SUPREME COURT OF QUEENSLAND

CITATION:	*Orb Holdings Pty Ltd v WCL (QLD) Albert Street Pty Ltd* [2019] QSC 265
PARTIES:	**ORB HOLIDNGS PTY LTD** (applicant) **v** **WCL (QLD) ALBERT STREET PTY LTD** (respondent)
FILE NO/S:	BS 6514 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	29 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 September 2019
JUDGE:	Davis J
ORDERS:	**1. Application BS 6514 of 2019 is dismissed;** **2. Orb Holdings Pty Ltd pay the costs of WCL (Qld) Albert Street Pty Ltd of application BS 6514 of 2019 including the costs of the application for judgment.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – where the applicant seeks a declaration against the respondent that certain land has been dedicated as, and is, a public highway or public road – where the respondent applied for judgment in the application – whether the respondent as registered proprietor in fee simple of the land, is not subject to any unregistered interest created by or as a result of a common law dedication of a road REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – RIGHTS OF HIGHWAY – where the applicant submitted that land had been dedicated as a public road and that that dedication was not affected by the transfer of the land to the respondent and registration of the respondent as proprietor in fee simple – whether the respondent has

indefeasible title to the land – whether common law public rights of passage over land take priority over registered interest

Acts Interpretation Act 1954, s 13

City of Brisbane Act 2010, s 3, s 5, s 63, s 65, s 65(2)(a), s 65(2)(b), s 66, s 81

Grammar Schools Act 1860

Grammar Schools Act 1975

Land Act 1962, s 369

Land Act 1994, s 93, s 94, s 95

Land Title Act 1994, s 3, s 5, s 6, s 7(1), s 7(2), s 19, s 24, s 27, s 28, s 29, s 31, s 48, s 50, s 51, s 51A, s 54, s 60, s 179, s 180, s 181, s 182, s 183, s 184, s 185, s 186, s 187, s 200, s 201

Real Property Act 1861, s 11, s 119

Real Property Act 1900 (NSW), s 46, s 47, s 48, s 49, s 50, s 51, s 52, s 53, s 54, s 55, s 56, s 57, s 72, s 73, s 74, s 88, s 89, s 90, s 91, s 92, s 93, s 94

Transport Infrastructure Act 1994, s 24, s 53

Uniform Civil Procedure Rules 1999, r 8(2), r 11, r 14, r 134, r 135, r 291, r 292, r 293, r 658, r 681

Agar v Hyde (2000) 201 CLR 552, followed

Anderson v City of Stonnington and Anor (2017) 227 LGERA 176, considered

Assets Company Ltd v Mere Roihi [1905] AC 176, cited

Atthow v McElhone [2010] QSC 177, cited

Attorney-General v City Bank of Sydney (1920) 20 SR (NSW) 216, cited

Bahr v Nicolay [No 2] (1988) 164 CLR 604, cited

Black v Garnock (2007) 230 CLR 438, cited

Breskvar v Wall (1971) 126 CLR 376, followed

Cassegrain v Gerard Cassegrain & Co Pty Ltd (2015) 254 CLR 425, cited

Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd (2013) 247 CLR 149, cited

City of Canada Bay Council v F & D Bonaccorso Pty Ltd (2007) 71

NSWLR 424, followed

Di Carlo v Kashani-Malaki [2013] 2 Qd R 17, followed

Farah Constructions Pty Ltd v Say-Dee Pty Ltd (2007) 230 CLR 89, cited

Fourmile v Selpam Pty Ltd (1998) 80 FCR 151, cited

Frazer v Walker [1967] 1 AC 569, cited

Hillpalm Pty Ltd v Heaven's Door Pty Ltd (2004) 220 CLR 472, cited

H Jones & Co Pty Ltd v Municipality of Kingborough (1950) 82 CLR 282, cited

Halloran v Minister Administering National Parks and Wildlife Act 1974 (2007) 229 CLR 545, cited

Higgins v Higgins [2005] 2 Qd R 502, followed

Jessup v Lawyers Private Mortgages Ltd [2006] QSC 003, followed

Jessup v Lawyers Private Mortgages Ltd [2006] QCA 432, cited

Lake Macquarie City Council v Luka (1999) 106 LGERA 94, cited

Lang v Castle [1924] SASR 255, cited

Leros Pty Ltd v Terara Pty Ltd (1992) 174 CLR 407, cited

Logue v Shoalhaven Shire Council [1979] 1 NSWLR 537, cited

Melisavon Pty Ltd v Springfield Land Development Corporation [2015] 1 Qd R 476, cited

Miller v Minister of Mines and Attorney-General of New Zealand [1963] AC 484, cited

Mills v Stokman (1967) 116 CLR 61, cited

Municipal Council of Sydney v Young [1898] AC 457, followed

Municipal District of Concord v Coles (1905) 3 CLR 96, followed

Newington v Windeyer (1985) 3 NSWLR 555, cited

Palais Parking Station Pty Ltd v Shea [1980] 24 SASR 425, cited

Palais Parking Station Pty Ltd v Shea (1977) 16 SASR 350, cited

Pilcher v Rawlins (1872) LR 7 Ch App 259, cited

Pratten v Warringah Shire Council [1969] 2 NSWR 161, considered

R (on the application of Smith) v Land Registry (Peterborough Office) [2011] QB 413, cited

Richardson v Cummins (1951) ABC 185, followed

Re Quinn's Application (1879) 1 QLJ Supp 7, followed

South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia (1939) 62 CLR 603, cited

Tara Shire Council v Garner [2003] 1 Qd R 556, followed

Theseus Exploration NL v Foyster (1972) 126 CLR 507, cited

Tierney v Loxton (1891) 12 NSWLR 308, cited

Trieste Investments Pty Ltd v Watson [1964] NSWR 1226, followed

Vickery v Municipality of Strathfield (1911) 11 SR (NSW) 354, considered

Weber v Ankin [2008] NSWSC 106, cited

Westfield Management Limited v Perpetual Trustee Company Limited (2007) 233 CLR 528, cited

COUNSEL:	R G Bain QC with J P Hastie for the applicant in BS 6514 of 2019 being the respondent in the application for summary judgment P Dunning QC with B Whitten for the respondent in BS 6514 of 2019 being the applicant in the application for summary judgment
SOLICITORS:	HWL Ebsworth for the applicant in BS 6514 of 2019 CDI Lawyers for the respondent in BS 6514 of 2019

[1] By originating application, Orb Holdings Pty Ltd (Orb) seeks against WCL (QLD) Albert Street Pty Ltd (WCL) a declaration "that the land described as Lot 11 on RP1073 has been dedicated as, and is, a public highway or public road".

[2] WCL has applied under r 658 of the *Uniform Civil Procedure Rules* 1999 (UCPR) and alternatively the inherent jurisdiction, for judgment in the application.

Background

[3] A significant amount of material was filed on the application for summary judgment. Mr Dunning QC who led for WCL accepted during argument that there were factual disputes that cannot be decided on an application such as the present. He based the application for summary judgment on discreet points any of which he submitted were fatal to Orb's application.[1]

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[1] T1-31.

[4] It follows then, that it is only necessary to refer to the evidence to the extent required to identify those issues and their relevance and of course to decide them, if indeed it is appropriate to decide them on this application for summary judgment.

[5] The dispute relates to parcels of land on the corner of Margaret, Albert and Alice Streets in what is now the Central Brisbane Business District.

[6] Registered Plan 1073 (RP1073) was registered in September 1876. By that point, the Torrens Title System had been established in Queensland.[2] The registered proprietors of the land who caused the plan to be registered were the trustees of the Brisbane Grammar School (the Grammar School).

[7] RP1073 shows:

(i) on the corner of Margaret, Albert and Alice Streets are nine individual lots;

(ii) Lots 1, 2, 3, 4 and 5 front Albert Street although Lot 1 also has a boundary with Margaret Street;

(iii) Lot 6, 7, 8 and 9 front Alice Street although Lot 6 also has a boundary with Albert Street;

(iv) along what can be described as the rear of all of the lots, runs an "L" shaped piece of land marked "Right of Way". That right of way is marked with a notation "Lot 11 (balance)";

(v) each end of the "L" shaped Lot 11 fronts onto a street being either Albert Street or Margaret Street. A person could physically then travel on foot or by other means from Margaret Street to Albert Street or vice versa (and therefore past all of the lots) across Lot 11;

(vi) running along the southern boundary of that part of Lot 11 which sits behind Lots 1, 2, 3, 4 and 5 is a shaded area which is a reserve and is about 30 centimetres wide (the reserve).

[8] After registration of RP1073, the Grammar School, between 1876 and 1881, disposed of the lots except Lot 11.

[9] Orb relies upon the expert opinion of an historian Dr Denver Beanland. In that report, Dr Beanland annexes various historical documents and opines that from the 1880s Lot 11 became known as "Beatrice Lane" and was in use as a public road.

[10] In 1927 the reserve was resumed by the Brisbane City Council and it was dedicated as a road in 1928.

[11] In 1971, solicitors acting for an interested party enquired of the status of the area marked "Right of Way". The Registrar of Titles conducted an investigation (the 1971 investigation) and responded to the solicitors as follows:

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[2] *Real Property Act* 1861.

> "It is considered that the area shown 'Right of Way' on Plan 1073 still forms part of the land in the original titles for Allotments 9, 10 and 11 of Section 37, City of Brisbane.[3]
>
> The original conveyances of Subdivisions 1 to 5 all describe these subdivisions as bounded by a 'Right of Way' and there has never been any express dedication of the land as a Road."

