IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

Not Restricted

S ECI 2022 01764

DELMA ANNE VALMORBIDA — Plaintiff/ Defendant by Counterclaim

v

LES DENNY PTY LTD (ACN 652 661 955) & ORS (according to the attached schedule) — Defendants/ Plaintiffs by Counterclaim

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JUDGE:	Gorton J
WHERE HELD:	Melbourne
DATE OF HEARING:	12, 13, 14, 15, 25, 26 and 27 September 2023
DATE OF JUDGMENT:	23 November 2023
CASE MAY BE CITED AS:	Valmorbida v Les Denny Pty Ltd
MEDIUM NEUTRAL CITATION:	[2023] VSC 680

PROPERTY – Whether registered proprietor dedicated land as a public highway – Whether or when acceptance of or acquiescence in use of land by the public amounts to dedication – Where actual intention to dedicate must be established – *Anderson v City of Stonnington* (2017) 227 LGERA 176.

PROPERTY – Easements by prescription – Whether plaintiff's use of defendants' land satisfies requirements for easement under doctrine of lost modern grant – Where easements 'howsoever acquired and subsisting' fall within exception to indefeasibility of title – Whether s 42(2)(d) of the *Transfer of Land Act 1958* (Vic) operates to defeat an easement where there has been a transfer of land during the period required to establish the easement – What is meant by 'acquired' – What is meant by 'subsisting' – Relevance of the exception for adverse possession – *Laming v Jennings* [2018] VSCA 335 – *Staughton v Brown* (1875) 1 VLR (L) 150 – *Nelson v Hughes* [1947] VLR 227 – *Dalton v Angus* (1881) 6 App Cas 740 – *Transfer of Land Act 1958* (Vic) s 42(2)(d) – *Transfer of Land Statute 1866* (Vic).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr M Townsend	S & K Planning Lawyers
For the Defendants	Mr A Strahan KC and Mr J Masters	Strongman & Crouch Solicitors

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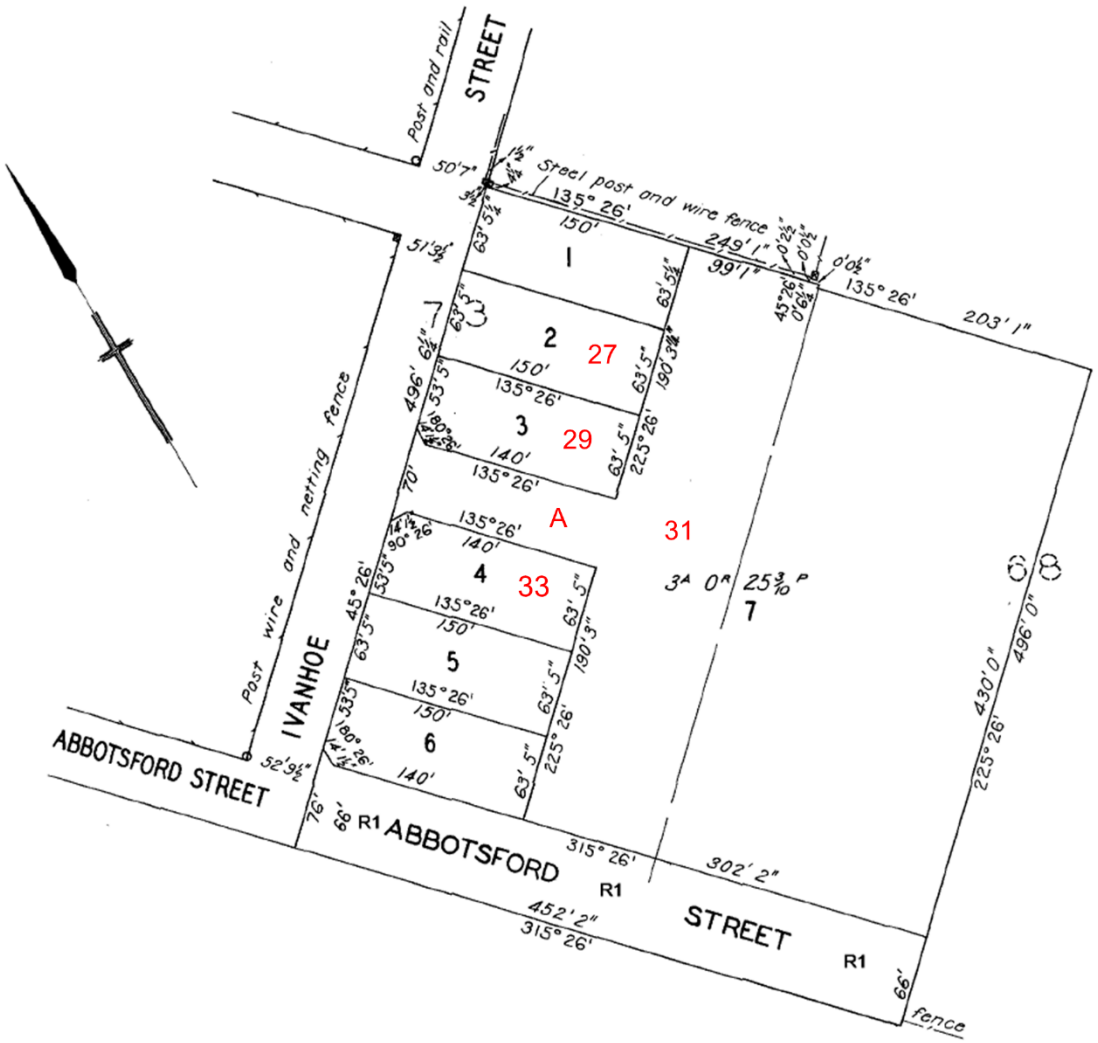
HIS HONOUR:

A. Introduction

1 By the registration of a plan of subdivision on 2 February 1967,[1] the following lots of land near Diamond Bay in Sorrento were created. The lot numbers are in black and are in the original plan of subdivision. The numbers and letter in red have been added to indicate the addresses by which the lots have come to be known: lots 2 and 3 are a single block known as 27-29 Ivanhoe Street, lot 4 is known as 33 Ivanhoe Street, and lot 7 is known as 31 Ivanhoe Street. The letter 'A' indicates a strip of land, which forms part of lot 7, that has come to be known as Stevens Court. No-one knows how it came to be known as Stevens Court.



[1] It seems that the plan of subdivision, set out above, was 'approved' on 22 December 1966 but not registered until 1967.

2 Lot 7 is approximately 12,826 square metres and lot 4 is approximately 883 square metres. Since October 1996, Mrs Delma Valmorbida,[2] the plaintiff, and her now-deceased husband have owned lot 4 and a residence on it. They and those visiting them have always accessed their property from Stevens Court. S Pitard Pty Ltd is the former name of Les Denny Pty Ltd, the first defendant, and it, Evie Pitard Pty Ltd, Chloe Pitard Pty Ltd and Hunter Pitard Pty Ltd, the second to fourth defendants, are the current registered proprietors of lot 7 (which includes Stevens Court). Mrs Skye Pitard is the sole director and shareholder of each of the defendants. Her husband, Mr Simon Pitard, had full authority to conduct negotiations and associated dealings on behalf of Les Denny Pty Ltd. The defendants are all associated with members of Mr Pitard's family, and each defendant is the trustee of a discretionary trust for the benefit of members of the Pitard family.

3 Lot 7 is, and has always been, vacant land. The defendants wish to be able to develop their land in due course. They assert a right to exclusive possession of the land now known as Stevens Court and wish to use it as a formal private entrance to the balance of their land forming lot 7. Mrs Valmorbida disputes their right to exclusive possession and contends that Stevens Court is a 'public highway' at common law[3] (albeit one in private hands), and, in the alternative, that she has an easement by prescription over Stevens Court that allows her and her visitors to use Stevens Court to access her property and for parking. Mrs Valmorbida seeks declaratory relief and an order that the register be altered either to record Stevens Court as a public highway or the claimed easement. The defendants counterclaim for declaratory relief and for an injunction restraining Mrs Valmorbida from entering on or using Stevens Court and for damages.

4 Referring to the land as Stevens Court rather than, for example, the handle of the

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2 I have used 'Mrs' rather than 'Ms' in these reasons when that was the person's preference.

3 Section 8 of the *Road Management Act 2004* (Vic) gives members of the public a right to pass along a road. A 'road' is defined in s 3(1) of the *Road Management Act 2004* (Vic) to include a 'public highway'. A 'public highway' is defined in s 3(1) of the *Road Management Act 2004* (Vic) to be 'any area of land that is a highway for the purposes of the common law'. Accordingly, this case turns on the common law definition of a public highway. The *Road Management Act 2004* (Vic) does not require the local council to maintain a public highway.

battle-axe block, might be thought tendentiously to convey a conclusion that the land is land over which the public has a right to go. I will, however, for convenience, continue to refer to the strip of land as Stevens Court, or the land now known as Stevens Court, without intending to convey by the use of that name any anterior conclusion that it is a public highway.

B. The legal principles

5 As the discussion below will show, there is a difference in the approach to the questions as to whether a public highway has been created and whether an easement has been granted. With the creation of a public road, it is necessary to draw an inference that there has been an actual dedication. With easements by prescription, a legal fiction is involved and the only question is whether there has been the required form of use for the relevant time period.

B.1 Dedication as a public highway

6 The fact that Stevens Court is on private land is not fatal to its being a public highway. A public highway is created, at common law, whenever a 'competent landowner manifest[s] an intention to dedicate land as a public road' and there is 'an acceptance by the public of that proffered dedication.'[4] There is no requirement that the land have any particular characteristics other than that it be 'a way over which all members of the public are entitled to pass and repass on their lawful occasions' and a cul-de-sac can be a public highway.[5] The owner of the fee simple is 'competent' to dedicate the land, but a mortgagor requires the consent of the mortgagee.[6]

7 There is little authority on whether the intention to be inferred must be subjective or whether it may be determined objectively. For example, in this case it is apparent that Mrs Jennifer McKendry, a director of Wistari Pty Ltd who was the registered

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4 *Permanent Trustee Co of NSW Ltd v Campbelltown Corp* (1960) 105 CLR 401, 420*; Anderson v City of Stonnington* (2017) 227 LGERA 176, 187 [40] (Warren CJ, Maxwell P, Kyrou JA). The required intention to dedicate is sometimes referred to as the *animus dedicandi*.

5 *City of Keilor v O'Donohue* (1971) 126 CLR 353, 363.

6 *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 864 (Griffith CJ); see also 875-876 (O'Connor J).

proprietor of 31 Ivanhoe Street between May 1984 and April 2015, was probably the mind of that company and she did not herself intend to dedicate Stevens Court as a public highway. Had she intended to do so, I have no doubt that she would have noted that fact when she was selling the property to Mr Pitard. However, I am prepared to assume, for the purpose of this case, that an intention to dedicate may be found from objective circumstances and behaviour notwithstanding the absence of a subjective intention to dedicate.

8 As noted above, lot 7 including Stevens Court was created on registration of the plan of subdivision that was approved in 1966. Thomas and Marjorie Latham were the registered proprietors of the land that was subdivided and so became the registered proprietors of lot 7. They remained the registered proprietors of lot 7 until 6 May 1982, at which time Bailey Quest Pty Ltd became the registered proprietor. Bailey Quest Pty Ltd remained the registered proprietor until 17 May 1984 at which time Wistari Pty Ltd became the registered proprietor. Wistari Pty Ltd remained the registered proprietor of lot 7 until 10 April 2015. On 30 November 2014, Mr Simon Pitard signed a contract for the purchase of lot 7 from Wistari Pty Ltd. The contract allowed Mr Pitard to nominate a purchaser. He nominated as purchaser a company controlled by him, Les Denny Pty Ltd, which is now known as ACN 156 618 825 Pty Ltd and has been referred to by the parties in their pleadings as Les Denny (Old) Pty Ltd. On 10 April 2015, Les Denny (Old) Pty Ltd became the registered proprietor of lot 7. On 27 September 2021, the defendants purchased lot 7 from a liquidator appointed to Les Denny (Old) Pty Ltd. For the avoidance of doubt, I will hereafter refer to the first defendant as Les Denny Pty Ltd, and otherwise refer to the company that was the registered proprietor of lot 7 between 10 April 2015 and 27 September 2021 as Les Denny (Old) Pty Ltd. Mr Pitard is now bankrupt, but has nonetheless, it seems, had the carriage of this proceeding on behalf of all the defendants.

9 Because there has not been an express dedication of Stevens Court as a public highway, the question is whether it should be inferred that, at some stage, either Thomas and Marjorie Latham, Bailey Quest Pty Ltd or Wistari Pty Ltd intended to

dedicate Stevens Court as a public highway, that is, a way over which members of the public were free to pass and repass as of right and without requiring their permission.[7] The intention to dedicate may be express or may be inferred. Any inference must focus on the 'conduct of landowner',[8] but relevant matters include the features of the land and how it interacts with surrounding properties including whether it has been fenced. If the public have used the land for so long and in such a manner that the owner must have been aware that the public were acting under the belief that the land had been dedicated and has taken no steps to disabuse them of that belief,[9] it may be inferred that the public use was the intended use of the owner.[10] But, a public highway is not acquired by use; rather, 'user is but the evidence to prove dedication'[11] and '[t]here cannot be such a thing as turning land into a road without intention on the owner's part.'[12] This makes it unlike a claim for adverse possession, where certain types of dispossession of another of their land may itself give rise to rights,[13] and the situation with easements, discussed later, where prolonged use of the land can establish a right pursuant to a legal fiction.[14]

10 The question can become whether the public's use was 'in the exercise and assertion of a public right' or may be 'ascribed to the tolerance of successive proprietors'.[15] For this reason, evidence that the landowner granted permission to the public to use the land will ordinarily negate an intention to dedicate the land.[16] It is to be

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7 If the circumstances justify an inference of dedication, it is not necessary to identify which of a series of owners of land used as a carriageway made that dedication: *Anderson v City of Stonnington* (2017) 227 LGERA 176, 188 [45] (Warren CJ, Maxwell P and Kyrou JA).

