SUPREME COURT OF QUEENSLAND

CITATION:	*Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd & Ors* [2022] QSC 190
PARTIES:	**ORB HOLDINGS PTY LTD** (Applicant) **v** **WCL (QLD) ALBERT ST PTY LTD** (First Respondent) AND **STATE OF QUEENSLAND** (Second Respondent) AND **REGISTRAR OF TITLES** (Third Respondent)
FILE NO/S:	SC No 6514 of 2019
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Brisbane
DELIVERED ON:	8 September 2022
DELIVERED AT:	Rockhampton
HEARING DATE:	16, 17 and 18 May 2022
JUDGE:	Crow J
ORDER:	**I make the following declarations:** **(a) A declaration that the land described on Lot 11 RP1073, also known as Beatrice Lane, has been dedicated as, and is a public road.** **(b) A declaration that by operation of s 369 of the Land Act 1962 (Qld) (repealed), the land described as Lot 11 on RP1073 known as Beatrice Lane, vested in and remains vested in the Crown.**
CATCHWORDS:	REAL PROPERTY – TORRENS TITLE – INDEFEASIBILITY OF TITLE – EXCEPTIONS TO INDEFEASIBILITY – RIGHTS OF HIGHWAY – where the first respondent acquired a lot of land in 2014 – where the first respondent subsequently closed the lot off from public access

- where the applicant is the owner of a nearby lot of land – where the applicant had relied upon the use of the lot acquired by the first respondent to access their business carpark – where the applicant seeks a declaration that the lot has been, and is, a public highway or public road at common law – whether the registered landowner in 1876 manifested an intention to dedicate the lot as a public road – whether there was acceptance by the public of the proffered dedication – whether the dedication was lawful.

Acts Interpretation Act 1954 *(Qld),* s 36
Grammar Schools Act 1860 (Qld), s 6
Local Government Act 1878 (Qld), s 3
Land Act 1962 (Qld), s 369
Real Property Act 1861, s 44, s 119, s 122

City of Keilor v O'Donohue (1971) 126 CLR 353, followed
Ex parte Le Gould (1864) 1 QSCR 130, cited
Greenwich Board of Works v Maudsley (1870) LR 5 QB 397, followed
Mayberry & Ors v Mornington Peninsula Shire Council (2019) 59 VR 383, followed
Newington v Windeyer (1985) 3 NSWLR 555, distinguished
Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd [2019] QSC 265, cited
Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd [2020] QCA 198, followed
Palmisano v Hawse & Ors [2003] NSWSC 566, applied
Re O'Quinn (1879) 1 QLJ (Supp) 7, considered
Rangeley v Midland Railway Co (1868) LR 3 Ch App 306, cited
The Centre Pty Ltd v Thomas R Magnus Pty Ltd (1969) Qd R 452, applied
Weber v Ankin [2008] NSWSC 106, followed

COUNSEL: J. D. McKenna QC with J.P Hastie for the applicant
S. B. Whitten and AL Lowe for the first respondent
D Keane and S Russell for the second and third respondents

SOLICITORS: HWL Ebsworth for the applicant
CDI Lawyers for the first respondent
Crown Solicitor for the second and third respondents

Introduction

[1] This proceeding concerns the ownership of an L shaped area of land running between Albert Street and Margaret Street, Brisbane. Street signs were erected in 1989 informing the public of the name of the land as Beatrice Lane.[1] Beatrice Lane was, by 1989, in all respects, an unremarkable lane within Brisbane City. That is, it was lit, paved, guttered and signposted as any other ordinary lane. It was however, the subject of a certificate of title issued in 1994 described as Lot 11 on Registered Plan 1073 (RP1073). Before it was known as Beatrice Lane, or Lot 11, the area of Beatrice Lane had been shown on cadastral maps of Brisbane dating as far back as 1889, as a part of the local road network.[2]

[2] The first respondent, hereafter "WCL", acquired Lot 11 in September 2014 for property development and on 11 May 2019, WCL closed Beatrice Lane, painting the words "Private Land - No Access" on the pavement at the Margaret Street entrance of Beatrice Lane. This was observed by John Matthews, director of the applicant, Orb Holdings Pty Ltd (Orb) who had used the area of Beatrice Lane as an access to his company's adjoining allotment since 1963.

[3] On 21 June 2019, Orb filed an application in this court seeking a declaration that Beatrice Lane was a public laneway. After points of claim and points of defence were delivered, WCL applied for summary dismissal of the application pursuant to r 658 of the *Uniform Civil Procedure Rules* 1999 (UCPR), arguing that Orb's case could not succeed, even upon the facts alleged by Orb. WCL's application for summary judgment succeeded with the first primary judge accepting that WCL's claimed ownership of the land must prevail because of the indefeasibility provisions of the *Land Title Act* 1994 (Qld).[3]

[4] In *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* [2020] QCA 198 the Court of Appeal set aside this decision, accepting Orb's argument of law that ownership of the land was not under the *Land Title Act* 1994 but rather that (presuming WCL's allegations of fact were accepted) the land had vested in the Crown by way of s 369

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1 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 651.
2 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 364.
3 *Orb Holdings Pty Ltd v WCL (Qld) Albert Street Pty Ltd* [2019] QSC 265.

of the *Land Act* 1962 (Qld). The Court of Appeal determined important questions of law to be applied on the facts to be found in the present application.

[5] As set out at [29] and [87] of the reasons of McMurdo JA,[4] the application raises three issues requiring a determination of fact.

[6] The first issue is whether the competent landowner manifested an intention to dedicate the land as a public road.[5] If so, the second issue is whether there was an acceptance by the public of the proffered dedication. The third issue is whether the dedication was lawful. It is necessary to consider the evidence, the common law and the statutory regimes for the creation of interests in land and roads in the late 19th Century, and then determine the findings of fact.

Documentary Evidence

[7] Given the passage of much time, the documentary evidence is the most important evidence in this case. Prior to the Torrens system of land transfer, the common law system of transfer of land was by deed. The common law system had several disadvantages, the principal of which was the insecurity of ownership of land as it was reliant upon production of and proof of deeds.

[8] The revolutionary Torrens system provided for a central registry and title by registration and was first introduced in South Australia by the *Real Property Act* 1858.

[9] Queensland was the second State to adopt the Torrens system when it passed the *Real Property Act* 1861. The establishment of a register not only provided certainty in respect of title to land, it provided, by s 122, a means of proof of that certainty as certified copies of any registered instrument was "prima facie proof of all the matters contained or recited in or endorsed on the original instrument."

[10] The affidavit of Mr Walker, solicitor, comprehensively sets out the Land Title documents that came into existence prior to and subsequent to 1861 in respect of the

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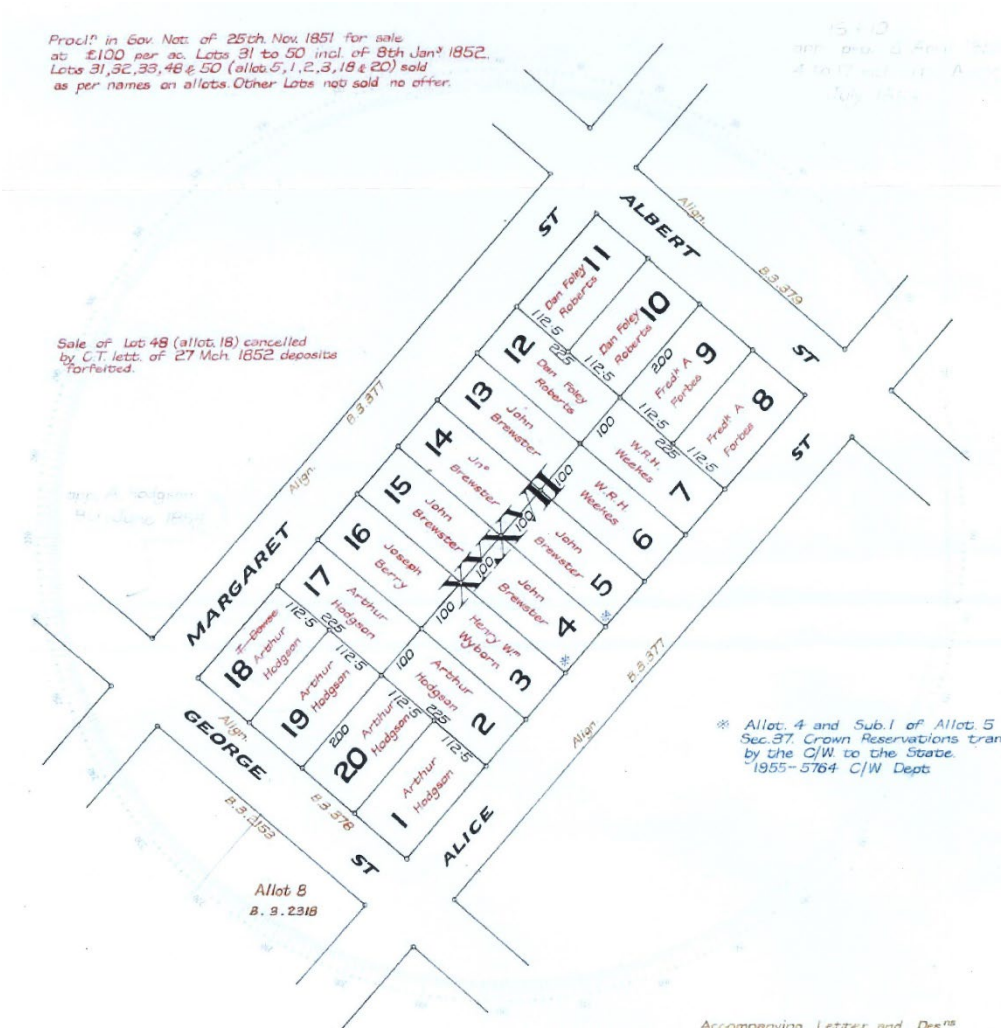
4 *Orb Holdings Pty Ltd v WCL (Qld) Albert St Pty Ltd* [2020] QCA 198 at [29] and [87].

5 See Windeyer J in *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council* (1960) 105 CLR 401 at 420.

subject land.[6] The documents provide "prima facie proof" of the property interests in the subject land.

[11] A matter which is uncontroversial is that the law with respect to the creation of public roads was fundamentally altered with the *Local Authorities Act Amendment Act* 1923 (Qld) which prevented the private creation of new roads at common law and required the dedication of any public road or public highway to have a statutory basis under that Act. The relevant factual history, therefore, primarily relates to the period prior to 1924.

[12] On 25 November 1851, the colony of New South Wales advertised for sale of Lots 31 to 50 of the town lots of the Police District of Brisbane. Survey Plan B.1182.29 shows a survey of Lots 7, 8, 9 10 and 11 on Section 37 as follows:[7]



6 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, pages 1 – 244.
7 Joint Trial Bundle (Exhibit 1) at volume 1, part A, page 1.

[13] Although the original lots pre-dated the *Real Property Act* 1861, that act provided for parcels of land to be brought under its provisions and, therefore, certificates of title to issue. Certificates of title in respect of the subject land were subsequently issued, showing that the trustees of the Brisbane Grammar School purchased Lots 8, 9, 10 and 11 by memorandum of conveyance registered on 13 November 1874.[8] The certificates of title also evidence the history of the land grants that were made.

[14] Lots 8 and 9 had been acquired by Frederick Augustus Forbes and Lots 10 and 11 had been acquired by Daniel Foley Roberts. It is of some significance that the adjoining parcel of land, Lot 12 on B.1182.29, was also at the time owned by Daniel Foley Roberts. That is, as can be appreciated by reference to survey plan B.1182.29, the trustees purchased two of Mr Roberts' three parcels of adjoining land.

[15] Important also, as will be seen, was the purchase in 1872 of Lot 7 by Frederick Hamilton Scott Hart.[9] Mr Hart thereafter constructed his house upon Lot 7 which adjoined Lots 8 and 9 in what was anticipated to become prime real estate in Brisbane.

[16] By memorandum of conveyance, registered 30 November 1874, the trustees of the Brisbane Grammar School became the registered owners of Lots 8, 9, 10 and 11 of Section 37 with the neighbouring allotments being owned by Daniel Foley Roberts and Frederick Hamilton Scott Hart. The trustees had, by September 1876, resolved to sell the Lots.[10]

[17] The most important document in the proceeding is RP1073, the relevant portion of the copy is shown below:[11]

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8 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 4.

