Well, it might matter to the registration and notification issue, because if it was valid under the QEII Act then reading the two together might give a different result from a mere contract being notified.

**MR CAMPBELL QC:**

Well, to be clear the argument in front of the Court of Appeal – which the Court of Appeal accepted – was that the third iteration was not a valid covenant under the QEII Act.

**GLAZEBROOK J:**

And that was because the schedule wasn't properly executed as a deed.

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

And does an amendment to a deed have to be executed as a deed to operate to the deed, and in that case, is it still a covenant under the QEII Act? I thought there was a point here that hasn't been dealt with.

**MR CAMPBELL QC:**

Well, the Court of Appeal accepted the submission that it was not a valid covenant under the QEII Act.

**GLAZEBROOK J:**

Well, we may not, is what I'm suggesting to you, so you might have to deal with that.

**MR CAMPBELL QC:**

Yes. Well, I haven't anticipated that because the Trust hasn't put that in issue in any way. I would have to look back at the submissions that I made to the Court of Appeal. My recollection is that that submission included the proposition that if one wants to amend a deed – an existing deed – then the amendment itself has to conform to the requirements of the deed.

**GLAZEBROOK J:**

Well, that's not necessarily the law and there is contrary authority.

**MR CAMPBELL QC:**

Well, I will have to review that at probably the luncheon interval, I think, Your Honour, to refresh my memory as to what the Trust's – sorry – Green Growth's submissions were on that point because I certainly haven't given that any thought for this appeal. The Court of Appeal made a decision on that. It hasn't been challenged by the Trust, either in leave submissions or in the submissions that the Trust has filed.

**GLAZEBROOK J:**

Well, we, as the final Court, have to – we can't operate on the basis of what might be a false finding below. We can't pretend the law is any different, so I think you will have to deal with it.

**MR CAMPBELL QC:**

Your Honour, I'm just explaining why –

**GLAZEBROOK J:**

No, I understand totally why you haven't. It wasn't a criticism.

**MR CAMPBELL QC:**

It may be that I'm not even able to deal with that very well today, I have to say.

**GLAZEBROOK J:**
Well, it may not be – it may not arise.

**MR CAMPBELL QC:**
The Court of Appeal hearing, I think, was probably close to two years ago now.

**GLAZEBROOK J:**
I can understand that.

**MR CAMPBELL QC:**
If I may, despite Justice Young's prompting, just follow the order that is in my written submissions, I accept that the first issue is independent of the question of whether the covenant should remain at all, and so it may be that the Court finds that it doesn't have to deal with it, but at this hearing I have to.

So as to whether rectification is available against Green Growth as a successor in title, I've addressed this from paragraph 32 onwards and I will simply highlight those points which I wish to emphasise welcoming, of course, any questions that any of Your Honours may have.

So section 62, of course, provides that the estate of a registered proprietor is paramount and it is with some of these statutory provisions, in my respectful submission, often useful to return to the words, even though we may refer to the provision again and again and again and although we understand the general effect of it, there's nothing like paying attention to the language that's in the statute.

The first part is the opening words of section 62, notwithstanding the existence in any other person of any estate or interest which, but for this Act, might be held to be paramount or to have priority. So it's making clear that one leaves to one side whatever interests might prevail under the general law.

Then it make the positive statement, the registered proprietor of land shall, except in the case of fraud – and I pause there to make the obvious point that fraud has never been an issue in this proceeding against Green Growth – hold the same subject to such encumbrances, lands, estates or interests as may be notified on the folium of the register. So it's accepted that because the covenant is notified, that engages that part of section 62. Green Growth holds the land subject to the notified covenant. But as will be explored under issue 2 – and this doesn't have any relevance to the rectification issue – Green Growth only holds, subject to the notified covenant, to the extent that the covenant is valid and effective against third parties, and I will be submitting notification doesn't cure any invalidity in the covenant. But that's a separate issue.

Returning to section 62, it concludes with the emphatic words, "But absolutely free from all other encumbrances, lands, estates or interests whatsoever." So notwithstanding those words, the Court of Appeal has subjected Green Growth's registered estate to an equitable claim for rectification by the Trust to rectify the covenant that's notified on the title.

**ELIAS CJ:**
Well, isn't equitable claim, though, in the nature of an estate or interest in land?

**MR CAMPBELL QC:**
Well, that draws attention –

**ELIAS CJ:**
I mean, you're characterising it as that. But I'm querying that.

**MR CAMPBELL QC:**
Well, can I put it – answer the question in this way, Your Honour, with two points? The first is it's accepted there is a debate about whether an equitable claim for rectification is an equitable interest or a mere equity, and it may be that Your Honour's drawing attention to that distinction.

So questions about whether mere equities are different from equitable interests and land and quite what the difference is, so I accept that there is, at one level, a debate about that distinction.

But in my submission, that distinction is irrelevant for the purposes of section 62 because it must be excluding both equitable interests and what are sometimes called mere equities.

**ELIAS CJ:**
But it doesn't exclude the possibility of correcting illegalities more generally. I'm just thinking of things like the section 60 Property Law Act argument in Regal Hastings, was it? Not Regal Hastings. What was it?

**ELLEN FRANCE J:**
Castings.

**MR CAMPBELL QC:**
*Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

**ELIAS CJ:**
Yes. It's possible to challenge behind the title which is confirmed by the register and compel that which ought to be done to be done, and isn't that really what rectification is? It's not a – it doesn't set up a competing estate or interest which is said to have priority. It's simply a remedy which is available. It doesn't touch section 62.

**MR CAMPBELL QC:**
Firstly, Your Honour, *Regal Castings*, as I recall, was decided on the basis of there being an *in personam* claim against the registered proprietor.

**ELIAS CJ:**
Well, that's what this would be, too.

**MR CAMPBELL QC:**

That is not how the Court of Appeal decided the question.

**ELIAS CJ:**

No, I understand that.

**MR CAMPBELL QC:**

So to answer your question, really, involves addressing a quite different field of the law relating to indefeasibility of title, and that is the extent to which *in personam* claims can be articulated against a registered proprietor. So I just want to highlight that it is a different field of inquiry.

So if one returns to the hypothetical that Mr Russell still owned the land, although this doesn't have to be finally resolved as between the Trust and Mr Russell, if there's a claim to rectification which arose out of the transaction in which Mr Russell was involved, that would just be an *in personam* claim no different from many other *in personam* claims that focus on the conduct of the registered proprietor, usually entering into some transaction. Here it would be a covenant. Sometimes it's agreeing to sell the land to a purchaser.

**ELIAS CJ:**

What's different about this position, it seems to me, is not the question of indefeasibility, because indefeasibility also arguably arises in the case of Mr Russell. What is engaged is the background of a system of registration which third parties are entitled to rely on. So the availability of rectification might be affected. It might be that you could only obtain rectification of an instrument that was inconsistent or had some error on its face. It may well affect that, but I'm not sure that that really has anything to do with indefeasibility of title.

**MR CAMPBELL QC:**

Well, it has something to do with indefeasibility of title in that although the scope and limits of the *in personam* claims of the *in personam* exception, as it's often called, have not been fully explored by this Court or by New Zealand

appellate Courts. There's been quite a lot of exploration of it, but I wouldn't say fully explored. What has been made clear is that *in personam* claims cannot be inconsistent with the scheme of indefeasibility in the Land Transfer Act itself.

It was for that reason that the Court of Appeal itself doubted Justice Wylie's holding that the Trust's claim to rectification was available against Green Growth via an *in personam* claim. The Court of Appeal – although not making a final decision on the point – said, "Well, that seems to be inconsistent with the idea that notice does not affect a registered proprietor or a purchaser." That's because Justice Wylie had reached his conclusion –

**ELIAS CJ:**
Well, that's as a matter of priority of estate and title. But if you admit that you can get rectification as between Mr Russell and the Trust, all I'm putting to you is why would rectification not be available, not because Green Growth doesn't have indefeasibility of its title, but at least to the extent that there is some obvious error or inconsistency in the instrument, I just don't see that indefeasibility of title is necessarily engaged, which is why I started by asking you whether you were going to address that.

**MR CAMPBELL QC:**
Can I firstly make clear that –

**ELIAS CJ:**
In fact, it's a most misleading term, indefeasibility, because clearly the interests can be affected. It's just the priority of interest that is indefeasible.

**MR CAMPBELL QC:**
Perhaps I can explore Your Honour's proposition by thinking about the different sorts of transactions that the Trust and Mr Russell might have engaged in back in 1996/1997. So in this case we've got a covenant. Let's assume that Mr Russell agreed to sell the land to the Trust under an enforceable agreement for sale and purchase. At that point, that would have

given the Trust an *in personam* claim against Mr Russell to have the land transferred to the Trust, notwithstanding Mr Russell's registered estate. Upon Mr Russell selling the land to Green Growth as purchaser and Green Growth obtaining its estate as registered proprietor, that *in personam* claim, if the Trust tried to make it against Green Growth, would be defeated by section 62 and the other "indefeasibility" provisions of the Land Transfer Act.

So indefeasibility is always the first step to responding to a claim like this which is based on prior acts between – in this case – the Trust and Mr Russell which have given rise to some equitable interest or equitable claim against the land. So back in 1997, let's say the Trust had an equitable claim for rectification against Mr Russell.

**ELIAS CJ:**
Well, your answer in your question was concerned with a prior estate in land. What I was putting to you was the situation which we have here where you have an instrument which is arguably defective on its face, and I can't see that obtaining rectification of that, if it's otherwise available, affects indefeasibility of the proprietor's title.

**GLAZEBROOK J:**
For this argument, we have to assume that it's a validly-exercised covenant under the QEII Act and therefore does provide an interest in land.

**MR CAMPBELL QC:**
Yes. The relevant defect that I think the Chief Justice is referring to is the blank in the covenant and the lack of an aerial photograph.

**ELIAS CJ:**
Yes, which is the Trust's – which is behind the Trust's application for rectification.

**MR CAMPBELL QC:**

I don't accept that, actually, Your Honour, and that takes me on to a point that I was going to make. The Trust is not seeking to rectify the mistake that appears on the covenant. The Trust is attempting to rectify the covenant in a way that a third party would never expect.

**ELIAS CJ:**

But that is a different point, really, because that is as to whether the form of rectification which the Court of Appeal has accepted was appropriate. I think there's …

**GLAZEBROOK J:**

So let's assume for the answer to the question that the rectification merely rectified a mistake on the face of the covenant because the second part of your submissions are that it went much further than that. But for the purpose of the first part of the, for the answer to the first part, when do you say rectification – do you say rectification just isn't available?

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

So even if there's a mistake on the face of the document it's not available. You're stuck with what's on the register?

**MR CAMPBELL QC:**

Yes.

**WILLIAM YOUNG J:**

You just interpret it?

**MR CAMPBELL QC:**

Indeed. That's what you're stuck with.

**ELIAS CJ:**

Well, except that you are, in the context of a register, and you don't want to mislead subsequent purchasers. So if you have an error, surely it is appropriate to address it, whether it's rectification or whether it's by the interpretation that I think Justice Wylie didn't undertake. I'm not terribly sure. But why wouldn't you address it?

**MR CAMPBELL QC:**

Well, the – one wouldn't address it through rectification because it would never be – and this is an important contrast between the position of Mr Russell and the position of Green Growth. Mr Russell was party to the transaction. He was party to the common intention that the Courts below held existed. Green Growth and any other purchaser has no idea what that common intention is, so even if the Trust's claim had been to simply fill in the blank and annex an aerial photograph, what photograph?

**ELIAS CJ:**

I accept that common intention can't take you the whole way, except to the extent that the irresistible inference of common intention on the face of the document. So I don't think you can go behind the document once you have the context of a register. But here there is a definition that goes nowhere, and there is – it's obviously, there are artefacts of an earlier agreement in this covenant. Why wouldn't you fix that? Because the common intention must have been, you know, whatever the covenant is properly construed as being.

**MR CAMPBELL QC:**

Can I just say a couple of things? One of your comments, Your Honour, was to anticipate the possibility that the common intention was obvious on the face of the document. Then you'd just be in the field of interpretation.

**ELIAS CJ:**

Well, I think you probably are. But does that mean that it isn't appropriate to rectify in the context of a register?

**GLAZEBROOK J:**

So that in 50 years' time somebody who comes along knows on the face of the document what it means without having to trawl through possible Court cases to find out what that particular covenant meant? So to stop the necessity to go to Court every time someone wants to interpret that particular provision.

**MR CAMPBELL QC:**

Yes, but there are a number of questions floating around here and if I may, I will answer Justice Glazebrook's – and it's the Chief Justice's proposition as well – by saying that the Court is nonetheless constrained by the legal landscape and the legal rules before it. If the effect of the Land Transfer Act is that equitable claims of this cannot be advanced, then –

**GLAZEBROOK J:**

But if it's an equitable claim and the only thing it does is confirm what the interpretation of the document is, how can it affect the indefeasible title of the registered proprietor?

**MR CAMPBELL QC:**

Well, in that case, Your Honour, all that the supposed equitable claim for rectification would be doing would be interpreting the document. That's not what the Trust's claim is attempting to do here.

**GLAZEBROOK J:**

Well, I mean, you're going to have to deal with the interpretation point which you will on your second argument, but this is just a question. You say rectification is not available, but if rectification does nothing more than make clear what the proper interpretation of a document is that otherwise might be unclear in 10 years' time, how does that affect the registered title of the proprietor?

**MR CAMPBELL QC:**

Your Honour, if that's all the rectification claim was, then in my submission, with respect, it wouldn't be a claim for rectification. It would just be a claim that this is what the document means.

**WILLIAM YOUNG J:**

And it could possibly be a claim under section – that's a precursor to an application for the registrar to correct it under section 81.

**MR CAMPBELL QC:**

Yes, but section 81 cannot be used to – in a way that's inconsistent with the infeasibility provisions.

**ELIAS CJ:**

What about section 80, actually? Because on the approach, it's not a wrongful thing. It would be the interpretation will identify that there had been a slip in the expression.

**MR CAMPBELL QC:**

I might have to come to that.

**ELIAS CJ:**

Suppose Justice Wylie had actually interpreted the contract, made that – what was being sought simply a declaration, was it?

**MR CAMPBELL QC:**

I think so. Could I just –

**ELIAS CJ:**

But what would have happened with that declaration? Surely there would have been follow-up with the register.

**MR CAMPBELL QC:**

Well, no, I don't believe so and I don't think that was sought. But before it leaves my mind, could I just make one other point? With respect, I think Your Honour the Chief Justice said that the mistake was – that it was clear from the notified covenant that it was an amalgam of iterations.

**ELIAS CJ:**

No, no. I said there was article – what's clear is that there's an artefact of an earlier iteration which is superseded, because it goes nowhere in this agreement, in this covenant.

**GLAZEBROOK J:**

Or it may just be that it's not an artefact of a previous – I don't think it matters very much because it doesn't go anywhere.

