IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 84/2016
[2018] NZSC 75

BETWEEN	GREEN GROWTH NO. 2 LIMITED Appellant
AND	QUEEN ELIZABETH THE SECOND NATIONAL TRUST Respondent

Hearing:	13 February 2018 (further submissions received 13 March 2018)
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	N R Campbell QC and W A McCartney for Appellant R J B Fowler QC, F B Q Collins and P B Kirby for Respondent
Judgment:	17 August 2018

JUDGMENT OF THE COURT

A **The appeal is allowed to the extent only that the order for rectification is set aside.**

B **There is a declaration that for the purposes of cls 2 and 7 of the second schedule of the open space covenant references to "protected area" mean the whole block of land subject to the covenant.**

C **The appellant is to pay the respondent costs of $25,000 and usual disbursements.**

REASONS

WILLIAM YOUNG AND O'REGAN JJ
(Given by William Young J)

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The appeal

[1] The Queen Elizabeth the Second National Trust (the Trust) was constituted by the Queen Elizabeth the Second National Trust Act 1977 (the QEII Act) to encourage and promote the provision, protection, and enhancement of open space for the benefit

and enjoyment of the people of New Zealand.[1] To this end it may enter into open space covenants with private landowners to protect and maintain open space values.[2] Such a covenant runs with and binds the land to which it relates and, as a deemed interest in the land for the purposes of the Land Transfer Act 1952 (the LTA, or where the context requires, the LTA 1952),[3] it may be notified on the title of the affected land.[4]

[2] This case concerns an open space covenant granted in favour of the Trust over a 404 hectare block of land near Tairua by its then owner, the late Mr Humphrey Mallyon Russell, which was notified on the title on 24 July 1997. As executed and notified the covenant is incomplete as it refers to a protected area defined by reference to an aerial photograph which is not attached. There are particular provisions in the covenant which are expressed as applying to the protected area but, there being no supporting photograph, the land to which these provisions apply is not defined. As well, it is said that there were irregularities in the execution and certification of the covenant.

[3] The appellant (Green Growth) is the current owner of the land. In issue between Green Growth and the Trust is the validity of the covenant and, assuming it is valid, how it is to be applied. Both the High Court and Court of Appeal concluded that the covenant is valid, albeit for different reasons, and that it should be rectified to reflect what those Courts held to have been the common intention of the Trust and Mr Russell; in effect that the provisions of the covenant directed to the undefined protected area should apply to the entire block.[5]

[4] In determining the appeal, we must address two sets of discrete issues. The first concerns the validity of the covenant as notified and the second relates to the resolution of the problem of the undefined protected area.

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1 Queen Elizabeth the Second National Trust Act 1977 [QEII Act], long title.
2 Section 22. This objective commonly includes the protection of native flora and fauna.
3 Section 22(6).
4 Section 22(7).
5 *Queen Elizabeth the Second National Trust v Green Growth No 2 Ltd* [2014] NZHC 3275, (2014) 15 NZCPR 785 (Wylie J) [*Green Growth* (HC)]; and *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2016] NZCA 308, [2016] 3 NZLR 726 (Randerson, Stevens and Wild JJ) [*Green Growth* (CA)].

[5] Before we get to those issues, it is appropriate to explain how the controversy arose.

How the controversy arose

The covenant as notified

[6] The second schedule to the covenant as notified contains the key provisions affecting the land. In this schedule "the land" is defined as "the property or part thereof defined as subject to this covenant". The expression "protected area" is separately defined as meaning "the area of native trees shown as area [blank] on illustrative aerial photo attached".

[7] Clause 2 of the second schedule provides:

> 2. No act or thing shall be done or placed or permitted to be done or remain upon the land which in the opinion of the Board materially alters the actual appearance or condition of the land or is prejudicial to the land as an area of open space as defined in the Act.
>
> In particular, on and in respect of the protected area, except with the prior written consent of the Board, or as outlined in the Third Schedule, the Owner shall not:
>
> (a) Fell, remove, burn or take any native trees, shrubs or plants of any kind.
>
> (b) Plant, sow or scatter any trees, shrubs or plants or the seed of any trees, shrubs or plants other than local native flora, or introduce any substance injurious to plant life except in the control of noxious plants.
>
> (c) Mark, paint, deface, blast, move or remove any rock or stone or in any way disturb the ground.
>
> (d) Construct, erect or allow to be erected, any new buildings or make exterior alterations to existing buildings.
>
> (e) Erect, display or permit to be erected or displayed, any sign, notice, hoarding or advertising matter of any kind.
>
> (f) Carry out any prospecting or exploration for, or mining or quarrying of any minerals, petroleum, or other substance or deposit.
>
> (g) Dump, pile or otherwise store any rubbish or other materials, except in the course of maintenance or approved construction, provided however that after the completion of any such work

all rubbish and materials not wanted for the time being are removed and the land left in a clean and tidy condition.

(h) Effect a subdivision as defined in the Resource Management Act 1991.

(i) Allow cattle, sheep, horses, or other livestock to enter, graze, feed or otherwise be present provided, however, that they may graze up to any approved fenceline on the perimeter of the land.

[8] Clause 3 of the second schedule is in these terms:

> 3. In considering any request by the Owner for an approval in terms of Clause 2 hereof, the Board will not unreasonably withhold its consent if it is satisfied that the proposed work is in accordance with the aim and purpose of the covenant as contained in the First Schedule.

[9] Clause 7 of the second schedule requires "the Owner" to "keep all fences … on the boundary of the protected area in good order and condition" and to "accept responsibility for all repairs".

[10] The scheme of the covenant is that the second schedule is subject to the rights of the owner which are provided for in the third schedule in this way:

> 1. The Owner may maintain and upgrade the existing access track on the land.
>
> 2. The Owner may construct one dwelling, ancillary buildings and amenities after consultation with the Trust as to siting, design and materials in an area cleared of vegetation for light and views, a garden and orchard, provided such use does not detrimentally affect the rest of the native vegetation.

[11] As we have noted, the effect of the order for rectification made by Wylie J in the High Court, and upheld by the Court of Appeal, is that cls 2(a)–(i) and 7 of the second schedule are to apply to the entire block.

How the covenant came to be notified in this form

[12] Discussions between Mr Russell and the Trust began in 1995. Mr Russell was then 73 years old. He owned two adjacent blocks of land, one of 207 hectares and the other of 404 hectares. His health was not particularly good. He was hospitalised soon after his initial contact with the Trust and was then relocated to a rest home in Tairua.

To meet the costs of his rest home care, some or all of the land had to be sold. This imposed constraints on the nature of the covenant or covenants which he could sensibly provide.

[13] There were three iterations of the covenant documentation signed by Mr Russell.

[14] The first was executed on 5 October 1996. This applied to both blocks of land (the 404 and 207 hectare blocks).[6] The expression "protected area" was separately defined as in the notified covenant, that is by reference to an unattached aerial photograph. The protected area provisions were as in cl 2(a)–(i) of the covenant as notified. The third schedule provided for activities in the management area in these terms:

> 1. An area not exceeding 40 ha with approval of the Board and shown as area [blank] on the illustrative photo attached, may be defined as a 'management area' provided that within the said management area nothing is done that is detrimental to the aims and purposes of the covenant in relation to the protected area.
>
> 2. Within the defined management area the Owner may:
>
> a) harvest and replant the existing area of pines [sic] trees and open grasslands (adjacent to the original homestead); the first call on the proceeds from this to be used for the management and protection of the protected area.
>
> b) after suitable survey definition at the Owner's cost, subdivide and/or erect dwellings, ancillary buildings, form an access thereto and clear vegetation necessary for light and views up to 1000m^2 per dwelling, after consultation with the Trust as to siting, design and materials.

The blanks in the document as to protected area and management area were not filled in because the aerial photograph on which they were to be noted was not to hand.

[15] In late 1996 Mr Russell was under pressure in respect of rest home fees and this resulted in a restructuring of what had been proposed. It was in the context of this restructuring that the second iteration of the covenant documents came to be executed.

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6 Before the Trust signed the covenant on 1 November 1996, however, its representative acting on the matter crossed out (on Mr Russell's instruction) the references to the 207 hectare block of land: see *Green Growth* (HC), above n 5, at [40].

The purpose of the exercise was to relax the restrictions in respect of the 207 hectare block but to impose more restrictive conditions over the 404 hectare block. A covenant in respect of the 207 hectare block was duly executed and notified against the title on 23 April 1997. The land was later sold. No issue arises as to this covenant.

[16] The Trust prepared another covenant applicable only to the 404 hectare block. The first and second schedules were the same as those in the first iteration of the covenant but it contained a revised third schedule which read:

> 1. An area not exceeding 20 ha, with the approval of the Board and within the area shown as area A on the illustrative photo attached, be defined as a 'management area' provided that within the said management area nothing is done that is detrimental to the aims and purposes of the covenant in relation to the protected area.
>
> 2. Within the defined management area the Owner may:
>
> a) harvest existing pines [sic] trees and replant in native vegetation or where suitable replant an area of pines or establish and maintain an area as open grassland adjacent to the original homestead.
>
> b) erect dwellings and ancillary buildings subject to District Council planning requirements and after consultation with the Trust as to siting, design and materials, and maintain same; form access thereto; and clear vegetation necessary for light and views up to 1000m^2 per dwelling.

[17] This version of the covenant for the larger block was signed by Mr Russell at his rest home with a witness present who attested his signature. Wylie J found that at this meeting the Trust representative had with him an aerial photograph and that he had outlined the proposed management area marked "A".[7] As we interpret the markings on the photograph in light of the evidence given, the balance of the block is marked out as being area "B".[8] This is strongly consistent with the view that the "protected area" consisted of the whole block apart from the "management area".

[18] The signed covenant and the marked up aerial photograph were sent to the Trust and the covenants were duly signed by the Trust. Completed copies of each covenant were forwarded to Mr Russell on 8 April 1997. The covenant over the larger

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7 *Green Growth* (HC), above n 5, at [42] and [53].

8 The same conclusion was reached by the Court of Appeal: see *Green Growth* (CA), above n 5, at [31].

block was signed correct by the manager of the Trust, Mr Porteous, on or about that date.

[19] When the Trust inquired about notification of the second iteration of the covenant over the 404 hectare block, the District Land Registrar indicated that it would not be accepted for notification. This was on the basis that a Class C survey was required as the marked up aerial photograph provided insufficient definition. The comments were addressed primarily to the management area albeit that there was also mention of the protected area. Rather than incur the not inconsiderable cost of a survey, the Trust decided to take the references to the management area out of the third schedule and in this way remove what it understood to be the definitional problem which had prevented notification. As we have seen, the revised third schedule (which is in the covenant as notified) does not refer to an aerial photograph.[9] Unfortunately, however, those responsible for preparing the documents did not appreciate that the second schedule (which was not altered) referred to a protected area defined by a marked up aerial photograph.

[20] Mr Russell signified his acceptance of this variation by initialling the revised third schedule. He did not otherwise sign the document and his initials were not witnessed. The revised third schedule was also initialled by representatives of the Trust. The covenant was then reassembled with the revised third schedule included and the aerial photograph taken out. It was not recertified as correct by Mr Porteous. The covenant in this form was then notified on the title.

How the dispute arose

[21] The land was sold in 1999, some four years before Mr Russell died. The current owner of the land is Green Growth. It holds the property on trust for ABD Properties Ltd. ABD Properties wishes to develop (or at least secure permission to develop) some of the land and to this end approached the Trust for permission to do so. The Trust declined permission and this prompted the present litigation.

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9 See above at [10].

Is the covenant binding?

The key issue

[22] Green Growth maintains that open space covenants can be created only by deed.[10] It thus contends that the covenant as notified is ineffective as it was not executed as a deed and also because it had not been certified correct appropriately and thus was wrongly accepted for notification. It maintains that the covenant should therefore be removed from the register under s 81 of the LTA. The primary reason why this argument failed in the Court of Appeal was the conclusion of that Court that the deemed interest in land evidenced by the covenant attracted the protection of immediate indefeasibility under s 62 of the LTA.[11]

[23] Section 62 of the LTA provides:

> **62 Estate of registered proprietor paramount**
>
> Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority but subject to the provisions of Part 1 of the Land Transfer Amendment Act 1963, the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificate of title of the land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever,—
>
> (a) except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this Act; and
>
> (b) except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land; and
>
> (c) except so far as regards any portion of land that may be erroneously included in the grant, certificate of title, lease, or other instrument evidencing the title of the registered proprietor by wrong description of parcels or of boundaries.

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10 Whilst the QEII Act does not explicitly provide that an open space covenant is to be in the form of a deed, Green Growth maintains that there are a number of indications in that Act and the LTA which, when read together, require open space covenants to be created by deed.

11 *Green Growth* (CA), above n 5, at [152]–[153].

This is reinforced by s 63 which provides:

> **63 Registered proprietor protected against ejectment**
>
> (1) No action for possession, or other action for the recovery of any land, shall lie or be sustained against the registered proprietor under the provisions of this Act for the estate or interest in respect of which he is so registered, except in any of the following cases, that is to say:
>
> …
>
> (c) the case of a person deprived of any land by fraud, as against the person registered as proprietor of that land through fraud, or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud:
>
> …
>
> (2) In any case other than as aforesaid, the production of the register or of a certified copy thereof shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the registered proprietor … of the land the subject of the action, any rule of law or equity to the contrary notwithstanding.

