

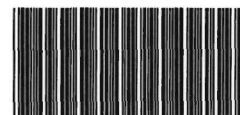
I, Snezana Vojvodic, solicitor on the record for the Appellant, hereby certify this and the following 20 pages are a true and correct copy of the Appellant's Written Submissions for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of Practice Note No. SC CA 1.

Dated: 3 October 2025


Snezana Vojvodic



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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00243213

TITLE OF PROCEEDINGS

First Appellant	Student A by his tutor Peter Johnston
First Respondent	COUNCIL OF NEWINGTON COLLEGE ABN 71824382623
Second Respondent	Attorney General of NSW

FILING DETAILS

Filed for	Student A by his tutor Peter Johnston, Appellant 1
Legal representative	Snezana Vojvodic
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Written submissions.pdf)

[attach.]

STUDENT A BY HIS TUTOR PETER JOHNSTON

v

COUNCIL OF NEWINGTON COLLEGE & ORS

New South Wales Court of Appeal

Proceedings No 2025/00243213

APPELLANT'S WRITTEN SUBMISSIONS

1. This is an appeal from:
 - a. orders made by Parker J on 28 May 2025 dismissing a claim for a declaration, which his Honour had ordered to be determined as a separate question in the proceedings (*Student A v Council of Newington College* [2025] NSWSC 534 (J)); and
 - b. orders made by Parker J on 11 June 2025, dismissing the proceedings as a consequence of resolution of the separate question.
2. The separate question raised for determination the question of whether it would be a breach of trust for the First Respondent, the Council of Newington College (**Council**), to apply property vested in it for the purposes of co-education.
3. The precise terms of the declaration sought were follows:

Declaration that the use of:

- (a) the land referred to in Schedules 1 and 2 of the NCC Act; and
 - (b) any property, whether real or personal, which vested in Newington College pursuant to s. 6 of the NCC Act;
- for co-education would be a breach of trust constituted by s 13 of the NCC Act.

Background

4. From 16 July 1863, a college, then known as the Wesleyan Collegiate Institute, was operated under the auspices of the Wesleyan Methodist Church (**the Church**) from a property known as "Newington House" in the Sydney suburb of Silverwater (J [40];

Red 63; ASOC [30], [31]; Red 10; Defence [30], [31]; Red 41-42). The property was also used as a theological institute (J [40]; Red 63-64).

5. The college was established following a public meeting held on 8 January 1862 (Blue 1.5-7) and pursuant to resolutions passed by the Australasian Conference of the Church on 20 January 1863 (Blue 1.290, 323). Those resolutions also provided for the Rev Allen Manton to be Principal of the College (Blue 1.323).
6. It subsequently became apparent that the Silverwater site was not suitable as a permanent location for the school. The school council began looking to replace the institution at Silverwater with a new collegiate school and theological institute at another site. By the late 1860s, certain land at Stanmore (the **Stanmore Land**) became the preferred site for the new collegiate school (J [45]-[46]; Red 65). The Stanmore Land had been owned by a wealthy Wesleyan Methodist, Mr John Jones (J [47]; Red 65).
7. In about February 1873, the Australasian Conference of the Church resolved to appropriate the Stanmore Land to “Collegiate purposes” (J [57], Blue 3.980-984). These resolutions also stipulated that moneys received under the will of Mr Jones “be appropriated to the erection of Collegiate buildings, one half of the proceeds of the legacy being devoted to the purpose of the Wesleyan Theological Institution and the other half to a Collegiate school”. They also stipulated that the principles contained in the foregoing resolutions be embodied in a deed of settlement.
8. The Stanmore Land comprised:
 - a. the **Watson Subdivision**, being land which had been conveyed to three members or office bearers of the Wesleyan Methodist Church, Rev H.H. Gaud, Rev JH Fletcher, and GW Barker (**Church Trustees**), pursuant to an indenture dated 18 October 1869 (Blue 2.536-543; J [47], [50]; Red 65-66); and
 - b. the **Estate Residue**, being land which was conveyed to the Church Trustees together with Rev B Chapman, Rev G Hurst, Rev JB Waterhouse, J Wearne, E Vickery, J Dawson and J Hardy (collectively, the **Newington Trustees**) pursuant to an indenture dated 22 October 1873 (Blue 3.1103-1111; J [47]; Red 65).

