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Update Summary

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PROPERTY LAW AND PRACTICE QUEENSLAND

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UPDATE SUMMARY

Anne Wallace has updated the following commentary:

Fiorenza v Fiorenza [2024] NSWSC 549 and *Purser v Purser [2024] NSWSC 611* are included in the commentary on payment of remuneration for statutory trustee for sale as examples of a cap being placed on the remuneration recoverable, see **[PLA.37A.50].**

Van Der Wolff v Van Der Wolff [2024] SASC80 is noted in the commentary to s 38 – Statutory trusts for sale. In that case an agreement made 20 years earlier for one co-owner to buy out the other co-owners was held to be unenforceable and accordingly did not provide a basis for refusing an order to appoint a statutory trustee for sale.

Breust v Anderson [2024] ACTSC 182 is also noted in the commentary. The plaintiff co-owner held only a bare legal title but sought an order for sale as a last resort measure to protect herself from increasing liability for unpaid water charges and rates incurred by the defendant co-owner who was in possession of the property and who held a full beneficial interest in the property. The defendant had paid out the plaintiff for her interest in the property many years previously and since then she had no connection with the property, although she remained as a co-owner on the title. The defendant did not respond to the plaintiffs attempts to communicate with him after she received notices regarding the unpaid water charges. The defendant was served with the application but did not appear. The order for sale was made but implementation was ordered to be delayed to give the defendant an opportunity to apply for variation or discharge of the orders for sale which would enable the defendant to provide an alternative solution to sale of the property, see **[PLA.38.180].**

Bremner v French (No 4); Aesthete 101 Pty Ltd v Stone [2024] NSWSC 793 is noted in the commentary on the point that once an order for sale of the property is made the co-owners interest in the property is converted into an interest in the proceeds of sale. If a co-owner sells or assigns their interest in the property after the appointment of the trustee for sale, the purchasers or assignees are in the same position. They have only an interest in the proceeds of sale. They have no beneficial interest in the property itself, see **[PLA.38.270], [PLA.38.390].**

Purser v Purser (No 2) [2024] NSWSC 700 is noted in the commentary to s 38(7) which provides that where property becomes subject to a statutory trust for sale, a sale under the trust shall not of itself effect a severance of a joint tenancy where the co-owners hold as joint tenants. In that case the court held that the joint tenancy in the proceeds of sale was severed after the order appointing a trustee was made because the conduct of the parties demonstrated a mutual recognition

that the joint tenancy was severed and they would hold as tenants in common. The court ordered that the balance of the proceeds of sale should be divided equally between the co-owners, see [PLA.38.390].

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Bill Duncan has updated and added the following commentary:

"impede some reasonable user" (s 181(1)(b))

Litfin v Wenck [2024] QSC 170 has been noted in relation to the interpretation of the expression "impede some reasonable user". Williams J said in that respect, " it is not necessary to find that the easement "substantially impedes" the reasonable use, nor is it necessary to find that no reasonable use is possible or that the reasonable use is otherwise frustrated". The removal of an easement of light and air together with the removal of the protection of a view on a valuable residential lot was held to impede reasonable use of the dominant tenement comprising a residence, see [PLA.181.180].

General reluctance of courts to make orders modifying easements

In *Litfin v Wenck [2024] QSC 170,* the court declined to make orders in its discretion to extinguish or modify an easement of light and air and protecting a view upon the basis that the applicant purchased the servient land knowing of the easement; that there had been no material change in the use of the use of the servient tenement since that time; that there were other satisfactory options for use of the land affected without disturbing the easement; and that compensation would not be an adequate remedy for loss of the benefits secured by the easement, see [PLA.181.270].

"adjacent owner" (definition in relation to encroachment)

An adjacent owner had been held to be confined to an adjacent owner of land. In *Wang v State of Queensland [2024] QSC 156* there was an unsuccessful attempt to allege that part of a canal constituted under the Canals Act 1958 could be the subject of an encroachment. The court found that the expression "owner" was limited by definition to a person entitled to "an estate of freehold in possession" and that the area upon which the canal was situated was unallocated state land. The Division could thus not apply, see new paragraph [PLA.182.70].

Discretion of court in making order relating to encroachment

Body Corporate for Vision Centre Gold Coast Community Title Scheme 29190 v Nerang Qld Pty Ltd [2024] QSC 152 was noted where relief was refused an applicant. Here, the alleged encroachment straddled a property boundary upon which was situated a comparatively small (11.4 sq metres) utilities building, parts

of which were protected by easements. One reciprocal easement allowed access to and use of the "encroaching" building by the owner allegedly encroached upon. In this circumstance, the court considered that there was no effective encroachment by the adjoining owner. As well, the removal of the utilities building constructed 24 years earlier would not be practically feasible given the nature of the construction of the building the utilities serviced. The upshot of this decision is that if the alleged encroachment has already been dealt with by other means in this case, the grant of an easement in favour of the owner encroached upon, it cannot be the subject of an order under this Part, see [PLA.185.30].

Apportionment of rents: s 232 (1)

Given the well-established, clear general understanding that rent was not apportionable in time at common law and that the section did not apply to rent payable in advance, it would be wrong, save in a very clear case, to attribute to a lessor and lessee who had entered into a full and professionally drafted lease an intention that, on the exercise of a break clause, the lessee should be able to recover an apportioned part of the rent payable and paid in advance. Thus notwithstanding, on the facts, the lessee had a powerful case for contending that it was necessary for business efficacy that a rent apportionment term should be implied into the lease; that implication was not necessary to make the lease work or to avoid absurdity; and that, accordingly, in the absence of express words to the contrary, the lessee's claim failed (*Marks and Spencer plc v BNP Paribus Securities Services Trust Co (Jersey) Ltd [2016] AC 742)*, see [PLA.232.30].