IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2007-441-877

BETWEEN	LINDEN ESTATE LIMITED (IN LIQUIDATION) Plaintiff
AND	BRUCE WILLIAM JANS AND HAWKES BAY NOMINEES LTD AND BISHORP NEW ZEALAND LLC First Defendants
AND	SEAFIELD FARM (HB) LIMITED Second Defendant

Hearing: 8 September 2008

Appearances: M McFarlane/N Gray for Plaintiff
T M Petherick for Defendants

Judgment: 23 July 2009 at 4pm

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 23 July 2009 at 4.30pm
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date .....

Solicitors: Gresson Grayson, PO Box 1045, Hastings
Sainsbury Logan & Williams, PO Box 41, Napier

[1] The plaintiff seeks orders for specific performance against both defendants requiring them to complete the execution and registration of certain easement certificates, and requiring the first defendants to pay to the plaintiff all monies together with accrued interest which the first defendant has retained in terms of an agreement for sale and purchase between the first defendant and the plaintiff.

Background

[2] The plaintiff was placed into liquidation by order of the High Court on 14 February 2006. Over the period 5 October 2005 to 30 June 2006 the plaintiff was also in receivership. Mr J R Palairet and Mr David Pearson were receivers.

[3] On 27 February 2006 the receivers entered into an agreement for sale and purchase of land owned by the plaintiff to Bruce William Jans or his nominee. The purchase price was $1,570,000. The agreement provided for settlement on 28 February 2006. Clause 18 and 19 of the agreement provided as follows:

> Clause 18
>
> In consideration of the purchaser entering into this agreement with the vendor, the vendor covenants with the purchaser that the vendor will prior to the settlement date or as otherwise mutually agreed;
>
> a) Create at the vendors expense all of the easements as shown in the schedule of proposed easements on plan DP361401 and a Right of Way in favour of Lot 1 DP350459 over the area marked A "ROW" on the plan attached, such easements to provide for the repairs, maintenance and any other contributions to be borne equally but to otherwise include provisions as usually included in well drawn easements. The easements are to be approved by the purchaser prior to the deposit of the easement plan.
>
> b) Ensure all easements on DP361401 proposed for the benefit of Lot 2 DP350479 will also be created for the benefit of Lot 3 DP341271.
>
> c) Ensure that the bird netting referred to in Appendix 10 if not available on settlement date, will as soon as practical thereafter but not later than 30 April 2006 be returned to the purchaser in a good,

sound and tidy condition to ensure that it is suitable for the purpose for which it is used.

d) Ensure (notwithstanding the provisions of general term 5.1), that the boundary of Lot 2 is pegged at the settlement date as shown on the plan annexed hereto and outlined in orange.

Clause 19

The vendor acknowledges that the purchaser shall be entitled to retain the sums of $100,000 and $10,000 ("amount retained on settlement") until such time as the vendor has satisfied the purchaser that the vendor has fulfilled its obligations in terms of clauses 18 a & b & 18c, and d respectively and if not fulfilled by 30 September 2006 the purchaser shall be entitled to deduct from the amount retained on settlement an amount equivalent to the cost incurred by the purchaser in completing these matters.

[4] Mr Jans nominated Hawkes Bay Nominees Ltd as purchaser. Settlement took place on 11 April 2006, the parties having agreed to extend settlement to that date. As authorised by clause 19 of the agreement for sale and purchase the first defendants on settlement retained $110,000 pending the satisfaction of the plaintiff's obligation to create the easements referred to in clause 18 of the agreement. With the plaintiff's consent, $2051.89 has been deducted from those funds to pay for the costs of a survey to satisfy clause 18(d) of the agreement.

[5] Prior to its liquidation, Linden Estate Limited subdivided its property at Eskview. The first defendant purchased Lot 2 DP350479 and Lot 3 DP341271, which are part of that subdivision. The plaintiff sold Lots 3 and 4 of the subdivision to Graeme and Christine Hurring, Lots 5 and 6 of the subdivision to BRW Limited and Kay Properties Limited and Lot 9 of the subdivision to Steven Harrington. The easements referred to in clause 18(a) of the agreement for sale and purchase should have been registered at the time Linden Estate Limited completed its subdivision.

