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:	On the papers, following judgment given on 23 November 2023
DATE OF RULING:	21 February 2024
CASE MAY BE CITED AS:	Valmorbida v Les Denny Pty Ltd (Form of Easement and Costs)
MEDIUM NEUTRAL CITATION:	[2024] VSC 51

PROPERTY – Where easement of way has been established by long use – Scope of easement – Where easement of way includes a right to park – Where no reason to assume existence of right of way unreasonably restricts use of the servient tenement – Liberty to apply – *Maurice Toltz v Macy's Emporium* [1970] 1 NSWR 474.

COSTS – Apportionment of costs – Where plaintiff was successful on issue plead later in the proceeding – Where evidence led by plaintiff was relevant to both the issue it succeeded on and the issue it failed on – Where offers were made by plaintiff on the issue that it failed on – *Calderbank v Calderbank* (1975) 3 All ER 333 – *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435.

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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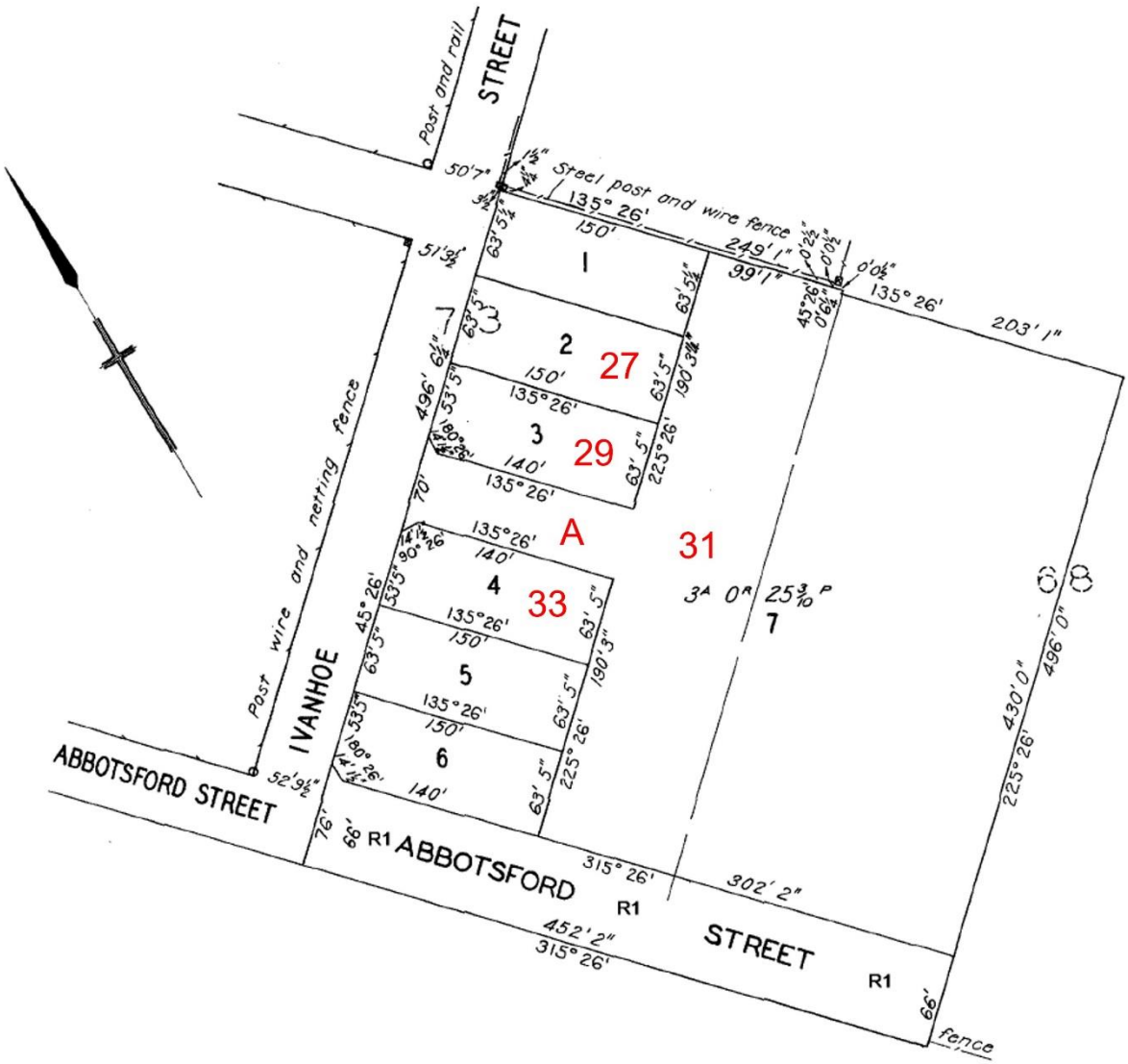
HIS HONOUR:

