SUPREME COURT OF QUEENSLAND

CITATION:	*Byrne v Palmer* [2024] QSC 46
PARTIES:	**STEPHEN TREVOR BYRNE AND JANE CHRISTINE BYRNE** (applicants) **v** **TERRENCE ALFRED PALMER AND MURIEL LINDA PALMER** (respondents)
FILE NO/S:	BS No 7909 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Brisbane
DELIVERED ON:	22 March 2024
DELIVERED AT:	Brisbane
HEARING DATE:	12 December 2023; 15 February 2024
JUDGE:	Crowley J
ORDER:	**1. The application for relief pursuant to s 196 of the *Property Law Act 1974* (Qld) is granted.** **2. The applicants and respondents are to prepare a minute of the orders necessary to give effect to my reasons for granting the relief under s 197 of the *Property Law Act 1974* (Qld).** **3. The application in respect of the alternative relief sought is dismissed.**
CATCHWORDS:	REAL PROPERTY – BOUNDARIES OF LAND AND FENCING – where the parties own adjoining properties with shared boundaries – where the parties are not connected to the mains water supply – where there was an agreement for shared ownership and benefit of the water bore to be sunk on the shared boundary – where a water bore was sunk wholly on the land of the respondent – where there was a mistake in where the bore was sunk – where the mistake was not known until recently – where owners of both adjoining properties jointly made lasting improvements to the water bore – where there was shared use of the water bore for nearly 40 years – whether the applicant is entitled to a property vesting order under s 197 of the *Property Law Act 1974* (Qld).

REAL PROPERTY – EASEMENTS – EASEMENTS GENERALLY – CREATION – where the respondents purchased the property in 1991 – where the respondents are the registered proprietors of a lot with a fee simple interest in the land – where the easement was not in existence when the respondent's lot was first registered – where the easement particulars have never been recorded in the freehold land register against the lot – where the applicant uses their property as a family holiday home and short-term holiday rental – where there may be alternative water sources available to the applicant – where the bore is used primarily to water the garden and for outdoor purposes – whether the applicant should have a statutory right of user to access and use the respondent's bore or have acquired an easement by prescription through long user.

Acts Interpretation Act 1954 (Qld), s 14A(1), s 32C
Land Title Act 1994 (Qld), s 184, s 185(1)(c), s 185(3) s 200, s 201
Property Law Act 1974 (Qld), s 180, s180(1), s180(3), s 196, s 197, s 198, s 198A
Water Act 2000 (Qld), s 27, s 101(1)(c), s 1046

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27*,* cited
Connellan Nominees Pty Ltd v Camerer [1988] 2 Qd R 248, considered
Delohery v Permanent Trustee Co of New South Wales Ltd (1904) 1 CLR 289, cited
Lang Parade Pty Ltd v Paluso [2006] 1 Qd R 42, cited
McClymont v Nelson [2023] QSC 59*,* distinguished
Newman v Powter [1978] Qd R 383, cited
Western Australia v Manando (2020) 270 CLR 81, considered
2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149 [2016] QSC 40, cited

COUNSEL: M J McDermott for the applicants
S McNeil with R Varshney for the respondents

SOLICITORS: Simpson Quinn Lawyers for the applicants
Colville Johnstone Lawyers for the respondents

[1] Teewah is a little beachside village within the locality of Noosa North Shore. The township is comprised of a small number of residential dwellings, many of which are used as holiday homes. It is only accessible by ferry, boat or four-wheel drive. There are few permanent residents.

[2] Due to its size and location, properties in Teewah are not connected to the mains water supply. Consequently, some property owners have water bores which they use to access underground water sources.

[3] The parties to this application own adjoining properties at Teewah. The Palmers own the property at 11 Tailor Street. They have owned their property since 1991. They initially purchased it as a holiday home for family and friends. They have never used it as their principal place of residence. The Byrnes are relative newcomers to Teewah. Mrs Byrne is the registered owner of 8 Tarwine Street. She and her husband purchased the property in early 2021. They intended to use it as a family holiday home and as a short-term holiday rental.

[4] The dwellings on the adjoining properties are relatively close to each other, being no more than about ten metres apart. There has never been a back fence marking the shared rear boundary between the properties. The area between the rear of their respective dwellings is simply covered by a patch of grass that at some point ceases to be the land owned by one neighbour and becomes the land owned by the other. The imaginary line of the property boundary had at one time been marked out by survey pegs, but that seems no longer to be the case.

[5] The current controversy is historical in its origin. Almost forty years ago, previous owners of the adjoining properties decided to sink a water bore for their mutual benefit. They agreed that: they would each share the costs of installing the bore and a pump; the bore would be placed on the boundary between their two properties; and they would each then share in its use and contribute to the running and maintenance costs.

[6] It seems it was good enough back in the day for the bore hole to be drilled at a location estimated, by reference to the location of survey pegs, to be on the shared rear boundary between the adjoining properties. So, that is what was done. A pump was then attached to the bore and a block and timber box enclosure was built to house the bore and pump.

[7] It is now apparent that whilst the pump enclosure was positioned so that it straddled the boundary, the bore was actually sunk at a location that is just within the boundary of the property now occupied by the Palmers.

[8] For many years, successive owners of the adjoining properties shared the use of the bore and the costs of running and maintaining the bore pump, seemingly without much thought or care as to the nature of any rights or interest they may have in the bore and its use.

[9] That position has now changed. Around the time Mrs Byrne assumed ownership of her property, the Palmers began padlocking the pump enclosure to prevent access, asserting that other persons had been using it without authority. After a subsequent disagreement arose between the Byrnes and the Palmers as to who owned the bore and on what terms it could be used, the Palmers obtained a survey which confirmed the bore is in fact positioned seven centimetres on their side of the rear boundary they share with the Byrnes.

[10] The Palmers say they are the owners of the bore as it is situated on their land. Consequently, they have disconnected the pump and restricted access to it and the bore from the Byrnes' side. They have also dismantled and modified the original pump enclosure so that it now also sits wholly within the boundary of their property and can only be accessed by them. The Palmers say that any prior use of the bore by

others, including the Byrnes, was only ever with their agreement and consent, as a neighbourly gesture, which they have now withdrawn.

[11] The Byrnes say that use of the bore was always intended to be shared. They say the Palmers' actions are contrary to the original agreement between the previous owners and inconsistent with the subsequent usage of the bore by successive owners of the adjoining properties. They say the bore was obviously mistakenly positioned on the land now owned by the Palmers and it was never intended that its placement on their land would confer exclusive ownership. They claim the Palmers are not entitled to unilaterally restrict their access to, and use of, the shared bore and pump.

[12] Accordingly, the Byrnes seek relief by way of property vesting orders under s 197 of the *Property Law Act 1974,* ('*PLA*'), in respect of the land upon which the bore was said to have been mistakenly placed. Alternatively, they seek an order granting them statutory rights of user under s 180 of the *PLA*, or an order, in the exercise of the Court's equitable jurisdiction, confirming they have an easement over the subject land that will allow them to access and use the bore and pump, which they have acquired through the lengthy period of past use of the shared bore.

Issues

[13] The issues for consideration are:

1. Whether a property vesting order can, and should, be made in favour of the Byrnes?
2. If not, whether an order, can, and should, be made in favour of the Byrnes' land for a statutory right of user by way of an easement over the Palmers' land?
3. If not, whether the Byrnes have acquired an easement by prescription through long user?

Evidence

[14] Because the issues are intertwined and cannot be discretely addressed absent an understanding of the full context of the dispute between the parties, it is necessary to first summarise the key evidence adduced at the hearing.

[15] The primary evidence was by given by affidavits from various witnesses. Several of the witnesses were required for cross-examination.

Applicants' evidence

Wayne Plant

[16] Mr Plant was the original owner of 11 Tailor Street. He lived there from around 1980 to 1984. He built the house on the property. His rear neighbour was Mr Mills, who lived at 8 Tarwine Street. Mr Mills is now deceased.