[24] Section 81 provides:

> **81 Surrender of instrument obtained through fraud, etc**
>
> (1) Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.
>
> (2) If the Registrar is satisfied as to any matter referred to in this section and there is a computer register involved, the Registrar may cancel or correct any computer register and, if appropriate, create a new computer register.
>
> (3) The Registrar must not take action under subsection (2) without first giving notice to any person appearing to be affected and giving a reasonable period for any response.

[25] The case was conducted before us on the basis that if the Trust is the registered proprietor of the interest in land created by the covenant, it has an indefeasible title

which is not able to be challenged under s 81. If so, any informalities as to execution and notification are of no moment.

[26] Section 81 is not an easy section to construe or apply. It is clear that s 81 cannot operate against a registered proprietor who, as a bona fide purchaser or mortgagee, has the protection of s 183.[12] It is also apparent that a registered proprietor who is not a bona fide purchaser or mortgagee is afforded the protection of ss 62 and 63 and thus enjoys what was described in *Frazer v Walker* as an immunity "from adverse claims, other than those specifically excepted".[13] Whether s 81 is such a specified exception was left open in *Frazer v Walker* and was the subject of lengthy discussion by McGechan J in *Housing Corp of New Zealand v Maori Trustee*,[14] a judgment which supports a literal approach to, and thus in theory a potentially broad application of, s 81. In contradistinction, the predominant view, as adopted by the majority in the Court of Appeal in *Nathan v Dollars & Sense Finance Ltd*, is that s 81 may not be utilised against any indefeasible title.[15] This was the basis upon which Green Growth's case was advanced before us and, in particular, we were not invited to consider the alternative approach to s 81 proposed by McGechan J. Such an approach, if adopted, would be unlikely to be of practical assistance to Green Growth.[16] We note as well that there is no provision in the Land Transfer Act 2017 (the LTA 2017) which corresponds directly to s 81.[17] Given these considerations, we propose to determine the appeal on the basis upon which it was argued.

[27] It follows that the key issue on this aspect of the case is whether the Trust is properly regarded as the registered proprietor.

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12 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1079.

13 At 1078.

14 *Housing Corp of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) at 678–702.

15 *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [156]–[158] per Glazebrook and Robertson JJ. The treatment of the s 81 issue was not in issue in the later Supreme Court appeal: see *Nathan v Dollars & Sense Ltd* [2008] NZSC 20, [2008] 2 NZLR 557.

16 The practical effect of McGechan J's judgment was limited as he plainly considered that the Registrar ought not, in that case, to exercise the power of correction: see *Housing Corp*, above n 14, at 701. As well, if it is the case that s 81 can be invoked against an indefeasible title, there is no warrant for reading "wrongfully" other than in the manner proposed by the Chief Justice; thus imposing a requirement to show bad faith which Green Growth has not satisfied: see [147]–[148] of the Chief Justice's reasons.

17 Section 21 of the LTA 2017 empowers the Registrar to correct the register in certain circumstances. As the Law Commission has made clear, however, the drafting of this section represents a conscious departure from the wording of s 81: Law Commission *A New Land Transfer Act* (NZLC R116, 2010) at [2.48]–[2.50].

[28] The LTA 2017 is not yet in force. It differs in some, possibly material, respects from the LTA 1952. For the purposes of this judgment, this is of no moment as under the transitional provisions in the LTA 2017, all issues associated with the open space covenant in issue in this case fall to be determined under the LTA 1952.[18] What follows in these reasons is therefore specific to the application of the LTA 1952.

Do the principles of indefeasibility apply to the covenant as notified?

[29] Green Growth's position is that the purpose of notifying an open space covenant is to limit the rights of the registered proprietor of the land, effectively by giving notice of the covenant, rather than to confer the status of a registered proprietor. Green Growth sought to illustrate this argument by reference to s 307 of the Property Law Act 2007 which, in respect of positive and restrictive covenants, provides for notification and, by subss (4) and (5), provides:

> (4) A covenant notified under subsection (3) is an interest notified on the register relating to the burdened land for the purposes of section 62 of the Land Transfer Act 1952.
>
> (5) Notification of a covenant under subsection (3) makes the covenant an interest of the kind specified in subsection (4), but does not in any other way give the covenant any greater operation than it would otherwise have.

Although there is no provision in the QEII Act corresponding to s 307(5), Green Growth's argument is that the position explicitly provided for by those subsections should also apply to open space covenants.

[30] Pausing at this point, we note that commentators have drawn from s 307(5) and its precursor, s 126(b) of the Property Law Act 1952,[19] the conclusion that notification under those provisions does not confer on the covenantee the status of registered

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[18] See cl 2(1)(c) of sch 1 of the LTA 2017.

[19] We note that s 126 became s 126A after amendments effectuated by s 4 of the Property Law Amendment Act 1986. However, s 126A remained substantially similar to s 126.

proprietor.[20] The correctness, or otherwise, of this conclusion is not directly in issue before us; this because open space covenants are not notified pursuant to the Property Law Act. For this reason we need not express a final view as to it. We are, however, of the opinion that denying the status of registered proprietor to a covenant notified under the Property Law Act was not the primary purpose of the relevant provisions, as we will now explain.

[31] Where a document which is registered contains a provision which is contrary to law – for instance an unlawful restraint of trade in a lease – registration does not preclude the conclusion that the provision is ineffective.[21] Similar issues can arise with notified restrictive covenants.[22] In this context, we see the purpose of s 126(b) of the Property Law Act 1952 and s 307(5) of the current Act as avoiding the possibility of an argument that notification of such a covenant would preclude scrutiny of the legal effectiveness of some of its terms.[23] In contradistinction, we think it unlikely that the legislature contemplated permitting instruments recorded on the register to be impeached on the basis of technical arguments as to mode of execution or certification.

[32] An open space covenant is deemed to create an interest in land in respect of which it is appropriate to regard the Trust as the "proprietor".[24]

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20 See, for example, EC Adams *The Land Transfer Act 1952* (2nd ed, Butterworths, Wellington, 1971) at [150]; GW Hinde, DW McMorland and PBA Sim *Land Law* (Butterworths, Wellington, 1978–1979) vol 2 at 1136; and DW McMorland and others *Hinde, McMorland & Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [17.014(d)]. Green Growth relies on this in support of its argument that notification of an open space covenant which has not been executed as a deed does not confer on the covenant greater legal effect than it would otherwise have. This is the argument we identified above at [22].

21 See, for example, *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 17 per Barwick CJ.

22 Notification of restrictive covenants was first provided for by s 126 of the Property Law Act 1952 in language which was largely borrowed from s 88(3) of the Conveyancing Act 1919 (NSW). *Pirie v Registrar-General* (1962) 109 CLR 619 dealt with the application of s 88 of the Conveyancing Act. That case concerned what purported to be a restrictive covenant which was invalid as it: (a) in some respects imposed "positive" restrictions; and (b) was not expressed to be annexed to other land. The conclusion that it was invalid in these respects was not precluded by the principles of indefeasibility of title.

23 This was the view of Kitto J in *Pirie*, above n 22, at 626, where he observed of s 88(3)(b) of the Conveyancing Act, which was the equivalent of s 126(b), "[p]resumably this means that the making of the notification on the certificate of title shall not provide a ground of validity or enforceability for a restriction which otherwise is invalid or unenforceable: the provision is concerned only with the operation of the restriction itself, and not, I should suppose, with the question whether a particular person in particular circumstances is subject to its operation".

24 See the definition of "proprietor" in s 2 of the LTA: "**proprietor** means any person seised or possessed of any estate or interest in land, at law or in equity, in possession or expectancy".

[33] Leaving aside s 129, which deals with the particular case of trusts of public reserves,[25] the LTA does not deal specifically with notification as opposed to registration.[26] This is of some practical moment as there are a number of other statutes which provide for various rights and restrictions in respect of land to be notified on the register. These include the Reserves Act 1977 (in respect of conservation covenants)[27] and the Forests Act 1949 (in respect of sustainable forest management plans).[28] Others provide for registration, including the Fencing Act 1978 (fencing covenants and fencing agreements)[29] and the Resource Management Act 1991 (bonds and covenants, and esplanade strips).[30] In this context we note that the Historic Places Act 1980 provided for notification of heritage covenants[31] whereas the current legislation, the Heritage New Zealand Pouhere Taonga Act 2014, provides for registration of such covenants.[32] There have also been some instances where the legislature has explicitly provided that entry on the register of particular rights operates "only as notice of the existence of" the rights and does not create a registered interest under the LTA.[33]

[34] While it is important to bear in mind that there is a broader statutory context, there is not much to be gained for the purposes of this case from a detailed analysis of the interplay between the LTA and the other statutes which we have mentioned. Rather, we see the present situation as most easily explained in terms of the relevant provisions of the LTA and their relationship with the QEII Act.

[35] Registration is addressed in Part 3 of the LTA with ss 33–35 relevantly providing:[34]

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25 Section 129 of the LTA operates in conjunction with s 112 of the Reserves Act 1977.

26 Counsel for Green Growth referred to ss 136 and 137 of the LTA as to the lodging of caveats, which we do not see as material in this context. As well, s 90F(4) of the LTA is to the same effect as s 307(5) of the Property Law Act 2007.

27 Section 77.

28 Section 67K.

29 Section 5.

30 Sections 109 and 232.

31 Section 52(5) and (6).

32 Section 41.

33 See Crown Minerals Act 1991, ss 83–85. There were similar provisions in the now repealed Water and Soil Conservation Amendment Act 1971: see ss 28 and 29.

34 We note that the modern procedure for registration is currently provided for by ss 6 and 30 of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002. Given that the covenant over the 404 hectare block was notified on the title on 24 July 1997, this Act is irrelevant for the purposes of our discussion.

33 Registrar to keep register

(1) Each Registrar shall keep a register, whether in the form of a book or otherwise, and shall bind up or include therein a duplicate of every grant of land and of every certificate of title to land within his district, and each such duplicate grant or certificate of title shall constitute a separate folium of the register, and the Registrar shall record thereon the particulars of all instruments, dealings, and other matters by this Act required to be registered affecting the land included under each such grant or certificate of title.

(2) The provisions of this Act or of any other Act … relating to the register book under this Act or to any grant or certificate of title bound in the register or in the register book or to any volume of the register or of the register book shall, in any case where the register or any part thereof is kept otherwise than in the form of a book, be read subject to such modifications as may be necessary, having regard to the form in which the register or part thereof is kept.

34 When instruments deemed registered

…

(2) Every memorandum of transfer or other instrument purporting to transfer or in any way to affect land under the provisions of this Act shall be deemed to be so registered so soon as a memorial thereof as hereinafter described has been entered in the register upon the folium constituted by the existing grant or certificate of title of the land.

35 Registered proprietor

The person named in any grant, certificate of title, or other instrument so registered as seised of or taking any estate or interest shall be deemed to be the registered proprietor thereof.

[36] "Dealing" is defined in s 2 as meaning:

every transfer, transmission, mortgage, lease, or encumbrance of any estate or interest under this Act.

And "instrument" as meaning:

…any printed or written document, map, or plan relating to the transfer of or other dealing with land, or evidencing title to land; … .

[37] Also material is s 42 which provides:

42 Informal instruments not to be registered

No Registrar shall register any instrument purporting to transfer or otherwise to deal with or affect any estate or interest in land under the provisions of this Act, except in the manner herein provided, *or as*

> *provided in any other Act authorising the registration of the instrument under this Act*, nor unless the instrument is in accordance with the provisions of this Act or of that other Act, as the case may be.
>
> (emphasis added)

[38] It is clear that an open space covenant is an "encumbrance".[35] It is thus both an "instrument" and a "dealing" for the purposes of s 33. By reason of s 34, the recording of a covenant by memorial is thus deemed to be registration. And by reason of s 35, the Trust as the entity named in the covenant as taking the interest created is the registered proprietor of that interest.

[39] It will be recalled that the District Land Registrar indicated that the second iteration of the covenant would be rejected for want of a Class C survey. This was under s 167 of the LTA which provides:

> **167 Plans to be deposited in certain cases**
>
> (1) On any application … for *registration of any instrument* affecting part only of the land comprised in any certificate or other instrument of title, the Registrar may require the applicant to deposit in the Land Registry Office of the district a plan of the land or subdivision or part thereof, as the case may be, which plan shall be in accordance with the regulations for the time being in force in that behalf; and until the requisition is complied with the Registrar shall not be bound to proceed with the application:
>
> …
>
> (emphasis added)

Section 22(8) of the QEII Act makes it clear that s 167 applies to open space covenants:

> (8) Where the burden of the covenant applies to land comprising part of the land in a certificate or instrument of title, the District Land Registrar may require the deposit of a plan in accordance with section 167 of the Land Transfer Act 1952; or, in lieu of such a plan, the District Land Registrar may accept a document incorporating the covenant, so long as the document is accompanied by a certificate given by the Surveyor-General, or the Chief Surveyor of the land district in which the land is situated, to the effect that the covenant is adequately described and properly defined—
>
> (a) for the nature of the covenant; and

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[35] *Hodge v Applefields Ltd* (1997) 3 NZ ConvC 192,500 (HC); aff'd *Apple Fields Ltd v Hodge* (1998) 3 NZ ConvC 192,726 (CA); and *Waimauku Estate Ltd v Jack* (2007) 8 NZCPR 274 (HC). See also *Half Moon Bay Ltd v Crown Eagle Hotels Ltd* [2002] UKPC 24, (2002) 60 WIR 330.

