

Amended Commercial List Statement
Filed Pursuant to Orders of Justice Rees 14 March 2023

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2021/88654

TITLE OF PROCEEDINGS

First Plaintiff	Darren Mitchell
Second Plaintiff	Rosaline Mitchell
First & Defendant	Roads and Maritime Services (ABN 76236371088), now Transport for New South Wales
Second Defendant	<u>[Previously Removed]</u> .

FILING DETAILS

Filed for	Plaintiffs
Legal representative	Trevor Hall
Legal representative reference	TH
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Type of Claim

Declaration – Land – Other

A. NATURE OF THE DISPUTE

- 1A. This pleading is filed pursuant to orders of Justice Rees made in these proceedings on 14 March 2023. This Amended Commercial List Statement replaces in totality the prior version of the Commercial List Statement and hence the excised parts do not appear in strike through in the conventional fashion, as the whole of the document has been excised.
1. This is a representative proceeding brought by the plaintiffs on behalf of themselves and the Group Members.

2. The Group Members are all the persons who have had land compulsorily acquired by TfNSW for the WestConnex M4-M5 Link Project. There are in excess of 7 Group members.
3. Land owned by the plaintiffs was compulsorily acquired by TfNSW without their consent and without payment of compensation and used in the construction of tunnels forming or to form part of the WestConnex M4-M5 Link Project.
4. The plaintiffs' first contention is that the acquisition of their land by TfNSW was not authorised by section 177(1) of the *Roads Act 1993* (NSW) because it was not for a purpose of that Act.
5. The plaintiffs seek declaratory relief to this effect.
6. Alternatively, the plaintiffs second contention is that the acquisition of their land by TfNSW was prohibited by section 179(1) of the *Roads Act 1993* (NSW) because it was for the purpose of re-sale.
7. The plaintiffs seek declaratory relief to this effect.
8. In respect of their first contention, alternatively their second contention, the plaintiffs seek a declaration that the *in personam* exception to indefeasibility of title applies to TfNSW, on the basis of its conduct before achieving registration as the registered proprietor of land acquired from the plaintiffs without authority (first contention), alternatively contrary to a prohibition against its acquisition (second contention) and they claim compensation for TfNSW's use of their former land.
9. In respect of their first contention, alternatively their second contention, the plaintiffs in the alternative to the previous paragraph claim recovery of damages from TfNSW under s. 120(2)(a) of the *Real Property Act 1900* (NSW) by reason of s. 120(1)(d) of that Act.
10. As a further alternative to their first and second contentions, the plaintiffs' third contention is that the acquisition of their land without compensation was prohibited by s. 62(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) because the land was not acquired for the purpose of constructing a tunnel.
11. The plaintiffs seek declaratory relief to this effect.

12. The plaintiffs are aware of the existence of several other project deeds relating to the WestConnex project, which may be to the same or similar effect as the project deed for the WestConnex M4-M5 Project.
13. In *Cappello v Roads and Maritime Services* [2019] NSWCA 227; 100 NSWLR 259, the Court of Appeal in a similar but different context to the contentions in these proceedings construed the meaning of the phrase “*the purposes of this Act*” within s. 177(1) of the *Roads Act NSW* (1993). The construction of that phrase arises in determining the plaintiffs’ first contention.
14. By reason of the matter in the previous two paragraphs, the plaintiffs claim that there exist “*special circumstances*” within the meaning of that phrase in *Uniform Civil Procedure Rules 2005* (NSW) Rule 1.21(1)(b).
15. By reason of the matter in the previous paragraph, the plaintiffs claim orders under Rule 1.21 of the *UCPR*, following the close of pleadings in these proceedings:
 - that the Court state that the questions to be decided or determined in these proceedings are the plaintiffs’ first, second and third contentions;
 - that, the Court, having stated the questions to be decided or determined, is satisfied that special circumstances exist that render it desirable to make an order for the removal of the proceedings into the Court of Appeal; and
 - that it so orders.

B. ISSUES LIKELY TO ARISE

1. Was the acquisition of the plaintiffs’ land by TfNSW not authorised by section 177(1) of the *Roads Act 1993* (NSW) because it was not for a purpose of that Act (the plaintiffs’ first contention)?
2. If the plaintiffs’ first contention is decided in the affirmative, does the *in personam* exception to indefeasibility of title apply to TfNSW, on the basis that it achieved registration as the registered proprietor of land by purporting to compulsorily acquire the plaintiffs’ land when it was not entitled to do so, for the purposes of implementing the Project Deed referred to in paragraph C2 below, and that this constituted taking unconscientious advantage of s. 177(1) of the *Roads Act* to achieve indefeasibility to which it was not entitled, such that its conduct before registration gave rise to a

personal equity against TfNSW of the sort referred to in *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604 per Mason CJ and Dawson J at [10] and per Wilson and Toohey JJ at [48]?

