

**IN THE HIGH COURT OF NEW ZEALAND  
HAMILTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
KIRIKIROA ROHE**

**CIV 2020-419-000144  
[2022] NZHC 2702**

BETWEEN PARKLANE INFRASTRUCT LIMITED  
Plaintiff

AND LU TRUSTEE LIMITED and HO NO.2  
TRUSTEES LIMITED  
Defendant

Hearing: 9 – 13 August 2022

Appearances: C Matsis for the Plaintiff  
A S Ross KC, K E Cornegé & J C Muggeridge for the Defendants

Judgment: 19 October 2022

---

**JUDGMENT OF VAN BOHEMEN J**

---

*This judgment was delivered by me on 19 October 2022 at 10:30 am  
Pursuant to Rule 11.5 of the High Court Rules*

.....  
*Registrar/Deputy Registrar*

Solicitors/Counsel:  
Shortland Chambers, Auckland  
Gault Mitchell Law, Wellington  
Tompkins Wake, Hamilton

## Introduction

[1] The plaintiff, Parklane Infrastruct Ltd (Parklane), seeks orders to give effect to rights it says it obtained under an agreement with the defendants, Lu Trustee Ltd and Ho No. 2 Trustees Ltd. The defendants are trustee companies and partners in the Trinity Green Estate Partnership (Trinity). The rights claimed by Parklane are access rights over land owned by Trinity outside Cambridge (Trinity land).

[2] The Trinity land is adjacent to land acquired by the New Zealand Transport Agency (NZTA) from Fonterra Co-operative Group Ltd (Fonterra) for the construction of the Waikato Expressway.<sup>1</sup> The land formerly owned by Fonterra (the ex-Fonterra land) is expected to be offered for sale and development because it is not required for the Expressway and Fonterra does not wish to reacquire it.

[3] Parklane has no legal interest in the ex-Fonterra land but is seeking rights to develop that land when it is offered for development.

[4] Parklane says it acquired interests in the Trinity land – specifically easements in gross – in a partly written and partly oral agreement which comprised:

- (a) written communications between the parties between 11 and 14 February 2019, in particular a letter dated 14 February 2019 in which one of Trinity’s principals, Wu Geng (known in New Zealand as Henry Wu), stated that Trinity agreed to allow roading and services access across its land to provide access to the ex-Fonterra land (the access letter); and
- (b) oral terms agreed by the parties at a meeting on 5 February 2019 or at a previous meeting.

---

<sup>1</sup> Note: in some of the correspondence discussed below the ex-Fonterra land is sometimes referred to as “the NZTA block”.

[5] In the alternative, Parklane says the access letter and discussions leading up to the access letter established in Parklane an expectation or belief, on which Parklane relied, that Trinity would grant it roading and services access across its land and Trinity is estopped from denying Parklane that right of access.

[6] Parklane registered a caveat against the title to the Trinity land when it learned that a consent to subdivide the Trinity land had been granted.

[7] In a judgment issued on 28 May 2021, Moore J ordered that the caveat not lapse. That order was conditional on Parklane issuing proceedings seeking specific performance of its rights under the access letter.<sup>2</sup> Parklane issued this proceeding pursuant to that condition.

[8] Parklane seeks a declaration that, under the agreement, it is entitled to require Trinity to grant legal and physical access over the Trinity land, either:

- (a) by vesting the land as a road in the Waipa District Council (District Council); or
- (b) by executing and registering a right of way easement over the Trinity land,

with the location, route, width and area of the vested land or easement to be determined by the District Council.

[9] Parklane seeks a parallel declaration in respect of services to be provided over the Trinity land to the ex-Fonterra land.

[10] Trinity says there was no agreement of the kind alleged by Parklane because it never intended to grant Parklane an interest in its land. It says the access letter was simply to help Parklane in impending discussions with Government agencies about Parklane securing development rights over the ex-Fonterra land.

---

<sup>2</sup> *Parklane Infrastruct Ltd v Lu Trustee Ltd* 2020 NZHC 1182.

[11] Trinity says it never had any intention to grant Parklane an interest in land in circumstances where:

- (a) Parklane had and still has no legal interest in the ex-Fonterra land;
- (b) the location and extent of the alleged access rights had not been agreed;
- (c) Parklane offered no commitment in return; and
- (d) no consideration was agreed or provided by Parklane.

[12] Trinity asks the Court for an order directing the Registrar-General of Land to remove Parklane's caveats from the title to the Trinity land.

### **Relevant background**

[13] The following account is taken principally from the evidence of, and documents produced by:

- (a) For Parklane: Trent Cary, a consultant employee of Parklane, and Murray Price, who is the sole director and shareholder of Parklane.
- (b) For Trinity: Mr Wu, who is the project manager for the development of the Trinity land and whose wife is the sole director of Lu Trustee, and Zhang Xinzong (known in New Zealand as Emily Zhang), who is the sole director of Ho No 2 Trustees.

[14] Parklane is a development company and Mr Price and Mr Cary have considerable experience in property issues. Mr Price has been involved in property development for around 15 to 16 years. Mr Cary is an experienced property developer and was largely responsible for progressing Parklane's interest in the ex-Fonterra land. Mr Cary is also Mr Price's son-in-law.

[15] Mr Wu and Ms Zhang are business partners.

[16] Mr Wu has been involved in property development in New Zealand for about eight years. He was involved in two developments prior to being involved with the Trinity land. Before that, Mr Wu was a builder in New Zealand for about five years. Before he came to New Zealand in 2009, Mr Wu was an interpreter for the Australian Court Service after graduating from the University of Australia which he attended as an international student. Mr Wu was born in China and went to Australia in 1998 when he was around 30. He is reasonably fluent in English.

[17] Ms Zhang was a banker for 13 years in New Zealand before establishing her own consulting company providing advice to private investors. She has been involved in property investment for about 12 years. Ms Zhang is also reasonably fluent in English but admits she had difficulty in understanding some of the proposals put to Trinity by Mr Cary.

[18] Philip Taylor, who is a solicitor and a friend of Ms Zhang and who attended one of the relevant meetings, also gave evidence on behalf of Trinity.

[19] Parklane did not call evidence from Murray Osmond, a consultant to Parklane. Mr Osmond participated in two relevant meetings and made a file note of one; participated in a relevant telephone call; advised on and prepared relevant documents; and commented on and proposed amendments to drafts of the access letter. Mr Osmond has a chequered history in property and financial dealings, both as a lawyer and an adviser.<sup>3</sup>

#### *The ex-Fonterra land*

[20] As part of its project to develop the Waikato Expressway (State Highway 1), NZTA acquired various parcels of land, including the ex-Fonterra land. In the event,

---

<sup>3</sup> Mr Osmond is a former solicitor who, in 1995, was sentenced to six months' imprisonment for theft from his firm's solicitor's trust account. Mr Osmond's appeal against sentence was dismissed by the High Court which noted that Mr Osmond's breach was wilful, advertent and calculated – see *R v Osmond* [1996] 1 NZLR 581 at 587.

In 1998, Mr Osmond was struck off from the roll of barristers and solicitors – see *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162.

In 2006, Mr Osmond was sentenced in the District Court to two years and three months' imprisonment after he and two others were convicted of defrauding Dorchester Finance. The Court of Appeal dismissed Mr Osmond's appeal against sentence – see *R v Harris & Ors* CA 121/06 [27 September 2006].

the ex-Fonterra land was not required for the Expressway and Fonterra chose not to exercise its right to buy back the land.

[21] Parklane understood the ex-Fonterra land was to be offered for development on the basis the development must include affordable housing provided under the auspices of KiwiBuild. Parklane understood that process was to be managed by the Ministry for Business, Innovation and Employment (MBIE) on behalf of KiwiBuild.

[22] In the event, responsibility for the ex-Fonterra land was taken over by the Ministry of Housing and Urban Development (MHUD). That occurred in October 2020, after this proceeding had been commenced. At the time of Parklane's initial approach to Trinity in late 2018, however, the ex-Fonterra land was still owned by NZTA and no decision had been taken to offer the land for housing.

[23] The ex-Fonterra land and two other parcels of land (the northern parcels) are immediately adjacent to and north of the Trinity land.

[24] The Trinity land is roughly rectangular in shape and, prior to the subdivision discussed below, comprised approximately 8.5 hectares. It had the street address of 80 Laurent Road and is bordered on the east by Laurent Road which runs directly alongside Victoria Road.

[25] Neither the ex-Fonterra land, nor the northern parcels, nor the Trinity land will have direct access from the roading network once NZTA and the District Council have given effect to their current roading plans.

#### *Access opportunities*

[26] At the time discussions began between Parklane and Trinity in 2018, the southern boundary of the Trinity land bordered land owned by Mr Bourke (the Bourke land) and Lot 201, a strip of land which separated the Trinity land from three cul-de-sac roads: MaryAnn Drive, Kerikori Way and Bourke Drive, all of which connected to Norfolk Drive. Lot 201 was owned by Landon Park Ltd, a company controlled by Mr Bourke. Lot 201 prevented the most obvious means of access to the Trinity land

and the land to the north. It is apparent that the purpose of Lot 201 was to preserve leverage and influence over the development of the Trinity land and the adjacent land.

