IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA666/2022
[2025] NZCA 31

BETWEEN	WIMAX NEW ZEALAND LIMITED Appellant
AND	MICHAEL AND JULIA FUGE, BRYCE MARLOWE TOWN, CHLOE ANN FUGE AND JULIA ELIZABETH FUGE AS TRUSTEES OF THE ABERDEEN FOUR TRUST Respondents

CA667/2022

BETWEEN	MICHAEL AND JULIA FUGE, BRYCE MARLOWE TOWN, CHLOE ANN FUGE AND JULIA ELIZABETH FUGE AS TRUSTEES OF THE ABERDEEN FOUR TRUST Appellants
AND	WIMAX NEW ZEALAND LIMITED Respondent

Hearing:	8 February 2024
Court:	French, Mallon and Ellis JJ
Counsel:	J E Hodder KC, K M Quinn and C B Pearce for Appellant in CA666/2022 and Respondent in CA667/2022 A S Ross KC and P W G Ahern for Respondents in CA666/2022 and Appellants in CA667/2022
Judgment:	26 February 2025 at 3 pm

JUDGMENT OF THE COURT

A **The appeal in CA666/2022 against the liability decision of the High Court is allowed and the arbitral award dated 11 November 2020 is reinstated. We answer the question of law as follows:**

> **Did the High Court err in holding there was an actionable interference with a vehicular right of way easement in circumstances where the encroaching structures did not substantially interfere with the grantee's current use of the right of way and what was relied on was the effect the structures might have on possible future plans to develop the benefited property?**
>
> **Yes.**

B **The appeal in CA667/2022 against the remedy decision of the High Court is dismissed. We answer the question of law as follows:**

> **Was the High Court wrong to remit the question of remedy back to the arbitrator?**
>
> **No.**

C **The trustees of the Aberdeen Four Trust must pay Wimax New Zealand Ltd costs in respect of both the appeal in CA666/2022 and the appeal in CA667/2022. In both appeals, the costs are to be calculated on the basis of a standard appeal on a band A basis together with usual disbursements. We certify for two counsel in the case of each appeal.**

D **Costs in the High Court are to be fixed by that Court in light of this judgment.**

REASONS OF THE COURT

(Given by French J)

Table of contents

Introduction

[1] The parties to these appeals are neighbours. They share a common accessway governed by a registered vehicular right of way easement. There is a sealed driveway. The dispute concerns structures erected by Wimax New Zealand Ltd (Wimax) that encroach on land subject to the easement, but which do not obstruct the driveway or impede movement up and down it.

[2] The trustees of a family trust called the Aberdeen Four Trust (the trustees) want the structures removed. They brought an action in nuisance against Wimax for wrongful interference with the easement.

[3] The dispute between Wimax and the trustees was arbitrated, as required by the terms of the easement.[1] The arbitrator found in favour of Wimax and dismissed the trustees' claim.[2] The trustees then successfully appealed to the High Court. Moore J held that the arbitrator had erred in law.[3] The Judge upheld the trustees' claim of wrongful interference but made an order remitting the question of remedy back to the arbitrator for determination.[4]

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1 Under an implied term derived from Land Transfer Regulations 2002, sch 4 cl 14.

2 In an award dated 11 November 2020.

3 *Fuge (as trustees of the Aberdeen Four Trust) v Wimax New Zealand Ltd* [2022] NZHC 1121, (2022) 24 NZCPR 556 [judgment under appeal] at [68]–[69] and [76]–[78].

4 At [90]–[92].

[4] Both parties were dissatisfied with that outcome and were granted leave to appeal to this Court.[5]

Legal terminology

[5] Before turning to discuss the background to this case, we consider it useful to provide the following brief explanation of some of the relevant legal terms.

[6] For present purposes, an easement can usefully be described as the right to use the land of another person in a specified way without any right of occupation or ownership of the land.[6] Under a vehicular right of way easement, what the person who is granted the right (the grantee) acquires is the right to pass over the other person's land (the land of the grantor) in order to access their own land.[7] The grantee is also referred to as the "benefited owner" and their property the "benefited land". Previously, the benefited property was called the "dominant tenement".

[7] The parcel of land which is subject to the easement in favour of the benefited land is referred to as the "burdened land".[8] Previously it was also called the "servient tenement".[9] The owner of the burdened land is known as the "burdened landowner". They may also be referred to as "the grantor", being the person who has granted the easement right.

[8] At all times, the grantor retains the right to use their land in a manner not inconsistent with the grantee's exercise of their rights under the easement.[10] For their part, the grantee/benefited owner must exercise the right of easement reasonably,

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5 *Fuge v Wimax New Zealand Ltd* [2022] NZHC 2922 [leave judgment].

6 D W McMorland *McMorland on Easements, Covenants and Licences* (5th ed, LexisNexis, Wellington, 2023) at [16.002].

7 At [16.042].

8 At [16.002].

9 It remains common to refer to "servient" and "dominant" tenements but it is preferable to use the terminology of "burdened" and "benefited" lands because those are the terms used in the Property Law Act 2007 and Land Transfer Regulations 2018. See *Synlait Milk Ltd v New Zealand Industrial Park Ltd* [2020] NZSC 157, [2020] 1 NZLR 657 at [12], n 10.

10 *Breslin v Lyons* [2013] NZCA 161, (2013) 14 NZCPR 144 at [30]; *SPAK (1996) Ltd v LeRoy* [2022] NZCA 564, (2022) 23 NZCPR 769 at [114]–[116]; *Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 at [45] per Lord Scott; and *Zenere v Leate* (1980) 1 BPR 9300 (NSWSC) at 9304.

including the exercise of any ancillary rights, and without undue interference with the grantor's enjoyment of what is after all their own land.[11]

[9] For the purposes of the dispute in this proceeding, the "grantor" is Wimax and its property is the burdened land. The "grantee" is the trustees and their property the benefited land.

Background

[10] The formed driveway in question runs some 145 metres from a public road called Riddell Road down towards a small beach. It is used by the parties and the occupants of several other residential properties that would otherwise be landlocked.

[11] A layout of the properties shown in the easement plan and an aerial photo with street numbers is attached as Appendices A and B respectively. The property belonging to Wimax is 519 Riddell Road and that belonging to the trustees is 515 Riddell Road.

[12] The driveway has existed along the same route since at least 1940. The width of the sealed driveway varies between 3.1 and 4.5 metres. As mentioned, the driveway does not occupy all of the area that is subject to the easement. The width of the easement area is approximately 6.2 metres.

[13] On either side of the driveway, along its length, there are several retaining walls, slopes, banks and similar formations both natural and man-made within the easement corridor.

[14] Rights of way were originally provided for via an easement registered in 1964. In May 2017, discussions between the neighbours resulted in the surrender of the 1964 easement and its replacement by the current vehicular right of way easement. Separate easements were registered for pedestrian rights of way and services. The route and stipulated area for the right of way did not change. The width also remained the same.

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[11] This principle has sometimes been referred to as the "civiliter principle".

[15] Both Wimax and the trustees acquired their properties prior to 2017. Wimax did so in 2007 and the trustees in 2013.

[16] The terms of the 2017 easement are expressed to include terms derived from sch 4 of the Land Transfer Regulations 2002 (the 2002 LT schedule) and sch 5 of the Property Law Act 2007 (the PLA schedule). When not needing to distinguish between the two schedules, we refer to the relevant provisions as the Schedule terms.

[17] The Schedule terms contain certain rights and powers that are implied into the grant of every vehicular right of way unless the parties agree to vary or exclude them. The 2017 easement does contain terms varying the provisions of the Schedule terms but the variations are limited and are not relevant to the issues in dispute.

[18] The key covenants contained in the 2017 easement derived from the Schedule terms are the right to pass and repass over the land subject to the easement, the right to establish and maintain a driveway and the right to have the area of the easement kept clear of obstructions to the use and enjoyment of the driveway. We discuss the content of the relevant implied terms in more detail later in the judgment.