9 Joint Trial Bundle (Exhibit 1) at volume 3, part 2, page 437.

10 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 131.

11 The copy shown does not precisely show the colouring of the lines on the plan. The faint lines where the 'right of way' meets Margaret St and Albert St are not black lines, but rather faint red lines. The pink/red tinting on Lots 1 to 9 (but not the right of way) is brighter on the tendered exhibit than appears herein. The blue notation 'Lot 11 (Balance)' was not added until 1994.

[18] Reference to RP1073 shows that registered surveyor, Richard Gailey, had drawn the plan and had certified it on 12 September 1876. The registered plan notes:

> "Being seized of the land herein delineated the trustees of the Brisbane Grammar School consent and approve of this plan of Subdivision (signed)"

[19] It is of some importance to note that the words "the trustees of the Brisbane Grammar School" are written by a different hand and in different ink. I would infer, as it is the same hand and ink of the person that signed the document, Sir James Cockle, that this alteration to the standard black ink text importantly shows that Sir James Cockle did consider the plan with some care prior to signing it.

[20] As may be observed from perusal of the portion of the plan extracted, it is uncontroversial that the plan had the effect of subdividing the original Lots 8, 9, 10 and 11, and:

(a) Creating Lots 1 to 9 on RP1073;

(b) Showing the laneway area of access to each of the rear of the lots as "right of way" (without the laneway being described as a "lot"); and

(c) Creating a reserve strip of land with a width of 1.5 links (about 30 cm) (also not described as a lot) situated on the southern boundary of the right of way, that is adjoining all of Lot 12 (Mr Foley's land) and that portion of the right of way to join Lot 7 (Mr Hart's land).

[21] It is important to note that upon lodgement of RP1073, Lots 1 to 9 were created, and certificates of title issued for Lots 1 to 9 only. There was neither lot number nor certificate of title issued for the reserve (subsequently created on 26 March 1886 as Lot 10) or for the right of way area (subsequently created in 1994 as Lot 11). RP1073 includes the words "right of way" which is at the heart of the current dispute and does not make any reference to any easement.

[22] The title documents show the trustees of the Brisbane Grammar School sold subdivided lots as follows:[12]

(a) Lots 4 and 5 were sold to George Prentice Jnr in 1876;

(b) Lots 6 and 7 were sold to Robert Lord in 1876;

(c) Lots 1 to 3 were sold to James Hunter in 1877; and

(d) Lots 8 and 9 were sold to George Pratton in 1881.

[23] Each of the certificates of title for each of the lots did not contain a reference to RP1073, nor reference to any easement rights. The reserve which had been noted on RP1073 was not noted in any plan on any certificate of title, however each certificate does refer to the "right of way".

[24] Five years after selling the last of the lots to George Pratton in 1881, the trustees lodged survey plan 1074 for registration. Notations on the top of the survey plan show that it appeared to have been lodged on 16 March 1886 and was passed 24 March 1886. The notations for the receipt and passing of the plan are in the same ink that

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12 Joint Trial Bundle (Exhibit 1) at volume 1, part A, pages 12 – 89.

appears on the plan with the words "Passed by the Master of Titles, see Transfer 138469."

[25] The survey plan, which became Registered Plan 1074 (RP1074), created Lot 10, being the reserve 1.5 links in width by 250 links in length. That is the 30 cm reserve, originally referred to in RP1073. The standard words upon the survey plan with respect to the dedication provide "As proprietor of this land, I agree to this plan of subdivision". In different ink, the words are then added "For trustees of Brisbane Grammar School" then "Charles Lilley, Chairman".

[26] It is important also to observe that the note of the Master of Titles by reference to transfer 138469 is the same "dealing number" as the third endorsement for each of the certificates of title for the original Lots 8, 9 and 10 of subdivision 37 (but not on the original lot 8 as the reserve did not affect that lot).

[27] The third endorsement on the three certificates of title for the original Lots 9, 10 and 11 are all in the same form, they refer to the transfer 138469 and to the portion of the reserve affected by the transfer of the reserve.

[28] Each of the three certificates of title in respect of the old Lots 9, 10 and 11 was signed by the deputy registrar of titles, a person with the surname of Brown on 26 March 1886. The next entry on each of those certificates is a rather large and elaborately handwritten note which reads "fully cancelled". I would infer that after recording the transfers of the portions of the reserve relevant to each of the old certificates of title for Lots 9, 10 and 11, the deputy registrar of titles considered it was appropriate to cancel those certificates fully.

[29] Further notations show that, at some latter point, a person has struck lines through the words "fully cancelled" and I would infer that person was the registrar of titles or an officer in the titles registry who purported to un-fully cancel the certificates for the purpose, in 1993, of the creating of Lot 11, namely the right of way, upon a separate certificate of title. The certificate of title for Lot 11, Beatrice Lane, was issued on 1 March 1994.

[30] At this juncture it is convenient to note that on 10 March 1886 a leading businessman in Brisbane, Mr Hart, considered it commercially sensible to acquire the reserve strip in its entirety.[13]

[31] This is of some importance in the present case as commercially it would be a nonsense for Mr Hart to seek to traverse the 30cm reserve area onto an area to which he had no right to be, if the right of way were a private right of way or easement.

[32] It only made commercial sense for Mr Hart to acquire the reserve to enable him to access the right of way and then utilise the right of way as a means of access to his property, Lot 7, if the right of way were considered a public thoroughfare.

[33] This is most relevant to the second issue, that is, acceptance by the public of the dedication of the right of way as public land. It is also relevant to the assessment of the trustee's intention, and is contemporaneous evidence of the attitude, if not intention, of a commercially astute investor in the 1880s.

[34] The delay in the creation of Lot 10 as the reserve for several years (from 1876 to March 1886), and the failure of the trustees of the Brisbane Grammar School to create Lot 11 in a timely way, both point to the intention of the trustees in dedicating the entire laneway area (that is the right of way and the reserve) to public use.

[35] The inference is that if a commercially astute landholder, which I presume the trustees of Brisbane Grammar School to be, would have intended to create Lot 10 as the reserve and Lot 11 as the right of way as private landholdings of the trustees, then the trustees would have been careful to create those lots and insist on the issuing of certificates of title at the same time that Lots 1 to 9 were created.[14]

[36] The declaration of Sir Charles Lilley, as chairman of the trustees of the Brisbane Grammar School, that the trustees agreed to this plan "as proprietor of this land" may be seen to support the respondents' argument that the trustees evinced an intention not to dedicate the subject land to public use.

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13 Joint Trial Bundle (Exhibit 1) at volume 1, part A, page 5.

14 White J in *Weber v Ankin* [2008] NSWSC 106 at [61] concluded that a landholder's willingness not to receive a certificate of title was a significant factor in favour of a conclusion of an intention to dedicate.

[37] When regard is had, however, to the state of the common law and statute law at the time of the dedication in 1876, as discussed, the declaration is lawfully correct. At common law when there was a dedication of a King's Highway, the dedication was for the use of the King and members of the public. The right of passage was over the land, rather than proprietorship of the land, which remained vested in the donee, such that that area of land not necessary for the fulfilment of the purpose of passage upon the land, i.e. the subsurface and minerals thereunder, remained property of the donee.

[38] The second reason for rejecting the submission that the declaration signed by Sir Charles Lilley on RP1074 is evidence of the trustees' intention not to create a road is the time delay between the creation of Lots 1 to 9 and the creation of Lot 10. The third reason is the natural desire of the trustees to act honourably in their dealings. In this latter regard, it has to be acknowledged that the trustees had advertised, by way of plan, the existence of the reserve and the creation of the reserve as a lot. This made good the trustees' public declaration that there would be a reserve as shown in the advertised plan.

[39] Contemporaneous recordings of the transfer show that the motivation for acting in 1877 in creating the reserve as Lot 10 was Mr Hart's desire to obtain access to the right of way area as a means of rear entrance to his property at Lot 7. It may also have revealed Mr Hart's long-term intention in subdividing Lot 7.

[40] In 1924, by RP40587,[15] Lot 7 was divided into two lots and an easement was created, burdening the first new lot, closest to the reserve and the laneway, whilst providing rear access to the second newly created lot. The registered plan clearly shows the easement and in accordance with accepted practice, deeds of grant of easement were drawn and notations of the easements made upon the certificates of title in respect of the land.

Nineteenth Century Land Law

[41] It is of assistance in drawing inferences as to the likely intention of the trustees to consider the different courses of action which would have been open to the trustees in respect of the subdivision of the relevant land. This requires an appreciation of the

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15 Joint Trial Bundle (Exhibit 1) at volume 1, part A, page 97.

Land Laws and in particular the law of the establishment of public throughfares and roads in the late 19th century.

[42] In Queensland, on 1 January 1924, the *Local Authorities Act Amendment Act* 1923 amended the *Local Authorities Act* 1902 by the addition of the new s 83C which provided:

> "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."

[43] That Act required the consent of the local authority to open a public road. Prior to 1 January 1924, the common law applied.

[44] In *Palmisano v Hawse & Ors*,[16] Bryson J summarised the common law position:

> "[7] The law relating to the creation of public roads operated differently in the 19th Century to the highly structured processes under modern statutes, in which public roads are created by unmistakably clear processes of dedication, with registration of survey plans, and only with the agreement of the local or other public authority to which ownership of the land passes. At common law a public road was created by dedication of land for that purpose by the owner of the land, whether the Crown or a private owner, and by acceptance by the public of the dedication. Dedication was not usually a formal act, but was to be understood from events such as leaving ways open to the public when constructing buildings or laying out subdivisions, referring to land as a road in a plan published in some way such as exhibiting it when lands are offered for sale, or even more usually simply by leaving the land open for unobstructed public use for a lengthy period. Acceptance of a dedication was to be understood from use by the public for an extended period. Title to the land over which the public road ran was not altered by its dedication; the land remained the property of the dedicating owner, but became subject to public rights."
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> (underlining added)

[45] Bryson J also said of the New South Wales Supreme Court in 1865:

> "[30] This Court was very ready, in 1865 to discern an intention on the part of the Crown to dedicate land as a highway from references to roads in advertisements published when land was offered to sale, and in the terms of grants; see *Rapley v Martin* (1865) 4 SCR (NSW) L 173 at 181-182. The observations of the Court show that readiness to discern an intention of the Crown

16 [2003] NSWSC 566.

to dedicate land to the public, not simply to reserve land to itself, where a document makes reference to a road, was based on the circumstances of New South Wales in the period after settlement. The dominating consideration appears to have been (at 181) "Roads through these granted lands, for the use of other existing or intending settlers, are indispensable." In effect, the court was unready to see a reference to land as a road in an advertisement, grant or published map as merely an expression of an unfulfilled intention to make a dedication. Such references became especially important when legislation prevented user alone from being treated as establishing a dedication against the Crown; this provision was first enacted in the *Dedication by User Act* 1881 and is now found in *Conveyancing Act* 1919 s178. This gives special importance to references to roads in grants and elsewhere for a number of Parish Portions to the south of Portion 133; there does not seem to have been any doubt about the effectual dedication of the road there, and as the road could have had no other outlet its creation and existence indicate that affairs were conducted on the assumption that a public road across Portions 132 and 133 existed. The general approach taken in *Rapley v Martin* appears still to be taken in Courts of Appeal: see *Bass Coast Shire Council v King* [1997] 2 VR 5 at 18-20 and *Lake Macquarie City Council v Luka* (1999) 106 LGERA 94 at 102. On dedication by a private owner see *Shire of Narracan v Leviston* (1906) 3 CLR 846 at 861, at 856 approving *Poole v Huskinson* (1843) 11 M&W 827 and 830.

[31] In *Sutherland Shire Council v Registrar General* (1991) 72 LGR 84 Young J reviewed the reported decisions in which *Rapley v Martin* has been referred and expressed concerns - at 92 - as to what exactly Rapley's case decided and the basis in principle of the decision. I am not now concerned to examine the authority of *Rapley v Martin* as in the present case the Crown did not designate the site of a road across Portions 132 and 133 at the time of the grant, and the inferred dedication and intention to dedicate upon which the claim that there is a public road depends are those of the grantee and his successors in title, and took place in a period after other persons acquired land for which the road was necessary for access; and user of the road was sufficient for Mr Surveyor Rogers to recognise it and establish its position on his plan of survey in 1864. What I understand *Rapley v Martin* illustrates is that relatively early in the settlement of New South Wales necessity for access was an important factor in the behaviour of the Crown and of other land holders, and of the public, that an intention to dedicate by the landholder and acceptance and user by the public in those times should be inferred relatively readily, and that the practices of more settled and more regulated times are not the test of what happened then."