A. Introduction

1 In reasons published on 23 November 2023,[1] I expressed my conclusion that the defendants hold lot 7 on a plan of subdivision (now known as 31 Ivanhoe Street) subject to an easement of way in favour of lot 4 on that plan of subdivision (now known as 33 Ivanhoe Street) over the land now known as Stevens Court. For convenience, I set out below a plan identifying those blocks of land. The land now known as Stevens Court is that part of lot 7 marked 'A'.



2 The easement was established from long use under the common law doctrine of the lost modern grant. I did not accept the plaintiff's claim that the land now known as

[1] [2023] VSC 680.

Stevens Court was a public highway. These reasons concern the form of order required to give effect to that easement, and costs.

B. The appropriate form of order

B.1 To park or only to access?

3 The plaintiff sought in her amended statement of claim a declaration that 33 Ivanhoe Street enjoys an easement of way over Stevens Court and an easement to park vehicles in Stevens Court, and an order directing the defendants to prepare and register an amended title plan including that easement of way and/or parking. The defendants submit that the easement found was only an easement of way, and not an easement to park vehicles. That submission is based on a paragraph in my reasons where I expressed my conclusion in terms only of there being an easement of way.[2]

4 That, however, is not an accurate summary of the findings I made. My reasons focused on the plaintiff's 'use' of the land now known as Stevens Court and whether that use was as of right or with permission and whether it could be said that the owners of lot 7 acquiesced in that use. I accepted that 'the Valmorbidas were openly using Stevens Court to access their property and to park their cars'.[3] My central conclusion was later expressed in these terms:

> 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.[4]

5 That use, on the evidence, included parking in Stevens Court. The evidence that persons using Stevens Court to access lot 4 regularly parked on Stevens Court was not challenged, and nor could it sensibly have been challenged. That an easement of

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2 Ibid [113].
3 Ibid [56].
4 Ibid [88].

way may include a right to park vehicles is not disputed.[5] Further, the defendants did not, in their final address, seek to draw a distinction between an easement limited to a right of way and an easement that included a right to park vehicles. In their written submission, they set out the plaintiff's claim for a declaration that 33 Ivanhoe Street enjoys 'an easement of way over Stevens Court' and 'an easement to park vehicles in Stevens Court' and criticised that claim as being 'too broad'. But the claim was not said to be too broad because it included a right to park. Rather, it was said to be too broad because any such easement could not extend 'over the whole of Stevens Court'. Further, in their argument against the finding of an easement they relied on some evidence given by a witness called by them, Ms McKendry, that she had given the plaintiff 'permission to use Stevens Court ' for parking'.

