Evans v Smith - [2025] NSWCA 102

Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation:	**Evans v Smith [2025] NSWCA 102**
Hearing dates:	7 April 2025
Date of orders:	16 May 2025
Decision date:	16 May 2025
Before:	Ward P and Stern JA at [1]; Adamson JA at [117]

Decision:

1. The appeal be allowed.

2. Orders 1, 7 and 9 made on 8 August 2024 be set aside.

3. In lieu thereof, declare that the respondent is the rightful owner of so much of the land in Lot 41 DP 1003436 upon which the respondent's house and its curtilage house sits (as identified in the plan attached (i.e., "Plan Sheet A" attached to the appellant's 23 May 2024 offer) but extended to accommodate vehicular and pedestrian access from the respondent's land to the Unformed Road).

4. Order the respondent to pay the appellants' costs of the proceedings at first instance on the ordinary basis.

5. Order the respondent to pay the appellants' costs of the appeal on the ordinary basis.

Catchwords:

LAND LAW – adverse possession – where the first respondent's land borders on land owned by the appellants (Lot 41) – where the first respondent sought a declaration that he was entitled to legal title of part of Lot 41 (the contentious land) by reason of decades of adverse possession – whether the first respondent and his predecessors in title had demonstrated continuous exclusive possession and an intention to possess the contentious land – whether the primary judge erred in concluding that the Lot 41 paper title owners lost title to the contentious land in 1989

LAND LAW – adverse possession – extent of relief – whether the court ought to declare any part of the contentious land beyond which the appellants conceded in an open offer as curtilage

Legislation Cited:

Crimes Act 1900 (NSW), ss 4, 111(2)

Conveyancing Act 1919 (NSW), s 88K

Real Property Act 1900 (NSW), ss 13A(1), 28T(4)

Roads and Streets Act 1833 (NSW), Act 4 William IV No 11

Cases Cited:

Ben-Pelech v Royle [2020] WASCA 168

Briginshaw v Briginshaw (1938) 60 CLR 336; [1938] HCA 34

Cawthorne v Thomas (1993) 6 BPR 13,840

Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd (1991) 22 NSWLR 389

Cooke v Dunn (1998) 9 BPR 16,489

Director of Public Prosecutions v Jay Williams [2018] NSWSC 1832

Enzo Developments Pty Ltd v Kiama Municipal Council [2025] NSWLEC 1092

Goode v Angland (2017) 96 NSWLR 503; [2017] NSWCA 311

Grasso v Stanthorpe Shire Council (1996) 91 LGERA 429; [1996] QCA 187

Henwood v Copeland [2023] EWHC 598 (Ch)

JNM Pty Ltd v Adelaide Banner Pty Ltd [2009] VSC 327

John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (2010) 241 CLR 1; [2010] HCA 19

Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8

Milro Pty Ltd v Associated Securities Ltd [1970] 2 NSWR 70

Pilbrow v St Leonard, Shoreditch Vestry [1895] 1 QB 433

Powell v McFarlane (1977) 38 P & CR 452; [1977] LS Gaz R 4 17

Precision Plastics Pty Ltd v Demir (1975)132 CLR 362; [1975] HCA 27

R v Birks (1990) 19 NSWLR 677

Royal Sydney Golf Club v Federal Commissioner of Taxation (Cth) (1955) 91 CLR 610; [1955] HCA 13

Sidoti v Hardy (2021) 105 NSWLR 1; [2021] NSWCA 105

Smith v Central Coast Council [2024] NSWSC 981

Smith v Waterman [2003] EWHC 1266 (Ch)

Stamford Property Services Pty Ltd v Mulpha Australia Ltd (2019) 99 NSWLR 730; [2019] NSWCA 141

Victoria v Sutton (1998) 195 CLR 291; [1998] HCA 56

Whittlesea City Council v Abbatangelo (2009) 259 ALR 56; [2009] VSCA 188

Williams v Usherwood (1983) 45 P&C 235

Category: Principal judgment

Parties: David John Evans (First Appellant)

	Carolyn Anne Evans (Second Appellant) Kenneth Linton Smith (First Respondent) Office of the Registrar General (Second Respondent)
Representation:	Counsel: N Hutley SC with LW Chan (Appellants) M Maconachie with M Summerhayes (First Respondent) Solicitors: Aubrey Brown Lawyers (Appellants) Maher Legal (First Respondent) Office of the Registrar General (Second Respondent) (Submitting Appearance)
File Number(s):	2024/00308533
Publication restriction:	Nil
Decision under appeal	Court or tribunal: Supreme Court of New South Wales Jurisdiction: Equity – Real Property List Citation: [2024] NSWSC 981 Date of Decision: 8 August 2024 Before: Peden J File Number(s): 2023/00191201

HEADNOTE

[This headnote is not to be read as part of the judgment]

The proceedings concern neighbouring rural land in Ravensdale in New South Wales.

On 4 June 1989, the appellants, Mr David Evans and Mrs Carolyn Evans, purchased land in Ravensdale (now Lot 41). The land that is the subject of these proceedings forms a part of Lot 41 (the contentious land).

In 1946, Mr Kenneth Smith's grandfather, Mr Harry Smith, bought the land now comprising Lot 1 and Lot 2 in Ravensdale. In 1963, Mr Harry Smith sold the lots to his son, Mr Keith Smith. On 29 June 1987, the sale by Mr Keith Smith to his nephew, Mr Kenneth Smith (Mr Smith), was stamped. Mr Smith has lived on the property since 1987.

On 21 June 2022 (in the context of the Central Coast Council's proposed acquisition of parts of Lot 41 for the construction of an upgrade of Maloney's Bridge and realignment of the road), the appellants were informed by the Council that Mr Smith's house was located on land owned by them.

Before the primary judge, Mr Smith sought a declaration that he was entitled to legal title of part of the contentious land by reason of adverse possession for many decades. The primary judge concluded that Mr Smith and his predecessors had demonstrated adverse possession of the contentious land from 1949 to 1989 and that the paper owners' title to that portion of land was extinguished in 1989.

The appellants conceded that Mr Smith had established adverse possession of that part of the contentious land on which his family house (the Smith house) was located and its curtilage.

The appellants challenged the primary judgment on various grounds, including that the primary judge erred: (i) in determining that Mr Smith had exclusive possession of the contentious land (excluding the house and its curtilage) for a continuous period of 40 years from 1949 (Grounds 1-4, 6-9, 13,15-18) and, (ii), in occupying the contentious land, Mr Smith (and his predecessors) did so with the requisite intention (Grounds 10-12, 14).

The Court held (Ward P and Stern JA, Adamson JA agreeing as to the outcome of the appeal but dissenting as to the form of the relief), allowing the appeal with costs:

1. The primary judge erred in concluding that exclusive continuous use was established over the requisite period for the area of the contentious land beyond that of the house, its curtilage and (to the extent that the curtilage did not otherwise extend that far) the area used to access to the sawmill (and Ravensdale Road). There is little or no evidence as to use of the bulk of the contentious land over the whole of the requisite period (other than some repair and maintenance of the fences and the construction and removal of a shed): [82]-[83],[100] (Ward P and Stern JA), [117],[121] (Adamson JA).

2. It was not necessary to determine whether her Honour erred in finding a continuous intention to possess the contentious land given the conclusion reached as to the primary judge's error in finding exclusive continuous factual possession. Had it been necessary to determine, the Court would not have found error in the finding that in all the circumstances Mr Smith and his predecessors manifested an intention to occupy the contentious land to the exclusion of the rest of the world: [102] (Ward P and Stern JA), [117] (Adamson JA).

   Powell v McFarlane (1977) 38 P & CR 452; [1977] LS Gaz R 4 17 at [471]-[472] considered.

3. Mr Smith is the rightful owner of so much of the land in Lot 41 upon which Mr Smith's house and its curtilage house sits. The curtilage extends to accommodate vehicular and pedestrian access from Mr Smith's house to the Unformed Road. It is inconsistent with the concept of curtilage as land serving the purpose of the Smith house to confine the curtilage in the present case to an area that does not permit ready access between the Smith house and the Unformed Road on which the sawmill stood at all relevant times, and which is Mr Smith's property: [115]-[116] (Ward P and Stern JA).

   Stamford Property Services Pty Ltd v Mulpha Australia Ltd (2019) 99 NSWLR 730; [2019] NSWCA 141 at [136] ; Pilbrow v St Leonard, Shoreditch Vestry [1895] 1 QB 433 ; Grasso v Stanthorpe Shire Council (1 996) 91 LGERA 429 at 434; [1996] QCA 187 ; Royal Sydney Golf Club v Federal Commissioner of

Taxation (Cth) (1955) 91 CLR 610 at 626; [1955] HCA 13 ; Milro Pty Ltd v Associated Securities Ltd [1970] 2 NSWR 70 cited.

4. The respondent wholly failed to discharge his onus of proof, except in relation to the residence close to Brush Creek Road and its immediate curtilage. It is not for this Court to speculate how access was obtained to this residence. The respondent failed to discharge his onus of establishing actual possession and *animus possidendi* in respect of the land which constituted such access: [121] (Adamson JA in dissent).

JUDGMENT

1. **WARD P and STERN JA**: This appeal involves a challenge to the determination in favour of the first respondent (Mr Kenneth Smith) of an adverse possession claim in respect of land in the Central Coast (part of Lot 41 of Deposited Plan 1003436) which was purchased by the appellants (Mr David Evans and Mrs Carolyn Evans) in June 1989 (see *Smith v Central Coast Council* [2024] NSWSC 981, the primary judgment).