(b) in relation to existing surveys made in accordance with regulations for the time being in force for the purpose; and

(c) in accordance with standards agreed from time to time by the board and either the Surveyor-General or the Chief Surveyor, as the case may be.

Section 22(8) is expressed in language which presupposes the applicability of s 167 of the LTA. Because s 167 is engaged only in respect of registration, s 22(8) therefore presupposes that the notification of an open space covenant amounts to registration for the purposes of the LTA.

[40] All of this brings into play s 75(1) of the LTA. This provides:

> **75 Certificate to be evidence of proprietorship**
>
> (1) *Every certificate of title duly authenticated under the hand and seal of the Registrar shall* be received in all courts of law and equity as evidence of the particulars therein set forth or endorsed thereon, and of their being entered in the register, and *shall*, unless the contrary is proved by production of the register or a certified copy thereof, *be conclusive evidence that the person named* in that certificate of title, or *in any entry thereon, as seised of or as taking estate or interest in the land therein described is seised or possessed of that land for the estate or interest therein specified* as from the date of the certificate or as from the date from which the same is expressed to take effect, and that the property comprised in the certificate has been duly brought under this Act.
>
> (emphasis added)

The language we have italicised is applicable to the interest created by the covenant as notified and is conclusive as to the interest of the Trust which is thereby created.[36] The exception in s 75(1) is not engaged because production of the register would not negate the effect of the certificate of title.

[41] We should also mention in passing the explanatory note to the Queen Elizabeth the Second National Trust Bill 1977.[37] In describing the effect of the clause which became s 22, it was noted that open space covenants "will be registrable against the

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[36] We note that s 75 was identified by Lord Wilberforce in *Frazer v Walker*, above n 12, at 1076 as bearing on indefeasibility.

[37] Queen Elizabeth the Second National Trust Bill 1977 (52-1).

title".[38] As will be apparent, we see no reason to construe the Act inconsistently with that purpose.

[42] We record that the provisions of the LTA which most strongly indicate that an open space covenant should be created by deed are ss 36(1) and 157.[39] At the time the covenant was entered into, they provided:

> **36 Instruments to be in duplicate**
>
> (1) Every instrument presented for registration shall (except in the case of a memorandum of transfer) be in duplicate, or, if the person presenting the same so requires, in triplicate, and shall be attested by a witness:
>
> **157 Instruments to be signed and attested**
>
> (1) Every instrument executed for the purpose of creating, transferring, or charging any estate or interest under this Act shall be signed by the registered proprietor and attested by at least one witness, and if the instrument is executed in New Zealand the witness shall add to his signature his place of abode and calling, office, or description, but no particular form of words shall be requisite for the attestation.
>
> …

Section 36(1) applies only to instruments submitted for registration. In the context of the LTA as a whole, we consider that the same applies to s 157. In large part, therefore, the argument that an open space covenant must be created by deed relies on the assumption that such documents when notified are thereupon registered. But, if that is so, any infelicities in execution are of no moment after notification as the covenant is registered and thus the principle of immediate indefeasibility applies.

[43] Both Wylie J in the High Court and the Court of Appeal took the view that whether the proprietor of an interest notified on the register is a registered proprietor enjoying immediate indefeasibility of title depends on an interpretative exercise addressed to both the LTA and the statute providing for notification. For present purposes it is sufficient to set out the reasoning of the Court of Appeal:

> [151] Approached on this footing, we are satisfied that Parliament intended to confer the protection of indefeasibility on an open space covenant

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38 Queen Elizabeth the Second National Trust Bill 1977 (52-1) (explanatory note) at iii.

39 For a summary of the deed argument see above at n 10.

authorised under the QEII Act once notified under the LTA on the title to the servient land. Our reasons for this conclusion are:

> (a) The effect of an open space covenant is to require the land to which it applies to be maintained as open space in accordance with the terms of the covenant which may have effect for a specified term or in perpetuity.
>
> (b) In order to give effect to the potentially long term nature of any such covenant, s 22(6) of the QEII Act is emphatic in providing that, notwithstanding any rule of law or equity to the contrary, the covenant shall run with and bind the land subject to the burden of the covenant and shall be deemed to be an interest in land for LTA purposes. As earlier noted, the District Land Registrar is obliged, on the application of the Board, to enter a notification of the covenant on the title to the land.
>
> (c) The object of an open space covenant is to further the Trust's purposes of encouraging and promoting the provision, protection and enhancement of open space for the benefit and enjoyment of the people of New Zealand. This suggests that Parliament is likely to have intended that notification under the LTA would ensure that an open space covenant would not be susceptible to attack for defects such as the form of execution.
>
> (d) If Parliament had intended to qualify the effects of notification then it could have said so as it has in relation to covenants under s 126 of the PLA 1952 and its equivalent in s 307 of the PLA 2007.
>
> (e) It might be said that Parliament could have used the term "registered" rather than "notified" if it had intended that notification was to have the same effect as registration. However, Parliament has not demonstrated any uniform approach to the distinction and, as Mr Collins submitted on behalf of the Trust, the expressions "registered" and "notified" are used interchangeably in s 62 of the LTA itself.
>
> (footnotes omitted)

[44] Our conclusion on this aspect of the case is the same as that of the Court of Appeal but we reach it on a slightly different basis. It seems to us that when another statute – such as the QEII Act – provides for the creation of particular interests in land for the purposes of the LTA which, upon being recorded on the register by way of notification, run with and bind the land, ss 33–35 of the LTA are engaged. This is consistent with the absence of provisions in the LTA dealing with notification and the language of the key sections which are expressed in terms broad enough to encompass notification. This, of course, is subject to there being no indication to the contrary in

the statute which provides for notification.[40] As will be apparent, we see no such indication to the contrary in the QEII Act.

[45] We are therefore of the view that: (a) the instrument creating an open space covenant is within the class of instruments referred to in s 33; (b) the notification process results in such an instrument being deemed to be registered under s 34; and (c) the person in whom the interest is vested is a registered proprietor for the purposes of s 35. Accordingly we conclude that the Trust is the registered proprietor of an interest in land created by the covenant as notified.

Conclusion as to binding effect of covenant

[46] For the reasons just given we are satisfied that the covenant, as notified, is effective and binding on Green Growth.

How should the problem of the undefined protected area be determined?

[47] The non-definition of the protected area produces difficulties as to how the covenant should operate. There are three issues which arise:

(a) What, if any, effect should be given to the particular covenants specified in cl 2(a)–(i)?

(b) If those covenants are to be disregarded, what, if any, effect should be given to cl 3?

(c) What, if any, effect should be given to cl 7?

[48] In the High Court and Court of Appeal, these difficulties were resolved by rectification. Those Courts concluded that the common intention of Mr Russell and the Trust was that the covenants in cl 2(a)–(i), along with cls 3 and 7, should apply to the entire block.[41] The covenant was thus rectified to accord with this common intention.

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40 For example, see the Crown Minerals Act 1991 mentioned above at n 33.

41 *Green Growth* (HC), above n 5, at [108]; and *Green Growth* (CA), above n 5, at [56]–[58].

[49] An alternative approach is to treat the issues as turning on the construction of the covenant. On this approach, there could be issues as to the admissibility of extrinsic evidence that can be used to construe a registered document; this given that the covenant affects land and thus binds third parties and takes effect within the context of the indefeasibility provisions of the LTA.

[50] Despite the difficulty of the issues which arise on this aspect of the case, their practical significance in terms of result is limited. From the point of view of Green Growth, the most favourable outcome would involve the covenant being: (a) not rectified; and (b) interpreted without reference to extrinsic evidence. But, so construed, the covenant would be almost as burdensome for Green Growth as the covenant as rectified by the Courts below. This is because on any conceivable result, Green Growth's ability to develop the land is constrained by the opening words of cl 2 and is therefore practically confined to what is provided for expressly in the third schedule.

[51] In the High Court, the Trust sought a declaration in these terms:[42]

> A declaration that the true meaning and effect of the covenant contained in covenant B429136.1 is to protect all of the land as described in the Schedule of Land and described in the body of the covenant as "the Land" or "Protected area".

The declaration as sought was not well-addressed to the interpretative problems which the case raised and which we have already identified at [47].

[52] In dealing with this aspect of the case, Wylie J, when addressing whether the words "protected area" in cl 2 of the second schedule embraced the whole of the land, observed:[43]

> I do not … consider this interpretation is open, given the terms of the covenant:
>
> …
>
> Once it is accepted that the protected area and the land were intended to be different things, it must follow that the provisions of cl 2(a)–(i) do not apply to the whole of the land. However, given the background, it seems to me that

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42 *Green Growth* (HC), above n 5, at [88].
43 At [91]–[93].

> Mr Russell and the Trust did not intend that the prohibitions contained in cl 2(a)–(i) were to be otiose. Other clauses in the covenant which apply to "the land" do offer protection – for example, the introductory paragraph to cl 2 … . It cannot therefore be said that the whole document is void for uncertainty; rather, the protection afforded to the land is more limited if cl 2(a)–(i) do not apply to all of the land. An interpretation which results in cl 2(a)–(i) being redundant would not, in my judgment, fully accord with Mr Russell's expressed intention to protect his land, the trees and regenerating bush. It would also not fully accord with the Trust's mandate and statutory function.
>
> I agree with the Trust that the wording of the third schedule is clear and that, in a broad sense, the overall purpose of the covenant is to protect all of the land described in the land schedule forming part of the document. I cannot, however, see that a declaration in the terms proposed by the Trust would advance matters. To my mind, the proposed declaration is nebulous and it does no more than state the obvious. It would remain unclear whether the obligations contained in cl 2(a)–(i) form part of the covenant. I therefore decline to make the declaration sought.

[53] In his reasons, Wylie J did not expressly address the possibility of a contextual and non-literal interpretation of the covenant. And, more generally, it is not entirely clear whether Wylie J was:

(a) just refusing to make the declaration sought as the making of that declaration would not resolve the interpretative issues raised by the case; or

(b) interpreting the covenant on the basis that, subject to rectification, the covenants in cl 2(a)–(i) did not form part of the covenant.

[54] In its judgment the Court of Appeal approached this aspect of the case solely on the basis of rectification. It did not address the interpretative issues which we have identified and its judgment is thus premised on the unarticulated assumption that the result which it arrived at using rectification lay beyond what was possible as a matter of construction.

[55] As a matter of logic, construction should come before rectification. This is because construction involves interpreting the words used in a document to reflect the intention of the parties. Conversely, rectification achieves this by altering the words used. If the words used in a document as it stands can be construed to reflect the intention of the parties, there is no need to alter the document to reach the same result.

For this reason, we propose to address how the issues we have identified at [47] should be addressed first as a matter of construction and secondly by way of rectification.

The construction problem

Preliminary comments

[56] The problem with the covenant is that the second schedule refers to a protected area that is defined by reference to a photograph which does not form part of the covenant. The two most likely explanations for this as they would strike a third party reading the document are:

(a) by mistake the parties left out the aerial photograph – in other words that the parties intended there to be a protected area to which special provisions would apply but never got around to defining it; or

(b) a protected area was not intended to be defined and the provisions in the second schedule which refer to it were mistakenly inserted.

The explanation as found by the High Court and Court of Appeal is somewhat different; that the protected area clauses were intended to apply to the whole block but that by mistake this was not provided for. In effect, the problem was that those responsible for the preparation of the covenant drafted it in a way which was appropriate only if the restrictions in cl 2(a)–(i) were to apply only to some of the land subject to the covenant – that is a "protected area".

[57] The majority in this Court reach the same conclusion as the High Court and Court of Appeal as to the legal effect of the covenant but on the different basis that, on the true construction of the covenant, and without a need to refer to extrinsic evidence, the references in cls 2 and 7 to "protected area" denote the whole block. On this approach, there is no need to address rectification.

[58] On this point, we disagree with the majority. A reader of the covenant who was not aware of the extrinsic evidence could not conclude from the text of the

covenant that "protected area" in cls 2 and 7 means the whole block. If this interpretation was proposed, such a reader would reject it on the basis that:

(a) The definition of "protected area" ("the area of native trees shown as area [blank] on illustrative aerial photograph attached") is consistent with the "protected area" being *a part only* of whole block.

(b) If the interpretation proposed had been intended:

(i) There would have been no definition of "protected area".

(ii) In cl 2 the words "on and in respect of the protected area" would have been omitted[44] so as to provide directly for the application of cl 2(a)–(i) to the whole block.

(iii) Clause 7 would have referred to boundary fences on the whole block.

As we have noted, the fundamental problem with the covenant is that those responsible for its preparation left in clauses that were not appropriate for what was then proposed. We consider that the conclusion that this is the explanation for what went wrong, rather than say a careless omission to attach the aerial photograph, can only be justified if regard is had to the extrinsic evidence. Accordingly, we see the primary issue on this aspect of the case as being whether the covenant should be construed in light of such evidence.

[59] In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, the approach to be taken to the interpretation of contracts was expressed in this way:[45]

> [60] … the proper approach is an objective one, the aim being to ascertain "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". This objective meaning is taken to be that which the parties

[44] On this basis the second sentence of cl 2 would have started, "In particular, except with the prior written consent of the Board … ".