[19] Between 2014 and 2016, Wimax carried out some alterations to its property. The alterations included the erection of structures adjacent to the formed driveway. The structures at issue were erected on Wimax's own land but in areas subject to the right of way easement. They included retaining walls, a retaining planter wall, a concrete parking area, two stone walls, a number of drains, various plantings, concrete and asphalt.

[20] The structures replaced historic structures in the same location. It was acknowledged at the hearing before us that the structures improve the appearance of the driveway and that with one exception, the structures do not further encroach than what was there previously. They are however considered bigger and more permanent.

[21] The trustees saw the works in progress but in evidence said it never occurred to them that the structures were encroaching.

[22] However, work undertaken in 2018 by another neighbour prompted the trustees to investigate the positioning of the easement and the formed driveway.

[23] The discovery that the structures encroached on the easement area prompted the trustees to demand Wimax remove the structures. The trustees contended that the structures constituted an infringement of the easement. Wimax refused on the grounds that the structures did not impede movement and that given the cost of removing the structures (said to be in excess of $1 million) the request was unreasonable. Wimax claimed that the trustees could access their property just as well as they and their predecessors in title had always done for over 60 years.

The arbitration

[24] The arbitrator's mandate was to determine whether there was an actionable infringement and if so what (if any) remedy should be granted.

[25] The notice of claim filed by the trustees for the purposes of the arbitration sought an order under s 313 of the Property Law Act requiring Wimax to remove the structures so as to make the entire width of the right of way available for a driveway.[12] The notice of claim pleaded that the structures prevented the trustees from being able to pass over all the easement facility and were thus interfering with the trustees' rights under the easement. More generally, it was also pleaded that Wimax's works represented obstructions to the use and enjoyment of the easement facility and an interference with or restriction of the trustees' rights under the easement.

[26] At the arbitration, it was common ground that a grantee's use and enjoyment of a right of way is not unlimited. Their use and enjoyment must be reasonable. In particular, the grantee has no right to go over every square inch of the burdened land, but only so much as is reasonable to access their own land.

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[12] Section 313 of the Property Law Act empowers the court to make orders enforcing easements. By virtue of s 12(1) of the Arbitration Act 1996, an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court. The arbitrator thus had jurisdiction to decide the application.

[27] It was also agreed that in law an encroaching or intruding structure is only actionable if it creates a substantial interference with the grantee's reasonable use of the right of way. The claim is a claim in nuisance.

[28] Whether an obstruction constitutes a substantial interference is a question of degree to be decided on the facts of each individual case.[13] As explained by Sim J in an oft-quoted passage from a 1920 decision cited by the parties:[14]

> Any wrongful interference with a right of way constitutes a nuisance … but it is not every obstruction of the way which amounts to an unlawful interference. There must be a substantial interference with the easement … and before the grantee can complain of an obstruction it must be clear that the obstruction is operating to the injury of the grantee.

[29] The parties further agreed that even where a substantial interference is found to exist, remedies are within the discretion of the judicial authority determining the dispute.

[30] In rejecting the trustees' nuisance claim, the arbitrator made the following findings:

(a) The structures did not obstruct the use of the existing driveway and had caused no substantial interference to the functionality of the driveway.

(b) Safety concerns raised by the trustees at the hearing were unfounded.

(c) No other form of unreasonable impediment to the use and enjoyment of the driveway existed.

(d) The possible loss of economic benefits was not a basis for relief under s 313 of the Property Law Act.

[31] This last finding arose from what, in the view of the arbitrator, appeared to be the trustees' "real concern": namely that the structures would prevent widening of the driveway in the future and thus thwart the possibility of subdividing and developing

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13 *First Gas Ltd v Gibbs* [2021] NZHC 3309 at [242].
14 *McKellar v Guthrie* [1920] NZLR 729 (SC) at 731.

their property. Expert evidence called by the trustees suggested the current driveway did not comply with the Auckland Unitary Plan and that it was likely any application for resource consent for a multi-unit development would be met with a condition requiring specified works to be undertaken to provide for likely increased traffic flows along the driveway.

[32] The arbitrator rejected this argument (which according to Wimax was only raised as an afterthought by the trustees) for two reasons. The first was that the purpose of the easement facility was to allow present owners or occupiers of the properties (or their purchasers) access to and from the public road. That purpose was not, the arbitrator said, undermined by the possibility that an owner might be denied the opportunity to gain economic benefits from development of its property. The possibility that such benefits might be denied was a consequence of the need to apply for discretionary consent to undertake such a project. It did not arise out of the erection of the structures.

[33] The second ground was that in any event it was premature to decide this issue. The arbitrator said he could not speculate as to what the requirements for driveways might be at the time any application of this type might be made in the future. In those circumstances assuming (without deciding) that the potential loss of economic benefits could be used as a basis for relief, he would not have exercised his discretion to grant relief.

The High Court decision

[34] The trustees were granted leave to appeal the arbitrator's decision on two questions of law:[15]

> (a) Question 1: Did the arbitrator err by interpreting the rights set out in the easement instrument and implied by the Land Transfer Regulations 2002 … and the Property Law Act 2007… to mean that, in circumstances where there is an existing formed driveway, structures that otherwise encroach within the full width of a right of way will only give rise to an actionable infringement if they were to obstruct a grantee's ability to use and enjoy that existing formed driveway?

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15 *Fuge v Wimax New Zealand Ltd* [2021] NZHC 2470 at [7] and [69].

(b) Question 2: Did the arbitrator err by failing to apply the relevant legal test, which is whether the obstructions or impediments Wimax placed or allowed to be placed on the [right of way] [e]asement were substantial, and therefore actionable?

[35] As regards the first question, the Judge held that the meaning attributed by the arbitrator to the rights in the easement was an "unduly narrow" interpretation and, as a result, the arbitrator had fallen into error.[16]

[36] In the Judge's view, the arbitrator wrongly conflated what were two separate concepts — the driveway, and the easement facility — and as a result reached a conclusion that was inconsistent with the express terms of the easement and the terms derived from the Schedules, as well as the case law.[17] There was, the Judge said, a "clear" body of law, including decisions of this Court, to the effect that a structure which is within the area of a right of way easement, but which does not interfere with a formed driveway, can constitute an actionable infringement.[18]

[37] The correct interpretation of the right conferred by the 2017 easement was to pass and re-pass over the entirety of the easement facility including but not limited to the driveway. If the easement facility is materially obstructed it is not possible to exercise that right.[19]

[38] Having answered question one in the affirmative, the Judge turned to address question two. For ease of reference, we set out question two again:

> Did the arbitrator err by failing to apply the relevant legal test, which is whether the obstruction or impediments Wimax placed or allowed to be placed on the right of way easement were substantial, and therefore actionable?

[39] The Judge also answered this second question in the affirmative. The arbitrator had, the Judge found, wrongly required there to be a nexus between the obstruction and the formed driveway.[20] In the Judge's view, the correct approach was that:

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16 Judgment under appeal, above n 3, at [37]–[48].
17 At [41]–[68].
18 At [49]–[60], citing *Harvey v Hurley* (2000) 9 NZCPR 427 (CA) [*Harvey* CA]; *Guo v Bourke* [2017] NZCA 609, (2017) 19 NZCPR 168; and *Breslin v Lyons*, above n 10.
19 Judgment under appeal, above n 3, at [39].
20 At [76].

> [77] The "substantial interference with the easement test" must … be assessed by reference to the entire area of the [right of way] [e]asement. It is undisputed that there are several permanent structures which encroach into the area of the [right of way] [e]asement. When viewed from this perspective, the conclusion that these structures substantially interfere with this easement is inescapable.

[40] Having concluded that the arbitrator had erred in law and that the structures were an actionable interference with the easement, the Judge then addressed the issue of whether he should remit the case back to the arbitrator to determine the appropriate remedy or determine it himself.

