

AUSTRALIA / JUDGMENT

# Walker v Adams

**[2026] NSWSC 1183****COURT**

Supreme Court

**DECIDED**

29 September 2026

**BEFORE**

Sirtes J

**CASE / FILE NUMBER**

2024/00474565

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## Source record

### Supreme Court

### New South Wales

**Medium Neutral Citation:** Walker v Adams [2026] NSWSC 1183**Hearing dates:** 14–16 September 2026**Date of orders:** 29 September 2026**Decision date:** 29 September 2026**Jurisdiction:** Equity - Real Property List**Before:** Sirtes J

**Decision:** (1) Judgment for the Defendant.  
(2) Pursuant to s 89(1)(c) of the Conveyancing Act 1919 (NSW), the easement created by dealing E363593 is extinguished so far as it benefits, or purports to benefit, Lot 54 in Deposited Plan 855587.  
(3) The parties are to file and serve written submissions of no longer than three pages on the question of costs by 9 October 2026. The question of costs will thereafter be determined on the papers.

**Catchwords:** LAND LAW – easements – construction of easements – general principles of construction – where right of carriageway incorporates Pt 1 of Sch 8 to the Conveyancing Act 1919 (NSW) – where way does not lead to dominant land and dominant owner has direct access to public road – whether right to “go, pass and repass ... for all purposes” extends to using way only to turn vehicles  
LAND LAW – easements – validity of easements – easement must accommodate dominant tenement – where dominant owner has direct access to public road – whether right to turn trucks on servient land confers benefit on dominant land or convenience on owner  
LAND LAW – easements – extinguishment of easements – extinguishment by order of court – where cross-claimant seeks extinguishment so far as easement benefits a lot – where ground relied on not pleaded but plaintiff not prejudiced – whether extinguishment would substantially injure persons entitled to easement – whether

discretion should be exercised

**Legislation Cited:**

Blue Mountains Local Environmental Plan 2015  
Conveyancing Act 1919 (NSW), ss 89, 181A, Sch 8, Pt 1  
Indian Easements Act 1882, s 24  
Real Property Act 1900 (NSW)

**Cases Cited:**

Bland v Levi [2000] NSWSC 161; (2000) 9 BPR 17,517  
Burke v Frasers Lorne Pty Ltd [2008] NSWSC 988; (2008) 14 BPR 26,111  
Butler v Muddle (1995) 6 BPR 13,984  
Campbell v Baigent [2010] NSWSC 1348; (2010) 15 BPR 28,959  
Carter v Cole [2006] EWCA Civ 398  
Casuarina Rec Club Pty Ltd v The Owners – Strata Plan No 77971 (2011) 80 NSWLR 711; [2011] NSWCA 159  
Clos Farming Estates Pty Ltd v Easton [2002] NSWCA 389; (2002) 11 BPR 20,605  
Dand v Kingscote (1840) 6 M & W 174; 151 ER 370  
Dewhirst v Edwards [1983] 1 NSWLR 34  
Elliot v Renner [1923] St R Qd 172  
Fincob Pty Ltd v Campbelltown City Council [2010] NSWSC 349  
Gallagher v Rainbow (1994) 179 CLR 624; [1994] HCA 24  
Hamilton v Joyce [1984] 3 NSWLR 279  
Hare v Van Brugge (2013) 84 NSWLR 41; [2013] NSWCA 74  
Harris v Flower (1904) 74 LJ Ch 127  
Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343  
Jalnarne Ltd v Ridewood (1989) 61 P & CR 143  
Jamison 17 Pty Ltd v Jaynick Pty Ltd [2023] NSWSC 1562  
Jeffery v Adams [2023] NSWSC 1270  
Jelbert v Davis [1968] 1 WLR 589  
Jobson v Record [1998] 1 EGLR 113  
Jones v Pritchard [1908] 1 Ch 630  
Kyren Pty Ltd v Cinema Place Pty Ltd [2006] SASC 93  
Laris v Lin (No 2) [2016] NSWSC 560; (2016) 18 BPR 35,917  
Liford's Case (1614) 11 Co Rep 46b; 77 ER 1206  
Moncrieff v Jamieson [2007] UKHL 42; [2007] 1 WLR 2620  
Owners Corporation Strata Plan 533 v Random Primer Pty Ltd [2025] NSWCA 8; (2025) 21 BPR 45,455  
Panfili v Lawless [2010] NSWSC 79; (2010) 14 BPR 27,283  
Perpetual Trustee Co Ltd v Westfield Management Ltd [2006] NSWCA 337; (2006) 12 BPR 23,793  
Philip v JPM Developments Pty Ltd [2015] NSWSC 145; (2015) 17 BPR 33,887  
PropertyPoint Ltd v Kirri [2009] EWHC 2958 (Ch)  
Prospect County Council v Cross (1990) 21 NSWLR 601  
Pugh v Savage [1970] 2 QB 373  
R v Registrar of Titles; Ex parte Waddington [1917] VLR 603  
Robinson Webster (Holdings) Ltd v Agombar [2001] All ER (D) 86 (Apr)  
Stokes v Mixconcrete (Holdings) Ltd (1978) 38 P & CR 488  
Timpar Nominees Pty Ltd v Archer [2001] WASCA 430  
Todrick v Western National Omnibus Co Ltd [1934] 1 Ch 561  
Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528; [2007] HCA 45  
White v Richards (1993) 68 P & CR 105  
Zenere v Leate (1980) 1 BPR 9300

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|-----------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Texts Cited:    | Adrian J Bradbrook and Susan V MacCallum, Bradbrook and Neave's Easements and Restrictive Covenants (3rd ed, 2011, LexisNexis Butterworths)<br>Colin Sara and Daniel Dovar, Boundaries and Easements (7th ed, 2019, Sweet & Maxwell)<br>Jonathan Gaunt KC and Sir Paul Morgan, Gale on Easements (22nd ed, 2025, Sweet & Maxwell) |
| Category:       | Principal judgment                                                                                                                                                                                                                                                                                                                |
| Parties:        | Stephen Charles Walker (Plaintiff/Cross-Defendant)<br>Dianne Michelle Adams (Defendant/Cross-Claimant)                                                                                                                                                                                                                            |
| Representation: |                                                                                                                                                                                                                                                                                                                                   |
| Counsel:        | NJ Condylis / J Tsaousidis (Plaintiff/Cross-Defendant)<br>M Bennett (Defendant/Cross-Claimant)                                                                                                                                                                                                                                    |
| Solicitors:     | Hodgson & Lee Solicitors (Plaintiff/Cross-Defendant)<br>McPhee Kelshaw (Defendant/Cross-Claimant)                                                                                                                                                                                                                                 |
| File Number(s): | 2024/00474565                                                                                                                                                                                                                                                                                                                     |

## JUDGMENT

### Introduction

This dispute involves neighbouring properties in the village of Woodford, which is situated in the Blue Mountains some 85–90 kilometres west of the Sydney CBD, on the Great Western Highway between Linden and Hazelbrook.

In March 2001 the Defendant, Dianne Adams, purchased 3 Bridge Lane (Lot 3 in DP 836473). The property is improved by a residence in which the Defendant lives with her family. At the date of purchase, the property was burdened by a right of carriageway 12.195m wide, created by registered dealing E363593.

On 20 December 2007 the Plaintiff, Stephen Walker, purchased 5 Bridge Lane (Lot 54 in DP 855587), which is recorded on its title as having the benefit of the right of carriageway. The right of carriageway and Lot 54 are not contiguous: Bridge Lane, a public road, lies between them.

Until around August 2021 the relationship between the Plaintiff and the Defendant appears to have been cordial and neighbourly. The relationship has since broken down, and a dispute concerning the right of carriageway must now be resolved. In short compass, the Plaintiff asks the Court to determine whether he is entitled to use the right of carriageway as a turning area so that his vehicles face forward when they enter his driveway and, relatedly, whether the Defendant, as owner of the servient tenement, is substantially interfering with his use and enjoyment of the right of carriageway by reason of her conduct. He also seeks a declaration that he may level and pave the area.

The Defendant, as Cross-Claimant, seeks an order under s 89 of the Conveyancing Act 1919 (NSW) (the Conveyancing Act) extinguishing the right of carriageway in part, namely so far as it benefits 5 Bridge Lane. Counsel for the Cross-Claimant characterised the application in opening address as one of “modification”. Her written closing submissions press extinguishment as the primary claim and modification in the alternative.

### Summary of conclusions

For the reasons that follow, my principal conclusions may be summarised as follows:

The outcome does not turn on questions of credit. I accept the evidence of both the Plaintiff and the Defendant and, where it matters, prefer the Plaintiff’s account of his use of the right of carriageway beyond the gate, which Mr Weatherstone independently corroborates: [48], [53], [58].

The Defendant properly conceded that the terms in Pt 1 of Sch 8 to the Conveyancing Act are incorporated into the right of carriageway: [36], [38]. I do not accept her concession that the right of carriageway extends only as far as the gate: [39].

The right of carriageway lies within the former battleaxe handle of Lot 6 in DP 810134, with a frontage of 13.02 metres to Bridge Lane. Its southern portion, Lot 57 in DP 855587, was never acquired for a road and remains part of the servient tenement. The gate stands within Lot 57, and the right of carriageway continues north of it: [80]–[81].

The right of carriageway leads to no public place at its northern end. It does not reach, and has never reached, the land now comprising Lot 54; nor did former Lot B adjoin it when the right was granted: [82]–[83].

Issue 1 (scope): the use the Plaintiff proposes, namely entering the right of carriageway from Bridge Lane, turning his vehicles and returning to Bridge Lane, is not a use to “go, pass and repossess ... to and from” the dominant tenement. The servient land is not a stage of any journey to or from Lot 54, the use is not ancillary to any passing and repassing, and the words “for all purposes” do not assist the Plaintiff: [123]–[127]. Panfili, Timpar and PropertyPoint are distinguishable: [101]–[122]. The terms of the easement do not otherwise restrict the size of the vehicles that may use it: [130].

Issue 1 (accommodation), as an alternative and independent ground: the right to turn vehicles on the servient land confers a convenience on the Plaintiff in driving on a public road, not a benefit connected with the normal enjoyment of Lot 54. Lot 54 is therefore not a part of the dominant tenement with which the right is capable of enjoyment, and it does not have the benefit of the right of carriageway. I make no finding that the easement is otherwise invalid: [131], [136]–[147].

Issue 2 (substantial interference) does not arise. Had I found otherwise, I would have found that the Defendant substantially interfered with the right of carriageway by the gate (maintained, at least at times, locked) and the pile of bricks, together with her refusal to accept any right beyond the gate, but not by the mailbox or the other items at the entrance: [152]–[153].

Issue 3 (levelling and paving) does not arise. In any event, the proposed works are vague; a gate demarcating private land would not be an unreasonable interference, provided the dominant owner could open and close it; and any works would have to be carried out without impeding the Defendant's access to her land: [169]–[171].

Issue 4 (the Cross-Claim) must be decided because the folio for Lot 54 records the benefit of the right of carriageway. I grant the order sought in prayer 1 of the Cross-Claim. The order is made on the basis of s 89(1)(c), not on the pleaded ground of obsolescence. The alternative claim for modification does not arise: [172]–[188].

The Plaintiff's claim therefore fails.

The land, the easement and Bridge Lane

The instrument and the subdivision

The Court Book contains a history of the dealings that gave rise to the easement over part of the Defendant's land.

Dealing E363593, stamped on 23 December 1991, is a transfer from the Roads and Traffic Authority of New South Wales (the RTA), for \$105,000, to Martin Paul McKew. The second schedule contains rights of carriageway created by DP 645130. The third schedule contains the following:

*"B The transferee hereby grants unto and in favour of Lot 8 in Deposited Plan 645130 and Lots A and B in Deposited Plan 321521 (hereinafter referred to as 'the dominant tenements') a right of carriageway 12.195 metres wide within Lot 6 of Deposited Plan 810134 in the position of '(F) proposed right of carriageway 12.195 wide DP810134' as shown on Deposited Plan 645130.*

For the purposes of s 88 of the Conveyancing Act:

- (a) The dominant tenements are Lot 8 in Deposited Plan 810134 and Lots A and B in Deposited Plan 321521.
- (b) The servient tenement is Lot 6 in Deposited Plan 810134;
- (c) The party having the right to release, vary or modify the right of carriageway is the Roads and Traffic Authority of New South Wales, its successors and assigns."

The same instrument created a further right of carriageway 5 metres wide, which the Defendant says leads to a stormwater retention basin.

Lot 3 was created on the registration of DP 836473 on 4 February 1994 from former Lot 6 in DP 810134. Lot 54 was registered in DP 855587 in about February 1996 from land formerly part of Lot B in DP 321521 (a reference corrected to DP 321512 by departmental dealing 2358412 in August 1996).

A marked-up aerial photograph, drawn from the Statement of Claim, depicts the easement in the context of the servient and dominant tenements:

### Bridge Lane and the physical setting

Bridge Lane is reached only from Station Street. It is not a through road. It slopes down from west to east and it terminates adjacent to 5 Bridge Lane. Its width, its gradient and whether there is anywhere to turn are in dispute. This is depicted in the following photographs.

The entry to Bridge Lane from Station Street, taken on 18 December 2023 (Walker 1 [12]).

Bridge Lane, looking down from near the top towards the Bend (left, taken on 7 August 2025), and looking back up towards Station Street from in front of 4 Bridge Lane (right, taken on 18 December 2023) (Walker 1 [15]–[16]).

The Bend at the bottom of Bridge Lane, taken on 16 January 2024 from in front of the driveway of 4 Bridge Lane (Walker 1 [18]–[19]).