[12] The 1971 investigation resulted in a notation on RP1073, in these terms: "Right of Way (Lot 11) investigated 1971".

[13] In 1994, a certificate of title was issued for Lot 11 showing the Grammar School as registered proprietor in fee simple subject to no encumbrances apart from the rights and interests reserved by the grant.

[14] In 2008 Lot 11 was transferred to Divine Limited.

[15] Another plan was registered in 2012. It is SP142332. It is the last plan that has been registered over the land.

[16] Plan SP142332 shows that:

(i) Lots 1, 2, 3, 4 and 5 on RP1073 have been amalgamated into Lot 9;

(ii) there is no note of "Right of Way" shown on Lot 11;

(iii) "Beatrice Lane" is shown as the reserve.

[17] In March 2014 Lot 11 was transferred to 30 Albert Street Pty Limited. By transfer from 30 Albert Street Pty Limited, WCL became the registered proprietor in fee simple of Lot 11 on 17 September 2014.

[18] Lot 12 on B118229 is owned by Orb (Orb's land). Orb's land fronts Margaret Street. It is south of Lot 11. The reserve runs along the northern boundary of Orb's land. The southern boundary of Lot 11 is common with the northern boundary of the reserve. On Orb's land is a building and access to the carpark of that building is gained over Lot 11 and the reserve.

[19] The Brisbane City Council maintains a roads register pursuant to s 81 of the *City of Brisbane Act* 2010. The land which is Lot 11 is described by the Council in that register as "Beatrice Lane". Beatrice Lane is recorded in the Council's roads register as a Brisbane City Council controlled road and not as a private road. That distinction has some significance under the provisions of the *City of Brisbane Act* 2010, although for reasons later explained, no relevance to the critical issue here.

[20] Recently, WCL began to develop the corner of Albert and Margaret Streets and is purporting to close access to Lot 11. Orb objects to WCL's interference with its access across Lot 11.

[21] Orb's application was filed on 21 June 2019.

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[3] The parcel subdivided by RP1073.

[22] On 11 July 2019 orders were made for the delivery and filing of Points of Claim, Points of Defence and Points of Reply. They have all been filed and delivered.

[23] In its Points of Claim, Orb asserts that:

(i) Lot 11 was, prior to 1923,[4] dedicated at common law as a public highway or public road; and

(ii) by s 369 of the *Land Act* 1962,[5] title in Lot 11 vested in the State of Queensland.

[24] Orb's case is that, given the dedication of Lot 11 as a public road, the public (including Orb) has a right of access over the land. Alternatively, property in Lot 11 is vested in the State, so WCL has no right to close access.

[25] In its Points of Defence, WCL raises various matters but as previously explained, limited its arguments before me given the nature of the present application. The precise matters of defence of the principal application relied upon on this application by WCL are identified later.

The principles concerning summary determination

[26] Here, the proceedings were commenced by originating application.[6] Although there have been orders directing the delivery of points of claim and defence, no order has been made for the proceeding to continue as if started by claim.[7] While r 291 of the UCPR applies Part 2 of Chapter 9 ("Summary Judgment") to all "proceedings" (which on its face would include proceedings commenced by originating application), rr 292 and 293 (which provide a specific procedure for summary judgment) do not apply to proceedings commenced by originating application because a precondition to an application for summary judgment under those rules is the filing of a Notice of Intention to Defend. No Notice of Intention to Defend, by the UCPR, is filed in relation to an originating application.[8]

[27] Rule 658 provides as follows:

> "**658 General**
>
> (1) The court may, at any stage of a proceeding, on the application of a party, make any order, including a judgment, that the nature of the case requires.
>
> (2) The court may make the order even if there is no claim for relief extending to the order in the originating process, statement of claim, counterclaim or similar document."

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4 The significance of that date is considered later.

5 Now repealed.

6 UCPR r 8(2) and 11.

7 UCPR r 14.

8 UCPR rr 134 - 135.

[28] The application here is brought under r 658 and also the inherent jurisdiction of the court.[9] Orb did not submit that there was no jurisdiction to entertain an application for summary determination of an originating application. Orb's submission was that upon such an application the usual limitations in proceeding summarily apply. WCL did not submit to the contrary and Orb's submission should be accepted.

[29] Judgment should only be given summarily in the clearest of cases and where there is no need for a trial.[10] Even when the only issue between the parties is a question of law, cases may arise where "the question of law raised is so difficult that it ought not be decided summarily."[11] However, as cases such as *Jessup v Lawyers Private Mortgages Ltd*[12] show, there will be cases where difficult questions of law ought to be decided on an application for summary judgment.

[30] WCL's application raises a number of arguments which, for reasons I explain, are not amenable to summary determination. However, one of the submissions is that WCL, by force of its registration as proprietor in fee simple of Lot 11, has taken its title free from any public rights over the land and any interest in the land which may have been vested in the State consequent upon dedication of Lot 11 as a public road. For reasons which appear below, WCL is entitled to judgment if it establishes that, as a matter of law, it, as registered proprietor in fee simple of Lot 11, is not subject to any public rights or any unregistered interest created by or as a result of a common law dedication of Lot 11 as a road. That issue is not dependent on any factual findings and there is no reason not to determine it. As will be seen, I determine that issue in favour of WCL.

Orb's case

[31] The *Local Authorities Act Amendment Act* 1923 amended the *Local Authorities Act* of 1902. By the 1923 amendment, s 83C was included in the 1902 Act. Section 83C was in these terms:

> "A new road shall not be opened by any private person or company, and land shall not be subdivided by any private person or company except in accordance with this Act."

[32] Orb accepts that from 1923, because of the enactment of s 83C, a private citizen, such as the Grammar School, could not dedicate land as a road, without complying with formal requirements prescribed by the *Local Authorities Act* 1902.[13] Orb does not suggest that those requirements were fulfilled.

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9 *Higgins v Higgins* [2005] 2 Qd R 502 at [15], *Atthow v McElhone* [2010] QSC 177 at [19].

10 *Agar v Hyde* (2000) 201 CLR 552.

11 *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 at 515 and see also *Melisavon Pty Ltd v Springfield Land Development Corporation* [2015] 1 Qd R 476 at 510.

12 [2006] QSC 003, approved on appeal in *Jessup v Lawyers Private Mortgages Ltd* [2006] QCA 432.

13 Similar considerations arose in *Weber v Ankin* [2008] NSWSC 106 at [89] and *Lake Macquarie City Council v Luka* (1999) 106 LGERA 94 at 101.

[33] Orb submits that prior to 1923, a citizen could dedicate land in Queensland as a public road provided that:

(i) an intention to dedicate the land as a public road was manifested; and

(ii) there was an acceptance by the public of that dedication by use of the road.[14]

[34] Orb's submission is that prior to 1923, the Grammar School dedicated Lot 11 on RP1073 as a public road. It manifested that intention in various ways but primarily by delineating Lot 11 as a "Right of Way" on RP1073, by setting it aside physically, and by allowing the public free access over it. The public accepted the dedication by using the land as a public road and it became known as "Beatrice Lane". There is evidence that the Brisbane City Council effectively took control of it.

[35] It is unnecessary to analyse in detail the evidence which supports Orb's submission. Orb has, through Dr Beanland, produced historical material which supports Orb's case that prior to 1923, the Grammar School manifested an intention to dedicate Lot 11 as a road, and the public accepted that dedication. That evidence is sufficient to prevent WCL from succeeding on summary judgment on the basis that there is no triable issue as to the dedication.

[36] Orb submitted not that, upon dedication, title in Lot 11 passed to the State, but that the land simply remained subject to public access as a road. Orb submitted that decades later, title in Lot 11 passed to the State by force of s 369 of the *Land Act* 1965 to which I will later refer. Orb submitted that the vesting of Lot 11 in the State did not extinguish the public rights that dedication of the land as a road at common law brings.

[37] Orb then submitted that neither the dedication of Lot 11 as a public road nor the later vesting of title in the State has been affected by subsequent events, namely:

(i) the issue of a certificate of title in 1994 to the Grammar School;

(ii) the transfer of Lot 11 to 30 Albert Street Pty Ltd and the registration of that transfer;

(iii) the transfer of Lot 11 from 30 Albert Street Pty Ltd to Divine Limited and the registration of that transer;

(iv) the registration of plan SP142332;

(v) the transfer of Lot 11 from Divine Limited to WCL and WCL's registration as proprietor in fee simple.

[38] The declaration which Orb seeks may be unnecessarily wide depending on which (if any) of Orb's two alternative cases are to be accepted. If Lot 11 was a public highway or road when the *Land Act* 1962 came into force, Lot 11 vested in the State, and if no movement in the register affects that position, then it may be beside the point that the land is being used as a public highway or road now. It was not argued that title reverts to the registered proprietor if the land ceases to be used by the public as a road. However, if any title vested in the State has

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[14] *Anderson v City of Stonnington and Anor* (2017) 227 LGERA 176 at [40], *Newington v Windeyer* (1985) 3 NSWLR 555 at 558.

been extinguished by later movements in the freehold land register, then Orb's case depends on the continued existence of the public rights. In that respect, continuity of use is a necessary element.

[39] The declaration which Orb seeks may also not be the appropriate relief, at least in the terms as presently drawn. Even though Orb seeks to rely upon public rights arising from the common law dedication of Lot 11 as a road, or arising from the land vesting in the State, the relief is pointless unless those rights take priority over WCL's interest as registered proprietor in the fee simple. In reality Orb's interest in the public rights is limited to its dispute with WCL.