(underlining added)

[46] In my view, Bryson J's insightful analysis is of some importance in the present case. *Rapley v Martin*[17] was a significant decision, published nine years before the subdivision of the relevant land in 1867, and competent lawyers in New South Wales and Queensland would have understood that the courts would infer "relatively readily" both an intention to dedicate land by a private landholder for use by the public and acceptance by the public of that dedication. It is important, as Bryson J points out, to view the law through the lens of a late-19th century lawyer, rather than the more recent practices of a settled and regulated time.

[47] An early example of common law dedication in Queensland is *Ex parte Le Gould*.[18] The case was heard by Cockle CJ (and Lutwyche J) in which their Honours expressed agreement with the application of early English cases including *Woodyer v Hadden* [1813] 5 Taunt. 126, *Bateman v Bluck* 18 Q.B., 870 and *Pipe v Fulcher* (November 15, 1858), reported 28L.J., Q.B., 12.

[48] Cockle CJ and Lutwchye J in reference to *Pipe v Fulcher* noted in that case that "there was nothing on the face of that map to show whether Mellow Lane was a public highway or merely an occupation road".[19]

[49] However, Le Gould's case concerned a road which was not open at each end but rather, in the original subdivision, open at one end of the public road. In particular, the court said:[20]

> "The Court agreed with Mr. Justice Chambre (the dissentient Judge in *Woodyer v. Hadden*) that an unequivocal act of dedication, such as building a double row of houses opening into an ancient street at each end, and selling or letting the houses, would instantly make the passage between the houses a highway…"
>
> (underlining added)

[50] The importance of this decision is that it would have been utmost in the mind of Sir James Cockle, as Chief Justice sitting in Banco Court on 26 November 1864, that an open thoroughfare joining two public roads would quite easily, on established English authority, be considered a public road.

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17 (1865) 4 SCR (NSW) L 173.
18 (1864) 1 QSCR 130.
19 *Ex parte Le Gould* (1864) 1 QSCR 130 at 133
20 *Ex parte Le Gould* (1864) 1 QSCR 130 at 132.

[51] Sir James Cockle must have appreciated the implications which flowed therefrom, namely that, absent the reserve strip, there was nothing to stop the owner of Lot 12, Mr Roberts, or the owner of Lot 7, Mr Hart, from demanding and receiving access to the right of way area as a public road.

[52] This would have created a serious problem for the trustees, namely that they had advertised on the basis of the owners of the new subdivision lots having access to the rear of their properties by use of the right of way, yet the trustees, and certainly the Chief Justice, knew that it was likely to be construed as a public road and absent a reserve, that Mr Hart as owner of Lot 7 and Mr Roberts as owner of Lot 12 had a right to use the rather confined access provided by the right of way.

[53] Furthermore, absent the reserve, Mr Roberts had the ability to subdivide Lot 12 and access the lane so the trustees would have conferred a substantial commercial benefit to Mr Roberts by sacrificing a portion of their land to make access available to the benefit of Mr Roberts. The reserve, which became Lot 10, prevented this undesirable commercial outcome and did so only if it was considered the right of way was likely to be construed as a public thoroughfare.

[54] A latter but also relatively timely example of the ease of an inference of public dedication of a roadway is the decision of Lutwyche ACJ in *re O'Quinn.*[21] Samuel Griffiths QC MLA appeared for Bishop O'Quinn, the first Roman Catholic bishop of the diocese of Brisbane. Bishop O'Quinn had purchased over two acres of land fronting Wickham and Ann Streets, Fortitude Valley. On attempting to register the transfer without the description of Gotha Street, Lutwyche ACJ discharged the order *nisi* for a *mandamus*, accepting that a prior plan and advertisement describing Gotha Street as being a street which intersected the land, meant that Gotha Street was therefore, by implication, a public road. Lutwyche ACJ held the advertisement and plan was *prima facie* evidence of the act of dedication.

[55] Lutwyche ACJ also referred to the absence of payments of rates for the land constituted by Gotha Street for several years as support of the intention "as far back as 1873 to dedicate Gotha Street to the public as a public road or highway".[22]

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21 (1879) 1 QLJ (Supp) 7.

22 *re O'Quinn* (1879) 1 QLJ (Supp) 7 at 8.

[56] In *Rangeley v Midland Railway Co*[23] at 311 Lord Cairns LJ explained that "…a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purposes of passing and re-passing…".

[57] There are many different forms of easements – easements of support, easements of light, easements of drainage, but the most common form of easement is an easement by right of way. An easement by right of way, however, fundamentally differs from a public road in that it is a corporeal right and an interest in the fee simple of the land. It is not a right that is granted to the public but rather confined to the proprietor of the dominant tenement. It is fundamentally different to a public road, is a registrable interest and, as is established by the titling documents in this case, easements were commonly granted and effected by a deed of easement and as required by statue, registered in the 1870's. The easement giving private right of access to the Queensland Club at the southern end of Margaret Street is a proximate example.

[58] *Rangeley* was cited with approval by Griffiths CJ in *Municipal District of Concord v Coles*.[24] The rights enjoyed by the public are incorporeal rights[25] and not proprietary rights and are obtained by the public or anyone upon the dedication of a road at common law.

[59] In *Greenwich Board of Works v Maudsley*,[26] Blackburn J said of "the right understanding of what constitutes right of way" at 404:

> "It is necessary to shew in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication."

[60] *Maudsley* is a case in which there was no evidence of any express dedication of the owners of the fee of any part of the path to the public. However, it was accepted by the court that the act of dedication would be inferred for the use of the public of that very path.

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23 (1868) LR 3 Ch App 306.
24 (1906) 3 CLR 96 at 105.
25 *R (Smith) v Land Registry (Peterborough)* [2011] QB 413 at [38].
26 (1870) LR 5 QB 397.

[61] In *Maudsley*, agreed fact 9 included:[27]

> "9. So far back as the memory of man extends the path in question has been used without interrupted (except as hereinafter mentioned) by the occupiers of the land enclosed and protected by the wall, and, since the factories and other buildings were built and occupied, by the persons employed at the factories and in the occupation of the buildings, as a means of communication between the factories and buildings and the adjacent neighbourhood, and from one factory or building to another. It has also been used so far back as living memory extends by all persons as a pleasure walk…"

[62] *Maudsley* is an example of the ease of an inference that an act of dedication of a public highway has been made. It explains that what is to be determined is whether the public had been using the thoroughfare for a sufficiently long time for the knowledge of use to become the intention of the owners of the fee. Blackburn J also pointed out that the use by employees of the proprietor of the land was sufficient to constitute public acceptance of a dedication.

[63] If the owners of the fee acquiesce such use, then as Blackburn J said, "a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication".[28]

[64] Similarly, Windeyer J in *City of Keilor v O'Donohue*[29] at 369 distinguished between a public right of way and an easement as follows:

> "Thirdly, a public right of way is not, properly called, an easement. For a true easement to exist there must be a dominant as well as a servient tenement … A highway is created by dedication by the proprietor of land of a right of way over a particular stretch of his land and its acceptance by the public. At common law the land then remains in private ownership but subject to the public right of passage … Dedication may be evidenced in various ways, as Griffith CJ mentioned in *Miller v McKeon*…"

[65] The position is well summarised in *Mayberry & Ors v Mornington Peninsula Shire Council*[30] at [76] by Richards J:

> "[76] Taken in isolation, the words 'right of way' in the definition of 'road' are capable of meaning a public right of way, or a private

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27 As recorded on page 398-399.
28 *Greenwich Board of Works v Maudsley* (1870) LR 5 QB 397 at 404.
29 (1971) 126 CLR 353.
30 (2019) 59 VR 383.

> right of way, or any right of way, whether public or private. However, words take their meaning from the context in which they are used. In this case, that context includes not only the current definition of 'road', but also the history of that definition in the Local Government Act."

[66] It is argued, on behalf of the first respondent, that the failure by the trustees to label the area "road", "lane" or "thoroughfare" but rather to use the words "right of way" is a strong indicator of the trustees' intention not to dedicate the area as a road or public right of way. I do not accept that argument.

[67] As demonstrated above, it has always been accepted that a right of way may be either a public or private right of way and accordingly the use of the words "right of way" is neither an indicator of an intention on behalf of the trustees to dedicate the land as a public right of way, or retain the land and make it available as a private right of way or easement.

[68] An analysis of both common law and statute law as applicable in 1876 is important as to informing on the choices available to the trustees in determining the nature of the right of way. Either the right of way was a public right of way, i.e. a public road or King's Highway, or it was a private right of way, namely an easement.

[69] In 1876 therefore, the trustees were faced with the choice of creating a public road or an easement; that there is no other species between the two in respect of any type of thoroughfare is made plain by s 44 of the *Real Property Act* of 1861 which provides for an exception to the indefeasibility provisions "and except as regards the omission or misdescription of any right of way or other easement created in or existing upon the same land…"

[70] Counsel for the second respondent argues that Lot 11 is not a public highway, not an easement, but rather a private right of way. In support of the second and third respondents' argument, that there was neither an intention to dedicate Lot 11 as a public road nor an acceptance by the public of the proffered dedication, they point to RP1073 and the use of the words "right of way" as an indication of the intention of the landowner not to dedicate Lot 11 as a road for general use but rather a private right of way or occupation road used only by the owners of the subdivided estates and not dedicated to use of the public.

[71] As to the species of private street or road, reference is made to s 3 of the *Local Government Act* 1878 (Qld), which contains the following definitions for the purposes of that Act:

> ""Street" and "road" - A street or road being a public road or highway"
>
> "Private street or private road" – A carriage way either accessible to the public from a public street or forming a common access to lands and premises separately occupied and not being a public highway"

[72] A separate definition of "street" and "road" (being a public road or highway) from "private street or private road" does not exclude the conclusion that a private street or private road is in fact an easement. Counsel for the second and third respondents referred to an extract from the 1835 book *A Digest of the Laws of England Respecting Real Property (Digest)*[31] where author William Cruise refers to a private right of way as follows:[32]

> "A right of way is the privilege which an individual, or a particular description of persons, such as inhabitants of the village of A., or the owners or occupiers of the farm of B., may have, of going over another person's grounds. It is an incorporeal hereditament of a real nature; entirely different from the king's highway, which leads from town to town; and also from the common ways, which lead from a village into the fields.
>
> There are three kinds of ways, First, a footway, which is called *iter, quod est, jus eundi vel ambulandi hominis.* The second is a footway and horseway, which is called *actus ab agendo.* This is vulgarly called a pack and primeway, because it is both a footway, and a pack or driftway also. The third is *via* or *aditus*, which contains the other two, and also a cartway; for this is *jus eundi, vehendi, et vehiculum et jumentum ducendi.* This is two fold; namely, *regia via,* the king's highway for all men; and *communis strata*, belonging to a city or town, or between neighbours.
>
> Notwithstanding these distinctions, it seems that any of the ways here described which is common to all the king's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; and that any such cartway may also be called the king's highway. But a way to a parish church, or to the common fields of a town, or to a village, which terminates there, may be called a private way; because it does not belong to all the king's subjects, but only to the inhabitants of a particular parish, village or house. And

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31 William Cruise, *A Digest of the Laws of England Respecting Real Property* (Saunders and Benning, 4th ed, 1835).

32 William Cruise, *A Digest of the Laws of England Respecting Real Property* (Saunders and Benning, 4th ed, 1835) at 85-86.

> Lord Hale says, that whether it be a highway or not, depends much on reputation…"

[73] There are two points to bear in mind when considering the above extract from the *Digest.* The first is in respect of the so-called species of private way, the comment by the author relates only to rights of way which terminate to a specific place, such as a particular parish, village or house. There is reference to a private right of way also being a right of way to the common fields of a town or to a village. The difficulty with such a view is if there were common fields of a town or village, such as the town common, then all members of the town or village have access to that area, such that it, for all intents and purposes, is not a private space, but a public space.

[74] The second difficulty with accepting the above expressed view, of a private right of way, is that in England, by 1830, it had been decided that an act of acceptance of dedication could be made by a parish.[33] I conclude therefore that the extract from the *Digest* may not accurately reflect English law in 1835 and even if it did, that does not assist the respondents, as the principle of a private right of way was limited to rights of way which terminated at a specific place. That is not the position here, as the laneway is open to public roads at both ends.