3. In the alternative to Issue 2, if the plaintiffs' first contention is decided in the affirmative, are the plaintiffs entitled to recover damages from TfNSW under s. 120(2)(a) of the *Real Property Act 1900* (NSW) by reason of s. 120(1)(d) of that Act?
4. If either Issue 2 or Issue 3 is decided in the affirmative, is the measure of the compensation or damages payable to the plaintiffs to be assessed by reference to a notional licence of the plaintiffs' former land or, alternatively, by an account of profits in respect of the use by TfNSW of the plaintiffs' former land?
5. In the alternative to the plaintiffs' first contention, was the acquisition of the plaintiffs' land by TfNSW prohibited by section 179(1) of the *Roads Act 1993* (NSW) because it was for the purpose of re-sale (the plaintiffs' second contention)?
6. If the plaintiffs' second contention is decided in the affirmative, does the *in personam* exception to indefeasibility of title apply to TfNSW, on the basis that it achieved registration as the registered proprietor of land by purporting to compulsorily acquire the plaintiffs' land in breach of a prohibition against acquisition and for the purposes of implementing the Project Deed referred to in paragraph C2 below and that this constituted taking unconscientious advantage of s. 177(1) of the *Roads Act* to achieve indefeasibility to which it was not entitled, such that its conduct before registration gave rise to a personal equity against TfNSW of the sort referred to in *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604 per Mason CJ and Dawson J at [6] and per Wilson and Toohey JJ at [48]?
7. In the alternative to Issue 6, if the plaintiffs' second contention is decided in the affirmative, are the plaintiffs entitled to recover damages from TfNSW under s. 120(2)(a) of the *Real Property Act 1900* (NSW) by reason of s. 120(1)(d) of that Act?
8. If either Issue 6 or Issue 7 is decided in the affirmative, is the measure of the compensation or damages payable to the plaintiffs to be assessed by reference to a notional licence of the plaintiffs' former land or, alternatively, by an account of profits in respect of the use by TfNSW of the plaintiffs' former land?
9. Was the acquisition of the plaintiffs' land without compensation prohibited by s. 62(2)

of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) because the land was not acquired for the purpose of constructing a tunnel?

10. Should the proceedings be removed into the Court of Appeal after the close of pleadings?

C. PLAINTIFFS' CONTENTIONS

1. Until 26 April 2019, the plaintiffs were the registered proprietors of the whole of the land (unlimited as to depth) known as [REDACTED], New South Wales.
2. On a date in 2018 not known to the plaintiffs, the defendant (then Roads and Maritime Services, now Transport for New South Wales ("**TfNSW**")) entered into a deed between itself, WCX M4-M5 Link PT Pty Ltd ("**Project Trustee**") and WCX M4-M5 Link AT Pty Ltd ("**Asset Trustee**") called "*WestConnex M4-M5 Link Project Deed*" ("**Project Deed**").
3. At the time of entry into the Project Deed, the Project Trustee and the Asset Trustee were proprietary companies owned by the State of NSW.
4. The Project Deed has 37 Schedules, which have not been made public.

Particulars

List of schedules in Project Deed, 2 non-numbered pages
following "*Contents*", headed "*Schedules*"

5. The Project Deed has 22 documents exhibited to it, which have not been made public.

Particulars

List of exhibits in Project Deed, 2 non-numbered pages following
the list of schedules, headed "*Exhibits*"

Summary pleading of the plaintiffs' contentions:

6. Section 177(1) of the *Roads Act 1993 (NSW)* ("**Roads Act**") provides that TfNSW "*may acquire land for any of the purposes of this Act*".

- 7 By force of s. 52(1) of the Act, construction by TfNSW of a tollway on land owned or to be owned by TfNSW is a purpose of the Roads Act for which acquisition of land is authorised by s. 177(1) of the Roads Act.
- 8 The plaintiffs' land was compulsorily acquired by TfNSW to form part of the tunnels to be constructed pursuant to the Project Deed.
- 9 On the proper construction of the Project Deed, the purpose of TfNSW in entering into the Project Deed was the construction by other parties of a tollway, on land alienated from TfNSW for about 40 years, whose operating and tolling rights for that period were to be sold to raise funds for the State of New South Wales. That purpose was to be achieved, and has been achieved, by:
- 9.1 The construction and operation by other parties of a tollway on land acquired without compensation from the plaintiffs;
 - 9.2 The alienation of that land for consideration from TfNSW, apart from a reversionary interest, by lease and its further alienation by sub-lease until 30 July 2060 and its treatment until then as if freehold owned by one of the third parties;
 - 9.3 The grant for consideration to third parties of the right to construct, operate and collect and retain tolls from the tollway until 30 July 2060; and
 - 9.4 The sale of the interests of the Government of NSW in the tollway to a third party for a large capital sum;
- with the result that the tollway to be constructed pursuant to the Project Deed cannot be characterised as a road constructed by TfNSW, nor as a road on land owned or to be owned by it, but as a road constructed for the purpose of the sale of its operating and tolling rights for a 40-year period, in order to raise funds for the State of NSW.
- 10 Construction of a road for the purpose set out in the previous paragraph is not a purpose of the Roads Act.
- 11 The plaintiffs' **first contention** is that, by reason of the matter in the previous paragraph, the compulsory acquisition of their land was not authorised by s. 177(1) of the Roads Act, or at all.

