

IN THE SUPREME COURT OF NEW ZEALAND  
I TE KŌTI MANA NUI O AOTEAROA

SC 31/2025  
[2026] NZSC Trans 1

**BETWEEN**

**MICHAEL AND JULIA FUGE  
BRYCE MARLOWE TOWN  
CHLOE ANN FUGE  
AND JULIA ELIZABETH FUGE  
AS TRUSTEES OF THE  
ABERDEEN FOUR TRUST**  
Appellants

**AND**

**WIMAX NEW ZEALAND LIMITED**  
Respondent

Hearing: 17 February 2026

Court: Winkelmann CJ  
Ellen France J  
Williams J  
Miller J  
Cooke J

Counsel: A R Galbraith QC, A S Ross KC and P W G Ahern  
for the Appellants  
J E Hodder QC, K M Quinn KC, C B Pearce and  
H Ranaweera for the Respondent

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**CIVIL APPEAL**

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**MR GALBRAITH QC:**

As the Court pleases. I appear with Mr Burbidge and Mr Ahern for the appellants.

**WINKELMANN CJ:**

5 Tēnā koutou.

**MR HODDER KC:**

May it please the Court, I appear with my learned friends Mr Quinn and behind me Mr Pearce and Mr Ranaweera. They're behind me because they're looking at a screen but they can't sit on this bench.

10 **WINKELMANN CJ:**

Tēnā koutou. Mr Galbraith, Mr Hodder just before we start, I want to apologise to you for yesterday because I failed to note that you were appearing on a screen so I didn't acknowledge your presence, so I apologise for that.

**MR HODDER KC:**

15 Thank you your Honour. It was an important occasion and it was well done if I may say so.

**WINKELMANN CJ:**

Thank you. Mr Galbraith, and Mr Galbraith perhaps you could start by telling us how to pronounce your client's names.

20 **MR HODDER KC:**

Fuge I think.

**WINKELMANN CJ:**

Fuge with a G.

**MR GALBRAITH KC:**

25 Mr Ahern's nodding so I take it that's correct your Honour. Thank you. This is an appeal for a case that was pleaded under section 313 in the schedules to the Land Transfer Regulations 2002 and Property Law Act 2007, and it was that

statutory basis upon which the High Court in particular proceeded, it certainly, in its initial interpretation of what the scope of the easements were. That came to be somewhat reversed in the Court of Appeal as your Honours will have seen from the judgment where paragraph 27, for example, of the judgment says this  
5 is a case in private nuisance, tortious case and claim in private nuisance.

That wasn't, as I say, the starting point that the High Court took. In my respectful submission the High Court was correct to start from the statutory position, the New Zealand statutory and regulatory position and before it got to  
10 assuming that everything about the common law of private nuisance was appropriate. And where you start I say is important, and where the High Court started was the correct place to start and where the Court of Appeal started wasn't because what happened then was having come to the conclusion that with the plethora of common law, cases and authorities, my learned friends no  
15 doubt compelling submissions, it then became a hurdle to see whether there was any room left for the application of the New Zealand statutory provisions and the regulations which arose from that.

It's accepted of course, and was accepted in the hearings below, both the  
20 arbitration in the High Court and the Court of Appeal, that the position in relation to the easements which exist here was informed by common law principles. For example that the easement doesn't give rise to an entitlement to pass and repass over every square inch of the identified easement area, but it wasn't accepted and isn't accepted that the full plethora of the common law principles  
25 derived out of England and Canada, Australia are those which should be imposed upon the New Zealand statutory and regulatory regime.

**WINKELMANN CJ:**

So just what is accepted in terms of not permitted doesn't include a right to pass and repass over every inch, is that –

30 **MR GALBRAITH KC:**

Yes. And that I think was accepted right from the start and you'll see that there were certain agreements reached at the time of the arbitration and we don't

resile from those agreements at all. But what we are contending for is that when one looks at the regime which was introduced from the early 1960s in New Zealand in response to the particular issues of urban intensification, the increase in subdivisions, the increase in easements, what was developed from 1961 through to indeed 2018, because it's still a continuing process, is the starting point to then see where common law principles developed on a different historic basis should fit or should be fitted.

On Friday I think, and I apologise for the lateness, we did send down a couple of more cases, and to be honest the Court seems to have more than enough when one reads the submissions and it's a bit hard, because I have conscientiously tried to read through them all too, but think that if in fact easements were applied actually in the words that they seem to suggest, that there would be an awful lot of litigation which would be avoided. In other words if they meant what they said, pass and repassed but that –

**WINKELMANN CJ:**

I was going to ask at some point so I should just highlight it for you now, I'm not going to trouble you with it, but it is underneath all of this but perhaps not explicitly addressed, certainly the Court of Appeal judgment is the approach to be taken to interpreting the written form of easements and what they permit?  
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**MR GALBRAITH KC:**

Yes. Your Honour's completely correct and, as I say, as I just commented, if they meant what they seemed to say then it would be an awful lot simpler, or over the couple of centuries and what we're really suggesting is that they should be taking it as saying, or meaning what they actually say at least in New Zealand under the regime that we now have, and if one thinks about it for a moment, it is a bit odd that they do say pass and repass at all times in the old days used to say, well that if you go back to section 90D which was the fount of the schedule's very expansive wording about what the easement was meant to entail, which has been rather more efficiently now set out in the 1961 and 1967 and the 2002 Regulations. But, really, I was sort of thinking whether the

easement should say pass and repass at all times, and we really mean that, in a sense, rather than it's been reinterpreted in effect over the time.

We did on Friday also send down, I suspect that the Court has already read, 5 Mr Gibbons' article which appeared in the *Law Journal*. That was post our submissions, so obviously we didn't refer to it. But in my respectful submission, and I will come back to it a wee bit later, it really raises really the issue which is implicit in what your Honour just said to me that is this really appropriate for New Zealand conditions now to simply impose English common law principles 10 in the practical situation of New Zealand conveyancers dealing with subdivision markets, multiple easements, having to do it on the fly, and in the practical situation of individuals who are interested in possibly purchasing a property, going to the title and the deposited plan, reading what it says, and believing that what it says it in fact correct, but not realising that it's to be reduced by whatever 15 common law principles may have derived out of the English situation of agricultural land undefined and right of ways over those lands or the *Hutton v Hamboro* (1860) 2 F & F 218, 175 ER 1031 case where wastelands 50-foot right of way, not surveyed of course because they didn't do that in those days, and a two-foot intrusion. That's a country mile from the situation, or what 20 the reforms of the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002 and the Property Law Act 2007 were directed towards.

So if I could, just in relation to Mr Gibbons' article, just draw attention to 25 particularly his last three paragraphs and what he really says that I've encompassed in fewer words and what I have just said. But that's what our submissions start off by saying that, really, one has to start with both the regulation and a statutory situation in New Zealand and what the context was that drove that statutory and regulatory enactments at the time.

30

The second issue then is the issue which the Court highlighted in granting leave as to whether, if the common law approach is to apply in its full force and effectiveness, does that preclude consideration of a reasonable possibility of future development as a matter of law, because that's, in effect, what the

Court of Appeal derived from the case authorities it had referred to. I'll come back to that but the simple proposition on our part is that, sure, there's any number of comments in the cases about assessing the interference in terms of the current position because that's what the Court was faced with in those cases. There is no suggestion in the cases that this was a matter of law that confined the Court to that position, but, as I say, I'll come back to that subsequently.

So just to remind the Court of what *Hutton v Hamboro* and those cases were about and as I say, *Hutton v Hamboro* was a case of a, I think it was a 50-foot right of way over some Putney land which from the bracketed headnote at the top, looks like it was wasteland at the time and a minuscule intrusion into that which, unsurprisingly it went to a jury with a direction from Lord Coleridge, a jury decided that wasn't a substantial interference.

15

The position in New Zealand is, as I've suggested, quite different, but I would like before I plunge into the regulatory position adjustments proper, I should take you to the actual easement here, unless your Honours have already closely examined that. Perhaps not? We perhaps should?

20 **WINKELMANN CJ:**

Well, we've examined it, certainly, but you take us to it. Because it's always helpful if counsel orientate us.

**MR GALBRAITH KC:**

Okay, Mr Burbidge will. It's at 302.0269, and as your Honours would expect, I'm working off hard copy, I apologise.

25

**WINKELMANN CJ:**

So am I.

**MR GALBRAITH KC:**

It's somewhat easier.

**WINKELMANN CJ:**

I think so.

**MR GALBRAITH KC:**

5 I guess the first thing, well the Court knows that there was an earlier  
easement certificate. This was the one that was entered into in 2017 under the  
influence of then Justice Fisher who lived in the Fuges' property at that stage,  
right down the bottom of the easement. The easement runs for considerable  
length, it's downhill, it's quite steep, and he abandoned the site in 2013, was it  
2013, yes, 2013 but remained involved in the completion of the easement.

10

Because it's a subdivisional easement, you'll see when one goes to 302.0271,  
that the grantors and grantees are pretty much parallel because what you've  
got, you've got an easement which people are going up and down over and it's  
servicing all the properties in the – served by the easement and so you'll see  
15 the parallels in the grantor/grantees and then there are schedules that run past  
there in relation to the right of way in respect of various of the lots because  
some of the lots don't have to have the same full easement.

20 If we go to 302.0281, the position under the regulatory provisions at the time  
was that the default provisions didn't compulsorily apply, and it was possible for  
easements to have their own particular terms. So, you'll see in 302.0281 in the  
first box: "Unless otherwise provided below, the rights and powers implied ...  
are those prescribed by the ... Regulations [in the] Schedule of the Property  
Law Act ..." and those are amended over the page at 302.0282, where there  
25 are specific amendments in relation to contribution to the maintenance or  
creation of both the driveway and the easement itself.

30 So if one looks down on 302.0282, it says: "The rights and powers in this  
instrument are in addition to and vary the rights and powers contained in ... [the  
2002 Regulations and the 2007 Regulations]." And then clause 2: "Clause  
11(2) of Schedule 4 is deleted and replaced with the following: (a) The  
Residents who have the right to use Easement Area A are responsible for the  
repair and maintenance of the easement facility on Easement Area A and for

[its] associated costs so as to keep the easement facility in good order and to prevent it from becoming a danger or nuisance, in the shares calculated in accordance with the formula below.” The same for easement areas B, C, and D, and then there’s a formula under (e), and then you’ll see the formula  
 5 relates to driveway length on that page and the following page.  
 1020

If you go across to 302.0284, “easement areas” are defined, and they’re defined in relation to the plans that follow at 302.0285 et cetera. On 302.0284, clause 3:  
 10 “In addition to the obligations implied by Schedule 4 and Schedule 5, the Residents shall keep and maintain the Right of Way in good order and shall prevent it from becoming a danger or nuisance and at all times shall keep it in a reasonable condition. The Residents shall promptly repair any potholes or large cracks in the Driveway. Where part of the Driveway is being resealed for  
 15 any reason, the resealing must extend at least 3 metres either side of the affected area of the Driveway.”

**WINKELMANN CJ:**

Can you explain that last sentence?

**MR GALBRAITH QC:**

20 Yes, as I understand it, it means literally what it says, is that because the driveway at that stage was sealed driveway, albeit it didn’t extend for the full extent of the right of way, it provides that the driveway being resealed must extend three metres either side of the affected area of the driveway. So if there’s a whole in the driveway in the middle of it, then you go three metres  
 25 both sides and it’s got to be resealed to that extent. What this –

**MILLER J:**

Or three metres up and down presumably?

**MR GALBRAITH QC:**

I’m sorry, yes.

**MILLER J:**

It's not necessarily about the boundaries of it but possibly the length of fit. So it's a clause about the quality of the repair is it?

**MR GALBRAITH QC:**

5 Yes, I think, and you'll see when we come to the regulations, that where work's done the regulations provide for the land to be restored. So it's, I think it's of that ilk. What the certificate of grant doesn't do, it doesn't face up to the problem that the driveway, or the right of way wasn't any longer protected as to its bounds, which it, with great respect, in hindsight probably would have been  
10 better if it had, we wouldn't be here now if it had, but it doesn't face up to that. So it assumes that the right of way to which the residents are meant to keep and maintain in good order, a bit difficult when some of the residents have assumed part of the right of way by that time.

**MILLER J:**

15 The interpretation you are putting on it seems consistent with clause 5, which preserves clause 11(6) of the schedule, so it's all about responsibility for keeping it all in good order –

**MR GALBRAITH QC:**

And 11(6) is that provision I was speaking about before Sir, about restoring  
20 back, restoring the land back when work's been done, and it's inconsistent with what was on the ground, but it's the legal rights which the – or sorry the legal obligations which the parties are accepting, and it's not limited just to the driveway because it includes the obligation to keep and maintain the right of way in good order.

25

So we'll see more of that when we come to – and perhaps just while we're on 302, really only for information rather than any particularity, if one looks at 302.0418, that's the record of title of the Fuge's property with, on 419, what's shown on the title as to the right of way. But, of course, title's don't show  
30 driveways, they simply show the bounds of the right of way, so anybody searching the title would simply see what's there. If you go back to 302.0416,

that's the Wimax property that's in dispute here. Sorry, 416 is the Rae property, I turned two pages. So 416 is the Rae property which you may recall was also developed but developed really through the Wimax property, which is at 414, and it's those two properties in a sense which are in issue in respect of the  
5 alleged obstruction of the interference to the right of way.

**MILLER J:**

You seem to be driving at the proposition that indefeasibility enters into this somehow.

**MR GALBRAITH KC:**

10 Yes.

**MILLER J:**

And that the Court of Appeal took that stance in *Hurley v Harley* (HC Auckland, HC170/98, 20 May 1999). It's not clear to me that it does. If you take, subject to a right on the part of the grantor to make reasonable use of their land so long  
15 as they don't interfere, it's always sort of forward-looking. What's the situation on the ground now, what can they do with it, as opposed to being dependent and their right to do that is clear is from the statutory context. How does it really enter the picture here? This is not a case, for instance, where there's some suggestion of an historical obligation that the Fuges knew nothing about.

20 **MR GALBRAITH KC:**

Well, sorry, not in terms of the easement, Sir, no, that's quite right. In terms of the interference, yes. I mean on a factual basis that is, of course, part of the case that they didn't know that and so they relied upon the face of –

**MILLER J:**

25 Well, they knew it was there. They saw the extra work being done. They didn't appreciate how it related to the boundaries of the easement area.

**MR GALBRAITH QC:**

Well, yes, but if you step back before that, at the time they purchased, which is really when indefeasibility tends to matter because people do things like (1) they buy, and (2) they take a mortgage and somebody gives them some money based on it. On the face of what they saw is what your Honours have just seen on those certificates of title. In other words, the certificates of title simply show the right of way and the deposited plan would also – well I'd better be a bit careful about the deposited plan in this case but I don't think we've got the deposited plan in front of us, have we, but when you think about normal subdivisions, your Honour, there's a deposited plan usually. In fact, what I was going to say is the normal way that these days and those days that easements were created was by the deposit of a plan. On that plan it would show pretty much what's in the certificate of grant here, the titles of which are affected, it would show on the plan the dimensions of the right of way, as the title does here, and people then transact on the basis of that. So I would, with respect, and it doesn't say it's subject to somebody having a reasonably bright idea to do something different. There's no suggestion of that on the face of the documents and the register which is normally what indefeasibility arises from.

**WINKELMANN CJ:**

Mr Galbraith, can I just take you back to the point I was sort of suggesting I might hear from you on earlier, which is that it seems to me indefeasibility bears upon the approach to construction once you'd take to a document such as this because they sit there on a record and third party lenders, the Council, et cetera rely upon the written terms, so that does place rather an issue, the extent to which one should take into account external considerations in documents that are operating within a system of indefeasibility of title.

**MR GALBRAITH KC:**

It's the *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75; [2019] 1 NZLR 161 (SC) position, your Honour, really which Justice William Young and Justice O'Regan discussed in that case that you shouldn't be going behind the scenes in a sense in relation to what people have to rely upon, the public documents because these are public documents.

What in effect the decision of the Court of Appeal is, is that you not only have to go behind but you've got to go on a world tour as well, off to the UK and Canada and Australia before you can be satisfied as to what the answer is.

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Whereas our position is that if you go on any tour at all you go to the Land Transfer Act 1952 and the Property Law Act provisions and if you want to delve more deeply you might have to go to the planning instruments that applied, that resulted in the certificate, sorry the easement, being created and that's a public document also. So you stick to the public documents and that's what you should be able to rely upon under the regime which there is in New Zealand.

Now, going back to *Hutton v Hamboro* and everything which happened in 1860 there wasn't anything like that to rely upon. As we know that was a deed system in England at the time and goodness only knows how you found out what the position was. Effectively you couldn't unless you were party to whatever the particular deeds were. So that's really the basis for our submission that one's got to start with, with our regulatory provisions, our schedule provisions in the context of the situation in New Zealand that was identified at the time where suddenly there was a snowball of subdivision and easement transactions which in the past hadn't existed, and I will take you to the Hansard extracts because for somebody as old as me there's certain nostalgia in those, having been around as a law clerk in those days.

25

So probably it's appropriate now to actually go and have a look at the schedules and the provisions of the two statutes. And both ourselves and my learned friends' side have provided schedules which summarise those and but I would like to actually take you to the relevant, what I think are the relevant provisions of both the Land Transfer Act and the Property Law Act and also a couple of Hansard extracts. So if we could start with the – there was in 1961 – if one goes perhaps to our schedule starting at page 26 of the written submissions and 23 has an appendix which has got the various pieces of legislation set out.

30

It wasn't until the 1920s that first of all there was provisions as to consents required for subdivisions et cetera.

5 The Land Transfer Act in 1952 didn't have anything particular about that. The Property Law Act in 1952 didn't have anything of particular significance but the Land Transfer Amendment Act in 1961 did. If I could just take you to that for one moment. So that did have new sections as to transfers, easements and profits à prendre et cetera.

10 It provided in 90A for the "creation of easements shown on [a] deposited plan" and how they "may also be created." It also provided the cancellation of easement certificates and under 90D it implied "rights and powers in certain easements" and in those easements in, if I can just find it, the easement certificate is part of the schedule to the easement and in a "Right of Way" under  
15 section 90D is: "The full, free uninterrupted and unrestricted right, liberty and privilege ..." et cetera. As I said, it's very expansive language which is used in section 90D in 1961.

So, that was the Land Transfer Act, and one reads that and thinks well, it's:  
20 "From time to time and at all times ... to go pass and repass ... [without all those things] with or without carriages ... over and along the land over which the right of way is granted or created".

The Property Law Act in 1986, which is tab 9, sorry is in the bundle also,  
25 introduced a new heading, as we say in the schedule, it included as implied terms the terms in schedule 9 which you will see there, not quite the same expansive language as was in the 1961 Amendment, but still: "The right of the grantee ... at all times by day and night to go, pass, and repass ..." et cetera included in the Ninth Schedule: "(a) The right to establish a driveway, and to  
30 effect necessary repairs ... and to carry out any necessary maintenance and upkeep, ... [and] (b) ... to have that land over which the easement is granted kept clear at all times of obstructions whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment" et cetera, and "(c) ... [the] reasonable contribution from other occupiers towards

the cost, the establishment, maintenance, upkeep, and repair of the driveway”, so focused on the driveway, and you’ll see in (e), which is carried forward subsequently: “Where work is carried out by one occupier on the land of an adjoining owner pursuant to paragraph (b) ... or to any order of a Court, the right of the latter owner or occupier to have the land restored as far as possible to its former condition after the completion of the work, subject to ... [contribution] in (c).”

Then the more significant amendment comes with the 2002 Land Transfer Regulations, which you’ll see that the principal Act’s amended by repealing sections 90 to 90F, substituting the following sections, and those sections provide for the “transfers and creation of easements, etc by [a] registered proprietor”, the “creation and surrender of easements”, and section 90B, which is in my respectful submission, of some significance, “Creation and surrender of easements on deposit of plan”, and that is what became the more usual way of creating an easement, rather than the old-fashioned granting of an easement, which required everybody to sign a piece of paper.

You had the schedule on the plan, supported by obviously a survey of the easement, and then when the plan is deposited, the easement becomes effective, and what that did, among other things, was that it got over the old common law situation where you couldn’t have an easement created by both, on both sides, by the same person. The grantor and the grantee had to be different. So, by being able to do it under the plan, it meant that a developer for example, or a subdivider could create the easement and the easement was there, and then when people purchased their section, they purchased it subject to the easement and that was a significant efficiency advance from what had existed previously.

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That echoes what was said in the Hansard discussions way back in 1961, so we’re stepping backwards for a moment, and if one looks at the Hansard provisions from June to August 1961, and it was the Minister involved at that stage was the Honourable Ralph Hanan and there he discusses, and my

learned friend's schedule sets it out in greater length, he talks about the number of transactions increasing to a stage where – and easements increasing – to a stage where something has to be done and he says: “The preparation of the documents for the registration ... has become increasingly difficult under existing methods ... The measures to be introduced have been discussed with the [society]” et cetera. “Broadly, it is being provided that on a major subdivision all the easements that are required will be delineated at the time of the subdivision, so that when sections are sold one does not require separate easements to be granted with every sale.” And the bit that I felt nostalgic about was the next paragraph which talks about doing away with the certificates which were in those days in bound volumes and one went up to the Land Transfer Office with tracing paper and that's how that...

**WINKELMANN CJ:**

That persisted for a long time.

15 **MR GALBRAITH KC:**

It did, yes, yes.

**WINKELMANN CJ:**

This is also the same year that Mr Hanan crossed the floor to lead the move to abolish the death penalty in New Zealand.

20 **MR GALBRAITH KC:**

I think probably a lot of us had a great deal of respect for Ralph Hanan and what he did as a Minister and that but those were the old days, very old days, as your Honour might remind me. In any case the second reading of the Bill he again says much the same thing about needed a comprehensive way of dealing with these problems. He referred there when: “... each section is transferred, so that if there are 100 sections in a subdivision there would be 100 separate recitals describing the particular easement ...” and so we have the deposited plan process. A little bit interesting perhaps just in that to read on to what your Honour will – I'm just trying to think of his first name.

**WINKELMANN CJ:**

Rex.

**MR GALBRAITH KC:**

5 Yes, yes, that's right. What he said on the opposite side but he describes that, across the page, that really it's been promoted by the Wellington City Council he suggests because "the hilly configuration has imposed difficulties and consequently people who would normally have separate access for each section have to use the one access and give mutual rights over it." So, it's that practical consideration, both in relation to subdivisions of large numbers of  
10 sections and the fact that you now get development on back sections without access to the road or in the hills of Wellington, that same problem.

**WINKELMANN CJ:**

So it's unlocking the potential of land?

**MR GALBRAITH KC:**

15 Yes, that's what it was about, your Honour. So, going back to where I was on the 2002 –

**WINKELMANN CJ:**

So, for these provisions to apply, these were not retrospective, the easement had to be re-registered for these provisions to apply, the new terms?

20 **MR GALBRAITH KC:**

Yes, they weren't retrospective in that sense which is why the easement here is under the schedules of the 2002 and the Property Law Act schedules of the 2018 schedules which do have some changes.

25 I was looking at the Land Transfer Amendment Act 2002 but then going to the Land Transfer Regulations 2002, perhaps starting with section 1, which is the interpretation section, a slightly odd, in my respectful submission, a slightly odd interpretation of easement facility. You'll see an easement facility defined there (a), (b), (c) but in relation to a right of way which is (c): "means that part of the

surface of the land described as the stipulated area” and then to find out what stipulated area is you’ve got to look at the next page: “stipulated course or stipulated area, in relation to any of the classes of easements referred to in these regulations, means the course that (a) is shown on a plan prepared for the purpose of specifying the easement; and (b) is referred to in a transfer instrument, easement instrument or deposited document.” Now, that will be the whole of the right of way. It's not confined, nothing has ever been confined in relation to right of ways to a driveway in terms of identifying the easement. And then rights of way –

10 **WILLIAMS J:**

So the facility is the physical surface and looking at all the other things in that list of rights, drainage for water and sewage and so on, it all talks about the plant. The capital items including the surface, so that facility is just the physical space –

15 **MR GALBRAITH QC:**

Yes, it’s just the physical, just the land.

**WILLIAMS J:**

Well, it’s more than that.

**MR GALBRAITH QC:**

20 Sorry, not in the water or electricity one, no.

**WILLIAMS J:**

Yes, it looks like it’s trying to find a big word for the driveway, anything else that supports the driveway, and whatever else might be attached to the actual physical nature of the right of way.

25 **MR GALBRAITH QC:**

I don’t, with respect Sir, think that it can be just limited to the driveway because there’s never been a driveway –

**WILLIAMS J:**

I didn't say it was limited to the driveway, but the facility is a physical thing. It's not what a lawyer would call a facility, it is earth surface and whatever has been placed on earth surface to provide for the passing and repassing.

