

Commercial List Statement

COURT DETAILS

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|-------------|----------------------------------|
| 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 known as Transport for New South Wales) |
| Second defendant | Registrar General |

FILING DETAILS

| | |
|--------------------------------|----------------------------------------------------------------------------|
| Filed for | Plaintiffs |
| Legal representative | Trevor Hall |
| Legal representative reference | TH |
| Contact name and telephone | Trevor Hall 9233 3353 0404 850 606 |
| Contact email | trevor@hallpartners.com.au |

TYPE OF CLAIM

Declaration – Land – Other

A. NATURE OF THE DISPUTE

1. This is a representative proceeding brought by the Plaintiffs on behalf of themselves and the Group Members.
2. The proceedings arise from circumstances disclosed by admissions made by the Defendant concerning the construction of various tunnels for the purposes of the WestConnex project, and in which the Defendant purported to subdivide land that was compulsorily acquired for their construction.
3. The Defendant obtained registration of Deposited Plans concerning the subdivision(s) by the making of Representations to the Registrar General that the Plaintiff says that the Defendant knew to be false; and for the ostensible purpose of acquiring the land subject of them pursuant to the provisions of the Roads Act 1993 (NSW).
4. The Plaintiffs claims that the acquisition of the Lands by the Defendant was prohibited by section 179 of the Roads Act 1993 (NSW), and / or was otherwise unlawful.
5. The Plaintiffs seek relief on behalf of themselves and the Group Members in respect of what the Plaintiffs say was an unlawful acquisition and unauthorized interference with their Land.

B. CONTENTIONS

1. These proceedings are commenced as a representative proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) on behalf of the Plaintiffs and all persons who:
 - (i). had their Lands compulsorily acquired by the First Defendant for the Tunnels; and
 - (ii). are not any of the following:
 - a. a party related to the Defendant;
 - b. an entity associated with the Defendant;
 - c. an officer or close associate of the Defendant;
 - d. Chief Justice, Justice or Registrar of the Supreme Court of New South Wales or the High Court of Australia; or
 - e. an officer or employee of, or other legal practitioner engaged by the law firm Hall Partnersreferred to herein as "**the Group Members**".
2. For the purposes of this commercial list statement, the following definitions apply:

- (i). "DPs" means all plans for which the First Defendant obtained registration in order to compulsorily acquire the subject Lands;
- (ii). "Gazette" means the Government Gazette for the State of New South Wales, and is the official publication of notices about the decisions and actions of the Government of the State of New South Wales;
- (iii). "Group Members" means all persons who have had their land or part thereof compulsorily acquired by the First Defendant for the WestConnex M4 East tunnels, the WestConnex M4-M5 Link tunnels, the WestConnex Rozelle Interchange tunnels, the WestConnex M5 East tunnels, the WestConnex M8 tunnels, and/or the NorthConnex tunnels;
- (iv). "Lands" means the land or part thereof compulsorily acquired by the First Defendant for the WestConnex M4 East tunnels, the WestConnex M4-M5 Link tunnels, the WestConnex Rozelle Interchange tunnels, the WestConnex M5 East tunnels, the WestConnex M8 tunnels, and/or the NorthConnex tunnels;
- (v). "Mainline Tunnel" means the tunnel running between the Sydney suburbs of Haberfield and St Peters and that is a part of the Westconnex M4-M5 Link;
- (vi). "Project Deeds" means the Deeds that the First Defendant entered into known as the WestConnex M4-M5 Link Project Deed, the WestConnex M4 Project Deed, the WestConnex M5 Project Deed, WestConnex M8 Project Deed, and the NorthConnex Project Deed ;
- (vii). The "WestConnex M4-M5 Link Project Deed" means the deed that the Defendant entered into with WCX M4-M5 Link PT Pty Limited and WCX M4-M5 Link AT Pty Limited, for the purposes of the design and construction of the Mainline Tunnel, and which provided for the operation and maintenance of the motorway known as Westconnex M4-M5 Link, (being both stages 3A and 3B of the WestConnex);
- (viii). "Registrar" means the Registrar General for the State of New South Wales with the New South Wales Department of Lands;
- (ix). "Tunnels" means all of the underground and on-ramp tunnels forming part of

the WestConnex M4 East tunnels, the WestConnex M4-M5 Link tunnels, the WestConnex Rozelle Interchange tunnels, the WestConnex M5 East tunnels, the WestConnex M8 tunnels, and/or the NorthConnex tunnels;