- 12 Section 179(1) of the Roads Act provides that land may not be acquired by compulsory process under Division 1 of Part 12 of the Act without the approval of the owner of the land, if it is being acquired for the purpose of re-sale.
- 13 Section 177(1) is within Division 1 of Part 12 of the Act.
- 14 On the proper construction of the Project Deed:-
- 14.1 the grant of a lease for consideration, pursuant to the Project Deed, of the plaintiffs' land purportedly acquired pursuant to s. 177(1) to a third party, constituted a sale of "*land*" within the meaning of that term in the Roads Act;
- 14.2 that sale constituted a "*re-sale*" within the meaning of that term in s. 179(1); and
- 14.3 the purpose of TfNSW in acquiring the plaintiffs' land was for the purpose of that re-sale.
- 15 If, contrary to the plaintiffs' first contention, TfNSW had power under s. 177(1) of the Roads Act to compulsorily acquire the plaintiffs' land, the plaintiffs' **second contention** is that, by reason of the matter in the previous paragraph and by force of s.179(1) of the Roads Act, TfNSW was prohibited from compulsorily acquiring their land pursuant to s. 177(1) without their consent. They did not consent to TfNSW's acquisition of their land and it therefore was not authorised by s. 177(1) of the Roads Act, or at all.
- 16 Section 62(2) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("**Just Terms Act**") provides that if land under the surface is compulsorily acquired under the Act for the purpose of constructing a tunnel, compensation is not payable except in circumstances not relevant here.
- 17 The entirety of the sub-surface land compulsorily acquired by TfNSW from the plaintiffs was not required for the purpose of the construction of the tunnels contemplated by the Project Deed. On the proper construction of the Project Deed, the reversionary interest to be left to TfNSW and referred to above in paragraph 9.2 of these contentions constituted "*land*" which was acquired from the plaintiffs but was not necessary for the purpose of constructing a tunnel. Accordingly, s. 62(2) of the Just Terms Act did not exempt TfNSW from paying compensation for that land.

18 If, contrary to the plaintiffs' first and second contentions, TfNSW had power to compulsorily acquire the plaintiffs' land, the plaintiffs' **third contention** is that, by reason of the matter in the previous paragraph and pursuant to the Just Terms Act, compensation was payable to the plaintiffs for the compulsory acquisition of that land but has not been paid.

Detailed pleading of the plaintiff's first contention:

19 The Project Deed recites on p.1, Recital B(1), that the parties to it enter into the Deed to set out the terms on which the Asset Trustee will carry out "*the investigation, financing, funding, planning, design and construction and commissioning of the Project Works ...*". "*Project Works*" is defined on p. 45 of the Project Deed as including "*the Main Tunnel Works*", a term itself defined on p. 33 of the Project Deed as "*the road, tunnel and other physical works, facilities, systems, and Utility Services defined in section 2.3.1 of Part A of the SWTC ...*". "*SWTC*" is a term defined on p. 59 of the Project Deed as meaning "*Scope of Works and Technical Criteria*" and relevantly meaning "*Exhibit M*". Exhibit M has not been made available to the public.

20 "*Project Works*" is defined to also include "*the State Works*", which is defined on p. 58 as having the meaning given to the term "*State Works Contractors Works*" in the Main Tunnel State Works Deed; that deed according to the definition of "*Main Tunnel State Works Deed*" on p. 33 is a deed titled "*WestConnex M4-M5 Link Main Tunnel State Works Deed*" entered into by TfNSW and the State Works Contractor on about the date of the Project Deed; it has not been made available to the public. "*State Works Contractor*" is defined on p. 58 of the Project Deed as WCX State Works Contractor Pty Ltd ACN 624 154 089.

21 The Project Deed recites on p. 1, Recital B(2) that the parties enter into the Project Deed to set out the terms on which the Project Trustee will carry out "*the operation, maintenance and repair of the Motorway and the handover of the Motorway to TfNSW at the end of the Term.*" "*Motorway*" is defined on p. 34 of the Project Deed to mean the Main Tunnel and the Rozelle Interchange and, with respect to the Main Tunnel, as:

"(a) ... *the roads, tunnels and other physical works, facilities, systems and Utility Services, including all plant, machinery, equipment, fixtures, fittings, landscaping, spare parts and other improvements on or in the Main Tunnel Motorway Stratum ...*".

- 22 “*Main Tunnel Motorway Stratum*” is defined on p. 33 of the Project Deed as “*the stratum of real property to be the subject of the Main Tunnel Lease as agreed or determined in accordance with Schedule 11*”. Schedule 11 has not been made available to the public but is described in the list of schedules in the Project Deed as “*Process for Granting M4-M5 Link Leases*”. “*M4-M5 Link Leases*” is defined on p. 31 as “*the Main Tunnel Lease and the Rozelle Interchange Lease granted in accordance with the terms of this deed*”.
- 23 The “*Main Tunnel Lease*” is defined on p. 33 of the Project Deed as “*a lease of the Main Tunnel Motorway Stratum granted in accordance with clause 18 on the terms specified in Exhibit E*”. Exhibit E has not been made available to the public but is described in the list of Exhibits in the Project Deed as “*Form of M4-M5 Link Leases and Subleases*”. Clause 18 is referred to below.
- 24 The Main Tunnel Motorway Stratum includes the former property of the plaintiffs compulsorily acquired by TfNSW and thus the Main Tunnel Lease and the M4-M5 Link Lease are leases of the former property of the plaintiffs.
- 25 “*Term*” is defined on p. 59 as “*the period calculated in accordance with clause 2(b)*”. Clause 2(b) provides that the term will end on the earlier of the date of termination of the Project Deed and “*the Final Expiry Date*”. That term is defined on p. 22 to mean “*31 December 2060, or such later date determined in accordance with this deed*”.
- 26 Clause 2 of the Project Deed is headed “*Grant of Concession*” and provides:
- “(a) *In consideration for the Trustees agreeing to perform their respective obligations under this deed, RMS:*
- (i) *grants the Trustees a right to carry out the Project;*
- (ii) *leases the operation of the Motorway to the Project Trustee; and*
- (iii) *grants the M4-M5 Link Leases to the Asset Trustee,*
subject to, and in accordance with, this deed.”

