Supreme Court
New South Wales

Medium Neutral Citation:	**Roads and Maritime Services v Rockdale City Council & Ors [2015] NSWSC 1844**
Hearing dates:	12, 13 and 17 November 2015
Decision date:	04 December 2015
Jurisdiction:	Equity
Before:	Black J
Decision:	Stand over the proceedings for a short time to allow the parties an opportunity to make submissions as to the form of any declaratory orders that should now be made and to allow the Council an opportunity to give effect to the trusts or give appropriate undertakings.
Catchwords:	EQUITY – trusts and trustees – purpose trusts – where trustee was a local council – where council held land or parts of it on trust for a county road and other purposes – where condition of trusts was that council transfer land or parts of it required for a county road to named body when requested at no cost – where Plaintiff sought transfer of the parcels of land that it 'required' for the construction of a road – whether council required to transfer only that part of land that was previously 'reserved' or that part of land which was now 'required' to the Plaintiff under the terms of the trusts – whether use for a road encompassed ancillary requirements for the construction of the road. LOCAL GOVERNMENT – regulation and administration – ordinances, regulations, by-laws and local laws – where council held parcels of land on trust for particular purposes – whether obligations arising under the trusts were affected by Local Government Act 1993 (NSW) – application of County of Cumberland Planning Scheme Ordinance CHARITIES – charitable purposes – other purposes beneficial to public – where council held land on trust for road purposes and for the purposes of a public park,

reserve or recreation area – whether trusts created for purposes of roads and road works are charitable trusts – whether trusts created for purposes of parks and public reserves are charitable trusts – whether trust purposes impractical or impossible – whether to order cy-pres scheme

WORDS AND PHRASES – 'required' – 'reserved' – 'road purposes' – 'purposes of a road'.

Legislation Cited:

- Charitable Trusts Act 1993 (NSW) ss 6, 9, 11
- Environmental Planning and Assessment Act 1979 (NSW) ss 9(1), 11(1), 11(4), 11(6)
- Environmental Protection and Biodiversity Conservation Act 1999 (Cth)
- Interpretation Act 1987 (NSW) ss 5(2), 21, 30, 30(1), Lands Acquisition Act 1906 (Cth)
- Land Acquisition (Just Terms Compensation) Act 1991 (NSW)
- Local Government Act 1993 (NSW) Ch 6 Pt 2 Div 2; ss 6, 8, 22, 23, 26, 29, 30, 31(3), 35, 36, 36(3A), 36(4), 36F, 36I, 37, 37(b), 37(d), 38, 40, 40A, 42, 43, 45, 45(1), 45(2), 46, 46(1), 46(2), 46(4), 47, 47A, 47D, 47F, 49, 186(3), 220, 674(1); sch 7 cll 2(1), 3, 3(2), 6, 6(2)
- Local Government Act 1919 (NSW) Pt XXIV Divs 3, 6; ss 518, 518(2), 519, 526, 529
- Local Government (Consequential Provisions) Act 1993 (NSW)
- Roads Act 1993 (NSW) s 178(1)
- Statute of Charitable Uses 1601
- Transport Administration Act 1988 (NSW) s 46
- Trustee Act 1925 (NSW) ss 6

- Rockdale Local Environment Plan 2000
- Rockdale Local Environmental Plan 2011
- Sydney Regional Environment Plan No 33 – Cooks Cove
- Local Government (General) Regulations 2005 (NSW) Pt 4 Div 1; regs 101, 103

Cases Cited:

- ADCO Constructions Pty Ltd v Goudappel [2014] HCA 18; (2014) 308 ALR 213
- Athletics Association (SA) Inc (Intervener) (1999) 76 LGRA 226
- Attorney General v Day [1900] 1 Ch 31
- Attorney-General (NSW) v Fulham [2002] NSWSC 629
- Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99

- Bathurst City Council v PwC Properties Pty Ltd [1998] HCA 59; (1998) 195 CLR 566
- Berry v Wong [2000] NSWSC 1002
- Black Uhlans Inc v NSW Crime Commission [2002] NSWSC 1060; (2002) 12 BPR 22,421
- Brisbane City Council v Attorney-General (Qld) [1979] AC 411
- Bull v Attorney-General (NSW) (1913) 17 CLR 370
- Burnside City Council v Attorney-General (SA) [No 2]; Athletics Association (SA) Inc (Intervener) (1999) 76 LGRA 226
- Carantinos v Magafas [2008] NSWCA 304
- Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd [2013] HCA 11; (2013) 247 CLR 149
- City of Burnside v Attorney-General (1993) 61 SASR 107
- Council of the City of Newcastle v Royal Newcastle Hospital (1957) 96 CLR 493
- Council of the City of Newcastle v Royal Newcastle Hospital (1959) 100 CLR 1
- Council of the Shire of Sarina v Dalrymple Bay Coal Terminal P/L [2001] QCA 146
- Dobrijevic v Free Serbian Orthodox Church [2015] NSWSC 637
- Fitzgerald v Masters (1956) 95 CLR 420
- IW v The City of Perth (1997) 191 CLR 1
- Johnston v Brightstars Holding Company Pty Ltd [2014] NSWCA 150
- Ku-ring-gai Municipal Council v The Attorney-General (1954) 55 SR (NSW) 65
- Labracon Pty Ltd v Cuturich [2013] NSWSC 97
- Mareen Development Pty Ltd v Brisbane City Council [1972] Qd R 203
- Marshall v Director General Department of Transport [2001] HCA 37; (2001) 205 CLR 603
- Monds v Stackhouse (1948) 77 CLR 232
- NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (1988) 14 NSWLR 685
- Queensland Premier Mines Pty Ltd v French [2007] HCA 53; (2007) 235 CLR 81
- Re Hadden [1932] 1 Ch 133
- Re Morgan [1955] 2 All ER 632
- Royal Botanic Gardens and Domain Trust v South Sydney City Council [2002] HCA 5; (2002) 240 CLR 45
- Ryde Municipal Council v Macquarie University (1978)

139 CLR 633
- Save Little Manly Beach Foreshore Inc v Manly Council (No 2) [2013] NSWLEC 156
- Special Commissioners of Income Tax v Pemsel [1891] AC 531
- Telstra Corporation Ltd v Port Stephens Council [2015] NSWLEC 1053
- Tempe Recreation Reserve Trust v Sydney Water Corporation [2014] NSWCA 437; (2014) 88 NSWLR 449
- Valuer General v Fivex Pty Ltd [2015] NSWCA 53
- Western Australian Planning Commission v Temwood Holdings Pty Ltd [2004] HCA 63; (2004) 221 CLR 30
- Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45; (2007) 233 CLR 528
- Willoughby City Council v Roads and Maritime Services [2014] NSWLEC 6; (2014) 201 LGERA 177
- Zhang v Canterbury City Council [2001] NSWCA 167; (2001) 51 NSWLR 589

Texts Cited:

- J D Heydon & M J Leeming, Jacobs' Law of Trusts in Australia, (7th ed, 2006, LexisNexis Butterworths)
- G E Dal Pont, The Law of Charity, (2010, LexisNexis Butterworths)
- DC Pearce and R S Geddes, Statutory Interpretation in Australia, (8th ed, 2014, LexisNexis Butterworths)
- Shorter Oxford English Dictionary 2007

Category:

Principal judgment

Parties:

Roads and Maritime Services (Plaintiff)
Rockdale City Council (First Defendant)
Attorney General for New South Wales (Second Defendant)
Minister administering the Environmental Planning and Assessment Act 1979 (Third Defendant)
Kogarah Golf Club Limited (Fourth Defendant)

Representation:

Counsel:
R Lancaster SC/P M Lane (Plaintiff)
I Hemmings SC/P Newton (First Defendant)
C Mantziaris/S Cominos (Second Defendant)
T To (Fourth Defendant)

Solicitors:
Minter Ellison (Plaintiff)
HWL Ebsworth (First Defendant)
Crown Solicitors Office (Second Defendant)
Beatty Legal (Fourth Defendant)

File Number(s): 2015/240470

JUDGMENT

The parties and the subject matter of the proceedings

1 These proceedings concern issues as to the acquisition of certain land for the purpose of the widening of Marsh Street, Arncliffe, and for construction facilities and other facilities in respect of the proposed extension of the M5 motorway ("New M5 Project").

2 The Plaintiff, Roads and Maritime Services ("RMS") is a statutory corporation constituted by s 46 of the *Transport Administration Act* 1988 (NSW), and is the successor to the Roads and Traffic Authority, which in turn succeeded the Commissioner for Main Roads. The First Defendant, Rockdale City Council ("Council"), is a body politic of the State with perpetual succession under s 220 of the *Local Government Act* 1993 (NSW) ("LGA 1993") and is the successor to the Council of the Municipality of Rockdale. The Second Defendant, the Attorney General for New South Wales exercises functions under the *Charitable Trusts Act* 1993 (NSW) ("Charitable Trusts Act") in the enforcement of trusts for a charitable purpose and is the protector of charities and is joined to the proceedings in that capacity. With some exceptions in respect of factual disputes, the Attorney General largely adopts the submissions of RMS, and directs her submissions specifically to matters concerning two trusts that are in issue in the proceedings. The Third Defendant, the Minister administering the *Environmental Planning and Assessment Act* 1979 (NSW) ("EPA Act"), is the successor to the assets, rights and liabilities of Cumberland County Council, which was in turn constituted under the *Local Government Act* 1919 (NSW) ("LGA 1919") on 27 June 1951. The Minister did not take an active role in the proceedings. The Fourth Defendant, Kogarah Golf Club Ltd ("Club") operates a golf course partly on the land that is in issue in the proceedings.

3 The first parcel of land in issue is Lot 14 in DP 213314 located at 19 Marsh Street, Arncliffe ("Lot 14**"**), which is situated to the south east of Marsh Street and to the north east of Marsh Street, and is partly traversed by the existing corridor of Marsh Street, and is over 8 acres in area. The Council is the registered proprietor of that land, which it acquired on the terms of a deed dated 30 October 1957 ("Deed") between the Commonwealth of Australia, Cumberland County Council and the Commissioner for Main Roads, a predecessor to RMS. The Club has occupied Lot 14 since at least 1961 and it comprises part of the Kogarah golf course. The second parcel of land in issue in the proceedings is Lot 1 in DP 108492 located at 13 Marsh Street, Arncliffe ("Lot 1"), which comprises land to the south east of Marsh Street and to the north west of Marsh Street near Valda Avenue, and has an area in excess of 29 acres. A small part is traversed by the existing corridor of Marsh Street, although this is not identified as being part of the land the subject of RMS's claim. The Council is also the registered

proprietor of that land, subject to a declaration of trust made on 14 April 1958 ("Declaration of Trust"). Part of Lot 1 to the south east of Marsh Street is also occupied by the Club and also comprises part of the Kogarah golf course.

4 As I noted above, the proceedings relate, in broad terms, to whether the Council is required, by the terms of the Deed and the Declaration of Trust, to transfer parts of these two parcels of land to RMS for use as a temporary works compound, and a smaller area for permanent use, in respect of the New M5 Project and a proposal for the widening of Marsh Street, Arncliffe, to provide three continuous westbound lanes. The New M5 Project in turn involves the design and construction of approximately 33 km of multi-lane roads to expand and link the M4 Western Motorway and the M5 South West Motorway. It is common ground that these works include the construction of a new, tolled multi-lane road link between the M5 East Motorway east of King Georges Road and St Peters, including twin motorway tunnels of approximately 9km in length and accommodating up to three lanes of traffic each, an interchange at St Peters and connection to the existing road network. Before the New M5 Project can proceed, it must be assessed and approved under the EPA Act and the *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth). When the proceedings were heard in mid-November 2015, an Environmental Impact Statement for the New M5 Project was being prepared, an application for the approval of the New M5 Project had not yet been made and a contract for the design and construction of the New M5 Project has not yet been awarded (Reynolds 30.10.15 [20]–[24]).

5 By its Further Amended Summons filed on 25 September 2015 and its Amended Statement of Claim filed on 25 September 2015, RMS seeks orders that the Council make available certain land at Arncliffe to RMS, at no cost, for (or, arguably, to facilitate) road works under the terms of a Deed and a Declaration of Trust, to which I will refer below. Specifically, in paragraphs 1 and 2 of the relief claimed in the Amended Statement of Claim, RMS claims, first, declarations that, on the proper construction of the Deed, the Council must make available to RMS, at no cost to RMS, the land in Lot 14 and, on the proper construction of the Declaration of Trust, the Council must make available to RMS, at no cost to RMS, the land in Lot 1. In paragraph 3 of the relief claimed, RMS seeks an order that the Council do all things necessary to give RMS possession of Lot 1 and Lot 14, or such part of the said lots as RMS has required or shall require, for the period of 4 years and 11 months from the date of the order or for such other period as the court determines.

6 In the alternative to the declarations and orders sought in paragraphs 1–3 of the relief claimed in the Amended Statement of Claim, RMS seeks orders, if and to the extent that Lot 14 and Lot 1 is held on a charitable trust for the purposes stated in the Deed and the Declaration of Trust respectively, for an administrative scheme or in the alternative a cy-pres scheme, by which the land in Lot 14 and Lot 1 is to be made available to RMS at no cost. RMS seeks that relief on the basis that the trusts in question are charitable trusts, and the Attorney General has approved the

commencement of the proceedings pursuant to s 6 of the Charitable Trusts Act in that regard. RMS also seeks further relief specified in paragraphs 6-10 of the Amended Statement of Claim.

7 There is a degree of urgency in the proceedings, arising from their context in respect of a proposed acquisition of land that needs to be completed prior to the commencement of construction works on the New M5 Project, and where the determination of the proceedings may determine the manner in which that acquisition proceeds. As will emerge below, Counsel for all parties advanced a range of relatively complex arguments and alternative arguments, and also addressed issues that would only arise if their primary positions were not accepted. There was also a degree of movement in the positions adopted by the parties between their pleadings, their opening written submissions and their oral submissions. I have sought to address the several versions of such positions where necessary, although that will involve a degree of repetition in referring to the parties' submissions below, since it is sometimes necessary to refer to several submissions which ultimately seem to be different ways of putting substantially the same point. I have largely sought to decide only those issues that need to be decided to determine the matter, so that this judgment could be delivered relatively promptly, rather than delaying it to address peripheral issues in a manner that might have deprived it of utility in determining the dispute between the parties within the time in which it needed to be determined in its practical context. The parties, helpfully, agreed certain background facts between them and I have drawn upon their statement of agreed facts in dealing with the issues in dispute below.

The legislative background

8 It will be necessary to refer to several aspects of the legislative regime governing roads and local government in dealing with the issues in dispute below and I should now identify the relevant instruments and their terms.

9 It appears that Lot 14 and Lot 1 were transferred to Council pursuant to s 526 of the LGA 1919 which provides that a council may accept and hold any real or personal property conveyed to it for any charitable or public purpose, and act in the administration of such property for the purposes and according to the trusts for which the same may have been conveyed. The Deed and Declaration of Trust in turn refer to the Cumberland County Council Planning Scheme Ordinance ("CCPSO"). The CCPSO came into force on 27 June 1951 and defined (in cl 3) the term "County road" to mean:

> "any road indicated on the scheme map as land shown white between black lines or shown broken white between broken black lines irrespective of whether such road is a main road within the meaning of the Main Roads Acts, 1924-1950".

The Council takes the point in these proceedings, as I will note below, that the relevant trusts are limited only to the roads as marked on the relevant scheme map. Mr Hemmings, who appears with Mr Newton for the Council, made clear, in oral

submissions (T20) that Council does not take a further and separate point that the relevant road is not a “County road” within the meaning of the CCPSO, or as to the subsequent repeal of the CCPSO.

10 The CCPSO also provided, in cl 5, that the Cumberland County Council was the responsible authority and was charged with the functions of carrying into effect and enforcing the provisions of the CCPSO relating to reservation of and restrictions on use of certain land under Part II. The CCPSO provided, in cl 10, that land indicated on the scheme map shown broken white between broken black lines and all land shown white between black lines was reserved for the purposes of a new County road and widening of an existing County road. The parties agree that the scheme map associated with the CCPSO shows a corridor in white between broken black lines on parts of Lot 14 and Lot 1. The CCPSO also provided, in cl 10, that land indicated on the scheme map shown in dark green was reserved for the purpose of parks and recreation areas. The parties agree that the scheme map associated with the CCPSO shows parts of Lot 14 and Lot 1, not being those parts indicated as land reserved for a County road, in areas coloured dark green reserved for parks and recreation areas.

11 It is also necessary to have regard to the LGA 1993. It is common ground that, from the commencement of the LGA 1993 on 1 July 1993, Lot 1 and Lot 14 were each taken to have been classified as community land for the purposes of Part 2 of Chapter 6 of the LGA 1993, pursuant to cl 6 of Sch 7 of the LGA 1993, because they were each subject to a trust for a public purpose. The parties also agree that the Declaration of Trust relating to Lot 1 and the Deed relating to Lot 14 and the consequential trusts continue to have effect despite the commencement of the LGA 1993.

12 It is common ground that the Council has not adopted a plan of management for Lots 1 and 14 under the LGA 1993. However, on 21 October 2015, the Council passed a resolution to exhibit a draft plan of management (Ex P3, tabs 26–27) for all community land within the local government area, including Lot 1 and Lot 14 which would, if adopted, categorise each lot as a sports ground, excluding part of Lot 1 comprising part of Valda Avenue Reserve which would, if the draft plan of management were adopted, be categorised as a park (Ex P3, pp 736, 796 and 802). The future permitted purposes of Lot 1 and Lot 14 comprising the Kogarah Golf Course are noted in the draft plan of management as being "subject to review in conjunction with priority precinct planning" (Ex P3 p 774).

