
Appendix 3.22. Letter of advice Right of Way - 30 September 2015

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RVA Australia Pty Ltd
6/1 Pitt Street
LOFTUS NSW 2232

By email: ron.van.ardenne@gmail.com

Attention: Ron van Ardenne

Dear Ron

Your right to use 'Sussex Street'

Overview

Issues	1	You have asked for our advice in relation to three issues, as set out below: (a) Issue 1: Is the strip of land adjacent to Spring Gully, known as 'Sussex Street', a public road? (b) Issue 2: Is there a private right of way over 'Sussex Street'? (c) Issue 3: Is there a private right of way over 'Sussex Street' and 'Liverpool Street' as depicted in certificate of title volume 3065 folio 63 (the 1920 certificate of title)?
Summary	2	In our opinion: (a) The strip of land adjacent to Spring Gully, known as 'Sussex Street', is not a public road. (b) There is a private right of way burdening the 'Sussex Street' land and benefiting the Spring Gully land. (c) As the owner of Spring Gully, you are entitled to construct a road on the site of the right of way. (d) You have the legal benefit of a right of way via 'Sussex Street' and 'Liverpool Street' (up to the point where 'Liverpool Street' connects with the public road of that name).

Detailed advice

- Background 3 We understand and assume the facts to be as follows:
- (a) You are the owner of the former Scout Association land at Bundeena known as **Spring Gully**. The property is located at 60-70 Bournemouth Street, Bundeena and its title reference is Lot 3 DP 213924.
 - (b) Adjacent to Spring Gully are strips of land that appear in the relevant plan of subdivision (DP 1782) as roads. These two 'roads' are described as 'Bournemouth Street' and 'Sussex Street'. Additionally, other strips of land are depicted in DP 1782, including 'Liverpool Street' (which connects 'Sussex Street' to the existing Liverpool Street public road).
 - (c) In addition to being depicted in DP 1782, these strips of land are depicted as the brown-coloured land in the plan that forms part of the 1920 certificate of title.
 - (d) The width of these strips of land is 66 feet (20.12 metres).
 - (e) No roads have ever been built on these strips of land. These 'roads' are, in fact, bushland. The factual history of 'Liverpool Street' is materially the same as 'Sussex Street'.
 - (f) It is impossible for a road to be built on Bournemouth Street in the future because of cliffs and the wetlands.
 - (g) It is physically possible to construct a road:
 - (i) from the edge of your property on 'Sussex Street'; and
 - (ii) along 'Liverpool Street',to connect with the existing Liverpool Street public road.
- 4 Please tell us if any of the above facts are not correct, as it may change our advice.

Issue 1 ***Is the strip of land adjacent to Spring Gully, known as 'Sussex Street', a public road?***

- 5 At the time that the plan of subdivision was registered, the mere registration of a plan depicting a road was not sufficient for land to actually become a public road.
- 6 The dedication of a public road prior to 1920 was governed by the common law (the plan of subdivision is dated 1886). This meant that, in order for a dedication of land as a public road to take place, there must have been:
- (a) a manifest intention by the then landowner to dedicate the land as a public road; **and**
 - (b) **acceptance by the public of the dedication**, usually inferred by sufficient use of the land by the public as a road

or a passageway.

(*Permanent Trustee Co of NSW v Campbelltown Corporation* (1960) 105 CLR 401).

- 7 All the available evidence suggests that the public never accepted the land dedication. Additionally, in the current Land and Environment Court proceedings (*RVA Australia v Sutherland Shire Council*, LEC proceedings no 15/10467 and no 15/10468), Sutherland Shire Council has asserted that the strips of land are privately owned. That is, the Council itself acknowledges that the strips of land were never accepted by the public as roads.
- 8 Accordingly, in our opinion, the strip of land adjacent to Spring Gully (known as 'Sussex Street') is not a public road.

Issue 2

Is there a private right of way over Sussex Street?

