Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 5225 v Registrar General of New South Wales
Medium Neutral Citation:	[2017] NSWSC 886
Hearing Date(s):	21 June 2017
Date of Orders:	26 July 2017
Decision Date:	26 July 2017
Jurisdiction:	Equity
Before:	Pembroke J
Decision:	See paragraph [72]
Catchwords:	PUBLIC ROAD – dedication at common law – unmade road – land described as road in subdivision created before 1906 – acceptance and use by public – maintenance by Council STATUTORY CONSTRUCTION – s224(3) Local Government Act, 1919 – freestanding operation not subject to s327 – not opening or dedication of road STATUTORY CONSTRUCTION – s327 Local Government Act – scope and operation – inapplicable to exercise of s224(3) power ADVERSE POSSESSION – exclusive physical control – intention to possess as against whole world – not established STANDING – entitlement of body corporate to sue – adjoining land
Legislation Cited:	Local Government Act 1906 Local Government Act 1919 Real Property Act 1900 Roads Act 1993 Strata Schemes Development Act 2015

	Supreme Court Act 1970
Cases Cited:	Attorney General v The City Bank of Sydney (1920) 20 SR (NSW) 216 Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd (1998) 194 CLR 247 Bridges v Bridges [2010] NSWSC 1287 Cababe v Walton-on-Thames Urban District Council [1914] AC 102 Casson v Leichhardt Council [2011] NSWLEC 243 Cavric v Willoughby City Council [2015] NSWCA 182; (2015) 89 NSWLR 461 Newington v Windeyer (1985) 3 NSWLR 555 Onus v Alcoa of Australia Ltd (1981) 149 CLR 27 Owen v O'Connor (1963) SR (NSW) 1051 Owners Strata Plan No 43551 v Walter Construction Group Ltd (2004) 62 NSWLR 169 Owners-Strata Plan No 1731 v Bailey [2014] NSWSC 875 Permanent Trustee Company of New South Wales Limited v Council of the Municipality of Campbelltown (1960) 105 CLR 401 Re A Caveat by the Council of the Municipality of Botany; ex part Homelands Development Co Ltd (1936) 36 SR (NSW) 615 Street v Luna Park Sydney Pty Ltd [2006] NSWSC 230 Owners of the Ship Shin Kobe Maru v Empire Shipping Company Inc (1994) 181 CLR 404 Weber v Ankin [2008] NSWSC 106
Category:	Principal judgment
Parties:	The Owners – Strata Plan No 5225 – plaintiff Registrar-General of New South Wales – first defendant Diana Mary Heath – second defendant Woollahra Municipal Council – cross defendant
Representation:	Counsel: M Pesman SC – for the plaintiff I Jackman SC with M Bennett – for the second defendant Solicitors: Chambers Russell Lawyers – for the plaintiff

	Solicitor for Registrar General of New South Wales – for the first defendant Norton White – for the second defendant HWL Ebsworth Lawyers – for the cross defendant
File Number(s):	2016/349163

JUDGMENT

Introduction

1 Mrs Heath (the second defendant) owns a residential property in Darling Point. She acquired the property in 1978 and now wishes to sell it. The property is known as 'No 5 Eastbourne Rd' but it has no frontage to Eastbourne Road and is, and appears always to have been, landlocked. Her access is from a strip of land adjacent to the property, running alongside its southern boundary. The status and ownership of that land are contentious.

2 The strip of land, although only a cul-de-sac, is in truth an old unmade road that was originally delineated in an 1837 plan of subdivision of William MacDonald's Mount Adelaide Estate. The plan is known as Roll Plan 477. The estate was named for the grand colonial residence known as 'Mount Adelaide' that once stood nearby on the highest point of Darling Point. In the early 20th century, it was demolished and replaced by Babworth House, another grand residence, which was built for the Hordern family.

3 For almost two centuries, the strip of land alongside the second defendant's property has been described and treated as a public road. It is not a thoroughfare but the evidence suggests that limited numbers of the public have been accustomed to using it freely – 'without permission, force or stealth' to quote Menzies J in *Permanent Trustee Company of New South Wales Limited v Council of the Municipality of Campbelltown* (1960) 105 CLR 401 at 415. They still do. And Woollahra Council has been treated as the owner of the strip of land, accepting responsibility for its maintenance and upkeep, sometimes reluctantly.

4 On the northern side of the strip of land there is a narrow pathway and steps leading from Eastbourne Road to the second defendant's front gate. It is only about 15 metres long. At the eastern or lower end, there is a discrete area

which has been separated from the balance by a brick retaining wall and a rudimentary wire mesh fence. It consists of brick paving and gardens that immediately adjoin and are accessible from the rear terrace and gardens of the second defendant's property.

5 The area of the second defendant's property is almost 300 square metres. The adjoining strip of land has an area of a little over 200 square metres or almost 9 perches. The second defendant now claims ownership of the whole of the strip of land. In the alternative, she claims those parts consisting of the pathway and steps to her front gate and the lower section at the eastern end. If her entitlement is justified, she will increase both the area and value of her property.

6 The basis of her claim, which is of recent origin, is the legal doctrine of adverse possession. Such a claim requires among other things, an appropriate degree of exclusive physical control of the land over a minimum twelve year period and a correlative intention to possess that land as against the whole world: *Bridges v Bridges* [2010] NSWSC 1287 at [14]-[17]. It is not available in respect of land that constitutes a public road.