[27] According to the evidence before the Court, the principal opportunities for private access to the ex-Fonterra land are from:<sup>4</sup>

- (a) Norfolk Drive, one or more of the cul-de-sac roads and across Lot 201 and the Trinity land; and
- (b) Norfolk Drive, Isobel Hodgson Drive and across land owned by Transland Developments Ltd (Transland).

*Summerset agreement*

[28] In 2018, Mr Wu was approached by representatives of Summerset Management Group Ltd (Summerset) which was considering the development of a retirement village in the vicinity. For that purpose, Summerset was looking to acquire the Bourke land, Lot 201, the northern parcels and a portion of the Trinity land in between.

[29] Summerset proposed an arrangement under which Trinity would subdivide its land into two lots and transfer approximately two-thirds of its land (Lot 2) to Summerset.<sup>5</sup> In part consideration, Summerset would acquire Lot 201 from Landon Park / Mr Bourke and transfer that lot to Trinity. As a consequence, Trinity would secure access to the remaining Trinity land (Lot 3) from at least Bourke Drive and Norfolk Drive.

[30] On 22 November 2018, Trinity and Welhom Developments Ltd, a part of the Summerset Group, concluded an agreement for sale and purchase to give effect to the above arrangement (the Summerset Agreement). The Summerset Agreement was subject to various conditions, including completion of due diligence by Summerset, obtaining the approval of the Summerset board and Summerset's acquisition of the

---

<sup>4</sup> The evidence did not include structure plans included in plan changes adopted by the District Council in February 2019 which included other options for access to the ex-Fonterra land.

<sup>5</sup> As discussed later in this judgment, the Trinity subdivision proposed 3 lots, with Lot 1, a strip bordering Laurent Road, to be vested in the District Council as drainage reserve.

Bourke land and Lot 201. Each of those conditions had to be fulfilled by specified dates which could be extended at the election of Summerset. The Summerset Agreement also gave Summerset the right to elect to complete the subdivision of the Trinity land on Trinity's behalf if the subdivision was not completed within nine months of confirmation of the conditions.

*Parklane approach to Trinity*

[31] Mr Cary says Parklane was interested in developing proposals for the ex-Fonterra land and had identified the possibility of combining with owners of adjoining land. He says Parklane approached Trinity after an unsuccessful approach to Transland to obtain access via the Transland land.

[32] On 18 December 2018, Mr Cary and Mr Osmond met with Mr Wu in Cambridge. Mr Cary says he and Mr Wu discussed the possibility of forming a joint venture for the development of all or part of the Trinity land.

[33] Mr Wu says Mr Cary discussed a proposal for the development of the ex-Fonterra land which would involve the construction of KiwiBuild homes. He says Mr Cary claimed to have political connections and influence, particularly with the Rt Hon Winston Peters, then Deputy Prime Minister, and had said these connections would ensure Parklane would be KiwiBuild's preferred developer. Mr Wu says Mr Cary's proposal was that Parklane would develop the ex-Fonterra land on behalf of KiwiBuild but would not itself take title to the ex-Fonterra land.

[34] At that meeting, Mr Wu and Mr Cray discussed a plan showing the Trinity land, with a hand-drawn line showing the boundary between Lot 2, the land Trinity had agreed to sell to Summerset, and Lot 3, which Trinity would retain. The plan showed no access way to or across the Trinity land.

[35] At the conclusion of the meeting, Mr Wu drove Mr Cary and Mr Osmond around parts of Cambridge, including the area around the Trinity and ex-Fonterra land.



*Scheme plan, proposed confidentiality agreement and memorandum of understanding*

[36] After the meeting, Mr Cary sent two text messages to Mr Wu asking him to send a scheme plan for the Trinity land and some high density housing plans. He said Parklane's planners were ready to start working out a master scheme plan for the ex-Fonterra land which they would include in Parklane's overall proposal. In the second message, Mr Cary underlined the need for urgency, saying, "We need to move fast on this and it would be a sign of good faith if you could please that [sic] straight away in order to start the relationship between ourselves."

[37] On 14 January 2019, Mr Cary asked Mr Wu, by text message, to send him a confidentiality agreement between Parklane and Mr Wu's company and a memorandum of understanding (MOU) regarding the proposed deal. The following day, Mr Cary sent an identical text message and two shorter follow up messages seeking a response from Mr Wu.

[38] On 15 January 2019, Mr Wu sent Mr Cary a scheme plan showing a possible development of part of the Trinity land and some concept designs for high density housing. The plan was dated January 2017 and predated the Summerset Agreement. It showed the three cul-de-sac roads extending to the southern boundary of the Trinity land and, in the case of Bourke Drive, extending into the Trinity land, but not to the boundary with the ex-Fonterra land. The plan did not show Lot 201.<sup>6</sup>

[39] Mr Cary also offered to draft the confidentiality agreement and MOU he had asked Mr Wu to prepare. Mr Wu accepted that offer.

*Proposed confidentiality agreement*

[40] On the evening of 17 January 2019, Mr Cary emailed Mr Wu a confidentiality agreement. It was not a draft. It had already been signed by Mr Price.

[41] Neither Mr Wu nor anyone else from Trinity signed the confidentiality agreement.

---

<sup>6</sup> It appears the plan pre-dated the formation of Lot 201.

*Proposed memorandum of understanding*

[42] On 22 January 2019, Mr Cary emailed Mr Wu a draft MOU between Parklane and Trinity. The operative part of the MOU recorded that the parties would prepare a scheme plan and concept building plan for the development of the land described in schedules attached to the agreement. The schedules were not provided. Other clauses discussed possible parameters of the development and the apportionment of costs but included no dollar figures.

[43] Mr Wu shared the draft MOU with Ms Zhang.

[44] On 25 January 2019, Mr Cary and Mr Osmond had a telephone conversation with Ms Zhang about the MOU. Mr Wu was unable to join the call.

[45] Ms Zhang told Mr Cary she had several issues with the draft MOU and pointed to aspects she considered unsatisfactory. She said Trinity were interested in proceeding with proposals that benefitted the community and were socially acceptable. Mr Cary said it was unfortunate Mr Wu was not available as he and Mr Cary had agreed to move forward from the initial approach to a full agreement or MOU on how to undertake a joint approach to KiwiBuild. He also said that time was of the essence because of political pressures the Minister and KiwiBuild were experiencing.

[46] On 27 January 2019, Ms Zhang emailed Mr Wu with her thoughts on the telephone conversation. She told Mr Wu it sounded “like a lot of rubbish” but she had told them Trinity was “keen and open for good, fair, honest discussion or business”.

[47] The draft MOU was never finalised or signed by anyone from Parklane or Trinity.

*Options Paper*

[48] On 28 January 2019, Mr Cary sent Ms Zhang and Mr Wu a paper headed OPTIONS for GREEN. The Options Paper said it had been developed in response to Ms Zhang's concern as to certainty. It put forward three options for Trinity:

Option A: Entry into a joint venture with Parklane in general accord with the draft MOU.

Option B: Entry into a development agreement to provide road and services access through the Trinity land not sold to Summerset (Lot 3) and across Lot 201 so that the ex-Fonterra land had direct road and services access.

Option C: Completion of the Trinity subdivision so that access to the ex-Fonterra land was available for Parklane. In return, Parklane would contract with Trinity to build affordable houses and would give Trinity options to be involved in further construction opportunities.

[49] Under Option B, the development agreement would provide that Parklane would, subject to final agreement with KiwiBuild with respect to the ex-Fonterra land, undertake the construction of the road and services within the road access area. The development agreement would also provide for Trinity to build 20 affordable homes at a fixed price of \$280,000 plus GST. The document stated:

It is acknowledged there is a considerable premium in this price.

This option gives a level of certainty for [Trinity] – it provides a consideration for the access (the development costs of the road and services) and a premium within the building context.

[50] Ms Zhang says Trinity did not ask for the Options Paper which was not discussed in the telephone conversation. Ms Zhang says, in particular, that Option B was not discussed.

*Cucina Café meeting in Hamilton on 5 February 2019*

[51] On 5 February 2019, representatives of Parklane and Trinity met at the Cucina Café in Hamilton (Cucina Café meeting). Mr Cary, Mr Price and Mr Osmond attended on behalf of Parklane. Mr Wu, Ms Zhang, Pargat Singh, a planner, and Mr Taylor attended on behalf of Trinity.

[52] Mr Wu says the purpose of the meeting was to have a “coffee catch-up” and for Mr Cary to meet Ms Zhang who had a half-interest in Trinity but had not been impressed with what Mr Cary had been proposing. He asked Mr Singh to attend in case he needed advice on planning issues. Ms Zhang says she asked Mr Taylor to attend to help her understand the Parklane proposals and that Mr Taylor was not there as Trinity’s lawyer. She says Trinity uses another lawyer to advise on its property deals.