[45] *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 (emphasis added, footnotes omitted).

> intended. While there is no conceptual limit on what can be regarded as "background", it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.
>
> [61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.
>
> [62] It should not be over-looked, however, that the language of many commercial contracts will have features that ordinary language (even a "serious utterance") is unlikely to have, namely that it will result from a process of negotiation, will attempt to record in a formal way the consensus reached and will have the important purpose of creating certainty, both for the parties and for third parties (such as financiers). *The fact that parties are aware their contract might be relied upon by a third party may justify a more restrictive approach to the use of background in some instances* … .
>
> [63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[60] If this was simply a dispute between the parties to an ordinary contract, the contract would be interpreted having regard to the background knowledge known or reasonably available to the parties, which would include the earlier iterations of the covenant and, in particular, the aerial photograph. Such an interpretative exercise would be carried out in terms of the principles discussed in *Firm PI* and could arguably result in the same outcome as that arrived at by the High Court and Court of Appeal using rectification. The problem, however, is that the open space covenant is not an "ordinary contract" of the kind just postulated. As indicated in the italicised section of the passage which we have set out from *Firm PI*, somewhat different considerations apply where the instrument in question affects the rights of third parties. And, as we will now explain, this is particularly so with instruments which create interests in land.

Admissibility of extrinsic evidence to construe a document which creates an interest in land under the Land Transfer Act – the leading authorities

[61] Where the instrument to be construed creates an interest in land and is on the register, the principles of indefeasibility are engaged. This is demonstrated by the judgment of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*.[46] In issue in that case was the interpretation of a registered easement which had been entered into by the predecessors in title of the parties to the litigation. In the High Court an attempt was made to rely on extrinsic evidence as an aid to construction. This prompted the following comment in the judgment of the Court:

> 37 However, in the course of oral argument in this Court it became apparent that what was engaged by the submissions respecting the use of extrinsic evidence of any of those descriptions, as an aid in construction of the terms of the grant, were more fundamental considerations. These concern the operation of the Torrens system of title by registration, with the maintenance of a publicly accessible register containing the terms of the dealings with land under that system. To put the matter shortly, rules of evidence assisting the construction of contracts inter partes, … did not apply to the construction of the Easement.
>
> …
>
> 39 … The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

And a little later:

> 44 It may be accepted, in the absence of contrary argument, that evidence is admissible to make sense of that which the Register identifies by the terms or expressions found therein. An example would be the surveying terms and abbreviations which appear on the plan found in this case on the DP.
>
> 45 But none of the foregoing supports the admission in this case of evidence to establish the intention or contemplation of the parties to the grant of the Easement.

The approach taken in Australia is that *Westfield* does not exclude consideration of the physical characteristics, including location, of the relevant property.[47]

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[46] *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528.

[47] *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324, [2008] NSW ConvR 56-200 at [15]–[16].

[62] *Westfield* was referred to by the Court of Appeal in *Big River Paradise Ltd v Congreve* where it was noted that a requirement to exclude extrinsic evidence:[48]

> … would not be in accord with the approach taken by this Court in *Ohinetahi Ridge Ltd v Witte* (2004) 5 NZ ConvC 193,938, a case which concerned water easements. These easements referred to some of the relevant water supply infrastructure (namely a spring, a well and existing pipes) which was in place when they were created. This necessitated inquiry into the nature of that infrastructure. But the Court also saw as relevant (or possibly relevant) to the factual matrix a broader range of extrinsic facts (see, for instance, paras [9], [11], [22] – [25], [44] and [53]). In short, the Court construed the easements as it would have construed ordinary contracts.
>
> Further, if *Westfield* were adopted in New Zealand, this would sit rather oddly with s 126G of the Property Law Act 1952 (now s 317 of the Property Law Act 2007), which allows a court to modify an easement or covenant where it is satisfied that there has been a change since its creation in:
>
> (a) the nature or extent of the use being made of the benefited land, the burdened land, or both;
>
> (b) the character of the neighbourhood; and
>
> (c) any other circumstance the court considers relevant.
>
> If it is legitimate to consider the circumstances at the time of the creation of an easement or covenant when deciding whether to modify or extinguish it, then it might be thought legitimate to consider the same circumstances when engaged in an interpretation exercise.
>
> As well, *Westfield* leaves some unresolved and perhaps troublesome issues:
>
> (a) Should so narrow an approach be taken as between the initial parties to the restrictive covenant or easement?
>
> (b) If not, when should the narrow approach kick in, when one of the original parties sells or when both sell?
>
> (c) What if the subsequent parties are well aware of the relevant extrinsic evidence? This might arise if the extrinsic evidence relates to a particular pattern of use which existed at the time the document was executed and was continuing when the subsequent party became affected by the easement or restrictive covenant.
>
> … we think it clear that the restrictive covenant should be construed not in the abstract but, at the very least, by reference to the location of the properties which are affected by it. Beyond that we prefer not to go, because irrespective of whether the *Westfield* approach is adopted, the result is the same … .

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[48] *Big River Paradise Ltd v Congreve* [2008] NZCA 78, [2008] 2 NZLR 402 at [20]–[23].

[63] In *Escrow Holdings Forty-One Ltd v District Court at Auckland*, this Court was required to interpret a deed of covenant which was on the register.[49] It commented:

> [41] The parties made submissions on the approach to be taken to the interpretation of documents on a public register, in particular on the question of the relevance of evidence of the background knowledge that would reasonably have been available to the parties. This contentious issue was discussed by the Court of Appeal in *Big River Paradise Ltd v Congreve* in the context of the interpretation of a restrictive covenant. There the Court of Appeal discussed the decision of the High Court of Australia in *Westfield Management Ltd v Perpetual Trustee Co Ltd*, expressing the view that, if that decision meant that what might otherwise be relevant extrinsic evidence should be ignored when interpreting a registered easement, it was "open to question" whether it should be applied in New Zealand.
>
> [42] As is apparent from the Court of Appeal's judgment in *Big River Paradise Ltd* … this is an issue of some complexity, raising a number of difficult policy considerations. Moreover, since the decision in *Big River Paradise Ltd*, a majority of this Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* has accepted that there may be situations where the fact that a document was intended to be relied upon by third parties not involved in its drafting will mean that extrinsic background material is of diminished relevance to its interpretation. …
>
> (footnotes omitted)

In that case, a decision on the admissibility of the extrinsic material was not, in the end, necessary.

[64] In *Lakes International Golf Management Ltd v Vincent* there was further discussion of this issue in the context of a registered covenant.[50] The case concerned a residential development and golf course originally undertaken by Pauanui Lakes Properties Ltd. The covenant required residential owners to be members of a golf club which was defined as being an incorporated society to be established. In issue was whether Mr Vincent's family trust, a residential owner, could be required to join a golf club which was operated by companies associated with the successors to Pauanui Lakes (Lakes International Golf Course Ltd and Lakes International Golf Management Ltd). Mr Vincent wished to rely on evidence as to the intention of Pauanui Lakes at the time the covenant was entered into which pointed to a very

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[49] *Escrow Holdings Forty-One Ltd v District Court at Auckland* [2016] NZSC 167, [2017] 1 NZLR 374.

[50] *Lakes International Golf Management Ltd v Vincent* [2017] NZSC 99, [2017] 1 NZLR 935.

deliberate decision that the golf club be an incorporated society. Counsel for Golf Course and Golf Management maintained that this evidence was inadmissible.

[65] Of this argument, the Court said:

> [26] [Counsel for the appellants] argued for a pure interpretative approach. Under this approach, agreements registered against land should be construed against a background confined to what subsequent parties could be expected to know or to be able to readily ascertain. He said that this was so even where the dispute is between the original parties and in respect of material which is common to both. He maintained that this approach was to be adopted not only in respect of agreements registered against land but also to contracts in three other categories, those:
>
> (a) likely to be assigned;
>
> (b) formed by the acceptance of offers to the public; and
>
> (c) customarily relied on by third parties (such as bills of lading).
>
> …
>
> [28] The questions raised give rise to some conceptual difficulty. We do not, however, see them in the context of the present case as warranting extended discussion. In part this is because we are not able to discern a genuine interpretation issue to which the extrinsic evidence might be relevant. The meaning of the definition of "Golf Club" is crystal clear in that the language used shows that the golf club envisaged was to be an incorporated society. In the absence of a genuine issue of interpretation, an elaborate review of the principles of interpretation relied on by [counsel for the appellants] would be largely abstract in character.
>
> [29] In any event, a conclusion that the material relied on by Mr Vincent is admissible would require an approach to the admissibility of extrinsic evidence which is more expansive than we would be prepared to accept. We say this because:
>
> (a) The extrinsic evidence relates solely to the reasons why Pauanui Lakes Properties provided for the golf club to be an incorporated society.
>
> (b) These reasons were of no practical moment for the Vincent Family Trust.
>
> (c) Golf Course and Golf Management were not original parties to the covenant and were not aware of the material at the time they took interests in the affected land.
>
> (d) When they took those interests they had no means of obtaining access to that material.

(e) The material does not relate to the physical layout of the land in question or to particular patterns of use or infrastructure to which the covenant related.

(f) There is nothing in the covenant to alert later parties to a need to make enquiry as to what the language used relates.

> [30] As will be apparent, we are of the view that, given the context just outlined, the extrinsic evidence relied on is inadmissible on any conceivable approach to the relevant principles of interpretation. We therefore see no need to address the broader arguments of [counsel for the appellants].

[66] Also material is the decision of the Court of Appeal of England and Wales in *Cherry Tree Investments Ltd v Landmain Ltd.*[51] Landmain was the owner of a property over which it had granted security to Dancastle Associates Ltd (Dancastle). The charge was registered under the Land Registration Act 2002 (UK), which provides for the registration of interests in land under a scheme which has some similarity to, but remains materially different from, the Torrens system. On the same day as the charge was executed, Dancastle and Landmain also entered into a facility agreement which contained unusual provisions as to when the power of sale was exercisable by Dancastle. As registered, the charge did not explicitly incorporate those provisions. Later, Dancastle, in purported exercise of its power of sale, sold the property to Cherry Tree. Landmain resisted Cherry Tree's entitlement to registration as owner of the land on the basis that Dancastle had not been entitled to exercise the power of sale.

[67] As Cherry Tree could be said to stand in the shoes of its vendor (Dancastle) a claim for rectification of the charge would have been available in terms of the principle referred to below at [83](b). That, however, was not the way the case was run. Instead, the parties confined themselves to the question whether the charge as registered should be construed by reference to the unregistered facility agreement between Dancastle and Landmain. And, as to this, Landmain relied on *Westfield*.

[68] Arden LJ, who dissented, did not regard *Westfield* as persuasive:[52]

> … I do not consider that this court should take the same course as the High Court of Australia and exclude extrinsic material as an aid to interpretation altogether simply because the document requiring interpretation has been registered at the Land Registry. Indeed I consider that this case should not be treated as persuasive authority in this case for three reasons. First, it appears

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51 *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305.

52 At [51].

> that the Australian courts have not adopted the *ICS* principles with regard to the admission of background material for all purposes as the general rule in contractual interpretation. Secondly, it appears even following the 2002 Act there are still some significant differences between the system of registration under that Act and that of the Torrens system adopted in Australia and New Zealand … . Thirdly, no consideration is given to the possibility of using extrinsic evidence as an aid to interpretation in a case where third parties are not affected.

She picked up on the third of these points when she expressed her conclusion:

> 54 For all these reasons I consider that the issue for the court, when it is asked to admit extrinsic evidence as an aid to interpretation of a document available for inspection at the Land Registry is whether there are third parties who would be prejudicially affected by its admission. If there are or may be such third parties, extrinsic evidence should not be admitted as an aid to interpretation.

[69] Lewison LJ considered that the Court was bound by an earlier decision of the Court of Appeal to conclude that the facility agreement was admissible as to the interpretation of the charge,[53] but he nonetheless found *Westfield* of assistance.[54] He saw the key to the case as being how the charge would be construed by "the reasonable reader":[55]

> The reasonable reader's background knowledge would, of course, include the knowledge that the charge would be registered in a publicly accessible register upon which third parties might be expected to rely. In other words a publicly registered document is addressed to anyone who wishes to inspect it. His knowledge would include the knowledge that in so far as documents or copy documents were retained by the registrar they were to be taken as containing all material terms, and that a person inspecting the register could not call for originals. The reasonable reader would also understand that the parties had a choice about what they put into the public domain and what they kept private. He would conclude that matters which the parties chose to keep private should not influence the parts of the bargain that they chose to make public. There is, in my judgment, a real difference between allowing the physical features of the land in question to influence the interpretation of a transfer or conveyance (which we do) and allowing the terms of collateral documents to do the same (which we should not). Land is (almost) invariably registered with general boundaries only, so the register is not conclusive about the precise boundaries of what is transferred. Moreover, physical features are, after all, capable of being seen by anyone contemplating dealing with the land and who takes the trouble to inspect. But a third party contemplating dealing with the land has no access to collateral documents.

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53 At [103].
54 At [127].
55 At [130].

On this basis, the facility agreement, while technically admissible, was to be disregarded.