[40] Unless the public rights (whatever they may be) take priority over WCL's interests, declaratory relief would be futile and the relief would be declined on discretionary grounds. I have approached the present application[15] on the basis that if whatever right or interest which may be established by Orb is defeated by WCL's title then the principal application should be dismissed.

WCL's submissions

[41] WCL submitted five reasons why Orb's case must fail and therefore no trial is required. Those five reasons are:[16]

1. Orb does not have standing to seek the declaration as it has no special interest in any public rights over Lot 11;
2. "Beatrice Lane" is the reserve not Lot 11;
3. There were legal preconditions to the Grammar School dedicating Lot 11 as a road and those preconditions were not fulfilled;
4. From 1861, there could not, under the law of Queensland, be a common law dedication of a road unless statutory requirements were fulfilled and they were not;
5. WCL has indefeasible title to Lot 11.

[42] WCL submits that if it is successful in any of those arguments, then the principal application is doomed to fail and should be dismissed now.

Lack of standing by Orb

[43] In the course of his oral submissions, Mr Dunning QC abandoned this ground for seeking summary judgment, although reserved the right to argue the point on any final hearing of the principal application. The concession was appropriate. Orb owns a building to which it gains access over Lot 11. WCL asserts a right to cut off that access and Orb has a commercial interest which it is seeking to protect.

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[15] See paragraph [30].

[16] Not in the order put by WCL.

Beatrice Lane is the reserve not Lot 11

[44] WCL points to Plan SP142332 where the reserve is described as "Beatrice Lane". On that plan, Lot 11 bears no endorsements as a "Right of Way".

[45] Orb's case is that Lot 11, being the area marked as "Right of Way" on RP1073 was dedicated as a public road and was used by the public. Part of that case relies on evidence that the area of Lot 11 was known for decades as "Beatrice Lane". As later explained, what Plan SP142332 shows is significant, but the naming of the reserve as Beatrice Lane on that plan is not. While it might be accepted that the reserve is now described as "Beatrice Lane" on Plan SP142332, the fact remains that there is an arguable factual case that Lot 11 was known as "Beatrice Lane" for decades and used as a public thoroughfare. That supports Orb's case that Lot 11 was dedicated at common law as a road.

[46] A related issue is that WCL submits that the creation of the reserve on RP1073 shows that the intention of the Grammar School was to create a "buffer" between the land now owned by Orb and Lot 11. That, WCL submits, demonstrates that there was no intention of the Grammar School to create a public access onto Orb's land from Lot 11. That, it is said, is relevant to the Grammar School's intention to create private rights in favour of the owners of Lots 1-9 rather than to create public rights.

[47] These are matters that cannot be resolved without trial. They will no doubt turn on a consideration of evidence such as the historical material which is sought to be admitted by Orb through Dr Beanland.

The Grammar School could not lawfully dedicate the road

[48] The *Grammar Schools Act* 1860 (the Grammar Schools Act) was in force until it was repealed by the *Grammar Schools Act* 1975. The Grammar Schools Act was therefore in force at the time of registration of RP1073 and at all relevant times prior to 1923 by which time the dedication must, on Orb's case, have been effected.

[49] Section 6 of the Grammar Schools Act provides:

> "Provided always that it shall not be lawful for the said trustees to alien, mortgage, charge or demise any messuages, lands, tenements or hereditaments to which they may become entitled by grant, purchase or otherwise howsoever unless with the sanction of the Governor and the executive council except by way of lease for any term not exceeding 21 years in position…"

[50] WCL submits rightly that there is no evidence that the Governor and the executive council approved the dedication by the Grammar School of Lot 11 as a road.

[51] As the authorities referred to below show, the private dedication of a common law road does not, of itself, vest in any government authority an interest in the land over which the road is

dedicated.[17] That vesting of title, if it occurred, occurred through no act of the Grammar School, but occurred by force of statute, namely s 369 of the *Land Act* 1962. It is therefore difficult to see how the creation of a right in the public to pass is to "alien … lands [of the Grammar School]". To alienate land is to create an interest in the property.[18]

[52] It is therefore by no means clear that the Grammar School could not, prior to 1923 (being the year in which private citizens were prohibited from dedicating roads except when regulated), lawfully dedicate the road without the sanction of the Governor and the executive council. Summary judgment could not be given on the basis that there has been some breach of the Grammar Schools Act which affects the validity of the dedication.

There were statutory requirements for the dedication of a road which were not complied with

[53] This argument is bound up with the submissions made concerning indefeasibility and in particular with s 119 of the *Real Property Act* 1861 (the 1861 Act). I deal with those issues below.

WCL has indefeasible title to Lot 11

[54] At common law, title to land was established through a chain of title to the entity ultimately asserting ownership.[19] The object of the Torrens Title System is to create a scheme of title by registration to render such an enquiry unnecessary. The scheme assumes that the only interests in the land which are recognised are those shown in the register, although there may be some exceptions.[20] Torrens Title is a system of "title by registration" not of "registration of title".[21]

[55] In *Breskvar v Wall*[22] Windeyer J explained the fundamentals of the scheme by reference to Robert Torrens' writings on the subject:

> "I would only observe that the Chief Justice's aphorism, that the Torrens system is not a system of registration of title but a system of title by registration, accords with the way in which Torrens himself stated the basic idea of his scheme as it became law in South Australia in 1857. In 1862 he, as Registrar-General published his booklet, A Handy Book on the Real Property Act of South Australia. It contains the statement, repeated from the South Australian Handbook, that:

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[17] *Municipal District of Concord v Coles* (1905) 3 CLR 96, *Tierney v Loxton* (1891) 12 NSWLR 308, *Municipal Council of Sydney v Young* [1898] AC 457.

[18] *Richardson v Cummins* (1951) ABC 185 at 191, *Lang v Castle* [1924] SASR 255 at 263-4 and *Di Carlo v Kashani-Malaki* [2013] 2 Qd R 17 at [30].

[19] *Pilcher v Rawlins* (1872) LR 7 Ch App 259.

[20] *Trieste Investments Pty Ltd v Watson* [1964] NSWR 1226 at 1228-1229.

[21] *Breskvar v Wall* (1971) 126 CLR at p 385.

[22] (1971) 126 CLR 376 at 399 - 400.

> '. . . any system to be effective for the reform of the law of real property must commence by removing the past accumulations, and then establish a method under which future dealings will not induce fresh accumulations. This is effectuated in South Australia by substituting 'Title by Registration' for 'Title by Deed' . . .'
>
> Later, using language which has become familiar, he spoke of 'indefeasibility of title'. He noted, as an important benefit of the new system, 'cutting off the retrospective or derivative character of the title upon each transfer or transmission, so as that each freeholder is in the same position as a grantee direct from the Crown'. This is an assertion that the title of each registered proprietor comes from the fact of registration, that it is made the source of the title, rather than a retrospective approbation of it as a derivative right."

[56] As the authorities referred to by Orb demonstrate, there may be statutory exceptions to indefeasibility beyond those expressly recognised by the relevant Torrens Title legislation. Orb submits that the dedication of a common law road and the vesting of the title in the State by legislation are exceptions.

[57] Here, the parties in their submissions largely focused upon the Torrens Title legislation in force at the time of the alleged dedication of Lot 11 as a public road. In my view, that is ultimately the wrong enquiry. WCL's title derives from its registration as the proprietor in fee simple of Lot 11. Its rights therefore derive from the register of freehold land kept by the Registrar of Titles under the provisions of the *Land Title Act* 1994 (the 1994 Act). Ultimately, the issue is whether the interest (as defined in the 1994 Act) of the registered proprietor of Lot 11, namely WCL, is subject to whatever public rights were allegedly created[23] by the dedication of Lot 11 as a road. It is nonetheless necessary to engage in an historical analysis to identify what those public rights are or were.

[58] The 1861 Act introduced Torrens Title to Queensland. It provided for a register upon which "instruments" could be registered. Those instruments included transfers, leases, easements and mortgages.[24]

[59] There is no mention in the 1861 Act of registering any interest in roads or public areas in favour of the State. However, s 119 provided as follows:

> "Any proprietor sub-dividing any land under the provisions of this Act for the purpose of selling the same in allotments as a township shall deposit with the Registrar-General a map of such township provided that such map shall exhibit distinctly delineated all roads streets passages thoroughfares squares or reserves appropriated or set apart for public use and also allotments into which the said land may be divided marked with distinct numbers or symbols and every such map shall be certified as accurate by the declaration of a licensed surveyor before the Registrar-General or a Justice of the Peace."

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[23] And later converted statutorily to an interest in the land in the State.

[24] Definition of "instruments", s 3.

[60] The concept of a "township" is somewhat antiquated but a subdivision to sell allotments "as a township" includes subdivision of any part of an existing township.[25] Therefore, RP1073 fell within s 119 of the 1861 Act in that it was a plan deposited to further an intention to "[sub-divide] any land for the purposes of selling the same in allotments as a township". There is nothing in s 119, or otherwise in the 1861 Act, suggesting that the registration of such a plan effects a transfer of title to the State (or anyone else) in land appropriated or set aside for public use, roads, streets, etc.