**MR CAMPBELL QC:**

Well, I just want to make clear that it's not obvious on the face of the covenant that the error is the result of a new schedule being annexed and there being some sort of intention that protected area no longer apply. The same problem is they're in the first and second versions. It's always been there. It wasn't created just by the amendment to the third schedule. If the blank had been filled in and there'd been an aerial photograph, the meaning of this covenant would have been perfectly clear. Protected area, certain restrictions, balance of the land, less – fewer restrictions. So there's no – it's not at all obvious and it was certainly not obvious to Green Growth. They only discovered this after the proceeding commenced, that there'd been these other iterations.

**ELIAS CJ:**

Yes. I think that goes to the form any rectification should properly take but I won't hold you up any further. I understand what your position is on, I think, section 62. I'm not entirely convinced yet.

**MR CAMPBELL QC:**

Well, so far we've been talking about something completely different from what the Court of Appeal decided the case on and what the Court granted leave on and what my submissions are addressing. I have at least had to think about the *in personam* exception because, as one does when a hearing is imminent, you start paying more attention to the submissions and the Trust, of course, without having given any notice that it was going to do so, appears to be wanting to support the Court of Appeal's decision on Justice Wylie's basis, not on the basis on which the Court of Appeal decided the case. So if I may make this broad proposition before moving on to the next topic, Your Honour, to attempt to respond to what's been put to me, as I understand it what has been suggested in some of the questions is that section 62 only protects against prior equitable interests or estate or liens or encumbrances and not something lesser than that. That would be extraordinary, with respect, if – to read section 62 down in that way. That would mean that a non-proprietary claim would be available against a registered proprietor, notwithstanding section 62, in situations where a proprietary claim is ruled out by section 62, and in this particular context in my submission the claim that the Trust is bringing is in any event. It's not just a mere equity. It's attached to what they claim is a covenant in the land. So what the rectification is seeking is to replace the existing notified covenant with a different covenant, and that different covenant is an interest in the land, so it is not the case, in my submission, that this is a mere equity or something that does not involve the claim of an equitable interest against Green Growth's registered estate.

**GLAZEBROOK J:**

Can I just say that wasn't my question or what was behind my question? My question was really dealing with the adverse interest issue. So your submission, basically, is that rectification per se isn't available, even if it doesn't affect the interest in land or, in fact, reduces the covenant and increases the interest in land. So say for instance the mistake had been that they'd got the land area wrong in some manner and said that the covenant was over the whole of the land when it was only supposed to be over part of it, and you say rectification isn't available in those circumstances, that your client

is stuck with a covenant over the whole land, even if you looked at common intention it should only have been over part of the land, because the Court of Appeal says, well, if it's not adverse, i.e. it increases the register of proprietors' estate rather than reduces it, then rectification is available and you say no, rectification isn't available in any circumstances against a third party, even if it would be beneficial to the third party and increase the estate rather than decrease it. That's the submission, as I understand it.

**MR CAMPBELL QC:**
Yes. That does bring us back to the submissions that I've addressed.

**GLAZEBROOK J:**
All right. I'm just checking. So you say they're wrong, even if it was beneficial to the extent that it increased rather than decreased the estate or it didn't have any effect on the estate, it's not available against a third party.

**MR CAMPBELL QC:**
Yes, and I'm happy to explain why, Your Honour. It's probably easiest to do that by exploring the implications of the Court of Appeal's approach, and I think with respect to the Court of Appeal, the most serious implication or effect is that it is no longer for the registered proprietor itself to decide whether or not it wants to rely on indefeasible title under section 62. So under the Court of Appeal's approach, if a third party comes along and says we've got a prior equitable interest of some sort in your land, whether it be by means of saying, well, we've got a mortgage over it. The mortgage doesn't actually reflect the common intention. You've purchased the land subject to the mortgage. We want the mortgage rectified, or a lease rectified. It could be the mortgagor or the mortgagee who's making such a claim. Or we could have –

**GLAZEBROOK J:**
But what would be the difficulty if, in fact, the rectification is to the benefit of the registered proprietor. And, in fact, in those cases I would imagine the registered proprietor having somebody come along and say we've got a

mortgage and would say, well, I want it rectified because you haven't actually got a mortgage in the terms that you say you have.

**MR CAMPBELL QC:**

Well, if I may continue, Your Honour, in instances where the third party comes along and says we want to rectify the instrument and it's in some way beneficial to the registered proprietor, it's likely that the registered proprietor will say absolutely, thanks, that'll be great and they would enter into a transaction that they could then register that would rectify the matter. But it should be for the registered proprietor to make the decision whether it wants to rely on section 62 or, in other words, it should be for the registered proprietor to decide whether it wants to accept the claim or not. What the Court of Appeal's approach does is cast great uncertainty in these situations.

**GLAZEBROOK J:**

Well, what does the registered proprietor do, though, if the registered proprietor actually thinks there's something wrong with the document that's registered and the third party says, well, this is what's registered. I don't care and I'm carrying on. How does the registered proprietor get that document rectified if rectification isn't available?

**WILLIAM YOUNG J:**

Well, they can't.

**GLAZEBROOK J:**

But the argument that it's for the registered proprietor to decide, it you don't have registration available the registered proprietor can't have it rectified. They're stuck with the third party saying, well, I don't care. This is what's on the register.

**MR CAMPBELL QC:**

Well, in that particular instance if, with that last example, Your Honour, and I'll have to come back to my answer which I'm afraid I hadn't finished, that in that particular instance, if I understand the question correctly, you've got

somebody with – the original party to some instrument that's registered against the title, mortgage, or lease, or something like that. The title itself has then been transferred to a new registered proprietor and the original party who's still got a registered mortgage, lease, whatever, says, well, the common intention was quite different. We want to rectify it. Well, that's going to be – the rectification in that instance is very likely to be one that the registered proprietor of the estate is not going to want to accept.

If I can go back to conclude my previous answer, the difficulty or the problem with the Court of Appeal's approach is that if a third party wants or makes a claim of some sort, whether it's an equitable claim for rectification, a claim that they have an equitable right of way over a parcel of land, maybe it's a vast rural estate and the neighbour says, well, by agreement with the previous owner I've got a right of way over a little corner down there. It's not registered. You didn't know anything about it, but I don't think it's adverse to you because I haven't seen you down there for a long time, that registered property can't simply say section 62, please go away. There then has to be – on the Court of Appeal's approach – an inquiry as to whether the claim is adverse or not and the Court of Appeal is taking away from the registered proprietor the right under section 62 to simply say my estate is free from all other estates or interests whatsoever, and instead creating uncertainty, room for disputes, and the like.

**ELLEN FRANCE J:**

I'm just a little unclear how that fits in, how what you're saying there in terms of the decision should be that of the registered proprietor, how that fits in with the *in personam* jurisdiction.

**MR CAMPBELL QC:**

I'm assuming in this discussion, Your Honour, the most recent discussion, that there's no relevant *in personam* claim against the registered proprietor, because I'm addressing the Court of Appeal's approach which didn't rely at all on there being an *in personam* claim, didn't rely at all upon whether or not the registered proprietor had any sort of notice of this claim by the third party. On

the Court of Appeal's approach, the neighbour wants to make a claim that they've got an equitable lease over the corner of the property. The Court of Appeal says, well, the registered proprietor first has to prove that that's adverse in a material way, and that's irrespective of whether the registered proprietor had any notice.

Your Honour, I'm not denying – I'm not contesting that there are situations where, regardless of that indefeasible title, the registered proprietor will have engaged in some conduct, entered into a contract, stolen property, whatever, that generates an *in personam* claim against that registered proprietor. But that's a different line of inquiry. At the moment, I'm addressing the Court of Appeal's reasons, which I say were wrong.

**GLAZEBROOK J:**
And you just say that the register is the register is the register and you're stuck with the register as it is subject to *in personam* claims and anything that might be able to be done under section 80, section 81. It's a simple argument, isn't it, and does have some attraction in terms of the scheme of the Act. So I understand the point.

**MR CAMPBELL QC:**
Yes. Nor is it a particular novel argument. The Court of Appeal's approach is novel.

**GLAZEBROOK J:**
No, I guess in terms of adverse I had assumed that they meant adverse to the title, so I don't think you could say I had a right of way and that's not adverse to you because you didn't use it. I'd assumed they meant adverse to the registered proprietor's title which a right of way would always be adverse to the registered proprietor's title. But they were probably not quite as clear on that, so I can see why you have some concerns about that.

**MR CAMPBELL QC:**

Yes, but my concerns are, with respect, equally valid in relation to a case like this.

**GLAZEBROOK J:**

I know. I understand your point. You say the register is the register.

**MR CAMPBELL QC:**

Yes. As I have noted in the submissions, this was not addressed at all in the hearing. Neither party was – and the Court didn't raise it, so that may explain some of the lack of clarity.

Although we've talked a lot about *in personam* claims, which wasn't the subject of my submission, I think I've addressed sufficiently the arguments that we make against the legal approach that the Court of Appeal took.

Unless Your Honours have further questions on that, I'll move on to the second part, which is independently an independent ground of appeal and the Court of Appeal's decision. They said that the claim that the Trust was making was not adverse to Green Growth's interest, and we say that that's not correct.

Now, this essentially requires a comparison between the notified covenant and the covenant as rectified by the Courts below, and I suppose comparing the interpretations of those two.

**GLAZEBROOK J:**

And the interpretation of the covenant as registered, as part of that?

**MR CAMPBELL QC:**

Yes. I said, Your Honour, that it requires a comparison of those two as notified and as rectified.

**GLAZEBROOK J:**
That's fine. Thank you.

**MR CAMPBELL QC:**
In my submission, this just illustrates the dangers of the Court of Appeal's approach because this is just ripe for uncertainty and dispute, one of the very things that section 62 was meant to avoid.

So I've addressed from paragraph 43 to 46 that contrast. Prior to rectification, the covenant on its face – albeit that there was a gap in it and didn't have a photograph – it drew a distinction between the protected area subject to quite close restrictions and the balance of the land, which were subject to fewer restrictions. It was clear that the third schedule in that notified covenant was there to qualify the restrictions, the close restrictions placed on the protected area. That – the express terms of the covenant make it clear that that's the role of the third schedule.

**ELIAS CJ:**
Sorry, can you just take us – perhaps we could look at the covenant and you can just explain that a bit more.

**MR CAMPBELL QC:**
Yes. There's probably one at the start of volume C1 at page 418. 419 starts with the actual text of the covenant itself. There were recitals. There's the first schedule with the purpose of the covenant. The second schedule starts with definitions, and if you turn the page you'll see the land means the property or part thereof defined as subject to this covenant. Also if you turn back to the first page, the very first paragraph under the heading "open space covenant" talks about Mr Russell being registered as a proprietor of an estate et cetera as set out in the schedule of land hereto, here and after called "the land". So that's the reference to the entire 404 hectares. That's what the land is referring to.

Now, going back to the definitions, “protected area” means an area of native trees – I emphasise – shown as area blank on the illustrated aerial photograph attached.

Then we go to clause 2. The first paragraph, it’s not numbered, so I’m just describing it as the first. “No act or thing shall be done or placed or permitted to be done or remain upon the land” – so this applies to the land as a whole, that paragraph – “which, in the opinion of the board, materially alters the actual appearance or condition of the land,” et cetera.

Then second unnumbered paragraph under clause 2. “In particular, on and in respect of the protected area” – so this applies to the protected area only – “except with the prior written consent of the board or as outlined in the third schedule.” So that signifies the role of the third schedule, to carve out some exceptions to these particular restrictions in that second paragraph. Then there are a number of particular restrictions, including at paragraph D. You can’t construct or erect any new buildings and so on. So that’s on the protected area. Subparagraph H, can’t affect a subdivision.

So those are all expressed to apply to the protected area, not to the land as a whole. Then when one turns to the third schedule, a couple of pages over, remembering this is referred to and given operative effect only in clause 2 as being –

**ELIAS CJ:**
Sorry, can you just explain to me – the protected area isn’t identified because there is no photograph and also what was – the position was, wasn’t it, that the district land registrar wouldn't accept the covenant, is that right, without a survey? Is that right?

**MR CAMPBELL QC:**
Yes. The Trust had shown a photograph to Mr Russell, as I recall. They never attached it to the covenant at any point. It hadn’t been initialled or anything like that. The Trust then made inquiries of the DLR through an agent

as to whether the photograph would be acceptable to define the protected area. DLR said no, you'll need a survey. The Trust didn't want to pay for a survey and –

**ELIAS CJ:**

So is the position that the blank is irrelevant because this couldn't have been registered anyway on the basis of the photograph that wasn't attached?

**GLAZEBROOK J:**

Well, it was registered. That's the second argument, probably.

**MR CAMPBELL QC:**

Please, Your Honour, notified.

**ELIAS CJ:**

Yes, I know. I do remember that distinction. But it wasn't capable of being accepted for notification, is that right? Or do we not really know that?

**GLAZEBROOK J:**

Well, without a survey and with only the photograph attached, it wasn't accepted, it wasn't going to be acceptable.

**MR CAMPBELL QC:**

Yes, that was the clear indication from the DLR. Whether that was a – I'd have to explore the survey regulations to know whether that was a justifiable position to take. It may not have been a position that the DLR would take with every single covenant. Maybe it was something particular about this. Or maybe it's a position that the DLR was taking at that point in time but not previously and not subsequently.

**ELIAS CJ:**

Yes, we don't really know the status of that.

**MR CAMPBELL QC:**

No, and it's not clear from the covenant that a photograph wouldn't have been acceptable. One wouldn't know unless one made the inquiries at that relevant time.

**GLAZEBROOK J:**

Can I just – what we've done is we've got a definition of protected area. If you were interpreting the covenant and there wasn't a photograph attached, you'd have to say, well, there isn't a protected area because there's nothing to indicate what that protected area is.

**MR CAMPBELL QC:**

Yes, most likely, Your Honour.

**GLAZEBROOK J:**

So you'd get rid of the protected area definition. You'd get rid of the in particular definition. I don't think you'd get rid of 3 because presumably you need approval to do any act or thing on the land.

**WILLIAM YOUNG J:**

What's the final – where are we?

**ELIAS CJ:**

We're looking at C10420.

**WILLIAM YOUNG J:**

Page 419?

**ELIAS CJ:**

Or 420, I think we're on now.

**ELLEN FRANCE J:**

Well, that is what happens, isn't it?

**GLAZEBROOK J:**

That's what I'm just asking. So you'd say because there isn't a protected area, there isn't actually anything in the in particular there, but clause 3, I think, would remain because you presumably need to get permission under 2 to do any act or thing because it has to be in the opinion of the board. I mean, it doesn't say you have to get permission but it would be odd if you could do that on the land and then have something you're not permitted to do. So you'd be sensible to get the permission of the board because it's the board's opinion that counts as to whether it is – and it can't be unreasonably held so if you say, you know, can I put a – well, I don't know, can I put a shed outside, then that might be unreasonable for them to say that it affects the actual appearance of the land.

**WILLIAM YOUNG J:**

Arguably it does say, I mean, the language is pretty hopeless but the in particular part of clause 2 refers to prior written consent, whereas the first part of 2 doesn't refer to an approval or consent. So 3 refers to an approval, not a consent, but it is an approval in terms of clause 2, which may be a reference to the in particulars.