[70] The third Judge, Longmore LJ, was of broadly the same view as Lewison LJ:

> 148 This line of argument [that the deficiency in the charge document could be resolved by construction], it seems to me, goes too far in its reliance on the background relied on, even though that background was undoubtedly known to both of the parties to the charge. The legal charge in the present case is not just an agreement made by two parties to the transaction who are themselves alone affected. It is a public document on a public register open to inspection and potentially to be relied on by third parties. I do not think that mistakes in such documents can be construed away by a process of construction of the kind envisaged in Lord Hoffmann's principle (5).

[71] The policy underlying the approach taken in *Westfield* is plainly cogent. There are, however, certain difficulties in terms of its application.

[72] Under *Westfield*, the rules which apply to the interpretation of registered instruments differ from those which apply to inter partes contracts. *Westfield*, however, is not explicit as to the precise circumstances in which the restrictive rules apply. For instance, do they apply if the dispute is between the original parties to the instrument? It is clear that rectification is available in respect of documents where: (a) the dispute is between the original parties; or (b) it is sought against an original party to the instrument by a successor in title to the other party. This is because indefeasibility does not trump in personam rights.[56] If rectification is available in those circumstances, is it logical to exclude as irrelevant to construction evidence which will be broadly of the same kind as would be admissible in rectification proceedings? On the approach adopted by Arden LJ in *Cherry Tree*, extrinsic evidence is relevant to construction in this situation.

Our approach

[73] A very flexible approach to the admission of extrinsic evidence as bearing on the construction of registered documents will promote litigation and, as was recognised in *Westfield*, has the potential to undermine the policy of indefeasibility of title. On the other hand, if we were to adopt a rigid rule excluding such evidence, there

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[56] See below at [83].

will still be marginal cases which will have to be addressed and, in some instances, perverse outcomes, despite there being no good reason why, as between the parties to the dispute, the extrinsic evidence should be ignored.

[74] Against that background, we consider that:

(a) Generally, registered documents should be construed without regard to extrinsic evidence which is particular to the original parties and is not apparent on the face of the register.

(b) This does not limit rights to apply for rectification, a topic which we address in the next section of these reasons.

(c) We would not exclude reference to facts which a reasonable future reader of the document could be expected to be aware of and would recognise as relevant and which they have access to, such as the configuration of land, any physical features to which the document relates or refers and any material referred to in the document.

Construing the open space covenant in this case

[75] As none of the aforementioned exceptions apply in this case, we are required to construe the open space covenant without the assistance of extrinsic evidence.

[76] Clauses 2(a)–(i) and 7 are expressed to apply only to the protected area. The corollary of the undefined protected area is that cls 2(a)–(i) and 7 are ineffective. This leaves in contention cl 3.

[77] The opening words of cl 2 prohibit actions which "in the opinion of the Board" materially alter the appearance or condition of the land or are prejudicial to the land as an area of open space. The second paragraph of cl 2 (containing cl 2(a)–(i)), applicable only to the undefined protected area, then prevents the owner, "except with the prior written consent of the Board" from carrying out certain activities. In this context, "request … for an approval" in cl 3 was plainly intended to encompass a request for "written consent" for the purposes of cl 2(a)–(i). What is not so clear is

whether it was also intended to encompass the formation of the "opinion of the Board" for the purposes of the first part of the clause. This is particularly so as it is difficult to see how a negative opinion under the first part of the clause could ever be reached if the Board was satisfied that the proposed work was in accordance with the aim and purpose of the covenant. In those circumstances, we are of the opinion that cl 3 should be construed as applicable only to cl 2(a)–(i) and is thus ineffective.

[78] On this approach cls 3 and 7 are ineffective and cl 2 is effective only to the extent that it provides:

> No act or thing shall be done or placed or permitted to be done or remain upon the land which in the opinion of the Board materially alters the actual appearance or condition of the land or is prejudicial to the land as an area of open space as defined in the Act.

No other provisions are affected. So the consequence is that the covenant is to be read as if cls 3 and 7 and the rest of cl 2 were deleted.

Section 80 of the LTA

[79] Section 80 of the LTA provides:

> **80 Errors in register may be corrected**
>
> (1) The Registrar may, upon such evidence as appears to him sufficient, subject to any regulations under this Act, correct errors and supply omissions in certificates of title or in the register, or in any entry therein, and may call in any outstanding instrument of title for that purpose.
>
> (2) The Registrar may cancel or correct any computer register and, if appropriate, create a new computer register in order to correct any error or supply any omission in any computer register.

[80] In the present case, the result of our approach is that the definition of "protected area" and cls 2(a)–(i), 3 and 7 are ineffective. On this basis their presence in the text of the covenant is misleading, and in this sense, erroneous. This error can be corrected under the s 80 power.

[81] Finally, we observe that s 80 would mitigate the potential practical problems associated with the possibility of shifting meaning. Thus if it is held that a registered

document should be interpreted in a non-literal way, the Registrar, under s 80, is entitled to correct the relevant error or omission in expression. And once the correction is made on the register, there should be no possibility of that document being subsequently interpreted in a different way.

Rectification of the covenant

Preliminary comments

[82] For the present purposes, we accept that the findings of fact made by Wylie J as to the common intention of Mr Russell and the Trust are correct; so that if the case had fallen to be determined between those parties, rectification would have been available. We see his findings as consistent with the history of the three iterations of the covenant and, in particular, the aerial photograph which formed part of the second iteration of the covenant.

[83] By way of further background, and to provide context for our discussion of the approaches adopted in the Courts below, we accept that:

(a) the assignee of a contract takes subject to equities and is thus susceptible to a claim to rectification;[57]

(b) a person who acquires an interest in land will be able to exercise any right which that person's vendor had to rectify a prior agreement affecting that interest;[58] and

(c) where the competition is between a party with a right to rectify and a subsequent equitable owner of the land, the principles of indefeasibility are not engaged.[59]

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57 There is a contract between A and B, which A is entitled to have rectified; B assigns the benefit of the contract to C; and A is entitled to rectification against C.

58 A as the owner of land enters into an agreement with B which affects the land (e.g. an unregistered lease) which B is entitled to have rectified as against A; B assigns to C; C is entitled to the same rights of rectification against A as B had.

59 A as the owner of land enters into an agreement with B which affects the land and which B is entitled to have rectified; A sells the land to C but the dispute arises before the transfer to C is registered; B's claim to rectification may, depending on the circumstances, be exercised against C.

[84] Green Growth was aware of the non-definition of the protected area before it acquired the land. In that sense, it was on notice that something had gone wrong with the way in which the covenant had been completed. Arguably it was therefore on notice of a likely claim for rectification. It is, however, clear that the effect of s 182 is that Green Growth's acquisition of title with such notice is not fraud.[60] Despite this, the High Court and Court of Appeal have rectified the covenant against Green Growth. The result is that Green Growth is now subject to an interest which is different in expression and, to a limited extent, effect (that is under the covenant as rectified) from that notified on the register. On the face of it, this result is inconsistent with s 62.

The cases relied on by the Courts below

[85] Wylie J and the Court of Appeal both referred to a number of judgments which they (and particularly Wylie J) saw as supporting the availability of rectification. Most of these cases fall into one of the categories referred to in [83] and do not warrant further mention in these reasons. Four of the cases, however, do require discussion.

[86] *Merbank Corp Ltd v Cramp* concerned a mortgage which, as registered, did not contain a charging clause.[61] As between the mortgagee and mortgagor, there was nothing to preclude rectification; this because the claim to rectification gave rise to an in personam right in favour of the mortgagee against the mortgagor to have the agreement between them rectified to accord with their bargain. Awkwardly, however, there were other charge holders; the second defendant (which had a subsequent mortgage) and the third defendant (which had a registered lien under the Wages Protection and Contractors' Liens Act 1939). The 1939 Act has been repealed and, for this reason, we will discuss the case only by reference to the second defendant.

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60 We see no need for discussion of the question whether a right of rectification in respect of an instrument which creates an interest in land is itself an equitable interest or is, instead, a "mere equity". Given that s 182 provides that taking with notice of an unregistered interest is not fraud, the same must necessarily be so of taking with notice of a mere equity.

61 *Merbank Corp Ltd v Cramp* [1980] 1 NZLR 721 (SC).

[87] In holding that rectification was available against the second defendant, Barker J did not specifically address the indefeasibility of the interest of the second defendant in the land. Instead, he observed:[62]

> Bearing always in mind the doctrine of the paramount nature of registration under the Land Transfer Act, discussed at length above, it is not possible for the second … [defendant] to claim [to be] prejudiced by rectification. [It is] deemed to have known of the existence of the registered second mortgage which secured "advances". [It] could have been in no doubt as to what the document had sought to achieve. It was referred to in the statutory memorial on the register as "mortgage". It contained numerous clauses which on inspection disclose the terminology frequently used in documents of this nature. No claim was made that [the] defendant … actually noticed the omission of the "charging clause". …
>
> Accordingly, I consider that in the circumstances of this case, the second [defendant has] not been prejudiced; that [its] intrusion onto the scene should not prevent me from granting rectification.

[88] Barker J made no reference to s 62. He thus did not address the question whether the order for rectification was inconsistent with the indefeasible title of the second defendant. On his approach, it was sufficient that there was no prejudice. In determining whether the second defendant was prejudiced, the baseline the Judge adopted was what it would have assumed the mortgage provided rather than what the mortgage actually provided.

[89] Rectification was not necessary to produce the result arrived at in *Merbank*. It was obvious that the purpose of the document was to charge the land as security for the advances made. The clauses in the registered document were expressed in terms which presupposed a charge. On this basis, no reference to extrinsic material would have been necessary to construe the document (or imply a term in it) so as to impose a charge.[63]

[90] In *Child v Dynes* the same Judge ordered rectification of a restrictive covenant which imposed a height limit and was registered.[64] The parties to the litigation were

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62 At 734–735.

63 We note in passing that the situation which arose in *Merbank* is addressed specifically in the amendments made to s 41 of the LTA 1952 by the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 and in the LTA 2017, s 24(3)(b).

64 *Child v Dynes* [1985] 2 NZLR 554 (HC) [*Child* (HC)].

successors in title to the original covenantor and convenantee. The critical promise was expressed in this way:[65]

> … the Transferees will not erect or permit or suffer any trees shrubs or hedges to grow upon that part of the land first above described marked with the letter "B" on the plan annexed hereto to a height *not* exceeding [as defined].

The drafter's hand had faltered badly. The word "not" which we have italicised ought not to have been there and "erect" should have been followed by "a building". But, given that "erect" connotes a building and is not apt to encompass the growth of vegetation, which in any event was specifically addressed, there could have been no difficulty in construing the covenant as if it provided:

> …the Transferees will not erect *a building* … to a height ~~*not*~~ exceeding [as defined].

This is the approach which was adopted by the Court of Appeal.[66]

[91] At first instance, the construction argument which succeeded in the Court of Appeal was not advanced. Instead, rectification of the covenant was sought. This was granted by Barker J. In doing so the Judge said:[67]

> In *Merbank Corporation Ltd v Cramp* (at p 734) I said that the "cases show how difficult it is to fix a third party with notice of the need for rectification. However, the rationale for refusing rectification in the case of third parties must lie in the consideration as to whether rectification, if ordered, would prejudice the third parties".
>
> Since the defendants knew of the height restriction and must have assumed when they signed the agreement that it applied to buildings, there can be no prejudice to them in allowing rectification in conformity with that belief.

Section 62 was not mentioned and presumably was not relied on. As will be noted, the approach to prejudice which was adopted was the same as that taken in *Merbank*; that is the prejudice to the third party was assessed against what that third party understood the position to be when they took title.

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65 At 556 (emphasis added).
66 *Child v Dynes* [1985] 2 NZLR 561 (CA) [*Child* (CA)].
67 *Child* (HC), above n 64, at 560–561.

[92] The interrelationship between indefeasibility of title and rectification was specifically addressed in the judgment of Windeyer J, at first instance, in *Tanzone Pty Ltd v Westpac Banking Corp*.[68] The case concerned a lease which contained a term that did not reflect the underlying bargain between the lessor and Westpac. The original lessor had not sought to enforce the clause. It then sold the property to Tanzone. Tanzone relied on the term and Westpac applied for rectification.

[93] Windeyer J found that Tanzone had taken title with notice of Westpac's right to seek rectification and that, but for ss 42 and 43 of the Real Property Act 1900 (NSW) (equivalent to ss 62 and 182 of the LTA), Westpac was entitled to rectification.[69] In his view, however, those sections were fatal to the claim:

> [48] As the effect of the Torrens System was to put a purchaser with notice who obtains registration of the transfer without fraud, in the same position as a bona fide purchaser of the legal estate without notice, or a bona fide purchaser of an equitable estate who gets in the legal estate after notice, then in my view the only sensible conclusion to be drawn is that unless there is some right in personam Tanzone takes free of the equity of rectification.

He also held that there was no claim in personam:

> [52] … The purpose and effect of the abolition of the effect of notice brought about through s 43 of the Real Property Act cannot be defeated by some cause of action which relies on notice for its existence. … notice itself cannot lead to a right in personam … .

[94] The final case we need to mention is *Frazer v Walker*.[70] In a passage cited in the Court of Appeal judgment, the Privy Council described indefeasibility in this way:[71]

> The expression [indefeasibility], not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.

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68 *Tanzone Pty Ltd v Westpac Banking Corp* [1999] NSWSC 478, (1999) 9 BPR 17,287. Reversed on a different ground on appeal in *Westpac Banking Corp v Tanzone Pty Ltd* [2000] NSWCA 25, (2000) 9 BPR 17,521.