[6] In December 2005, the plaintiff's solicitor, Mr A G Barclay of Messrs Sainsbury Logan & Williams, prepared an easement instrument for the purpose of creating the easements referred to in clause 18(a) being easements relating to electricity, water and telephone. In May 2006, Mr Barclay circulated the relevant documentation for execution to the other property owners in the Eskview subdivision affected by the creation of the easements. The first defendant was also invited to execute those documents. At that time all those involved, other than the first

defendants, executed the documents creating the easement. The first defendant had to execute the easement document because the first defendants and Messrs O'Brien and Pearson had acquired an adjoining property affected by the easements.

[7] In a letter dated 30 June 2006 the solicitors for the first defendants, in explaining the reason for refusing to execute the easement documents, state:

> There are two main issues that need to be addressed so far as our client, Bruce Jans is concerned. These are:
>
> 1. The documents creating the electricity and the telecommunication easements are in order except they need to provide that if our client wishes to relocate those easements, he can do so, at his cost.
>
> 2. The easements creating the right to convey water will require further agreement between the parties.
>
> In particular,
>
> - Each connection at each property will need to be metered.
>
> - Agreement needs to be reached as to what upgrading is necessary, including any repositioning to ensure there is a functional water supply. Any costs incurred to achieve this will need to also be discussed.
>
> - There will need to be a general understanding as to the ongoing operation costs.
>
> 3. Another matter raised by Mr Jans relates to the possibility that a water treatment system may be put in place. This could be a Council requirement in the future and it would be appropriate for the matter to be discussed at the same time that the other matters are being resolved.

[8] On 12 July 2006 the plaintiff's solicitor in his letter in reply states:

> 1. We respond to the points raised in your letter dated 30 June 2006.
>
> 2. In a multi party easement arrangement it would be unusual to include a clause in the documentation allowing your client to relocate the easement at his option notwithstanding the fact that he will pay the costs of doing so. We expect that the other parties involved will strongly object to including such a provision in the easement documentation.

3. In respect of the water issue, your client was aware that the system did not include meters when your client purchased the property. It appears to us that your client is now trying to improve his position in respect of the water system when he is not entitled to do so. The easement documentation provided to you, as it relates to water, is perfectly adequate and meets the stipulations set out in clauses 18a and 18b in the agreement.

4. As above, the inclusion of a water treatment system is a matter that your client should have considered before submitting his offer.

5. The Harringtons have already executed the easement instrument and we expect that the other parties (Hurring, Kay/Wilson and O'Bryan/Pearson) will return the executed documents to us shortly. When we provide you with confirmation that those parties have executed the easement instrument we will look to demand from your client that he executes the same documentation immediately.

[9] On 28 September 2006, the plaintiff's solicitor wrote to the defendants' solicitor enclosing the easement instrument which had been signed by all parties other than the first defendants. In that letter the plaintiff's solicitors requested that the document be executed by the defendants. On 4 October 2006 the defendants' solicitor replied as follows:

> We referred your letter 28 September 2006 to Mr Jans who commented that it is premature to finalise the form of the easement at this stage. Mr Jans is in the course of substantially changing the water easement with the agreement of the neighbours. Once that has been finalised we can finalise the form of the easement.
>
> Mr Jans also commented that when he entered into the agreement to purchase the property he was aware of the complexity of the position vis a vis the easements and for that reason provided that the easements had to be sorted out to his satisfaction.
>
> We are told by our client that the easements in their present form are "a mess" to such an extent that one neighbour has no idea as to where their sewage is discharged.
>
> Mr Jans is working on the matter and will get back to us when in a position to do so.

[10] The second defendant is a company in which Mr Jans, one of the first defendants, is the sole director and shareholder either through a trust or in his own name. The second defendant, whilst the negotiations relating to settling the easement

documents were in progress, acquired property adjoining the plaintiff's land that had been sold by the plaintiff to Mr and Mrs Harrington in September 2004. The memorandum of transfer transferring the property to the second defendant is dated 28 February 2007. The plaintiff considered there to be little point in referring the easement documents to the second defendants in circumstances where the first defendants were not prepared to execute the documents.

[11] There followed correspondence in which the plaintiff sought the first defendants' execution of the easement documents. The first defendants' solicitors advised that the first defendants would not execute these documents. In a letter of 17 October 2007, the solicitors for the first defendants gave the following explanation for the delay in the execution of the easement documents.