[61] In *Municipal District of Concord v Coles*[26] the High Court, after considering a number of quite old cases held that "a public right of highway is not an estate or interest in the land over which the road is dedicated."[27] In that case, the High Court held that the local council did not acquire a caveatable interest as a result of public rights of way existing over the land in question.[28] In *Municipal Council of Sydney v Young,*[29] it was held that public rights created by the dedication of a road did not create an interest in one public authority sufficient to support a claim for compensation upon resumption of the land by another public authority.[30]

[62] Section 369 of the *Land Act* 1962 provided:

> "All land which, having been before, is at the commencement of this Act, or which may on or after the commencement of this Act be, dedicated by the owner thereof, not being the Crown, to public use as a road shall, by virtue of such dedication be vested (and in the case of land so dedicated before the commencement of this Act, is hereby declared to have always been vested) in the Crown and may be dealt with in the same manner as roads which have been dedicated to public use by the Crown."

[63] Before s 369 of the *Land Act* 1962, there was s 196 of the *Land Act* 1910 which was in these terms:

> "All land which has herertofore been, or may hereafter be, dedicated by the owner thereof, not being the Crown, to public use as a road may be dealt with in the same manner as roads which have been dedicated to public use by the Crown."

[64] Section 196 of the 1910 Act does not vest title in any road in the Crown, but gives the Crown rights to use the land. That is consistent with the common law position that the private dedication of a road creates public rights but not a proprietary interest in the land.

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[25] *Re Quinn's Application* (1879) 1 QLJ Supp 7.

[26] (1905) 3 CLR 96.

[27] Barton J at 110.

[28] See also *Tierney v Loxton* (1891) 12 NSWLR 308.

[29] [1898] AC 457.

[30] See also *Weber v Ankin* [2008] NSWSC 106 at [53] and [59].

[65] Orb relies on various authorities[31] to support a submission that the common law public rights over Lot 11 survived the vesting of the land in the State and therefore existed somehow alongside the interests of the State. Those authorities do not support that submission and it should be rejected.

[66] The effect of s 369 of the *Land Act* 1962 was to convert a public right of way into a proprietary interest in the land in favour of the State. That would then permit the State to regulate roads and their use. If the public rights of way subsisted then there could be a conflict between the State's interest in the land and the public rights. That is not what was intended.[32]

[67] The highest and best case for Orb is that the term "Right of Way" shown on RP1073 over Lot 11 is the delineation on that plan of a "road, street, passage [or] thoroughfare … appropriated or set aside for public use" pursuant to s 119 of the 1861 Act. There may be some dispute about that. Orb asserts that the term "Right of Way" refers to a public right. WCL points out that Lot 11 is not marked as a road. It therefore submits that s 119 of the 1861 Act has not been complied with, at least to the point of properly delineating Lot 11 as a road. It further submits that the term "Right of Way" refers to a private right to be enjoyed only by the owners of Lots 1 to 9 on RP1073. There may be problems with WCL's argument on that point because the 1861 Act provided for the registration of easements and that is the usual manner in which a right of way is granted over land (the servient tenement) where the right attaches to other land (the dominant tenement).

[68] In any event, given the nature of the present application, I proceed on the basis that Orb has an arguable case that the Grammar School caused RP1073 to be lodged delineating a "road, street, passage [or] thoroughfare" (marked as the "Right of Way") for public use over Lot 11. The lodgement of such a plan would be evidence of an intention to dedicate Lot 11 for public use.[33] To the extent that adoption by the public is a necessary element to perfect the dedication, Orb has the evidence of Dr Beanland.

[69] It would follow then that Orb has an arguable case that upon the proclamation of the *Land Act* 1962, title in Lot 11 vested in the State.

[70] Notwithstanding the above being accepted, the problem faced by Orb is that the registered proprietor of Lot 11 is WCL not the State. Further, the current registered plan (SP142332) does not show any road, street, passage or thoroughfare existing over Lot 11. The significance of the state of the register must be considered in the light of the provisions of the 1994 Act.

[71] Section 3 of the 1994 Act states the objects as follows:

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[31] *R (on the application of Smith) v Land Registry (Peterborough Office)* [2011] QB 413, *H Jones & Co Pty Ltd v Municipality of Kingborough* (1950) 82 CLR 282 and *Fourmile v Selpam Pty Ltd* (1998) 80 FCR 151.

[32] And see, *City of Canada Bay of Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424 set out at [105] of these reasons and see also [113].

[33] As well in other evidence to which it is unnecessary to refer, and see *Attorney-General v City Bank of Sydney* (1920) 20 SR(NSW) 216 at 231.

> "**3 Object of Act**
>
> The object of this Act is to consolidate and reform the law about the registration of freehold land and interests in freehold land and, in particular—
>
> (a) to define the rights of persons with an interest in registered freehold land; and
>
> (b) to continue and improve the system for registering title to and transferring interests in freehold land; and
>
> (c) to define the functions and powers of the registrar of titles; and
>
> (d) to assist the keeping of the registers in the land registry, particularly by authorising the use of information technology."

[72] Section 5 of the 1994 Act is in these terms:

> "**5 Act binds all persons**
>
> This Act binds all persons, including the State and, so far as the legislative power of the Parliament permits, the Commonwealth, the other States and the Territories."

[73] Section 5 overcomes the effect of s 13 of the *Acts Interpretation* Act 1954 which is in these terms:

> "**13 Future Acts when binding on the Crown**
>
> No Act passed after the commencement of this Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included in the Act for that purpose."

[74] A section that is in some ways related to s 5 is s 48 which provides:

> "**48 Land held by the State**
>
> The State may, under this Act, acquire, hold and deal with lots."

[75] The term "State" is not defined in the 1994 Act but is defined in the *Acts Interpretations Act* 1954 in these terms:

> "State means a State of the Commonwealth, and includes the Australian Capital Territory and the Northern Territory."

[76] Section 6 of the 1994 Act provides that there shall be a Registrar of Titles and s 7(1) provides that the Registrar must keep a "land registry". Section 7(2) provides that "land registry" includes "the freehold land register".

[77] As to the freehold land register, ss 27, 28 and 29 provide as follows;

"**27 Registrar must keep register**

The registrar must keep a register of freehold land (the freehold land register).

28 Particulars the registrar must record

(1) The registrar must record in the freehold land register the particulars necessary to identify—

(a) every lot brought under this Act; and

(b) every interest registered in the register; and

(c) the name of the person who holds, and the name of each person who has held, a registered interest; and

(d) if the person who holds a registered interest is a minor— the minor's date of birth; and

(e) all instruments registered in the register and when they were lodged and registered.

(2) The registrar must also record in the freehold land register anything else required to be recorded by this or another Act.

29 Particulars the registrar may record

(1) The registrar may record in the freehold land register anything that the registrar is permitted to record by this or another Act.

(2) The registrar may also record in the freehold land register anything that the registrar considers should be recorded to ensure that the register is an accurate, comprehensive and usable record of freehold land in the State."

[78] The term "instrument" is defined, relevantly here, as:

"***instrument*** includes—

(a) a deed of grant or certificate of title; …

(e) a request, application or other document that deals with a lot and may be registered under this Act; and

(f) a map or plan of survey that may be lodged; …" (emphasis added)

[79] Section 60 of the 1994 Act concerns registering a transfer. That is in these terms:

"**60 Registering a transfer**

(1) A lot or an interest in a lot may be transferred by registering an instrument of transfer for the lot or interest.

(2) To remove any doubt, part of a lot may not be transferred."

[80] As already observed, the term "instrument" includes a map or plan of survey. By s 31:

> "**31 Instruments form part of the freehold land register**
>
> On registration of an instrument in the freehold land register, the instrument forms part of the register."

[81] Sections 200 and 201 are transitionary provisions. They provide as follows:

> "**200 Things made under repealed Acts**
>
> (1) In this section—
>
> ***done*** includes issued, recorded, entered, kept, granted, declared, registered, lodged, deposited, produced, transferred, created, served, given, acquired, required, executed, removed, noted, sealed, imprinted, witnessed, advertised and anything else prescribed by regulation for this definition.
>
> (2) Everything done under an Act repealed by this Act, is as effective as if it had been done under this Act. (editor's note omitted)
>
> **201 Interests and certificates of title under repealed Acts**
>
> (1) On the commencement of this section—
>
> (a) each interest in freehold land held by a person immediately before the commencement, and recorded under an Act repealed by this Act, is taken to be an interest held by the person in the freehold land register; and
>
> (b) each certificate of title, duplicate certificate of title or deed of grant (other than a deed of grant prescribed by regulation) issued under an Act repealed by this Act before the commencement is taken to be a certificate of title issued under this Act.
>
> (2) The registrar must do everything necessary or desirable to ensure that the particulars of each interest mentioned in subsection (1) are fully and accurately recorded in the freehold land register."

[82] Therefore, by force of ss 31, 200 and 201 together with the definition of "instrument", both RP1073[34] and SP142332 form part of the register of freehold land.

[83] RP1073 was lodged and registered under the 1861 Act. The 1971 investigation and the annotation on the plan was probably conducted pursuant to s 11 of the 1861 Act. That section relevantly was as follows:

> "**11. Powers of Registrar.** The Registrar-General may exercise the following powers that is to say

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[34] In the Real Property Act 1861, see s 35, and the definition of "instruments" in s 3.

(1) **To inspect documents.** He may require any proprietor or other person making application to have land brought under the provisions of this Act or any proprietor mortgagee or other person interested in land under the provisions of this Act in respect of which any transfer lease mortgage encumbrance or other dealing or any release from any mortgage or encumbrance is about to be effected or in respect of which any transmission is about to be registered or registration abstract granted under this Act to produce all deeds wills or other instruments in his possession or within his control affecting such land or the title thereto

…

(4) **To correct errors.** He may upon such evidence as shall appear to him and the Master of Titles sufficient in that behalf correct errors in certificates of title or in the register book or in entries made therein respectively and may supply entries omitted to be made under the provisions of this Act provided always that in the correction of any such error he shall not erase or render illegible the original words and shall affix the date on which such correction was made or entry supplied together with his initials and every certificate of title so corrected and every entry so corrected or supplied shall have the like validity and effect as if such error had not been made or such entry omitted except as regards any assurance or instrument which may have been entered in the register book previously to the actual time of correcting such error or supplying such omitted entry"

[84] Sections 19 to 24 of the 1994 Act[35] empower the Registrar of Titles in terms broadly similar to s 11 of the 1861 Act.