2. The land in question (the contentious land) is the bulk of the land from what was referred to as the "Paper Road" (or "Unformed Road") to Brush Creek Road (as we explain in due course).

3. The primary judge noted (at [16] of the primary judgment) the parties' agreement that, if the requisite possession (in terms of fact and intention) was established from 1949 to 1989, then the paper owner's legal title to the contentious land was thereby extinguished in 1989 (about ten years before the appellants purchased what shortly thereafter became, and is now, Lot 41).

4. The primary judge held that the respondent (to whom we will refer as Mr Smith in distinction to his uncle, Mr Keith Smith) and his predecessors possessed, and intended to possess, the contentious land (see [25] of the primary judgment) over the requisite period so as to extinguish the paper owner's legal title to that land in 1989. The primary judge declared that Mr Smith was the rightful owner of both the contentious land and the "Paper Road" land (see Orders (1)-(3) at [66] of the primary judgment). The appellants did not contest that Mr Smith's predecessors in title obtained title to the Paper Road land (see [6] of the primary judgment) and this is not in issue on the appeal.

5. At the hearing at first instance, the appellants conceded that Mr Smith had established adverse possession of that part of the contentious land on which his family house (the Smith house) and its curtilage have been located since 1949 (29/07/2024; T 5.12-16) (see [4] of the primary judgment). On appeal, the appellants did not identify the dimensions of the curtilage around the house in respect of which they concede adverse possession has been established (nor do their proposed orders do so). However, they accepted that it could be inferred from the admitted possession of the house that there was adverse possession of a narrow (few metres) area of curtilage around it (see AT 10.44) (highlighted by the fact that from time to time, there had been fences erected around the house to keep animals such as horses and cattle away from the house). In oral submissions, the appellants accepted that the curtilage would certainly

extend to the timber post and rail fence on Brush Creek Road (see AT 11.3-4; AT 19.21-24). What they resisted was the suggestion that the curtilage would extend from the house up to the boundary of the Paper Road (or Unformed Road) (see AT 74.47-49).

6. The appellants argue that the finding of adverse possession in respect of the balance of the contentious land (i.e., excluding the house and its curtilage) was not open on the evidence. In particular, the appellants contend that the evidence does not demonstrate that there was either continuous factual possession or an intention to possess that part of the contentious land for an uninterrupted period of 40 years (though accepting that for the purpose of continuous possession one could aggregate the periods of possession by different owners).

7. By way of relief, in their notice of appeal (as orally amended in the course of submissions), the appellants seek that Orders 1, 7 and 9 made by the primary judge should be set aside, though leaving undisturbed the declarations made in Mr Smith's favour as to the Paper Road land (see Orders 2 and 3 made by the primary judge).

Background

8. It is necessary at the outset to explain the various terms used in relation to the land the subject of the proceedings at first instance and on appeal (not least because some of the areas of land were given different labels in the parties' submissions). On appeal, this was done by reference to a survey plan prepared in April 2023, which was partly reproduced in the primary judgment at [8], together with an aerial photograph of the land. Complicating the exercise is the fact that for much of the period from 1949 to 1989 the respective blocks of land were held under old system title.

9. The contentious land is an irregular shaped area approximately bounded at the bottom of the survey plan by a road running broadly in a north/south direction and described on the plan as "Proposed Road R2590A – 1603". That is the road that ultimately became Brush Creek Road. The contentious land is bounded at the top by what is referred to on the survey plan as the "Unformed Road R2590 – 1603". That is referred to in various of the submissions as the "Paper Road" and elsewhere as the "Unformed Road". The Brush Creek Road transects Lot 41 of DP 1003436, which is now owned by the appellants. Above the "Unformed Road" on the survey plan is Lot 1, which (together with Lot 2) is owned by Mr Smith.

10. The eastern boundary of the contentious land is Ravensdale Road, which leads down to an intersection between Yarramalong Road and Brush Creek Road. (Mr Smith's street address is given with a street number on Ravensdale Road, Ravensdale although his house is closer to Brush Creek Road.) The western boundary of the contentious land is close to the Wyong Creek boundary of the Unformed Road.

11. The history in relation to the Unformed Road and the Proposed Road that became Brush Creek Road is relevant to place in context the possession and use of the contentious land by Mr Smith and his predecessors.

12. In 1884, when the whole of the area (some 57 acres) was owned by a Mr Aaron Walters Jr, it was contemplated that a public road would be opened, traversing Mr Walters' land. A plan depicting the proposed road, to be opened as a "Parish Road", was laid before the Executive Council on 21 January 1884. The plan was labelled "2590 – 1603" (the 1884 Plan). Preliminary notification of the opening of the proposed Parish Road was gazetted on 12 February 1884. Confirmation of that notification was gazetted on 4 July 1884. Both notifications used the road number "R2590".

13. On 1 May 1885, notice was given in the Gazette of the formal marking and opening of the said road (R2590) "and that the same is now open for public use". There appears to be no dispute that this is the road depicted on the 2023 survey plan as the "Unformed Road". The Unformed Road was never built. Senior Counsel for the appellants, Mr Hutley SC, explained that it seemed to have been common ground between the parties that the topography of the land made the location of the Unformed Road unsuitable (AT 7.31-33). In any event, the gazettal of the formal opening of the Unformed Road for public use had the effect, as a result of the road dedication legislation at the time, that it ultimately came to be on a separate title (as Mr Hutley SC explained at AT 7.7-8).

14. On 20 August 1889, a plan was laid before the Executive Council (numbered "2590A – 1603") (the 1889 Plan) showing a "deviation" of a portion of the Parish Road that had been confirmed in the Gazette on 4 July 1884. The road described on this plan as proposed to be opened in lieu of part of the road confirmed in the 4 July 1884 Gazette is that which ultimately became Brush Creek Road. Preliminary notification of the proposed partial deviation of the said Parish Road (with road number 2590A – 1603) was published in the Gazette on 6 September 1989. As adverted to above, this became the formed road (known as Brush Creek Road). In lay terms, R2590A effectively superseded the "Unformed Road" (R2590), which was later described in a survey plan registered in July 2015 as a "Road Reserve".

15. The survey plan registered in July 2015 clearly depicts a timber and metal shed straddling the "Road Reserve" 2590 – 1603 (i.e., the Unformed Road) and Lot 1; as well as a weatherboard cottage (the Smith house) close to the 2590A – 1603 road (i.e., the Brush Creek Road), which was there described as a "formed road" with the notation "Road Opening Not Gazetted". It is not clear whether the opening of this portion of the road was ever separately gazetted.

16. In essence, Counsel for Mr Smith, Mr Maconachie, argues that there was a misdescription in the old system conveyance to the appellants of the land now known as Lot 41, by reference to the difference between R2590 – 1603 (the Unformed Road) and R2590A – 1603 (now the Brush Creek Road). That would be a logical explanation for the fact that, up until 2022, the parties all seem to have understood that what the appellants were acquiring was land that did not include the contentious land (as would have been the case had the conveyance included the R2590A description instead of R2590 description) (AT 53.25-50). The understanding of

the previous owners of the appellants' land (Mr Smith's cousins) was certainly consistent with this, namely that the contentious land belonged to the Smith family (though we accept that this is not determinative of the issue).

17. The statement of claim pleads at [35] that there was a misdescription in the old system deed of conveyance dated 4 June 1999 entered into between the appellants, as purchasers, and Mrs Robin Fernance and Mr Colin Fernance, as vendors, for the purchase of the land now known as Lot 41, in that the Deed misdescribed the north-eastern boundary of Lot 41 as formed by the south-western side of a road with catalogue number "R2590-1063" whereas the correct description of that catalogue number was "R2590-1603". As noted above, that may not be the only likely misdescription of the boundaries of the land acquired by the appellants. That said, the well understood operation of the system of Torrens Title is that, absent fraud, the appellants hold indefeasible title to what is now registered as Lot 41 (hence the need for the respondent to establish adverse possession of the contentious land).

18. Returning to the history of the land acquisitions, all of the land adjoining the proposed Brush Creek Road and the Unformed Road remained in the ownership of Mr Walters until 5 October 1896, when he sold his land (57 acres) to a Mr Henry Perry (see indenture of that date). The appellants say that it was common ground before the primary judge that the proposed road (i. e., the Brush Creek Road) must have been constructed prior to 1896 when Mr Walters sold the land to Mr Perry (reference being made to the transcript at first instance at 30/07/2024; T 59.3-11).

19. The appellants accept that the operation of the *Roads and Streets Act 1833* (NSW), Act 4 William IV No 11, (the *1833 Act*), which came into force on 28 August 1833 (and the subsequent enactments that replaced the 1833 Act), had the effect that the creation in 1889 of a deviation in the Unformed Road to the Proposed Road and the subsequent construction of the Proposed Road which became Brush Creek Road in 1889 was that, after construction of the "proposed road", ownership of the Unformed Road vested back and was held by the previous owner of that land (Mr Perry and his successors in title to that area) (AT 8.46-9.3). Hence, the claim (not contested by the appellants) by Mr Smith to the Paper Road land.

20. Some time after 1896 but before 1946, Mr Perry's descendants subdivided the land that they had purchased from Mr Walters (still then held on the old system title) to create the areas now referred to as Lots 1 and 41 (AT 9.10-13).

21. In about 1946, Mr Smith's grandfather (Mr Harry Mervyn Smith) bought the land now known as Lot 1 (which was described by Mr Keith Smith – Mr Smith's uncle and Mr Harry Smith's son – as the Mill Property although it should be noted that Mr Keith Smith clearly used that description to include both the contentious land and Lot 1) from Mrs Bridgette Perry (see Mr Keith Smith's affidavit affirmed 9 August 2023 at [10], [11] and [18]). Mr Smith has similarly described the Mill Property (see Mr Smith's affidavit at [4] and [8]).