8 *Anderson v City of Stonnington* (2016) 217 LGERA 179, 190 [34] (McMillan J).

9 *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 857 (Griffith CJ), citing from *Poole v Huskinson* (1843) 11 M. & W., 827, 830.

10 *ORB Holdings Pty Ltd v CL (Qld) Albert St Pty Ltd* (2022) 11 QR 750, 769 [62]-[63] (Crow J).

11 *Attorney-General v Esher Linoleum Co Ltd* [1901] 2 CH 647, 649 (Buckley J), quoted with approval by Young J in *Sutherland Shire Council v Registrar-General* (1991) 72 LGRA 84, 93 [69].

12 *Barraclough v Johnson* (1838) 112 ER 773, 775 (Patteson J), quoted in *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846 by Griffith CJ at 859 and O'Connor J at 872.

13 See, eg, *Cervi v Letcher* (2011) 33 VR 320.

14 The position in the United Kingdom is different. Under s 31 of the *Highways Act 1980* (UK), if the public has used a way over land for 20 years, it is deemed to have been dedicated as a highway unless there is evidence to the contrary.

15 *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 857 (Griffith CJ), citing from *McPherson v Scottish Rights of Way and Recreation Society Ltd* 13 App Cas 744, 751.

16 *Anderson v City of Stonnington* (2017) 227 LGERA 176, 189 [49] (Warren CJ, Maxwell P, Kyrou JA).

remembered, though, that the issue remains one of real-world fact: the party asserting the existence of a public highway must establish that there was an actual intention to dedicate the land for that purpose on the part of someone who owned the land.[17] That necessarily involves a conclusion that an owner intended to divest themselves of the right to exclude members of the public normally associated with ownership of private property.[18]

11 It has been said that 'it is only unequivocal acts of dedication from which intention to dedicate may be inferred'.[19] Again, however, that should be seen as reminder that it is a serious thing to conclude that a private landowner chose to dedicate land to the public, rather than establishing a further legal test to be satisfied that the acts relied upon to ground the inference be 'unequivocal'. The question remains one of fact;[20] the party asserting the existence of the public road must establish to the reasonable satisfaction of the Court that one of the landowners, at some stage, on the balance of probabilities, dedicated the land as a public road.[21]

B.2 Easement by prescription

B.2.1 Principles by which an easement is established

12 As I have previously noted,[22] as a matter of logic, any proprietary right, for it to be a right rather than a claimed right, must have had a lawful beginning. In the case of an ordinary easement, there must have been, at some stage, an express or implied agreement to create it. If use has been since time immemorial, or for as long as anyone alive can remember, then it may be assumed that, at some stage, there has been such an agreement, even if the details of the agreement cannot now be

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17 See, eg, *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 859-860 (Griffith CJ), 872 (O'Connor J).

18 *Anderson v City of Stonnington* (2017) 227 LGERA 176, 187 [40] (Warren CJ, Maxwell P, Kyrou JA).

19 *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1989) 23 FCR 536, 546 (Lockhart J).

20 Historically, a question for the jury to decide: see, eg, *Barraclough v Johnson* (1838) 112 ER 773 at 755: 'I think that the intention to dedicate or not must be left to the jury.' (Patteson J).

21 In circumstances where the certificates of title do not show a road, the onus is on the party seeking to establish that the land was dedicated and accepted. Cf *Howard Finance Pty Ltd v Yarra City Council* [2020] VSC 610, [18] (Kennedy J).

22 Most of the discussion in the following paragraphs mirrors what I wrote in *Sorbara v Prochilo* [2022] VSC 146 at [63] and following.

established. This makes sense in circumstances where the use has been since time immemorial or for as long as anyone alive can remember and the use is not otherwise able to be explained. But, in order to promote the interest of stability in the usages of land, and following the introduction of statutory limitation periods in the United Kingdom in the 19th century, a different method of establishing an easement developed. Instead of the use having to be since time immemorial or for as long as anyone alive could remember, the law now provides that 20 years is sufficient. This is the doctrine of 'the lost modern grant'.[23] Although initially it was a question of fact as to whether or not the existence of a lost grant could be inferred, the inference has since became unassailable; if the necessary use is established, the claim cannot be defeated by evidence that no grant was ever in fact made.[24] Consequently, the notion that there had been a grant that had been lost was recognised as a legal fiction.[25]

13 The criteria for the emergence of an easement from 20 years' use of a neighbour's property are otherwise expressed in different ways. It is said that the use must have been '*nec vi, nec clam, nec precario*' — that is, without violence, without stealth and without permission.[26] It is also said that the use must have been 'as of right', and have been with the knowledge of, but without the consent of, the neighbour.[27] These requirements overlap, and must be understood in the context of the underlying rationale and reasoning processes for which the law recognises the emergence of an easement in these circumstances.

14 As noted above, the rationale for the development of the fiction was to promote certainty of peoples' interests in land. But the finding of an easement places a

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23 See *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 307–308 (Griffith CJ).

24 *Dalton v Angus* (1881) 6 App Cas 740, 765 (Lindley J), 813–814 (Lord Blackburn); *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2020) 60 VR 579, 590 [54], 598 [94] (Tate, Niall and Emerton JJA).

25 *Hampshire Automotive Centre Pty Ltd v Centre Com (Sunshine) Pty Ltd* (2020) 60 VR 579, 589 [52] (Tate, Niall and Emerton JJA).

26 See, eg, *Mills v The Mayor, Alderman, and Burgesses of Colchester* (1867) LR 2 CP 476, 486 (Montague Smith J); *Laming v Jennings* [2018] VSCA 335, [83] (Kyrou, McLeish and Niall JJA).

27 See, eg, *Laming v Jennings* [2018] VSCA 335, [84] (Kyrou, McLeish and Niall JJA).

burden on the servient tenement. Accordingly, if it is to be just, there must be something in the conduct of the registered proprietors of the servient tenement that makes it appropriate to burden that property with an easement that the proprietors never in fact agreed to grant and for which they received no consideration. That gives rise to the notion of 'acquiescence'; if a person had notice of the use, and did nothing to prevent it for 20 years, then, just as if there were a statutory limitation period, they could no longer be permitted to complain if the use were to become permanent. A 'lapse of time accompanied by inaction, where action ought to be taken', may confer a right not previously possessed.[28] 'The paper owner would be expected to resist the assertion of right or face the consequences of an easement by prescription arising if it fails to do so.'[29] Indeed, it is this fundamental notion of acquiescence that informs the questions as to whether a particular use has been open and without force, as of right, and whether the owner of the servient tenement had notice. This area of law rests upon acquiescence of the owner.[30] Each of the criteria are, in my view, really ways of considering whether or not there has been the necessary acquiescence. I will develop these connections further below when the individual criteria are considered.

15 A right may also arise in circumstances where the owner was not aware of the use of the land at all, but 'ought' to have been aware of that use. In those circumstances, notice will be imputed. The rationale for imposing an easement in these circumstances of 'constructive' notice is the expectation that land owners will with reasonable diligence inform themselves of actions taken in respect of their land. They will be held to have notice of that which, with reasonable diligence, they would have observed. Expressed in the negative, 'the prescription cannot arise where the acts would not be known to an owner reasonably diligent in protecting its rights'.[31] Although the distinction is not always made clear, one cannot in fact acquiesce to

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28 *Dalton v Angus* (1881) 6 App Cas 740, 773 (Fry J).

29 *Laming v Jennings* [2018] VSCA 335, [85] (Kyrou, McLeish and Niall JJA).

30 *Dalton v Angus* (1881) 6 App Cas 740, 773 (Fry J), discussed in *Laming v Jennings* [2018] VSCA 335, [85] (Kyrou, McLeish and Niall JJA). See also *Sunshine Retail Investments Pty Ltd v Wulff* [1999] VSC 415, [117] (Hedigan J).

31 *Laming v Jennings* [2018] VSCA 335, [84] (Kyrou, McLeish and Niall JJA).

something of which one is unaware,[32] and so this is, conceptually, an extension from the notion of acquiescence in fact to a form of ascribed acquiescence. It is difficult to see how this extension sits comfortably with the basal concept that the easement arises in circumstances where the conduct of the parties gives rise to an assumption that there must have been at some time in the past an actual grant. Nonetheless, these are the balances that have been struck between the public benefit in promoting certainty in land use and the rights of individual land owners.

B.2.2 The different role of 'acquiescence' in the two circumstances under consideration

16 The above discussions explains how a proprietor's 'acquiescence' in the use by another underlies, in a very real sense, the legal fiction of the lost modern grant. Mrs Valmorbida submitted, in effect, that acquiescence operates in an analogous manner when it comes to determining whether land has been dedicated to public use. Relying on a supportive passage in *British Museum Trustees v Finnis*,[33] Mrs Valmorbida submitted that if a registered proprietor is aware that members of the public are regularly passing over the registered proprietor's land, then, unless the registered proprietor takes some positive step to assert a power to exclude such as erecting a fence or gate, even if only for one day a year, then the registered proprietor has acquiesced in the public use and the land is to be taken as having been dedicated for public use. Given that the land now known as Stevens Court was intended as a means of accessing the balance of lot 7, her counsel submitted:

> In order to maintain its private character, it needs to be blocked off from the public, potentially licensed, then opened … closed off one day a year, but none of that has happened here.

17 Otherwise, the acquiescence, it was in substance submitted, compels a conclusion of dedication.

18 I do not accept that this is so. I accept that the use[34] of land by the public might be

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32 Ibid [86].

33 (1833) 172 ER 1053.

34 I will use the more modern word 'use', rather than the more traditional word 'user', to describe use of the land. The words do have a different meaning, in that 'user' connotes use as of right, rather than,

of such duration that dedication may be presumed in the absence of evidence to the contrary.[35] That, however, is not a statement of legal principle as if there were some independent test relating to whether the use is sufficient to engage that principle, so much as an observation of how the factual enquiry may be resolved in some cases: the circumstances may be such that it can be inferred that the owner knew of and acquiesced in the public use and from that it may be inferred, absent some evidence to the contrary, that the owner had dedicated the land for public use.[36] Even when it is said that the presumption is engaged, the requirement remains that 'the evidence must raise the inference that, at some point of time, the owner dedicated the road to the public.'[37] Accordingly, any 'acquiescence' by the registered proprietor is not an independent method of establishing the existence of a public highway: it is a factor that goes to the ultimate factual question, but that question remains not whether there has been acquiescence in long use, but rather whether, in all the circumstances, there has been an intention to dedicate. Put simply, an owner may acquiesce in public use of land over time without intending to dedicate that land to the public. In this respect, I observe that there are public policy objectives against the too ready removal of private rights from landowners who permit others to use their land as it could cause landowners to be 'churlish about their rights for fear that their indulgence may be abused' or to act 'under the fear that their good nature may be misunderstood'.[38]

B.2.3 The role of indefeasibility of title under the Transfer of Land Act 1958 **(Vic)**

19 In this case, Mrs Valmorbida relies on use by her and those visiting her in and after

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for example, use as a trespasser. However, using 'use' rather than 'user' allows for a distinction to be made between the 'use' and the 'user', with the latter being a reference to the person who is engaging in the use. I respectfully agree with the observations in this regard made in *London Tara Hotel Ltd v Kensington Close Hotel Ltd* [2012] 2 All ER 554 at 570 [75] by Lewison LJ and at 560 [24] by Lord Neuberger MR.

35 *Anderson v City of Stonnington* (2017) 227 LGERA 176, 188 [43].

36 *Anderson v City of Stonnington* (2017) 227 LGERA 176, 198 [84]-[87] (Warren CJ, Maxwell P, Kyrou JA).

37 *Newington v Windeyer* (1985) 3 NSWLR 555, cited with approval in *Anderson v City of Stonnington* (2017) 227 LGERA 176 at 189 [47] (Warren CJ, Maxwell P, Kyrou JA). See also *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 856 (Griffith CJ), quoting from Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 385.

38 See *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 860 (Griffith CJ), quoting from Bowen LJ in *Blount v Layard* [1891] 2 Ch 681, 691.

1996. Accordingly, the 20 year period required for an easement to arise under the doctrine of the lost modern grant ended on a date in 2016. The defendants do not contend that they disputed Mrs Valmorbida's use of the land prior to that date. They do not dispute that if Mrs Valmorbida used the land in a way that met the test for the creation of an easement, she did so for more than 20 years after 1996 until a discussion between her and Mr Pitard in early 2018 in which he asserted his right to exclude her. However, Les Denny (Old) Pty Ltd became registered proprietor on 10 April 2015, which was before the end of the 20 year period relied on. Section 42(1) of the *Transfer of Land Act 1958* (Vic) provides, subject to certain exceptions, that a registered proprietor holds property free from any encumbrances not recorded in the Register. The easement the Valmorbidas claim has never been recorded in the Register. The defendants submit that by reason of the operation of the *Transfer of Land Act 1958* (Vic), either no easement arises in common law or if it does they are not bound by it.

20 I will return to this issue towards the end of these reasons.

C. Matters relevant particularly to the question of public dedication

21 Mrs Valmorbida relied on some matters that were relevant particularly to the question of dedication as a public highway. I will consider these first.