[41] In the Judge's assessment, the arbitrator was in a uniquely advantageous position to decide remedy having visited the site and having seen and heard the witnesses.[21] The factual situation was complex — the removal of any or some of the structures was not a foregone conclusion — and further evidence was likely.[22]

[42] The Judge accordingly made an order remitting the question of remedy to the arbitrator.[23]

[43] In a subsequent leave decision, the Judge granted both parties leave to appeal his decision on different questions of law: the trustees were granted leave to appeal the decision to remit the issue of remedy and Wimax leave to appeal the decision to answer the two questions in the affirmative.[24]

[44] In this Court, each of the notices of appeal that were then filed were allocated a separate file number. Wimax's appeal (the liability appeal) is CA666/2022. The appeal filed by the trustees (the remedy appeal) is CA667/2022. Both appeals were heard together.

[45] At the hearing before us, counsel for the trustees Mr Ross KC confirmed that the trustees are no longer seeking removal of all encroaching structures but only those erected by Wimax. Effectively that excludes the historic structures and those erected

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21 At [86].
22 At [87].
23 At [89] and [92].
24 Leave judgment, above n 5, at [8(a)–(b)], [19] and [24]–[25].

by other neighbours, which in turn means the trustees are no longer seeking full clearance of the entire width of the easement area.

Arguments on the liability appeal

Submissions on behalf of Wimax

[46] In contending that the High Court's answers to both questions were wrong, Mr Hodder KC argued in relation to the first question that the Judge had misunderstood the arbitrator's decision and in relation to the second question, that the Judge had wrongly applied the relevant test for liability.

[47] In support of that central submission, Mr Hodder contended that the arbitrator did not as a matter of law limit the trustees' rights to the formed driveway and never stated that where the obstruction was located on the easement area was, in itself, the critical factor. The arbitrator's statements that it would only be an actionable interference if there was an obstruction of the trustees' ability to use and enjoy the existing formed driveway were correct on the particular facts of the case. His reasoning was premised on the factual basis that the existing formed driveway provided reasonable access in the circumstances for the time being.

[48] Developing this point, Mr Hodder argued that the Judge's analysis was flawed because he took no account of the purpose of the easement. A substantial interference, Mr Hodder contended, is something which interferes with the purpose of the easement. The purpose of this easement was to provide access to get from one end to the other and the structures had not interfered with that in any way. The width of the driveway had not been materially narrowed by the structures, and no form of unreasonable impediment to the use and enjoyment of the easement existed.

[49] Mr Hodder further submitted that an associated error made by the Judge was to equate "substantial" with physical size for the purpose of the "substantial interference" test. The Judge wrongly reasoned that because the structures were big,

then by definition they constituted a substantial interference. But under the test what must be substantial is the interference, not the structures themselves.[25]

[50] Turning to the issue of the future economic benefits, Mr Hodder argued that there is a temporal dimension to the substantial interference test.

[51] A grantee can, Mr Hodder submitted, only object to activities which substantially interfere with the use or exercise of the right as for the time being. In this case, the trustees by their own admission have no current intention to develop their land in a way requiring more access than the formed driveway allows and in evidence accepted it could in effect be two or three generations away. And that, in Mr Hodder's submission, was fatal to their claim. He acknowledged that if at some future date the circumstances change and there is a different development on the benefited land, and what is on the burdened land is a substantive interference with the grantee's right to use the right of way, an action would likely lie. There might be a fresh nuisance that can be explored under the circumstances as they arise then. What the trustees were not entitled to was an indefinite sterilisation or clearing of the land.

Submissions on behalf of the trustees

[52] In oral submissions, Mr Ross framed the issue on appeal as being whether a benefited owner is able to defend the easement facility from encroachments that are inconsistent with the grant *in the circumstances of this case*.

[53] Mr Ross emphasised that the qualifier "in the circumstances of the case" was critical. By "the circumstances of this case", it became apparent he meant the potential impact of the encroachments on possible future development. According to Mr Ross, the effect of what Wimax was advocating would be the creation of "a rogue's charter" whereby an owner of the burdened land could create facts on the ground that would make it more difficult, more expensive and impossible to enjoy a right that has already been granted. Wimax, he argued, was essentially seeking a derogation from the grant

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[25] We note that, in the leave judgment, above 5, at [14]–[17] and [24], the High Court expressly declined to grant leave to appeal this particular point. However, there was no objection to Mr Hodder advancing the submission and, in any event, it can arguably be regarded as part of the High Court's answer to the second question and so subsumed within the question on which leave to appeal was granted.

and “an annexation by stealth of a property right belonging to the trust”, namely their existing property right to develop their land.

[54] In Mr Ross’s submission, it was “obvious” that the construction of substantial permanent structures on a material proportion of a right of way which impacts future lawful use of the easement by the benefited owner must be an actionable interference. He said Wimax’s position defied common sense, and was contrary to the case law and the terms of the easement derived from the Schedules. Wimax’s position was also internally inconsistent because, on the one hand, it recognised that a grantee has the right to widen or develop a driveway within the stipulated area as is reasonably required, while, on the other hand, it argued that because that right was not presently being exercised it could not be enforced or protected.

[55] As regards the reasoning in the High Court, Mr Ross contended that the arbitrator had limited the Trust’s rights to the existing formed driveway and the Judge was therefore correct to find error. Mr Ross disputed any suggestion that the Judge had suggested the encroachments were actionable per se. He said the Judge was well aware of the impediment these structures posed to the “necessary widening of the driveway”. Question two and the Judge’s response to it needed therefore to be seen in the context of Wimax erecting substantial structures that interfere with the ability to widen the driveway to enable development of the trust property.

[56] Mr Ross acknowledged the future plans were not a current proposal. Rather they were, he said “an idea” which the trustees “anticipate” they will likely one day implement.

Analysis

[57] There is much in the High Court judgment with which we agree.

[58] In particular, we agree — as indeed does Mr Hodder — that there exists an ancillary right potentially to expand, or develop a driveway within the easement area and that such a right could be invoked if widening or re-routing of the driveway is reasonably required. What we consider controversial is the implicit proposition in the judgment that the whole of the right of way must be kept clear in case the grantee

wishes to expand the driveway in the future, notwithstanding that an established and adequate driveway is in place and there is presently no need to widen it or alter its route.

[59] During the course of the hearing, it became apparent that the arguments of the parties were also coalescing around that contention. Thus, to some extent, arguments as to whether the arbitrator had or had not restricted the rights to the driveway or whether the Judge had reasoned it was sufficient in itself if the structures were physically large, became beside the point. Both parties accepted in each instance that if that had been the reasoning of the relevant decision maker (which was not accepted), it was wrong.

[60] There was instead a discernible shift of focus to the "future development" issue, an issue which was never specifically addressed in significant detail by the Judge,[26] and which appears to have been something of a fall-back position for the trustees at the arbitration. Certainly, it is not immediately obvious from their notice of claim and nor was it front and centre of their opening submissions in the arbitration as it is now in this appeal.

[61] In order to reflect the parties' change of focus, we have re-framed the question of law submitted for determination by wording it in the following terms:

> Did the High Court err in holding there was an actionable interference with a vehicular right of way easement in circumstances where the encroaching structures did not substantially interfere with the grantee's current use of the right of way and what was relied on was the effect the structures might have on possible future plans to develop the benefited property?

[62] Given the evolving nature of this case, we have also found it helpful to begin our analysis by returning to the common law and first principles. It was not disputed that both the PLA schedule and the 2002 LT schedule reflect the rights developed at common law.

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[26] In the judgment under appeal, above n 3, at [47], the Judge interpreted two clauses in the Schedules as conferring a right to widen or develop the driveway "in the event that it is required".

[63] The principle that the grantee of a right of way easement has no right to insist on the entirety of the burdened land being kept free of all structures, and that an intruding or encroaching structure is only actionable if it creates a substantial interference with the grantee's use and enjoyment of the right of way, is well established.