[85] Sections 50, 51 and 51A deal with plans of subdivision and particularly relevant here, "public use land". That term is defined as:

"***public use land*** means land dedicated to public use by a plan of subdivision."

[86] Sections 50, 51 and 51A are relevantly in these terms:

"**50 Requirements for registration of plan of subdivision**

(1) A plan of subdivision must—

(a) distinctly show all roads, parks, reserves and other proposed lots that are to be public use land; and

(b) include a statement agreeing to the plan and dedicating the public use land by—

(i) the registered owner; or

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[35] Division 4 of Part 2

(ii) if the mortgagee of the registered owner is in possession—the mortgagee in possession; and

(c) show all proposed lots marked with separate and distinct numbers; and

(d) distinctly show all proposed common property; and

(e) show all proposed easements marked with separate and distinct letters; and

…

51 Dedication of public use land in plan

(1) The dedication of a lot to public use in a plan of subdivision must be of the registered proprietor's whole interest in the lot.

(2) On registration of the plan, without anything further—

(a) if the dedication is for a road—the road is opened for the Land Act 1994; or

(b) if the dedication is for a non-tidal watercourse or a lake—the plan is taken to be the source material for the land for the Survey and Mapping Infrastructure Act 2003, section 99; or

… (A statutory note is omitted)

51A Access for public use land

A plan of subdivision providing for the dedication of a lot to public use, other than as a road, non-tidal watercourse or a lake, may be registered only if—

(a) on registration, access to the lot will be available through a road or a public thoroughfare easement; or

(b) the Minister administering the Land Act 1994 has approved that the plan of subdivision may be registered without access to the lot being available."

[87] Section 54 concerns dedications of roads. That is in these terms:

"**54 Dedication of road by notice**

(1) The registered owner of a lot may dedicate the lot as a road for public use by the registration of a dedication notice.

(2) Part of a lot may not be dedicated as a road for public use under this section.

(3) A dedication notice must have been approved by the relevant planning body.

(4) On the day the dedication notice is registered—

(a) the dedication of the lot as a road for public use takes effect; and

(b) the land is opened for public use as a road.

(5) This section does not apply if the dedication notice is for the land to be dedicated as a road under the Acquisition of Land Act 1967, section 12B."

[88] The current particulars in the freehold land register include those shown on Plan 142332 which is an "instrument" and part of the freehold land register. Importantly:

(i) the term "Right of Way" as it originally appeared in RP1073 does not appear in Plan 142332 over Lot 11. That is understandable given the 1971 investigation;

(ii) there is no "dedication notice" registered over Lot 11;[36]

(iii) there is no notification of Lot 11 as "public use land".

[89] As well as an interest of a proprietor in fee simple, there are interests in land which may be registered under the 1994 Act: leases,[37] mortgages,[38] easements,[39] covenants[40] and profits a prendre.[41] Subdivisions A and B of Division 2 of Part 9 deal with the consequence of registration and indefeasibility. They provide:

"**Division 2 Consequences of registration**

Subdivision A General

180 Benefits of registration

The benefits of this division apply to an instrument whether or not valuable consideration has been given.

181 Interest in a lot not transferred or created until registration

An instrument does not transfer or create an interest in a lot at law until it is registered.

182 Effect of registration on interest

On registration of an instrument that is expressed to transfer or create an interest in a lot, the interest—

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[36] Although on Orb's case Lot 11 was dedicated a century or so before 1994.

[37] Division 2 of Part 6.

[38] Division 3 of Part 6.

[39] Division 4 and 4AA of Part 6.

[40] Division 4A of Part 6.

[41] Division 4B of Part 6.

(a) is transferred or created in accordance with the instrument; and

(b) is registered; and

(c) vests in the person identified in the instrument as the person entitled to the interest.

183 Right to have interest registered

A person to whom an interest is to be transferred or in whom an interest has been created has a right to have the instrument transferring or creating the interest registered if—

(a) the instrument has been executed; and

(b) the person lodges the instrument and any documents required by the registrar to effect registration of the instrument; and

(c) the person has otherwise complied with this Act in relation to the registration of the instrument.

Subdivision B Indefeasibility

184 Quality of registered interests

(1) A registered proprietor of an interest in a lot holds the interest subject to registered interests affecting the lot but free from all other interests.

(2) In particular, the registered proprietor—

(a) is not affected by actual or constructive notice of an unregistered interest affecting the lot; and

(b) is liable to a proceeding for possession of the lot or an interest in the lot only if the proceeding is brought by the registered proprietor of an interest affecting the lot.

(3) However, subsections (1) and (2) do not apply—

(a) to an interest mentioned in section 185; or

(b) if there has been fraud by the registered proprietor, whether or not there has been fraud by a person from or through whom the registered proprietor has derived the registered interest.

[90] WCL's registration as proprietor of the fee simple gives it priority over any unregistered "interests". At least on the face of s 184, WCL's interest would defeat the interest in Lot 11 vested in the State by s 369 of the *Land Act* 1962.

[91] Section 185 prescribes the exceptions to indefeasibility. Public rights in a common law road are not an exception expressed in s 185 and neither is the improper omission of an endorsement on a plan of a public use area, such as a road.

[92] Section 186 of the 1994 Act empowers the Registrar to correct errors in some circumstances and s 187 empowers this court to order the correction of the register in other circumstances. Neither party argued that either the power of the registrar or the jurisdiction of the Court is enlivened here to act under ss 186 or 187 respectively in aid of Orb's position.

[93] Also of some importance is s 179 of the 1994 Act which is in these terms;

> "**179 Evidentiary effect of recording particulars in the freehold land register**
>
> In all proceedings, the particulars of a registered instrument recorded in the freehold land register are conclusive evidence of—
>
> (a) the registration of the instrument; and
>
> (b) the contents of the instrument; and
>
> (c) all terms stated or implied in it by this or another Act; and
>
> (d) when the instrument was lodged and registered."

[94] *Breskvar v Wall*[42] was decided upon a construction of the 1861 Act. The indefeasibility provision in the 1861 Act shares basic characteristics with the provisions in the 1994 Act.[43] There, a party who was the registered proprietor signed a transfer to secure a loan. The transfer did not bear the name of a transferee and was consequently a void instrument by force of s 53(5) of the *Stamp Act* 1894. Although the transfer was to be held in escrow, the lender fraudulently registered a transfer of the land to one of his relatives who then sold the property to the purchaser. The purchaser did not become registered but was in possession of documents giving a right to registration. The purchaser therefore had an equitable interest in the land but the original proprietor asserted that notwithstanding the registration of the transfer to the nominee of the lender, the original proprietor retained legal title. That assertion failed, with Barwick CJ describing Torrens Title in these terms:[44]

> "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. The affirmation by the Privy Council in *Frazer* v *Walker* (1) of the decision of the Supreme Court of New Zealand in *Boyd* v *Mayor, & c, of Wellington* (2), now places that conclusion beyond question. Thus the effect of the *Stamp Act* upon the memorandum of

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[42] (1971) 126 CLR 376

[43] Sections 184 and 185.

[44] Page 385 -386.

transfer in this case is irrelevant to the question whether the certificate of title is conclusive of its particulars."

[95] *Breskvar v Wall* has been affirmed by the High Court on numerous occasions. In *Bahr v Nicolay* [No 2],[45] the court held that the taking of an interest with notice of an antecedent interest does not subject the party who subsequently becomes registered to the antecedent interest in the absence of fraud.[46] In *Leros Pty Ltd v Terara Pty Ltd*,[47] it was held that while a short lease was an exception to indefeasibility, a proprietor later registered in fee simple was not bound by any option to renew even with notice of the option.[48] In *Hillpalm Pty Ltd v Heaven's Door Pty Ltd*,[49] a plan of subdivision provided for the creation of two lots of land and a right of carriageway. The plan was registered bearing a diagram of a "proposed Right of Way 10 metres wide" but the carriageway was not registered. The registered proprietor of the fee simple was held to hold his interest free from any right of way. The right of way was not a statutory exception to indefeasibility of the registered proprietor's title.[50]

[96] *Westfield Management Limited v Perpetual Trustee Company Limited*[51]concerned the extent to which (if any) extrinsic evidence could be adduced to aid in construction of the terms of an easement registered over Torrens Title land. In holding that the admission of extrinsic evidence to construe the terms of a registered easement was contrary to the basic principles of the Torrens System, the High Court observed:

> "Together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens system to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question. This important element on the Torrens system is discussed by Barwick CJ in *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (31). It will be necessary later in these reasons to refer further to the significance of this for the present appeal."[52]

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45 (1988) 164 CLR 604.

46 At 653, although in that case rights in equity arose against the registered proprietor; see also *Mills v Stokman* (1967) 116 CLR 61 at 78.

47 (1992) 174 CLR 407.

48 Pages 417 - 419.

49 (2004) 220 CLR 472.