[75] In my view, the orthodox view is to the contrary. In *Newington v Windeyer (Newington)*,[34] McHugh JA, with whom Kirby P and Hope JA agreed, said at 559:

> "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 […] In an appropriate case, the contents of leases, plans of subdivision, and maps, although not public documents, may, nevertheless, allow an inference of dedication to be drawn. Dedication to the public may also be presumed from uninterrupted user of the road by the public […] But care must be taken to distinguish evidence of user, from which dedication can properly be inferred, from mere evidence of continual use even for a very long period. At common law, continual trespassing could not create a public road. The evidence must raise the inference that, at some point of time, the owner dedicated the road to the public."

[76] With respect to McHugh JA's comment upon continual trespassing, that ought to be understood in the context of the facts in *Newington*. The area of dispute in *Newington*

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33 See *R v Mellor* (1831) B And A D 32 at 37; 109 ER 699 at 701.
34 (1985) 3 NSWLR 555.

was a small parcel of land in Woollahra, Sydney. That parcel of land provided access to four residences and in 1883 was called Walker Street or Walker Lane. It was then renamed Grove Street in 1885 and by 1887 the word "street" had been omitted and the area was then known as "The Grove". The primary judge's conclusion that the Grove was not a public road was affirmed by the Court of Appeal.

[77] In its original form Walker St provided access to only four residences. A map, published in 1887, marked the area as "private". Of the redaction of the word "road" in 1887, McHugh JA said:[35]

> "By 1887 the land had become The Grove. The inference is almost irresistible that, by that date, it was a private road. This inference is strengthened by the evidence of the map, published in 1889, showing Walker Lane as a "private lane". Thus the evidence not only shows that the land was used as a private road before 1906 but it supports the conclusion that both Walker Street and Walker Lane were always intended to be used as private and not public roads."

[78] The facts in *Newington* also showed that The Grove was fenced off prior to 1910. The facts in the present case are to the contrary. That is, until 2019, Lot 11 had never been fenced off, until 2014 it had never been shown in any plan as private and has not been shown in any registered document, such as a survey or registered plan, as private. Furthermore, in respect of the land, McHugh JA said in *Newington* at 564:

> "The evidence proved that the owners of Nos 1-4 The Grove had engaged in many acts of ownership over a period of nearly fifty years. They employed a man to mow the lawn. They engaged in the maintenance of the trees, garden and rockeries. They cut down trees when necessary. They used The Grove as a common garden. Individual residents held birthday parties and wedding receptions in The Grove, used it for displays of sculpture, for exhibitions, and, on a number of occasions, for the entertainment of Dental Congresses. Since 1978 the occupiers of the houses in The Grove have been assessed for and paid rates in respect of the land. They blocked off attempts by Dr Kelly and the appellant to use The Grove. On many occasions the occupiers told uninvited visitors that The Grove was private land and that they were trespassing."

[79] In the present case, there were no acts of ownership at the relevant time, that is, prior to 1924. There is no evidence of the private owners undertaking maintenance, by

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35 *Newington v Windeyer* (1985) 3 NSWLR 555 at 563.

themselves privately improving the lot[36] or paying rates in respect of the land. There is no evidence of any persons (until 11 May 2019) being blocked from using the land and no evidence of any attempts to dissuade uninvited visitors from using the land.

Evidence of John Matthews

[80] Mr John Matthews' parents' company, Margaret Street Properties Pty Ltd, purchased Lot 12 on 10 July 1963. The current applicant, Orb, of which Mr Matthews is a director, purchased Lot 12 from Margaret Street Properties on 11 August 1978.[37] Mr Matthews has had a close association with the property since 1974 when his office was located upon Lot 12.[38]

[81] Mr Matthews recalls that, since at least 1963, Lot 11, which is known as Beatrice Lane, was used by members of the public to access the rear of the buildings on Lot 12.[39] The building at the rear of Lot 12 was a mezzanine carpark, originally being the mezzanine carpark of the Watson Brothers building, which stood upon Lot 12.

[82] There was little challenge to the evidence of Mr Matthews. The only challenge was to the use of the word "constantly" in paragraph 14(a) of his affidavit,[40] where Mr Matthews had deposed that:

> "I have also observed that Beatrice Lane has been, since at least 1963, consistently and constantly used by members of the public as a means of vehicle access between Albert Street and Margaret Street…"

[83] Mr Matthews readily conceded in cross-examination that he did not mean that he had been watching the laneway for 24 hours a day, 7 days a week since 1963 and hence had not been watching the laneway "constantly" for the last 59 years,[41] rather he meant to express that the laneway has had a lot of public use in that period. Mr Matthews explained that in his observation, the traffic in Brisbane from the 1960s until present in the vicinity of the subject land has altered little. That is, it has always been relatively heavy during peak hour traffic.[42]

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36 As discussed at [129] to [134] one landowner did contribute to the costs of the Brisbane Municipal Council to form up the initial pavement of the laneway area and another landowner contributed to the costs of laying the porphyry stones in the laneway.
37 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 245 & 259.
38 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 245.
39 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 246.
40 Affidavit contained within Joint Trial Bundle (Exhibit 1) at volume 2, part 1, pages 245 -273.
41 T1-45, line 46 to T1-46, line 1.
42 T1-47, lines 1 – 15.

[84] Mr Matthews' evidence, which I accept, provides a solid foundation for the acceptance by the public, at least since 1963, of the benefit conferred by the dedication of the trustees of the Brisbane Grammar School, of the area known as Beatrice Lane, as a road. Mr Matthews also confirmed that the street sign "Beatrice Lane", which looks similar to other street signs in the Brisbane CBD, was placed in Beatrice Lane in or about 1989 and that Beatrice Lane enjoyed street lighting similar to other CBD streets.[43]

[85] Prior to the respondent restricting access to Beatrice Lane, Mr Matthews cannot recall any instance between 1963 and 22 April 2019 (56 years) where any person sought to exclude any members of the public from use of the lane.[44]

Evidence of Historians

[86] Dr Denver Beanland AM and Dr Margaret Cook are experienced historians who have undertaken research and provided detailed reports with numerous exhibits relating to the history of the subject land.[45]

[87] The historians agree on most matters of relevance but, as set out in the conclave report,[46] the historians disagree on two key matters. The first matter relates to the ink marks on RP1073. Dr Beanland makes no comment upon the ink marks as he considers this is beyond his expertise as an historian. Dr Cook considers that the ink marks indicate an impediment on use.

[88] I prefer Dr Beanland's opinion over Dr Cook's opinion on this matter upon which the historians disagree, as *prima facie*, it is beyond the expertise of an historian to provide evidence as to the meaning of markings upon survey plans, and Dr Cook has not provided evidence to suggest that she, nor any other historian, has any particular expertise as a historian which could assist in the determination of the meaning of any particular marking on a survey plan.

[89] Furthermore, as discussed below, all of the very experienced surveyors called in the case are of a contrary opinion. That is, that the ink marks on RP1073 do not indicate

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43 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 247.
44 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 247.
45 Individual reports contained within Joint Trial Bundle (Exhibit 1) at volume 2, part 2, pages 343-683 and volume 3, part 1, pages 71-181.
46 Joint Trial Bundle (Exhibit 1) at volume 5, pages 1-6.

one way or another whether Lot 11 was intended to be a public or private right of way.

[90] The second area of disagreement relates to the second issue, namely whether there was the acceptance of the benefit of a public dedication of the land by the usage by the public of the land. By reference to numerous historical documents, Dr Cook proffers an opinion that the land was not used by the general public, but rather used by employees of the businesses in the adjoining premises.[47] Dr Beanland proffers an opinion to the contrary, namely that the historical documents support a conclusion that the land was more likely to be used not only by persons associated with the businesses in adjoining premises but also members of the public generally.[48]

[91] With respect to the acquisition of the subject land by the trustees of the Brisbane Grammar School, both historians make reference to the same minutes of the trustees of Brisbane Grammar School meetings (of 4 September 1876, 29 September 1876, 27 October 1876, 5 November 1877), the same advertisements for the sale of land and the same plan provided by the selling agent, Mr Cameron, in respect of the proposed sale of the nine allotments.

[92] Dr Cook's report includes Appendix R,[49] which sets out an extract from the text *Light Dark Blue* by Helen Penrose.[50] Dr Beanland also references this text.[51] As set out below, the text provides important background information with respect to Brisbane Grammar School's land holdings from 1873, and the purchase and subsequent subdivision of the subject land. This forms the basis for Dr Cook's opinion, which I accept, that it was the intention of the trustees of the Brisbane Grammar School to dispose of all of their interests in the subject land.

[93] The minutes from the meetings of the trustees of Brisbane Grammar School support this historical opinion. The minutes of 4 September 1867 show that Sir Charles Lilley was the chair of the meeting, attending were Sir Samuel Griffiths QC MLA, Mr Bernays, Mr Mein and Mr Scott. Those minutes record that a letter had been

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47 Which in any event is evidence of public acceptance, see paragraph [59] – [63] above.
48 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 355.
49 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 135.
50 Helen Penrose, *Light Dark Blue: 150 years of learning and leadership at Brisbane Grammar School* (Brisbane Grammar School, 2019).
51 Joint Trial bundle (Exhibit 1) at volume 2, part 2, page 657.

received from Gailey Architect with his account of £7.7 passed by the trustees. The note then records:[52]

> "The following matters were considered:
>
> Sale of land in Alice Street
>
> Resolved that the steps be taken for sale of same. Messrs Scott and Bernays to arrange.
>
> Compensation for land resumed by government
>
> Resolved that claim be pressed and that Mr Mein proceed accordingly."

[94] Reference to Gailey Architects is a reference to Richard Gailey, licenced surveyor and architect, who is recorded on plan RP1073 as the person who prepared the plan. The trustees resolved to pay Mr Gailey's fees on 4 September 1876 and Mr Gailey signed the plan as licenced surveyor on 12 September 1876. RP1073 provided for the subdivision and sale of the nine lots. It is apparent that two committee members, Messrs Scott and Bernays, were required to arrange for the sale of the subject lands and I accept Dr Cook's opinion that the reference most likely is a reference to the sale of the entirety of the parcels as shown upon RP1073.

[95] The notes also record the trustees' desire to pursue a claim for compensation for the resumption of land. This accords with the history recorded by Ms Penrose in her book *Light Dark Blue* which relates the claim for compensation to resumption by the government of the Roma Street land for the purposes of constructing a new railway station. The notes of the trustees' meeting of 27 September 1876 are signed by Sir Charles Lilley who chaired the meeting. It is important to note that Sir Charles Lilley was then a sitting Justice of the Supreme Court of Queensland.

[96] The trustee's meeting of 27 October 1876, again chaired by Sir Charles Lilley, includes a notation of the trustee's approval for the Chairman Sir James Cockle to affect the memorandum of transfer of conveyance in respect of the "land in Alice and Albert Streets and to sign the certificate required by the 114 sec. of the Real Property Act".[53] RP1073 bears the signature of Sir James Cockle, chairman of the trustees of the Brisbane Grammar School.

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52 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 131.
53 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 133.

[97] The notes of the special meeting of Monday 5 November 1877 likewise record the trustees' approval for the chairman's certificate to the conveyances of the balance of the land at Alice Street.[54] The absence of any further mention of the land at Alice and Margaret Streets in the records of the meetings of the trustees supports Dr Cook's view that it was the intention of the trustees to exit entirely their property holdings in respect of the subject land. This makes commercial sense. Although the notes of the trustees' meetings are relatively concise, they do reveal the desire of the trustees, as would be expected, the ensure that the transfers of land undertaken by the trustees were carried out according to law.

[98] Dr Cook accepted, in cross-examination, that given the involvement of the Chief Justice of Queensland and a sitting Supreme Court Judge and other distinguished members of the community as either members of Parliament or senior public servants, had the correct legal requirements of the conveyances not been carried out completely in accordance with the law, it would have been quite a scandal.[55]

[99] In terms of the use of the land, Dr Cook accepted the proposition generally that it is useful to look at the use of the land in three phases; the pre-industrial phase from about 1876 till the 1880s, the industrial phase from the 1880s to 1910 and then the warehousing stage from about 1910 to approximately the 1970s.[56]

[100] With reference to numerous historical documents, Dr Beanland proffered an opinion that Lot 11 was open to and used by the general public since approximately the 1880s.[57]

[101] The first significant building to be constructed upon the subdivisional lots appears to be the Masonic Hall. The relevant parcels of land (8 and 9) had been purchased by the trustees of the Masonic Hall on 7 October 1884, and between 1884 and 1886, the substantial building shown in photographs[58] being the Masonic Hall was constructed.