13 It is also common ground that, on 25 August 2000, the Rockdale Local Environment Plan 2000 (“RLEP”) was gazetted and took effect. Lot 1 and Lot 14 were zoned, in part, as Zone 7(c) – Transport Reservation under the RLEP. It is also common ground that, on 25 June 2004, the Sydney Regional Environmental Plan No 33 – Cooks Cove (“SREP 33”) was gazetted and took effect in respect of land at Cooks Cove, Arncliffe, as identified in the zoning map, and repealed RLEP to the extent that it applied to land to which SREP 33 applies. Lot 1 and Lot 14 are zoned, in part, Special Uses Zone under SREP 33 and parts of Lot 1 and Lot 14 are zoned Trade and Technology and

Open Space under SREP 33. It is common ground that cl 11 of SREP 33 provides that the objectives of the Special Uses Zone are to accommodate existing special uses, including the M5 corridor and to provide for the development of a transport corridor by the then Roads and Traffic Authority or for other public transport infrastructure; the objectives of the Trade and Technology Zone are to encourage specified economic activity and to provide facilities for the workforce by allowing a limited range of ancillary, retail and recreational uses that are ancillary and provide support to the dominant functions within the zone; and the objectives of the Open Space Zone include providing for active sporting and recreational land uses and club facilities and other matters.

The affidavit evidence

14 RMS relies on the affidavits of Mr Simon Ball sworn 17 August 2015, 10 September 2015 and 30 October 2015; Mr Glenn McDiarmid sworn 9 September 2015, 3 November 2015 and 16 November 2015; and Mr Kenneth Reynolds sworn 30 October 2015. Mr Ball's first affidavit dated 17 August 2015 referred to and annexed correspondence between RMS, Westconnex Delivery Authority ("WDA") and the Council in relation to RMS's requirement for part of Lot 1 and part of Lot 14. Mr Ball also refers to the urgency involved in the proceedings as to the validity of that requirement, where an alternative to the exercise of RMS's claimed rights under the trusts is a compulsory acquisition of the land, and any compulsory acquisition notice would need to be published in the NSW Government Gazette by December 2015, if RMS is to acquire vacant possession of the land by the date it requires it, 31 March 2016 (Ball 17.8.15 [19]). There is also evidence that major works associated with the New M5 Project are scheduled to commence on the required land by mid-2016 and that the New M5 Project is projected to be open to traffic in late 2019 (Ex P2, tab 7). Mr Ball's further affidavit dated 10 September 2015 refers to the steps which had been taken to source planning maps relating to the CCPSO and to further correspondence with the Council in respect of RMS's requirement for the land. Mr Ball's third affidavit dated 30 October 2015 refers to further correspondence with Council's solicitors in respect of RMS's requirement for the land.

15 The affidavits of Mr McDiarmid are directed to identifying the extent to which the required land, which has varied in the period prior to the proceedings, overlaps with Lots 1 and 14 and the reservations of land for County road purposes under the CCPSO.

16 The affidavit of Mr Reynolds, who is Project Director for the New M5 Project, related to the program of works for, inter alia, the New M5 Project and identified the extent to which RMS sought to require land for that project and for the road widening works at Marsh Street. That affidavit described the works involved in the New M5 Project, and also referred to the steps which were being taken for assessment and approval of the project under the EPA Act and the *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth), if required. Mr Reynolds' affidavit also set out the

proposed use of the land required from Lot 14 and Lot 1 for the New M5 Project, and indicated that the boundaries of the footprint of the land required were now fixed, although the layout of road works and traffic control works within that footprint were subject to change depending on operational requirements and conditions of approval. That affidavit also set out the facilities which were proposed to be constructed on the land, to which I will refer below. Mr Reynolds also referred to the works to be done in widening Marsh Street, although Mr Hemmings pointed out that Mr Reynolds was not directly responsible for the Marsh Street work. An email from the Principal Manager Infrastructure Property of RMS to Mr Reynolds (Ex P2, tab 14) in turn indicates that RMS would require exclusive possession of part of the land on a temporary basis, under the terms of a lease which permitted its use for:

> "The carrying out of road work, traffic control work (as those expressions are defined by the *Roads Act 1993* (NSW)), including but not limited to all ancillary works such as excavation, stockpiling, laying down, testing, removing and fencing, and any other work necessary or desirable to be carried out in connection with the New M5 Project and Marsh Street widening works."

Whether the whole or only part of Lot 14 is subject to the trusts for a County road created by the Deed

17 The first question in the proceedings is the content of the obligations upon the Council in respect of Lot 14, and also Lot 1 which I will address below. RMS pleads that the terms of the Deed provided for Lot 14 to be required for a County road (Amended Statement of Claim [13]); that it was a condition of the vesting of Lot 14 in the Council that the Council would make available Lot 14, when required for a County road, on request by RMS as the successor of the Commissioner of Main Roads (Amended Statement of Claim [14]); and also pleads that it is a term of the Deed that Lot 14 (in whole or in part) be made available without cost to RMS on request (Amended Statement of Claim [52]).

18 On 11 September 1947, the Commonwealth of Australia compulsorily acquired Lot 14 under the *Lands Acquisition Act* 1906 (Cth). On 30 October 1957, the Commonwealth of Australia, Cumberland County Council and the predecessor to RMS entered into the Deed in respect of Lot 14. I set out relevant provisions below, with omissions as indicated for simplicity:

> "WHEREAS by notification of acquisition by the [Commonwealth] under the Lands Acquisition Act 1906-1936 … , lands comprising inter alia the land hereby conveyed were vested absolutely in the [Commonwealth] AND WHEREAS the [Commonwealth] has agreed to sell and the [Cumberland] County Council has agreed to purchase the said land and hereditaments for the sum of FOUR THOUSAND TWO HUNDRED AND NINETY POUNDS (£4,290.0.0) AND WHEREAS it has been agreed between the [Cumberland] County Council and the [Council] that the said land (which land is reserved under Division 2 of Part II in the Cumberland County Council Planning Scheme Ordinance for County Road purposes) shall be conveyed to the [Council] pursuant to the provisions of Clause 18(1) of the Cumberland County Council Planning Scheme Ordinance to be held by the said Council upon trust and subject to the conditions hereinafter expressed and declared concerning the said land NOW THIS DEED WITNESSETH that in consideration of the sum of Four thousand two hundred and ninety pounds (£4,290.0.0) paid by the [Cumberland] County Council to the [Commonwealth] (the receipt whereof is hereby acknowledged) the [Commonwealth] as beneficial owner doth hereby convey at the request and by the direction of the [Cumberland] County Council (as is testified by its execution hereof) to the [COUNCIL]

> in fee simple ALL THAT piece or parcel of land situate in the Municipality of Rockdale and containing [detailed description of Lot 14 omitted] and THE [COUNCIL] hereby ACKNOWLEDGES AND DECLARES that it will hold the said land UPON TRUST for the following purposes subject to the following conditions:-
>
> 1. THAT THE [COUNCIL] will hold the said land which is required for a County Road under the Cumberland County Council Planning Scheme, for that purpose AND will make the same available without cost to the Commissioner for Main Roads or any other body that may be the constructing authority for the County Road when required so to do by the said Commissioner or other body as aforesaid AND pending its requirement for a County Road the Council shall not use the said land or permit same to be used for any purpose other than the purpose of a public park, public reserve or public recreation area.
>
> 2. THAT THE COUNCIL will not erect or permit to be erected on the said land or any part thereof any building without first obtaining the approval of the County Council and will observe and comply with all conditions which the County Council may impose in connection with any such approval."

19 It is common ground that Cumberland County Council paid the Commonwealth the specified consideration of £4,290 and Lot 14 was conveyed to the Council.

20 The Council subsequently made available Lot 14 (and also Lot 1) to the Club pursuant to a deed dated 2 May 1961. The recitals to that deed record that, so far as Lot 14 is concerned, the relevant land:

> "is held by the Council upon trust for the purpose of a County Road and subject to conditions (inter alia) that pending its requirement for a County Road the Council shall not use or permit to be used such land for any purpose other than the purpose of a public park, public reserve or public recreation area and will not erect or permit to be erected on such land or any part thereof any building without first obtaining the approval of the Cumberland County Council." (Ex K1, p 906)

The deed in turn provided for the lease of the relevant land to the Club for a 30 year period and provided, in cl 23 that:

> "Immediately upon receipt of a written request by the Cumberland County Council, the Department of Main Roads or the Council, the Club shall vacate and peacefully yield up possession to the Council without the payment of any compensation or damages whatsoever so much of the land shown shaded blue in the said [p]lan as may be specified in the said written notice."

(For completeness, I note that the parties did not make substantive submissions as to the extent of the land shaded blue in the plan attached to that deed).

21 Mr Lancaster, who appears with Ms Lane for RMS, refers (T14) to well accepted rules for the construction of instruments, which were also common ground between the parties, namely that the whole of the instrument has to be read and particular words are to be read in the context of the whole, and in accordance with the apparent purpose of the instrument as revealed from a consideration of the whole of its terms. In *Fitzgerald v Masters* (1956) 95 CLR 420 at 437, McTiernan, Webb and Taylor JJ observed that:

> "It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words … Many illustrations may be given of the circumstances in which these processes have been followed but to do so would add nothing to the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction."

22 Mr Lancaster also refers to *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109, where Gibbs CJ observed that:

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust."

In *Tempe Recreation Reserve Trust v Sydney Water Corporation* [2014] NSWCA 437; (2014) 88 NSWLR 449 at [53]–[56], Leeming JA summarised the relevant principles and observed, inter alia, that it is axiomatic that legal documents are to be read as a whole; that that requires effect to be given to each provision of the document having regard to the others, and reflects a presumption that the various provisions were intended to operate together to achieve a specific purpose or purposes; that the effect of doing so may be to depart from the natural and ordinary meaning of the words of one provision, where it is necessary to do so to avoid absurdity or inconsistency with the rest of the instrument; and that "in determining the legal meaning of language in a legal instrument, the law requires regard to be had to the immediate context, being the whole of the instrument."

23 RMS also submits that both the Deed and the Declaration of Trust may be read in conjunction with the enabling legislation under which they were made. In *Bathurst City Council v PwC Properties Pty Ltd* [1998] HCA 59; (1998) 195 CLR 566 at [44]–[65], the High Court reviewed the scope of the relevant sections of the LGA 1919, and specifically ss 518 and 526, and observed that s 526 of the LGA 1919 had the result that:

> "… a council might accept real or personal property for a public purpose in the sense of that term, by then long understood in New South Wales, even though that purpose was not a charitable purpose and the property was not transferred to and accepted by the council on trust in the strict sense of that term. The council then would be restricted by s 518 in its dealings with that land, and subject to restraint at the suit of the Attorney-General."

Mr Lancaster also refers to *Western Australian Planning Commission v Temwood Holdings Pty Ltd* [2004] HCA 63; (2004) 221 CLR 30 at [119], where Gummow and Hayne JJ observed that the authorities suggested that the Crown may be subject to more than a moral or political obligation to observe the purpose of a vesting of land in it, but did not find it necessary to express a concluded view as to that question. RMS also submits, and I accept, that the LGA 1919 and the CCPSO at least provided the legislative framework for the transfer of Lot 14 and Lot 1 to the Council as an exercise of government functions for public purposes, and that the Council was obliged to

perform the trusts in a way that advanced their objects in that statutory context: *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45 at [81].

24 Mr Lancaster also relied (T141–142) on *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2007] HCA 45; (2007) 233 CLR 528 at [37]–[39], where the High Court observed that, together with the information appearing on the relevant folio, the registration of dealings manifests the scheme of the Torrens System to provide third parties with the information necessary to comprehend the extent or state of the registered title to the land in question, and that the extent of extrinsic material that would be relevant to interpretation of documents that are registered on title is limited. That approach was confirmed in *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53; (2007) 235 CLR 81 at [14] and *Castle Constructions Pty Ltd v Sahab Holdings Pty Ltd* [2013] HCA 11; (2013) 247 CLR 149 at [20]. It seems to me that the obligations arising under the Deed and the Declaration of Trust are properly treated as matters registered on title, so far as in each case a caveat is recorded on the register which draws attention to the relevant instrument.

25 Broadly, RMS submits that, on the proper construction of the Deed, the Council must upon demand make available to RMS all or any part of Lot 14 that may from time to time be required by RMS for both a road and for ancillary road purposes at no cost to RMS. After closing submissions, I directed the parties to provide a summary of the key propositions in their submissions, which was intended to expose the logic of and key steps in their respective submissions. RMS's summary of the propositions for which it contended summarised its position as being that the whole of the land in Lot 14 (and also Lot 1) is held for the purposes of a road as required by RMS and otherwise for the purposes of a public park, public reserve or public recreation area. RMS also identified several steps in that submission, namely that "the said land" referred to in the Deed is the whole of Lot 14; the reference to "which is reserved" in the Deed is a general descriptive phrase about a characteristic of Lot 14, not a limitation on the area to which the trust for road purposes applies; it relies on the content of the phrase "which is required"; and the reference to "pending" in the Deed shows that the requirement is a matter for the future, not an existing reserved area on the CCPSO map. RMS also noted that, subject to the issue about the extent of land "which is required" for the purposes of a road (to which I refer below), the parties were not in dispute that the required land is for the purposes of a "County road" as that term should now be understood (T19–T20).

26 The first step in RMS's submission is that the words "the said land (which land is reserved … for County [r]oad purposes)" in the recitals to the Deed are not inconsistent with the Deed applying to the whole of the land in Lot 14. RMS submits that the quoted words do not have the effect of applying the obligation in the Deed only to that part of Lot 14 as was at the time of the Deed classified as a County road under the CCPSO, or that part of Lot 14 as might be at some other point in time classified as a County road

under the CCPSO. RMS submits that the whole of the land in Lot 14 is subject to the Deed, and that the words in parentheses merely explain the basis on which the Deed was entered into. RMS submits that, as at the date of the Deed, there was no such road and the parties would have known that for it to be provided, more land than was ultimately to be the physically permanent road infrastructure would be required for its construction.

27 RMS also submits that, if the recitals to the Deed were to be understood as limiting the land within Lot 14 which would be, as between the parties, agreed to be made available, the recital should have read "*part of* which land is reserved …", where only part of Lot 14 was in fact reserved for road purposes at the date of the Deed (McDiarmid 9.9.15 Annexure B page 22, 23). RMS also submits that the recitals bind the parties to the stated position, that the whole of Lot 14 would be considered to have been reserved for the purposes of a County road, even though only part of that land had in fact been so reserved: *Berry v Wong* [2000] NSWSC 1002 per Young J at [14]; *Labracon Pty Ltd v Cuturich* [2013] NSWSC 97 at [105]–[153], [159]. It is not necessary to determine that question, given the findings that I reach on other grounds below. RMS alternatively submits that, even if the recitals to the Deed do not prevent the Council from disputing that the whole of Lot 14 was to be treated as reserved for a County road, then the recitals set out the contextual understanding on which the parties entered into the Deed, which was that the whole of Lot 14 (which then contained a part of Marsh Street) was available for any future requirement for the purposes of a County road.

28 RMS submits that other matters support its construction of the Deed. First, RMS submits that the extent of any reservation from time to time is not precise. RMS relies on the reports of Mr McDiarmid which map the CCPSO scheme maps against the boundaries of the land and the land now required by RMS and estimates that the accuracy with which those maps could be plotted against the lot boundaries contains a significant margin for error and in some cases could not be plotted. RMS submits that the extent of the boundary of the reserved land cannot be identified with such a degree of precision as to support a construction that it was only the land subject to the reservation at the time that was intended to be subject to the trusts. RMS also submits that the provisions of the Deed were expressed in broad terms apt to accommodate the probability that town planning schemes would change or adapt in response to changing circumstances. RMS submits that the requirement to keep the whole of the land free from buildings was consistent with a construction that any part of the land was intended to be capable of being applied for the road purpose.

29 RMS also emphasises the relevance of the requirement to make the land available "at no cost" and submits that the Cumberland County Council gave valuable consideration for the land before it was ultimately transferred to the Council. RMS submits that the effect of accepting the construction of the Deed contended for by the Council is that the RMS would be required to pay for the land (or so much of the land that comprises the land now required) to be made available for the public purposes of a road for a second

time. Mr Hemmings responded to that submission by reference to a range of documentation which, he contended, suggested that, even if the Cumberland County Council had initially paid for the relevant land, its costs of doing so had ultimately been funded by the Council, so far as the Cumberland County Council had raised loans to pay for the land, and the principal and interest of those loans was reflected in rates and levies issued by the Cumberland County Council to Council (T81). RMS in turn contested that that matter was established by the relevant documents. It does not seem to be necessary to reach a finding as to that question, where the issues of the construction of the relevant documents do not depend upon whether the Cumberland County Council had paid for the land, from its own resources, or whether it would be fair or unfair that the State be required to exercise its rights under the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) ("Just Terms Act") to acquire that land, if it had originally paid for it.

30 By contrast, the Council submits that the declarations of trust contained in the Deed identify the parts of Lot 14 held by the Council for RMS by reference to the scheme map for the CCPSO; provide that only those parts of Lot 14 (shown white on the CCPSO scheme map) are held for RMS for new County roads and widening of existing County roads; and provide that the remainder of the land (shown green on the CCPSO scheme map) is dedicated as open space. The Council accepts that it is obliged under the Deed to make available to RMS that part of Lot 14 which is marked white between broken black lines on the CCPSO scheme map. It appears from oral submissions of Mr Hemmings that the Council also accepts that it is obliged to make available the land which was represented by the broken black lines themselves. However, the lack of textual guidance in the Deed as to that matter is a reason why the Council's construction of the Deed should not be accepted. I will identify several other difficulties with that construction below.

31 In its opening outline of submissions, the Council submits that the Deed relating to Lot 14 is in two parts, and the first part contains the conveyance of all of Lot 14 to the Council, and the second part contains an acknowledgement and declaration that the Council either holds all of Lot 14 on trust or, alternatively, part of Lot 14 (comprising the land reserved for a County road) on trust for the purposes and subject to the two conditions which follow in the Deed. The Council submits that the purpose and conditions of the trust are narrowed or delineated by the reference to the CCPSO, and emphasises that cl 1 of the second part of the Deed (the acknowledgment and declaration) provides that the Council "will hold the said land which is required for a County [r]oad under the [CCPSO], for that purpose and will make the same available without cost to the Commissioner for Main Roads" and, pending a proper request by RMS to make the area reserved for a County road available to it for that purpose, the Council is not to use the land held on trust or permit it to be used for any purpose other than the purpose of a public park, public reserve or public recreation area. The Council points out that cl 2 of the second part of the Deed provides that it is a condition of the

trust that the Council will not erect or permit to be erected any building on any part of Lot 14 without first obtaining the approval of the Cumberland County Council and will observe and comply with all conditions imposed in connection with any such approval.