**GLAZEBROOK J:**

Or it may be a reference to the first part of 2, because –

**ELIAS CJ:**

Well, in its terms 3 is a referral to the whole of clause 2 and one would have thought that the requirement to not unreasonably withhold consent does apply to the first part, which attaches to the whole land. So if you were seeking rectification, one would think that 3 has to remain.

**GLAZEBROOK J:**

Or even if you were interpreting, because you'd be getting rid of protected area, you'd be getting rid of the in particular. 3 would remain. Sorry, I think I probably lost you because I was thinking about that when you were on to your next point.

**MR CAMPBELL QC:**

I'll do my best to start at the appropriate point, wherever that might have been. I just observe that what has really been going on for the last few minutes is interpretation, not rectification.

**GLAZEBROOK J:**

Well, yes, but that might become important later, because it may be that we say you can't rectify but you do interpret.

**ELIAS CJ:**

Or we may say that the equitable remedy of rectification ought to be available if an interpretation is required of this document.

**MR CAMPBELL QC:**

Yes, though, Your Honour, keep in mind that the rectification granted below and always sought by the Trust is, leads to a very different result from what's been interpreted.

**ELIAS CJ:**

Yes, I understand that.

**GLAZEBROOK J:**

Which is why I was trying to get to what the result would be on interpretation of this document, irrespective of what the change might be.

**MR CAMPBELL QC:**

Yes. Thank you, Your Honour.

**GLAZEBROOK J:**

So just to be absolutely clear, what …

**MR CAMPBELL QC:**

I think I'd moved on to the third schedule and I'd said that it was given operative effect by the second paragraph of that clause 2. That tells us what the point of the third schedule is. And then it authorises Green Growth.

**GLAZEBROOK J:**

Where's the – there's no – the third schedule just sort of sits there, doesn't it? I'm just thinking in terms of an interpretation sense.

**MR CAMPBELL QC:**

Are you suggesting that it's not given effect in the other operative provisions?

**GLAZEBROOK J:**

Well, no. Let's assume for these purposes that this is the document to be interpreted, the document that includes the third schedule.

**MR CAMPBELL QC:**

Yes.

**ELIAS CJ:**

Well, it is. It's the one that's notified.

**MR CAMPBELL QC:**

Yes. Your Honour, the third schedule is given effect by – if you go back to clause 2, the second paragraph, in particular in respect of the protected area, except with the prior written consent of the board or as outlined in the third schedule.

**GLAZEBROOK J:**

Okay. So, in fact, just on interpretation the in particular doesn't go as well. It's just the reference to the protected area. So protected area definition goes and then in particular on except with the prior consent of the board or except as outlined in the third schedule, the owner shall not.

**WILLIAM YOUNG J:**

There's a more general reference to the schedules at the start of the document.

**MR CAMPBELL QC:**

Yes.

**WILLIAM YOUNG J:**

The mutual covenant, in the terms of the third schedule are incorporated generally there, aren't they?

**MR CAMPBELL QC:**

With the mutual covenant?

**WILLIAM YOUNG J:**

Yes. Mutual covenant to perform the duties and obligations et cetera contained in the schedule. So that would include the third schedule, even if you took out the in particular.

**ELIAS CJ:**

Absolutely, and I mean the scheme of this is the first schedule is purpose, the second schedule is restrictions, and the third schedule is a permission, notwithstanding the restrictions.

**MR CAMPBELL QC:**

But to be clear, the third schedule is a permission in respect of the protected area.

**ELIAS CJ:**

Well, except there is no protected area.

**GLAZEBROOK J:**

Is that right? Because it's or as outlined in the third schedule. It's not linked to the protected area.

**ELIAS CJ:**

And 1 in the third schedule is on the land, so it's using the defined term.

**MR CAMPBELL QC:**

Yes, but the second paragraph of clause 2 is focusing on what can't be done on and in respect of the protected area.

**GLAZEBROOK J:**

Where does it say that?

**MR CAMPBELL QC:**

In particular on and in respect of the protected area.

**GLAZEBROOK J:**

All right. You read the two together. I can understand that.

**ELIAS CJ:**

Oh, sorry, you're talking about 2 in the second schedule. I'm talking about the third schedule.

**GLAZEBROOK J:**

No, no. I think I can see the argument. You say on an interpretation if you get rid of the protected area the third schedule is only related to the protected area, not related to the whole of the land, and the in particular has to be read in the – as a permission which, except for the prior consent of the board is the or as outlined on the third schedule. I can see that reading.

**ELIAS CJ:**

Well, I don't read it like that myself.

**GLAZEBROOK J:**

No, it may not be but it's possible. I see what your argument is. You say the third schedule by the in particular only relates to the protected area. It doesn't relate to the whole of the land.

**MR CAMPBELL QC:**

Yes, but it's not because of the words – not just the words "in particular". It's the words "on" and "in respect of the protected area". That paragraph has – in subparagraphs A through I; this is clause 2 of the second schedule – has a whole lot of restrictions that apply on and in respect of the protected area. Those restrictions don't apply to the balance of the land, just interpreting this.

**ELIAS CJ:**

Well, I accept that but I don't accept that the third schedule falls away because there is no protected area. I think I accept that A to I of clause 2 of the second schedule hangs together and it refers to the protected land. But I don't think that that means that the third schedule drops away.

**MR CAMPBELL QC:**

I think ultimately that doesn't have to be decided for the purposes of –

**WILLIAM YOUNG J:**

Well, can I just put this to you? The first part of clause 2 imposes restrictions from which the third schedule is an exception. So the third schedule can provide an exception to the first part. It can work logically in relation to the first part of clause 2. So it's not open to the opinion of the board to say, well, you can't do this because under clause 3 the owner can do that.

**MR CAMPBELL QC:**

Yes, although with respect the more natural reading is that clause – sorry, the third schedule is engaged by the second paragraph of clause 2 and therefore is creating permissions.

**WILLIAM YOUNG J:**

The problem with that is that if you actually put a blue pencil through 2A to I and take out the third schedule then the owner is in real problems, because everything really depends on the opinion of the board. Whereas if you leave the third schedule in but take out A to I, you've got a workable covenant. Perhaps not as specific as the Trust would have hoped, but probably in substance not that much different.

**GLAZEBROOK J:**

And is the existing access track only over the protected area, or what should have been the protected area?

**MR CAMPBELL QC:**

I am not sure, Your Honour.

**GLAZEBROOK J:**

I sort of doubt it, myself.

**MR CAMPBELL QC:**

I don't know the answer to that.

**ELIAS CJ:**

Except, again, if you're looking at it through the lens of history my impression is the protected area was the vast majority of the acreage here. Isn't that right?

**GLAZEBROOK J:**

It's just that clause 1 of the third schedule just says "on the land". It doesn't refer to the protected area.

**ELIAS CJ:**

That's what I pointed out. I also think it is significant that – and this ties in with what Justice Young was saying – that the first schedule deals with purpose, the second with restrictions, and the third provides a permission to the owner.

**MR CAMPBELL QC:**

I certainly think that the third schedule is permissive.

**ELIAS CJ:**

So the argument on this is that the rectification which was undertaken was too extensive by simply deleting on and in respect of the protected area?

**MR CAMPBELL QC:**

The argument is that the rectification was adverse because it results in the particular restrictions which are in subparagraphs A to I, applying to the entirety of the land instead of just to the protected area. That's the essential way in which we say the rectification was adverse.

**ELIAS CJ:**

But even leaving aside the adverse reason for this, because that's relating to section 62, if one was simply looking at this as a matter of interpretation you wouldn't – there being no protected area – retain A to I, reading the thing fairly, in any event.

**MR CAMPBELL QC:**

I think that's correct.

**GLAZEBROOK J:**

So what you would have is the third schedule being an exception to paragraph 2 and being something that not only – which is allowed under the covenant absolutely.

**MR CAMPBELL QC:**

Regardless of the board's opinion or consent.

**GLAZEBROOK J:**

And then otherwise anything else is in the board's opinion and can't be unreasonably withheld.

**MR CAMPBELL QC:**
Yes.

Now, Your Honours, the only other point that is addressed in my written submissions on this issue is the position under the 2017 Land Transfer Act. I expect I don't have to address that orally today. I was asked to do – both parties were asked to do some written submissions.

So that takes me to the second issue which is whether an improperly-executed covenant that is notified but not registered successors in title.

So the first point here is that the Court of Appeal held that the QEII Act required an open space covenant to be executed as a deed and this had not been because the requirements of the then Property Law Act 1952 were not met. The Court said that the consequence of this was that the covenant was invalid against successors in title, such as Green Growth, at least until it is notified. So that then took the Court to consider what the effective notification was and whether it cured the invalidity in the covenant.

**GLAZEBROOK J:**
What I can't really understand is why would it be effective against successors in title in any event?

**MR CAMPBELL QC:**
The Court said it wasn't effective against.

**GLAZEBROOK J:**
No, but why would it be? Even if it was an effective covenant, why would it bind successors in title if it wasn't on the register?

**MR CAMPBELL QC:**
Well, I don't think the Court of Appeal had ever suggested that if it was a valid covenant it would bind successors, regardless of notification.

**GLAZEBROOK J:**

Well, exactly, so who cares? That's the point. It doesn't matter. The issue is the notification and what effect notification has, isn't it?

**MR CAMPBELL QC:**

Yes, and in summary Green Growth's position is that notification engages section 62 of the Land Transfer Act, just as notification under the Property Law Act have restricted positive covenants engages section 62, and this means that Green Growth's estate is subject to that notified covenant, but with the important qualification – which is really the issue here – to the extent that that covenant itself is valid. So the question for the Courts below and for this Court on this part of Green Growth's counterclaim is whether the notification of the covenant cured that invalidity, as against Green Growth.

**GLAZEBROOK J:**

Well, but you say the invalidity – it's not an invalidity, in fact, because you accept that it's valid as between the parties. What you do – what, as I understand your argument is that it's – not that it's invalid but it's not capable of registration and of effecting the title because it's not a valid covenant under the QEII Act. Because you accept it's valid between – it was valid between Mr Russell and included in the amendment as between Mr Russell and the Trust. So your argument is actually that it was invalid under the QEII Act.

**MR CAMPBELL QC:**

Yes, but which the Court of Appeal accepted.

**GLAZEBROOK J:**

So the argument is not that it's invalid. It's just that it's not a QEII covenant and therefore can't be notified. That's my understanding of it. Because it's not an invalid document, and you accept that. It's a totally valid document and if the Trust wanted to enforce it against Mr Russell – were he still alive – and the registered proprietor then they would be able to do so, possibly through an *in personam* claim, however.

**MR CAMPBELL QC:**

Well, it would be through a contract claim rather than through a claim on a deed because of the improper execution. It's not a deed. It would be a contract claim.

**GLAZEBROOK J:**

Well, there is conflicting authority on that in terms of whether you can amend a deed by pure contract.

**MR CAMPBELL QC:**

Well, that's a point that I'll have to see whether I can address today.

**WILLIAM YOUNG J:**

I suppose there might be an issue as to whether the composite document of contract effect that emerges is a deed.

**GLAZEBROOK J:**

Yes, and even as part of it is invalidly exercised, you can excise the part that's invalidly exercised, in any event. But you probably wouldn't want to do that.

**ELIAS CJ:**

You wouldn't want to do that.

**MR CAMPBELL QC:**

Well, that would – excising the invalid part, just to be clear, wouldn't just mean that you take, you get rid of the third schedule. It means that you would replace it with the prior third schedule, which was –

**GLAZEBROOK J:**

Well, it's not totally certain that's the case because if you have amended it by agreement, then you have amended it. I'm not sure you can go back to the previous deed, but in any event.

**ELIAS CJ:**

I wouldn't have thought you could go back to an agreement that has been superseded.

**MR CAMPBELL QC:**

Well, I was simply responding to a sub-proposition, as I understood it, that if the amendment was invalid then you'd just take out that amended – that new third schedule and my –

**GLAZEBROOK J:**

Well, it depends. The case law is very complicated on this. It actually depends whether it materially alters the whole of the deed et cetera, but I don't think we need to go there because your proposition is that if it's not a QEII covenant you can't notify it. That seems to be the proposition.

**MR CAMPBELL QC:**

If it's not a QEII covenant under the general law, it doesn't bind successors in title. Notification does not change that.

**GLAZEBROOK J:**

Well, it doesn't – if it's a QEII covenant it doesn't bind successors in title unless it's notified on the register.

**MR CAMPBELL QC:**

Although we haven't had to explore that or didn't have to explore that in the Court of Appeal, I think that's almost certainly the case.

**GLAZEBROOK J:**

Well, I would say that must be the case.

**ELIAS CJ:**

Sorry, this is just a very ignorant question, but can a covenant be notified – not a QEII covenant, can any covenant be notified?

**MR CAMPBELL QC:**

Some covenants can be notified. Covenants for the benefit of other land can be notified under the Property Law Act, firstly the 1952 Act, now the 2007 Act. And that legislation is addressed in my submissions so –

**ELIAS CJ:**

Yes, that's under legislation but there'd have to be some legislative basis, would there, for notification?

**MR CAMPBELL QC:**

Yes. That calls into question whether the –

**ELIAS CJ:**

You can't use it as a noticeboard, except by caveat, I suppose.

**MR CAMPBELL QC:**

Yes, correct, Your Honour. Because certain covenants will be effective in equity and if you lodge a caveat then that will protect one's position to a certain extent. The point of the Property Law Act was to provide a – instead of the caveat procedure, which doesn't involve putting the document on the title under the Property Law Act. You have a notification. The document is available for the world to see. But that was incrementally introduced so that only some covenants could be notified initially, basically those that were recognised under the general law, by which I mean common law in equity. Covenants such as this, as I explained in my submissions, it's a covenant in gross until the very recent amendments to the Property Law Act which I think actually haven't come into force yet. Covenants in gross have never bound subsequent owners of the land, whether they've got notice or not. And the Property Law Act has never allowed them to be notified. That's about to change.

So that's why absent compliance with the QEII Act to make this an open space covenant, we've just got a covenant in gross. It might have been

binding against Mr Russell via contract, but it would never have been effective against anybody else subject –

**ELLEN FRANCE J:**
Sorry, just to be clear, the argument that it's invalid in terms of the QEII Act depends on it having to be a deed.

**MR CAMPBELL QC:**
Having to be executed as a deed, yes.

**ELLEN FRANCE J:**
Having to be executed as a deed.

**MR CAMPBELL QC:**
And that's – well, again, this was the subject of submissions before the Court of Appeal.

**ELIAS CJ:**
And certification.

**GLAZEBROOK J:**
Well, there is some certification process, isn't there?

**MR CAMPBELL QC:**
But that's not a requirement of the QEII Act. That's a requirement of the Land Transfer Act.

**O'REGAN J:**
But if it's not a deed it wouldn't be a covenant in deed either, would it?

**MR CAMPBELL QC:**
Well, a covenant in gross, as that phrase or term is used, could refer to a covenant in gross that's simply created by a simple contract. As I understand, if we think of a restrictive covenant, for instance, that could be binding in

equity on a subsequent purchaser who had notice et cetera, regardless of whether the restrictive covenant took the form of a deed or took the form of a contract. Equity gave effect to it, as I understand it, regardless of the form.