50 See also *Halloran v Minister Administering National Parks and Wildlife Act* 1974 (2007) 229 CLR 545 at [35], *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [193], *Black v Garnock* (2007) 230 CLR 438 at [10], *Cassegrain v Gerard Cassegrain & Co Pty Ltd* (2015) 254 CLR 425 at [16], *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* (2013) 247 CLR 149 at [20] and *Westfield Management Limited v Perpetual Trustee Co Ltd* (2007) 233 CLR 528 at [5].

51 (2007) 233 CLR 528.

52 Citations omitted; and see also paragraph [38] at page 539.

[97] There are numerous cases decided both before and after *Breskvar v Wall* which demonstrate the significance of the principle that the Torrens Title System is one of title by registration, not registration of title. For example:

(i) in *City of Canada Bay Council v F & D Bonaccorso Pty Ltd*,[53] the local authority transferred land to a third party notwithstanding that it had no statutory power to do so. The third party upon registration was held to have acquired indefeasible title in the fee simple;

(ii) in *Logue v Shoalhaven Shire Council*[54] a local authority purported to exercise a statutory power of sale of land for unpaid rates. Notwithstanding that the local authority had exceeded its powers, the transferee obtained an indefeasible title upon registration;

(iii) in *Frazer v Walker*,[55] a mortgagee of land fraudulently passed title to an innocent third party. Upon registration, the third party acquired indefeasible title in the fee simple;

(iv) in *Assets Company Ltd v Mere Roihi*,[56] under legislation in New Zealand a court made orders which ultimately led to the registration of the proprietor. The proprietor took an indefeasible title notwithstanding that the court had acted in excess of jurisdiction;

(v) in *Palais Parking Station Pty Ltd v Shea*,[57] a government officer purportedly acting under powers of compulsory acquisition acquired land. He had no lawful right to do so.[58] Because the government officer acted *bona fide* and therefore the fraud exception to indefeasibility did not apply, the Full Court of the Supreme Court of South Australia held that the government officer had acquired indefeasible title upon registration of his interest.

[98] Even though the 1994 Act made sweeping changes to the system of registration of land in Queensland, the Act embraces those fundamental characteristics of Torrens Title as prescribed by the 1861 Act and as explained in *Breskvar v Wall*.[59]

[99] Notwithstanding these lines of authority and the provisions to which I have referred,[60] Orb submits that the registered title of WCL is subject to public rights of way established about a century ago under common law principles and which have been converted to a proprietary interest in the land in the State where that interest appears nowhere on the freehold land register.

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[53] (2007) 71 NSWLR 424.

[54] [1979] 1 NSWLR 537.

[55] [1967] 1 AC 569.

[56] [1905] AC 176.

[57] [1980] 24 SASR 425.

[58] So held in *Palais Parking Station Pty Ltd v Shea* (1977) 16 SASR 350.

[59] *Tara Shire Council v Garner* [2003] 1 Qd R 556 at [48] - [49].

[60] Especially s 5, definition of "instrument", s 31, s 60, s 179 and s 184.

[100] Orb relies on two different but related exceptions to the indefeasible title of a registered proprietor:

(i) Where the interest or right said to trump the registered title is one that is not included in the registration system.

(ii) Where some statutory provision elevates the unregistered interest to priority over registered interests.

[101] Orb submits that *Vickery v Municipality of Strathfield*[61] stands as authority for the proposition that "the dedication of land as a public highway or road has been said to "lie wholly outside" the system of land titling and the acquisition of title by registration."[62] *Vickery*, decided in 1911, no doubt is authority for the proposition that upon a proper construction of the *Real Property Act* 1900 (NSW) (the New South Wales Act of 1900) in the terms as it was then enacted, a registered proprietor of the fee simple did not take his title free from rights created by dedication of a public road.

[102] After finding that the land in question had in fact been dedicated as a public road in accordance with the common law, Rich AJ (as his Honour then was) considered provisions of the NSW Act of 1900 and then held as follows:

> "It is clear, therefore, that a registered proprietor holds his land absolutely free from all encumbrances, liens, estates, or interests whatsoever other than those notified on the grant or certificate of title, save in the cases expressly mentioned. Is this language sufficiently wide to cover public rights of highway ? I am of opinion that is it not. The language of s 42 itself suggests that the interests referred to are such as are capable of existing in an individual ; this is inconsistent with applicability to public rights of user. But, apart from this, public highways appear to lie wholly outside the scope of the Act. In the case of private easements, their registration is contemplated and provided for by s 47. No provision has been made for the recording of the dedication of land for a highway, and, indeed, it has been held in New Zealand that such a dedication in unregistrable : *Howell v The District Land Registrar* (27 NZ 1074).
>
> It is true that Griffith, CJ, in *Municipal District of Concord v Coles* (3 CLR at p 106), has expressed the opinion that whenever the Registrar-General knows that there is a highway he is bound to indicate[63] it on the face of the certificate of title. There, however, the learned Chief Justice was considering an original application to bring land under the Act, and the question raised in the present case was expressly left open.
>
> I am of the opinion that the existence of a clean certificate of title does not prevent the dedication of the while or any part of the land comprised therein as a public highway, and that although the transferee from a registered proprietor

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[61] (1991) 11 SR (NSW) 354.

[62] Orb's submissions at 36.

[63] Perhaps should read "indicate".

> is not affected by notice direct or constructive of any trust or unregistered interest, he is none the less subject to any public rights of highway that may exist on the land comprised in the certificate of title, whether the highway be indicated thereon or not."[64] (emphasis added)

[103] The NSW Act of 1900:

(i) did not contain a provision to the effect that the State was bound by the Act;

(ii) did not contain a provision that under the Act the State may hold or deal with lots;

(iii) provided for limited "dealings" to be registered under the Act, namely transfers,[65] leases,[66] mortgages and encumbrances,[67] and provided for transmission of title upon bankruptcy,[68] marriage[69] or death.[70] It also provided for powers of attorney,[71] and caveats to be registered;[72]

(iv) contained indefeasibility provisions dealing with competing "interests" in land;[73]

(v) contained nothing which suggested that a common law dedication of a road created an interest in land.

[104] It is therefore with respect unsurprising that the indefeasibility provisions were construed as relating only to private as opposed to public rights. Clearly though, it is within the legislative power of the Queensland Parliament to enact legislation giving indefeasibility to private interests over public rights or proprietary interests vested in the State. In *City of Canada Bay Council v F & D Bonaccorso Pty Ltd*[74] the Court of Appeal of New South Wales observed that in determining questions of competing priorities, the differentiation between private and public rights was "not a principled distinction"[75] and went on to decide the question of priorities upon the construction of the relevant statutes. In *Vickery*, the crucial point was that the public

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64 At 362-3.

65 Sections 46 - 52.

66 Sections 53 - 55.

67 Sections 56 - 57.

68 Sections 90 - 91.

69 Section 92.

70 Sections 93 - 94.

71 Sections 88 - 89.

72 Sections 72 - 74.

73 Section 42.

74 (2007) 71 NSWLR 424.

75 At [32].

rights (not being an interest in land) were not registerable. The rights therefore existed "wholly outside the scope of the [Torrens Title system]".

[105] *Vickery* has received approval in later cases.[76] In *City of Canada Bay Council v F & D Bonaccorso Pty Ltd*[77] this was said:

> "46 However, apart from fraud and the exceptions set out in s 42(1)(a)–(d) of the *Real Property Act*, it is clear that rights in land under the Torrens system might arise outside the *Real Property Act* and that in some circumstances those rights effectively supplant the rights under that Act. Thus, before the enactment of legislation such as the *Roads Act* 1993, which vested the fee simple of public roads in a local council as the relevant roads authority (see s 7(4) and s 145(3)), the common law right of the public to use a dedicated highway could not be defeated by the registered proprietor of the land on which the highway was located. Thus in *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 at 362, 28 WN (NSW) 107 at 110, Rich AJ said:
>
> > 'It is clear, therefore, that a registered proprietor holds his land absolutely free from all encumbrances, liens, estates, or interests whatsoever other than those notified on the grant or certificate of title, save in the cases expressly mentioned. Is this language sufficiently wide to cover public rights of highway? I am of opinion that it is not. The language of s 42 itself suggests that the interests referred to are such as are capable of existing in an individual; this is inconsistent with its applicability to public rights of user. But, apart from this, public highways appear to lie wholly outside the scope of the Act.'" (emphasis added)

[106] WCL submitted that s 119 of the 1861 Act established the only way in which, from 1861, a public road could be dedicated, namely by delineating the road on a plan which was then deposited. On that basis, Mr Dunning QC sought to distinguish *Vickery*.

[107] There are difficulties with that submission. Firstly, the New South Wales Act of 1900 contained, as s 113, a provision in virtually identical terms to s 119 of the 1861 Act. Section 113 was therefore part of the framework being considered in *Vickery*.

[108] Secondly, both the New South Wales Act of 1900, and the 1861 Queensland Act, concern the registration of "interests in land". Public rights created by the dedication of a road are not "interests in land". That is why in *Vickery*, such rights could not be registered and were held to be outside the scope of the New South Wales legislation. Section 113 of the New South Wales

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[76] *City of Canada Bay of Council v F & D Bonaccorso Pty Ltd* (2007) 71 NSWLR 424 at 46 and *Anderson v City of Stonnington and Another* (2017) 227 LGERA 176.

[77] (2007) 71 NSWLR 424.

Act of 1900[78] just provided for the lodgement of a plan delineating areas over which public rights might attach. For the same reason, the rights existed outside of the 1861 Act.