> You are aware of the background in this matter. The delays are not our clients making and notwithstanding your advice that sometime ago that the easements had been signed by the remaining parties we are told there are still issues with those parties and these are matters that will need to be sorted out before the final form of the executed document is agreed on. These issues include additional easement requirements by the neighbours (i.e. O'Briens has asked for access over Jans property and also does not include existing water easement).
>
> The main matter that is outstanding relates to the electricity and water. While Mr Jans was with us we ascertained from Adrian Mannering (Irrigations Services) that he will start work on the property next week. He acknowledged to the writer that he had been requested on numerous occasions to carry out the work but other commitments did not permit him to do so. He has assured us that he will give the matter priority and should be able to complete the work within a two week time span. That being so Mr Jans is to engage Surveying the Bay (Andrew Taylor) to immediately commence his work. Once that is the case then maybe a meeting needs to be arranged between the affected owners.

[12] The defendants claimed that there were problems with the right-of-way, electricity and telecommunications easements as proposed by Mr Barclay. Mr Andrew Taylor, the surveyor instructed by the first defendants, in his report of 19 March 2008, confirms the electricity and telecommunications easements as drawn accurately reflect the layout of those services and, accordingly, the definition of Deposited Plan 361401 can be utilised for the purpose of creating those easements. He also confirms there to be no problems with regard to the creation of the right-of-way in accordance with the documents prepared by Mr Barclay.

[13] The defendants contend that the water easements, as drafted by Mr Barclay, are not acceptable and consequently refused to execute the documents creating such easements or to release the funds held pending completion of the easements pursuant to clause 19 of the agreement for sale and purchase.

Case for the Plaintiff

[14] The plaintiff maintains that it prepared the appropriate easement instruments in terms of clause 18(a) of the agreement for sale and purchase, that all parties other than the first defendants who were required to execute the easement instrument did so and that the first defendants are in breach of the agreement by refusing to execute the easement instrument.

[15] The claim against the second defendant is based upon an estoppel. The circumstances creating the estoppel arise out of the purchase by the second defendant of the property adjoining the plaintiff's property, which the plaintiff had sold to Mr and Mrs Harrington. Mr and Mrs Harrington had executed the easement instrument. It is pleaded that when the parties executed the agreement containing clause 18 they proceeded on an underlying assumption that in the event of the first defendants or any party associated with the first defendants acquiring any land that was to be subject to the easements to be created by the easement instrument, that the first defendant or such party acquiring such land would execute the easement instrument upon the plaintiff satisfying its obligations under clauses 18(a) to (d) of the agreement.

[16] The plaintiff maintains the water easement, as drafted by Mr Barclay, shows the physical presence of those easements as depicted on DP 361401. The defendants contend that the location of the easements on the ground differ from the location as shown on DP 361401 and that the Deposited Plan must be changed to reflect the actual existing position of the easements. The plaintiff submits that to comply with clause 18(a) of the agreement, the easements must be drawn up to reflect the position of the easements as shown on the Deposited Plan. The plaintiff also relies on the evidence of Mr Richard Ian Cross, a solicitor of Napier, who is of the opinion the

easements prepared by Mr Barclay are well drawn and satisfy the requirements of clause 18(a) of the agreement for sale and purchase.

[17] Mr Cross is a partner in the Napier law firm of Willis Toomey Robinson. His practice is exclusively property law, specialising in subdivisions, easements and a wide rage of local government and utility property work. Since he was admitted to the Bar in 1978, Mr Cross has practised in the property law departments of various government departments, including Lands and Survey, Housing Corporation, Rural Bank and the Land Titles Office. He has been in private practice since 1994 and a partner since 1996. He claims to have particular expertise in the area of titles of documentation for subdivision, particularly easements. He was District Land Registrar for Hawkes Bay from 1982 until 1994 and during that time had, among other duties, responsibility for an intensive residential training course for future assistant land registrars. He was a member of the Land Information New Zealand Advisory Board until 2006 and worked closely with LINZ overseeing and advising on the development of land-on-line. He assisted the Registrar General of Land to develop what is now the Fourth Schedule to the Land Transfer Act. He says the development of the Fourth Schedule was, in the view of the Property Law Section Executive and the Land Titles Committee, essential. They collectively wished to widen the implied terms and conditions in easements and increase the number of standard easement purposes with a view to simplifying the drafting of easements as a concurrent project with the development of land-on-line. Their ultimate aim was to enable most routine easements to be capable of electronic registration and, as part of that project, to enable a simple one-page electronic form to be used to register easements with an extensive range of rights and powers sitting behind that form by way of the Land Transfer Regulations. He says the 2002 Regulations largely achieved that aim. Consequently, he is well qualified to comment on the easements drafted by Mr Barclay.