- 9 Spring Gully and the adjacent strip of land known as 'Sussex Street' were in common ownership until 19 August 1926 (under the 1920 certificate of title). On that date, the ownership of the land described in the 1920 certificate of title (which included the Spring Gully land) was transferred from Ms Lucy Wolstenholme to Mr Edward Blackmore (transfer B398221).
- 10 The description of the land in the 1920 certificate of title was incorporated (by reference) into the instrument of transfer. This description in the 1920 certificate of title was by way of both text and plan. The text cited the plan (which corresponds to DP 1782) and identified allotments excluded from the 1920 certificate of title by reference to DP 1782. (The plan and DP 1782 are also referenced in the section of transfer B398221 titled 'Encumbrances, &c., Referred to'.)
- 11 However, according to a hand-written amendment on transfer B398221, Ms Wolstenholme explicitly **did not** transfer 'all' of her 'estate and interest' in
- the land shown on the plan on said certificate of title and thereon coloured brown
- This land included 'Sussex Street'.
- 12 As a result, Ms Wolstenholme's estate still has title to 'Sussex Street' under the 1920 certificate of title.
- 13 Certificate of title volume 3916 folio 59 (**the 1926 certificate of title**) defines the land transferred to Mr Blackmore by reference to nominated lots in DP 1782. Relevantly, 'Lots 1 to 6 inclusive of Section G' are among those nominated.
- 14 In our view, the High Court's decision of *Dabbs v Seaman* (1925) 36 CLR 538 applies. This decision says that on the transfer of Torrens title land described (by words or diagram) as adjoining a road owned by the vendor, there is an implied (in favour of the land transferred) right of way over that 'road'.
- 15 It does not matter that the right of way is not explicitly identified as an easement. It does not matter that the road has not been constructed.
- 16 We consider that when Ms Wolstenholme transferred what was then

Lots 4-6 Section G in DP 1782 to Mr Blackmore in 1926, a private right of way was created entitling the owners of those lots (now Spring Gully) to insist that:

- (a) the width of Sussex Street is to be preserved as a right of way; and
- (b) may be used by them as such.

Nothing in the 1926 certificate of title is capable of suggesting that a right of way did not arise.

17 The right of way binds both successors-in-title of the transferor/vendor and the transferee/purchaser (*Lake Macquarie City Council v Luka* [1999] NSWCA 447 [15]-[17]; *Weber v Ankin* [2008] NSWSC 106 [30]).

18 We note that while the land is now known as Lot 3 DP 213924, it is still described, by diagram, as adjoining 'Sussex Street'. It is also still defined by reference to Lots 4-6 DP 1782. (The references to these lots still appear in grey lettering on the diagram depicting Lot 3 in DP 213924. Additionally, DP 213924 describes itself as a 'plan of subdivision of ... whole of lots 4,5 & 6, Sec. G, D.P. 1782')

19 For this right of way to exist there **does not need to be** any explicit language in the transfer that resulted in the creation of the right of way. **However**, the explicit language of the transfer **is consistent** with the creation of the right of way. The transfer (B398221) assumes that rights **are** created, by reason of the transfer, over the 'roads'. We say this because:

- (a) In its opening paragraph, the transfer establishes Ms Wolstonholme's capacity to make the transfer by saying that she is

registered as proprietor of an estate in *fee simple* in the land hereinafter described, **subject**, however, **to such encumbrances, liens and interests as are notified hereunder** (bold added)

- (b) The notice 'hereunder' discloses that the existing title held by Ms Wolstonholme

is issued **subject to all existing rights of way or other rights** (if any) over the roads and streets coloured brown in plan thereon and also shown on Deposited Plan 1782 (bold added).

- (c) This notice would have been unnecessary if the intent of the transferor was that no rights should be conferred in those 'roads'. It only would have had utility if the transferor intended that a right of way be created (by reason of the transfer) over the roads, but that the transferee was put on notice that the right of way was constrained by any existing rights of way **or other rights** in relation to that land.

In particular, the 1920 certificate of title did not include certain lots that were shaded yellow on the plan (these lots had previously been transferred to others). This means that it is **possible** that half of the 'roads' adjacent to these excluded allotments were also transferred - as part of those excluded allotments - under the middle line rule (*ad medium filum viae*, as per *Casson v Leichhardt Municipal Council* [2011] NSWLEC 243). If this occurred, it would have meant that

transfer B398221 was incapable of creating a right of way on the:

- (i) the relevant halves of Liverpool Street (to the middle line) adjacent to Lot 8 Section D and Lot 8 Section I; and
- (ii) half of Sussex Street (to the middle line) adjacent to Lot 15 Section K.

In short, we think that the 1920 certificate of title was issued in contemplation of the possibility that minor portions of the roads were not included in the title. This potential limitation on the existing title was notified to Mr Blackmore as part of transfer B398221. This notification is consistent with - **and would serve no purpose in the absence of** - the creation of rights of way over the roads that **were** included in the 1920 certificate of title.