5 **MR GALBRAITH QC:**

Yes, I agree with, well. I'm not sure I would agree with you, Sir, about what is placed on the surface for passing and repassing. You're entitled to pass and repass over the whole of the course, which is shown on the plan prepared, because there it says in stipulated clause the stipulated area means the course  
10 that is shown on the plan prepared for the purpose of specifying the easement. Now the course will be the right of way. That's what shown on the plan. There's no driveway shown on the plan.

**WILLIAMS J:**

Yes, that's the slight tension between the other list and this list because the  
15 drainage rights and electricity and so forth, utilities, they're all about plant.

**MR GALBRAITH QC:**

Yes, I don't disagree with that.

**WILLIAMS J:**

So there's not a comfortable fit when you talk about the right to pass and repass,  
20 and so they've adopted this new phrase that they call "facility" probably to fudge it, isn't it?

**MR GALBRAITH QC:**

That could be, but the facility is then, as I say, defined as the stipulated area, and the area is the course shown on the plan.

25 **WILLIAMS J:**

Then you get these limiting ideas in subclause (3), don't you?

**MR GALBRAITH QC:**

Yes.

**WILLIAMS J:**

5 It talks about a driveway and then you're entitled to do things with the driveway, and you're entitled for it to be kept free of obstructions, including by parked vehicles, deposited materials, or unreasonable impediment. Not any impediment, but unreasonable impediment. So you're clearly not entitled to a pristine, polished, flat surface, from one edge of the right of way to the other, because this introduces the idea of reasonableness.

10 **MR GALBRAITH QC:**

The difficulty we always find when we turn up and say something or other is limited in that way when it starts with the word "includes". So once you start with the word "includes" Sir that's not exclusive, it's –

**WILLIAMS J:**

15 No, but it's important, isn't it. The use of the word "unreasonable" isn't there as a mistake, it's an indication, isn't it, that this is not an absolute right, even with the "includes". It indicates the draftsmen's speaking about some give and take somewhere.

**MR GALBRAITH QC:**

20 Well, as I said Sir, it's accepted it's not the whole square inch of the right of way that –

**WILLIAMS J:**

No, it's –

**MILLER J:**

25 I wanted to ask you about that actually, because it seems to me the corollary of your acceptance is that the owner of the land may continue to use it for purposes other than, here, a driveway, within certain limits, and those limits are probably a question of fact.

**MR GALBRAITH QC:**

Most generally yes they are Sir, but the question of fact in respect to what has been conveyed, perhaps I shouldn't use the word "conveyed", but created by the easement, the grantee rights under the easement, so I mean cases talk  
5 about it being a balance of some sort or other. It's how far one can take that –

**WINKELMANN CJ:**

Well from your submissions I take your simple point to be however far you can take it, it doesn't extend to permanent structures which obstruct – which actually reduce the ability to use the easement.

10 **MR GALBRAITH QC:**

Yes, that's what our position boils down to.

**WINKELMANN CJ:**

Because a lot of the cases about whether you can park your car there, when they get to building a swimming pool, or paving associated with the swimming  
15 pool, they say no?

**MR GALBRAITH QC:**

Yes. Well no, they say no, you're quite right.

**MILLER J:**

Could you define for me, please, what is the extent of the reasonable user of  
20 the land that the grantor has?

1050

**MR GALBRAITH KC:**

Well, if your Honour's asking for a definition that applies, it will turn on the facts, obviously. So, if you take, I mean *Hutton v Hamboro* is a good example,  
25 50-metre, sorry, they didn't have metres in those days, 50-foot right of way, two-foot intrusion, that's got to be on the – and the jury, unsurprisingly, said: "Not a problem." Put the jury deciding this case where there's significant permanent, if not, yes well permanent structures there, what would a jury decide

in that circumstance. Well it's not for me to suggest but I suspect they would approach the situation very differently than it was approached in 1860, in relation to 50 feet and two feet, so –

**COOKE J:**

5 But clause 6 allows the construction of a driveway in the facility area.

**MR GALBRAITH KC:**

Yes.

**COOKE J:**

10 So when the driveway that's constructed is narrower than the facility, you accept that the users may construct in the easement area in order to connect their properties to the formal driveway?

**MR GALBRAITH KC:**

Yes.

**COOKE J:**

15 And have driveways, retaining walls, drains, that sort of thing.

**MR GALBRAITH KC:**

On their property.

**COOKE J:**

Yes, and in the easement facility.

20 **MR GALBRAITH KC:**

No. Sorry, in the easement facility?

**COOKE J:**

Within the easement facility area.

**MR GALBRAITH KC:**

25 No.

**COOKE J:**

Well how do they connect to the driveway then?

**MR GALBRAITH KC:**

Well, they connect the driveway in the same way that we connect to the  
5 accessway from the road. You get to the –

**COOKE J:**

Don't you have to build your driveway up to the formed driveway?

**MR GALBRAITH KC:**

Yes, you would have to, well if you're trying to get access to the road that's how  
10 you do it. You don't –

**COOKE J:**

Yes, so you can build your own private driveway in the easement area to –

**MR GALBRAITH KC:**

No, you do that on your own land. If you're trying to get off the road and your  
15 land is below the road, you've got to build your land up to get there.

**COOKE J:**

But the formed driveway here is narrower than the easement facility.

**MR GALBRAITH KC:**

Yes.

20 **COOKE J:**

So, if it's flat how do I get from my land to the formed driveway other than by  
constructing things within the easement facility area?

**MR GALBRAITH KC:**

Sorry, I'm probably at cross-purposes with your Honour. You simply drive out  
25 onto the driveway I would've thought. Because what's happened here is that  
you don't – the formed driveway, as I understand it, I may be wrong in this –

**WINKELMANN CJ:**

Well so take the Raes for example, the Raes say, you know, they've got that tricky accessway and so they build this retaining wall on the right of way. That's what Justice Cooke is taxing you with. And you say, and I think this is the proposition that has been advanced for the appellant, well there is a way to join it without actually encroaching on the driveway. This is a very constrained driveway, we don't need more constraints. You should be doing your works on your land, not subject to the right of way.

**MR GALBRAITH KC:**

Well, I'm trying to avoid getting into the facts because they're in dispute, but when Wimax, as I understand it, and I've only recently come into this so just make that caveat, as I understand it when Wimax got resource consent to do what they proposed to do with the works, that was on their land. What they actually constructed was, in part, on the right of way. So, if they got a resource consent on the basis that they could do the works on their land, that's what, that is how they get to the right of way.

**MILLER J:**

Who owns the land on which those works stand?

**MR GALBRAITH KC:**

The grantor if it's, well, it depends of course where the works are but the grantor in respect of that area, if –

**MILLER J:**

Is Wimax.

**MR GALBRAITH KC:**

Sorry?

**MILLER J:**

Is Wimax, presumably.

**MR GALBRAITH KC:**

Wimax in that particular area would be –

**MILLER J:**

5 Right, so they are in fact building something on their own land but it is part of their land that is subject to the easement facility.

**MR GALBRAITH KC:**

Yes.

**MILLER J:**

10 So this distinction where sharply drawn between their land and the easement does not rest on the proposition that they have no rights to the easement area, other than the right to pass over it themselves, and that is not correct, is it?

**MR GALBRAITH KC:**

Well the rights they have are circumscribed by the rights, the easement. Put it that way.

15 **MILLER J:**

Yes of course.

**MR GALBRAITH KC:**

So we're back to whether it's –

**MILLER J:**

20 They may continue to use their own land so as long as they don't interfere with the easement.

**MR GALBRAITH KC:**

Yes, that must be right.

**ELLEN FRANCE J:**

I'm a bit unclear now about what you're saying the legal test is. So you're accepting some reasonable incursion because it's not every, you're not saying it's every inch of the right of way?

**5 MR GALBRAITH KC:**

No. We can't say that.

**ELLEN FRANCE J:**

10 So in terms of how you would describe the legal principle that you then apply, what is it?

**MR GALBRAITH KC:**

Well it can't circumscribe the grantees' rights under the easement, is putting it at the highest level, I mean the most abstract level let's say. But in the particular, I mean this is the issue for example that the, well no I shouldn't say  
15 "for example". The issue which the Court has identified as to whether the driveway, whatever that is, is the be-all and end-all of the circumscription of the grantor's rights, and obviously we say it's not because easements are, in a sense, forever and the world doesn't change. Sorry the world doesn't stay static forever and so because there's a right to create a driveway there's also an  
20 ancillary right, which the Court of Appeal recognised, to change a driveway, to expand a driveway. Or there may be a demand and a requirement because of increased use of the land which is being served by the easement that requires a better driveway, a wider driveway, the full right of way to be utilised. And it's not, we would say, there's not a prohibition at law on an arbitrator or a court  
25 considering that future possibility, which is in effect what the Court of Appeal have said as a matter of law don't consider future development.

**WINKELMANN CJ:**

So is your case simply based on future development or is it also based on the utility of the driveway as it's now used? Because when I had read the lower  
30 court judgments before looking at the photographs I imagined some quite large

driveway but when I looked at the photographs it's actually a very constrained driveway isn't it?

**MR GALBRAITH KC:**

5 Yes and it's got difficult corners and et cetera in it, but no, the case the that was put before the Arbitrator was that which your Honours describe, that this was a difficult driveway because of its, because it's a steep driveway, it's a long driveway, it's got tight corners as some of those photos show and there may well be a desire by either the Fuges or a consensus in due course that that driveway should be improved and that right is an ancillary right to widen or  
10 improve a driveway.

**WINKELMANN CJ:**

Would it be improved by the removal of the structures? Would its sight-lines, would its manoeuvrability be improved by removal of the structures?

**MR GALBRAITH KC:**

15 There was evidence on both sides your Honour and the decision of the High Court was that that factual dispute, if I can put it that way, should go back to the Arbitrator to be decided.

**WINKELMANN CJ:**

And what do you say to that? I mean I know you cross, you appealed that.

20 **MR GALBRAITH KC:**

Well we cross-appealed and didn't get leave.

**WINKELMANN CJ:**

But what do you say about that as a matter of law?

**MR GALBRAITH KC:**

25 That that makes sense. Well it would certainly make sense that the decision-maker of fact should be the person who ultimately decides because it is a factual issue at the end of the day.

**WINKELMANN CJ:**

Well is it? Because you're saying it's not, aren't you? You're saying that the easement is the easement. I mean what is your position in relation to it? Is it all to be sort of sorted out in a kind of a big melange of facts, or are there some  
5 bright lines?  
1100

**MR GALBRAITH KC:**

There's bright lines in this respect, as we say I think in paragraph 106 of the written submissions, that whatever is done by the owner who has the rights that  
10 his Honour Justice Miller was referring to can't compromise the potential for the further development of the right of way, which includes further development of the driveway because nothing is static when you come to property in a subdivision. It just isn't static, doesn't stay the same forever, that's not the world that we live in. It felt like that when I was growing up but it doesn't feel like that  
15 now. So, that things change and, as the Court will be aware, there's a debate on the papers here as to about the fact that planning changes, and so it's said for the respondent, that why should they be restricted because nobody quite knows what the planning environment will be in due course. And we've seen in Auckland certainly the directives that if there's bare land you can put three  
20 storeys on it and then that's gone up in the air at the moment with plan change 120, which my understanding is that that has very little likelihood of being what ultimately ends up being the answer. So, to lock an easement and the right to expand the driveway into a current situation simply postpones the day when that's not going to be appropriate.

**25 COOKE J:**

If we're looking for that kind of right in the schedule terms, the development right, do we find that in clause 10 of the regulations?

**MR GALBRAITH KC:**

Yes.

**COOKE J:**

And if we look at 10(1)(b) would you accept that one could only develop an established driveway if it was established that it was no longer a suitable facility because that's what 10(1)(b) says?

5 **MR GALBRAITH KC:**

It says: "If no suitable easement facility exists, the right to lay, install and construct an easement facility reasonably required by the grantee –

**COOKE J:**

That's the only schedule term that talks about constructing a driveway so  
10 wouldn't an arbitrator, if it's not agreed, have to agree that the current facility was no longer suitable and it was reasonably required for things like plan change developments et cetera?

**MR GALBRAITH KC:**

If it goes back to the Arbitrator that's what he's going to have to grapple with,  
15 and that's what I was saying about there's evidence on either side as to whether the facility at the moment is satisfactory or not satisfactory because of the, because of narrowness or bends or whatever else it might be.

**COOKE J:**

But do you accept that's the test?

20 **MR GALBRAITH KC:**

Sorry?

**COOKE J:**

Is that the test whether the current facility is no longer suitable and it needs to be widened because that is reasonably required?

25 **MR GALBRAITH KC:**

Well it depends what it's suitable for. I mean if it's suitable for – it's got to be – it can be widened if – well let's jump ahead because it raises the discretion.

Easements are generally interpreted, how can I put it, they're not interpreted in terms of being restricted to whatever the current use might be. So, the easements that you have in relation to a single dwellinghouse, and in due course it turns out there's a motel using the easement, too bad, the easement  
5 accommodates the fact that there's now a motel using the easement unless there was some peculiarity in the easement certificate. So, that suitability has got to be regarded, not just in terms of can a car drive down there okay today but can a car drive down there or a bulldozer drive down there if in due course you're going to be building three townhouses down there. So the suitability is...

10 **WILLIAMS J:**

Doesn't that amount to rescinding your "every square inch" concession because if you are simply contemplating whatever might be possible in the future you're going to inevitably get to every square inch?

**MR GALBRAITH KC:**

15 Well that's a bit extreme Sir I think, with respect.

**WILLIAMS J:**

Well you'd need every square inch to get a bulldozer down there.

**MR GALBRAITH KC:**

Well and you're entitled to get a bulldozer down there because any vehicle, so –

20 **WINKELMANN CJ:**

Yes. I'm actually a bit –

**WILLIAMS J:**

So wouldn't it be better if people waited until you needed a bulldozer to go down there?

25 **WINKELMANN CJ:**

No.

**MR GALBRAITH KC:**

Well perhaps put it this way Sir, if you're doing a subdivision, forget about this particular one, a hundred sections, what happens is it's done by deposited plan, so it's not a grant of any sort or other. A hundred people buy the hundred  
5 sections, 50 of them are on the back sections and so they've got an entitlement by the easement to get to the road, that's the only entitlement they've got.

So, yes, his Honour just submitted it is of course correct that the front property has retained ownership over its land which it's granted the easement on.  
10 So, I'm taking an extreme example, so excuse me for doing that, but so a week after the hundred sections have been sold to a whole swag of people, the 50 people who've got the front sections suddenly build on semi-permanent structures on the bit of the right of way which is outside the driveway. Sorry, I was going to use a pejorative term but I think that would cause some surprise.

**15 WILLIAMS J:**

Yes.

**MR GALBRAITH KC:**

I think that –

**WILLIAMS J:**

20 But you've got 50 purchasers there so it's understandable.

**MR GALBRAITH KC:**

Well I don't think it's the number, I think it's the shock that 50 –

**WILLIAMS J:**

Perhaps your better example would be if you had 50 lots at the front and an  
25 empty paddock at the back that are owned by the same subdivider that could potentially be developed, but no firm plans yet. That's your counterfactual.

**MR GALBRAITH KC:**

Well that's another counterfactual, yes Sir, but the ones that they were bothered about in 1961 and through the period to 2018 were the hundred-lot subdivisions or the Wellington steep configurations where you need an easement to actually  
5 develop the back section. But your Honour's quite right, if you take the counterfactual which you've suggested, does that mean in the meantime the 50 sections, or whatever it was you were assuming Sir on the front there, could all build permanent structures on the – there wouldn't be a right of way to the back.

10 **WILLIAMS J:**

Well I guess one way of addressing it is that you're required to keep it clean for the possibility. The other way of dealing with it is to say those who built the narrower, more constrained and impeded driveway are in jeopardy, and it's their fault if they need to be cleared away.

15 **MR GALBRAITH KC:**

Well that's fine if the delays the courts have is going to be exacerbated by another 50 people coming along wanting to argue about that sort of thing, it doesn't –

**WILLIAMS J:**

20 But if the principle is clear enough then perhaps that won't happen.

**WINKELMANN CJ:**

Can I just ask a question which I've been wanting to ask for some time. So, I'm troubled by how you're treating this concession about "not everywhere all the time". I mean that's quite a smudgy kind of a concession, the whole things  
25 seems to me to be lacking in detail because, generally speaking, not everywhere all the time simply means something like the old batch kind of right of ways, you know, which are all on unformed land and that meant that someone could set up their beach chairs and their sun umbrellas in an area.

**MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

5 But so I don't see that "not everywhere all the time" is meaning that people can build permanent structures on a right of way which is preserved for access to and from properties. I should just state that as my proposition I'm moving to this next thing from.

10 I still think that the thing you're not really squaring up to is what approach to construction of these documents we take, because you keep on putting things in the future and saying "preserving future use" but there's also the question about what your rights are in terms of present use and those constructions do impinge onto the corridor, which is a narrow corridor.

**MR GALBRAITH KC:**

15 Yes.

**WINKELMANN CJ:**

20 So what is, I mean are you saying that it is – are you kind of accepting the Court of Appeal paradigm that what the rights are can move around with the facts, or are you saying if the rights are, as per the document, read in what context?

1110

**MR GALBRAITH KC:**

My personal preference, if I can express that, I'm a bit, I feel constrained by what has already been conceded in the hearing. My personal preference –

25 **WILLIAMS J:**

In the findings of fact in the arbitration.

**MR GALBRAITH KC:**

In the arbitration, yes, sure. My personal view is that section 313 stands on its own. It's not a claim to private nuisance. It's a claim under the regulatory regime which has been set up. It means what it says, so the Court has the ability to determine what the extent of a right of way is. The Court might be influenced or might not be influenced by private nuisance arguments, or it might be more influenced by the sort of issue that his Honour Justice Williams was just taking, that if you've got a situation where there's an undeveloped back section, then you've got to protect it, protect those rights, and so –

10 **WINKELMANN CJ:**

Isn't there a prior question, which is whether your client is simply entitled to insist upon the terms of the easement, which basically says that this should be free as the High Court Judge says. While you may not be driving up and down every square inch, this is what people have said, we're going to keep as the easement for moving backwards and forwards and it has an implication how wide that easement is as to how easily the driveway is itself used.

**MR GALBRAITH KC:**

Yes, well that, and your Honour is quite right, that is what the High Court Judge determined. My understanding, I wasn't there, is that that was still subject to this "not every square inch" reservation, though that's not, in fact, expressed in the actual terms that he expressed his view, because his view was that despite the factors, as been put to me by your Honours, that clause 6(3) and these provisions here talk about unreasonable impediment to the driveway. That, in fact, there was, that the easement itself, because it referred to, it granted the right to pass and repass over the whole of the right of way, had to be protected. That was his Honour's position and that would be the far simpler provision if one was looking at a go forward for, certainly for subdivisional easements.

**COOKE J:**

Are you looking, sorry –

**WINKELMANN CJ:**

So, pass and repass might involve, for instance, using a part of the width to edge past a car off the formed driveway.

**MR GALBRAITH KC:**

5 Yes, well, it would have to, because it wouldn't be a, if you look at the photos of this driveway, there's not a chance that you'd get two delivery trucks going down and without probably having to pull in one of the side right of ways and, of course, that's what happens in planning terms that, and you'll see it somewhere in the evidence there, that you can have a lesser driveway,  
10 provided you've got a passing bay every 50 metres, because you can't get two delivery trucks into three metres, it doesn't work.

**WINKELMANN CJ:**

Now I cut off Justice Cooke.

**MILLER J:**

15 I'd like to go back to this question of interpretation because it is what we have and picking up Justice Cooke's point about clause 10, can we just have a look at that. I'm trying to look at a way in which your argument can be framed. This clause, as Justice Cooke says, the development right or appears to be, and it looks at the situation as it stands, and looks forward to something that may  
20 interfere with the efficient operation of the easement facility, and I wonder whether that concept, the concept of the "efficient operation of the easement facility" is the, and I'm not trying to put words in your mouth, I'm simply trying to explore what this legislation means, how you might then encompass the future needs of the area, and just by way of context, thinking of the approach that this  
25 Court took in *Synlait Milk Ltd v New Zealand Industrial Park Ltd & Anor* [2020] NZSC 157 to the statutory provisions that are intended to accommodate current needs and create statutory powers for courts to intervene in restrictive covenants and easements. Because what you seem to be bothered about, you're pushing on an open door to the extent that you say they can't block it  
30 forever, everyone agrees with that. If it turned out as of today they had to widen it in order to develop the property, you might be in a different position.

What you've effectively been told in the Courts below and with the Arbitrator is come back when you actually need it, and so your argument really is efficient operation requires that we know now what we can do, that this is a reasonable potential use.

5 **MR GALBRAITH KC:**

Yes, yes. And because – well the short answer is yes and as a – the comeback later in the context of subdivisional right of ways is not what is anticipated. In other words, let's again talk about reality. Somebody is going along and buying a section in a subdivision which has got an easement. It's got the back section,  
10 or whatever it might be, or we've got the front section, it really doesn't matter. They read what they read and they don't understand about private nuisances and the law out of England, Canada and Australia or wherever and they think we've got the right to – a right of way extending to six metres if we need it now or in the future. So, hoping to live for another 50-odd years and might want to  
15 do something more with it or develop the land or planning might change. They then go and get – I mean in reality do they then think well, whoop-de-do if they're the grantor, or they've bought the grantor's rights somewhere, whoop-de-do we can go and build down to wherever the driveway is at the moment, and they go to their lawyer and their lawyer says, yes, you can do that  
20 but you've got to know about the law of private nuisance and in due course it may create a nuisance et cetera. It doesn't happen that way. Nobody does this. The reason this has happened in this particular case is not because people in real life go off thinking, yes, I've bought the grantor's interest and therefore I can build down to wherever the driveway is at the moment –

25 **WINKELMANN CJ:**

Isn't your simple answer to the proposition though that that's a significant impingement upon the owners at the end of the driveway's interest in the land because at some time in the future if they wish to sell it, they have to sell it with the person who buys it knowing they don't have to litigate, declare that driveway  
30 and in the meantime, according to that approach, other people may build bits of their houses over this driveway on that approach.

**MR GALBRAITH KC:**

Yes, and having got advice from their lawyer I don't think frankly any lawyer would tell anybody that was a good idea to do that. So, in a sense, what we're saying is that does that really – do we really want to have that being the – I can understand how my learned friend can argue for that in terms of the common law et cetera, et cetera but is that really what we want because if that is the law, then people are entitled to do that, and so one should then assume that people will do what the law permits them to do. And the thought of it's really the point that Justice Williams corrected me on, or changed my counterfactual on, does one really want 50 purchases of the front properties to actually install semi-permanent insulations on the basis that oh well their lawyer said in 20 years' time they might do something about it. It really goes back to what I said before. If easements mean what the words say they mean and one doesn't start circumscribing them, life would be a lot simpler for both parties, grantor and grantee.

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**COOKE J:**

But here the driveway has been formed.

**MR GALBRAITH KC:**

20 Yes.

**COOKE J:**

In accordance with the schedule terms and it's been maintained and resealed. So the issue then comes under clause 10 –

**MR GALBRAITH KC:**

25 Well the driveway –

**COOKE J:**

– whether the existing facility remains suitable or whether widening is reasonably required, and how can an arbitrator assess that when there's no

agreement, if the Arbitrator doesn't even know if the council will consent it? Council may not consent it or may suggest a different place for the driveway.

**MR GALBRAITH KC:**

Which may happen, that's absolutely correct Sir. And some of the cases do  
5 relate to applications to have grantors agree, consent to, work to be done under  
an easement. There are a couple of Australian cases in respect of that.  
So that's what happens.

**COOKE J:**

Yes, but doesn't that show that this is premature? That you can only make that  
10 determination once you actually know what can be done, what is proposed?  
And there would be different views about whether the existing driveway is  
suitable, and what is being asked for is reasonable, and that's why they've got  
an arbitration clause. But don't you have to have something concrete before  
the Arbitrator makes the call?

15 **MR GALBRAITH KC:**

Well only in that it depends how concrete that that is required. The, my learned  
friends' submissions accept that if it's imminent or, I think committed, actual,  
imminent I think was the phraseology, that then you do look to what might be  
done. That opens another whole spectrum of arguments Sir, because you do  
20 see in some of the cases consideration of what might be done in the future  
where people who have come up with proposals and then their proposals are  
challenged by injunctive proceedings or whatever else to say, if you do that then  
you're going to interfere with my rights, being me grantor or grantee, and there's  
cases on both sides of that spectrum. So it just creates another series of  
25 disputes which –

**COOKE J:**

Well I wonder if it does because you're really saying we – the dispute should  
extend to hypotheticals, and I mean these issues are always going to be  
fraught.

**MR GALBRAITH KC:**

No –

**COOKE J:**

That's why we have an arbitration clause.

5 **MR GALBRAITH KC:**

My preferred position is that the words mean what they say and that's it. You're stuck.

**WINKELMANN CJ:**

10 The case that you filed, was it you who filed it, *B&Q Plc v Liverpool and Lancashire Properties Limited* (2001) 81 P. & C.R. 20? Is it *B&Q*?