Case for defendant

[18] The case for the defendant is based on the evidence of Mr Bruce Jans, who negotiated the purchase of the property from the plaintiff on behalf of the defendants. It is claimed, based on that evidence, that there were certain representations made

relating to the easements which must be incorporated in to creation of the easements in accordance clause 18 of the agreement for sale and purchase.

[19] In particular, Mr Jans says he was concerned as to the terms of the water supply where his property would be the servient tenement. His evidence in this regard is as follows:

> I believe that the only fair way to operate a rural water supply is through the use of water meters to ensure that the cost is spread in accordance with use. I believe Mr Palairet understood that I believed we agreed to the incorporation of meters given his comment that such an approach was a good idea and needed.

[20] He claims that the provision in clause 18(a) relating to the need for the easements to be "approved by the purchaser prior to the deposit of the easement plan" provided an adequate safeguard to ensure that his concerns were addressed. He states in his affidavit:

> I felt that this sentence safeguarded the purchaser's position as I felt John Palairet acknowledged that the easements needed a considerable degree of work, particularly in terms of installing a suitable water supply and finding the physical location of supply, before the easements could be deposited.

[21] Mr Jans also claims that he should have the right to relocate the easements. He states that prior to entering into the agreement for sale and purchase Mr Palairet agreed that any easements created would need to contain a clause that the easements could be relocated on the property being purchased should the need arise.

[22] He also states that he understood the easements would reflect the position of the actual supply:

> It is my understanding that clause 18(a) of the agreement for sale and purchase required me to "create" the easements on the ground. I believe that John Palairet understood this and therefore agreed to a substantial retention of funds. I do not accept the plaintiff's position that all that was required was essentially the completion of the paperwork.

[23] Further, Mr Jans is concerned that the easements as drawn by Mr Barclay provide for water to be supplied from bore number 5044, located on the northern perimeter of Lot 3 of the property purchased by the first defendants. He claims that this bore and pump conveys water of an inferior quality, which is not suitable for

residential or domestic use. He claims that the subdivided land uses water from bore number 410, which is contained, he incorrectly believed, on Lot 4 and was suitable for residential and domestic use. He claims that the bore appears to be derived from the Esk River which is a higher grade water quality, inappropriate for domestic use.

[24] Based on that evidence, it is submitted on behalf of the defendant that the easements as drawn do not comply with clause 18(a) of the agreement for sale and purchase because they do not reflect the physical position of the easements on the land. Furthermore, it is submitted that compliance with clause 18(a), which requires that the repairs, maintenance and any other contributions be borne equally, can only be practicably be achieved, in respect of water usage, by the use of meters.

[25] It is also submitted that the defendants, and possibly the plaintiffs, were acting under a mistake when they entered into the contract. That mistake arises out of a belief that the easements for water, as shown on DP 361401, reflected the physical presence of the easements on the property. Clearly this was not the case. The first defendants, it is argued, were influenced by this mistake when they entered into the contract. The mistake included a belief that the first defendants were entitled to access water from bore 410, in accordance with the easements to be created by clause 18(a) of the agreement for sale and purchase. It is submitted that the inability to access water from that bore, together with the requirement to relay a considerable part of the whole water scheme to comply with easements drawn in accordance with those shown on DP 361401, creates a substantial unequal exchange in value which would justify the defendants in obtaining relief under the Contractual Mistakes Act 1977.

[26] It is further submitted that to meet the intentions of the parties when they entered into the agreement for sale and purchase, the contract needs to be rectified so as to accurately provide for the water easements as physically shown on the ground, rather than reflecting the easements as shown in DP 361401.

Decision

[27] Where, as in this case, a transaction has been recorded in writing by agreement of the parties, extraneous evidence is generally inadmissible to contradict, vary, add to or subtract from the terms of the contract: see *Edwards v O'Connor* [1991] 2 NZLR 542 at 548. The wording of clause 18(a) is precise and unambiguous. In terms of that clause, the plaintiff was required to create the easements on plan DP 361401, together with a right-of-way as shown on an attached plan. Deposited Plan 361401 displays the exact positions on the ground of the easements to be created in terms of clause 18(a). The defendants do not suggest that the easements, as drawn by Mr Barclay, fail to accord with the position as shown on plan DP 361401.