[109] *City of Canada Bay Council v F & D Bonaccorso Pty Ltd*[79] concerned a disposal of land by a local authority. Under the provisions of the *Local Government Act* 1993 (NSW), the council had no authority to sell land which was classified under that Act as "community land". The question for the Court of Appeal of New South Wales was whether, properly construed, the provisions of the *Local Government Act* overrode the indefeasibility created by the New South Wales Act of 1900 so as to defeat the interests of the party who acquired a registered interest in the land. The court held that the indefeasibility provisions prevailed. The case was, of course, decided against the statutory context of New South Wales legislation and upon the proper construction of that legislation.

[110] In *Anderson v City of Stonnington and Another*[80] this was said:

> "54. Once land has become a public highway through dedication by its owner, it retains that status irrespective of whether the title to that land discloses that status. A purchaser of that land is bound by its status as a public highway whether or not he or she was aware of that status at the time of purchase. Neither the owner who has dedicated the land as a public highway nor a successor in title can retract the dedication so as to change the status of the land as a public highway. Further, the status of the land as a public highway would not be affected by the public ceasing to use it after it was dedicated."

[111] In *Anderson*, the Court of Appeal of Victoria was considering whether a lane was a "road" within the meaning of s 3(1) of the *Local Government Act* 1989 (Victoria). Part of that consideration turned upon a statutory definition whereby a "road" was defined as including a "public highway" which in turn was defined as "any area of land that was a highway for the purposes of the common law". It was against that background that *Vickery* became relevant.

[112] There is nothing in either *City of Canada Bay Council* or *Anderson* which suggest that as a matter of absolute principle, the dedication of a public road vests a right or interest in the State, or more generally, the public, which must prevail over the interest of a proprietor registered under the Torrens Title System. In the end, the rights of the registered proprietor must be determined upon a proper construction of the relevant legislation, here the 1994 Act and any other relevant statutory provisions.

[113] In the passage of *City of Canada Bay Council*, that I have set out at paragraph 105 of these reasons, the court drew a distinction between the public rights created by dedication of a public road and the interest created by the land being statutorily vested in the relevant government authority: see the lines in the passage of the judgment of *City of Canada Bay*

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[78] *Real Property Act* 1861, s 119.

[79] (2007) 71 NSWLR 424.

[80] (2017) 227 LGERA 176.

Council that I have emphasised. Once the land was vested in the council, the interest thereby created was one which fell within the Torrens system of registration.

[114] The common law public rights upon dedication of a public road stand "wholly outside the scope of the [Torrens System]"[81] because of the nature of those rights. They do not constitute an "interest" in the land for the purposes of s 42 of the New South Wales Act of 1900 and would not constitute an "interest" for the purposes of s 44 of the 1861 Act or s 184 of the 1994 Act. Registration of a plan of subdivision showing areas that have been dedicated for public use under s 113 of the New South Wales Act of 1900 or s 119 of the 1861 Act did not create an interest in land in favour of the relevant government authority. The registration of the plan simply identified the land over which the public rights may exist.

[115] As previously observed, once the land over which the public rights existed was vested,[82] the public right was converted to an interest in land in favour of the relevant authority; in Queensland by force of s 369 of the *Land Act* 1962. The State's interest in the land does not then exist "wholly outside the scope of the [Torrens system]".

[116] It may be that in 1962, title in Lot 11 vested in the State. It may be that the Registrar of Titles in 1971 erred in finding that no dedication of Lot 11 as a road had occurred. It may be that the Registrar of Titles erred in issuing a certificate of title to the Grammar School in 1994 because the State, not the Grammar School, owned Lot 11. However, the Torrens Title System presently in force in Queensland through the 1994 Act, requires reference to the register, not history, to determine the rights of the respective parties here.

[117] What the register shows, and the effect of what it shows, is as follows:

(i) WCL is the registered proprietor in fee simple of Lot 11;

(ii) the register includes "instruments" which are registered;

(iii) Plan SP142332 is a registered instrument which is part of the register;

(iv) plan SP142332 does not show Lot 11 as a road or other public use land;

(v) there is no other notation in the register which shows any interest in the State in Lot 11.

[118] There is no suggestion by Orb that any of the exceptions to indefeasibility prescribed by s 84 of the 1994 Act exist. It therefore follows that in the absence of any statutory provision outside of the 1994 Act which preserves as against WCL the interest of the State in Lot 11, WCL's interest as the registered proprietor in fee simple means that it enjoys the land free of any claim that title in the land has been vested in the State.

[119] Various authorities stand for the undoubted proposition that provisions in statutes other than the statute which constitutes the Torrens System of title may create an exception to the indefeasibility of title which would otherwise be enjoyed by the proprietor by force of registration.

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[81] *Vickery v Municipality of Strathfield* (1911) 11 SR (NSW) 354 at 362.

[82] By the *Roads Act* 1993 (NSW) in New South Wales and the *Land Act* 1962 (Qld) in Queensland.

[120] *City of Canada Bay Council* was a case where statutory public rights did not survive registration of a transfer of the fee simple. The case though was somewhat different from the present. There was no doubt that the council there had owned the land and no doubt that it had transferred it. The issue was whether defects in the exercise of the power of the council to transfer the land affected the indefeasible nature of the interest obtained by the transferee.

[121] *Pratten v Warringah Shire Council*[83] concerned a drainage reserve. Section 398 of the *Local Government Act* 1919 (NSW) provided that where a drainage reserve was shown on a registered plan, title in the land vested in the council. There was originally no provision in the New South Wales Act of 1900 enabling the council to be registered on the title as proprietor of the land the subject of the drainage easement. However, the legislation was amended empowering the Registrar-General upon application by the council, to issue a certificate of title for the drainage easement land in favour of the council. The council never applied for a certificate and the registered proprietor of the land claimed priority by force of his registration.

[122] After considering various authorities, Street J (as his Honour then was) held:[84]

> "Guided by these authorities, it must in my view follow that the estate which became vested in the council in September 1920 vacated any further interest in the land in question on the part of the then registered proprietor. Thereafter it did not in law have the fee simple in the land. Nor was it able by transfer to call back, so to speak, that fee simple and vest it in a transferee. The absolute indefeasibility ordinarily flowing from registration (*Frazer v Walker,* [1967] 1 A11 ER 649; [1967] 1 AC 569) will not avail where the fee simple has, by an overriding statute, been in effect removed from the registration system. Moreover, not only was the then registered proprietor incapable of calling back his fee simple, but no act of the Registrar-General otherwise than consequent upon the written request of the council pursuant to s 14[85] of the Real Property (Amendment) Act 1921, could be recognized as effective to trench in any way upon the council's fee simple. If, of course, the council had itself made the written request contemplated by s 14 this would have the effect, upon the Registrar-General performing the necessary ministerial functions, of putting the fee simple back into the register, whereafter registered dealings would have their normal effect and significance in accordance with the provisions of the Real Property Act. But such a step has not at any time been taken in the present case. I am accordingly of the view that upon the main contest the council's statutory title will prevail over the registered title asserted by the plaintiff."

[123] While the council had not sought the issue of a certificate of title and therefore had not "[put] the fee simple back into the register", the plan remained registered showing the drainage

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[83] [1969] 2 NSWR 161.

[84] At 166 - 167.

[85] Section 14 authorised the council to apply for the issue of a certificate of title.

reserve. His Honour had no need to consider the effect upon the council's interest in the reserve if a new plan, not showing the reserve, had been registered.

[124] In *South-Eastern Drainage Board (South Australia) v Savings Bank of South Australia,*[86] it was held that charges on land which arose by the *South Eastern Drainage Act* 1931 (South Australia) took priority over a registered mortgage. In *Miller v Minister of Mines and Attorney-General of New Zealand,*[87] the Privy Council held that rights under a mining licence granted under the *Mining Act* 1926 (NZ) which were not registerable on the Torrens Title System in operation in New Zealand[88] took priority over the interest of the registered proprietor. In *Trieste Investments Pty Ltd v Watson*,[89] a resumption of land under the *Public Roads Act* 1902 (NSW) vested title in the Crown which took priority over the interest of the registered proprietor.

[125] In the main,[90] the statutes creating the interests which defeated the interest of the registered proprietor of the fee simple, did not provide for a mechanism for registration of the interest. Further analysis of the cases is unhelpful because ultimately they turn on the construction of statutes different from those being considered here.

[126] The *Land Act* 1962, by vesting in the State title in land over which there are public roads, must have created an interest in the State which took priority over that of the registered proprietors of the fee simple in the land over which the roads and public rights existed. If that were not the case, then s 369 of the Act would have no effect because the land owner would take priority by force of being the registered owner. There was no express provision for the issue of certificates of title reflecting the State's interests in the land vested in it by the *Land Act* 1962.

[127] However, in relation to roads which appear delineated on a plan of subdivision lodged under the 1861 Act, the delineation of the road becomes part of the register.[91] Consequently, the effect of s 369 of the *Land Act* 1962 was to vest roads delineated on a plan to the State. From that point the State held an interest in the land.

[128] When the 1994 Act came into force, it bound the State.[92] The State may hold interests in land pursuant to the 1994 Act; that is hold registered interests.[93] There is no reason to doubt that the State's interest in land vested in it by the *Land Act* 1962 could be extinguished by registration of a contrary interest.

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86 (1939) 62 CLR 603.

87 [1963] AC 484.

88 *The Land Transfer Act* 1952 (NZ).

89 [1964] NSWR 1226.

90 *Pratten v Warringah Shire Council* [1969] 2 NSWR 161 being an exception.

91 *Real Property Act* 1861, ss 35, 119 and the definition of "instrument" as including a plan; see s 3.