**MR GALBRAITH KC:**

Yes. Well *B&Q*'s quite interesting, I can say that with respect.

**WINKELMANN CJ:**

*B&Q Plc v Liverpool.*

15 **MR GALBRAITH KC:**

Yes. *B&Q*'s quite interesting because it places considerably more emphasis on the rights of the grantee, or the interests of the grantee, let's put it that way, so that it uses the terminology of "convenience" which actually is the terminology which goes back to Lord Coleridge, because you'll find that in, back  
20 in the old days of convenience, and in effect what *B&Q* recognises is that it's the convenience of the grantee which is, I suppose you'd say, the limiting factor on the position that the grantor, the owner of the part which isn't under the particular driveway at the time can do anything they like with the balance, and you'll see in *BQ* next to the other case which we put in too summarises *B&Q*,  
25 but –

**WINKELMANN CJ:**

And so do all, and so does *Gale On Easements* and –

**MR GALBRAITH KC:**

Yes, all of those but in *B&Q* if one looks at – they have a discussion, 255 on, about actionable infringement of a right of way and at paragraph 45 his Honour says: “Those passages justify the following propositions ... (1) the test of an  
 5 actionable interference is not whether what the grantee is left with is reasonable, but whether his insistence of being able to continue the use of the whole of what he contracted for is reasonable; (2) it is not open to the grantor to deprive the grantee of his preferred modus operandi and then argue that someone else would prefer to do things differently, unless the grantees  
 10 preference is unreasonable or perverse.”

And then there was a third proposition, across the page at 257: “Justified that” – in paragraph 47: “That passage justifies the following further propositions advanced by Mr Gaunt, which I call Mr Gaunt’s third proposition, namely, that if  
 15 the grantee has contracted for the “relative luxury” of an ample right, he is not to be deprived of that right in the absence of an explicit reservation of a right to build on it merely because it is a relative luxury and the reduced, non-ample right would be all that was reasonably required. In short, the test, as Mr Gaunt submitted, is one of convenience and not necessity or reasonable  
 20 necessity. Provided that what the grantees insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?”

That case was one where there was a proposal as to what was going to occur  
 25 in the future and it was decided that that proposal would be contrary to the easement, and the *Emmett v Sisson* [2014] EWCA Civ 64 case was one where it was decided that there were multiple points of entry to the right of way and they could not be compromised, and *B&Q* was cited in support, with those three passages confirmed as being, in the view of the Court, in *Emmett* –

**30 WINKELMANN CJ:**

That was one where there was a right of way which allowed the person to go on from their property on multiple places and a brick wall was formed which constrained them and it said that it didn’t matter that it was adequate, they

should be allowed to go on in multiple places, which is consistent with the principle in *B&Q*.

**MR GALBRAITH KC:**

Yes.

5 **WINKELMANN CJ:**

That if you contract for yourself an ample provision, it doesn't matter that it's more than is necessary or reasonably necessary, but that's sort of why I raise that, is that it links to the proposition which I think underlies what Justice Miller and Justice Cooke are both putting to you, which is that somehow the formation  
10 of a driveway limits the easement. So, the fact the driveway is now formed means that everybody else is free to put permanent structures on it, so long as it doesn't impinge upon the driveway.

**MR GALBRAITH KC:**

That is, I think, what's implicit in those propositions, yes, your Honour, and I'd  
15 say, with respect, that the easement is an easement over the right of way and it gives a right to pass and repass and while a miniscule concession of two feet out of 50 feet may not be an impediment, putting permanent structures over three metres of the, or two metres of the three metres left in the right of way, is unreasonable.

20 **COOKE J:**

I put a nuance to what is said where what was "implicit", that you're enabled to build structures within the right of way area in order to facilitate your connection to the formed driveway. So you can build your own drive, retaining walls, that sort of thing.

25 **MR GALBRAITH KC:**

Well, that –

**COOKE J:**

You can't build a swimming pool, but you can reasonably connect to the formed driveway.

**MR GALBRAITH KC:**

5 What I said before, Sir, I still stick to. You've got to do that on your own land, not on the right of way.

**COOKE J:**

It is their own land.

**MR GALBRAITH KC:**

10 Sorry?

**COOKE J:**

It's just got a –

**MR GALBRAITH KC:**

Well, it's their own land subject to the easement.

15 **COOKE J:**

Yes, so you can't build your driveway on the easement area?

**MR GALBRAITH KC:**

Well, no, is the short answer.

**COOKE J:**

20 So you can't get to the common driveway?

**MR GALBRAITH KC:**

Well, you should be able to get to the common driveway because –

**WINKELMANN CJ:**

Off your property, off your non-easement property.

**MR GALBRAITH KC:**

Yes, I mean, if the –

**COOKE J:**

You mean a dirt track between the driveway?

5 **MR GALBRAITH KC:**

No, no, no, well, it could be. It could be, but I mean, that's the – when you create the driveway in the first place and you've seen the photos of these ones, they all have a connection to their own land. I mean the driveway –

**COOKE J:**

10 And they've built on it.

**MR GALBRAITH KC:**

When you build a driveway, you're not going – I mean you might, but you wouldn't think you would oddly build it so that there was a gap between the driveway and the –

15 1130

**COOKE J:**

But that's exactly what we have here. The formed driveway is narrower than the easement facility.

**MR GALBRAITH KC:**

20 Yes, that's right, it is, because of the intrusion on the easement. In other words if the easement had been – and you've seen what's happened here is that what's happened is exactly what your Honour's suggesting, that the properties have extended their boundaries out into the right of way.

**COOKE J:**

25 I think it's the other way around. I think the driveway was in existence first and then the easement was created. The driveway, was it from the 1940s that driveway was formed where it is and then the easement was created in 1960.

**MR GALBRAITH KC:**

What I was starting to say earlier on but got distracted was this is an odd situation, your Honour, where the driveway was, as you say, formed, I don't know exactly how it was formed but it was formed an awful long time ago and  
5 the easement's come along subsequent to that.

**COOKE J:**

Yes, and then everyone probably has built on the easement area to facilitate their use of the common driveway.

**MR GALBRAITH KC:**

10 I don't have the –

**WINKELMANN CJ:**

I mean, you would say they can, I think, so long as it's not obstructing the easement. So if they build say a flat pathway, swoop around, or perhaps in the *Hutton v Hamboro* thing would you concede that they could if it was say like a  
15 500-metre wide thing, which is an improbability, we'll say it's a 100-metre wide thing and it comes in, so if it's de minimis in the context.

**MR GALBRAITH KC:**

Well here it's probably – well yes, but it's also here, what they built was probably effectively part of the driveway.

20 **COOKE J:**

Yes, retaining wall, for example. That holds up their own driveway.

**MR GALBRAITH KC:**

I don't know the retaining will be part of the driveway. I don't think the retaining wall, bit hard to drive over a retaining wall but –

25 **COOKE J:**

But it holds up the bank from the common driveway.

**MR GALBRAITH KC:**

But that, they can build on their own – that was what the resource consent was meant to be, that the work was to be done on their property. Instead of that it was –

5 **WINKELMANN CJ:**

It's not subject to the easement.

**MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

10 Because it is all their property.

**MR GALBRAITH KC:**

Yes, but so what should have happened was, yes, retaining wall goes back into your – I don't mean your property, your Honour, you know what I mean – into the property and the rest of it's driveway or it's not driveway.

15 **WILLIAMS J:**

So was there a subdivisional, sorry, some sort of building consent condition or resource consent condition that required the impinging items to be inside the non-shared boundary? Because if that's the case why don't they bring enforcement proceedings under the Resource Management Act 1991?

20 **MR GALBRAITH KC:**

As I understand it Sir, the works that were done post the, I think it – I'm not sure on the dates now.

**WILLIAMS J:**

2017.

**MR GALBRAITH QC:**

I think the works that were done were done pursuant to a resource consent which I understand identified the works as being done within the Wimax property.

5 **WILLIAMS J:**

Well if that's the case they have a cause of action. That has nothing to do with these issues.

**WINKELMANN CJ:**

Well that –

10 **MILLER J:**

You mean within the non-burdened land?

**MR GALBRAITH KC:**

Sorry?

**MILLER J:**

15 Within the non-burdened land.

**MR GALBRAITH KC:**

Yes, as I understand it but I'm just cautious –

**WINKELMANN CJ:**

20 But that rather depends on whether it's a requirement or it's just how it was consented, doesn't it?

**MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

Yes. It's 11.30.

25 **COURT ADJOURNS: 11.33 AM**

**COURT RESUMES: 11.49 AM**

**ELLEN FRANCE J:**

Can I just check, Mr Galbraith, just one thing in terms of the regulation 10(b) the reference to “suitable easement facility”, do you say that means the right of  
5 way or the driveway?

**MR GALBRAITH QC:**

Sorry, I'll just get myself back to...

**ELLEN FRANCE J:**

Because it's presumably linked back to that part of the surface of the land  
10 described as the stipulated area, which would be the right of way?

**MR GALBRAITH QC:**

The right of way. That's what it goes back to.

**WILLIAMS J:**

Presumably it's the actual land, when it says “if no such facility exists” it means  
15 either there's nothing formed, or it needs to be regarded or excavated or  
whatever to be the facility.

**MR GALBRAITH QC:**

It goes back to what we were saying before your Honour, the definition is a little  
bit awkward because “easement facility” is defined as the surface of the land,  
20 which is the source of the right of way when you go to stipulated area, and then  
when you go to 10, I mean the land exists...

**COOKE J:**

It's used the word “construction” here so when talking about, if we don't have a  
suitable facility you can construct one. I mean it isn't talking about the legal  
25 instrument, it's talking about the physical thing that you have on the ground.  
So it uses interchangeable expressions, but it must be referring to the thing  
that you need to actually access your facility, that is a driveway in this case.

**WILLIAMS J:**

And perhaps some drains.

**WINKELMANN CJ:**

Well it's defined, isn't it, "easement facility".

5 **WILLIAMS J:**

Yes but rather unhelpfully.

**MR GALBRAITH QC:**

I'm sorry your Honour?

**WILLIAMS J:**

10 Rather unhelpfully. The definition is.

**MR GALBRAITH QC:**

Yes, that's where I start off by saying it's a...

**COOKE J:**

15 Well you create an easement facility by registering one so that doesn't, this is talking about construction and installing.

**MR GALBRAITH QC:**

Yes, you do create it by registering it, that's the easement facility there and then.

**COOKE J:**

20 And that's not with this subsection is contemplating. It's talking about something you install and construct.

**MR GALBRAITH QC:**

That's right, yes, and...

**WINKELMANN CJ:**

May I ask another about construction of the clause? So the English case talk about taking into account construing the easement, the circumstances that exist at the time that it's created. Do we treat the purposes of the Act, the point at  
5 which it's created, the 2017, is it 2017, what year is it? It's 2017 isn't it?

**MR GALBRAITH QC:**

Yes.

**WINKELMANN CJ:**

Do we treat that as the year that it's created, and do we take into account the  
10 circumstances as they exist at that point in time?

**MR GALBRAITH QC:**

In my submission, yes, because that is when the easement certificate, which is in issue, was created, and one should construct it in terms of what's actually contained in it, and as I said a while ago now, when we went to the easement  
15 certificate itself of course, it requires the parties to maintain effectively the right of way, not just the driveway, that is, specific as to the driveway, but it's the whole right of way which has to be maintained.

**WINKELMANN CJ:**

So the implication of that is – so your answer is, yes it's 2017, but no you don't  
20 take into account the fact that when it was created there were already these obstructions on it. It's the thing itself?

**MR GALBRAITH QC:**

Yes, and there are cases on that.

**WINKELMANN CJ:**

25 Are there?

**MR GALBRAITH QC:**

I'm sorry, yes. I'll try and find...

**WINKELMANN CJ:**

Looking hopefully to your left.

**MR GALBRAITH QC:**

5 Yes. But because that situation has arisen, of course, in the past, where there are driveways, or whatever it might be, that are there, but my memory is, and don't hold me to it until I've gone back to the cases –

**WINKELMANN CJ:**

Well we will hold you to it.

**MR GALBRAITH QC:**

10 Yes. I'm sorry yes. I know your Honour will. But I just caveat it with the fact that my memory is that what is said if they want to limit it to what was there, then that should be said in the grant. But of course a lot of those cases are talking about, I mean this is a grant here, but more generally of course we're talking about situations of let's say deposited plans et cetera where there is no  
15 derogation from the grant.

Perhaps, because I didn't quite get there, one should also look at the Property Law Act 2007, and the implied – that the schedule there, because that's the other schedule which applies here. That section 297 implies covenants into  
20 “... a vehicular right of way.” Section 298 has rights in relation to access and then of course it has section 313 which, as I said before, I would see as the source of this Court's, any court's jurisdiction unconstrained by having, so far as the section is concerned, to incorporate everything which has happened in England since 1860, but acknowledging the concessions that were made  
25 before the Arbitrator, and then Schedule 5 is the –

**WINKELMANN CJ:**

I mean, however, the concession was that it doesn't include a right to pass and repass over every inch of land.

**MR GALBRAITH KC:**

That was the principal concession but –

**WINKELMANN CJ:**

What is the other concession?

5 **MR GALBRAITH KC:**

There were some others. Sorry, from the case on appeal. Sorry I'm in the wrong place.

**WINKELMANN CJ:**

Don't let me hold you up. Your junior could perhaps locate that and come back.

10 **MR GALBRAITH KC:**

No, no. It won't take a moment once I get to the right place.

**MILLER J:**

The Court of Appeal seemed to recognise that there was some complexity about how these, or some confusion perhaps, about how these schedules  
15 relate to one another.

**MR GALBRAITH KC:**

Yes.

**MILLER J:**

I wonder if you could assist us.

20 **WINKELMANN CJ:**

Perhaps once he's done the task.

**MILLER J:**

Yes.

**MR GALBRAITH KC:**

I think it's paragraph 45 of the Arbitrator's award. And so he summarises, when I say concessions, but you'll see in paragraph 44 it's said that: "Mr Ross, while disagreeing on questions of application was content to adopt the statements of principle drawn from those Authorities" and that's set out in 45. And your Honour the Chief Justice, will see in 45(c): "In cases where a structure pre-dates the grant of an easement, it is a question of interpretation, in each case, whether the right of way was granted subject to, or free from, the obstruction." So that's as I said –

10 **WINKELMANN CJ:**

Well that's a fair enough point isn't it?

**MR GALBRAITH KC:**

Yes, absolutely.

**WINKELMANN CJ:**

15 And you've already answered that and you say, well if they want to make it subject to it they put it in it.

**MR GALBRAITH KC:**

Yes, they should say it. And you'll see (d) and the "every square inch" is (b).

**WINKELMANN CJ:**

20 Yes. So as, I should say as to those concessions on points of law.

**MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

25 The Supreme Court can of course not be bound by concessions on points of law because we can't be constrained from stating the law as it is.

**MR GALBRAITH KC:**

I expressed my personal view as to what the law should be.

**COOKE J:**

And those concessions come out of the authorities and your main point is that the regime regulates this.

**MR GALBRAITH KC:**

5 Is the regime and you only look to the authorities if –

**COOKE J:**

To guide interpretation.

**MR GALBRAITH KC:**

– this Court decides that it's a good idea to look to the authorities.

10 **COOKE J:**

Yes, and it might be relevant because section 313 is discretionary, right?

**MR GALBRAITH KC:**

Discretionary though in the sense your Honour, that it's still a discretion in relation to the law to apply.

15 **COOKE J:**

Sure, but you wouldn't grant section 313 enforcement if the person would be entitled to 317 relief for example.

**MR GALBRAITH KC:**

I agree. No I agree.

20 **COOKE J:**

So you have to interpret the provisions in an interrelated way.

1200

**MR GALBRAITH KC:**

25 Yes I agree, and that goes back to the *Synlait* point that I think her Honour was making to that, I mean I tried in *Synlait* to – because I was the losing counsel in *Synlait*, I've lost lots of cases in my time, that was one of them – but that was

the argument that we were running there and the Court said no, look at the statute, and I have, personally, a lot of sympathy with the argument that one looks at the statute in the schedules and it saves a lot of arguments, let's put it that way, it reduces the amount of arguments, and your Honours are putting to  
5 me some of the matters of course which are in the schedules.

Perhaps just the other schedule to look at is, well perhaps the other two I just would like to draw your attention to is the Property Law Act, Schedule 5, which I was referring to before.

10 **WINKELMANN CJ:**

And Justice Miller was asking you how you reconcile, or do you need to reconcile the regulations and the Property Law Act schedule?

**MR GALBRAITH KC:**

Well they both apply. That's the short answer to it.

15 **WINKELMANN CJ:**

I didn't think they conflicted but...

**MR GALBRAITH KC:**

No, they don't head-on conflict. They've got a different emphasis, I suppose, is what I would say, and you'll see in Schedule 5, that section 3, which I referred  
20 to before: "Right to have land restored after completion of work ... if a person entitled to enforce these covenants (person B) has undertaken work ... (2) Person A has the right, after the completion of the work, to have the land restored as far as possible to its former condition (except for the existence of the [right of way])."

25

So, they again, just like the certificate of easement, are still directed towards maintaining and restoring, as that requires, restoring the right of way, not just the driveway, and so there's, yes.

**COOKE J:**

And presumably you rely on section 2(c), “the right to have that land at all times kept clear of obstructions”?

**MR GALBRAITH KC:**

5 Yes, which I think the Court of Appeal accepted, I mean, all the land.

**COOKE J:**

Yes.

**MR GALBRAITH KC:**

10 And, yes, but it’s got the same provision about “... unreasonable impediment to the use and enjoyment of the driveway,” but it’s still directed towards the land. The other, which doesn’t directly apply, is just to look quickly at the 2018 Regulations which don’t directly apply to this land but, in my respectful submission, have got some value in respect to what regime is intended to be created, and you’ll see there in Schedule 5 the “easement facility” is again the  
15 word, the definition used: “(c) for a right of way, means the surface of the land described as the easement area, including any driveway.”

So, it is the same, but with different wording and a different way of getting to the answer, that an easement facility is the “surface of the land”. It includes,  
20 it’s specific here, it includes the driveway but it is the “... surface of the land described in the easement area ...” and it’s interesting when one goes across to “Rights of way”, which is clause 6, similar statements about going over and along the right of way. Subclause (3): “A right of way includes the right to have the easement facility kept clear at all times of obstructions (whether caused by  
25 parked vehicles) ... to the use and enjoyment of the easement facility.” It is now not the driveway, so it’s the full easement facility, no question about it.

**MILLER J:**

Sorry, are we under the Property Law Act schedule here?

**MR GALBRAITH KC:**

I'm sorry?

**MILLER J:**

Is this the Property Law Act schedule you're referring to or the...

5 **MR GALBRAITH KC:**

No, the Land Transfer Regulations 2018.

**MILLER J:**

Right.

**WINKELMANN CJ:**

10 What clause were you up to there, Mr Galbraith?

**MR GALBRAITH KC:**

Sorry.

**WINKELMANN CJ:**

No need for you to apologise.

15 **MR GALBRAITH KC:**

No, clause 6 of the schedule and subclause (3) "... the easement facility kept clear at all times ... ". Subclause (5): "The easement facility for the relevant easement is the surface of the land described as the easement area, including any easement facility laid or to be laid along the easement area in accordance with clause 10(1)." So, that's really directed towards the position that his Honour Justice Williams was putting to me in relation to the 2002 Regulations, so the easement facility is both, "the surface of the land described as the easement area", that's the whole thing, and "an easement facility laid or laid along the easement area in accordance with clause 10(1)".

25 **COOKE J:**

Clause 10 is in more or less the same terms, isn't it?

**MR GALBRAITH KC:**

Clause 10 is, yes. Yes, your Honour.

**WINKELMANN CJ:**

5 What would happen if we were talking about the ability to park cars along here  
and –

**MR GALBRAITH KC:**

10 Well, if one was acting for the grantor, for example, you would say “we can park  
cars along there as long as it doesn’t obstruct the driveway”, that’s what you’d  
say. Now that hasn’t been a very successful argument in any case but one that  
I’ve seen. There is a Scottish case where they said, in these very exceptional  
circumstances where the particular person had no access, vehicular access to  
their property, that they could be entitled to park a car on their part of the  
easement area, but Lord Hope made it clear that was a, I won’t say a peculiarly  
Scottish solution, but it was peculiar to the particular facts, but parking cars –

15 **WINKELMANN CJ:**

It’s the grantee parking the car though, isn’t it?

**MR GALBRAITH KC:**

Yes

**WINKELMANN CJ:**

20 What about grantor parking the car?

**MR GALBRAITH KC:**

No, that was a grantee parking the car.

**WINKELMANN CJ:**

Yes.

25 **MR GALBRAITH KC:**

Yes, you’re quite right. So I suppose one would say, well, that comes within  
the convenience.

**WINKELMANN CJ:**

But it just seems to me that a permanent structure is a different order of thing to something that's passing by, say a pile of dirt, or a car?

**MR GALBRAITH KC:**

5 My respectful submission, is yes, I agree entirely, your Honour, and when we come down to what Justice Cooke was talking to me about, about joining the property to the easement or to the driveway, then that's fine. Normally you'd do it with a flat piece of paving or whatever it might be and that would, in effect, become part of the driveway, but putting a permanent structure there, such as  
10 a retaining wall, as his Honour suggested, goes far beyond what might reasonably be a non-obstruction, let's put it that way.

**COOKE J:**

But it ultimately comes to what is reasonable, is that right?

**WILLIAMS J:**

15 Exactly.

**WINKELMANN CJ:**

Or is this a difficult case?

**MR GALBRAITH KC:**

This isn't a typical case.

20 **WINKELMANN CJ:**

No, no, but I'm saying, is this an atypical case?

**MR GALBRAITH KC:**

Yes, this is an a –

**WINKELMANN CJ:**

25 Which might tempt us to make bad law.

**MR GALBRAITH KC:**

Yes, I'm sorry, yes.

**WINKELMANN CJ:**

So it's because it could've been preserved in the easement.

5 **MR GALBRAITH KC:**

It could've been preserved, well, that's what I said about – the easement certificate doesn't deal with the fact that there were obstructions to the right of way at that time and it should've and if it didn't, then it's, there's stuff.

**COOKE J:**

10 What about a proposition that they are allowed to build things that are reasonably necessary to facilitate use of the common driveway.

**MR GALBRAITH KC:**

Well, I guess, the probably answer is it depends what those are, Sir. If they obstruct the right to pass along, then they can't.

15 **COOKE J:**

Well here the terrain obstructs their ability to move along the easement. A retaining wall, for example, may prop up their own driveway, but may also be of benefit to the common driveway. So isn't it, in the end, something that has to be approached on what is reasonably required to facilitate connection with  
20 the facility.

**MR GALBRAITH KC:**

Well, I don't disagree that you've got to be able to connect with the facility, but I would say that you've got to be able to connect with the facility on your own land, that's the –

25 **WILLIAMS J:**

Only if your connection on the easement area is unreasonable.

**MR GALBRAITH KC:**

Well, if it's inconsistent with the easement, then you shouldn't be able to do it.

**WILLIAMS J:**

No, but that – there's this test of reasonability in there.

**5 MR GALBRAITH KC:**

I know, you're going to say, "begs the question", yes. Look, I understand, but that's why it's difficult to be precise about that.

1210

**COOKE J:**

10 Well, we're only interested in the law, and that seems to me to be a sound proposition of law, and if you have got structures within the easement facility that join you to a driveway, it's always possible that in the future the current facility will be regarded as unsuitable, and it's reasonably required to be broader, in which case your connection infrastructure may need to be rebuilt.

15 But isn't that how the whole thing works?

**MR GALBRAITH QC:**

Well not if the whole thing says that you can't do that in the first place, then you've solved all of that problem.

**COOKE J:**

20 But even you have conceded that pavers might be appropriate in the easement area so you can use it.

**MR GALBRAITH QC:**

Pavers aren't going to be an obstruction Sir, they're going to – you simply drive over pavers. I mean it's the same thing we we're talking about before with two  
25 delivery vans, okay, if you've got pavers there then one delivery van can pull over onto the paver, but one delivery van can't pull over into a retaining wall, and –

**COOKE J:**

Well a kerb and a gutter.

**MR GALBRAITH QC:**

Well it depends if it becomes an obstruction Sir, doesn't it? I mean there's a  
5 case where there was a step, and the step became three steps, and then  
four steps, and that was regarded as an obstruction, so it depends. If it's a flat  
kerb, it won't be a flat kerb, it's not a kerb if it's a flat kerb, so it is an obstruction  
of a kind. I just was going to more accurately explain what the situation was in  
relation to that consent et cetera. As I am instructed, a resource consent was,  
10 in fact, to do developments to the house, not to the driveway.

**WILLIAMS J:**

This was the area underneath, the area that was enclosed underneath the  
driveway?