9. On 23 October 1873 a further indenture (**the Trust Deed**) was executed by the Newington Trustees (Blue 3.1112-1129; 3.1130-1149; J [65]; Red 65). It is entitled “Trust Deed of the Wesleyan Theological Institution and Collegiate School at Stanmore” (Blue 3.1149).
10. On 5 December 1873, a further indenture was executed which conveyed to the Newington Trustees the Watson Subdivision (Blue 3.1156, 3.1160; J [67]; Red 70). It was clearly intended that the Newington Trustees would hold the Watson Subdivision on the same terms as the property that was subject to the Trust Deed (J [67]; Red 70).
11. The Trust Deed records in its recitals that the land the subject of the indenture dated 22 October 1873 had been conveyed to the trustees upon condition that they should execute the present indenture for the purpose of settling and declaring the trusts upon which they hold the said land (Blue 3.1131). The recitals also refer to the February 1873 resolution, pursuant to which it was resolved that the Stanmore Land be appropriated to Collegiate purposes and that the money received under the will of Mr Jones be appropriated to the erection of Collegiate buildings, one half being devoted to the purpose of a Wesleyan Theological Institution and the other half to a Collegiate School (Blue 3.1131-1132). Finally, the recitals refer to the existing collegiate school at Newington established by the Church and record that it is intended that that existing school would be discontinued upon the completion of the collegiate school at Stanmore (Blue 3.1132-1133).
12. The operative part of the Trust Deed states, relevantly:

NOW THIS INDENTURE WITNESSETH that for the purpose of carrying out the said resolutions and of declaring the trusts and purposes upon and for which the parties hereto of the first part hold the said lands the said parties...agree covenant and declare...that the parties hereto of the first part shall stand seised of the said lands....comprised in the said Indenture [of 22 October 1873] UPON TRUST to permit the erection and maintenance thereon of a Wesleyan Theological Institution and a Wesleyan Collegiate School...THAT the object of such School shall be to provide an efficient course of education for youth...” (Blue 3.1133-1134)

13. Following the eventual construction of a school on the Stanmore Land, the school known as Newington College (**the College**) has operated as a boys-only school on that land since 1880 (J [1], [4], [69]; Red 56, 70).
14. In 1922, the New South Wales Parliament passed the *Newington College Council Act 1922* (**the NCC Act**). The NCC Act, relevantly, constitutes the Council of Newington College as a body corporate (s 1).
15. Section 6 provides:

From and after the passing and by virtue of this Act there shall vest in the said council and its successors, subject nevertheless to all mortgages, liens, and encumbrances existing thereon, all and singular the lands and hereditaments described in the First and Second Schedules hereto, and also all other property, whether real or personal, which immediately before the passing of this Act was vested in any person or persons or corporation upon trust for or for the purposes of carrying on the collegiate school known as Newington College, together with all rights to sue for, recover, and enforce or call for a transfer of such real or personal property.
16. The land referred to in the First Schedule comprises the land the subject of the indentures of 18 October 1869 and 22 October 1873 i.e. the Stanmore Land: see the preamble to the NCC Act. The land referred to in the Second Schedule comprises additional land conveyed to certain individuals pursuant to an indenture dated 6 March 1907: *ibid*.
17. Section 13 of the NCC Act provides:

The said council shall hold all the property at any time vested in it by virtue of this Act upon trust to carry or cause to be carried into effect the regulations hereinbefore referred to and the general objects for which the said collegiate school was founded as set forth in the said indenture of trust of the twenty-third day of October, one thousand eight hundred and seventy-three, and the lands described in the Second Schedule hereto shall henceforth be freed and discharged from trusts declared by the said recited indenture of the sixth day of March, one thousand nine hundred and seven, registered number five hundred and three, book eight hundred and twenty-three, and such trusts are hereby revoked.
18. Since November 2023, the Council has sought to transition the College to a co-educational school (J [8]; Red 57). The separate question concerned whether co-education would be permitted by the terms pursuant to which the College's land is held by the Council.

Leave to appeal

19. The Appellant was ordered by the Registrar to file a Summons seeking leave to appeal and has done so. However, the Appellant contends that leave is not required.
20. Leave is not required pursuant to the *Supreme Court Act* 1970, s 103 because, although the orders made on 28 May 2025 comprised a decision on a separate question, the decision inevitably resulted in dismissal of the balance of the proceedings (which occurred by consent on 15 June 2025). The trial judge had stated at J [15] (Red 58) that it was common ground that, if the claim for the declaration concerning the Stanmore Land failed, the Appellant's claim would likewise fail.
21. Leave is not required pursuant to the *Supreme Court Act* 1970, s 101(1)(r). In the terms of that provision, the appeal involves a "question", namely the terms on which the Stanmore Land is held. The Stanmore Land is plainly worth more than \$100,000.
22. If contrary to that position, leave is required, it should be granted. There is no dispute as to the basic facts (J [17]; Red 59). The appeal raises a confined question of construction of the Trust Deed, which is determinative of a matter which the trial judge recorded is controversial among parents and alumni of Newington College, namely, whether the College can transition to co-education (J [8]; Red 57). The answer to that question is of significance not only to the Appellant who is a student at the school, but also to other present, former and prospective members of the school community.