[28] There is no provision in clause 18 requiring that the easements include a provision enabling the first defendants to relocate the easements, nor is there any provision requiring that water meters be installed to assist in assessing the contributions to any repairs and maintenance. Clause 18(a) provides for repairs and maintenance to be borne equally. Consequently, the contribution will be assessed by dividing the total cost of repairs and maintenance by the number of properties using the water supply to calculate an equal contribution. Such calculation does not depend on a water meter. Water meters would be required if the contribution to repairs were to be assessed on usage.

[29] The defendant did not adduce any evidence to contradict the evidence of Mr Cross that the easements as drawn are in accordance with clause 18(a) of the agreement and are "well drawn". The first defendants do not require easements to use water from either bore 5044 or bore 401 as both are situated on the property they purchased. At one time the parties believed bore 401 was situated on an adjoining property. However, Mr Andrew Taylor, the first defendant's surveyor, now confirms that bore 410 is situated on the first defendant's property. In para 9 of his affidavit, sworn on 26 May 2008, Mr Taylor states:

> The letter begins with and builds on the incorrect assumption that well 410 is located on Hurrings land, Lot 4 DP 350479 (refer paragraphs 1, 8, 9 and 16 of Mr Cross's letter). However, bore 410 is located on the Defendant's

> property, Lot 2 DP 350479 (refer to paragraph 10 of my first affidavit). At paragraph 16 of the letter Mr Cross says that I have identified bore 410 as being *"3.95 meters from area U within Lot 4"*. That is not what my affidavit states at paragraph 10 (which Mr Cross also discusses in his paragraph 10), and the water right diagram appears correct.

[30] Consequently, the first defendant cannot make out any basis for relief under the Contractual Remedies Act 1977 arising from any failure to provide an easement for the first defendants to use water from bore 410.

[31] The evidence of Mr Jans as to verbal representations, which are relied upon to base a claim for rectification of the agreement for sale and purchase, is very imprecise. Statements such as "believing Mr Palairet understood that I believed we agreed to the incorporation of meters given his comments that such an approach was a good idea and needed" cannot establish a representation by Mr Palairet that the easement would include provision for the installation of meters.

[32] In his affidavit sworn on 27 May 2008 in reply to Mr Palairet's evidence, Mr Jans states at para 24:

> While Mr Palairet cannot recall discussions over a "proper rural water supply", I can accept that we may have been talking past each other. I cannot recall belabouring the point of water supply with Mr Palairet, probably as it is such an obvious factor in rural subdivisions. However, I have no doubt that Mr Palairet was fully aware that the water supply was my primary reasons for needed to withhold monies and that substantial work was likely to be required to create the easements.

[33] That evidence supports a conclusion that there were no verbal pre-contractual representations by Mr Palairet concerning the location of the easements to be created in terms of clause 18(a), or the conditions to be contained in such documents. Consequently, the first defendants have failed to establish any legal basis for their refusal to approve the deposit of the easement plan. In particular, the first defendants cannot justify refusing to approve easements drawn up in accordance with the proposed easements as shown on plan DP 361401.

[34] I doubt whether the second defendants' refusal to complete the easements would justify the Court in declining the plaintiff's claim for the first defendants to perform their obligations under the agreement. The property purchased by the

second defendant is Lot 9 DP 350479. The easements to be created in terms of clause 18(a) being easements referred to on DP 361401, do not require the registered proprietor of Lot 9 to grant an easement. The easements to be created under clause 18(a) require the registered proprietors of the land being sold to grant an easement for water, electric power and telephone communications in favour of the registered proprietors of Lot 9. Consequently, if the second defendant does not wish to have the benefit of the easements to be created in terms of clause 18(a) of the agreement for sale and purchase, that would be for the benefit of the first defendants as there would be a reduction in the number of registered proprietors entitled to draw water from the first defendant's bore and a reduction in the number of registered proprietors entitled to have their power and telecommunication services through the first defendant's property.