[64] The "substantial interference" test derives from the law of nuisance and has been said to reflect the nature of the benefited owner's right.[27] They do not "own" the right of way, nor the land on which the right of way runs, but only enjoy the reasonable use of that property for its granted purpose. The benefited owner may only sustain a claim predicated on substantial interference with that reasonable use. The distinction is thus between a right of ownership and the right of use for an identifiable purpose.[28]

[65] Early expressions of these principles can be found in the 1860 decision of *Hutton v Hamboro*,[29] the 1874 decision of *Clifford v Hoare*,[30] and the 1913 decision of *Pettey v Parsons*.[31] In these early cases, it was pointed out that a private right of way is not the same as a public road where any obstruction if appreciable is a wrong.[32] In the case of a right of way granted over a private road, however, the legal position was said to be that so long as there is reasonable access to the land and a reasonable opportunity of exercising the right of way there is not any obstruction to it and, therefore, no derogation from the grant.[33] Thus, in *Pettey* the erection of quite substantial structures such as fencing and gates on the burdened land was held not to be actionable.

[66] In *Hutton*, Cockburn CJ ruled that the essential question for determination was whether "practically and substantially the right of way can be exercised as conveniently as before".[34]

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27 *Weidelich v de Koning* 2014 ONCA 736, 122 OR (3d) 545 at [12].

28 At [12]; *Saggers v Brown* (1981) 2 BPR 9329 (NSWSC) at 9331; and *Clifford v Hoare* (1874) LR 9 CP 362 (Comm Pleas) at 370 per Lord Coleridge CJ, and 371 per Brett J.

29 *Hutton v Hamboro* (1860) 2 F & F 218, 175 ER 1031 (Assizes).

30 *Clifford v Hoare*, above n 28.

31 *Pettey v Parsons* [1914] 2 Ch 653 (CA).

32 At 662 per Lord Cozens-Hardy MR, 665 per Swinfen Eady LJ, and 667 per Pickford LJ; *Clifford v Hoare*, above n 28, at 370 per Lord Coleridge CJ; and *Hutton v Hamboro*, above n 29, at 219.

33 *Pettey v Parsons*, above n 31, at 667 per Swinfen Eady LJ and 667–668 per Pickford LJ.

34 *Hutton v Hamboro*, above n 29, at 219.

[67] The principles from these seminal authorities have been consistently applied in England and elsewhere in the common law world.[35] They also inform the interpretation of the Schedule terms.

[68] The more modern formulations of principle often include an express temporal dimension that in our view was clearly implicit in Cockburn CJ's ruling quoted above. Thus, in a 1962 decision of the English Court of Appeal, the claim of a benefited owner who asserted a right to clear and level the whole of the strip dedicated to the right of way failed because that was not necessary to his "present" requirements.[36] This case was said in a later Court of Appeal decision to exemplify the proposition that a right of way is not an absolute right to restrict the burdened owner's use of their land, at a time when there was no need to do so for the "current requirements" of the benefited owner.[37] The grantee of the right could only:[38]

> … object to such activities of the owner of the land, including retention of obstruction, as substantially interfered with the use of the land in such exercise of the defined right *as for the time being is reasonably required*.

[69] To the same effect is the 1999 decision of the English Court of Appeal in *West v Sharp*.[39] In that case it was held that as a matter of fact and degree on the evidence, there was no substantial interference with the plaintiff's right of way occasioned either by the permanent narrowing of the road or by the presence of concrete blocks and trees.[40] In coming to that conclusion, Mummery LJ, writing for the Court, and echoing the words of Cockburn CJ in *Hutton*, stated that:[41]

> There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction. Thus, the grant of a right of way in law in respect of every part of a defined area does not involve the proposition that the grantee can in fact object to anything done on any part of the area which would obstruct passage over that part. He can only object to such activities … as substantially

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35 That includes in Australia, in cases such as *Healy v Ellco Farm Supplies Pty Ltd* (1986) 3 BPR 9596 (NSWCA) and *Lowe v Kladis* [2018] NSWCA 130, (2018) 19 BPR 38,599, as well as in Canada, in cases including *Oakville (Town) v Sullivan* 2021 ONCA 1, 10 MPLR (6th) 163 and *Weidelich*, above n 27.

36 *Dyer v Mousley* EWCA, 30 July 1962 at 26.

37 *Keefe v Amor* [1965] 1 QB 334 (CA) at 347.

38 At 347 (emphasis added).

39 *West v Sharp* (1999) 79 P&CR 327 (CA).

40 At 333–334.

41 At 332.

> interfere with the exercise of the defined right as for the time being is reasonably required by him.

[70] As Mr Hodder pointed out to us, the principles from these cases are cited as authoritative by the leading New Zealand text on easements, *McMorland on Easements, Covenants and Licenses*.[42]

[71] As he also pointed out to us, the same common law principles have been adopted in Australian and Canadian decisions. As regards Australian decisions, the decision that Mr Hodder particularly relied on is a 1997 decision of the Supreme Court of New South Wales, *Finlayson v Campbell*.[43] The case concerned the erection of a garage, car park and brick wall all of which encroached on the right of way. The Judge held there was no substantial interference in fact but, significantly for present purposes, also held that this finding did not prevent the plaintiff from bringing an action at a later date if the structures erected by the defendant interfered with a future development.[44]

[72] In a 2014 Canadian decision, the Ontario Court of Appeal endorsed the English case law and confirmed that an encroachment on a private right of way is only actionable if there is a "substantial interference" with the ability of the benefited owners to use the right of way for a purpose identified in the grant.[45] That was said to be the case even when the encroachment is permanent.[46]

[73] Applying these principles, the Court held that a finding by the first instance judge that the laneway in question remained as accessible and passable now as it was before the construction "compels" dismissal of the benefited owner's claim.[47]

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42 McMorland, above n 6, at [16.050], n 5. See also the leading texts in England, namely Jonathan Gaunt and Paul Morgan *Gale on Easements* (21st ed, Sweet & Maxwell, London, 2020) at [13-06]; and Martin Dixon, Janet Bignell and Nicholas Hopkins *Megarry & Wade: The Law of Real Property* (10th ed, Sweet & Maxwell, London, 2024) at [29-010].

43 *Finlayson v Campbell* (1997) 8 BPR 15,703 (NSWSC).

44 At 15,712.

45 *Weidelich*, above n 27, at [9]–[17].

46 At [18]–[30].

47 At [18], [30] and [34].

[74] It is correct, as pointed out by Mr Ross, that the Ontario Court's attempt in this case to distinguish an earlier statement to the contrary from one of its own earlier decisions in the 1920s is not particularly convincing.[48]

[75] However, even taking that into account, we are satisfied having reviewed these authorities, that there is a strong body of case law illustrating that at common law, the substantial interference test is applied by reference to the purpose of the grant and the current requirements of the grantee. We also accept that this case law strongly supports Wimax's position that because the trustees can currently access their property just as well as they and their predecessors in title have done for 60 years, and because they have no firm or current plans to develop their land, they do not have a claim.

[76] What then of the case law relied on by Moore J and the applicable Schedule terms?

The New Zealand case law cited by the High Court

[77] In his decision, the Judge did not engage in any detail with the English authorities referred to above at [65] to [69]. He did however discuss three decisions of this Court: *Harvey v Hurley*, *Guo v Bourke* and *Breslin v Lyons*.[49] According to Mr Ross, *Harvey* and *Guo* together with a fourth decision of this Court — *Cornes v Residential Homes* — show that Wimax's position is wrong in law and that the trustees are entitled to insist on the driveway being widened now.[50]

[78] It is, therefore, necessary for us to examine these various decisions and their relevance to this appeal.

[79] *Breslin* involved a grantor's application for a declaration that he was entitled to permanently park on the shared driveway. The trial Judge found that parking was not authorised by the easement and that parked vehicles created difficulties for other vehicles to be able to drive past, thereby constituting an unreasonable impediment to

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48 At [23]–[26], citing *Devaney v McNab* 51 OLR 106 (ONCA).

49 Judgment under appeal, above n 3, at [49]–[60], citing *Harvey* CA, above n 18; *Guo v Bourke*, above n 18; and *Breslin v Lyons*, above n 10.