The legal context

23. Before turning to the trial judge's reasons, it is necessary to say something about the legal context in which the Trust Deed fell to be construed.
24. In addressing the question of whether the Stanmore Land may be used for the purposes of co-education, the starting point in the analysis is s 13 of the Act. That provision now governs the purposes for which the College's land (and other property vested under the NCC Act) can be used. Although it is unnecessary for the Court to determine this question for the purposes of the appeal, it is likely that the provision creates a trust cognisable in equity of the kind identified in *Catholic Metropolitan Cemeteries Trust v*

A-G NSW (2024) 422 ALR 33; [2024] NSWCA 30 at [216]. This follows from the language of “trust”, the fact that the provision continues the purposes contained in the 1873 indenture which itself created a trust, and the existence of a charitable purpose in the form of the advancement of education.

25. The critical effect of s 13 is to require that the property be applied to “the general objects for which the said collegiate school was founded” as set out in the Trust Deed. That in turn incorporates the purposes contained in the Trust Deed, which include, relevantly, “an efficient course of education for youth”. It was common ground below that the dispositive question was whether that phrase was capable of encompassing co-education. Ultimately, that involved interpretation of the Trust Deed; and in particular, the phrase “an efficient course of education for youth” (J [11], [79]-[80]; Red 57-58, 75).
26. The relevant principles of construction were uncontroversial between the parties and are set out at J [91] (Red 78-79). Critical among them is the proposition that the meaning of the language in the Trust Deed is to be determined as at the date it was executed, i.e., October 1873 (J [91](5); Red 79; J [118]; Red 85). Also critical to understanding the trial judge’s reasons is the proposition that recourse may be had to surrounding circumstances to construe the Trust Deed where the language used is ambiguous or susceptible to more than one meaning (J [91](3), (4); Red 79).

The trial judge’s reasons

Ambiguity

27. The trial judge determined that the plain and ordinary meaning of the word “youth” as used in the Trust Deed is unambiguously gender-neutral. His Honour found that its usage corresponds to the fifth usage identified in the Oxford English Dictionary (**OED**), namely “young people...collectively”; and that the meaning of the term has not changed since 1873 (J [76], [118]-[123]; Red 75-73, 85-86). In reaching that view, his Honour rejected as inadmissible newspaper articles containing instances of usage of the word “youth” in or around 1873 (J [113]-[117]; Red 84-85).

28. His Honour accepted that a gender-neutral word may acquire a gendered connotation from context, but found there was nothing in the Trust Deed to require the word “youth” to be read down in this way (J [124]-[125]; Red 86). In that regard, his Honour accepted a submission that a restrictive reading of the Trust Deed should be eschewed, where its purpose was to provide a governing instrument for the College for the indefinite future and where the concept of “efficiency” allowed for a great deal of judgment in deciding what to teach and how to teach it (J [126]-[127]; Red 86-87).
29. His Honour also attributed significance to references in the Trust Deed to “pupils” being admitted, pointing out that if a male-only enrolment policy was to have been mandated, that is precisely where one would have expected to see the use of male-only language (J [130]; Red 87).

Surrounding circumstances

30. Against the possibility that he was wrong in concluding that “youth” in the Trust Deed was used unambiguously in its gender-neutral sense, the trial judge considered the surrounding circumstances (J [132], [133]; Red 88).
31. His Honour considered that references in the Trust Deed to Newington School and English Methodist Schools which had boys-only admission policies said nothing about the issue before the Court (J [148]; Red 92).
32. He also considered that debates within and outside the Church about co-education reinforced the choice of gender-neutral language in the Trust Deed (J [148]; Red 92). His Honour appeared to treat as relevant in this regard measures which had been used in Church schools in Victoria to accommodate co-education, pointing out that admission of girls did not require all boys and girls to share college facilities together (J [149]; Red 92).
33. His Honour considered that a change in wording between an 1872 recommendation of the school council which used male-only language (J [51]-[52]; Red 66), and the 1873 resolution of the conference which used gender-neutral language (J [57]; Red 67), evidenced a deliberate choice (J [150]; Red 92).