[17] In around 1983, Mr Plant proposed to Mr Mills that they sink a water bore on their shared boundary. The boundary between their respective properties was marked by survey pegs. Mr Plant suggested that the bore be put on the boundary so they could share the use of the bore. He further suggested that they would each equally share the cost of sinking the bore. Mr Mills agreed to the proposal.

[18] Mr Plant then arranged for a contractor to sink the bore and sourced a petrol pump to extract the water. He believed the bore was sunk on the boundary, in line with where the existing survey pegs were then situated. He then built a concrete block

enclosure to house the pump. Mr Mills reimbursed Mr Plant half of the costs of the expenses for the bore, pump and enclosure.

[19] Mr Plant recalled the survey pegs for the boundary between the properties were still visible when he built the pump enclosure. He built it across where he believed the boundary line was, with the intention that about half of it would be on each side of the boundary.

[20] Mr Plant confirmed that he never intended that the bore would be solely on the Palmer property. To the best of his knowledge, he thought the bore was sunk on the boundary line between the neighbouring properties. He is now aware that a recent survey shows that the borehole is actually a few centimetres onto the Palmers' property. He was not aware of this at the time the bore was sunk. His instructions to the bore contractor who drilled the hole were to sink it on the boundary. His instructions reflected his agreement with Mr Mills.

[21] Once the bore was sunk and the pump installed, both Mr Plant and Mr Mills used the water from the bore and there were no disputes between them. They would each contribute petrol to use the pump.

[22] Sometimes Mr Plant and Mr Mills would give permission to another resident of Teewah to draw water from the bore. Their established practice was that either Mr Plant or Mr Mills could give permission to a third party to use the bore water.

[23] According to Mr Plant, about a year after the bore was put in, he sold his property to Kevin and Cynthia Jones. On this point, I note that it was agreed between the parties that 11 Tailor Street was actually owned by Mr Plant between 6 August 1980 and 5 November 1987 and thereafter by Kevin and Cynthia Jones between 5 November 1987 and 16 May 1991.

[24] In cross-examination, Mr Plant agreed that the physical work in respect of sinking the bore was carried out by a contractor which he had arranged. He agreed that he had organised for the pump to power the bore. He further agreed that the survey pegs were in place, designating what he thought was the boundary between his property and Mr Mills' property at the time.

[25] As to the placement of the bore, Mr Plant agreed that he gave instructions to the contractor about where to drill. He accepted he had pointed to the position for the bore and had asked the contractor to sink it in that spot. He further agreed that he had built the enclosure to house the pump, connected the pump to the bore and had built an exhaust pit for the pump. He described the exhaust pit as being an old five-gallon keg, which he placed in a hole in the ground, with an exhaust pipe connecting it to the pump.

[26] When it was put to him that the exhaust pit was actually situated entirely on his own property, Mr Plant disagreed. He stated that the exhaust pit was on Mr Mills' side. He demonstrated the location by reference to photographs shown to him, identifying a point on the neighbouring property, behind the pump enclosure, where he said the exhaust pit had been located.

[27] Mr Plant was also shown a diagram drawn by Ashley Palmer, which was said to depict the pump enclosure and exhaust pit. The diagram showed the exhaust pit was on the Palmers' land. It also showed the hinged lid to the pump enclosure opened from the Palmers' side and lifted back towards the Byrnes' side. Mr Plant stated that the configuration shown in the diagram was different to how it was when he first installed the pump and exhaust pit. He stated that the lid was hinged such that it

opened from left to right, not front to back, and the exhaust pit was not in the location shown on the diagram, but was instead where he had indicated, behind the pump enclosure and situated on the neighbouring property.

Neil Summerson

[28] Mr Summerson has had a long association with Teewah. He knows Mr Plant and he knew Mr Mills. He was in Teewah when the bore was sunk and remembered seeing both Mr Plant and Mr Mills on site with a drilling apparatus mounted on a trailer or vehicle.

[29] Mr Summerson's wife owned 8 Tarwine Street between 2005 and 2021. She had purchased the property from Mr Mills in 2005. Mr Summerson managed the property for his wife. She sold the property to Mrs Byrne on around 31 March 2021. The Palmers were the neighbours immediately to the rear, at 11 Tailor Street, when Mrs Summerson owned 8 Tarwine Street.

[30] During the time Mr Summerson managed his wife's property, the bore was used mainly for gardening and other non-potable water uses. The pump for the bore was originally petrol powered and both the Palmers and the Summersons jointly maintained it. He and his wife replaced the original pump with a further petrol pump when the original became unworkable.

[31] In 2010, Leslie and Mary Leatham became the tenants and caretakers at 8 Tarwine Street. In 2011, the Leathams and the Palmers discussed the bore and decided to install an electric motor to replace the petrol motor. Mr Summerson was aware of this arrangement as Mr Leatham had asked him for permission to replace the pump. Mrs Summerson agreed to the arrangement, provided that the cost was to be shared equally between the Summersons and the Palmers. A new electric motor for the pump was purchased and installed and the Summersons paid half of the cost.

[32] The Palmers did not have power connected to their property at the time the electric pump was installed. The electric pump was therefore connected to the power outlet on the Summersons' property. Whenever the pump was run for the bore, electricity from the Summersons' property was used. Consequently, when the Palmers used the pump, they used the Summersons' power. They would occasionally leave cash in the pump box to reimburse the Summersons for the cost of their electricity use. This arrangement continued for approximately ten years, until Mrs Summerson sold her property to the Byrnes.

[33] Mr Summerson's opinion and belief was that the bore was always jointly owned and used as a shared bore. Until 2021, the Palmers had never said anything to him, or to anyone else to his knowledge, to the effect that they solely owned the bore.

[34] Amongst other things, Mr Summerson believed it was a shared bore because a pop-up sprinkler system was permanently connected to the pump when his wife bought her property. The sprinkler system consisted of pipes and a lever which could be used to water the Summersons' property. The sprinkler lines were partly buried and partly exposed.

[35] Before the present dispute arose, Mr Summerson never checked where the bore pipe was actually located in relation to the boundary between the two properties. He saw no reason to do so as he, and everyone he encountered, behaved as if it was jointly owned.

[36] In cross-examination, Mr Summerson denied that he would have had to seek the permission of the Palmers to do something in relation to the pump. He instead stated that he would not have needed to seek permission because it was always commonly known that it was a shared pump. He agreed that before he and his wife purchased their property in 2005, he had not had any conversations with the Palmers relating to the pump.

[37] When it was put to him that he had formed his opinion based on what other people might have told him about ownership of the pump, he stated that he had certainly had conversations with Mr Mills and had himself been there when the bore was put down, so he was well aware of its history. He agreed that he had not had any conversation with the Palmers about who owned the bore, adding that he did not see that he needed to have any such conversation. He ultimately agreed that his opinion and belief as to the bore always being a shared bore was based entirely upon what Mr Mills had said to him about the matter.

[38] Mr Summerson further agreed that he was particularly interested when he heard about the dispute about the bore, and so much so that he went to the property and inspected the bore and housing for himself. He disagreed however that his interest in the case was because he had told the Byrnes before they purchased the property that they had half-ownership of the bore. He further denied that he had told the Byrnes' real estate agent that he considered that they would have half ownership of the bore. He explained that he told the agent that there was a shared bore which was not on the title.

Leslie Leatham

[39] Mr Leatham and his wife Mary Leatham lived at 8 Tarwine Street from about October 2010 until 2021. During that time, Mr Leatham was the tenant and caretaker of the property for the Summersons.

[40] Mr Leatham recalled there was nothing marking the boundary between the adjoining properties. He knew there was a water bore on or around the boundary with the property owned by the Palmers. The bore was comprised of a single shaft, descending down into the ground, powered by a single pump. The pump drew water up and discharged it through one of two valves. Each valve pointed towards one of either the Palmers' property or the Summersons' property. There was a lever valve that allowed the water to be shut off to one property or the other while the pump was operating. The bore water was used predominately by the occupants of each of the properties to irrigate their respective gardens, wash cars and for other general domestic uses of non-potable water. Mr Leatham stated that in times of drought, they might also fill their water tanks with the bore water and use it for drinking and washing as it was good quality water.