[53] Mr Wu and Ms Zhang say Mr Cary did most of the talking at the Cucina Café meeting, which Ms Zhang described as informal. Ms Zhang says no-one at the meeting took notes and there was no agreement reached on anything, although Mr Cary talked about different options and what could be done with the ex-Fonterra land. Mr Taylor says Mr Wu told Mr Cary that in principle Trinity would support Parklane for the purpose of discussing the ex-Fonterra land with KiwiBuild, and that there was some discussion about how there could be access to the ex-Fonterra land through the Trinity land.

[54] Mr Taylor also says no agreement was reached. He describes the meeting as an exploration by Mr Cary of Parklane’s needs, wants and desires and why Trinity should work with Parklane.

[55] Mr Wu says Mr Cary talked about his advantage as being the preferred developer of KiwiBuild because of his political connections, his other successful developments and said Parklane wanted access through Trinity’s land. Mr Wu says he told Mr Cary he had to show that he had secured KiwiBuild before Trinity could enter into any kind of agreement. Mr Wu refers to this as the “chicken and egg” situation. Parklane needed Trinity’s agreement on access to secure development rights to the ex-

Fonterra land but Trinity's interest in granting access depended on Parklane securing those development rights.

[56] Mr Wu says he told Mr Cary that if Trinity was to grant Parklane formal access over its land there would need to be "a consideration", that is a price to be paid and that both understood that would require discussion. Mr Wu says they did not discuss payment in any more detail at the meeting apart from Mr Cary "throwing out ideas" such as Trinity getting a contract to build 20 houses in a strip on the Crown's side of the ex-Fonterra land boundary. Mr Wu says he did not take seriously those and other big picture ideas about making lots of money that Mr Cary talked about.

[57] Mr Wu says the only action point from the meeting as far as he can recall was that Mr Cary was to meet the following week with KiwiBuild and would get back to Trinity.

[58] Mr Cary says that although the participants at the meeting did not settle on the details of a full joint venture, they did address "the access right" separately from the options in the Options paper. He says both parties were agreed that, were access granted, Parklane would construct and pay for the road and services within the access area. In cross-examination, Mr Cary agreed there was no such agreement at the Cucina Café meeting but said the parties had agreed this previously.

[59] On 6 February 2019, Mr Osmond emailed Mr Cary a note he had prepared of the Cucina Café meeting. The note recorded that:

The understanding left at the end of the meeting was that:

- a) We had to wait for the Summerset deal condition in two days to be sure that the Green Partnership could offer access. Only once this was in order could we proceed to next step.
- b) As a next step (to allow a proposal to be put by Parklane to Kiwibuild) the Green Partnership would then agree to access generally in accordance with their existing scheme plan BUT Henry noted they might change it to accord with the accepted proposal from Kiwibuild for the adjacent land (density etc).

[60] The file note was not shared with Trinity.

*Exchanges following meeting of 5 February 2019*

[61] On the afternoon of 11 February 2019, Ms Jannah Grant, Practice Manager at Davies Law, a firm then acting for Parklane, telephoned Mr Taylor and then emailed him her contact details. The contents of the conversation between Ms Grant and Mr Taylor are not in evidence.

[62] Mr Taylor replied by email that evening advising that Summerset had extended the due diligence date as they were entitled to do and said “we” would get back after they had heard either way. Mr Taylor copied his reply to Ms Zhang.

[63] Later the same evening, Mr Cary sent a text message to Mr Wu asking that he confirm “the understanding that Trinity was agreeable to granting” Parklane access through its land on the condition that the Summerset deal proceeds but that Parklane would not have to wait until the Summerset deal concluded “before access is granted and or agreed in order for [Parklane] to attempt to progress a deal with KiwiBuild without further delay.”

[64] Mr Cary’s text message added that, on the assumption the Summerset deal did not proceed, “... it was further agreed that we would attempt to implement a back up offer on Bourke’s land in order to still try and achieve the same access to benefit [Trinity’s] land and also the NZTA land.”

[65] About half an hour later, Mr Wu replied, “yes, confirmed.”

*The Davies Law letter*

[66] At 10.28 am the following morning, 12 February 2019, Ms Grant emailed Mr Taylor attaching a letter dated 11 February 2019 on Davies Law letterhead (the Davies Law letter). Mr Cary says the Davies Law letter was sent on his instruction and was in accordance with what had been agreed. Approximately 20 minutes later, Mr Cary sent the Davies Law letter to Mr Wu under a covering email that stated:

As agreed, please see letter confirming our arrangement attached.

Can you please chase your solicitor in regards to urgently emailing our solicitor back a reply so we can start making our approach to Kiwibuild without further delay.

[67] A few minutes later, at 10.49 am on 12 February 2019, Ms Zhang emailed Ms Grant, copying in Mr Wu, stating that Trinity did not appreciate direct contact with their solicitor and that if clarification was needed on any matter, Ms Grant should contact her or Mr Wu directly.<sup>7</sup>

[68] In the Davies Law letter, Ms Grant set out Parklane's understanding of the Summerset Agreement, which would allow Trinity access to its land and would also provide access to the ex-Fonterra land. The letter asserted that Trinity had agreed to grant road access through its land to Parklane if the Summerset deal was approved, and that this agreement would allow Parklane to progress its project with KiwiBuild.

[69] The letter set out Parklane's understanding of potential sticking points with the Summerset agreements and said that, if the agreements were not confirmed, Parklane had expressed interest in taking over the agreement with Mr Bourke, which would allow Trinity and Parklane "the same access". The letter said Mr Cary and Mr Wu had agreed Mr Cary should initiate discussions with Mr Bourke and Summerset.

[70] The letter concluded:

Could you please urgently confirm your client's agreement to grant access as detailed above.

[71] There was no reply to the Davies Law letter. Mr Taylor says he forwarded it to his property colleague at Tomkins Wake who received instructions from Trinity not to engage.

---

<sup>7</sup> Ms Zhang's message may have been prompted by Mr Taylor's email to Ms Grant sent on the evening of 11 February 2019 rather than Mr Zhang receiving the Davies Law letter the following morning. However, nothing turns on that issue.

*Mr Cary engages with Ms Zhang*

[72] Later on 12 February 2019, Mr Cary sent an email Ms Zhang, copied to Mr Wu, stating it had been Parklane's understanding from the meeting in Hamilton that Parklane would ask their lawyer to make contact with Mr Taylor to discuss the way:

... both our legal people felt it would be best to document the access consent matter (only) at this stage to enable ourselves to advance matters with KiwiBuild sooner rather than later.

[73] The email said Parklane was sorry if that was not Ms Zhang's understanding but said they had to have at least a basic documented understanding that Trinity would agree to consent to granting Parklane access so they could represent the same to KiwiBuild. It added that Parklane would make it clear to KiwiBuild that access would only be made available if Trinity was also able to achieve access through the Bourke land (Lot 201) and pending further discussion with Parklane in relation to the overall KiwiBuild framework.

*Mr Cary presses Mr Wu to confirm consent for access*

[74] At 8.34 am on 13 February 2019, Mr Cary sent a lengthy text message to Mr Wu. The text message referred to the Davies Law letter and Mr Cary's email to Ms Zhang. It then said Parklane was hoping they could move forward more quickly on a more positive basis.

[75] The text read, in part:

Can you please come back to us with something formal in writing so we can table a proposal with MIBE [sic] and or Kiwibuild that gives them confidence that we may be able to expedite access to the NZTA block. Just to be very clear any agreement provided to us by yourselves in relation to consent for access will be on the assumption that you are also successful in gaining access to your block via Bouke's [sic] block as part of the deal with Sommerset or by any alternative means.

Please note we have booked flights to Wellington for next Monday and are wanting to meet and engage in further discussions with IMBE [sic] and or Kiwibuild in relation to the NZTA block.

On that basis if you side could please urgently revert with a form formal confirmation in way of consent for access to the NZTA block on behalf of the entity that owns your block. At the very least we will need an email off your entity rather than a text message confirming your consent.



[76] The text went on to emphasise the need for urgency and expressed concern that another party, such as a local iwi, might soon be approached by KiwiBuild and have different plans for the block that could have negative impacts for Trinity's land.

[77] The text concluded:

The ball is firmly in your court.

Please urgently advise if you are going to provide confirmation so we can confirm our appointment on Monday 18 February with MBIE and or KiwiBuild.

*Mr Wu provides draft letter to Mr Cary*

[78] At 9.04 pm, Mr Cary sent Mr Wu a text message reminding him to email the "access consent confirmation documentation".

[79] At 9.28 pm, Mr Wu sent Mr Cary an email with a draft letter attached. The email asked Mr Cary to have a look at the draft and stated: "If Ok, I like to proceed." The email listed the file name of the attached document as "Trinity Supprt Letter.docx."

[80] The draft letter read:

To Parklane Limited

Access Right to Parklane Infrastruct Limited

I confirm the following

- Trinity Green supports Parklane Infrastruck [sic] Limited's proposal to approach KiwiBuild to develop the ex-Fonterra block.
- To enable Parklane to progress its proposal, Trinity Green agrees to allow roading access needed on Trinity's land and necessary access to the ex-Fonterra block.