[102] Dr Beanland demonstrated with reference to newspaper extracts the use to which the Masonic Hall had been put, as one of the most impressive halls in Brisbane.

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54 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 134.
55 T2-71, lines 17-18.
56 T2-55, lines 14 – 24.
57 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 355.
58 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 525.

[103] Dr Beanland refers to the physical appearance of the rear double gateway and its associated stables and buggy houses, which enabled access from the rear of the property, commenting "The caretaker and many of the brethren and patrons to the hall would have required stable accommodation for their horses, which could only be gained from the rear by the lane".[59]

[104] In respect of the large functions being held in the Masonic Hall, attended by some hundreds of persons, and given the limited access to the hall from Alice Street, I infer that Lot 11 was used frequently by not only the brethren and their patrons, but also suppliers, caterers and an assortment of persons which may be expected to be required to operate the functions in the large Masonic Hall. Dr Beanland's analysis in this regard relates to the so-called 'industrial phase' from 1880 to 1910.

[105] The industrial phase also relates to the expected heavy use by A Overend & Co. On the corner of Alice and Albert Street, next to the Masonic Hall, was the business of A Overend & Co, a busy and successful engineering business. The top floor of the warehouse was "devoted to a wide range of agricultural implements and appliances of English and American manufacturers".[60]

[106] The other very significant building in the area was the Queensland Milling Company flour mill situated on Lots 4 and 5 of the subdivision.[61] It was an imposing five level building, and Brisbane's first flour mill.

[107] The heavy use to which the area was put in the industrial period from the 1880s to 1910, in my view, supports the conclusions of Dr Beanland that the laneway area of Lot 11 has always been open to the public was commonly used by the public.

[108] Dr Cook proffers a contrary opinion for two reasons. Firstly, the use of the laneway would not provide a shortcut for members of the public.[62] Secondly, the area was such a busy working site that members of the public would not choose to use the laneway as a thoroughfare.[63] It is common ground that the area of Lot 11 was, until 2019, always open to the public. The first of the reasons proffered by Dr Cook, that

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59 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 359, paragraph [45].
60 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 357, paragraph [23]..
61 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, pages 357 - 358 & 509.
62 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 76, paragraph [16(d)].
63 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 75, paragraph [16(c)].

it was not a shortcut, is literally true, however, for members of the public wishing to walk in a southerly direction towards George St, it was neither a shortcut nor a longcut, but precisely the same distance. That some persons would utilise the laneway cannot be discounted as a general proposition, nor the likelihood that members of the public might simply wish to satisfy their curiosity by walking the laneway to see what was there. This would apply generally but also in times of the construction of the very substantial buildings which occurred in and about the subject land.

[109] The second reasoning deployed by Dr Cook, that persons of the public would not wish to traverse upon an area which is a busy working site, suffers from the irony, as it was put by senior counsel for the applicant,[64] that it is to argue that the area was so busy and so frequently attended upon by so many different types of persons that others would be unlikely that others would use Lot 11 as a thoroughfare.

[110] The first respondent submitted that although Lot 11 was a busy place the private nature of the access to Lot 11 remained as the registered proprietors of each lot were entitled to attend upon the right of way, and their employees and invitees may also attend and not offend the nature of the private right of way. That submission runs contrary to Blackburn J's decision in *Maudsley,*[65] and I reject it.

[111] The difficulty with the argument is with such large businesses, or the use of the Masonic Hall by many persons, the nature of the use of the laneway to all intents and purposes would take the appearance of being a public laneway. It would, in my view, be extremely difficult to accept that a member of public, seeing dozens of persons access an open laneway area which appears as an ordinary road, would think that area was not a public roadway and use it as such.

[112] With respect, however, to the three different phases, it may be accepted that the industrial phase from the 1880s to 1910 was the busiest period of probable public use of the land due to presence of the Masonic Hall and the businesses of A Overend & Co and the Queensland Milling Company. Dr Cook disputes the conclusion that the Masonic Hall was used by members of the public by reference to the usual use of the Masonic Hall, that is for the ceremonies undertaken by the brethren of the Masonic Lodge.

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64 T2-54, lines 29- 30.

65 See paragraphs [59] - [63] above.

[113] Dr Beanland, however, points out that published articles show that other public events were held at the Masonic Hall including the annual art shows of the Queensland Art Society from August 1884.[66] Other articles show that "Over the decades, many of the major functions in Brisbane were held at the Masonic Hall".[67]

[114] Dr Beanland references some events where "more than 200 brethren sat down at a banquet".[68] Historical documents that are available in respect of the subject land do lead me to conclude that Dr Beanland's opinion ought to be accepted, that the laneway the subject of Lot 11, which was open to the public, was in fact regularly used by public.

[115] In respect of the third issue, namely the compliance by the trustees with s 6 of the *Grammar Schools Act* 1860 (Qld), I accept Dr Cook's evidence that she has undertaken considerable research of the Government Gazette, the Titles office records, the Lands office records, newspapers and the trustee's minutes to attempt to locate evidence that the sanction required by s 6 had been undertaken and was unable to find any such document.

[116] I also accept Dr Cook's evidence that the best inference in respect of such a sanction document is that it would have been obtained by the solicitors retained by the trustees for the conveyance and most likely would have been placed upon the solicitor's conveyance file, which has been subsequently destroyed. This, together with the likely public scandal which would have erupted had the board not complied with its obligations under s 6, as Dr Cook accepts, leads to the best inference, that such a sanction had been obtained.

Surveyor's Evidence

[117] Three surveyors were called to give evidence, Phillip Pozzi, Christopher Swane and Richard Statham, the principal surveyor for Queensland Titles Registry Pty Ltd. As the joint report of the surveyors makes plain, there is considerable agreement between the surveyors as to the markings upon the relevant plans.[69]

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66 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 359 paragraph [52].
67 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 360 paragraph [52].
68 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 360 paragraph [54].
69 Joint Trial Bundle (Exhibit 1) at volume 5, pages 7 – 11.

[118] Particularly in examining the most important plan, RP1073, all surveyors agree that there is no black linework at either end of the right of way, but rather that the linework at either end of the right of way is red or brown and, consistent with good surveying practice even in 1876, indicative of the boundaries of the allotments 8, 9, 10 and 11 on section 37 (that is the original allotments to be subdivided by the plan of subdivision).

[119] As Mr Swane said, if it was intended that the right of way was to be a public right of way, it would have been drawn in the manner in which it was, namely with no black lines at the end of either right of way. Most importantly, the joint experts agree that:[70]

> "There appears to be no documentary evidence that we are aware of on any of the associated Deeds of Grant, Certificates of Title or plans that specifies what the words "Right of Way" are intended to mean."

[120] Mr Swane's preference to an inference that right of way was intended to mean a private right of way open only to the owners of Lots 1 to 9 of the subdivision is premised, it would seem, upon the poor choice of the words "right of way" to delineate the use to which the land was put. As Mr Swane lamented, had the words "lane" or "road" been used, then the position would be clear.[71] Whilst that opinion is logical, it does not assist in determining the intention of the trustees.

[121] The important part of the evidence of all of the surveyors relates to the interpretation of RP1073 in showing that either end of the right of way is in fact open to the public streets of Margaret Street and Albert Street.

[122] Although each of the surveyors have referenced to the reserve as shown on RP1073 as being in support of their primary opinions as to the nature of the right of way as being public as supported by Mr Pozzi or private as supported by Mr Swane and Mr Stratham, in my view, the only assistance of the surveying evidence in this regard is common evidence of the surveyors that the reservation extending as it does, from the entirety of the boundary of Lot 12 and partially into the boundary with Lot 7 (that is, to the end of the L at the right of way), is that it was intended as a reservation to prevent access from Lots 7 and 12 to the right of way.

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70 Joint Trial Bundle (Exhibit 1) at volume 5, page 11 paragraph [2.1.11].
71 T2-85, lines 20-25.

[123] In my view, that is as far as the surveying evidence can take it and then it is a matter for ordinary determination by this court as to the reasons, which must be inferred, that the trustees placed the reserve in its position to deny access to the right of way from Lots 7 and 12. This can only be discerned by considering the likely commercial reasoning behind the imposition of the right of way as a barrier in the promotion of the sale at value of the nine-lot subdivision.

The First Issue - Intention of Landowner

[124] In *Weber v Ankin*,[72] White J, in a careful examination of the authorities, said:

> "[69] The law is not very clear as to what acts were sufficient to amount to acceptance of a proffered dedication. In most cases at common law, acceptance is by the public using the road as a road. In *Sutherland Shire Council v Registrar-General* (1991) 72 LGRA 84, Young J (as his Honour then was) said (at 92–93):
>
> > "In the great majority of cases, acceptance of a dedication is proved by user: see, eg, *Cubitt v Maxse* (1873) LR 8 CP 704 at 715 and *Attorney-General v City Bank of Sydney* (at 220). It must be realised that such user is only evidence that there has been acceptance by the public: the user itself does not constitute such acceptance: *Poole v Huskison* (1843) 11 M & W 827 at 830 ; 152 ER 1039 at 1041; *Mann v Brodie* (1885) 10 App Cas 378 at 386 and *Stewart v Wairoa County Council* (1908) 28 NZLR 178 at 188.
> >
> > In *Attorney-General v Esher Linoleum Co Ltd* [1901] 2 Ch 647 at 649, Buckley J pointed out that: 'In all these cases of right of way it is necessary to remember that the thing to be established is dedication, not user. A highway is not acquired by user. … User is but the evidence to prove dedication … .'"
>
> [70] The cases cited were more directed to the question of whether public use was sufficient evidence of the landowner's intention to dedicate land as a public road, but I adopt his Honour's formulation.
>
> [71] In England, acceptance of the dedication could also be by the parish (*R v Mellor* (1830) 1 B & Ad 32 at 37 ; 109 ER 699 at 701). In New South Wales municipalities had the care and management of public roads other than main roads from the commencement of the *Municipalities Act* 1858, (ss 73 and 82 *Municipalities Act*; s 117 *Municipalities Act* 1867; s 75 *Local Government Act* 1906). They stood in a like position to the

72 [2008] NSWSC 106.

parish. In *Permanent Trustee Co of NSW Ltd v Campbelltown Municipal Council*, Windeyer J said (at 422):

> "A declared intention to dedicate would be ripened into dedication by public user of the land of the road, or by a public body having authority to take it over on behalf of the public doing so, by for example, expending money in forming or maintaining it as a road."

[72] Windeyer J gave the expenditure of money by the public authority on the road as an example of how the authority could take over the road. Clearly, his Honour did not say that such expenditure was the only way in which that could be done. Under both the *Municipalities Act* 1867 and the *Local Government Act* 1906 a council had the control and management of a road in its municipality only if the road had become a public road, and was only potentially liable to maintain the road if the dedication of the road as a public road had been accepted. It follows that, in theory at least, acceptance of the road as a public road should precede the council's expenditure on it. Expenditure is evidence from which the inference of acceptance should be drawn.

[73] In his paper "*Public Roads in New South Wales*" read to the Institution of Surveyors (NSW) on 24 October 1933 and printed in The Australian on 1 December 1933, Mr V Le Gay Brereton, a senior examiner of titles with the Registrar-General's department observed:

> "Expenditure by Public Authority — If the owner of a way, being competent to dedicate, permits a public authority, such as a Municipal or Shire Council, to expend money on the way, as by making, repairing or lighting it, and the authority would not have been entitled to incur the expense unless the way was a highway, an intention to dedicate may be inferred against the owner.
>
> Acceptance by the Public — Acceptance by the public may be inferred from user; but sometimes may be found in a document,, such as the memorandum of dedication sometimes used when the land is under the provisions of the Real Property Act, 1900. There the evidence is that of acceptance by the Council of the Municipality or Shire, which is regarded as evidence of acceptance on behalf of the public generally, that being necessary, for there cannot be a dedication to part of the public, a fact which indicates that the expression 'dedication to the Council,' which one sometimes sees, should not be used. As justification for regarding the acceptance of the Council as sufficient, one may quote the words of Mr. Justice Littledale in R v Mellor (1830) 1 B, and Ad., 32 at p 37 — 'A road becomes public by reason of a dedication of the right of passage to the public by the

> owner of the soil, and of acceptance of the right by the public or the parish.'
>
> Even if there be a doubt on that point, user by the public, as soon as it occurs, will supply evidence of acceptance.
>
> Parenthetically, I may here remark that the memorandum of dedication in use in the Land Titles Office derives no efficacy from the Real Property Act, 1900, which does not expressly deal with dedication. The memorandum is merely evidence on which the Registrar-General acts in performing what has been held to be his duty — to note the existence of highways in the register.""