The Plaintiff's case is that Bridge Lane is a steep and narrow laneway, wide enough for a single vehicle, with no public or accessible cul-de-sac or turning area, and a single point of entry and exit onto Station Street, which he says is a busy road: Walker 1 [11]–[20]; PCS [52]. Ms Solano and the Plaintiff also give evidence of frequent fog: Solano 1 [10]; Walker 3 [10].

The Defendant responds that Bridge Lane is wide enough for the Plaintiff's two trucks and his four-wheel drive and that it is not steep save where it rises to Station Street. She says that Station Street is not busy, that fog severe enough to affect driving is unusual, and that the area in front of the gate is more than adequate for a car or small truck to make a three-point turn: Adams 2 [13], [15], [20], [37]–[40], [63]–[67].

The Court conducted a view of the site on the morning of the first day of the hearing. From this view it was observed that Bridge Lane is on a gradient but that one would not describe it as overly steep. I agree that its steepness increases as it rises to Station Street. I accept the Defendant's submissions that the front area of the gate is more than adequate for a car or a small truck to make a three-point turn. This much appears to be accepted by the Plaintiff himself. During the view it was also observed that the Plaintiff's truck was parked facing up Bridge Lane.

These observations on the view have been taken into consideration in my understanding of the parties' evidence and my assessment of the site.

## The extent of the right of carriageway and the identity of the dominant tenement

Lot 54 has the benefit of the right of carriageway only if it is “the dominant tenement or any such part thereof” within Pt 1 of Sch 8 to the Conveyancing Act, that is, if it was part of former Lot B. The Plaintiff relies on the recording of the benefit on the folio for Lot 54 and on those words. The Defendant pleads that Lot 54 “at law does not benefit” from the right of carriageway. Neither party’s written submissions address the effect of registration under the Real Property Act 1900 (NSW).

As to the extent of the right of carriageway, the Defendant says that the diagram in the Statement of Claim wrongly includes a triangle forming part of Bridge Lane, being the area shown as Lot 57 in DP 855587 that was never acquired, and that the right of carriageway ends about three-quarters of the way along the western boundary of No 4, where bricks on either side of the driveway mark its northern end: Adams 2 [16], [89].

Extract from the SDT Explorer website showing 3 Bridge Lane (Lot 3 in DP 836473, outlined) and Lots 53 and 54 in DP 855587 at the end of Bridge Lane, with Station Street and the Great Western Highway (Ex DMA-1, Tab 1; CB 436).

Extract from Mr Hogan’s survey of Bridge Lane dated 23 August 2025, showing the entrance to the Defendant’s driveway, the gate, the letterbox, the stacked bricks and the log garden edge. The area marked (B) is the right of carriageway 12.195 metres wide (E363593 and DP 645130); the area marked (C) is the plan of proposed acquisition for the purposes of the Roads Act 1993 (DP 855587) (Hogan, Annexure C; CB 391).

## The history of the parties’ occupation

On 2 or 3 March 2001 the Defendant settled the purchase of Lot 3 from Ivan James Constable and Jennifer Constable for \$340,000 (transfer 7458434) and moved in with her husband, Mr Trevor Adams, and their two daughters. As at the date of purchase there was a main gate on the driveway, a line of large logs on the western side outside the gate, a silver cylinder letterbox near the gate on the right-hand side of the driveway (as seen from the street), wire fences on both sides outside the gate, a side gate in the eastern fence, and the “Bridge End” sign, which had been installed by the previous owner, who named the property. The gate was fitted with a motor and remote-control receiver, although it was not connected to electricity until 2016. As at the date of purchase, it had no independent locking mechanism. The Plaintiff seeks relief to remove these structures. He relies on Mr Hogan’s surveys and contends that removal of the structures would open the full 12.195m face of the right of carriageway which, with the adjacent public road section, would give in excess of 15m of frontage: PCS [82].

It appears to be common ground that the gate has been in its present position since at least December 2007 and that it was not erected by the Defendant. The Plaintiff accepts that the letterbox, fence and post have been there since he bought his lot. From the time of purchase, the Defendant and her family have kept the main gate closed, so that their animals (dogs and, later, an alpaca) did not escape, and for privacy and security.

Google Street View image of 3 Bridge Lane, January 2008, showing the main gate, side gate and letterbox (Ex DMA-1, Tab 5; CB 270).

On 20 December 2007 the Plaintiff purchased Lot 54 from Pamela Lemoine for \$302,000 (transfer AD698734) and has lived there since. At the time of purchase the Plaintiff was working as a building contractor and as head teacher of construction trades at TAFE, which required him to travel to Bathurst, Orange and Dubbo. He is a carpenter by trade and holds a builder's licence. Between late 2007 and 2011 the relationship between the Plaintiff and the Defendant was cordial and without dispute. During that period the Plaintiff did not store trucks or earth-moving plant at Lot 54.

In or about 2012 Mr Adams placed the brick stacks in their current location along the eastern side of the driveway, inside the fence on the Bridge Lane side of the gate. At about the same time the owners of Lot 51 (2 Bridge Lane) and Mr Adams erected a new timber retaining structure along the boundary between Lot 51 and the western side of the driveway.

The driveway at 3 Bridge Lane in 2013, showing the bricks and the retaining wall, with an alpaca (Ex DMA-1, Tab 6; CB 273).

On 6 December 2012 the Plaintiff's company, S C Walker & Co Pty Ltd, changed its registered office, and, on 19 July 2013, its principal place of business, to 5 Bridge Lane. In his evidence the Plaintiff said that he used his home address as he had no other address to use.

Between 2013 and 2020 Mr Adams, who was a plant mechanic, regularly brought home trucks and drilling rigs for repair.

In around 2014, the Plaintiff says he asked the Defendant whether he could open the gate and enter the bottom of her driveway to turn his vehicles (no more than three or four times a week). Although that conversation is in dispute, I do not consider it germane. An independent witness, Mr Paul Weatherstone, who moved into 4 Bridge Lane in mid-2014, observed the Plaintiff frequently using the driveway beyond the gate to load and unload his trucks and to turn his vehicles.

In 2015 the Plaintiff purchased a Land Rover Discovery at the same time as a trailer and a small excavator; the Discovery towed the trailer and excavator. Before that, according to Ms Lisa Mare, the Plaintiff's former partner (and a witness for the Defendant), the Plaintiff drove a Holden ute. Ms Mare saw the Plaintiff execute three-point turns using the driveways along Bridge Lane. He soon sold the small excavator and bought a larger excavator and a truck to carry it. In 2016 the Plaintiff acquired a tabletop truck (approximately 2.5m × 10m, initially a Mitsubishi) to carry his compact-tracked loader and excavator.

In approximately May 2016 the Defendant obtained electricity for the shed and the gate. She told the Plaintiff that she was happy to provide him with his own remote. Shortly afterwards either the Defendant or her husband handed the Plaintiff his first remote. It is the Plaintiff's evidence that no restriction was placed on its use, and he was never asked to return it before the parties fell into dispute. Mr Weatherstone recalled that the Plaintiff had a remote in his possession from about 2016. The Defendant does not accept this evidence entirely. She states that the remote was provided so that the Plaintiff could carry out work, or practise with his earth-moving equipment, and that a chain latch was in place until 2017. I need not resolve this dispute.

Between May 2016 and August 2021, the Plaintiff used the remote and regularly accessed the right of carriageway beyond the gate as a turning area for his tip truck and trailer. He reversed up the lane past No 4, jack-knifed into the driveway and through the gate, and then drove forward up Bridge Lane to re-enter Station Street front-on. He also used the right of carriageway to load and unload his compact-tracked loader, excavator and attachments onto the tabletop truck.

In around 2021 the Plaintiff obtained his Hino FM truck (2021 model). In mid-2021, during the COVID-19 pandemic, the relationship between the Plaintiff and the Defendant broke down. It did not do so because of the Plaintiff's use of the driveway, and there is no need to examine precisely why the relationship ended.

At around this time the Defendant erected a "No Trespass" sign on the property which read, in part: "STOP NOW ... Entry by private invitation only ... Trespass applies without prior consent or prior invitation ... Trespass is a criminal offence". The Defendant says that she erected the sign during the pandemic because her daughters were concerned about unauthorised entry and to stop delivery drivers opening the gates, and that it had nothing to do with the Plaintiff.

The "No Trespass" sign on the Defendant's property, taken on 19 February 2024 (Walker 1 [90]; CB 99).

In around August 2021 the remote then in the Plaintiff's possession stopped working. He did not raise the matter with the Defendant or her husband because he was no longer speaking to either of them. The gate has remained closed and, according to the Plaintiff, locked since that time. Paragraph 18 of the Statement of Claim alleges that the Defendant, without notice, reprogrammed the gate's lock and code. That is denied: Defence at [19]. In consequence, the Plaintiff began loading his trucks on Bridge Lane rather than beyond the gate.

In October 2021 Mr Weatherstone and his partner, Ms Rebecca Scheithe, sold 4 Bridge Lane to Ms Elena Solano. In December 2021 Ms Solano, her husband Brad and their two young children moved into No 4. Ms Solano's elderly father, George, later also lived there. Because the gate has been shut and locked, Ms Solano says she has never had access to the right of carriageway beyond it. She has had minimal interaction with Mr Adams and has never spoken to the Defendant.

The proceedings and the pleadings

## The claim

By his Statement of Claim filed on 20 December 2024 the Plaintiff seeks:

a declaration that the right of carriageway allows him to use the subject land as a turning area for the purposes of getting to or from the dominant tenement;

an order that the Defendant remove the gate and the “Impeding Structures” within 28 days;

a declaration that the Plaintiff may repair and maintain the land by paving and levelling the entrance to the driveway so as to have full use of it as a turning area;

an injunction restraining the Defendant from obstructing his use of the right of carriageway in accordance with prayer 1;

damages;

interest; and

costs.

The cause of action is nuisance by substantial interference with the easement, pleaded in three strands: the gate (SOC [12]–[17]); the cessation of remote access from August 2021 (SOC [18]–[21]); and the “Impeding Structures”, defined as a large letterbox, a pile of bricks, timber log garden edging and a hedge (SOC [22]–[25]). The Plaintiff also pleads the Defendant’s refusal to desist (SOC [26]–[28]), the ancillary right to carry out works (SOC [29]–[31]) and loss (SOC [32]–[33]).

## The Defence, the Cross-Claim and the responsive pleadings

By her Defence, the Defendant denies that the terms in Pt 1 of Sch 8 to the Conveyancing Act are incorporated, contending that the right of carriageway is limited to the text of the final paragraph of the schedule: Defence [10(a)]. She pleads that, construed by reference to the intention at the time of the grant, the right of carriageway benefited only Lot 8 and Lots A and B, was intended to work with the further 5 metre right of carriageway, was not for turning and does not benefit Lot 54: Defence [7(f)]–[7(g)]. The Defendant says that the absence of contiguity severs any connection: Defence [10(c)]–[10(d)]. She pleads the history of the gate and the items at the entrance, and that no works are permitted or required and no loss has been suffered: Defence [13]–[15], [22]–[23], [29], [32].

The Defendant/Cross-Claimant ultimately abandoned her contention that the right of carriageway does not incorporate the terms in Pt 1 of Sch 8 to the Conveyancing Act, and I have proceeded to determine the matter on that basis. The concession was properly made, because I would have so found in any event.

By her Cross-Claim the Defendant seeks extinguishment under s 89 so far as the right of carriageway benefits, or purports to benefit, Lot 54, pleading the RTA’s purpose, the subsequent acquisitions and road dedications, the physical impossibility of traversing the right of carriageway to and from Lot 54, that as to Lot 54 the easement is “otiose and obsolete”, and non-

use: Cross-Claim [10]–[23]. The Plaintiff’s Defence to the Cross-Claim treats that as invoking s 89(1)(a), objects to reliance on material outside the Register and pleads discretionary grounds: Defence to Cross-Claim [11(b)], [25]. By her Reply to the Defence to the Cross-Claim, the Defendant pleads that the only lawful use of Lot 54 is as a private residence, that the Plaintiff’s use of it as a “truck depot” is unlawful and has involved unreasonable use of the right of carriageway, causing damage to the small side gate, and that his Discovery damaged “red glass plants”: Reply to Defence to Cross-Claim [1]–[2].

### **Concessions and changes of position at the hearing**

As I have already noted, in closing the Defendant accepted that the terms in Pt 1 of Sch 8 are incorporated: DS [27]. She describes the right of carriageway “up to the gate” as agreed (DS [33]) while also pressing extinguishment so far as it benefits Lot 54: DS [42(i)]. The Plaintiff says the two positions are irreconcilable: PCS [28], [74]. The issue of contiguity (or lack thereof) has also fallen away. The Defendant’s submissions record that the claim for damages is not pressed: DS [3B]. The Plaintiff’s closing submissions do not address damages and Counsel for the Plaintiff effectively abandoned the claim during oral closing submissions. The Plaintiff disavowed in cross-examination any claim to stop, load or unload on the right of carriageway: T17.50–20.15; PCS [31]–[32]. The Defendant’s submissions no longer use the words “otiose” or “obsolete”: PCS [1], [75].

The Court is not bound by the Defendant’s concession that there is a right of carriageway up to the gate but not past the gate. For reasons that will become apparent below, I do not accept the Defendant’s concession.

### **Matters said to fall outside the pleadings**

The Plaintiff submits that the Defendant’s reliance on the size of his trucks, “idiosyncratic use” and unreasonable or excessive use was raised for the first time in submissions and is not pleaded (PCS [2], [34]–[36], [60]), and that the modification now sought was never pleaded, the Cross-Claim not having been amended: PCS [1], [74]. The Reply to the Defence to the Cross-Claim does plead unlawful commercial use, unreasonable use and damage, although in answer to the Plaintiff’s Defence to the Cross-Claim rather than to the claim. I do not consider these pleading issues to be of any moment. They do not seek to introduce new factual questions but, rather, submissions on the facts and law. It is hardly contentious that the Plaintiff seeks to use the right of carriageway to manoeuvre his large truck and trailer into the driveway. Moreover, the arguments fall within the ambit of issues raised by the claim and the Cross-Claim.