22. Mr Smith's cousin, Mr Leonard Fernance, formerly the co-owner (with his brother, Colin Fernance) (the Fernance brothers) of what has since become Lot 41, gave evidence that the house in which Mr Smith lives (and which was formerly occupied by Mr Smith's grandparents and uncle, Keith) was built in about 1945 ([13]). We refer to this as the Smith house. It would seem more likely that the house was built after acquisition by Mr Smith of the land now known on Lot 1 than before.

23. Mr Smith's uncle (Mr Keith Smith) and his family (Mr Smith's grandparents) moved onto the Mill Property (after a flood) in about 1949 (see Mr Keith Smith's affidavit at [13]). Mr Keith Smith's recollection is that, when his family moved to the Mill Property in 1949, the boundary of the Mill Property was Brush Creek Road, Ravensdale Road and Wyong River; and that there were fences along the boundary of Brush Creek Road and Ravensdale Road in the same location where the fences are today (Mr Keith Smith's affidavit at [10]). (Insofar as the appellants here assert that Mr Smith's evidence does not demonstrate that the occupational boundaries remained the same, this does not appear to take into account Mr Keith Smith's evidence to that effect.)

24. Mr Smith's evidence is that a sawmill business was conducted at the Mill Property run by his relatives, starting with his grandfather (Mr Smith's affidavit at [16]). Mr Smith says that the evidence demonstrates that, although the building which housed the sawmill is located on Lot 1, and on the Paper Road land, the sawmill business operated also on the contentious land. However, it is not clear in what respect the operation of the sawmill is said by Mr Smith to have operated on the contentious land (as opposed to straddling the Paper Road land) and we note that the appellants cavil with the proposition that the evidence establishes that it did.

25. At some time, the area now known as Lot 41 was sold by the Perry family to a Ms Elma Stackman (AT 9.17).

26. As the appellants emphasise, there was a paucity of evidence as to the use of the contentious land (other than occupation of the Smith house) for the period from 1949 to 1963. Mr Smith recalls that, sometime in 1952 to 1953, at the age of eight, he rode a new bike to the Smith house; that his grandparents lived at the Mill Property (as we understand it, in the Smith house) and had two cows; that the cows were used for milking; and that his uncle, Mr Keith Smith, milked the cows (Mr Smith's 9 August 2023 affidavit at [9] and [11]).

27. In about November 1963, Mr Keith Smith purchased the Mill Property from his father, Harry (Mr Keith Smith's affidavit at [18]). Mr Keith Smith says that the Mill Property was always used for the sawmill business during the time that he owned it but, during that period, he also had a dairy cow for milk and two horses (affidavit at [30]). His evidence is that, during the time that he owned the Mill Property, there were times that he had erected fences around the property "to contain horses" and that the fences were erected "solely for the purposes of ensuring that the horses did not escape or come near the Mill or house"(affidavit at [32]).

28. Mr John Curtis, Mr Smith's brother-in-law, deposed that, between 1966 and 1970, he built fences at the property, referring to building the fence along the Brush Creek Road boundary of the property from the bridge that crosses Brush Creek to replace a fence that was already there (Mr Curtis' affidavit at [16]). In about 1980, Mr Curtis and his brother, Lawrence Curtis, built a timber fence at the house on the property on the area that fronted Brush Creek Road (Mr Curtis' affidavit at [24]).

29. In the 1970s, Mr Keith Smith had a large shed built on the lower side of the entrance to the Mill Property from Ravensdale Road (Mr Keith Smith's affidavit at [24]).

30. As adverted to above, in about August 1979, the Fernance brothers bought the property described now as Lot 41 (see Colin Fernance's evidence at 29/07/2024; T 38.9-10).

31. In the mid-1980s, Mr Keith Smith replaced a large section of the fence around the boundary of the Mill Property with a 3-rail timber fence along the boundary of Brush Creek Road and Ravensdale Road. (Mr Keith Smith's affidavit at [25]).

32. In February 1987, Mr Smith purchased the sawmill business from his grandfather and uncle and in June 1987, Mr Keith Smith sold what he described as the Mill Property to him. On about 10 September 1987, the land now in Lot 1 was converted from old system title to Torrens Title land (dealing CA 21625) (see statement of claim [25]). Lot 1 was created within both a qualified and limited folio of the Register. On about 15 September 2015 the status of Lot 1 as qualified title land was removed from the Register (see statement of claim at [27]).

33. Mr Smith's evidence is that, from the time of his acquisition of the Mill Property until about 1997, Mr Smith ran the saw-milling business on what he describes as the Mill Property. Mr Smith extended the size of the sawmill in that period (see his affidavit at [34](e)). Mr Smith later removed the large shed that had been built in the 1970s (see his affidavit at [34](g)) (this may have been between 1987 and 1989) (see 29/07/2024; T 46.10-11). Mr Smith also gives evidence that small fences were erected around the house at the Mill Property (affidavit at [49] -[53]).

34. On about 4 June 1999, the appellants entered into an old system deed of conveyance for the acquisition of the land then owned by Mrs Robin Fernance and Mr Colin Fernance (the Deed was stamped on 11 June 1999 and entered in Book 4238 Number 526).

35. On 29 June 1999, Lot 41 was converted from old system title to Torrens Title and registered as qualified and limited title (dealing CA80404) (see primary judgment at [5]) (statement of claim at [39]-[40]). On or about 15 September 2014 the status of Lot 41 as qualified title land was removed from the Register (dealing AJ811575).

36. Both Lots 1 and 41 are now registered in a limited folio of the Register within the meaning of ss 13A(1) and 28T(4) of the *Real Property Act 1900* (NSW) (see statement of claim at [28]; [42], respectively).

37. In mid-2022, apparently in the context of the Council's proposed acquisition of parts of Lot 41 for construction of an upgrade of Maloney's Bridge and realignment of the road (see email 21 June 2022 from the Council to the appellants' solicitor), the appellants were informed by someone at Central Coast Council that the Smith house was located on land owned by them (i. e., part of Lot 41).

38. Mr Smith lodged a caveat over Lot 41 on 21 October 2022 claiming an interest in the land by reference to his occupation of the "cottage" on the land and surrounding curtilage for approximately the past 35 years. It should be noted that the curtilage so identified on the attached plan appears to have been of the whole of the contentious land.

39. In 2023, by way of summons, Mr Smith commenced proceedings seeking interim and final relief in relation to the contentious land. The appellants then filed a cross-summons, seeking relief against Mr Smith. The matter proceeded on pleadings. Mr Smith filed a statement of claim on 11 August 2023, seeking declaratory relief in relation to the contentious land and the Paper Road land, as well as nominal damages for trespass or alternatively for nuisance against the appellants and, in the ultimate alternative, equitable compensation. The statement of claim included an estoppel claim (see from [53]ff) in respect of both the contentious land and the Paper Road land (which at least in part seems to explain the evidence going to occupation and improvement of the contentious land after 1989, although we note that Mr Smith argues that it is also relevant to the requirement that adverse possession not having been abandoned since 1989). The estoppel claim was not ultimately pressed.

40. By an open offer dated 23 May 2024, the appellants put to Mr Smith a settlement offer, including that the boundaries of Lot 41 be amended to reflect that Mr Smith has title to 1306 sq metres of land upon which his house is situated (which area included a curtilage around the house and shed extending to Brush Creek Road)and that there be a right of way "over the access way" on Lot 41 which connects that parcel of land to the Paper Road. In other words, the appellants' offer reflected the concession made at the hearing that Mr Smith had established exclusive adverse possession and control over the Smith house and its curtilage but it also made provision for access from the Smith house to the Unformed Road (and hence both to Lot 1 and to Ravensdale Road).

41. In oral submissions, Mr Hutley SC estimated that the area from the curtilage identified on their open offer to the Unformed Road was "probably about 20 metres" (in the most direct perpendicular line between the two) (see AT 75.5-6). We note that the curtilage area in the open offer included the shed next to the house (and a narrow area around that).

42. It appears clear from various of the photographs in evidence (though we accept the caution as to the weight to be placed on such evidence) that there is some form of track or road from the Paper Road to the area close to the shed near the Smith house and that for many years there has been a track in approximately this location, which is perhaps explicable on the basis that none of the photographs in evidence suggest that there has been any vehicular access to the Smith house or the sheds from time to time adjacent thereto other than via Ravensdale Road and the Paper Road (see for example the aerial photographs said to be from the 1950s which, contrary to the submission by Mr Hutley SC during the appeal, suggests a track for vehicular access from the Smith house to the Paper Road and onwards to the mill; see also the photograph from 1983). That seems to be the area referred to in the open offer as the "access way" over which the right of way was offered.

43. The appellants' offer was not accepted.

Primary judgment

44. The primary judge heard the matter in the Real Property List on 29-30 July 2024 and handed down judgment with commendable promptness on 8 August 2024.

45. After identifying the contentious land ([8]-[10]) and setting out the principles concerning adverse possession claims (about which there is no dispute) (from [11]-[22]), the primary judge addressed what she identified as the real issue, namely whether, and if so when, Mr Smith and his predecessors in title demonstrated "possession" of the contentious land, as a matter of fact and intention ([22]).

46. At [23] the primary judge noted Mr Smith's submission that possession commenced at the latest in 1949. (We note this because there was debate at the hearing in this Court as to whether it was now open to Mr Smith to point to a later time for the commencement of adverse possession – see AT 40.2-42.49.)