Regards

Henry Wu

Trinity Green Estate GP

*Exchanges on 14 February 2019 on draft letter*

[81] Mr Cary consulted Mr Osmond on the draft letter. Late on 13 February 2019, Mr Osmond sent Mr Cary a revised draft and raised questions about the composition of the Trinity Green partnership and noted that Mr Wu and Ms Zhang had separate interests in their respective companies that comprised the Trinity Green partnership.

[82] The following day, 14 February 2019, Mr Cary and Mr Wu exchanged a number of text messages, all at the instigation of Mr Cary. Mr Cary sought information about the nature and official name of the Trinity partnership as shown on the official register so the draft documents could be amended if required. Mr Cary mentioned no other changes to the draft letter.

*Mr Cary sends revised draft of access letter*

[83] At 3.31 pm, Mr Cary sent Mr Wu an email with a revised draft of the letter. In his email, Mr Cary said that if Mr Wu was happy with the proposed changes, Mr Wu should print it and email it back to Parklane ASAP so they could progress the matter with KiwiBuild the next Monday (18 February 2019) along the lines previously discussed and agreed in principle.

[84] The text of the revised draft read:

To Parklane Infrastruct Limited

Access Right granted to Parklane Infrastruct Limited (“Parklane”)

I confirm the following

- The registered proprietors of 80 Laurent Road, Cambridge. Waipa District, being Lu Trustee Limited and Ho No. 2 Trustees Limited as general partners in the Trinity Green Estate Partnership (Trinity) supports Parklane’s proposal to approach KiwiBuild to develop the ex-Fonterra block.
- To enable Parklane to progress its proposal, Trinity agrees to allow roading and services across Trinity’s land to provide the necessary access to the ex-Fonterra block.

Henry Wu  
as duly authorised agent for  
Trinity Green Estate Partnership

[85] After text message prompts from Mr Cary sent at 4.06 pm and 6.36 pm, at 6.47 pm that day Mr Wu signed the access letter and emailed it to Mr Cary. In his email, Mr Wu said, “Hope this is good enough for you to proceed.”

*Discussions between Parklane and KiwiBuild on 14 February 2019*

[86] In the morning of 14 February 2019, before Mr Cary sent Mr Wu the revised draft of the access letter, Mr Cary called Philip Stroud of KiwiBuild to discuss Parklane’s interest in the ex-Fonterra land.

[87] In an email sent at 3.49 pm that day, Mr Stroud thanked Mr Cary for his call and said that, as he had explained, the suitability of the ex-Fonterra site for KiwiBuild’s Land for Housing Programme was being considered. Mr Stroud explained that Kieran Douglas of KiwiBuild was responsible for investigating the site’s potential and working with NZTA’s disposal manager. He provided Mr Douglas’s contact details and outlined the process KiwiBuild would follow before any recommendation would be put to the Minister. He advised that, overall, the process could take over 12 months.

[88] Between 4.38 pm and 4.52 pm, Mr Cary and Mr Douglas exchanged text messages which resulted in Mr Douglas agreeing to meet Mr Cary at Parklane’s development site in Wellington on the afternoon of 18 February 2019.

[89] In the event, Mr Douglas cancelled the meeting at short notice on 18 February 2019. There is no evidence of any subsequent meeting between Mr Cary and Mr Douglas. However, on 21 February 2019, Mr Stroud sent an email message to Mr Cary following a discussion with Mr Cary. In the email, Mr Stroud acknowledged there could be some advantage to Parklane if it had access to the ex-Fonterra land, but said that if the land was to be developed it would through a tender process in which Parklane was free to take part.

*Mr Cary approaches Mr Bourke*

[90] In late February 2019, Mr Cary approached Mr Bourke to inquire whether he might be interested in selling his land to Parklane if the Summerset deal should not

proceed. Nothing came of that approach. Mr Wu says he always considered it unlikely Mr Cary would get anywhere with Mr Bourke, who was difficult to deal with.

*Exchanges regarding Summerset Agreement*

[91] On 26 February 2019, Mr Cary sent Mr Wu a “friendly reminder” to send Parklane the scheme plan attached to the Summerset contract so they could come up with plans that could dovetail into their proposal with KiwiBuild. Later than day, Mr Wu forwarded a plan prepared in November 2018. The plan did not show any road connecting to the Trinity land over Lot 201.

[92] On 27 and 28 February 2019, Mr Cary sent three text messages to Mr Wu asking when Summerset was due to settle with Trinity and Mr Bourke. Mr Wu replied that settlement was “maybe 6 months away, subject to completion of subdivision”.

[93] Mr Cary then asked what the wording of the contract said. A subsequent message said Parklane needed to get a reasonable fix on the timing for the availability of connecting road and services to the KiwiBuild proposal and so Mr Osmond could talk to the District Council to see how fast they could process the resource consent.

[94] There is no evidence of Mr Wu responding to those messages.

*Summerset conditions satisfied*

[95] On 22 February 2019, the due diligence condition in the Summerset Agreement was satisfied.

[96] On 13 March 2019, the Summerset Board approved the Summerset Agreement.

*Parklane – Trinity exchanges resume and end*

[97] Between 14 and 19 June 2019, Mr Cary sent Mr Wu a succession of text messages proposing a further meeting. In one of his messages, Mr Cary said Parklane now had a scheme plan he wished to share with Mr Wu ASAP. Mr Wu eventually replied and agreed to a further meeting at the Cucina Café at 11 am on 26 June 2019.

[98] Mr Wu says he was annoyed with Mr Cary at the meeting for a number of reasons. First, he had learned that the meeting in February with KiwiBuild had not gone ahead. Secondly, despite Mr Cary's claims to have done a lot of work, Mr Wu regarded the "scheme plans" produced by Mr Cary as laughable "almost just like kids' painting".<sup>8</sup> Thirdly, when he asked Mr Cary for a copy of the papers, Mr Cary refused, despite Mr Wu having freely shared his plans with Mr Cary earlier. Mr Wu does not accept that Trinity's failure to sign the Confidentiality Agreement forwarded by Mr Cary provided any basis for Mr Cary's refusal to share the plans.

[99] Mr Wu says he decided to break off contact with Mr Cary from that point because, as he told Mr Cary at the meeting, he considered Parklane had nothing to offer Trinity. Mr Wu deleted most of the text messages from Mr Cary from his phone at about that time.

[100] Mr Wu did not respond to a text message sent by Mr Cary on the afternoon of 26 June 2019 asking Mr Wu to call because he wanted to add something to their discussion. Nor did Mr Wu reply to a longer text message sent by Mr Cary on 9 July 2019 asking if Trinity still wanted to proceed with Parklane. An identical email sent from Mr Cary two hours later also went unanswered.

*Trinity lodges resource consent application for subdivision of Trinity land*

[101] On 10 July 2019, Trinity lodged its application for resource consent to subdivide its land into three lots: Lot 1, comprising a drainage reserve strip along the Laurent Road that was to vest in the District Council; Lot 2, the land to be transferred to Summerset; and Lot 3, the land to be retained by Trinity.

[102] A subdivision plan annexed to the application showed the three lots, Lots 201 and the three cul-de-sac roads. It did not show any access to the Trinity land across Lot 201 or across the Trinity land to the ex-Fonterra land. A note on the plan said that Lot 2 was to be transferred to the owner of the Bourke land (which was to be Summerset) and that a single record of title should issue.

---

<sup>8</sup> The Notes of Evidence record Mr Wu as saying "almost just like Keats' painting" but I am satisfied the Notes are incorrect.

[103] The Assessment of Environmental Effects accompanying the application said a roading connection to Lot 3 was available from Bourke Drive once the development of Lot 201 was completed.

[104] On 26 July 2019, the District Council requested Trinity to provide further information about the timing expectations for the development of the roading extension of Bourke Drive or for an alternative layout that provided a road connection to Lot 3. It also asked for written approval from the owners and occupiers of the northern parcels and the ex-Fonterra land. These requests were reiterated by the Council on 19 November 2019 in a letter which noted that the access proposed did not comply with the Council's Structure Plan and the Council officers were likely to recommend the application be declined.

*Parklane lodges caveat against title to Trinity land and asserts it is an affected party*

[105] On 12 December 2019, after a meeting between Mr Price and Mr Cary for Parklane and Aaron Smail of Summerset, Parklane lodged a caveat against the title to the Trinity land. The caveat applied to all of the Trinity land, including the area to be transferred to Summerset.

[106] That same day, senior counsel retained by Parklane wrote to the District Council and informed the Council that, in accordance with the Resource Management Act 1991, Parklane was an affected party for the purposes of limited notification of Trinity's subdivision consent application because it had an interest in the Trinity land by virtue of the access letter.

[107] On 13 December 2019, Davies Law, on behalf of Parklane, informed Summerset that Parklane had lodged a caveat against the title to the Trinity land and had put the District Council on notice that Parklane was an affected party.