- 27 “Project” is defined on p. 42 of the Project Deed as:
- “(a) *the investigation, financing, funding, planning, design, construction, commissioning and maintenance of the Project Works and the Temporary Works;*
 - (b) the operation, maintenance and repair of the Motorway;*
 - (c) the handover of the Motorway to RMS at the end of the Term; and*
 - (d) the levying and collection of tolls on the Motorway.”*
- 28 Clauses 4(b)(xv) and 4A.1(b)(i)(A) of the Project Deed provide that, subject to express provisions of the deed, the Trustees accept all risks associated with, among many other things:-
- (xv) damage to the Project Activities, the Project Works, the Temporary Works, the O&M Work, the Asset Renewal, the D&C Phase Maintenance, the Construction Site, the Extra Land or the Motorway.”*
- and similarly with respect to the Rozelle Interchange.
- 29 Clause 7.6(a) of the Project Deed obliges TfNSW to “ensure” that the Minister (defined on p. 34 as “any Minister responsible for administering Part 5 (Classification of Roads) of the Roads Act”) makes a declaration under s. 52 of the Act that the Main Tunnel and the Rozelle Interchange are declared to be a tollway; directs in accordance with s. 63 of the Act that all the functions of a road authority in respect of the declared tollway are the responsibility of TfNSW; and declares by order published in the *Gazette* that the Project Trustee is a “toll operator” in respect of the tollway for the purpose of the definition of “toll operator” in the Dictionary to that act.
- 30 Clause 15.1(a) of the Project Deed provides that “*the Asset Trustee must construct the Project Works and the Temporary Works, and ensure that the State Works Contractor constructs the State Works*” in accordance with the requirements of the Project Deed.
- 31 Clause 18.1 deals with the M4-M5 Link Leases, and provides:
- “M4-M5 Link Leases**
- (a) The parties acknowledge and agree that the M4-M5 Link Leases cannot be registered under the Real Property Act 1900 (NSW) in their present form.*
 - (b) The Asset Trustee must procure surveys and other documents in accordance with the SWTC.*

- (c) *RMS must grant the Asset Trustee the M4-M5 Link Leases and a licence or licences over the Licensed Maintenance Areas in accordance with Schedule 11.*
- (d) *Between the Date of Opening Completion and the date on which each of the M4-M5 Link Leases is registered at Land and Property Information (NSW), the respective rights and obligations of RMS and the Asset Trustee will be as set out in the draft motorway stratum leases comprising Exhibit E and the parties will be bound by the provisions of the relevant draft motorway stratum leases comprising Exhibit E:*
 - (i) *in respect of the Main Tunnel Lease from and including the Date of Opening Completion; and*
 - (ii) *in respect of the Rozelle Interchange Lease from and including the Rozelle Interchange Transfer Date, even though the parties may not have executed the M4-M5 Link Leases or they may not have been completed in accordance with Schedule 11.*
- (e) *RMS acknowledges that the Asset Trustee will grant to the Project Trustee each of the M4-M5 Link Subleases on each of the M4-M5 Link Subleases' respective Commencement Dates (as defined in each M4-M5 Link Sublease) in accordance with this deed."*

Exhibit E and Schedule 11 have not been made available to the public.

- 32 *"Date of Opening Completion" is defined on p. 14 of the Project Deed as "the date notified in a Notice of Opening Completion as the date Opening Completion was achieved". "Opening Completion" is defined on p. 38 partly in terms of satisfaction by the Asset Trustee of conditions precedent set out in Part A of Schedule 24, which has not been made available to the public.*
- 33 *"M4-M5 Link Subleases" is defined on p. 31 of the Project Deeds as "the subleases to be entered into between the Project Trustee and the Asset Trustee as referred to in section 4 of Schedule 11". As already noted, Schedule 11 has not been made available to the public.*
- 34 *Clause 21.1 of the Project Deed provides that the Project Trustee may levy tolls for the passage of motor vehicles through the Main Tunnel and the Rozelle Interchange until the expiry of the Term. Clause 22.2 provides that the Project Trustee will be entitled to all toll revenue collected during the Term, "subject to cl. 2.2 of the M4-M5 Link Leases".*

Because those leases have not been made available to the public, the plaintiffs do not know the extent to which the Project Trustee is not entitled to retain toll revenue collected during the Term but they are aware, on the basis of the judgment of his Honour Lindsay J in *Aversa v Roads and Maritime Services* [2021] NSWSC 1047 at [61], that “*through sub lease arrangements characterised as ‘tollway concessions’, the [NSW] Government receives a revenue stream from operation of the tollway*”.