7 I have concluded that, except perhaps in relation to the lower section at the eastern end, the second defendant's degree of exclusive physical control of the strip of land is negligible; her intention to possess as against the whole world is fanciful; and her own prior conduct is inconsistent with the claim. I have also concluded that, despite its unlikely appearance, the strip of land is and always has been a public road.

8 Although I suspect I may have benefited from hearing oral evidence, the second defendant did not attend the hearing and was not able to be cross-examined. Her husband did attend but he was not cross-examined. Nor was anyone else. In any case, the documented facts adequately tell the story. They do not assist the second defendant.

Inconsistent Conduct

9 A summary of events during the period of the second defendant's ownership of No 5 Eastbourne Road is revealing. In 1980, a few years after acquiring the property, she retained the well-known architect Espie Dodds to apply for the

'private leasing' of what she called 'the Council's land'. She wished to build a garage on the strip of land over which she now claims ownership. This concerned the residents of the neighbouring apartment building at No 4 Marathon Avenue, whose body corporate is the plaintiff in these proceedings. It opposed any proposal to lease a section of the strip of land to construct a garage. It suggested that it 'has always attended to the proper care and preservation of this Council property'.

10 A report from the Council's Engineer's Department stated that the land requested to be leased 'has been dedicated as a public road' and that any lease would have to be made in accordance with the *Local Government Act 1919* and be limited to 5 years. The report recommended that the Council should retain the land for use by the public; and it pointed out that if the proposed lease were granted, 'the existing pedestrian access to the adjoining home unit development would not be available'. The Council refused the second defendant's application, specifically drawing attention to both of those concerns.

11 In 1981 the second defendant made another, more limited application, once again through Espie Dodds. She sought to lease from the Council a smaller portion of the strip of land for the construction of what was labelled a 'garbage store'. The application on her behalf described the strip of land as 'the unmade road'. And once again, the Council Engineer's report reminded her that the strip of land 'has been dedicated as a public road' and that any lease would have to be pursuant to the *Local Government Act* and could only be for five years.

12 The Council was amenable in principle to the lease application for the garbage store, subject to the reduction in height of the structure. But in 1982 the second defendant complained directly to the Mayor, Mr Rofe, about the Council's requirement that the proposed garbage store (which she described as a 'handsome cupboard designed by Espie Dodds') be reduced in height. The Mayor's reply once again informed her, among other things, that the strip of land was 'an unmade public road'.

13 For almost the next quarter of a century, no further question seems to have arisen about the legal status of the strip of land. During that time, the second defendant corresponded with the Council on a number of occasions, initially in relation to the repair and re-construction of the pathway and steps leading to her front gate and later in relation to renovation works to the residence. And throughout that period and afterwards, neither she nor her husband hesitated to complain to the Council about the strip of land. It was described from time to time in correspondence as 'the public land between two properties at 5 Eastbourne Rd and 4 Marathon Avenue'.

14 In particular, two wild olive trees and three cypress trees on the strip of land were a source of concern. The olive trees were a particular annoyance to the second defendant. In an early letter to the Council about them, she stated that 'The land on the right of our house belongs to the Council'; that her pathway on the strip of land was 'in need of repair'; and that the 'olive trees are dropping berries that are extremely hazardous, as one slips on them'. She warned that if a delivery person or her cleaner slipped, 'I could be contesting a worker's comp case'. And she concluded by emphasising that 'it is Council land and I request you to pull out the trees'. The Council notes record that its officers duly carried out the following work at the second defendant's request: 'Cut olive trees back off property and foot path; cut hibiscus off path'.

15 The three cypress trees on the strip of land were another source of complaint. Once again, the second defendant did not appear to suffer from any illusion about the public nature of the land on which they were growing. In one of her communications, she described the cypress trees as 'being on Council land outside our front gate'. They were eventually removed by the Council at rate-payers' expense, after urging by the second defendant's husband. The Council was not willing to remove the stumps however, despite a request to do so. In one email, sent as late as 16 January 2014, the second defendant's husband referred to the strip of land as being 'shown on property maps as an 'unmade road' which we try to maintain'. The response from the Council complimented him on his civic pride in wanting to maintain the area but warned him that 'Council cannot condone residents landscaping or planting trees on public land'.

Improvements and Landscaping

16 The improvements and landscaping which the second defendant and her husband caused to be carried out on the strip of land are essential ingredients in her claim to adverse possession – if it is available. However, such work as was done never extended to the whole of the strip of land. Gardeners and contractors engaged and paid for by the plaintiff have been accustomed to maintaining and mowing a substantial grassed section on the southern side of the strip of land.

17 Despite her statement to the Council in 1983 that the pathway was 'in need of repair', the second defendant decided to carry out that work herself. She and her husband caused the existing bitumen pathway and steps on the strip of land to be replaced with a tiled pathway and steps. Years later, a timber post and rail fence were added on the open side of the pathway. They understandably took matters into their own hands. This is not a matter for criticism but it does not prove the claim to adverse possession.

18 They also took a number of horticultural steps to enhance the entrance to their property and to improve its general amenity. Adjacent to the pathway, they established a garden bed containing lavender, rosemary and a pepper tree; near to their front gate, they established another substantial area planted out with clivia; and they planted hydrangeas – all of which they have maintained. They also established plantings and maintained the lower section at the eastern end of the strip of land. This must have been the area through which it was noted in the 1930s that persons used it to take 'a short cut to Double Bay'. It leads down to Wiston Gardens but it is no longer practicable to take that route.