C.1 The plan of subdivision

22 As noted above, the relevant parcels of land were created in 1967 by the lodging of the plan of subdivision set out at the beginning of these reasons. That plan subdivided land previously recorded in two certificates of titles created in 1952. One related to the land to the left of the line drawn across the plan of subdivision just to the left of where the numeral '7' appears, and the other related to the land to the right of that line. The certificate of title that related to the land to the left of the line provided for a series of seven residential blocks that extended east from Ivanhoe Street to that line. Each was just over 377 links (about 75 metres) deep. Six of them were 100 links (about 20 metres) wide, and the southern-most was just over 152 links (just over 30 metres) wide. There was nothing distinctive about the part that

included the land now known as Stevens Court. Neither of the two 1952 parent certificates of title noted the eastern extension of Abbotsford Street provided for in the 1967 plan of subdivision.

23 When the 1967 plan of subdivision was registered, the present lots 1 to 7 were created as was the separate parcel of land noted as 'Abbotsford Street'. Lot 7 included the area now known as Stevens Court. Ten foot splays appeared for the first time where lot 7 met Ivanhoe Street and where the area described as Abbotsford Street met Ivanhoe Street. The dimensions of the blocks were altered. Lots 1 to 3 and 4 to 6 are 63 feet 5 inches (about 20 metres) wide, or 53 feet 5 inches where there is a splay. The depth of those lots was reduced to 150 links with the balance forming part of lot 7. The land now known as Stevens Court is 70 feet wide where it joins Ivanhoe Street, but is otherwise 50 feet (just over 15 metres) wide for its balance beyond the splays. That was less than in the earlier titles and was the same width as other roads in the area.

24 The plan of subdivision also provided for an extension of Abbotsford Street that is 76 feet wide. This is wider than both Ivanhoe Street and the old part of Abbotsford street on the other side of Ivanhoe Street. That is a peculiarity that remains unexplained. I accept, nonetheless, that the sizing of the different lots, the battle-axe shape of lot 7 and the existence of the splays where lot 7 meets Ivanhoe Street indicate that the persons responsible for the lodging of the 1967 plan of subdivision, and Thomas and Marjorie Latham who were the registered proprietors at the time, intended that, at least at some stage, the land now known as Stevens Court would be used for vehicular access for the balance of lot 7. That would be the case whether the balance of lot 7 was to be further subdivided or developed as a large single dwelling.

25 But that fact is insufficient to establish that the owners intended, at the time the lots were created, to dedicate the land now known as Stevens Court as a public highway. The treatment of the land now known as Stevens Court is to be contrasted with the creation, at the same time, of the extension of Abbotsford Street. The plan of subdivision that created lots 1 to 7 also created the parcel of land immediately below

lot 6 (which had been part of the same parent titles as lots 1 to 6). Significantly, that parcel of land:

(a) was given a separate colour;[39]

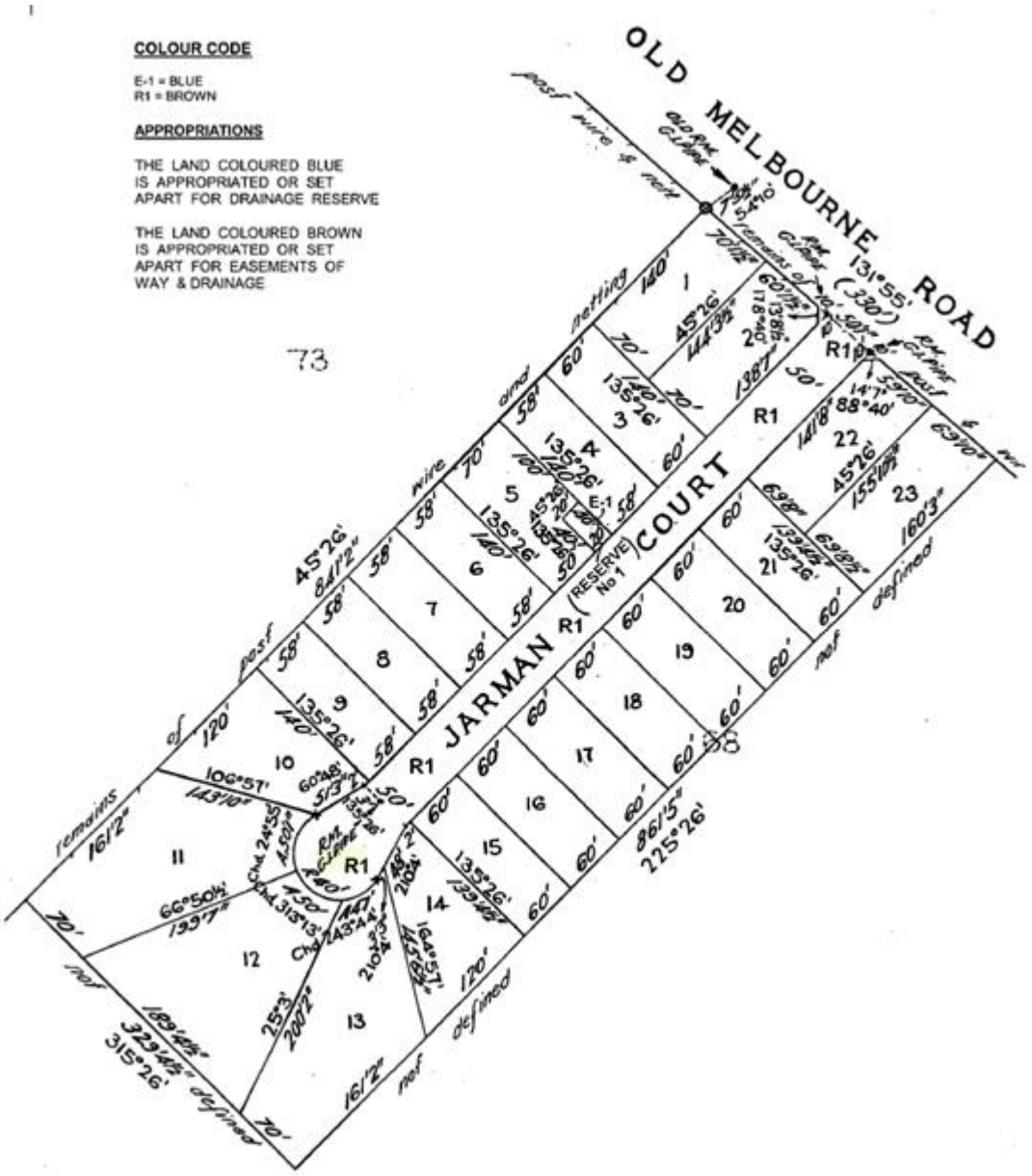
(b) was described as 'Abbotsford Street';

(c) was said on the plan of subdivision to be 'appropriated or set apart for easements of way'; and

(d) was said on the plan of subdivision to be encumbered by a 'carriageway easement'.

26 To illustrate the point, the 1967 subdivision may be contrasted with a subdivision of a nearby block that was approved, it seems, in 1957, a copy of which is set out below:

[39] The markings 'R1' are stated to indicate, under a 'colour conversion', the colour brown.

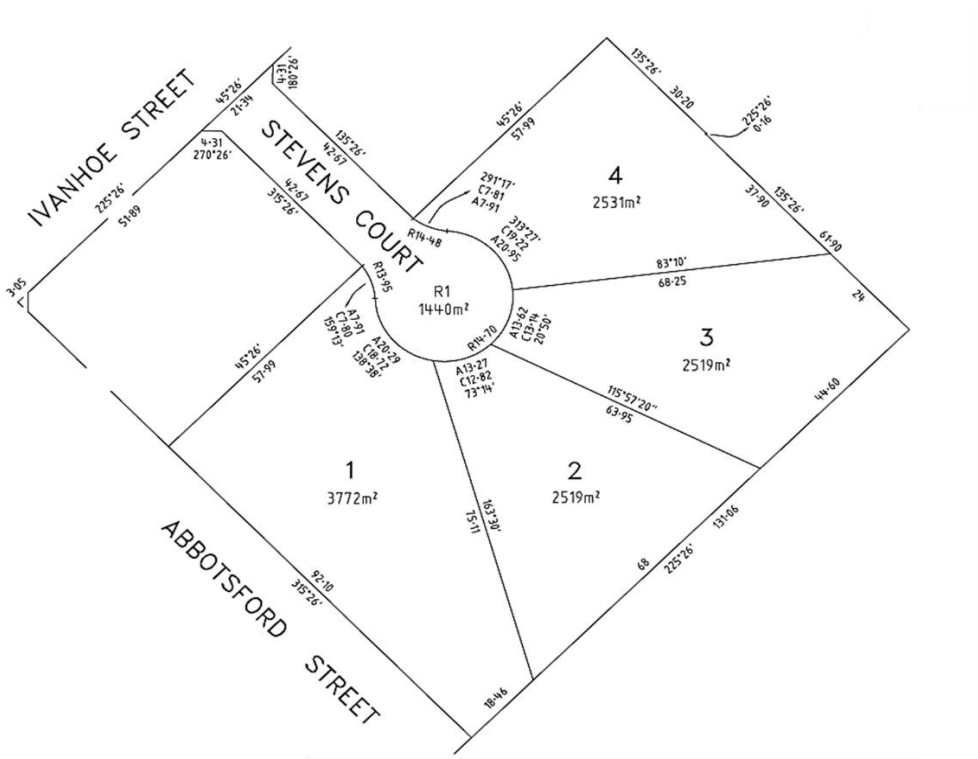


27 This subdivision created 'Jarman Court', noted that it is 'appropriated or set apart for easements of way & drainage', and provided for a series of allotments that were given access to the wider road network only through Jarman Court. The registration of this subdivision would probably found an inference that Jarman Court was dedicated as a public highway.[40]

28 It may also be contrasted with a proposed subdivision of lot 7 that was prepared for Les Denny (Old) Pty Ltd, the then owner, in January 2017 and which formed part of

40 *Permanent Trustee Co of NSW Ltd v Campbelltown Corp* (1960) 105 CLR 401, 411-412 (Kitto J), 415 (Menzies J), 422, 424 (Windeyer J); *Anderson v City of Stonnington* (2016) 217 LGERA 179, 192 [39] (McMillan J); *Newington v Windeyer* (1985) 3 NSWLR 555, 559 (McHugh JA).

an application filed with the Council in April 2018. A copy of this proposed subdivision is set out below:



29 Again, this proposed subdivision identified Stevens Court as a carriageway that would provide access to four separate lots and connect each of them with the wider road network via Ivanhoe Street. The registration of a subdivision in this form would probably found an inference that Stevens Court was to be dedicated as a public highway. However, this proposed subdivision was not pursued; had it been registered, it is likely that the dispute the subject of this proceeding would not have arisen.

30 Both of the above plans of subdivision provide a striking contrast to the 1967 plan of subdivision where the area now known as Stevens Court was treated as a part of one of the seven allotments created, was not noted as a road, was not a parcel of land required to connect some other parcel of land to the wider road network, and was not noted as land over which there was a right of way. The creation of 'battle-axe' blocks, where the handle is intended as a means of accessing the balance of the block, is commonplace, and it would be a surprising result if the mere creation of lots of that shape were taken to indicate an immediate intention that the handle part

of such blocks were dedicated to the public. More significantly, however, the failure to treat the land now known as Stevens Court in a similar way to the way the parcel below lot 6 was treated, but instead to leave it simply as part of lot 7 in private ownership with no easements encumbering it, at least according to the plans, is against a conclusion that the owners intended, at the time of the subdivision, to dedicate the land now known as Stevens Court as a public highway. Had the owners intended then to dedicate the land known as Stevens Court as a public highway, it might be expected that the plan of subdivision would have treated that land in a similar way to the way the land identified as the extension of Abbotsford Street was treated.

31 Mrs Valmorbida submitted that the area known as Stevens Court was created as a means of access to Ivanhoe Street for lots 3 and 4, which are adjacent to the area known as Stevens Court. I do not draw that conclusion. Lots 3 and 4 were each given direct access to Ivanhoe Street. Although the frontages are reduced by the splays and thus are ten feet shorter than lots 1, 2, and 5, their frontages remain more than 15 metres wide, which is more than sufficient to arrange for vehicular access. The layout is equally consistent with the land now known as Stevens Court being set aside only as a private accessway to the balance of lot 7.

32 The fact that the owners that arranged for the 1967 plan of subdivision and became the owners of lot 7 on its registration might have had in mind a later subdivision of lot 7 that used the land known as Stevens Court in a way similar to that shown in the proposed 2018 subdivision is no reason to conclude that they intended in 1967 to dedicate Stevens Court to the public. The most that could be said is that they anticipated that they or a subsequent owner and developer of lot 7 might one day in the future so dedicate Stevens Court. It is just as likely, indeed more likely, that their intention was that the owners of lot 7 would retain the right to exclude members of the public from using the land now known as Stevens Court at least until such time as a further step in the development of the block were taken.

C.2 The surrounding area

33 The surrounding area, still, has public roads that are unsealed and, as noted above, of similar dimensions to Stevens Court. Accordingly, there is nothing in Stevens Court's appearance that is inconsistent with it being a public road rather than a private road.