**MR GALBRAITH QC:**

15 Yes, I think there was another –

**WINKELMANN CJ:**

Can you just give the answer Mr Galbraith, because I don't know the detail that  
Justice Williams is, can you just give the answer? I was trying to hear you?

**MR GALBRAITH QC:**

20 Yes, sorry, it was to make a development to the house, I think it was an office  
and a kitchen or something like that. The work that was done to the driveway  
wasn't consented and was outside – was in the right of way area, or much of it,  
and then the same with the Raes in due course.

**WILLIAMS J:**

25 The question was a bit different though. It's whether there were conditions,  
expressed or implied, in the resource consent, which –

**MR GALBRAITH QC:**

No, my understanding is the resource consent was obtained on the basis that it wouldn't increase the use.

**WILLIAMS J:**

5 Right.

**MR GALBRAITH QC:**

10 So that there weren't any conditions in relation to the right of way. If the resource consent had been, it wasn't, but if the resource consent had been we're going to put, I don't know, an upstairs flat or something like that, then it might have provoked a condition.

**WILLIAMS J:**

There were no conditions about the access?

**MR GALBRAITH QC:**

No, not that I'm aware of.

15 **WILLIAMS J:**

Right, okay.

**WINKELMANN CJ:**

Now, Mr Galbraith, your timing.

**MR GALBRAITH QC:**

20 You've probably heard enough from me.

**WINKELMANN CJ:**

No, I'm not trying to stop you.

**MR GALBRAITH QC:**

25 No but I think you understand the position, and the position really is summed up in our, I think it's our paragraph 106 of our written submissions that – perhaps just to say a little bit about the second question which is future development.

I've already said something about that in terms of property, it's dynamic, the uses of property and over time things change. There's nothing in the texts that we've been able to identify that has a rule of law such as the Court of Appeal identified, that you can't consider future development. In my respectful  
5 submission there's nothing in the authorities which suggest that. If my learned friend points to the *Finlayson v Campbell* (1997) 8 BPR 15,703 (NSWSC) case, what happened there was, and one can well understand what happened there, it was a question about a building that was going to be erected. Could that building be changed in a way that meant that there was an impediment, and  
10 what the Court decided was the person who got consent to build that building wasn't going to change it because there's no way they were going to give up the consent which they had because that had been obtained under a provision that no longer existed, and so they wouldn't get the same consent again. So not surprisingly the Court shrugged its shoulder and said, well, not going to worry  
15 about the possibility of future amendment because in real life it isn't going to happen. So *Finlayson*, which is a case which talks about it can come back again doesn't, as a rule of law, say that you don't look to the future.

**WINKELMANN CJ:**

This is a hypothetical case then, the Court is saying. So we're not going to look  
20 at it because it's hypothetical.

**MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

But couldn't that be said about you? If you keep on focusing on future use, as  
25 opposed to the alternative analysis, so I put to you which is that this is an easement that enables the driveway to be used in a comfortable –

**MR GALBRAITH KC:**

Which I prefer, your Honour.

**WINKELMANN CJ:**

It can be said to you, which it has been said to you, “come back again”.

**MR GALBRAITH KC:**

Yes, but that’s why I personally prefer your Honour’s explication of that  
5 because –

**WINKELMANN CJ:**

Is it covered in your paragraph 106?

**MR GALBRAITH KC:**

Paragraph 106 does turn to the future. Can I just also give your Honours a  
10 couple of references to future considerations. The Australian case of  
*Owners Corporation Strata Plan 533 v Random Primer Pty Ltd* [2025]  
NSWCA 8.

**WINKELMANN CJ:**

My copy of your submissions doesn’t have a paragraph 106.

15 **MR GALBRAITH KC:**

Oh, doesn’t it? I was doing that from memory, your Honour.

**WINKELMANN CJ:**

There is no paragraph 106.

**MR GALBRAITH KC:**

20 I did say “106”. Paragraph 104 I meant, sorry.

**WINKELMANN CJ:**

Thank heavens.

**ELLEN FRANCE J:**

Sorry.

**WINKELMANN CJ:**

Paragraph 104.

**MR GALBRAITH KC:**

I'm getting dyslexic. *Owners Corporation v Random Primer*, which my friends  
5 also refer to, is worth noting, particularly in respect to paragraph 35, and they've  
discussed there some of the cases which have been referred to here and then  
in paragraph 35 they say: "Implicit in these cases is an understanding that the  
manner in which the dominant owner may exercise their right of way is not  
necessarily limited to the particular way in which it is currently being exercised.  
10 If the dominant owner's development application proposes a use which is  
consistent with the right of way, then for the servient owner to exercise their  
rights of ownership to prevent that use by declining to give owner's consent  
may be to interfere with the dominant owner's rights. Of course, the issue must  
always be considered in light of the nature of the particular rights granted and  
15 all the circumstances of the case." And you've just got to be a little bit careful  
because a lot of the cases are in relation to quite specific grants of easement,  
rather than the sort of regime grant that I'm referring to.

**WINKELMANN CJ:**

Well, can I ask you this question?

20 **MR GALBRAITH KC:**

Yes.

**WINKELMANN CJ:**

Are there any cases that'll allow permanent structures to be built on an  
easement that supports a formed driveway right of way, a right of way?

25 **MR GALBRAITH KC:**

Not that I can think of, not that, no, and I get a shake from my left, so the answer,  
in my respectful submission, is no. That *Random Primer* case is quite  
interesting though for that point they're just making that because that's in that  
context I was talking about before where you can ask for a servient owner to,

or vice versa, to consent to an application you might be going to make for a resource consent to do something in the future. I mean, that's part of the entitlement under the easement and there's another authority also in the authorities there *Lowe v Kladis* (2018) 18 BPR 38,599 (NSWCA) is another  
5 one, L-O-W-E and *Kladis*, is a similar situation where they're seeking consent and the paragraph I've referred to there is paragraph 116, I won't take you to it, and then, of course, what I –

**WINKELMANN CJ:**

Seeking consent to what?

10 **MR GALBRAITH KC:**

Seeking a consent to a future use of, you know, a development of some sort or other.

**ELLEN FRANCE J:**

15 Sorry, and what, in addition to *Lowe*, what was the other one you were referring to? Was that *Owners Corporation* or is there another one?

**MR GALBRAITH KC:**

No, *Owners Corporation*, yes, but also in the context, of course, as you'll see in *Hinde*, for example, the extracts in there, that as I said before, easements are regularly interpreted to mean that kind of whatever happens down the track  
20 happens and it comes – falls within the easement. So, as I say, if you go from a single dwelling to a motel, well the easement accommodates that. Not if you go to a railway station. There was one at a railway station.

1200

**WINKELMANN CJ:**

25 And as to Justice Cooke's one about, well, could you say that you should be able to build permanent structures that facilitate the servient owner's access to the right of way? You'd say that there's no cases that say that?

**MR GALBRAITH KC:**

No.

**WINKELMANN CJ:**

What about –

5 **WILLIAMS J:**

Well aren't there cases that say you can build a, put a gate in as long as you give the owner a key?

**MR GALBRAITH KC:**

There are cases which –

10 **WILLIAMS J:**

Or not lock it, there's several cases like that aren't there?

**MR GALBRAITH KC:**

That's right. But on interpreting the particular easement Sir, not as a, in other words, the chance of you being able to put gates in 100 or 50 right of ways in a  
15 subdivision is just not going to fly.

**WILLIAMS J:**

Sure.

**MR GALBRAITH KC:**

For any number of reasons.

20 **WINKELMANN CJ:**

There's also the decision that you referred to us, I think it's the one that follows on from *B&Q v Liverpool*.

**MR GALBRAITH KC:**

Yes the *Emmett v Sisson*.

**WINKELMANN CJ:**

*Emmett*, yes which rather suggests to the contrary of the position that Justice Cooke is proposing.

**MR GALBRAITH KC:**

5 Because the easement certificate there was regarded as having, providing for access along the whole 30-odd metres or yards or whatever it was, multiple access. And *Harvey v Hurley* (2000) 9 NZCPR 427 (CA), I shouldn't pass by without referring to *Harvey v Hurley*. I mean those recent cases which the Court of Appeal all distinguished are the New Zealand cases in the area and  
10 while *Harvey v Hurley* was a modification case, the statement that was made by the Court was quite explicit. It was commented on by Don McMorland who was still the editor of *Hinde McMorland* at the time, that it might infer that the easement didn't allow for the odd square inch of impediment, but no challenge to the principle that was stated by the judges there and that was a strong court  
15 and that was a court because of the generation, time, that would be well aware of conveyancing practice and procedures because that's what kept law firms afloat in those days.

**WINKELMANN CJ:**

And what year was that *Harvey*?

20 **MR GALBRAITH KC:**

*Harvey v Hurley* was –

**ELLEN FRANCE J:**

2000.

25 **WINKELMANN CJ:**

2000. So in terms of –

**MR GALBRAITH KC:**

Well it was Justice Henry, Justice Thomas and Justice...

**COOKE J:**

Tipping.

**WINKELMANN CJ:**

5 So that was the common law context in which the legislative framework that  
now –

**MR GALBRAITH KC:**

2000 it was reported.

**WINKELMANN CJ:**

10 That's the common law context in which the legislative framework was  
adopted?

**MR GALBRAITH KC:**

Yes, yes. Thank you, your Honours.

**WINKELMANN CJ:**

Thank you Mr Galbraith. Mr Hodder.

15 **MR HODDER KC:**

The Court pleases. You have our road map filed yesterday afternoon?

**WINKELMANN CJ:**

Yes.

**MR HODDER KC:**

20 In the way of the world, I don't imagine I'm going to get through all of that if I  
start at the beginning and work my way through to the end so it would be more  
of an aide-mémoire for us and possibly you?

**WINKELMANN CJ:**

25 Do you want us to be quiet for a period of time to facilitate that? We didn't do  
that for Mr Galbraith but we're prepared to do it for you if you're feeling  
time constrained?

**MR HODDER KC:**

No your Honour, as I think it's just much more useful for everybody if we have the Court's questions clearly asked when they're required.

5     Could I explain that I'm proposing that we divide the argument, my learned  
friend Mr Quinn would deal with what is actually four and five of our road map  
and that's because I wasn't quite as late an arrival as my learned friend  
Mr Galbraith was, but I didn't, only arrived in the Court of Appeal. I certainly  
wasn't involved in the work in the arbitration and there was some factual matters  
10    I think would be helpful to have explained, including by reference to the alphabet  
map which we have also sent an annotated version in through to the Court  
yesterday. So my proposal is that he will come up and speak to that relatively  
soon.

15    Now I wanted to say some background things which may save time later on to  
explain how our submissions work and on one level I'm probably here as a  
defender of the tort of nuisance, that it hasn't been wiped out by accident  
somewhere along the way, and that section 313 is a remedial provision, it  
doesn't create a jurisdiction as such. But that's, underpins much of it.

20

So, our submissions go to the effect that actionable interference, which is the  
language used in all the decisions to date and which comes from nuisance, with  
easement rights, should continue to be decided by reference to the reasonable,  
actual, or imminent use of the grantee. That phrase "actual or imminent use",  
25    or in other words, the phrase "actual or imminent" in relation to use come from,  
for example, *Todd on Torts'* discussion of nuisance, that's in the authorities at  
tab 89 and the discussion is at page 581. *Todd* also goes on to explain that  
that "actual or imminent" risk of harm or wrong is the essence of the tort of  
nuisance and that therefore requires a balancing of conflicting interests, and  
30    again the *Todd* text at 581 and also 593 touched that, and what is being sought  
by the law of nuisance is fair and workable balancing of the conflicting interests  
involved when there are multiple property rights affecting a particular piece of  
land, which of course is what we have with any easement and not least here.

The principles and approach to nuisance from the common law in our submission remain relevant, notwithstanding there has been a partial restatement in the schedules under both the Property Law Act and the Land Transfer Act, and that the easements are Torrens-recorded interest.

5 Now, there is a reference made to Mr Gibbons' article in the *New Zealand Law Journal* in recent times. There's an even more recent one which we will perhaps hand up later after lunch which I received this morning from the author, which takes a somewhat different view, but the essence of the point is that registration –

10 **WINKELMANN CJ:**

Who's the author?

**MR HODDER KC:**

Rod Thomas, yes, of AUT Law School. But the basic proposition that what registration does is to give notice and validity, it doesn't give you a definitive list  
15 of everything that you're going to get there, and so there's a hint in my learned friend's submissions that we are looking for a lawyer-free conveyancing system and –

**WINKELMANN CJ:**

May I just ask about those two authors. Are either of them involved in this  
20 litigation in any way?

**MR HODDER KC:**

Not to my knowledge.

**WINKELMANN CJ:**

Right, good. It's always good to know.

25 **MR HODDER KC:**

So, the idea that you can go to the registrar and know everything seems, with respect, heroic, and simply not the foundation on which the law should be considered, at least at this level. That's partly why people write textbooks, so

what you would expect if there's an issue is that a person who is a layperson interested in these things would have to go and see a lawyer, they couldn't safely or sensibly simply say I read the title on the registered documents and that's it. The lawyer would at least, at a minimum, go and look at *McMorland*,  
5 or *Hinde, McMorland & Sim*, and they would see all the common law cases and authorities and principles summarised there. In particular, they would see them there on the 2015 addition, which would've been the addition that was current at the time that this easement was entered into in 2017. There are some changes in the 2025 addition under "new management" namely Mr Gibbons,  
10 which in an attempt to reconcile the High Court decision in this case with what was there before, possibly not entirely successful, but that's kind of where we are with that. So, what we say is that the law –

**WINKELMANN CJ:**

Is Mr Thomas' article published?

15 **MR HODDER KC:**

Yes.

**WINKELMANN CJ:**

Thomas'. Where's it published?

**MR HODDER KC:**

20 It's in the conveyancing bulletin.

**MR HODDER KC:**

I think that's what it's called.

**WINKELMANN CJ:**

Okay, right. So, you're going to hand it up to us?

25 **MR HODDER KC:**

We are going to, we have hard copies here. I confess I haven't read it fully yet, but that won't stop us. So, that's what we say is relevant to that, the reason

that we say nuisance is relevant and why the Court of Appeal was correct to go into the legal history of nuisance is because that's the understanding. That's why McMorland's text is full of the cases that the Court of Appeal refers to, going all the way back to *Hutton, Pettey v Parsons* [1914] 2 CH 653 (CA) and others.

**WINKELMANN CJ:**

Was it referred to by the Court of Appeal in the *Harvey* case?

**MR HODDER KC:**

There were no authorities referred to about this in the *Harvey* case. It doesn't appear to have been argued. It was a modification case.

**WINKELMANN CJ:**

Mhm.

**MR HODDER KC:**

There's not a case mentioned in the judgment, not an argument mentioned, and so the relevant paragraph in which my learned friend is founding himself is a classic example of observation. It wasn't necessarily the decision, it wasn't informed by argument, or the citation of authorities.

**WINKELMANN CJ:**

How does it fit with the legislative scheme?

**MR HODDER KC:**

Which sorry?

**WINKELMANN CJ:**

Nuisance. How does nuisance fit with the legislative scheme?

1230

**MR HODDER KC:**

So the legislative scheme –

**WINKELMANN CJ:**

Because the legislative scheme in the Torrens framework doesn't really rely upon people enforcing their rights by reference to nuisance, does it?

**MR HODDER KC:**

- 5 In terms of an interference with a property interest such as an easement, yes. That's what all the cases have done from the beginning.

**WINKELMANN CJ:**

So you're saying that's –

**MR HODDER KC:**

- 10 From *McKellar v Guthrie* [1920] NZLR 729 (SC) through to now.

**WINKELMANN CJ:**

Okay.

**MR HODDER KC:**

- 15 The only case I think that says this is purely a section 313 case is a recent decision of Justice O'Gorman's in the last couple of years, but every other case has been discussing the law of nuisance, because that's the way it works.

**WILLIAMS J:**

Why would they need to if these are covenants? Why don't they just sue on the statutory covenants? Or rights?

- 20 **MR HODDER KC:**

Well they're going to finish up in the same place is the point I'm coming to, because you're going to have to do a balancing exercise. The balancing exercise in a principled way has been done by the common law courts and where they've got to, and the essence of all that –

- 25 **WILLIAMS J:**

So do you need to fight heroically for nuisance at all?

**MR HODDER KC:**

Well you don't but if I can just come back to what we say is going on in terms of the structure of the legislation. The legislation doesn't say thou shalt not interfere with any easement rights. The interference comes from committing  
5 nuisance, and then the remedies are partly specified, for example, in section 313 in the Property Law Act.

**WINKELMANN CJ:**

But it remains the case, what the cases are doing is using nuisance to define what the rights are created under the Land Transport Act, which is not a  
10 necessary, it's not an inevitable or even obvious approach, analytically. An obvious approach analytically is to look at the document deposited to define the rights as opposed, and the legislative framework, as opposed to looking at nuisance to define the rights.

**MR HODDER KC:**

15 Well we would say that tends to have some risks and is not the most appropriate to approach it. The point about easement is it's not a defined term in the legislation. It's assumed that people know what an easement it, but an easement is a common law construct. It's a right of reasonable use over somebody else's land, but the Acts don't tell you that.

**20 WINKELMANN CJ:**

No, but they do tell you what a right is.

**MR HODDER KC:**

Well they tell you what some of the rights are –

**WINKELMANN CJ:**

25 And the document tells the other.

**MR HODDER KC:**

– and they explain them at a higher level. The legislative history, we'll go back one step. I apprehend this appeal is largely about statutory interpretation and

the way our – how the common law fits in with the statute, and you’ve got our submissions, which I won’t go back to, about the idea that the legislation should be interpreted consistently with the common law. That’s the backdrop to where the legislation has been passed.

5

So our appendix, or schedule to our written submissions, which is about a third of the submissions, is quite detailed on that because that’s the important stuff, and when you get into it, my learned friend took you to some of the Hansard parts, but when you get into that, or you get into the property law and equity law reform committee’s report, nothing there is suggesting they’re kind of trying to lay waste to the law of nuisance, or it’s a major comprehensive codification like the Accident Compensation, or the Domestic Actions Act 1975, abolition of other torts. It’s building on the common law assumption about what an easement is, and trying to simplify things somewhat, which is why we say the appropriate to think of it is a partial restatement, but not in a way that takes away the principle.

10  
15**COOKE J:**

Well at the very least the common law cases would influence your interpretation of the schedules.

20 **MR HODDER KC:**

Yes well I understand my friend to say “informed” but it wasn’t quite clear what that means. I think the same submission was made in the Court of Appeal as well on behalf of the appellant but we say whatever you do you finish up, and I’m going to come to the *Fearn & Ors v Board of Trustees of the Tate Gallery* [2023] UKSC 4 case after we’ve heard from Mr Quinn, because that has a particularly helpful discussion on the principles and why you would use that, and the general common law idea that what you’re doing is distilling important points through the experience of a common law process over time. So rather than criticising the idea that the Court of Appeal was citing ancient cases from a foreign country, *Hutton v Hamboro* and those other cases, the point is it demonstrates the common law methods. Those principles have been consistent, and the demonstration in New Zealand is most particularly

25  
30

McMorland's texts where the text is very largely based on the common law concepts, the key one of which is reasonable user.

**WINKELMANN CJ:**

Well perhaps mistakenly and that's what the Court is concerned with.

5 **MR HODDER KC:**

Well there's a question about, why would you say it was mistaken when there's nothing in the legislative materials to indicate that there was a radical change meant to depart from nuisance.

**WINKELMANN CJ:**

10 Yes, and that's what I'm interested in, because it seems to me that the issue is whether the treatment that is adopted by the Court of Appeal means that the easement rights conferred under the document that was deposited under the Land Transfer Act change over time, because it's just a kind of a, a very perambulatory approach to construing what's effectively a contractual  
15 document that sits within our statutory framework. So your rights are changing all the time, even though it appears people who are third parties dealing with them, that they are set out there.

**MR HODDER KC:**

20 And the fact that the rights will change all the time is really something that the law can't do much about, because positions and facts and circumstances change, which is why, with respect, Justice Cooke's emphasis on the arbitration clause in the regulations and schedules, in our submission, is significant and correct. The point about the legislative reforms is to keep it simple and try it make it more fact-based. Now it's not always going to work and so here we are  
25 in this Court after an arbitration, High Court, Court of Appeal, et cetera, but in most cases these are questions of fact, and the facts may change. The law of nuisance recognises that, and the point about remedies for interference is an important part of the law in nuisance's contribution here. So there's no question –

**WINKELMANN CJ:**

So if I may formulate the issue then. The appellants say the documents and the legislation tell you what the rights are created by the easement, and you say you cannot understand the right created by the easement without the law  
5 of nuisance. The law of nuisance refines the rights?

**MR HODDER KC:**

Correct. But there's an initial point I might usefully make at this point, is my learned friend talked about ancillary rights, quite rightly at one point towards the end of her submissions. Those ancillary rights aren't in the schedules. You go  
10 to the common law to find those, examples of those, indications of those. so that's why I'm saying, clearly in the legislative materials provides no credible support for the proposition that in 1961 or 1986 or 2002 somebody set out to comprehensively codify the law about easements and abolish the relevance of nuisance in that area. It just, there's nothing to support it, and there's no reason  
15 why one should. Now whether you say it informs, or whether you say it is the cause of action, in a sense doesn't matter very much because you finish up in the same place. The only point that we are really arguing about here is the reasonable user point that comes from the common law. That is to say that common law understood an easement to be a right a reasonable user over  
20 somebody else's land. That meant that the grantor's rights weren't all given away, and it meant that the grantee rights were constrained, and in dealing with that the question was focused on actual or imminent interference, as opposed to potential and hypothetical interference, and the whole point of the appeal, as I've understood it, in this Court and the Court below, is to pursue the point that  
25 there was a wider right, as the High Court found, that immunises against any potential future problems, and that isn't the way the law of nuisance works at least, and it's not the way the Court of Appeal came to its conclusion. But in the law of nuisance of course you don't have a once for all remedy. You can come back when the circumstances change, and that's the point made very  
30 well in the *Finlayson* case, but not *just* in the *Finlayson* case.

**WINKELMANN CJ:**

Can I just ask you about that. The futurity issue may arise here because the thing that has been put on the easement is a permanent structure. So you might be looking here and now when it's still a car or a pile of dirt, but when  
5 you're putting something that's permanently there.

**MR HODDER KC:**

That's also a feature that's recognised in the law of nuisance. You don't get any rights from prescription. If it turns out that a reasonable use requires it to be removed, then you're at risk.

10 **COOKE J:**

It's also implicit in the statutory scheme because of the discretions in section 317.

**MR HODDER KC:**

Yes.

15 **COOKE J:**

And actually another one that hasn't been mentioned, section 323, which is about infringing instructions and relief in relation to infringing instructions, and section 313, which is discretionary as well, and you may say that the common law would influence how the Court should apply those discretions.

20 **WILLIAMS J:**

What about the –

**MR HODDER KC:**

Yes. I'll come back, sorry, just to complete, I'll come back to distinguish section 317 to section 313 because I don't accept the proposition my friend puts  
25 in his written submissions, and orally, about how relevant *Synlait* is, but I'll come back to that. Your Honour?

**WILLIAMS J:**

What about the potential inefficiencies of, that permanent structures get built, plans change, you're inevitably walking into bitter conflict between neighbours because the cost of fixing the intrusion is going to be expensive, it's not an  
5 efficient way of running the system of right of way regulation.

**MR HODDER KC:**

Well we say it's a question of fact, that it also avoids speculation because inevitably you're going to have speculation, and you're trying to somehow or other boil the speculation into fact.

10 **WILLIAMS J:**

Right, either way you've got to balance?

1240

**MR HODDER KC:**

Yes, and again I come back to the point that the legislative structure provides  
15 for arbitration which is, we say, a reasonably clear hint that what's contemplated is that you deal with these as matters of fact as much as you can, including the question of prematurity or futurity, which in fact the Arbitrator did do in his award, he did consider it, and found as a fact that there wasn't a problem in terms of the reasonable usage of the driveway that we are concerned with.

20 **COOKE J:**

At present and that if there was a resource consent that things may change?

**MR HODDER KC:**

If there were something else to happen but the – as a matter of fact the Trust, which we've described a huge interest throughout our submissions, could not  
25 demonstrate any imminent or actual need for anything to change. Now my learned friend Mr Quinn will come to this, but there's a whole bunch of people there who could or might say the same thing and they simply haven't, and they would also be affected at various points for the same thing.

If I can just touch on the Court of Appeal judgment, I mean clearly we say that it was sound and correct, but your Honours will determine that in due course. What we say is it was consistent with a Parliamentary intention and the legislative history as we described in our written submissions and that that is also consistent with the common law in the way that for example the *Bennion* text discusses. That's in the authorities bundle at tab 82, and a way that, and this Court endorsed the approach in *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5; [2024] 1 NZLR 14 (SC) as an appropriate way to look at these things. We say that applies here.