19 A low brick retaining wall was constructed at the western end of the lower section of the strip of land before the second defendant purchased the property. In the 1990s, she added a wire mesh fence on top of the retaining wall. This brick paved area is now used as if it were her own, as an extension of the rear garden of No 5 Eastbourne Rd. Unlike the western end of the strip of land, it is not used by the public and is readily accessible only from the

second defendant's property. When the paving was damaged in 2009 by a leaking water pipe, it was repaired by and at the cost of the then Water Board.

Public Use of Land

20 Mr Lowy, the chairman of the executive committee of the plaintiff, gave evidence about the public use of the strip of land by the lot owners at No 4 Marathon Avenue. His evidence was not questioned:

> Since my time in my unit, there has always been a gate on the northern side of the strata scheme allowing access to the Eastbourne Strip – with this gate accessible from the pool area of the strata scheme.
>
> The layout of the strata scheme is such that *the large grassed area* (approximately 20 metres long and 30 metres wide) along the northern boundary, west of the pool, *is only safely accessible by exiting the pool gate and walking north along the Eastbourne Strip*.
>
> I have personally used this gate *to access the northern strip of the strata scheme* many times between 2003 and now – *and also to access the paved section of Eastbourne Road via the stairs on the northern part of the Eastbourne Strip adjacent to Ms Heath's property*. The gate and stairs represent a level means of walking to Darling Point Road and thereafter to the local store from which milk, papers, and bread are regularly purchased by residents.
>
> I have seen many other owners/occupiers in the strata scheme, on many occasions, use this gate to access the Eastbourne Strip.
>
> I have had numerous discussions with Ms Heath and her husband, Simon Heath, over the years in relation to the Eastbourne Strip – generally regarding the pruning and or removal of trees on the Eastbourne Strip. Ms Heath has always approached these discussions, as have I, on the basis that the Eastbourne Strip was public land maintained by Woollahra Council.
>
> (emphasis added)

21 Mr Lowy added the comment that when he was made aware of the second defendant's application to claim the strip of land by adverse possession, he was 'quite taken [a]back, given that Mrs Heath has never made it known to myself or, as far as I am aware, any residents of the strata scheme, that she claims the Eastbourne Strip as her own'.

22 A garden path with paving stones crosses the strip of land from the end of the tiled pathway to the pool gate on the adjoining common property belonging to the plaintiff. Mr Lowy made clear that the route across the strip of land serves a dual purpose for lot owners. It provides access to the 'large grassed area along the northern boundary, west of the pool'. And it constitutes a means of access by which the neighbouring lot owners are accustomed to reaching Darling Point

Road. There is no other reasonable way of doing so, except by Marathon Road. The tiled pathway and steps are therefore shared. So is the pathway from the pool gate across the strip of land to the tiled pathway. Mr Heath himself explained the situation as follows:

> A person leaving SP5225 via the swimming pool gate would have to walk *along a pathway on the Claimed Land* adjacent to the boundary with SP5225 and then cross the Claimed Land to *join the pathway from our front gate to Eastbourne Road*.
>
> (emphasis added)

The Troublesome Title Search

23 The seeds of future contention were sown in March 2008. The firm of Travers & Co provided the second defendant with a non-definitive, somewhat simplistic, title search that contained the tantalising but tentative suggestion that the strip of land 'may well be a private subdivision road … remaining in the name of William MacDonald'. Mr MacDonald, the owner of the Mount Adelaide Estate responsible for the plan of subdivision in 1837, is long gone and his heirs and successors appear to be untraceable. If the strip of land is not a public road, but remains in private but unknown ownership, then a claim to adverse possession could at least be entertained.

24 Notwithstanding the warning that the title search was not definitive, the suggestion that the strip of land 'may well be a private subdivision road' appears to have gradually piqued the interest of the second defendant and her advisors. A definitive search, the author said, would be 'quite time-consuming and accordingly rather expensive'. The second defendant chose not to obtain a definitive search. If she had spent money on doing so, she might not have had to spend money on this litigation.

25 The title search included the remark that 'There is no evidence of the dedication [of the land] as public road'. However in 1956, unknown to Travers & Co, the Council had purported to remove any doubt as to precisely that issue by notification in the Government Gazette pursuant to Section 224(3) of the then *Local Government Act*. Prudently, the search contained the warning that the records of the Registrar-General were not conclusive as to the status of roads provided for in subdivisions prior to 1920. And it added percipiently that 'Such status may be affected by use by the public or the expenditure thereon of

public moneys'. This was a reference to the fact that the consequence of public use and public expenditure may well be that the road should be treated as having been dedicated as a public road at common law prior to 1920.

The Primary Application

26 In June 2012, four years after Travers & Co provided its non-definitive and inconclusive title search, the second defendant set in train the events that have given rise to this litigation. She engaged solicitors who wrote to the Council on her behalf, enclosing the search from Travers & Co and stating that the strip of land 'probably remains in the name of William MacDonald'. This was a bold and incautious assertion, given the limited nature of the title search and the qualifications contained in it. However, the response by the Council's property officer on 6 July was just as incautious and even more unqualified. He stated that 'Council has no fee simple title and makes no claim to this land'.