69 At [39].

70 *Frazer v Walker*, above n 12.

71 At 1075, cited in *Green Growth* (CA), above n 5, at [89].

As we will see, the Court of Appeal took from this passage the view that indefeasibility of title applies only against an "adverse claim". We respectfully disagree. Litigation over indefeasibility is unlikely to occur unless the claim in question is adverse to the interests of the registered proprietor. This was the position in *Frazer v Walker* and in such a case the use of the expression "adverse claim" was understandable. But what s 62 provides is that a registered proprietor takes free of *any* interest which is not notified. If the interest asserted is different from that notified, s 62 applies; this notwithstanding a judge being of the view that the registered proprietor is not prejudiced by the difference.

The approaches taken in the Courts below

[95] In the High Court, Wylie J, after reviewing authorities including *Merbank* and *Child* along with cases of the kind referred to at [83], concluded:

> [130] The position seems to be that the equity of rectification, particularly of a document creating proprietary rights which is registered against a title to land, is available against a successor in title, notwithstanding registration of his or her title under the provisions of the Land Transfer Act 1952, where the successor in title was on notice.

[96] Later in his judgment he set out s 182. He considered that this was not directly engaged as he did not regard the Trust's assertion of an entitlement to a covenant which differed from that notified as an "unregistered interest". He then went on:[72]

> Nevertheless, s 182 causes me to pause. If a purchaser from a registered proprietor is not affected by notice of a trust or unregistered interest, why should a successor in title be affected by a claim to the equitable right of rectification?
>
> To my mind, the answer lies in the following:
>
> (a) The concept of indefeasibility does not prevent equity, working alongside, and not contrary to the Land Transfer Act 1952, from imposing in personam obligations (including equitable obligations) on a registered proprietor.
>
> (b) Rectification, when granted, relates back to the time of execution of the document, and requires that it be read as if it had been originally executed in the rectified form.

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72 *Green Growth* (HC), above n 5, at [134]–[135] (footnote omitted).

[97] The Court of Appeal commenced its discussion of this aspect of the case by saying:

> [68] It is clear that, in the absence of fraud or any of the other three exceptions specified in s 62 of the LTA, an equitable claim for rectification does not prevail against a bona fide purchaser for value without notice. The more difficult question is whether a claim for rectification is available against a registered proprietor who takes title with notice that a claim for rectification has been made or is likely to be made.
>
> (footnote omitted)

[98] The Court then reviewed the authorities, including those which we have discussed. And then, having set out s 62, it went on:

> [87] Where rectification is sought against a successor in title, s 62 of the LTA is clearly engaged. The section protects against adverse claims in the absence of fraud or any of the other three exceptions specified in s 62(a)–(c). It is uncontroversial that fraud means actual fraud. It is well-established that mere notice of an unregistered interest is not sufficient by itself to amount to fraud.
>
> [88] Although we agree with Barker J's view in the authorities discussed that a claim for rectification of an interest associated with or ancillary to land is more than a mere equity and is more akin to an equitable interest in land, we do not consider the court's task is simply a matter of weighing competing equities. The paramountcy of s 62 precludes that approach. In that respect, the approach adopted in *Tanzone* has much to commend it in terms of principle.
>
> [89] But we do not need to reach a concluded view on this because the protection afforded to a registered proprietor by s 62 is only against claims which are adverse to the interests of the proprietor. As noted by the Privy Council in *Frazer v Walker*:
>
> > The expression [indefeasibility], not used in the Act itself, is a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys. This conception is central in the system of registration.
>
> [90] The rectification of a covenant or other agreement between the original parties so that it truly reflects what the original parties themselves intended could not be adverse to the interests of either. When granted, the agreement is amended retrospectively to take effect from the time it was made. We are satisfied s 62 has no application in such a case, although relief may of course be declined on other discretionary grounds.
>
> [91] In cases such as the present where rectification is sought against a successor in title, the court may consider whether the claim is adverse to the interests of the proprietor and whether the grant of an order for rectification would undermine the principle of indefeasibility. Where, upon analysis, the order for rectification would not have that effect, we consider relief may be

> granted. In particular, if the order sought is not adverse to the interests of the registered proprietor then we do not view s 62 as precluding the grant of relief. Put another way, s 62 does not operate as a shield to protect the registered proprietor irrespective of the impact on the registered proprietor's interests of the recognition of the claim or interest of another.
>
> (footnotes omitted)

[99] The Court compared the covenant as rectified by Wylie J and the covenant as notified to determine whether rectification was adverse to Green Growth's interests. Being of the view that the claim was not adverse to Green Growth's interests, the Court upheld the order for rectification.[73]

Our approach to rectification

[100] Contrary to the view of Wylie J, we see s 182 as directly applicable to this case. The debate as to whether a right to rectify is "an equity" or "an equitable interest", which is somewhat abstract at the best of times, is of no practical moment in the context of the indefeasibility provisions of the LTA. We are satisfied that a right of rectification in respect of an instrument creating an interest in land is itself for the purposes of:

(a) section 62, comprehended by the protection afforded by that section in respect of "all other encumbrances, liens, estates, or interests whatsoever"; and

(b) section 182, within the expression "any trust or unregistered interest".

Although this conclusion is inconsistent with the High Court decisions in *Merbank* and *Child*, the s 62 issue was not argued in those cases. The approach we prefer is consistent with the first instance decision in *Tanzone* and with other Australian authority.[74] More significantly we see it as compelled by the principles of the LTA, as we will now explain.

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73 *Green Growth* (CA), above n 5, at [93]–[95].

74 See, for example, *Ong v Luong* (1991) 9 BPR 16,759 (NSWSC); and *We Are Here Pty Ltd v Zandata Pty Ltd* [2010] NSWSC 262, (2010) 15 BPR 29,087.

[101] By reason of s 182, taking title with notice of a right of rectification does not amount to fraud. This is because consistency with the policy of s 182 requires the court to refrain from recognising or creating in personam rights which are based simply on notice. If, by mistake, the open space covenant had not been notified on the title and Green Growth had taken title with notice of that mistake, it would, nonetheless, have taken title free of the covenant. This is the effect of ss 62 and 182. If, after the covenant had been notified, Mr Russell and the Trust had appreciated the problems with the undefined protected area and had executed a memorandum of variation which, by mistake, had not been notified, Green Growth, having taken title, would have been unaffected by the memorandum of variation even if it had had notice of it. In this context, it would be contrary to principle to conclude that Green Growth became subject to an in personam claim by reason only of its awareness that there was no aerial photograph and thus no definition of the protected area.

[102] As explained when we were discussing the passage in *Frazer v Walker* relied on by the Court of Appeal, we do not accept that the protection given to registered proprietors is inapplicable where, in the opinion of the court, an un-notified interest is not adverse to the interests of the registered proprietor. As we have explained, we see the section as applicable in any case where the interest asserted is different from that which is on the register.

[103] For those reasons, we are satisfied that rectification of the covenant ought not to have been granted.

Disposition

[104] We make the following orders, the second of which is by a majority (Elias CJ, Glazebrook and Ellen France JJ):

(a) The appeal is allowed to the extent only that the order for rectification is set aside.

(b) There is a declaration that for the purposes of cls 2 and 7 of the second schedule of the open space covenant references to “protected area” mean the whole block of land subject to the covenant.

(c) The appellant is to pay the respondent costs of $25,000 and usual disbursements.

ELIAS CJ

The appeal

[105] In May 2012 Green Growth became the registered proprietor of an estate in fee simple of a block of land of 404 hectares near Tairua. The title it obtained was subject to a notified covenant for protection of open space under the provisions of the Queen Elizabeth the Second National Trust Act 1977. The covenant had been entered into between the Queen Elizabeth the Second National Trust and the then registered proprietor of the land, Humphrey Mallyon Russell. Green Growth acquired the land after Mr Russell's death.

[106] Under s 22(6) of the Queen Elizabeth the Second National Trust Act, "[n]otwithstanding any rule of law or equity to the contrary, every open space covenant shall run with and bind the land that is subject to the burden of the covenant, and shall be deemed to be an interest in the land for the purposes of the Land Transfer Act 1952". The effect of notification of an open space covenant under s 22(7) is that the title of the registered proprietor of the land is limited by the covenant despite the fact that s 62 of the Land Transfer Act provides that the registered proprietor's title is (subject to statutory exceptions not in issue in the case and apart from other notified interests), "absolutely free from all other encumbrances, liens, estates, or interests whatsoever".

[107] The appeal concerns the meaning and effect of the covenant as notified. There are two applications to the Court that underlie it.

[108] The first is an application by the Trust to rectify by deletion from the covenant references to a "protected area" to which restrictions on development apply under clause 2 of the second schedule. The effect of such deletion would be to apply the restrictions expressed as attaching to the "protected area" to the land as a whole, subject only to the landowner's right under the third schedule of the covenant to construct a single dwelling and developments which are ancillary to it. The Trust was

successful in its contentions in the High Court[75] and Court of Appeal[76] in obtaining rectification. Green Growth appeals largely on the basis that rectification is inconsistent with its indefeasible title.

[109] For the reasons given in what follows, I consider that rectification was misconceived because the meaning of the covenant as notified is that the land as a whole is protected by the restrictions on development contained in the covenant subject only to the exception provided for the landowner's rights of development in respect of a single dwelling. In this view of the proper interpretation of the covenant I differ from the view taken by William Young and O'Regan JJ who consider that the covenant as expressed is deficient because the restrictions on use contained in the second paragraph of clause 2 of the second schedule are confined to a "protected area" intended to be defined. In the absence of its adequate definition, they consider that the provisions of the second paragraph of clause 2 are ineffective and that the Registrar may delete them using the power to correct errors in the register under s 80 of the Land Transfer Act.[77]

[110] On the approach I take, the principal dispute between the parties is resolved on proper interpretation of the terms of the covenant. Questions of rectification based on the common intention of the parties to the covenant and the impact of rectification on the indefeasibility of interests (obtained both by Green Growth as registered proprietor and the Trust because the covenant amounts under the Queen Elizabeth the Second National Trust Act to an interest in land) do not arise. I express doubt however as to the approach taken in the High Court and Court of Appeal as to the availability of the equitable remedy of rectification in relation to registered and notified interests except as may be obtained through an action in personam, which was not available either to Green Growth or to the Trust in their claims.

[111] The second application to the High Court was the counterclaim by Green Growth. It asserted that deficiencies in the execution of the covenant and what

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75 *Queen Elizabeth the Second National Trust v Green Growth No 2 Ltd* [2014] NZHC 3275, (2014) 15 NZCPR 785 (Wylie J) (referred to throughout as *Green Growth* (HC)).

76 *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2016] NZCA 308, [2016] 3 NZLR 726 (Randerson, Stevens and Wild JJ) (referred to throughout as *Green Growth* (CA)).

77 See above at [80].

it contends was the Trust's "wrongful" procurement of notification by reason of these deficiencies and improper conduct (described in the reasons of William Young J and not repeated by me) mean that the covenant as a whole is ineffective and ought to be declared to be so by the Court, allowing its notification to be removed from the register by the Registrar acting under s 81 of the Land Transfer Act.

[112] On the appeal brought from the rejection of these claims by Green Growth in the High Court and Court of Appeal, I agree with the conclusion reached by William Young and O'Regan JJ that the scheme of the Queen Elizabeth the Second National Trust Act and the Land Transfer Act is that the Trust obtains immediate indefeasibility of its interest on notification. That is the effect of s 22(6) of the Queen Elizabeth the Second National Trust Act read with ss 33, 34, 35, 62 and 63 of the Land Transfer Act and the definitions in s 2 of that Act of "dealing", "instrument", "land" and "proprietor". In the absence of fraud (which is not alleged[78]), the defects in execution or procurement of notification cannot be used by Green Growth to defeat the Trust's interest. I too would dismiss the appeal by Green Growth on its counterclaim that the covenant was invalid because of irregularities in its execution and procurement.

[113] I am not convinced that the indefeasibility of the Trust's interest in the land on notification is an answer to Green Growth's claim for a declaration that the covenant was "wrongfully obtained" so that the Registrar may correct the register under s 81 of the Land Transfer Act. Green Growth seems to have accepted in this Court that correction under s 81 of the Land Transfer Act could not be used to overcome an interest that was otherwise indefeasible under the legislation. But there is conflicting authority on whether the Registrar's powers under s 81 are more extensive than the fraud exception allows and the terms of s 81 are difficult to confine in that way, as explained briefly below at [145]–[146]. Since however s 81 can only be invoked where there is fraudulent or wrongful conduct by the registered proprietor, I take the view that s 81 cannot assist Green Growth in the present case given that the Courts below did not find that the Trust behaved in bad faith in its dealings with Mr Russell.

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[78] Wylie J refused to allow Green Growth to amend its counterclaim to include an allegation of fraudulent conduct by the Trust: see *Green Growth* (HC) at [14].

The terms of the covenant

[114] The notified covenant in its terms binds the covenantor and the Trust "to observe and perform the respective duties and obligations imposed by the restrictions, stipulations and agreements contained in the Schedules hereto to the end and intent that the same shall bind the land in perpetuity". There are three schedules.

[115] The first schedule describes the purpose of the open space covenant as being:

> (a) To protect and maintain open space values of the land.
>
> (b) To protect native flora and fauna on the land.