[41] When the Leathams first moved in the bore was served by an old petrol-powered pump. The pump was housed in a concrete pump enclosure on or around the boundary between the properties. Throughout the time the Leathams lived there, petrol and oil for the pump was provided and paid for by both sides. Whoever used the pump would top it up with petrol afterwards.

[42] In or around 2011, the old petrol pump was replaced with an electric pump, which Mr Leathem sourced. The Summersons paid half of the costs for the new pump. Mr Leatham installed the electric pump as well as a weather-proof power outlet and an underground cable that ran from the outlet to the dwelling on the Summersons' property. After the installation, all power used to run the new pump was provided

by the Summersons. The Palmers did not have mains electricity connected to their property. They did not have any ready alternative to run the pump save for using the Summersons' electricity supply. The Palmers would contribute to the electricity costs in various ways. They would send up boxes of vegetables to the Summerson property or Ashley Palmer would occasionally leave cash on the pump box.

[43] In about the last six months or so that the Leathams lived at the Summersons' property, Ashley Palmer brought a petrol generator up to the Palmers' property and ran an extension lead from it to the electric pump. This meant that the Palmers no longer needed to use the Summersons' electricity. From that time onwards, whoever used the pump connected their own power supply to run the pump.

[44] Mr Leatham performed some work to maintain the electric pump. This included replacing a capacitor and also installing a pressure tank on the pump. He personally paid for these expenses and never asked, nor received, any contribution from the Palmers or from the Summersons.

[45] In about the last year or so that the Leathams lived at the Summersons' property, Mr Leatham's relationship with Ashley Palmer soured. By this time Ashley Palmer's parents were no longer living at 11 Tailor Street very often. However, Ashley was a frequent visitor as he also owned the block of land adjacent to his parents' property. Mr Leatham would often see Ashley at 11 Tailor Street, using water from the bore to water his parents' garden and his own property next door.

[46] According to Mr Leatham, his relationship with Ashley Palmer soured because Ashley objected to Mr Summerson and Mr Leatham allowing other owners of neighbouring properties to use the bore water to water their properties. Ashley Palmer thought that the Summersons were the only ones other than the Palmers who were entitled to use the bore water and that the Summersons could only use it for their own property.

[47] Mr Leatham recalled having many contentious discussions about these matters with Ashley Palmer around this time. He understood there was a long practice of shared use of the bore water by other neighbouring properties, provided they had the permission of the owners of either the Summersons' property or the Palmers' property. His understanding was based on many years occupying the Summersons' property and the numerous conversations he had in that time with other neighbouring residents and owners, including the prior owners Wayne Plant and Mervyn Mills.

[48] For the entire 11-year period that he resided at the Summersons' property, no one ever suggested to Mr Leatham that the bore was owned by the Palmers or solely formed part of the Palmers' property. He recalled having various conversations about the bore with Ashley Palmer, but Ashley never mentioned that it belonged to the Palmers. The first time that he heard of such an assertion being made by the Palmers was about three months after he moved out of the Summersons' property. It was around this time that he one day saw Ashley Palmer putting a chain and padlock on the bore pump enclosure. When he asked him what he was doing, Ashley told him that he was doing it because one of the other properties, not being the Byrnes' property, was using too much water. When Mr Leatham responded that he thought Ashley was doing the same thing by using the bore water to water his own property, Ashley told him that was different. Mr Leatham then asked Ashley whether he had given the Byrnes a key to the pump enclosure to which Ashley

responded, 'No, she has to ring me first'. According to Mr Leatham, at no stage during that exchange did Ashley mention that the Palmers owned the bore.

[49] Later that same day, Mr Leatham had a further conversation with Ashley Palmer. Mr Leatham had seen a surveyor in Teewah and around the Palmers' property. Mr Leatham asked Ashley whether he had had the boundary surveyed. Ashley did not directly respond to that question but during their conversation he said the bore pipe was on the Palmers' property and he could prove it. This was the first time Mr Leatham recalled Ashley Palmer saying that the bore was solely on the Palmers' property.

[50] Mr Leatham remembered that the pump enclosure straddled the boundary between the two adjoining properties. He recalled that this was evident when standing next to a survey peg at the boundary and looking towards the survey peg at the other end of the boundary. In his view, whilst the bore pipe into the ground would have been difficult to judge with the naked eye, the pump enclosure was obviously across the common boundary. In his opinion, when viewed with the naked eye, the bore looked like it was on the boundary line between the properties. Mr Leatham recollected that the petrol pump and later the replacement electric pump were positioned such that they sat on top of the boundary line between the properties running lengthwise along and a-top of the boundary line.

[51] According to Mr Leatham, he was never in control of the bore, rather control was shared between the Summersons' property and the Palmers' property.

[52] As part of his responsibilities as caretaker and tenant, Mr Leatham was responsible for watering the gardens at 8 Tarwine Street. He did this regularly, using water from the bore. When Mr Leatham lived there, the pump enclosure had a small hole in the block wall on the Summersons' side. A permanently plumbed pipe fixed to the bore pump extended through the hole to a pipe which connected via underground piping to a tap outlet on the western side of the house at 8 Tarwine Street. The tap had a dual lever fixture connected to it which activated an underground pop-up sprinkler system on the property. To operate the sprinkler system, the dual lever system within the pump enclosure first had to be activated to allow water to be piped to the Summersons' side. There were initially five pop-up sprinklers connected to the underground sprinkler system. Four were located on the Summersons' property but one was actually situated on the neighbouring property owned by the Wilkinsons. At some stage, Mr Leatham disconnected one of the sprinklers on the Summersons' property as well as the sprinkler on the Wilkinsons' property.

[53] From photographs shown to him of the pump enclosure, Mr Leatham identified that the enclosure had since been modified. He observed that the original pipe extending out of the hole through the block wall on the Byrnes' side had been disconnected. Further, a steel plate and wooden sideboards had been constructed, physically shutting off access to the disconnected pipe from the Byrnes' side of the pump enclosure.

[54] In cross-examination, Mr Leatham agreed that he had suggested that the old petrol pump be replaced because it was noisy and leaking oil. He agreed that he had proposed the replacement of the pump to both Mr Summerson and the Palmers and each had agreed.

[55] When it was put to him that the reason he spoke to the Palmers was because he knew he needed to get their permission to do anything with the pump, Mr Leatham

stated that he did so because it was his understanding that the pump and the bore were shared and they were going to have to halve the costs.

[56] Mr Leatham was asked about when the Wilkinsons had occupied the neighbouring property to 8 Tarwine Street. His recollection was that they were living there from 2019 onwards. He agreed however that he could be mistaken and they may have lived there from 2015 onwards. However, he said that before they lived there permanently the Wilkinsons had used their property as a holiday home and had been visiting there for many years.

[57] Mr Leatham agreed that he had given the Wilkinsons permission to use the bore and had not asked the Palmers if it was okay to do that. He denied that he considered that he was in control of the bore.

[58] Mr Leatham denied the suggestion that Ashley Palmer had spoken to him at some time in 2015, objecting to the Wilkinsons, or anyone staying at the Wilkinsons' property, using the bore. He rejected the proposition that he had told Ashley that he was in control of the bore, and not the Palmers, during this supposed discussion. He denied that it was from around 2015 that his relationship with Ashley had soured, reiterating that it would have been later than 2015.

[59] Mr Leatham agreed that he had replaced the roof on the pump enclosure when he was living at 8 Tarwine Street. He accepted that he had attached the roof to the existing hinges that were in place on the enclosure. He agreed that the existing hinges were on the side closest to the Summersons' property.

Jane Byrne

[60] Mrs Byrne became the current owner of the property at 8 Tarwine Street on 27 April 2021. Although she is the sole owner, both she and her husband made the decision to purchase the property jointly. They bought the property from the Summersons to use it as their holiday home and as a short-term holiday rental.