27 Regrettably, the Council's letter (and the solicitor's letter to which it responded) appear to have been directed to 'the ownership of the land parcel between the property owned by your client Ms Diana Mary Heath – Lot 1 DP 798780, 5 Eastbourne Avenue, Darling Point – and Lot 10 in DP 15968'. This is not a description of the strip of land in issue, which lies between the southern boundary of the second defendant's land and the northern boundary of the plaintiff's land (SP5225). It seems to refer to the land between the eastern boundary of the second defendant's land and the western boundary of another property known as No 9 Wiston Gardens, which is Lot 10 in DP 15968.

28 As to this land, the property officer may well have been justified in stating that 'there were no residual lands remaining between Lot 10 in DP 15968 and Lot 1 in DP 798780 and that the Council makes no claim to this land'. But it is not the land in question. It is not a reference to the strip of land on the second defendant's southern boundary; the land described in correspondence as 'the public land between two properties at 5 Eastbourne Road and 4 Marathon Avenue'.

29 The second defendant did not quite know what to do with the Council's response. And I doubt whether she picked up the apparent error in description of the land. Another three years went by. During this time, she appears to have

consulted her advisors. They may have emboldened her. In August 2015, she wrote to the Council, attaching a copy of the Council's three year old letter sent in July 2012. She clearly sensed an opportunity. Her letter stated that 'As a result of this representation [by the Council] and on advice, I decided to make a Primary Application' in respect of the strip of land. In September, she followed up, requesting the Council to 'advise the LPI forthwith that it has no objection to the registration of Primary Application 83278'. The Council duly obliged.

30 Over time, the Council property officer responsible for the July 2012 letter was promoted to 'Senior Property Officer'. He maintained his views; apparently unaware of the purported Council notification in 1956; apparently not satisfied that the strip of land had been dedicated as a public road at common law; appearing to place more weight than was justified on the tentative conclusions in the Travers & Co title search; and probably unaware that his July 2012 letter appears to have referred to the wrong land.

31 When the second defendant's primary application was processed, the Council acquiesced and the application was approved, subject to formal implementation. The reasons that led to that result, and the process undertaken to arrive at it, were not revealed to me. It is apparent however that, among other possible defects, the Registrar-General's consideration of the primary application did not uncover the Council notification in the Government Gazette in 1956. That notification stated that the strip of land 'is a public roadway under the control and management of, and vested in, the Council of the Municipality of Woollahra'.

32 The plaintiff says that the Registrar-General should not – indeed cannot – grant the primary application. It says that, under the common law, the strip of land has been dedicated as a public road and cannot be the subject of a claim to adverse possession. It also says that the matter was put beyond doubt by the statutory notification in 1956 pursuant to Section 224(3) of the *Local Government Act.* That notification was specifically designed to remove any doubt as to whether a road left in a subdivision of private lands before 1906 was a public road. Additionally, the plaintiff says that the second defendant has not established the essential requirements for a claim of adverse possession,

including in particular the requirements for an appropriate degree of exclusive physical control of the land and an intention to possess it as against the whole world. I agree.

Public Road – The History

33 I will deal first with the threshold public road issue. The strip of land has been depicted as a road continuously since the dawn of the Victorian era. Roll Plan 477 filed as FP 19299 shows all the parts of what then comprised 'Eastbourne' Road, including parts previously comprised in or known as 'Bank Street' and 'New Road'. The part of 'New Road' adjacent to No 5 Eastbourne Road is shown on all maps published since as 'Road' or 'Eastbourne Road'.

34 The evidence supports the inference that the strip of land has been continuously treated in accordance with its uninterrupted description as a road. When the second defendant purchased her property in 1978, the strip of land was described as 'Eastbourne Road' for the purposes of describing the southern boundary of her land. The same applied in the 19th century. In the original 1837 subdivision, the second defendant's property was described as Lot 34. It was landlocked then and remains so. Access has always been from the strip of land.

35 The minutes of Woollahra Council reveal something of the 20th century historical picture. Together with the original plan of subdivision and other fragmentary evidence, they enable an ineluctable inference to be drawn as to the position prior to 1906. The minutes include the following:

(a) in 1930, the Council was requested to adjust and improve the lighting adjacent to the strip of land as well as 'the steps leading down to the 'dead-end'.

(b) in 1931, the Council considered an application by the owner of No 5 Eastbourne Road for a lease of the strip of land, which was referred to in the minutes as 'the dead-end of Eastbourne Road'. A reason for the application was to secure greater privacy from persons who 'frequently use it [the strip] as … *a short-cut to Double Bay'*. The owner requested that before he takes over, the land 'be cleaned up'.

(c) in 1936, the owner of No 2 Marathon Road drew to the Council's attention the fact that a fence had been erected across the eastern end of the strip of land, which was described in the minutes as '*the subject thoroughfare*, viz, Eastbourne Road'. He

requested that the obstruction be removed 'and the whole street left open so that the public may know it is a street'.

(d) in 1937, the owner of No 5 Eastbourne Road complained of the condition of the strip of land and requested that it be '*thoroughly cleaned up and kept in order'*.

(e) in 1947, the owner of No 5 Eastbourne Road applied to the Council for *'the closing of the dead-end'* so that he could purchase it. The minutes noted that the strip of land was used for '*rear access to the private hospital'* which had a frontage to Marathon Avenue. (This is the same land now occupied by the apartment building). The minutes included a recommendation that the request to purchase be approved and added the rider that *'the Council would be better off without [the land]'*.

(f) in 1954, the Council minutes referred to the strip of land as 'the *piece of Council property* between No 5 Eastbourne Road and the hospital'; noted that the land was *'mainly used for access to No 5 Eastbourne Road'*; and recommended that the land be inspected by the Works Committee 'before any decision to improve same'.