[35] When Mr Barclay circulated the easement certificate creating the easements referred to in clause 18(a) of the agreement for sale and purchase in May 2006, all registered proprietors involved, other than the registered proprietors of Lots 5 and 6 DP 350479 who were BRW Limited and Kay Properties Limited, executed the certificate. BRW Limited and Kay Properties Limited required a minor change to the electricity easement which did not detrimentally affect any of the other landowners in the development. On the plaintiff agreeing to the amendment, BRW Limited and Kay Properties Limited executed the easement certificate. That amendment has been approved by all parties to the easement certificate other than Mr and Mrs Harrington.

[36] By the time the plaintiff had agreed to the amendment requested by BRW Limited and Kay Properties Limited, Mr and Mrs Harrington had sold their property, being Lot 9 DP 350479, to Seafield Farms (HB) Limited, the second defendant. Mr Jans is the sole director and shareholder, either personally or as trustee, of the second defendant. The second defendant refuses to execute the amended easement certificate.

[37] In September 2006 Mr Barclay wrote to the first defendants' solicitors enclosing the easement certificate executed by all parties including Mr and Mrs Harrington. That certificate provides for the plaintiff to grant to Mr and

Mrs Harrington, as registered proprietors of Lot 9 DP 350479, rights to water, to convey electricity and to convey telecommunications, more particularly set forth in the easement certificate, over and through the plaintiff's property. The terms and conditions of the grant are provided by reference to the Land Transfer Regulations and the 9th Schedule of the Property Law Act 1952.

[38] On the execution of the easement certificate by Mr and Mrs Harrington, there was an agreement in writing made by the parties to create the easements in terms of that certificate. Furthermore, such agreement was for valuable consideration in that the plaintiff was agreeing to Mr and Mrs Harrington's is entitlement to the easements over the plaintiff's property in respect of water, telecommunications and electricity. Such agreement was clearly in writing, satisfying the provisions set forth in the Contracts Enforcement Act 1956 and s 24 Property Law Act 2007. Such agreement to create an easement is an equitable easement in respect of the land. In *New Zealand Land Law*, Bennion Brown Thomas and Toomey (2005), the learned authors at para 10.5.02 at page 790 summarised the law with regard to equitable easements as follows:

> An equitable easement in respect of land under the Land Transfer Act 1952 is created by an agreement to grant an easement under the principle in *Walsh v Lonsdale*. It may, and indeed should in most cases, then be converted into a legal easement.
>
> The agreement must:
>
> (a) Be for valuable consideration; and
>
> (b) Satisfy the requirement of writing under the Contracts Enforcement Act 1956, or be evidenced by a sufficient act of part performance.
>
> An equitable easement over Land Transfer land may be defeated by the interest of a person who, without fraud, purchases the servient tenement and registers the instrument. However, the dominant owner may protect an equitable easement by lodging a caveat.

[39] As stated by the learned authors of *New Zealand Land Law* and pursuant to s 182 Land Transfer Act 1952, except in the case of fraud, the second defendant acquires the property exclusive of any easements created by the easement certificate as the easement certificate had not been registered. Fraud, for the purpose of s 182, has been defined in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1923] NZLR 1137 by Salmon J as follows:

> The term 'fraud' is not here used in its most restricted sense as including merely deceit, nor in its widest sense as including the constructive or equitable fraud of the Court of Chancery. It means dishonesty – a wilful and conscious disregard and violation of the right of other persons. In the words of the Privy Council in *Assets Co Ltd v Mere Roihi*, 'By fraud in these Acts is meant actual fraud – ie, dishonesty of some sort'. And although the Act provides that the knowledge of the existence of a trust or unregistered interest shall not of itself be imputed as fraud, it is well settled that knowledge of a breach of trust or the wrongful disregard and destruction of some adverse unregistered interest does itself amount to fraud. In *Locher v Howlett* it is said by Richmond J: 'It may be considered as the settled construction of this enactment that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking.'

That definition has been cited with approval by the Court of Appeal in *Sutton v O'Kane* [1973] 2 NZLR, 204 at 321.

[40] In the present case there is uncontradicted evidence that the second defendant, when acquiring the property from Mr and Mrs Harrington, was aware that Mr and Mrs Harrington had agreed to the easements referred to in the easement certificate and was fully aware of the reasons why the easement certificate had not been registered. Furthermore, the second defendant was aware that when registering the transfer of the property without reference to the easements, the plaintiff's claim to the easement was being defeated. I have already concluded that there is no legal justification for the first defendants' failure to approve the easement certificate. Consequently, the second defendant, through its director, was aware that in proceeding to register the memorandum of transfer, it was unlawfully depriving the plaintiff of the benefit of the easements in the easement certificate.