3. The Plaintiffs are natural persons and are entitled to sue and be sued in their own names.
4. The First Defendant is and was at all material times a statutory corporation and is a NSW government agency, that is entitled to sue and to be sued in its corporate name and style.
5. The Westconnex Project is a project concerning the construction of a series of interlinking Tunnels throughout the area of metropolitan Sydney, and for which Planning approvals were granted pursuant to section 5.19 of the Environmental Planning Assessment Act 1979 ("EPA Act Approvals").
6. The Tunnels will be or are located under the surface of the Group Members Land and that were or are to be constructed and maintained pursuant to the Project Deeds.
7. Concerning the Plaintiffs Land, and which is now traversed (below) by the Mainline Tunnel, the Defendant entered into the Westconnex M4-M5 Link project Deed, to facilitate its construction, (and other related matters).
8. The Plaintiffs were, until the time of the compulsory acquisition of their Land, the registered proprietors of the whole of the parcel of land, (unlimited as to depth), held by them for the purposes of the *Real Property Act 1900* ("**RPA**") located at 11 Miller Street, Haberfield, ("**Plaintiffs' Land**").
9. Section 52(1) of the *Roads Act 1993 (NSW)* ("**Roads Act**"), provides that the Minister may, by order published in the Gazette, declare:
 - (i). any road that is owned by the First Defendant and that is designed to facilitate the movement of motor traffic; or
 - (ii). any road proposed to be constructed on land owned or to be owned by the First Defendant;to be a tollway ("**Tollway**").
10. Section 52(2) of the *Roads Act* provides that any public road that is declared to be a Tollway ceases to be a public road, with Section 52 (3) of the Act providing that a Tollway is not a road or a road related area within the meaning of section 4 (1) of the *Road Transport Act*

2013 (NSW), or for the purposes of any law.

11. Pursuant to section 52(1) of the Roads Act, orders were published in the Gazette to the effect that the Tunnels are Tollways for the purposes of the Act (**Tollway Declaration**).

Particulars

- (a). On 18 August 2018, an order was published in the Gazette declaring the Mainline Tunnel (including the On Ramp Tunnel) and which passes beneath the Plaintiffs' Land to be a tollway as defined in the Roads Act
12. By virtue of sections 52(2) and 52(3) of the Roads Act, the Tollway Declarations rendered the Tunnels *not* to be public roads; or a "road or road related area" within the meaning of section 4(1) of the *Road Transport Act 2013* (NSW), or for the purposes of any law.
 13. Pursuant to Section 37 and part 3 of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) ("**Acquisition Act**"), an owner of an interest in land which is validly divested, extinguished or diminished by an acquisition notice is entitled to be paid compensation by the State authority which acquired the land.
 14. However, pursuant to section 62 of the Acquisition Act, if the land under the surface is compulsorily acquired under the Roads Act for the purpose of constructing a tunnel, compensation is not payable (subject to subsection (1) of section 62 of the Acquisition Act), *unless* the surface of the overlying soil is disturbed, or the support of that surface is destroyed or injuriously affected by the construction of the tunnel, or any mines or underground working in or adjacent to the land are thereby rendered unworkable, or are injuriously affected.
 15. In the premises, and so as to enliven section 62 of the Acquisition Act, the Defendant:
 - (i). subdivided the sub stratum of the Plaintiffs and the Group Members Lands; and,
 - (ii). purported to separately and compulsorily acquire the sub divided section of the substratum of the Group Members (and the Plaintiffs) Lands;with the intent that the Land subject of the substratum would be acquired by the Defendant, without having to pay for it.
 16. At all material times, and by consequence of Section 9 of the Roads Act, the only power for the First Defendant to lodge a subdivision subdividing the Land was that a person may open a public

road by causing a plan of subdivision or other plan that bears a statement of intention to dedicate specified land as a public road, (including a temporary public road), to be registered in the offices of the Registrar-General.