C.3 The reference to Stevens Court in maps

34 Nobody who gave evidence could explain how Stevens Court came to be called Stevens Court. There is no council street sign. It appeared as Stevens Court in the Melways street directories from the 1984 edition to the 1999 edition and in the UBD street directories from the 1993 edition to the 2015 edition. Nobody who gave evidence could explain how it came to be recorded in those street directories or how it has since come to be removed from them. It still appears in the internet-based Google Maps, NearMap and MetroMap services. These maps were admitted into evidence notwithstanding the defendant's contention that they contained hearsay representations. They were admissible, however, because the general reputation of a road is relevant to determining whether a road is a public road and maps may be looked at to assess that reputation.[41] There was no suggestion that the various authors of the maps engaged in some form of legal analysis and only included roads that were public roads. For this reason, the fact that Stevens Court was included in the various maps of the area added little to the evidence given by all the witnesses that were called to the effect that the part of lot 7 in dispute in this case was generally known as Stevens Court.

C.4 The chain at the end of Stevens Court where it joined the main part of lot 7

35 Although there was never any impediment to the access to Stevens Court from Ivanhoe Street, at some stage Wistari Pty Ltd put a chain across the end of Stevens Court where Stevens Court met the balance of lot 7 because people were, in Mrs McKendry's words, driving into it and 'dumping rubbish'. This was, it seems, 'a few years' before Les Denny (Old) Pty Ltd bought lot 7.

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41 *Everingham v Penrith Municipal Council* (1916) 3 LGR 74, 75; see also 81.

36 This behaviour indicates that Wistari Pty Ltd intended to retain the right to exclude members of the public from the balance of lot 7. It is also consistent with Wistari Pty Ltd intending that members of the public be permitted to access that part of lot 7 that is known as Stevens Court, because the chain was not put where Stevens Court joins Ivanhoe Street. But it is also consistent with Wistari Pty Ltd simply being content with the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street continuing to use Stevens Court to access their properties.

D. The use to which the land has been put

37 Because the question of public dedication and the creation of an easement both require consideration of the use of the land, it is convenient to consider the use of the land generally, before turning to whether the criteria for each are satisfied.

D.1 The actual use of Stevens Court following the 1967 subdivision

38 Since at least 1996, but probably for many years before that, the land now known as Stevens Court has had the appearance of a wooded, vacant block with a sand or dirt track leading from Ivanhoe Street through to the balance of lot 7. There has been a fence around the large part of the block and along the sides of the land now known as Stevens Court (with gates in it as indicated below), but no fence where lot 7 joins Ivanhoe Street or any signs indicating that the land now known as Stevens Court was private land or that members of the public were not entitled to enter onto it. For this reason, members of the public including neighbours have had, in fact, unrestricted access from Ivanhoe Street to the land known as Stevens Court. I will consider below the use of Stevens Court by various people, and then, in Part D.2 below, whether that use was use 'as of right' or use with the consent of the registered proprietor.

D.1.1 Occupants and visitors to 33 Ivanhoe Street (lot 4)

39 For as long as the Valmorbidas have owned 33 Ivanhoe Street, there have been gates in the fence along (or more or less along) the border between their property and Stevens Court. There has been a gate that gives vehicular access at the rear and a gate that gives pedestrian access towards the front of their block. The Valmorbidas

house has always been oriented towards Stevens Court rather than Ivanhoe Street. Since at least 1996 when they bought 33 Ivanhoe Street, and probably from when their house was first built, there has been a retaining wall along the boundary of their property and Ivanhoe Street and extensive vegetation between the boundary and their house. There is no evidence, or indeed any suggestion, that the densely planted trees where 33 Ivanhoe Street meets Ivanhoe Street have not been there for many years. Both Mrs Delma Valmorbida and her daughter, Ms Daniela Valmorbida, said that they and those visiting them have always used Stevens Court to access their property at 33 Ivanhoe Street. I accept that evidence. Accordingly, I accept that the inhabitants of and visitors to 33 Ivanhoe Street have used Stevens Court to access that property from at least the time that the house on 33 Ivanhoe Street was built, and that that would have been obvious to anyone who cared to look.

D.1.2 Occupants and visitors to 27-29 Ivanhoe Street (lots 2 and 3)

40 The property on the other side of Stevens Court is a double block and is known as 27-29 Ivanhoe Street. From 28 March 1972 to 20 January 1978, Mr Arthur and Mrs Marjorie Campbell were the registered proprietors of that block. They built the house on it. From 20 January 1978 to 25 July 1989, Wistari Pty Ltd, a company associated with them, was the registered proprietor. Their daughter, Mrs Jennifer McKendry, a director of Wistari Pty Ltd, gave evidence. From 25 July 1989 to 6 December 2018, Mr Kevin McDonald and Ms Eunice McDonald were the registered proprietors. Since 6 December 2018, Magold Investments Pty Ltd has been the registered proprietor.

41 As noted above, on 17 May 1984 Wistari Pty Ltd became the registered proprietor also of lot 7 (or 31 Ivanhoe Street) including Stevens Court. So between 17 May 1984 and 25 July 1989, lots 2 and 3 and lot 7 were in common ownership.

42 There is a fence along (or more or less along) the boundary of 29 Ivanhoe Street (lot 3) and the land now known as Stevens Court. There is a house on lot 3. Lot 2, or 27 Ivanhoe Street, is a garden to that house. There is a driveway from Ivanhoe Street

into lot 2 that curves around the back of the house and joins the land now known as Stevens Court at the rear of lot 3. There has been, for many years, a set of gates where the driveway joins the land now known as Stevens Court. There has also been, at all relevant time, it seems, a gate about halfway up the land now known as Stevens Court adjacent to where there is a garage on 27-29 Ivanhoe Street. Accordingly, there was vehicular access to 27-29 Ivanhoe Street at two locations on the land now known as Stevens Court, but also access to that property from Ivanhoe Street itself. I infer that those gates have been present at least since the house was constructed.

43 Accordingly, I accept that the inhabitants of and visitors to 27-29 Ivanhoe Street have also used Stevens Court to access or to leave that property from at least the time that the house on 27-29 Ivanhoe Street was built, and that would have been obvious to anyone who cared to look.

D.1.3 Other neighbours

44 Mrs Jillian Fearon has lived on one of the properties that adjoins lot 7 at the rear since November 1994.[42] There was a gate in the fence between her block and lot 7 that enabled her and her family to walk across lot 7 and down Stevens Court to get to the beach and she and her family regularly did so. Mrs Fearon also used the gate to visit Mrs McDonald, for whom she cared, at 27-29 Ivanhoe Street. Mrs Fearon also used Stevens Court when she drove to visit the Valmorbidas or Mrs McDonald. However, Mrs Fearon understood that the block behind her property was private property and that her and her families' use of it was with the permission of the owners, rather than as of right. Not long after she and her husband had moved in, her husband asked the McKendrys for, and the McKendrys gave them, permission to continue to use the gate in the fence. Mrs Fearon understood that if the McKendrys had withdrawn that permission, she would have had to cease using their land. Further, in 2015, Mrs Fearon attended a meeting on the block that Mr Pitard had

[42] Her property, which is on Jarman Court, is adjacent to the rear part of the north-eastern most border of lot 7.

arranged to discuss a proposed new fence (she was the only neighbour to turn up). Mrs Fearon asked that a gate be put in the new fence so that she could continue to visit and to care for Mrs McDonald at 27-29 Ivanhoe Street. Mr Pitard agreed to do so, although he had Mrs Fearon sign a document confirming that her use of his property was pursuant to a licence that he could terminate at will. Mrs Fearon's use of the main part of the block was clearly, therefore, not as of right but with the permission of the legal owner.

45 The position with Stevens Court was, however, not as straightforward and I consider that further in Part D.2 below.

D.1.4 People who weren't neighbours

46 Mr Garry Deverson lives about 500 metres away. He visited, with his dog, a resident on Ivanhoe Street on a weekly basis between about 2013 and 2017. He said, and I accept, that on 20 to 25 times or more he would walk his dog into Stevens Court as a 'little oasis off the bitumen' of Ivanhoe Street. He assumed that the land known as Stevens Court was a road.

47 Mr Kelvin Blogg was the gardener at 27-29 Ivanhoe Street between 1994 and 2018 for the McDonalds and has been a gardener for the Valmorbidas since 1996 or 1997. I accept his evidence. He drove into 27-29 Ivanhoe Street from Ivanhoe Street, and out of Ivanhoe Street via the gate at the rear into the land now known as Stevens Court. He considered that safer than reversing onto Ivanhoe Street from 27-29 Ivanhoe Street because that access point was on the top of a hill (which evidence was consistent with what was seen at a view the Court conducted). He believed that Stevens Court was a 'street' or a 'road'. He observed the people who performed tree pruning at 27-29 Ivanhoe Street would park their trailer in the land now known as Stevens Court, and then drive through 27-29 Ivanhoe Street the same way he did to collect the pruned branches. This happened a few times each year. On two occasions within the last ten years, after heavy rains, he repaired the area where the land now known as Stevens Court joins 27-29 Ivanhoe Street at the rear by laying some crushed rock, once himself by hand and once by hiring someone with a bobcat.

In this context, he noted that the council was not repairing the surface of Stevens Court. He also said that shortly after he had purchased the property, Mr McDonald, who has died, expressed satisfaction that his views would not be obstructed by any building on Stevens Court. He has also worked for the Valmorbidas, and when he does so he parks on the land now known as Stevens Court, and on occasions enters the rear of their property from Stevens Court.

48 Mr Timothy Robertson was born in 1966 and grew up on Ivanhoe Street and lived there until 1994. I accept his evidence. He used to billycart in the area including Stevens Court in the 1970s. He is a plumber and regularly worked on the plumbing, over the years, at 27-29 Ivanhoe Street and when he did so used Stevens Court to leave that property. He also did some work for the Valmorbidas and when he did so he parked on Stevens Court and, on occasions, accessed the rear of the Valmorbidas' property from Stevens Court.

D.2 Was the use of Stevens Court 'as of right' or with permission?

D.2.1 Members of the public generally

49 I am satisfied those members of the general public who used Stevens Court, such as Mr Deverson and Mr Robertson, used it as if they had the right to do so. Stevens Court opened off Ivanhoe Street, had dimensions consistent with it being a road, provided obvious access to the properties on both 27-29 and 33 Ivanhoe Street, and there were no signs or other markings to indicate that it was private land. There is no reason to think other members of the public would have treated it as private property or considered that they were trespassers when they entered onto it. I am also satisfied, however, that the use by members of the public who were not neighbours was probably quite small, given that it was not a thoroughfare.

D.2.2 Mrs Fearon and the other neighbours at the back of lot 7

50 For Mrs Fearon, the use of lot 7 to access the beach or 27-29 Ivanhoe Street inevitably included the use of Stevens Court. Mrs McKendry recalled that Mrs Fearon was expressly given permission to use a gate in the fence between her property and lot 7, but could not recall whether any of the other neighbours were given this permission.

Although she understood that she needed permission of the owner to walk across the main part of lot 7, she did not consider that she required permission to use Stevens Court; she did not realise that it was part of the block owned by the McKendrys and later Mr Pitard and assumed that Stevens Court was a public road. Consistently with this, there was no mention of Stevens Court in the requests or grants of permission to walk across the block behind her property. Mrs Fearon was an impressive and patently honest witness and I accept her evidence in this regard. Accordingly, I conclude that she, too, used Stevens Court 'as of right', rather than as a trespasser.

D.2.3 The Valmorbidas

51 Ascertaining the nature of the use of Stevens Court by the Valmorbidas is not straightforward and requires a consideration of the evidence given by Mrs Jennifer McKendry, and also the evidence given by Mrs Delma Valmorbida and her daughter Ms Daniela Valmorbida in the context of:

(a) plans prepared for the Valmorbidas for potential renovations to their property in 2003 and 2004;

(b) a survey and performed in 2010 and associated correspondence that was provided to the Valmorbidas at that time; and

(c) the marketing and sale of lot 7 to Mr Pitard in 2014.

52 Mr and Mrs Campbell and Mr and Mrs McDonald have all died. However, Mrs McKendry who, as noted above, is the daughter of Mr and Mrs Campbell and has been a director of Wistari Pty Ltd since 1989, was available and gave evidence. As noted above, the Campbells or Wistari Pty Ltd owned 27-29 Ivanhoe Street from 1972 to 1989, and Wistari Pty Ltd owned lot 7 from 17 May 1984 until it was sold to Mr Pitard's former company, Les Denny (Old) Pty Ltd on 10 April 2015. (As noted above, between 1984 and 1989, Wistari Pty Ltd owned both 27-29 Ivanhoe Street and lot 7 on the plan of subdivision set out above.)

D.2.3.1 Mrs McKendry of Wistari Pty Ltd – the registered proprietor

53 Mrs McKendry explained that Wistari Pty Ltd engaged in some fire mitigation strategies but otherwise let the main part of lot 7 remain as a 'bush block'. However, she knew there were some unlocked gates in the fence, and occasionally saw people walking across the block. She was 'content' for those people to use the land and indicated that consent by 'nodding' at them. Mrs McKendry's evidence established, were there any doubt, that Wistari Pty Ltd considered the main part of the block, at least, to be private land from which it retained the right to exclude people and whose users were doing so with its permission.

54 The situation was, again, however, not so straightforward with the land now known as Stevens Court. Mrs McKendry confirmed that there was a 'sandy track' on Stevens Court even in 1978 and that it was used by the owners of and visitors to both 33 Ivanhoe Street and 27-29 Ivanhoe Street even at that time. Ivanhoe Street itself was an unmade road. Mrs McKendry said that the house on 27-29 Ivanhoe Street was completed before the period of common ownership, but was unable to say when the driveway was built. Mrs McKendry's understanding was that although people did walk into Stevens Court 'willy-nilly', they probably 'should' have sought permission to do so. I conclude that she, or Wistari Pty Ltd as the registered proprietor, considered Stevens Court to be private property and only able to be used by members of the public with their permission.