[61] The Byrnes' neighbours at the rear of their property are the Palmers, who live at 11 Tailor Street. Mrs Byrne has never met Terrence and Muriel Palmer. She understood their son, Ashley Palmer, was the person who makes most of the day-to-day decisions about the property. She had spoken to Ashley on the telephone but had never met him.

[62] The Byrnes' property is not connected to the mains water supply. They get their water from rainwater that fills the water tanks on their property or via the bore located on the Palmers' property.

[63] At the time she became the owner of 8 Tarwine Street, Mrs Byrne saw that the pump enclosure was situated on the boundary between her property and the Palmers' property. The bore pump could be accessed by lifting the hinged metal sheet roof that sat on top of the enclosure. Mrs Byrne has never actually operated the pump herself and is unfamiliar with how exactly the bore water flows from the bore to her property.

[64] Mrs Byrne arranged for a neighbour, Mel Byrne (no relation) to manage 8 Tarwine Street. Mel Byrne lives at 4 Tarwine Street. As property manager, Mel Byrne operated the bore pump to water the Byrnes' garden and to fill the Byrnes' water tanks whenever they were low. When Mrs Byrne initially bought her property, both the Palmers and the Byrnes used water from the bore and the pump on a shared

basis. Without water from the bore she would have serious concerns about the reliability of the water supply to the property.

[65] According to Mrs Byrne, part of her decision to purchase the 8 Tarwine Street property was because there was shared use of the bore and pump. She became aware of the shared bore and pump through an email Mr Summerson had sent to Byrnes' real estate agent in November 2020, which stated:

> I presume Les mentioned the bore is jointly owned with neighbour behind.
> It is in the boundary and we jointly use the electric pump but there is nothing stopping each owner having their own pump
> The contract (if we proceed) should reflect this

[66] Mrs Byrne understood that previously the only electricity for the pump came from the connection to 8 Tarwine Street. By the time she purchased the property however, the Palmers had their own separate electricity connection via a generator.

[67] Mrs Byrne was aware the bore pump had been operated by her other neighbours, the Wilkinsons, who live at 10 Tarwine Street. According to Mrs Byrne, that only occurred when they watered her garden. On those occasions she permitted them to use the bore water to also water their own garden in return.

[68] The Leathams continued to occupy 8 Tarwine Street for a time after Mrs Byrne had purchased the property. There was no padlock or restriction upon access to the pump enclosure during that period as far as she was aware. However, by the time the Byrnes first visited the property in April 2021, a padlock and chain had been applied to the pump enclosure, preventing access. During that visit, Mrs Byrne met a man who said he was Ashley Palmer's father-in-law. He came over to the Byrnes' property to introduce himself and speak to the Byrnes. He told them that one of the neighbours had been using the bore without permission, so they had felt the need to put a padlock on the pump enclosure. He then gave them a key for the padlock.

[69] In around late 2021, Mel Byrne telephoned Mrs Byrne and advised her that she had been unable to use the bore water because the padlock on the pump enclosure had been replaced with a new padlock for which she did not have a key. Mrs Byrne instructed Mel Byrne to cut the chain so they could access the bore. According to Mrs Byrne, this scenario repeated a number of times, through until around June 2022. On each occasion she instructed Mel Byrne to cut the chain off the pump enclosure so that she could access the bore.

[70] On 17 August 2022, Mrs Byrne had a telephone conversation with Ashley Palmer about the matter. During that conversation, Mrs Byrne raised her concerns about the continual installation of padlocks on the pump enclosure and asked him why it was continuing without the Byrnes being given a key. She recalled he responded by referring to his history with Mr Leatham and the Wilkinsons. He told her that he believed the Wilkinsons had used the bore water without permission and mentioned some hassle he had had with Mr Leatham.

[71] Mrs Byrne explained to Ashley Palmer that she did not allow other persons to access the pump. She advised him that she only gave permission to Mel Byrne to use the bore to water her garden or fill the water tanks when needed. She further advised him that she also gave permission to the Wilkinsons to use water from the bore to water their garden in return for them watering her garden on occasions. In response, Ashley told her that the Palmers owned the bore and that it was likely on his side of the boundary. Mrs Byrne replied that they could get it surveyed,

however it was still a jointly owned bore in her view, as she had been advised by the Summersons at the time she purchased the property.

[72] After some further discussions, Mrs Byrne asked for a key to the latest padlock which had been placed on the pump enclosure. She requested that it be provided to Mel Byrne. Ashley Palmer said he did not want to give the key to Mel Byrne. According to Mrs Byrne, she told him that he could leave the key at the Byrnes' property somewhere and let her know where it was, to which he agreed.

[73] Despite that discussion and Ashley Palmer's agreement to provide a key to the pump enclosure, the Byrnes were never given a further key. As a result, the Byrnes' continued to be locked out and unable to access the bore. Mrs Byrne again instructed Mel Byrne to cut the chain on the pump enclosure so that she could access the pump and bore.

[74] According to Mrs Byrne, before the August 2022 telephone conversation with Ashley Palmer, no one had ever described ownership of the bore as anything other than it being shared between the adjoining properties.

[75] Subsequently, in late November 2022, Mel Byrne again phoned Mrs Byrne and advised that the pump enclosure now had a new large chain and padlock on it. Mrs Byrne telephoned Ashley Palmer to speak to him about the matter. Her call was not answered so she left a message. On 3 December 2022, Ashley sent her a text message which read:

> Hi Jane, sorry I didn't get back to you sooner, I guess you were calling about the bore, I have had the property surveyed and it confirms that the bore is inside our boundary…the existing shelter of the bore encroaches on your property and I will rebuild the shelter so it doesn't cross the boundary…due to the unfortunate circumstances there will no longer be any access to the bore…

[76] In response, Mrs Byrne sent a text message to Ashley Palmer, advising him that she did not agree that the Palmers had the right to disconnect the shared bore and that he should not move any of the pump enclosure structure.

[77] Later that day, Mel Byrne telephoned Mrs Byrne to advise her that Ashley Palmer and another person were performing works on the pump enclosure. Mel Byrne subsequently informed Mrs Byrne that the bore water pipe from the pump onto the Byrnes' property had been disconnected and the pump had been entirely relocated to the Palmers' side of the boundary and enclosed in a re-built pump enclosure.

[78] On 14 December 2022, Mrs Byrne received an email from Eagle Surveys, attaching a copy of a survey which had been carried out at the Palmers' property and a notification of encroachment, advising that the pump enclosure encroached onto the northern boundary of the Byrnes' property by 0.47 metres.

[79] Mrs Byrne and her husband had never complained about any such encroachment and were unaware of it. According to Mrs Byrne, even if they had been told about it, they would never have requested that the pump enclosure be moved.

[80] In relation to other persons using the bore water, Mrs Byrne recalled that she had been told by the Leathams and by Mel Byrne that it was established practice that each owner of the adjoining properties could authorise other Teewah residents to use the pump and draw water from the bore.

[81] Mrs Byrne confirmed that since the date the pump enclosure had been altered the enclosure has remained padlocked and they have had no access to the bore or the pump.

[82] On 8 December 2022, solicitors acting for Mrs Byrne sent a letter to the Palmers demanding that the original arrangement regarding the pump enclosure and access to the bore be restored. The letter also requested that the Palmers agree to register an easement on their title, permitting the Byrnes to access the bore, so as to remove any doubt about the matter.

[83] On 3 February 2023, the Byrnes received a letter from the Palmers' solicitors, advising that the Palmers denied there was any prior practice of shared use of the bore and that they did not agree to consent to any registration of an easement on their land. The letter further advised that the Palmers maintained there was no agreement for any shared use of the water bore, which was wholly on their property, and that whilst certain indulgences had been granted to neighbours from time to time by them, such indulgences did not create a proprietary right to access the Palmers' property and use the bore on their land. The letter stated that the relationship in the past was more akin to that of a licence to use the water or pump, which had been revoked by the Palmers as of right, in or about November 2022.