10

So we say it's of no more authority, or even a principled basis for the Trust's argument that easements must protect potential future development options, that is beyond actual or imminent, and the law recognises of course that if relevant circumstances do change as a matter of fact, then the grantee may be able to say as a matter of fact there is an actionable interference. Now that may happen. These are rights of indefinite duration. Now nobody can look forward far enough to say what's going to happen because you're in speculative territory, but the law generally tries to avoid basing remedies on speculation, which effectively is what the Trust's appeal is trying to reverse.

15

20 **WILLIAMS J:**

Can I just test that that, it doesn't arise in this case, but what's your tipping point? An application has to be filed, I know it doesn't arise on your facts but we have to think about this systemically. An application has to have been filed to intensify. There have to be firm plans even if there hasn't been an application filed. Where do I, where does the line get drawn?

25

**MR HODDER KC:**

Where do we say – the line gets drawn, by the Arbitrator as a matter of fact, but those are the helpful indicators. Beyond that I don't think I can say anything definitive. Nor can anyone else.

**WILLIAMS J:**

Yes but let's assume that they're reading *Bennion* circa 2028 and not wanting to spend thousands of dollars on an expensive arbitrator, what would the rule be that their conveyancing lawyer could look up to see whether something could or should be done or couldn't?

**MR HODDER KC:**

I'm not sure that the law can offer them that. This is a question of fact.

**WILLIAMS J:**

Yes I know but we need some shape to this or the arbitrators are going to make, are going to do rather well.

**MR HODDER KC:**

But the Court will appreciate that filing in a sort of a semi-proforma non-bona fide application to try and trigger this would have one result. A fully detailed application supported by, you know, the usual rigmarole of engineers' reports et cetera would be a different kettle of fish.

**WILLIAMS J:**

Right. So as long as it looks reasonably serious that might be enough?

**MR HODDER KC:**

If it's bona fide and it's credible then you're getting very close to the line. I'm not sure I can go any further than that.

**WINKELMANN CJ:**

Isn't that an extremely inefficient way for us to regulate our property market? Because wouldn't an efficient way to regulate our property market be that you stipulate in your easement what you're entitled to do with the site, so you wouldn't have a situation where people can build permanent structures on the easement because no one currently absolutely needs that, and if they needed in the future to develop the property further then they have to come to court. And there's uncertainty about what is going to be problematic in that regard so

some people may build part of their house over the easement et cetera. It sounds like a recipe for disaster and inconsistent with the intention of the Torrens system.

**MR HODDER KC:**

5 Well you wouldn't expect me to agree entirely with that your Honour, but –

**WINKELMANN CJ:**

No I'm putting it to you and I wouldn't expect you to agree at all.

**MR HODDER KC:**

10 Well I'm trying to think of a jurisprudential way to say that's a rather alarmist analysis. I can't exclude the possibility there will be cases where another case like this goes through the routes of what has to happen, but because we're talking about infinite variety of circumstances and questions of fact then it seems to be that one has to say you can't avoid that somehow. Unless –

**MILLER J:**

15 Well you can point to section 313, as an indication, the very existence of a discretion.

**MR HODDER KC:**

Yes.

**COOKE J:**

20 And the existence of –

**MILLER J:**

To enforce or change something suggests that uncertainty is the price of doing justice.

**MR HODDER KC:**

25 Yes, I'd agree with that.

**COOKE J:**

And section 317, which contemplates the Court modifying the easement, and section 323, which contemplates the Court authorising infringing structures. So it's hard-baked into the statutory scheme that the Court can modify these rights.

**MR GALBRAITH KC:**

Which creates a lack of certainty which the Chief Justice's question is concerned about.

**WINKELMANN CJ:**

Well, no, because the Court, the rights are what they are and the legislative scheme allows people to say well, I need a permanent structure on this easement. I will go to the Court and then the parties can be heard. As opposed to someone just self-helping to a permanent structure on the easement. It seems your approach is flipping it on its head.

**MR HODDER KC:**

Well, I hope not.

**COOKE J:**

I think section 323 contemplates that it had already been built.

**WINKELMANN CJ:**

And it being removed because it's –

**COOKE J:**

No, getting relief from it.

**MR HODDER KC:**

The particular facts of this case, which we'll get to shortly, is a particularly difficult case, I think, with respect to the appellants' arguments, but indicative of the fact that there will be a whole series of circumstances that have to be taken into account when somebody has to make a decision about this, and that's what

arbitration provisions are there for, and yes, I think I'd be repeating myself if I go further.

**WINKELMANN CJ:**

Section 323 –

5 **MR HODDER KC:**

What we also say about the Court of Appeal judgment is it represents continuity in New Zealand law and that, we say, is a good thing in the area of property and it represents continuity as indicated by, for example, *McMorland*, and again, I urge the Court to have regard to the 2015 edition, which we sent  
10 through yesterday, as opposed to the 2025 edition which is trying to take into account the High Court decision in this litigation.

Also, perhaps not entirely irrelevant, says this with slightly more caution, it's consistent with the Australian jurisprudence. The Australian jurisprudence  
15 comes from the jurisdiction, not least New South Wales, where there are statutory schedules, where there is a Torrens system, and it has no hesitation about taking the approach that the Court of Appeal took, and so the cases that we've referred to from New South Wales in our submissions and in our road map, all go to that point.

20 **WINKELMANN CJ:**

Are those cases dealing with permanent structures or things like cars, planted beds of bush, heaps of dirt, that sort of thing. Are they dealing with permanent structures?

**MR HODDER KC:**

25 There's a range. The permanent structure case I'll come back to when I come back is the *Weidlich v de Koning* (2014) 122 OR (3d) 545 (ONCA) case from Canada, where that issue was raised and rejected on the basis there was no authority for it and there are English cases going the other way.

**WILLIAMS J:**

There are certainly fences and gates in the New South Wales' cases, I think. Big, big fences.

**MR HODDER KC:**

- 5 Yes. If that's convenient, then at this point I was proposing to hand over to Mr Quinn to address you on the background of the alphabet map, and what are points 4 and 5 in our road map.

**MR QUINN KC:**

- 10 May it please the Court, my apprehension is that I stand here somewhat with trainer wheels on, licenced to talk about the facts but not the law, but I was involved from the outset, as it were, and so was counsel for the respondent at the arbitration. The facts have come up quite a bit already this morning, almost to a surprising extent to me, so they are important.

- 15 A good place for the Court to start when you want to spend some more time getting into the facts would be the brief of evidence of Stuart Macky, which I'm not going to take you to now because I'd end up just reading through the brief, but Mr Macky was not cross-examined at all, was not required to be cross-examined at the arbitration, and his evidence was expressly accepted by  
20 the Arbitrator, it's in the award.

- Mr Macky has an association with the property going back to 1963 when he was a child, but not an infant, and so he recalls moving into what is now 509. Just to start orientating the Court, if you were heading down the troublesome  
25 part of the easement and driveway that we're talking about today, 509 is the property on the right, so it's not a property in respect of which there are structures sought to be removed et cetera. But anyway, he moved in there in 1964 when his parents had brought the property and the house and been built by 1964.

- 30 1250

His evidence was that at that time the formed driveway, such as it was, was made of earth and gravel and so the, I forget whose intuition it was that perhaps the, in fact it might have been Justice Cooke I think, that perhaps the formed driveway here predates the creation of the easement in the 1960s. One can't  
5 be absolutely certain of that but it looks to be the case.

**WINKELMANN CJ:**

Your chronology assumes as much, doesn't it?

**COOKE J:**

I think the Arbitrator found that, didn't he?

10 **WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

Well we did have in evidence before the Arbitrator an aerial photograph from the 1940s in which you can dimly discern a track that leads all the way down to  
15 the beach, to the property that's now the Colmans at 513, 513 and 511

**WINKELMANN CJ:**

So where's the beach in relation to this?

**MR QUINN KC:**

In relation to – what exactly is your Honour looking at?

20 **WINKELMANN CJ:**

Well, I've got the Wimax, the Colmans, the Fuges, the Raes.

**MR QUINN KC:**

Yes.

**WINKELMANN CJ:**

25 The Mackys. Where is it?

**MR QUINN KC:**

So if you carried on past the Fuge's property, 515 at the top of the photograph there. You'd eventually be in the water.

**WINKELMANN CJ:**

5 Okay, and the Colman's property also runs down to the water?

**MR QUINN KC:**

That's off to the right and it's a waterfront property as well, yes.

**WINKELMANN CJ:**

Okay so it's coming to a sort of a point.

10 **MR QUINN KC:**

Well actually, I mean the beach is more or less straight along there.

**WINKELMANN CJ:**

Okay, all right, the Colman property goes through.

**MR QUINN KC:**

15 And there's – between the Fuge property, 515 and 513, the Colman property, between their properties and the high tide mark, as it were, is a paper road owned by the council. What I – we sent through yesterday an annotated version of the so-called alphabet plan which was called that in the arbitration and has featured at all stages of this litigation.

20 **WINKELMANN CJ:**

Is that this?

**MR QUINN KC:**

It is. I've got some A2 copies of that which I prefer to hand up if I may.

**WILLIAMS J:**

25 Excellent. I had to read this with my phone.

**MR QUINN KC:**

I insist on A2 whenever I can. So I've got, I think six copies there. Can I just get my file. Well we do have also an A2 version of the aerial photograph which shows the layout of the relevant parts of the easement.

5 **WILLIAMS J:**

The more recent one?

**MR QUINN KC:**

No so this is the one Sir, that's actually appended to the back of the Court of Appeal judgment.

10 **WILLIAMS J:**

Right. I thought you were going to give us the 1940s one.

**MR QUINN KC:**

No, I don't think we're going to learn too much from that because all you could see in the 1940s was the Colman property which is now at 513. That's where  
15 the track led to.

**WILLIAMS J:**

Right.

**WINKELMANN CJ:**

Could we have a larger one of that map which I think is the same as this one?  
20 Is it possible to get a larger one and could we have the names written on it?  
Because I found writing the names on them, having names on it very helpful.

**MR QUINN KC:**

I can help you with writing the names on it very quickly if you like, it will only take –

25 **WINKELMANN CJ:**

But a larger one.

**MR QUINN KC:**

Yes, yes, I'm handing that up now your Honour.

**WILLIAMS J:**

He's got A2s.

5 **WINKELMANN CJ:**

Oh, have you got the large one? Most excellent.

**MR QUINN KC:**

I've got the larger one.

**WINKELMANN CJ:**

10 That's what you were talking about.

**MR QUINN KC:**

So I think by far the fastest way will be if I just give you the names and you scribble them on.

**WINKELMANN CJ:**

15 On the numbers.

**MR QUINN KC:**

Yes. So 519 is the Wimax property. 517 is the Rae property, R-A-E. 515 is Fuge, the Trust. 513 and 511 are in common ownership of the Colmans, haven't featured in this litigation, but they're the terminal point, if you like, of the  
20 easement in this case. That's as far as you can go. You go down towards the Fuge's house at 515 and then you turn sharply to the right and enter the Coleman property about sort of 15, 20 metres further on. Then 509 is the Macky property, M-A-C-K-Y. As I think I said, owned by the Mackys since 1963. It's still in the family, but Stuart Macky, who gave evidence, is now the trustee  
25 of his parents' estate. What you can see there –

**COOKE J:**

What about 523?

**MR QUINN KC:**

So 523, I forget the name of the owners –

**WINKELMANN CJ:**

But they're not affected.

5 **MR QUINN KC:**

They're not, well, it's interesting 523. 523 was previously occupied by some people called the Stevensons and owned by the Stevensons, so you see their name on the easement instrument itself, which we looked at at the beginning of today.

10

Immediately below the Stevensons, you can see what I would call the main trunk, if you like, of the easement. So that part of the driveway there, heading to the sort of left and off the bottom of the photograph, that's the main trunk which is, to all intents and purposes, straight and leads straight out to Riddell Road. You can see that when you get to the edge of the Stevensons' property you can either continue straight ahead, so the easement forks at that point, it services other properties off to the right or you can turn left onto our part of the easement that's in issue today.

15

**WINKELMANN CJ:**

20 So if you – once, if you're driving up that easement and you reach the Stevensons on your right.

**MR QUINN KC:**

On your left.

**WINKELMANN CJ:**

25 No. Okay, was that – is that down it then and –

**MR QUINN KC:**

No, your Honour.

**WINKELMANN CJ:**

So, if I'm coming from –

**MR QUINN KC:**

So Riddell Road is off to the left.

5 **WINKELMANN CJ:**

Okay, so if I'm coming this way and I go right, I'm going towards Riddell Road.

**MR QUINN KC:**

Yes. If you're the Fuges exiting their property, you come out past, you'll come past the Raes on your right, then Wimax on your right, then the Stevensons,  
10 and you turn right there.

**WINKELMANN CJ:**

On your right, when you turn right, as I said.

**MR QUINN KC:**

Now the alphabet plan that I've handed up, if we pick it up, right at the bottom  
15 of the page, that is showing part of the accessway that's immediately to the right of the Stevenson property. So you see, just to sort of skip ahead, you see where there's the red letter "a", which has a description annotated against it "A 'retaining wall'" et cetera, you see that small letter "a"?

**WINKELMANN CJ:**

20 Yes.

**MR QUINN KC:**

So that's immediately above the red line which indicates the boundary of the Wimax property.

**WINKELMANN CJ:**

25 What colour is the easement marked in?

**MR QUINN KC:**

The easement is not, well it's marked in purple, save for where it's overlaid by the red true boundary line, and so you see about halfway up the portion of the accessway immediately adjacent to the Wimax property, you see a circular  
5 notation "CB".

**MILLER J:**

Yes.

**MR QUINN KC:**

So that portion of the accessway "CB" runs from the southern boundary of the  
10 Wimax property from the eastern boundary of it, which is shown in red, to the western boundary of it, which is shown in purple, and it turns the corner where the Wimax property meets the Rae property, turns the corner slightly and then you get to a point where the Wimax property narrows substantially by cutting across to the left. The boundary cuts across to the left, across the accessway.  
15 Immediately above that sloping line, you've got Fuge property, Trust property, so that part where the notation "1.88" is showing.

**WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

20 That's on the Fuge property.

**WINKELMANN CJ:**

The "1.88" is on the Fuge property?

**MR QUINN KC:**

Well, just the notation is.

25 **WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

Yes. You see you've got a different part of the easement identified in front of the Rae property. It's a notation "CG" which is in a circle. What you've got there is just a two-metre strip of the Wimax property which runs from the purple strip down alongside the Fuge property and then it goes off the top of the page. We don't see the end of it, but it's – that portion of it is effectively a pedestrian access down past the Fuges' property to the beach.

1300

**WINKELMANN CJ:**

10 So the Wimax property has got a very unusual – it's the true panhandle property. It provides most of the easement.

**MR QUINN KC:**

Yes. I mean, impossible to describe the shape of the Wimax property, it's perhaps the most irregular one I've seen in a long time.

**15 WINKELMANN CJ:**

It's kind of got a very thin panhandle kind of aspect to it though, hasn't it? There's the body and then there's the handle.

**MR QUINN KC:**

20 Yes. Well, the handle there that runs along to the west of the Trust property, the Fuge property, that is, although it's subject to the vehicular right of way as well, it's only two metres wide and it's plainly, in my submission, and this was the case at the arbitration, it's intended to be used for access down to the beach.

**WINKELMANN CJ:**

25 So that is beach access.

**MR QUINN KC:**

Well, once you go to the left of the Fuge property. You can see that the Fuge property on this plan is 515 Riddell Road.

**WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

5 Lot 1, on the deposited plan. All three of the properties that are really concerned here are all on DP 52029. The Fuge property is lot 1, and that access there becomes, yes, a pedestrian access down the western boundary of the Fuge property.

**WINKELMANN CJ:**

Okay, right.

10 **MR QUINN KC:**

But we'll come to some – we won't come to some photos right now, no.

**WINKELMANN CJ:**

Lunch adjournment.

**COOKE J:**

15 Does the Colman property, is it – are we then going up the top – off the top of this map for the continuation of the access or where is Colman access?

**MR QUINN KC:**

20 The – yes, no, in fact, the Colmans have access, they have a right of way across part of the Trust property, across 515. I can't answer precisely your question, Sir, whether it's off the top of the map or not, but they have a right of way that is a hard right angle towards their property, and it runs in front of the Fuge house.

**COOKE J:**

Right.

25 **MR QUINN KC:**

I don't think it's – it maybe that it would be on this map. I don't think that it would – that the surveyors were instructed to show it.

**WINKELMANN CJ:**

Right, we'll take the adjournment.

**COURT ADJOURNS: 1.02 PM**

**COURT RESUMES: 2.17 PM**

5 **WINKELMANN CJ:**

Mr Hodder – Mr Quinn, sorry. How could I forget.

**MR QUINN KC:**

Thank you, your Honour. Just to pick up with that point that briefly detained just immediately before the break, the easement facility, which turns right in front of  
10 515 and goes to the Colmans' place at 513 and 511, must in fact lie on that plan that we've got there, it's just that it's not shown. You can see that from looking at the aerial photograph, although the portion of the easement facility is, it's shown roughly in a dotted red line, right? What is not shown is the part that turns hard right in front of 515 and leads to the Colmans' place, simply because  
15 that portion wasn't in issue. Now, I am going to take the Court through the –

**WINKELMANN CJ:**

Do the Colmans have another access, or do they depend on all of that too?

**MR QUINN KC:**

No, this is the Colmans' access as well.

20 **WILLIAMS J:**

So that clear area before you run into what looks like a tennis court or something, is that the end of that access?

**MR QUINN KC:**

Yes, well, immediately before the tennis court, that's on private land, that's the  
25 Colmans' land within –

**WILLIAMS J:**

Yes, but is that where the access ends up?

**MR QUINN KC:**

Yes, I think it ends up, more or less, from recollection, having looked at it myself,  
5 more or less at the legal boundary between 511 and 513, which is a legal  
boundary only because, you know, it's one property for current purposes.

**WILLIAMS J:**

Right, yes, okay.

**MR QUINN KC:**

10 It might be that it's more leading into 513, I'm not sure. What you see in 513  
there is an enormous, covered swimming pool behind the Colmans' house and  
I think that the driveway leads in towards that as well.

1420

15 Now, I'm going to take the Court through the alphabet plan, 303.0627.  
The genesis of the alphabet plan is that it was created by the appellants, the  
Trust. If you go, and I'm not going to take you to it, but if you went to  
paragraph 14 of the "Amended Points of Claim", which is early in the bundle,  
paragraph 14 sets out from (a) to (k) alleged encroachments into the easement,  
20 many of which are admitted and I'm going to show them to you, up and down  
the two areas of the easement, only CB and CG, which were put in issue in the  
arbitration and the amended points of, you see they are now on the screen, the  
amended points of claim detailed (a) through to (k), annexed a copy of this  
easement plan, but didn't at that stage have the alphabetised items of complaint  
25 on it. They were added later and this was referred to extensively during the  
arbitration, as you'd expect.

So, what we're going to do is start in the photograph bundle, which is at the end  
of volume 6, and in doing this – and I'm going to take you through each of the  
30 items that are complained about, some every quickly, some going to detain us  
longer. In doing that, I would like the Court to have in mind the submissions

for the Trust in their current submissions to this Court, paragraphs 17 to 19, in which, and I'm paraphrasing here, what the Trust says is that from 1964, and in paragraph 19 they say even earlier, from that period through to about 2012 or 2014, "the whole of the easement facility area was largely respected", that  
5 the true line and extent of the right of way was respected when people built their houses and so on. In fact, despite my learned friend, Mr Galbraith, saying the facts are in dispute, they're not in dispute, and the Arbitrator has found the facts. It's not the case that the true line and extent of the right of way, if we put it that way, was ever respected. I don't know that it was ever intentionally abused  
10 either, but the fact is that there have been encroachments along this accessway for many decades now, and that was clearly shown in the evidence before the Arbitrator.

**WILLIAMS J:**

These are permanent structures?

15 **MR QUINN KC:**

Yes.

**MR QUINN KC:**

The photograph bundle starts at 634 of volume 6 of the case on appeal. We have that, in fact, I said I wasn't going to show it to you, but we have that  
20 early 1940s aerial photograph at 636. Then we have –

**WINKELMANN CJ:**

Well, can you just talk us through that? That is interesting to me.

**MR QUINN KC:**

Very good. So it's difficult to see exactly where we're talking about, but it's  
25 perhaps easiest if I point to it.

**WILLIAMS J:**

Can someone widen that picture? Whoever's driving this thing. Thank you.

**WINKELMANN CJ:**

Well that might not help us.

**MR QUINN KC:**

5 So that there, if we're able to hover the cursor over that point that, I believe, is  
the Colman house. You can see there's a gap, as I said, from the Colman  
house down to the water, that's where the paper road lies.

10 Now the track, if you like, of the easement facility, the accessway is from where  
the Colman house is, we would head towards sort of 10 pm if you like,  
heading –

**WINKELMANN CJ:**

Is it the curving bush line down to a track?

**MR QUINN KC:**

That's it, and then we'd start to come down – Carter, you'd be able to –

15 **WINKELMANN CJ:**

Is that down to a track we can see there?

**MR QUINN KC:**

20 Yes, and then you can see the track more clearly as one, you'd come around,  
the cursor should come around to the immediate left now, that's it, keep coming,  
start coming down.

**WINKELMANN CJ:**

Curving left, going down.

**MR QUINN KC:**

25 That's the track there, and it leads all the way down out to the main trunk, and  
then off to the left you can see, the very hard left of the photograph, you can  
see Riddell Road.

**WILLIAMS J:**

Right down the bottom.

**MR QUINN KC:**

Right down there. That's it. Over there on the left.

5 **WILLIAMS J:**

So was this a farmlet?

**MR QUINN KC:**

Look, I can't answer that.

**WINKELMANN CJ:**

10 Right.

**WILLIAMS J:**

That's one property though, that –

**MR QUINN KC:**

15 On the other side of Riddell Road, even today, there are horses and so on,  
there's undeveloped land there. Just in that part at least. Sorry, I missed a  
question from someone.

**WILLIAMS J:**

No, it's fine.

**MR QUINN KC:**

20 Now, before we get to the – I'm going to take you slightly out of order through  
the photographs. Can you turn please to page 653? That's it. So, what this  
shows us is the beginning of our fork off the main accessway that leads from  
Riddell Road, so we've come straight down from Riddell Road and we're now  
looking to our left and looking to the beginning of the disputed part of the  
25 accessway.

**WINKELMANN CJ:**

So that's the Stevensons on the left?

**MR QUINN KC:**

Exactly right. So you can see that the Stevensons have got a large concrete  
5 wall there, immediately bounding the left-hand side of the formed way and that,  
if you're looking at the alphabet plan, that wall is shown as, it's shown shaded  
in green if you like, the right-hand extremity of that shaded part is the concrete  
wall.

**WINKELMANN CJ:**

10 Where's that?

**ELLEN FRANCE J:**

Sorry, whereabouts on the alphabet one?

**MR QUINN KC:**

So, right at the bottom of the plan. That concrete wall is the right-hand side of  
15 the portion shaded green.

**COOKE J:**

So the wall, the fence, and the house area are in the easement area?

**MR QUINN KC:**

Correct. The wall's well into the easement area, approximate, nearly  
20 two metres, 1.67 to 1.82 or so, and you can see, right at the very bottom of the  
alphabet plan, you can see a portion of the house, there are three pillars there  
holding up a covered veranda. You can see that one of those pillars is within  
the easement corridor, shown as a little square box, and you can see that pillar  
in the photograph we were just looking at, 653, that's the pillar you can see  
25 there on the left-hand side of the photograph above the wall.

**WILLIAMS J:**

So relatively recent? By the look of it.

**MR QUINN KC:**

But predates the easement because the Stevensons, yes.

**WILLIAMS J:**

Yes, right.

5 **WINKELMANN CJ:**

Their house was there before 2017?

**MR QUINN KC:**

I believe so, yes.

**WINKELMANN CJ:**

10 So, and what do the Fuges say about that?

**MR QUINN KC:**

They say nothing about that, your Honour. They didn't – so the same easement instruments deals with the easement over that bit of land that's owned by the Stevensons, but they were not brought into this proceeding.

15 **MILLER J:**

So, an issue might arise as another contingency with respect to the future as to whether development of the Fuges' property might require that the entire length of the easement be widened.

**MR QUINN KC:**

20 Yes, well this was a question that was considered in some detail by the planning engineers and the traffic engineers. There were matching experts called on both sides as to what might be required in the future. There are joint expert reports available for both the planners and the traffic engineers. Can I just tell you very quickly what the upshot of that is please, because it does not all turn  
25 on encroachment into the easement. The two traffic engineers were agreed that if you wanted to have, from a right of way access point of view, from a traffic engineer's point of view, if you wanted to have ability to develop as of right you

needed 5.5 metres, and you will have seen that referred to, but they said it would still always be, development of 515 would still always be a discretionary activity from the point of view of traffic and access because of the steepness of the way, particularly down in front of the Fuges' own property, so that you are never going to get to the position, as matters stand now, even if you cleared away all encroachments into this easeway corridor, you still would be looking at it as a discretionary activity because of the steepness of the accessway.