55 That was not necessarily the case, though, with the occupiers and visitors to 27-29 and 33 Ivanhoe Street. Mrs McKendry's evidence relating to their status at times conflicted. She was aware that the Valmorbidas were using Stevens Court as their driveway and to park their car. When asked whether the Valmorbidas had ever asked her for permission to do so, Mrs McKendry first said she could not recall them doing so and that 'they didn't need to'. She then qualified her assertion that people should have sought permission to use Stevens Court as applying only if those people 'had no right to be there', and gave, as an example by way of contrast, tradespeople that were working at 27-29 or 33 Ivanhoe Street who would be 'in a different category' to 'members of the public'. Later in her cross-examination, however, she

agreed that although she could not recall doing so, it was likely that she gave the Valmorbidas permission to use Stevens Court.

56 Having heard and watched Mrs McKendry giving her evidence, I consider that it was more probable than not that she did not give the Valmorbidas express permission to use Stevens Court. The concession she made was made with what I perceived as some uncertainty and contrasted with the confidence with which she gave her earlier evidence that, although members of the public should have sought permission, the Valmorbidas 'did not need to'. Also, she could recall having a conversation with Mrs Fearon about permission to use lot 7, but could not recall any discussion with the Valmorbidas. The impression I had is that Mrs McKendry knew that the Valmorbidas were using Stevens Court, was content for them to continue to do so because they occupied the block immediately adjacent to it, and felt no need to have any discussion with them about it. In all these circumstances, I conclude that the Valmorbidas were openly using Stevens Court to access their property and to park their cars, that Mrs McKendry (and thus also Wistari Pty Ltd) knew of this, that she was content for them to do so, and that she did not give them permission to do so.

57 I note that Mrs Valmorbida said she had never met Mrs McKendry, but Mrs McKendry said that she had met Mrs Valmorbida on a small number of occasions. Mrs McKendry was able to give an accurate description of Mrs Valmorbida and I prefer Mrs McKendry's evidence over Mrs Valmorbida's in this regard.

D.2.3.2 The 2003 and 2004 proposed renovations

58 It is apparent from material produced by the council in response to a subpoena filed by the defendants that considerable work was done on behalf of the Valmorbidas in 2003 and 2004 with a view to renovating the property at 33 Ivanhoe Street. The issue of the Valmorbidas' access to their property from Stevens Court was raised during that process. The documents produced by the Council included the following:

(a) Some sketches of the existing and a proposed renovated residence dated March 2003 showing the property from Ivanhoe Street. The 'proposed' sketch

showed a driveway from Ivanhoe Street;

(b) An undated planning report prepared for the Valmorbidas by the town planner Matt Ryan following some 'pre application discussions' held with Council officers. It noted in its introduction that 'matters discussed' included the following:

> - Identify the need to provide a legal point of access to the Property. This necessitates access from Ivanhoe Street because access from Stevens Court (although identified on Streets Directory) where there is an access track, may not be a *road*. The current access from Stevens Court to the rear has the advantage of allowing continued informal access from Stevens Court, which may some day be formally declared a road.… Therefore in response to Council Officer's suggestion an alternative access has been provided.

In the balance of the document, Mr Ryan noted that 'Stevens Court appears to be an unmade road providing access to 33 Ivanhoe Parade (sic) and the neighbour at 31 Ivanhoe Parade (sic)'. He then stated:

> However its status is unclear. While it appears to have been intended as an access to the rear land (area about 1.2 Ha) and even has the typical entrance displays, the large rear allotment incorporating Stevens Road is single title, and a access road may not be guaranteed (although it has been used informally for many years).
>
> While creation or confirmation of access in the future would seem to be a desirable planning outcome, it must be presumed until then, that alternative access from Ivanhoe Street is necessary.

(c) Plans drawn up relating to a 1 April 2003 application for 'proposed alterations and extensions' to 33 Ivanhoe Street'. There was also a set of plans in similar form dated 27 June 2003. The plans showed the 'present layout', and what was proposed. They showed the existing access from Stevens Court and marked Stevens Court as an area 'designated as Stevens Court in Melways and Vicmap of Mornington Peninsula'. The plans otherwise acknowledged, by failing to mark any boundary, that Stevens Court formed part of lot 7. Significantly, the 'proposed floor plans' proposed the creation of a gravel driveway that entered from Ivanhoe Street, passed the house parallel to Stevens Court but on the Valmorbidas' land, and ended at an underground

garage at the back of the house. That said, it seems that at least some of the plans anticipated retaining vehicular access to Stevens Court at the rear of the property;

(d) An 11 April 2003 'application for planning permit' signed by the town planner Matt Ryan on behalf of Terry and Delma Valmorbida that attached the various plans;

(e) A 15 July 2003 'advertising checklist' signed by the Council's planner, John Rush;

(f) A 21 November 2003 'internal memorandum' from the Council's planner, John Rush, to the Council's traffic and transport engineer, Mr David Wood, that stated:

- At present egress from the property is thru what appears to be an existing property – the plans indicate the designated area as Stevens Crt in Melways – a site inspection will give more indication;
- The proposal seeks to add a new crossover and driveway to the frontage of Ivanhoe Street (thus creating dual access), is the proposal reasonable or should we look at one crossover only given that the existing one may be sufficient – The area is located near the highest point of Ivanhoe Street and there may be safety issues;

(g) A 26 November 2003 response from Mr Wood where he suggested that the 'status of lot 4, or 'Stevens Court' should be investigated, to determine if the subject property has legal rights of access at this location';

(h) A 18 December 2003 'delegate report', that provided for an approval on 23 December 2003 from the council's consultant planner said to be in response to an application received on 29 April 2003. The report noted that the proposal included a 'new crossing and driveway', that the proposal was advertised, that no objections were received, that the current access was 'via Stevens Court, a narrow stretch of vacant land abutting the site', that the alterations included 'the closing off of the existing gate and access via Stevens Court' and the 'construction of a new crossover off Ivanhoe Street' and the

building of a basement carpark. It also noted the Shire's Traffic Engineer's comments that it would be safer if access could also be maintained from Stevens Court, and that 'the status of lot 4 or 'Stevens Court' should be investigated, to determine if the subject property has legal rights of access at this location'. The report recommended granting the permit subject to 'attached conditions'. (The copy tendered did not have any conditions attached to it.)

(i) A 22 December 2003 email from John Rush, the council's planner, to Matt Ryan, the Valmorbidas' planner, in which Mr Rush said that he had 'called your client, Delma Valmorbida' advising that he had the permit ready, but that the advertising fee had not been paid;

(j) A 23 December 2003 email from John Rush, the council's planner, to Matt Ryan, the Valmorbidas' planner, that said that 'informally, the conditions of permit are drawn up' for consideration the following day. The email noted that the 'plans currently show access to the property from Stevens Court', that 'this has been ascertained as private land', and that therefore the Council was 'unable to endorse any plans that reflect egress from this location'. There was a later email the same day from John Rush, the council's planner, to Matt Ryan, the Valmorbidas' planner, that indicated proposed conditions including 'deletion of the driveway access from the adjoining lot 7 on PS 075564' (that is, Stevens Court'). Mr Ryan responded the same day, saying that the conditions were too restrictive. Mr Ryan's response included the following (some typographical errors have been corrected):

> I have already indicated how to deal with the driveway and that involves flexibility to allow them to not construct any new driveway - no time limit on access construction - so they can continue as is. This is the answer. No one wants to come in the front. They have been using the existing access for 30 years. This is a complete red herring. If the owner of the land denied them access next week then you would have to give them front access as they must be able to get onto their side. If that happened the access would go in and some vegetation would be removed….It will probably never happen but if it does it is a simple 'fact of life' which will be negligible between the existing building with a new driveway and the proposed building with a new

driveway.

(k) An unsigned 24 December 2003 planning permit and a covering letter to the Valmorbidas care of Matt Ryan, that was subject to conditions including that:

> 1. Before the development starts … The plans must show:
>
> 1.1 Deletion of the current driveway access on the adjoining land located on Lot 7 of PS 075564.
>
> …
>
> 1.5 Detail of a revised driveway and crossover from Ivanhoe Street…
>
> …
>
> 11. A vehicular crossing must be provided to the standards of the Responsible Authority prior to the initial occupation of the building.
>
> 12. A driveway must be provided to the land and surfaced to the satisfaction of the Responsible Authority prior to the initial occupation of the building.

(l) A 20 February 2004 council file note for a mediation hearing that sets out part of the above proposed conditions;

(m) A 5 May 2004 drawing described as a 'design response plan amended in response to condition 1 of planning permit', showing a crossover and driveway from Ivanhoe Street;

(n) A 7 May 2004 letter from the Council's planner, Mr Russell Smith, to the Valmorbidas, care of Matt Ryan, that referred to a Victorian Civil and Administrative Tribunal decision dated 26 April 2004, advised that the decision had been varied, and attached a copy of a planning permit issued on 7 May 2004. The 7 May 2004 permit retained the same conditions as those set out in in para (k) above;

(o) A 13 May 2004 letter from Mr Ryan, for the Valmorbidas, to the council attaching varied plans that were said in response to condition 1.1 and which had the driveway from Stevens Court deleted; and

(p) Plans endorsed on 27 May 2004 by the council that provided for access off Ivanhoe Street.

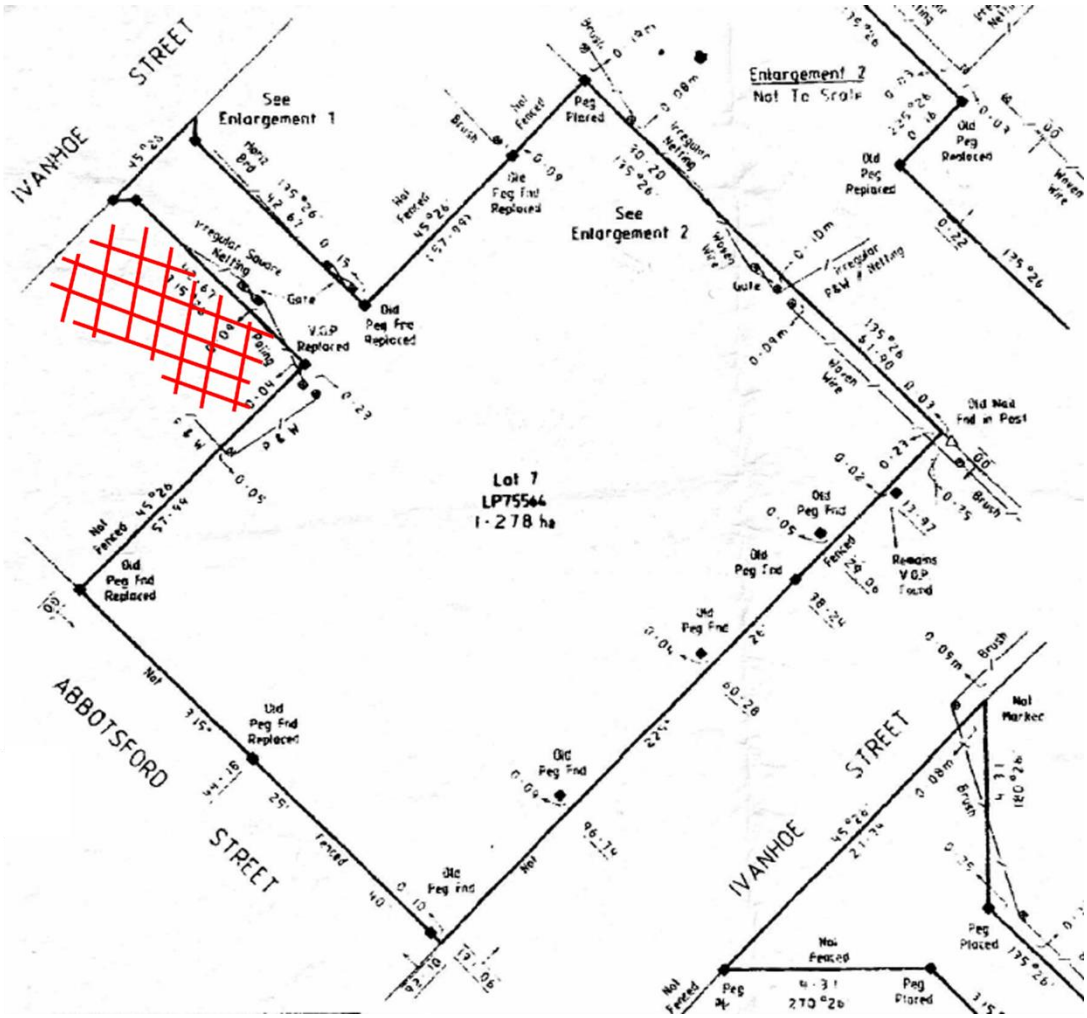
59 The proposed works were not performed. However, these documents reveal that considerable work was done over many months in relation to the proposal and that the question as to whether or not the Valmorbidas had a legal right to use Stevens Court as a means of accessing their property was the subject of consideration.