*Affected parties consent to Trinity subdivision application*

[108] On 3 and 20 December 2019, the then owners of the northern parcels provided written approval of the Trinity application. An acknowledgement to the approvals noted that roading connection to Lot 3 would be provided via Lot 201 as an extension

of Bourke Drive and would continue through Lot 3 to provide access to future development of the land to the north, and that this roading arrangement was to be provided “in lieu of” any alternate roading connections or services lanes indicated in the Structure Plan. A plan annexed to the approvals showed, by way of dashed lines, Bourke Drive continuing over Lot 201 and Lot 3 to the boundary with the ex-Fonterra land. This is the first plan showing Bourke Drive extending over Lot 201 and the Trinity land to the boundary with the ex-Fonterra land.

[109] Also on 20 December 2019, NZTA, on behalf of the Crown, provided written approval of the Trinity application. The NZTA approval contained the same acknowledgement as the other two approvals except that it stated that the roading arrangement through Lot 201 and Lot 3 was to be provided “in addition to” any alternate roading connections or services lanes indicated in the Structure Plan. NZTA confirmed this position to the District Council in an email exchange on 8 January 2020.

*Summerset takes over Trinity consent application*

[110] On 13 January 2020, Summerset advised the District Council it had executed its right under the Summerset Agreement to take over the Trinity subdivision application.

*Trinity applies for caveat to lapse*

[111] On 30 January 2020, Trinity filed a notice that Parklane’s caveat should lapse.

*Subdivision resource consent granted*

[112] On 12 February 2020, the District Council informed Summerset it had granted the Trinity subdivision application on a non-notified basis. The consent was subject to a notice that no further development of Lot 3 be allowed until the proposed extension of Bourke Drive to the southern boundary of Lot 3 is vested as a public road or Lot 3 is amalgamated with Lot 201. The consent made no reference to any extension of Bourke Drive over Lot 3 to the boundary with the ex-Fonterra land.

### **Initial caveat proceeding**

[113] On 17 February 2020, Parklane applied for orders that its caveat not lapse. Trinity opposed that application.

[114] On 26 February 2020, Tompkins Wake, solicitors for Trinity, wrote to Davies Law setting out Trinity's concern that the breadth of the terms of the Parklane caveat would prevent Trinity from concluding the Summerset Agreement and could cause Trinity substantial loss. The letter proposed that Trinity would consent to an interim order sustaining the caveat over the land in Lot 3 pending further order of the Court.

[115] On 28 February 2020, Davies Law replied to Tomkins Wake, noting Parklane's concern that the subdivision consent had been granted despite Parklane's notice to the District Council that it was an affected party and the application should be notified. In these circumstances, it was premature to consider the Trinity proposal.

[116] On 28 April 2020, Tompkins Wake filed a memorandum seeking orders that the caveat be restricted to Lot 3. This was followed on 6 May 2020 by an open offer to restrict the caveat to Lot 3. That offer was not accepted.

[117] On 5 May 2020, Moore J heard Parklane's application that its caveat not lapse. On 28 May 2020, Moore J issued his judgment granting Parklane's application.<sup>9</sup>

### **High Court judgment**

[118] Moore J considered the evidence adduced by Parklane and the respective submissions of counsel. He then assessed whether there was consideration and whether there was an intention to create an easement as distinct from a personal licence to Parklane. He observed that it was inappropriate on the application before him to determine contested factual questions relating to the discussions between the parties and the purpose of the access letter. However, Moore J considered it was inherently implausible that Mr Wu signed the access letter solely to help Parklane in its discussions with KiwiBuild. He noted there had been discussions about a possible joint venture by which part of the Trinity land might be developed and held there were

---

<sup>9</sup> *Parklane Infrastruct Ltd v Lu Trustee Ltd*, above n 2.



other potential advantages to Trinity, such as gaining a level of influence over how neighbouring land would be developed.<sup>10</sup> For these reasons, he held it was at least arguable there was valuable consideration to Trinity in executing the access letter.<sup>11</sup>

[119] As to the intention to create an easement, Moore J noted that Mr Cary had told Mr Wu that an email from Trinity would have been sufficient. Moore J considered it significant that Trinity elected to respond more formally than Parklane had required by reproducing the draft letter “Parklane’s solicitors” had prepared on Trinity letterhead, signing it and dating it and returning the letter to Mr Cary. Moore J did not believe Mr Wu would have taken these steps if he had not intended to create a binding legal relationship with Parklane.<sup>12</sup>

[120] Moore J also noted that Parklane was aware Trinity intended to subdivide and sell part of its land. Mr Cary had been shown initial draft plans for the proposed subdivision that marked the extension of Bourke Drive. Moore J also said no useful purpose would have been served in Parklane engaging with KiwiBuild about the future development of the ex-Fonterra land without an assurance that access issues had been resolved with Trinity. Moore J also held that the contemporary correspondence revealed that access was a condition precedent to Parklane’s discussions in Wellington. On that basis it was strongly arguable that the parties must have intended the access rights to run with the land rather than being a personal licence.<sup>13</sup>

[121] Moore J also considered whether the caveat was defective because it applied to the whole of the Trinity land while Parklane’s alleged access right related only to Lot 3. Moore J held that because the final form of access could not be determined at that stage, he did not consider Parklane’s failure to particularise the land over which the interest is claimed meant it should lapse.<sup>14</sup>

[122] Moore J also held it was inappropriate for him to determine that Parklane had acted unreasonably in rejecting Trinity’s offer to consent to an interim order sustaining

---

<sup>10</sup> At [30].

<sup>11</sup> At [32].

<sup>12</sup> At [34].

<sup>13</sup> At [35].

<sup>14</sup> At [41] – [42].

the caveat just over the land in Lot 3 pending further order of the Court and declined to exercise his residual discretion to remove the caveat.

[123] Moore J ordered that the caveat not lapse but on condition that Parklane issue proceedings seeking specific performance of its rights under the access letter within 15 days of the judgment.

### **Trinity's appeal to the Court of Appeal**

[124] On 7 June 2020, Trinity appealed Moore J's decision. Trinity's appeal did not seek re-consideration of whether the access letter amounted to the grant of an easement. It accepted that question would be determined at the substantive proceeding ordered by Moore J. The appeal was limited to whether Moore J was correct in holding there was an arguable case that Parklane had an interest over the whole of the Trinity land, including the land to be sold to Summerset.

[125] The Court of Appeal allowed the appeal and set aside the order that the caveat not lapse.<sup>15</sup> However, the Court also ordered that that order not take effect until certain events had occurred, including completion of the subdivision of the Trinity land and the issue of a title to Lot 3, at which point Parklane was granted leave to lodge a further caveat with respect to Lot 3.

[126] In reaching its decision the Court of Appeal considered whether Moore J was right to conclude that the access rights granted by Trinity were not so vague and uncertain as to preclude Parklane from maintaining a claim to the whole of the Trinity land. The Court was not persuaded that the evidence supported that conclusion for because:<sup>16</sup>

- (a) The Summerset Agreement had been concluded before the November 2018 meeting between Parklane and Trinity and it was clear Mr Cary was aware of the intention to transfer Lot 2 to Summerset;

---

<sup>15</sup> *Lu Trustee Ltd v Parklane Infrastruct Ltd* [2020] NZCA 682, (2020) 21 NZCPR 740.

<sup>16</sup> At [41] – [45].

- (b) The correspondence leading up to the access letter also took place against the backdrop of the Summerset Agreement and was predicated on the Summerset deal being confirmed.

[127] The Court of Appeal concluded:

[47] ... we do not consider the evidence justified the proposition that access would be provided across the Trinity land except insofar as the part of it that was to be retained in Lot 3.

...

[52] ... we are satisfied that there was not a proper basis for sustaining the caveat in so far as it protected a claimed interest in the Trinity land other than in respect of the part of it that would be within Lot 3 of the proposed subdivision.

### **Subsequent events**

[128] On 31 March 2021, the Summerset Agreement settled. Lot 1 was transferred to the District Council. Lot 2 was transferred to Summerset. Lot 201 was transferred to Trinity, which retained Lot 3. At that point, the initial Parklane caveat was removed.

[129] On 24 September 2021, Parklane lodged caveats against the titles to Lot 3 and Lot 201.

### **Relevant law**

[130] As the Court of Appeal said in *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd*:<sup>17</sup>

[53] The prerequisites to formation of a contract are therefore:

- (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
- (b) An agreement, express or found by implication, or the means of achieving an agreement (eg an arbitration clause), on every term which
  - (i) was legally essential to the formation of such a bargain; or

---

<sup>17</sup> *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* [2002] 2 NZLR 433 (CA).

- (ii) was regarded by the parties themselves as essential to their particular bargain.

A term is to be regarded by the parties as essential if one party maintains the position that there must be agreement upon it and manifests accordingly to the other party.

[54] Whether the parties intended to enter into a contract and whether they have succeeded in doing so are questions to be determined objectively. In considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the words of their “agreement” to the background circumstances from which it arose - the matrix of facts. This can include statements the parties made orally or in writing in the course of their negotiations and drafts of the intended contractual document.