[84] In February 2023, the Byrnes attended their property at Teewah. They observed a number of changes had been made to the pump enclosure. In particular, Mrs Byrne noted the pump enclosure had been partly demolished, moved and rebuilt so that it appeared to now be entirely constructed on the Palmers' property. The water pipe from the pump to the Byrne property had been detached and the pump was disconnected from the electricity point on the Byrnes' side of the pump enclosure. Further, a divider had been placed in the middle of the pump enclosure preventing the Byrnes from being able to access the pump and the rebuilt pump enclosure was now encased in steel sheeting and secured with a padlock.

[85] Mrs Byrne confirmed that she and her husband had decided to purchase the property at 8 Tarwine Street in the belief that there was shared access to the bore. She further confirmed that the water supply from the bore is important for filling their tanks during drought and watering the garden. According to Mrs Byrne, they will be unable to purchase water to be supplied by a truck as it would be unable to get into Teewah.

[86] Mrs Byrne obtained a verbal quote from Brandt Logan of Titan Drilling Group for the costs of sinking a new bore on her property. He advised it would cost about $20,000 for the bore itself and there would be additional costs for a pump. He further advised the due to the space requirements for a new bore, it would have to be sunk in the Byrnes' front yard and that may cause access problems because of the trees they had there.

[87] In cross-examination, Mrs Byrne agreed that she had not spoken with the Palmers at all prior to purchasing 8 Tarwine Street. She agreed that her assumption about having joint ownership of the bore and her claim that she had a right to access water from it were based upon what Mr Summerson and the real estate agent had told her about having a right of ownership in the bore.

[88] Mrs Byrne disagreed with a suggestion put to her that Ashley Palmer had telephoned her to speak to her about use of the bore on the evening of the day when she had been given a key for the pump enclosure. Mrs Byrne denied there was any such call or conversation. She further denied that during the supposed conversation

Ashley had told her they were letting her use the bore for her property only and that they had put a lock on the pump enclosure because Ashley had had troubles in the past with the Wilkinsons and Mr Leatham.

[89] When asked about the telephone conversation with Ashley Palmer in August 2022, Mrs Byrne agreed that he had told her then that there was a prior history between himself and the Wilkinsons from before she had purchased the property. However, she added that she told Ashley that she and her husband were new owners and the Wilkinsons did not have free access to the bore.

[90] In response to a proposition put to her that Ashley Palmer never suggested to Mrs Byrne that she was an owner of the bore and pump during any conversation he had with her, Mrs Byrne stated that he had implied that they were joint owners. She explained this was the implication in her view because Ashley's only concern was the Wilkinsons accessing the bore. She reiterated that she assured him that the Wilkinsons did not have free access and that the only reason they were allowed to use the bore was when they watered the Byrnes' garden. She agreed that on the occasions when the Wilkinsons were permitted to use the bore to water their garden that she had arranged for them to have the key to access the pump enclosure.

[91] Mrs Byrne denied saying to Ashley Palmer words to the effect of, 'I want access to this water' during the August 2022 conversation. She said that she had told Ashley that they just wanted their rights as landowners of the shared bore. She said that she told him it was a shared bore and that she did not understand why they were not given keys to access it. She denied that they had failed to reach any agreement in that conversation, reiterating that Ashley had said he would give her a key and leave it at the property. She further denied that Ashley had told her that it was his opinion that the Palmers owned the bore. She said he did not think that he owned it but thought maybe it was on their property.

[92] Mrs Byrne agreed that at no stage had she ever asked the Palmers for permission to use the bore, adding that she did not need permission because it was a shared bore.

[93] When asked about her evidence that they were unable to purchase water to be supplied by truck as it would be unable to get in to Teewah, Mrs Byrne conceded that she had not actually made any inquiries about the matter.

[94] As for the quote obtained from Mr Logan for drilling a new bore, Mrs Byrne agreed that she had only obtained a verbal quote for the bore itself and had not made any inquiries about the cost of a pump. When it was put to her that this was because she was not very serious about the possibility of putting in her own bore, she answered 'No, because we already have a joint bore.' Mrs Byrne accepted that she had not obtained a quote from any other bore subcontractor for sinking the bore and that she had not investigated what trees might need to be removed from her front yard to install a bore.

Brandt Logan

[95] Mr Logan operates a bore drilling business called 'Titan Drilling Group'. He has thirteen years' experience in the drilling industry.

[96] He confirmed he provided Mrs Byrne with a verbal quote of approximately $20,000 plus GST for the cost of drilling a new bore at 8 Tarwine Street.

[97] According to Mr Brandt, because a new bore must be drilled at least ten metres from any existing bore, it would not be possible for a new bore to be sunk in the

Byrnes' backyard. It would instead have to be drilled in the front yard, which was filled with trees that would first need to be removed to allow access for a drilling rig. He confirmed Titan Drilling Group did not have a drilling rig small enough for the job. He believed a smaller drilling rig could do the job if the front yard was first cleared of trees and other obstacles.

Christopher Anderson

[98] Mr Anderson is a professional valuer. He provided a valuation report concerning the effect of a potential boundary realignment or easement in respect of the Palmers' property at 11 Tailor Street. His report concerned only the land value and did not consider any added value for the bore infrastructure.

[99] Mr Anderson noted that each of the adjoining properties was comprised of a 610m^2 lot, zoned for residential use, upon which modest, semi-modern residences had been constructed. He described the section of land where the bore is situated as being a small area, adjacent to the rear western corner of both 8 Tarwine Street and 11 Tailor Street.

[100] Mr Anderson considered that the option of a boundary realignment, such that the rear boundary of the properties would be redrawn so that the bore hole is squarely on top of it, would excise approximate 7cm^2 of land from the south-western corner of the Palmers' property and add it to the Byrnes' property. In his opinion such a realignment would not have any notable impact upon the value of either property as it would be unlikely to result in a change in the surveyed land area for either property.

[101] Mr Anderson assessed the value of the land at the 11 Tailor Street property as $1,500/sqm. He calculated the value of the potential loss of a 0.07m^2 piece of land by reason of the suggested boundary realignment as $105.

[102] With respect to the option of an easement, Mr Anderson concluded that the registration of an easement over such a small portion of land would not have a negative impact on the appeal, marketability or value of 11 Tailor Street and would not enhance the value of 8 Tarwine Street. His opinion was that compensation of $100 would be appropriate for the granting of an easement over the Palmers' property to permit the Byrnes to access the bore and draw water from it.

[103] Overall, Mr Anderson determined a 'compensation assessment' amount of $100.

[104] In cross-examination, Mr Anderson agreed that for the purposes of his valuation, the area of land in question was seven centimetres in depth and approximately one metre in width. He accepted that his original calculation of the land being 7cm^2 in area was incorrect and that it should actually be 700cm^2 or 0.07m^2. However, he agreed that his valuation for a potential boundary realignment was based on 0.07m^2.

[105] Mr Anderson further agreed that whilst he had referred to recent sales evidence in his report for the basis of his valuation, he had obtained that information from third-party sources and was unable to verify the accuracy of their information.

[106] With respect to the option of an easement, Mr Anderson agreed that his assessment was based solely upon the area of the easement being 700cm^2 or 0.07m^2 and did not take into account any actual effect on the use and enjoyment of the 11 Tailor Street property by reason of the presence of an easement.

Respondents' Evidence

Terrence Palmer

[107] Terrence Palmer and his wife Muriel jointly own 11 Tailor Street. They purchased the property from Kevin and Cynthia Jones on or about 16 May 1991. According to Mr Palmer, the property they purchased comprised land and improvements, namely a residential dwelling and an operational bore. The bore is situated towards the rear boundary of the property which adjoins the Byrnes' property. There is no registered easement on the title for 11 Tailor Street in respect of the bore.