[125] In that case, White J concluded that Wallace Lane in Marrickville was a public road. Among the many reasons for White J's conclusion was an examination of acts by public officials and authorities with respect to the disputed parcel of land. As White J concluded at [82], if land shown upon a survey plan was not intended to be a public road, but rather a private right of way or private road, the Registrar-General ought to have issued a certificate of title to the land and, if the Registrar-General had treated the disputed land as a public road, he would not have been obliged to issue a certificate of title for the land. Furthermore, White J said at [83]:

> "…If the lane was not a public road, or the Council did not intend to accept it as such so as to complete the dedication, it had no business in even considering Mr Wymer's request for a financial contribution towards the making of a track to take vehicles. […] None of its functions under the *Local Government Act* 1906 extended to making a footpath or track suitable for vehicles on private land, or contributing to the cost of such work, which would only benefit private persons if the lane were not a public road."

[126] The above two matters are of some importance in the present case. The Registrar-General did not issue a certificate of title for Lot 11 upon RP1073 at the time of its registration, nor ten years subsequently, when Lot 10, the reserve, was issued a certificate of title. The absence of the certificate of title being issued in respect of the lane is an indication that the Registrar-General treated the area of Lot 11 as a public road. Furthermore, rates were not paid by any landholder in the relevant period (prior to 1924).

[127] White J observed at [83], if land were private property, the council had no business contributing to maintenance, upkeep or improvement of the land at all. Yet, the contrary occurred in the present case, council's involvement in the use of the land is

detailed in Dr Beanland's report of 17 December 2021.[73] Dr Beanland has provided detail of the many matters which point to the Brisbane Municipal Council considering the area a public road and for the owners of the adjoining lots to take the same view.

[128] First is the letter of complaint from A. Overend & Co of 22 March 1889 in which A Overend & Co complained to the Brisbane Municipal Council about drainage from the right of way adjoining their premises. This is an indication that A Overend & Co considered the land to be a road, with the responsibility falling to Brisbane Municipal Council. It is true, as Dr Beanland points out, that the council minutes of April 1889 show the council did not agree to correct the drainage issue, at that point arguing the right of way was private property, however, in the numerous correspondence thereafter, council appears to have changed its view and accepted the road was a public road.

[129] On 17 January 1890, A Overend & Co asked the Brisbane Municipal Council to form the lane, that is, by the creation of a proper roadway surface. Council's response, as reported on 4 February 1890, was to recommend the land be formed and metalled, providing A Overend & Co agreed to pay one half of the cost. A Overend & Co agreed to that proposition. It seems from that point and at least from February 1890, after having formed the area of Lot 11 as a road, the council had responsibility for the maintenance and repair of the road area.

[130] In or about 1895, porphyry stones were laid in the road as a means to keep the lane in permanent repair. Dr Beanland concludes from his research that the Brisbane Municipal Council laid the porphyry stones and paid for those stones.[74]

[131] Dr Cook's analysis of the historical records was that the "council did the construction" and the records show that the cost was shared with the council and flour mill.[75]

[132] After the porphyry was laid in 1895, there were several other transactions in respect of that area which showed that the council considered the area to be a public area or road. In correspondence of 1896, the council described the area as a "lane for general

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73 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, pages 360 – 364 paragraphs [58] – [99].
74 T1-64 & 66.
75 T2-63.

traffic" and therefore required the Queensland Milling Company to pay a permit fee of £1 per annum for the right to install a weighbridge in the road area.[76] Council gave permission for the construction of the weighbridge by Queensland Milling Company and could have only given permission if it truly believed it was the owner of the road.

[133] Furthermore, the receipt of the fee of £1 per annum to retain the weighbridge in the road is a further indicator that council considered the road to be a public space. If that were not the case, the council would be committing fraud.

[134] There is further correspondence in 1897 whereby the Queensland Milling Company sought permission from the council to run a gangway across the lane between the upper stories of their mill and the Watson Brothers warehouse. That was agreed by council. In the late 1890's, council performed drainage works upon the laneway area, that it alleged had been caused by the weighbridge and sent an account to the Queensland Milling Company in respect of those costs. On 2 October 1900, the council told Queensland Milling Company that they were liable for the fee "whether they used the gangway much or little".[77]

[135] On 31 July 1905, the Works Committee for the Brisbane Municipal Council approved expenditure for £10 for the metalling of the laneway for the "roadway at the rear of the Queensland Milling Company's premises".[78] Dr Beanland also pointed out that the laneway had been shown as a part of the local road network consistently in 10 public maps from 1889 right through to 1986.[79]

[136] All of these matters point to both the intention of the trustees dedicating the land the subject of the laneway as a public roadway and the acceptance by the public, at least through public authorities, of that dedication.

[137] In 1876, eight men were the trustees of the Brisbane Grammar School. The Chairman of Trustees from 1874 to 1877 was Sir James Cockle, then Chief Justice of Queensland. It is Sir James Cockle's signature which appears upon the most important documentary exhibit, RP1073.

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76 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 583.
77 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 618.
78 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 627.
79 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, pages 633 – 642.

[138] Sir Charles Lilley was a trustee of the Brisbane Grammar School from 1868 to 1887 and later chairman of the trustees from 1877 to 1887. Sir Charles Lilley served in many roles in legislative assembly, including as Attorney-General, Premier, and Member of the Executive Council. Sir Charles Lilley was appointed a judge of the Supreme Court of Queensland from 1874 to 1879 (that is at the relevant time) and then served as Chief Justice of Queensland from 1879 to 1893.

[139] Sir Samuel Griffith QC MLA was a trustee of the Brisbane Grammar School from 1871 to 1904 and its third chairman from 1887 to 1892 and then again from 1895 to 1904. At the relevant time, that is 1876, Sir Samuel Griffiths QC MLA was the Attorney-General of Queensland as well as the Secretary for Public Instruction. He was later Premier and then Chief Justice of Queensland from 1893 to 1903, then Chief Justice of the High Court of Australia from 1903 to 1919.

[140] Charles Mein, solicitor, was a trustee from 1874 to 1889 and was also a member of the Legislative Council from 1876 to 1885. Charles Mein was later appointed as a judge of the Supreme Court in 1885.

[141] John Scott was a trustee from 1874 to 1888 and was a member of the Legislative Assembly in 1868 and then again from 1870 to 1888 and a member of the Legislative Council from 1888 to 1890.

[142] Randall MacDonnell was a trustee from 1874 to 1889 and was the General Inspector of Queensland Primary Schools from 1860 to 1876.

[143] Lewis Adolphus Bernays, a distinguished public servant, was trustee from 1868 to 1904 and clerk of the Legislative Assembly in Queensland from 1860 to 1908.

[144] John Douglas MLA was trustee from 1874 to 1877 and was a member of the Legislative Assembly and had previous served as a member of the Legislative Council, as Treasurer of Queensland, Secretary of Public Works, Secretary of Lands and as Premier from 1877 to 1879. Mr Douglas MLA was a member of the Executive Council at the relevant time in 1876.

[145] It is common ground that in 1876, the trustees of the Brisbane Grammar School embarked upon a scheme to subdivide the lots they acquired (Lots 8, 9, 10 and 11 of Section 37) into nine lots. There were two plans associated with that scheme. The first

is RP1073 which shows the reserve as shown on the plan is only 1.5 links wide, i.e. 30 centimetres in width, and runs the entirety of the common boundary between Lot 12 and the former Lots 10 and 11 and to Lot 7 (Mr Harts lot). As discussed, the reserve has some significance in the interpretation of the intention of the trustees.

[146] RP1074, the plan of the creation of the reserve was signed by Sir Charles Lilley as the chairman of the trustees of the Brisbane Grammar School in March 1876. RP1074 created the reserve as a lot and also includes upon it notation of a "right of way". As there can be no direct evidence from any of the trustees, the intention of the trustees must be gleaned from examination of documentary evidence relevant to the subdivision, including notes of the trustees, meetings in respect of the subdivision of the land, the advertisements for the subdivision of the land, and most importantly, the plan itself, being RP1073.

[147] The extract from the text *Light Dark Blue* by Helen Penrose, contained within Dr Cook's report of 18 February 2022,[80] records the difficulty the school faced with the government resumption of land in Roma Street to construct a railway station. In September 1874 the Trustees received approx. £4,500 in compensation for loss of the Roma Street land. It is then recorded:

> "Attention then turned to the search for a new site, led by a subcommittee of William Box (trustee 1871-74) and Samuel Griffith. They found a block in the city, bordered by Alice, Albert, and Margaret Streets, that cost £2250. Charles Lilley, not present at the meeting that made this decision, later tried to convince his fellow trustees to change their minds. But it was too late to reverse the purchase, so the land was subdivided into 11 allotments and eventually, in 1876, ten were sold. Lot 11, a narrow block of land approximately five metres in width, ran from Albert Street to the rear of the lots and also from Margaret Street to the rear of the lots, like a letter 'L'. Referred to a Beatrice Lane, it had been used by local owners for many years as a laneway to their properties. Brisbane Grammar School rediscovered its 'legal' ownership of Lot 11 in 2007 when a property developer did a title search and eventually purchased it for $2 million. Until then, and according to the board minutes of 1876, the evidence suggested all the land had been sold at once to James Hunter."

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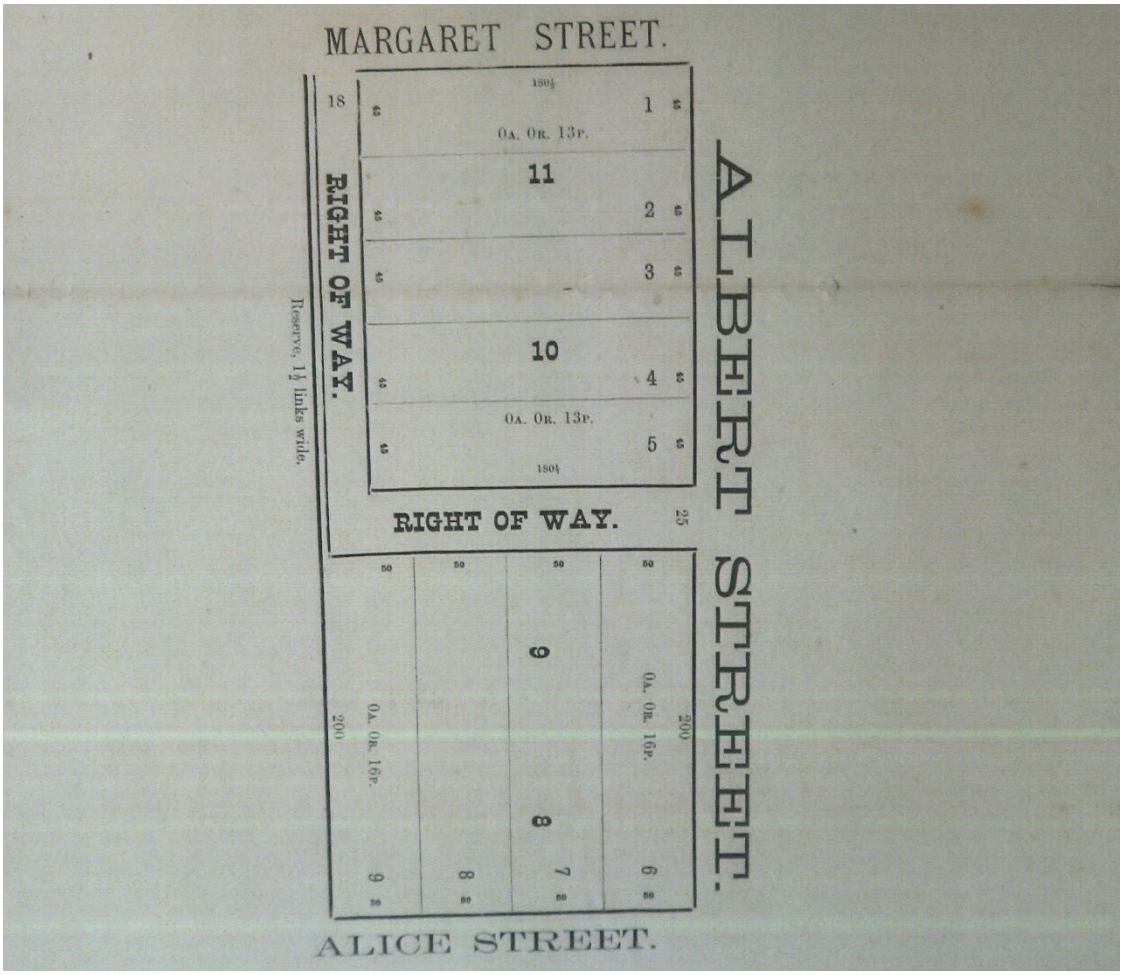
80 Helen Penrose, *Light Dark Blue: 150 years of learning and leadership at Brisbane Grammar School* (Brisbane Grammar School, 2019), page 34.