92 Section 5.

93 Section 48.

[129] The public rights of way were subsumed by s 369 of the *Land Act* 1962 into any title over Lot 11 vested in the State. The registration of Plan SP142332 and the registration of WCL as proprietor of the fee simple in lot 11 effectively extinguished any interest in the land by the State, subject to any legislative provision beyond the 1994 Act.

[130] Orb, in its submissions, referred to the fact that Lot 11 appears in the Brisbane City Council roads register as a public road. That necessitates consideration of the *City of Brisbane Act* 2010.

[131] Section 3 of the *City of Brisbane Act* states the legislation's objects in these terms:

> "**3 Purpose of this Act**
>
> (1) The purpose of this Act is to provide for—
>
> (a) the way in which the Brisbane City Council is constituted and the unique nature and extent of its responsibilities and powers; and
>
> (b) a system of local government in Brisbane that is accountable, effective, efficient and sustainable.
>
> (2) Compared to other local governments in Queensland, the council is unique in its nature and the extent of its responsibilities and powers for the following reasons—
>
> (a) Brisbane is the capital city of Queensland;
>
> (b) the council is the largest provider of local government services in Queensland;
>
> (c) there are 26 councillors (other than the mayor) who each represent the interests of the residents of a ward;
>
> (d) the mayor has unique responsibilities as the mayor of a capital city;
>
> (e) the council has an Establishment and Coordination Committee that coordinates its business;
>
> (f) the chairperson of the council presides at all of its meetings and is responsible for ensuring its rules of procedure are observed and enforced.

[132] Section 5 of the *City of Brisbane Act* then provides:

> "**5 Relationship with Local Government Act**
>
> (1) Although the Brisbane City Council is a local government, this Act, rather than the Local Government Act, provides for—
>
> (a) the way in which the Brisbane City Council is constituted and the nature and extent of its responsibilities and powers; and

(b) a system of local government in Brisbane.

(2) Generally, the Local Government Act does not apply to the Brisbane City Council or its councillors, employees, agents or contractors.

(3) However, particular provisions of the Local Government Act apply, or may apply, to the Brisbane City Council as a local government. (statutory examples omitted)

[133] Part 4 of Chapter 3 deals with roads. Section 65 provides:

"**65 What this division is about**

(1) This division is about roads.

(2) A ***road*** is—

(a) an area of land that is dedicated to public use as a road; or

(b) an area of land that—

(i) is developed for, or has as 1 of its main uses, the driving or riding of motor vehicles; and

(ii) is open to, or used by, the public; or

(c) a footpath or bicycle path; or

(d) a bridge, culvert, ford, tunnel or viaduct.

(3) However, a ***road*** does not include—

(a) a State-controlled road; or

(b) a road, or that part of a road, within an airport site under the *Airports Act 1996* (Cwlth); or

(c) a public thoroughfare easement.

Section 66 provides:

66 Control of roads

(1) The council has control of all roads in Brisbane.

(2) This control includes being able to—

(a) survey and resurvey roads; and

(b) construct, maintain and improve roads; and

(c) approve the naming and numbering of private roads; and

(d) name and number other roads; and

(e) make a local law to regulate the use of roads, including—

(i) the movement of traffic on roads, subject to the *Transport Operations (Road Use Management) Act 1995*; and

(ii) the parking of vehicles on roads, subject to the *Transport Operations (Road Use Management) Act 1995* (including the maximum time that a vehicle may be parked in a designated rest area that adjoins a road, for example); and

(iii) by imposing obligations on the owner of land that adjoins a road (including an obligation to fence the land to prevent animals going on the road, for example); and

(f) make a local law to regulate the construction, maintenance and use of—

(i) public utilities along, in, over or under roads; and

(ii) ancillary works and encroachments along, in, over or under roads; and

(g) realign a road in order to widen the road; and

(h) acquire land for use as a road.

(3) Nothing in subsection (1) makes the council liable for the construction, maintenance or improvement of a private road.

(4) A ***private road*** is a road over land that is owned by a person who may lawfully exclude other persons from using the road.

Section 81 provides:

81 Roads map and register

(1) The council must prepare and keep up to date—

(a) a map of every road, including private roads, in Brisbane; and

(b) a register of the roads that shows—

(i) the category of every road; and

(ii) the level of every road that has a fixed level; and

(iii) other particulars prescribed under a regulation.

(2) The register of roads may also show other particulars that the council considers appropriate.

(3) The council must ensure the public may view the map and register at its public office or on its website.

(4) On application and payment of a reasonable fee fixed under a resolution or local law, a person may obtain—

(a) a copy of a map or register of roads; or

(b) a certificate signed by an employee of the council who is authorised for the purpose—

(i) about the category, alignment and levels of roads in Brisbane; or

(ii) about the fact that the alignment or level of a road in Brisbane has not been fixed."

[134] Section 65 (putting aside references to footpaths, bicycle paths, bridges, culverts, fords, tunnels or viaducts) defines a road as an area that is "dedicated to public use as a road" or, in essence, is used as a road. Section 66 then gives control of "roads" to the council.

[135] The granting of control of roads to the council is not intended to be a grant of title in the land upon which the road exists. That is made clear by the explanatory notes to the *City of Brisbane Bill* 2010. Clause 63 of the Bill became s 66 of the Act. The explanatory note to clause 63 is in these terms:

"**63 Control of roads**

This clause provides the council with a head of power to control roads, and lists those activities included in control.

This clause contains a power to approve the naming and numbering of private roads, so the council can ensure that addressing data for private estates is collected for emergency service purposes. The council may ensure that naming of roads is consistent with relevant standards and guidelines, so as to prevent multiple roads in one locality with the same name, for example."

[136] Section 66 gives control to the council of "all roads in Brisbane" which would include both dedicated roads[94] and private roads being private land which falls within the description in s 65(2)(b).[95]

[137] Section 65(2)(a) recognises that there may be land which is "dedicated" as a road. The *Land Act* 1994 concerns, amongst other things, the dedication of roads. Sections 93, 94 and 95 of the *Land Act* provide as follows:

"**93 Meaning of *road***

(1) A ***road*** means an area of land, whether surveyed or unsurveyed—

(a) dedicated, notified or declared to be a road for public use; or

(b) taken under an Act, for the purpose of a road for public use.

(2) The term includes—

(a) a street, esplanade, reserve for esplanade, highway, pathway, thoroughfare, track or stock route; and

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[94] Section 65(2)(a).

[95] And see also s 66(4).

(b) a bridge, causeway, culvert or other works in, on, over or under a road; and

(c) any part of a road.

94 Dedication of road

(1) The Minister may dedicate unallocated State land as a road for public use.

(2) A person may apply for the dedication of land as a road for public use.

(3) The Minister may dedicate land as a road for public use without receiving an application under subsection (2).

(4) Land may be dedicated as a road for public use by the registration of a dedication notice or a plan of subdivision.

(5) On the day the dedication notice or plan of subdivision is registered—

(a) the dedication of the land as a road for public use takes effect; and

(b) the land is opened for public use as a road.

95 Roads vest in the State

The land in all roads dedicated and opened for public use under the following Acts vests in, or remains vested in, the State—

(a) this Act, or an Act repealed by this Act or repealed by the repealed Act;

(b) the *Land Title Act 1994*."

[138] Section 95 concerns title to land over which there is a road. It has no relevance here as s 95 only concerns roads "dedicated and opened for public use" under legislation. Orb's case is that the road over Lot 11 was dedicated not under statute but by operation of the common law.

[139] Even if the term "dedicated as a road" in s 65 of the *City of Brisbane Act* includes land dedicated as a road at common law, there is nothing to suggest that the grant of control of that land to the council defeats the interest of a registered proprietor in the fee simple.

[140] It is worth mentioning the *Transport Infrastructure Act* 1994 only because it is a statute which concerns, among other things, roads. That Act though only concerns "State controlled roads" which exist over land declared to be a State controlled road.[96]

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[96] Sections 24 or 53.

Conclusions

[141] In order to succeed in the principal application, Orb must establish:

1. The Grammar School manifested an intention to dedicate Lot 11 as a public road.
2. The public accepted the dedication.
3. The dedication has led to the creation of rights which defeat WCL's right to enjoy Lot 11 without the restriction of maintaining it as a public thoroughfare.

[142] There is evidence to support the first two elements of Orb's case such that it is not clear (for the purposes of an application for summary judgment) that Orb's case must fail at trial for want of proof of those elements.

[143] The best case for Orb is that RP1073 delineates Lot 11 as a public thoroughfare (a road for present purposes) and by the *Land Act* 1962 Lot 11 vested in the State. Whether that interest defeats the registered interest of WCL does not depend on the resolution of any contentious matters of fact.

[144] For the reasons I have explained, WCL's interest as registered proprietor of the fee simple is not held by it subject to any interest of the State's[97] arising from the common law dedication of Lot 11 as a road prior to 1923.

[145] There is no need for a trial. WCL should have judgment in the principal application. The appropriate order is to dismiss application BS 6514 of 2019.

Costs

[146] Rule 681 of the *Uniform Civil Procedure Rules* 1999 provides that unless the court otherwise orders, costs ought follow the event. Mr Bain QC who led for Orb conceded that if WCL's application for judgment was successful then there was no defence to an order for costs of both WCL's application and Orb's.

Orders

[147] I order that:

(i) application BS 6514 of 2019 is dismissed;

(ii) Orb Holdings Pty Ltd pay the costs of WCL (QLD) Albert Street Pty Ltd of application BS 6514 of 2019 including the costs of the application for judgment.

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[97] Vested by s 369 of the Land Act 1962.