[108] The Palmers purchased their property to use it as a holiday home for family and friends. They have never lived in it as their principal place of residence, however, when their children were younger, they would regularly visit and stay at the property. The property has never been connected to mains electricity. They use solar power to charge batteries to power the house and a generator for back-up and to run the bore pump.

[109] The Palmers have no knowledge about the facts and circumstances relating to the sinking of the bore or when that was done. The bore was fully operational when they bought the property. Neither the previous owners, the Jones', nor their real estate agent for the purchase, mentioned anything about the use of the bore by third parties. They were not told of any existing or historic proprietary right or formal agreement of any kind which required future owners of the property to provide access for neighbours to use the bore.

[110] After they purchased the property, their neighbour, Mr Mills, used the bore with their knowledge and consent. Because the bore was located near the boundary at the rear of their property, there was virtually no interference to their use and enjoyment of their own property.

[111] According to Mr Palmer, it was customary for whoever used the bore to refill the pump with fuel after its use. Mr Mills always contributed to any required maintenance costs for the bore pump. He did so of his own initiative, and it was never necessary for the Palmers to seek any contribution from him. Mr Palmer considered it was a relationship of cooperation between them and there was no obligation for Mr Mills to contribute to the costs of maintenance or fuel.

[112] When Mr Mills sold his property to the Summersons in 2005, the arrangements for the use and enjoyment of the bore continued without any actual discussion taking place. According to Mr Palmer, the Summersons' tenants (i.e., the Leathams) were respectful of the Palmers' property when using the bore, so there was no interruption to the peace and quiet enjoyment of their land. Further, maintenance costs were shared as and when required, so there was no reason to challenge the status quo.

[113] In recent years Mr Palmer has had little to do with managing or maintaining 11 Tailor Street due to his age. Both he and his wife are now 80 years old. Their son, Ashley Palmer, looks after the property for them. He has been responsible for maintaining and dealing with all matters regarding their property for the past 26 years. Ashley is also the registered owner of the vacant land block next door at 9 Tailor Street. Ashley regularly visits 11 Tailor Street to attend to general maintenance of the gardens. He also has full and complete use of the bore to attend to his own property.

[114] According to Mr Palmer, there has recently been interference with the Palmers' right to enjoy their property and claims have been made in respect of a proprietary interest in their land and rights to access their bore. Mr Palmer considers these claims to be a consequence of the 'neighbourly conduct' they have shown to the various owners of 8 Tarwine Street.

[115] In cross-examination, Mr Palmer agreed that the bore and pump enclosure were in place on his property when he bought it. He agreed that a bit of the enclosure was across the boundary but denied that was obviously so. He stated that when he bought the property, Mr Mills had a hose connected from the pump to his own yard. He agreed that at some later point in time a valve was installed on the pump.

[116] As to his knowledge of the location of the borehole at the time he purchased the property, Mr Palmer said that going by survey pegs that were in place then there was 'no question' that it was not on his property. He recalled the survey pegs were right next to the borehole.

[117] With respect to Mr Mills' use of the bore, Mr Palmer agreed that Mr Mills had continued to use the bore after the Palmers had purchased 11 Tailor Street, albeit he maintained that was with his permission. However, he further agreed that he had never spoken to Mr Mills about needing permission and Mr Mills had not sought permission to use the bore. He said he did not think Mr Mills needed to, and as a friendly neighbour he did not expect him to do so.

[118] Similarly, Mr Palmer agreed that the Summersons had continued to use the bore after they acquired 8 Tarwine Street from Mr Mills, and they also had not sought his permission to do so. When it was put to Mr Palmer that the Summersons did not need to seek his permission, Mr Palmer stated 'They did if they wanted to be legal, but as a friendly…neighbourly thing, they were allowed to carry on where Merv Mills left off'. He denied that they used the bore 'as of right', stating that their use was 'as a privilege'. He denied the suggestion that the bore was shared.

[119] As to the Leathams' use of the bore, Mr Palmer agreed that when they became the tenants of the Summersons they also continued to use the bore. He agreed that they did so without seeking his permission but added that they were 'allowed to use the bore'.

[120] Mr Palmer agreed that the Summersons continued to contribute to the cost of running the petrol pump, stating that if they wanted to water their garden they would put petrol in the pump. When it was put to him that he did the same when he used the pump, he stated 'Exactly, because it was my pump'.

[121] Regarding the replacement of the petrol pump, Mr Palmer agreed that the Summersons and he had each paid half of the costs of the new electric pump. He said that it was the Summersons' idea to put in an electric pump and that he and his wife had allowed that. He agreed that when the electric pump was first installed it was run on electricity from the Summersons' property. He stated that they now run it using their generator.

[122] Mr Palmer agreed that half of the pump had belonged to the Summersons but added 'but not the borehole'. He accepted that the pump was now locked away on his property, stating 'access to the pump should only be…allowed if they ask permission to come onto our place…to turn it on.' He stated that the privilege to use the water had been 'locked up'.

[123] When asked about any problems with neighbours, Mr Palmer stated that there had been no problems with the Leathams. In response to the proposition that it was only after Mrs Byrne had purchased the neighbouring property that Ashley Palmer had started locking up the pump enclosure, Mr Palmer stated 'After the trouble started, yes'. When asked if the trouble had started in 2015, as Ashley Palmer had claimed in his affidavit, Mr Palmer stated he could not answer that question. When pressed further about whether the trouble with the neighbours had started in 2018, Mr Palmer stated 'I never had any trouble with anyone…Except now, we get a letter from someone claiming that they own the bore. That's where my trouble started. Never before, except that…the neighbours were abusing the use of it…' When asked whether the neighbours abusing the use of the bore had started happening in 2021, Mr Palmer stated 'Can't say exactly. But…if that's when…the neighbours moved in, and they sent this letter…I guess they allowed the neighbours to use the pump all the time, which they did…'

[124] When asked more directly whether the trouble he was talking about was with the Byrnes, Mr Palmer stated 'The trouble is with the overuse of the bore…no respect for the owner – which is us – who had the bore. No one asked permission. And we didn't give it…' He agreed with the suggestion that the bore had been locked away because he did not want other people using it without the Palmers' permission. He further agreed that had probably occurred after the Byrnes purchased their property. He disagreed with the suggestion that the bore had always been shared until the Palmers had obtained the survey, stating 'It wasn't the survey that changed it at all…It was people's attitude'.

[125] Mr Palmer agreed that the Byrnes had initially been given a key to the locked pump enclosure. He accepted that they had not asked for a key, adding that he thought it was the neighbourly thing to do.

Ashley Palmer

[126] Ashley Palmer is the son of Terrence and Muriel Palmer. For the past 26 years he has been responsible for all matters pertaining to 11 Tailor Street, including the maintenance of the dwelling on the land, the gardens and the bore pump and housing. He is the person who has dealt with the neighbours about the maintenance and the use of the bore during that period.

[127] He is also the registered owner of the neighbouring property at 9 Tailor Street. He confirmed that he uses the bore, with his parents' knowledge and consent, to attend to the garden on his own land.

[128] Mr Palmer confirmed that he has no knowledge of the facts and circumstances relating to the sinking of the bore as outlined by Wayne Plant. He recalled it was present on his parents' property when they purchased it. He confirmed it is currently used, and has been used since May 1991, to water the gardens and for general cleaning. It is not used for household purposes or to fill the water tanks.

[129] According to Mr Palmer, ever since his parents purchased 11 Tailor Street they have permitted the owners and occupants of 8 Tarwine Street to use the bore on their land.

[130] Mr Palmer recalled that his parents had a good neighbourly relationship with Mr Mills and they had no objection to him using their bore to water his garden and for other non-household uses.

[131] Mr Palmer stated that it was always his understanding, based on discussions with his parents and his own experiences in dealing with their neighbours, that there was a mutual understanding between his parents and their neighbours for the time being at 8 Tarwine Street that they were permitted to use the bore and they would contribute towards the maintenance of the pump as consideration for the use and benefit obtained. His understanding was that it was not and never has been a joint liability to maintain or replace jointly owned property.