32 The Council also made detailed submissions as to the means by which land was reserved for the purpose of a County road under the CCPSO and its relationship to the RLEP and SREP 33. The Council submits that the CCPSO was a prescribed scheme under the LGA 1919 and had statutory force. The Council also submits that, under the CCPSO, most land was zoned, but certain land was reserved for public purposes specified in the table in cl 10 of the CCPSO, to which I have referred above. The Council submits that the land reserved and the purpose for which it was reserved was defined by reference to markings on the scheme map associated with the CCPSO and that owner initiated acquisition rights were conferred by the CCPSO in some circumstances, and controls were imposed on the use of reserved land.

33 The Council submits that the reference to the CCPSO in the Deed was for the purpose of identifying the area of land reserved for RMS and the use for which it was reserved (i.e. new County roads and widening of existing County roads). The Council submits that, on a static or ambulatory approach to construction of the Deed, the parts of Lot 14 that the Council is required to make available to RMS at no cost are either the areas shown in white on the CCPSO scheme map (on a static construction), or the area identified as a Special Uses Zone to accommodate the M5 corridor and the development of a transport corridor by the Roads and Traffic Authority under SREP 33 (on an ambulatory construction). The Council submits that the determination of this issue will turn on whether the references to the CCPSO in the Deed and Declaration of Trust are given a static or ambulatory construction and, if the latter, whether SREP 33 is a successor instrument to the CCPSO. Given the view that I reach below as to the scope of the requirement under the Deed, namely that it is directed to the whole of Lot 14, it is not necessary to address the question of a static or ambulatory reading of the Deed.

34 I prefer RMS's construction of the Deed to that advanced by the Council for several overlapping reasons. It seems to me that the first matter that strongly supports the construction which RMS gives to the Deed in respect of Lot 14 is that the recitals record an agreement to convey the "said land", described (in parentheses) as land which is reserved under Division 2 of Part II of the CCPSO "for County [r]oad purposes", to be held by Council upon trust and subject to the conditions set out in the Deed, and then proceed to record the conveyance of the whole of the land and the creation of the trust. The fact that the reference to the CCPSO in the first recital is in parentheses suggests that it is descriptive of the "said land", not part of the identification of it, by contrast with an identification of the land as, for example, "that part of the land that is reserved under

Division 2 of Part II of the CCPSO for County road purposes". That matter must in turn inform the use of the similar phrase, albeit without the parentheses, in paragraph 1 of the operative provisions of the Deed which creates the trust.

35 Second, it seems to me that the reference to the recitals to the land which was to be transferred and held in trust, and the reference in the operative provisions to the land which was in fact transferred and held on trust, should be understood to refer to the same land, being the whole of the relevant land. If that interpretation were not given to the Deed, then the relevant recitals would refer only to an agreement to deal with part of the land, being that reserved for County road purposes under the CCPSO, but not to the balance of the land that was not the subject of that reservation. That would in turn have the result that the operative provisions of the Deed would extend well beyond the recital of what the parties had agreed to do.

36 Third, it seems to me that the language "the said land (which land is reserved under Division 2 of Part II in the [CCPSO] for County [r]oad purposes)" in the recitals and the similar phrase in cl 1 of the operative provisions can properly be understood to refer to the whole of the land, as a matter of ordinary usage. As a matter of ordinary usage, a parcel of land can properly be described as reserved for County road purposes where a significant part of the land is reserved in that manner.

37 Fourth, RMS's reading of cl 1 of the Deed is supported by the fact that that clause uses the language "required" for a County road not the language "reserved" for a County road. The term "reserved" is defined, in the Shorter Oxford English Dictionary (2007) as "to [keep] for future use" whereas the term "require" is defined as, inter alia, "to need for a particular purpose", a concept that is directed to the present rather than the future. At the time the Deed was executed, the parts marked on the scheme map under the CCPSO were reserved, not required, for a County road, and it would have been natural, had the intent been to refer to those parts, to refer to those parts of the land which were "reserved" for that purpose. It seems to me that the language "required for a County [r]oad" contemplates the possibility of a future requirement for use of the land or parts of it, which were then unidentified but which would be identified at the point of that future requirement, as distinct from the "reservation" of parts of the land which were identified at an earlier point in time. Conversely, it seems to me that the Deed cannot be construed in a way that treats the relevant trusts as fixed by reference to the point at which land was reserved for a County road in the CCPSO, because the land which was then reserved for a County road was not then required for a County road. The relevant requirement would necessarily arise at a subsequent point when, as has now occurred, RMS (or its predecessors) indicated the land which was in fact required for the purposes of the construction of the County road, rather than the land which had previously been "reserved" for that purpose.

38 Fifth, as RMS points out, a further reason to read cl 1 of the operative provisions of the Deed as referring, by the term "said land", to the whole of the land is that, unless that term is read in that way, across the whole of the clause, then the restriction on use of

the land binding the Council, pending the requirement of the land "for a County [r]oad" would bind only that part of the land which was then reserved for a County road under the CCPSO, and Council would be free to use other parts of the land for any purpose. That does not seem to me to be consistent with the likely objective intent of the parties to the clause.

39 Sixth, I am reinforced in the view which I take as to the construction of the Deed by the fact that, as Mr McDiarmid's evidence indicates, a reference to the scheme map under the CCPSO would have been a particularly imprecise way of identifying what part of the land could be required by RMS, given the scale of that scheme map, where parties which had wished to designate a particular part of the land for use for a road could readily have precisely identified the boundaries of that part of the land.

40 For completeness, I note that the reading which I would give to the Deed is consistent with the recitals to the deed under which the Council granted a lease of Lot 14 to the Club, to which I referred in paragraph 20 above, and with cl 23 of that deed which provides that the Club must yield up possession of the land to the Council, without any compensation or damages, upon written request by the Cumberland County Council, the Department of Main Roads or the Council. That requirement is directed to the whole of Lot 14, reflecting the requirement in the Deed as I would understand it, and not only that part of the land which the Council contends could be required for County road purposes. There may be a question, which I do not further address where the parties did not direct submissions to it, whether that recital and that clause would fall within the exception that permits reference to post-contractual conduct of the parties, not as an aid to interpretation of a contract, but so far as that conduct may constitute "an admission of the state of the parties' rights": *Johnston v Brightstars Holding Company Pty Ltd* [2014] NSWCA 150 at [79], [84] per Beazley P, at [121], [122] per Basten JA.

41 For these reasons, it seems to me that cl 1 of the Deed requires the Council to make the relevant land, which I have held to be the whole of Lot 14, (or, in this case, that part of it that is now required) available without cost to RMS, as the successor to the Commissioner for Main Roads, or any other body that may be the constructing authority for the County road, when required to do so by that body, and subject to the further issues that I address below. The trigger for the obligation to do so is the requirement of RMS, although the second line of that clause indicates that that requirement is to be "for a County road" under the CCPSO and the sixth line indicates it is to be for a "County road" without the specific reference to the CCPSO.

The construction of the Declaration of Trust relating to Lot 1

42 I now turn to the position in respect of Lot 1. On 27 March 1957, Cumberland County Council purchased Lot 1 from Mr George Soren Bang for £24,000 and, on 5 May 1958, the Cumberland County Council transferred Lot 1 to the Council. The transfer appears to have been made under cl 18 of the CCPSO which provided that the Cumberland County Council may transfer which it acquired, under cl 17 of the CCPSO, to a council.

Clause 17 of the CCPSO, to which cl 18 referred, in turn permitted an owner of land which was reserved under Div 2 to require, relevantly, the Cumberland County Council to acquire the land.

43 Before that transfer occurred, on 14 April 1958, the Council made the Declaration of Trust. I set out the relevant parts below:

> THE [COUNCIL] … hereby ACKNOWLEDGES AND DECLARES that it holds and is seised of the land described in the Schedule hereto (which has been transferred to it pursuant to the provisions of Clause 18(1) of the [CCPSO]) UPON TRUST for the following purposes and subject to the following conditions, namely:-
>
> > 1. AS TO PART of the said land that is as to so much thereof as is required for a County road under the [CCPSO] the Council holds the same for that purpose AND will make the same available without cost to the Commissioner for Main Roads or any other body that may be the constructing authority for the County road when required so to do by the said Commissioner or other body as aforesaid AND pending its requirement for a County Road the Council shall not use or permit to be used such part of the said land for any purpose other than the purpose of a public park, public reserve or public recreation area.
> >
> > 2. AS TO THE RESIDUE of the said land the Council holds the same for the purposes of a public park, public reserve or public recreation area and the Council will not use or permit to be used such residue of the land for any purpose other than the purpose of a public park, public reserve or public recreation area.
> >
> > 3. THE COUNCIL will not erect or permit to be erected on the said land or any part thereof any building without first obtaining the approval of The Cumberland County Council and will observe and comply with all conditions which The Cumberland County Council may impose in connection with any such approval.
>
> THE SCHEDULE
>
> ALL THAT piece or parcel of land situated in the Municipality of Rockdale Parish of St. George Cumberland County Council being part of the land in Certificate of Title registered volume 6580 folio 173 containing an area of 29 acres 3 roods 20¾ perches as shown on plan annexed to Notice of Acquisition dealing number F539934 also being the whole of the land comprised in memorandum of transfer registered number G684473.

44 Mr Hemmings accepted that the Court would begin the exercise of construction of the Declaration of Trust with the terms of the relevant instrument, and would only turn to the other documents to the extent that there was ambiguity in the instrument. He also took me, in submissions, to several documents by way of the background to the acquisition of Lot 1. It does not seem to me that I should give significant weight to the pre-contractual documents, both because of the principles in *Westfield Management* to which I have referred above and because it seems to me that those documents record the history of the acquisition of the land, to which I have referred above, but do not provide any illumination in respect of any question of the parties' objective intention that is relevant to the construction of the Declaration of Trust.

45 The Council subsequently made Lot 1 available to the Club pursuant to the deed dated 2 May 1961, to which I referred above in respect of Lot 14. The recitals to that deed record that Lot 1:

> "is held by the Council upon trust for the purposes of a public park, public reserve and public recreation area and subject to conditions which are substantially to the same effect as those herein before recited with regard to [Lot 14]."

I have referred to the recitals to that deed in respect of Lot 14 above. As I noted above, the deed in turn provided for the lease of the relevant land to the Club for a 30 year period and provided, in cl 23 that:

> "Immediately upon receipt of a written request by the Cumberland County Council, the Department of Main Roads or the Council, the Club shall vacate and peacefully yield up possession to the Council without the payment of any compensation or damages whatsoever so much of the land shaded blue in the said plan as may be specified in the said written notice." (Ex K1, p 906)

As I also noted above, the parties did not make substantive submissions as to the extent of the land shaded blue in the plan attached to that deed.

46 The Declaration of Trust plainly applies to the whole of Lot 1, so the issue in respect of it relates to the purposes for which the land may be used under the Declaration of Trust. RMS pleads that Lot 1 was vested in the Council "on condition that the [Council] make [available] such part of Lot 1 as may be required by [RMS] for the purposes of a County road without cost to [RMS]" (Amended Statement of Claim [19]) and that it is a condition of the Declaration of Trust that such part of Lot 1 as RMS requires be made available without cost to the RMS on request (Amended Statement of Claim [53]). RMS makes substantially the same submissions in respect of the construction of cl 1 of the Declaration of Trust as it made in respect of cl 1 of the Deed. RMS's summary of the propositions for which it contended in respect of Lot 1 indicated its position that the relevant land is the whole of Lot 1; the hierarchy of purposes specified in the Declaration of Trust gives primacy to road purposes; relies on the phrase "which is required"; and submits that the phrase "make available" is not prescriptive as to process but envisages all necessary access to and occupation of the land. RMS also submits that the description of the land subject to the trust declared in clause 1 of the Declaration of Trust being "so much thereof as is required for a County road" describes the land actually required by the Commissioner for Main Roads (or its successor) at the time the land is required, and does not refer only to that part of Lot 1 which was at the date of the Declaration of Trust described as "County road" in the CCPSO, or that part of Lot 1 which was subject to the CCPSO at the time the request was made. In oral submissions, Mr Lancaster similarly submits that the words "so much thereof as is required" in the Declaration of Trust refer to a future requirement by the Commissioner for Main Roads or its successor for the use of land for a public road or a main road (T23).

47 In response, Mr Hemmings submits, first, that RMS is not entitled to the whole of Lot 1, but only to the land marked in white on the scheme map, being the land reserved for the purposes of a County road (T67). The Council points out that Lot 1 is marked on the CCPSO scheme map to be reserved partly as a "County road" (in white) and partly for either the purpose of "parks and recreation areas" or "foreshore reservations and places of natural beauty or advantage" (in green). The Council accepts that it is obliged under the Declaration of Trust to make available to RMS that part of Lot 1 which is marked white between broken black lines on the CCPSO scheme map, and accepted in oral submissions that that extended to the land represented by the broken black

lines. The lack of textual guidance in the Declaration of Trust as to that matter is, as it was with the Deed in respect of Lot 14, a reason why the Council's construction of the Declaration of Trust should not be accepted.

48 In its opening submissions, the Council submits that the Declaration of Trust provides that the Council holds Lot 1 upon trust for the purposes and subject to the conditions stated in cll 1, 2 and 3 of the Declaration of Trust. The Council submits that the trust created for Lot 1 has two purposes and to meet those purposes, separates Lot 1 into two parts. The Council points out that cl 1 refers to part "of the said land that is as to so much thereof as is required for a County road under the [CCPSO]" and provides, pending a proper request by RMS to make the area reserved for a County road available to it for a County road, the Council is not to use the land held on trust or permit it to be used for any purpose other than the purpose of a public park, public reserve or public recreation area; cl 2 provides that the residue of Lot 1 is held by the Council for the purposes of a public park, public reserve or public recreation area; and cl 3 provides that it is a condition of the trust that the Council will not erect or permit to be erected on any part of Lot 1 any building without first obtaining the approval of the Cumberland County Council and will observe and comply with all conditions imposed in connection with any such approval.

49 In oral submissions, Mr Hemmings submitted (T91) that Council's construction of the Declaration of Trust should be preferred because, on the construction adopted by RMS, any part of the land could at any time be required for the purposes of a County road, and the balance of the land would be held subject to the balance of cl 1, so that it would be used for a public park, public reserve or public recreation area where not required for a County road; and that cl 2 would in that event be superfluous. I do not accept that submission, because it seems to me that cl 1 specifies the nature of the requirement which may be made and the use of the land pending that requirement; and cl 2 is directed to the position as to the balance of the land after such a requirement has been made. The Council also adopted substantially the same line of reasoning as it adopted in respect of the Deed, to which I have referred above.

50 The Club also submits, consistently with the submission put by the Council, that the terms of the Declaration of Trust over Lot 1 created two purpose trusts, one being directed to that part of the land required for a County road, and the other being the residue of the land to be held for public recreation. The Club in turn contends that the construction adopted by RMS is unworkable because, until the relevant requirement was made, Council would not know whether it should hold a specific part of Lot 1 for County road purposes or for public recreation. I do not accept that submission because, on the proper construction of the Declaration of Trust, Council held the entirety of Lot 1 for the purposes of a public park, public reserve or public recreation area until the

relevant requirement was made and then held the land required for a County road on trust for that purpose, and the residue on trust for a public park, public reserve or public recreation area.

51 It seems to me that RMS's construction of the Declaration of Trust should be accepted, for reasons which overlap with those applicable to similar language in the Deed. It seems to me that RMS's reading of cl 1 of the Declaration of Trust is supported by the fact that that deed uses the language "required for a County road under the [CCPSO]" not the language "reserved" for a County road under the CCPSO. At the time the Declaration of Trust was executed, the parts marked on the scheme map under the CCPSO were reserved, not required, for a County road, and it would have been natural, had the intent been to refer to those parts, to refer to the parts of the land that were "reserved" for that purpose. It also seems to me that the concept of land that is "required for a County [r]oad under the [CCPSO]" was necessarily future looking, and contemplated the possibility that the land that would in future be required would potentially be different from that which was then reserved under the CCPSO. The obligation to make "the same available without cost" to the Commissioner for Main Roads or any other constructing authority "when required to do so" also emphasises both that the clause is directed to a future requirement, and that what is required to be made available is the land that is in future required. The language of the last part of that clause, which limits Council's use of the land to a public park, public reserve or public recreation area "pending its requirement for a County [r]oad" also contemplates that that requirement will be made in the future. It seems to me that, as was the case with the similar language in the Deed, the language "required for a County [r]oad" contemplated the possibility of a future requirement for use of then unidentified parts of the land, as distinct from the "reservation" of identified parts of the land which did then exist. I am reinforced in that view by the fact that, as I noted above in respect of the Deed, and as Mr McDiarmid's evidence indicates, a reference to the scheme map under the CCPSO would have been an imprecise way of identifying what part of the land could be required by RMS, given the scale of that scheme map, where parties which had wished to designate a particular part of Lot 1 could readily have precisely identified the boundaries of that part of the land.

52 For these reasons, it seems to me that the Declaration of Trust also requires the Council to make that part of Lot 1 that is now required by RMS available without cost to RMS, subject to the further issues that I address below.

Whether the requisite land is required for the purposes permitted by the Deed and Declaration of Trust

53 RMS contended that its required use of parts of Lot 14 and Lot 1 was within the specified purposes set out in the Deed and the Declaration of Trust. The evidence is that RMS requires land on both a temporary and a permanent basis within Lot 14 and Lot 1 in connection with the New M5 Project (Reynolds 30.10.15 [25]–[26]). On part of Lot 14, RMS would place permanent facilities such as ventilation shafts, an electrical

substation, site access, water treatment plant and sedimentation pond for tunnel operation and motorway infrastructure (Reynolds 30.10.15 [26(a)(i)]) and temporary facilities during construction such as a water treatment plant, sedimentation pond, electricity substation, spoil extraction shaft, spoil stockpile, acoustic shed, self-bunded fuel storage, offices and crib rooms, parking for light vehicles, ablutions blocks, laydown areas, noise wall and hoarding (Reynolds 30.10.15 [26(a)(ii)]). On part of Lot 1, RMS would place permanent facilities (Reynolds 30.10.15 [27]) and temporary facilities during construction such as a decline for tunneling machinery and equipment, temporary access roads and loops, spoil stockpile, acoustic shed, acoustic spoil shed, self-bunded fuel storage, sedimentation pond, parking for light vehicles, concrete testing station, noise wall and hoarding (Reynolds 30.10.15 [26(b)]). The land is therefore not to be used as the road in respect of the New M5 Project but for temporary facilities that will facilitate the construction of the road and permanent facilities that will facilitate the operation of the road.