35 Clause 22A.16 of the Project Deed provides that if any damage occurs to the Motorway arising out of TfNSW carrying out a New Network Project (defined on p. 35 of the deed as a project undertaken by TfNSW or its nominee, after the date of the Project Deed, to connect a new road to the Motorway), TfNSW must reimburse the Trustees for the reasonable costs of repair.

36 Otherwise, however, pursuant to cl. 26.1 of the Project Deed, the Trustees bear the risk of loss or damage to the Main Tunnel to the end of the Term. Further, pursuant to cl. 27.1 of the Project Deed, the Trustees must indemnify TfNSW against any loss and any claim in respect of personal injury, disease or death or property loss arising in any way out of their activities in relation to the Motorway. Sub-cl. 27.1(g) provides:

“The Trustees and the State Works Contractor have the same responsibilities to third parties in respect of persons, property and all other aspects of the Project which they would have if they held the freehold title to the Motorway Stratum and the Maintenance Site.”

“*Motorway Stratum*” is defined on p. 35 of the Project Deed as “*the Main Tunnel Motorway Stratum and the Rozelle Interchange Motorway Stratum*” and thus includes the former property of the plaintiffs compulsorily acquired by the defendant.

37 Clause 34.2 of the Project Deed provides that, on the last day of the Term, the Trustees must “*peaceably surrender and yield up to RMS, the Motorway and the Motorway Stratum (including any right, title or interest in them) in a fully functional condition ...*”.

38 Clause 37.1(a) of the Project Deed provides that the Trustees may not sell, transfer, assign, mortgage, charge or otherwise dispose of, or deal with, or encumber their interest in the Motorway or the Project Documents without the prior written consent of TfNSW. “*Project Documents*” is defined on pp. 43 of the Project Deed as comprising

35 documents, including the Project Deed (item (a)), each of the M4-M5 Link Leases (item (s)) and each of the M4-M5 Link Subleases (item t)), plus any other document agreed to be a Project Document (item jj)).

39 Clause 37.1(c) provides:

“RMS may sell, transfer or assign or otherwise dispose of its interest in the Project Documents without the prior written consent of the Trustees provided either:

(i); or

(ii) RMS is assigning, transferring, sub-participating or otherwise dealing with all or any part of its rights and benefits under this deed or any Project Documents in relation to its entitlement to any rent under an M4-M5 Link Lease.”

40 On 17 August 2018, pursuant to cl. 7.6(a)(1)(A) of the Project Deed and s. 52(1) of the Roads Act, the Minister published in the *Gazette* a declaration that the proposed road to be constructed in the Main Tunnel was a tollway.

41 On 31 August 2018, the NSW Government announced that it had sold 51% of its interest in WestConnex for \$9,260,000,000.

42 On 26 April 2019, by acquisition notice published in the *Gazette*, TfNSW compulsorily acquired two underground strata in the plaintiffs' land at [REDACTED] referred to in paragraph 1 of Part C of this Commercial List Statement. Those two strata are [the relevant lots] (the “**plaintiffs' land**”), in respect of which TfNSW is now the registered proprietor.

43 By reason of the matter in paragraphs 18-41 above, at the time of the acquisition by TfNSW of the plaintiffs' land pursuant to the acquisition notice referred to in the previous paragraph, on the proper construction of the Project Deed, the purpose for which TfNSW acquired the plaintiffs' land was:

43.1 Not for the construction of a road on land owned or to be owned by TfNSW but for construction of a tollway on land alienated from TfNSW, for consideration, by lease and sub-lease, for over 40 years;

- 43.2 To two proprietary companies, the Asset Trustee and the Project Trustee, to whom TfNSW had granted the right to carry out the project of constructing a tollway with a third proprietary company, the State Works Contractor;
- 43.3 Where TfNSW had leased the operation of the Motorway to the Project Trustee for more than 40 years, during which it was entitled to charge and retain tolls for use by motor vehicles of the tollway but was required by sub-lease to remit some of the tolls to TfNSW;
- 43.4 Where the Asset Trustee was responsible for the *“investigation, financing, funding, planning, design and construction and commissioning”* of the Tollway;
- 43.5 Where the Project Trustee was responsible for the operation, maintenance and repair of the Tollway;
- 43.6 Where Trustees accepted all risk of damage to the Motorway and had *“the same responsibilities to third parties in respect of persons, property and all other aspects of the Project which they would have if they held the freehold title to the Motorway Stratum and the Maintenance Site; and*
- 43.7 Where the State of NSW had sold part of its interest in the Tollway for a large capital sum and was intending to sell its remaining interest for another large capital sum.
- 44 On the proper construction of the Roads Act, the purpose for the acquisition of the plaintiffs’ land by TfNSW set out in the previous paragraph is not a purpose of the Roads Act.
- 45 By reason of the matter in the previous paragraph, the acquisition of the plaintiffs’ land by TfNSW was not for a purpose of the Roads Act.
- 46 By reason of the matter in the previous paragraph, the acquisition of the plaintiffs’ land by TfNSW was not authorised by s. 177 of the Roads Act, or at all.
- 47 Sub-s. 7(1) of the Just Terms Act provides that that Act does not empower an authority of the State to acquire land if it does not have the power (apart from that Act) to acquire the land.