The issues arising from the pleadings

I consider that there are four main issues which I must resolve:

the construction and scope of the right of carriageway;

whether there has been substantial interference with the right of carriageway;

whether the Plaintiff is entitled to carry out works on the right of carriageway; and the Cross-Claim under s 89.

#### The evidence

The Plaintiff relied upon the following affidavit evidence in support of his claim and his defence to the Cross-Claim:

Stephen Charles Walker (11 November 2025 (Walker 1), 13 March 2026 (Walker 2) and 28 May 2026 (Walker 3));

Elena Regina Solano (21 October 2025 and 26 May 2026);

Paul James Weatherstone (9 March 2026 and 2 June 2026); and

Richard Anthony Hogan, registered surveyor (26 May 2026).

The Defendant relied upon the evidence of the following:

Dianne Michelle Adams (11 November 2025 (Adams 1), 18 February 2026 (Adams 2) and 13 May 2026 (Adams 3));

Trevor Ian Cork, the Defendant's solicitor (5 November 2025);

Madison Joy Adams (MA) (29 May 2026); and

Lisa Mare (29 May 2026).

Only the Plaintiff, the Defendant and Ms Solano were cross-examined.

#### The Plaintiff's evidence in cross-examination

The Plaintiff's cross-examination yielded the following relevant responses:

the Plaintiff seeks to use the right of carriageway for turning only, rather than for loading or unloading: T19–20, T32. That is so despite paragraphs of his affidavits which dealt with loading and unloading; the Plaintiff characterised those paragraphs as describing past practice and not future intentions;

the Land Rover, as well as the tipper without the trailer, can each turn without going past the gate: T25, T26. Only the 10m tabletop truck cannot turn in Bridge Lane at all. Indeed, it apparently cannot turn even when the gate is open: T8, T26 and T35;

the Plaintiff has run his business from his home since August 2021 and can access the property with both trucks. Even with the turning area he would still have to reverse along part of Bridge Lane. He parks both trucks facing up the lane so that he can drive straight out. To get them into that position:

returning from Katoomba, the Plaintiff turns left into Ridge Street and turns around there. He then reverses along Station Street, negotiating the bend, and reverses down the whole length of Bridge Lane, including the ramp (which is narrow and curved, with an Armco railing on the right) and then the stretch past Lot 3 to his property; and

returning from Springwood, he stops at Station Street and reverses down Bridge Lane;

when driving the tipper with the trailer he has to jack-knife the trailer to get it into his driveway: T33. When the gate was accessible he used the area beyond it to perform that manoeuvre: T9, T35;

if he parks nose-first in his driveway, he reverses up Bridge Lane onto Station Street and then heads west to Katoomba, or continues reversing and turns east towards Springwood;

as to rear visibility, the Plaintiff said that he has side mirrors and a camera, and that both trucks have reversing beepers and lights: T33; and

at T31 the Plaintiff accepted that the turning area would make access more convenient, and that “it’d be much easier if I had access”: T34. He did not say that using the easement was necessary; indeed, the Plaintiff has successfully parked his vehicles without using the right of carriageway since 2021.

### Assessment of the Plaintiff’s evidence

The Plaintiff submits that he should be accepted as a witness of truth who did his best to answer the questions asked: PCS [5]. He confirmed that his case goes no further than his pleadings and relief (T17.50–20.15; PCS [6]) and that his motive is not the (further) souring of the relationship but being able to get in and out of his property and to turn his vehicles safely: T31.32–37; PCS [7]–[8]. In response to the suggestion that his reversing along Bridge Lane was his own “choice”, the Plaintiff says it was a “Hobson’s choice”: T32.42–50; PCS [10]–[11].

The Defendant points to the inconsistency between the Plaintiff’s affidavit statements about loading and unloading on the right of carriageway and his disavowal in cross-examination (DS [13]–[14], [14A(i)]), and to his evidence that he “tolerated” the gate until relations soured: DS [14A(iii)]; Walker 1 [66].

A few things can be said on this issue. First, the outcome of these proceedings does not turn on questions of credit or reliability. Although there are some minor discrepancies between the parties in relation to dates and other matters (eg the circumstances in which the remote control was handed over, and whether the gate was locked), none of these are germane to the outcome. Secondly, the few issues that are critical to the Court’s determination involve questions of construction of the terms of the easement taken together with uncontested facts. Thirdly, I considered both the Plaintiff and the Defendant to be witnesses of credit who gave their evidence in a forthright fashion. Although I favoured the evidence of the Plaintiff in relation to the locking of the gate, that did not affect my assessment of the Defendant’s credibility.

Ms Solano, Mr Weatherstone and Mr Hogan

Of these three remaining witnesses, only Ms Solano was cross-examined, and then only very briefly.

The Plaintiff relies on Ms Solano's evidence that she supports the proposed works and sees no problem for her property: T37.24–25, T38.36–45; PCS [13]. He relies on Mr Weatherstone's unchallenged evidence that he saw the Plaintiff use the right of carriageway between 2014 and 2021: Weatherstone 1 [33]–[36]; PCS [14]. He also relies on Mr Hogan's surveys: PCS [15].

The Defendant relies on Ms Solano's evidence that she turns her own vehicle in her driveway and that third parties use her driveway and grassed area to turn: DS [11], [14A(ii)]. The Defendant also relies on Mr Weatherstone's evidence that he stored his boat and trailer without using the right of carriageway and was unaware of it: DS [11].

### **The Defendant's evidence**

The Plaintiff submits that the key theme of the Defendant's evidence was outright opposition to his use of the right of carriageway, including its mode, the vehicles used and use by his agents, and that after three affidavits she had not offered a key or any other means of access: PCS [16]. The Defendant's evidence addresses the history of the gate and the items at the entrance, the purpose for which the remote was provided, the incidents relied on as damage and the impact of strangers using the driveway: DS [9]–[16].

The Defendant was cross-examined briefly. Her cross-examination gave the Court neither occasion nor, I should add, any reason to form an adverse view of her or of her evidence. I accept that the Defendant's evidence was truthful.

### **Mr Cork's evidence of the title history**

At PCS [17], the Plaintiff submits that Mr Cork's evidence of documents outside the Register, and the argument founded on it, is of the kind precluded by the observations in *Westfield Management Ltd v Perpetual Trustee Co Ltd* (2007) 233 CLR 528; [2007] HCA 45 (*Westfield*) at [35]–[45]. The Defendant relies on that history in support of her construction argument: DS [20]–[24]. I hold that the Cork material is not admissible to construe the grant beyond the confines of *Westfield*, but can be considered in relation to the Cross-Claim where the purpose of the easement at creation, and changes since then, are pressed into relevance.

### Ms Mare and Ms Madison Adams

Neither party's closing submissions address this evidence directly. Ms Mare's evidence goes to the period 2011 to early 2016, including that, to her knowledge, the Plaintiff did not use the driveway beyond the gate to turn while she lived at No 5 and that in 2015 Mr Adams agreed that the Plaintiff could turn his truck well beyond the end of the driveway: Mare [13]–[18]. Ms Madison Adams gives evidence about the family's animals, the gate and the purpose of the "No Trespass" sign, and produced photographs: MA [4]–[15].

### The absence of Mr Trevor Adams

The Plaintiff submits that Mr Adams was heavily involved in many of the key events, that he was the obvious witness for the Defendant to call, and that a Jones v Dunkel inference arises from his absence. He adds that the Court is left without evidence of whether Mr Adams presents a risk of future interference: PCS [18], [84].

These factual disputes do not matter. As I have stated above, the issues in these proceedings will not be disposed of by reference to insignificant disputes about past practice, the dates on which remote controls were issued or similar matters. The Plaintiff's evidence makes it plain that for many years after he bought the property, he was unaware that the right of carriageway existed. He understood that he could only use the driveway by a grace-and-favour arrangement with the Defendant or her husband. Had he known of the right, he would have used it without seeking consent. None of these disputes detract from the matters that fall for determination. The first is whether the right of carriageway registered on the Defendant's title could have been used by the Plaintiff without any such grace-and-favour arrangement but as of right, and whether he may do so in the future. The second is whether, if the Plaintiff otherwise succeeds, the right should be modified or extinguished in part. Nonetheless, I shall dispose of these factual disputes briefly for completeness.

### Findings on the contested facts

### Use of the right of carriageway beyond the gate

The Plaintiff says that he used the right of carriageway beyond the gate from 2011 (or 2014) to May 2016 by opening a latched gate, and from May 2016 to August 2021 with a remote, to turn his tip truck and trailer and to load and unload plant, with the Defendant and her husband often present and never objecting: Walker 1 [62]–[69], [77]–[83]; Walker 3 [30]. Mr Weatherstone corroborates that use, which he put at two to three times a week: Weatherstone 1 [33]–[36]; Weatherstone 2 [5]–[6]. The Defendant says that the Plaintiff never went beyond the gate except when expressly invited to carry out work or to practise with his plant, and then largely beyond the limit of the right of carriageway: Adams 1 [55], [86]; Adams 2 [69], [74], [126]; Adams 3 [6], [19], [30], [46], [71]–[75]; DS [10], [37]. Ms Mare's evidence supports the Defendant for the period to early 2016. I prefer the Plaintiff's evidence on this issue owing to the corroborating evidence of Mr Weatherstone, who was not cross-examined and was independent.

## The gate, the remotes and the events of August 2021

The Plaintiff says that the gate was secured only by a ring latch until May 2016, when the Defendant obtained power for the gate and he was given a remote for general use: Walker 1 [72]–[73]. The Defendant says that the chain-latch period ran from about 2013 to 2017, when a new motor was fitted, and that the remote was given by Mr Adams only so that the Plaintiff could carry out work and practise with his plant: Adams 1 [28], [38]; Adams 2 [73], [85]–[87]. The Plaintiff alleges that in August 2021 the gate was reprogrammed without notice. The Defendant says that the gate has no lock or code, has never been locked and that the remotes were never reprogrammed: Adams 2 [61]–[62], [97]. Ms Solano’s evidence is that the gate has been shut and locked since December 2021: Solano 1 [11]; Solano 2 [7]. The Defendant’s solicitors demanded the return of the remote in December 2023. I prefer the Plaintiff’s version as to the locking of the gate since December 2021 owing to the corroborative evidence of Ms Solano. I have no reason to treat Ms Solano as partial to the Plaintiff merely because she has been called in his case. I accept her evidence in finding that the gate has been locked since December 2021.

The main gate and the sealed area in front of it, with a box trailer parked outside the gate, taken on 16 October 2023 (Walker 1 [100]–[101]; CB 102).

## The breakdown of the relationship and the “No Trespass” sign

The Plaintiff and Mr Weatherstone place the breakdown in mid-2021: Walker 2 [24]; Walker 3 [86], [88]; Weatherstone 2 [7], [12]. The Defendant places it in April 2022: Adams 1 [45]; Adams 2 [93]–[98]; Adams 3 [18], [56], [63]. The Plaintiff says the sign went up in 2021, while Mr Weatherstone still lived at No 4, and relies on Mr Weatherstone’s photograph of 17 October 2021. The Defendant says the signs were bought in about August 2021 but not put up for some months: Adams 3 [65].

Nothing hangs on this evidence. The parties’ relationship fractured in 2021 or 2022. Precisely when or why is of no moment.

## The items at the entrance

The Statement of Claim pleads that the Impeding Structures were placed in about August 2021: SOC [22]. The Defendant says the letterbox has been there since 2001 (moved about 2m in 2008), the bricks since 2012 and the log edging and hedge since 2019: Adams 1 [13], [22], [29]–[30]. The Plaintiff accepts that the letterbox, fence and post were always there (Walker 1 [104]), and the Defendant says that in cross-examination he accepted the entrance was unchanged since his purchase save for the hedge and the removal of the logs: DS [9]. The date of the hedge is variously given as late 2021, 2017 and 2019: Walker 1 [108]; Walker 2 [18]; Defence [22(d)]. The Plaintiff also complains of bins placed across the driveway: Walker 1 [111]–[112]. The Defendant says bins are placed for collection, not to obstruct: Adams 2 [109]–[111]. I accept the Defendant’s evidence in relation to all of these matters (insofar as a dispute continues to exist after concessions were made by the Plaintiff).

The entrance to the Defendant's driveway, showing the letterbox, fence and fence post, taken on 10 October 2024 (Walker 1 [103]; CB 102).

### **The vehicles and whether they can turn**

The Plaintiff contends that, with the structures removed, both trucks could turn: PCS [82]; Walker 2 [43(c)]. The Defendant contends that the 10m tabletop truck could not turn even within the 9.25m area the Plaintiff proposes (DS [14A(ii)(iv)]), that the Discovery and the tipper without its trailer already turn in front of the gate, and that the tipper with its trailer needs access only to the gate: DS [14A(ii)], [37C(ii)]. There is no swept-path or engineering evidence. In the absence of independent evidence on this issue, I am unable to make a finding one way or the other in relation to the tabletop truck. Ultimately, the matter is not significant in the Court's determination.

The Plaintiff's tip truck, taken on 2 October 2025 (Walker 1 [55]; CB 89).

The Plaintiff's tabletop truck, taken on 9 October 2025 (Walker 1 [57]; CB 90).

### **Safety**

The Plaintiff submits at PCS [54]–[56] that reversing the length of Bridge Lane, by day or night, is an obvious safety hazard and that safety is a relevant consideration: *Burke v Frasers Lorne Pty Ltd* [2008] NSWSC 988; (2008) 14 BPR 26,111 (Burke) at [25] (Brereton J); *Prospect County Council v Cross* (1990) 21 NSWLR 601 (Prospect County Council) at 610B (Bryson J). The Defendant submits that access has always been available and that reversing past Lot 53 would be required in any event: DS [10], [14A(iv)].