54 RMS pleads that, on the proper construction of the Deed and the Declaration of Trust, the Council is obliged to make the required land available to RMS for the purposes of the construction, maintenance and use of the road works (Amended Statement of Claim [56]). In its summary of the propositions for which it contended, RMS submitted that the trusts for the purposes of holding and making available land required for the purposes of a road – in substance, trusts for road purposes – are not confined to making Lot 14 and Lot 1 available to the extent only of the vehicle carriageway, verges and any footpaths or the like comprising the finished roadway, but extend to making available other land required for or necessarily incidental to constructing, operating and maintaining the road.

55 RMS submits that the words “for that purpose” in cl 1 of the Deed relating to Lot 14 do not describe only the use of the lot for the physical area of a road, and the effect of the clause is to extend to land that encompasses necessary consequential uses for the purpose of constructing a road, such as plant, equipment, spoil, storage, and other such uses. It submits that the land is said to have been reserved for “County road purposes” and the obligation is to hold the land “which is required for a County [r]oad” and that neither the obligation nor the reservation contain any qualification or restriction to a specific purpose associated with the road, such as “constructing”, or “maintaining” or “widening”, and that suggests that all purposes associated with roads, and not only the immediate purpose of construction was intended on the words of the Deed and the Declaration of Trust.

56 RMS also submits that an analogous construction is applied to the identification of purpose in land acquisition cases, where acquisition for “road purposes” has been held to encompass all matters necessary for the carrying out of the activities involved in undertaking road construction or widening or maintenance, and relies on the High Court’s decision in *Marshall v Director General Department of Transport* [2001] HCA 37; (2001) 205 CLR 603 at [22]. In that case, the High Court considered the scope of a

compensation power where land was resumed for “road purposes” under s 7 of the *Acquisition of Land Act* 1967 (Qld). The plurality observed that the use of land as a site for the deposition of residue from road works, for the support of a batter or for drainage associated with road works or for future road-widenings, or as a passive buffer, was a use of that land for “road purposes”. I accept that, as Mr Hemmings points out, that case was concerned with the construction of the relevant statute and that the authorities relating to the purpose for which land is used must also be understood on the basis that the concepts of use and purpose each depend on their particular context: *Valuer General v Fivex Pty Ltd* [2015] NSWCA 53 at [37]. Nonetheless, it does seem to me to support the view that use for a road, or for the purposes of a road, may extend beyond use as a road. Mr Lancaster also draws attention to *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 at 515, where Taylor J treated land as used for the purposes of a hospital where it was used as a passive area of land surrounding the hospital. The Privy Council took the same view in *Council of the City of Newcastle v Royal Newcastle Hospital* (1959) 100 CLR 3. It seems to me that those decisions are of less assistance, so far as they appear primarily directed to characterisation of the relevant purpose on their particular facts. In *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 649, Stephen J similarly held that land was used for the purposes of a university where it was made available for providing commercial and shopping facilities for staff and students.

57 The Council initially denied that the concept of “County road” used in the Deed and the Declaration of Trust extended to the roads in issue in these proceedings. In paragraphs 34 and 35 of its Defence, the Council pleaded that the concept of “County road” was not continued into subsequent planning instruments after the CCPSO, including the Rockdale Planning Scheme Ordinance and, in paragraphs 42–49 of the Defence, the Council accepted that subsequent planning instruments zoned parts of Lots 1 and 14 for “transport” or “special uses” but did not admit that those instruments permitted the use of Lots 1 and 14 for the purposes of a road. Those propositions were not pressed at the hearing and I need not address them further.

58 The Council instead relied on a second proposition, summarised in its summary of the propositions for which it contended as follows:

> “Council is only required to make the Land Reserved available to RMS for new county roads and widening of existing county roads and not for the permanent facilities and 'construction compound' shown in Figure 1 of Annexure 'B' to the Affidavit of Glen Ian McDiarmid dated 16 November 2015 and as also shown at sub-tab 10 of Exhibit KJR-1 to the affidavit of Kenneth James Reynolds dated 30 October 2015, (Exhibit P2, Court Book 2, page 605).”

In oral submissions, Mr Hemmings similarly submitted that RMS was only entitled to land for the purposes of a road, or for the purposes of widening a road, and not for use as a construction compound or for construction purposes or for tunnelling (T67). For completeness, the Attorney General took no position on the factual question as to the

use to which the required land is put (whether road, road widening or ancillary road works), albeit expressing the premise that that land is legitimately needed for road works.

59 The Council submits that RMS is not entitled to any part of Lot 14 and Lot 1 associated with the New M5 Project as it is not to be used for a County road or widening of existing County road. The Council submits, and it is common ground that the New M5 Compound Plan (Ex P2, tab 10), indicates that none of the land required for the New M5 Project is to be used as a County road or as the widened part of an existing Country road. In oral submissions, Mr Hemmings also pointed out (T79–80) that the balance of the land that was required within Lot 14, other than that part required for Marsh Street, was required for a construction compound, and the whole of the land required within Lot 1 was required for a construction compound.

60 As I noted above, the Deed in respect of Lot 14 uses, in cl 1, the language "required for a County [r]oad" and requires the land to be made available "when required to do so" by, relevantly, RMS as the successor to the Commissioner for Main Roads, implicitly in respect of that requirement "for a County [r]oad". I am conscious that the language used in the Deed does not expressly refer to "road purposes", by contrast with that considered by the High Court in *Marshall v Director General Department of Transport* above. Nonetheless, it seems to me that the concept of "for a County [r]oad" is wider than the concept of "as a County [r]oad", both as a matter of language, and reading the Deed as a whole and in its context. It seems to me that the use of part of Lot 14 as a temporary construction facility, where that use is proximate to and genuinely for the purpose of constructing a road, is properly described as use *for* that road, although it is not use *as* that road. It seems to me that use for permanent facilities required for a road is also properly described as use *for* that road, although not as use *as* that road, and that proposition extends to facilities such as ventilation shafts and electricity substations, which are necessary for the operation of a road, as it would also extend to drainage or a footpath or an emergency exit gate that was necessary to the operation of that road. That result is consistent with the reasoning in *Marshall v Director General Department of Transport* above, although I have reached it on the proper construction of the Deed.

61 Clause 1 of the Declaration of Trust in respect of Lot 1 similarly refers to the Council holding the land "required for a County road" and expressly states that the Council holds the land "for that purpose" and is required to make it available "for a County road". It seems to me that the language *for* a County road is again wider than the concept *as* a County road, and the express reference to purpose in this clause reinforces that conclusion. A use of Lot 1 for temporary facilities required in the

construction of a road, and for permanent facilities necessary for the operation of that road, seems to me to be a use *for* that road, and for the specified purpose of a road, although it is not use *as* a road.

62 For these reasons, I do not accept the Council's second submission that the proposed uses of Lot 14 and Lot 1 do not fall within the scope of the Deed in respect of Lot 14, the Declaration of Trust in respect of Lot 1 or the trusts created by those documents.

63 The dispute as to whether the land is required by RMS for the requisite purpose was of narrower scope in respect of the widening of Marsh Street than in respect of the New M5 Project. It appears that Council had raised the possibility in July 2010 that part of Lot 14 should be dedicated as a public road in respect of Marsh Street. A letter dated 21 July 2010 from Roads and Traffic Authority, RMS's predecessor, to the Council (Ball 17.8.15, Annexure "B") responded that the area of Lot 14 that was currently in use as part of Marsh Street had not been formally dedicated as public road and observed that:

> "As the subject property is partly within a County Road Reservation for the proposed Southern Freeway between Tempe and Loftus, the Roads and Traffic Authority (RTA) does not propose to undertake the necessary action for the dedication as public road and declaration as freeway of the appropriate areas of Lot 14 at this stage."

That letter went on to refer to the Deed relating to Lot 14 and to express the position, which RMS now presses, that:

> "[T]he whole of this Lot is required to be held by Council for public purposes until such a time as it is required by the constructing authority when it is to be transferred at no cost. Once final boundaries are established the RTA will arrange for the removal of the covenant from the area of Lot 14 that is not required for road or freeway."

64 RMS now requires, permanently, 10,910 m2 of land within Lot 14 for the purpose of widening Marsh Street (Ex P1, tab 14). RMS pleads that, after the completion of the widening of Marsh Street, RMS intends to cause or procure Marsh Street (as widened) to be dedicated as a public road pursuant to the *Roads Act* 1993 (NSW) (Amended Statement of Claim [28]). RMS also requires, on a temporary basis, 4,010 m2 of land within Lot 14 for working facilities in connection with widening Marsh Street (Ex P1, tab 4 p 193).

65 In its opening submissions, the Council acknowledged that, subject to its obligations as trustee, it is willing to grant a leasehold interest for the term required by RMS in those parts of Lot 14 which comprise the land reserved for a County road (shown white on the CCPSO scheme map) to RMS for the widening of Marsh Street at no cost, upon request, and will take all necessary and lawful steps to seek to reclassify the land under the LGA 1993 for operational purposes to enable it lawfully to do so. Mr Hemmings drew attention in oral submissions to s 47F of the LGA 1993 which restricts the dedication of community land as public road for some purposes, but does not apply to a dedication of land for the purpose of widening an existing public road. Mr Hemmings submits, and I accept, that it would be open to Council first to dedicate Marsh Street as a public road, completing the process which it had raised but the predecessor to RMS had not pursued in 2010, then to dedicate the additional land required for the widening of that road under s 47F of the LGA 1993. Mr Hemmings noted that, although the

widening of Marsh Street extended to land that was partly marked in green on the relevant CCPSO plan, that did not raise a difficulty so far as Marsh Street was already a road and there was no legal impediment to its transfer to RMS (T79). In any event, on the findings as to the construction of the Deed that I have reached above, the Council's obligations to make the land available where required for County road purposes extend to the whole of Lot 14, not only that part of it that was marked in white on the CCPSO scheme plan as reserved for County road purposes.

66 There may be a remaining dispute in respect of part of the land sought to be required in respect of the Marsh Street widening proposal, which is not to be used for the road itself but for ancillary works (T110). To the extent that a dispute remains in respect of that area, RMS is entitled to have that land made available to it at no cost for the same reasons as I have reached that conclusion in respect of land required for ancillary works in respect of the New M5 Project, as set out above.

The impact of the LGA 1993 and other instruments

67 A further issue in the proceedings is whether the Council is prevented from making the required land available to RMS on the proper construction of the Deed and the Declaration of Trust by reason of the LGA 1993, including those provisions in that Act which relate to local councils' ability to deal with land classified under that Act as "community land".

68 Paragraph 49 of the Council's Defence pleaded that none of the core objectives in ss 36E–36N of the LGA 1993 included road works or road construction purposes. That paragraph also pleaded that an estate in community land could be granted for the provision of a road, but only where that estate was consistent with one of the core objectives stated in ss 36E–36N of the LGA 1993, and paragraphs 49(b) and (c) of the Defence pleaded that, under ss 45(1)–(2) and 46(1)(b) of the LGA 1993, a lease, licence or other estate in respect of community land could not be granted unless it was expressly authorised under a plan of management. Paragraph 40 of the Council's Defence pleaded that a draft plan of management existed in relation to Lots 1 and 14, and if it were adopted, it would categorise each of those lots as a sportsground and would not authorise the grant of an estate to create a road. Paragraphs 55–60 of the Council's Defence relied on the restrictions imposed by the LGA 1993 to contend that those restrictions prevent the Council now making the required land available to RMS and pleaded that the Council was not able to implement a plan of management that would permit the use of Lots 1 and 14 for road works and that none of the land marked for use for parks and recreation areas in the scheme map for the CCPSO could be transferred to RMS for road works pursuant to the terms of the trusts, by reason of ss 45 and 46 of the LGA 1993.

69 In its opening outline of submissions, the Council submits that the LGA 1993 fetters Council's power to dispose of community land, within the meaning of the Act. The Council relies on s 45 of the LGA 1993 which provides that a council has no power to

sell, exchange or otherwise dispose of community land. The Council accepts that it may grant a lease, licence or other estate in respect of community land but only in accordance with Division 2 of Part 2 of the LGA 1993, but submits that s 46 of the LGA 1993 provides that a lease, licence or other estate in respect of community land may be granted in accordance with an express authorisation in a plan of management, and that such a lease, licence or other estate in respect of community land may be granted only if the purpose for which it is granted is consistent with the core objectives prescribed by ss 36E–36N of the LGA 1993. The Council initially submitted that none of the core objectives for community land prescribed by ss 36E - 36N of the LGA 1993 include granting estates or interests in community land for road works or road construction purposes. The Council also submits that a plan of management is void to the extent that it purports to authorise the grant of a lease, licence or other estate in contravention of s 46 of the LGA 1993.

70 In its summary of its key propositions, RMS submits that, even if the general savings provision in the LGA 1993 (to which I will refer below) does not have the effect for which RMS contends, the LGA 1993 does not prevent the Council making the required land available to it. RMS submits that the classification of the land as community land and its proposed categorisation by the Council as a sportsground, to which I referred above, are not impediments to the Council making the required land available and a plan of management need not expressly authorise the use of the land for the widening of Marsh Street and the New M5 Project.

71 The Attorney General submits, with substantial force, that the effect of the LGA 1993, on which Council relies, would either prevent both the land required for a County road (marked in white in the scheme plan) and the land reserved for parks and recreation areas (marked in green in the scheme plan) being made available to RMS, or it would prevent neither class of land being made available to RMS. The Attorney General also points out, again with substantial force, that the prohibitions under ss 45 and 46 of the LGA 1993 apply to both classes of land and, if an interest can be granted in the land required for a County road under the LGA 1993, then it can also be granted in the land required for parks and recreation areas under that Act; that the provisions that apply for reclassification of the land required for a County road as operational land under s 30 of the LGA 1993 also apply to the reclassification of the land required for parks and recreation areas; and that both categories of land were proposed to be categorised as a sportsground in Council's draft plan of management so that, if that proposed zoning affects the Council's ability to perform the trusts, it does so in respect of both categories of land. It seems to me that those submissions must be accepted, and the Council is either able to perform the trusts in their entirety, in respect of both categories of land, or it is not able to perform the trusts at all.

72 Turning now to the terms of the LGA 1993, it is helpful to refer first to a note to Pt 2 of the LGA 1993 although, by reason of s 6 of the LGA 1993, it does not form part of the Act but is provided to assist understanding. That note records that Pt 2 of the LGA 1993

requires all land vested in a Council (except, relevantly, a road) to be classified as either “community” or “operational” land. That note indicates that:

> “The purpose of classification is to identify clearly that land which should be kept for use by the general public (community) and that land which need not (operational). The major consequence of classification is that it determines the ease or difficulty with which land may be alienated by sale, leasing or some other means.
>
> Community land must not be sold (except in the limited circumstances referred to in s 45(4)). Community land must not be leased or licensed for more than 21 years and may only be leased or licensed for more than 5 years if public notice of the proposed lease or license is given and, in the event that an objection is made to the proposed lease or license, the Minister’s consent is obtained. No such restrictions apply to operational land.”

73 Mr Hemmings also draws attention to the Council’s charter, as set out in s 8 of the LGA 1993, which includes requirements to bear in mind that it is the custodian and trustee of public assets and to effectively plan for, account and manage the assets for which it is responsible. Part 2 Div 2 of the LGA 1993 in turn sets out the requirements for the use and management of community land. Section 35 provides that community land is required to be used and managed in accordance with the plan of management applying to the land, any law permitting the use of the land for a specified purpose or otherwise regulating its use and Pt 2 Div 2. Section 36 provides for preparation of a draft plan of management for community land which must identify specified matters, and which may apply to one or more areas of community land, except as provided by Pt 2 Div 2. Section 36(4) provides that community land is to be categorised as one or more of several categories in a draft plan of management, including permitting categorisation relevantly as a sportsground or for “general community use”.

74 The Council relies, in support of the proposition that it cannot make the land available to RMS, consistent with the core objectives, upon s 36F of the LGA 1993 which sets out the core objectives for “management of community land categorised as a sportsground”. The immediate difficulty with that proposition is that, as is common ground, the relevant land is not in fact categorised as a sportsground, because any such categorisation would arise from a plan of management, which Council has prepared in draft but not adopted. The Council submits that any lease and license of the land would depend upon the making of a plan of management, and that proposition is correct so far as such a lease or license relied on s 46(1)(b) and s 46(4) of the LGA 1993 but not, as I will note below, to the extent that it relied on s 46(1)(a) of the LGA 1993.

75 The Council submits that, when the land was to be categorised by a plan of management, as would be required in order to grant a lease or license of it, the relevant land would have to be categorised as a sportsground, which would then limit the purposes for which it could be used by s 36F of the LGA. Mr Hemmings refers to Pt 4 Div 1 of the Local Government Regulations 2005 (NSW), which sets out guidelines for the categorisation of community land, and in particular to reg 103 which provides that:

> “Land should be categorised as a sports ground under s 36(4) of the [LGA 1993] if the land is used or proposed to be used primarily for active recreation involving organised sports or the playing of outdoor games.”

Mr Hemmings also drew attention to what would be required for Council to take the specified matters into consideration: *Zhang v Canterbury City Council* [2001] NSWCA 167; (2001) 51 NSWLR 589 at [70]ff.

76 I do not accept the Council's submission that it would be obliged to categorise the relevant land as a sportsground on that basis. First, as Mr Hemmings accepted in oral submissions, reg 101 of the Local Government Regulations provides that Pt 4 Div 1 of the Regulations sets out "guidelines" for the categorisation of community land, and requires Council to "have regard" to those guidelines, rather than mandating a particular result. Second, it seems to me that any categorisation by the Council would have to have regard, not only to the use to which the Club is presently putting the land, but also to the terms of the trusts. To put that proposition another way, it could scarcely be said that Council, as trustee, would be entitled to disregard the requirements of the trusts as to the purposes for which the land must be used, in categorising it as a sportsground, because it was presently being used for another purpose, for example, for a subordinate purpose under the trust, or indeed in breach of trust. In making these observations, I proceed on the basis that the trusts were not extinguished by the LGA 1993, as was ultimately common ground between the parties.