50 *Cornes v Village Residential* [2021] NZCA 216, (2021) 23 NZCPR 115.

the use and enjoyment of the driveway.[51] In upholding the High Court decision, this Court stated:[52]

> [The grantor] can only use his servient land in a way that does not derogate from the [grantee's] right to pass and repass over his property. Parking a vehicle permanently there will create an obstruction to that right if, as a matter of fact, it will hinder the [grantee's] use of the area for access to their property. That would constitute a substantial and thus unlawful interference with the rights of freedom and ease of passage conferred by the grant, amounting in law to a derogation from it.

[80] Although Moore J referred to this passage, he thought it necessary to distinguish this case on the facts.[53] We agree the facts are different from the present case but the statement of law is generally applicable and accords with the traditional common law position we have outlined above.

[81] *Breslin* was decided after *Harvey*. As regards the latter decision, the Judge considered it was supporting authority for the proposition that structures which encroach onto a right of way are contrary to the grant even if they do not interfere with passage.[54]

[82] Mr Ross says further that *Harvey* illustrates that structures and items that do not interfere with the current use of an existing driveway will nevertheless be held to be actionable interference with future potential use of the easement.

[83] We are not persuaded that the weight placed on *Harvey* by the Judge and Mr Ross is justified.

[84] *Harvey* concerned the construction of a swimming pool. The pool surrounds including decking and steps with associated landscaping were built (in the face of objections by the grantee) on part of the burdened land that had previously been open, thereby reducing the existing area of the right of way. A fence was also erected across part of the right of way.

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51 *Lyons v Breslin* [2012] NZHC 366, (2012) 13 NZCPR 181 at [43]–[44].
52 *Breslin v Lyons*, above n 10, at [24].
53 Judgment under appeal, above n 3, at [59].
54 Judgment under appeal, above n 3, at [50]–[53].

[85] The grantors (the Harveys), who had built the swimming pool, claimed that the area in question was outside the right of way but if that was wrong, they sought a court order under s 126G of the Property Law Act 1952 modifying the easement so as to exclude the area on which the impugned structures had been erected.[55] Section 126G empowered a court to modify or extinguish an easement if satisfied of one of four alternative grounds: an unforeseeable change in the nature or extent of the user of the burdened land, any other relevant circumstance, an impediment to the reasonable use of the burdened land caused by the easement, or no substantial injury to the benefited owner by the proposed modification or extinguishment.

[86] The Harveys were successful in the District Court and obtained a modification order. The grantees (the Hurleys), however, successfully appealed that decision to the High Court where Cartwright J held that properly construed the easement did include the relevant area and that none of the grounds for a modification order was met.[56] She therefore quashed the modification order made in the District Court. She did not address a cross-application filed by the Hurleys for the removal of the obstructions because that application had not been determined in the District Court.[57]

[87] In a further appeal from the High Court to this Court, the sole focus was the issue of whether the grounds for a modification order had been made out.[58] As happened in the High Court, this Court declined to hear argument about removal of the swimming pool surrounds.[59] As a result, there was no analysis of the test for actionable interference with a right of way and accordingly no engagement with the common law authorities.

[88] The reason the case appears to have been relied upon by Moore J arises from a passage in the judgment responding to what this Court clearly considered was an unattractive submission made in support of the modification application. The submission was to the effect that in order for the burdened owner to have reasonable

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55 *Harvey* CA, above n 18, at [1]–[11].
56 *Hurley v Harvey* HC Auckland 170/98, 20 May 1999 [*Harvey* HC] at 18.
57 At 19.
58 *Harvey* CA, above n 18, at [14]. That is, putting aside the argument raised by the Harveys about the nature of the grant, and whether the area of land on which the pool was built was actually included within the right of way (an argument this Court dismissed).
59 At [29].

use of the land in issue, it was necessary to permit a swimming pool or its surrounds to be constructed on that land.[60] In response, the Court made the following observation:[61]

> [26] It is, of course, difficult to conceive how a swimming pool could be regarded as a reasonable use of the land subject to a right of way … *Once that land is impressed with the grant of a right of way, any use inimical to the right to "go pass and repass" over the land cannot be considered a "reasonable [use] of the land"*. … Nor does the continued existence of the easement impede the reasonable user of the land subject to the right of way in a different manner or to a different extent from that which could have been reasonably foreseen by the original parties at the time the right of way was created. The original parties at that time could only have reasonably foreseen that the right of way would be used for the purposes of a right of way, not a swimming pool or its surrounds.

[89] In our view, the wording of the italicised sentence above is potentially problematic, being on the face of it inconsistent with the principle that the grantee is not entitled to use every part of the right of way. For that reason, the statement is questioned by Dr McMorland.[62]

[90] As we understand it, Mr Ross relies on the decision because of the factual context of these observations. The benefited owners claimed the construction of the pool surrounds on part of the way would deprive them of the ability to use that part in the future for turning vehicles. The area in question was not currently being used for that purpose and remained unsealed. However, as noted by Cartwright J, were they to decide to re-develop their property in the future to a higher density level they would then wish to use the right of way fully.[63]

[91] In our view, while there are obvious similarities between the factual context in *Harvey* and this case, they are superficial. There are important differences. In the High Court, Cartwright J had found that from the outset, the right of way created by the easement had incorporated a facility for vehicles to turn around in, and further, that the part of the right of way at issue in the case was the area intended for that very

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60 At [25].
61 Emphasis added.
62 McMorland, above n 6, at [16.050], n 13.
63 *Harvey* HC, above n 56, at 4.

purpose.[64] That had remained the mutually understood intention.[65] This finding was not disturbed on appeal.[66]

[92] As mentioned, there are also differences in the legal context, the case being modification, not unlawful interference as it is here. This Court expressly noted that of the four statutory grounds for modification of the easement, only the ground of an impediment to the *burdened* owner's reasonable use of their own land warranted its attention and that was indeed the focus of the judgment.[67]

[93] For these reasons, we consider it a stretch to contend that *Harvey* provides significant support for the trustees' claim.

[94] The second Court of Appeal decision relied on by Mr Ross is *Guo*, also cited by Moore J. Mr Ross described this decision as another example where structures that do not interfere with the current use of an existing driveway are nonetheless held to be an actionable interference with future potential use of the easement.

[95] The shared driveway in this case straddled two strips of land with the respective owners of each strip having a right of way over the other. Strip A was situated on the Bourke's land. Strip B was on Ms Guo's land.

[96] Ms Guo issued proceedings seeking removal of steel gates and a wall that the Bourkes had placed across the far end of the driveway.[68] In the High Court, Duffy J dismissed her claim.[69]

[97] The Bourkes brought a cross-application seeking removal of a boundary wall as well as removal of vegetation on Strip B which took up half the width of the strip.[70] Although the Judge accepted Ms Guo's submission that the wall and vegetation did not "impinge on the formed driveway", she still allowed the cross-application and

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64 At 4–5.
65 At 9–10.
66 *Harvey* CA, above n 18, at [24].
67 At [23].
68 *Guo v Bourke* [2016] NZHC 2240, (2016) 17 NZCPR 769 at [2].
69 At [62].
70 *Bourke v Guo* [2016] NZHC 2932, (2016) 17 NZCPR 782 at [5].

made an order for removal.[71] The Judge's reasoning was that because the intrusion took up at least 50 per cent of the width of the right of way, it went "well beyond what is tolerable and reasonable" and constituted a "substantial interference" with the Bourkes' right to use the right of way.[72] That reasoning is, of course, at odds with the body of case law we have discussed at [63] to [75].

[98] Ms Guo appealed both decisions to this Court. The Court allowed her appeal against the refusal to order removal of the gates, holding that the gates interfered substantially with the exercise of her rights under the right of way.[73] That was the main focus of the judgment.

[99] As regards Ms Guo's appeal against the removal order made against *her*, that was addressed in just two paragraphs.[74] The order to remove the boundary wall was quashed. The Court did not hear argument regarding the other impediments (which amongst other things included plants and garden walls) because Ms Guo did not press that point and the Bourkes' position was that those impediments did not cause them any difficulty.[75] The Court did, however, state that because those impediments took up at least 50 per cent of the easement, there was "no room to argue" that Duffy J had erred in ordering Ms Guo to remove it, despite the "impediments" causing "no difficulty" for the Bourkes.[76]

[100] This statement was not necessary to the outcome and, importantly, was made without the benefit of argument or any reference to the case law. We accordingly place little weight on it.