Subsequent events

34. Finally, his Honour held that regard could not be had to subsequent events under the ancient documents rule, unless the term “youth” as used in the Trust Deed was ambiguous or obscure (J [162]; Red 95). His Honour held in any event that two instances of subsequent conduct relied on – the fact that the school when it opened in 1881 was a boys only school, and the fact that a girls only school (MLC in Burwood) was established in 1886 – said nothing about the question of power he had to decide (J [163]; Red 95-96).

The Appellant’s argument

35. It is convenient to follow the course taken by the trial judge and address first ambiguity and secondly the surrounding circumstances.

Ambiguity

36. The trial judge erred in finding that there was no ambiguity in the word “youth” as used in the Trust Deed.
37. **First**, his Honour erred in his treatment of dictionary definitions.
38. His Honour identified at J [76]-[77] (Red 72-73) a number of contemporaneous dictionary definitions of the word “youth”. It is accepted that, as his Honour found, the word as used in the Trust Deed is used collectively (i.e. it corresponds to OED sense five); and, with the exception of an entry in *Barclays Complete and Universal English Dictionary* (1848), contemporary dictionary definitions indicated that the word when used collectively was gender-neutral.
39. However, the very existence of the Barclays definition – which stated relevantly that the word means “Young men used collectively” (J [77]; Red 73-74) – is a reason that the word is relevantly ambiguous. Where some contemporary definitions say it is gender-neutral, and another says it refers to males alone, there is plainly an ambiguity as to which meaning the word bears in the Trust Deed.
40. The trial judge stated that the Barclays definition cannot stand against the preponderance of other dictionaries in evidence (J [123]; Red 86). However, that

misunderstands the endeavour on which his Honour was engaged. As his Honour correctly stated at J [114] (Red 84), the question is one of recognised usage rather than “correctness”. And as his Honour further stated at J [116] (Red 84), a dictionary is some evidence of recognised usage. In short, the existence of the Barclays entry is evidence that some people (even if not all people) used the word “youth”, when using it collectively, in a male-only sense. That suffices to establish that the word was susceptible of more than one meaning in 1873.

41. The trial judge was critical of the Barclays entry because it did not include an illustrative quotation (J [123]; Red 86). However, that criticism does not detract from the force of the considerations outlined in the previous paragraph. In short, it does not undermine the ability of the Court to rely on the Barclays entry as evidence of a usage by at least some people. It would be a different question if the Appellant had sought to show that the male-only meaning of the word was the only available usage in 1873; but that was not the case put below (see J [93]; Red 80), nor is it the case put on appeal.
42. Before leaving the topic of dictionaries, it should be noted that his Honour stated that the OED was accepted by the parties as the most authoritative dictionary (J [76]; Red 72-73). That is not correct – a submission to this effect was made by the Attorney-General (Tr 76.45-50, Black 150), but no such statement was made or accepted by the Appellant. In *Provincial Insurance Australia Pty Ltd v Consolidated Wood Products Pty Ltd* (1991) 25 NSWLR 541 at 561, Mahoney JA emphasised that there is no single authoritative dictionary.
43. **Secondly**, the trial judge erred in rejecting the admissibility of newspaper articles.
44. The articles the Appellant sought to tender are identified in a list handed up at the hearing (Tr 5.15, Black 79; Supplementary Blue Book 1717-1718).
45. Although the trial judge expressed a concern that admission of the articles would lead to an avalanche of further argument and evidence (J [115]; Red 84), his Honour did not reject the articles under s 135 of the *Evidence Act*. Rather, the trial judge rejected articles on the basis that they are “inadmissible as evidence of meaning”: J [117]; Red 85. That ruling was erroneous.

46. While ordinarily the meaning of words used in a private instrument must be determined without regard to extrinsic evidence (*Thornley v Tilley* (1925) 36 CLR 1 at 7), the position is different when it comes to “ancient documents”, being documents which date to before living memory. In such a case, evidence may be admitted to prove the meaning of the words used as at the time of execution: *Shore v Wilson* (1842) 8 ER 355 at 518-519, 533. The rule, which permits admission both of contemporaneous evidence of meaning and evidence of subsequent conduct, was referred to with approval by the House of Lords in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261 (Lord Wilberforce) and 269-270 (Lord Simon of Glaisdale; and by Gibbs J in *Administration of Papua New Guinea v Daera Guba* (1973) 130 CLR 363 at 446.