The Plaintiff implicitly asks me to accept that reversing down Bridge Lane is an “obvious safety hazard” based on his say-so or through judicial notice. I can do neither. There is no independent expert evidence from (eg) a traffic or road safety consultant that establishes the safety hazard. There is no empirical evidence of accidents or near-misses. It is not immediately apparent to me why a slow-moving truck reversing carefully down Bridge Lane constitutes a safety hazard. The Plaintiff has now been doing this manoeuvre for years, as have local garbage trucks, without any reported incident. I decline to make such a finding for these reasons.

### **The use of Lot 54 and its planning lawfulness**

The Defendant contends that Lot 54 is zoned C4 Environmental Living under the Blue Mountains Local Environmental Plan 2015 (the LEP), that the Plaintiff is operating a truck or transport depot without consent, and that his use is “idiosyncratic”: DS [35]. The Plaintiff says that he keeps his work vehicles at home, as is common in the Blue Mountains, that truck use on Bridge Lane is unremarkable, and that the point is irrelevant: PCS [53]. There is little evidence on planning law beyond the LEP extracts.

This is not a sufficient basis to make any such finding. I note that there has been no suggestion that the local consent authority shares this view or that any action has been taken in relation to the Plaintiff's truck operation.

### Incidents of alleged damage

The Defendant relies on a photograph of a “mess” found after the Plaintiff's truck was moved (Adams 1 [23]), a collision between the tipper and the side fence on 4 October 2023 (Adams 1 [70]) and damage to plants on the verge: Reply to Defence to Cross-Claim [2(f)]. The Plaintiff says that he spread sawdust over an oil spill that was not from his vehicles, to which the Defendant gave no reply evidence: Walker 2 [9]–[10]; PCS [59(a)]. He says that the fence contact was inadvertent and itself shows the lack of room to turn: Walker 2 [42]; PCS [59(b)]. He denies parking on the plants: Walker 3 [51]. This issue is not germane to the issues I must decide and no finding is warranted.

Having dealt with these issues I now deal with the matters of substance that require the Court's determination.

The applicable principles

### Contiguity

The parties appear to agree that contiguity is not necessary for the validity of an easement, and that it is not an issue here merely because the registered easement is separated from the dominant tenement by a public road.

At [18-003] of *Boundaries and Easements* (7th ed, 2019, Sweet & Maxwell), the learned authors observe:

*“It is sometimes said that a right of way must have a terminus a quo and a terminus ad quem, that is, that it must lead from one fixed point to another. Usually one of these fixed points will be a public highway and the other will be the dominant tenement. There is no requirement, however, that the way must lead directly to the dominant land. There is nothing stopping a person obtaining a right of way over one parcel of land for the purpose of gaining access to his own land over intervening land. Even though the right of way must be directly or indirectly a means of access to the dominant land, it can be exercised by driving over the right of way and then parking on the intervening land before proceeding to the dominant land on foot ... The dominant owner may not, however, use the way as a means of access to other land owned by him which is not part of the dominant tenement.”*

The leading decision on contiguity, *Todrick v Western National Omnibus Co Ltd* [1934] 1 Ch 561 (Todrick), is authority for the proposition that the absence of contiguity is not fatal to the validity of an easement. At 574, Lord Hanworth MR stated:

*“Now, as Romer LJ has pointed out, supposing there is not physical contiguity, yet if the owner of the blue land can exercise the right of way that he has secured by this reservation why should he not be entitled to exercise it? The fact that he may have some difficulty in obtaining access to some intervening portion ought not to militate against his enjoyment of a right which is of such a nature that it is*

*beneficial to the blue land which he occupies, and has a natural connection with the property as being for its benefit in the sense that it provides a speedier and easier access to the highway called Skidden Hill, to which he may wish to pass.”*

Lord Justice Romer also dealt with the issue of contiguity, agreeing with the Master of the Rolls. At 579–580 his Lordship stated:

*“The essential qualities of an easement are stated, and in my opinion stated accurately, in Gale on Easements, 11th ed, p 19: ‘According to the civil law it was necessary that a servitude should be productive of advantage to the dominant tenement. A mere restriction upon the rights of the servient owner was invalid, if unaccompanied by any benefit to the dominant owner, or if such benefit were one merely personal to him. For the same reason no servitude could exist unless the dominant and servient tenements were sufficiently near to allow the one to receive a benefit from the subjection of the other. So in English law an easement must be connected with the enjoyment of the dominant tenement and must be for its benefit. Thus there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland’.”*

Todrick has been widely followed: *Pugh v Savage* [1970] 2 QB 373 at 381C–382A (Cross LJ, Harman and Salmon LJ agreeing); *Robinson Webster (Holdings) Ltd v Agombar* [2001] All ER (D) 86 (Apr) at [84] (Etherton J); *Dewhirst v Edwards* [1983] 1 NSWLR 34 at 51D–F (Powell J); *Hamilton v Joyce* [1984] 3 NSWLR 279 at 291B (Powell J).

In *Casuarina Rec Club Pty Ltd v The Owners – Strata Plan No 77971* (2011) 80 NSWLR 711; [2011] NSWCA 159 (*Casuarina Rec Club*) at [71]–[80], Young JA (with whom Macfarlan JA and Handley AJA agreed) observed:

*“71. There has been some consideration of this sort of matter in connection with the rule that an easement must accommodate the dominant tenement.*

72. It is clear that, when considering whether an easement over the servient tenement accommodates the dominant tenement, the dominant and servient tenements need not be contiguous: *Todrick v Western National Omnibus Co Ltd* [1934] 1 Ch 561; *Gallagher v Rainbow* (1994) 179 CLR 624 at 648. Whilst this is so, the cases do not seem to have upheld an easement where the dominant and servient tenements were not contiguous unless ‘... the two sets of premises shall be so adjacent as that the enjoyment of one should be evidently connected with and dependant [sic] on the state of the other[.]’ (per Bowen LJ in *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 Ch D 295 at 314).
73. In *Pugh v Savage* [1970] 2 QB 373 at 381, Cross LJ put that the servient tenement must be ‘sufficiently close’ to the dominant tenement for the easement to be sensibly described as appurtenant. See also *Elliott v NMRP Pty Ltd* (Supreme Court, 8 November 1994, unreported) where Bryson J considered the matter. Professor Butt took from that case the proposition that it was unlikely that an easement would be upheld unless the two tenements were contiguous or almost contiguous, see Butt, *Land Law* 6th ed (2010) Sydney, Thomson Reuters at [16 15].

74. Even if it is unlikely, there are cases where such an easement has been upheld. In *City Developments Pty Ltd v Registrar-General (NT)* [2000] NTSC 33; (2000) 156 FLR 1, Thomas J did not consider that the fact that some of the dominant owners had to pass through other land to get to the servient tenement (a lake and its beach) was a disqualifying factor.

75 Another aspect of the law of easements which needs to be examined is whether it is sufficient to constitute an easement being appurtenant and so touching the enjoyment of the dominant tenement that the value of the dominant tenement is enhanced by the existence of the right in question.

76. It will be noted from par [118] of the primary judgment, that the concept of ‘enjoyment’ of the dominant land is a concept that may be relevant in this connection: it certainly is in the law of easements, if that is an analogous situation.

77. In *Re Ellenborough Park*, Evershed MR, giving the reasons of the English Court of Appeal, said (at 173) that the fact that the right claimed in that case enhanced the value of the property could not be dismissed as wholly irrelevant, but it was in no way decisive. It needed to be shown that the right was connected with the normal enjoyment of the property.

78. The Court (at 174) said that it agreed that a right given to the owner of property to have free admission to the zoo or the local cricket ground could not be said to have sufficient nexus with the use of the property. However, the right to use a close by communal garden would qualify.

79. In *City Developments*, Thomas J had little difficulty in holding that the right to enjoy a nearby lake and its beach benefited the land, not just its individual owner. Her Honour relied on the decision of the Supreme Court of Canada in *Dukart v Corporation of the District of Surrey* [1978] 2 SCR 1039; (1978) 86 DLR (3d) 609 at 616 where Estey J held that the right to use a pleasure lake was akin to a condition running with the land.

80. There was some discussion during oral argument of the relevance of cases which have considered whether an easement touches and concerns the dominant tenement. Both sets of counsel were reluctant to enter this field. It seems to me that this line of enquiry does support the proposition that one looks at the nexus question liberally, but one still ends up with a question of fact as to whether the enjoyment of the land as opposed to the owner thereof is benefited.”

Contiguity need not be established so long as the easement over the servient tenement “accommodates” the dominant tenement. If it does not, contiguity falls away, as the easement fails at the threshold. If, however, there is sufficient accommodation, then contiguity would not be in issue so long as there is sufficient geographic proximity between the dominant and servient tenement.

## Construction of easements

In explaining the process of construing easements, Hodgson JA (with whom Beazley and Tobias JJA agreed) made the following observation in *Perpetual Trustee Co Ltd v Westfield Management Ltd* [2006] NSWCA 337; (2006) 12 BPR 23,793 at [26]:

*“In my opinion, there is just one question, what does the grant authorise; and that question is to be determined by construing the grant. One way of posing the question is to ask, what use was intended to be authorised by the grant; but no separate investigation into the use contemplated by the parties is either necessary or permissible. However, in determining this question, regard may be had to surrounding circumstances, including the physical circumstances of the dominant and servient tenements and the use actually being made of them at the time of the grant.”*

Before Westfield, the Full Court of the Supreme Court of Western Australia had touched upon this subject matter in *Timpar Nominees Pty Ltd v Archer* [2001] WASCA 430 (Timpar), where Kennedy J (with whom Pidgeon and Wheeler JJ relevantly agreed) stated at [37]:

*“Unless the grant provides otherwise, however, the use of an easement may change to keep pace with technology ... Subject to any limitation to be derived from the words of the grant, or the surrounding circumstances, a right of way may be used in the manner authorised by the grant, for any purpose and to any extent for the time being required for the enjoyment of the dominant tenement or any part of it, irrespective of the purpose for which the dominant tenement was used at the date of the grant.”*

In *Kyren Pty Ltd v Cinema Place Pty Ltd* [2006] SASC 93 at [7], Besanko J stated that the court, when considering the grant of a right of way, will consider three matters:

the locus in quo over which the way is granted;

the nature of the terminus ad quem; and

the purpose for which the way is to be used.

## Locus in quo

The right of carriageway is located within the former battleaxe handle of Lot 6 in DP 810134, in the position marked “(Y) proposed right of carriageway 12.195 wide” on that plan and “(F)” on DP 645130, and shown as “z” within Lot 3 on DP 836473: Cork [36(c)], [42], [46]. It has a frontage of 13.02m to Bridge Lane and extends northwards for 42.235m along its western side: Cork [50].

The southern portion of the right of carriageway is Lot 57 in DP 855587 (296.9m<sup>2</sup>). Although that plan identified Lot 57 as land to be acquired for road, it was never acquired: it remains part of Lot 3 in the Defendant’s ownership, as the notation of DP 855587 on her folio confirms: Cork [47]–[49], [51]. Lot 57 is therefore part of the servient tenement and is burdened by the right of carriageway, whatever its appearance on the ground; it does not form part of Bridge Lane as a matter of title. The gate stands within it, and the right of carriageway continues north of the gate within the balance of Lot 3 to the limit shown on Mr Hogan’s survey. I prefer that survey, prepared by a registered surveyor and not challenged, to the Defendant’s estimate of where the

way ends: Adams 2 [16], [89]. It follows that the right of carriageway is not confined to the area in front of the gate.

### Terminus ad quem

When the right was granted in 1991, the way ran from the frontage of Lot 6 to the Great Western Highway (through Lot 7 in DP 810134, which was to be declared public road) north into the body of Lot 6. Of the dominant tenements, Lot 8 in DP 810134 was land the RTA intended to be declared public road. It was dedicated as public road on 3 May 1996 and is now vested in Blue Mountains City Council. Lots A and B in DP 321512 comprised the former Lots 51 (Lot A) and 52 to 55 (Lot B) in DP 9917, each fronting the highway. Former Lot 51 (Lot A) adjoined the handle; former Lots 52 to 55 (Lot B) lay to its east and did not.

The way does not reach, and has never reached, the land now comprising Lot 54. Nor did former Lot B adjoin the way when the right was granted. Any practical connection between Lot B and the way in 1991 depended upon passage over adjoining land (either Lot 8 or Lots 51–53), and that connection did not survive the subdivision that created Lot 54.

### Purpose for which the right of way is used

In *Jalnarne Ltd v Ridewood* (1989) 61 P & CR 143 the owner of the dominant land sold part of the land to a third party, which used it for a motor car dealership involving the use of the right of way by large transporter vehicles carrying cars. The court held that the grant of the right of way was unrestricted and that, as a consequence, the change in the use being made of the dominant land did not prevent the easement from being used in connection with the new use. At 157 the Court (Judge Moseley QC) referred to the then current edition of *Gale on Easements* (15th ed, 1986) which stated:

*“subject to any restriction to be gathered from the words of the grant or the surrounding circumstances a right of way may be used, in the manner authorised by the grant, for any purpose and to any extent for the time being required for the enjoyment of the dominant tenement or any part of it irrespective of the purpose for which the dominant tenement was used at the date of the grant. It would seem, also, that user of an authorised kind, e.g. with vehicles, may be had, at least if that particular kind of user is expressly authorised, to any increased extent which the physical state of the locus in quo will for the time being allow.”*

In the absence of words of restriction, the basic rule is that the uses to which a right of way may be put are as general as are compatible with the physical nature of the servient tenement. Of course, this rule is subject to the precise wording of the easement as qualified by the words incorporated by Pt 1 of Sch 8.