**WILLIAM YOUNG J:**

You would normally expect a covenant like this to be in the nature of a deed because it probably wouldn't be supported by consideration, I guess. The grantor is giving something away and they're usually not getting anything back in return. So that might explain the language, but where there is consideration, why would it need to be a deed?

**MR CAMPBELL QC:**

As between the parties it wouldn't have to be.

**WILLIAM YOUNG J:**

Yes, but if it was valid as between the parties why would it need to be a deed to be valid against third parties if it's notified? I mean, what gives it – the policy reason why it should bind a third party because it's notified. I would have thought it would be a matter of indifference to the third party as to the formalities by which the obligation that was originally created, providing such an obligation was created.

**MR CAMPBELL QC:**

Yes. If I've understood your question correctly, Your Honour, I think the answer I'd give is that a covenant in gross, whether it's by deed or by contract, simply doesn't bind third parties.

**WILLIAM YOUNG J:**

Yes, but what I'm really saying is that the language that perhaps is indicative of a deed is possibly explicable on the basis that in most cases a QEII covenant will be by deed, will have to be by the grantor is not receiving consideration. Otherwise it wouldn't be effective. But what I'm saying here is that's not so obviously applicable because in this case there was consideration and therefore why should a document that is effected legally

just as effective as a deed would have been not have the consequences provided for in the Act if it is notified?

**MR CAMPBELL QC:**
Because the Act itself –

**WILLIAM YOUNG J:**
You say just because, just because there's got to be a deed.

**MR CAMPBELL QC:**
No, Your Honour. I don't say just because.

**ELIAS CJ:**
Well, it's a legislative because.

**WILLIAM YOUNG J:**
Yes, just because the statute requires it. That's what you're saying. There isn't really a policy reason. It is just – in that sense it's a just because.

**MR CAMPBELL QC:**
No. With respect, it's a little more than that. Some statutes say deal with as the subject matter transactions that are perfectly valid and effective under the general law and along comes Parliament and says, well, we only want you to be able to do that if you comply with the particular requirement. Chattels transfer legislation, for instance, and the PPSA.

Depending upon what the statute says, if you fail to comply with the requirement, the transaction itself will still be valid and effective under the general law. The QEII Act is not that sort of statute. It is instead enabling legislation. It's allowing people to do something which they couldn't do under the general law, namely, make covenants in gross to bind subsequent owners.

**WILLIAM YOUNG J:**

And if the statute had explicitly said it must be by deed, then that would be fine but you're saying that we should effectively imply into the language used and looking at the context, including the context provided by the Property Law Act, say, well, it's implicit in the statute the covenant has to be effected by deed. The statute doesn't say that.

**MR CAMPBELL QC:**

Of course, my submissions don't address that point at all, and I'm sorry to repeat myself.

**WILLIAM YOUNG J:**

No, no, I understand that.

**GLAZEBROOK J:**

It may be we do need some assistance on that and it may be on both of the points that you weren't prepared to deal with that we might have to give you some extra time to put in some written submissions.

**MR CAMPBELL QC:**

Yes. I'll want some clarity on that in due course as to what those questions are. I say that with respect and so I don't forget to make that clear at the appropriate time. But …

**GLAZEBROOK J:**

I think the question Justice Young is putting to you is why, if it is valid between the parties, does it have to be by deed to be a QEII covenant?

**MR CAMPBELL QC:**

There are actually –

**GLAZEBROOK J:**

Valid between the parties and notified.

**MR CAMPBELL QC:**
There are, as I understand it, two questions that have been raised.

**GLAZEBROOK J:**
The first question was my earlier question, which we were discussing, that you said –

**MR CAMPBELL QC:**
Sorry, Your Honour, not that one. I meant just in the past few minutes. There's one question which is whether the QEII Act requires covenants to be by deed, and Justice Young raised that. The second is if it's not by deed, if that requirement hasn't been complied with, why doesn't it just bind third parties anyway, and I think you asked that as well, Justice Young.

**ELIAS CJ:**
On notification.

**MR CAMPBELL QC:**
On notification, yes.

So the second question is addressed in my submissions quite briefly because the Court of Appeal accepted the view that if the covenant was not in the form of a deed, then it was ineffective against third parties unless notification cured the general law and validity. So I've addressed that at paragraph 49 and 50. As I say quite briefly, the answer in summary is that – to go back to the contrast I was drawing earlier with, say, the PPSA and that sort of legislation which adds requirements to transactions that are already effective – the QEII Act is not that sort of legislation. It's what I've described as enabling legislation. It's allowing somebody to do something that would be ineffective under the general law. In order to take advantage of that enabling provision, one has to comply with the requirements. Otherwise you just default back to the –

**ELIAS CJ:**

Where do we find the requirements you're referring to?

**MR CAMPBELL QC:**

The requirement that the covenant be in the deed?

**ELIAS CJ:**

Yes.

**MR CAMPBELL QC:**

That is something that I made submissions to the Court of Appeal on and I think I do have to reserve my position to address you separately on that, because that wasn't challenged.

**ELIAS CJ:**

Yes. Sorry, I had assumed –

**GLAZEBROOK J:**

My question was, is it still a deed even though the third covenant wasn't validly executed, and I think you were going to try and deal with that as well. But it might be we need to give you some time.

**MR CAMPBELL QC:**

Yes, I understand that's a related but different question.

**GLAZEBROOK J:**

Yes, exactly.

**ELIAS CJ:**

It may be convenient to take the adjournment now. We'll take 15 minutes.

**COURT ADJOURNS 11.28 AM**

**COURT RESUMES 11.43 AM**

**MR CAMPBELL QC:**
Your Honours, if I can just start with a qualification or clarification for which I'm grateful to Mr McCartney for raising, and that's in respect of the questions largely from Justice Glazebrook about whether the transaction would have been binding against Mr Russell, and I repeatedly said yes, it would have as a matter of contract.

The qualification is that the very final version, of course, involved replacing an existing third schedule with a new one, and that's an exemplar of a situation where there's no consideration whatsoever. The third schedule is much worse for Mr Russell than the previous one.

The easiest way of seeing the comparison – I'm not going to take you through it, but I'll give you the reference. It's volume C1, page 590. That's the letter from the Trust sending the amended version saying they've decided to alter the third schedule in an attempt to meet your future needs. They enclose – if you keep turning the pages – the second version of the covenant until you come to page 594. You'll see the third schedule, and it's not initialled because the Trust basically put that in there as being the intended new third schedule and their covering letter makes clear that they're also enclosing the old third schedule with the line through it and that's at page 597. So that's a very easy way to see the difference between the two.

So I should clarify that in our submission the Trust would have had a very difficult time enforcing that amendment as a matter of contract law against Mr Russell, because they didn't provide any consideration for that change.

**WILLIAM YOUNG J:**
That's just a different deal, though, isn't it? Isn't it a different deal? I mean, if you change a contract then there's a surrender of contractual rights and an obtaining of new contractual rights. Isn't that consideration without really acquiring a careful balance of where the advantage lies?

**MR CAMPBELL QC:**

Well, in my submission it's pretty clear that there's no value coming to Mr Russell. Your Honour, this is not a point that has to be finally decided by this Court. It's not been an issue. It's really, I suppose, background to the questions before the Court as to the extent to which the transaction might have been binding as a matter of contract law between the Trust and Mr Russell.

**GLAZEBROOK J:**

It may not be, depending upon the view we take of the QEII Act, though.

**WILLIAM YOUNG J:**

If he can build a building on any part of the property instead of only within the defined management area, isn't he better off?

**MR CAMPBELL QC:**

Well, under the previous schedule he could have built more than one building subject to district council requirements.

**GLAZEBROOK J:**

But only within the defined management area.

**MR CAMPBELL QC:**

Yes.

**WILLIAM YOUNG J:**

Yes. Whereas now it can go anywhere.

**ELIAS CJ:**

Well, maybe.

**MR CAMPBELL QC:**

There is that difference.

**O'REGAN J:**
But your point that the covenant would have been binding between Mr Russell and the Trust independently of the QEII Act if it had been a contract. The qualification you're saying now is but only if the contract had been supported by a consideration so under contract law it was binding. That's what you're saying.

**MR CAMPBELL QC:**
Yes, that's all I'm saying, Sir, absolutely.

Now, if I can return to the submissions on issue 2, so before the break I dealt very briefly – but I may have to expand on it in subsequent submissions – the point that this is enabling legislation so the consequence of not following the legislative requirements is that it doesn't bind third parties. So the question is whether notification cures that. My written submissions on this –

**ELIAS CJ:**
Sorry, and the legislation not followed is what?

**MR CAMPBELL QC:**
The QEII Act.

**ELIAS CJ:**
Not followed in what respect?

**MR CAMPBELL QC:**
The deed requirements of the – well, it's the QEII Act and the then Property Law Act 1952. So the requirements of those Acts are not complied with.

So I've provided fairly extensive written submissions on this particular point, the effect of notification and whether – as the Court of Appeal held – it's the same with registration. I will try and deal with them reasonably quickly given the time, but again, please interrupt as you see fit.

So the starting point is the provisions of the – well, overall we say that the Land Transfer Act itself has always made a distinction between registration and other types of entry such as notification. That distinction is within the Act itself, and the indefeasibility provisions of that Act make clear that they're engaged only by registration, not by notification.

So mere notification under the Act doesn't attract indefeasibility, and we say this is reinforced by the provisions of the QEII Act itself, other provisions of the Land Transfer Act, the Reserves Act 1977, which we refer to because that was passed at basically the same time as the QEII Act, adopted the same wording as we find in section 22 of the QEII Act, and the Reserve Act itself undoubtedly uses registration and notification to mean different things because the Act uses those different terms in the same legislation to relate to different matters. We say also that –

**ELIAS CJ:**
But I must say I have some difficulty with the concepts here because if you – well, why do you need indefeasibility? If you encumber the title – if your covenant encumbers the title as is provided for by the legislation, well, who cares about section 62?

**MR CAMPBELL QC:**
Because it depends on the extent to which – or the way in which it encumbers the title. So, for instance, the very idea of immediate indefeasibility, if I can use that term, under the Land Transfer Act, is recognised in cases like *Frazer v Walker* [1967] NZLR 1069, [1967] 1 AC 569, is that it cures the invalidity of an instrument once it is registered under the Act, subject to questions such as fraud and *in personam* exceptions and so on. So the question is whether notification –

**ELIAS CJ:**
Well, that's fairly loose language you're using there after reminding us – quite rightly – that you should stick with the statutory language. It cures invalidity.

**MR CAMPBELL QC:**
Well, that is the effect of the contest in *Frazer v Walker* was –

**ELIAS CJ:**
Well, that was invalidity in the registration.

**MR CAMPBELL QC:**
Invalidity in the instrument. The mortgage itself had no effect under the general law because it was forged.

**ELIAS CJ:**
Yes.

**MR CAMPBELL QC:**
So the question in terms of section – in terms of the Act itself is when section 62 refers to the registered proprietor's estate being subject to interest that is notified under the register. Does – is the registered proprietor nonetheless entitled to say, well, that interest may well have been notified but it's still invalid because it's invalid under the general law and notification doesn't affect that position. It's undoubtedly the case that, for instance, notification of covenants under the Property Law Act does not render an invalid covenant valid.

One of the points of registration is to allow the person who has registered the instrument – and I use "registered" carefully – to enjoy the protection that's extended by section 62. *Frazer v Walker* and many other cases confirm that. The Land Transfer Act is very careful in referring to registration and the "indefeasibility" provisions of that Act, refer to registration. They do not refer to notification.

So I start first with the QEII Act itself, section 22(6) and (7), so the first thing that those provisions do is reverse the general law position that a covenant in gross cannot or doesn't run with the servient land. If we didn't have that

provision, we wouldn't be here. It simply wouldn't – the covenant simply wouldn't bind successors in title.

Then subsection (6) goes on to say the covenant – an open space covenant shall be deemed to be an interest in land for the purposes of the Land Transfer Act. That doesn't tell us anything about whether the covenant enjoys the protection confers by section 62 and the other indefeasibility provisions of that Act, and that's because the Act itself – the Land Transfer Act – doesn't confer those protections on every interest in land, only on interests that are registered. Section 22(6) doesn't deem an open space covenant to be a registered interest under the Land Transfer Act. All it does is allow notification of the covenant.

The point of notification is to allow the registered proprietors, the owner's estate, to be qualified by that covenant to the extent that the covenant is valid and effective, and that's precisely –

**GLAZEBROOK J:**
Where do you get that from the wording of section 62?

**MR CAMPBELL QC:**
The fact that the notified covenant operates – qualified the registered proprietor's estate.

**GLAZEBROOK J:**
Well, there it clearly does qualify but where do you get that it has to be a valid covenant?

**MR CAMPBELL QC:**
By looking –

**GLAZEBROOK J:**
Is it just because you say it's not an estate or interest unless you say it comes within the QEII? Is that the argument?

**ELIAS CJ:**

No, the argument is that in contradistinction to registration, which you say confers a halo of validity, there's no such equivalent for notification.

**GLAZEBROOK J:**

Yes. I'm just wondering where that is in the statute and in section 62, that's all. That was my question.

**ELIAS CJ:**

Well, that's the big question about *Frazer v Walker*, really.

**MR CAMPBELL QC:**

Yes. Well, I think, Your Honour, the easiest way to answer – well, one way of answering that is to apply section 62 and the other indefeasibility provisions of the Land Transfer Act from the perspective of the Trust having a notified covenant and ask whether the Trust's notified covenant – the fact that the Trust has notified the covenant on the title allows it to take advantage of the protection afforded by section 62. Section 62 says the registered proprietor of land or of any estate or interest in land and so –

**GLAZEBROOK J:**

But they hold the subject same to such encumbrances such as may be notified on the folium of the register. This is notified on the folium of the register.

**MR CAMPBELL QC:**

Yes, but section 62 is not saying that the – is not giving any effect or saying anything about the substantive effect or validity of that notified interest. That –

**GLAZEBROOK J:**

Well, that's the same about anything, isn't it? So where does the …

**MR CAMPBELL QC:**

Your Honour, if one thinks, for instance, of a mortgage that is registered against an owner's title, the mortgagee itself has a registered interest in the land. So they enjoy the benefit of the opening words of section 62. Their mortgage is an estate or interest that is – that they hold subject to any other interest that are notified against that mortgage. So one has to apply section 62 positively to any particular interest, estate.

**GLAZEBROOK J:**

Well, the argument is it's not an estate or interest in land unless it comes under the QEII Act. It comes down to that again. Is that right? Because the QEII Act says it is an interest in land, although under general law it wouldn't be.

**MR CAMPBELL QC:**

Yes, but it is more than that, Your Honour, because the Court of Appeal's approach is that even if there is a completely ineffective covenant entered into by the Trust, as soon as it's notified on the title, whatever defects there might have been in that covenant are cured by the notification. The only way of achieving that result is by assuming that notification is the same as registration so that the Trust or any other person who has a notified covenant, for instance, under the Property Law Act enjoys the protection conferred by section 62, or by the other indefeasibility provisions of the Act. But all of those provisions only confer the protection on somebody who's got a registered estate or interest, and the covenant is not registered.