60 When asked, Mrs Valmorbida said that she could recall that in around 2004 her husband and an architect friend spoke about renovating the property at 33 Ivanhoe Street, but that she was always against it, never agreed to it, was not aware that any application for a permit was made, and that she had not seen the permit before the subpoenaed copy was shown to her in the course of the litigation. Her assertion that she was not aware that an application for a permit was made was in tension with a statement made by her in an affidavit that she and her husband had 'decided not to act on' that permit. When that statement was put to her, she accepted that she and her husband would have discussed the permit at the time but maintained that she had 'dismissed it as irrelevant'. At one time she accepted that she had looked at the plans. On balance, I consider that Mrs Valmorbida's memory of these events is unreliable. I conclude that, with the passage of time, she has forgotten about the extent of her involvement in these events. I do not accept her assertion that she had no awareness at the time of the matters that were set out in the planning materials including the issue that arose as to their entitlement to access their property from Stevens Court. I conclude that at least Mr Valmorbida, and probably also Mrs Valmorbida, were aware, at least from 2003, that Stevens Court formed part of lot 7, was in private hands, was not a road like other roads in the area, and that their right to use it to access their property was at least questionable in the sense that they may well have had no established legal right to do so.

D.2.3.3 The 2010 survey

61 In 2010, Mrs McKendry had lot 7 surveyed. A copy of the survey is set out below (the markings in red identifying the location of the Valmorbidas' block have been

added):



62 Mrs McKendry, on behalf of Wistari Pty Ltd, sent a copy of the survey to Mrs Valmorbida under cover of a letter to Mrs Valmorbida dated 14 September 2010, the material part of which stated:

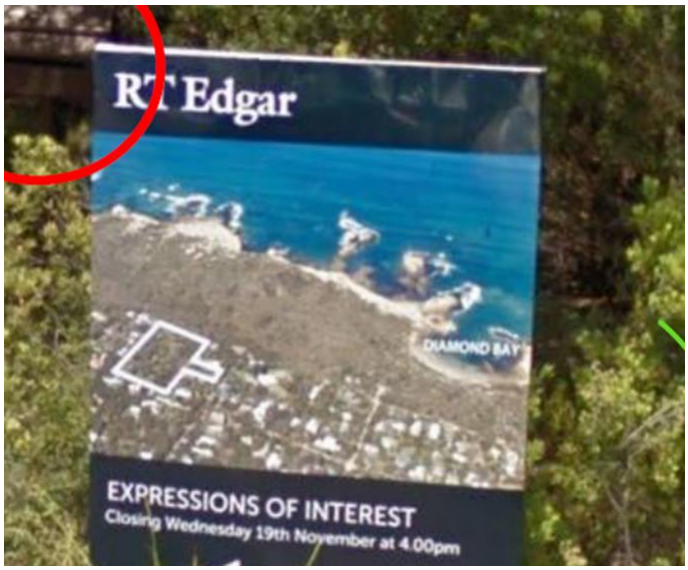
> … our surveyor has indicated to us that the title boundaries and the existing fences on your northern and eastern boundaries do not coincide. The main problem seems to be with the post and wire fence along your rear boundary, which significantly encroaches into our title.
>
> Our surveyor has advised us that we should make you aware of the situation. We do not require any rectification of the present situation: only to point out to you that the fence and title do not agree.

63 Mrs Valmorbida understood when she received this letter that Wistari Pty Ltd was claiming ownership of all the land within the marked boundaries. Stevens Court was clearly within the marked boundaries. The letter and the accompanying plan clearly indicated that the fences encroached into both the main part of lot 7 and

along Stevens Court, and that Wistari Pty Ltd was drawing the Valmorbidas' attention to both. It is conceivable, I suppose, that a letter in these terms could have been sent if Wistari Pty Ltd considered Stevens Court to be private land that had been dedicated to the use of the public. However, in my view this letter instead indicates and communicated to the Valmorbidas a belief on the part of Wistari Pty Ltd that Stevens Court had not been dedicated to the use of the public.

D.2.3.4 The for sale sign in 2004

64 In 2014, Wistari Pty Ltd decided to put lot 7 on the market. That year, a sign was put up on the corner of Stevens Court and Ivanhoe Street directly in front of the Valmorbidas' property. The sign, a copy of which is set out below,[43] clearly identified the outline of lot 7 in a way that included the land now known as Stevens Court. The Valmorbida family had to walk or drive past it to access their property.



65 Ms Daniela Valmorbida became aware that Wistari Pty Ltd was selling its land but said that she believed that it was only the block of land behind her parents' property that was being sold. That is, she contended that she was not aware at that time that the land now known as Stevens Court was also being sold. She said she did not appreciate that there was any issue about the use by them of Stevens Court until October 2021 when Mr Pitard was put in power and she became concerned that he was intending to put in gates.

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43 The red circle indicates the location of the Valmorbidas' letterbox behind the sign.

66 Mrs Valmorbida had no recollection of seeing the sign. She said both that if she had seen the sign she would have remembered it, but also agreed with the proposition that, probably, the family saw the sign and then discussed the impending sale.

67 I conclude that the Valmorbidas saw the sign, and that Mrs Valmorbida has simply forgotten having done so. In my view, the only interpretation that could have been made of that sign is that the land being sold included Stevens Court. Ms Daniela Valmorbida's evidence to the contrary is probably, in my view, a reconstruction by her.

D.2.3.5 The negotiations for the sale

68 In 2014, Wistari Pty Ltd decided to sell. The negotiations for the sale make it clear that Wistari Pty Ltd was well aware that the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street used Stevens Court and might have legal rights to continue to do so. Mrs McKendry was a director of Wistari Pty Ltd at the time although their family accountant and 'trusted adviser' was handing the details of the sale. Communications between those representing Mr Pitard and the estate agent responsible for the sale were tendered. They reveal that:

(a) On 28 October 2014, Wistari Pty Ltd's estate agent called its lawyer and noted that 'the land between lots 3 and 4 is essentially used as a driveway for those lots, even though it is shown as part of Wistari land', and that 'those owners had been using the land in that manner for probably in excess of 30 years'. On 30 October 2014, Mrs McKendry spoke to Wistari Pty Ltd's lawyers acting in the sale about 'implied easements'. On 31 October 2014, Wistari Pty Ltd's lawyers 'updated' the contract of sale and vendor's statement to 'disclose the potential existence of an implied easement in favour of adjoining landowners given that part of the land is essentially used as a shared driveway'. The vendor's statement was amended to provide that 'the vendor advises that part of the land adjoining lots 3 and 4 on LP75564 may be affected by an implied easement of way in favour of the owners of those lots'. The special conditions in the contract of sale were amended to include the following:

4.1 The purchaser acknowledges that the Land is purchased subject to:

4.1.1 all registered and implied easements existing over or upon or affecting the property, including without limitation any implied easement of way that may exist in favour of adjoining owners of land;

…

(b) On 5 November 2014, the agent told Mr Pitard that 'family members' owned lots 3 and 4 and had been using 'the entry to the site to access their properties' and that they 'wish to continue to do so in the future'. Mr Pitard said, and I accept, he was told that the vendors would 'look favourably' on a purchaser who was willing to facilitate their ongoing access. Mr Pitard asked his conveyancer, among other things, to let him 'know what their rights are in doing this once we settle';

(c) On 6 November 2014, Mr Pitard's conveyancer suggested preparing non-assignable licence agreements granting permission to use Stevens Court, and noted that this would protect him against a later claim for adverse possession. Mr Pitard agreed with this suggestion;

(d) Mr Pitard's conveyancer conducted a title search of lots 3 and 4 and found out that they were not owned by directors or secretaries of Wistari Pty Ltd and so concluded that the contract of sale could not be 'made binding' on them. Mr Pitard's conveyancer suggested imposing a condition on the sale that the vendor obtain and provide signed licence agreements from the occupiers of lots 3 and 4. On 19 November 2014, proposed special conditions to that effect were drafted by Mr Pitard's conveyancer and sent to the vendor's agents. The conditions included Mr Pitard's having a right of first refusal;

(e) On 19 November 2014, Mr Pitard made two offers, one for $2.4M with settlement in April 2015, and one for $2.6M with settlement in April 2017. They were made on the basis that the vendor would obtain license agreements signed by Mrs Valmorbida and Mrs McDonald; and

(f) On 25 November 2014, Mr Pitard offered $2.6M with the settlement in April 2015 and without requiring the provision of licences. On 27 November 2014, Mr Pitard's conveyancer advised him that the vendor was including the special conditions set out in para (a) above and that the effect of this was that Mr Pitard could not make any claim or seek compensation against the vendor 'about this'. The contract of sale was then signed.

69 There is nothing to suggest that the Valmorbidas were aware of these communications. These communications do show, however, that, at least by the time of the sale:

(a) Wistari Pty Ltd did not consider that Stevens Court was a public road;

(b) Wistari Pty Ltd considered that the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street (the Valmorbidas) may well have an easement over Stevens Court obtained from their long use;[44] and

(c) Mr Pitard was or should have been aware that the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street (the Valmorbidas) may well have an easement over Stevens Court obtained from their long use.

70 The defendants relied on an earlier sale authority prepared by an agent for Wistari Pty Ltd that indicated that there were no encumbrances on the property. In light of the communications referred to above, however, it is clear that both Wistari Pty Ltd and Mr Pitard were aware that there might be encumbrances associated with the long use by the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street.

71 The defendants placed some emphasis on the fact that Wistari Pty Ltd accepted a higher price for the property on terms that did not require it to obtain licence agreements from the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street. I do not consider that fact to be relevant in circumstances where Wistari Pty Ltd

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44 That Wistari Pty Ltd was aware of this is clear, despite Mrs McKendry's evidence, that she herself did not then know about easements of way.

expressly put Mr Pitard on notice of the fact that the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street might have easements over Stevens Court.

72 These communications also show that Mr Pitard did not give the Valmorbidas any permission to use Stevens Court in a way that would break the twenty-year period of use as of right rather than with the owner's permission.

E. Should the inference of public dedication be drawn?

73 As noted above, Stevens Court will be a public highway if, in all the circumstances, an inference may be drawn that at some point in the past its owner dedicated it as a road for the use of the public, and the public have used it as such.

74 Lot 7 was created with the dimensions it has, and has since been left effectively untouched save for maintenance, with no restrictions on the access to that part of it known as Stevens Court. Even so, however, I am not persuaded, in the circumstances of this case, that Stevens Court has been dedicated as a public highway. I have set out my reasons in Part C.1 above about why I do not consider that the 1967 plan of subdivision alone founds such an inference. I have set out in para 24 above my conclusion that the land known as Stevens Court was designed so that it would provide vehicular and other access to the balance of lot 7. Even when the plan of subdivision and the intended vehicular use is considered together with the subsequent open use of Stevens Court by members of the public, I remain of the view that there has not been, to date, an intention by an owner to dedicate Stevens Court to the public. There was probably an expectation that at some future date the land now known as Stevens Court might well become a public road and be so dedicated. That would likely be the case if lot 7 were to be further subdivided and the land that forms Stevens Court were to connect new blocks to Ivanhoe Street. But, as Mr Pitard's current intentions show, that was not inevitable, and it always remained possible that some other form of development of lot 7 would be undertaken with the land known as Stevens Court remaining land over which the owners reserved the right to exclude members of the public.

75 I conclude that the owners of lot 7 tolerated the use of their land by the public, and

in particular by the occupiers of 27-29 Ivanhoe Street and 33 Ivanhoe Street, but did not intend forever to forego their right to close it off one day to members of the public should they wish to do so. The fact that the owners tolerated the use of the land now known as Stevens Court by the occupiers of lots 3 and 4 might mean that the owners of those lots obtained private easement rights by reason of the legal fiction that applies. That is considered in Part F below. But neither the acceptance of their regular use nor acceptance of the use by other members of the public justifies, in my view, an inference that the land was intended to be dedicated to the public. For so long as lot 7 remained undeveloped, it would be more accurate to describe the use of the land known as Stevens Court by members of the public as use that may be 'ascribed to the tolerance of successive proprietors' than as use 'in the exercise and assertion of a public right'.[45]

76 It is not necessary to consider whether, if there were such a dedication, the dedication had been accepted by the public. But had I found that there were such a dedication, I would have found that use was sufficient to amount an acceptance by the public.

F. Has Mrs Valmorbida satisfied the requirements for an easement over Stevens Court?

F.1 The nature of the use

77 Given my finding that Stevens Court is not a public road, it is necessary to consider whether the Valmorbidas, as the registered proprietors of 33 Ivanhoe Street, have an easement that permits them and those visiting them to use Stevens Court as a means of access to their property and as a place to park vehicles.[46]

78 I have set out in para 60 above my conclusion that at least Mr Valmorbida, and probably also Mrs Valmorbida, were aware, at least from 2003, that Stevens Court

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45 *President of the Shire of Narracan v Leviston* (1906) 3 CLR 846, 857 (Griffiths CJ), citing from *MacPherson v Scottish Rights of Way and Recreation Society Ltd* (1888) 13 App Cas 744, 746.

46 If Stevens Court were a public road, any easement would have been extinguished by cl 14 of sch 5 to the *Road Management Act 2004* (Vic), which states: 'A private … easement cannot … develop or co-exist with a public right of way over the same land …'. That clause is given effect to by s 45(2) of the *Road Management Act 2004* (Vic).

formed part of lot 7, was in private hands, was not a road like other roads in the area, and that their right to use it to access their property was at least questionable in the sense that they may well have had no established legal right to do so. That is, I do not accept that they at all times subjectively believed that they had a legal right to use Stevens Court. It is more likely, given the proposed renovations and communications with the council, that they simply used Stevens Court because they could, indeed had to in light of the configuration of their property, and that they intended to continue to do so at least until such time as someone tried to prevent them from doing so.