[41] Consequently, in the circumstances I have outlined above, the second defendant is bound by the terms of the easement and the plaintiff is entitled to require the second defendant to proceed with the registration of the easement instrument.

[42] For the reasons I have set forth above, I am satisfied that both defendants have no defence to the plaintiff's claim. The plaintiff is therefore entitled to

judgment in terms of the statement of claim. There will therefore be judgment against the first defendants in the following terms:

(i) That within 3 working days of the making of such Order (time being of the essence):

(a) The first defendants specifically perform the Agreement (for sale and purchase dated 27 February 2006) by the first defendants duly executing the Easement Instrument prepared by Mr A G Barclay, solicitor for the defendants on 28 September 2006 and forwarded to the plaintiff by its solicitors, Sainsbury Logan & Williams of Napier; and

(b) At the same time as the executed Easement Instrument is returned to Sainsbury Logan & Williams the first defendants shall make payment to the plaintiff by its solicitors Sainsbury Logan & Williams of Napier of all monies plus accrued interest presently retained by the first defendants' solicitors pursuant to further term clause 19 of the Agreement, such monies to be for a sum not less than $107,948.11 plus accrued interest.

(ii) That in the event the first defendants do not strictly comply in every respect with such order at (i)(a), pursuant to s 150 Land Transfer Act 1952 the Registrar (as defined by the Land Transfer Act 1952) is directed to execute the Easement Instrument referred to in paragraph (i)(a) above in the place of the first defendants and shall return the original executed Easement Instrument to the plaintiff by its solicitor Sainsbury Logan & Williams of Napier. In that event:

(a) Within 24 hours of their receipt by facsimile of a signed copy of the Easement Instrument referred to in paragraph (i)(a) above, the first defendants' solicitors

shall make payment to the plaintiff by its solicitors of all monies plus accrued interest presently retained by the first defendants' solicitors pursuant to further term clause 19 of the Agreement, such monies to be for a sum not less than $107,948.11 plus accrued interest.

(b) All reasonable costs (including legal) incurred by the Registrar in complying with such direction shall be payable directly by the first defendants' solicitors' upon receipt of the related invoice.

(c) All reasonable costs (including legal) incurred by the plaintiff in carrying out such order at (i)(a) shall be payable by the first defendants to the plaintiff by its solicitors within 7 days of the first defendants' solicitors' receipt of the related invoice.

[43] The plaintiff is also entitled to judgment against the second defendant in the following terms:

a) That within 3 working days of the making of such Order (time being of the essence) the second defendant specifically perform the agreement to create the easements referred to in paragraph 38 of this judgment by the second defendant duly executing the Easement Instrument referred to in para (i)(a) above and returning it to the plaintiff by its solicitors, Sainsbury Logan & Williams of Napier.

b) That in the event the second defendant does not strictly comply in every respect with such order at (i)(a):

i) Pursuant to section 150 Land Transfer Act 1952 the Registrar (as defined by the Land Transfer Act 1952) is directed to execute the said Easement Instrument in the place of the second defendant and shall return the original executed

Easement Instrument to the plaintiff by its solicitors Sainsbury Logan & Williams of Napier.

a) All reasonable costs (including legal) incurred by the Registrar in complying with such direction shall be payable directly by the second defendant to the Registrar within 7 days of the second defendant's receipt of the related invoice.

b) All reasonable costs (including legal) incurred by the plaintiff in connection with the second defendant's failure to comply with such order at (i)(a) shall be payable by the second defendant to the plaintiff by its solicitors within 7 days of the second defendant's receipt of the related invoice.

[44] The plaintiff seeks costs on an indemnity basis. At this stage I would be prepared to order the defendants to pay the plaintiff's costs on a 2B basis. If the plaintiff wishes to pursue costs on an indemnity basis, then the plaintiff shall, within 14 days of the date of delivery of this judgment, submit a memorandum giving full particulars of the costs it seeks and the submissions in support of such costs. The defendants will have 14 days to file any memoranda in reply. The plaintiff will have a further 14 days to file any memoranda in answer, and the file should then be referred to me for consideration.

[45] Should the plaintiff choose not to file a memorandum within 14 days, then there will be orders that the defendants pay the plaintiff's costs assessed on a 2B basis with disbursements as fixed by the Registrar.

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Associate Judge Robinson