**GLAZEBROOK J:**

Where does it say so? You just get it from the opening words of section 62, do you?

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

So you can have a notified interest but if you're not a registered proprietor it doesn't count, but that can't be right anyway, but you're never a registered proprietor in terms of just a notified covenant.

**MR CAMPBELL QC:**

That's correct, but that is precisely the position –

**GLAZEBROOK J:**

Well, no, but when you look at the words, the registered proprietor holds it subject to anything that's notified.

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

And even if it's a valid covenant you're never going to be able to register it under the Land Transfer Act, so you never come under the words because you can never register it because it can only be notified. So the argument that you say applies to mortgages doesn't apply to these covenants, even if they're valid.

**MR CAMPBELL QC:**

If the covenant is valid, whether it's a restrictive covenant that's been notified under the Property Law Act or an open space covenant that's been validly entered into, and it's notified on the title, then it is going to qualify the registered proprietor's estate or interest to the extent of the effect of that covenant. If the covenant itself isn't valid for whatever reason, notification doesn't cure that. That's the position that's always applied under the Property Law Act which provided for notification well before the QEII Act was enacted. That's the position that commentators on the Property Law Act viewed the effect of notification as being and I've referred to that extensively in my submissions. That's consistent with the distinction that legislation has long drawn between registration on the one hand and notification on the other.

**ELIAS CJ:**

Well, is there registration except of registered proprietors? So you'd have to use the two concepts, wouldn't you, in an Act which provides for notification? Sorry, I probably didn't put that very clearly.

**MR CAMPBELL QC:**

Somebody who has a registered mortgage is a registered proprietor of the mortgage.

**ELIAS CJ:**

Yes, exactly. I think this is just another way of saying what Justice Glazebrook is saying, that there'd never be any – that a covenant could never obtain any recognition – I'm trying to use a neutral term – under the Act. I suppose you say that it's only the – the only thing that it does is give notice.

**MR CAMPBELL QC:**

Yes, and therefore qualifies the registered proprietor's estate or interest to the extent to which –

**ELIAS CJ:**

Yes. Well, it does do that, though, as well. It does both, doesn't it? It gives notice to all the world but it also, as section 62, the words allow, it does qualify the registered proprietor's estate.

**MR CAMPBELL QC:**

Yes. Maybe if I gave an example of a covenant in gross that wasn't a covenant under the QEII Act.

**ELIAS CJ:**

No, no, sorry. I'm just thinking about the language here. I'm just wondering whether the commentators are refining too much on these two terms. They're just used where they're appropriate, aren't they? If you have a registered

proprietor you talk about registration, but there's provision for notification. It is notification on the folium of the register.

**GLAZEBROOK J:**

And you can only notify the things you're allowed to notify under the Act, or under any other Act.

**ELIAS CJ:**

Yes, yes. I'm just not sure that the language takes you very far, or as far as the – and I accept that the texts do make a big point, in some of the cases, about a fundamental difference between registration and notification. But I'm still grasping for what it is, in effect.

**MR CAMPBELL QC:**

Well, I think it is probably put most clearly by – or was by Hinde, McMorland and Sim in their first text, which I've quoted at paragraph 70. The essence of the section is that it makes provision for notification only. This is referring to the Property Law Act provision which allows certain covenants to be notified. It is not registration and none of the consequences of registration flow from notification.

**ELIAS CJ:**

Well, that's what I don't understand. I just don't understand, really, what that means.

**GLAZEBROOK J:**

Especially if you look at the wording of section 62, which just talks about notification.

**ELIAS CJ:**

And accepts that notification qualifies the interest in land, the estate.

**MR CAMPBELL QC:**

Well, there is not only that quote but I think it is put elsewhere.

**ELIAS CJ:**

I mean, putting it another way I don't see why notification entered on the register doesn't register that notification. It just seems to me that the statute uses the apt term, but not necessarily in any technical sense.

**MR CAMPBELL QC:**

Which statute, Your Honour?

**ELIAS CJ:**

The – I'm talking about the Land Transfer Act.

**MR CAMPBELL QC:**

Well, the Land Transfer Act quite carefully uses the word "registration" in a number of provisions, and uses a different term –

**ELIAS CJ:**

Well, when you say "carefully" it just may be the appropriate terminology for it to be used, but I would have thought that in general-speak something that is notified and entered on the register is registered.

**MR CAMPBELL QC:**

Well, I've canvassed in my written submissions the relevant provisions of the Land Transfer Act that make this distinction and which confirm – gives various effects –

**ELIAS CJ:**

Well, that adopt the two terms, yes.

**MR CAMPBELL QC:**

-to registration but never say that the effect is going to be given by a notification.

**O'REGAN J:**

Could I just ask you another question about section 22 of the QEII Act? The section you took us to is section 22(7), which talks about notifying but the previous subsection talks about the covenant running with the land, and that doesn't seem to be conditional on the notification taking place, does it? It just says "an open space covenant runs with the land".

**MR CAMPBELL QC:**

Yes, Your Honour. I've tried to address that.

**WILLIAM YOUNG J:**

It would probably be subject to indefeasibility unless notified under section 62.

**ELIAS CJ:**

Subject to defeasibility.

**WILLIAM YOUNG J:**

Well, it would be subject – sorry, if not, yes, if not notified then a registered title would probably – a registered proprietor would take free of it.

**ELIAS CJ:**

Yes.

**MR CAMPBELL QC:**

Yes, and that's precisely –

**ELIAS CJ:**

But it doesn't mean to say that it's created by notification/registration.

**O'REGAN J:**

But this is a later statute than the Land Transfer Act 1952, and it just says it runs with the land.

**MR CAMPBELL QC:**

Yes. That might give rise to questions about the extent to which one might override the other, but in my submission it would have to be much clearer than that and the provision for notification suggests that consistently with the prior scheme under the Property Law Act 1952 that the point was that although there are slight differences between the two approaches the point was that as was expressed by, again, Hinde, McMorland and Sim back in 1978 – and I've quoted this at paragraph 56 – they expressed the purpose of notification in exactly the terms that Justice Young just did. The point of notification is to thereby qualify the title. If it's not notified, there's no qualification to the registered estate.

**O'REGAN J:**

But that means it doesn't run with the land, completely contrary to what section 22(6) says.

**MR CAMPBELL QC:**

But, Your Honour, it's true that, say restricted covenants run with land in equity and have done since sometime in the 19th century so long as notice is given, but under the Land Transfer Act if there's no notification of the restrictive covenant on the register and the new owner has some other notice of the restrictive covenant, section 62 is going to avail the new owner, subject to questions of fraud. So the mere fact that a covenant may –

**ELIAS CJ:**

But if there's actual notice – yes, okay. It does seem to me that this connection between subsection (6) and (7) may indicate that the benefit obtained by notification is indefeasibility in relation to subsequent interests in land, in which case, you know, if that's right, if you have a provision that it runs with and binds the land, but you don't – but there is a requirement or there is an indication that you can notify it and have it entered, then the only purpose of that would be to secure indefeasibility vis-à-vis later registered interests, wouldn't it?

**MR CAMPBELL QC:**

No, Your Honour. In my submission, and I address essentially that question at paragraphs 56 and 57, the purpose of notification is – as the term "notification" suggests – simply to give notice of the covenant.

**ELIAS CJ:**

Well, what's the effect? The effect must be that you have priority over subsequently registered interests.

**MR CAMPBELL QC:**

Yes.

**ELIAS CJ:**

And if that's so, what's the difference between notification and registration?

**MR CAMPBELL QC:**

The difference is – and I explore this again in paragraphs 56 and 57 – I think Your Honour asked what's the point? The point is to engage the qualifications set out in section 62 that the registered proprietor's estate is subject to notifications on the register. But that provision doesn't tell you what the effect of that notified covenant itself is, and it does not say that anything that's notified on the register becomes a registered estate or interest so that it enjoys –

**ELIAS CJ:**

Does it prevail over subsequent registered interests?

**MR CAMPBELL QC:**

To the extent that it is a valid covenant, yes.

**ELIAS CJ:**

Well, then, it just does seem to me that section 62 applies whether it's a notification or a registration.

**WILLIAM YOUNG J:**

It can apply, I suppose – you'd probably say that it applies because the benefits of section 62 are always subject to interests that are notified. So later purchasers are stuck with the notified.

**ELIAS CJ:**

Yes, because of the notice.

**WILLIAM YOUNG J:**

Because it's a carve-out from section 62, as it were.

**MR CAMPBELL QC:**

Yes. With respect to some of the propositions that have been put, they're completely contrary to the way in which – well, the suggestion seems to me that this would be an absurd scheme to adopt, to have notification of covenants which qualify the registered proprietor's title without at the same time conferring indefeasibility on those notified covenants, that this is somehow an extraordinary distinction to make. But it's the very distinction that the Property Law Act has made since it allowed restrictive covenants and then positive covenants to be notified.

**GLAZEBROOK J:**

So why do you say the Property Law Act has allowed that?

**MR CAMPBELL QC:**

Well, for one thing the Property Law Act explicitly says that notification doesn't give the covenant any greater validity than it otherwise would have. I've addressed this at – and that's the way in which the Property Law Act has always been applied.

**ELIAS CJ:**

So where do we find the provision in the Property Law Act in the materials that we have? Do we have it? Because we've just been looking at section 62.

**MR CAMPBELL QC:**

The provision itself – the 1952 Act is at tab 8 of volume 1 of the appellant's authorities, section 126, which is on page 37 of the bundle. If you turn the page, in the 1980s section 126 was replaced by section 126A. So starting with 126, where a restriction arising under covenant or otherwise as to the user of any land, the benefit of which is intended to be annexed to other land – that means that covenants in gross don't count – is contained in an instrument coming into operation after the commencement of this Act. Firstly, the DLR shall have power to enter in the appropriate folium of the register book a notification of the restriction and a notification of any instrument.

So paragraph B and as I explain in the written submissions, we say subparagraph B is just there for the avoidance of doubt and that's exactly how it is framed in later legislation, and notification in the register book of any such restriction shall not give the restriction any greater operation than it has under the instrument creating it.

So the idea is if the covenant that is notified is invalid because let's say it's a forgery.

**ELIAS CJ:**

Sorry, you get this from any greater operation, isn't that the scope of the covenant that's being referred to?

**MR CAMPBELL QC:**

No. It's hard to imagine how notification could give a covenant a greater scope than it already has.

**ELIAS CJ:**

Well, you say it's for the avoidance of doubt but you're pinning – you're saying this is all about validity, is it?

**MR CAMPBELL QC:**

Yes, well, validity is really a subset of operation. If the covenant is not operative against another party because it's invalid for some reason, then it's not operative.

**ELIAS CJ:**

It's a very strange way to put it, but …

**GLAZEBROOK J:**

And you say it has direct reference to QEII covenants?

**MR CAMPBELL QC:**

No, it doesn't have – well, not direct operation, if that what's – I mean, that's not applicable to QEII covenants. The argument is that the legislature consistently with quite a number of other pieces of legislation decided under the QEII Act to allow for notification, but not registration, and that way was making a deliberate distinction. It wasn't just some sort of slip of the tongue.

**GLAZEBROOK J:**

And the distinction was, is, that section 62 doesn't confer indefeasibility, you say, or doesn't qualify the title if it's invalid, which is in line which what's said in section 126. Is that …

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

Even though it's not said in the QEII Act?

**MR CAMPBELL QC:**

Yes, and I explore the reasons for the – that we don't have an avoidance of doubt provision in the QEII Act at paragraph 70 and that, essentially, is because there's a slight difference between the QEII Act and the Reserves Act and the Historic Places Trust Act and the Forests Act, all of which allow

notification rather than registration, and on the other hand the Property Law Act. It's a very slight difference, but the Property Law Act, as I explain in paragraph 70, requires a notification in order for the covenant to be an interest for the purpose of the Land Transfer Act. Because notification has that constitutive effect under the PLA, I expect the legislature wanted to make clear that that was the only effect that it had.

If I can dwell on some of those other pieces of legislation which, in our submission, adopt exactly the same scheme as the QEII Act, I note that the Reserves Act draws a – in one part, allows certain covenants to be registered and in another part allows certain – well, I should say instruments rather than covenants – allows certain other instruments merely to be notified. So the idea that the legislature didn't intend a difference between those two notions is, in my submission, a very difficult one to advance.

Likewise in the Forests Act 1949, which I've referred to at section – sorry, paragraph 67B, that allows the creation of sustainable forestry management plans and section 67K allows the DLR to enter a notification of such plans. The very same Act –

**ELIAS CJ:**

Sorry, when you're talking about – I haven't looked at the Historic Places Trust Act – these examples that you're giving, but you mention that the 1980 Act provided for notification but its replacement provides for registration, is that with different effect?

**MR CAMPBELL QC:**

Well, I think the way in which the provisions are set out might be slightly different. But it otherwise –

**ELIAS CJ:**

Well, I'm just wondering if there's any substantive change beyond the language. You're making the point that they've used "notification" in one and

they've used "registration" in another. It would assist your argument, I would have thought, if there was a material difference in effect.

**MR CAMPBELL QC:**
Yes. I'm afraid, Your Honour, I would have to refresh my memory but in my submission the fact that there has been a change like that tends to reinforce the difference rather than suggest they're exactly the same thing.

**ELIAS CJ:**
If it had a different consequence, that might well be so.

**MR CAMPBELL QC:**
But the point is equally applicable – well, it's even stronger when a single piece of legislation such as the Reserves Act or the Forests Act allows notification at one point and registration at another.

Could I just add one notation to paragraph 67B where I'm referring to the Forests Act? I don't think I need to hand it up, but in the very same Act which allows for notification of forestry management plans section 67Y onwards allows for the creation of forestry sink covenants and section 67ZD allows for those covenants to be not notified but registered, and indeed you see an example of that on the very title that we're dealing with here, because after Green Growth acquired the land they registered a permanent forestry covenant on the land. You'll see that on the title. It covers a majority of the land but not all of it.

So there's another piece of legislation which is dealing with, on the one hand, one type of instrument allows notification, on the other hand allows for other covenants to be registered and that – the contrast that's within that legislation itself supports the thesis that's put forward in my written submissions that the rationale for the distinction that we see in these pieces of legislation may well be that a lot of these public interest or conservation focus covenants are volunteered. Consideration is not provided for them, and we see that in the Forests Act with a sustainable forestry management plan. It's not a –

**ELIAS CJ:**

But why would that affect a choice between notification and registration? It might affect how you go about entering into the covenant, whether it would have to be by deed or not. But why would it affect the choice of language between registration and notification?

**MR CAMPBELL QC:**

Because the legislature might have thought that if somebody like the Trust was effectively being given something in the way, for instance, of an open space covenant or a heritage covenant under the old legislation, that there was no need to – and it was not appropriate to confer indefeasibility on the covenant for two reasons. One, the Trust or the Historic Places Trust or whoever's getting the benefit of the –

**ELIAS CJ:**

Sorry, how would it be defeated?