**WILLIAMS J:**

Well that's consentable.

10 **MR QUINN KC:**

Well, anything's consentable.

**WILLIAMS J:**

But that's generally a permitted activity, not in the technical sense, but one in which the, against which the plan doesn't set its face and according to the traffic engineers, even the requirements in the traffic controls in the plan are routinely avoided, if there's good traffic evidence to indicate there's no safety issues.

**MR QUINN KC:**

Exactly right, Sir. Yes, that's right. And, so, where the traffic engineers got to was that a logical solution that appealed to them was just dealing with what they called two pinch points. I mean this was a logical approach that was led, if you like, by our evidence but it was agreed by the opposing expert that this was a sensible way of dealing with things, that there are two pinch points, I can show you where they are just on our alphabet map.

1430

25

The first one is here outside the Stevensons' wall, which is not even on our land, so that's a pinch point that would need to be dealt with. They didn't, at this time, have a way of dealing with that, they just noted that that's something that you'd need to deal with because you can see the accessway here, the driveway rises up and so you don't have good visibility there for a little way.

30

**WINKELMANN CJ:**

But the Fuges aren't putting that at issue?

**MR QUINN KC:**

I beg your pardon?

5 **WINKELMANN CJ:**

The Fuges don't put that at issue, do they?

**MR QUINN KC:**

No, they've not sought to deal with that, but the traffic engineers were saying, if you were developing 515, this is a place that you would need to give special  
10 attention to, this corner here outside 523.

**WINKELMANN CJ:**

Okay, and where else?

**MR QUINN KC:**

And the other one is down by the junction, if you like, between the Wimax  
15 property and the Rae property, just where the accessway turns a little bit to the right and leads down to the Fuges' house.

**WINKELMANN CJ:**

So that's the part that is then the focus of some concern, which is where the retaining wall is?

20 **MR QUINN KC:**

Yes, and we'll come to that. I'll show you that the retaining wall that is still there now is the one that was there back even before the 1960s.

**WINKELMANN CJ:**

Oh. I thought I'd seen photographs of it being replaced?

**MR QUINN KC:**

Part of it has been, you're quite right, but not there. I'm talking about the pinch point that the traffic engineers identified. They said that that's roughly speaking where K and G are on our alphabet plan because, and you can understand  
5 immediately why that would be so. You need to improve access where you're turning a slight corner, or improve visibility, and so they developed a scheme that would apply for increasing the width there slightly to create passing bays.

**WINKELMANN CJ:**

There are two "K" and "G".

10 **MR QUINN KC:**

Exactly, there are.

**WINKELMANN CJ:**

So it's between the top "K" and the bottom "G" is it?

**MR QUINN KC:**

15 Well so it's the top, I mean it's as you approach the corner there. so if we can go back to the photographs quickly please, 653, and then the next photograph is just looking from the crest of the hill there, just as you're about to get, but still not quite at, the photographer is not quite at the Wimax property here, and looking back out past the Stevenson wall, this is 654 yes.

20 **WINKELMANN CJ:**

So this is now looking from the other direction?

**MR QUINN KC:**

Exactly, yes. So looking back to where the first photograph was taken from, and now the wall's on our right. So you're looking out to the main trunk of the  
25 whole easement that leads out to Riddell Road to the right.

**WINKELMANN CJ:**

So why was an easement created without noting a limitation for the Stevenson's property?

**MR QUINN KC:**

- 5 I don't know the answer to that but these were, as it's called, facts on the ground at the time that the easement was created in 2017.

**COOKE J:**

No one registered it with an issue, is the answer?

**MR QUINN KC:**

- 10 I don't believe so, no. I mean the same is true of the works undertaken by Wimax in 2015 and 2016, which I'll be showing you, and the basic submission to bear in mind there is that these did not decrease the width of the formed driveway at all, but no issue was taken with those. There's no dispute that, yes, they're works that strictly speaking were undertaken within the easement  
15 corridor, but no issue was taken about them either, and that's before the date of the easement creation.

- So we come first to (a), item (a), and you can see the annotation that we've put next to it there, which is just the, first of all it's just the description of the item  
20 from the amended points of claim. A retaining wall together with a commencement of a parking area onto the respondent's property. The photograph that we've referred to there, and the annotation is 660, I'll just wait for that to come up. So this is a useful before and after shot that gives us quite a good orientation. If we just stay up the top first, what you see there on  
25 the left, leading up to the large, the jumbo bin, is the access to the Wimax property, to 519, and just as Justice Cooke expected, what you see there is the method of getting, as it were, from the formed driveway, which the Macky evidence was to the effect that it was formed back in about, it was sealed back in about 1967 or 1968. That's their method of getting from that formed driveway  
30 up to their dwelling.

**WINKELMANN CJ:**

So, how much of that is on the easement, on the –

**WINKELMANN CJ:**

It's not that much of it, is it?

5 **MR QUINN KC:**

No, correct. But what you can see, it's perhaps slightly more than you think, you see the clivias there, hanging over the low rock wall in the foreground.

**WINKELMANN CJ:**

Yes.

10 **MR QUINN KC:**

Immediately to the upper left of the clivias there's a, kind of a black post.

**WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

15 Where that black post was is where there's now a more fancy looking pillar, if you like, which is the, and it has the number on it "519", for the Wimax property.

**WINKELMANN CJ:**

And that's in the easement area?

**MR QUINN KC:**

20 And that's just inside the easement area.

**WINKELMANN CJ:**

Okay.

**MR QUINN KC:**

25 You can see that at, to the right of item (b) on our plan, so immediately to the right of (b) you can see a square depicting the gatepost.

**WINKELMANN CJ:**

Yes.

**MR QUINN KC:**

And if we go down, if we stay on our same page of 660 and go down to the – so  
5 that was a photograph from, I think, 2012, or thereabouts. What we have now  
in the photograph below is, as it says, “taken June 2020”, so you can see the  
post, it’s got some ivy growing on it, and what you can also see is that where  
previously the small, the little retaining wall, it’s not much more than a gutter  
that leads from the post out towards the formed way, the common driveway,  
10 that’s been straightened out, where previously, if we scroll back up again,  
previously it was at a bit of an angle. All that’s happened is it’s been  
straightened out and then a little area of garden retaining has been created to  
the right of it.

**MR QUINN KC:**

15 What I would like to bring to –

**WINKELMANN CJ:**

So, I mean –

**MR QUINN KC:**

I beg your pardon. Yes?

20 **WINKELMANN CJ:**

It just seems to me that, it’s strange that when the easement was created in  
2017 no thought was given to just protecting existing structures within the  
easement.

**MR QUINN KC:**

25 No, but I mean I can’t speculate about that.

**WINKELMANN CJ:**

Well, it's relevant I suppose to, and I know you're not allowed to talk about the law, but are we dealing with just a case of an easement that hasn't been properly drafted which is creating problematic situations and most people  
5 wouldn't create such a situation?

**MR QUINN KC:**

Well, I don't know that I would agree with the proposition that the easement hasn't been properly granted.

**WINKELMANN CJ:**

10 Well, it depends on whether you want to be clear about what people's rights are, hasn't been properly drafted to recognise existing structures.

**MR QUINN KC:**

Is hasn't been drafted to recognise those structures, there's no question about that. That is the position. Whether that's a problem or not of course isn't, in all  
15 the sense why we're here today. We had –

**WILLIAMS J:**

Were they resurveyed? Were the lines resurveyed in 2017?

**MR QUINN KC:**

I don't know the answer to that.

**20 WILLIAMS J:**

Would they just rely on the lines on the DP?

**WINKELMANN CJ:**

Probably did, probably did.

**MR QUINN KC:**

25 I don't know the answer to that. I suspect that it might be the latter because otherwise you would think that everyone would've been alerted to the issue.

**WINKELMANN CJ:**

Yes, the focus in 2017 seemed to be the costs.

**MR QUINN KC:**

But what did happen –

5 **WINKELMANN CJ:**

The earlier focus seems to have been with the costs, who was going to pay the costs, that seemed to have been the focus earlier.

**MR QUINN KC:**

Yes, and they – because at or about 2017 they resealed the entire accessway.  
10 You will have noticed, well the state of the seal in the photo at the top, 2012, is, if you'll take it from me is not nearly as good as what we see in 2020 and you can see from the photos where we were looking at outside the Stevenson place, the state of the seal is in quite good order. So, they were focused on cost at that time and they added to the vanilla provisions, if I can call them that, that  
15 are implied by the schedules, they added specific provisions to deal with the cost of maintaining the driveway and what was obviously on their mind at that point was this new seal, also some new drainage work and kerbing that went in, particularly on the right-hand side as you go down, of the driveway.

**COOKE J:**

20 Did they also extend it to create rights for services and things like that?

**MR QUINN KC:**

Oh, they did. Because what they were having to do there, and wanted to do, was to amalgamate a fairly unholy mess of numerous easements that were dealing with those issues and they were able to bring them all under one set of  
25 documents here.

**COOKE J:**

So, it was a neighbourhood discussion to resolve all practical issues with the driveway perceived at that time?

1440

**MR QUINN KC:**

Precisely and, I mean, I made submissions to that effect of course, as you'd expect, in the arbitration, and submissions to this effect as well, that we had  
5 people of intellect, wealth, and endeavour, as it were, living up and down this driveway for many decades and no one had ever seen the width of the formed accessway itself as being an issue prior to the Fuges, and they didn't even see it as an issue when the Wimax works were done. They became agitated about it, if I can put it that way, in 2018, only when the Raes did some work around  
10 their horseshoe driveway.

**ELLEN FRANCE J:**

Mr Fuge does say, doesn't he, that at the time, although there'd been no surveying, it was intended to remain exactly as it had been before.

**MR QUINN KC:**

15 Yes, I mean I think that that seems to be the practical effect of what they did in 2017. No one tried to change anything in terms of physical dimensions or location of the stipulated area subject to the easement and remember it's subject to the use of a great many of the neighbours. There's – I forget the exact number, but we're up into double figures of people whose property  
20 interests are all subject to parts of this easement.

So far as surveying in concerned, I do recall that the evidence that was given by Mr Fuge, and there's no dispute about this, was that they got the surveyors in themselves, the Trust did in 2018, I believe, or perhaps early 2019, and  
25 so far as one can ascertain, that's when it was realised that the, first of all, the true width of the easement, in theory at least, was 6.2 metres and that the formed way was much less than that.

**MILLER J:**

30 So if we look at this photograph that you're showing us on the screen now, can you tell us approximately where is the red line on the alphabet plan, the

right-hand side of that easement? Is it the edge of the seal or is it in the vegetation somewhere?

**MR QUINN KC:**

It's definitely in the vegetation. If we look – are we looking at the more modern  
5 photograph down the bottom?

**MILLER J:**

Well, either, really.

**WINKELMANN CJ:**

Well, let's look at the more modern one down the bottom.

10 **MR QUINN KC:**

It's the same.

**MILLER J:**

Yes.

**MR QUINN KC:**

15 Just before we look at the bottom and I will answer Justice Miller's question, but  
if we just look at the top one, what I want to draw to your attention is the gutter  
that lies immediately below or the kerbstones that lie immediately below  
that – the right – the concrete wall that you can see sort of extending into the  
distance, midway through the photograph. So there's kerbing stones and a  
20 gutter at the bottom there, exactly, the cursor is on it now, and there's just past  
the entranceway to Wimax property, if the cursor can come forward, that's it,  
that's a drain there. One of those grilled drains that as a kid you always lost  
your ball down or whatever, so –

**WILLIAMS J:**

25 You sound like you're traumatised.

**MR QUINN KC:**

It happened so often. So that's a drain and if we look at the photo below, that drain is still there, exactly where the cursor is now. I can take you to a better photograph that shows it to you, in fact –

5 **WINKELMANN CJ:**

What's your point, Mr Quinn?

**MR QUINN KC:**

My point is that where the new bits of work were done, where bits of wall were changed and so on, there was no further encroachment, if I can put it that way,  
10 into the formed way at all. If you look –

**WINKELMANN CJ:**

Okay, can you tell me where exactly, so Justice Miller is asking about where it is on the right, where is the line on the left on the Wimax property on the easement.

15 **MR QUINN KC:**

So, it is – it just takes in the pillar, that's the right-hand pillar to the gate there.

**WILLIAMS J:**

Those pictures, there are photos that have red lines across them, are they reasonably accurate indicators of where the boundary is?

20 **MR QUINN KC:**

Yes, there's some sort of green scale mock-ups done by engineers which show where the plane of the easement boundary is. Yes, I believe they're reasonably accurate. They – that line – you can work it out most accurately, I suppose, by looking at the actual alphabet plan. You can see what's included and what's  
25 not. Where that – where it joins up to, you see the very significant block wall on the left of the accessway to the Wimax property, you see that block wall just to the right of the cursor now, it clearly has a change of direction in the block wall and you see that on the alphabet plan as well, the block wall curves around and

then just shortly, about a centimetre on the map before we get to the Wimax property it changes direction and turns about 25 degrees to the left. Is everyone with me?

**WINKELMANN CJ:**

5 Yes.

**MR QUINN KC:**

Yes. So you can see that what the Wimax wall there is doing, the block wall of Wimax is doing, is just joining up with 523, the Stevenson wall, and the true line of the easement goes from very nearly that corner point, back across to the left-hand side of the pillar and carrying on down the driveway. As the map shows, it's anything from, at its extremity, a two-metre encroachment to rather the less than that, 1.62, 1.77, 1.63, et cetera, as you move down the driveway.

**WINKELMANN CJ:**

So this must be at the major point of encroachment, is it?

15 **MR QUINN KC:**

Well, the major point of encroachment, if you look on the alphabet plan, is all outside of our land in fact, Wimax's land. You see, before we get to the Wimax land you've got an encroachment of two metres and 2.09 metres, that's on where the servient land is, 523, the Stevenson property.

20 **WINKELMANN CJ:**

Okay, well apart from the Stevensons' property, in terms of the challenged area, this is the major area of encroachment.

**MR QUINN KC:**

Well, that and (h) right at the top, you can –

25 **WINKELMANN CJ:**

Which is the?

**MR QUINN KC:**

You can see that (h) has a measurement of 3.21 metres against it. The problem with that for the Fuges, and they withdrew this part of the complaint in the arbitration, is that only two metres of that is on Wimax land and 1.21 metres is  
5 in the Fuge land. And it's not merely garden or something like that, there's a gutter – you can see that there's – the measurement is described as being from channel to easement boundary, so where the yellow dotted line is there, that is a formed structure, a channel, a gutter that runs within the Fuge property.

**WINKELMANN CJ:**

10 Is it a raised structure which impedes travelling along the land? Or is it simply sort of a drainage type thing?

**MR QUINN KC:**

You cannot possibly travel along that part of the land because it's – there's a – I'll show it to you.

15 **WINKELMANN CJ:**

Well, it'll be in the photograph, won't it?

**MR QUINN KC:**

Yes.

**WINKELMANN CJ:**

20 Which is 303...

**MR QUINN KC:**

There's a channel at the bottom and there is, it's 6047. Sorry 0647.

**WINKELMANN CJ:**

Now, explain what we're looking at here, Mr Quinn.

25 **MR QUINN KC:**

Now to orientate you here, the carport you can see at the bottom, that's the Fuges' carport and you can see that the –

**WINKELMANN CJ:**

Is it on the easement?

**MR QUINN KC:**

The Fuges' carport?

5 **WINKELMANN CJ:**

Mmm.

**MR QUINN KC:**

No.

**WINKELMANN CJ:**

10 Right. Carry on.

**MR QUINN KC:**

I don't believe so. But you can see on the left-hand side, what you see in the top left-hand corner of the picture, you see the number 517 on a post. That's the lower entrance to the horseshoe driveway for the Raes, and so you see the driveway to the Raes' place in the upper left-hand corner of the photograph. Then, further on down the driveway, you can see the kerbing stones that I was talking about there and there's bank and vegetation and all the rest of it immediately above it. That's all on Fuge land, and of course I put it to Mr Fuge that if he was concerned with the narrowness of the driveway he could've removed this himself in the seven years he'd been living there, but he had not done so and so the complaint about item h was withdrawn.

**WINKELMANN CJ:**

So, can I just ask you, are you talking about the kerbstones on the left or on the right?

25 **MR QUINN KC:**

On the left, your Honour.

**WINKELMANN CJ:**

So the Fuge land runs out across the driveway, because the Fuges are on the right, aren't they, so.

**MR QUINN KC:**

5 Well, yes at this point where CG is on the easement map on the alphabet plan.

**MR QUINN KC:**

CG is Wimax land, everything to the immediate right of it is Fuge land.

**WINKELMANN CJ:**

Okay.

10 **MR QUINN KC:**

And you can see that there's an encroachment shown on this alphabet plan and labelled "h" as being an encroachment into the easement, but the point is that it wasn't into the easement at all, other than for the Colmans. They have a right of way over this portion of the accessway.

15 **WINKELMANN CJ:**

I'm just not clear. Can you just – I'm not clear about where you're saying is this thing on the Fuge land that is an obstruction.

**WILLIAMS J:**

On the panhandle.

20 **WINKELMANN CJ:**

I know, I know that. I'm just asking where in the panhandle.

**MR QUINN KC:**

If you look at the alphabet map.

1450

**WINKELMANN CJ:**

Well, if we can just look at the photograph, the carport, where is it in relation to the carport?

**MR QUINN KC:**

5 I'll point.

**WINKELMANN CJ:**

Yes, that would be good.

**MR QUINN KC:**

10 It's this bank and kerbstones underneath it. You can't see all of it in this photograph because it –

**WINKELMANN CJ:**

I'm just finding it confusing because if the Wimax's land's on the left, how can that be Fuge land?

**WILLIAMS J:**

15 It's Rae land.

**COOKE J:**

All the Fuge land is the driveway too.

**MR QUINN KC:**

Yes, the Fuge land, the Fuges own the –

20 **WINKELMANN CJ:**

Right-hand side of that panhandle.

**MR QUINN KC:**

Yes.

**COOKE J:**

25 And the driveway itself.

**WINKELMANN CJ:**

Where is Wimax land, because they say that's running along there too.

**MR QUINN KC:**

Wimax land is that very narrow strip which has CG planted in the middle of it.

5 **WINKELMANN CJ:**

And where is it in this photograph?

**MR QUINN KC:**

In the bush.

**WINKELMANN CJ:**

10 Okay. So this right of way is really kind of quite a long way, the driveway is quite a long way out of the...

**MR QUINN KC:**

Sort of pushed to the right.

**WINKELMANN CJ:**

15 Yes.

**COOKE J:**

And what's impeding going along the right of way is the terrain.

**MR QUINN KC:**

In this instance, yes.

20 **WINKELMANN CJ:**

Right. I think I'm a bit clearer.

**MR QUINN KC:**

So if I can take us a little further on in the alphabet map to (b) and in fact just to (b). (b) is a complaint about retaining wall gates and entrance pillars, together  
25 with a power board.

**COOKE J:**

I'm sorry to do this. Just going back to that photograph, there's a bit of yellow string in the photograph at 647. Is that the actual right-hand side of the right of way?

5 **MR QUINN KC:**

That is, and if you look on – that's my understanding of what it was. I don't think the evidence was led on that to be honest, but that's certainly my understanding, and that corresponds with the purple line to the right of the, you know, to the east of that portion of the accessway on our alphabet plan.

10 **COOKE J:**

So the formed driveway goes into the Fuges' land?

**MR QUINN KC:**

It does at that point, yes, you can see it clearly.

**WINKELMANN CJ:**

15 The non-easement Fuges' land. Outside the easement. It goes beyond the servient land.

**MR QUINN KC:**

It does. The Colmans, of course, have a right to go down this part and over it.

**WINKELMANN CJ:**

20 No, the part to the right of the yellow thread is outside that?

**MR QUINN KC:**

That's right. So that's land not subject to...

**WINKELMANN CJ:**

The easement.

25 **MR QUINN KC:**

The easement, correct.

**WINKELMANN CJ:**

Because it needs to operate, the drive to operate.

**MR QUINN KC:**

One assumes so, and these kerbing stones, you can see they're all pretty new,  
5 this is what was done in around 2017, around the same time that the easement  
document or instrument was updated. The entire accessway was re-asphalted  
and some new kerbing was put in. On this side. But we still have old kerbing  
on the western side. The side that's in issue. Can we move back to 660 please.  
I'll just finish off explaining what (b) was about, as we apprehend the claim.  
10 So (b), the retaining wall that's complained about in the points of claim, that's  
the retaining wall to the very left-hand side of the picture that I explained to you  
before. That's really just, it's a continuation of the Stevenson wall, and then just  
past that change of direction, but before you get to the gate there, it becomes,  
you know, it's not easement land anymore, it's on the unburdened part of  
15 Wimax. Then the pillar, yes, the pillar is within the easement corridor, and the  
gate that hangs from the pillar is obviously within the easement corridor as well,  
and it's in this open state.

(c) is just a little bit further along. It's the retaining wall planter patio and steps  
20 separate pillar and edging, and so what we've asked you to look at here is 662,  
and we're also looking here at, I think the better photograph, actually, to go to  
is 663.

**WINKELMANN CJ:**

What letter in this alphabet map is it?

**MR QUINN KC:**

25 We're looking at (c) and (d) really. We'll look at them together.

**WINKELMANN CJ:**

Okay.

**MR QUINN KC:**

So what we have here is the work that was done when Wimax developed the underneath of that large concrete platform, and they built, as it's been said, a rumpus room or an office or something downstairs. What you have here, very  
5 obviously, is a parking pad just off the formed accessway. That didn't used to be there at all and complaint is made about that at item (d) for example, you see on the annotated map: "A 'full concrete parking area ... adjacent to access to the flat and beyond the boundary of the Respondent's Property ...'"

**WINKELMANN CJ:**

10 What –

**MR QUINN KC:**

What did it look like before? We see that in 0641. You can see the Wimax driveway leading up to their parking platform and house and so on, and so works are done in underneath that. So, where those clivias are and where the  
15 stone wall is to the left of the kerbstones, what Wimax did was punch a hole through that and create a parking platform and that's what you see – in fact, you see the works being done in 642, and even better in 643. No, 643 shows it very clearly. So, where previously there was a wall abutting the driveway, now there's an open space, which led to what you can imagine were fairly  
20 obvious submissions.

**WILLIAMS J:**

The key point was, wasn't it, that the alignment of the kerb didn't change.

**MR QUINN KC:**

That's right. That's absolutely right, and you can see that, you can see the  
25 gutter stones or the kerbing stones you can see in 643, well they get removed at the point where the parking pad starts so it becomes even more smoothly adjoined to the formed right of way.

**COOKE J:**

Didn't they put the drain underneath the driveway, is that right?

**MR QUINN KC:**

Now, the – oh, you mean as in the sense of guttering?

**WILLIAMS J:**

They put it underneath the asphalt, yes.

5 **COOKE J:**

There's a pipe underneath, isn't there? Is that right?

**MR QUINN KC:**

Not here. That happens down outside the Raes.

**COOKE J:**

10 Okay.

**WINKELMANN CJ:**

What strikes me when I look at this is I'm thinking that if this had all been properly documented in an easement it wouldn't have been an issue and should the whole of easement law be shaped to meet the needs of a case like this?

15 Or is this an absolutely common phenomenon that there are permanent structures built all over easements like this all over the country? We don't have any evidence about that, because certainly you could've created an easement situation which protected these interests, or you could say it can be dealt with under those provisions that Justice Cooke referred to, but should the whole of  
20 easement law be shaped by this kind of scenario?

**MR QUINN KC:**

Well, we don't have evidence on how prevalent it is, you're right, but it doesn't seem like a stretch to imagine that it's quite common, in fact, particularly because what you're dealing with is people responding to the terrain that they  
25 encounter and what we had here was originally essentially a dirt accessway that's on a slope and it's the most natural thing in the world to retain part of that slope where it's practical to do so to, in fact, partly to protect the formed accessway and that's all that had happened –

**WINKELMANN CJ:**

Well, and also to maximise your land usage of the other land.

**MR QUINN KC:**

Well, with respect, there's no suggestion that that happened here. If you look  
5 at the early photographs you've got about a metre-high concrete buttress wall  
that ran – and Mr Macky gives evidence about this. If you look at 642, if I could  
get you to look at that please, 642, you can see in the foreground towards the  
bottom right-hand corner you can just see behind the – through the foliage you  
can see a quite old concrete wall, and it was buttressed as well it had little  
10 portions that came out every metre or two along, so that was always there, then  
he gives evidence about how when the Wimax property was built in the 1960s  
part of that wall was replaced by the concrete wall that was a little bit higher up  
the accessway, the one through which Wimax punched a hole when it created  
its parking block.