77 I recognise that the Council is obliged to comply with its statutory obligations, including those arising under the LGA 1993, in conducting itself as trustee of the trusts, even if those obligations restrict steps which it might otherwise take to promote the purposes of the trust. However, it does not seem to me that that provides an answer to the difficulty which the Council, as trustee, would face, by way of conflict of duty and duty, if it is required in its capacity as a local council to have regard to specified considerations in declaring the land to be a sportsground, but its conduct in that regard would be inconsistent with its duties as trustee, so far as it would prevent its compliance with its obligations as trustee. In that situation, Council must resign as trustee, or would potentially be removed as trustee by the Court, where that would be necessary to allow compliance with its obligations in respect of categorisation of the land for the purposes of the LGA 1993 without breach of its obligations as trustee. The fundamental difficulty with the Council's submission in this respect is, it seems to me, that it contemplates that a trustee would, in undertaking the act of categorisation contemplated by the LGA 1993, act in a manner that would prevent its performance of the trust, rather than first resigning as trustee so as to comply with its statutory obligations without breach of trust. It is not necessary to read down the trust to accommodate the Council's statutory obligations in respect of the classification of the land under LGA 1993, where both a breach of those obligations and a breach of trust could be avoided by Council's resignation as or removal as trustee of the trusts.

78 Section 36I of the LGA 1993 in turn provides for the core objectives for management of community land categorised as general community use, which are to promote, encourage and provide for the use of the land, and to provide facilities on the land, to meet the current and future needs of the local community and of the wider public,

including in relation to purposes for which a lease, license or other estate may be granted in respect of the land (other than the provision of public utilities and works associated with or ancillary to public utilities). The exclusion of land used for the provision of public utilities and works associated or ancillary to them is consistent with s 46(1)(a) of the LGA 1993, to which I refer below, so far as the use of community land for the provision of public utilities and works associated with them does not require authorisation under a plan of management. Section 46(4) of the LGA 1993 in turn specifies the purposes for which a lease, license or other estate in the land may be granted.

79 Mr Hemmings submitted (T107) that an approach which understood s 36I of the LGA 1993 as permitting a license or lease to be granted, where s 46(4) of the LGA 1993 specified the purposes for which that could occur, was circular. I do not accept that submission, although I accept that the LGA operates in a somewhat indirect manner, which contemplates (in s 46(2)) that a lease may only be granted within s 46(1)(b) if it is consistent with the core objectives; then, in s 46(4), specifies prescribed purposes for which such a lease or license may be granted; then, in s 36I(b) treats a lease, license or other estate granted for the relevant purposes as complying with the core objectives, in respect of land categorised as general community use. It seems to me that, in effect, s 36I treats as one of the core objectives the grant of a lease, license or other estate which s 46(1)(b) and s 46(4) would permit to be granted or, as Mr Lancaster put it in oral submissions, makes clear that the core objectives include the provision of leases to the extent that Council otherwise has power to grant leases under the LGA 1993 (T34). It also seems to me that the core objective in s 36I would be satisfied, so far as the relevant land were used for a facility that would facilitate the construction of the new M5, so far as that is a proper purpose for which a lease, license or other estate may be granted in respect of the land under ss 46(1)(b) and 46(4), if it were not otherwise properly characterised as a public utility or works associated with it under s 46(1)(a) of the LGA 1993. I will refer to those sections below.

80 Mr Lancaster also drew attention to s 37 of the LGA 1993 which provides that a plan of management for community land that is not “owned by the Council” must identify the owner of the land, and, inter alia, state whether the land is subject to any trust, and whether the use or management of the land is subject to any condition or restriction imposed by the owner. The scope of that section is by no means clear, so far as it raises a question when land that is not “owned by the Council” would properly be classified as “community land”, and whether the concept of ownership referred to in that section is to legal or beneficial ownership. Subsection 37(d) in turn requires that a plan of management for community land falling within this category must not contain any provision inconsistent with anything required to be stated by s 37(b), relevantly, that the land is subject to the trust. It seems to me that this section must at least apply to land as to which Council is the registered owner where it holds it as trustee for a beneficial owner or under a charitable trust. Otherwise, the reference to land that is “subject to any trust” might well be otiose, since Council would commonly be the registered owner,

but not the beneficial owner, of land that is subject to a trust. That is consistent with a reading of the phrase "not owned by the Council" in s 37 as referring, not to legal ownership, but both to legal and beneficial ownership. It seems to me that there is a strong argument that s 37 would be contravened by a plan of management that referred to the existence of the trust, but then contained provisions that were inconsistent with its terms. It is, however, not necessary to express a final view as to that question, given the findings that I reach on other grounds.

81 Section 45 of the LGA 1993 relevantly provides that a Council has no power to sell, exchange or otherwise dispose of community land, but may grant a lease or license of community land, only in accordance with Pt 2 Div 2, and may grant any other estate in community land to the extent permitted by that Division or under the provision or under the provisions of another Act. The combined effect of ss 26, 45(1) and cl 6(2)(b) of Sch 7 of the LGA 1993 was treated as being that land subject to a trust for a public purpose was taken to be classified as "community land", which a Council had no power to sell or otherwise dispose of in *Save Little Manly Beach Foreshore Inc v Manly Council (No 2)* [2013] NSWLEC 156 at [73]–[81], cited with approval in *Willoughby City Council v Roads and Maritime Services* [2014] NSWLEC 6; (2014) 201 LGERA 177 at [22]. That proposition was not, however, addressing the circumstances in which a Council would have power to lease or grant a license or other estate in the relevant land. Mr Lancaster points out (T29) that the limitation in s 45 of the LGA 1993 is in terms directed to Council, rather than to the land, and it seems to me at least arguable that it would not apply to a trustee of the trusts other than Council. In *Willoughby City Council v Roads and Maritime Services* above at [37], Biscoe J treated the legislative prohibition on the sale by a Council of "community land" as a matter which was peculiar to the owner, rather than of general application, for the purposes of valuing the land under the Just Terms Act, and that supports a view that, if the Council were unable to perform the trust, that inability would not attach to a replacement trustee. However, it is also not necessary to express a concluded view as to that issue given the views that I have reached below on other grounds.

82 Section 46(1)(a) of the LGA 1993, to which Mr Lancaster draws attention, in turn provides that a lease, license or other estate in respect of community land:

> "may be granted for the provision of public utilities and works associated with or ancillary to public utilities."

By contrast with s 46(1)(b) of the LGA 1993, to which I will refer below, s 46(1)(a) does not appear to require provision in a plan of management relating to the relevant grant and, by contrast with s 46(2) which restricts the grant of a lease, licence or other estate for a purpose mentioned in s 46(1)(b) to a purpose that is consistent with the core

objectives described in Pt 2 of the LGA 1993, no such restriction is imposed on the grant of a lease, license or other estate for the provision of public utilities and works associated or ancillary to them under s 46(1)(a) of the LGA 1993.

83 Mr Lancaster points out that the term “public utilities” is not defined in the dictionary to the LGA 1993, and might at least be regarded as including matters such as water and gas, electricity, garbage collection and the like. However, Mr Lancaster submits that that concept also includes public roads or that public roads are ancillary to public utilities. Mr Lancaster draws attention to the decision in *Telstra Corporation Ltd v Port Stephens Council* [2015] NSWLEC 1053, where Pearson C referred at [67] to the definition of “public utility” in the Oxford English Dictionary (online edition) as:

> “A service or supply regarded as essential to the community, esp the supply of electricity, gas and water; (also) a company providing such a service or supply.”

The Commissioner there noted that works contemplated by a telecommunications provider in the form of an upgraded accessway and the provision of cabling would fall within that section so that a lease or license could be granted.

84 It seems to me that some assistance may also be drawn, by way of analogy, from the use of that term “public utility” in other instruments to which Mr Lancaster drew attention. For example, in the Standard Instrument – Principal Local Environmental Plan and in the Sydney Regional Environmental Plan No 33 – Cooks Cove, which is applicable to the relevant area, the term “public utility undertaking” is defined as “any services or facilities” carried on by, or under the authority of, relevantly, a State Government Department or agency, or pursuant to a State Act, for the purposes of providing road transport or facilities, as well as for sewerage or drainage, water and telecommunication facilities. A similar definition appears in the Rockdale Local Environmental Plan 2011. These definitions contemplate that services or facilities carried on for the purpose of providing road transport fall within that concept.

85 It seems to me that the language used in those definitions is consistent with the result which would be reached as a matter of general usage. While a public road may not itself be a “public utility” for the purpose of s 46(1)(a) of the LGA 1993, because it is specifically addressed in s 46(4)(b), to which I will refer below, it seems to me that services or facilities carried on for the purpose of providing such a road do have the character of a “public utility”. In particular, it seems to me that such services have an element of public benefit, so far as they permit the construction of roads that are beneficial to the community. For these reasons, it seems to me that the Council’s submission that it is not able to provide the relevant lease, license or other estate in respect of Lots 1 and 14 fails at the threshold, because s 46(1)(a) of the LGA 1993 permits it to do so, and does not require an express authorisation in the plan of management for that purpose. I am reinforced in that view by the fact that it would be odd, in the extreme, if the LGA 1993 were to permit, by s 46(1)(b) and s 46(4) the

provision of public roads, but not permit Council to make facilities available that are necessary for ancillary purposes in respect of such roads, for example, drainage or adjacent footpaths, or for the construction of such roads.

86 Use of the relevant land for permanent facilities comprising ventilation shafts, an electrical substation, site access, water treatment plant and sedimentation pond for tunnel operation and motorway infrastructure also seems to me to fall within the concept of a "public utility" in its general usage. At the risk of stating the obvious, there seems to me to be little room for a suggestion the public generally, who are likely to be the users of the new M5, are not assisted by ventilation of the proposed tunnel, electricity for it, water treatment or the infrastructure necessary for the motorway to operate, in a similar way to which they are assisted by electricity substations and water supply within the ordinary concept of "public utility". These findings are sufficient, without more, to have the result that the Council may make the relevant land available to the RMS under the LGA 1993, notwithstanding its character as community land.

87 Section 46(1)(b) of the LGA 1993 in turn provides that a lease, license or other estate in respect of community land may be granted, in accordance with an express authorisation in a plan of management, for a purpose prescribed by s 46(4) of the LGA 1993 or for a purpose prescribed by ss 36E–36N as a core objective of the categorisation of the land concerned. However, s 46(2) provides that, despite s 46(1), a lease, license or other estate in respect of community land may be granted for a purpose specified in s 46(1)(b) only if the purpose for which it is granted is consistent with the core objectives, as prescribed in Pt 2, of its categorisation. Section 46(4) in turn specifies purposes falling within s 46(1)(b)(i) as including "the provision of public roads". The term "public roads" is in turn defined in the LGA 1993 as "a road which the public are entitled to use". Mr Hemmings accepted, in oral submissions, that the language of s 46(4) of the LGA 1993, referring to the provision of public roads, extended beyond the land which would be used for the road to additional land which may be required at the time of provision of the road, such as a works compound to build a road (T103). It seems to me that that proposition is correct, since otherwise that section could simply have referred to "public roads", rather than to the provision of such roads. It also seems to me that, additionally to the view which I have reached in respect of s 46(1)(a) of the LGA 1993, the provision of the relevant land to RMS would be permitted under s 46(1)(b)(i) and s 46(4) of the LGA 1993, so far as the land would be for the provision of public roads. I note, in this respect, that it seems to me that the language "the provision of public roads" in s 46(4)(b) extends beyond the use of the land itself as a public road, to steps involved in providing the public road, which would include steps involved in the construction of that road.

88 The Council relies, in contending that it is not able to provide the relevant land under s 46, on the absence of a draft plan of management for the relevant land which records a purpose of making it available for the provision of public roads, notwithstanding its obligation under the LGA 1993 to prepare a plan of management for the land, and

notwithstanding its obligations under the trust. On the findings that I have reached above, the Council is obliged to provide the relevant land to RMS for the relevant purposes, and under the terms of the LGA 1993, it has for many years been obliged to prepare a plan of management. The fact that the Council has not prepared such a plan that is consistent with the requirements of the trusts does not seem to me to provide any basis for non-compliance with its obligations under the trusts.

89 Mr Lancaster also raised, in reply, the possibility that a lease could be granted within s 46(1)(b) where there is no extant plan of management applying to the land, and that s 46(2) does not operate because there is no relevant categorisation of the land. It does not seem to me that the language, or structure, of the section support that reading of it. Section 47D of the LGA 1993 in turn prohibits the exclusive occupation or exclusive use by any person of community land other than in accordance with a lease, license or estate to which s 47 or s 47A applies. Mr Lancaster drew attention to the exceptions to that section, arising under the regulations. I do not consider it necessary to address that issue where, on the findings that I have made, the occupation of the land by RMS for a lease of a term of less than five years would be permitted under s 47A of the Act. In any event, it appears to be common ground that, as Mr Hemmings submitted in oral submissions (T96), it would also be open to Council to reclassify the land as operational land, and then convey it to RMS, to the extent that the Deed or the Declaration of Trust required it to do so; and a dispute which previously existed between the parties as to whether that course might defeat the trusts appears to have dissipated, with it now being common ground that that course could be taken in a manner that preserved the character of the land not required by RMS as subject to the trusts.

90 For completeness, I should note that an issue arose in Mr Hemmings' oral submissions as to whether the form of the lease proposed by RMS was in fact a lease for less than five years, or whether an offer by RMS to make good the land after the completion of the works had the result that it continued for a longer period (T122). It does not seem to me to be necessary to address that issue, where it involves matters of detailed drafting of a lease which has not yet been prepared, rather than an issue of substance as to the terms of the trust or RMS's ability to require the land to be made available under it.

RMS's reliance on the transitional provisions in the LGA 1993

91 In its summary of its key propositions, RMS also submits that, on the proper construction of the general savings provision of the LGA 1993, the provisions regulating community land in that Act do not prevent the Council making the required land available because the declaration and acceptance of the obligations of the trusts was a thing done under s 526 of the LGA 1919 and is an obligation preserved under cl 3 of

Sch 7 of the LGA 1993. I should address this issue, which received detailed attention in submissions, although it is not strictly necessary to do so given the findings that I have reached above.

92 Broadly, RMS submits that the transitional provisions in cl 3 of Sch 7 of the LGA 1993 preserved the obligations on the Council to make the land in Lot 14 and Lot 1 available such that the regime under the LGA 1993 regulating dealings in community land does not apply to any grant required to give effect to the obligations. RMS also submits that, where the obligation of a trustee is one that imposes a personal requirement to deal with the land in accordance with the terms of the trust, a construction of the transitional provisions that continued to recognize the effect of the trust, but which imposed stricter controls on the manner in which the purpose of the trust could be carried out, would be inconsistent with the scheme of the legislation, including its transitional provisions.

93 RMS submits that, under the LGA 1919 the Council was obliged as a matter of both public and private law to act so as to make the land available either permanently or by way of lease for the purposes of a County road. RMS submits that s 518 of the LGA 1919 permitted the Council, subject to the Act, to "sell or exchange any land or building or other real or personal property vested in or belonging to the council or under its care, control, and management" but did not "authorise the sale or exchange of any public reserve, public place, or cemetery, or any land subject to a trust" (s 518(2)(b)). Section 519 of LGA 1919 contained a power to lease land for two years without approval, or for a period not exceeding 21 years with the approval of the Governor. Section 526 of the LGA 1919 in turn empowered the Council "to act in the administration of such property for the purposes and according to the trusts for which the same may have been conveyed…". RMS submits that s 526 proceeded on an assumption that the legal incidents of a trust, including the remedies for breach, should attach to the Council's power to deal with Lot 14 and Lot 1 being the trust property. RMS submits that, as a specific power, s 526 supplemented the general powers of councils, which had the power to bind themselves to enforceable legal obligations under their general powers. RMS also points out that s 529 of the LGA 1919 gave a council the power to "do any acts, not otherwise unlawful, which may be necessary to the proper exercise and performance of its powers and duties." RMS submits that ss 518 and 519 appeared in Div 3 of Pt XXIV dealing with sale and lease, and s 526 appeared in Div 6 of Pt XXIV, which confers various specific ancillary powers on councils in respect of discrete subject matters.

94 RMS submits that, by reason of these provisions of the LGA 1919, the Council had the same powers as a trustee that was a private person, and would have to regulate the use of the land vested in such a trustee as to make its use accord with the trusts under which the land is held: *Ku-ring-gai Municipal Council v The Attorney-General* (1954) 55 SR (NSW) 65 at 72. RMS also submits that the Council was under an enforceable obligation to perform its functions only in a way that advanced the objects of the statutory trust and that it was not open to them to act otherwise, and refers to *Royal*

Botanic Gardens and Domain Trust v South Sydney City Council above at [79], to which I referred above. RMS submits that, before the enactment of the LGA 1993, the Council was therefore under an obligation to give effect to the terms of the Deed and the Declaration of Trust and had power pursuant to ss 526 and 529 of the LGA 1919 (and in respect of Marsh Street, its road powers) to make Lot 14 and Lot 1 available, whether by granting a lease to RMS or otherwise.

95 RMS accepts that the enactment of the LGA 1993 reclassified the land comprising Lot 1 and Lot 14 as "community land", which is subject to the regime of control to which I have referred above, under ss 36 – 47F of the LGA 1993. However, RMS submits that the LGA 1993 specifically preserved the effect of things done under the LGA 1919 by means of a general saving in Sch 7 cl 3, which provides that:

> "(1) If anything done or commenced under a provision of an instrument repealed by the *Local Government (Consequential Provisions) Act 1993* has effect or is not completed immediately before the repeal of the provision and could have been done or commenced under a provision of an Act specified in clause 2(1) if the provisions of the Act had been in force when the thing was done or commenced:
>
> (a) the thing done continues to have effect, or
>
> (b) the thing commenced may be completed.
>
> (2) This clause is subject to any express provision of this Act or the regulations on the matter."

The legislation repealed by the *Local Government (Consequential Provisions) Act* 1993 (NSW) ("Consequential Provisions Act") included the LGA 1919, other than several Parts that are not presently relevant. The Acts specified in Sch 7 cl 2(1) are in turn, relevantly, the Consequential Provisions Act and the *Roads Act* 1993.