**MR CAMPBELL QC:**

How would what be defeated?

**ELIAS CJ:**

The interest.

**GLAZEBROOK J:**

It does qualify under section 62 the registered proprietor's land, if it's notified.

**MR CAMPBELL QC:**

Yes.

**ELIAS CJ:**

So how would that qualification –

**GLAZEBROOK J:**

And if you are relying on the register and you are wanting to buy something, you would know and therefore adjust your price accordingly that it was incumbent by a particular title, a particular instrument, because it was on the title.

**MR CAMPBELL QC:**

Your Honour, I'm simply focusing on the original transaction that gives rise to whatever covenant it might be and I'm responding to the Chief Justice's question about why the legislature would draw a distinction between some –

**GLAZEBROOK J:**

Well, it draws a distinction because some of them aren't interests in land which couldn't be registered, so they can only be notified. But does that mean that some of those covenants aren't specific interests in land, are they, so they can only be notified. This wouldn't be an interest in land if it didn't say it was.

**MR CAMPBELL QC:**

Most of the legislation – perhaps all of it that I've referred to – has a very similar scheme to the QEII Act.

**GLAZEBROOK J:**

Well, that's right because it declares it to be an interest in land but otherwise it would not be an interest in land. In the Property Law Act, it's only notification that creates it as an interest in land under some of these other Acts. They're created as being an interest in land by being created in the first place.

**MR CAMPBELL QC:**

Yes. Well, I address the rationale at paragraph 81, which is in my submission essentially that unlike most other interests such as mortgages, leases, easements, and the like, these covenants are never going to be transferred. They're never going to be sold. The Trust is not in the business of buying and selling open space covenants. So one of the purposes of the Land Transfer

Act is to allow transfers of interest to be made easier and to be protected. That rationale does not apply here.

Another rationale behind indefeasibility under the Land Transfer Act is to protect those who have given value, whether it's a purchaser or a mortgagee. Whereas here, generally speaking the recipient of these public services covenants or conservation covenants are not giving value.

**WILLIAM YOUNG J:**
Just remind me how restrictive covenants are dealt with on the register. Are they notified or registered?

**MR CAMPBELL QC:**
Notified.

**WILLIAM YOUNG J:**
But they can be transferred?

**MR CAMPBELL QC:**
Yes.

**WILLIAM YOUNG J:**
When they're transferred with the land.

**MR CAMPBELL QC:**
Your Honour, the submission at paragraph 81 is identifying that there are quite a number of legislative schemes that allow the creation of what I've called conservation or public interest covenants.

**WILLIAM YOUNG J:**
Yes, but for the purpose of section 62, it does apply, would apply, to a restrictive covenant, the notification. I mean, I understand the argument you're making that the notifications might be thought to be best suited for what are restrictions on the use of land, restrictions that in the ordinary course of

events aren't going to be the subject of separate trading, and they don't need indefeasibility of title for that reason. So that's really what you're saying, isn't it?

**MR CAMPBELL QC:**
It's partly that and that value –

**WILLIAM YOUNG J:**
The issue doesn't really arise. But I'm just wondering about restrictive covenants.

**MR CAMPBELL QC:**
The extent to which they might be traded?

**WILLIAM YOUNG J:**
Well, they were traded when the dominant tenement is traded.

**MR CAMPBELL QC:**
That's true of that particular scheme.

**WILLIAM YOUNG J:**
It may be that it's just not a completely symmetrical statutory treatment of these ideas.

**MR CAMPBELL QC:**
But it is largely correct as far as conservation-focused covenants are concerned, which date – the value has not been given, and the Forestry Act provides a nice contrast there between management plans – you're not getting paid to provide one of those – and permanent forest sink covenants where you do get a quid pro quo through the Emissions Trading Scheme, carbon credits. So that may be why under that particular piece of legislation the legislature has thought it appropriate to confer indefeasibility through registration on those latter covenants, but not later management plans.

**GLAZEBROOK J:**

Effectively, then, anything that's notified, the zillionth purchaser can go back and say, oh, but it wasn't a valid covenant, despite it being notified on the title, and despite section 62 saying notification qualifies the registered proprietor's interest.

**MR CAMPBELL QC:**

Yes, and an example of that –

**GLAZEBROOK J:**

But why? I mean, the PLA Act says that explicitly, perhaps, but the others don't, do they?

**MR CAMPBELL QC:**

Well, we're dealing – to give one example, on the Court of Appeal's approach and the Trust's approach, if an imposter entered into a covenant with the Trust and the Trust notified it on the title and the registered proprietor had had no dealing whatsoever with that, then just like *Frazer v Walker* and the forged mortgage, the covenant would be binding on that registered proprietor.

**GLAZEBROOK J:**

But that would be fraud on that registered proprietor, wouldn't it?

**MR CAMPBELL QC:**

No, it would not be. Not if – only if the Trust was involved in it. That seems peculiar, with respect, because the Trust is not given any value, which goes back to my submission as to the possible rationale, and necessarily – I'm only saying it's a possible rationale because there's no legislative material that gives a clue as to why notification is sometimes used as opposed to registration.

**ELIAS CJ:**

This is a very elaborate construct, it seems to me, and I simply do not understand why if you accept that notification qualifies title, effectively that isn't indefeasibility in terms of section 62.

**MR CAMPBELL QC:**

Because section 62 does not, in its express terms, purport to protect the notified interest holder against all other claims.

**ELIAS CJ:**

Well, it doesn't explicitly protect the registered proprietor. It's only subsequent encumbrances et cetera, which I would have thought notification protected against, too. Anyway, I've probably exhausted the topic.

**MR CAMPBELL QC:**

Well, section 62 does explicitly protect the estate or interest of the registered proprietor. That's the entire focus of the section and of the other indefeasibility provisions.

**ELIAS CJ:**

And interests in land.

**MR CAMPBELL QC:**

The registered proprietor of estates or interests, but that's the positive conferral of protection by section 62 and the other indefeasibility provisions of the Act. They're focused and they're triggered by registration or somebody having a registered estate or interest.

**ELIAS CJ:**

Right, thank you.

**GLAZEBROOK J:**

We have to have an invalid document first so maybe we don't need to grapple with this.

**ELIAS CJ:**

Maybe Justice Young was right about order.

**MR CAMPBELL QC:**

Well, yes.

**ELIAS CJ:**

Is there anything more you want to say on this point?

**MR CAMPBELL QC:**

No, no.

So the third and final question and I'm a little anxious about time, frankly, is devoted to section 81. It is – I think it will be quicker, however, because there are two issues. One is the meaning of "wrongfully" in section 81 and limits on section 81's application, so that's a question, essentially, of law, and secondly whether the entry of the covenant was wrongfully obtained.

The submissions that we've made on that first legal question I think should be largely uncontroversial given the previous case law, except to say one thing which is to emphasise what I said at paragraph 91. This is to say that the term "wrongfully" is a plain word that should be allowed to speak for itself. It's true that sometimes it's going to be difficult to determine whether something is wrongful or not, but in our submission it simply means that an entry is wrongfully obtained where it has been obtained as a result of some wrong, and I encourage the Court not to substitute that plain language with different words.

**ELIAS CJ:**

It's not correct, or something like that.

**MR CAMPBELL QC:**

Yes. From paragraph 92 onwards, we recognise that there's a tension between section 81 and the other indefeasibility provisions. That's long been recognised as well, including by Justices Glazebrook and William Young in the *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 case, which I've referred to. So section 81 can't be invoked to impeach what would otherwise be an infeasible title under the Act.

So in my submission, the primary question is was the entry of the covenant wrongfully obtained?

Now, the trial Judge recognised that the Trust practices were unsatisfactory. Can I just take you to the way in which the second covenant appeared and you may still have it open, but again, the easiest way to look at this in a way is from page 591 of volume C1, because that's where the Trust sends the second version with the replacement page.

So the – from pages 591 to 593, that's the covenant as it appeared in its second version. Then we've got the third schedule, which is eventually signed by – sorry, witnessed, initialled by Mr Russell and by the three Trust representatives.

Over the page, page 595, that's the execution page. One peculiar aspect of this is that you'll see at the bottom that there are three signatories from the Trust saying that they have – the common seal was affixed in their presence. You will look in vain to find the common seal on that page because it's not there. It appears later on. So when you look at what's actually eventually notified, the common seal is applied at some later point.

If you turn the page, that's where Mr Porteous as the Trust manager signs the covenant as correct for the purposes of the Land Transfer Act. And then over the page is the second version of the third schedule, which had a line put through it.

I've set out the obviously unsatisfactory aspects of the way in which the Trust operated in relation to this covenant. It seemed that on many occasions the Trust simply left things blank, referred to aerial photographs which they attached to covenants later. Justice Wylie referred to that. But in my submission, the most serious aspects of the Trust's practices were the way in which it chose to simply substitute a third schedule rather than prepare a new covenant, and perhaps more importantly to then present the whole document to the DLR as if it was one original document and without recertifying it. And it wasn't as if there was some error by which – some accident on the Trust's part in doing this. They well knew that the covenant had already been certified. They understood that it hadn't – that the new third schedule hadn't been properly executed because of the lack of witnessing and I've compared in our written submissions what the Trust did with the practice required by the Land Transfer Act section 164 of which requires an endorsement that the covenant is correct for the purposes of the Act.

That's a very important provision because that means the person certifying the instrument – whatever the instrument might be – is really acting as some sort of gatekeeper. The DLR has no capacity to check whether or not instruments have been correctly executed, so section 164 has a very important gatekeeping role.

**ELIAS CJ:**
Don't take us to it, but what's the page reference for the certificate of correctness?

**O'REGAN J:**
596.

**MR CAMPBELL QC:**
596.

**ELIAS CJ:**
Thanks.

**MR CAMPBELL QC:**
And the notified covenant is exactly the same page, which is at page 424. They just swapped one page, the third schedule, for the other.

The other aspect was particularly serious, to present the covenant as if it appeared on its face to be a complete original instrument when it wasn't, and I've referred to the then regulation 12 of the Land Transfer Regulations which show the need at that point – and that was the applicable regulation at the time – to show the alteration and to have the alteration initialled or signed or witnessed. So that's all fine if it's clear from the face of it that that was has occurred, but that was never so here.

Just as an example of the consequences of that, it wasn't until this proceeding started and discovery was provided that Green Growth had any idea that there'd been this alteration. So nobody would have been any the wiser had this litigation not commenced.

Then finally at paragraph 102 I've addressed the limits on the registrar's section 81 powers and we say there are three independent reasons why those limits don't apply. I emphasise these are independent. First, although this goes back to the issue number 2, we say the Trust doesn't have an indefeasible interest because the covenant wasn't registered. The second reason, the Trust was not a purchaser. They were not providing consideration in the way that section 183, I think it is, of the Land Transfer Act, requires. The third independent reason, we say the Trust was not bona fide, because in relation to this final amendment to the covenant, we say that the Trust gave the appearance to Mr Russell of altruism. It said it was making this change in an attempt to meet your future needs. It was not in dispute at the trial that the – and Mr Parr, the Trust's representative at the time, his own evidence was that the reason for the changed schedule was because the Trust didn't want to pay for a survey. So the Trust is putting forward this altruistic reason for the amendment when, in fact, the reason is quite different and Mr Parr, who is the one who took the letter to Mr Russell so that Mr Russell could initial the

changes, didn't suggest in his evidence that he revealed the true reason for the change.

Your Honours, unless you have other questions I think it's time for me to make way for my learned friend. We may have to discuss – maybe I'll try and think over the luncheon break of the questions that need to be further addressed, though we may want to discuss that further this afternoon.

**ELIAS CJ:**
Although it may be clarified as we go on whether that's necessary.

Thank you, Mr Campbell.

**GLAZEBROOK J:**
I think it probably is necessary because if the deed is valid despite these things, I think much of this argument falls away. Or if it doesn't need to be by deed, again, much falls away.

**MR CAMPBELL QC:**
And I don't think we're going to have resolution of that this afternoon because my learned friend, despite raising various matters, doesn't address those matters.

**GLAZEBROOK J:**
No, I understand that.

**ELIAS CJ:**
Mr Fowler, I think we should probably get underway if that's all right with you.

**MR FOWLER QC:**
I'm happy to make a start, Your Honour.

**ELIAS CJ:**
Thank you.

**MR FOWLER QC:**
If I may just take a moment to assemble. Madam Registrar, I have some speaking notes.

**ELIAS CJ:**
Yes, thank you.

**MR FOWLER QC:**
If the Court pleases, I intend to address questions 1 and 2 and my learned friend Mr Collins will briefly address you on question 3.

In terms of the two questions, what I intend to do is to go directly to the matter raised by Her Honour Justice Glazebrook which is actually in terms of question 2. So can I take the Court over to that.

Can I leapfrog entirely the registration versus notification piece there at the beginning of question 2 and also the piece concerning the Land Transfer Act, and go directly to what's headed "alternatively", and can I start there, if the Court pleases, by openly and candidly acknowledging that this is not a matter that is addressed in the submissions for the respondent in argument, and doesn't appear to have been addressed in the Court of Appeal or by the Court of Appeal. But nonetheless, it does go centrally to the matters raised by His Honour Justice Young and Her Honour Justice Glazebrook, and it arises in this way. The trigger for that contest, whether one gets hung up about notification versus registration or not, is that it is said registration or this other concept of indefeasibility – whatever it is – would be curative and it's interesting that in argument that concept has been drifting into the exchanges, that it would be curative of defects in form and process, but mere notification would not. I've given you reference there to the written submissions of the appellant, and you've heard it reiterated in argument, anyway, today.

That argument assumes the absence of a valid covenant for the purposes of this notification. But in fact the submission is what was notified was a validly

executed covenant that had been invalidly amended. I'm using the word "invalidly" there advisedly because that, of course, is by reference to the requirements of the Property Law Act with what you are required to do when you are executing deeds.

So in terms of what we actually have that was notified, we have the second version and there's been no suggestion that it was invalid in terms of these form and process requirements, and I've given you there the High Court reference to where that's addressed. There was, at paragraph 39 of the High Court judgment – and I don't think we need to look at it closely – a slight question over the presence of one witness, but then there was a High Court finding subsequently at paragraph 54 that disposed of that.

The third version, the one that was notified at – we've been looking at that and spent some time on it this morning at the very beginning of volume C, that's the one that starts at C10418, is simply the second version with a replaced third schedule, i.e. the notified covenant is the validly-executed second version with an invalid amendment.

Now, there are two submissions I make, one of which is recorded here and one of which isn't, in terms of why this therefore gets over the threshold in terms of being valid under the QEII Act, and what follows.

The first is this: under section 11(1) of the Property Law Act, there is a provision the rule of law that a deed becomes invalid if there is a material alteration after its execution is abolished. So in terms of the argument or the suggestion that the whole deed drops through a black hole, version number 3 drops through a black hole is simply wrong. The notification here is of a valid deed that contains an irregularly-executed amendment. It still operates as a notification of a valid deed because it is still version 2, save for the substituted third schedule.