[132] According to Mr Palmer, at no time did Mr Mills or Mrs Summerson claim to use the bore as of right and he did not believe there was any claim to any proprietary right as a consequence of use.

[133] Mr Palmer confirmed that the owners of 8 Tarwine Street have, at various times, contributed to the cost of maintaining the bore pump. The Summersons contributed towards the cost of replacing the original petrol motor pump to an electric motor pump in or about 2011. The pump was replaced at the request of Mr Leatham, who was then the occupant of 8 Tarwine Street. The Summersons' property was then connected to the mains electricity, whereas the Palmers' property was not. The Palmers' used solar panels and a back-up generator to power their home. The generator is now also used to run the bore pump.

[134] Mr Palmer recalled that in 2015, the Wilkinsons' purchased the property at 10 Tarwine Street, next door to the Summersons. According to Mr Palmer, after the Wilkinsons purchased their property, Mr Leatham unilaterally decided that they, or the occupants of their property, could use the bore and he ostensibly gave them permission to do so. As a result, the Palmers have since encountered unreasonable interference with their use and enjoyment of their property, as well as additional wear and tear on the bore pump.

[135] By way of example, Mr Palmer recalled that during the Christmas holiday period in 2015 to 2016, people staying at the property owned by the Wilkinsons turned on the bore pump and as a result the sprinkler system on the Palmers' property unexpectedly activated, causing water to go through their vehicles and through their downstairs bedrooms. Mr Palmer spoke to the occupants at the Wilkinsons' property, advising them that they were not to use the bore, however they continued to do so. According to Mr Palmer, he raised his objection with Mr Leatham, who took umbrage and stated that he was in control of the bore, not the Palmers.

[136] By way of further example, Mr Palmer recalled another occasion, in November 2018, when he was visiting at 11 Tailor Street for a few nights and had the bore running whilst he visited a neighbour. When he returned about half an hour later, he observed the bore pump had been unplugged from the generator, but it was still running. He did not know why the bore pump had been unplugged.

[137] As a result of these and other similar incidents and the continual disregard for the Palmers' right to control access to their property, Mr Palmer installed a chain and padlock to the bore pump enclosure in early 2021.

[138] When Mrs Byrne purchased the property from the Summersons she was given a key to access the pump enclosure. According to Mr Palmer, she was advised at the time that the Palmers were happy for her to use the bore pump on her own property, but due to previous issues with neighbours the Palmers did not allow anybody else to access it.

[139] Mr Palmer stated that his parents' proprietary rights have continually been interfered with by people entering onto and trespassing upon their land, damaging their property by cutting the chain and accessing the pump and bore without their consent.

[140] Mr Palmer recalled that in early 2022, Mrs Wilkinson came to the front door of the Palmers' property complaining about not being able to access the bore pump and stating that she was entitled to do so because she had an arrangement with Mrs Byrne, the owner of 8 Tarwine Street. Mr Palmer pointed out to Mrs Wilkinson that the matter had nothing to do with her, that they were not a party to any arrangement that she may have had and suggested that she ask Mrs Byrne to contact Mr Palmer. Mr Palmer stated no contact was made by Mrs Byrne until August 2022.

[141] According to Mr Palmer, he and his parents' concerns about persons from neighbouring properties randomly accessing 11 Tailor Street to use the bore have been dismissed as being irrelevant by the current owners and occupiers of 8 and 10 Tarwine Street, who simply seek to exercise more control over his parents' land and the use of the bore. He believed they were completely indifferent to his parents' rights as the registered owners of 11 Tailor Street to use and enjoy their land and control access to it.

[142] Mr Palmer confirmed that the survey conducted by Eagle Surveys showed the bore was wholly situated within the boundary of 11 Tailor Street. The survey also indicated that the pump enclosure encroached onto the property of 8 Tarwine Street. Mr Palmer remedied the encroachment by reconfiguring the pump enclosure, so that it is now enclosed solely on his parents' side of the boundary. In addition, the pump was unplugged from the electricity supply and the water pipe from the pump to the Byrnes' property was also disconnected.

[143] In addition to his affidavit evidence, Ashley Palmer gave the following further oral evidence in chief at the hearing.

[144] He identified his hand-drawn diagram of the pump enclosure and exhaust pit. He said the diagram depicted the state of things from when his parents first bought 11 Tailor Street in 1991 and that it remained that way for the next 20 or so years, until the electric pump was installed. Mr Palmer described, and the diagram showed, the pump enclosure as having a hinged lid, with the hinges being at the back of the enclosure, closest to the neighbouring property side, and the lid opening from the Palmers' property side. He further described, and the diagram showed, there being two holes in the block wall on the Palmers' property side of the enclosure, one for a water pipe and the other for the exhaust pipe. Mr Palmer described the exhaust pit as consisting of a concrete sump trap.

[145] Mr Palmer stated the first time he had spoken to Mrs Byrne was the evening after his father-in-law, Gary, had given Mr Byrne a key for the pump enclosure. He said that he had called Mrs Byrne to explain about the pump and to introduce himself. His recollection of the conversation was that he told Mrs Byrne that she had been given a key to use the pump, if she chose to do so, and that he explained the troubles he had had with the Wilkinsons. Mr Palmer said he told Mrs Byrne that the Wilkinsons had continuously been using the bore pump without asking the Palmers to use it and that they had caused him a lot of trouble, as had Mr Leatham. He stated that he had asked Mrs Byrne to use it for her property only.

[146] Mr Palmer was then asked about the conversation he had with Mrs Byrne in August 2022. He said his recollection was that Mrs Byrne had asked why they were not getting access to the bore, to which he replied that it was because the Wilkinsons were given access to it and were still causing problems. He stated that Mrs Byrne said 'I don't care. I need water' and that she had asked for a key to access the bore. Mr Palmer stated that he said she could have a key if it was just for herself, but that Mrs Byrne did not accept that as she wanted the Wilkinsons to still have access. He said the Wilkinsons were using the bore pump every day and he could not agree to that, so they did not ultimately come to an agreement about Mrs Byrne being given a key.

[147] In cross-examination, Mr Palmer denied the suggestion put to him that no conversation took place with Mrs Byrne in April 2022. He further denied the suggestion that during the August 2022 conversation with Mrs Byrne he had agreed to give her a key for the pump enclosure.

[148] When asked about the length of his involvement with 11 Tailor Street, Mr Palmer said he had had a lot to do with the property ever since his parents bought it in 1991. Although he was only 11 years old at the time, he said that he would help his father with the maintenance and yard work. He confirmed that since 1997, when he was about 17 years old, he has managed the property.

[149] Mr Palmer agreed that when he took over the management of 11 Tailor Street, Mr Mills was then the neighbour at 8 Tarwine Street. He agreed that Mr Mills had been using the bore at that time and that he had never asked Mr Palmer for his permission to do so. He further agreed that Mr Mills' use of the bore did not interfere with his parents' property. In response to the suggestion put to him that there was an understanding that the bore was shared, Mr Palmer stated 'Well, we always just allowed him to use it'.

[150] As to the original location of the pump enclosure and set up of the bore, Mr Palmer agreed that the pump enclosure had been 47 centimetres across the boundary and that the pump had previously had two taps, one for each direction. He stated that it was different now.

[151] Mr Palmer agreed that the Summersons had never sought his permission to continue using the bore. He further agreed that he did not tell the Summersons that the bore was his or that they could not use it.

[152] With respect to the time the Leathams were living next door, Mr Palmer agreed that they had moved in around 2010 or 2011 and that he initially had a good relationship with Mr Leatham. He also agreed that the bore pump was changed from petrol to electric and that Mr Summerson had paid half the cost. As to who installed the electric pump, Mr Palmer stated 'I don't know who put that in. We've had so many motors, I couldn't tell you the last.' Mr Palmer agreed that the electric pump was initially connected to, and powered by, an electricity point on the property at 8 Tarwine Street and that he or his parents would provide cash to the Leathams to cover the electricity costs.