[116] The second schedule contains definitions in a numbered first clause and in numbered clauses 2 and 3 sets out the duties, obligations, restrictions, and rights agreed to in relation to the land. The appeal is concerned with the meaning and effect of the second schedule.

[117] The second schedule restricts development on the land prejudicial to its value as open space, particularly in relation to a "protected area". The term "protected area" is defined in clause 1 of the second schedule as "the area of native trees shown as area [blank] on illustrative aerial photo attached" but no such photograph was attached to the covenant as notified. The impact of the omission of such a photograph on the meaning of the second schedule is the principal question on the appeal.

[118] Clause 2 of the second schedule protects the appearance and open space and ecological qualities of the land by requiring the permission of the Trust's board for changes, subject to a requirement of reasonableness in clause 3 of the second schedule. Clause 2 limits "[i]n particular, on and in respect of the protected area" certain activities and development:

> 2. No act or thing shall be done or placed or permitted to be done or remain upon the land which in the opinion of the Board [of the Trust] materially alters the actual appearance or condition of the land or is prejudicial to the land as an area of open space as defined in the Act.
>
> In particular, on and in respect of the protected area, except with the prior written consent of the Board, or as outlined in the Third Schedule, the Owner shall not:

(a) Fell, remove, burn or take any native trees, shrubs or plants of any kind.

(b) Plant, sow or scatter any trees, shrubs or plants or the seed of any trees, shrubs or plants other than local native flora, or introduce any substance injurious to plant life except in the control of noxious plants.

(c) Mark, paint, deface, blast, move or remove any rock or stone or in any way disturb the ground.

(d) Construct, erect or allow to be erected, any new buildings or make exterior alterations to existing buildings.

(e) Erect, display or permit to be erected or displayed, any sign, notice, hoarding or advertising matter of any kind.

(f) Carry out any prospecting or exploration for, or mining or quarrying of any minerals, petroleum, or other substance or deposit.

(g) Dump, pile or otherwise store any rubbish or other materials, except in the course of maintenance or approved construction, provided however that after the completion of any such work all rubbish and materials not wanted for the time being are removed and the land left in a clean and tidy condition.

(h) Effect a subdivision as defined in the Resource Management Act 1991.

(i) Allow cattle, sheep, horses, or other livestock to enter, graze, feed or otherwise be present provided, however, that they may graze up to any approved fenceline on the perimeter of the land.

3. In considering any request by the Owner for an approval in terms of Clause 2 hereof, the Board will not unreasonably withhold its consent if it is satisfied that the proposed work is in accordance with the aim and purpose of the covenant as contained in the First Schedule.

Further reference to the "protected area" is found in clause 7 of the second schedule (which relates to the maintenance of fences and gates around the protected area).

[119] The third schedule stipulates the owner's right to maintain an existing access track and the right to the construction of one dwelling on the land:

1. The Owner may maintain and upgrade the existing access track on the land.

2. The Owner may construct one dwelling, ancillary buildings and amenities after consultation with the Trust as to siting, design and materials in an area cleared of vegetation for light and views, a garden

> and orchard, provided such use does not detrimentally affect the rest of the native vegetation.

[120] As is made clear by the wording of clause 2 of the second schedule, the developments "outlined in the Third Schedule" are exceptions to the restrictions on development in the protected area.

History of the notified covenant

[121] The dealings between the Trust and Mr Russell are set out in the reasons given by William Young J[79] and do not need to be repeated by me in any detail. I confine myself to the essential background.

[122] In the form in which a first covenant was originally submitted for notification, a photograph identified both a "protected area" within the block (which was subject to the restrictions as to use and development which are still provided for the "protected area" by the second schedule of the notified covenant) and a "management area" (in which development including subdivision was permitted subject to consultation with the Trust under the terms of the original third schedule). Evidence in the present proceeding disclosed that the Registrar was unwilling to accept the original covenant on the basis that the distinct areas could not be identified by a photograph (as provided for in the original covenant) and that a survey was required. The Trust apparently considered that the survey was an expense that was not warranted.

[123] Instead, an amended covenant was adopted and resubmitted for notification. The first and second schedules maintained the original terms contained in the covenant rejected by the Registrar but a revised third schedule (the terms of which are set out above at [119]) was inserted. It replaced the original third schedule which had sought to identify a wider "management area" in which more extensive development, including by subdivision, could occur than the erection of one dwelling and improvements ancillary to it. The effect of the substituted third schedule was to make it unnecessary to identify in advance an area in which development could occur as of right and to replace it with the landowner's right to one dwelling and ancillary

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[79] See above at [12]–[20].

development subject to consultation with the Trust as to siting and to the proviso in relation to impact on the native vegetation.

[124] The covenant as modified continued to refer in clause 2 of the second schedule to the protected area in respect of which development and use was limited by the terms of clause 2.

The litigation

[125] When Green Growth sought the approval of the Trust to undertake development of the property, a question arose as to the significance of the omitted photograph and the scope of the obligations contained in schedule 2 of the notified covenant. As a result, the Trust applied to the High Court for rectification of the covenant by deletion of the definition of "protected area" in clause 1 of the second schedule and by deletion of the words "on and in respect of the protected area" in the second paragraph of clause 2 of the second schedule.[80] The effect was to make the whole land subject to the restrictions contained in the second schedule subject only to the exception provided by the third schedule.

[126] Rectification was sought by the Trust on the basis that retention of the reference to the "protected area" was a mistake. It was said that the intention of Mr Russell and the Trust at the time the covenant was finalised was that the whole of the land would be subject to the restrictions on development in the open space covenant, subject to the right contained in the third schedule.

[127] Green Growth opposed rectification on the basis that it would not achieve the common intention of the parties at the time the covenant was entered into. It also opposed the claim for rectification on the basis that it could not succeed "in light of the protection given by s 62 of the [Land Transfer Act] 1952 to Green Growth's registered estate".

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[80] In the High Court the Trust had also sought (as an alternative cause of action) a declaration as to the correct interpretation of the covenant. Wylie J refused to make the declaration sought: see *Green Growth* (HC) at [88]–[93].

[128] In addition to these defences to the claim by the Trust for rectification, Green Growth counterclaimed for a determination that the covenant as a whole was invalid because of irregularities and deceptive conduct in its execution. It sought removal of the covenant from the register under the power of correction available to the Registrar under s 81 of the Land Transfer Act.

[129] The High Court and Court of Appeal affirmed the validity of the covenant, dismissing the counterclaim by Green Growth on the basis that the covenant on notification conferred an indefeasible interest in land on the Trust. The Court of Appeal also confirmed orders granted in the High Court to rectify the covenant to accord with what was held to be the common intention of Mr Russell and the Trust by deletion of the references to the "protected area" in the second schedule, with the effect that all restrictions (including those in the second paragraph of clause 2) applied to all the land subject only to the exception contained in the third schedule.

The Trust's claim to rectification

[130] I consider that the covenant properly understood in its own terms (without recourse to extrinsic evidence) makes it clear that clause 2 of the second schedule is modified only by the exception provided in the third schedule and that the references to the aerial photograph and the definition of "protected area" are artefacts of drafting which are clearly superseded and have no effect. To this extent I agree with the view taken in the lower Courts that the reference to a defined "protected area" is otiose and can be ignored.

[131] I do not consider however that the equitable remedy of rectification is available following notification of the covenant. It may be open to the Registrar to correct the register under s 80 of the Land Transfer Act by removing the definition of the "protected area" in clause 1 of the second schedule if the Registrar considers that leaving in a reference I consider to be surplusage could cause confusion in the future. But that is a matter for the Registrar acting under the statute, at least in the first instance, and not because the equitable remedy of rectification is available to the Trust.

(a) The meaning of the covenant

[132] Before the High Court the parties seem to have accepted that extrinsic evidence was admissible in considering the meaning of the notified covenant. Both called evidence as to the dealings between the Trust and Mr Russell and the intentions and expectations of the parties at the time the covenant was entered into (although much of this background was relevant to the claim that notification was "wrongful" rather than being directed to the meaning of the covenant).

[133] There is some authority that the only extrinsic evidence properly admitted when construing registered instruments is, in the absence of special circumstances, context that would be readily apparent to all third parties.[81] A similar approach to ascertaining the meaning of a standard contract of insurance was taken by McGrath, Glazebrook and Arnold JJ in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* when accepting that a "more restrictive approach to the use of background" than in other cases may be prompted when the parties are aware their contract might be relied on by a third party.[82] It is however unnecessary for me to resolve whether and to what extent resort to extrinsic evidence is appropriate in the case of instruments notified on a public register as I am of the view that the meaning of the covenant is clear in its terms as a whole.

[134] The more specific provisions for erection of a single dwelling house contained in the third schedule are expressed as an exception to the restrictions contained in clause 2 of the second schedule. The second paragraph of clause 2 says so explicitly and any other interpretation would deprive the third schedule of effect. The third schedule requires "consultation" with the Trust in respect of siting and design of the one dwelling and associated buildings and gardens that are permitted to the owner as of right provided only that the use "does not detrimentally affect the rest of the native

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81 *Opua Ferries Ltd v Fullers Bay of Islands Ltd* [2003] UKPC 19, [2003] 3 NZLR 740 at [19]–[20]; *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45, (2007) 233 CLR 528 at [37]–[45]; *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [151] per Campbell JA; and *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305 at [124]–[130] per Lewison LJ and [147]–[150] per Longmore LJ (compare at [36]–[54] per Arden LJ).

82 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [62].

vegetation" (a reference that in context can only be to the native vegetation on the whole block).

[135] Clause 2 of the second schedule applies to the remainder of the land, not within the exception in the third schedule. It requires permission of the Trust for any use or development of the entire land. And outside the development permitted as of right and "outlined in the Third Schedule" or as approved by the Trust, the particular developments and activities listed in the second paragraph of clause 2 are further restricted. Although the permission of the Trust cannot be withheld unreasonably, the Trust must be satisfied that the use or development "is in accordance with the aim and purpose of the covenant as contained in the First Schedule". That is to say, it must accord with the "open space values of the land" and the protection of "native flora and fauna on the land". The scheme of the covenant as notified is that all the land is protected by clause 2 except in so far as development is allowed under the third schedule as of right (but after consultation with the Trust and only if it is satisfied that the use "does not detrimentally affect the rest of the native vegetation").

[136] In the High Court and Court of Appeal it was held that the words in the second paragraph of clause 2 "on and in respect of the protected area" were to be deleted in the rectification ordered. It seems to me that the sense of the second paragraph is, as its opening words ("In particular") indicate and as the overall scheme of protection provided for suggests, that the particular instances of use or development which require the permission of the board illustrate the general restriction in the first paragraph of clause 2. It is the definition of "protected area" in clause 1 that is unnecessary on this view, because all land outside the scope of the development permitted in the third schedule is subject to the protections of clause 2. Accordingly, the balance of the land outside the exception for a single dwelling and access is protected by the specific restrictions in subparas (a)–(i) of the second paragraph of clause 2 as well as by the general requirement of permission contained in the first paragraph. I do not therefore think it is necessary to excise the words "on and in respect of the protected area". In the context of the covenant as a whole it refers to the land subject to clause 2 outside the excluded area "as outlined in the Third Schedule".

[137] This interpretation achieves much the same effect as the approach taken in the lower Courts. It means there is no awkwardness in the opening words of the second paragraph as would be the case if they point both to exposition and illustration of the general restriction ("In particular") and also restrict the examples to part only of the land to which the general restriction in the first paragraph of clause 2 applies. This meaning is indicated also by the illustrations given in subparas (a)–(i) which are self-evidently uses which must be restricted if the purposes of clause 2 and clause 3 are to be fulfilled. They bear directly on material alteration of the appearance or condition of the land and prejudice to its value as open space (as the first paragraph of clause 2 requires). And they impact on the purposes contained in the first schedule (as clause 3 suggests is important to the exercise by the Trust of its powers of control). There is therefore no sense in their restriction to an area more confined than the land to which the general restriction in clause 2 applies.

(b) Availability of rectification

[138] I agree with William Young and O'Regan JJ's conclusion that the equitable remedy of rectification is not available against Green Growth. A claim for rectification in equity between the parties to a transaction is not precluded by the fact of registration of transfer under the Land Transfer Act.[83] But it requires in personam claim. A claim for rectification is a "mere equity"[84] and does not entail the assertion of an interest of the kind contemplated by s 62 or s 182 of the Land Transfer Act (which provides that a person taking a transfer from a registered proprietor is not affected by notice of any trust or unregistered interest).[85] A claim for rectification is not a proprietary interest and does not itself engage the purpose of indefeasibility in protecting registered title. The remedies obtained in a claim for rectification of an instrument may compel a registered proprietor to provide satisfaction but the remedies are granted against the registered proprietor personally.

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83 *Oh Hiam v Tham Kong* (1980) 2 BPR 97,130 (PC).

84 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL) at 1238 per Lord Upjohn; and *Australian Mutual Provident Society v Bridgemans Art Deco Ltd* [1996] 2 NZLR 263 (CA) at 277 per Henry J, with whom Richardson P and Gault J agreed on this issue (at 269). Compare *Child v Dynes* [1985] 2 NZLR 554 (HC) at 560 per Barker J (a right to rectification "falls somewhere between equities and interest").