The Defendant accepts that the right of carriageway includes Pt 1 of Sch 8 to the Conveyancing Act, by virtue of s 181A, but she denies that the expression “to go, pass and repass” extends to and includes using the right of carriageway only for the purpose of manoeuvring a vehicle. Reliance is placed on the decision of Henry J in *Jamison 17 Pty Ltd v Jaynick Pty Ltd* [2023] NSWSC 1562 (*Jamison 17*) at [56]–[58], where her Honour said:

*“56. An easement that provides a right to “go, pass and repass” is broad but it involves some limitation of rights. While not necessarily requiring constant movement, a right to “go, pass and repass” does not expressly allow for stopping in, parking a vehicle or leaving goods on the right of carriageway: Middleton v Arthur (2002) 11 BPR 20,263; [2002] NSWSC 627 (Middleton v Arthur) at [34]; and Berryman v Sonnenschein [2008] NSWSC 213 at [19].*

57. Ancillary rights may be implied where the right is reasonably necessary for the enjoyment of the rights expressly granted: *McWilliam v Hunter* [2022] NSWSC 342 (*McWilliam v Hunter*) at [37] and the cases there cited.
58. As Brereton J (as his Honour then was) said in *Trewin v Felton* (2007) 13 BPR 24,579; [2007] NSWSC 851 at [52]:

‘Accordingly, in the absence of an implied term, a right of carriageway which authorises passing and repassing to and from the dominant property, does not authorise parking on the site of the easement, except to the extent that it is necessarily part of passing and repassing to and from the dominant property – for example, as was conceded in *Bulstrode v Lambert* (at 1070), to halt for a brief moment to put down or pick up a passenger, as that was *de minimis*, but no more [*Jones v Pritchard* [1908] 1 Ch 630, 638; *Zenere v Leate*, 9306-7; *Butler v Muddle*].’

As to ancillary rights, the learned authors of *Boundaries and Easements* note at [10-005]:

*“It is well established that any easement carries with it some ancillary rights. The principle has now been clearly formulated (at least in respect of express and implied grants) in Moncrieff v Jamieson, which, although a case concerning a Scottish servitude, also states the English law. A servitude (and therefore an easement) carries with it other rights which, although they would not qualify on their own as servitudes, are necessary if the dominant proprietor is to make reasonable and comfortable use of the property in favour of which it is granted.”*

Issue 1: Construction and scope of the right of carriageway

## The Plaintiff’s submissions

In oral closing submissions the Plaintiff drew attention to the letter sent by his solicitors to the Defendant’s solicitors on 20 September 2024, which sought to set out his arguments comprehensively. The limbs of the argument were as follows:

there is no need for contiguity between the servient and dominant tenements;

on its proper construction, the easement permits use of the servient tenement that is preceded or succeeded, as the case may be, by use of a public road when going from or coming to the dominant tenement; and

there is authority which supports the use of a servient tenement for the turning of vehicles.

Paragraph 40 of that letter stated as follows:

*“Conclusion*

40. For the foregoing reasons, we consider that (1) it is no objection to the validity of the right of carriageway that the dominant and servient tenements are not contiguous and that (2) the use of the servient tenement as a turning way solely for the purpose of going to or from the dominant tenement, over intervening land in the form of Bridge Lane, a public road, is squarely within the permitted construction of the right of carriageway.”

The Defendant’s submissions

The Defendant now accepts that the terms in Pt 1 of Sch 8 are incorporated: DS [27]. She advances three arguments in answer.

First, the Defendant submits that the state and condition of the land in 1991, the fact that the grant was made by the RTA, and the fact that neither Lot 53 nor Lot 54 then had dwellings on them are relevant to construction and show that the right of carriageway was never intended to be used as the Plaintiff contends, relying on *Gallagher v Rainbow* (1994) 179 CLR 624; [1994] HCA 24. The Plaintiff submits that this is the “Codelfa-style” approach rejected in *Westfield* at [28], [35]–[45] for registered easements: PCS [22]. I agree with the Plaintiff’s submission on this issue. Under *Westfield*, the terms of a registered easement are to be construed from the instrument and the register, not from the circumstances existing at the time of the grant.

Secondly, the Defendant says that no Australian authority extends “go, pass and repass” to travel on a public road after the right of carriageway has been used, and that the English authorities, while confirming that contiguity is unnecessary, do not address a dominant tenement that otherwise has street access: DS [29]–[29A], citing *Todrick* at 576. She submits that “for all purposes” does not enlarge the actions comprised in “go, pass and repass”: DS [30]. She also says that the use is a matter of convenience, not necessity: DS [31(ii)]. The Plaintiff submits that DS [29] misstates the issue because use of the public road is always an adjunct to going to or from the dominant tenement, and relies on the authorities in the 20 September 2024 letter and his opening: PCS [26]–[27].

Thirdly, the Defendant contends that the benefit must be to the land and not to the owner: *Casuarina Rec Club* at [80]. She says that the residential use of Lot 54, rather than the Plaintiff’s “idiosyncratic” trucks, is the benchmark, and that his true proposed use is loading and unloading: DS [33]–[34]. The Plaintiff submits that the loading point is a straw man, which he rejected in cross-examination, and that the attack on the trucks is unpleaded and contrary to *Panfili v Lawless* [2010] NSWSC 79; (2010) 14 BPR 27,283 (*Panfili*) at [43], [46]–[50] (*White J*).

The first two of these arguments deal with whether the purpose for which the Plaintiff seeks to use the easement falls within its scope. The third concerns a different issue, namely, whether the easement accommodates the dominant tenement.

### Scope of the grant

The Defendant maintains that entry to, and exit from, the right of carriageway from and then back into Bridge Lane, for the purpose of further travel, is not within the terms of the expression “to go, pass and repass”.

There is little question that the right of carriageway, incorporating as it does the terms of a “right of carriageway” in Pt 1 of Sch 8 to the Conveyancing Act, is broadly stated. It confers a “full and free right” to “go, pass and repass at all times and for all purposes with ... vehicles ... to and from the said dominant tenement or any such part thereof”.

The Plaintiff relies upon the expression “for all purposes” in support of his argument that the terms of the right of way are broad enough to encompass the limited use he seeks to make of it.

The High Court considered the meaning of this expression “for all purposes” in *Westfield*. At [21] the Court held that “purposes”, extensive as they may be, must confer (what the law regards as) a benefit on the dominant tenement, by making it a better and more convenient property. That is, something more than a personal advantage to the owner of the tenement for the time being. This will be further addressed below when dealing with the accommodation issue.

As to the use of a right of carriageway to turn vehicles, the learned authors of *Bradbrook and Neave’s Easements and Restrictive Covenants* (3rd ed, 2011, LexisNexis Butterworths) record, at [611], the decision of the Full Court of the Supreme Court of Queensland in *Elliot v Renner* [1923] St R Qd 172. The Court there held that the turning of vehicles which had been driven through the laneway was necessary to the convenient enjoyment of the dominant tenement. The Court was dealing with ancillary rights in the context of principal usage of vehicles passing and needing to repass.

The Plaintiff points to existing case law where courts have sanctioned the use of a right of carriageway for the purposes of turning vehicles which, he argues, supports his construction that the broad terms of the easement encompass the use he proposes. Those cases merit scrutiny.

### Panfili v Lawless

*Panfili* concerned works that had been built by the defendants on a right of carriageway over their land, and White J held that the works had interfered with the plaintiff’s right, as the dominant owner, to bring large rigid-bodied trucks onto that carriageway in order to reach the gates on her own lot. Mandatory orders were made for the removal of parts of the works, calibrated to what the view showed was necessary. The Plaintiff relies upon the case because of the similarity of its facts to those before me.

In *Panfili*, the plaintiff owned Lot B (8 Gladstone Avenue, Warrawee), a battle-axe block. The defendants owned the adjoining Lot C (No 6). Both lots had come from a 1960s subdivision whose plan showed proposed rights of way over parts of each lot. In November 1976, on a transfer of Lot B, reciprocal rights of carriageway “within the meaning given ... by s 181A” of the Conveyancing Act were granted over the Lot C strip (appurtenant to Lot B) and reserved over the Lot B strip (appurtenant to Lot C). The two strips lay side by side with a combined width of about 20m.

In 1976, only Lot B had a formed driveway to the street. The last few metres of Lot C were too steep for an ordinary sedan. The plaintiff bought in 2003 and the defendants in 2005. Before the works, the level eastern part of the Lot C strip was used for parking and, on occasion, by large delivery trucks which crossed onto Lot C before swinging right to the double gates at the terminus of the Lot B carriageway. The plaintiff, a garden landscaping consultant, took truck deliveries about every eight weeks. By 2007 both sides contemplated separate driveways and the extinguishment of the reciprocal easements, but negotiations broke down over a proposed boundary adjustment. In October 2008 the defendants built a raised driveway on Lot C, with garden beds, retaining walls and a row of trees along the boundary, leaving a gap of about 3.9m. A car could pass between the driveways through the gap, but a large rigid truck could not.

Justice White identified the critical questions as (1) whether the right of carriageway over Lot C permitted the passage of large rigid trucks and (2) if so, whether the works, or which part of them, substantially interfered with that passage.

His Honour found that nothing in the Sch 8 wording (“at all times and for all purposes with or without animals or vehicles”), the instrument or the plan limited the vehicles which could use the Lot C carriageway to reach Lot B. The combined 20-metre width pointed against any limitation, and nothing in the physical condition of the land in 1976 implied one. Use by furniture vans, building suppliers and concrete pourers on the then undeveloped residential sites was neither unreasonable nor unforeseen.

Counsel for the defendants in *Panfili* expressly disclaimed any argument that the right to “go, pass and repass” over Lot C did not extend to turning or manoeuvring vehicles on Lot C to gain access to the Lot B driveway. Accordingly, that case, unlike these proceedings, proceeded upon a concession on that point.

Justice White ordered the defendants, at their expense, to remove the three easternmost trees with their beds and retaining walls, and the six easternmost trees west of the gap with their bed and retaining wall, and to lower the Lot C driveway so that it was readily accessible to vehicles travelling to and from the Lot B carriageway or manoeuvring into its northern and southern extensions, including by obtaining council approval.

Panfili is not authority for the proposition that the expression “go, pass and repass” includes turning, as that was conceded. The case also says nothing about accommodation of the dominant tenement. Significantly, in Panfili the Lot C carriageway was used to reach the dominant tenement: trucks crossed onto Lot C to arrive at the gates at the terminus of the Lot B way. Owing to the concession, the scope of the expression “pass and repass” as conferring a right to turn was not determined.

### **Timpar Nominees Pty Ltd v Archer**

The Plaintiff also placed significant reliance on the decision of the Full Court of the Supreme Court of Western Australia in Timpar. That case concerned an appeal by the servient owner against orders made against it to restore the level of a right of way it had excavated.

The facts were these. A 1914 subdivision in East Perth created Lot 4, fronting Bennett Street, and Lot 5, fronting Bronte Street. A right of way about 30 metres long and three metres wide ran within Lot 4 from Bennett Street to the rear of Lot 5, which abutted its eastern end and part of its southern side. The right of way had been used by both lots since at least 1961. After redeveloping Lot 5 between 1990 and 1993 with a rear garage and loading area, the respondents turned vehicles using part of their own land and part of the right of way. The appellant never objected, but did not consent. In 1998 the appellant excavated the right of way, cutting off access to Lot 5. It claimed that it was only restoring a level which the respondents had previously raised.

The Court divided on whether the Ninth Schedule, the Western Australian equivalent of Sch 8, applied. Pidgeon and Wheeler JJ held that it did. In relation to the entitlement of the dominant owner to turn its vehicles in the right of way, Kennedy J, with whom the other members of the Court agreed, held that safety was relevant to reasonableness. The right of carriageway was narrow, and it was reasonable that the dominant owner be able to turn its vehicles so as to avoid reversing its length.

The facts of Timpar are closer to this case than those of Panfili, a right to turn having been conceded in Panfili but contested in Timpar. There are, nevertheless, significant differences.

In Timpar, the turning of vehicles occurred where the right of way met Lot 5 and was used to get in and out of the dominant land. Turning avoided reversing along the narrow right of way itself. Here, the Plaintiff’s concern is reversing along a public road. Even if the right of way were available for turning, he would still have to reverse down that road for at least part of the way. The right of way in Timpar was used to pass and repass in order to gain access to Lot 5. Turning vehicles around was not the main or only use of the right of way. It was incidental only.

The reasoning in relation to allowing turning on the right of way at [101] appears to be based entirely on the safety of using the right of way itself, and not on the issue raised in these proceedings, which is the safety, for the Plaintiff himself, of using a public road.

I do not consider that the decision in Timpar provides much guidance in deciding a case on different facts.

PropertyPoint Ltd v Kirri

The Plaintiff also relies on the decision of Vos J in *PropertyPoint Ltd v Kirri* [2009] EWHC 2958 (Ch) (*PropertyPoint*).

Those proceedings concerned a dwelling-house and garage at 1A Spencer Avenue, London. The property the subject of the dispute was one of a row of terraced houses with a lane running down the back of them, in the north London suburb of Palmers Green. The residents of No 1A had a garage at the rear of the property, which could be reached by driving down the alleyway that ran alongside the side boundary of that property. Further down the alleyway was the so-called “yellow land”, which was next to a former garage site.

The matter being heard by Vos J was an appeal against a determination of a deputy adjudicator, and involved whether there was “factual use sufficient to establish any easement over the yellow land”. The question was whether the owner of No 1A, a Mrs Kirri, who acquired the property in August 1982, had used the yellow land to turn her vehicle so that she could exit the alleyway onto Spencer Avenue rather than reversing into it.

A question arose whether a prescriptive right of way solely for the purpose of turning a vehicle was one recognised by the law.