[131] The general approach to contractual interpretation in New Zealand was set out by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* and re-affirmed in *Bathhurst Resources Ltd v L & M Coal Holdings Ltd*.<sup>18</sup>

[132] As the Supreme Court said in *Firm PI 1*:

[60] ... the proper approach is an objective one, the aim being to ascertain “the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”. This objective meaning is taken to be that which the parties intended. While there is no conceptual limit on what can be regarded as ‘background’, it has to be background that a reasonable person would regard as relevant. Accordingly, the context provided by the contract as a whole and any relevant background informs meaning.

[61] The requirement that the reasonable person have all the background knowledge known or reasonably available to the parties is a reflection of the fact that contractual language, like all language, must be interpreted within its overall context, broadly viewed. Contextual interpretation of contracts has a significant history in New Zealand, although for many years it was restricted to situations of ambiguity. More recently, however, it has been confirmed that a purposive or contextual interpretation is not dependent on there being an ambiguity in the contractual language.

...

[63] While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious

---

<sup>18</sup> *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432, at [60] – [63]; *Bathhurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696, at [43].

one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

(footnotes omitted)

### **Questions for decision**

[133] The principal question for decision is whether Parklane and Trinity reached a binding agreement that Trinity would allow access for roading and access across Lot 3 such that Parklane is entitled to the relief sought.

[134] Within that general question are the following questions:

- (a) Did the parties intend to conclude a binding agreement to confer legal access rights over Trinity's land?
- (b) Was the agreement supported by consideration?
- (c) If there was no agreement, has Parklane established an estoppel?
- (d) Does Parklane have an easement over Lot 3?

### **Submissions of counsel for Parklane**

[135] Mr Matsis, counsel for Parklane, submits that the answer to all of these questions is "yes".

[136] Mr Matsis submits that an objective analysis of the access letter and the surrounding circumstances establishes that a contract was formed. He points, in particular, to the following considerations:

- (a) The letter was addressed to Parklane and not to KiwiBuild directly as might have been expected if the letter was simply providing information to KiwiBuild;
- (b) The subject line expressly refers to an "access right" being "granted";

- (c) The letter provides a full legal description of the Trinity parties;
- (d) The letter records Trinity's support of Parklane's approach to KiwiBuild so it is clear Trinity knew the purpose for which Parklane wanted the letter;
- (e) The letter records that Trinity agreed to allow roading and services access across its land to enable Parklane to progress its proposal;
- (f) The letter was printed on Trinity letterhead and signed.

[137] Mr Matsis says the consideration provided by Parklane comprised:

- (a) Parklane going ahead with its proposal to develop the ex-Fonterra land in a manner complementary to Parklane and Trinity;
- (b) Parklane agreeing to implement a back-up offer to acquire the Bourke land; and
- (c) Parklane offering to pay for the road.

[138] Mr Matsis says Parklane's offer to pay for the road was the subject of an express oral agreement between Mr Cary and Mr Wu reached at one of their meetings prior to 14 February 2019 and that Parklane's intention to pay was also recorded in the Options paper.

[139] Mr Matsis says Parklane relied on the access letter as evidenced by Parklane:

- (a) Setting up the meeting with KiwiBuild for 18 February 2019 and remaining in contact with MHUD / KiwiBuild subsequently;
- (b) Contacting Mr Bourke to discuss providing a back-up offer to Summerset and contacting and negotiating with Summerset and the owners of the northern parcels;

- (c) Engaging planners and surveyors to prepare plans and drawings;
- (d) Mr Cary spending hundreds of hours on the development after 14 February 2019 and Parklane spending hundreds of thousands of dollars in these efforts.

[140] Mr Matis submits that the parties are commercial parties, that these were commercial arrangements and that it is not for the Court to second-guess the adequacy of the consideration.

### **Submissions by counsel for Trinity**

[141] Mr Ross KC submits that the true position is that:

- (a) Trinity was always willing, in principle, to provide access on terms to be agreed once Parklane's proposal to KiwiBuild / MHUD had progressed and once there was more certainty around the Summerset Agreement;
- (b) No agreement on access was reached at the Cucina Café on 5 February 2019 or at any earlier meeting;
- (c) Before the access letter was provided, Mr Cary assured Mr Wu and Ms Zhang in writing that there would be further discussions about any future development agreement before there would be any binding commitment;
- (d) Parklane asked for something to show KiwiBuild in a meeting Mr Cary artificially said was urgent, even though Mr Cary was going to Wellington for other purposes, no meeting with KiwiBuild had been scheduled and KiwiBuild/MHUD were not requiring Parklane to demonstrate access as a condition of discussions;

- (e) The claim to an interest in land was made in a different context long after the access letter had been concluded and the relief now sought is a far cry from the asserted easement.

[142] Mr Ross says it is clear there was no intention to be bound, no certainty as to the terms of the alleged agreement and no consideration. He also says:

- (a) If there was an agreement, it is unenforceable because its terms are not recorded in writing;
- (b) There was no estoppel and no easement in Parklane's favour;
- (c) Even if there was an agreement or an estoppel, the Court should decline to grant the orders sought by Parklane.

### **Analysis**

#### **Did the parties intend to conclude a binding agreement to confer legal access rights over Trinity's land?**

[143] Parklane's statement of claim pleads that the written component of the asserted agreement comprised written communications between the parties between 11 and 14 February 2019, including the access letter. In his closing submissions, Mr Matsis says the agreement was primarily documented by way of the access letter. He refers to the preceding correspondence and meetings to show that the access letter documents the agreement of the parties, subject to his submission that part of the consideration, the agreement to pay for the construction of the road, was the subject of an express oral agreement.

[144] For the purposes of this analysis, I consider first the terms of the access letter to determine whether, it establishes that the parties intended to conclude a binding agreement as alleged. I then consider the communications between the parties leading up to the letter.



*The access letter as signed*

[145] The letter was addressed to “Parklane Infrastruct Limited” and headed “Access Right granted to Parklane Infrastruct Limited”. It began, “I confirm the following”. The letter itself comprised two operative statements:

- (a) The registered proprietors of 80 Laurent Road, together comprising the Trinity Partnership, support Parklane’s proposal to approach KiwiBuild to develop the ex-Fonterra land; and
- (b) To enable Parklane to progress its proposal, Trinity agreed to allow roading access over Trinity’s land for the necessary access to the ex-Fonterra block.

[146] It was signed by Mr Wu “as duly authorised agent for Trinity Green Estate Partnership”.

[147] There are a number of aspects of the letter that give it the appearance of a legal document; that is, a document conferring legal rights. It was printed on “Trinity letterhead”; the heading used the terms “access right” and “granted”; the body of the letter used formal descriptions of the constituent parts of the Trinity partnership; and Mr Wu signed as the “duly authorised agent” for Trinity.

[148] Moore J considered the fact Mr Wu elected to respond to Mr Cary’s text message of 13 February “by reproducing the draft Parklane’s solicitors had prepared on Trinity letterhead, signing and dating it and returning it to Mr Cary”, indicated that Mr Wu had intended to create a binding relationship between Trinity and Parkland.<sup>19</sup> With all due respect to Moore J, who did not have the benefit of extensive evidence and submissions on the communications prior to the letter, for the reasons that follow, I consider that conclusion is not consistent with the language of the letter or with the process that led to the letter.

---

<sup>19</sup> *Parklane Infrastruct Ltd v Lu Trustee Ltd*, above n 1, at [34]. In fact, the final version of the letter was prepared by Mr Osmond, who was not Parklane’s solicitor and was formally prohibited from acting as a solicitor.

*The language of the letter*

[149] The first operative statement and the opening words to the second operative statement provide the context for the letter – Parklane’s proposed approach to KiwiBuild. The first statement expressed Trinity’s support for the proposed approach. The second statement said that, to allow Parklane to progress its proposal, Trinity “agreed to allow” Parklane access to its land.

[150] Neither of these statements was directed at Parklane – they were statements to the world at large. The context and the operative language strongly suggest the letter was intended to be read by a third party. While the addressee was Parklane, the letter’s purpose was to show KiwiBuild Trinity had agreed to allow Parklane access. The operative part of the letter did not grant Parklane access or even state Trinity had granted access. It was a statement to KiwiBuild and others that Trinity had agreed to allow Parklane access.

[151] What the terms of that agreement might be were not stated in the operative part of the letter. In this regard, it is also relevant Trinity had not conclusively committed to the exact access route at the time the letter was signed. I accept Mr Cary and Mr Wu would have discussed that likely route across Trinity’s land and that likely route was to continue Bourke Drive across Lot 201 and the Trinity land. But no plan commissioned by Trinity between the date it acquired its land and the execution of the access letter showed that route. The first plan to do so came in December 2019 with the consent of the owners of the northern parcels to Trinity’s subdivision application. For these reasons, I do not accept that Mr Cary relied on a plan shown to him by Mr Wu.

[152] For these reasons, and leaving aside the legal “look and feel” of the letter (to which I return below), I am satisfied that the language of the letter is not consistent with an intention by Trinity to grant access rights to Parklane in that document. That conclusion is reinforced by examination of the exchanges that led to the letter and, in particular, by examining how the legal “look and feel” of the letter came about.