**WILLIAM YOUNG J:**
But what is Green Growth subject to? What is the title of Green Growth subject to? Version 2 or version …

**MR FOWLER QC:**
Is subject to, we say, the deed as actually notified on the title.

**WILLIAM YOUNG J:**
So that's version 3?

**MR FOWLER QC:**
That's version 3.

Now, I'm at what's noted there as paragraph 4.4 of the speaking notes, and at this point there is a second argument that needs to be propounded as the other reason why this deed gets over the threshold, or at least this covenant, I should say. I should use the expression covenant gets over the threshold.

The QEII legislation does not require a deed. In fact, if you word-search it, the word "deed" does not appear in the Act. All section 24(1) provides, which I think we can see in the materials at page 1 of volume 1 of the respondent's materials – you've probably got it on your screens – subsection (1) ends with the words – well, it's partway through. "The board may treat and agree with the owner or lessee." In fact, that was the subject of an explicit finding in the High Court which His Honour Justice Wylie addressed. You'll find it in volume A page 0168 at paragraph 153, where His Honour said, "First, I observe that the Queen Elizabeth the Second National Trust Act does not require that a covenant be put in place by way of deed, and that the covenant at issue in this case does not purport to be a deed. Rather, it is a statutory covenant provided for by the Act. It takes the form of and is a contract between the parties. It follows that the formalities which apply to the execution of a deed do not apply to execution of the covenant."

So where that gets us, in my submission, is this whole curative issue disappears and the covenant can be the subject of rectification in equity in the ordinary way.

Now, I'm going to move away from question 2 unless the Court has any questions and, as I said before, I wasn't proposing to deal with the head-to-head issue concerning registration and notification. That's really a reiteration of what's already been said by the Court of Appeal and is in the written submissions. So I'll turn now to question 1 which, perhaps, puts it in the natural sequence.

So in terms of question 1, what we have in terms of the first response, if you like, by the appellant, to that question is, well, section 62A protects Green Growth vis-à-vis its title, and to that the respondent has two arguments, and they're the arguments set out in italics. First one is just at the head of paragraph 2, that there's no room for section 62 and no protection derived or, as I think Your Honour the Chief Justice put it early in argument, section 62 is not engaged. Is it engaged or isn't it?

And the second argument, just to jump ahead, you'll find over the page which actually hasn't been addressed until now and is in the written submissions, is headed notification contained a self-evident gap, and therefore an equity of rectification. It might have been touched on, but I don't know that we've examined it particularly closely.

So taking that first one, that there's no room for section 62 and no protection derived, the obvious question is how much room is there for section 62 to operate here. What protection is derived? And the starting point, obviously, is section 62. I don't want to go over and over that, because the wording has been trawled quite closely. But the important wording is set out there in the note, "hold the same subject to such encumbrances, lands, estates, or interests as may be notified on the folium of the register." So that must be notice of an interest, is what we're grappling with here. The important words in section 62 are "subject to" and then, of course, from there you go to section

22(6) of the QEII legislation where you have the emphatic wording about running with the land and so on which, incidentally, is quite different in terms of its wording from the provision of section 126, I think it was, of the Property Law Act that my learned friend was directing you to in argument.

So on 4, the unrectified QEII covenant was notified on the register and Green Growth took title as registered proprietor subject to what was notified. So Green Growth's section 62 indefeasibility protection issue can only relate to the difference – if any – between what was notified and what is sought by way of rectification or, putting it another way, what was adverse.

**WILLIAM YOUNG J:**
What was your primary – what was the primary argument in the High Court, that it should be – that it should simply be construed with the protected area references deleted?

**MR FOWLER QC:**
Well, yes. Your Honour raises an interesting point. I wasn't counsel in the Hight Court, of course, but it's been pointed out to me that in fact the primary argument there was an interpretation one and a declaration was sought which His Honour determined wasn't primary.

**WILLIAM YOUNG J:**
He didn't think it would have been consistent with the intentions of the parties, but it would have presumably been that you take 2(a) – (i) away, and possibly 3.

**MR FOWLER QC:**
No, no. We'll come to that.

**WILLIAM YOUNG J:**
Well, there will be an argument about that.

**MR FOWLER QC:**

There will be an argument about that. We'll come to that and in fact it's interesting because where this is colliding, whether you're looking at it that way, whether you're comparing rectified, unrectified, or simply looking at the covenant and saying, well, what did it actually mean in terms of what was notified with the missing tooth, you come back to an interpretation, a construction issue, and that's really where we have to go with this. And that's where I've taken the argument next.

**ELIAS CJ:**

Perhaps it might be convenient to finish off, if it suits.

**MR FOWLER QC:**

Yes.

**ELIAS CJ:**

But if you're moving, really, on to a more detailed part of the argument, perhaps we should take the lunch adjournment. Thank you.

**COURT ADJOURNS 12.57 PM**

**COURT RESUMES 2.16 PM**

**MR FOWLER QC:**

If it please the Court, I had reached, I think, 6.1 of my notes where I was about to embark on the interpretation issues, so I was going to refer the Court to volume C, 0419, the covenant that actually was notified and some of these issues have already been explored at least in part already, so I won't linger on them too long, I hope, unless the Court wishes me to do so.

But there are four fundamental aspects that I've set out there at 6 that I wish to draw to the Court's attention in terms of the interpretation issues. The first one is obviously the first schedule, very self-evident. The purpose of the within written open space covenant is to achieve the following, open space

objectives to the Covenantor and the Trust, to protect and maintain open space values of the land, to protect native flora and fauna on the land, and the submission – no surprises – that in the light of that wording consent to multiple subdivision and development because, of course, that's what the case, at its heart, is about. It's going to be very challenging indeed.

The second point is an examination of the ambit of the board's power to consent and the outcome there, I submit, is very much the same. Breaking that down, looking first of all at the second schedule, first paragraph, the important point there is that that stays. That's unchanged. That remains no matter what.

**GLAZEBROOK J:**
You mean of paragraph 2?

**MR FOWLER QC:**
The very first paragraph of clause 2.

**GLAZEBROOK J:**
Yes.

**MR FOWLER QC:**
The first paragraph of clause 2 is a constant and it requires – it's got a general restriction and with the control of the opinion of the board. That, no doubt, has to be governed by the overarching first schedule.

The second point about the ambit of the board's power to consent, jumping down to clause 3, which I think might be a little bit more controversial, my submission there is that that also – well, first of all that's another constant, so we have that in all versions. My submission on that is that that still applies to clause 2 first paragraph, so the point in terms of the choke of not unreasonably withholding consent and how that applies is still going to be run through the filter of clause 2 first paragraph, because both those two paragraphs are constants.

The third point –

**WILLIAM YOUNG J:**
Except clause 2 first paragraph doesn't talk about consent or approval.

**MR FOWLER QC:**
No, Your Honour. But clause 3 is, provides the if you like control on how that is to be exercised. It must be, because if you are going to look at excising –

**WILLIAM YOUNG J:**
Well, it depends on whether you read clause 3 along with the second part of clause 2. It's unhappy drafting because different words are used, but …

**MR FOWLER QC:**
Possibly, Your Honour, but the plain words of the opening line of clause 3 in terms of clause 2 hereof. It doesn't refer to the –

**WILLIAM YOUNG J:**
The only consent required in terms of clause 2 is (a) to (i).

**MR FOWLER QC:**
Well, no, Your Honour, I would take issue with that because the first paragraph of clause 2 reads "no act or thing shall be done or placed or permitted to be done," et cetera.

**WILLIAM YOUNG J:**
I understand that, but it doesn't say anything about consent or approval. I understand there's a debate about it.

**MR FOWLER QC:**
Well, I accept it doesn't use the word "consent".

**ELIAS CJ:**
You'd usually ask.

**GLAZEBROOK J:**
Well, as it's the opinion of the board it's probably at least prudent that you ask for approval.

**WILLIAM YOUNG J:**
Or confirmation as to what their opinion is.

**GLAZEBROOK J:**
That would be an approval. It doesn't say "consent".

**MR FOWLER QC:**
Which takes me to clause 4, which hadn't been touched on previously in argument. That's an interesting one, in my submission, because although it's directed to water issues it still applies to the land which is the whole block. Multiple subdivision and development would be highly unlikely without triggering a need for written consent under clause 4, and again clause 4 is a constant. It's there throughout. So those are the reasons why in my submission the ambit of the board's power to consent doesn't really change in any way.

The third point, the bottom of the page, second schedule, clause 2, second paragraph – this is the one that we've been focusing on a lot, the one that starts "in particular". These are, on its face, specific restrictions that begins "in particular", but in my submission they self-evidently follow under the broader egis of the first paragraph. Have to, because the paragraph starts "in particular".

Non-compliance with them still requires the written consent of the board, and my submission is that probably neither the presence or absence of a defined protected area or even the whole of that second paragraph add or subject much, if anything, to the first paragraph. And I'd even go so far as to make

the submission that that might be a little bit of an understatement to say much, if anything. I make the submission that it makes effectively no difference.

**ELIAS CJ:**
So you wouldn't be contending that – you wouldn't be strenuously supporting the rectification that was made. You'd be equally happy with deletion from "in particular" to the end of I?

**MR FOWLER QC:**
Yes, Your Honour, although certainly the preferred position is the position that the High Court found of simply addressing the deletion of the protected area because, of course, on the evidence that aligns with the finding of what the common intent actually was.

So the fourth and final point on this interpretation issue – and it was touched on in prior argument; I think Her Honour Justice Glazebrook raised this – and that is that in the unrectified version the third schedule isn't orphaned. It would still be part of the covenant by reason of the reference to the schedules hereto, as His Honour Justice Young identified. And that must be given some meaning.

And also, and I think this was noted, if the first – the third schedule clause 1 refers to the land, as it does, it seems unlikely that clause 2 would have meant something different. So where that gets us to, in my submission, is that under both unrectified and rectified the prospects of a successful application for multiple subdivision and development would be highly unlikely.

The second and final broad argument under this issue on question 1 is that notification contained a self-evident gap and therefore an equity of rectification. The argument is quite simple. You start with the notified covenant itself. It contained a self-evident gap and as such Green Growth took title aware on the face of the notification of a susceptibility to an equity of rectification. That's dealt with in the judgment, I think, in the High Court at page 0160 – this is volume A – paragraph 132. That's actually partway

through that paragraph at the top of 160 where His Honour held the evidence established not only that Green Growth knew of the covenant and the restrictions contained in it but also that something was amiss with the covenant. Indeed, that was obvious from the covenant itself.

So the submission is any title Green Growth obtained had an uncertainty or a self-evident gap on the face of notification, of the notification, and section 62 cannot improve on that. Section 62 cannot improve on it.

Now, that completes what I had intended to cover in terms of question 1. Does the Court wish me to deal with the Land Transfer Act 2017? There are some interesting points there, but I'm not sure that they're entirely relevant.

**ELIAS CJ:**
Well, for myself, no but I'm not sure whether others – thank you. No.

**MR FOWLER QC:**
In that case, if the Court pleases, unless there are any questions, that's questions 1 and 2 disposed of. It would only remain for Mr Collins to address the Court briefly on question 3.

**ELIAS CJ:**
Yes, thank you.

**MR COLLINS:**
Thank you, Your Honours.

The issue on issue 3 really boils down to what we say are procedural irregularities, the procedural irregularity being primarily focused on the certificate of correctness, which my learned friend Mr Campbell points out was wrongfully provided because he says that should have been freshly signed after the new third schedule had been substituted.

The short point I want to make on that submission – and I don't wish to be glib in saying this – is so what? What is the effect of a technical irregularity? Because under section 81 the registrar has the ability to correct or cancel the offending instrument. The point made by His Honour Justice Wylie in the High Court was that would be a triumph of formalism over pragmatism.

So even if Mr – if my learned friend is correct, where does that take them? And our answer is, it's simply a technical irregularity and it would beggar belief for a registrar to remove or make void this instrument as a result of that irregularity.

My learned friend also makes the point that the Trust was not bona fide in acting on registration. But it was accepted by the High Court on the evidence that there was no lack of good faith on the Trust's part. The evidence was that Mr Russell – the late Mr Russell – was actually keen to restrict development. It was not his wish to allow for development, and I can take Your Honours to the relevant passage of the High Court judgment that expressly states that. That's at paragraph 110 tab 9.

**ELIAS CJ:**
I'm not sure we – we probably know that but I'm not sure that it's really relevant.

**MR COLLINS:**
If Your Honours accept that it's not relevant, then I'm very happy to move on.

**ELIAS CJ:**
Well, you're sort of going into the overall merits of it here, but it seems to me that the arguments addressed to us, really, are pretty specific and quite technical and that they don't go back beyond – except by way of background – to the earlier arrangements between the parties.

**MR COLLINS:**
Yes.

**GLAZEBROOK J:**

Are you saying that if it's merely a technical difficulty then it should not invalidate registration unless there was something possibly behind it to show there was something more than that? Is that the purpose of the submission that you're making?

**MR COLLINS:**

The point my learned friend has made is that there was – and he used the words "bona fide". He claims or asserts that the Trust was not bona fide in providing this document for registration. And I just want to make the short point, that is not correct. The Court found on the evidence that the Trust did act in good faith. It's simply its conveyance procedures were sloppy. That's the point. We accept that the conveyancing procedures were sloppy. We come back to my main submission of, so what? What is the remedy? In our submission, as pointed out by the High Court, it's a triumph of formalism over pragmatism if we're to remove this covenant because the certificate of correctness was signed before the third schedule was substituted and it was not replaced with a fresh certificate. That's essentially the submission.

So unless Your Honours have any further questions, that concludes the submission for the respondent.

**ELIAS CJ:**

Thank you.

Mr Fowler, I do have, actually, a question I meant to put to you. It was just concerning section 11(1) of the Property Law Act. That's the 2007 Act. Does that apply here?

**MR FOWLER QC:**

The 2007 Act is applicable, I think. That part of the Act is in force, I think.

**ELIAS CJ:**

No, I mean to this dispute.

**MR FOWLER QC:**

I'm not aware of any reason why it wouldn't be, Your Honour.

**ELIAS CJ:**

What dates are we talking about?

**MR FOWLER QC:**

Certainly the covenant itself would have been executed well before that, but the changes to the law relating to – I think it's the abolition of the rule in *Pigot's Case* (1614) 1 Co Rep 26b; 77 ER 1177 or whatever it's called runs from, presumably, the enactment of the – the commencement of the 2007 legislation, but I'd need to check that, Your Honour, and come back.

**ELIAS CJ:**

Yes. I wasn't sure whether that would be so if we're referring – I'm not sure. I have no idea. But I just wanted to know what your response was. You think the Act applies?

**MR FOWLER QC:**

Certainly that part of the Act is enforced and applies to this document. But I'll double-check that.

**ELIAS CJ:**

Yes, thank you.

**MR CAMPBELL QC:**

Firstly addressing – replying to my learned friend Mr Collins' submissions on the third question, his proposition was that there'd been merely a technical breach in relation to the certificate of correctness because the only failing was that Mr Porteous for the Trust hadn't redone the certificate of correctness after the covenant was altered. With respect, that misses the point in relation to the

certificate of correctness. It's not just that Mr Porteous didn't redo it when he should have. But contrary to my learned friend's submission, Mr Porteous never could have recertified that covenant as correct for the purposes of the Land Transfer Act.