96 RMS submits that, if the Council's power to make a plan of management would otherwise be constrained by the LGA 1993 in a manner that is inconsistent with its obligations to perform the Deed and the Declaration of Trust, the general saving provision found in Sch 7 cl 3 of the LGA 1993 is applicable and the Council is empowered to perform the trusts under the Deed and the Declaration of Trust without regard to the LGA 1993. RMS submits, inter alia, that both the Deed and the Declaration of Trust were "things done" by the Council which "had effect" immediately before the repeal of the provision (in this case, s 526 of the LGA 1919); the thing done or commenced under a provision of an instrument repealed by the Consequential Provisions Act has effect or has not been completed before the repeal of the provision; and the thing could have been done or commenced under a provision of an Act specified in Sch 7 cl 2(1), if the provisions of that Act had been in force when the thing was done or commenced. RMS also submits that, pursuant to ss 22 and 23 of the LGA 1993, the Council would have had the power to enter into the Deed and the Declaration of Trust if those provisions had been in force when Council's entry into the Deed and the Declaration of Trust was "done or commenced". It was not entirely clear, from RMS's submissions, how the Consequential Provisions Act, in itself or combined with the LGA 1919, was said to have permitted the relevant acts to be done or commenced, since RMS focused on a submission that those acts would have been permitted under

the LGA 1919, as distinct from under the Consequential Provisions Act. Given the other findings I reach below on other grounds, it is sufficient that I assume, without deciding, that the reference to the Consequential Provisions Act in Sch 7 cl 2(1) extended the operation of the savings provision in Sch 7 cl 3 to an act that could have been done under the LGA 1919.

97 RMS submits that the savings provision in Sch 7 cl 3 is beneficial or remedial in nature in that it guards against the consequence that would otherwise possibly flow from the repeal of the LGA 1919. It relies on the approach to be adopted in relation to the interpretation of remedial legislation as reflected in the dissenting judgment of Isaacs J in *Bull v Attorney-General (NSW)* (1913) 17 CLR 370 at 384, where his Honour observed that:

> "In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially … This means, of course, not that the true signification of the provisions should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow".

RMS also refers to observations in D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, (8th ed, 2014, LexisNexis Butterworths at [9.2] and *IW v The City of Perth* (1997) 191 CLR 1 at 12 in this respect. I broadly accept that submission, although it does not substantially advance the question of the particular acts that could have been done under the Consequential Provisions Act or the LGA 1919.

98 The Council responds that, assuming that the LGA 1919 is an "instrument" repealed by the Consequential Provisions Act, Sch 7 cl 3 of the LGA 1993 provides, so far as is relevant, that, if anything done under s 526 of the LGA 1919 (relevantly, the establishment of a trust) has effect immediately before the repeal of that section and could have been done or commenced under a provision of an Act specified in cl 2(1) (which it contends refers to the LGA 1993 not the LGA 1919) if the provisions of the LGA 1993 had been in force when the thing was done (relevantly, the establishment of the trust), the thing done (the establishment of trust) continues to have effect and is subject to any express provision of the LGA 1993. It seems to me unlikely that a saving provision should be construed as saving only what complies with the LGA 1993, since a saving provision would not seem to be required for matters that already complied with the new Act without that provision; however, it is not necessary to express a final view as to that matter given the conclusions that I reach on other grounds. The Council submits that the restrictions imposed by ss 45 and 46 of the LGA 1993 therefore apply to the land held by the Council on trust. The Council submits that, if this interpretation is not accepted, and the LGA 1919 still has effect in respect of those matters, Pt XXIV Div 3 of the LGA 1919 contains similar restrictions on the Council's power when dealing with land held on trust to the restrictions contained in Ch 6, Pt 2 Div 2 of the LGA 1993.

99 As I noted above, I assume, without deciding, that the general saving provision in cl 3 of Sch 7 of LGA 1993 is capable of preserving the operation of the Deed and the Declaration of Trust, so far as they were created under the LGA 1919, so that the Deed and Declaration of Trust continue to have effect. There otherwise does not seem to me

to be any other relevant act that was either done or commenced under a provision of either the Consequential Provisions Act or the LGA 1919 to which the saving provision could apply. In particular, the saving provision could not, in my view, apply to any requirement by RMS for the land, since no act of requiring the land had been done or commenced while the LGA 1919 was in effect. It also seems to me that, so far as ss 42–45 of the LGA 1993 would apply to matters done by the Council in respect of the trusts created by the Deed and Declaration of Trust, ss 36–47F of the LGA 1993 are express provisions of the LGA 1993 "on the matter" for the purposes of cl 3(2) of Sch 7 and the saving provision would in any event be subject to those provisions.

RMS's reliance on s 30 of the Interpretation Act 1987

100 RMS also submits that the trust obligations and the rights to enforce the terms of the Deed and the Declaration of Trust which had accrued to the Plaintiff (or to the Attorney General) at the time the LGA 1919 was repealed are preserved by s 30 of the *Interpretation Act* 1987 (NSW) ("Interpretation Act"). Section 30(1)(c) of the Interpretation Act provides that the amendment or repeal of an Act does not, relevantly, affect any right, privilege, obligation or liability acquired, approved or incurred under that Act.

101 RMS submits that s 30 of the Interpretation Act applies except in so far as the contrary intention appears in the Act or instrument concerned, and survives the enactment of legislation which would prevent giving effect to the accrued right: Interpretation Act s 5(2); *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 308 ALR 213 at [12], [27]; *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 at 696. RMS submits that section applies to the repeal of the LGA 1919 and the CCPSO (which was a statutory rule pursuant to s 21 of the Interpretation Act), and that upon entering into the Deed and the Declaration of Trust and becoming subject to the obligations to deal with the land consistently with the terms of the Deed and the Declaration of Trust under s 526 of the LGA 1919, the Council accrued an obligation to administer the land as a trustee and to make the land available to the RMS (or its predecessor, the Commissioner for Main Roads) for the purposes of a County road as and when required, and a concomitant right to enforce the terms of the Deed and the Declaration of Trust accrued to the Minister administering the EPA Act as successor to the Cumberland County Council.

102 The Council responds that s 30(1)(c) of the Interpretation Act provides that the amendment or repeal of an Act does not "affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act or statutory rule"; the Deed and Declarations of Trust were made by the Council in exercise of the power conferred on it by s 526 of the LGA 1919; and the trusts were created by declarations contained in executed deeds. The Council submits that the existence of the trusts was not then dependent upon s 526 of the LGA 1919 and the repeal of the LGA 1919 did not affect

the existence of the trusts. The Council also submits that, if the repeal of the LGA 1919 affected the existence of the trusts, then s 30 of the Interpretation Act preserved any acquired, accrued or incurred "right, privilege, obligation or liability" and that section did not displace or interfere with the restrictions on community land contained in the LGA 1993.

103 Again, I accept that the effect of s 30(1)(c) of the Interpretation Act would be to preserve the operation of the trusts, to the extent that they had been created under s 526 of the LGA 1919. However, it does not seem to me that that section goes further, so as to immunise the performance of any future obligation under the trusts from the requirements of ss 45–46 of the LGA 1993, or indeed any other relevant statutory provision. It seems to me that Council is correct in distinguishing the rights and obligations arising under s 526 of the LGA 1919, on the one hand, which are preserved by s 30(1)(c) of the Interpretation Act, from a right and obligation which a council might obtain or become liable to under an arrangement formed by a power conferred by the LGA 1919, which are not excluded from the effect of further statutory regulation by the Interpretation Act.

Whether the trusts are charitable trusts

104 RMS submits that the trusts under the Deed and the Declaration of Trust are charitable trusts, on the basis that holding the land for road purposes, and for public recreation, are both purposes which are beneficial to the community within the fourth class of charities. The Attorney General similarly submits that the trusts created for the purposes of roads and road works and parks and public reserves by the Deed and Declaration of Trust are charitable trusts. The Attorney General summarises her position as that charitable trusts are a subset of trusts for public purposes; that the High Court's decision in *Bathurst City Council v PwC Properties Pty Ltd* above at [64] confirms the existence of a judicially recognised category of non–charitable trusts for public purposes, that would otherwise fail for certainty of object; and that both the trust in respect of land required for use for a County road and the trust for park and recreational purposes are charitable within the fourth head of *Special Commissioners of Income Tax v Pemsel* [1891] AC 531 and do not fall into the category of 'public purpose' trusts. The Attorney General submits that the *Statute of Charitable Uses* 1601 provides support for the characterisation of a trust relating to roads as charitable, so far as it expressly refers to the repair of, inter alia, highways and that the repair of highways has been held to be a charitable purpose in the case law: *Attorney General v Day* [1900] 1 Ch 31. The Attorney General also indicates her position that, even if the relevant trusts were public purpose trusts, the Council would still be under a duty to perform its duties as trustee.

105 In paragraphs 67–72 of its Defence, the Council pleads that the trusts are not charitable trusts but are trusts for "public" or "governmental" purposes in the sense addressed in *Bathurst City Council v PwC Properties Pty Ltd* above and that the Court's supervisory

jurisdiction over charitable trusts is not available, and there is no power to order a cy-pres or administrative scheme, because the trusts are not charitable in character. That submission was qualified in the Council's opening written submissions to advance the proposition that the trusts "may not be a charitable trust" in respect of the land required for a County road, but may be charitable in respect of the land for park and recreational purposes and that, even if the trusts are charitable, they are subject to the provisions of the LGA 1919 and the LGA 1993.

106 The Council submits that, although the Crown can be a trustee of property, in public law the mere use of the word "trust" in relation to Crown or governmental property usually does not denote a trust enforceable in a court of equity: J D Heydon & M J Leeming, *Jacobs' Law of Trusts in Australia*, (7th ed, 2006, LexisNexis Butterworths) at [519]. The Council also notes that the High Court had reviewed the history of "public trusts" created by Crown grant or statute in *Bathurst City Council v PwC Properties Pty Ltd* above at [44]–[65]. The Council submits that those obligations may be enforceable at the suit of the Attorney General as a matter of public law, but do not give rise to a trust enforceable in equity. The Council accepts that trusts for the provision of means for public recreation, such as playing fields, parks, and gymnasiums, have been held to be charitable in character: *Re Hadden* [1932] 1 Ch 133; *Re Morgan* [1955] 2 All ER 632. However, the Council submits that a trust in the context of a complex statutory scheme, although not itself a statutory instrument, would not be intended to operate in any different way than the governmental trusts. On that basis, the Council submits that the relevant trusts, or at least the trusts providing for use of the land for a County road, "may not be a charitable trust".

107 The Council submits that the question whether it holds Lot 14 and Lot 1 on trust for the charitable purposes stated in the Deed and Declaration of Trust is a "vexed issue" and is not necessary to determine. The Council also submits that this issue does not need to be determined because, if RMS's submissions on the proper construction of the declarations of trust are accepted, RMS is entitled to any part of Lot 14 and Lot 1 that it requires in relation to any road works and, if Council's submissions on the proper construction of the declarations of trust are accepted, RMS is only entitled to the areas within Lot 14 and Lot 1 shown white on the CCPSO scheme map for a County road and widening of an existing County road. The Council submits that a need for an administrative scheme or a cy-pres scheme does not arise in either case.

108 It is also not strictly necessary to decide this question, given the conclusions that I have reached above, since no inability to perform the trusts has been established which could require a cy-pres scheme or relief under s 9 of the Charitable Trusts Act. I should

nonetheless address this issue, in deference to the detailed submissions made by the parties, and against the contingency that an appellate Court may take a different view of the issues that I have determined above.

109 In *Special Commissioners of Income Tax v Pemsel* above at 583, Lord Macnaghten observed that charity in its legal sense comprised four principal divisions, being trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion and "trusts for other purposes beneficial to the community, not falling under any of the preceding heads". The fourth limb of a charitable trust, in respect of "other purposes beneficial to the community", is described in G E Dal Pont, *The Law of Charity*, (2010, LexisNexis Butterworths) at [11.3], to which the Attorney General refers, as requiring that the purpose be beneficial to the community, and that it fall within the spirit of the Preamble to the *Statute of Charitable Uses*. In *Bathurst City Council v PwC Properties Pty Ltd* above at [34], the joint judgment of the High Court also observed, referring to *Brisbane City Council v Attorney-General (Qld)* [1979] AC 411, that:

> "The spirit and intendment of the preamble to the Statute of Elizabeth should be given no narrow or archaic construction",

110 In *Monds v Stackhouse* (1948) 77 CLR 232 at 246, to which RMS refers, Dixon J observed that:

> "… any bequest to be applied in the improvement of a city in accordance with the powers of the municipal corporation for the benefit of the inhabitants appears to be charitable … "

In *Bathurst City Council v PwC Properties Pty Ltd* above at [35], the High Court observed, in obiter dicta, that a charitable purpose in respect of a highway may extend as far as the provision of a car park. The Court also referred (at [36]) to *Mareen Development Pty Ltd v Brisbane City Council* [1972] Qd R 203 for the proposition that a trust by which areas of land adjacent to a road were held for town planning purposes was charitable in character. In oral submissions, Mr Hemmings points out, and Mr Mantziaris who appears for the Attorney General accepts, that the relevant areas of land in issue in *Mareen Development* were held for town planning purposes, rather than for the repair of highways, and that case did not, strictly, determine they were subject to a charitable trust. However, as Mr Mantziaris points out, the High Court in *Bathurst City Council v PwC Properties* above at [36] nonetheless treated that case as an example of a situation where a charitable trust could exist.

111 It seems to me that the construction of roads, and the ancillary works necessary for their construction, are purposes beneficial to the community, and that those purposes, including in respect of the ancillary works, fall within the spirit of the Preamble to the *Statute of Charitable Uses*, by analogy with the reference to "highways" in that statute. It also seems to me, to the extent that there was any residual dispute as to this issue, that the trusts providing for the land that is not required for a County road to be used for the purposes of a public park or public reserve is also charitable in character: *Brisbane City Council v Attorney-General (Qld)* above at 422ff; *City of Burnside v Attorney-General* (1993) 61 SASR 107 at 135. It also seems to me that, as the Attorney General

points out, a trust will retain its charitable character even if it can also be classified as falling within the wider category of a trust for "public purposes". A trust in very similar terms to those in issue in this case seems to have been assumed, or decided, to be a charitable trust in *Willoughby City Council v Roads and Maritime Services* above, after the relevant land had become subject to the LGA 1993.

112 A further issue arose as to whether the effect of the LGA 1993 was in some way to extinguish or displace any charitable trusts created by the Deed and the Declaration of Trust. The Council submitted that the trusts were converted into public trusts by the LGA 1993, and that any private trust obligations attaching to the land are excluded by the prohibitions in ss 45–49 of the LGA 1993. The Attorney General responded that the trust obligations attaching to land bought under the LGA 1993, by means of LGA 1993 Sch 7 cl 6(2)(b), are not extinguished through the classification of that land as "community land". The Attorney General puts that proposition in what she describes as a 'strong' form, supporting RMS's position in reliance upon the transitional provisions; and submitting that the absence of any reference to trusts in the "community land" classification in the LGA 1993 is consistent with a scheme by which the Council's obligations, as trustee, would be performed without regard to the limitations on dealings imposed by ss 45–49 of the LGA 1993. I have not accepted RMS's submissions as to that matter, at least in the strong form, above.

113 The Attorney General also puts an alternative submission which she describes as a 'weak' form, namely that the trust obligations imposed on the Council co-exist with the obligations attaching to land reclassified as "community land" upon reception into the LGA 1993 system, in the absence of express extinguishment or textual indications of extinguishment in the statute. I accept that submission. I find it difficult to see any basis for a suggestion that a regime intended to limit the Council's dealings with community land, under the LGA 1993, was intended to displace trust principles, in effect by a sidewind. It seems to me that, as the Attorney General points out, the existence of the trusts continue beyond the introduction of the LGA 1993, where s 31(3)(b) of the LGA 1993 prohibits reclassification of land received as community land to operational land after 1 July 1993 if it would be inconsistent with the terms of any trust applying to the land, and s 186(3) of the LGA 1993 preserves trusts on community land vested in a Council which is subsequently acquired by a Council. Those sections indicate, first, that there is no intrinsic inconsistency between the existence of a trust and the classification of land as "community land" and, second, make it unlikely that trusts that existed prior to the introduction of the LGA 1993 would be extinguished by the classification of land as "community land", while trusts created after that date would be expressly preserved.

114 I accept, as the Attorney General points out and as I have noted in addressing the LGA 1993 above, that the obligations under ss 45–49 of the LGA 1993 may narrow the obligations arising under the trust, but only to the extent of an inconsistency, and that, as trustee, the Council must seek to perform the trusts to the extent that it may do so without breach of those prohibitions. I have also held, in addressing the LGA 1993

above, that the Council is not entitled to continue as trustee, in a conflict of duty and duty, if an exercise of classification of land which it is required to perform under the LGA 1993 would be inconsistent with its obligations as trustee or would defeat the purposes of the trusts, at least where it could readily avoid that conflict by resignation as trustee of the trusts.

Whether the Council has acted in breach of trust

115 A further issue was raised in the proceedings as to whether the Council has acted in breach of trust or threatened to breach the trusts. RMS and the Attorney General each identified several instances of conduct of the Council of which they contended preferred the interest in promoting a compulsory acquisition of the land for its fair value to the Council's obligations as trustee to deliver the land to RMS without cost, and characterising that conduct as a breach or threatened breach of trust. RMS did not press several allegations which it had originally advanced as to breach of trust and the Attorney General reformulated her allegations of breach of trust, to some extent, in the course of submissions. I will seek to identify that conduct within categories below.

116 The Council generally responds to these allegations by its submission that only part of the required land falls within Lot 14 and Lot 1 comprising land reserved for a County road, that RMS has not requested that the Council only make available to it those parts of Lot 14 and Lot 1 and the Council has not acted in breach of trust. The Council also relies, in response to the allegation of breach of trust, on the propositions that the land is community land which imposes restrictions on Council's power to dispose of, lease, licence or grant any other estate in community land under the LGA 1993, which I have addressed above. I have had regard, in dealing with these issues, to the fact that I have been informed that the Council sought and obtained a direction from the Court that it could, as trustee, properly defend these proceedings although the matters put before the Court in seeking that direction and the content of the direction given are not matters that are before me.