47. From [25], the primary judge set out her conclusion that, on the balance of probabilities, Mr Smith and his predecessors possessed and intended to possess the contentious land. The primary judge's reasoning for this conclusion may be summarised as follows.

48. First, the primary judge addressed the issue of factual possession. The primary judge accepted Mr Smith and his witnesses as witnesses of truth ([27]), noting that the appellants led no evidence.

49. The primary judge referred to: the construction on the land (alterations to the Smith house over the years and the building of a large shed in the 1970s, as well as the building of various initial fences); the usual use of this type of land (noting there was no evidence it had ever been

used for agriculture or farming beyond the paddocking of the Smith's dairy cow or a few horses); the land having been used as land surrounding the house and near the mill ([32]); and that the Smith family had "obviously" accessed their house across the contentious land and that work had been carried out on the land and the grounds had been maintained ([32]). The primary judge also referred to the existence of fences along the boundary of the contentious land and the Proposed Road and Ravensdale Road.

50. In so doing, the primary judge said at [31] that the fact that the appellants behaved as if Mr Smith owned the contentious land was consistent with the conduct of the previous owners of the contentious land (presumably there referring to the Fernance brothers to whom the land was sold in the 1970s).

51. The appellants here challenge many of the findings or observations made by the primary judge in relation to the issue of factual possession (to which we refer in due course). Relevantly, the appellants point to the paucity of the evidence for the period 1949 to 1963 in respect of many of those matters.

52. In particular, the primary judge considered (see at [35]) that the fences were clear and cogent evidence of the Smith family's possession of, and assertion of an intention to possess, the contentious land. (The appellants accept that the act of fencing is important but they emphasise that the fencing was already in existence as at 1949.)

53. The primary judge then considered the evidence of the attitude of others who considered the contentious land belonged to the Smith family, referring to the Fernance brothers who the primary judge said never interfered with the Smiths' use of the land, of which they were aware, and who never told any person that the contentious land was part of their Lot 41. The primary judge considered that this evidence was important, referring to what was said in *Whittlesea City Council v Abbatangelo* (2009) 259 ALR 56; [2009] VSCA 188 (*Whittlesea*) at [82] . (The appellants point out that this evidence goes only to the period after 1963.)

54. The primary judge did not accept that there had been common use of the land by the Smiths together with the paper title owners ([37]), as the appellants had suggested, and said (at [38]) that the fact that use of the land by the Smiths was inconsistent with the paper title owners' potential use supported the finding of possession. (The appellants challenge the finding that the use of the land by the Smiths is inconsistent with the paper title owner's potential use of the land, arguing that there is no reason why the "incidental or occasional" use of the contentious land for the paddocking of a couple of cows or horses is inconsistent with the paper title owner's potential use of the land and they complain that there is no evidence to support such a finding.)

55. The primary judge also said at [38] that all others were excluded from the land, unless they sought permission to enter and use the land or were invited in by the Smiths. (The appellants

challenge this finding, saying that there is no evidence that anyone was excluded from the land or that they were only permitted to enter if invited and contending that the primary judge ought to have so found.)

56. Turning to the question of intention, the primary judge considered that the evidence of factual use established more than "mere use" but, rather, demonstrated the requisite intention to possess and exclude the paper title owner ([40]). (The appellants here complain that the evidence was of a mélange of uses at various times.)

57. At [41], the primary judge rejected the appellants' submissions that Mr Smith's evidence was lacking in relation to intention because there was no evidence as to the reason for the erection of the fences.

58. Noting the caution as to reliance on statements of intention by a putative adverse possessor, the primary judge considered that the only logical reason for erecting and maintaining the fencing was to signify publicly the asserted boundary of the Smiths' land and to contain their home and property, including the contentious land, from the roads and to prevent uninvited access ([41]).

59. The primary judge thus concluded that Mr Smith had demonstrated that the paper title owners had lost title to the contentious land in 1989 (and went on to make declarations accordingly – see at [66]).

60. The primary judge then addressed the Paper Road land (from [44]), as to which (as already noted) there was no contest by the appellants. It is not necessary here to summarise the primary judge's reasons on this question, save to note that the primary judge accepted the analysis by Mr Maconachie and held (at [57]) that the operation of the *1833 Act* vested the Unformed Road in the adjoining owner (Mr Walters) in 1889 on the construction of the Proposed Road; and that this was sold in 1896 to Mr Perry (and ultimately vested with Mr Smith) ([58]).

Grounds of Appeal

61. The appellants raise 18 grounds of appeal as follows:

> 1 The primary judge erred in declaring that the respondent is the rightful owner of so much of the land (the contentious land) in Lot 41 DP 1003436 as is to the north-east of the road with catalogue number R2590-1603 and identified with cross hatching in the plan drawn by registered surveyors Barry Hunt Associates, dated 17 April 2023.
>
> 2 The primary judge erred in finding the respondent had demonstrated that the Lot 41 paper title owners lost title to the contentious land in 1989 ([7], [25], [43] of the primary judgment).

3 The primary judge erred in finding that there was the requisite quantity and quality of evidence to demonstrate sufficient factual possession of the contentious land ([27] of the primary judgment).

4 The primary judge erred in finding that adverse possession from 1949 to 1989 in relation to the house is a material consideration in relation to the claimed possession of the rest of the contentious land surrounding the house and fenced as part of Lot 1 ([28] of the primary judgment).

5 The primary judge erred in finding that there is no evidence that the contentious land has ever been used for agriculture or farming, beyond the paddocking of the Smiths' dairy cow or a few horses ([30] of the primary judgment).

6 The primary judge erred in finding that the Evans and the previous owners of the contentious land behaved as if the respondent owned the contentious land ([31] of the primary judgment).

7 The primary judge erred in finding that the contentious land had been used as land surrounding the home and near the mill ([32] of the primary judgment).

8 The primary judge erred in finding that work had been carried out on the contentious land and the grass had been maintained ([32] of the primary judgment).

9 The primary judge erred in finding that the uses of the land identified in paragraphs 7 and 8 above are the natural and obvious uses to which such land around a home in a rural area would be put ([32] of the primary judgment)

10 The primary judge erred in finding that the Smith family carried out repairs and modifications to the fences along the boundary of the contentious land and the Proposed Road and Ravensdale Road from time to time over the years ([33] of the primary judgment).

11 The primary judge erred in finding that it was necessary [sic] for the Smiths to padlock the fences their home and land in the neighbourly rural setting ([34] of the primary judgment). [We note that the actual finding was that it was not necessary for them to do so].

12 The primary judge erred in finding that the fences were clear and cogent evidence that the Smith family were possessing and asserting an intention to possess the land; and that the only logical reason for erecting and maintaining fencing was to signify publicly the asserted boundary of the Smiths' land and contain their home and property, including the contentious land, from the roads and to prevent uninvited access ([35], [41] of the primary judgment).

13 The primary judge erred in finding that the use of the land by the Smiths is inconsistent with the paper title owner's potential use of the land ([38] of the primary judgment).

14 The primary judge erred in finding that all others were excluded from the land, unless they sought permission to enter and use the land or were invited in by the Smiths ([38] of the primary judgment).

15 The primary judge erred in finding that the respondent had established continuous possession ([40] of the primary judgment) or *animus possidendi* ([40] -[42] of the primary judgment) for a period of 40 years from 1949 in the contentious land.

16 The primary judge erred in finding that the registers for lots 1 and 41 must be corrected in relation to the contentious land by reason of the operation of s 28U or s 45C of the *Real Property Act 1900* (NSW) . ([60] of the primary judgment)

17 The primary judge erred in finding that the subsisting interest of the respondent in the contentious land extinguished the paper title owner's right in relation to the contentious land before Lot 41 was converted to the register. ([60] of the primary judgment)

18 The primary judge erred in failing to find that the respondent had not established by evidence 40 years of continuous possession and *animus possidendi* from 1949 of the contentious land.

62. Notwithstanding the numerous (and to some degree repetitive) grounds of appeal (a large number of which simply frame as grounds of appeal challenges to the primary judge's factual findings), the appeal in essence challenges the ultimate findings by the primary judge as to: first, exclusive possession of that part of the contentious land excluding the house and its curtilage for a continuous period of 40 years from 1949 (so as to extinguish the paper owner's title to that land in 1989) and, second, that, in occupying the contentious land, Mr Smith (and his predecessors) did so with the requisite intention. Grounds 1, 2, 15, 17 and 18 challenge the ultimate conclusion reached by the primary judge as a result of the findings on those two issues.

63. We propose therefore to address the appeal grounds under those two broad categories.

64. At the outset, however, we note that the appellants take issue with any suggestion by Mr Smith in his submissions that there could be a different starting point for the 40 year period of claimed adverse possession, the appellants insisting (see AT 26.41-46) that, in the absence of a notice of contention, Mr Smith is bound by the way the case was run at first instance (namely that adverse possession of the contentious land started in 1949 and the interest was crystallised in 1989). The appellants refer to the oral submissions at first instance in which Mr Smith's case was tied to the period of 1949 to 1989 (referring to 30/07/2024; T 96.49-97.2; T 98.13-15; T 98.42-44). In response to this submission, Mr Maconachie, argued that Mr Smith "never tied himself entirely" to the period from 1949 to 1989 (see AT 41-42), pointing to the pleading and his submission to the primary judge that the primary judge could take "for the starting point of the adverse possession" any of the dates (1949, 1963, 1987, 1999) all of which would give the requisite period of time. There was, however, no notice of contention and, when pressed, Mr Maconachie did not contend for a different starting point for the requisite period (see AT 40.37-41.3). We have proceeded on the basis that Mr Smith should be held to his case, as submitted to the primary judge (see 30/07/2024; T 107) that time started to run in 1949 and crystallised in 1989 (which explains why the primary judge did not need to make findings for the period after 1989).