At [38] his Lordship stated:

*“In conclusion on this point, I see no reason why a right of way should not, in theory, be established for the defined purpose of turning vehicles using the Garage. Mr Harris was, in my judgment wrong both to suggest that no such right was known to the law, and to argue that it was so burdensome that it sterilised the land...”*

Mr Justice Vos continued, at [48]:

*“Mr Harris contended under this head both, as a matter of law, and as a matter of fact, that the right to turn or manoeuvre vehicles was not of the type or intensity required to establish an easement. He sought to draw a distinction between easements in North London and those that might be accepted in remoter parts of the country (as in *Moncrieff v Jamieson* [2007] 1 WLR 2620). I have dealt above with the question of whether this type of right can form the subject-matter of an easement and have concluded that it can. I do not think there is anything in a right of way to turn vehicles that makes it inappropriate for acquisition in a North London suburb - rather the reverse, the right to turn vehicles is particularly important in the confined spaces often found in large conurbations. Such an easement would be less likely to be necessary in a less built-up and highly populated area.”*

The facts in *PropertyPoint* are insufficiently similar to the circumstances here. First, the Plaintiff’s property has direct access to a public road via its two driveways. There is no necessity to manoeuvre vehicles in order for them to enter and leave the Plaintiff’s property, or indeed the property next door owned by Ms Solano (who gave evidence for the Plaintiff). Secondly, the issue before Vos J was whether an easement by prescription for the sole purpose of turning vehicles was something recognised by law. That is not the question here. The question that must be determined is whether the easement registered on title accommodates the dominant tenement.

That was not a question his Lordship considered, as it was not necessary in order to decide the matter before him, nor was it an argument that was raised.

## Consideration

The Plaintiff's journey runs from the public road onto the easement and then, after a manoeuvre that involves jack-knifing the vehicle, back onto the public road. The Plaintiff then enters his driveway from the road. The servient tenement is not a stage of any journey to or from 5 Bridge Lane. It functions as a turning bay for traffic on the street, not as a means of passage between the street and the Plaintiff's land. By this I mean that the Plaintiff can travel freely to and from his property by vehicle without any need to use the servient tenement. That is unlike the case in which, in order to gain access to a public road, the Plaintiff must pass, and later repass, over the servient tenement. Undoubtedly, breaking the journey by using the servient tenement offers a convenience to the Plaintiff, but it is not a convenience that involves the dominant tenement.

On a Sch 8 carriageway, the right is to pass "to and from the said dominant tenement". Where the servient land does not lead to the Plaintiff's land, passage over it cannot, in any direct sense, be to and from that land. The *Pugh v Savage* line of authority may permit a way reached over intervening land, but the use must still be part of a journey to and from the dominant land. The Plaintiff's use is not: he drives in from the street, turns, and leaves back onto the street.

I appreciate the counter-argument that turning on the approach home is incidental or ancillary to a journey "to" the dominant tenement and that the grant is "for all purposes". But I reject this argument because the Plaintiff reaches his land by the road in any event. There are limits to the notion of ancillary use: *Harris v Flower* (1904) 74 LJ Ch 127; *Jobson v Record* [1998] 1 EGLR 113. The right of carriageway is not being used in an ancillary way, because there is no occasion for ancillary use where there is no passing and repassing to and from the dominant tenement. It would be different if the servient tenement were used to pass and repass from, for example, a paddock or a public road, and the easement were used in an ancillary way to turn vehicles, as in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620 where an ancillary right to park was implied into a right of vehicular access. Here, however, the only use (as opposed to ancillary use) is the use of the servient tenement as a turning circle. The principles governing whether an easement extends to ancillary use therefore do not arise.

The facts before me are distinguishable for a number of reasons. The right of carriageway goes nowhere. It does not lead to the dominant tenement or (eg) to a parking space for the benefit of the Plaintiff. It has no obvious utility. Because of this, it does not involve any passing or repassing. Indeed, the Plaintiff himself does not wish to "pass and repass" unless that expression is treated in the loosest possible way. If the right of carriageway here genuinely was used to pass and repass as part of a journey to the dominant tenement or (eg) to or from a public road, then, consistently with the case law upon which the Plaintiff relies, a right to turn around could be implied as part of the main use of the right of way. That, however, is a markedly different situation from that before the Court. The same point of distinction applies equally to the decision of *Elliot v Renner* upon which the Plaintiff also relies.

I am not persuaded that using the right of carriageway merely for the purpose of a driving manoeuvre so that the Plaintiff's vehicle may re-enter a public road facing a different direction falls within the scope of "to go, pass and repass".

The Defendant submits that the conceptual lens through which the right of carriageway is to be construed is the residential use of Lot 54 and not the "idiosyncratic" use of large excavator equipment and trucks. She submits that in *Todrick* at 576, the grant was held never to have been intended for omnibuses and that the Plaintiff's use is excessive: see also *White v Richards* (1993) 68 P & CR 105 at 113 (Nourse LJ, Stuart-Smith and Mann LJJ agreeing); *Jamison* 17 at [60], citing *Jelbert v Davis* [1968] 1 WLR 589 at 595 (Lord Denning MR, Danckwerts and Edmund Davies LJJ agreeing).

The Plaintiff submits that this is unpleaded and that, as in *Panfil* at [43] and [46]–[50], nothing in the instrument limits the vehicles that may use the way, a context-based limitation of that kind having been rejected as speculative and unsubstantiated. To the extent that the Plaintiff's trucks are used for a business purpose, it must be accepted that the normal enjoyment of a dominant tenement may, in certain circumstances, include its commercial use: *Clos Farming Estates Pty Ltd v Easton* [2002] NSWCA 389; (2002) 11 BPR 20,605 (*Clos*) at [31] (*Santow JA*, *Mason P* and *Beazley JA* agreeing).

I do not consider that the terms of the easement restrict the size of the vehicles that the Plaintiff could bring onto the servient tenement. But for the findings I have already made, the use of the Plaintiff's trucks would be neither inconsistent with the terms of the right of way nor excessive. I do not find that the use by the Plaintiff of his vehicles and land for business use would, otherwise, be beyond the scope of the easement.

### **Accommodation of the dominant tenement**

If I am wrong in finding that the purpose for which the Plaintiff seeks to use the right of carriageway falls beyond its scope, the Plaintiff's claim fails on an alternative and independent ground.

An essential characteristic of a valid easement is that it must "accommodate" the dominant tenement. The right must be connected with the normal use and enjoyment of the dominant land, and must not merely confer a personal advantage on its owner: *Clos* at [31].

Paragraphs [1-28] to [1-31] of *Gale on Easements* (22nd ed, 2025, Sweet & Maxwell) are instructive on this point, and state as follows:

*"(2) An Easement Must Accommodate the Dominant Tenement"*

1-28 This essential characteristic was examined in detail by the Supreme Court in *Regency Villas*. The leading judgment was given by Lord Briggs JSC, with whom Baroness Hale PSC and Lords Kerr and Sumption JJSC agreed; Lord Carnwath JSC dissented. The Supreme Court cited with approval earlier statements by Dr Cheshire and in a Law Commission report. In his *Modern Law of Real Property*, Dr Cheshire expressed the requirement in this way:

‘One of the fundamental principles concerning easements is that they must be not only appurtenant to a dominant tenement, but also connected with the normal enjoyment of the dominant tenement.’

Dr Cheshire continued: ‘It must have some natural connection with the estate as being for its benefit’. In its report *Making Land Work: Easements, Covenants and Profits à Prendre* the Law Commission advised:

‘the easement must accommodate, or accommodate and serve, the dominant land. The requirement is that the right must be of some practical importance to the benefited land, rather than just to the right-holder as an individual: it must be “reasonably necessary for the better enjoyment” of that land.’

The leading judgment also repeated how the matter had been described in the judgment of the Court of Appeal in *Regency Villas*, as follows:

‘In our view, the requirement that an easement must be a “right of utility and benefit” is the crucial requirement. The essence of an easement is to give the dominant tenement a benefit or utility as such. Thus, an easement properly so called will improve the general utility of the dominant tenement. It may benefit the trade carried on upon the dominant tenement or the utility of living there.’

1-29 The Supreme Court then explained that, save only for easements of support (which may be said to benefit the land itself), easements generally serve or accommodate the use and enjoyment of the dominant tenement by human beings. Thus, a right of way makes the dominant tenement more accessible. Service easements enable the occupiers of the dominant tenement to receive water, gas and electricity. A drainage easement enables rainwater and sewage to be removed from land, in circumstances where its use would otherwise be inhibited by flooding.

1-30 The Supreme Court then made a number of general points:

- (1) It is not enough that the right is merely appurtenant or annexed to the dominant tenement, if the enjoyment of it has nothing to do with the normal use of it. Nor is it sufficient that the right in question adds to the value of the dominant tenement. Thus, for example, a right granted to the owners and occupiers of a house in Kennington to have free access to the Oval cricket ground on test match days might be annexed to the ownership of that house, and add significantly to its value. But it would have nothing to do with the normal use of the property as a home.

- (2) The 'normal use' of the dominant tenement may be a residential use or a business use. Further, since easements are often granted to facilitate a development of the dominant tenement, the relevant use may be not merely an actual use, but a contemplated use.
- (3) It is not an objection to qualification as an easement that the right consists of or involves the use of some chattel on the servient tenement. Examples include a pump, a lock and a sluice gate, and even a lavatory.
- (4) Although accommodation is in one sense a legal concept, the question whether a particular grant of rights accommodates a dominant tenement is primarily a question of fact.

1-31 It is no objection that other land, or other people, could equally be accommodated by the same right, or that the grant of the right has the effect of conferring some benefit on other land also. It was said in *Re Ellenborough Park* that what is required is that the right

'accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders his ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties.'

(Footnotes omitted.)

Justice Hood in *R v Registrar of Titles; Ex parte Waddington* [1917] VLR 603 set quite a low bar as to whether a right of way could be said to benefit a dominant tenement by finding that it could do so even if it was as small as one square link. His Honour stated, at 607:

*"So long as it does not appear that the right claimed is wholly unconnected with the beneficial use of the land in question, that is, that it is in no way connected with the enjoyment of the dominant tenement, it is, in my opinion, a valid easement."*

More recently, in *Clos, Santow JA*, with whom Mason P and Beazley JA agreed, stated the following at [29]–[34]:

*"29. Bryson J concluded that the easement was invalid because the Fourteenth Restriction failed both the second and fourth conditions for the creation of a valid easement first recognised in the classic judgment of Evershed MR in In Re Ellenborough Park [1956] Ch 131. In that case, four conditions were laid down for a valid easement. First, that there be a dominant and servient tenement. Second, that the easement must 'accommodate' the dominant tenement. Third, that the same person must not own and occupy the dominant and servient tenements (the Real Property Act now allows an individual that owns both the dominant and servient tenements to create an easement through a s88B instrument). Fourth, that the right claimed as an easement must be capable of forming the subject matter of a grant. In the present case, conditions one and three were not in issue but conditions two and four were."*

30. In assessing whether the second condition was satisfied, namely that the easement 'accommodate' the dominant tenement, attention was given to exactly what that entailed. This requirement did not become established until the mid-nineteenth century as Professor Holdsworth records in 'An Historical Introduction to the Land Law' (Oxford, 1927) at 272. The case which definitively established that requirement was *Ackroyd v Smith* (1850) 10 CB 164; 138 ER 68 (CP). But what does 'accommodation' mean in this context?
31. First, it requires there be a natural connection between the dominant and servient tenements. The right must be reasonably necessary for the enjoyment of the dominant tenement and not merely confer advantage on the owner of that tenement, as would a mere contractual right; *Finlay* 91 WN(NSW) 730 (DC). Reference was made by the Trial Judge to *Hill v Tupper* (1863) 2 H&C 121 and *In Re Ellenborough Park* (supra). Bryson J concluded that whether the right granted accommodated and served the dominant tenement depended on whether the right granted was connected with the normal enjoyment of the dominant tenement. That is a question of fact, dependent on the nature of the dominant tenement and the right granted. It was not enough that the land be a convenient incident to the right. Rather the nexus must exist in a real and intelligible sense (Judgment at [22]). Additionally, Bryson J recognised that facilitation of the business or commercial use in which the dominant land is involved may, in limited circumstances, be nonetheless sufficient to create the requisite nexus, provided the criteria for an easement is satisfied (Judgment at [36]). Bryson J concluded that in reality the Fourteenth Restriction did not accommodate lot 86 as a piece of land. This was because he concluded that there was no evidence supporting any 'accommodation, advantage or enhancement of lot 86'. Thus 'Lot 86 could be a convenient incident to action under the Fourteenth Restriction: but that is not enough' (Red Book, 38 at para 47).
32. The Appellant submitted that his Honour erred in reaching this conclusion. It was submitted that the Fourteenth Restriction rendered lot 86 a more convenient place from which Clos Farming as dominant owner conducts its business of farm management and that this established a sufficient accommodation (Appellant's Submissions in Reply and Supplementary Outline of Submissions at para 48-50). It was submitted that the requirement that the easement sufficiently accommodate the dominant tenement is in effect a requirement that the easement make the property better and more convenient. This may be achieved, it was argued, as in this case, merely by benefiting some trade carried out on the property; *In Re Ellenborough Park*; *Clapman v Edwards* [1938] 2 All ER 507; *Frater v Finlay* (1968) 91 WN(NSW) 730; *Moody v Steggles* (1879) 12 Ch D 261, the latter was a case where the owner of a public house was empowered to affix a signboard on the wall of the defendant's house, that being held to be a valid easement. As Fry J reasoned (at 266):

‘It is said that the easement in question relates, not to the tenement, but to the business of the occupant of the tenement, and that therefore I cannot tie the easement to the house. It appears to me that that argument is of too refined a nature to prevail, and for this reason, that the house can only be used by an occupant, and that the occupant only uses the house for the business which he pursues, and therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it.’