(g) later in 1954, the Works Committee recommended that steps be taken with a view to '*closing this portion of the road* under the Public Roads Act' and disposing of it.

(h) in 1956, the Council minutes noted, somewhat confusingly, that 'This portion of Eastbourne Road was opened in 1922 by a subdivision and should therefore be dedicated'; noted that a conference was to be arranged to discuss '*closure of this road'*; and recommended endorsement of the road purchase application by the owner of No 5 Eastbourne Road.

(i) later in 1956, the Council minutes recorded that the then owner of No 5 Eastbourne Road had been informed by the Lands Department that investigations at the Land Titles Office had failed to disclose any evidence of the dedication of the strip of land as a public road; that the strip of land was provided as a road in the 1837 subdivision; and that, before *closing and selling* '*this road'*, the Council should proceed under Section 224(3) of the Local Government Act – to remove any doubt about its dedication as a public road.

(j) in 1968, the owner of the private hospital at No 4 Marathon Avenue applied to the Council to purchase '*the common roadway'* between its property and No 5 Eastbourne Road. The then owner of the latter objected. The Council Finance Committee emphasized that it endorsed the application because it did not wish the strip of land to *'be retained' [by the Council] and 'to remain open' as a public road.*

(k) in 1972, Richardson & Wrench (on behalf of the owner) requested the Council to construct a 'made' road on the strip of

land to allow vehicular access to No 5 Eastbourne Road. The Council replied in the negative 'due in part to the *effect on pedestrian access to the adjoining property'*. It suggested a lease of the strip of land pursuant to Section 276A of the *Local Government Act*, which enabled a lease 'of any public road or part thereof' to an adjoining owner.

(l) (emphasis added)

36 No lease was entered into however and the strip of land remained open to the public. And in due course, the private hospital was demolished and the current apartment building was constructed in its place. As the evidence of Mr Lowy and others demonstrates, the continuing modern usage of the strip of land is probably more extensive now than when the private hospital existed at No 4 Marathon Avenue. Among other things, public access through the strip of land is a means by which the many lot owners of the apartment building at No 4 Marathon Avenue have long been accustomed to reach the small shop on Darling Point Road that provides daily staples such as bread, milk and newspapers, not to mention coffee. As is well known, that shop is the one and only of its kind on the Darling Point peninsula.

37 It is also, of course, relevant to take into account the historical use of the strip of land over time by successive owners of No 5 Eastbourne Road. They are just as much the 'public' for this purpose as the occupiers of adjoining lands: *Permanent Trustee* at 415, Menzies J. For example, No 5 Eastbourne Road, (then known as 'Glendalough'), was shown on a copy of an 1889 plan. The owner at that time was necessarily just as much a public user of the strip of land for the purpose of accessing the property as the second defendant has been since 1978. It has always been thus. The second defendant's property was shown as being landlocked in the 1837 plan of subdivision. Access has always been from the strip of land.

38 Finally, I should observe that there are ancient public facilities of indeterminate age and origin running down the strip of land – a stormwater drain; a sewer pipeline and manhole; and an old MWS&DB box in the centre of the strip of land. Mr Ian McCormack, Senior Conversion Officer, Land and Property Information, observed that a MWS&DB box was 'usually only placed in 'public' lands'. And in *Owen v O'Connor* (1963) SR (NSW) 1051 at 1054 Sugerman J

stated that in considering whether land has been accepted as 'public', it was material to consider, among other things, its 'use by public authorities for purposes such as the laying of water or sewer mains'.

Common Law Dedication – Legal Principle

39 The principles that govern the common law dedication of land as a public road are well-established. They only apply to the period before the commencement of the *Local Government Act, 1906*. Prior to that date, a public road could be created at common law whenever a landowner manifested an intention to dedicate land as a public road and there was acceptance by the public of the proffered dedication: *Permanent Trustee* at 420, Windeyer J; *Cavric v Willoughby City Council* [2015] NSWCA 182; (2015) 89 NSWLR 461 at [12]-[15] and [42]-[45]. See also *Casson v Leichhardt Council* [2011] NSWLEC 243 at [61] and *Weber v Ankin* [2008] NSWSC 106 at [51]-[89]. The absence of Council control over the dedication of a public road in a private subdivision was one of the vices to which the 1906 Act was directed. This concern was reflected in the aphorism – 'Once let the proprietor dedicate, the burden of repair is irrevocably cast upon the inhabitants': *Cababe v Walton-on-Thames Urban District Council* [1914] AC 102 at 115.

40 At common law therefore, lodging a plan of subdivision before 1906 showing a proposed public road could amount to an offer to dedicate the road shown on it: *Permanent Trustee* at 422 (Windeyer J); that offer to the public could ripen into a complete dedication by its acceptance and use by the public: *Permanent Trustee* at 422 (Windeyer J); and no great amount of public use was necessary to make the dedication complete: *Permanent Trustee* at 423 (Windeyer J).

41 In *Attorney-General v The City Bank of Sydney* (1920) 20 SR (NSW) 216, Harvey J emphasised (at 221) that 'the lodging of the deposited plan in the Land Titles Office, wherein the roads are shown as open streets giving access to the subdivided lots, is undoubtedly an invitation to the public to use the streets as such'. Kitto J agreed in *Permanent Trustee* at 412. Sugerman J was equally clear in *Owen v O'Connor* at 1053 when he said that 'an intention [to dedicate] is sufficiently manifested by the deposit with the Registrar-General of a plan in which land is shown as a road … for the use of the public'. And

McHugh JA stated in *Newington v Windeyer* (1985) 3 NSWLR 555 at 559 that 'When a road is left in a subdivision and runs into a public road system, the inference usually to be drawn is that it was dedicated as a public road unless access to the road is prevented by fencing or other action'.