17. "Public road" for the purposes of Section 9 of the Roads Act means any road that is opened or dedicated as a public road, (whether under the Roads Act or any other Act or law), and any road that is declared to be a public road, for the purposes of the Act.

Particulars

- (a). Section 4 and Schedule 2 of the Roads Act.

18. The First Defendant purported to register Deposited Plans in respect of the titles of each of the Group Members Lands, whereby the purported registration of the Deposited Plans divided the Plaintiffs' Land and the Group Members' Lands into three lots, being two underground lots beneath the surface of each lot, (acquired by the First Defendant), and the surface of each lot.

Particulars

- (a). Deposited Plans in Schedule 1.

19. In accordance with section 9 of the Roads Act and section 195C of the Conveyancing Act 1919 (NSW) ("Conveyancing Act"), the Deposited Plans were each required to contain a statement showing which roads (if any) shown on the Deposited Plans were intended to be dedicated to the public roads ("**Statement of Intention**"), in order to be registered by the Second Defendant.

Particulars

- (a). Section 9 of the Roads Act
(b). Section 195C(d)(i) of the Conveyancing Act.

20. The Statement of Intention on each Deposited Plan stated the following words:

*(a). Statement of Intention to dedicate public roads acquire / assume land.....
Lots [x] to [y] inclusive are required for "freeway" under section 48 of the Roads
Act 1993*

21. A 'Freeway', as referenced in the Statements of Intention means a road that is declared to be a freeway by an order in force under section 48 under the Roads Act.

Particulars

- (a). Section 4, Schedule 2 and section 48 of the Roads Act.

22. In accordance with section 48 of the Roads Act, the Minister may, by order published in the Gazette, declare any main road to be a freeway that is designed to facilitate the movement of motor traffic.
23. The Minister has not declared the Mainline Tunnel to be a 'Freeway' pursuant to section 48 of the Roads Act and at all material times the First Respondent knew that the Minister had not and would not be making any such declaration(s).
24. A 'main road' means a road that is declared to be a main road by an order in force under section 46 of the Roads Act.
25. In accordance with section 46 of the Roads Act, the Minister may, by order published in the Gazette, declare to be a main road any public road, or any other road that passes through public open space and joins a main road, highway, freeway, tollway, transit way, or a controlled access road.
26. The Minister has not declared the Tunnels to be 'Main Roads' pursuant to section 46 of the Roads Act and at all material times the First Respondent knew that the Minister had not and would not be making any such declaration(s).
27. In the premises, and as a consequence of the Tollway Declarations, the Tunnels are not and are not intended to be:
 - (i). 'Main Roads', or, 'Freeways' ;
 - (ii). 'public roads';
 - (iii). "roads" or "road related areas";within the meaning of section 4(1) of the Road Transport Act 2013 (NSW) or for the purposes of any Act or law, at all.
28. Further and additionally, at all material times the Statements of Intention contained **Representations** that were false and that the First Defendant knew to be false, in that the Representations were made after the Tollway Declarations had been made, and:
 - (i). the Tunnels are Tollways, not Freeways, and are not 'public roads';
 - (ii). a tollway is not a "road" or "road related area" within the meaning of section 4 (1) of the *Road Transport Act 2013*, or for the purposes of any Act or law.

Particulars

- (a). The Statements of Intention;

- (b). The WestConnex Project Deeds;
- (c). The planning approval that had been granted pursuant to the EPAA provided for the creation and construction of the roads as Tollways;
- (d). Publications in the Government Gazette referred to the Tunnels as Tollways.

29. Following the making of the Representations by the Defendant and in the circumstances in which the Defendant knew them to be false, the Defendant proceeded to lodge them for registration in the Registry for the purposes of obtaining and effecting registration of the substratum of the Plaintiffs and of the Group Members Lands in the name of the Defendant, and with the intention of depriving the Plaintiffs and the Group Members of what had previously been the whole of their titles as had hitherto existed, without sub division.