*The process that led to the letter*

[153] The process that led to the access letter entailed the following elements discussions and exchanges before the Cucina Café meeting, the Cucina Café meeting itself, and discussions and email and text exchanges after the Cucina Café meeting.

[154] It is apparent no binding agreement was reached prior to the Cucina Café meeting. The meeting in Cambridge in December 2018 was a preliminary exchange of information and ideas. The documents that followed – the confidentiality agreement, the draft MOU and the Options Paper – were not agreed to by Trinity. With the exception of what was stated in Option B of the Options paper, they also did not deal with access issues. Mr Cary himself says the “access right” was discussed separately from the options in the Options Paper.

[155] It is also apparent that nothing binding was agreed at the Cucina Café meeting. Mr Osmond’s file note is consistent with the evidence of Mr Wu, Ms Zhang and Mr Taylor that there was no agreement at the meeting.

[156] The impetus for “something in writing” showing Parklane could have access to the ex-Fonterra land, either by way of the Summerset Agreement or by some other means, began after the meeting and after Mr Cary learned Summerset had extended the date for completing its due diligence. That led to Mr Cary’s text message to Mr Wu on the evening of 11 February 2019, asking for confirmation of an “understanding” that Trinity was “agreeable to granting” Parklane access and would not have to wait until the Summerset deal had been concluded before access was “granted and or agreed”.

[157] In that context, Mr Wu’s reply “Yes, confirmed” cannot be taken as meaning access had been granted or even that it would be granted. It was only that Trinity was “agreeable” to granting access.

*The Davies Law letter*

[158] It is apparent the purpose of the Davies Law letter was to try to secure more than an informal, in principle, assurance that Parklane could have access over the

Trinity land. That is evident from the fact the letter was sent from a law firm and from the detail and formality of the letter. In addition, the letter concluded with a request that Trinity's solicitors urgently confirm their client's "agreement" to grant access as outlined above.

[159] There are a number of curious aspects to the letter. First, it was signed by the firm's practice manager rather than a qualified lawyer. It is unusual that a letter from a law firm setting out the position of a client and seeking to secure the agreement of another party in a commercial transaction should be signed by a practice manager rather than the one of the principals or solicitors of the firm – as Mr Taylor said in evidence.

[160] Secondly, despite the concluding request in the final sentence, the body of the letter did not outline a proposal for access. The letter recorded the fact of the Cucina Café meeting and Parklane's understanding of where things stood with the Summerset. It then stated:

Your client has agreed to grant road access through their land to our client for their project on the basis the Summerset deal is confirmed. This agreement will allow our client to progress their proposal with KiwiBuild without the delay of waiting for the outcome of the Summerset negotiations.

[161] This was not a proposal but an assertion of what purported to be an established fact – that Trinity had agreed to grant access through its land if the Summerset deal were confirmed. That was not consistent with Mr Osmond's file note and was a considerable upping of the ante from the text messages exchanged the evening before.

[162] In any event, whatever the content of the letter and the intentions behind it, there was no response by Trinity to the letter. Mr Taylor did not reply to it and Mr Wu made no comment on it. Ms Zhang's email conveying her unhappiness that Davies Law was communicating directly with Trinity's solicitors effectively ended the Davies Law line of communication with Trinity.

*Mr Cary's engagement with Ms Zhang*

[163] For present purposes, the important point in Mr Cary's email to Ms Zhang was that his assurance Parklane would make it clear to KiwiBuild that access would only

be made available if Trinity secured access through Lot 201 and pending further discussion between Trinity and Parklane in relation to the overall KiwiBuild framework. That assurance constituted a representation to Trinity that the access Parklane was seeking was contingent on those two further events. This was a considerable retreat from the position asserted in the Davies Law letter.

*Mr Cary's request for "something formal in writing"*

[164] In his text message of 13 February 2019, Mr Cary made three specific asks of Mr Wu:

- (a) for "something formal in writing" so Parklane could table a proposal with MBIE or KiwiBuild that would give confidence Parklane "may be able to expedite access" to the ex-Fonterra land;
- (b) for "formal confirmation in way of consent for access" to the ex-Fonterra land;
- (c) for, at the very least, an email rather than a text message confirming Trinity's consent.

[165] The first ask was the primary request. It was not a request for legal access over the Trinity land. It asked for something from Trinity to show MBIE / KiwiBuild that Parklane may be able to provide / secure access to the ex-Fonterra land. It was also subject to the rider that any agreement by Trinity "in relation to agreement for access" would be on the assumption that Trinity was successful in getting access to its land. That made any consent by Trinity contingent on that outcome and reinforces the conclusion that the first ask was not a request for a grant of legal access.

[166] The subsequent asks took their colour from the first ask. The second ask was stated to be on the basis of the first. Whatever "formal confirmation in way of consent for access" might have been intended to mean, I do not consider that a reasonable person with the background knowledge of Mr Wu would have considered it to be a request for a formal grant of access. That is confirmed by the third ask which said an email would be enough.

*Mr Wu's draft of the access letter*

[167] While Mr Wu chose to provide a letter rather than an email as suggested by Mr Cary, I do not see any significance in that choice. Mr Wu knew Mr Cary wanted to put something from Trinity in front of KiwiBuild. A letter on Trinity letterhead would be an obvious way of doing that.

[168] The initial draft prepared by Mr Wu looked less formal than the final version signed by Mr Wu after the draft had been amended by Mr Cary and Mr Osmond.

[169] Mr Cary and Mr Osmond made four significant changes to Mr Wu's draft:

- (a) The insertion of "granted" in the title, so it read: "Access Right granted to Parklane Infrastruct Limited".
- (b) The insertion of the address of the Trinity land and the substitution for "Trinity" of the formal names of the trustee companies comprising the Trinity partnership, which was also given its formal name;
- (c) The addition of "and services" in the second statement; and
- (d) The substitution of the more formal description of Mr Wu in the signature block.

[170] For present purposes, the addition of "and services" is of no significance. It did not add to the legal effect of the letter, even if it might have been intended to have broadened its scope.<sup>20</sup>

[171] The first, second and fourth changes are more significant. The insertion of "granted" suggested that a right of access had been or was being granted. Similarly,

---

<sup>20</sup> The addition of "and services" might have been significant if it had been Parklane's intention to run services separately across Trinity's land from Kerikori Way, the middle of the three cul-de-sac roads, as asserted by Mr Cary in evidence. However, that proposition was held not to be arguable by the Court of Appeal, which held that the evidence supported only the proposition that access would be provided across Lot 3; see *Lu Trustee Ltd v Parklane Infrastruct Ltd*, above n 12, at [47]. Because Lot 3 would not connect to Kerikori Way, Parklane could not have run services from that road to the ex-Fonterra land.

the use of the legal descriptions of the trusts comprising the Trinity partnership and the expanded sign-off by Mr Wu gave the appearance of greater formality and legal moment.

[172] As a matter of substance, however, they did not change the operative effect of the draft Mr Wu had prepared.

[173] Whatever was stated in the heading, no right of access had been granted prior to the access letter and, for the reasons already given, I am satisfied none was granted the operative part of the letter itself. And because the operative part of the letter did not grant a right of access, the greater formality in the description of the parties and in Mr Wu's sign off changed nothing.

*Conclusions about access letter*

[174] For these reasons, I am satisfied that a reasonable person, having all the background knowledge which would reasonably have been available to Mr Wu and Mr Cary at the time Mr Wu signed the access letter, would not have considered that, in signing the access letter, Mr Wu had been intending to conclude a binding agreement granting Parklane a legal interest in Trinity's land.

[175] A reasonable person having Mr Cary's background knowledge would have known the letter was written for the purpose of assisting Parklane in its discussion with KiwiBuild. They would also have known assurances had been given to Mr Wu and to Ms Zhang that anything Trinity gave Parklane was for the purposes of those discussions and would be contingent on Trinity securing access over Lot 201 and on Trinity and Parklane having further discussions in relation to the overall KiwiBuild framework.

[176] Having that background, a reasonable person would not have considered the insertion of "granted" in the heading of the letter and the greater formality in the description of Trinity or in Mr Wu's sign-off changed the purpose of the letter or its intended effect. Importantly, a reasonable person having Mr Cary's background knowledge would have known that those changes to the letter had been made at their own initiative so they would not have been misled as to their effect. They would also

have known, because Mr Osmond had pointed this out to Mr Cary, that if there was an intention to bind Trinity legally, Ms Zhang would have had to have signed for the Ho No 2 Trustees. Having that knowledge, they could not reasonably have relied on the ostensible authority of Mr Wu signing as the authorised agent of Trinity.

[177] Accordingly, I am satisfied the access letter and the communications leading up to the letter do not establish that the parties intended to conclude a binding agreement to confer legal access rights over Trinity's land.

**Even if access was agreed, was there consideration?**

[178] Because I am satisfied there was no intention to conclude a binding agreement, it is not necessary for me to consider whether there was consideration to support such an agreement. For the sake of completeness, however, I record that I am also satisfied there was no consideration.