[148] Both historians have attached several advertisements concerning the sale of the allotments subdivided by the trustees of the Brisbane Grammar School. The first advertisement on 18 September 1876 records that "John Cameron had been favoured with instructions of the trustees of Brisbane Grammar School to sell by public auction" … "nine charming residence sites" with "each lot having a back entrance".[81]

[149] Exhibit 1 contains a copy of the plan of the choice building sites being offered by John Cameron for auction on 2 October 1876.[82] That plan shows the right of way being open at both its Margaret and Albert Street ends. The plan also shows the reserve of 1.5 links wide. The relevant portion of the advertised plan is set out below:



[150] The trustees had authorised a series of public advertisements and a plan showing direct access from Albert and Margaret Streets to the area delineated as the right of way.

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81 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 435.
82 Joint Trial Bundle (Exhibit 1) at volume 1, part C, page 134.

[151] Whilst the presence or absence and type of line upon the proper interpretation of RP1073 is of great importance, the original 1876 notations upon the plan, including the reserve of 1.5 links wide, and the right of way, are also of great importance.

[152] It is undisputed that the trustees of the Brisbane Grammar School would have been acutely aware of the applicable common law with respect to the creation of the roads at the time of the subdivision of 1876.

[153] The trustees of the Brisbane Grammar School were therefore well aware of their ability as owners of the fee simple to create interests in land, be they interest by way of easement, reservation, right of way or subdivision of any land. The commercial background of the transaction for the purchase of the subject land is also of importance. The trustees had received over £4,500 from the Queensland Government in respect of the loss of the trustee's Roma Street land, and it would appear, had purchased the original Lots 8, 9, 10 and 11 for £2,250. The only permissible reason to purchase was to acquire land for the Brisbane Grammar School, however the trustees changed their mind and determined to sell the land and at least recoup their £2,250 investment.

Commercial Motivation

[154] The first respondent's argument, that it ought to be inferred that the trustees intended Lot 11 to be a private right of way or easement, was in part based upon the trustees' description in the advertisements for the subdivision of the provision of access to the rear of each lot. In my view, the trustees' multiple advertisements describing the provision of access to the rear of the properties together with the advertising plan showing the right of way (and reserve) cannot have that effect. The advertising plan shows a right of way which was either a public right of way (namely a road) or a private right of way (namely an easement).

[155] As discussed above, the reserve was a strong indicator to any person observing the advertisement plan that the right of way was to be a public right of way. It is safe to proceed on the assumption that the trustees would have acted in an orthodox, lawful, commercial and honourable way. If the trustees intended the right of way to be a private right of way or easement, then acting in an orthodox, lawful, commercial, and honourable way would have required the creation of Lot 11 and multiple deeds of

easement describing Lot 11 as the servient tenement, and each of the subdivision Lots 1 to 9 as the dominant tenements.

[156] Deeds ought to have then been drafted, making for the usual types of provisions for a right of way easement, namely the descriptor of the right of passage, a descriptor of the type of service of the right of way and, given that there were nine dominant tenements, a clear obligation to make proportional contributions to the maintenance of the easement. Acting in an orthodox, lawful, commercial and honourable way would have required the easements to have been registered. The fact that none of this occurred is a strong indicator that the trustees intended the right of way to be a public right of way or road. If the trustees had intended the right of way to be a public right of way or road, then they would have directed the surveyor to draw the plan precisely as the surveyor did.[83]

[157] Nothing more was required in respect of the dedication of the right of way as a road. As discussed above, however, in order to make good upon their promise of the existence of the reserve, it was necessary to create the reserve, and that as discussed above, did occur. Further, trustees wishing to act in an honourable way would have been conscious of the fact that a dedication of the right of way as a road would have relieved them from the burden of rates, which, acting honourably, they would have insisted on paying if it would have been their intention to retain ownership of the fee simple subject to an easement. The fact that the trustees did not pay rates and did not for many years take any steps in relation to the land after selling Lots 1 to 9 supports the inference that the right of way was intended to be public.

[158] The fact that the right of way was open to the public and there was no evidence of any steps being taken at any time in excess of 150 years (until recently) to exclude any person from the use of the right of way provides a strong basis for an inference that the trustees intended to dedicate the right of way as a public right of way.

[159] There were three reasons why the trustees, in furthering their commercial interests, would have preferred to dedicate the road as a public roadway as opposed to an easement. The first, as mentioned above is the relief from the payment of rates. The second is the likely maintenance costs presented by each alternative. The second and

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83 See evidence of Mr Swane at T2-84, lines 44-46 and T2-85, lines 10-14.

third respondents point to s 75 of the *Municipal Institutions Act* 1864 (Qld) which provided for the council to have care, construction and management of public streets and public thoroughfares but with the proviso in respect of the council that:

> "… no municipality shall be compelled to take the charge or managements of any new road or street laid down by any private proprietor upon or through his own land which shall not be less than half a chain in width, unless or until the same shall have been fully made and completed to the satisfaction of the surveyor of the municipality."

[160] It is common ground that the narrow lane which formed Lot 11, or Beatrice Lane, was less than half a chain and accordingly under s 75, the Brisbane Municipal Council was not compelled to take charge of management of the new road. The respondents argued that, as the right of way the subject of Lot 11 was less than half a chain, there was no commercial advantage in the trustees dedicating a road to the public as the council were not obliged to form or maintain the road. Whilst that argument has some logic, it is a matter of commercially balancing the alternatives.

[161] If the right of way was a private right of way of an easement, there was no prospect of the council taking charge or management of the road or forming or maintaining the road. That would have obliged the trustees, who wished to exit their investments in that area, to maintain the easement *ad infinitum*. That was not commercially sensible. Alternatively, if the right of way was dedicated as a public road, whilst the council could not be compelled to manage and maintain it, the council could choose to do so, particularly in such a busy public area where important functions were held at the Masonic Hall.

[162] Put shortly, conferring a private easement was commercially not sensible as it was certain there would be ongoing maintenance costs, whereas dedicating it as a public road was commercially sensible as there was a chance that council would take management of the new road, or alternatively the trustees could ensure that was the case by fully making the road and having it surveyed to the council.

[163] The third commercial driver was the cost of ongoing ownership, in the general sense of managing the right of way. The argument on behalf of the respondents is that the fee simple in the right of way is a valuable asset which could be retained by the trustees and sold. The difficulty with the acceptance of this argument is that it would

have required the trustees to act in a dishonourable manner. To keep the trustees to their word that a reserve had been created in the position of Lot 10 meant that the area the subject of the right of way held no commercial value. As the owners of Lots 1 to 9 already had access to the right of way, and by virtue of the reserve, no one else had access to the right of way, and so it would be unlikely that anyone would wish to purchase the right of way.

[164] As is demonstrated by Mr Hart's acquisition of the reserve, there was no commercial interest in the purchase of the area the subject of the right of way (by an adjoining owner) without owning the reserve. Likewise, there was no commercial sense in any of the owners of Lots 1 to 9 purchasing the right of way as they already had the benefit of the use of that right of way. The acquisition by the adjoining owner, Mr Hart, of the reserve made the area valuable, at least to Mr Hart. However, had the trustees contrived to sell the right of way to Mr Hart, or to any of the owners of Lots 1 to 9, then they would have breached the promises made by their advertisements of each lot having a rear access.

[165] The only commercial benefit for the trustees to remain owners of the fee simple could arise in circumstances where the owners wish to sell the fee simple in the right of way, but in good conscience they could only do that to a buyer who purchased each lot of the subdivision, that is, to re-amalgamate the entire parcels of land. Having just embarked upon a commercial exercise they judged best for the return of their investment in the subject lands, it did not make commercial sense of the trustees to envisage that at any time in the near future a person would wish to effectively undo the subdivision which the trustees had embarked upon. If the trustees were to act as they ought to, in an orthodox, lawful, commercial and honourable way, the only proper inference is that the trustees intended to dedicate the right of way as a public road.

[166] The trustees, by appointing John Cameron to sell the land, approved an advertisement showing the right of way being open to members of the public. I would conclude the commercial background to the acquisition of Lots 8, 9, 10 and 11, their subsequent subdivision, and the advertisements for subdivision, including the plan showing the open accessway do assist in ascertaining the intention of the trustees at the time of the

subdivision, and all point to an intention of the trustees to open the right of way for public use.

[167] RP1073 is a critical document which shows not only the positioning of the right of way and its reserve, but also its association with the public roads in Albert and Margaret Streets. I accept the evidence of the surveyors Mr Statham, Mr Pozzi and Mr Swane that the line delineations in faint red/brown ink, as shown where the right of way meets both Margaret and Albert Streets, are an indicator of the existence of the prior lots and not the subdivisional lots.[84] That is, in my view, the proper interpretation of RP1073 accords with the advertisement of John Cameron, that is with the rights of way being open access to Margaret and Albert Streets.

[168] It can be observed from the RP1073 that the right of way, where it meets Margaret Street, is only 18 links wide, which is insufficiently wide for two cars and probably two horse and buggies. The width where the right of way adjoins Margaret Street can be contrasted with the width where the right of way adjoins Albert Street, which is 25 links, a sufficient width to allow two cars to pass with care. It was commercially sensible in 1876, for the trustees as owners of the land to seek to prevent the adjoining Lot 12 from subdividing and to use the laneway as a means of access due to its small size.

[169] The first respondent argues that a comparison of what appears on RP1073 and s 119 of the *Real Property Act* of 1861 supports the conclusion that the right of way was not a public right of way. Section 119 of the *Real Property Act* of 1861 provided:

> "**119.** Any proprietor sub-dividing any land under the provisions of this Act for the purpose of selling the same 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 all 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."

[170] In my view, however, a careful reading of s 119 supports the applicant's case, rather than the respondents' case. What is required by s 119 is a distinct delineation of roads, not a distinct labelling or any labelling of roads. It can be seen upon RP1073 that the

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84 Joint Trial Bundle (Exhibit 1) at volume 5, page 9.

right of way is distinctly delineated. It is true that the right of way is entitled "Right of Way", rather than as a road, street, passage, thoroughfare, square or reserve as appropriated or set apart for public use. However, the definition of throughfare is extremely broad and can include a path by which persons can move from one place to another. A right of way fits squarely within the genesis of the words used, particularly the word thoroughfare.

[171] The third point is that if the right of way were to be a private right of way or easement, s 119 required the right of way area to be distinctly numbered as an allotment (as if it were intended by the proprietor to be a division of the land into an allotment that could be utilised as a private right of way). The plan does not provide an allotment for the right of way. The first respondent's argument that the absence of the word "public" before "right of way" supports the inference that the trustees intended the laneway to be a private right of way[85] suffers from the mirror image argument, which could be brought on behalf of the applicant, namely that if the trustees intended the right of way to be a private right of way, they could have inserted the word "private" before "right of way". The descriptor "right of way" is therefore a neutral feature, particularly in light of the trustees' knowledge of their options to either create a public right of way or a private right of way (i.e. an easement).

[172] In short, the right of way was not large enough to carry high volumes of traffic, which was likely to occur if Lot 12 were subdivided in a manner similar to the original Lots 8, 9, 10 and 11. A protective feature of the reservation therefore was of some benefit to the purchasers of the nine lots in the subdivision. This is consistent only with a desire to prevent the owners of Lot 12 or any subdivision of Lot 12 from accessing the laneway, rather than any members of the public accessing the laneway from Margaret or Albert Streets.

[173] The alternative proposition urged by the respondents is that the trustees of the Grammar School did not intend to dedicate the right of way as public land but wished to continue as the owners of the fee simple faces numerous hurdles. First is that the trustees deliberately overlooked paying the rates, in effect tricking the Brisbane Municipal Council into believing the right of way was a public road, when it was not.