117 First, RMS pleads that the Council has acted in a manner that is inconsistent with its obligations under the Deed and Declaration of Trust by refusing to make the required land available to RMS and refusing to make the required land available to RMS at no cost (Amended Statement of Claim [60]) and that Council has breached and/or threatens to breach the terms of the Deed and the Declaration of Trust (Amended Statement of Claim [61]). In the course of oral submissions, Mr Lancaster indicated that RMS maintained its claim that the Council had acted in a manner which was inconsistent with its obligations under the Deed and Declaration of Trust by refusing to make the required land available to RMS, or refusing to do so at no cost. The Attorney General also submits that the Council has failed to perform the trusts and submits that, if RMS's construction of the trusts is correct (as I have found), then the Council has breached or threatened to breach the trusts by its failure to make the land available to RMS. For the reasons noted in paragraph 126 below, I do not consider that it is

necessary for me now to express a view as to whether a breach of trust is established on that basis. It is still open to the Council to take steps to give effect to the trusts, as I will note below.

118 Second, RMS contends that the Council has breached or threatens to breach the trusts by claiming an entitlement to compensation under the Just Terms Act other than in its capacity as trustee of the land that RMS has required or in accordance with its obligations under the trusts. The Attorney General also submits that, by its correspondence and Defence, the Council asserts its entitlement, through its legal ownership of the land, to a compensation interest if the land were compulsorily acquired; that the necessary inference from the Council's pleaded Defence and the way it has conducted its case is that the Council has no objection to making the required land available for the road works, but only if that proceeded by way of compulsory acquisition for compensation at commercial value; that the Council has been advised, at least by the Attorney General, that a claim to compensation money and using it for community land generally and without reference to Lots 1 and 14 is not for a trust purpose and not in the trusts' interest; that the Council was invited prior to the hearing to disavow its compensation interest and has not done so; and that it was open to the Council as a trustee to bring a construction suit, and step aside, rather than putting itself in a position of conflict but it has not done so. The Attorney General also submits that Council has had a significant conflict of interest, so far as it has been promoting the alternative of an acquisition of the land under the Just Terms Act, instead of provision of the land to RMS under the terms of the trusts at no cost. It seems to me that the positions initially taken by the Council largely had a consistent consequence that performance of its obligations as trustee would either not be possible, or would only be possible with difficulty and over a time scale that would be inconsistent with RMS's needs in respect of the New M5 Project, with the potential result for the Council that RMS would be driven compulsorily to acquire, under the Just Terms Act, the land that, on the findings I have reached, the Council was obliged to deliver to RMS at no cost. In fairness, it should also be recognised that the Council significantly moderated many of those positions in the course of the hearing before me, advancing indications of what it could and would do as it understood its obligations.

119 Third, the Attorney General submits that the Council had not acquainted itself with the terms of the trusts and complains of Council's contention that it is "unnecessary to determine" whether the trusts are charitable trusts. The Attorney General criticises the Council's position that it is unnecessary to determine whether Lot 1 or Lot 14 are held on trust for charitable trusts as inconsistent with a trustee's obligation to ascertain the terms of the trust to which he or she has been appointed. It seems to me that there is

little weight in this criticism, so far as Council was ultimately correct that it is not necessary to determine that question in these proceedings, given the conclusions that I have reached on other grounds.

120 Fourth, the Attorney General complains that Council refuses to consider a cy-pres application which she contends it was obliged to bring under s 11 of the Charitable Trusts Act. The Attorney General submits that, to the extent that the purposes of the trusts have failed, the Council was obliged under s 11 of the Charitable Trusts Act to secure the effective use of the property for charitable purposes by taking steps to enable it to be applied cy-pres, and that Council has failed to take that step. The premise of that failure is not established where I have held that it is possible for Council to perform the trusts and no need for a cy-pres scheme is established.

121 Fifth, the Attorney General submits that the Council has pleaded and argued a series of legal and practical impediments to the timely performance of its duty to transfer the land required for a County road to RMS and, but for the limited performance suggested in paragraph 74 of its Defence, the Council's Defence seeks to create a false legal impasse with the effect that the Council claims to be unable to perform the trusts. The Attorney General submits that impasse does not exist since at least four ways have been suggested by RMS and the Attorney General by which the Council could perform the trusts and transfer the land at no cost, but that the Council resists these options. The Attorney General here refers to ss 46(1)(b) and 46(4) of the LGA 1993 to which I have referred above, s 36(3A) of the LGA 1993 which provides for single area plans of management, which she contends would avoid the risk of delay on which the Council has relied; and complains that the Council does not adequately respond to her submission (which I have accepted above) that the difficulties on which Council relies would exist in respect of both the land for road purposes and parks and recreational areas in the CCPSO map or neither of them. The Attorney General also criticises the Council's previous denial of the possibility of a compulsory acquisition for nominal consideration under s 178(1) of the *Roads Act* or s 9(1) of the EPA Act, although the Council appears to have accepted that possibility, so far as it is required to make the land available under the trusts, at least in the course of oral submissions in the hearing.

122 Sixth, the Attorney General submits that Council relies on its own failure to publish a plan of management for the relevant land since the introduction of the LGA 1993, that Council failed to comply with s 36 of the LGA 1993 by publishing a plan of management that would have enabled land marked as required for a road on successive planning instruments to be used for that purpose and also submits that draft plan of management ultimately proposed by the Council would have classified the land as a sportsground in a manner that was inconsistent with the terms of the trusts. I have addressed the issue of classification of the land under the LGA 1993 above.

123 Seventh, the Attorney General complains that the Council resists the argument that a lease is available so far as the land would be used for a public utility under the LGA 1993 and adopts RMS's submission in that regard. I have accepted RMS's submission

as to that issue above, although it is by no means self-evident that the fact that Council took a different view as to that issue is properly characterised, at least in itself, as a breach of trust.

124 Eighth, the Attorney General complains that the Council has denied the possibility or the need for it to resign as trustee of the trusts, implicitly because of the conflicts of duty and duty or duty and interest which she submits it faces, or to appoint the Minister administering the EPA Act as a replacement trustee. The Attorney General submits that the Minister would not be subject to the prohibitions under ss 45 and 46 of the LGA 1993 (T63), although that submission is of less practical significance where I have held that those sections would also not prevent the Council's performance of the trusts. The Attorney General also submits that, if a trustee's trust duty conflicts with its statutory duty, including any prohibition on a dealing with land under the LGA 1993, it should remove itself from its position as trustee through transfer or compulsory acquisition by agreement for nominal consideration, and, if the trustee is confronted with the exercise of discretionary powers under the LGA 1993 regarding leasing and re-classification, it should only exercise those powers in a manner that promotes the interests of the trusts. I have addressed this issue in dealing with the classification of the land under the LGA 1993 above.

125 Ninth, the Attorney General submits that the Council's position cannot be explained by different views of the construction of the trusts and the Council cannot demonstrate that it has exhausted all avenues at making the land available to RMS at no cost. The Attorney General also referred to an issue, which was ultimately not pressed by RMS, as to whether the use of Lots 1 and 14 by the Club was consistent with the terms of the trusts, but it does not seem to me to be necessary to address that issue for the purposes of determining these proceedings.

126 It will be apparent from the above that numerous matters are relied upon, by RMS and even more expansively by the Attorney General, in respect of the allegations of breach of trust. Many of those matters relate to arguments advanced and positions taken by the Council prior to, and to a lesser extent in, these proceedings as to which it was not successful. Although I have made some observations as to these issues above, it does not seem to me to be necessary to express any final view as to the allegations of breach of trust at this stage, where no claim for compensation for breach of trust is made, and no party sought to remove the Council as trustee if it now performs its obligations as determined by the Court. Where it is not necessary to determine those matters, it is not appropriate to do so, given the serious character of the issues raised. It may be necessary to determine these issues if the Council does not now perform its obligations as trustee and it then becomes necessary to consider whether it should be removed as trustee of the trusts.

Whether cy-pres or other relief should be ordered

127 RMS's and the Attorney General's submissions as to the impracticability of the trusts and the cy-pres application were primarily directed to the position if it was not possible to identify a "County road" or the trusts did not extend to the whole of the land required by RMS or the LGA 1993 prevented performance of the trusts. The Council did not press the former proposition and I have not accepted the latter propositions. It is therefore not strictly necessary to determine either the application for the cy-pres scheme, or for an administrative scheme, although I will make several comments as to this issue in deference to Counsels' detailed submissions.

128 I will first identify the nature of the relief sought and its legal basis and then turn to the particular matters that were identified as potentially requiring that relief. In *Dobrijevic v Free Serbian Orthodox Church* [2015] NSWSC 637 at [426]ff, White J observed that, at general law, if execution of the purposes of a charitable trust has become impossible or impractical, the Court has authority to direct a scheme for the promotion of objects that as nearly as possible give effect to the original trust purpose, having regard to the spirit of the trust. Section 9 of the Charitable Trusts Act widens the scope for altering the purposes of a charitable trust. That section relevantly provides:

> "**9 Extension of the occasions for applying trust property cy pres**
>
> (1) The circumstances in which the original purposes of a charitable trust can be altered to allow the trust property or any part of it to be applied cy pres include circumstances in which the original purposes, wholly or in part, have since they were laid down ceased to provide a suitable and effective method of using the trust property, having regard to the spirit of the trust.
>
> (2) References in this section to the original purposes of a charitable trust are to be construed, if the application of the trust property or any part of it has been altered or regulated by a scheme or otherwise, as references to the purposes for which the trust property are for the time being applicable."

129 In *Attorney-General (NSW) v Fulham* [2002] NSWSC 629 at [16]–[17], Bryson J observed that:

> "… s 9 of the Charitable Trusts Act 1993 has widened the grounds on which the Court may act, in that it is no longer necessary that actual compliance with the original terms should be impossible. It is now enough that they have ceased to provide a suitable and effective method of using the trust property. …
>
> The Court may alter the purposes of a charitable trust where the original purposes have ceased to provide a suitable and effective method of using the trust property; this is well short of a test requiring impossibility. [Section] 9(1) greatly widens the circumstances in which the Court may act and the influence which it may allow considerations of practicality to have."

130 RMS submits that the trusts are susceptible to the establishment of a cy-pres scheme to carry out the purposes of the Deed and the Declaration of Trust if their purposes become impossible or impracticable to carry out, and to the remedial provisions of the Charitable Trusts Act. RMS submits that a scheme to carry out the trusts under the Deed and the Declaration of Trust would require that a new trustee be appointed, and a vesting order made consequentially on that appointment to permit the trustee (which it submits would logically be the Minister administering the EPA Act) to make the grants

necessary to make the land available for the road purposes the subject of the trusts under the Deed and the Declaration of Trust. RMS points out that s 11(1) and s 11(4) of the EPA Act provides for the Minister to hold land and to manage land vested in it.

131 RMS submits that an administrative scheme would involve the administration of the terms of the trusts under the Deed and the Declaration of Trust as if they provided that the whole or such part of Lot 14 and such part of Lot 1 were required to be made available on request by RMS for the purpose of constructing a major road project. RMS submits that the settlement of an administrative scheme does not involve the variation of the trusts under the Deed and the Declaration of Trust, but involves directing its administration as if it contained certain provisions to overcome the hiatus created by supervening circumstances: *Ku-ring-gai Municipal Council v The Attorney-General* above at 74; *Burnside City Council v Attorney-General (SA) [No 2]; Athletics Association (SA) Inc (Intervener)* (1999) 76 LGRA 226 at 228. RMS submits that a vesting order would nevertheless still be required, even if the trusts were administered on the broadest construction of the Deed and the Declaration of Trust, if the Council would still be bound by the suggested constraints under the LGA 1993 if no accrued rights to have the trusts under the Deed and the Declaration of Trust performed could be identified. That issue does not arise given the findings I have reached as to the application of the LGA 1993 above.

132 The Council responds to this issue by repeating its submission that it is not, on the proper construction of the trusts, obliged to make available to the RMS all of the land required by RMS. I have not accepted that submission above. The Council also denies the availability of a cy-pres scheme on the basis that the trusts were not charitable trusts. I have also not accepted that submission above. The Council also submits that, in order for the court to order a cy-pres scheme, there must be a case of initial impossibility, and an intention to benefit charity or general charitable intention plus a possible mode of effectuating that intention; or a case of supervening impossibility (whether the intention be general or merely particular); or a case where a trust has exhausted its original purpose (whether the original purpose be particular or general in intent) and a surplus remains: *Jacobs' Law of Trusts in Australia* above [1070].

133 In its summary of the propositions for which it contended, the Council also denied that it was impossible or impracticable to perform the objects of the trusts on the basis that:

> "… Council can and will make the land the court declares must be made available to the RMS (on the proper construction of the declarations of trust) as follows:
>
> a *First,* by dedication of Marsh Street and the area required to widen Marsh Street (comprising 10,910 sqm of land) as a road pursuant to section 47F LGA 1993.
>
> b *Second,* the reclassification of the land as operational land pursuant to section 30 LGA 1993; and/or

> c *Third,* by an agreement to make the land available to RMS for nominal consideration pursuant to an (sic) pre-acquisition agreement under section 63 of the [Just Terms Act] upon the exercise of compulsory acquisition powers by the RMS under the *Roads Act* 1993."

134 It seems to me that none of the matters that might require an order for a cy-pres scheme or administrative scheme arise on the findings that I have reached above. The first situation in which such a scheme was sought by RMS was if it would be impracticable to perform the trusts if, on the proper interpretation of the Deed and the Declaration of Trust, the changes to the statutory scheme had the effect that it is no longer possible to identify a "County road", whether because the changes in the planning instruments meant that the area actually designated for road purposes fluctuated over time or because the repeal of the CCPSO (or the Rockdale Planning Scheme Ordinance which varied it or succeeded it) meant that it was no longer possible to identify a "County road" to which the Deed or the Declaration of Trust could apply. While the Council had raised that possibility in its Defence, it did not press it at the hearing and that issue therefore does not give rise to any impracticability or impossibility in Council's performance of the trusts.

135 The second situation in which such a scheme was sought by RMS was if the purpose of the trusts was for required land to be made available to RMS, but the identification of the geographical area in the trusts was confined so as to be inapt for the RMS's proposed use. That issue does not arise since I have held that the terms of the Deed and the Declaration of Trust require the Council to make the land that RMS requires for the relevant purposes available to it at no cost.

136 The third situation in which such a scheme was sought by RMS was if, contrary to its submissions, the LGA 1993 prevented the Council from making the land available in accordance with the trusts. In that case, RMS submitted that either an order should be made to replace the Council with the Minister administering the EPA Act or a cy-pres scheme should be prepared for the application of the trust property to purposes as close as possible to the original purposes of the trusts and for the achievement of the trust purposes. RMS noted that the Council (at least initially) claimed that it was prevented from implementing the terms of the trusts under the Deed and the Declaration of Trust by the constraints on dealing with land pursuant to the LGA 1993. I have addressed those issues above. The findings that I have reached above have the result that the LGA 1993 does not prevent the Council's performance of the trusts and impracticability or impossibility of performance of the trusts does not arise on that basis.

137 The Attorney General submits that, where there is an allegation that the terms of the trusts are no longer a suitable and effective method of using the trust property, the Court is permitted by s 9 of the Charitable Trusts Act, to look at the more general purpose beneficial to the community of which the particular trust was a specific instance. The Attorney General also submits that the trusts' purpose could here be reformulated as to provide public land at no cost to the road constructing agency for important transport node effecting city-wide transport links, if a supervening event being

the impracticability of building a satisfactory modern road on the area denoted on the CCPSO plan arises. Impracticality or impossibility of performance of the trusts does not arise on that basis, since I have held that the trusts for County road purposes extend to those parts of Lot 14 and Lot 1 that are now required by RMS. The Attorney General also submits that a supervening impossibility or impracticability to perform the trust purposes would arise if the area required for a County Road could no longer be defined, or the road works identified as necessary by RMS could not be performed within the terms laid out by the trusts for road purposes, so as to support a cy-pres order. Again, these situations do not arise on the position taken by Council and the findings that I have reached.

138 RMS also raised the further possibility of replacement of the Council as trustee of the trusts, which remains open if, following the delivery of this judgment, the Council does not perform the trusts. RMS submits that s 6 of the *Trustee Act* 1925 (NSW) ("Trustee Act") and the Court's jurisdiction and powers in respect of charities permit the appointment of a new trustee where, relevantly, a trustee "refuses or is unfit to act in such trusts or powers, or is incapable of acting therein". RMS submits that the Council's reliance on the constraints on dealing with the land brings it within the provisions because it is "incapable" of acting to carry out the trusts. RMS also submits that the Council has not demonstrated a willingness to act in the performance of the trusts under the Deed and the Declaration of Trust, and consistently with the principles applicable to remedying defaults by trustees of private trusts, the Court should exercise powers to enable the purposes of the trusts under the Deed and the Declaration of Trust to be carried out. The findings that I have reached above have the result that the Council is not incapable of carrying out the trusts. I do not consider that I should find that it is not willing to do so, without allowing it a further opportunity to do so.

139 The Council submits that the statutory provisions of the LGA 1993 are inconsistent with the replacement of Council as a land manager in a cy-pres scheme. The Council submits that Ch 6 Pt 2 of the LGA 1993 reposes control and management of community land in Council, and invites community consultation and public participation in decision-making concerning the future uses of community land: s 29 (public hearing into reclassification of community land), s 38 (draft plans of management must be publicly exhibited), s 40 (public submissions on the draft plan must be considered by council), s 40A (public hearings required for some plans) and s 43 (the plan must be available for public inspection). The Council submits that these provisions are inconsistent with judicially supervised management of community land, except to the extent that Council has acted or threatened to act in breach of the LGA 1993, for which remedies are available under s 674(1) of the LGA 1993 in the Land and Environment Court. The Council's submissions as to its role as council under the LGA 1993 do not seem to me to be to the point. No question arises of preventing the Council from performing its obligations under the LGA 1993, as land manager or otherwise. It does not follow that the Court would not, or should not, remove the Council as trustee of the trusts if

(contrary to my findings) it could not perform its obligations under the trusts without breach of its duties as a local council under the LGA 1993, or, in the event, it is simply unwilling to perform those obligations.

140 RMS responds that the making of an order vesting the land in a replacement trustee is not inconsistent with the provisions of the LGA 1993, because the Trustee Act regulates the manner in which the trustee performs the obligations under the trusts, and the LGA 1993 provides for the manner in which the land vested in it may be dealt with. RMS submits that there is no inconsistency between the restrictions on the Council's power to deal with land and the exercise of the Court's power to appoint a new trustee and to vest the trust property in that trustee, where that vesting is the result of a determination by the Court of the manner in which the trust should be carried out. RMS submits that that course would not involve the Council in any contravention of the LGA 1993 because Council would not then be dealing with the land. In any event, this question does not arise because I have held that the LGA 1993 does not prohibit the performance of the trusts.