42 To that summary of principle, it is convenient to add several further judicial observations, especially insofar as they relate to the completion of an intended dedication by the acceptance and use of the land as a public road. In *Weber v Ankin* White J stated at [52]:

> The public acceptance of the proffered dedication could arise from the *use of the road as a road by members of the public, or by acceptance by the relevant public authority on the public's behalf*. Dedication was not complete by the expression of intention on the part of the landowner to dedicate land as a public road, but only became complete on the proffered dedication being accepted. *Such acceptance could take the form of the local authority undertaking the care and maintenance of the road, such as by expending moneys on its formation, upkeep or lighting*.
>
> (emphasis added)

43 And in *Permanent Trustee*, Menzies J stated at 415:

> …I regard it as an artificial and unreal conception that when roads are left in subdivision they are left as private roads merely for the use of those who want to get to land in the subdivision. It seems more realistic to treat such roads as shown as part of the general roadway system and as open to all so that unless access is prevented by fencing or otherwise, roads shown upon a plan of subdivision are properly to be regarded as open to the public, with the consequence that *if there is use of such a road as a means of passage by any members of the public, whether owners of land in the subdivision or not, then it is a public road*.
>
> (emphasis added)

44 I should add that it is well settled that in order to determine whether a dedication of land as a public road in respect of a subdivision created before the commencement of the *Local Government Act 1906*, has been completed by acceptance and use, regard can be had to acts occurring after that date from which an appropriate inference can be drawn. It is really a matter of the probative value of the evidence of later use. As Sugerman J said in *Owen v O'Connor* at 1059 'dedication could become effective by public use after the 1906 Act when an *animus dedicandi* had been expressed before that Act'. White J was clear in *Weber v Ankin* at [67]:

> It is now settled that in respect of a pre-1906 subdivision regard can be had to acts done up to 1 January 1920, (including acts done after that date from which inferences can be drawn as to conduct before that date) to determine whether the dedication was completed (*Newington v Windeyer* at 563; *Lake Macquarie City Council v Luka* at 102).

45 I am satisfied that the requirements for the dedication of the strip of land as a public road at common law, have been met. The strip of land was used by the public prior to 1906 and parts of it have been used by the public subsequently, increasingly so since the twelve-storey apartment building was built at No 4 Marathon Avenue. And the Council has maintained the strip of land and acknowledged responsibility for it, although it seems clear that from time to time it would have preferred that the road be closed and sold off.

Statutory Notification

46 The plaintiff's fall-back position relies on the statutory process undertaken in 1956 pursuant to the *Local Government Act* (now repealed). The purpose of that process was to clarify the status of the strip of land. The power given to a council by Section 224(3) of the Act was not a power to 'dedicate' land as a public road. It was a power to enable a council – by notification in the Government Gazette – to remove any doubt as to whether or not certain land is a public road. The land to which the section applies must already have been a 'road'. More particularly it had to be 'any road ... left in a subdivision of private lands before the commencement of the Local Government Act, 1906'.

47 Section 224(3) provided relevantly:

> Where any road has been left in subdivision of private lands before the commencement of the *Local Government Act, 1906* a*nd there exists any doubt as to whether or not it is a public road* –
>
> (d) … the Council may notify in the Gazette that such road is a public road and thereupon the road shall be a public road and shall vest in the Council'.
>
> (emphasis added)

48 Section 224(3) appears in Division 2 of Part IX of the repealed Act. Division 2 is headed 'Status of Roads'. It is clear that its subject matter is the settling and clarification of the status of land used as a road. The section was not designed to be used to 'open' a public road, as that concept is applied elsewhere in the Act, but to remove a doubt as to the status of a road left in a subdivision of private lands before the commencement of the 1906 Act.

49 The Council purported to give effect to its statutory power by publishing the following notice in the Government Gazette on 23 November 1956,:

> MUNICIPALITY OF WOOLLAHRA – Eastbourne-Road, Darling Point – Public notice is hereby given that, pursuant to the provisions of section 224 of the Local Government Act, 1919, as amended, this Council hereby notifies that the road known as Eastbourne-road, Darling Point, is a public roadway under the control and management of, and vested in, the Council of the Municipality of Woollahra. A. E. RYAN, Town Clerk, Council Chambers, Double Bay, 19/11/56.

50 In one of several strange features of this litigation, the second defendant and her advisors were wholly unaware of the Council notification in the Government Gazette – both when she made her primary application and later when the proceedings were commenced. The matter only appears to have come to attention in about February this year when someone in the office of the plaintiff's solicitor stumbled across the notification in the online archives of the National Library of Australia. If the statutory notification is valid and effective, it puts the matter beyond doubt. I will deal later with the challenge to it. But even if the notification is not valid and effective, the second defendant would have failed anyway for other reasons.

51 As I have now made abundantly clear, one of those reasons is that the strip of land was already a public road at common law. This is not to criticise the Council decision in 1956. The relevant Council officers were entitled at that time to conclude that there was a 'doubt' of some sort. They were justified in deciding that it was appropriate to engage the power given to the Council pursuant to Section 224(3) of the then *Local Government Act*. But six decades later, having heard evidence in an adversarial hearing covering the period from 1837 to 2017, I am quite satisfied on the balance of probabilities that the strip of land is and always has been a public road.