85 *C N & N A Davies Ltd v Laughton* [1997] 3 NZLR 705 (CA) at 711–713 per Thomas J for the Court, referring to *Oh Hiam v Tham Kong*. See also *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [21] per Elias CJ.

[139] I do not consider however that the Trust has an in personam claim for rectification of the covenant against Green Growth on the basis that Green Growth took title with notice of the defects which were apparent on the face of the notified covenant. As Mason CJ and Dawson J pointed out in *Bahr v Nicolay (No 2)*, the paramountcy, indefeasibility and notice provisions of the Torrens system do not preclude claims to an interest in land "arising out of the acts of the registered proprietor himself" because such equities involve no conflict with the policy of the legislation.[86] It is however quite inconsistent with the policy of the notice provisions that an equitable claim to rectification could arise out of mere reliance on the register.

[140] Since I consider that the notified covenant already bears the meaning the Trust seeks to use rectification to achieve, the claim for rectification is in any event misconceived. Had the meaning of the covenant not accorded with the intentions of the parties however I do not consider that rectification could have been sought by the Trust against Green Growth as a subsequent registered proprietor.

The Green Growth counterclaim appeal

[141] As has been foreshadowed and in agreement with William Young and O'Regan JJ, I consider that Green Growth's counterclaim that the covenant is unenforceable is inconsistent with the indefeasibility provisions of the Land Transfer Act. I have more doubt that the indefeasibility provisions answer the claim that the Registrar should correct wrongfully procured notification, but consider that the findings of fact in the lower Courts preclude recourse to s 81 in any event.

(a) Irregularities in execution do not affect the notified interest of the Trust

[142] A notified open space covenant is a statutory interest in land which limits the interest of the registered proprietor of the land even though the interest of the registered proprietor is otherwise "absolutely free from all other encumbrances, liens, estates, or interests whatsoever" not "notified on the folium of the register constituted by the grant or certificate of title of the land" under s 62 of the Land Transfer Act.

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86 *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613.

[143] Registration does not confer validity on all terms of a registered instrument.[87] Nor does it affect personal obligations. Personal causes of action in law or equity arising out of notified instruments or their registration remain available to those who have been wronged.[88] In the present case, while it might have been open to Mr Russell to challenge the execution of the covenant or its notification by in personam claim, Green Growth has no such claim. The interest Green Growth obtained in the land was always subject to the notified covenant. Subject to questions of interpretation of the covenant (such as are raised by the application by the Trust) or any basis for legal invalidity of the terms of the covenant extraneous to questions of proprietary interest, Green Growth is bound by the notified covenant and its estate in the land is limited by the Trust's interest. As William Young J explains at [29]–[45], the Trust is the "proprietor" (as that term is defined in s 2 of the Land Transfer Act) of an interest in land created by the covenant. Upon its entry in the register it is not open to Green Growth to challenge the covenant's validity on the basis of its improper execution. Such a claim is, in the absence of fraud, precluded by s 63, as that section was explained in *Frazer v Walker*.[89]

(b) Correction of the register under s 81 of the Land Transfer Act

[144] Under s 81 of the Land Transfer Act the Registrar is empowered to correct the register where any grant, certificate, instrument, entry, or endorsement has been "fraudulently or wrongfully obtained" or is "fraudulently or wrongfully retained". Green Growth says the open space covenant was "wrongfully obtained" because Mr Russell's initials to the replacement third schedule were not witnessed (as was required by reg 12 of the Land Transfer Regulations 1966), because it was unsatisfactory to present a document that gave the incorrect appearance of being unaltered and because a new certificate of correctness (required by s 164 of the Land Transfer Act) was not signed before the final form of the covenant was presented to

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87 See *PT Ltd v Maradona Pty Ltd* (1992) 25 NSWLR 643 (SC) at 679 per Giles J: "Registration does not validate all the terms and conditions of the instrument which is registered. It validates those which delimit or qualify the estate or interest or are otherwise necessary to assure that estate or interest to the registered proprietor." See also *Duncan v McDonald* [1997] 3 NZLR 669 (CA) at 681–682 per Blanchard J for the Court.

88 *Frazer v Walker* [1967] NZLR 1069 (PC) at 1078–1079; and *Regal Castings Ltd v Lightbody* at [21]–[22] per Elias CJ, [78] per Blanchard and Wilson JJ and [147]–[156] per Tipping J.

89 *Frazer v Walker* at 1075 and 1077.

the Registrar for entry on the title. It seeks a declaration that notification of the covenant was wrongfully obtained and an order that it be removed from the title.

[145] The submissions of the parties in this Court proceeded on the basis that the Registrar cannot use s 81 to impeach an indefeasible interest in land.[90] Given the conflicting authority on the scope of s 81,[91] I prefer not to endorse that approach in the absence of argument. Where the claimed wrongful conduct is that of a registered proprietor (in this case the Trust) a determination that recourse cannot be had to s 81 goes beyond the protection of bona fide purchasers and mortgagees suggested by the Privy Council in *Frazer v Walker.*[92] It may be accepted that it is distinctly odd that the court might procure a result by declaration acted on by the Registrar which it could not achieve directly under s 85 (because of the effect of s 63 as recognised in *Frazer v Walker*[93]). And such declaratory relief may be thought to be inappropriate in relation to registered interests, whatever the scope of the Registrar's powers.

[146] Against such considerations, the Registrar's powers under s 81 were described in *Frazer v Walker* as "significant and extensive", and "not coincident with the cases excepted in ss 62 and 63".[94] Although there was "room for some difference of opinion as to what precisely may be comprehended in the word 'wrongfully'", the Privy Council considered that "s 81 must be read with and subject to s 183 with the consequence that the exercise of the Registrar's powers must be limited to the period before a *bona fide* purchaser, or mortgagee, acquires a title under the latter section".[95]

[147] The Trust is not assisted in the present case by s 183 since it is not a bona fide purchaser or mortgagee but an original party to the covenant. If the covenant on which it relies was notified "wrongfully", it is arguable that s 81 could permit the Registrar to remove its notification. I do not think it is necessary or appropriate to resolve whether recourse to s 81 could defeat a registered interest in the present case. Accepting that the jurisdiction may apply to a registered interest of someone who is

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90 On the basis discussed in *Nathan v Dollars & Sense Finance Ltd* [2007] NZCA 177, [2007] 2 NZLR 747 at [36] and [156]–[158].
91 Referred to by William Young J above at [26].
92 *Frazer v Walker* at 1079.
93 At 1077.
94 At 1079.
95 At 1079.

not a bona fide purchaser or mortgagee, I do not consider that it is available in the present case because, on any view of the errors relied on, it cannot be said that the Trust "wrongfully" procured notification of the covenant.

[148] "Wrongful" registration may fall short of actual fraud, as is suggested by the distinct references to "fraudulently" and "wrongfully" in s 81 itself. I would however decline to accept that s 81 applies in the absence of unconscionable conduct of some kind. That I think follows from use of the language of "fraudulently or wrongfully" in the section. "Wrongfulness" requires "something more than that the instrument pursuant to which it was procured was void or that the certificate of correctness was erroneous for that reason".[96] Even on the looser view suggested in *Housing Corp of New Zealand v Maori Trustee* by McGechan J (that "wrongful" conduct is conduct that "infringes the legal rights of another"),[97] it is difficult to see that any relevant rights have been infringed.[98] Despite the fact his signature was not witnessed, it was not suggested that Mr Russell did not sign the variation to the covenant.[99]

[149] The High Court and the Court of Appeal in the present case did not find there was a lack of good faith on the Trust's part. I consider that in light of that and on the evidence to which we were referred there is no basis for any finding of wrongfulness in the sense of unconscionable conduct on the part of the Trust. On that view, Green Growth's claim for correction under s 81 was rightly rejected.

Disposition

[150] I would allow the appeal in part. I would set aside the order for rectification of the open space covenant made in the High Court on the basis that such rectification is unnecessary on proper construction of the covenant and in any event is not available as between the Trust and Green Growth. The "protected area" within which the protections of clause 2 of the second schedule of the covenant attach is the whole block of land with the exception of that contained within the development permitted by the third schedule. I concur in the making of the declaration proposed by William Young

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96 *Congregational Christian Church of Samoa Henderson Trust Board v Broadlands Finance Ltd* [1984] 2 NZLR 704 (HC) at 714 per Barker J.

97 *Housing Corp of New Zealand v Maori Trustee* [1988] 2 NZLR 662 (HC) at 699.

98 See *Green Growth* (CA) at [129].

99 *Green Growth* (HC) at [155].

and O'Regan JJ. I would dismiss the appeal in relation to Green Growth's counterclaim that the notification of the covenant was wrongfully obtained by the Trust. I agree with the costs order set out in the reasons given by William Young J.

GLAZEBROOK J

[151] I agree with the reasons of William Young and O'Regan JJ on all issues apart from the interpretation of the covenant.[100]

[152] William Young and O'Regan JJ consider that cl 2(a)–(i) of the second schedule only applies to the undefined protected area. Contrary to the view of the Chief Justice, they do not consider the protected area can be interpreted, absent extrinsic evidence, as encompassing all of the land apart from that dealt with in the third schedule. They also construe cl 3 of the second schedule as being applicable only to cl 2(a)–(i) and thus ineffective.

[153] As to cl 3, there is nothing in the wording of the clause itself that limits its application to cl 2(a)–(i). Further, the first paragraph of cl 2 contemplates an application for approval. Without knowing what actions are contemplated, the Board would have no ability to form an opinion as to whether or not such actions come within the restriction in the first paragraph of cl 2 before they are embarked upon.

[154] The terms of the covenant must also be interpreted in the light of the purpose of the Queen Elizabeth the Second National Trust Act 1977 (QEII Act) and in a manner that achieves the objective of the covenant[101] and makes it workable. It would defeat the purpose of the QEII Act and the covenant if something could be done on the land without first asking for consent. If prior consent were not required, actions may irretrievably damage the open space values or the native flora and fauna on the land before the Board becomes aware of them.

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100 This means I agree with the whole of their reasons apart from [57]–[58], [76]–[78] and [80] to the extent it refers to the interpretation favoured by William Young and O'Regan JJ. I also agree with their discussion on rectification, although on the interpretation reached by the majority, rectification would not have been necessary: contrary to [57] of William Young and O'Regan JJ's reasons. See [140] of the Chief Justice's reasons.

101 Set out in the first schedule: see [115] of the Chief Justice's reasons.

[155] In addition, cl 3 of the second schedule protects the owner in that it sets out a clear process to be followed if an owner wishes to do something on the land. It also makes it clear that the consent of the Board cannot be withheld unreasonably.

[156] Turning to cl 2(a)–(i), I can see force in William Young and O'Regan JJ's view that, on the basis of the wording in the covenant, those paragraphs only apply to a protected area which is an undefined smaller area than the whole property less from the area referred to in the third schedule.[102]

[157] As the Chief Justice says, however, those paragraphs can also be seen as illustrative of the general restriction contained in the first paragraph of cl 2 and therefore do not add to the restriction already contained in that paragraph. Indeed, they may be useful aids to guiding the Board's decision-making under the first paragraph of cl 2. I also agree that the reference to the third schedule before paras (a)–(i) is important to make it clear that the restrictions in cl 2 do not apply to that part of the land dealt with in the third schedule.

[158] Accordingly, I agree with the interpretation of the covenant reached by the Chief Justice.[103]

[159] I also agree that s 80 of the Land Transfer Act 1952 could be used to align the register with the interpretation arrived at by this Court in order to avoid any future misunderstanding.[104] In this regard, any correction would presumably remove the definition of protected area in cl 1 of the second schedule and delete the words "on and in respect of the protected area" from the second paragraph of cl 2 of the second schedule.[105]

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102 Particularly in light of the matters pointed to in William Young and O'Regan JJ's reasons at [58].

103 At [130] and [134]–[137] of the Chief Justice's reasons.

104 See at [131] of the Chief Justice's reasons and [80]–[81] of William Young and O'Regan JJ's reasons.

105 The latter change is not strictly necessary on the majority's interpretation but would assist avoiding possible confusion later.

ELLEN FRANCE J

[160] The background to the appeal is set out in the reasons of William Young and O'Regan JJ at [6]–[21] and [114]–[129] of the reasons of Elias CJ.

[161] I agree with the conclusions of Elias CJ as to the interpretation of the covenant for the reasons she gives and as to the approach to s 80 of the Land Transfer Act 1952.[106] However, I make no comment on the approach to be taken to the use of extrinsic evidence in the construction of registered documents.[107] This issue was not the subject of argument before us. Further, on the approach to interpretation I adopt it is not necessary to reach any view on this aspect.

[162] Further, for the reasons given by Elias CJ at [138]–[140], I consider that rectification is not available against Green Growth, as a successor in title, based on its notice of the defects in the covenant.

[163] I agree, for the reasons given by William Young J at [29]–[45] that the covenant, as notified, is effective and binding on Green Growth. I would uphold the decision to reject Green Growth's claim for correction of the register under s 81 of the Land Transfer Act on the same basis as outlined by Elias CJ at [144]–[149].

[164] I would accordingly dispose of the appeal in the way set out at [104] of the reasons of William Young and O'Regan JJ.

Solicitors:
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Gibson Sheat, Wellington for Respondent

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106 At [109] and [130]–[137] of her reasons.
107 See the reasons of William Young and O'Regan JJ at [73]–[74].