141 I do not accept Council's submission that an order for a cy-pres scheme or its replacement as trustee would contradict the LGA 1993; however, on the findings which I have reached above, the former order is not required, because there is no obstacle to the performance of the Council's obligations as trustee under the LGA 1993. I will return to the possibility of the latter order below.

The Attorney General's resulting trust submissions

142 The Attorney General raised a question whether, if the trusts are non-charitable public trusts, as the Council contended, a resulting trust would arise upon the failure of those trusts. The Attorney General also submitted that, if the trusts were not charitable trusts, an inability to identify the relevant "County road" or the prohibition on alienation contained in ss 45 and 46 of the LGA 1993, if applicable, would cause the trust gift to fail, so that the Council would hold that gift on resulting trust for the benefit of the Minister responsible for the EPA Act, who would hold the land pursuant to ss 11(4)(g), (i) and 11(6) of the EPA Act. It is not necessary to determine that question given the conclusions that I have reached above.

Other claims by RMS

143 Paragraphs 58 and 59 of the Statement of Claim plead that the Council has failed to do such acts and things as would permit it to make the required land available in accordance with the terms of the Deed and the Declaration of Trust. Paragraph 63 pleads that any right of the Council to hold and remain as owner of the required land is, on the proper construction of the Deed and the Declaration of Trust, contingent upon performance by the Council of the condition to make the required land available without cost to RMS. Paragraph 65 of the Amended Statement of Claim pleads that, on the proper construction of the Declaration of Trust, the Council acquired Lot 1 upon a

condition subsequent that the Council make available Lot 1, or so much of Lot 1 as is required, to RMS without cost when required to do so by RMS. It does not seem to me to be necessary to determine these claims, which were not abandoned but to which little attention was given in submissions, given the conclusions that I have reached on other grounds.

Form of relief claimed by RMS

144 RMS identifies a further issue, arising if the Court finds that the Council is obliged to make the required land available to it, as to the appropriate orders by which the land should be made available to RMS. RMS pleads that the Council is obliged to make the land required by RMS available by giving exclusive occupation of part of Lot 14 or such part of Lot 1 as may be required by RMS; giving possession of part of Lot 14 or such part of Lot 1 as may be required by RMS; or entering into a lease in respect of part of Lot 14 or such part of Lot 1 as may be required by RMS (Amended Statement of Claim [57]). RMS submits that the obligation imposed by the Deed and the Declaration of Trust is to make the required land available, and that the manner in which that land may be made available can include the entry into a lease of such parts of the Land as are required, or otherwise to confer a right of exclusive occupation on RMS. RMS notes that it has requested that the Council make the Land available by granting a lease of 4 years and 11 months. RMS also submits that the nature of the obligation to make land available depends on the interpretation of the instrument under which it arises, and that the term “making available” is not prescriptive, and the content of the obligation will depend on the circumstances and the activities for which the land is required, and the statutory powers of the relevant authority: *Council of the Shire of Sarina v Dalrymple Bay Coal Terminal P/L* [2001] QCA 146 at [21].

145 In closing submissions, and at my request, RMS identified the hierarchy of the relief it claimed as follows:

> 1 Declarations as set out in paragraphs 1 and 2 of the Further Amended Summons; a declaration that the [Council] (as trustee) may fulfil its trust obligations in respect of the land permanently required for the Marsh Street Proposal by dedication of that land as a public road under section 10 of the *Roads Act 1993*; and liberty to apply.
>
> 2 Declarations as set out in paragraphs 1 and 2 of the Further Amended Summons; an order vesting Lot 1 and Lot 14 (the trust property) in the [Minister administering the EPA Act] subject to the trust obligations as found and declared by the Court; and liberty to apply.
>
> 3 Declarations as set out in paragraphs 1 and 2 of the Further Amended Summons; a declaration that the [Council] may fulfil its trust obligations by entering into an agreement with [RMS] under ss 30 and 63 of the [Just Terms Act] for the acquisition by [RMS] of a fee simple interest in land required permanently and a leasehold interest for a term of 4 years and 11 months over the remainder of the land required by [RMS], such acquisition to be completed as soon as practicable and in any event before 31 March 2016, for nominal consideration; and liberty to apply.
>
> 4 Declarations as set out in paragraphs 1 and 2 of the Further Amended Summons; a declaration that the [Council] may fulfil its trust obligations in respect of the land required for the Marsh Street Proposal by dedication of that land as a public road under section 10 of the *Roads Act 1993*; a declaration that the [Council] may fulfil its trust obligations in respect of the other land required by [RMS] by the preparation of a Plan of Management pursuant to which a lease of the land required by [RMS] is provided for

and authorised, for road and/or road purposes, so as to provide access to and possession of the land as soon as practicable and in any event before 31 March 2016; and liberty to apply.

146 RMS indicates that its claims assume that the Council as trustee of the land in Lot 1 and Lot 14 will comply with its obligations as declared by the Court and as may be explained in the reasons for decision of the Court. The relief sought by RMS contemplates that RMS is granted vacant possession of the required land on and from 1 April 2016. RMS also noted that the claims for relief in paragraph 1 above reflect its submissions that the LGA 1993 does not impose impediments on the performance by the Council of its trust obligations in respect of the land. RMS noted that the claim for relief in paragraph 3 above assumes that the Court determines that all or part of the required land must be made available to it at no cost; and that RMS cannot make the required land available due to impediments under the LGA 1993, so that the interests in the land must be compulsorily acquired for nominal consideration and within such a time as to permit possession of that land on or before 1 April 2016 to overcome those impediments. RMS indicated that each of the claims for relief assumed that the steps to be taken by the Council (as trustee) are taken at no cost to RMS.

147 Mr Lancaster accepted, in the course of oral submissions, that RMS's position would be sufficiently addressed by the Court allowing the Council an opportunity to transfer or lease the relevant land to RMS in accordance with its obligations as trustee, or confirm, by undertaking to RMS and to the Court, that it will do so and, if such an undertaking is not given or not performed, exercising its power to remove the Council as trustee of the trusts (T39–40). Mr Mantziaris, who (as I noted above) appeared for the Attorney General, similarly accepted in submissions that the Council could properly be allowed an opportunity to provide an undertaking that it would perform the obligations arising under the trusts in a manner consistent with the Court's determination, rather than proceeding to a cy-pres scheme, particularly if there was no necessity for such a scheme in the absence of supervening impossibility or circumstances which made the performance of the trusts impracticable for the purposes of s 9 of the Charitable Trusts Act (T45). Mr Mantziaris also accepted that the Court should not be placed in a position where it was required to make mandatory orders directed to a trustee, as to the performance of its obligations under the trusts, although Mr Mantziaris appeared to reserve the position that the Court might direct the trustee to perform those obligations, rather than removing the trustee if it failed to do so (T45).

148 The Council in turn submits that "subject to its obligations as trustee", it is willing lawfully to grant a leasehold interest for the term required by RMS in those parts of Lots 14 and 1 which comprise the land reserved for a County road to RMS for a new road and the widening of Marsh Street at no cost, upon request, and will take all necessary

and lawful steps to seek to reclassify the land under the LGA 1993 for operational purposes to enable it lawfully to do so. I have dealt with its wider obligations as trustee in respect of the land required for the New M5 Project above.

149 It seems to me that, as I noted in the course of oral submissions, it is the trustee's role and not the Court's role to determine which of the available options it ought to take to comply with the trusts, although the Court may in a proper case give directions to a trustee that it would be justified in taking a particular course that it proposes. I have held above that the Council is obliged to comply with the trusts, in respect of the whole of the land required by RMS comprising parts of Lot 1 and Lot 14, and is not incapacitated from doing so by the LGA 1993. I do not consider that I should make any of the orders sought by RMS at this point, other than possibly declarations as to the Council's obligations under the trusts, where that would amount to the Court making decisions, as between alternatives that would each potentially comply with the trusts, that ought properly be made by the trustee. It seems to me that the Council should be allowed a short time in which to comply with the trusts or give an appropriate undertaking to the parties and to the Court in that regard. If the Council does not comply with the trusts or give such an undertaking within that short time, it will be necessary to consider whether that matter, combined with the issues as to conflict of duty and interest and conflict of interest which have been raised in the course of these proceedings, may require its removal as trustee of the trusts. If that situation arises, a possible outcome would be that the Minister administering the EPA Act could, as RMS and the Attorney General submit, be appointed as trustee of the trusts and a mandatory order made directing the transfer of Lot 1 and Lot 14 from the Council to the Minister. However, I would allow the parties a short further opportunity to be heard before any such orders were made.

Kogarah Golf Club's position

150 The Club took a relatively narrow role in the proceedings. It made limited submissions on the construction of the Deed and the Declaration of Trust (although I noted one such submission above), the effect of the LGA 1993 or the charitable trust matters, and recognised that its interests were generally protected by the position taken by Council in that respect. The Club's primary position is that any orders made in favour of RMS should be subject to specific conditions protecting, or considering, the Club's interests.

151 The Club relies on a letter dated 14 July 2015 from it to WDA, marked "without prejudice" but admitted without objection by any party, which set out the Club's proposal for compensation as a result of interruption to its business. The Club also relies on a letter dated 20 July 2015 from the WDA to the Club, which attached a draft information sheet for the review of the Club, and also stated that:

> "WDA remains committed to compensating the Club for losses arising from the new nine-hole arrangement including the reasonable costs of hole relocation and loss of income. …" (Ex K1, tab 49 p 975)

The draft information sheet in turn stated, under the heading "[h]ow will the Club's viability be maintained during construction?":

> "[WDA] is working with Club management to agree a compensation mechanism for the construction period. The objective is to protect the Club from losses arising from the new nine-hole arrangement, including the reasonable costs of hole relocation and loss of income." (Ex K1, tab 49 p 977)

152 The Club also relies on a draft memorandum of understanding ("MOU") dated July 2015, to which, inter alia, WDA, RMS, the Club and Council would be parties which provided that:

> "RMS (on behalf of WDA) will seek a lease or license for construction land from the relevant landholder ([Council]), and does not intend (sic) acquiring a freehold interest.
>
> RMS will acquire a freehold interest from [the Council] and [the Club] for land permanently required for the widened Marsh Street and WestConnex operational facilities, consistent with previous discussions with [the Club's] advisers.
>
> All land acquisition transactions will be undertaken in accordance with the [Just Terms Act] and, where relevant, the terms of the original trust arrangements between the State and [Council]." (Ex K1, tab 49 p 978)

That draft MOU also provided that:

> "WDA agrees to pay reasonable compensation for [the Club's] losses as a result of construction activities, having regard to the principles set out in [the Club's] "without prejudice" letter dated 14 July 2015 and the [Just Terms Act]." (Ex K1, tab 49 p 979)

The draft document therefore included reference to the terms of the trust arrangements that are in issue in these proceedings as well as to the Just Terms Act.

153 The Club also referred to an information sheet subsequently issued by WDA, which also contained a statement under the heading "[h]ow will the Club's viability be maintained during construction?", which indicated a further commitment to ensuring a nine-hole course was available during construction, and was otherwise in substantially the same terms as the draft information sheet to which I referred above. Finally, the Club relied on a letter dated 10 September 2015 from RMS's solicitor to the Club's solicitor, which referred to a letter from the Club's solicitor seeking confirmation whether the Club's costs in these proceedings were compensable under the Just Terms Act, and responded that:

> "If RMS is successful in the Proceedings, it will not be necessary for RMS to compulsorily acquire interests in part of Lot 14 …. and part of Lot 1 … and, therefore, the Just Terms Act will not apply."

It seems to me that that letter was plainly correct in that observation.

154 The Club submits that the Court would find that "promises" were made by WDA (which are taken to have been made by the RMS) to the Club, that the Club should be compensated for "losses associated with the new nine-hole arrangement including the reasonable costs of hole relocation and loss of income", and compensation should be paid having regard to the principles of the Just Terms Act. In submissions, the Club accepted that the draft MOU did not create contractual relations between WDA and the Club, but submitted that the "promises" made to the Club, some of which were also made outside that draft MOU, should be taken into account in the exercise of the Court's discretion if RMS is otherwise found to be entitled to relief. The Club submits

that those promises have a direct connection with the equity sued for by RMS, being the delivery of land at no cost to the RMS; that there is impropriety in the RMS denying the Club the benefit of the promises; and that equity allows relief where none would be forthcoming at law.

155 In its opening submissions, the Club relied on equitable maxims, including principles of "unclean hands" and that "he who seeks equity must do equity", and referred to *Black Uhlans Inc v NSW Crime Commission* [2002] NSWSC 1060; (2002) 12 BPR 22,421 at [157]–[184] and *Carantinos v Magafas* [2008] NSWCA 304 at [50]–[61]. The decision in *Black Uhlans* was directed to misrepresentations to a lender which had funded the acquisition of relevant property, and Campbell J there referred (at [181]) to the requirements for the application of the "unclean hands" principle as including depravity in a legal as well as in a moral sense, which had an immediate and necessary relation to the equity sued for, and noted that those were a necessary but not sufficient condition for the application of the maxim. The decision in *Carantinos v Magafas* above was in turn directed to the provision of money pursuant to a scheme designed to defraud tax authorities.

156 The Club submits that the equity sought by RMS was to secure Lot 14 and Lot 1 at no cost to RMS, and the "promises" to pay compensation made by the WDA, which may be attributed to RMS, had an obvious relationship to the equity sued for by RMS. The Club also submits that, by these proceedings, RMS adopts a course "designed to prevent" any rights of compensation under the Just Terms Act accruing to the Club. That will, no doubt, be a consequence of RMS acquiring the land, in accordance with its rights under the Deed and the Declaration of Trust, that an acquisition of the land under the Just Terms Act would not be necessary. It does not follow, of course, that the Club would not then have rights of compensation, to the extent that it contends and can establish that WDA and RMS have made the promises on which it relies to support the conditions which it claims should be imposed on the relief granted to RMS.

157 RMS responds that the Club does not advance any claim capable of proper determination in the proceedings and the Court cannot and would not impose any condition on the grant of relief to the effect of the condition(s) proposed by the Club. By its submissions in reply, RMS also submits that no Cross-Claim had been filed by the Club and no cause of action had been identified by it. RMS submits that the Club's position is untenable on the facts and the law, where the Club entered into an exclusive license for the land under a promise to make the land available without cost if required to do so. RMS also submits that the Court would not impose a condition that RMS would provide compensation on the basis provided in the Just Terms Act if that Act does not in fact apply.

158 It seems to me that the Club's application cannot succeed. In *Black Uhlans* above, Campbell J observed (at [159]) that the unclean hands maxim "requires the Court to look at the conduct of the litigant who seeks the assistance of equity". That proposition highlights the difficulty in the Club's claim, namely the absence of any evidence that

RMS has acted wrongfully or unconscionably in dealing with the Club, either at all, or in a manner that has any appropriate connection to the subject matter of the suit, namely an application to enforce the relevant trusts. The Club contends that WDA has made various representations, for which RMS is liable, as to the terms on which WDA will deal with the Club. The Club leads no evidence in these proceedings that RMS has sought to resile from any such representations. Mr To, who appeared for the Club, invited me to infer that RMS must have done so because the Club has appeared in the proceedings. I cannot draw that inference, where an equally available inference is that the Club is simply seeking to improve its position beyond any rights that it may have by reason of the representations on which it relies.

159 So far as the evidence goes, WDA appears to have adopted a constructive approach in dealing with the Club's wish to be compensated for loss which it may suffer and there is no evidence that RMS has resiled from that approach. I note, in that regard, that it does not seem to me that a previous indication to negotiate reasonable compensation arrangements with the Club requires RMS to submit to the application of the Just Terms Act, if that Act is in fact not applicable, because RMS is entitled to enforce the trust obligations, as distinct from seeking to progress a negotiated arrangement with the Club as the WDA had committed to do. In the absence of any evidence that RMS has sought to resile from any representations that WDA may have made to the Club, or of reliance by the Club on those representations, or of detriment that has to date been suffered by the Club, no basis for a claim for wrongful conduct or unconscionability on the part of RMS is established, and no basis is shown to impose a condition requiring that the State or RMS proceed in accordance with the Just Terms Act if that Act is not otherwise applicable.

160 As Mr To properly accepted in submissions, the condition which the Club now seeks to have imposed, in substance, corresponds to the representations which it contends have already been made to it. It does not seem to me that the Court should seek to impose conditions on orders made in these proceedings, to give effect to existing charitable trusts, so as to promote the interests of a third party which has available to it other equitable remedies in respect of any representations on which it has relied to its detriment. The preferable course is to leave the Club to rely on such rights and remedies as it may have in respect of the promises or representations on which it relies.

Orders and Costs

161 It seems to me that, in the first instance, I should stand over the proceedings for a short time to allow the parties an opportunity to make submissions as to the form of any declaratory orders that should now be made and to allow the Council an opportunity to give effect to the trusts or give appropriate undertakings. If it is necessary to do so, any

question of the removal and replacement of the Council as trustee of the trusts can then be addressed, whether before the end of the Court term in mid-December 2015 or in January or early February 2016.

162 RMS submits that the Council and the Golf Club should be ordered to pay its costs of the proceedings. It seems to me that RMS has been substantially successful in its claims against the Council which should, in the ordinary course, be required to pay its costs. It will also be necessary to hear the parties as to the position of the Attorney General in this regard. Although the Club was not successful in seeking relief in these proceedings, it seems to me that its involvement added little to the overall costs of the proceedings, where its written submissions were directed to limited issues and Mr To's oral submissions were appropriately brief. In those circumstances, it seems to me that there should be no order as to the Club's costs of the proceedings.

163 However, I should hear the parties generally as to costs once any remaining issues as to whether the Council remains as trustee of the trusts have been determined and orders have been made to give effect to my judgment.

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Amendments

23 December 2015 - Para 6 - Attorney-General to Attorney General.
Para 97 - final sentence - "although does not" to "although it does not"
Para 103 - LGA 1993 to LGA 1919.
Para 117 - first sentence - "refusing make" to "refusing to make"

Decision last updated: 23 December 2015