47. The trial judge (in a later of part of his judgment dealing with the admissibility of evidence of subsequent conduct) considered that the rule only applied where the document is ambiguous or obscure: J [162]; Red 95. That cannot be correct. One cannot know whether language used in a document executed beyond the limits of living memory is ambiguous or obscure without knowledge of contemporaneous usage. The point was made by Coleridge J in *Shore v Wilson* at 518-519:

...in proportion as we are removed from the period in which an author writes, we become less certain of the meaning of the words he uses; we are not sure that at that period the primary meaning of the words was the same as now, for by the primary is not meant the etymological, but that which ordinary usage of society affixes to it...

When, therefore, we are call on to construe deeds of the years 1704 and 1707, it seems to me that we not only at liberty, but are bound, to inquire what at that time was the meaning of the phrases used in them; not taking for granted, because they bear a certain clear meaning now, that they did so then...

48. The trial judge considered that there was room for debate as to whether the rule should apply to documents executed “beyond the limits of human memory”, suggesting that a longer period was appropriate: J [161]; Red 95. However, the “limits of human memory” gateway is well entrenched in the case law, and his Honour cited no authority for the proposition that a different threshold is appropriate. It may be noted that the period at issue in *Shore v Wilson* (1704 or 1707 to 1842) was slightly shorter than that in issue here. In *Earl of Lonsdale v AG* [1982] 1 WLR 887, Slade J looked at contemporaneous evidence of usage to construe the word “minerals” used in a grant made in 1880, some 100 years earlier.

49. The trial judge gave no principled reason for distinguishing newspaper articles from other forms of extrinsic evidence. His Honour did distinguish dictionary definitions, which he likened to an expert opinion and are an accepted aid to determining the meaning of words (J [116]; Red 84). This overlooks the fact that recourse is had to dictionary definitions not because they are evidence or expert evidence, but because they are apt to assist a judge in his or her task of determining the meaning of a word, which task ordinarily must be undertaken *without* recourse to extrinsic evidence: *Dyson v Pharmacy Board of NSW* (2000) 50 NSWLR 523; [2000] NSWSC 981 at [36]-[37].
50. It is notable that in *Earl of Lonsdale v AG* [1982] 1 WLR 887 at 925-928, Slade J had regard to a range of materials in determining the contemporary meaning of “minerals” in 1880, including dictionaries, encyclopaedias and other reference works, a series of early 20th century writings using the word, and collations of statistics of sets of minerals. In *Shore v Wilson* at 529, Parke B referred to the court informing itself “from history, and other general sources of information, of the meaning of the language used at that particular time”.
51. If it is accepted that in applying the ancient documents rule, a court is not confined to dictionaries alone, there is no reason why evidence of usage of a word cannot be supplied by newspaper articles in which the word is used. The concern that such articles can lead to an avalanche of further articles and argument is misplaced in the context of the present case. As already emphasised, the purpose of the exercise is not to determine which usage is “correct” (cf J [114]; Red 84). The Appellant’s purpose was to establish that some people at least used the word “youth” as if it referred collectively only to males, thus providing a basis for a conclusion that the word when used collectively in the Trust Deed was susceptible to more than one meaning (J [93]; Red 80). It is irrelevant that there might be other newspaper articles that show that others might have used the word, collectively, in a gender-neutral manner.
52. It is unnecessary in these submissions to work through each of the examples of usage itemised in the Appellant’s list of articles. It suffices to identify two. One is extracted at J [98] (Red 81) – a report of proceedings in Parliament, where a member said that “It was a libel upon the youth of New South Wales to say that we could not get men of ability to sit in Parliament without being paid”. Another is at Blue 3.1152, an article

from *The Empire* in the context of a burlesque on communism, which related a character stating that when no limitation was placed on personal charms, the results were “Appropriation of the affections of the whole youth of the Commune by half a dozen belles...”. In both examples it is plain that youth is used in a manner that suggests that the word is apt only to refer to young men collectively.