Summary

52 The history that I have recounted, and the evidence of usage and common assumption that it reveals, tell against the second defendant. The evidence suggests that during the 19th, 20th and 21st centuries, the strip of land has been recognised, treated and used as a public road. And except perhaps in relation to the lower section at the eastern end of the strip of land, there is no persuasive evidence that the second defendant has exercised sufficient

dominion over any part of it to prove a claim in adverse possession, even if it is not a public road.

53 The pathway and steps have been shared with the lot owners at No 4 Marathon Avenue. So has the garden pathway from the pool gate to the tiled pathway. The second defendant has never exhibited the requisite intention to possess the strip of land against the whole world. She simply took advantage of the situation as best she could for understandable pragmatic reasons. Her case on adverse possession is unconvincing, to say the least. It is contrary to decades of usage, to the weight of evidence, to many years of consistent behaviour, including her own conduct, her husband's conduct and that of her predecessors in title.

54 There has never been a sufficient 'degree of exclusive physical control of the land in question' – except arguably in relation to the enclosed lower section at the eastern end. And in relation to the whole of the strip of land, there has never been 'any intention to possess the land to the exclusion of all others': *Weber v Ankin* at [103]. Notwithstanding the retaining wall and wire mesh fence that separates the lower or eastern end of the land from the balance, the second defendant appears always to have been cognisant of the public nature of the entirety of the strip of land.

55 The facts of this case have a similarity with those in *Weber v Ankin* as explained at [98] – [100]. None of the gardening or other improvements undertaken by the second defendant was taken necessarily with a view to excluding others from the strip of land. The second defendant's use and care of the land for personal convenience, with no intention to exclude all others, is not legally sufficient. And paradoxically – given her claim to adverse possession – she saw it as the Council's ultimate responsibility to maintain the land, including by pruning and removing trees and stumps on the land.

56 As I have found that the strip of land was dedicated as a public road at common law, the second defendant's attack on the validity of the statutory notification process undertaken in 1956 does not arise. The notification in the Government Gazette was made 'to remove any doubt' but I have concluded that it was unnecessary. If I make a declaration that the strip of land is a public

road, that will be the end of the matter – unless there is some unlikely reason why the plaintiff does not have standing to seek such a declaration or any of the restraining orders which it claims. The restraining orders are sought, if necessary, pursuant to Section 122 of the *Real Property Act 1900* and Sections 65 and 66 of the *Supreme Court Act 1970*. They seek to prevent the Registrar-General from granting the second defendant's primary application.

57 The Registrar-General has filed a submitting appearance. If I make the declaration sought, he will have no basis for acceding to the primary application, which is predicated on the strip of land not being a public road. The restraining orders will therefore be unnecessary.

Standing

58 That leaves two remaining issues. The first is the challenge to the plaintiff's standing. The second is the attack on the Council's 1956 notification in the Government Gazette. The latter does not arise on my analysis, but I will deal with it. The challenge to the plaintiff's standing has little merit. The plaintiff's interest is distinct from the public at large; it has a special interest in the subject matter of the proceedings; it is the trustee and agent for the individual lot owners in the neighbouring apartment building, whose units directly adjoin the strip of land; those lot owners have long been accustomed to using the strip of land for access, among other things, to Darling Point Road; no one else, other than the second defendant and the Council, has as direct an interest in the strip of land; and the Registrar-General considered that the plaintiff had such a sufficient interest in the second defendant's primary application that he served it with a notice under Section 12A of the *Real Property Act.*

59 It is not necessary that the plaintiff have a proprietary interest, even a caveatable interest, in the strip of land in order to have standing to bring these proceedings. This applies whether it seeks relief as a 'person who is dissatisfied' for the purpose of Section 122 of the *Real Property* Act or as a person seeking restraining orders pursuant to Sections 65 and 66 of the *Supreme Court Act* or as a person seeking declaratory relief. As Brennan J said in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27 at 73, a special interest may arise absent a legal or equitable right or a proprietary or pecuniary

interest. I gratefully adopt the helpful summary of the applicable legal principle explained by Black J in *Owners-Strata Plan No 1731 v Bailey* [2014] NSWSC 875 at [32]-[35].

60 All that is required is that the plaintiff 'have a sufficient special interest, greater than that of members of the public generally, in the subject matter of the action': *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 230 at [41]. The rule is flexible: *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at [46]-[47]. And as Spigelman CJ said in *Owners-Strata Plan No 43551 v Walter Construction Group Ltd* (2004) 62 NSWLR 169 at [49]: '… it seems to me that, as registered proprietor of the common property, the body corporate would have rights equivalent to the rights of any other registered proprietor to protect its interests'.

61 That would be enough to dismiss the challenge to the plaintiff's standing, but there are yet further obstacles. In addition to everything else, the plaintiff, as registered proprietor of the adjoining land, has a number of relevant statutory powers that reinforce its special interest and hence its standing:

(a) Section 25 of the *Strata Schemes Development Act 2015* entitles an owners corporation to acquire additional common property, including among other things, the power to accept a lease or transfer of contiguous land;

(b) Section 254(2) of the *Strata Schemes Development Act* entitles an owners corporation to take proceedings in circumstances where the lot owners in the scheme would be jointly entitled to take the proceedings;

(c) Section 6 of the *Roads Act 1993* entitles the owner of land adjoining a public road to 'access (whether on foot, in a vehicle or otherwise) across the boundary between the land and the public road'.