79 That, however, is not fatal to their claim for a prescriptive easement. There is no requirement that the user hold a (mistaken) belief that they have a legal right to use land before an easement may arise; it is the nature of the use that informs the question as to whether the owner, by tolerating that use, has acquiesced in it in a manner that, after 20 years, gives rise to a legally enforceable right by the use of the legal fiction of the lost modern grant.[47]

80 The ongoing use of this legal fiction may be open to criticism.[48] Nonetheless, it remains the law that I must apply.[49]

81 Here, the Valmorbidas' use of Stevens Court was open, without force, without permission and therefore as of right.[50] Their use was open because it was regular and visible to anyone who cared to look. The physical layout of their property made it obvious that Stevens Court was being used by them and, were there any doubt, as I concluded in Part D.2.3.1 above, Wistari Pty Ltd, through Mrs McKendry at least,

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47 See *Staughton v Brown* (1875) 1 VLR (L) 150, 160 (Fellows J): '...I would observe that the expression, "assertion of right," cannot mean that the defendant is supposed he had any right — for confessedly he had none – but it means were the acts done in the same open manner that a rightful owner would have done them, or are they done by stealth, and with a view to prevent detection and discovery? In the former case they would amount to possession by reason of the supposed acquiescence of the owner, and in the matter they would be nothing more than trespasses.' Although this case concerned a claim for adverse possession, I consider the same approach applies.

48 See, eg, *Laming v Jennings* [2018] VSCA 335, [196]-[198] (Kyrou, McLeish and Niall JJA).

49 Ibid [81] (Kyrou, McLeish and Niall JJA).

50 See, eg, *Gardner v Hodgson's Kingston Brewery Company Ltd* [1903] AC 229, 238 (Lord Davey).

was in fact aware that the Valmorbidas were using the land now known as Stevens Court in the way they were. Their use was without force because they did not have to overcome any barriers, whether physical, oral or implied by circumstance, to their so using it.

82 Their use was as of right because they used Stevens Court without obtaining permission from Wistari Pty Ltd or any other proprietors exactly the same as if they had the legal right to use it. I have not overlooked the fact that, as noted in Part D.2.3.3 above, in 2010 Wistari Pty Ltd had its land surveyed and drew to the Valmorbidas' attention the fact that their fence encroached into the land now known as Stevens Court. However, asserting the existence of a boundary line is not inconsistent with the existence of an easement which, by definition, involves use of another's property. Had Wistari Pty Ltd 'given permission' to the Valmorbidas to use its land in a way that negated the possibility of their having an easement, I would have expected that to have been noted in that letter. I contrast this with the manner in which Mrs McKendry gave permission to Mrs Fearon to use the gate along the fencing of lot 7.[51]

83 In the circumstances, and in particular given my finding that Mrs McKendry did not discuss the use with Mrs Valmorbida, the better characterisation is that Wistari Pty Ltd acquiesced in the Valmorbidas' use of the land now known as Stevens Court, rather than that it permitted the Valmorbidas to use that land. Or, looked at another way, Wistari Pty Ltd's allowing of the Valmorbidas to use the land, which was never the subject of any actual discussion between Wistari Pty Ltd and the Valmorbidas, amounted to acquiescence.

F.2 The duration of the use

84 Mrs Valmorbida expressly claimed for the period of her use that commenced in October 1996. The 20 year period finished in October 2016. She was cross-examined

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[51] I have set out in paras 56 and 57 that although Mrs McKendry's evidence as to whether she gave the Valmorbidas permission to use Stevens Court conflicted, I formed the view that it was likely that she did not given express permission to the Valmorbidas to use Stevens Court.

about the amount of time she spent there over the years, but I am satisfied that she and her family regularly attended at their house on Ivanhoe Street and regularly used the land now known as Stevens Court in the way described from October 1996. Wistari Pty Ltd sold lot 7 in 2014 which was before the 20 year period had been reached. The purchaser, who acted through Mr Pitard, did not take any steps to interfere with the Valmorbidas' use of the land now known as Stevens Court until 2018, which was after the 20 year period.

85 Under the fiction of the lost modern grant as it has been understood, it is not necessary to establish 20 years of use as against a single owner.[52] In one sense this is counterintuitive. But the easement is a legal right, not an equitable right that arises because it would be in some way unconscionable for the current owner of the burdened tenement to deny its existence. The ability to 'tack'[53] periods of use against successive owners makes sense when it is recalled that the fiction commenced with the notion that the use has been since 'time immemorial', and it could not be assumed that there has been for that duration only one owner of the burdened tenement. The requirement that the use be 'open' reduces the potential unfairness to a recent purchaser of the burdened tenement (and of course, in this case, as I have outlined in Part D above, the purchaser was expressly put on notice by the vendor and purchased the property with actual knowledge that the Valmorbidas were and had been for some time using the land now known as Stevens Court to access their property). Open use, as of right, by the owners of the dominant tenement of their neighbour's land for 20 years can justify the (fictional) inference that the use has all along been pursuant to a granted easement, even if there has been a change of ownership of the burdened tenement during that time. Indeed, ongoing use despite a change of ownership of the burdened tenement may be an indication of use as of right, rather than by permission.[54] The defendants did not submit that the common law principles did not permit the claimant to 'tack'

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52 See, eg, *Auckran v The Pakuranga Hunt Club* (1904) 24 NZLR 235, 240-241 (Edwards J); *Wayella Nominees Pty Ltd v Cowden Ltd* [2003] WASC 210, [230] per Roberts-Smith J.

53 To adopt the word used by Butt in *Land Law* (Thomson Reuters, 7th ed, 2017) [16.470].

54 See, eg, the statement of principle in *Dobbie v Davidson* (1991) 23 NSWLR 625, 629 (Kirby P).

periods of use of land across a change of ownership of the burdened tenement.

86 Further, I am satisfied that there was no change in the nature of the use by the Valmorbidas after lot 7 was sold, and that they continued to use it without any permission from but with the acquiescence of the subsequent registered proprietor, Les Denny (Old) Pty Ltd, who knew or ought to have known of their use.

F.3 Conclusion on the application of the doctrine of the lost modern grant.

87 The Court of Appeal in *Laming v Jennings* raised the possibility that the accepted notion that an owner of a burdened tenement is bound by the acquiescence of this or their predecessors of title might have to be reconsidered.[55] I consider that accepted notion to be in accordance with the principles that apply to the doctrine and that it should continue to apply for so long as the doctrine remains available. But, in any event, as a trial judge hearing this matter at first instance, it is a notion that I must accept. Equally, the Court of Appeal in *Laming v Jennings* suggested that there may need to be a new approach to this area of law in light of the diminishing acceptance of 'the historical rationale of legal fictions'.[56] In both these respects, weight would have to be given to the fact that the Victorian legislature, in contrast to Tasmania, has not decided legislatively (at least explicitly) to oust the principle of the lost modern grant with its attendant common law principles[57] and so some caution might have to be exercised before the Courts decide to effect substantial changes. Again, however, as a trial judge hearing this matter at first instance, I must apply the law as it currently is.

88 Accordingly, I am satisfied that the Valmorbidas used the land now known as Stevens Court, in a way that engages the legal fiction of a lost modern grant, from 1996 for more than 20 years. It follows that the common law requirements for the establishment of an easement to recognise and to permit that use into the future are satisfied.

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55 [2018] VSCA 335, [195].
56 [2018] VSCA 335, [196]-[197].
57 *Land Titles Act 1980* (Tas), s 138I – discussed further below in para 109(c).

89 The issue that now arises is whether the *Transfer of Land Act 1958* (Vic), which is directed at making the register paramount by making registered interests in many respects indefeasible, operates to deny the creation of the easement or to prevent it from being enforceable against the defendants.

G. Does any easement survive the registration of Les Denny (Old) Pty Ltd as registered proprietor on 10 April 2015?

90 The introduction in Victoria of the Torrens system of title by registration did not oust the doctrine of the lost modern grant and that doctrine continues to apply to land in Victoria.[58] Other States have taken a different approach. Whether the doctrine leads to an enforceable easement in a particular circumstance will depend on the terms of the Victorian legislation.

91 Section 42 of the *Transfer of Land Act 1958* (Vic) provides as follow:

> **42 Estate or registered proprietor paramount**
>
> (1) Notwithstanding the existence in any other person of any … interest … which but for this Act might be held to be paramount or to have priority, the registered proprietor of land shall, except in case of fraud, hold such land subject to such encumbrances as are recorded on the relevant folio of the Register but absolutely free from all other encumbrances whatsoever …
>
> …
>
> (2) Notwithstanding anything in the foregoing the land which is included in any folio of the Register … shall be subject to –
>
> …
>
> (b) any rights subsisting under any adverse possession of land;
>
> (c) any public rights of way;
>
> (d) any easements howsoever acquired subsisting over or upon or affecting the land;
>
> …
>
> notwithstanding the same respectively are not specially recorded as encumbrances on the relevant folio of the Register.

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58 *Nelson v Hughes* [1947] VLR 227 (Lowe J); *Laming v Jennings* [2018] VSCA 335, [179]. Cf *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, [129]-[130] (Mason P).

92 The defendants contend that to allow the easement to survive against them would be contrary to the principles underlying the introduction of Torrens system of title by registration where a person purchasing a property is entitled to rely on the Register and its ownership is subject only to interests recorded on the Register. They focus on the position when Les Denny (Old) Pty Ltd became the registered proprietor of the land in 2015. The defendants submit that, on a proper construction of s 42 of the *Transfer of Land Act 1958* (Vic), the exception for easements does not apply because the easement in question had not been 'acquired' by the time that Les Denny (Old) Pty Ltd took ownership of the land because in 2015 the requirement for 20 years use had not then been satisfied. Accordingly, they submit, Les Denny (Old) Pty Ltd acquired ownership of lot 7 free of any easement rights, as did they when they took ownership from Les Denny (Old) Pty Ltd in 2021. They contend that the use of the word 'acquired', emphasising its past tense, means that the easement must subsist at the time of the transfer for the transferee to be subject to it. They relied on generally supportive statements to that effect in *Laming v Jennings*[59] where the Court of Appeal, in dicta, suggested that the phrase 'any easements howsoever acquired subsisting' might not apply to rights that 'are continuing to accrue'.[60]

G.1 The argument based on the word 'acquired'

93 With respect, I find the argument focused on the word 'acquired' unpersuasive. Both s 42(2)(b) and (d) of the *Transfer of Land Act 1958* (Vic) use the word 'subsisting' as qualifying the adverse possessory rights and easements that fall within the proviso, which does convey that the adverse possessory rights or the easement must in fact already exist. In my view, the phrase 'howsoever acquired' does not add a further time element but is instead a broad phrase intended simply to ensure that the exception to indefeasibility applies regardless of how the easement came to be.

94 This is supported by the statutory history. Section 49 of the *Transfer of Land Statute 1866* (Vic) provided as follows:

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59 [2018] VSCA 335.
60 Ibid [189].

> Notwithstanding the existence in any other person of any … interest … which but for this Act might be held … to have priority the proprietor of land … under the operation of this Act shall except in the case of fraud hold the same subject to such encumbrances as may be notified on the folium of the register book … but absolutely free from all other encumbrances whatsoever …. Provided always that the land … shall be deemed to be subject to … any rights subsisting under any adverse possession of such land and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land … and also where the possession is not adverse to the interests of any tenant of the land … notwithstanding the same respectively may not be specially notified as encumbrances on such certificate …

95 This form of words indicated that the exception to indefeasibility applied to easements 'acquired by enjoyment or user or subsisting over' the land. A provision in that form remained in the *Transfer of Land Act 1890* (Vic),[61] the *Transfer of Land Act 1915* (Vic),[62] and the *Transfer of Land Act 1928* (Vic).[63] The *Transfer of Land Act 1954* (Vic) re-expressed the provision, by breaking it up into paragraphs and replacing the phrase 'any easements acquired by enjoyment or user or subsisting over or upon or affecting such land' with the phrase 'any easements howsoever acquired subsisting over or upon or affecting the land.'[64] That phrase was then re-enacted and, as noted above, remains in the *Transfer of Land Act 1958* (Vic).[65] It follows, in my view, that the phrase 'howsoever acquired' should be seen merely as a simple replacement for the phrase 'acquired by enjoyment or user', and its introduction was not intended to add any additional requirement, if one were not already found in the legislation, that the land must have been used for the necessary period to establish an easement prior to the registration of a new proprietor.

96 The more difficult question, in my view, is whether the same result should flow from the language more generally including the use of the word 'subsisting', which, I accept, conveys that the exception will only apply if it is established that an easement already exists.

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61 Section 74.
62 Section 72.
63 Section 72.
64 Section 42(2)(d).
65 Some other minor and inconsequential amendments were made to the wording of s 42 by the *Transfer of Land (Computer Register) Act 1989* (Vic) ss 75- 76.

G.2 Can the period required to establish the easement span a change in registered proprietor?