Appellants' submissions

65. While the appellants accept that there was some evidence of "incidental use" of the contentious land in the relevant 40-year period, they argue that there was no evidence of continuous possession of the contentious land for the entire 40- year period from 1949 to 1989.

66. In this regard, the appellants point to gaps in the evidence as to the 40-year period, emphasising that there is no evidence of use in the periods from 1949 to Christmas of 1952 /1953 and from Christmas 1952/1953 to 1963. The appellants say that the only evidence of use of the contentious land from 1949 to 1963 is the evidence of Mr Smith riding his bike to his grandparents' house and that, when his grandparents lived there they had two cows milked by Mr Keith Smith; and that the only evidence from 1963 is that Mr Keith Smith had a dairy cow for milk and two horses, that Mr Smith occupied the house and curtilage over that period and that he removed a shed after he purchased the Mill Property.

67. The appellants challenge the findings at [32] of the primary judgment: that the contentious land had been used as "land surrounding the home and near the mill" (saying there is insufficient evidence to support such a finding for a continuous period of 40 years); that work had been carried out on the contentious land and the grass had been maintained (saying that there is no evidence that the grass was maintained from 1949 to 1989 or that work was carried out on the contentious land for a continuous period from 1949 to 1989 and that the only evidence of work being done is the erection of the shed and its eventual removal); and that the uses of the land (as land surrounding the home and near the mill and the maintenance of the grass and work on the land) are the natural and obvious uses to which such land around a home in a rural area would be put (complaining that there is no evidence to support this finding as to what is the "natural and obvious" use of the contentious land and minimal evidence of use of the contentious land). The appellants also challenge the finding (at [31]) that they and the previous owners of the contentious land behaved as if Mr Smith owned the contentious land (saying that there is no evidence to support this finding).

68. As to the findings at [35] and [41] of the primary judgment in respect of the fences, the appellants emphasise that there is no evidence as to why the boundary fence was initially erected (before the Smith family acquired the land), that there was no evidence as to the state of the fences between 1949 and 1963 or whether any repairs were carried out to the fences in that period, and that Mr Keith Smith's evidence is that he maintained the fence from 1963 to 1987 for the sole purpose of keeping his animals away from the mill and the house. The appellants say that Mr Smith gave no evidence as to what work if any was done to the boundary fence for the period from 1987 to 1989 and that he only deposed to the appellants helping with the maintenance of the fence when the appellants were the owners of Lot 41 (referring to his 6 November 2023 affidavit at [30]-[33]; 28 January 2024 affidavit [10]-[12]). The appellants also challenge, in the context of this being evidence of intention, the finding that the Smith family carried out repairs and modifications to the fences along the boundary of

the contentious land and the Proposed Road and Ravensdale Road from time to time over the years (see at [33] of the primary judgment).

69. As to Ground 4, the appellants say that there is no legal basis for the finding by the primary judge that adverse possession from 1949 to 1989 in relation to the house is a material consideration in relation to the claimed possession of the rest of the contentious land surrounding the house and fenced as part of Lot 1 ([28]). In that regard, the appellants refer to cases where the land the subject of a claim for adverse possession is considered by reference to notional areas as to whether the elements of adverse possession have been satisfied for each notional part (citing *Ben-Pelech v Royle* [2020] WASCA 168 (*Ben-Pelech v Royle)*; *Henwood v Copeland* [2023] EWHC 598 (Ch)).

Mr Smith's submissions

70. Mr Smith, in his submissions, points to the evidence that was before the primary judge as to possession and use of the contentious land, referring in so doing to a notice of valuation dated 7 November 1963 from the Department of the Valuer General NSW to Mr Smith's grandfather in respect of what appears to be the Mill Property. Mr Smith says that this notice independently confirms that the occupational boundaries of the Mill Property were as he and his witnesses, historically understood them to be. Mr Smith also argues that it goes to his grandfather's intention to occupy the Mill Property exclusively, noting that the nature of the interest valued is described in the notice as "[t]he unencumbered interest as Owner in the Fee Simple in Possession". (Pausing here, the primary judge did not attach significance to this notice of valuation – see at [39], noting that it did not determine the matter "because there is already agreement that there is adverse possession in relation to the house". That, however, does not appear to take into account that Mr Smith's grandfather was clearly asserting at that time that he was the owner in fee simple of the Mill Property, including the area of the contentious land. It does therefore provide some evidence of his understanding and intention at the time.)

71. Mr Smith argues that the established facts clearly demonstrate that he and his forebears had exclusive occupation of the Mill Property since 1949 (and he further submits that those facts, especially in combination, justify the finding that he had the relevant intention to possess the land).

Intention – Grounds 10-12 and 14

Appellants' submissions

72. The appellants argue that evidence of *animus possidendi* for the 40-year period was non-existent.

73. Insofar as the primary judge relied upon the fence around the boundary of the contentious land in determining the requisite *animus possidendi*, the appellants reiterate that there was no evidence as to who erected the fences or why the fences were originally erected prior to 1949

and they say that the only evidence as to why the fences were maintained between 1963 to 1987 was Mr Keith Smith's evidence that his sole purpose for the boundary fences was to contain his horses. In relation to the erection of the ornamental fence around the Smith house, the appellants say that there is no issue that Mr Smith has established adverse possession of the house and the curtilage around it.

74. Further, the appellants argue that there was no evidence that any of the owners of Lot 1 from 1949 to 1989 excluded all others from the land unless they sought permission to enter and use the land. They emphasise that there was no evidence that Mr Smith intended to exclude the true owners of the contentious land from time to time, referring to the cross-examination of the owners of Lot 41 from 1979 to 1999 (the Fernance brothers), which they say makes this clear.

75. As to the subjective beliefs of the various witnesses called by Mr Smith as to the boundaries of the Mill Property, the appellants accept the potential relevance of their subjective beliefs but say that the evidence is no more than conclusions. The appellants maintain that subjective beliefs are not sufficient to establish adverse possession as a matter of law if not supported by appropriate acts that would amount to a sound claim for adverse possession. The appellants emphasise that there must be some outward manifestation of the trespasser's subjective intention which makes clear that intention to the "world at large" (citing *Powell v McFarlane* (1977) 38 P & CR 452; [1977] LS Gaz R 4 17 at [471]-[472] (*Powell)*). They argue that a fence, while significant, must be accompanied by evidence or actual use and intention to possess (citing *Smith v Waterman* [2003] EWHC 1266 (Ch) at [19]).

Mr Smith's submissions

76. Mr Smith maintains that the clear inference from the evidence called by him is that he (and his forebears) intended exclusively to occupy the contentious land.

77. In this regard, Mr Smith attaches particular significance to the fact that the parties did not realise the discrepancy between the use of the contentious land, and the descriptions on the titles (pointing to the email from the appellants' solicitor sent on 28 June 2022 in response to the Council which Mr Smith says confirmed the appellants' understanding his house was on his land) until 2022. Reference is made in this context to *Sidoti v Hardy* (2021) 105 NSWLR 1; [2021] NSWCA 105. (The appellants say that it is irrelevant whether the parties had realised the discrepancy between the use of the contentious land and the descriptions on the titles, noting that, on Mr Smith's case, his interest in the contentious land had crystallised prior to them becoming the paper owners of the contentious land.)

78. Mr Smith accepts that he did not lead direct evidence that he intended to occupy the contentious land to the exclusion of all others but submits that such evidence would have been self-serving and would have carried little, if any weight (citing *Whittlesea* at [6](f)). Rather, Mr Smith argues that the most powerful evidence of his intention is his evidence that he permitted the appellants, and the stone mason (Mr Mitchell), to access and use the Mill Property from time to time on terms dictated by him (as confirmed by the evidence of Mr

Mitchell). (The appellants point out that the grant of permission by Mr Smith to the appellants and Mr Mitchell to access and use the Mill Property from time to time occurred outside of the relevant period of 1949 to 1989, noting that Mr Mitchell did not store stone at the Mill Property until 2006. Accordingly, they say that this evidence is irrelevant on the issue of adverse possession in the 40-year period from 1949.)

Determination

79. As noted earlier, the legal principles as to adverse possession claims were summarised by the primary judge (at [11]) and are not in dispute.

80. What is important here to emphasise is that what is required is clear evidence of both factual possession and an intention to possess; the former requiring an appropriate degree of exclusive physical control (and not necessarily established solely by enclosure of the land); the latter requiring manifestation of an intention to exclude the world at large (albeit that this may be found through objective acts of factual possession). Clear evidence is required because of the recognition of the drastic results of a change of possession (see Slade J in *Powell* at 480).

81. Although Mr Smith has emphasised that evidence of various of the witnesses was not challenged (and says that it would ordinarily be accepted unless it is inherently incredible – see *Precision Plastics Pty Ltd v Demir* (1975)132 CLR 362 at 371; [1975] HCA 27 per Gibbs J (as his Honour then was) (Stephen and Murphy JJ agreeing)), the gravamen of the appellant's submissions here is that, even accepting the unchallenged evidence, it is not sufficient to establish adverse possession.

82. In the present case, the difficulty as we see it in relation to the finding of exclusive continuous possession for the requisite period is that there is little or no evidence as to use of the bulk of the contentious land over the whole of the requisite period. In saying this, we exclude evidence as to the house itself (noting that the appellants accept that from that evidence use of the house and its curtilage can be inferred).