[179] Mr Cary's offers to approach Summerset or Mr Bourke to act as back up if the Summerset Agreement fell through do not amount to consideration. For the offers to be meaningful, there would have had to be some evidence that Parklane had the means to stand in, either to complete the Summerset Agreement or to reach an alternative deal with Mr Bourke. There is no such evidence.

[180] The evidence is that Parklane had put nothing on the table in its discussions with Trinity. It was not looking to buy the ex-Fonterra land. Rather, it was looking to leverage Trinity's ability to provide access to secure the inside running with KiwiBuild and to leverage its ability to secure that inside running to get access over Trinity's land. A reasonable person having Mr Wu's background knowledge of what Parklane was bringing to the table would not have assumed that the offers to approach Summerset or Mr Bourke amounted to anything of substance.

[181] I am also satisfied there was no agreement between Mr Cary and Mr Wu that the consideration for Trinity granting Parklane access over its land was Parklane would pay the costs of constructing the access road.



[182] First, there is no evidence of such an agreement other than Mr Cary's assertion that he and Mr Wu had agreed on this element of the deal at or prior to the Cucina Café meeting. I do not accept Mr Cary's evidence on this point. Mr Wu denies there was such an agreement and I find Mr Wu to be a far more credible and consistent witness than Mr Cary, both generally and with regard to this issue.

[183] If there had been such an agreement, it is highly unlikely it would not have featured in the Davies Law letter or in the many text messages and emails Mr Cary sent to Mr Wu after the Cucina Café meeting. That it does not feature at all strongly supports the inference that there was no such agreement.

[184] Secondly, a reasonable person having the background knowledge of Mr Wu and of Mr Cary would have known the right to gain access to the ex-Fonterra land over Trinity's land was valuable and was not to be traded off by Parklane agreeing to pay costs they would likely always have been required to bear as part of the cost of the development of the ex-Fonterra land.

[185] For these reasons, even if there had been an intention to conclude a binding agreement, that agreement would not have been supported by consideration.

**If there was no agreement, has Parklane established an estoppel?**

[186] As set out by the Court of Appeal in *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*,<sup>21</sup> and confirmed in *Pollard v Pollard*, four elements must be established by the party asserting an equitable estoppel:<sup>22</sup>

- (a) that the party to be estopped has acted in a clear and unequivocal manner which has caused the claimant to have a certain belief or expectation;
- (b) that the claimant has relied reasonably upon that belief or expectation;
- (c) that the claimant has suffered detriment by relying on that belief or expectation; and
- (d) that it would be unconscionable for the party to be estopped to depart from the belief or expectation.

---

<sup>21</sup> *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

<sup>22</sup> *Pollard v Pollard* [2016] NZCA 186, (2016) 23 PRNZ 229 at [33].

[187] For the reasons given above, I am satisfied Parklane has made out none of these elements:

- (a) Trinity did not cause Parklane to have a belief or expectation it was being granted a legal right of access over the Trinity land. As discussed, Parklane knew Trinity had no intention of granting such a right.
- (b) Parklane has not demonstrated any reliance on such a belief or expression. There is no evidence of any undertaking by Parklane on the basis of its belief it had legal access over the Trinity land. Parklane's only actions were the lawyers' letters sent to the District Council and Summerset when it learned Trinity had applied for subdivision consent and the lodging of the caveat.
- (c) Parklane has not demonstrated it has suffered detriment by relying on that alleged belief or expectation it had a right of access over Trinity's land:
  - (i) Parklane set up the KiwiBuild meeting on 18 February 2019 before the access letter was signed and knowing that the process for making the land available for development was likely to take over a year;
  - (ii) There is no evidence of any weight to show that Parklane put significant effort into contacting Mr Bourke or in negotiating with Summerset and the owners of the northern parcels of land beyond the odd phone call and a meeting with Summerset after the caveat had been lodged; and
  - (iii) Despite the claims by Mr Price and Mr Cary that Parklane has continued to apply significant time and resources to developing the ex-Fonterra land, they have produced no invoices or any other documentary evidence to support that claim. In the

absence of such evidence of actual expenditure, the production of a few scheme plans by Mr Cary's planners is of little weight.

- (d) It would not be unconscionable for Trinity to depart from the alleged belief or expectation Parklane had a legal right of access over the Trinity land. To the contrary, I am satisfied it would be unconscionable to allow Parklane to continue to prevent Trinity from dealing with its land on the basis of Parklane's unsubstantiated assertion it has a legal interest in the Trinity land.

### **Does Parklane have an easement over Lot 3?**

[188] For all the reasons given above, I am satisfied that Parklane has no legal interest in and no easement over Lot 3. For that reason, it had no basis for lodging a caveat against the Trinity land.

### **Result and order**

[189] It follows that Parklane has no right to the relief it seeks. Accordingly, I dismiss Parklane's claim.

[190] It also follows that Parklane's caveat cannot be sustained. Accordingly, I direct the Registrar-General of Land to remove Parklane's caveats from the title to the Trinity land.

### **Comment**

[191] The above analysis necessarily focusses on the objective question of what the access letter and associated communications would have conveyed to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time the access letter was signed. Because it is settled law that the analysis must be of the parties' intentions assessed objectively, I have not discussed or relied on the evidence of Mr Cary and Mr Wu, as the principal parties involved, of what their intentions had been or made findings about those intentions.

[192] Nonetheless, it is appropriate to record that I found Mr Cary to be a less than reliable witness. When cross-examined on statements he had made to Mr Wu in the course of discussions, it became apparent there was sometimes little, if any, factual foundation for those statements. An example is Mr Cary's claim to have political connections. When asked to substantiate his claims to have ready access to former Deputy Prime Minister, Mr Peters, Mr Cary said he had spoken to Mr Peters a number of times through the years when he was growing up but acknowledged they were not personal friends. He said he had access to Mr Peters because he had known him through his late father and because his lawyer was Mr Peters' neighbour in Northland.

[193] Other examples are Mr Cary's statements to Mr Wu that Parklane needed something on access from Trinity so it could engage with KiwiBuild and the impression he conveyed to Mr Wu that he had booked flights to Wellington the following week for the specific purpose of engaging with KiwiBuild.

[194] The evidence establishes that there was never any need to demonstrate access to KiwiBuild and that KiwiBuild was months away from making any decisions on the ex-Fonterra land at the time Mr Cary was pressing Mr Wu for something in writing. It also establishes that Mr Cary was travelling to Wellington on other Parklane business, irrespective of any meeting with KiwiBuild.

[195] Against that background, Mr Cary's claims that he believed Mr Wu was intending to grant Parklane a legal right of access over Trinity's land irrespective of Parklane's intended engagement with KiwiBuild are not credible. They are even less credible when account is taken of the changes Mr Cary and Mr Osmond made to Mr Wu's draft of the access letter.

[196] I am satisfied those changes were an attempt by Mr Osmond and Mr Cary to make the letter "look" more legal, and therefore binding, even though the operative words in the letter had not changed. In this respect, Mr Osmond may have been demonstrating a skill remarked on by the Court in another case in which Mr Osmond was involved. In *Blanchett v Osmond*, Associate Judge Doogue observed that arrangements prepared by Mr Osmond, rather than representing genuine legal structures, seemed to have been fashioned to give apparent legitimacy to outcomes for

which Mr Osmond alone was responsible.<sup>23</sup> In the present case, the changes to Mr Wu's draft were made to give the appearance of legal effect to a document Mr Cary and Mr Osmond knew was intended only to be a letter of support for Trinity in its discussions with KiwiBuild.

[197] For these reasons, Mr Cary's claims he believed Trinity had given Parklane a caveatable interest on land are not tenable. This is not, however, the first time that Mr Cary has made such a claim which was found by the Court to lack factual foundation.<sup>24</sup>

### **Costs**

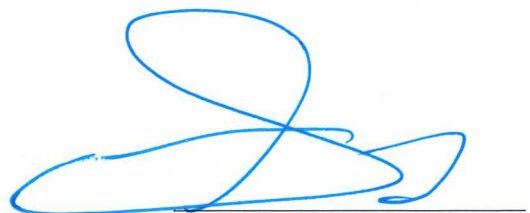
[198] Trinity is entitled to costs.

[199] Mr Ross requests that Trinity have the opportunity to address me before I fix costs.

[200] Unless the parties request otherwise, I will deal with costs on the papers and on the basis of memoranda of no more than six pages.

[201] Any memorandum on behalf of Trinity should be filed and served by 8 November 2022.

[202] Any memorandum on behalf of Parklane should be filed and served by 22 November 2022.



G J van Bohemen J

---

<sup>23</sup> *Blanchett v Osmond* [2015] NZHC 467 at [40]. The Court of Appeal dismissed Mr Osmond's appeal and held that one of the documents prepared by Mr Osmond was a fabrication; see *Osmond v Blanchett* [2016] NZCA 240 at [54].

<sup>24</sup> See *Property Sales Direct Ltd v Hawken Lane Development LP* [2022] NZHC 1735 at [65] – [67].