33. Thus it was contended that in assessing whether the Fourteenth Restriction benefited the dominant tenement so as to accommodate it in the relevant sense, consideration of the contractual infrastructure supporting the Clos farming system was required (Appellant’s Submissions in Reply and Supplementary Outline of Submissions at para 52). Counsel for the Appellant contended that the Fourteenth Restriction thus needed to be assessed in its commercial context. That in this way it became clear that the dominant tenement was benefited, through benefiting the trade and industry carried out on lot 86. In sum, the Appellant contended that as lot 86 was used for the purposes of carrying out farming and harvesting works, and the servient Clos farms were used for viticultural purposes, this clearly established the necessary nexus between the dominant and servient lots.
34. In written submissions in reply, counsel for the Respondent emphasised that the Appellant had not sought to challenge the long established principle that the dominant tenement, as land, must nonetheless be benefited by the easement (Respondents’ Submissions in Reply at para 7). The Respondents acknowledged that a right benefiting a trade carried out on the dominant tenement may in appropriate circumstances be a valid easement. But this is provided that the conduct of the trade is a necessary incident to the normal enjoyment of the land, not merely an independent business exercise. The Respondents submit that in accordance with the authority dating back to 1863 (*Hill v Tupper* (supra)) lot 86 as the supposed dominant tenement was not relevantly benefited by the rights conferred by the Fourteenth Restriction. This was because it was merely a convenience and matter of efficiency that lot 86 be used for the purposes of farm management (Respondents’ Submissions in Reply at para 12). Secondly it was put that there was no feature of lot 86 that rendered it the natural or only place from which to carry out harvesting and associated works. Highlighted was that, in the agreed statement of facts, there was no evidence which indicated that farm management, as distinct from storage, was actually carried out on that lot. The supposed connection was thus not a real one. I would agree.”

(Emphasis added.)

Accommodation is tested at the date of the grant (1991) against the dominant tenement as a whole (Lot 8 and Lots A and B), which includes the land now comprising Lot 54. The present use of Lot 54 is relevant only as evidence of whether the right benefits that land in a real and intelligible sense.

The relevant facts informing the satisfaction of the accommodation condition are as follows:

the use of the Plaintiff's property is residential. That the Plaintiff may currently use the lot to conduct his business, although not irrelevant, does not make that the ordinary use of the dominant tenement. Running a transportation or trucking business from the site is not the normal use of the property as a home (even though business use may in some circumstances be a normal use);

the Plaintiff does not need to use the right of carriageway to gain entry to his land;

the Plaintiff seeks to use the right of carriageway not for any convenient use of the property. Using the carriageway does not improve the use of the land per se; and

the use of the carriageway enhances the Plaintiff's use of the public road system.

The right in question, namely, to use the right of carriageway to perform a driving manoeuvre so as to orient vehicles in a particular direction when leaving the Plaintiff's lot, so that they are able to drive forward up the street, must be of some practical importance "to the benefited land". It must be something more than a benefit to the right holder as an individual. It must be reasonably necessary for the better enjoyment of the land. It must improve the general utility of the dominant tenement.

Examples of easements that accommodate the use and enjoyment of a dominant tenement include service easements which enable the land to receive utilities, drainage easements, rights of carriageway that allow the owner of the dominant tenement to gain access to an otherwise landlocked lot.

In this case, if the Plaintiff is deprived of the ability to use the right of way, the practical consequence is one of two things:

his vehicles (or, at least, his large trucks) must be parked so that they do not face the point of egress from the property and then must reverse up Bridge Lane to get to Station Street; or

the vehicles must be reversed down the entire length of the street so that they can be parked facing the street.

Even if the Plaintiff were able to use the easement to manoeuvre his trucks, he would still have to reverse from the roadway beyond the right of carriageway down to his driveway. Use of the easement does not dispense with the need for his vehicles to reverse part of the way down the street to his lot, albeit I accept, for a considerably shorter distance than he must presently travel.

I also accept that use of the easement in the way sought by the Plaintiff confers an advantage on him. That, however, is not the correct question. I must be satisfied that the right is "reasonably necessary for the enjoyment of the dominant tenement". That in turn requires the Court to be satisfied that the right granted by the easement is connected with the normal enjoyment of the dominant tenement. As stated at [31] of *Clos*, that is a question of fact which depends on the nature of the dominant tenement and the right granted. It is not enough that the land be a convenient incident to the right. The nexus must exist in a "real and intelligible sense".

It is critical at this juncture to note that the Plaintiff wishes to use the right of carriageway not to go anywhere, but solely to turn his vehicles. It is therefore not ancillary to any other usage (which is its differentiating factor from Timpar, Panfili and PropertyPoint). Convenience is not the touchstone for the principal usage of the right of carriageway.

The Plaintiff's case, with respect, confuses the normal enjoyment of the land with something different, namely, the convenience of driving a vehicle on a public road. It is undoubtedly more convenient for the Plaintiff to be able to park his trucks in the driveway in a way that avoids the need to reverse down, or up, the street (or the greater part of it). Nevertheless, I am not satisfied that the use of the right of carriageway to orient the Plaintiff's large truck and trailer, so that such a vehicle can be parked on Lot 54 facing the street to avoid reversing up the street, is a benefit to the land. It does not connect the land to a public road system, or to an amenity such as a lake or the harbour foreshore, or provide drainage, or electricity. It merely alters whether the Plaintiff's vehicles must travel forwards or backwards on one part of the journey when either leaving or arriving at the dominant tenement. The Plaintiff either drives down Bridge Lane and reverses up or the opposite.

I do not consider that this is a sufficient nexus in a "real and intelligible sense". I am not satisfied that the normal enjoyment of the residential land owned by the Plaintiff requires the ability to manoeuvre trucks into the right of way so that, when parked in either of the driveways on his lot, they face the street. The property is capable of enjoyment irrespective of this particular use.

Contiguity is not, therefore, the obstacle for the Plaintiff; the absence of a connection with the dominant tenement is. What is required is a real connection between the right and the dominant land. A way that does not join, lead to or serve the dominant land, and which confers no access benefit on it, resembles a right in gross, not a benefit to land.

As a consequence, the right is not capable of enjoyment by Lot 54 in the manner in which the Plaintiff uses it. This does not mean that the easement is invalid in respect of other lots. No finding is made in that respect.

Issue 2: Substantial interference

### **The Plaintiff's submissions**

The Plaintiff submits that the Defendant's blanket refusal to permit any use was founded on her denial that Sch 8 was incorporated, now abandoned, and that the interference takes three forms: first, refusing him any entry by keeping the gate locked or refusing a remote or key, and threatening trespass proceedings and police referral; secondly, denying his rights in her pleadings and evidence; and thirdly, maintaining the "zig-zag" barrier across the face of the right of carriageway, which leaves only a sliver accessible and reduces the usable frontage even if the gate is open: PCS [46]–[50].

As to significance, the Plaintiff relies on the topography of Bridge Lane, the absence of any turning area and the single exit onto Station Street. He argues that truck use in the area is unremarkable and submits that safety is relevant: *Burke* at [25]; *Prospect County Council* at 610B. He further submits that:

the Defendant has led no evidence of any function served by the barrier or the items, or of any consideration of alternatives;

past use shows no real damage;

no excessive use is pleaded; and

use by agents and couriers is normal: *Philip v JPM Developments Pty Ltd* [2015] NSWSC 145; (2015) 17 BPR 33,887 at [154] (*Sackar J*).

The Plaintiff submits that it now falls to the Court to make a “practical, evaluative judgment” to understand the “nature, extent and significance” of the Defendant’s interference: *Owners Corporation Strata Plan 533 v Random Primer Pty Ltd* [2025] NSWCA 8; (2025) 21 BPR 45,455 at [29] (*Kirk JA, Gleeson and Mitchelmore JJA agreeing*).

The Defendant’s submissions

The Defendant submits that:

the gate has been in the same position since before 2001, is 4m wide and was not erected by her;

the items (the so-called “Impeding Structures”) have been in place for many years and, on the Plaintiff’s own evidence, the entrance is unchanged since his purchase save for the hedge and the removal of the logs;

the gate has never been locked and the remotes were never reprogrammed;

she does not object to anyone turning in front of the gate, and the Land Rover Discovery and the tipper without its trailer can turn there: *Adams 2* [61]–[62], [97]; *Adams 3* [24]; and

she holds concerns as to her security and privacy, about containing her animals, on the impact of strangers using the driveway, and on the driveway being her only access.

## Consideration

Had I found otherwise on scope and Lot 54’s accommodation of the easement, I consider that the Defendant, by her conduct, has substantially interfered with the Plaintiff’s rights for the reasons identified by the Plaintiff (and not largely contested by the Defendant in her written submissions). That interference has not been caused by the location of the mailbox or other items that fall within the description of the Impeding Structures, other than the pile of bricks. Rather, the substantial interference is caused by the gate structure and the pile of bricks, accepting as I do that the gate has been locked, at least over certain periods, taken together with the Defendant’s steadfast refusal to accept that the Plaintiff has rights to use the right of way other than in front of the gate.

As to competing rights and interests, I accept the Plaintiff's submissions that the Defendant does not advance any serious counterargument as to the impact on her rights and interests. The limited nature of the evidence that has been put forward, namely, the deposit of some sawdust (which the Plaintiff explained in his affidavit evidence) and a collision involving the Plaintiff's tipper truck (which he also explained), are de minimis. They do not establish that the use, as contemplated by the Plaintiff, of the right of carriageway constitutes an overuse or is unreasonable.

### Issue 3: Levelling and paving

This issue does not arise in accordance with my findings, but it is appropriate that I address it for completeness.

### The Plaintiff's submissions

The Plaintiff submits that a dominant owner has an ancillary right to repair and maintain the way, extending to such work as is reasonably necessary to create or maintain vehicular access: *Hare v Van Brugge* (2013) 84 NSWLR 41; [2013] NSWCA 74 (*Hare*) at [28]–[29] (Barrett JA, Macfarlan JA and Tobias AJA agreeing); *Zenere v Leate* (1980) 1 BPR 9300 (*Zenere*) at 9305 (McLelland J). That work can be undertaken without the servient owner's prior permission and extends to grading and paving: *Bland v Levi* [2000] NSWSC 161; (2000) 9 BPR 17,517 (*Bland*) at [13], [17] (Young J); *Jeffery v Adams* [2023] NSWSC 1270 (*Jeffery*) at [104]–[106], [158(7)] (Peden J).

He submits that the declaration would quell a dispute because:

the Defendant has denied the right: *Defence* [29]; *Adams 2* [117]–[119];

the works would make turning easier: T20–21;

persons authorised by him may use the works;

he is a licensed builder who will obtain any approvals and engage a qualified professional: *Walker 1* [124]–[125]; *Walker 3* [63]; and

Ms Solano supports the works: T37.

### The Defendant's submissions

The Defendant opposes any such works and submits that:

the onus is on the Plaintiff and there is no expert evidence about supports, approvals, standards, duration, services, drainage or the effect on turning circles: *DS* [16], [38];

the dominant owner must "take the easement as he finds it": *DS* [37D], [38];

*Hare* concerned the maintenance of an existing inclinator: *DS* [37A];

the works would change the topography, render her driveway unnavigable and create a "New Public Space": *DS* [37B], [37D];

the Plaintiff disavowed the plan at CB 351 as the plan for approval: DS [37C(i)];

development consent may be required: DS [37A];

garbage trucks have no right to use the area: DS [16]; and

services, including the electricity connection and the water meter, are located in the area of the proposed works: DS [9], [16(v)].

### Source and character of the right to maintain and repair

The right to repair and maintain the way is one of the ancillary rights implied into a grant. The foundational statement, quoted in Bland at [14] and Hare at [29], is that of McLelland J in Zenere at 9305:

*“... a term is to be implied to the effect that the dominant owner has such ancillary rights as are reasonably necessary to the effective and reasonable exercise and enjoyment of the rights expressly granted ... Such ancillary rights include the right to carry out such work on the right of way site as may from time to time be reasonably necessary to create or maintain reasonable vehicular access along the right of way site ...”*

Justice Barrett in Hare at [29] confirmed that the right to repair and maintain at the dominant owner’s expense “is one of the ancillary rights that an easement confers” and that it “extends to the provision of any service that is reasonably necessary to make the easement usable”.

For Torrens land (which this is), the ancillary right is an incident of the registered easement, not a separate unregistered encumbrance, and is therefore as much “on the register” as the express terms of the grant: Hemmes Hermitage Pty Ltd v Abdurahman (1991) 22 NSWLR 343 at 350 (Kirby P) and 355–356 (Priestley JA, Handley JA agreeing), applied in Jeffery at [57]–[58].

The content of the grant (and hence of the ancillary rights) is ascertained by construing the instrument in light of the physical characteristics of the tenements, which are admissible notwithstanding Westfield: Hare at [16]–[18], [21]. Man-made improvements forming part of the site (a road, bridge, steps or, in Hare, an inclinator) are part of the land over which the rights are exercisable: Hare at [22], [27].

The scope of the right entitles the owner of the dominant tenement to enter upon the servient tenement and undertake such works without permission. Justice Young in Bland at [13] stated that: [1]

*“... one of the rights that the holder of a dominant tenement has is the right without prior permission of the servient owner to enter onto the servient land and take all necessary steps to grade the area of the right of way, to repair it, including replacing any structure on the right of way by way of concrete road to meet altered conditions.”*

The dominant owner may pave so much of the way “as is reasonably necessary for his enjoyment”: *Butler v Muddle* (1995) 6 BPR 13,984 at 13,987 (Young J). That owner may “enter on the right of way and do whatever is necessary for the purpose of making it suitable for the exercise of the rights granted”: *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488 at 494–495 (Buckley LJ).