53. Again, this is not to gainsay that others at the time might have used “youth” collectively as if it could have a gender-neutral meaning. An example of this occurring is provided in J [100] (Red 81). The point for present purposes is that the word as used at the time was susceptible of both meanings.
54. **Thirdly**, the trial judge’s reliance on other aspects of the Trust Deed by way of context does not provide an answer one way or another to the question of whether “youth” is used in a gender-neutral or male only sense.
55. It may be accepted that the concept of an “efficient” course of education referred to in the Trust Deed gives some leeway to the Council in the course it takes to educate youth (cf J[126]; Red 86); it does not follow that the word “youth” *must* be read in a gender-neutral sense when it is capable (for the reasons given above) of referring to males alone. Where the word is capable of having both meanings, the meaning it bears in the Trust Deed cannot be determined by reference to the undesirability of a restrictive reading alone; rather regard must be had to all the circumstances, including admissible evidence of surrounding circumstances.
56. Further, the fact that “pupils”, used elsewhere in the Trust Deed in the context of enrolments (Blue 3.1135), is gender-neutral (J [130]; Red 87) cannot bear on whether there is ambiguity in the meaning of the word “youth”. The word “pupils” is not the word used in the critical phrase, “the efficient education of youth”. If “youth” is used in that phrase to refer to men alone, it is irrelevant that another word is used later which (depending on context) may refer to men alone or men and women together. Contrary to J [131] (Red 87), this reasoning is not circular. It simply emphasises that the use of gender-neutral language in another part of the Trust Deed does not advance the analysis.

Surrounding circumstances

57. If the foregoing arguments are accepted, it follows that the trial judge ought to have had regard to surrounding circumstances to construe the Trust Deed.
58. There were five key matters in this regard advanced below (cf J [134] (Red 88), recording four of those matters). His Honour erred in failing to find that these matters suggested that “youth” as used in the Trust Deed was used in its male-only sense.
59. *First*, the Trust Deed contemplated that the College would be a male-only college, because it envisaged the new College as a continuation of the existing school at Silverwater.
60. Thus, the Trust Deed states that the “said Collegiate school at Newington aforesaid shall be discontinued upon the completion of the said Collegiate school at Stanmore aforementioned” (Blue 3.1153).
61. The fact that the one school was envisaged as the continuation of the other is reinforced by the circumstances that led to the foundation of the new school, set out at J [45] (Red 65). The proposal to establish a new school at Stanmore had come from the council of the existing school, which in May 1872 passed resolutions recommending to the Sydney District and the General Conference a resolution for the appropriation of the Stanmore Land in May 1872 (J [51]-[52]; Blue 3.1042). The existing school council was by 1867 referred to as the “Council of Newington College” (J [44]; Blue 1.459).
62. There was no doubt that the existing school was established to be a male-only school. Thus:
- a. at a public meeting held on January 1862 to discuss the proposed Wesleyan Collegiate Institution, Rev Manton referred to the members of the Church “having long felt the need of a suitable establishment to which to send their sons for superior education” and the proposal to commence an institution along the lines of Horton College in Tasmania (J [42]; Red 64; Blue 1.5). Horton College was a boys only school at the time (J [42]; Red 64).

- b. advertisements seeking enrolments for the school stated that it was “open to the sons of parents of all religious denominations” (Blue 1.377, 1.396);
 - c. at the school’s inauguration, Rev Manton stated “But in the midst of all this prosperity, we had not yet succeeded in raising an educational institution for the sons of our more wealthy people; and it was such to be feared that we had lost vast numbers of fine promising young men in consequence of that want” and “Many of the sons of Wesleyan parents, who had made considerable advances in secular learning, ... had been led away from religion altogether” (Blue 1.382)
 - d. the school itself commenced with twenty boys and two young men as students for the Ministry (Blue 1.382).
63. The link between the old school and the new school suggests that when “youth” is used in the context of a proposed school which is contemplated to be a continuation of a school established avowedly for boys, the word is used in a male-only sense.
64. The trial judge dismissed this argument on the basis that it says nothing about the issue currently before the Court: J [148]; Red 92. That is not correct. The connection between the two schools is a relevant part of the surrounding circumstances, which are admissible on the question of construction once it is accepted that “youth” as used in the Trust Deed is susceptible of more than one meaning.
65. It should be noted that the link between the old school and the new school is confirmed by a further matter occurring after 1873. On 18 January 1880, the Council of Newington College resolved “to request the Conference as follows (1) that the Rev J H Fletcher be appointed for another term President of the College at Newington and Stanmore (2) That the new College be called Newington College, Stanmore”. Resolutions to that effect were made by the Australasian Conference on 21 January 1880 (Blue 3.1180, 3.1232). His Honour did not address this evidence, although he was taken to it in argument (Tr 38.1-40, Black 112).
66. *Secondly*, there was evidence that the new school had itself been established for boys and, specifically, for the purpose of training them for university. That is significant where at the time the University was open to men only (J [30]; Red 61).