- 48 By reason of the matter in the two previous paragraphs, TfNSW lacked power to compulsorily acquire the plaintiffs' land and the plaintiffs claim a declaration to this effect.
- 49 By reason of the matter in the previous paragraph, the *in personam* exception to indefeasibility of title applies to TfNSW, on the basis that it achieved registration as the registered proprietor of land by purporting to compulsorily acquire the plaintiffs' when it was not entitled to do so for the purposes of implementing the Project Deed, and that this constituted taking unconscientious advantage of s. 177(1) of the Roads Act to achieve indefeasibility to which it was not entitled, such that its conduct before registration gave rise to a personal equity against TfNSW of the sort referred to in *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604 per Mason CJ and Dawson J at [6] and per Wilson and Toohey JJ.
- 50 By reason of the matter in the previous paragraph, the plaintiffs are entitled to, and claim, a declaration that TfNSW holds the plaintiffs' land on constructive trust for the plaintiffs.
- 51 In the alternative to the previous two paragraphs, by reason of the matter in paragraphs 48 and 49, the plaintiffs are entitled to recover damages from TfNSW under s. 120(2)(a) of the *Real Property Act 1900* (NSW) ("**Real Property Act**") by reason of s. 120(1)(d) of that Act.
- 52 By reason of the matter in paragraph 50, alternatively paragraph 51, the plaintiffs are entitled to, and claim, compensation, alternatively damages, payable to the plaintiffs to be assessed by reference to a notional licence of the plaintiffs' former land or, alternatively, by an account of profits in respect of the use by TfNSW of the plaintiffs' former land.

Detailed pleading of the plaintiffs' second contention:

53 The plaintiffs refer to clause 2(a) of the Project Deed, set out above in paragraph 26 of these contentions, which relevantly provides:

"In consideration for the Trustees agreeing to perform their respective obligations under this deed, RMS:

(i) ...

(ii) ...

(iii) grants the M4-M5 Link Leases to the Asset Trustee."

54 For the purposes of the Roads Act, "land" is defined in the Dictionary to the Act, having regard to the definition in the Dictionary of "interest in land" as "an estate, interest, right or power, at law or in equity, in or over or in connection with the land".

55 By reason of ss. 41(1) and 53(1) of the Real Property Act and Form 07L ("the approved form" under Real Property Act s. 53(1)), the rights and powers of a registered proprietor include the right and power to lease land under the Act.

56 The plaintiffs refer to paragraph 18.1 of the Project Deed, set out above in paragraph 31 of these contentions.

57 By reason of the matter in the previous paragraph, TfNSW is obliged to register the M4-M5 Link Leases on the titles to [the relevant lots] , with the Asset Trustee shown as lessee.

58 By reason of the matter in the previous two paragraphs, TfNSW on entry into the Project Deed consented to the Asset Trustee granting the Project Trustee the M4-M5 Link Subleases.

59 By reason of the matter in paragraphs 57 and 58 of these contentions, TfNSW is obliged to register, alternatively obliged to consent to the registration of, the M4-M5 Link Subleases on the titles to [the relevant lots] , with the Project Trustee shown as sub-lessee.

- 60 By reason of the matter in paragraphs 57-59 of these contentions, the grant by TfNSW for consideration of the M4-M5 Link Leases effected by s. 2(a) of the Project Deed will, upon registration of those leases, constitute a sale to the Asset Trustee of “*land*”, namely of the right and power of the Asset Trustee as a registered proprietor to grant a lease under the Real Property Act.
- 61 The compulsory acquisition by TfNSW of the plaintiffs’ land pleaded in paragraph 42 of these contentions effected an acquisition by TfNSW of the right and power to grant a lease under the Real Property Act and was for the purpose of satisfying the obligation of TfNSW under cl. 2(a) of the Project Deed of granting the M4-M5 Link Lease to the Asset Trustee for consideration.
- 62 By reason of the matter in the previous paragraph, the purpose of the acquisition by TfNSW of the plaintiffs’ land was for a resale of “*land*”, namely of the right and power of a registered proprietor to grant a lease under the Real Property Act.
- 63 By reason of the matter in the previous paragraph, the acquisition by TfNSW of the plaintiffs’ land was prohibited by s. 179(1) of the Roads Act.
- 64 By reason of the matter in the previous paragraph, the *in personam* exception to indefeasibility of title applies to TfNSW, on the basis that it achieved registration as the registered proprietor of land by purporting to compulsorily acquire the plaintiffs’ when it was prohibited from so doing for the purposes of implementing the Project Deed, and that this constituted taking unconscientious advantage of s. 177(1) of the Roads Act to achieve indefeasibility to which it was not entitled, such that its conduct before registration gave rise to a personal equity against TfNSW of the sort referred to in *Bahr v Nicolay (No 2)* [1988] HCA 16; (1988) 164 CLR 604 per Mason CJ and Dawson J at [6] and per Wilson and Toohey JJ.
- 65 By reason of the matter in the previous paragraph, the plaintiffs are entitled to, and claim, a declaration that TfNSW holds the plaintiffs’ land on constructive trust for the plaintiffs.