Works must be reasonably necessary for the effective and reasonable exercise of the rights expressly granted and the right does not enlarge the grant: *Zenere* at 9305; *Hare* at [29]; *Bland* at [17], [22]. As Young J observed in *Bland* at [22]:

*“The right to decide what works will be done, what is the thickness of the driveway and the like, are part of the rights that are granted to the dominant owner and are a matter for it alone.”*

Accordingly, the servient owner is not entitled to full details of the works so as to be in a position to give or withhold consent: *Bland* at [23], [25]. Where the site includes fixtures, the ancillary right includes “the right to keep the fixtures in working order at their own expense”: *Hare* at [30].

Justice Barrett in *Hare* at [28] held that the dominant owner is entitled to maintain and repair but must bear the cost, and may enter the servient land for that purpose “but only to do necessary work in a reasonable manner”: *Carter v Cole* [2006] EWCA Civ 398 at [8(6)] (Longmore LJ, Lloyd and Waller LJJ agreeing), citing *Liford’s Case* (1614) 11 Co Rep 46b at 52a; 77 ER 1206 at 1217; *Jones v Pritchard* [1908] 1 Ch 630 at 638 (Parker J).

In *Jeffery*, Peden J, applying *Bland* at [13]–[17] and *Hare* at [28]–[29], declared (order 7) that the plaintiffs “have the right to carry out reasonable work on the land on which the First ROC is situated ... to render that land fit for vehicular use, including levelling and grading work at their own expense, without the consent of the fourth defendant”, with liberty to apply as to its operation (order 8). [2]

There are limitations on the exercise of the right in the manner in which the work is undertaken:

Per *Zenere* at 9305, the right must be exercised in a manner which “(a) is consistent with the reasonable use and enjoyment by the servient owner of the right of way site ... and (b) does not interfere with the use and enjoyment of [the servient land] by the servient owner to a greater extent than is reasonably necessary”.

In *Bland* at [22], Young J summarised the position as permitting reasonably necessary work done so as to avoid unreasonable interference with the servient tenement or undue inconvenience to its holder, and at [19]–[20] endorsed s 24 of the Indian Easements Act 1882 as correctly stating the position in New South Wales:

*“... such acts must be done at such time and in such manner as, without detriment to the dominant owner, to cause the servient owner as little inconvenience as possible; and the dominant owner must repair, as far as practicable, the damage (if any) caused to the servient heritage.”*

What is reasonably necessary is measured by the terms of the grant construed against the physical features of the land: Hare at [21].

Both owners must exercise restraint. Neither may exercise his or her rights so as to interfere unreasonably with the other's, but neither is required to desist altogether so as to leave the field clear for the other: Hare at [25]–[26].

Entry is “only to do necessary work in a reasonable manner”: Hare at [28]. Apart from deviation around an obstruction, the only right to go outside the easement is to do necessary work in a reasonable manner: *Campbell v Baigent* [2010] NSWSC 1348; (2010) 15 BPR 28,959 (*Campbell*) at [111] (*Slattery J*); *Jeffery* at [59]. Any dealing with the land in excess of the right is an actionable trespass: *Bland* at [25], citing *Dand v Kingscote* (1840) 6 M & W 174; 151 ER 370.

If completed works create problems (eg levels, retaining walls), the servient owner may seek damages or a mandatory injunction: *Bland* at [26]. Whether use of a reconstructed way amounts to excessive user was left open: *Bland* at [25].

The nature and extent of the works proposed by the Plaintiff are vague. The relief sought in prayer 3 refers to “paving and levelling the entrance to the driveway”. In *Walker 1* at [119]–[126] the Plaintiff sets out the works he wishes to undertake for the purpose of fully utilising the right of carriageway to allow it to be used not for the purpose of passing and repassing, but, rather, for the installation of a turning circle. It involves the removal of any gate so that anyone, it seems, could drive into the right of carriageway not even knowing that, in doing so, they would be engaging in trespass.

For reasons set forth above, I do not consider the existence of a gate, of some description, to demarcate private land from public land to be an unreasonable interference with the right of carriageway, so long as the owner of the dominant tenement could open and close the gate. I consider that the removal of the present gate without a replacement gate being reinstalled by the Plaintiff would be an unreasonable interference with the rights of the Defendant to maintain the privacy and security of her land. The Plaintiff would also be required to reinstate, by relocation to a convenient location, the mailbox.

Any such works would need to be undertaken in such a way that the Defendant and other occupants of the Defendant's land (most notably members of the Defendant's family) were not impeded, at any time, from full and free use of the right of carriageway for the purpose of ingress and egress by both vehicular and pedestrian traffic. The Plaintiff does not need the easement to reach Lot 54, but the driveway that the easement partly covers is the Defendant's sole access from Bridge Lane. Any such work must not leave the owners of the servient tenement or their invitees stranded upon that property whilst such work is undertaken.

#### Issue 4: The Cross-Claim under s 89 of the Conveyancing Act

The Cross-Claim must be decided. Although the Plaintiff's claim fails, the folio for Lot 54 records the benefit of the right of carriageway. The Cross-Claim seeks an order that that benefit, insofar as it purports to extend to Lot 54, be extinguished. I will make that order, but on a different ground to the one pleaded.

Section 89 of the Conveyancing Act relevantly provides as follows:

89 Power of Court to modify or extinguish easements, profits à prendre and certain covenants

- (1) Where land is subject to an easement or a profit à prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit à prendre, restriction or obligation upon being satisfied—
  - (a) that by reason of change in the user of any land having the benefit of the easement, profit à prendre, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit à prendre, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit à prendre, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit à prendre or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
  - (b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit à prendre or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit à prendre or the benefit of the restriction is annexed, have agreed to the easement, profit à prendre, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit à prendre wholly or in part or waived the benefit of the restriction wholly or in part,
- (b1) in the case of an obligation—
  - (i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or
  - (ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or

- (c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation.

The Cross-Claimant bears the onus of establishing one or more of the grounds in s 89(1) of the Conveyancing Act and of persuading the Court to exercise its discretion in her favour: *Laris v Lin* (No 2) [2016] NSWSC 560; (2016) 18 BPR 35,917 (*Laris*) at [65] (Slattery J).

The Cross-Claimant's case is difficult to pinpoint owing to its meandering journey from the pleadings, through the oral opening submissions of Mr Bennett of Counsel, to the closing oral and written submissions, each of which characterised the relief sought, and the grounds supporting such relief, differently.

The relief claimed in Prayer 1 of the Cross-Claim is in the following terms:

*"1. An order pursuant to s 89 of the Conveyancing Act 1919 (NSW) extinguishing the easement with dealing number E363593 so far as it benefits, or purports to benefit, Lot 54 in Deposited Plan 855587."*

The pleaded case is that, as to Lot 54, the right of carriageway is "otiose and obsolete" (Cross-Claim [20]), read by the Plaintiff as invoking s 89(1)(a), founded on the RTA's original purpose, the subsequent acquisitions, the absence of contiguity and non-use: Cross-Claim [10]–[23]. The pleading seeks extinguishment of the right of carriageway so far as it purports to benefit Lot 54.

During his opening submissions Mr Bennett expressly abandoned the pleaded claim for extinguishment and confined the claim to a modification of the easement ending the right at the street side of the gate. The written closing submissions, however, reinstate extinguishment, as pleaded in prayer 1, as the primary claim and put modification of the easement in the alternative. Modification of an easement is a lesser form of relief within s 89(1) and could be accommodated by prayer 3 of the Cross-Claim, namely the boilerplate provision ("such further order as this Court thinks fit").

The ground developed in the written submissions, as compared with the pleaded ground, departs from obsolescence and argues that the right is unnecessary for, or of no practical benefit to, residential use.

That argument is, in substance, an argument under s 89(1)(c) of the Conveyancing Act, namely, that extinguishing the easement so far as it benefits Lot 54 will not substantially injure the persons entitled to it, because the residential use of Lot 54 does not require it. The Defendant did not identify that limb by number, but I treat DS [42(i)] as advancing it.

The grounds pressed in the Cross-Claimant's closing submissions are captured at DS [42]:

*"42. Those passages confirm that, there is no need to move the gate and that the ROCW should be extinguished, or otherwise modified so far as it extends beyond the gate, pursuant to s 89 of the Conveyancing Act. The Defendant's case is:*

- (i) The ROCW ought to be extinguished so far as the Plaintiff's property is concerned because the residential uses of the Plaintiff's property do not require it (see [14A] above).

(ii) In the alternative, the ROCW should be modified to limit it to the area from the road to the current fence and gate, retaining the current bitumen sealed pavement without change, which would even permit the idiosyncratic use of the trailer on the Tipper Truck.”

In her Reply to the Defence to the Cross-Claim, the Cross-Claimant pleads, in general answer to that Defence, that the right of carriageway “does not comprise valuable rights in favour of the Cross-Defendant or any other future registered proprietor of the unconnected new lot”.

The Plaintiff submits that:

the Cross-Claim was never amended and that the Defendant’s position is internally inconsistent;

no ground in s 89(1) is identified and the passages relied on at DS [39]–[41] concern reasonable use, not extinguishment;

obsolescence is no longer advanced;

no revised plan of the modified easement has been provided, as was done in *Fincob Pty Ltd v Campbelltown City Council* [2010] NSWSC 349 (*Fincob*) at [14] (*White J*); and

the owners of the other dominant tenements, Ms Solano and Blue Mountains City Council, have not been joined: *Campbell* at [120]. Nor is there evidence of them having been notified of the proposed modification.

Obsolescence under s 89(1)(a) is no longer pressed and I do not decide the Cross-Claim on that ground, but instead under s 89(1)(c). I accept the Plaintiff’s submission that this basis is not pleaded in the Cross-Claim. However, I am satisfied that he has not been prejudiced by this course. First, prayer 1 is not confined to any ground. Secondly, the Defendant’s closing submissions put the case that the residential use of Lot 54 does not require the easement. Thirdly, the Plaintiff answered that case in his own submissions. Fourthly, whether extinguishment would injure him depends on the evidence he gave in any event about his need to turn his vehicles.

Section 89(1)(c) requires that the Court be satisfied that the extinguishment will not substantially injure the persons entitled to the easement. Substantial injury is injury of real and present substance, although it need not be large: *Laris* at [74]; *Campbell* at [75]. The onus lies on the Cross-Claimant in this respect. If I am right on Issue 1 then Lot 54 has no entitlement, and the Plaintiff cannot suffer injury from an order limited to Lot 54. Yet even if that were not so, the extinguishment will not substantially injure the Plaintiff because:

he does not require use of the easement to enter or leave his land;

he disclaimed any right to stop, load or unload on it. The only use he claims is turning his vehicles. The Land Rover and the tipper without the trailer can turn without going past the gate, and the tabletop truck apparently cannot turn even where the gate is open;

turning on the easement would not spare him from reversing on Bridge Lane. It would at most shorten the distance;

he did not establish that reversing on Bridge Lane is unsafe; and the use is a convenience in driving on a public road. The loss of that convenience is not an injury of real and present substance.

The Plaintiff otherwise relies on the discretionary matters pleaded, including loss of valuable rights, reliance on the easement when purchasing, delay and acquiescence: Defence to Cross-Claim [25(c)].

Section 89 confers a discretion on the Court, and the Court will exercise caution before extinguishing a proprietary right: *Laris* at [78]. The burden of demonstrating that the discretion should be exercised lies with the Defendant as the servient owner: *Laris* at [77]. I am persuaded that the discretion should be exercised in her favour because:

for the reasons given above, the Plaintiff will lose no right of real value;

there is no evidence that the Plaintiff bought Lot 54 in reliance on a right to turn vehicles on the easement. Indeed, he did not even know the right of carriageway existed for many years; and

his use of the easement was, on his own evidence, by permission. Permission is not acquiescence in a right.

For these reasons, I will make the order sought in prayer 1 of the Cross-Claim under s 89(1)(c). The alternative claim for modification therefore does not arise.

## Conclusion

The Plaintiff's claim fails. I do not consider that the sole use of the right of carriageway as a staging platform for driving manoeuvres, to allow the Plaintiff to orient his large trucks facing forward when parked in Lot 54, falls within the scope of the easement. I do not consider that existing case law sanctions such a sole use as falling within the stated scope of the easement. The facts here are novel.

In the alternative, I consider that the right of carriageway does not accommodate Lot 54.

The easement should be extinguished to the extent it benefits Lot 54. To do otherwise would leave this issue prone to further disputation between subsequent owners of these lots.

I will hear the parties on costs and determine the issue on the papers.

## Orders

The Court makes the following orders:

Judgment for the Defendant.

Pursuant to s 89(1)(c) of the Conveyancing Act 1919 (NSW), the easement created by dealing E363593 is extinguished so far as it benefits, or purports to benefit, Lot 54 in Deposited Plan 855587.

The parties are to file and serve written submissions of no longer than three pages on the question of costs by 9 October 2026. The question of costs will thereafter be determined on the papers.

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## Endnotes

1.

In Bland, Young J noted that there was “precious little authority” and no authority directly in point ([13], [20]). Its statements have nonetheless been followed (Jeffery at [104]) and are consistent with the appellate statement in Hare at [28]–[30], which is the binding authority on cost and on the absence of any obligation to repair.

2.

The declaration in Jeffery (order 7) was made without opposition ([106]), so the principles were not tested by argument. Bland (which was an urgent interlocutory application decided without precise details of the works and on imperfect proof of title ([2], [8]–[10])) at [13] speaks of grading and of replacing structures “to meet altered conditions”; whether that extends to re-grading an already formed way (as opposed to forming an ungraded one) is not addressed in terms and would turn on the reasonable necessity and manner limitations in Zenere.

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Decision last updated:

29 September 2026

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