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85 First Respondent's Outline of Closing Argument (Exhibit 8) at paragraphs [46] – [51]

[174] The second is that the trustees deliberately avoided their obligations to the purchasers of Lots 1 to 9 of the subdivision by failing to create the right of way as a reserve and failing to create and properly document upon the certificates of title the easements that would have secured the rights of each of the owners of the dominant tenements. Such a position does not sit well with trustees acting honestly.

[175] The first respondent is then forced into a position to argue that it was not dishonesty, but rather, inattention, a lack of interest, inertia or ignorance that lead to an oversight,[86] or simply indifference with respect to the rights of the land.[87] It is further argued that the trustees were ignorant, indifferent or careless in relation to the rights in respect of Lot 11.[88] The acceptance of those submissions is most unattractive and I cannot accept them, in view of the calibre and position of the trustees of the Brisbane Grammar School at the relevant time involved in the creation of Lots 1 to 9 on RP1073.

[176] In my view, the acceptance of the likely commercial motivation for the complete sale of the parcels of land, together with the markings on RP1073 accord with the analysis of Helen Penrose in her book *Light Dark Blue*,[89] that is to sell all the land and exit the investment. I therefore accept that it was the intention of the trustees to dedicate the land shown in the right of way as a public road.

The Second Issue - Acceptance by the Public of the Proffered Dedication

[177] The passage of time has constrained the evidence available upon this issue, to inferences to be drawn from historical documents. In this respect, the reports of both historians are of considerable assistance. John Matthews was 18 years old in 1963 when his parent's company purchased the land. Whilst Mr Matthews has observations of the use in the period between 1963 and 1974, it was not until 1974, when Mr Matthews' office was situated in Lot 12,[90] that he made more consistent observations of the use of the laneway.

[178] It is a common fact that until 1994 the entrances to the right of way were open to the public. In the vicinity of the corner of the L, there was an entrance to a carpark being

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86 First Respondent's Outline of Closing Argument (Exhibit 8) at paragraphs [138] and [143].
87 First Respondent's Outline of Closing Argument (Exhibit 8) at paragraph [146].
88 First Respondent's Outline of Closing Argument (Exhibit 8) at paragraph [149(b)].
89 Referred to above at paragraph [92].
90 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 245.

the mezzanine level carpark on Lot 12. I accept Mr Matthews' evidence that the right of way was used by members of the public, clients of the carpark, for many years, at least from 1963 as a means of access to the mezzanine carpark.[91]

[179] Dr Denver Beanland provided a good deal of evidence upon the use of the Masonic Hall. I accept Dr Beanland's evidence that upon its construction, the Masonic Hall was among the most impressive public spaces in the city of Brisbane and frequently called upon for use.[92] The building was indeed an impressive building as shown in the historical reports. It abutted Alice Street in the position of Lots 8 and 9 of the subdivision. As explained by Dr Beanland,[93] a caretaker's cottage was constructed in the rear as well as other buildings, including a buggy house and galvanised iron stable that was open. The galvanised iron stable and buggy house was a relatively large building, approximately 9 ft wide and over 59 ft long. I accept Dr Beanland's evidence that the only reasonable inference that the stable and buggy house was intended for use of the members and associates of the Masonic Hall and not for the enjoyment of the caretaker as it was a large stable.[94]

[180] Dr Cook, in her report, has included an article from the Telegraph on 3 May 1890 dealing with the Masonic Hall alterations.[95] The alterations were improvements and were said to add to the building's convenience and appearance. The article includes the words "In addition to the renovation of the interior, the caretaker's cottage is to be enlarged and stables erected at the back of the hall, a long existing want."

[181] Provision of the large stable at the rear of the Masonic Hall being accessed through gates from the right of way is another indicator of the right of way's public use as far back as 1890.

[182] As to the other evidence, Dr Beanland points out that in the April 1889 Brisbane Municipal Council minutes correspondence from A Overend & Co was responded by the council pointing out the right of way was private property.[96] That correspondence does suggest that Lot 11 was not considered a public road in 1889. However, by 1896

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91 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 245.
92 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 359; T1-69, lines 45-47.
93 In reference to Field Book extract contained in Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 531.
94 Joint Trial Bundle (Exhibit 1) at volume 2, part 1, page 359.
95 Joint Trial Bundle (Exhibit 1) at volume 3, part 1, page 103.
96 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 360.

(page 362) Brisbane Municipal Council enquired of the Queensland Milling Company (an owner in the area), in respect of a weighbridge that the Queensland Milling Company sought permission to fix in Beatrice Lane behind their premises, "if the machine was likely to obstruct the lane for general traffic" and stating that a small fee would have to be paid annually.[97] The Queensland Milling Company replied "that the weighbridge would not cause the least obstruction and they were willing to pay any reasonable fee".[98]

[183] This correspondence from Brisbane Municipal Council shows that by August 1896 the council considered that the subject lot was a laneway for general traffic. As until recent times the laneway was in fact open to the public, has been used frequently, at least since 1974, by the public and was considered, at least by 1896, to be a general laneway for public use. I find that the public did accept the proffered dedication by the trustees of Brisbane Grammar School of the subject land as a public road.

The Third Issue - The Trustee's Authority

[184] In *Orb Holdings Pty Ltd v WCL*[99] McMurdo JA said at [84] and [87]:

> "[84] The *Grammar Schools Act* 1860 was in force until its repeal and replacement by the *Grammar Schools Act* 1975. At any relevant time, s 6 of that Act was as follows:
>
> > "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…"
>
> […]
>
> [87] For other reasons, however, WCL's argument should not be accepted, at least at this stage. The evidence was silent on this point, neither proving nor disproving the fact of a sanction. The case for Orb has the advantage of the presumption of regularity, by which it should be presumed that the trustees acted with the requisite authority, until the contrary is shown. Further, it must be kept in mind that this was an application for summary judgment. The prospect that the preparation of this case towards

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97 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 362.
98 Joint Trial Bundle (Exhibit 1) at volume 2, part 2, page 362.
99 [2020] QCA 198

> a full hearing would disclose relevant evidence on this question cannot be excluded."
>
> (footnotes omitted)

[185] As pointed out by McMurdo JA, the starting point is the presumption of regularity. That is, it should be presumed the trustees acted with requisite authority until contrary is shown. That principle of law is applicable to all trustees, however, when reference is had to the intended purpose of s 6 of the *Grammar Schools Act* of 1860 (that is to protect the assets of a grammar school which are sourced from both donations from the public and government funds) irregularity would not be lightly inferred.

[186] It is not to be lightly inferred that the trustees, including the Chief Justice of Queensland and a Supreme Court Judge would knowingly breach s 6. Furthermore, with members of the trustees being either a part of or closely associated with the government, it would be difficult to envisage a circumstance where a sanction of the Governor and the Executive Council would not be forthcoming. As is shown on the extract from *Light Dark Blue*, there was other, more suitable, available land and it was, in fact, acquired.

[187] Two members of the trustees sat upon the Executive Council in 1876. Whilst there is no actual documentary proof that the alienation of any of the subdivisional lots, including the subject lot, were sanctioned by the Governor and the Executive Council, there is also no document to suggest that it was not.

[188] The presumption of regularity is sufficient to dispose of this point in the applicant's favour, however, it seems to me that the only proper inference to be drawn from the evidence is that sanctions had been obtained as required from the Governor and Executive Council.

Form of Declaration

[189] In their amended points of claim,[100] the applicant seeks:

(a) A declaration that Beatrice Lane has been dedicated as, and is, a public highway or public road;

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100 Amended Points of Claim filed by applicant 26 October 2021 (Court document no 40).

(aa) A declaration that, by operation of s 369 of the *Land Act* 1962 (Qld) (repealed) Beatrice Lane vested, and remains vested in, in the Crown.

[190] The second and third respondents submit that the declarations ought to take the following form:[101]

(a) The land described on Lot 11 on RP1073 has been dedicated as, and is, a highway at common law;

(b) By operation of s 369 of the *Land Act* 1962 (Qld) (repealed), the land in the highway so dedicated vested in, and remains vested in the Crown.

[191] Although ostensibly the form of the declarations appears similar, they have, in fact, a significantly different effect. On behalf of the second and third respondents, it is argued that the orthodox position at common law, as pointed out by the Court of Appeal in *Orb Holdings Pty Ltd v WCL*,[102] that the dedication of a public road does not constitute a disposition of the owner in the fee simple but rather creates the incorporeal right of a member of a public to pass upon that fee simple and so s 369 authorises only the disposition of that fraction of the land which is necessary to preserve the public's incorporeal right to pass over the right of way.[103]

[192] The appellant submits that the form of declaration that is submitted is consistent with the purpose of s 369 of the *Land Act*. Section 369 of the *Land Act* 1962 (Qld) (repealed) provides:

> "369. Roads dedicated to the public by private persons (1910, s. 196)
>
> 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."

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101 Second and Third Respondents' Outline of Submissions filed by second and third respondent 16 May 2022 (Court document no 68).

102 [2020] QCA 198.

103 Second and Third Respondents' Outline of Submissions filed by second and third respondent 16 May 2022 (Court document no 68) at paragraph [7].

[193] The entire point of s 369 was to allow the Crown to deal with roads which have been dedicated to the public by private persons in the same manner as roads which have been dedicated to public use by the Crown. That cannot occur if the word "land" in s 369 is narrowly construed to mean only that portion, perhaps unidentifiable, which has been dedicated by private persons to public use.

[194] When the *Land Act* was passed in 1962, s 36 of the *Acts Interpretation Act* of 1954 provided, where relevant:

> "36. Meaning of certain terms
>
> In every Act, unless the contrary intention appears, the following terms shall have the meanings respectively assigned to them, that is to say:-
>
> …
>
> *Land* – Includes messuages, tenements, and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the estate or interest therein, unless where there are words to exclude houses and buildings or to restrict the meaning to tenements of some particular tenure or to some particular estate or interest…"

[195] Although a broad definition of "land" applies, s 369 focuses upon what is "dedicated by the owner". It seems to me appropriate that which is dedicated by the owner, in this case, the trustees, is that which is delineated upon the plan RP1073. As is made plain by s 119 of the *Real Property Act* of 1861, it is that which is delineated upon plans which is of import.

[196] It can be observed from RP1073 that the delineated land is the right of way and that the trustees are to be taken to have dedicated that delineated area for the purpose of passage by the public as a road. Whilst it is clear at common law that the fee simple is not transferred by the owner upon the dedication of an area or land for public road, that is not the focus of s 369. The focus is upon the area delineated which has been dedicated by the owner for use as a public road. Section 369 vests the area of such dedication in the Crown and allows the Crown to deal with that area in the same manner as roads which have been dedicated to public use by the Crown, that is, by all intents and purposes, as if they were dedicated to public use by the Crown.

[197] In my view, s 369 cannot be construed as urged by the second and third respondents, that is, to have the effect of vesting only an undetermined sliver of land necessary for the passage of the public upon it as being vested in the Crown as opposed to the land

upon which the road is situated. The word "land" therefore under s 369 ought to be construed broadly and in its usual sense.

[198] *The Centre Pty Ltd v Thomas R Magnus Pty Ltd,*[104] in a different statutory context, referred to the word "land" at 458 to 459 as follows:

> "A part must be of the same nature as the whole in which it exists. Looking at the situation at the time these agreements came into being, that which was the whole contained in the existing Certificate of Title was undeniably land in the earthy sense, whilst that which was sold was an estate in fee simple in a building unit, and appurtenant rights, in a building not yet in existence but to be erected in the future on that parcel. […] But where it occurs in that description the word "land" cannot mean a building unit not yet in existence, nor the fee-simple estate therein, for the reason that, at the critical moment of sale, property of that kind simply is not freehold land under *The Real Property Acts.* […] None of these difficulties occur if the sub-section is confined in its application to land in the natural sense of the word."

[199] The narrow interpretation urged by the respondents deprives s 369 of its intended effect.

[200] For the foregoing reasons, I make the following declarations:

(a) A declaration that the land described on Lot 11 RP1073, also known as Beatrice Lane, has been dedicated as, and is, a public road;

(b) A declaration that by operation of s 369 of the Land Act 1962 (Qld) (repealed), the land described as Lot 11 on RP1073 known as Beatrice Lane, vested in and remains vested in the Crown.

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104 (1969) Qd R 452.