20 In terms of the **scope** of the right way:

- (a) In our view, the 20.12 metre width of the right of way indicates that the right of way is both a footway and a carriageway (that is, it allows for vehicular access): *Mantec Thoroughbreds v Batur* [2009] VSC 351.
- (b) The owner of Spring Gully is the 'dominant owner'. As such, the owner of Spring Gully is entitled to construct a road over the site of the right of carriageway. We believe that you may enter on the Sussex Street strip adjacent to your land to do whatever is reasonably necessary to make the right of way effective – including making a road so that there is a serviceable carriageway over which vehicles can pass in poor conditions as well as in good weather (*Burke v Frasers Lorne Pty Ltd* [2008] NSWSC 988 [21]).
- (c) However, such works would still require development consent under the *Environmental Planning and Assessment Act 1979*. While the owner of the 'Sussex Street' strip would need to consent to any development application for such works, the owner would not be entitled to withhold its consent for any reasonable works of this kind: *Sertari Pty Ltd v Nirimba Developments Pty Ltd* [2007] NSWCA 324.

Issue 3

Is there a private right of way over 'Sussex Street' and 'Liverpool Street' as depicted in the 1920 certificate of title?

21 DP 1782 was prepared in 1886. It was deposited with the Register-General prior to or on 22 August 1887 (as evidenced by transfer 124995 recorded on that date). At the time, section 100 of the *Real Property Act 1862* provided that:

Any proprietor subdividing any land under the provisions of this Act for the purpose of selling the same in allotments as a township shall deposit with the Register General **a map of such township provided that such map shall exhibit distinctly delineated all roads streets passages thoroughfares squares or reserves appropriated or set apart for public use** and also all allotments into which the said land may be divided ...

22 In *Permanent Trustee Co of NSW v Campbelltown Corporation* Windeyer J said (at 420-421) that the lodgement of a plan with the Register-General in conformity with section 100 of the *Real Property*

Act 1862 (firstly) had the following result:

... it gave those who purchased and took transfers of lots by reference to the plan, and their successors in title, a right to use as a way of access any road shown on the plan on which their lots abutted. St George's Parade [the 'road' that was the subject of the proceedings] thus became available for use as a private or occupation road for the benefit of at least the owners of the allotments abutting on it **and perhaps the owners of other allotments in the subdivision also** (bold added).

23 In *Lake Macquarie City Council v Luka* [1999] NSWCA 447 it was held by Handley JA (Sheller JA and Stein JA agreeing) (at [16]) that:

The private rights-of-way must extend to other private roads or lanes in the sub-division owned by the transferor which gave access to public roads. Windeyer J suggested, in the passage referred to [above], that the right-of-way may extend to **all roads and lanes in the sub-division**, and this seems to be correct. **The description of the lots transferred by reference to lot numbers in ... [the deposited plan]**, included not only the common boundaries of the lots with the adjoining roads and lanes **but the place of those roads and lanes in the grid shown in the plan**. The transfers therefore created private rights-of-way in favour of each transferee over all the roads and lanes in the deposited plan (bold added).

24 In short, private rights-of-way extend to other private roads in a sub-division owned by the transferor which give access to public roads (not just the roads immediately adjacent to the allotment concerned).

25 In the present case, the 1920 certificate of title included its own plan (which was clearly based on DP 1782) **and** explicitly referenced DP 1782. Both plans depicted roads in grid, including 'Sussex Street' and 'Liverpool Street'. This certificate of title was incorporated by reference into transfer B398221. As outlined in paragraph 18 above, the present definition of the land continues to reference and rely on DP 1782.

26 To work out what this means for you, it is necessary to consider what land was part of the 1920 certificate of title when the non-road land was transferred out of it.

27 In paragraph 19(c) above, we said that it is possible that half of the 'roads' adjacent to certain allotments were transferred (as part of those allotments) under the middle line rule. We do not presently have enough factual information to know if this is definitely what happened. (We would need to carry out a detailed search in relation to those allotments, and even then, the 'middle line' presumption may be rebutted by matters not disclosed on the register.)

28 However, for present purposes, you may wish to assume that:

- (a) the relevant halves of Liverpool Street (to the middle line) adjacent to Lot 8 Section D and Lot 8 Section I; and
- (b) half of Sussex Street (to the middle line) adjacent to Lot 15 Section K,

were not part of the 1920 title.

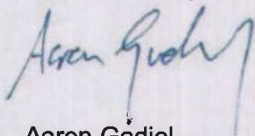
29 On this assumption, no right of way could have been created by the 1920 transfer over **those portions** of Sussex Street and Liverpool Street. Nonetheless, this would have still left a 33 feet wide (assuming the total width of the 'road' was 66 feet) portion of the

road (adjacent to those lots) that we consider to be subject to the right of way.

30 In short, we consider that you have the legal benefit of a right of way via 'Sussex Street' and 'Liverpool Street' (up to the point where 'Liverpool Street' connects with the public road of that name).

Please do not hesitate to call me if you would to discuss this advice.

Yours sincerely



Aaron Gadiel

Partner

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