67. In this regard:

- a. a report of the Wesleyan Methodist Conference on 27 January 1877 recorded that Stanmore College “was designed to afford a higher class education for the sons of our people and furnish an adequate training for the candidates for our University” (Blue 3.1171);
- b. a speech delivered in 1877 by Rev Fletcher, who as has been seen was President of the College, recorded that the Trust Deed as having purposes which included “the maintenance of a School of higher education, open to boys of all religious denominations” and “to provide residence, tuition and oversight for Methodist students attending the University” (Blue 3.1172);
- c. when the new College was formally opened on 18 January 1881, speeches given at the opening ceremony referred to candidates being “young men” and “boys” and that the College would be a “home of boys” (J [69]; Red 70; Blue 3.1263).

68. The trial judge did not refer to the first two matters, although he was taken to them in argument (Tr 49, Black 123).

69. As to the third matter, the trial judge considered that evidence of subsequent conduct of this kind was not admissible under the ancient documents rule, because there was no ambiguity in the Trust Deed (J [162]; Red 95). The reasons that that is in error have already been explained. His Honour also considered that this evidence did not make a difference because it says nothing about the question of power that is in issue in this case: J [163]; Red 95-96. With respect, that is not correct. The fact that the new school was contemplated to be a school for boys only bears directly on the question of whether the word “youth” as used in the Trust Deed should be construed as confined to its male-only sense.

70. *Thirdly*, the surrounding circumstances include the reference to Kingswood school in the Trust Deed. The Deed refers to a requirement that children of Wesleyan ministers receive education “in accordance with the plan which prevails in the Kingswood and Woodhouse Grove Schools in England” (Blue 3.1132). Kingswood was a male only school at the time (Blue 4.1365; the evidence was silent about Woodhouse Grove). The trial judge dismissed this consideration too on the ground that it says nothing about the

issue before the court: J [148]; Red 92. Again, that is in error, where the circumstance that the Trust Deed contemplates a model along the lines of that adopted in a male-only school reinforces (albeit slightly) the inference that when the word “youth” was used it was used in its male-only sense.

71. *Fourthly*, at the time the Deed was executed, the provision of schooling for girls had been under consideration by the Church, but the issue had been held over and it went down a different track.

72. The evidence in this regard is touched on at J [73]-[75]; Red 71-72. Relevantly:

- a. at the annual conference in January 1872, the Australasian conference remitted to the consideration of certain committees, to report to the next District meetings and Conference, the following resolution: “That...the time has arrived when provision should be made for the superior education of the daughters of our people” (Blue 2.736);
- b. at a Wesleyan Sydney District Meeting on 4 November 1872, it was resolved that “questions relating to the erection of new College at Stanmore, and of higher female education, were remitted to conference for their decision” (Blue 2.815)
- c. on 20 November 1872, the Wesleyan Sydney District Meeting resolved that “The question of higher female education, remitted by the last Conference for consideration, having been brought up, Rev S Wilkinson addressed the committee on the importance of the question, but it resolved that it could not make any recommendations on the matter to the Conference” (Blue 2.816).
- d. As at 21 January 1880, at the Conference of the Australasian Wesleyan Methodist Church, “The establishing of a School for the higher education of girls” remained under consideration (Blue 3.1244).
- e. It was not until 1886 that a Wesleyan Methodist Secondary School for girls was established as Methodist Ladies College (now MLC School) at Croydon (J [75]; Red 72).

73. This sequence of events established that the Conference which established the new College at Stanmore was at the same time considering, as a separate item, the provision of superior education for women and, to that end, the establishment of a secondary school for girls. That is part of the surrounding circumstances supporting the inference that when the word “youth” was used in the Trust Deed in connection with the new College at Stanmore, it was used in its male-only sense.
74. With one exception, the trial judge did not engage with this material. The exception is J [163]; Red 95-96, where his Honour referred to the establishment of MLC School in 1886 as saying nothing about the question of power that is in issue in this case. For the reasons just given, that material is relevant as demonstrating that the question of superior education for women in Sydney was going down a different track.
75. However, his Honour did make a different point. He referred to debates within the Church concerning co-education and said that they reinforced the choice of gender-neutral language (J [148]; Red 92). The debates referred to appear to be those summarised at J [70]-[72]; Red 70-71, which concern the question of co-education in Victoria, where Church elementary schools were co-educational. That material has little bearing on the meaning of “youth” in the Trust Deed where, as the sequence of events identified in paragraph [72] above shows, the question of the superior education of women had not advanced at all at the time the Deed was executed and where there is no evidence that co-education at a secondary level was under contemplation in New South Wales.
76. *Fifthly*, at the time the Deed was executed, government policy for education at the secondary level had not embraced co-education.
77. The trial judge made several findings in this respect at J [27]-[32]; Red 60-62. Relevantly, until the 1870s, secondary schools offering higher education were available only for boys. The first secondary school for girls in New South Wales was Sydney Girls’, a selective high school which opened in 1883. Until 1884, the University of Sydney (being the only University in New South Wales) was open to men only. It was not until 1906 that the first public co-educational high school was established.