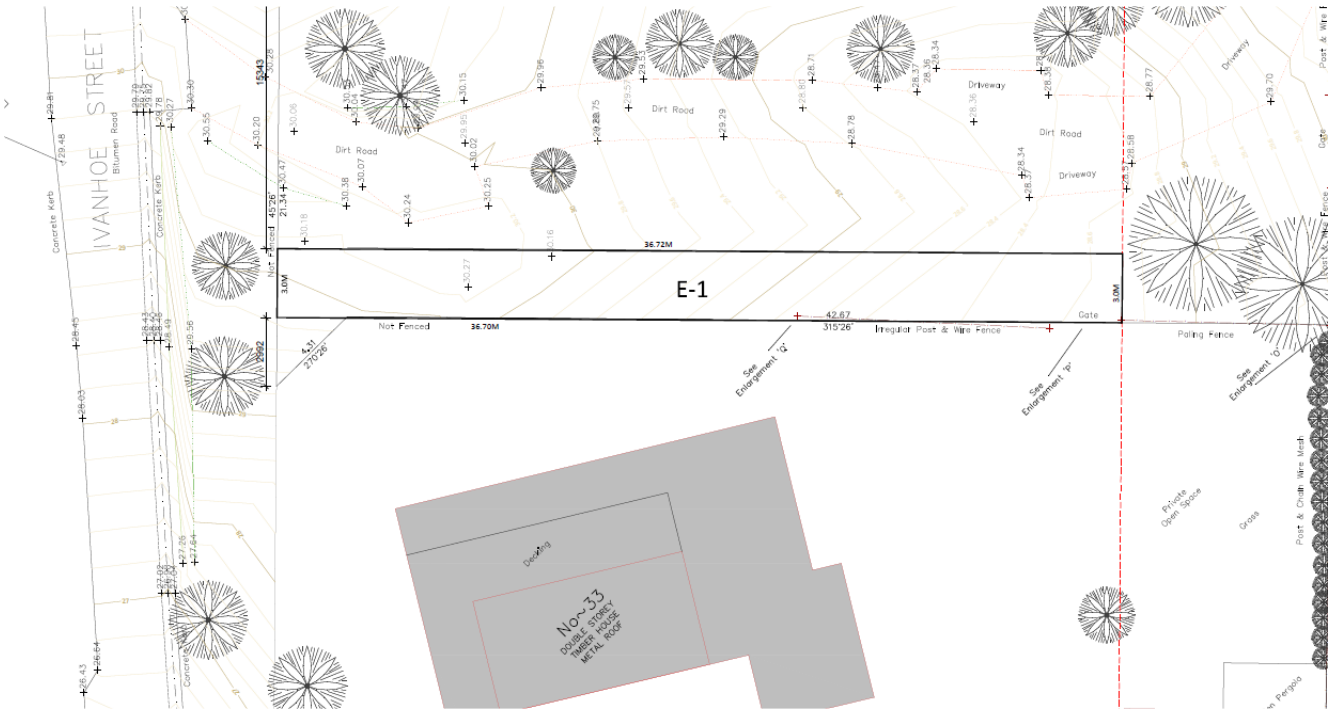
6 For the above reasons, the easement that I have found existed includes a right in the plaintiff and her invitees to park vehicles on Stevens Court.

B.2 What part of Stevens Court?

The plaintiff sought an order that identified the easement in accordance with the following marked photograph, with the right to park limited to the hatched areas:

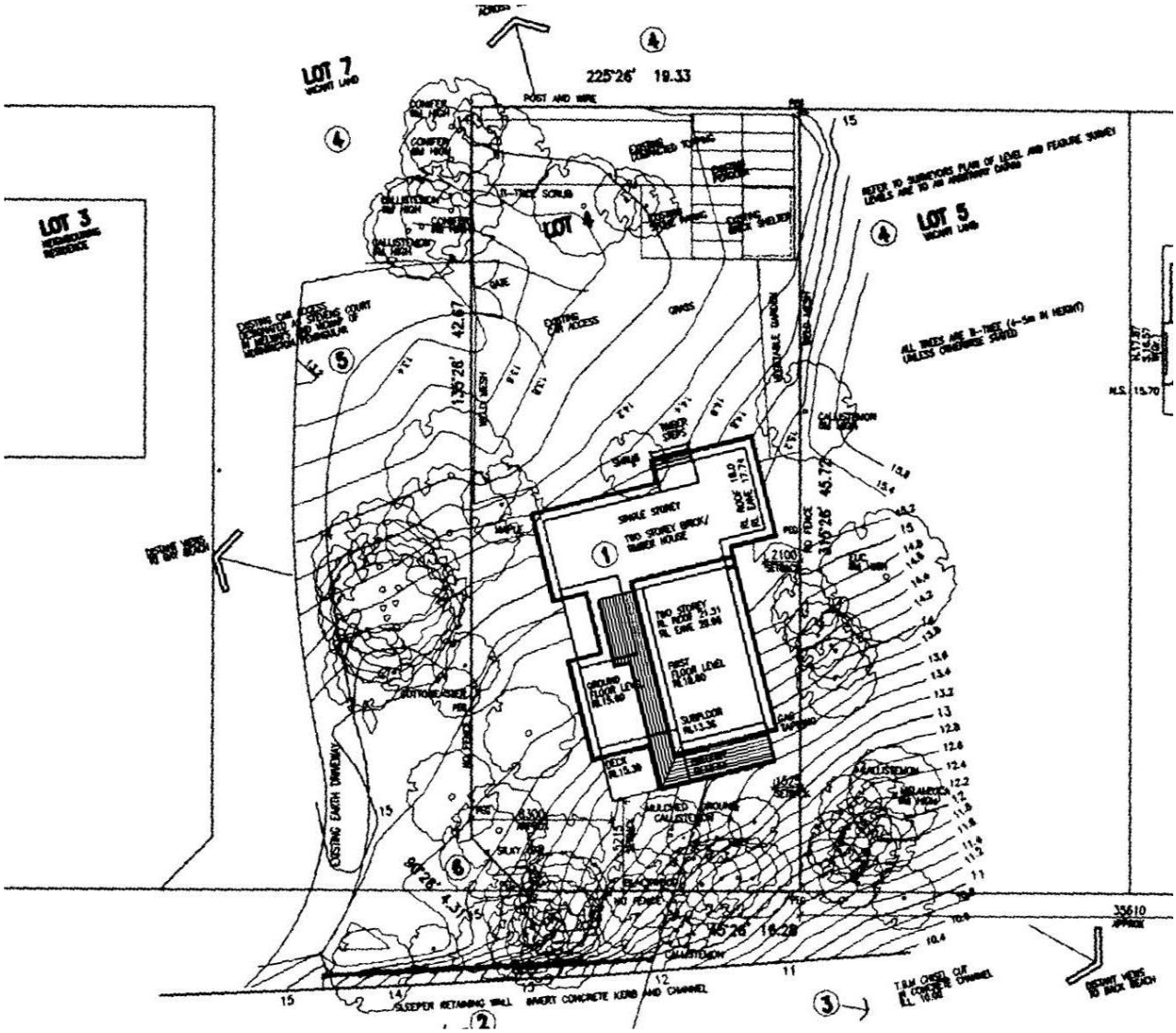
5 See, eg, *Wilcox v Richardson* (1997) 43 NSWLR 4, 15F (Handley JA); *Owners of East Fremantle Shopping Centre West Strata Plan 8618 v Action Supermarkets Pty Ltd* (2008) 37 WAR 498, 512 [57]. It may be different if the right to park would deprive the servient owner of any reasonable use of their own land, but that is not this case. See, eg: *Batchelor v Marlow* [2003] 4 All ER 78, 80-81[8]-[15] (Tuckey LJ); *Virdi v Chana* [2008] EWCH 2901 (Ch), [15] (Judge Purle QC); *Moncrieff v Jamieson* [2007] 1 WLR 2620, 2632 [38] (Lord Hope of Craighead), 2647-2648 [76] (Lord Rodger of Earlsferry), 2663 [139] (Lord Neuberger of Abbotsbury), cf 2642-2643 [59] (Lord Scott of Foscote).

7 The defendants instead sought an easement consisting of a three metre strip in Stevens Court alongside the first 36.7 metres of its boundary with lot 7. They produced the following diagram:



8 There was little evidence that dealt with the precise areas of Stevens Court that was used to access lot 4 and or that justified the precise dimensions set out in the plaintiff's proposal. The best evidence of actual use, in my view, comes from plans that were prepared in April 2003 when the Valmorbidas were considering making

alterations to their property, including the plan set out below:



9 The bottom left hand corner of that plan shows what it describes as an 'existing earth driveway' that joins Ivanhoe Street adjacent to a 'sleeper retaining wall'. I am satisfied from this plan, the photographs tendered, the view that was undertaken and the evidence generally that the plaintiff (and her invitees) used that part of Stevens Court that is marked as the 'existing earth driveway' to access the plaintiff's property, and that vehicles were parked in the areas immediately in front of her front and rear gates.

10 The defendants' proposal, therefore, bore little relationship to the past actual use. They accepted that their proposal would require earthworks to be undertaken to create an access point where their proposed easement meets Ivanhoe Street, and

offered to pay for those works. They also supported the feasibility, or appropriateness of, their proposal by reference to an offer earlier made by the plaintiff in an attempt to resolve the proceeding.

11 For the above reasons, were I obliged to identify the easement by that past actual use, I would conclude that an easement should be declared generally in the form of that proposed by the plaintiff, rather than in the form proposed by the defendants. However, that said, I accept that the proposal put forward by the defendants is probably a more 'sensible' solution to the problem, in that it would, ultimately, after necessary earthworks had been done, allow continued vehicular access to lot 4 while minimising the interference with the defendants' use of the balance of Stevens Court.