83. Apart from the presence somewhere on the contentious land of the two dairy cows and a few horses from time to time, there is almost no evidence (other than some repair and maintenance of the fences and the construction and removal of a shed) as to the use of the contentious land apart from occupation and use of (and it would follow access to) the house (and sheds as present from time to time) itself. The highest the evidence goes as to actual use is in relation to the boundary fences. We do not consider that the fact that they were erected before 1949 and that there is no evidence as to why they were erected is fatal to the claim for adverse possession as the appellants suggest (since the evidence is that the fences were retained on the boundary and repaired or improved from time to time). Nor is the fact that the fencing was built by Mr Keith Smith in order to stop animals escaping as significant as the appellants suggest (since boundary fences as a matter of common sense operate to signify ownership of

the land enclosed). The difficulty is, however, that there is nothing to evidence what use was made of the fenced land beyond the area of the house and curtilage (including, as we consider appropriate, the access way thereto).

84. There is nothing other than the fences (and the erection and removal of a shed on the property) to show the actual use made of the land beyond the house and its curtilage from which the fact of exclusive possession can be inferred. Possession of one part of the land does not necessarily give rise to an inference that there is possession of the whole of the land (see *Ben-Pelech* , where there was a finding of adverse possession in relation to part of the land in question but not of other parts of the land). Therefore, while we do not accept that the primary judge erred in finding that occupation of the house was a material consideration in relation to occupation of the balance of the land, it was not in our opinion sufficient. As to this, we accept that there remains very little evidence, if any, as to the use of the balance of the contentious land.

85. The appellants appear to accept (see at AT 33.25-35; AT 71.25-36) that it may be inferred that there was some pedestrian access or movement between the house and the sawmill (or at least as far as the Paper Road) over the relevant period (which seems to us again to be common sense) but say that the nature and extent of this is unclear. We note that the appellants argue that access or movement from the house to the mill does not of itself establish exclusive possession. That may be so but it must be seen in combination with the boundary fences which enclose the contentious land together with the balance of Lot 1: as to the importance of considering acts of possession in context see *Williams v Usherwood* (1983) 45 P&C 235 at 251-252. Viewed in the context of the boundary fencing which was retained (and maintained) throughout the relevant period, use of the contentious land to move between the Smith house and the mill and Ravensdale Road as, we would infer as a matter of common sense, likely occurred throughout the relevant period could be seen as inconsistent with the paper owner's potential use of the land.

86. In oral submissions, there was debate as to whether one could find constructive possession of the whole of the land from the occupation and use of part of it (i.e., relevantly, the Smith house and curtilage). However, the appellants maintain that this is not a case where the particular requirements for an inference as to possession of the whole of the land (i.e., constructive possession) has been established (in effect a "marked division" of the relevant contentious land). Hence the appellants submit that what is required in the present case is proof of continuous actual possession of each part of the contentious land – not necessarily every square inch but possession across the whole of the approximately 1.3 hectares of land (see AT 11.43-40).

87. Bearing in mind the clear and cogent evidence required for a finding of exclusive continuous factual possession of the whole of the contentious land, we have respectfully concluded that the primary judge erred in making that finding.

88. Turning briefly to the particular challenges made to the primary judge's factual findings in the grounds of appeal, we are of the following opinion.

89. As to Ground 4, we do not accept that the primary judge erred in law in finding that adverse possession in relation to the house was a material consideration in relation to the claimed possession of the rest of the contentious land ([28]), in circumstances where the external boundaries of the land were fenced and there was no physical boundary between the contentious land and Lot 1. Moreover, adverse possession of the house makes available the inference that at least part of the contentious land was used for access to the mill (since it can readily be inferred that Mr Smith's grandfather and others working at the sawmill when living at the house would have used the contentious land to access the mill and Ravensdale Road).

90. As to Ground 5, the appellants surely do not challenge the finding that there is no evidence that the contentious land has ever been used for agriculture or farming (since the appellants rely on the paucity of evidence of use of the land in support of their contention that the primary judge erred in making the finding of factual possession). Rather, this ground appears to challenge the suggestion that the paddocking of the dairy cows or horses would amount to relevant or sufficient use. In our opinion, such use might well establish (at least in conjunction with other evidence) exclusive possession of the land (say, if there was a rotational program for cows to be put in paddocks from time to time around the whole of the contentious land). However, we accept that there was no evidence of this. In any event, we read [30] of the primary judge's judgment as favourable to the appellants – i.e., that the primary judge was there treating the paddocking of the dairy cow or horses as essentially *de minimis* and hence as not establishing exclusive use. (This ground, like others, seems to us to be the product of an approach of challenging almost every factual finding whether or not that was likely to be dispositive of the issues on appeal.)

91. As to Ground 6, we do not accept the appellants' submission that there is no evidence to support the finding that the appellants and the previous owners of the contentious land behaved as if the respondent owned the contentious land ([31] of the primary judgment). There was evidence that the appellants sought permission to access the land for the cattle to graze on it (and expressed their appreciation for being able to do so). As to the Fernance brothers, their evidence was not consistent with use by them of the land as if it were their own and their evidence of access to the land must be understood in that context. A no evidence challenge requires more than a challenge to the weight to be placed on such evidence. We do not accept that there was error in the finding here impugned. The primary judge expressly noted that the evidence of the appellants' access to the farm was not specifically relevant in that the appellants did not purchase the Lot 41 land until 1999. However, as Mr Smith points out, it is a requirement for adverse possession claims that the adverse possessor's interest not be abandoned. Evidence of this kind would go to that issue.

92. As to Ground 7, there is no error in the finding that the contentious land had been used as land surrounding the home and near the mill. It is clearly to be understood as meaning that obviously (as the appellants accept can be inferred), the land surrounding the home and near the mill will have (at least to some extent) been used for access between the mill and the house. The problem for Mr Smith is that this does not go far enough to encompass exclusive continuous use of the whole of the balance of the contentious land.

93. As to Ground 8, the complaint as to the finding that work had been carried out on the land, this finding is sustained by the evidence of the building of internal fences, construction of the shed, improvements to the shed and the like. Again, however, the difficulty is that the evidence of such work is not in relation to the bulk of the contentious land. As to the complaint as to lack of evidence of maintenance of the grass on the contentious land, this seems to us to be contrary to common sense. The land would have become overgrown had the grass not been maintained over a 40-year period. Accepting the limited use to which photographic evidence can be put on appeal, the photos of the contentious land do not show an obvious wilderness. It seems unarguable that over the years the grass has been maintained (at the very least by the presence of some cattle on the land about which there was evidence).

94. As to Ground 9, the complaint as to the finding that work around the house (fencing and the like) and the maintenance of the farm are natural and obvious uses of rural land again seems to us to be without force. Expert evidence was hardly required as to the natural and obvious use of rural land in this context. It is surely a matter of common sense. (If it had been suggested that the natural and obvious use was for some unusual type of activity for a rural farm, then we might have accepted that evidence for this would be necessary but that is not the case here.) Similarly, the finding as to access between the buildings, to which we have referred, is simply common sense.

95. As to Ground 10, there was evidence to support the findings that the Smith family had carried out or caused to be carried out repairs to the boundary fences from time to time (as noted in the background section above).

96. As to Ground 11, this seems to us to involve a misreading of the primary judge's findings. What the primary judge there said was that it was not necessary (to establish exclusive possession) that the Smiths padlock the fences and home and land in a neighborly rural setting. We see no error in that observation.

97. As to Ground 12, it is accepted by the appellants that erection of fences is a relevant indicator of exclusive possession (and intention to possess). Whether the "only" logical reason for the erection of the fences was that which the primary judge considered is not to the point. The fact is that one can readily infer that one purpose of a boundary fence is to enclose the land (and signify publicly that the land is private). Nor is the fact that the boundary fences were erected before the Smiths acquired the land show error in the finding that they are an indicator of exclusive possession. The fact is that the boundary fences were retained on the land and improved from time to time. There was evidence of their repair and maintenance from time to time (at least insofar as Mr Keith Smith gave evidence that he replaced a large section of the boundary fence in the mid-1980s (see the background section above)).

98. As to Ground 13, we see no error in the finding that the use of the land by the Smiths was inconsistent with the proper owners' potential use of the land. The Fernance brothers gave evidence of their access to the land, which was inconsistent with any recognition by either the Smiths or them that the Fernances were free to treat the land as their own; and the giving of permission by Mr Smith for use of the land by Mr Mitchell and by the appellants themselves

was inconsistent with their use of the land as a matter of right. We accept that this was after the relevant period, but it cannot be said to be wholly irrelevant given the requirement that there not be an abandonment of possession after the adverse possession had crystallised.

99. The same reasoning applies in relation to Ground 14.

100. That said, we are persuaded that the primary judge erred in concluding that exclusive continuous use was established over the requisite period for the area of the contentious land beyond that of the house and its curtilage including, as we consider it should, the area used to access the mill and Ravensdale Road.

101. On that basis, we find that Grounds 1, 2, 15, 17 and 18 are established.

102. As to the finding of continuous intention to possess and use the land to the exclusion of the true owner over the requisite period, to the extent that the grounds challenging findings of intent are bound up with the challenge to the findings of factual possession, they have already been considered. We accept that the most relevant evidence of intention to exclude others from the contentious land is to be found in the boundary fencing (not the internal fencing around the Smith house). Ultimately, it is not necessary to determine this given the conclusion we have reached as to the error in finding exclusive continuous factual possession. Had it been necessary to determine, we would not have found error in the finding that in all the circumstances there was manifested an intention by the Smith family to occupy the contentious land to the exclusion of the rest of the world. Such a finding follows in our opinion from the retention (and repair or improvement on occasion) of the boundary fences from 1949, signifying exclusion of others from the land, coupled with such acts of factual possession as related to the use of the house and access from the house to the mill and Ravensdale Road.