[101] The fourth Court of Appeal decision cited by Mr Ross is *Cornes*. Comments are made in that judgment to the effect that the benefited owner is not bound to maintain the right of way's condition as at the time of the grant and that the rights

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71 At [12]–[13].
72 At [12].
73 *Guo*, above n 18, at [32(b)].
74 At [61]–[62].
75 At [2] and [62].
76 At [62].

conferred in an easement can respond to "evolving circumstances" so that they are sufficient to enable the lawful use of the benefited land "at any given time".[77]

[102] Again, this is not in our view a decision directly on point. Neither the decision itself, nor the authorities cited in it, involved a claim in nuisance for unlawful interference, or orders for a burdened owner to remove alleged impediments to a possible future development. *Cornes* was an application for an order confirming that the benefited owner was entitled to undertake an upgrade of the driveway for the purposes of a consented subdivision.[78] The resource consent was conditional on the existing driveway being upgraded.[79] The "evolving circumstances" had actually eventuated. They were current needs that were required for the consented subdivision to move forward.[80]

[103] The same observation about not being directly on point can also be made of two High Court authorities cited by Mr Ross. *Ruby & Rata Ltd v Reed Trustee 2018 Ltd* involved access to an accessway in an interim injunction context,[81] while *Handforth v Kokomoko Farms Ltd* concerned the inability of stock trucks to access an area to which they previously had access before the burdened landowner erected some fencing.[82]

[104] Having reviewed the New Zealand authorities cited by the Judge and Mr Ross, it is clear in our view that not only are they of limited relevance, none engage with the settled common law principles discussed at [63] to [75], and none expressly purports to depart from those principles. There is therefore no basis, in our view, for any suggestion, that those settled principles are not applicable in New Zealand.

[105] In particular, there is no authority — apart possibly from passing comments in *Harvey* and *Guo* — that the whole of a right of way must be kept clear in case the grantee wishes to expand the road or driveway at some unspecified time in the future.

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77 *Cornes*, above n 50, at [36].
78 At [7].
79 At [5].
80 At [37].
81 *Ruby & Rata Ltd v Reed Trustee 2018 Ltd* [2022] NZHC 2025, (2022) 23 NZCPR 463.
82 *Handforth v Kokomoko Farms Ltd* (2010) 11 NZCPR 171 (HC).

[106] It follows in our view that the only basis on which the trustees could establish liability in this case is if the wording of the Schedule terms contained in the easement warrants a departure from the traditional common law principles. We therefore now turn to discuss these.

The Schedule terms

[107] As mentioned, the implied covenants, rights and powers are derived from the 2002 LT schedule and the PLA schedule. The PLA schedule is headed "[c]ovenants implied in grants of vehicular rights of way", while the 2002 LT schedule (which is not limited to vehicular rights of way) has a more general heading of "[r]ights and powers implied in easements".

[108] As also mentioned, the primary right in a right of way easement is the right to pass and repass over the area subject to the easement. That right finds expression in cl 6(1) of the 2002 LT schedule and cl 1 of the PLA schedule.

[109] Clause 1 of the PLA schedule relevantly states:

> **1 Right to pass and re-pass**
>
> (1) The grantee and the grantor have (in common with one another) the right to go, pass, and re-pass over and along the land over which the right of way is granted.
>
> (2) That right to go, pass, and re-pass is exercisable at all times, by day and by night, and is exercisable with or without vehicles, machinery, and equipment of any kind

[110] That right to go, pass, and re-pass is exercisable at all times, by day and by night, and is exercisable with or without vehicles, machinery, and equipment of any kind. Clause 6(1) of the 2002 LT schedule similarly states:

> **6 Rights of way**
>
> (1) A right of way includes the right for the grantee in common with the grantor and other persons to whom the grantor may grant similar rights, at all times, to go over and along the easement facility.

[111] Clause 1(c) of the 2002 LT schedule defines the term "easement facility" in relation to a right of way as, in effect, meaning the land over which the easement has

been granted. The right to "go over and along the easement facility" is, therefore, a right to go over and along the whole area of the land that is subject to the easement.

[112] The Judge construed cl 6(1) as meaning that the entire area of the easement must be kept clear of obstructions which substantially interfere with its use.[83] He acknowledged that the clause did not expressly say that but reasoned it would be impossible to exercise the right to go over and along the easement facility in its entirety if the easement facility is materially obstructed.[84]

[113] This suggests the right should be construed as an unqualified one. However, as re-affirmed by this Court in the 2022 decision of *SPAK (1996) Ltd v LeRoy*, the right to go over the land has always been regarded as subject to limits of reasonableness.[85] The grantee cannot insist on going over every part of the land, or on using an unreasonable route.[86]

[114] The Schedule terms also provide for specific rights to establish and maintain a driveway. Clause 6(3) of the 2002 LT schedule states:

> (3) A right of way includes —
>
> (a) the right to establish a driveway, to repair and maintain an existing driveway, and (if necessary for any of those purposes) to alter the state of the land over which the easement is granted; and
>
> (b) the right to have the easement facility kept clear at all times of obstructions (whether caused by parked vehicles, deposit of materials, or unreasonable impediment) to the use and enjoyment of the driveway.

[115] The same wording is employed in cl 2 of the PLA schedule:

> **2 Right to establish and maintain driveway**

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83 Judgment under appeal, above n 3, at [39]–[41].

84 At [39].

85 *SPAK*, above n 10, at [114]–[118] and [122]–[123].

86 *Hutton v Hamboro*, above n 29, at 219; *F C Strick & Co Ltd v The City Offices Co Ltd* (1906) 22 TLR 667 (Ch) at 669; *Emmons Developments (NZ) Ltd v RFD Investments Ltd* HC Christchurch CP42/01, 4 July 2001 at [43]; *Keam v Theilman-Le Cornec Trust* (2005) 7 NZCPR 26 (HC) at [102]; and *Plum v Hawkins* (1985) 2 NZCPR 322 (HC) at 325.

> The owners and occupiers of the land for the benefit of which, and the land over which, the right of way is granted have the following rights against one another:
>
> (a) the right to establish a driveway on the land over which the right of way is granted, and to make necessary repairs to any existing driveway on it, and to carry out any necessary maintenance or upkeep, altering if necessary the state of that land; and
>
> …
>
> (c) the right to have that land at all times kept clear of obstructions, whether caused by parked vehicles, deposit of materials, or unreasonable impediment to the use and enjoyment of the driveway; and
>
> …

[116] In our view, it seems clear that under these provisions, firstly, the land which is required to be kept clear is the whole of the easement area — the phrase "*that* land" in cl 2(c) can only be a reference back to cl 2(a)'s reference to "the land over which the right of way is granted" — and, secondly, what the land is required to be clear of are obstructions that unreasonably impact on the use and enjoyment of the *driveway*. It is not on the face of it a blanket prohibition on all structures on the easement area regardless of whether they unreasonably impact on the use and enjoyment of the driveway or not.

[117] In the High Court, however, Moore J considered the right to have the land kept clear of obstructions to the use and enjoyment of the driveway was merely a specific example of a broader right to have the whole of the land kept clear of obstructions.[87] We respectfully disagree. That is not what the words say and such an interpretation seems inconsistent with the established principles of construction related to easements, in particular that the rights should be construed strictly.[88] And, if that is what was intended, it is unclear why there was a need for a specific driveway provision.

[118] In fairness to the Judge, he also linked his reasoning to the specific right to establish a driveway. He reasoned that the right to establish a driveway must include

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87 Judgment under appeal, above n 3, at [42].