12 I raised with the parties whether it was necessary for me to identify the precise dimensions of the easement, and what they submitted I ought to order in the event that I considered that the version put forward by the plaintiff was more in accordance with the evidence led as to past usage but the version put forward by the defendant was 'fairer'. The defendant submitted that I should 'determine the scope of the easement by reference to questions of reasonableness', and that their proposal was the more reasonable proposal and so should be adopted. The plaintiff submitted that if I were not prepared to make an order in accordance with their initial proposal, I should instead declare a 'general easement'.

13 In my view, it is neither necessary nor desirable that I delineate in my orders any particular part of Stevens Court over which the plaintiff has an easement. The doctrine of the lost modern grant does not work like a claim in adverse possession, where a precise area of land has been occupied. Rather, it operates by assuming, as a legal fiction, that an easement has been granted that explains or justifies the prolonged past use. Equally, a right of way may be established by long use without that use having always been over the precise same path through the servient tenement.[6] Accordingly, there is no reason to assume the existence of a grant that

6 *Davis v Whitby* [1974] 1 Ch 186.

contains unnecessary detail or that restricts, more than necessary, the rights of the owner of the servient tenement to an identified path;[7] because a party may enjoy a right of way over another's land without the precise path being forever fixed, the past use of the land by the plaintiff could be justified by a past grant of an easement expressed in general terms. In the circumstances of this case, the fiction is that the owners of lot 7 granted an easement in favour of lot 4 that permits the owners of lot 4, and their invitees, to access lot 4 (including where their rear gates are) across the land known as Stevens Court and to park their vehicles on Stevens Court. There is no need to assume that the grant gave the owners of lot 4 the right to pass over or to park on all, or any particular parts of, lot 7.

14 *Maurice Toltz v Macy's Emporium*[8] is a good example of this principle. The tenant of the second floor of a commercial building was given a right to access, among other things, internal stairs that opened from the ground floor. The occupier of the ground floor sold furniture and other homewards and disputed the enforceability of the easement. Hope J said as follows:

> The lease does not indicate how over the ground floor the means of access is to go, i.e., it is not limited to any particular strip on the ground floor, but it must have been intended to have been a right to go from the bottom of that stairway both to the Pitt Street entrance and to the Wilmot Street entrance of the building. This, in my opinion, is the clear and necessary construction of the expression "for access and egress from the demised premises". Consequently, the grant of the access, so far as regards what I have described as a general ground floor area, was from the foot of the stairway to the Pitt Street entrance and to the Wilmot Street entrance, not over any specified or identified route, but just generally across intervening area of the ground floor.
>
> Can there be an easement of this character under the general law? I think, having regard to the authorities, that there can. In *Wimbledon and Putney Commons Conservators v Dixon* (1875), L. R. 1 Ch. D. 362, at p. 369; [1874-80] All E.R. Rep 1218, at p. 1221, Mellish, L.J. said: "Suppose the owner of this common had granted by deed to Mr. Dixon the right to go from the gate leading out of Caesar's Camp to the highway by the National School with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise

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7 Analogously to the concept that an easement obtained by the doctrine of the lost modern grant cannot permit use of a changed nature or different in scope to the past use: *Maher v Bayview Golf Club Ltd* (2004) 12 BPR 22,457, 22,473, [57] (Campbell J).

8 [1970] 1 NSWR 474 (Hope J).

> definite track between the one terminus and the other in which he was to go in using the right-of-way. If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it and so forth."
>
> …
>
> Accordingly the grant in the present case was a grant to go from the foot of the stairway to the entrances I have described, over any part of the second floor area, subject to the right of the lessor to confine the way to a reasonable route and a reasonable area. Having regard to the nature of the ground floor and the purpose for which it was used, it is clear that the lessor could store his furniture or place his furniture at various places over that ground floor which might vary from time to time, but he was required to leave sufficient way for the plaintiff to go from the two entrances to the foot of the stairway.[9]

15 Accordingly, I will not include in my declaration any plan setting out the path that that the owners of lot 4 must follow but will instead express the easement in general terms.