78. The principal source material underlying these findings may be found at Blue 4.1409; 4.1445; Blue 4.1624. A convenient summary is also found in the Council’s submissions below at [95] (Black 40-42).

79. In light of the trial judge’s findings, it is unnecessary to go to the source material. The short point is that there is no reason that at the time of execution of the Deed the parties would have contemplated that the school they were establishing would be co-educational. To the contrary, consistent with educational practices at the time, they must have contemplated that the school would be a school for boys (there being no secondary schools for girls).

80. Senior Counsel for the Council candidly acknowledged this below (Tr 58.9-12, Black 130):

His Honour : ...would you accept that the people who drafted this deed would have expected, when the school opened, it would be a boys-only school?

Hutley: I have got no problem with that at all...

81. This context too, which is part of the surrounding circumstances, supports the inference that when the word “youth” was used in the Trust Deed in connection with the new College at Stanmore, it was used in a male-only sense.

82. The trial judge did not engage with this matter, save to say that debates outside the Church concerning co-education reinforced the choice of gender-neutral language (J [148]; Red 92). However, the only such debate referred to is at J [31]; Red 61-62. That was a debate held in the 1880s, at the time of the introduction of the *Public Instruction Act* 1880, under which public secondary schools were first established (J [29]; Red 61). In response to a question as to whether the new high schools would be co-educational, the premier Sir Henry Parkes replied “We do not propose to teach courtship in these schools”. That is not a debate about co-education.

83. The trial judge made an additional point about the surrounding circumstances. His Honour identified a change in wording between the 1872 recommendation of the school council concerning the Stanmore Land, which stipulated that the *sons* of Wesleyan Ministers labouring in New South Wales receive education for the amount of the

allowance to *boys* from the Children's and Educational funds (J [52]; Red 66), and the ultimate resolution of the Conference, which stipulated that the *children* of Wesleyan Ministers labouring in New South Wales receive education for the amount of the allowances from the Children's and Educational funds (J [57]; Red 67). His Honour stated that the change illustrates that a deliberate choice was made to use gender-neutral language (J [150]; Red 92).

84. That conclusion should not be accepted. There was no evidence that the drafters of the Conference resolution had made a deliberate choice to depart from the gendered language used by the drafters of the school council's resolution.
85. Notably, there are other drafting differences in the text of the respective resolutions: for instance, the second resolution refers to moneys received under the will of Mr Jones while the first does not; the first refers to the Stanmore property while the second refers to the Stanmore Estate; the first has the phrase "as soon as practicable" while the second does not; the second refers to the erection of Collegiate buildings while the first does not; and the second refers to the children of Wesleyan Ministers being selected by a committee while the first does not.
86. It is plain that the author of the second resolution engaged in a bespoke drafting exercise which led to a number of changes being made. There is nothing to support the proposition that any one of these changes was made with a deliberate end in mind, let alone the end of ensuring that girls as well as boys would be educated at the new school.
87. There is the further difficulty that only two of the parties to the first resolution were parties to the Trust Deed: see the Council's submissions below at [86] (Black 38-39). It is unclear how the remaining parties to the Trust Deed could be fixed with knowledge of the changes made to the resolution, so as to make that knowledge a relevant part of the surrounding circumstances. (That problem does not affect the surrounding circumstances on which the Appellant relies, where those matters may be taken to have been known by the parties to the Trust Deed who were, at the time of its execution, members of the Council: Blue 2.866)
88. For the foregoing reasons, the surrounding circumstances support the view that the word "youth" is used in the Trust Deed in its male-only sense.

Conclusion

89. The appeal should be allowed with costs and a declaration made in the form identified in the separate question.

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Michael Izzo

Tel: (02) 9221 1977

mizzo@elevenwentworth.com



Denis Barlin

Tel: (02) 9231 6646

dbarlin@13wentworth.com.au