**WILLIAM YOUNG J:**
Exactly.

**MR CAMPBELL QC:**
Exactly.

**GLAZEBROOK J:**
And that's because of the lack of witnessing, is it?

**MR CAMPBELL QC:**
Yes.

**GLAZEBROOK J:**
And that's all?

**MR CAMPBELL QC:**
Yes.

And my written submission refers to authority for the Court ordering removal of instruments where the certificate of correctness is not accurate. So this is not a matter of a triumph of form over substance. In substance, it couldn't have been – the certification could not have been made.

My learned friend Mr Fowler began, I think, by essentially submitting that much of the argument really fell away because this was simply a valid deed, namely the second version, with an invalid amendment. But I struggle, with respect, to see where that takes the Trust other than to go back to the second version of the deed. It's never been disputed that that was validly executed in accordance with the QEII Act and the Property Law Act.

The submission appears to be that the invalidity of the amendment simply doesn't matter. Now, that may lead to the question that Justice Glazebrook raised this morning that hadn't been addressed in any written submissions, which – with the Court's leave – I do seek to make submissions to after the hearing because, as the Court is probably aware – there's a procedure for giving notice of seeking to support a judgment on different grounds and the procedure is there for a number of very good reasons. It gives the Court the opportunity to determine whether or not those additional grounds are ones worthy of argument in this Court. That gives the parties the opportunity to make submissions on those points in advance of the hearing. It gives the parties in the Court an opportunity to know how much hearing time to allocate to the argument.

**ELIAS CJ:**

Well, you don't need to convince us of the desirability of it. If you're simply saying that you would like an opportunity to respond, of course we'll make that opportunity available to you.

**MR CAMPBELL QC:**

Thank you, Your Honour.

The same goes with much of my learned friend's written submissions on the first question, which are really directed to supporting the Court of Appeal's judgment on a basis that the Court didn't rely on, namely the basis that Justice Wylie relied on, and again this has not been ventilated.

**ELIAS CJ:**

But you were prepared for that, because you addressed us on it in your opening. So was that in response to the written submissions?

**MR CAMPBELL QC:**

Well, I think I glanced at it, Your Honour. My opening – well, my oral submissions largely focused on section 62.

**ELIAS CJ:**

No, but you made that very point that the basis of the argument of the respondent was effectively the reasons given by Justice Wylie, not the Court of Appeal, for its conclusion.

**MR CAMPBELL QC:**

Yes, yes.

I should add, my learned friend doesn't seem to have been articulating that in his oral submissions. A different point seems to have been made. But again, all that I would seek leave to is basically repeat the submissions that I made to the Court of Appeal because those – they're largely reflected in the Court of Appeal's judgment in relation to the – they're very much doubting that Justice Wylie was correct. Justice Wylie, you may recall, said that an *in personam* claim could be articulated so long as the registered proprietor was on notice, and the Court of Appeal in essence said, well, that seems to be inconsistent with the scheme of the Land Transfer Act, which provides explicitly that notice doesn't defeat registered estates or interests.

The Court of Appeal also pointed out that all the authorities on which Justice Wylie relied were authorities that didn't decide the point at all, and the only authority on point is an Australian case – well, there are several Australian cases, most of which are referred to by the Court of Appeal. I don't think any of them are in the bundles. The one Australian case that is in the bundle, it has the wrong report so the relevant passages are not there. So to a large extent –

**WILLIAM YOUNG J:**

I mean, I don't know if *Bunt v Hallinan* [1985] 1 NZLR 450 is still an issue as being challenged but *Bunt v Hallinan* says notice isn't fraud. *Bunt v Hallinan* …

**MR CAMPBELL QC:**

Says notice?

**WILLIAM YOUNG J:**

Is not fraud. That you can take with notice and not be fraudulent, even if you intended to disregard the interest of which you've got notice.

**MR CAMPBELL QC:**

Yes, and the Land Transfer Act is explicit on that.

**WILLIAM YOUNG J:**

So that effectively applies reasonably literally what section 62 provides.

**MR CAMPBELL QC:**

And section 183, as well.

Now, to some extent –

**GLAZEBROOK J:**

I didn't actually understand the respondent's submissions as going that far back to the High Court argument. I think they were just talking about the equity of rectification which, as I understood it, was explained in the way Mr Fowler did in the speaking notes. So I wouldn't necessarily think you need to go into great detail on that, but if it's merely providing the Court of Appeal submissions then …

**ELIAS CJ:**

So you don't want to develop it at all at the moment? You want to recast it, do you? Or – we don't really need to receive, surely, your submissions in the Court of Appeal. You might want to look at them again and summarise the points that you would make in response here after doing so, but do we really need to trawl through the submissions in the Court of Appeal?

**MR CAMPBELL QC:**

I wasn't suggesting the entirety of the submissions just on that particular point. It may be that, as Justice Glazebrook has signalled, that this is an issue that the Court itself – and my learned friend didn't progress the point in his oral notes that this is a point that the Court does not feel that it needs to hear submissions on. On the other hand, you may get to the point where you think that this is –

**ELIAS CJ:**

What is "this"? I'm getting slightly confused about what it is.

**GLAZEBROOK J:**

I think it's the issue about *in personam* claims and – is that correct?

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

The issue about *in personam* claims and whether they're limited to the original registered proprietor, or whether just in terms of rectification, which I think is what the argument of the respondents is. It can go a bit wider than that, but only if it's not adverse to the interests of the registered proprietor.

**MR CAMPBELL QC:**

If the respondent is not seeking to support the judgment on the basis that Justice Wylie articulated, then the point does not need to be taken further. It's just that that seemed to be what was hinted at in the written submissions. Not all of them, but in some of the written submissions.

**ELIAS CJ:**

Well, I think what would be sensible is to simply give you leave to file further submissions within, say, 10 days with Mr Fowler being able to respond in a like amount of time and you reflect on – because it may be that the discussion took a slightly different turn and had been anticipated, and we want to get it

right. But I don't think you need to give us material that may have been overtaken. We'd really rather you closed on the issues that are of interest to us.

**MR CAMPBELL QC:**
Yes, thank you, Your Honour.

**GLAZEBROOK J:**
There's also the deed issue. Did you want to – and whether it does need to be by deed at all.

**MR CAMPBELL QC:**
I don't want to address that this afternoon.

**GLAZEBROOK J:**
No, but that was another issue that you're going to address in the submissions afterwards, is that right?

**MR CAMPBELL QC:**
Yes. Obviously, that wasn't raised even in my learned friend's written submissions but it was in his notes.

**GLAZEBROOK J:**
No, it was raised orally.

**MR CAMPBELL QC:**
My learned friend is correct as to what Justice Wylie decided in the High Court, that the Court of Appeal decided the opposite.

**GLAZEBROOK J:**
Absolutely. So …

**MR CAMPBELL QC:**

And related to that is the effect of an amendment to a deed, where the amendment is not consistent, which Your Honour raised this morning. And again, my learned friend has orally made submissions on that and I would like the opportunity to make submissions in response to that.

**ELIAS CJ:**

Yes.

**MR CAMPBELL QC:**

There were – in relation to the rectification claim, the point made by my learned friend orally appears to be that because there was an obvious error on the face of the covenant then a rectification – an equity of rectification arises and it's available against Green Growth and that – I took a note of this – that section 62 cannot improve on that. This, with respect, wasn't explained why section 62 couldn't improve on that.

I add, moreover, and I think this was the subject of some exchanges this morning, the claim for rectification that the Trust has brought – the particular claim – is not one that appears likely or even probable on the face of the covenant. The likely claim appears to be let's fill in the blank and let's attach an aerial photograph. Instead, the Trust's claim is completely different. So in that sense, the equity of rectification might have been available against Mr Russell, who was party to the common intention, but any other person seeing the notified covenant would have no inkling that this is the type of rectification that the Trust would seek to bring.

**ELIAS CJ:**

Just on that section 62 point, and whether it improves things or not, surely in the context of the note we've been given it's simply a submission that section 62 doesn't cure uncertainties or self-evident gaps on the face of the notification. Mr Fowler, is that what – yes, thank you.

**MR CAMPBELL QC:**

Yes, but that doesn't take the Trust very far, with respect. That just means that section 62 doesn't cure the –

**ELIAS CJ:**

Bite.

**MR CAMPBELL QC:**

But the question is whether Green Growth's registered estate is subject to, vulnerable to, a claim for rectification. That's not notified.

**ELIAS CJ:**

Yes, but that's the argument you have developed. There's nothing that hasn't been exhausted on that, is there? I'm just trying to understand why you say that the suggestion that section 62 cannot improve matters is a new one.

**MR CAMPBELL QC:**

No, my point was simply to say that in my submission, my learned friend didn't explain why section 62 doesn't, cannot improve on that.

**ELIAS CJ:**

Well, it doesn't fill gaps. It doesn't remove patent uncertainty on the face of the notification. That's all it means.

**MR CAMPBELL QC:**

But it does prevent claim –

**ELIAS CJ:**

You say it prevents rectification because that is to contradict the estate, the interest.

**MR CAMPBELL QC:**

Yes. So that, it is in that sense I say that section 62 does improve on that, from Green Growth's perspective.

**ELIAS CJ:**

Yes.

**MR CAMPBELL QC:**

In my learned friend's written submissions, there was some – in support of the rectification claim there were also some new factual propositions now being advanced in support of it that go beyond what was pleaded or put or even found below and there were two aspects of this. One is at paragraph 30 of my learned friend's written submissions, the Trust asserted that what had happened here was more than mere notice. Justice Wylie's reasoning for upholding rectification was based simply on notice, not on something more than notice. At paragraph 43 of my learned friend's written submissions –

**ELIAS CJ:**

Sorry, are you addressing things in the written submissions, not necessarily developed by Mr Fowler orally?

**MR CAMPBELL QC:**

Yes, and with respect it's important that I do so, because those submissions are –

**GLAZEBROOK J:**

Well, you usually do that in your main submissions, because you usually do a reply to the written submissions, at least in your main submissions, rather than leaving it to reply.

**ELIAS CJ:**

It's all right. If you're telling us that you didn't make your response to the written submissions in your oral presentation, well, we will have to hear you on it.

**MR CAMPBELL QC:**

Yes.

**GLAZEBROOK J:**

I was just noting for the future, really, that usually you would make the reply to the written submissions when you are making submissions. It just makes it easier.

**MR CAMPBELL QC:**

Thank you, Your Honour, but I've been told different ways in which that should be done. I've sometimes been told off for trying to anticipate replies. My preference is to see how the argument is received before replying to it, because that's often the best way in which to articulate.

**ELIAS CJ:**

It's fine. We better pull out Mr Fowler's written submissions if you're going through them.

**MR CAMPBELL QC:**

Well, I think there really is two points.

**ELIAS CJ:**

Yes, that's fine.

**MR CAMPBELL QC:**

One at paragraph 43. It's suggested there's ample evidence in this case that the knowledge which Green Growth had at the time of registration was sufficient to have left an impression on an honest person that it had an obligation to recognise the intent of the covenant. Now, that's to suggest that there's some dishonesty by Green Growth. That's never been an issue in the case and I just want to indicate that that's never been put, pleaded, and then at paragraph 38 – I'm sorry, I'm going backwards a little – the second sentence, "In fact, Green Growth procured registration with an intention to defeat the existence and intent of the covenant." That's very similar to the language often used to describe land transfer fraud, and again, never put in issue. It's true that – and my learned friend refers to this in his written

submissions – that in the Courts below both Justice Wylie and the Court of Appeal said that they thought that Green Growth was trying to take advantage of the defects in the covenant. But neither Court said that they thought Green Growth had that intention when it procured registration when it became owner, and that's actually a very significant difference. So I just do want to make that clear, and of course Green Growth didn't know about most of these defects until after this proceeding was issued.

The rest of the notes that I have, Your Honours, were really on other matters that my learned friend made in his written submissions that were more of a legal nature, such as the reference to some academic articles on the indefeasibility principle. I note in that respect only that the main one refers to – it actually has a discussion of the Australian case on which the Court of Appeal, which the Court of Appeal referred to and accepts in relation to the *in personam* claim that the Australian case was correctly decided. That was the *Tanzone Ptd Ltd v Westpac Banking Corporation* [1999] NSWSC 478.

**ELIAS CJ:**

That went on appeal, and the Court of Appeal decided it on a different basis. I've pulled out the thing but I haven't read it. In fact, the Court of Appeal treated it as having a patent absurdity which should be corrected. So it sort of avoided some of the complexity which we're looking at again in this case.

**MR CAMPBELL QC:**

Yes. Well, I think that particular piece of litigation illustrates how interpretation and rectification are sometimes not very far apart.

**ELIAS CJ:**

Yes, yes, exactly.

**MR CAMPBELL QC:**

But the Court certainly didn't doubt – the Court of Appeal didn't doubt the trial Judge's view on indefeasibility.

**ELIAS CJ:**

Well, except it didn't regard – it didn't seem to have regarded it as the convenient and sensible way to address what was obviously something that needed correction. It seems to have treated it as more complicated than was necessary.

**MR CAMPBELL QC:**

Yes.

**ELIAS CJ:**

A bit along the lines, I thought, of the sort of discussion we had this morning. But I might be wrong in that, because I'd only flipped through it.

**MR CAMPBELL QC:**

Yes. Well, I think the Court of Appeal was merely saying that the instrument, the lease in that case, could be interpreted and any problems could be resolved through a process of interpretation and there was no need to resort to rectification.

**ELIAS CJ:**

Yes, yes.

**MR CAMPBELL QC:**

Your Honours, those are the points that I wished to make in reply.

**ELIAS CJ:**

Yes, thank you.

All right. Well, then, counsel, probably the sensible thing is, Mr Campbell, if you would file any submissions you wish, written submissions you wish to make, perhaps 10 days from today, and Mr Fowler to have a further 10 days to respond.

**MR CAMPBELL QC:**

I'd be happy with that, Your Honour.

**ELIAS CJ:**

All right.

**MR FOWLER QC:**

I'm just drawing Your Honour's attention – I undertook to come back to you.

**ELIAS CJ:**

Yes.

**MR FOWLER QC:**

Your Honour is quite right. I need to draw to the Court's attention provisions 367(3) of the Property Law Act. However, when I come to file our written submissions, I will address, still address the issue because the view that we take is that that doesn't dispose of the survival point that we make.

**ELIAS CJ:**

You've lost me there.

**MR FOWLER QC:**

The point was whether section 11(2) addressed the question of whether the deed was cured.

**ELIAS CJ:**

And you say that despite 367(3), you say it applies? All right. Well, you might like to tell Mr Campbell what your view is of that so that we don't have more exchanges of submissions in response later.

**MR FOWLER QC:**

I'll see that he's alerted before he files his, because it relates to common law issues.

**ELIAS CJ:**

That will be helpful, thank you. All right, thank you, counsel, for your assistance. We'll reserve our decision, but we will receive those additional submissions. Thank you.

**HEARING ADJOURNS**