30. By depriving the Plaintiffs and the Group Members of what had been the benefit of the whole of their non subdivided titles, the Defendant:

- (i). obtained the benefit of the substratum and the subdivision of the Plaintiffs and the Group Members titles without paying the Plaintiffs and the Group Members anything for it;
- (ii). obtained the benefits of the financial payments that flowed to it from its entry into the WestConnex Project Deeds;
- (iii). held those titles at the time that it acquired them on trust for the Plaintiffs and the Group Members, charged with the obligation to either return them to the Plaintiffs and the Group Members or to compensate and to pay to each of them the value of all benefits that the First Defendant received concerning them.

Improper Purpose

31. Notwithstanding the matters pleaded above, the First Defendant purported to issue ("PANS") to the Plaintiffs and the Group Members in respect of the two lots beneath the surface of the Lands ("**Substratum Lands**").

32. The PANS stated that the Substratum Lands were to be acquired "for the purposes of the Roads Act in connection with the construction, operation and maintenance of the WestConnex M4-M5 Link tunnels."

33. In purported compliance with section 177 of the Roads Act, the First Defendant published notices in the Gazette regarding the Substratum Land, and in which it purported to acquire the same.

34. Once acquired, a roads authority may carry out road work on any public road for which it is the

roads authority, and/or on any other land under its control.

Particulars

(a). Section 71 of the Roads Act.

35. For the purposes of section 71 of the Roads Act, "road work" includes "the construction, erection, installation ... of...road work".

Particulars

(a). See Section 4 and Schedule 2 of the Roads Act.

36. For the purposes of "State significant infrastructure," approved under Part 5.1 of the EPAA, (as the Tunnels were and are):

(i). Section 64(1A) of the Roads Act may be relied upon to confer upon the First Defendant the functions of a road authority" in respect of a road where the First Defendant is not otherwise "the roads authority" for that road under s 7 of the Roads Act; and,

(ii). Section 71 of the Roads Act empowers a "roads authority" to "carry out road work" "on any public road for which it is the "road authority" and "on any other land under its control".

37. However, as pleaded above, The Tollway Declarations were published in the Gazette; and by virtue of sections 52(2) and 52(3) of the Roads Act, the Tollway Declarations rendered the Tunnels *not* to be a public road; or a "road" or a "road related area" within the meaning of section 4(1) of the Road Transport Act 2013 (NSW) for the purposes of any Act or law.

38. In the premises, the carrying out and the construction of a road for the purposes of the Tunnels upon or below the Plaintiffs and the Group Members Lands was, by operation of s 64(1A) and 71 of the Roads Act, an Improper Purpose and was not authorized, as the Tunnels are not 'roads.'

39. In the further alternative, as a result of the Registrations, the First Defendant held the whole of the Substratum Land on trust for the Plaintiffs and the Group Members, and is liable to account to them for any benefit that it thereby received or derived.

40. In the further alternative, the First Defendant having entered into the WestConnex Project Deed and having purported to invoke section 62(2) of the Acquisition Act in order to avoid its obligations to pay compensation to the Plaintiffs, but in circumstances in which the Defendant is not and did not construct the Tunnels, the Defendant is liable to pay compensation to the Plaintiffs and to the Group Members for the interference that it has caused to their Lands.