103. Ground 16, which was not separately addressed in submissions, does not arise in light of the conclusion reached as to the outcome of the appeal.

Relief

104. This brings us to the relief sought by the appellants. The critical question, it seems to us, is the identification of the boundaries of the land over which adverse possession has been established, i.e., the extent of the curtilage of the house encompassed by the finding in that regard. We have already noted the concession made in that regard by the appellants which is in any event consistent with the recognition that rights obtained by adverse possession may extend to an area of use ancillary to occupation of a premises (*Cawthorne v Thomas* (1993) 6 BPR 13,840).

105. There appears to be no legislative definition of curtilage in New South Wales, despite it being mentioned in the *Crimes Act 1900* (NSW) . In *Stamford Property Services Pty Ltd v Mulpha*

Australia Ltd (2019) 99 NSWLR 730; [2019] NSWCA 141, Emmett JA referred to the meaning of curtilage (at [136]), as a matter of ordinary English, as referring to "a yard or piece of ground attached to a building and forming one enclosure with the building". In *Pilbrow v St Leonard, Shoreditch Vestry* [1895] 1 QB 433 (*Pilbrow*), curtilage was defined as a garden, yard or piece of ground lying near and used in connection with a dwelling house, often (but not necessarily) fenced in with the house.

106. The *Pilbrow* definition of curtilage was adopted in *Director of Public Prosecutions v Jay Williams* [2018] NSWSC 1832 at [25] by Wilson J, where there was a charge of entering of a dwelling with the intent to steal contrary to s 111(2) of the *Crimes Act 1900* . The defendant argued that the car park of the apartment occupied was not within the curtilage of a dwelling house as the curtilage ended at the apartment walls (albeit that the car park was within the same building). The primary judge said that "[c]urtilage, for the purposes of s 4 of the *Crimes Act 1900* , means a piece of ground or land belonging to and lying near a dwelling house" and held that the car park in question was a building or other structure within the same curtilage as the apartment dwelling.

107. What constitutes the curtilage of a building is a question of fact to be determined upon the evidence in each particular case (see *Grasso v Stanthorpe Shire Council* (1996) 91 LGERA 429 at 434; [1996] QCA 187).

108. In *Royal Sydney Golf Club v Federal Commissioner of Taxation (Cth)* (1955) 91 CLR 610 at 626; [1955] HCA 13 *(Royal Sydney Golf Club)*, where the issue related to an assessment of the unimproved value of the taxable portion of certain land owned by the appellant, the High Court approached the question of curtilage by reference to whether the area of land "subserves" the purpose of the building. The High Court held that the land, except the respective sites of the buildings thereon, and the respective curtilages thereof, was vacant. The area of curtilage was that which contributed to the enjoyment of a building for the fulfilment of its purpose.

109. In *Milro Pty Ltd v Associated Securities Ltd* [1970] 2 NSWR 70 at 75 the Court cited *Royal Sydney Golf Club* , and found that the following constituted curtilage of the relevant building: "a concrete driveway and parking area, a bitumen parking area, an internal small light well or similar area, and some land immediately adjoining the building, which from the measurements could only be used for some purpose such as access around the building, and also from the concrete driveway and parking area to the bitumen parking area", applying the test as to whether the areas actually or supposedly contributed to the enjoyment the building for the fulfilment in its purpose.

110. Thus, the relevant question is whether the land fulfils or contributes to the purpose and enjoyment of the building. A recent example in the Land and Environment context is *Enzo Developments Pty Ltd v Kiama Municipal Council* [2025] NSWLEC 1092, where the submission that open landscape surrounding a heritage garden and homestead (giving views of an escarpment) amounted to an extended curtilage for the heritage property in question was rejected.

111. In the present case, it is significant in our opinion, that over the period from 1949 to 1989 the house was continuously occupied and used as a residence in proximity to the sawmill business, then carried on by successive members of the Smith family. Access between the mill and the Smith house can only sensibly have been via the area of land between the Smith house and the mill. It makes no sense to postulate that Mr Smith's grandfather and uncle travelled from the Smith house to the mill via Brush Creek Road and Ravensdale Road when they could seemingly readily have gone across the contentious land to gain access to the mill. Moreover, from the photographic evidence (and accepting the limitations of such evidence to which we give only limited weight) vehicular access to the Smith house appears most likely to have been from Ravensdale Road and via the Unformed Road. There is no evidence that there has ever been any driveway or vehicular access through the boundary fence on Brush Creek Road (and the only evidence of a gate being put in that fence was to allow "cows to come on holiday more easily" after the appellants began living in their house). Consistent with this, there appears to be some track between the Smith house and the Unformed Road on the photographs dating back to the 1950s and on a photograph of the contentious land from 1983.

112. Therefore, we would conclude that the area of land between the house and the Unformed Road, permitting access from the house to the mill and to Ravensdale Road, was land that served the purpose of the house and thus falls within the expanded definition of curtilage.

113. We consider that the logic of this conclusion is reinforced by the fact that the open offer made by the appellants referred in the covering letter to the "access way on Lot 41" and included the creation of rights of way between the house and the Unformed Road and Ravensdale Road. We accept that this was not a concession (as Senior Counsel for the appellants hastened to make clear) and that parties offering a compromise in contentious litigation may well offer more than they consider they are obliged to give. However, it does involve a tacit recognition that some right of access from the house to the Unformed Road has occurred in the past and would contribute to the enjoyment the building for the fulfilment in its purpose (even though the mill is no longer there).

114. Mr Hutley SC emphasised, and we accept, that a right of way is inconsistent with an exclusive right of possession. We certainly accept that the creation of a right of way (at least absent consent thereto by the appellants) is neither open nor appropriate in the present case. We also accept that extending the curtilage to the Unformed Road would effectively divide the contentious land into two blocks of land. However, (apart from the fact that the appellants would appear to have obtained something which they did not understand they were even acquiring back in 1999), it would be open for the appellants themselves to seek a right of way across the extended curtilage if that be necessary for whatever use they now propose to put that part of the contentious land over which adverse possession has not been established.

115. In any event, to our minds, it is inconsistent with the concept of curtilage as land serving the purpose of the Smith house to confine the curtilage in the present case to an area that does not permit ready access between the Smith house and the Unformed Road on which the mill stood at all relevant times and which is the respondent's property. Accordingly, we would adopt the

area of the Smith house and curtilage on the plan accompanying the appellants' open offer but with an extended curtilage covering a narrow access way perpendicular to the area of the Smith house and shed leading to the Unformed Road. Mr Hutley SC indicated that this would be an area of around 20 metres beyond the curtilage shown in the plan in the most direct perpendicular line between the two. We set out below a diagram of what we have in contemplation in that regard. The parties should have liberty to apply if there is any dispute as to how that area is to be noted on the relevant title documents.

Orders

116. For the above reasons, we propose the following orders:

    1. The appeal be allowed.

    2. Orders 1, 7 and 9 made on 8 August 2024 be set aside.

    3. In lieu thereof, declare that the respondent is the rightful owner of so much of the land in Lot 41 DP 1003436 upon which the respondent's house and its curtilage house sits (as identified in the plan attached (i.e., "Plan Sheet A" attached to the appellant's 23 May 2024 offer) but extended to accommodate vehicular and pedestrian access from the respondent's land to the Unformed Road).

    4. Order the respondent to pay the appellants' costs of the proceedings at first instance on the ordinary basis.

    5. Order the respondent to pay the appellants' costs of the appeal on the ordinary basis.

117. **ADAMSON JA**: I have had the benefit of reading the reasons of Ward P and Stern JA in draft. I agree that the appeal ought be allowed, in substance for the reasons their Honours give. The following are my reasons for my concurrence in this order and my disagreement with the extent of the relief proposed by Ward P and Stern JA.

Whether the claim for adverse possession has been made out

118. In order to make out its claim for adverse possession of the contentious land, Kenneth Linton Smith (the respondent) was required to prove, for a period of at least 40 years from 1949 to 1989, continuous factual possession and an unequivocal intention to possess the land, or *animu s possidendi*: see, for example, *Cooke v Dunn* (1998) 9 BPR 16,489 at 16,493 (Santow J). In so far as Mr Maconachie, who appeared with Ms Summerhayes for the respondent, sought to recast the basis on which the respondent sought to establish adverse possession by contending that he did not have to prove adverse possession for 40 years from 1949 to 1989, he should not be permitted to do so. The respondent is bound by the way his case was put in the Court below: *R v Birks* (1990) 19 NSWLR 677 at 683-685 (Gleeson CJ, McInerney J agreeing).

119. In order to prove continuous factual possession, the respondent was required to prove an appropriate degree of exclusive physical control: *Powell v McFarlane* (1979) 38 P & CR 452 (*Powell*) at 471 (Slade J). The intention to possess must be made known to the world, such that it is clear that the claimant (in this case, the respondent) intended to exclude the owner from the contentious land: *Powell* at 472.