66 In the alternative to the previous two paragraphs, by reason of the matter in paragraphs 63 and 64, the plaintiffs are entitled to recover damages from TfNSW under s. 120(2)(a) of the Real Property Act by reason of s. 120(1)(d) of that Act.

67 By reason of the matter in paragraph 65, alternatively paragraph 66, the plaintiffs are entitled to, and claim, compensation, alternatively damages, payable to the plaintiffs to be assessed by reference to a notional licence of the plaintiffs' former land or, alternatively, by an account of profits in respect of the use by TfNSW of the plaintiffs' former land.

Detailed pleading of the plaintiff's third contention:

68 If, contrary to the plaintiffs' first and second contentions, TfNSW validly compulsorily acquired the plaintiffs' land, the plaintiffs plead as follows.

69 Sub-s. 62(2) of the Just Terms Act provides that no compensation is payable for the acquisition of underground land "*for the purpose of constructing a tunnel*".

70 Sub-s. 62(2) of the Act Just Terms provides an exemption from payment of compensation for an acquisition of underground land under the Act only if the authority of the State which is authorised to acquire the land by compulsory process (in this case, TfNSW), had by the time of acquisition of the land formed the intention to use the land for the purpose of constructing a tunnel.

71 At the time of acquisition of the plaintiffs' land, TfNSW intended to deal with, and dealt with the plaintiffs' land, in the following manner:

71.1 Pursuant to cl. 2(a) of the Project Deed, in consideration of the Trustees agreeing to perform their respective obligations under the deed, TfNSW granted the Trustees a right to carry out the project; leased the operation of the Motorway to the Project Trustee; and granted the M4-M5 Link Leases to the Asset Trustee.

71.2 Pursuant to cl. 18.1 of the Project Deed, the M-4 M-5 Link Leases are to be registered under the Real Property Act.

71.3 On registration of the M4-M5 Link Leases under the *Real Property Act 1900* (NSW), TfNSW will be the registered proprietor of the land and the Asset Trustee will be the registered proprietor of the M4-M5 Link Leases.

71.4 The Trustees would construct and operate a tunnel on the Land pursuant to the leasehold interest of the Asset Trustee under the M4-M5 Link Leases.

72 By reason of the matter in the previous paragraph, the manner in which TfNSW intended at the time of acquisition of the plaintiffs' land to deal with, and in fact dealt with, the plaintiffs' land, to the knowledge of TfNSW, will continue to have the effect that until at least 30 June 2060 TfNSW will remain the registered proprietor of the reversionary interest in the Land (the "**reversionary interest**").

73 As defined by s. 4(1) of the Just Terms Act, "*land*" includes" any *estate or interest in land*. As also defined there, "*Interest in land*" is "*an estate, interest, right, charge, power or privilege over, or in connection with, the land*".

74 The combined effect of the definitions of "*land*" and of "*interest in land*" in s. 4(1) of the Just Terms Act is that, for the purposes of that Act, "*land*" includes any "*estate, interest, right, charge, power or privilege over, or in connection with, the land*".

75 By reason of the matter in the two previous paragraphs, the reversionary interest constitutes "*land*" within the meaning of that term in sub-s. 62(2) of the Just Terms Act.

76 Pursuant to s. 5(1) of the Just Terms Act, the Act "*applies to the acquisition of land (by agreement or compulsory process) by an authority of the State which is authorised to acquire the land by compulsory process*".

77 By force of s. 177 of the *Roads Act 1993* (NSW), TfNSW is an authority of the State which is authorised to acquire land by compulsory process.

78 Pursuant to s. 5(1) of the Just Terms Act, TfNSW is authorised to acquire any interest in land, except those specifically excepted by sub-ss. 6(b)-(d) of the Act, none of which is relevant here. By force of s. 37 of the Just Terms Act, TfNSW is empowered to acquire an interest in land which extinguishes the owner's interest in the land but also to acquire an interest in the owner's land that does not extinguish the owner's interest but diminishes it.