G.2.1 The relevance of the exception that applies for adverse possession

97 As set out above, s 42(2)(b) of the *Transfer of Land Act 1958* (Vic) excepts from indefeasibility 'any rights subsisting under any adverse possession of land'. The reference to 'rights' subsisting under any adverse possession is somewhat surprising because, strictly, a 'right' to stay in possession against the paper title owner derives only from the expiration of a limitations defence to an action for possession.[66] Further, the limitations statutes themselves do not use the phrase 'adverse possession'. As observed by Fellows J in *Staughton v Brown*:

> … it is impossible to construe the word "rights" and the word "adverse" in their ordinary and proper sense, because no "rights" ever did or could "subsist under any adverse possession"… I therefore come to the conclusion that the word "adverse" must be read in its popular sense. "*The Transfer of Land Statute*" is far from technical, and I am of the opinion that when the wrong man is in, and the right man is out of, possession, the possession is "adverse" within the meaning of that Act.[67]

98 That said, the *Real Property Statute 1864* (Vic), which was in place at the time that the *Transfer of Land Statute 1866* (Vic) was enacted, did provide that on the expiration of the limitation period the 'right and title' of the person 'to the land … for the recover whereof such … action … might have been made … shall be extinguished'.[68]

99 Be that as it may, it seems to be accepted that this exception applies even when the property has been transferred during the period required to establish a claim in adverse possession. Moore, Grattan and Griggs in '*Australian Real Property Law*' suggest that 'the better view' is that the drafters of the legislation intended that 'an adverse possessor of Torrens land should be in the same position as an adverse possessor of general law land'.[69] They suggest that the phrase 'rights subsisting under any adverse possession of land' includes 'inchoate possessory rights' as well

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66 See, eg, s 18 of the *Real Property Statute 1864* (Vic): 'After the passing of this Act no person shall … bring an action to recover any land … but withing fifteen years next after the time at which the right to … bring such action shall have first accrued …'.

67 (1875) 1 VLR (L) 150, 159.

68 Section 43.

69 (Thomson Reuters, 7th ed, 2020) [3.390].

as 'possessory rights which have developed with the effluxion of time into the bests interests in the world'. In this way, it can be said that (inchoate) rights are 'subsisting', even if the full time period has not yet been reached,[70] with the result that the necessary period of possession may span a change in registered proprietor. The authors of '*Sackville & Neave: Australian Property Law*' agree.[71]

100 So far as I am aware, however, it has not been determined by the Court of Appeal that this is the position. I note that in New South Wales the legislature has intervened and provided that 'a possessory application may not be made' if 'the whole of the period of adverse possession that would be claimed in the application if it were lodged would not have occurred after that proprietor became so registered.'[72] On the other hand, the legislature in Tasmania has explicitly extended the exception to indefeasibility to 'rights ... in the course of being acquired' under a statute of limitations.[73] Victoria has done neither.

101 The apparent acceptance that claims to adverse possession are not defeated by a change of registered proprietor during the relevant period is broadly of assistance to the Valmorbidas because it assumes a system whereby a newly registered proprietor may find their title affected by an unregistered interest shortly after purchase. It removes the suggestion that s 42 of the *Transfer of Land Act 1958* (Vic) is designed to ensure that a registered proprietor is never affected by developing claims in relation to land that are not recorded on the register at the time of purchase. Possibly, the

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70 In *Robertson v Keith* (1870) 1 VLR (E) 11, the plaintiff had purchased land and taken possession of it but had not become a registered proprietor. Four years later, a judgment creditor of the person who sold the land to the plaintiff obtained a writ by which the sheriff sold the land to the defendant and the defendant became the registered proprietor. The defendant sought to eject the plaintiff. The plaintiff successfully applied for an injunction to prevent the defendant from ejecting him and sought to become the registered proprietor. Molesworth J did not rely on the exception for adverse possession, because the plaintiff's possession was not 'adverse' at the time of the transfer of the land to the defendant. Molesworth J concluded that the plaintiff was a 'tenant', and was able to rely on the exception for a tenant in possession that is not adverse. But the case suggests that, had the possession been 'adverse' to the interests of the vendor, then the exception might have applied even if the possession had not been for the fifteen-year period required to establish a limitations defence.

71 Edgeworth, Rossiter, O'Connor, Godwin and Terrill, *Sackville & Neave: Australian Property Law*, (LexisNexis, 11th ed, 2020) [5.142]. See also Fiona Burns, 'Adverse Possession and Title by Registration Systems in Australian and England' (2011) 35 *Melbourne University Law Review* 773.

72 *Real Property Act 1900* (NSW) s 45D(4).

73 *Land Titles Act 1980* (Tas) s 40(3)(h). See also ss 138W(2), 138W(4) and 138W(6).

defendants focused on the word 'acquired' in order to provide a textual reason for drawing a distinction between the exception for claims for adverse possession and claims for easements by lost modern grant, because both exceptions use the word 'subsisting'. But, ultimately, I consider that theoretical underpinning of claims based on adverse possession and the language used in its exception are sufficiently different from the theoretical underpinning of claims based on the lost modern grant and the language used in the exception for easements that the cases that consider the exception for adverse possession are of little assistance in determining the scope of the exception for easements obtained by lost modern grant.

G.2.2 The application of the legislation to easements established by the fiction of the lost modern grant

102 The defendants' submission, as I see it, proceeds on a premise that s 42 of the *Transfer of Land Act 1958* (Vic) is directed at protecting a registered proprietor from any 'developing' interests not on the register as at the time of purchase. This argument has support in the sense that that is, indeed, part of what the Torrens system of land registration is designed to achieve. Consistently with their argument, s 43 of the *Transfer of Land Act 1958* (Vic) provides that a purchaser is not 'required or in any manner concerned to inquire or ascertain the circumstances under ... any previous proprietor was registered … or shall be affected by notice actual or constructive of any … unregistered interest'.

103 The issue that arises, however, is whether that premise is correct in the case of interests in land that are understood to arise at common law as a result of prolonged use both before and after a change of registered proprietor and where those interests are exceptions, or possible exceptions, to the principle of indefeasibility of title.

104 Section 43 of the *Transfer of Land Act 1958* (Vic) can certainly protect a purchaser from equitable claims that might otherwise be made, but it is not clear how it would apply to the situation where an easement interest arises at law if there is open use for the necessary period without any additional requirement, in terms, that the registered proprietor otherwise have notice and where it cannot be said, prior to the effluxion

of the necessary period, that there is 'an unregistered interest'.

105 The defendants' argument is that time must 'begin again' every time there is a change of ownership. They would accept that if they (or the predecessor related company) had become registered proprietors two years later, the Valmorbidas would have an easement that was enforceable against them notwithstanding that it was not recorded on the register.[74] They necessarily draw a distinction between the situation where they (or the predecessor related company) became registered at the 18-year mark and thereafter acquiesced in a further two years' of ongoing use, and a situation where they (or the predecessor related company) became registered after the 20-year period had already expired. Their argument would accept that an enforceable easement arises in the latter situation, but denies that an enforceable easement arises in the former situation. As a matter of broad policy, it is difficult to justify the existence or not of a common law right arising out of open use of land, even one based on a statutory fiction, depending on such accidents of timing. And here, of course, the purchasers were well aware that the use was long-standing and ongoing and allowed that use to continue until the 20-year period was met.

106 There are, in my view, three problems with the defendants' argument. The first is that it fails adequately to acknowledge the fact that, in Victoria, the legislation has deliberately removed easement interests, of all types, from the purchaser's ability to rely on the Register as a complete record of legal interests in the property at the time of purchase. Quite simply, in Victoria, easements are an exception to the principle of indefeasibility of title. The possibility that a registered proprietor may be bound by an easement that is not recorded on the title is an inevitable consequence of the existence of that exception.

107 The second is that it treats s 42 of the *Transfer of Land Act 1958* (Vic) as if its purpose were to establish the legal situation as at the time of a transfer of land rather than establishing the situation at all times including the time at which a dispute arises.

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74 Assuming, of course, that the other requirements were satisfied.

Section 42 of the *Transfer of Land Act 1958* (Vic) does not forever fix the registered proprietor's rights as at the date of purchase. It does not say, for example, that a newly-registered proprietor holds the land thereafter free from any encumbrances not recorded on the register as at its moment of registration as proprietor. Rather, in my view s 42 is an ambulatory provision, in the sense that it states the legal situation at any particular time: a registered proprietor holds land free of any encumbrances not recorded on the Register except for, among other things, any easements howsoever acquired affecting that land. It is correct to say that, as at the time of transfer, Les Denny (Old) Pty Ltd acquired the registered interest free of any easements, because, at that time, there were no subsisting easements. But once it is accepted that time can continue to run at common law for the purpose of a claim for an easement under the principle of the lost modern grant against a purchaser of a property, and that the principles of that doctrine continue to apply in Victoria, and easements are an exception to indefeasibility of title, there is no reason to freeze the legal position as between the parties as at the time of sale or to 'reset' the years back to zero.

108 The third is that it fails adequately to accommodate the legal fiction that, when the criteria are satisfied, it is assumed that an easement was granted more than 20 years previously.

109 The position in Victoria, where easements 'howsoever acquired' are an exception to indefeasibility without any limits imposed on that exception other than that the easement be 'subsisting', may be contrasted with the situation in other Australian States where the exception has been removed or substantially narrowed:

(a) In New South Wales, s 42(1a) of the *Real Property Act 1900* (NSW) provides that the exception to indefeasibility for easements only applies to an 'omitted or misdescribed' easement 'subsisting immediately before the land was brought under' the provisions of the Act. The New South Wales legislature therefore has substantially narrowed the exception by effectively precluding prescriptive easements that evolve when the land is already under the

Torrens system.[75]

(b) In Queensland, s 82 of the *Land Titles Act 1994* (Qld) provides that an easement may only be created by registering an instrument of easement. Section 185(1)(c) provides an exception to indefeasibility of title only if the 'particulars' of an easement 'have been omitted from, or misdescribed in, the freehold land register'. Under s 185(3)(a), that test is relevantly satisfied only if 'the easement was in existence when the lot burdened by it was first registered'. The Queensland legislature has also in this way substantially removed the easement exception for land that is under the Torrens system.

(c) In Tasmania, s 138I of the *Land Titles Act 1980* (Tas) abolishes the 'rule of law known as the doctrine of the lost modern grant for the acquisitions of easements'. Section 138J(1) provides that a person who has 'exercised rights which may amount to an easement at common law for a period of not less than 15 years may apply for an order vesting an easement in respect of those rights in the person'. It, therefore, has replaced the common law principles with a statutory application process.

110 The situation is more complicated in other States, where there is more room to argue, as there is in Victoria, about the extent of the exception.[76] Nonetheless, the three examples given above highlight how broad and openly-expressed the exception to indefeasibility is for easements in Victoria.

111 The defendants' argument, as noted above, reduces, substantively, to an attack on

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75 See *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286, 297-300 [112], [127], [129].

76 In South Australia, s 84 of the *Real Property Act 1886* (SA) provides that no easement created by 'express grant or transfer' is binding on a registered proprietor taking the land bona fide for valuable consideration unless it is entered on the certificate. It is arguable whether this would apply to an easement under the fiction of the lost modern grant. In Western Australia, the position seems to be similar to that in Victoria – see s 68(1A) of the *Transfer of Land Act 1893* (WA) and s 2 of the *Prescription Act 1832* (WA). I put to one side the argument that if there is the one owner of the burdened tenement for the full twenty year period, the claim is an *in personam* claim and thus outside the indefeasibility provisions, because that situation does not arise here. Cf *Golding v Tanner* (1991) 56 SASR 482, 484-6 (King CJ).

the proposition, accepted at common law, that the doctrine of the lost modern grant allows use during a period with one registered proprietor to be 'tacked' onto use during a period with a second registered proprietor in order to establish the required 20 years' use. However, unlike Tasmania, where s 138I of the *Land Titles Act 1980* (Tas) provides that 'the rule of law known as the doctrine of the lost modern grant for the acquisition of easements is abolished', the Victorian legislation has not sought, at least expressly, to remove or to alter the rule of law known as the doctrine of the lost modern grant for the acquisition of easements. Nor has it, unlike in New South Wales and Queensland, sought to limit the exception to indefeasibility for easements to easements in existence as at the time the relevant land became part of the Torren-system.

112 In my view, the issue in dispute should be expressed in terms of the position now, rather than the position at the time of transfer: can the defendants, now, rely on s 42 of the *Transfer of Land Act 1958* (Vic) to defeat the Valmorbidas' claim to an easement arising from 20 years of open use? In my view they cannot. Once the 20-year period ended in 2016, there emerged, at common law, an easement 'subsisting' over the land now known as Stevens Court. Accordingly, from that time, there has been a subsisting easement, and so the exception to indefeasibility has been engaged. Indeed, under the legal fiction, as at today, there has always been an subsisting easement.

113 For these reasons, I conclude that the defendants now hold lot 7 subject to an easement of way in favour of lot 4 over the land now known as Stevens Court that is enforceable against the defendants notwithstanding that it is not recorded on the Register because it is a common law easement that has been acquired and that is subsisting over that land and thus falls within the exception to indefeasibility of title contained in s 42(2)(d) of the *Transfer of Land Act 1958* (Vic).

114 If there is unfairness to the defendants, it is unfairness that arises from the deliberate choice of the legislature to exempt from the principle of indefeasibility of title easements obtained under the legal fiction of the lost modern grant.

H. Disposition

115 The application for a declaration that the land now known as Stevens Court is a public highway will be dismissed. I will make orders that give effect to my finding that lot 4 enjoys an easement of way over the land now known as Stevens Court. The defendants' counterclaim will be dismissed.

116 I will otherwise hear the parties on the precise form of order and on the question of costs.

SCHEDULE OF PARTIES

S ECI 2022 01764

DELMA ANNE VALMORBIDA	Plaintiff/ Defendant by Counterclaim
-and-	
LES DENNY PTY LTD (ACN 652 661 955)	First Defendant/ First Plaintiff by Counterclaim
EVIE PITARD PTY LTD (ACN 652 661 679)	Second Defendant/ Second Plaintiff by Counterclaim
CHLOE PITARD PTY LTD (ACN 652 661 651)	Third Defendant/ Third Plaintiff by Counterclaim
HUNTER PITARD PTY LTD (ACN 652 661 795)	Fourth Defendant/ Fourth Plaintiff by Counterclaim