88 *SPAK*, above n 10, at [113]; *Freestyle Enterprises Ltd v Starfin Group Ltd* [2008] 1 NZLR 266 (HC) at [22]–[23]; and *Gregory v EK Trust Ltd* [2015] NZHC 1785, (2015) 16 NZCPR 519 at [19].

the right to expand an existing one and therefore the effect of these provisions was that any obstruction within the right of way necessarily infringes the right to establish a driveway because it impedes the grantee's ability to expand the driveway in future.[89]

[119] We are not persuaded that this necessarily follows. It assumes that the right to establish a driveway is unqualified. However, the correct position is that, like the primary right to pass and repass, the right to establish a driveway is subject to a reasonableness requirement. A grantee cannot for example necessarily insist on paving the whole of the easement area for use as a driveway nor insist that the whole of the land be kept clear for that purpose.[90]

[120] Nor, contrary to a submission made by Mr Ross, do we consider that the Judge was right to derive support for his analysis from cl 10 of the 2002 LT schedule. Clause 10 details the general rights implied in all the various classes of easements covered by the schedule.[91] The general rights set out in cl 10 include:

(a) The right to use any easement facility already situated on the stipulated area for the purpose of the easement granted.[92]

(b) If no suitable easement facility exists, the right to lay, install and construct an easement facility reasonably required by the grantee (including the right to excavate land for the purpose of that construction).[93]

(c) A prohibition on the grantor doing or allowing to be done, on the burdened land, anything that may interfere with or restrict the rights of any other party or interfere with the efficient operation of the easement facility.[94]

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89 Judgment under appeal, above n 3, at [45].

90 *SPAK*, above n 10, at [122]. See also *Butler v Muddle* (1995) 6 BPR 13,984 (NSWSC) at 13,987.

91 In addition to rights of way easements, the other easements referred to in the 2002 LT schedule are a right to convey water, right to drain water, right to drain sewage, a right to convey electricity, a right to convey telecommunications and computer media and right to convey gas.

92 Land Transfer Regulations 2002, sch 4 cl 10(1)(a).

93 Schedule 4 cl 10(1)(b).

94 Schedule 4 cl 10(2).

(d) A reciprocal prohibition in the same terms on the grantee, in relation to the benefited land.[95]

[121] In the Judge's view, a significant encroachment on the right of way easement which restricts the right to widen or develop the driveway in the event that is required in the future would be inconsistent with these general rights.[96]

[122] However, we are not persuaded these general provisions add anything other than to reinforce the existence of a reasonableness requirement. They could not have been intended to alter or enlarge the scope of the specific driveway rights.

[123] We conclude that, correctly interpreted, there is nothing in any of the applicable Schedule terms that would warrant a departure from the established principles. That is hardly surprising given as mentioned, the Schedule terms are themselves derived from the common law and that when construing them the courts look to those cases, as do textbooks, when discussing the terms. We are not aware of any authority and none was cited to us that the intention of the legislature in enacting the Schedule terms was to make a radical change from the pre-existing law.

[124] In coming to these conclusions, we have not overlooked the Judge's reliance on a change in the wording of the rights and powers implied in easements under sch 5 of the Land Transfer Regulations 2018 (the 2018 LT schedule). The Judge acknowledged that because it is the 2002 LT schedule that applies to this case, the 2018 LT schedule could not dictate the proper interpretation of the 2002 LT schedule. He nevertheless considered it might assist.[97]

[125] The relevant changes identified by the Judge included a change to the definition of "easement facility", defined under the 2018 LT schedule "as the surface of the land described as the easement area, including any driveway".[98] The 2002 LT

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95 Schedule 4 cl 10(3).
96 Judgment under appeal, above n 3, at [47].
97 At [64].
98 Land Transfer Regulations 2018, sch 5 cl 1 definition of "easement facility", para (c).

schedule definition, it will be recalled, made no reference to driveways. It read "that part of the surface of the land described as the stipulated area".[99]

[126] We pause here to interpolate that, of itself, that change is not significant. The stipulated area, under the 2002 LT schedule, meant the whole of the easement area.[100] Both definitions therefore included driveways.

[127] The other change identified by the Judge was a change in the wording of the 2018 successor to cl 6(3)(b). The tracked changes below reflect the 2018 changes.

> A right of way includes the right to have the easement facility kept clear at all times of obstructions (whether caused by parked vehicles, deposit of materials, or unreasonable impediment) to the use and enjoyment of the ~~driveway~~ easement facility.

[128] Noting that neither he nor counsel had found any official explanation for these changes, the Judge said it was possible the changes demonstrated that the 2002 iteration of cl 6(3) had provided for rights limited to the driveway and the legislature considered a change was needed.[101] However, a more likely explanation, in his view, was that the 2018 drafting was intended to clarify the uncertainty in the old provision and more clearly express what had always been intended, namely that the driveway is an aspect of the easement facility and that rights attach to the entirety of that easement facility.[102]

[129] The general rule of construction is that subsequent legislation cannot change the interpretation of what the Parliament who enacted the previous legislation

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99 Land Transfer Regulations 2002, sch 4 cl 1 definition of "easement facility", para (c).
100 Schedule 1 cl 1 definition of "stipulated course or stipulated area".
101 Judgment under appeal, above n 3, at [67].
102 At [67].

intended.[103] There are exceptions to that rule.[104] However, in the absence of any indication in the legislative history as to the purpose of this change, it is in our view speculative to attribute any significance to it. There is also the further point made by Mr Hodder that the issue remains what is reasonable, and reasonable access can be defined in terms of an existing effective accessway.

[130] Drawing all these threads together — the traditional common law principles, the terms of the easement and the New Zealand case law — we have concluded that the liability appeal should be allowed. We are satisfied that the structures erected by Wimax do not constitute an actionable infringement in the particular circumstances of this case where there is an adequate and effective driveway and no current need for it to be widened. In our view the High Court finding to the contrary was wrong because it is inconsistent with well-established principles relating to the construction of the relevant easement rights.

[131] We do not accept that there is any inconsistency between this finding and the recognition of the existence of a potential right to widen the driveway. In every case the assessment of substantial interference is one of fact and degree. Nor do we consider that in upholding Wimax's appeal we are licensing a rogue's charter. Quite apart from the fact that the evidence does not suggest any underhand conduct by Wimax, the case law is replete with instances of physically large structures being held not to be actionable. This case is no different.

[132] Finally for completeness, we record that we are rejecting the trustees' claim for substantial interference for reasons that differ to some extent from those given by

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103 *Students for Climate Solutions Inc v Minister of Energy and Resources* [2024] NZCA 152, [2024] 2 NZLR 822 at [62]; *Commissioner of Inland Revenue v Vector Ltd* [2016] NZCA 396 at [36]; *Holler v Osaki* [2016] NZCA 130, [2016] 2 NZLR 811 at [55]; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437 at [193]; *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd* [2012] NZCA 481, [2013] 1 NZLR 66 at [22]; *Agnew v Pardington* [2006] 2 NZLR 520 (CA) at [28]; and *Databank Systems Ltd v Commissioner of Inland Revenue* [1990] 3 NZLR 385 (PC) at 394 per Lord Templeman.

104 See for example *Students for Climate Solutions Inc v Minister of Energy and Resources*, above n 103, at [62]–[63]; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc*, above n 103, at [194]–[196]; and *Postal Workers Union of Aotearoa Inc v New Zealand Post Ltd*, above n 103, at [22].

the arbitrator. In particular, we do not consider that the claim can properly be dismissed for reasons of causation.

The Remedy Appeal

[133] In light of our decision to allow the liability appeal, the trustees' remedy appeal obviously falls away and must be formally dismissed.

[134] We can however indicate that even had we dismissed Wimax's appeal, we would have upheld the Judge's decision to remit the issue of remedy to the arbitrator. Apart from anything else, it emerged there has never been an assessment of each of the structures sought to be removed and hence no finding that all of them are in fact infringing. Mr Ahern for the trustees resisted the suggestion that this was a problem with the remedial order sought. He said it was a situation of res ipsa loquitor, meaning that it went without saying. One only need look at the encroachments, he said, to see it was not possible to suggest they do not interfere. However, when some examples were put by us to Mr Ahern, such as the entrance to the parking pad, he conceded that might not be a substantial interference, thereby highlighting another problem in addition to those identified by the Judge.