16 It follows that the owners of lot 7 remain able to do such works on the land known as Stevens Court as they wish (subject of course to any necessary permits being obtained) so long as they do not unreasonably restrict the right of the owners of lot 4 and their invitees to use lot 7 for access to their front and rear gates and for reasonable parking. It may be that the defendants are, for example, able to install fences or other obstacles that prevent the plaintiff from using any part of Stevens Court other than that part of Stevens Court that the defendants identified in their submissions as the area of their proposed easement. Whether or not the defendants may do so will depend on whether that would unreasonably restrict the plaintiff's enjoyment of the easement. That would be a question for another day but, I observe, that it would very likely unreasonably prevent access unless the earthworks were first performed that would allow a crossover into Ivanhoe Street where there is presently a retaining wall.[10]

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9 Ibid 480.

10 It may also depend on whether the defendants are able to perform those earthworks without obtaining the plaintiff's permission, if it would require work on the plaintiff's property, as to which I

C. Costs

C.1 Apportionment of costs having regard to mixed success

17 The plaintiff failed in her principal case that Stevens Court was dedicated as a public highway. She succeeded in her alternative case that she had an easement by reason of long open use.

18 The plaintiff did not bring the claim for an easement when the proceeding was commenced on 13 May 2022. The initial statement of claim was limited to the claim that Stevens Court was a public highway. The alternative case that there was a prescriptive easement over Stevens Court was introduced by an amendment to the statement of claim dated 27 April 2023 and filed on 9 May 2023. Up until that date, the only claim being prosecuted was the claim on which the plaintiff failed.

19 The defendants did not submit that a separate costs order should be made for the period prior to 9 May 2023. Instead, they submitted that, having regard to the matters set out immediately above, the plaintiff should have only 25% of her costs. The plaintiff submitted that she should receive her costs without there being any reduction to take into account either her partial success or the fact that the easement claim was not introduced until 9 May 2023.

20 The plaintiff substantially succeeded in the sense that she established an easement and defeated the defendants' counterclaim for a declaration that she had no right to use Stevens Court. Accordingly, the plaintiff should have a costs order in her favour. However, in assessing what costs order should be made, in my view it is appropriate to take into account both the plaintiff's failure on her argument that Stevens Court was dedicated as a public highway and the fact that the claim on which she succeeded was not introduced until 9 May 2023.[11] The claim that Stevens Court was a public highway was conceptually discrete and a significant part of the written and oral argument was directed to that issue. I reject the plaintiff's submission that the two claims were 'alternative legal characterisations of the same

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say nothing.

11 See *Chen v Chan (No 2)* [2009] VSCA 233, [10] (Maxwell P, Redlich JA and J Forrest AJA).

issue': one depended on dedication by the registered proprietor of lot 7, and the other depended on the use and circumstances of use by the registered proprietor of lot 4. Further, the easement claim was limited to use of Stevens Court as from 2 October 1996, and so some of the evidence led that related to the use of Stevens Court prior to that date was relevant, really, only to the public highway claim.

21 On the other hand, I am satisfied that much of the evidence that was led was relevant to, and would properly have been called, even on the easement claim. The use more broadly of Stevens Court by neighbours and other persons, at least since 1996, was also material that went generally to the issues such as whether the defendant had acquiesced in use by the plaintiff and her invitees. It is appropriate that the plaintiff receive all the costs associated with the calling of that evidence, even though it was also relevant to the claim that Stevens Court was a public highway.

22 The extent to which the bringing of the public highway claim added to the costs that would have been incurred in any event in relation in the prosecution of the easement claim is not easy to determine. The question is made more difficult given that some allowance must also be made for the fact that the easement claim was not introduced until May 2023. I am entitled, if not required, to apportion costs having regard to 'impression' and 'evaluation' rather than 'with arithmetical precision' with a view to achieving 'practical justice' between the parties and, if possible, avoiding the complications and costs that would be associated with a detailed taxation.[12]

23 Having regard to the mixed success and delay in introducing the successful claim, but also having regard to the overlap in the evidentiary material and associated issues in the lengthy trial, I consider that practical justice is achieved by ordering that the defendants pay two-thirds of the plaintiff's costs of the proceeding.

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12 *Chen v Chan (No 2)* [2009] VSCA 233, [10] (Maxwell P, Redlich JA and J Forrest AJA); *McFadzean v Construction, Forestry, Mining and Energy Union* (2007) 20 VR 250, 290 [153], 291-292 [157]-[160] (Warren CJ, Nettle and Redlich JJA); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 63.04.