15

So, all of that stuff dates from the '60s or earlier and all that has been done  
there, it's not, in my submission, a question of someone trying to maximise the  
use of their land or whatever, there was nothing happening in this part of the  
Wimax property, if I can put it that way, there's a couple of really very heavily  
20 pruned pōhutukawas there, pruned so that you can maintain the view out to the  
ocean, and it's just garden. But it's retained and the wall is built there for a very  
sensible purpose which is to retain the bank and stop it collapsing into the  
driveway.

1500

25 **COOKE J:**

And to answer the Chief Justice's other point, we don't know how prevalent this  
is but we need a system that addresses this kind of situation and we need to  
know what the principles are that should be applied.

**MR QUINN KC:**

30 Yes well that'll be a matter for Mr Hodder principally I should think –

**WINKELMANN CJ:**

It's beyond your pay grade.

**MR QUINN KC:**

5 But in my submission we have the system in place and it's a question of balancing rights as between a number of owners who are all using, living together in this neighbourhood and balancing the reasonable rights of user of each of them, and for decades this neighbourhood was able to do that, apparently without difficulty.

**WILLIAMS J:**

10 It does, the greater the intensification of land use, particularly urban land use, the greater that requires a degree of uncertainty that gets problematic. That's the question for us is whether we're at that point.

**MR QUINN KC:**

15 Yes, but in my submission, deciding that potential future development should be a lodestar for disputes, dealing with disputes of this kind invites exactly the kind of behaviour that happened here which was that the case was advanced on the basis that first of all, essentially we have a 6.2-metre wide easement so we're entitled to have it all cleared and if it's not it's dangerous and it's too narrow and there's going to be accidents and all the rest of it, and in the end  
20 the evidence in that was wholly unconvincing.

But so what happened as an afterthought in the arbitration, it came in only by reply evidence from the Trust, was here's a drawing that's been dashed off by a man called Dawson, it's in the bundle, showing potentially three townhouses  
25 that we could squeeze onto our land down at the bottom of the drive and if we did that then we probably need a wider driveway and all the rest of it, you know how it goes. But it's very much an afterthought that was resorted to to bolster a case to have the driveway cleared from, effectively from top to bottom. Top being the Wimax land in this case, not further.

30

I'll just deal very –

**MILLER J:**

It does look as though this is a case that may require some wholesale amendments by the Court in exercise of its jurisdiction under the Property Law Act right, to regularise the structures that are there now.

**5 MR QUINN KC:**

Well with respect I don't see that there's any need to regularise these structures at all. The structures have been there in many cases. (k) and (g) for example, when we get to (k) and (g) in the alphabet plan we are unquestionably talking about structures that have been there for more than 60 years.

**10 WINKELMANN CJ:**

Yes, but the point is what's on the title? There's no relationship to what's on the ground and the more you point it out to us the more apparent that becomes.

**MILLER J:**

15 And it does rather highlight, to me anyway, when we're looking at the question of principle in this case, that quite a lot goes back to what was done or not done in 2017 and what the understanding of all of these people who reached agreement was about the status of their existing structures. One could see a case that says, look we all understood that none of these structures would be changed and that seems to me to have a bearing on this case potential or the  
20 way in which we answer this case.

**MR QUINN KC:**

And potentially it does. It does decide of course which, depend on which view you take. There's no evidence that anyone was aware of the intrusion into the easement corridor. Even the Fuge's evidence was to that effect. This is  
25 something that they were attuned to, if you like, in 2018 when they became disturbed by what the Raes were doing at the horseshoe driveway, notwithstanding that the Raes were just rebuilding a garden retaining wall in the same footprint as well.

The key point in my submission is that the right that exists pursuant to the registered instrument is to the benefit of a 6.2-metre easement corridor and the rights that attach to that are to form a right of way through it, a driveway through it, and use that, and it's the combination of those two things that needs to be considered, whether there's still reasonable use available. The factual answer to that was yes, there definitely is, and that if you wanted to change it, the factual position so that the formed driveway was a full 6.2 metres, then you were going to have the problem that Justice Cooke has identified, which is that you're eating so far into the bank that you cut off access, save that enormous cost, you cut off access to properties along the left-hand side of the driveway.

**WINKELMANN CJ:**

But that all can be provided for in contractual documentation, can't it? There's also, isn't there, somewhere else, someone else, because you say they didn't complain about the Stevensons but someone else's deck...

15 **COOKE J:**

That is that.

**MR QUINN KC:**

No, it's not someone else's –

**WINKELMANN CJ:**

20 Is it the Stevenson's?

**MR QUINN KC:**

No. So the reference to deck is just in front, or at the end of that parking pad that leads to the new area underneath the Wimax house, which I can show you.

**WINKELMANN CJ:**

25 So that, at the bottom of that area on the bottom photograph, that's the space through which a car has to pass, is it? It looks narrow. Is that planting on each side?

**MR QUINN KC:**

Sorry, we're looking at 663 is your Honour talking about?

**WINKELMANN CJ:**

5 No, I'm looking at the one that's sitting in the middle of the screen at the moment, which has got the concrete pad to the left, and you can see a car down the other end of it.

**MR QUINN KC:**

Yes the car, that's misleading. The car that you can see on the end is on the Rae property. So that's –

10 **WINKELMANN CJ:**

Okay. So the driveway goes around to the right, okay.

**MR QUINN KC:**

So the driveway turns off before that, yes. So that's on the upper leg, if you like.

15 **WINKELMANN CJ:**

Upper part of the Rae property.

**MR QUINN KC:**

20 Of the Rae horseshoe, yes. So the reference to "deck" you see we deal with this. The reference to deck I believe must be in relation to the steps and deck that you can see in that middle photograph that we're looking at at the moment, 0663. But the deck is not intruding into the easement corridor at all. All it's intruding is a tiny portion, literally millimetres, of the post for the handrail to the right.

**COOKE J:**

25 But the part of the Stevenson building –

**MILLER J:**

So can I go back to my earlier, sorry.

**WINKELMANN CJ:**

Can you just clarify that for – so it's the handrail is the thing that's – there's no part of the building.

**MR QUINN KC:**

5 No.

**WINKELMANN CJ:**

Okay, right, sorry.

**MR QUINN KC:**

10 It's the post of the handrail, so of course it's a vertical structure the post, so that's part of it, so it's just within literally millimetres we're talking about.

**WINKELMANN CJ:**

So Justice Miller had a question.

**MILLER J:**

15 I just, again what I wanted to know when I asked the question some time ago, is where is the right-hand side of the easement boundary in this photograph. We were referring to another one, but this one will do.

**MR QUINN KC:**

So it's at or about where that right-hand post is. The – no, not that pillar there, the post for the handrail.

20 **WINKELMANN CJ:**

No, I think Justice Miller is asking about the other side of the right of way in the vegetation.

**MILLER J:**

25 I'm looking on the right-hand side of the asphalt. I want to know how much easement space there is on that right-hand side.

**MR QUINN KC:**

There is some. I can't tell you how much, but that kerbing there is not at the extremity of the burdened land.

**WINKELMANN CJ:**

- 5 So you could say it could all be fixed with taking some of that, but it does count – doesn't fix the Rae problem, which is the pinch point.

**MR QUINN KC:**

No, well, I would say none of it needs to be fixed at all, in the sense that, as the Arbitrator found, as a matter of fact, it's always been able to be used perfectly  
10 well, and nothing changed with what Wimax did. Nothing changed with what the Raes did either. Just so that you understand what the Raes did, because it's come up several times, their works can be seen first of all at 667 we see the finished job, as it were. So that's the upper and lower entrances to the horseshoe driveway for the Raes, and there's two parts of this which are  
15 claimed to be offending. There is part of the scoria wall to the lower left. That's obviously historic. That's what the evidence was in the arbitration, and there's the new plastered concrete wall in between the two arms of the horseshoe there, that just supports some garden, and you can see the work being done for that at – I forget which photo it is, there we go.

20 1510

So at 644 we see after works had actually started here, so they'd cleared away – the evidence from the Raes was they'd started clearing away vegetation to sort of tidy up their driveway. You can see there used to be a concrete crib  
25 wall there. Over the page at 645 they rebuild that wall. So it's no longer leaning backwards, as the crib wall did, but it starts from the same point and so essentially sat in the same footprint.

**COOKE J:**

So the facts that you've taken us through might be such that would allow a  
30 Wimax property to obtain relief under section 317.

**MR QUINN KC:**

Mhm.

**COOKE J:**

And maybe a court would say, well, we're not going to grant you relief because  
5 there is a potential for development of the driveway, so neither section 313 relief  
nor section 317 relief will be given.

**WINKELMANN CJ:**

Or maybe it wouldn't, yes.

**MR QUINN KC:**

10 Yes, but they're not necessarily the converse of each other, at all, and that's a  
point made in our submissions, that merely because you cannot insist on  
modification of the easement doesn't mean that anything that intrudes into the  
easement should have to be cleared away.

**COOKE J:**

15 No.

**WINKELMANN CJ:**

Well, yes, that's what we're here to decide.

**COOKE J:**

But, in the end, it would be for the Court to make that call, wouldn't it?  
20 Actually, this is the Courts' call rather than the Arbitrator's call?

**MR QUINN KC:**

Yes, but in any given instance it's very obviously going to be an intense question  
of fact.

**COOKE J:**

25 Sure. But this is how the regime responds to this problem.

**MR QUINN KC:**

Yes. I'm told that we can see the right-hand side of the easement in photograph 302. I'm not sure what we're going to but I'm in my junior's hands, 302.0347...

5 **WINKELMANN CJ:**

I'm just wondering about time too because we have to have Mr Galbraith's reply and we finish at four.

**MR QUINN KC:**

10 Yes. So, that plan there – it's not a photograph – that plan, Sir, shows the line of the guttering where it is present on the right-hand side of the easement corridor.

**WILLIAMS J:**

So it's not encroaching, except for what looks like an accessway on the other side.

15 **WINKELMANN CJ:**

I think it is encroaching.

**MR QUINN KC:**

Well, I don't know that it's a question of encroaching as such.

**WILLIAMS J:**

20 Into the non –

**MR QUINN KC:**

The point is that the formed way of the driveway is not taken to the right-hand extremity of what's available.

**WILLIAMS J:**

25 Yes. I thought you were saying that it was in the vegetation earlier, that's all.

**COOKE J:**

So all the yellow bits are right of way that haven't got a driveway on them, is that right?

**MR QUINN KC:**

5 Correct.

**MILLER J:**

Right.

**MR QUINN KC:**

I think, especially in light of the timing issues, I'm going to hand over to  
10 Mr Hodder, unless you've got any more factual questions for me?

**WINKELMANN CJ:**

No.

**MR QUINN KC:**

Thank you.

15 **MR HODDER KC:**

Right. Well, there is a timing constraint on us all here at this stage. Can I perhaps at this point deal with a question that's been raised about whether this is a defect in the 2017 easement or not, and the answer to that, in our submission, is it depends on whether you take the assumptions that were  
20 available to the parties in 2017 as being those you are going to find in *McMorland*, et cetera, in the 2015 addition which is to say that the common law will answer all these questions perfectly well, or whether you say that they have to assume the right of way and they have to write specifically down to preserve what was going on.

25

The submission is that it's obvious that what was going on here is that the people had an easement which effectively dated back to the 1964 easement, and they were carrying all of it on apart from the contribution to costs regime,

which was explicit. Nobody expected that they were making themselves in to doing something illegal, in the sense that they were using, effectively, as grantors, the grantors' land to do something which was illegitimate and, given that these were expectations about property interests, in our submission, there's no reason why that position shouldn't be confirmed by this Court. If there was to be a more comprehensive regime for transition, then that might be a statutory requirement, but it can't really be done through this piece of litigation. So as what was being described by Mr Quinn indicates, there is a lot of work being done on the grantors' land, exercising the rights of a grantor to do what it does on its land, subject always to the risk.

**WINKELMANN CJ:**

Do you not accept that there is some obligation on the those who record easements to get them right? And that's the assumption of the Property Law Act and in fact our entire Torrens system?

15 **MR HODDER KC:**

Well, with respect to that, assumption assumes away the law of nuisance as being part of the equation.

**WINKELMANN CJ:**

20 But I should say I, myself, have difficulty with the notion that the law of nuisance somehow defines the rights. Surely the easement itself in the legislative scheme defines the rights and the law of nuisance deals with those kind of areas of rub as to whether there's a breach of those rights or not, it can't itself define the rights?

**MR HODDER KC:**

25 Well, I'd be repeating what's in our written submissions in response.

**WINKELMANN CJ:**

Okay.

**MR HODDER KC:**

But the basic proposition is that, no, it's a partial restatement, it's not a replacement of the law of nuisance and the flexibility and principles of the law of nuisance, as described by the Court of Appeal in its judgment, would address  
5 all these matters without any difficulty or anybody being found to have done something wrong in the process, albeit subject to the fact that they can't get prescriptive rights for permanent structures or otherwise.

**COOKE J:**

Wouldn't the provisions also do so? Even if we don't accept your submission  
10 that the law of nuisance prevails, if we say that is a statutory scheme, doesn't the scheme respond to the situation as well?

**MR HODDER KC:**

Well you have the same principles, you have to figure out – I mean, it seems, with respect, that one can't avoid some kind of balancing exercise, and  
15 balancing has always been at the heart of the law of nuisance in this field.

**COOKE J:**

Sure.

**MR HODDER KC:**

The textbooks are replete with and the cases are replete with that proposition,  
20 as I'm sure the Court has already seen, and what I think your Honour is putting to me is, well, wouldn't we have the same balancing exercise required in the statutory regime? Well the answer would be yes.

**COOKE J:**

Yes.

**25 MR HODDER KC:**

But when you're already gone through the process of having the Court – the common law develop some principles which work tolerably well, then why would you throw those away, or would you throw those away? And I come back to

the basic proposition that there is simply nothing in the legislative history to indicate that these materials are meant to substitute for the entire law in the area, and if they don't substitute, then the law of nuisance remains.

**WINKELMANN CJ:**

- 5 Well, I would probably take the view that the law of nuisance has never defined the rights of easements that have reduced to writing. They may define the rights of easements which predate any kind of formal recording, but the law of nuisance surely dysregulates the behaviours within the rights.

**MR HODDER KC:**

- 10 Well, the accommodation of both but, for example, if you take a case like *McKellar*, the earlier decision of Justice Sim in the High Court in New Zealand, Supreme Court as it then was, that's taking a written instrument and going through and applying common law nuisance principles to the way in which it's dealt with. There's no difficulty about that, and likewise in the *Spear v Rowlett*  
15 [1924] NZLR 801 (SC) case, another decision of Justice Salmond's going back into the – 100 years ago, there's no great issue around that, and that position remains. Nobody's suggest –

**WINKELMANN CJ:**

- 20 Perhaps I should've defined it. I meant before the Torrens system I suppose, yes.

**MR HODDER KC:**

- 25 But again what's happening more recently is that these are deemed into provisions by the schedules, there's no question about that, but those schedules, as the Property Law Reform Committee report indicates, were designed to take commonly used forms of easement language and reduce them into a relatively standard form. They weren't creating something new, or something different, and that's the distinction in section 317 which was a new jurisdiction.

**COOKE J:**

Well, at the very least, the law of nuisance would have to apply subject to the express permissions of the legislation and the schedules.

**MR HODDER KC:**

- 5 With inconsistencies, yes. In the case of inconsistencies you'd say the legislative scheme prevails. But if you accept the idea that reasonableness is inherent than what the schedules are contemplating, there is no inconsistency.

**WINKELMANN CJ:**

- 10 Well isn't another framework that reasonableness is in the scheme and that's what you're applying within the scheme and nuisance is just your remedy for a breach of the rights of the scheme, it's not itself defining it.

**MR HODDER KC:**

- 15 There are still going to be gaps because there hasn't been a comprehensive replacement of nuisance, so if you get to the question of ancillary rights, they're not dealt with in schedules, you have to find those from somewhere. So, they either come out of the ether or you say you can find them in the common law, or you can find the indications as to what you'd be looking for.

1520

- 20 I say that there is – in all the jurisprudence we've had, since the Torrens system came into place, since 1961, since 2007 the basic proposition has been that when you get into a strife over an easement you are looking at nuisance. That's what was said in this very case at the outset that there was no difference between the parties' nuisance principles on actual interference of what were  
25 involved. It's the kind of the move away from that that's created the issue that the Court, is now I think, primarily focused on.

- 30 But in terms of what I wanted to do very briefly before you were getting a full reply I wanted to draw attention to the *Tate Gallery* case which is one of the cases we sent through yesterday, or it wasn't one of the only cases we sent through yesterday I think, were *Fearn v Tate Gallery*, a decision of 2023 by the

UK Supreme Court. Quite helpful in a range of things and I've given in the road map at box 3, the series of paragraph references and I won't take the Court to any but one of those. Actually I'm going to take – there are two of them, but one of them is the question about why you don't deal with matters that are hypothetical. So if the Court has that judgment we can bring it up.

At paragraph 43 of the judgment – let's take it back to paragraph 42 to explain what's being said. Paragraph 42, the proposition that's being discussed by Lord Leggatt for the majority: "is that 'coming to a nuisance' is [no] defence." And at 43 and 44 he's explaining that proposition by referenced alternatives and at 43 the: "alternative approach [will] be to treat an activity as an actionable nuisance even though it is not interfering with any actual use of the claimant's property if it impairs a potential use." And the paragraph goes on to explain why that isn't a helpful approach, and at about, just before you get to marginal note C: "There are good reasons why the law does not permit such a claim. First, requiring actual interference to be shown allows someone in Mr Bridgeman's position to make use of his land, at least for the time being in a what that benefits him and is not inconveniencing his neighbour." That's the right of the grantor to use their land.

"Second, the potential conflict of use might never actually arise." And indeed the facts in our case rather say that. This community around Riddell Road has been operating for probably now into the third generation and there hasn't been an issue until the issue has been raised by the appellant in this case. And then the last sentence: "It is not desirable to have litigation about possible future conflicts that may never actually occur." And we say that's entirely apposite to the matter before your Honours at the moment.

**WINKELMANN CJ:**

The difficulty again I have with this analysis is that it loops around to your nuisance point and that all deals with the rights of the individuals whereas easements are created for the benefit of the land and that's the concept of indefeasibility that it passes with the land. So that this sort of fact, moment by

moment approach that you suggest is necessary to define the rights doesn't really seem to conform with the legal framework we're necessarily dealing with.

**MR HODDER KC:**

Well I'm not sure there is a discordance there your Honour, the idea of use is  
5 use of the land for the benefit of the land, it's not about an individual's personal preferences. So the use has to be tied back to the land, I accept that. Beyond that I don't think I'm inclined to go.

And the second, the paragraph 44 of the *Tate Gallery* case is the proposition  
10 about no prescriptive rights: "A second theoretical possibility would be to allow a person to acquire a right to continue a use of land through long uninterrupted use during a period when the neighbouring landowner has no right to prevent such use because..." it wasn't a nuisance. And they make the obvious point: "It is wrong in principle that a person should be able to acquire rights over  
15 neighbouring land and diminish [their] neighbour's rights over [their] own land without the neighbour's consent or acquiescence, simply by his unilateral action." And that's the point that's made in the *Fitzgerald* – in the *Finlayson* case, the Australian case you've given references to which says, well you can't deal with it now, well there's not enough now to substitute or to establish a  
20 nuisance but if the facts change you can come back, the very point that's being made in that case.

The other case I'll just refer to without taking you to it which has a useful modern  
25 discussion on the principles is the *Random Primer* case, which we have referred to, a New South Wales Court of Appeal case from last year, which has helpful discussion of the approach to all these matters with reference to the Australian and English authority. And underpinning all of this is the rejection most clearly in both the Australian case and the Canadian cases of the not every inch  
30 approach.

Now there was a degree of hopping from one foot to the other I thought in relation to where the appellants were on that but as taking it at the case that it was a concession that not every inch is being claimed then the moment you do

that you move from a bright line to an area of balance. When you move to an area of balance then you have the question mark about reasonableness as the test or the yardstick for determining where the balance lies, and so you bring back the reasonable user concept and then within the reasonable user concept  
5 you have a temporal dimension for the reasons mentioned in paragraph 43 of for example, *Tate Gallery* but also elsewhere. It avoids speculation.  
The Chief Justice –

**MILLER J:**

How does it fit with the idea not restricting the efficient operation of the  
10 easement facility? One can readily accept I think that you may start with the law of nuisance, but we have here a statutory regime and we're considering how it ought be applied in the modern world and it creates what you might call a discretion. We have here this right in, well this prohibition on doing or allowing anything to be done that may restrict the efficient operation of the facility, and  
15 that seems to me potentially a forward looking concept that maybe gets in the way of your proposition that it's, well one just looks at what's happening now. I'm just trying to fit what's said in that *Tate* case into the regime here.

**MR HODDER KC:**

The response your Honour would be that that's a question of fact. It's not a  
20 question of law and in effect as I read the award that's what, the Arbitrator very much considered that and so you'd be looking at the evidence that you need to find out whether it does interfere with the efficient operation of the easement facility. And again, the question is how hypothetical is that and how real is that? It's not a matter that lends itself to a bright line legal test.

25 **WINKELMANN CJ:**

Mr Hodder, say we're not with you on this and we take the view that the statutory scheme does really give the answer that when this easement was registered someone should have taken the trouble to note existing structures and that the answer now is for, there'd be an application to enable those existing structures  
30 to remain. Well say we're not with you in the first part of the argument, where do you say we would end up as a matter of a remedial response?

**MR HODDER KC:**

Again I'd suggest that's a matter of fact. Well you have the normal choice, do you stop it, do you get a mandatory injunction to destroy it, is there some compensation that can be made to overcome the problem? We don't have any  
5 material on the case that answers those questions apart from the proposition from the arbiter award that says there isn't a problem.

**WINKELMANN CJ:**

Look because why I'm asking you is because there is an alternative legal history of this proceeding where it comes to the Court as an application for those  
10 structures to be able to remain. But it's not how it's come to us.

**MR HODDER KC:**

Exactly. And so none of us have addressed you on that particular point. The section 317 is an entirely different original jurisdiction unlike section 313, in our view, which is a remedial jurisdiction tacked on to the law of nuisance.

15 **WINKELMANN CJ:**

So in that case do you say we would remit it to the Arbitrator? Would that be the path?

**MR HODDER KC:**

You'd have to remit it to the parties to recast their cases. Whether the Arbitrator  
20 is now functus to the issue, if the issue is still disputed you'd have a new dispute.

**WINKELMANN CJ:**

Because he still, he had it presented to him in this particular legal way.

**MR HODDER KC:**

Yes.

25 **WILLIAMS J:**

It was referred back wasn't it?

**MR HODDER KC:**

There was a cross application which was, duly recognises they're not going to get anywhere in terms of the criteria under section 317 at that point. But it wasn't pursued and isn't the subject of discussion in the award or other courts  
5 below.

**COOKE J:**

Can I check whether sections 322 and 323 would also apply? That's relief for wrongly placed structures.

**WINKELMANN CJ:**

10 That's what I was talking about.

**COOKE J:**

And there's section 317 which is –

**WINKELMANN CJ:**

Oh sorry I meant all of them, all of the remedial provisions.

**15 COOKE J:**

Right, but I'm just checking because no one's actually mentioned the section 322 and 323 in their submissions.

**MR HODDER KC:**

I'd have to defer to Mr Quinn on whether that was addressed at that point.  
20 1530

**MR QUINN KC:**

It wasn't addressed in the arbitration. I don't think that it applies because it's not in someone else's land. You see the structures that are complained of are still within our land, and they're intended to be placed within our land to benefit  
25 our land et cetera. So I don't think it was considered by either party as being relevant to section 323.

**WINKELMANN CJ:**

Well, it might apply. We might need to have submissions on this I think.  
We might have to –

**COOKE J:**

5 Yes, and section 317 would certainly apply.

**WINKELMANN CJ:**

Mmm.

**COOKE J:**

10 And then the proposition would be you wouldn't give section 313 relief if you  
could get section 317 relief, if you follow me.

**MR HODDER KC:**

Yes, well they're not the mirror of each other, I don't, in our submission, but  
they're in quite different criteria.

**COOKE J:**

15 No, they wouldn't necessarily be, but –

**MR HODDER KC:**

I mean there's a much bigger hurdle under section 317 than there is in the  
ordinary law of nuisance, for example, or if that's translated into the section 313  
jurisdiction then that would be there.

20 **COOKE J:**

Or *Synlait* suggested it may not be such a barrier.

**WINKELMANN CJ:**

I mean the question would be whether a grantee is the holder of any other  
encumbrance and that's the question, isn't it?

25 **COOKE J:**

Yes.

**MR HODDER KC:**

But again that's not the way the matter has got to the Court so far.

**WINKELMANN CJ:**

No, no, exactly.

5 **MR HODDER KC:**

Yes.

**WINKELMANN CJ:**

But we have to look at this issue within the legislative scheme and so it would be useful, I think, that we have submissions about the applicability of  
10 sections 317, 322, and 333.

**MILLER J:**

I wonder if we might perhaps issue a minute after the hearing when we consider the scope of that.