Challenge to Statutory Notification

62 The challenge to the validity of the Council notification in the Government Gazette involves three arguments. The first depends on the proposition that the notification was not effected for a proper purpose; the second assumes that Section 327(1) of the *Local Government Act* applied to the process, and that it prescribed a number of conditions applicable to the operation of Section 224(3)

that were not satisfied; and the third involves the contention that the notification is invalid because it did not adequately identify the land.

63 As to the first, the purpose for which the statutory power in Section 224(3) of the Act was given, was the removal of 'any doubt' as to whether a road left in a subdivision of private lands is a public road. In this case, there was a doubt and the Council exercised its power to remove that doubt. It was not suggested that the doubt was a sham. The exercise of power to remove the doubt was intended to achieve the object for which the power was given. It is irrelevant that the context for the removal of the doubt was the possible closure of the road by the Council and its sale to neighbouring owners. Those matters are legitimate activities of a council but as events transpired, they did not occur. Nonetheless, the anterior exercise of power pursuant to Section 224(3) was exercised for the purpose for which it was given.

64 As to the second, Section 327 of the *Local Government Act* belongs in a different area of the Act and has no relevant application in this case. It addresses the conditions to be observed before opening new roads and subdivisions. That is not this case. The exercise of the power pursuant to Section 224(3) is not directed to the 'opening' of a public road, but is concerned with the removal of doubt as to the legal status of an existing road. It applies only to a 'road' that has been 'left in subdivision of private lands'. I repeat what I said in paragraphs [46]-[51].

65 And the section is not expressed to be subject to Section 327 or any other provision of the Act. Section 224 is a free-standing provision intended to have a beneficial effect, operating to the extent necessary 'in aid of and not in derogation' from any other provision of the Act. It is concerned with the status of a road not the opening of a road. It has no application to the facts of this case.

66 Furthermore, the terms and scope of Section 327 reinforce its unlikely application to the context and circumstances envisaged for the operation of Section 224(3). Section 327 is directed to the town planning, surveying and Council requirements that must be satisfied before a new road is opened or land (providing for the opening of a public road) is subdivided. In contrast,

Section 224(3) is directed to land which has long been a 'road'; one that was left in subdivision of private lands prior to the *Local Government, 1906*; one where a doubt existed as to whether the road – an existing 'road' – was or was not a public road.

67 Finally, the statement by Nicholas J in *Re A Caveat by the Council of the Municipality of Botany; ex part Homelands Development Co Ltd* (1936) 36 SR (NSW) 615 at 619 has no application to this case. His Honour said that 'the *Local Government Act, 1919-1935* forbids the opening and dedication of a road until the requirements of s.327 have been fulfilled'. That statement was made in a different context and was not directed to, nor in my view was it intended to circumscribe, the operation of Section 224(3). The decision is authority for the proposition that if a developer prepares a plan of subdivision including a proposed public road, but changes its mind and does not complete the process envisaged by Section 327, then sells the land, it cannot be said that the proposed road has become a public road, even if the public had come to use it. The approval of the statement by Nicholas J in *Cavric v Willoughby City Council* at [45] is not to the point.

68 The third argument is one of statutory construction. It requires reading into Section 224(3) an implied qualification that is not there. The second defendant contends that the section requires a full and complete description of the land so as to identify the subject land adequately to strangers and third parties. No authority was relied upon to support the argument. On this argument, paragraph (d) should be read with qualifications something like:

> … the Council may notify in the Gazette that such road – *as long as it is fully identified* – is a public road and thereupon the road – *but only if so identified* – shall be a public road and shall vest in the Council.
>
> (emphasis added)

69 The power under Section 224(3) is clearly an important and useful one. It should be given a beneficial operation consistent with its obvious purpose. To adopt the language of the High Court in a different but apposite statutory context, it is 'quite inappropriate' to make implications or impose limitations on the exercise of such a power that are not found in the statutory language:

Owners of the Ship Shin Kobe Maru v Empire Shipping Company Inc (1994) 181 CLR 404 at 421.

70 There is not the slightest reason to doubt that the persons directly affected – the Council and the adjoining landowners – knew exactly what land was covered by the notification in the Gazette. The adjoining owners were, and remain, the only realistic users of the public road. The metes and bounds of the strip of land, its precise area, its dimensions and boundaries have never been in dispute. They have been regularly shown on plans since 1837. The only dispute is as to the status of the strip of land, not its description or area. A conveyancing perfectionist might have ensured a fuller description of the land in the Government Gazette. But Section 224(3) does not call for perfection – either expressly or by necessary implication. In my view, formality of description is not a condition of the application of Section 224(3). And informality of description is not a ground for invalidating its intended effect.

Conclusion and Orders

71 For those reasons, the plaintiff is entitled to succeed. The second defendant's claim to adverse possession fails. There is no basis for the Registrar-General to grant the primary application. It is, of course, open to the Council to close the road and sell it to the second defendant subject to the grant of an appropriate right of way for the benefit of the adjoining lot owners. That is a matter for the parties.

72 I make the following declarations and orders:

(1) I declare that the land described in primary application PA83278 is a public road vesting in Woollahra Municipal Council.

(2) I dismiss the cross claim.

(3) I order the second defendant to pay the plaintiff's costs.