C.2 Standard or indemnity costs and offers made

24 The plaintiff made several offers in an attempt to settle the dispute, none of which were accepted by the defendants.

25 Offers made on 6 January 2022, 30 August 2022 and 19 April 2023[13] each required the defendants to accept that Stevens Court was a public highway and to agree to having their title documents amended accordingly. Because the plaintiff failed to establish that Stevens Court was a public highway, and although the last two offers also included an offer to pay some moneys towards costs, it cannot be said that said that the defendants acted unreasonably in not accepting these offers. These offers are, therefore, no reason to alter the costs order that would otherwise be made.

26 However, on 24 July 2023 the plaintiff offered to settle the proceeding on the basis that:

(a) the parties would cooperate to have a carriageway easement registered in accordance with a provided plan;

(b) the plaintiff would abandon the claim that Stevens Court was a public highway;

(c) the defendants grant the plaintiff, in the meantime, a licence for her and her invitees to use Stevens Court; and

(d) the plaintiff would prepare the documents required to record the easement, and bear her own costs of the proceeding.

27 The offer, which was expressed to be made in accordance with the principles in *Calderbank v Calderbank*[14] and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*,[15] proposed the following easement:

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13 The plaintiff relied also on a letter sent on 26 October 2021, but that was not, in fact, an offer.
14 (1975) 3 All ER 333.
15 (2005) 13 VR 435.

28 A letter sent on 26 July 2023 invited the defendants 'to propose any alternative alignment for the easement that they would find acceptable or more appropriate having regard to their development aspirations for their property.' It also offered, on largely the same terms, an alternative easement as follows:

29 The issue is whether, in all the circumstances, it was unreasonable for the defendants not to have accepted that offer such that they should pay costs on an indemnity basis as from their failure to do so. The policy behind this principle is that parties should act reasonably in efforts to compromise litigation or, if they do, a party that has acted reasonably in an effort to compromise litigation should not be out of pocket for costs that could and should have been avoided.

30 I am not satisfied that it was unreasonable for the defendants not to have accepted the plaintiff's offers made in July 2023. This is because the offer did not take into account the fact that the defendants had expended costs to that date in defending the claim that Stevens Court was a public highway (on which point the plaintiff failed), and because the plaintiff's success in the case depended in large part on the oral evidence that she was able to give (rather than material within the defendants' knowledge) and on the plaintiff having concluded in her favour a legal issue – whether the necessary 20-year period of use could include a change of registered proprietor of the servient tenement – that was uncertain. This is not a case where, eschewing hindsight, it can be said that the defendants acted unreasonably by failing to agree to having an easement over their property and bearing their own costs and instead defending the claims made against them.

31 Accordingly, I reject the plaintiff's submission that I should order costs on the indemnity basis as from the date of her offers.

C.3 Fixed sum

32 I do not consider it appropriate that I fix costs, notwithstanding that the plaintiff's solicitors have filed an affidavit in which they set out their costs. This is particularly so given that I have not ordered costs on the indemnity basis.

C.4 The costs ordered on 8 September 2023.

33 On 8 September 2023, I ordered the defendants to pay the plaintiff's costs thrown away of the defendant's application for leave to issue a short-service subpoena for documents from the Mornington Peninsula Shire. The plaintiff's sought that this costs order be set aside on the basis that it would be 'covered by the indemnity costs

order' that she sought. Given that I have not ordered costs on the indemnity basis, I will not set aside the 8 September 2023 order.[16]

D. Disposition

34 I will declare that the land marked 'A' in the plan above, which plan I will attach to the form of order, being part of the land described in Certificate of Title Volume 8655 Folio 413, is encumbered, for the benefit of the land described in Certificate of Title Volume 8655 Folio 410, by:

(a) a right of carriageway from Ivanhoe Street to the location of the present front and rear gates on the boundary of the land marked 'A' and the land described in Certificate of Title Volume 8655 Folio 410; and

(b) a right to park vehicles on that land.

35 I will order that:

(a) the defendants' counterclaim be dismissed;

(b) the defendants pay two-thirds of the plaintiff's costs of the proceeding to be taxed in default of agreement on the standard basis; ands

(c) the plaintiff's claim otherwise be dismissed.

36 I will grant liberty to apply in the event that further orders are required to give effect to my reasons - in particular, in the event that the parties require a more specific indication of the location of the plaintiff's front and rear gates. The location of those gates are marked on the various plans that are before me, from which plans some determination may be made if need be, but have not been identified by precise measurements.

[16] It is not necessary for me to consider whether I would have the power to do so.

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