**WINKELMANN CJ:**

15 Have a chance to confer, yes.

**MILLER J:**

Yes.

**WINKELMANN CJ:**

So, it's a possibility you'll be asked to file supplementary submissions.

20 **MR HODDER KC:**

It is, I mean – well, without wanting to cut across that, if the Court simply doesn't address that in a definitive way then there may be a fresh dispute that arises which is recognised as a possibility because of the prescriptive rights but –

**WINKELMANN CJ:**

Well, that's exactly right. I think, you know, it wouldn't be good if we didn't deal with the applicability of sections 317, 322 and 333, but I don't think we could deal with the remedial part of it because that's a matter of fact.

5 **MR HODDER KC:**

And nobody's addressed that aspect in any serious way.

**WINKELMANN CJ:**

No, exactly. But when we construe provisions within legislation we can't do them in isolation or else we end up in error.

10 **MR HODDER KC:**

No, understand. Permanent structures, the Chief Justice has raised that question.

**WINKELMANN CJ:**

I was very interested in that.

15 **MR HODDER KC:**

I don't think I have time to take you to all the items in it but the case that I was mostly relying on was the *Weidelich* case which is the most direct – it's a Canadian case which is in the bundle at tab 81 and it's addressed at paragraph 19 where the submission was made, that this is a permanent  
20 obstruction and the Court said that doesn't matter, and it cited English cases. It also cited the fact that *Gale on Easements* draws no distinction between permanent and other obstructions.

The same thing is pretty much said by Lord Scott in the House of Lords case of  
25 *Moncrieff v Jamieson* [2007] 1 WLR 2620 (HL), at paragraph 45. *Moncrieff* can be found at tab 56 of the common bundle of authorities and those cases in turn draw on other matters. It's also discussed in *Random Primer*, paragraph 28, *Foxes Lane* at paragraph 74 –

**WINKELMANN CJ:**

Sorry, what was the last case before *Foxes Lane*?

**MR HODDER KC:**

5 *Random Primer*, or in our notes we have used the second name rather than the first, it's called *Owners Corporation*, number 72.

**WINKELMANN CJ:**

Oh, *Owners Corporation*. Right, yes, didn't recognise it. And the next one was *Fox* –

**WILLIAMS J:**

10 What was the last one?

**MR HODDER KC:**

The last one was *Foxes Lane*, and that's at tab 66, *Fitzgerald v Foxes Lane*, and the reference there is at paragraph 74, *Random Primer* was paragraph 28. The basic proposition is also made in *Keefe v Amor* [1965] 1 QB 334 (CA) at  
15 pages 346 to 347, and that is in the bundle at tab 55.

On the facts you have the old cases of *Clifford v Hoare* (1874) LR 9 CP 362 (Comm Pleas) which are encroaching portico. *Petty* is cited, I think, by *Weidlich*. *Finlayson* is involved in encroaching garage and carport, and there  
20 are cases with gates and other bits and pieces. But the basic proposition which seems to be the case is that as in *Gale on Easements*, which I think has been provided to you at paragraph 13-06, no distinction is drawn between permanent and other structures. The same is true of McMorland's texts, there's no distinction drawn between permanent and other structures, and I'm sorry to  
25 repeat the kind of my theme on this, but the law of nuisance wouldn't expect there to be the distinction between them. It's the risk that you run.

On *Synlait* and sections 131 and 137 we address that briefly in our synopsis. Actually before I come to that, one other point. In terms of the schedules there  
30 is, we say, the significant point that the Court of Appeal makes that if you don't

give full weight to the fact that the schedules draw distinction between the driveway and the rest of a vehicular right of way then you're not recognising what consciously has been done, but if you do make the distinction then the wider right which the Trust has been seeking the Court to uphold or to find  
5 doesn't really help very much. The real thrust of those provisions referring to a driveway in the 2002 Land Transfer Regulations and the earlier property law material are significant, drawing a different and specific and deliberate distinction between them, and what –

**WINKELMANN CJ:**

10 So is the submission that if you don't give full weight the distinction the schedule makes between the driveway and the right of way, then you do not give effect to the legislative scheme?

**MR HODDER KC:**

Correct.

15 **MILLER J:**

That's what I was trying to ask Mr Galbraith about before because in the Property Law Act 2007, Schedule 5, there is that distinction very clearly drawn and I was hoping for some assistance about the priority of these instruments, at least as they affect this case.

20 **MR HODDER KC:**

Well there's a logic to that which is that if the grantor does retain rights over its own unencumbered, unencumbered by driveway land, then that would make perfect sense and we would say that distinction is consistent with that basic proposition that the grantor retains rights to deal with its own land for so long  
25 as that land is not impeding a reasonably necessary or appropriate driveway.

**WINKELMANN CJ:**

And what is the point of granting an easement which is much broader than a driveway?

**MR HODDER KC:**

The only answer I can offer is that it, because these things are of infinite duration or indefinite duration, that at some point something may change and there may need to be a change. But those circumstances will reveal themselves if they ever do at some point.

**WINKELMANN CJ:**

Is it also possibly because a driveway is not in reality just used for the distance that a car is travelling on it, but actually its ability to be used is impacted upon the amount of visual sight and space on either side, which I think the cases do discuss?

**MR HODDER KC:**

I confess, I haven't focused on that part of any discussion but when the statutory scheme and the schedules are talking specifically about vehicular rights of way, it isn't clear that there's any reference in there to the scenery which we'd end up getting from A to B on a vehicle.

**WINKELMANN CJ:**

No, no, the visual amenity because when you drive you need to see what's coming at you, you need to see what's coming, so, and –

**MR HODDER KC:**

Well the safety dimension would factor into reasonableness, I don't doubt that.

**COOKE J:**

This scheme of the provisions seemed to contemplate the creation of the easement and then the construction of a facility within that area. So the driveway comes second, if I can put it that way, usually.

**MR HODDER KC:**

Well the drafting is, the idea of an easement instrument is defined by reference to the stipulated area is, if I can say so respectfully, not the most elegant that we've ever had to address.

**WINKELMANN CJ:**

No.

**WILLIAMS J:**

No.

5 **MR HODDER KC:**

And in fact, in terms of the property law, sorry the Land Transfer Regulations at regulation 6, the more useful area in fact indicative is the one in clause 6.3 where the right of way includes a right to establish it first and the right to have it kept clear of things such as unreasonable impediments of the use and  
10 enjoyment of the driveway. That now means you don't resort to the general rights that Justice Cooke's been referring to, you don't need to go there. You've got a specific provision that addresses it.

**COOKE J:**

And this is an odd case because we had the driveway first and then the  
15 easement.

**MR HODDER KC:**

Yes.

**COOKE J:**

And we don't really know why the easement was formed wider than the actual  
20 driveway. But I suppose it could have been because of the possibility that a wider driveway might be needed in the future.

1540

**MR HODDER KC:**

Yes, I agree with that. *Harvey v Hurley* I think we've dealt with in our written  
25 submissions. The real point is these issues simply were not addressed. Nobody doubts that it was an experienced Court of Appeal, but the issue just wasn't there. The issue was about something different.

**WINKELMANN CJ:**

Mr Hodder, one thing that really strikes me when I read *Hinde McMorland & Sim* and other texts et cetera, and the English cases, is that they say, just glibly, easements don't confer the right to drive over every –  
5 or to move across every part. Right of way easements don't confer the right to move across every part of the easement, which is the concession that's recorded in the Arbitrator's award and yet the easement itself says that they do, and it seems a very strange disjunct.

**MR HODDER KC:**

10 All I can offer, your Honour, is the temporal proposition that says that: "for the time being", and that's the language you get from *Keefe*, Lord Justice Russell in *West v Sharp* (1999) 79 P&CR 327 (CA) and others that "for the time being", nothing else is required, but if at some point, some future time, something is required, then you have access to that.

**15 WINKELMANN CJ:**

But is it perhaps not capturing the notion that a right of way is the place where things are in motion. So whilst you may not be allowed – it's not conferring a right to you to be everywhere on that driveway all the time, on that easement, but it is conferring a right upon you to have the use of the easement for the  
20 purpose of moving on and off the property. The driveway is part of it, but so is the easement itself.

**MR HODDER KC:**

Well, that would be a relatively novel approach. In the Commonwealth jurisprudence on easements, all the jurisprudence has been trying to say,  
25 look – and I'm sorry to go back to nuisance, but nuisance is a strict liability, you have to keep it under control, so you use "reasonable user", and it doesn't mean you to get to go over the whole thing, that remains the grantor's land and they can do what grantors or what landowners normally can, provided they don't interfere with the purpose of what's been granted and derogate from that grant,  
30 and if the purpose is to get from A to B and there's a perfectly good driveway, there is no derogation by putting something off that area.

**WINKELMANN CJ:**

Thank you.

**MR HODDER KC:**

We haven't heard much in the oral discussion, but there's a theme in the written  
5 submissions for the appellant about the statutory planning regime being special  
context, and I just draw attention to paragraph 19 of our road map. There are  
cases that specifically address that point and say that they are independent,  
and they make the point that the law of easements, whatever the law of  
easements is, is about private rights and that planning statutes involve  
10 public rights. Now obviously both of them involve some balancing, but that  
distinction is made in each of *Random Primer*, *Armstrong v North Saanich*  
[2025] BCCA 277, a Canadian case, and *Tate Gallery* in the passages marked  
in our right-hand box at paragraph 19.

15 While there is much more that could be said, I think I probably would invite  
questions before I offer you, without much comment, the Thomas paper from  
the *Conveyancing Bulletin*.

**MILLER J:**

You were going to say something about *Synlait* and sections 313 and 317.

**MR HODDER KC:**

The point about sections 313 and 317 goes back to the legislative history.  
Section 317, this Court went through the legislative history in some detail to get  
to the point where it got to to say that section 317 creates a kind of a bespoke  
originating jurisdiction and it shouldn't be read down in the strict way by  
25 reference to the common law or previous judicial statements, none of which we  
take exception to for our purposes.

Section 313 is not, as I have been submitting, more than once, in that category.  
What section 313 does – what section 313 doesn't do which, if you look at the  
30 legislative history, is create a new codification jurisdiction. It creates  
remedial provisions, and those remedial provisions originally designed to give

District Court jurisdiction and now in part giving arbitrator's jurisdiction, are in the form of efficiency, clarity, as – well they try to be, and partial restatement.

**WINKELMANN CJ:**

Wasn't part of the underlying rationale to the Court's approach in *Synlait*,  
5 however, that land should be kept in a reasonably orderly state in terms of legal rights affecting it, so as not to impede its economic usefulness?

**MR HODDER KC:**

It's an aspect of it, but the main aspect, as I read the case, is more the other way.

10 **COOKE J:**

In that case they're giving relief from the registered instrument.

**MR HODDER KC:**

Yes.

**COOKE J:**

15 So it was the other way round.

**MR HODDER KC:**

A different issue.

**WINKELMANN CJ:**

It was but it still informs the approach, which I think is, might be said to inform  
20 the Property Law Act 2007 mightn't it?

**MR HODDER KC:**

I think one of the factors that section 317 is distinctive for is it gives a compensation power, so that adjustment becomes very real because the Court has given a power to kind of pay money to take away rights. Section 313  
25 doesn't offer that, as I read it.

**COOKE J:**

But they're both remedial provisions and it would be strange if we didn't interpret them in a way that made them work together.

**MR HODDER KC:**

5 That might be ancillary powers, which would be an interesting debate in itself on the interpretation. So –

**WINKELMANN CJ:**

And you're going to hand up the Thomas paper?

**MR HODDER KC:**

10 I'm going to hand out the Thomas paper.

**WINKELMANN CJ:**

There's also an article by Katherine Sanders.

**MR HODDER KC:**

15 Katherine Sanders, came out this morning in the Law News. This Court seems to provoke academics, among others.

**COOKE J:**

Not just academics.

**WINKELMANN CJ:**

Yes, we've noticed that Mr Hodder.

20 **MR HODDER KC:**

I believe the registrar may have copies, or the Court may have copies.

**WINKELMANN CJ:**

I have a copy, I can distribute it.

**MR HODDER KC:**

So I'm not suggesting there's anything profound about this, but it did come out, it came to my attention this morning, and page 214 there a couple of passages that touch on the role of registration that might be worthwhile bearing – well one  
5 of registration, one of context, so if the Court has page 214 the first part paragraph.

**WINKELMANN CJ:**

Give us a moment. I just sent it to you all.

**MR HODDER KC:**

10 The first dozen or so lines on page 214, the left-hand column, they're partly talking about the function of registration. I was under the impression the Court had hard copies.

**COOKE J:**

We'll get it, don't worry.

15 **WINKELMANN CJ:**

It's the one that's headed "Humpty Dumpty's Approach to Interpretation May Offend Both Simple and Straightforward"?

**MR HODDER KC:**

Yes it is. That's the first line.

20 **WINKELMANN CJ:**

That's not the bit you're relying on.

**MR HODDER KC:**

That would be unkind of me to volunteer either way I think so no.

**WINKELMANN CJ:**

25 But you're referring us to – I mean there's a discussion of *Green Growth*?

**MR HODDER KC:**

There's a discussion of *Green Growth* among other things. For our part *Green Growth* we say doesn't help us and we don't take any exception to the idea that when you're into an instrument on the register then you wouldn't be  
5 looking for intrinsic evidence in the ordinary case but what I was drawing your attention to was the first paragraph on the right-hand column of 214 about what registration achieves, and then the paragraph under the "Context" heading or the first 15-odd lines, there's always an interpretation context is everything, and this probably goes back to where I've been for quite time during my time on my  
10 feet, which is the context includes the need for balancing between the relevant property interests, and for the last couple of hundred years the common law has done a good job with the law of nuisance.

So if the Court pleases, subject to any further questions, those were the  
15 submissions on behalf of the respondent.

**WINKELMANN CJ:**

Thank you Mr Hodder.

**MR HODDER KC:**

Thank you your Honours.  
20 1550

**MR GALBRAITH QC:**

Thank you your Honour. It's inappropriate for me to say what the Court should do in relation to approaching this issue but the submission that I did make earlier on was that the statutory and regulatory regime for this Court to make a decision  
25 on really does require the Court to look at the entirety of the regime including the 2018 Regulations, despite the fact they don't apply to the individual easement which is before you because whatever you – well, this is a topic that hasn't come before this Court before. In fact it doesn't seem to have come before any court pretty much for quite a long time and it is a real topic and it  
30 does cause real disputes and it is because of the intensity of urban development these days. It would be nice to have an answer to it which –

**WILLIAMS J:**

It is striking that other post-colonial Torrens systems that are dealing with green fields turning into cities much more regularly than the UK seem to stick with this approach.

5 **MR GALBRAITH KC:**

Well two of them, well, sorry, I shouldn't say two of them because of course in Canada and that matter in Australia they're state systems so I don't think one can generalise to that extent.

**WILLIAMS J:**

10 Well the cases seem to suggest that you're getting the same sort of –

**MR GALBRAITH KC:**

Well, no, if you look at that – sorry, I didn't mean to interrupt you, Sir. But if you look at that Canadian case, which my learned friend, *Weidlich* there, if you actually read the jolly case there's other decisions which are contrary to that particular decision including out of the UK, so it's not as –

15

**WILLIAMS J:**

So what do you say, if you read the case it doesn't say what...

**MR GALBRAITH KC:**

No, no, the decision in the case says what it says, obviously.

20 **WILLIAMS J:**

But there are contrary decisions that it cites.

**MR GALBRAITH KC:**

There are contrary decisions which the Judge deals with and he says he doesn't follow a different decision which came to a different conclusion, so it's not like this is settled law in the sense of how it applies, and my learned friend is right, of course, it applies fact by fact in various situations. But there isn't a lot of it which is law in the jurisprudential sense, and if you look how this all started off

25

in the UK, it started off, with great respect, in the way that her Honour the Chief Justice has talked about, as a matter of construction, because when you had 45 metres undefined, question was for a jury do you really think that they meant what they said, and so the jury would say no, you can't find somebody  
5 in breach for a two-foot intrusion.

So it was a construction that they can't have meant. Yes, we really mean this because it was 45 metres over wasteland. Who cares. It's a heck of a, sorry, it's lot different when you come to a subdivision where you've got cheek and  
10 jowl neighbours, and the neighbours are driving over the specific defined area of the easement and that's why, with the greatest respect, it would be helpful, sorry, if the Court could not just look at the instan case because as her Honour said, you know, difficult cases can make bad law and this is a difficult case because the driveway was created a long time ago and it was there and  
15 nobody's done anything about it for how ever many years it is, 40-odd years or more.

Now it's all very well to say, okay we'll fix that under section 317, and I don't mean to be disparaging about that, but that's a hard thing to fix in the sense  
20 that while it might be attractive to think that the existing use of the easement facility be simply confirmed in the hands where they lie, but how do you change it after that? And you might well need to change it because there are pinch points and they're not just pinch points, the planners' evidence was you will never be able to get a greater use of this land unless the easement was  
25 55 metres. Forget about the fact that those pinch points might be –

**WINKELMANN CJ:**

5.5.

**MR GALBRAITH KC:**

Sorry, 5.5 metres. It's getting – sorry, apologise. But 5.5 metres because that  
30 would be the, that's the increased use over a lengthy driveway such as that. So, those would all be the considerations which would come up under a

section 317 and, as my learned friend quite rightly says, we haven't got the facts before the Court for a section 317.

**WINKELMANN CJ:**

5 So if you were to persuade us that it is legislative and contractual and that the law of nuisance does not define the rights, and we were persuaded that there is a legislative scheme that allows this to be fixed up, what would you say is the appropriate step for us to take?

**MR GALBRAITH KC:**

10 Well I indicated my preference of course which is not to be giving away on the square inches but that has been the concession made so far in the law. The reasonableness which is specifically in the schedules is in my respectful submission directed to the specific issues that it's attached to.

**WINKELMANN CJ:**

15 No I'm asking about the Court's remedial response on appeal. What do we do? What are the orders? Yes.

**MR GALBRAITH KC:**

20 Oh sorry. Well, obviously our position is that this should be, well, the Court has not accepted the appeal against the remission back to the Arbitrator so presumably it goes back to the Arbitrator but with a direction that the judgment of the High Court in effect is the operative direction for the Arbitrator to consider. So the Arbitrator has to consider both the driveway and the balance of the right of way in terms of whether there is an obstruction to both or either sorry.

**WINKELMANN CJ:**

25 Mr Hodder has said he doesn't think that's right because the issues that were before the Arbitrator did not engage sections 137 and if they apply –

**COOKE J:**

Section 317.

**WINKELMANN CJ:**

Section 317, and if they applied, section 322 and section 323.

**MR GALBRAITH KC:**

I agree with that because they didn't so it's only because –

5 **WINKELMANN CJ:**

And so the High Court Judge also was dealing with it in one way.

**MR GALBRAITH KC:**

Yes.

**COOKE J:**

10 The Arbitrator's answer was it's premature.

**MR GALBRAITH KC:**

Yes.

**COOKE J:**

Because you need to know what actually is proposed to be done before we can  
15 balance and we have to assess whether that is right or wrong.

**MR GALBRAITH KC:**

Right or wrong, yes. And if you – and I've already submitted on that and that  
means grappling with the new regime which is set up now under the  
Regulations Property Law Act and the Land Transfer Act and if I can just briefly  
20 repeat what I said before about the planning interstice, I mean the reason there  
is an easement is because planning requires that and if planning says it's got  
to be say 5.5 metres, then that is for a whole lot of reasons, including the  
experience which the planners should have about what's safe, what's needed  
so that there isn't obstruction from passing vehicles, two delivery things going  
25 down at the same time et cetera. There's a reason –

**WILLIAMS J:**

That's only if there's a proposal, it doesn't apply now.

**MR GALBRAITH KC:**

No, but the reason, what I'm saying Sir, is the fact that in fact you're at 6.2 at the moment would have been for a reason. It's very unlikely that it's plucked out of mid-air. Now I don't think we know what the minimum in the planning requirements at the time was but it is an objective measure, as I say, it's not  
5 plucked out of mid-air when it arrives into a planning instrument.

**COOKE J:**

Well it could have just been there or thereabouts. They weren't going to survey it all. We know there's a road so we put it six metres wide, we cover it.

10 **WINKELMANN CJ:**

Well wasn't the pre-existing easement six metres, is the point I think?

**COOKE J:**

No. No it was always –

**MR GALBRAITH KC:**

15 I think the pre-existing easement was six –

**WINKELMANN CJ:**

Yes it was I think.

**COOKE J:**

Oh the easement was, yes.

20 **MR GALBRAITH KC:**

Yes, the easement was.

**WINKELMANN CJ:**

Yes.

**COOKE J:**

25 The driveway wasn't.

**MR GALBRAITH KC:**

No not the driveway no.

**COOKE J:**

Yes.

5 **MR GALBRAITH KC:**

Only the easement. All I'm saying is that six metres isn't plucked out of nowhere, it's got a justification. And so if it's got a justification it should be, in my respectful submission, taken into account when one looks at the application of the schedules or the statute, or for that matter when one finally gets on to  
10 section 317 or section 322, 23 et cetera –

**WINKELMANN CJ:**

Well one approach would be to remit it to the Arbitrator but I don't know what would be remitted to the Arbitrator. Another approach would be to simply to allow the appeal and then to allow the respondents to make applications if we  
15 were to reach that point. But anyway perhaps it might be something we seek further submissions on.

1600

**MR GALBRAITH KC:**

Yes. And can I just deal very quickly, the *Fearn v Tate* case which my learned  
20 friend referred to, of course that's not nuisance in a contractual sense, and we've got contracts here and we've also got registered easements, so somebody moving into the flat next door and then complaining about you playing your whatever is a slightly different position.

25 Very quickly, *Harvey v Hurley* it was suggested there were no cases, there in fact were two cases the Court referred to but it was an appeal from Justice Cartwright and Brian Henry was for the party contending. I'd be very surprised if there weren't cases that floated past Justice Cartwright on the particular topic, but it is worth reading *Harvey v Hurley* because they do talk  
30 about indefeasibility. It wasn't just a question of modification and they did, they

effectively said that the wording of the easement is clear and, they said, should be stuck to which –

**WINKELMANN CJ:**

That's the swimming pool case, isn't it?

5 **MR GALBRAITH KC:**

Yes, yes your Honour.

**MR GALBRAITH KC:**

And we've also –

**WILLIAMS J:**

10 But that's probably because it was a swimming pool?

**MR GALBRAITH KC:**

Sorry?

**WILLIAMS J:**

That's probably because it was a swimming pool..

15 **MR GALBRAITH KC:**

Well it was the –

**WILLIAMS J:**

An access ramp might be seen slightly differently.

**WINKELMANN CJ:**

20 It was a structure, associated structures.

**MR GALBRAITH KC:**

Yes, it was the structure around the swimming pool Sir. Not the swimming pool itself but...

**WILLIAMS J:**

Yes, that's right. An access ramp or a retaining wall might have been seen differently.

**MR GALBRAITH KC:**

5 Yes, something like that. Yes I think they – yes, I won't speak – well, Lord Justice Scott in one case talks about growing cabbages or playing basketball on the grantor's part of the easement as not being a good idea, but that was his examples.

10 But just looking, because my learned friend said parliamentary history, and you're obviously going to look at that, also said New Zealand law would be changed, well *Harvey v Hurley* was, as I said before, 19 – what the heck did I say?

**WILLIAMS J:**

15 It was 2000.

**MR GALBRAITH KC:**

2000. And then there was *Breslin v Lyons* (2013) 14 NZCPR 144 (CA) and there was *Guo* and there were a couple of other cases which aren't specifically on point but when one reads them, and they're subsequent to the 2002 Regulations, they're consistent, in my submission, with what we've been submitting and perhaps just note in *Breslin* that *Moncrieff*, which was the House of Lords case I think it was that my learned friend referred to, was distinguished in the particular circumstances and also there is some comment about, or a situation where getting onto the right of way was a major problem and I don't think the Court was sympathetic in that particular case.

I'll just perhaps in respect of the, how come nobody did anything in 2017, there was some evidence before the Arbitrator in that. He deals with it at paragraphs 16 to 22, the evidence in very summary form was that the Fuges were in and out of New Zealand at the time Mr Fuge was based overseas and they thought what was being done was just confirming what there always had

been and it wasn't until subsequently, as my learned friend said, when they came back more permanently and saw the Raes' work going on that they then got a survey done and the issues began. But it does really illustrate, in my respectful submission, why it should be a hard-edged, not a soft-edged, obligation in respect of an easement because otherwise you run the risk of what happened here, although what happened here of course has the historical background that one can have some sympathy for. No doubt about that.

Thank you very much. Thank your Honours.

10 **WINKELMANN CJ:**

Thank you, Mr Galbraith. Well, thank you counsel. It is possible we'll be seeking some further submissions on those remedial provisions and perhaps on relief. Thank you for your submissions, excellent submissions, we've been much assisted and we will now retire. We are reserving our decision.

15 **COURT ADJOURNS: 4.05 PM**