41. The First Defendant is, pursuant to section 37 of the Acquisition Act, liable to pay compensation to the Plaintiffs and to the Group Members for the compulsory acquisition of the Lands.
42. The Plaintiffs and the Group Members claim compensation calculated in accordance with section 58 of the Acquisition Act, being the depreciation in the market value of the land remaining in their ownership after the compulsory acquisition of the Substrata of the Lands.
43. Moreover and additionally, Section 179 of the Roads Act prohibits the compulsory acquisition of land for the purpose of resale.
44. Pursuant to the Project Deeds, the First Defendant sold the Land compulsorily acquired by it.
45. The First Defendant's purported compulsory acquisition of the Lands was prohibited by section 179 of The Roads Act and is null and void.
46. The Plaintiffs and the Group Members are entitled to damages from the Defendant for the breach of the statutory duty imposed by section 179(1) of the Roads Act.
47. Alternatively the First Defendant held the Lands on trust for the Plaintiffs and the Group Members and is liable to account to them for any benefit that it thereby received, and including the whole of the benefits as to its sale.
48. And the Plaintiffs claim:
 - (i). A **Declaration** that the compulsory acquisition of the Plaintiffs' land and the Group Members' Lands was prohibited by section 179 of the Roads Act 1993 (NSW);
 - (ii). A **Declaration** that the purported Substrata Subdivisions of the Plaintiffs' land, and the Group Members' Lands were invalid and were not authorized according to law, in that:
 - (a). each of the plans subdividing the Lands ("DPs") contained an error on the face of the record, being a statement of intention to dedicate the Lands as a public road as a "Freeway" under section 48 of the Roads Act;
 - (b). the PANS stated that the Substratum Lands were to be acquired "for the purposes of the Roads Act in connection with the construction, operation and maintenance of the WestConnex M4-M5 Link tunnels," as Tollways;
 - (c). It was never intended to dedicate the Lands as public roads;

- (d). it was intended to acquire the Lands for the purposes of resale;
- (iii). A **Declaration** that the Representations were false, and that the Defendant knew them to be false, or ought reasonably to have known them to have been false but was recklessly indifferent as to whether they were true or false at the time at which they were made;
- (iv). A **Declaration** that in the circumstances in which the Defendant acquired the Substratum Lands, it acquired them on trust for the Plaintiffs and the Group Members and is obliged to account to them as to the value of all benefits received;
- (v). Damages;
- (vi). An accounting for all benefits received;
- (vii). Equitable compensation;
- (viii). Such other Orders or Declarations as the Court thinks fit;
- (ix). Costs.

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 claim for damages in these proceedings has 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

8 December 2021

13.

NOTICE TO DEFENDANT

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

- 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.

HOW TO RESPOND

Please read this statement of claim 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.

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 11 Miller Street, Haberfield NSW 2045
Occupation
Date 13
11 December 2021

I say on oath / affirm::

- 3 I am the second plaintiff.
- 4 To the best of my knowledge and belief, the allegations of fact in this Commercial List Statement are true.

#SWORN #AFFIRMED at Sydney
Signature of deponent Rosaline Mitchell
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 confirmed the deponent's identity using the following identification document:

Driver's License

Identification document relied on (may be original or certified copy)

Signature of witness Trevor Hall

This affidavit was sworn by the use of audio visual technology pursuant to the Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 which provides for the attesting of documents by remote means.

#AFFIDAVIT VERIFYING

Name Darren Mitchell
Address 11 Miller Street, Haberfield, NSW 2045
Occupation
Date 13
11 December 2021

I say on oath / affirm::

- 1 I am the first plaintiff.
- 2 To the best of my knowledge and belief, the allegations of fact in this Commercial List Statement are true.

#SWORN #AFFIRMED at Sydney
Signature of deponent *D. Mitchell*
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 confirmed the deponent's identity using the following identification document:

Driver's License
Identification document relied on (may be original or certified copy)

Signature of witness *Trevor Hall*

This affidavit was sworn by the use of audio visual technology pursuant to the Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 which provides for the attesting of documents by remote means.

FURTHER DETAILS ABOUT PLAINTIFFS

First plaintiff

Name Darren Mitchell
Address 11 Miller Street
HABERFIELD NSW 2045

Second Plaintiff

Name Rosaline Mitchell
Address 11 Miller Street
HABERFIELD NSW 2045

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
Telephone (02) 9233 3353
Email trevor@hallpartners.com.au

DETAILS ABOUT DEFENDANT

First defendant

Name Roads and Maritime Service
Address 27 – 31 Argyle Street
PARRAMATTA NSW 2150

~~Second defendant~~ Registrar General

~~Address McKell Building
2 – 24 Rawson Place
SYDNEY NSW 2000~~