- 79 By reason of the matter in the previous paragraph, TfNSW (intending as it did at the time of acquisition of plaintiffs' land that it would be used for the purpose of a tunnel to be constructed on it by the Trustees pursuant to leasehold interests, rather than by itself pursuant to the freehold interest) could have accomplished its intention by (i) acquiring from the plaintiffs a leasehold interest in the Land pursuant to s. 5(1) of the Act; (ii) registering the dealing creating the leasehold interest pursuant to s. 41 of the *Real Property Act 1900* (NSW), with the result that it became a registered proprietor of the plaintiffs' land as to a leasehold interest; and then (iii) pursuant to ss. 3(1)(a), 51 and 52 of the *Real Property Act 1900* transferring that interest to the Trustees who could then have constructed and operated the tunnel pursuant to their leasehold interests.
- 80 Had TfNSW taken the steps pleaded in the previous paragraph, it could and would have acquired from the plaintiffs only land that it intended to be used for the construction of a tunnel.
- 81 By reason of the matter in the previous paragraph, the reversionary interest was not intended at the time of TfNSW's acquisition of it, is not now intended, and never will have been intended to be acquired for the purpose of construction of a tunnel and therefore did not and does not and never will constitute land acquired under the Act for the purpose of constructing a tunnel.
- 82 By reason of the matter in the previous paragraph and of sub-s. 66(2) of the Just Terms Act, TfNSW was not entitled to acquire the reversionary interest without paying the plaintiffs compensation for it.
- 83 By reason of the matter in the previous paragraph, the plaintiffs are entitled to, and claim, a declaration that TfNSW was not entitled to acquire the reversionary interest without paying the plaintiffs compensation for it.

Plaintiffs' contentions as to the disposition of the proceedings:

- 84 The plaintiffs are aware of the existence of several other project deeds relating to the WestConnex project, which may be to the same or similar effect as the Project Deed.

Particulars

WestConnex M4 Project Deed, WestConnex M5 Project Deed,
and WestConnex M8 Project Deed

85 In *Cappello v Roads and Maritime Services* [2019] NSWCA 227; 100 NSWLR 259, the Court of Appeal in a similar but different context construed the meaning of the phrase “*the purposes of this Act*” within s. 177(1) of the Roads Act.

86 By reason of the matter in the previous two paragraphs, there exist “*special circumstances*” within the meaning of that phrase in *Uniform Civil Procedure Rules 2005* (NSW) Rule 1.21(1)(b).

87 By reason of the matter in the previous paragraph, the plaintiffs claim orders under Rule 1.21 of the *UCPR* that, following the close of pleadings in these proceedings:

87.1 the Court state that the questions to be decided or determined in these proceedings are the plaintiffs’ first, second and third contentions;

87.2 the Court, having stated the questions to be decided or determined, finds that it is satisfied that special circumstances exist that render it desirable to make an order for the removal of the proceedings into the Court of Appeal; and

87.3 it so orders.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

1. The plaintiffs are not aware of any questions appropriate for referral to a referee.

E. A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION AND WHETHER THE PLAINTIFFS ARE WILLING TO PROCEED TO MEDIATION AT AN APPROPRIATE TIME

1. The parties have not attempted mediation.
2. The plaintiffs are willing to proceed to mediation at an appropriate time and suggest that the close of pleadings would be an appropriate time.
3. The plaintiffs suggest that the proceedings are highly appropriate for mediation because they raise difficult issues of law and, as a result, all parties are at risk in terms of the outcome of the proceedings. In these circumstances, mediation offers an opportunity to mitigate that risk by reaching an agreed outcome.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the [Legal Profession Uniform Law Application Act 2014](#) that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claims in these proceedings have reasonable prospects of success.

I have advised the plaintiffs that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor

Date of signature

14 March 2023

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this commercial list statement:

- You will be in default in these proceedings.
- The court may enter judgment against you without any further notice to you. The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.
- Please read this commercial list statement very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

HOW TO RESPOND

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim**, by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed**, by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed**, by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.
 - Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address Law Courts Building, Queens Square Sydney
Postal address
GPO Box 3, Sydney NSW 2001
Telephone 9230 8111

AFFIDAVIT VERIFYING

Name Rosaline Mitchell
Address [REDACTED] [REDACTED]
Occupation [REDACTED]
Date 14 March 2022

I say on oath:

- 1 I am the second plaintiff. I am also authorised to swear this affidavit on behalf of the first plaintiff.
- 2 I believe that the allegations of fact in this Commercial LIST Statement are true.

SWORN at Sydney

Signature of deponent [REDACTED]


Name of witness Trevor Hall

Address of witness Shop 6, 172-176 Parramatta Road Homebush NSW 2140

Capacity of witness Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness 

This affidavit was electronically sworn, signed and witnessed over audio visual link using Zoom software in accordance with section 14G(2) of Part 28 of the *Electronic Transactions Act 2000* (NSW) and the witness:

- (a) witnessed the deponent sign or initial the affidavit with its exhibit and take the oath in real time;
- (b) confirms that the signature was witnessed by signing the document or a copy of the document;
- (c) is reasonably satisfied that the document the witness signed is the same document, or a copy of the document signed by the signatory; and
- (d) confirms that the document and any annexures or exhibits to it are an electronic copy, not an original.

FURTHER DETAILS ABOUT PLAINTIFFS

First plaintiff

Name Darren Mitchell

Address

[REDACTED]
[REDACTED] [REDACTED]

Second Plaintiff

Name Rosaline Mitchell

Address

[REDACTED]
[REDACTED] [REDACTED]

Legal representative for plaintiffs

Name Trevor Hall

Practising certificate number 22757

Firm Hall Partners

Contact solicitor Trevor Hall

Address Shop 6, 172-176 Parramatta Road
HOMEBUSH NSW 2140

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DETAILS ABOUT DEFENDANT

First defendant

Name Roads and Maritime Service

Address 27 – 31 Argyle Street
PARRAMATTA NSW 2150