120. The principle of constructive possession (that one can infer use of the whole of the contentious land from the use of the part) could not avail the respondent because it is limited to situations where the contentious land is defined by a physical boundary: see the summary of the authorities in *JNM Pty Ltd v Adelaide Banner Pty Ltd* [2009] VSC 327 at [36]-[41] (Byrne J). In the present case, as Ward P and Stern JA explained in their reasons, the contentious land abutted part of Lot 41 as well as abutting another title (to the Paper Road, which was owned by the successors in title to Henry Perry), which, in turn abutted Lot 1. There was no definition between these areas of land. Thus, the respondent was required to prove actual continuous factual possession of all parts of the contentious land to which it claimed to be entitled by reason of adverse possession.

The parameters of the appropriate relief to be granted

121. For the reasons advanced by Mr Hutley SC, who appeared with Ms Chan for the appellants, in the submissions summarised by Ward P and Stern JA, the respondent wholly failed to discharge his onus of proof, except in relation to the residence close to Brush Creek Road and its immediate curtilage. I accept Mr Hutley's submission that it is not for this Court to speculate as to how access was obtained to this residence, with a view to inferring that the contentious land includes access to the residence by any route other than from Brush Creek Road. The respondent bore the onus of establishing actual possession and *animus possidendi* in respect of the land which constituted any such access and has failed to discharge it.

122. It follows that I do not consider that this Court ought declare any part of the contentious land beyond that which the appellants have conceded in their open offer dated 23 May 2024 and the attached diagram and aerial photographs. Mr Hutley confirmed in submissions in reply that he could not be heard against a declaration that the respondent has title to the area surrounding the residence and associated shed designated by the red line around the two buildings which backs onto Brush Creek Road. However, it would be, in my view, at odds with principle and the evidence to declare that the rights of way indicated by the appellants in their open offer ought be added to the respondent's title in circumstances where the respondent, who bore the onus, failed to discharge it in respect of those areas.

123. The principle in *Jones v Dunkel* (1959) 101 CLR 298 at 308, 312 and 320-321; [1959] HCA 8 applies to the evidence of Keith Smith, the uncle of the respondent who lived on the property from 1949 when he was 15 years old until about 1960 when he was about 26 years old. Keith Smith could have been expected to give evidence in the respondent's case as to the means of access between the residence on Brush Creek Road and the building which was referred to as the mill. As he was not asked about this matter when he gave evidence it can be inferred that

the most natural inference is that the respondent's representative feared to do so since the answer would not assist the respondent's case: *Commercial Union Assurance Co of Australia Ltd v Ferrcom Pty Ltd* (1991) 22 NSWLR 389, 418-419 (the *Ferrcom* inference).

124. In these circumstances, I am not persuaded that it is appropriate, as the majority has done, to infer from photographs, including aerial photographs, that access from the residence to the mill during the relevant period (1949 to 1989) was by way of a road across the contentious land. The use of photographs for this purpose is fraught, having regard, not only to the question of timing of the use of land, but also because photographic images can be deceptive in relation to perspective and distance. Though a photograph may give rise to conjecture, more is required for the purposes of proof: see the authorities discussed in *Goode v Angland* (2 017) 96 NSWLR 503; [2017] NSWCA 311 at [84]-[96] (Beazley P, Meagher JA and Leeming JA agreeing). The photograph taken in 1950 does not suggest that there was any sort of vehicular access between these two buildings. Movement between the two buildings in more recent years is insufficient to establish adverse possession for the purposes of the respondent's claim.

125. Further, the relief proposed by the majority will result in the division of the remainder of the contentious land into two blocks which are divided by the additional land added to the residence and its immediate curtilage. I am not persuaded that this is justified, given the absence of evidence.

126. The appellant's offer made on 23 May 2024 to resolve the proceedings included a benefit to the respondent which the respondent did not claim in the proceedings: a right of way over part of the contentious land. It would have been open to the respondent to seek alternative relief in the Court below to obtain such a right of way by adding a claim for the creation of an easement by the Court under s 88K of the *Conveyancing Act 1919* (NSW) . This claim for alternative relief would have addressed the scenario which has ensued as a result of this Court allowing the appeal: that the respondent has only been partially successful in its claim for adverse possession and, indeed, has achieved no more than was offered to him by the appellants in their open offer. Had this occurred, the Court below would have been obliged to address the matters set out in s 88K .

127. Section 88K relevantly provides:

> **88K Power of Court to create easements**
>
> (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
>
> (2) Such an order may be made only if the Court is satisfied that—
>
> (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

…

128. For the reasons given above, the hypothesis that the respondent's predecessors in title crossed the contentious land to get to the mill is not only unsupported by the evidence but is also inconsistent with the *Ferrcom* inference is also against it. Further, another hypothesis is also reasonably available on the evidence: that those residing in the residence on Brush Creek Road used that road to travel to the mill via Yarramalong Road and Ravensdale Road.

129. In *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] HCA 34, Dixon CJ said at 361 :

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality.

130. While courts ought be astute to facilitate the just, cheap and quick resolution of the real issues between the parties with a view to quelling their disputes on a final basis, I do not consider there to be any warrant for this Court to bypass s 88K of the *Conveyancing Act* or the issues between the parties in the Court below by granting a right of way over the appellants' land (which was never sought by the respondent, either in the Court below or in this Court) or, worse still, by declaring that the land comprised by the right of way ought be transferred to the respondent, in circumstances where the evidence was manifestly insufficient to prove actual use and *animus possidendi* in respect of that land.

131. It follows that, although I agree with Ward P and Stern JA that the area outlined in red in the diagram annexed to these reasons ought be transferred to the respondent, I do not agree that the strip outlined in black ought be transferred.

Costs

132. On this basis, the appellants have succeeded in obtaining a result better than that which they offered on 23 May 2024. The offer remained open for 14 days. I consider that it is appropriate, in these circumstances, that the respondent (the plaintiff in the Court below) pay

the appellants' (the second and third defendants in the Court below) costs of the proceedings in the Court below on the ordinary basis until 6 June 2024 and on an indemnity basis thereafter.

Further matter

133. It came to the Court's attention in argument on the appeal that the owner of the Paper Road, the successors in title of Henry Perry, had not been joined to the proceedings as parties. The Court below made orders which included that land, notwithstanding that the registered proprietor of that land was not a party and had not had an opportunity to be heard against the making of those orders. As Mr Hutley pointed out, his client had no standing to challenge the orders made against another person. Accordingly, the orders relating to the Paper Road do not arise for consideration in this appeal.

134. It is important that trial judges ensure that proceedings are properly constituted by requiring a plaintiff to join all necessary and proper parties as defendants to proceedings. If this important matter is overlooked, the person whose interests have been adversely affected by not having been joined, is denied procedural fairness and the orders of the Court are susceptible to being set aside on that basis: *Victoria v Sutton* (1998) 195 CLR 291; [1998] HCA 56 at [77] (McHugh J); approved by the High Court unanimously (French CJ, Gummow, Hayne, Heydon and Kiefel JJ) in *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1; [2010] HCA 19 at [131] . This Court cannot take that step of its own motion in the context of this appeal, including because, as Mr Hutley confirmed, the appellants have no standing to challenge the declaration made in favour of the respondent in respect of the Paper Road.

Proposed orders

135. For the reasons given above, I propose the following orders:

    1. Allow the appeal.

    2. Set aside orders 1, 6 and 8 made by Peden J on 8 August 2024 and, in lieu thereof, make the orders set out in (3) below.

    3. Make the following orders:

        1. Declare that the plaintiff is the rightful owner of so much of the land in Lot 41 DP 1003436 as is outlined in unbroken red in annexure "A" to the letter dated 23 May 2024 from the appellants' solicitor to the respondent's solicitor, being the area outlined in unbroken red in the document identified as Amended diagram of Plan Sheet A annexed to these reasons.

        2. Order the plaintiff to withdraw any caveat lodged in respect of the land over which the second and third defendants are registered proprietors which makes a claim beyond order (3)1 above.

3. Order the plaintiff to pay the second and third defendants' costs in the Court below on the ordinary basis until 6 June 2024 and on an indemnity basis thereafter.

4. Order the respondent to pay the appellants' costs of the appeal.

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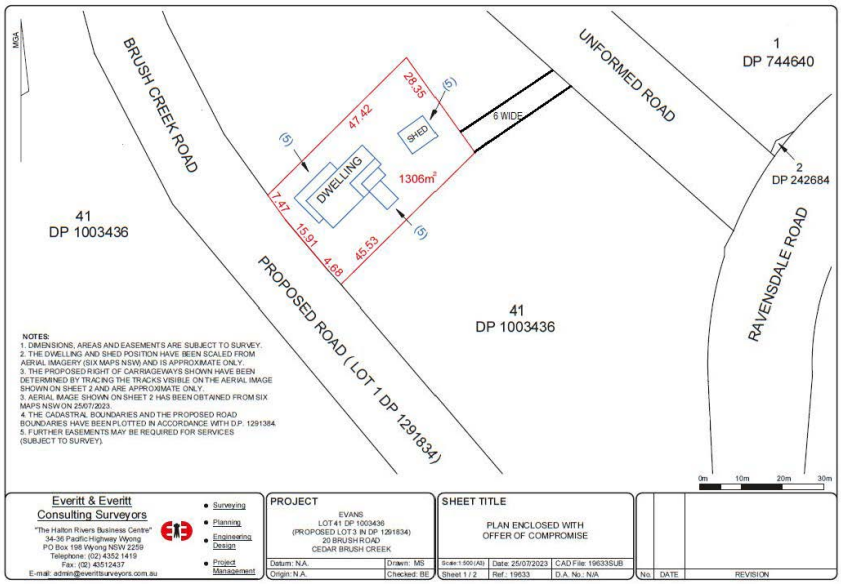
Amended diagram of Plan Sheet A



Decision last updated: 16 May 2025