[135] Further, in our view, the scope of the anticipated further evidence would likely be even greater than that contemplated by the Judge. Allegations that the future development argument was something of an afterthought at the arbitration appear to have some foundation, meaning additional expert evidence (possibly quite extensive on that subject too) seems almost inevitable.

[136] Had we needed to decide the remedy appeal, we would of course have been very mindful of the understandable desire for finality in this unfortunate and protracted litigation between neighbours. But unfortunately the issues raised in relation to remedy would simply not have been suitable for an appellate court to attempt to resolve.

Costs

[137] Counsel agreed that the costs in respect of each appeal should be calculated as for a standard appeal on a band A basis together with usual disbursements and certification for two counsel.

[138] We agree that is appropriate and so order.

[139] As regards costs in the High Court, we direct that these be fixed by the High Court in light of this judgment.

[140] As regards costs related to the arbitration, the arbitrator awarded costs to Wimax in a separate award.[105] The trustees paid Wimax these costs but, at the trustees' request, Wimax properly refunded them following the High Court decision. These costs should now be returned to Wimax.

Outcome

[141] The appeal in CA666/2022 against the liability decision of the High Court is allowed and the arbitral award dated 11 November 2020 is reinstated. We answer the question of law as follows:

> Did the High Court err in holding there was an actionable interference with a vehicular right of way easement in circumstances where the encroaching structures did not substantially interfere with the grantee's current use of the right of way and what was relied on was the effect the structures might have on possible future plans to develop the benefited property?
>
> Yes.

[142] The appeal in CA667/2022 against the remedy decision of the High Court is dismissed. We answer the question of law as follows:

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[105] In an award dated 12 February 2021.

Was the High Court wrong to remit the question of remedy back to the arbitrator?

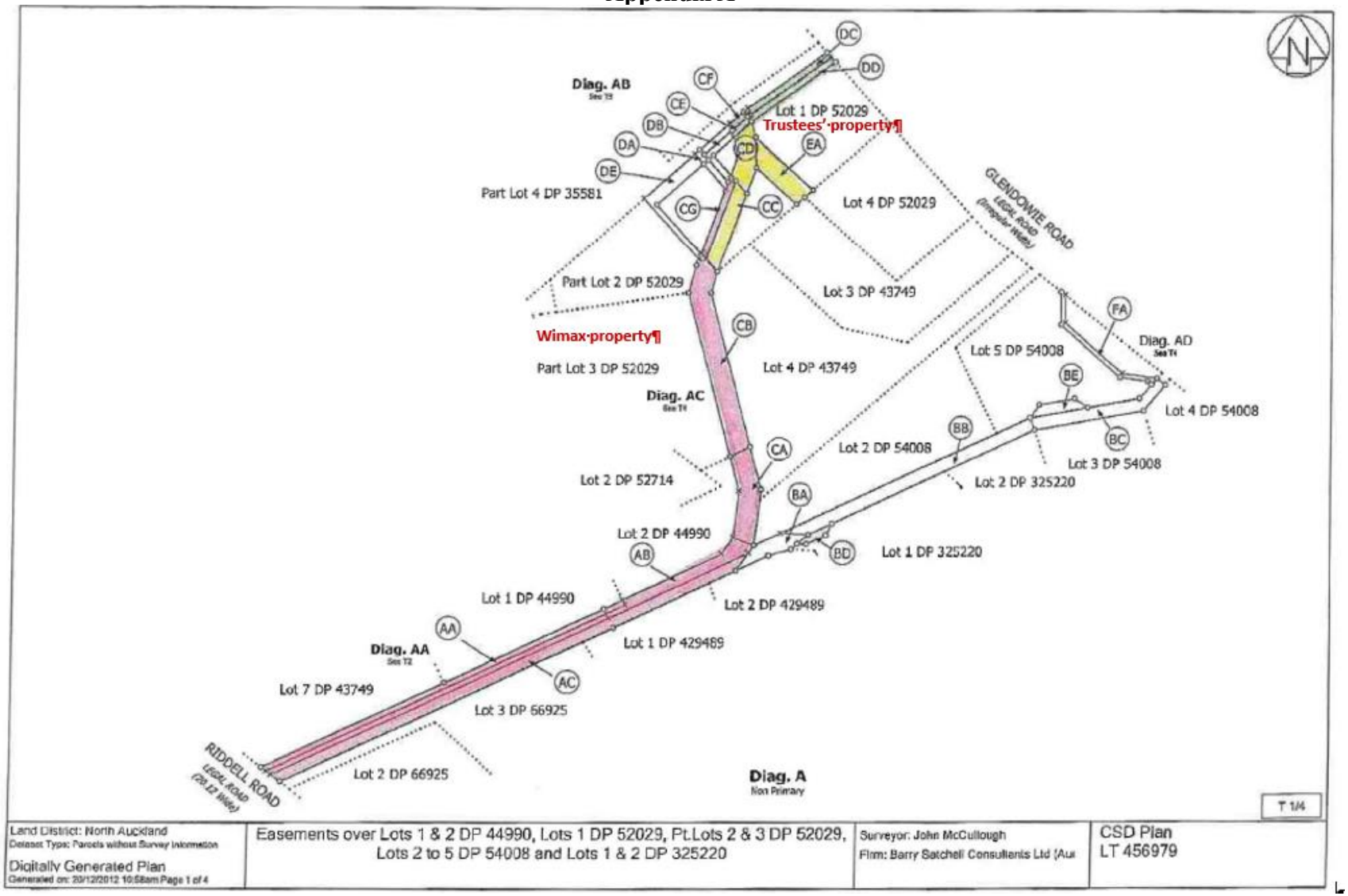
No.

[143] The trustees of the Aberdeen Four Trust must pay Wimax New Zealand Ltd costs in respect of both the appeal in CA666/2022 and the appeal in CA667/2022. In both appeals, the costs are to be calculated on the basis of a standard appeal on a band A basis together with usual disbursements. We certify for two counsel in the case of each appeal.

[144] Costs in the High Court are to be fixed by that Court in light of this judgment.

Solicitors:
Thompson Blackie Biddles, Auckland for Appellant in CA666/2022 and Respondent in CA667/2022
Morrison Kent, Auckland for Respondents in CA666/2022 and Appellants in CA667/2022

Appendix A


Diag. AB
See T3
DC
DD
CF
CE
DB
DA
DE
Lot 1 DP 52029
Trustees' property
EA
CD
Part Lot 4 DP 35581
CG
CC
Lot 4 DP 52029
GLENDOWIE ROAD
LEGAL ROAD
(Irregular Width)
Part Lot 2 DP 52029
Lot 3 DP 43749
FA
Diag. AD
See T4
Wimax property
CB
Lot 5 DP 54008
Part Lot 3 DP 52029
Lot 4 DP 43749
BE
Diag. AC
See T4
Lot 4 DP 54008
BB
BC
CA
Lot 2 DP 54008
Lot 3 DP 54008
Lot 2 DP 52714
Lot 2 DP 325220
BA
Lot 2 DP 44990
AB
BD
Lot 1 DP 325220
Lot 1 DP 44990
Lot 2 DP 429489
AA
Diag. AA
See T2
Lot 1 DP 429489
AC
Lot 7 DP 43749
Lot 3 DP 66925
RIDDELL ROAD
LEGAL ROAD
(20.12 Wide)
Lot 2 DP 66925
Diag. A
Non Primary
T 1/4
Land District: North Auckland
Dataset Type: Parcels without Survey Information
Digitally Generated Plan
Generated on: 20/12/2012 10:58am Page 1 of 4
Easements over Lots 1 & 2 DP 44990, Lots 1 DP 52029, Pt Lots 2 & 3 DP 52029, Lots 2 to 5 DP 54008 and Lots 1 & 2 DP 325220
Surveyor: John McCullough
Firm: Barry Satchell Consultants Ltd (Auc
CSD Plan
LT 456979

Appendix B