[153] Regarding the apparent falling out with Mr Leatham, Mr Palmer said this happened in about 2015, after the Wilkinsons had moved into 10 Tarwine Street. He agreed that at that time the bore was being used to water the properties at both 8 and 10 Tarwine Street. Mr Palmer further agreed that he was upset by the Wilkinsons use of the bore. He explained this was because they would turn it off on him and would use it whenever they wanted. He stated they were responsible for the incident in

2015 or 2016 when the sprinklers unexpectedly came on at the Palmers' property, causing water to go through a car and the Palmers' house. He said this happened because 'they' did not know how to operate the pump and they were 'fiddling with all the taps trying to work out how to do it'. Mr Palmer agreed that he had not referred to these matters in his affidavits.

[154] I note it is not clear whether in giving this evidence Mr Palmer was referring to the Wilkinsons as the persons who were fiddling with the taps or whether it was the occupants of the Wilkinsons' property at the time, as he had stated in his affidavit evidence. It seems to me that he was referring to the occupants, as when it was later put to him that he did nothing about this incident at the time Mr Palmer stated, 'Well, I had a word to the people at the time and they simply walked away.'

[155] In response to a suggestion that he had not warned Mr Leatham in 2015 that he would cut off the bore if the Wilkinsons kept using it, Mr Palmer stated that he had mentioned that to both Mr Summerson and Mr Leatham and that they had agreed that whoever bought number 10 Tarwine Street was not to use the bore. He agreed that he had not mentioned any such conversations in his affidavits. He denied the suggestion he had not said anything of the sort to Mr Leatham about cutting off the water because the bore was shared. He denied the suggestion that he had not spoken to Mr Summerson, adding that Mr Summerson had said that he would sort it but that as Mr Palmer knew the property (i.e., 8 Tarwine Street) was going to be sold they decided to be patient and wait for it to be sold.

[156] Mr Palmer agreed that if he owned the bore, as the Palmers claimed, he could have cut off access at any time but added, 'But being neighbourly…We tried to get along with our neighbours.' He agreed that he had not locked the pump enclosure after the incident during the 2015 to 2016 Christmas period but said that was because Mr Leatham was still living next door at the time and was in and out of the pump enclosure every day.

[157] Mr Palmer also agreed that he had not cut off access after the 2018 incident, where someone had apparently unplugged his generator from the pump. Mr Palmer added that on multiple occasions someone had either unplugged his generator from the pump or turned it off.

[158] With respect to the Byrnes, Mr Palmer agreed that they became the owners of 8 Tarwine Street in 2021. He denied that he saw their arrival as an opportunity to lock the pump enclosure. He instead said it was an opportunity to just keep it secure and that was why he had given the Byrnes a key. He agreed that he had given them a key without them requesting it. He stated he did so because he was just 'being neighbourly'. He agreed that after he had given the Byrnes the key, he had seen someone else use the bore many times and that was why he had changed the lock.

[159] When it was put to Mr Palmer that he knew the Byrnes were not local and therefore they would not have known about the long history of the shared bore, Mr Palmer stated 'No, I'd said that we'd always – we allowed people to use it, and I said we'll continue to let them use it.'

[160] Mr Palmer agreed that he had sent the text message to Mrs Byrne on 3 December 2022, in which he had advised he was locking off the bore due to 'unfortunate circumstances'. He denied that the unfortunate circumstances concerned the previous incident where water had gone through his car and the house. He instead explained that he was referring to the Wilkinsons continuing to use the bore and that the Byrnes had given them the key or access to the bore.

[161] Mr Palmer disagreed with the suggestion that he did not know the borehole was on his land until the survey had been done. He said that he thought it was on his land and that there had originally been survey pegs in place but, because they had been moved, he could not prove that the bore was on the Palmers' property without a survey. He further stated that Mrs Byrne had said 'prove it to me' and that was why he had the survey done. He agreed that he had previously known of the encroachment by the pump enclosure, but that they could not do anything about it before as they needed to know the exact boundary to be able to fix the encroachment. He explained that the encroachment was by the pump enclosure, which went across onto the Byrnes' property, but that the bore and pump had been located on the Palmers' property. He disagreed that he had known the pump enclosure was owned by the owners of both 8 Tarwine Street and 11 Tailor Street.

[162] As to the diagram he had drawn of the pump enclosure and exhaust pit, Mr Palmer disagreed with the suggestion that it was only accurate if it assumed the neighbouring properties were in opposite positions to that which he had described in his evidence, so that the exhaust pit shown in the diagram would be on the Byrnes' property. He explained that the photographs of the pump enclosure in evidence showed the exhaust pit pipe exiting from a hole in the pump enclosure wall on the Palmers' property side.

Can and should a property vesting order be made in favour of the Byrnes?

[163] The Byrnes' primary case is for relief by way of a property vesting order under s 197 of the *PLA.* The Byrnes seek orders for the Palmers to transfer to them a small part of the Palmers' land so as to effect a boundary realignment. That would result in the bore then being situated on the shared boundary between their property and the Palmers' property.

Relevant provisions of the PLA

[164] This aspect of the Byrnes' application is made pursuant to s 196 of the *PLA* which provides:

> **196 Relief in case of improvements made by mistake**
>
> Where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that—
>
> (a) such land is the person's property; or
>
> (b) such land is the property of a person on whose behalf the improvement is made or intended to be made;
>
> application may be made to the court for relief under this division.

[165] The relief available in respect of such an application is provided for by s 197, which relevantly states:

> **197 Nature of relief**
>
> (1) If in the opinion of the court it is just and equitable that relief should be granted to the applicant or to any other

person, the court may if it thinks fit make any 1 or more of the following orders—

(a) vesting in any person or persons specified in the order the whole or any part of the land on which the improvement or any part of the improvement has been made either with or without any surrounding or contiguous or other land;

(b) ordering that any person or persons specified in the order shall or may remove the improvement or any part of the improvement from the land or any part of it;

(c) ordering that any person or persons specified in the order pay compensation to any other person in respect of—

(i) any land or part of the land; or

(ii) any improvement or part of the improvement; or

(iii) any damage or diminution in value caused or likely to be caused by or to result from any improvement or order made under this division;

(d) ordering that any person or persons specified in the order have or give possession of the land or improvement or part of the improvement for such period and upon such terms and conditions as the court may specify.

(2) An order under this division, and any provision of the order, may—

(a) include or be made upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs (to be taxed as between solicitor and client or otherwise), or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise; and

(b) declare that any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or may vary, to such extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land; and

(c) direct that any person or persons execute any instrument or instruments in registrable or other form necessary to give effect to the declaration or order of the court; and

(d) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and

(e) direct a survey to be made of any land and a plan of survey to be prepared.

[166] Section 198 of the *PLA* identifies the persons who may bring an application under s 196. Such persons include the successor in title to any person upon whose land the improvement or any part of the improvement was intended to be made. I pause here to note that whilst both Mr and Mrs Byrne are the named applicants here, it is only Mrs Byrne who is a successor in title for the property at 8 Tarwine Street.

Submissions

[167] The Byrnes submit that I should find that Mr Plant and Mr Mills intended that the bore be placed on the boundary between their properties and the fact that it was actually placed on the property that is now the Palmers' land was simply a mistake. They note that the only evidence given on this issue was that given by Mr Plant and that he was a credible witness. They emphasise that he was not cross-examined about whether there was any agreement with Mr Mills allowing him to use the bore despite it being on Mr Plant's property. They also emphasise that it was not put to Mr Plant in cross-examination that the location of the bore was not intended to be on the boundary of both properties. They submit that the location of the bore seven centimetres from the shared boundary is patently an error.

[168] The Byrnes say the mistake comes within the scope of s 196. The say the bore is clearly a 'lasting improvement' made on the land that is now the Palmers' property in the genuine but mistaken belief that it was being positioned on the shared boundary. The Byrnes argue that whilst s 196 refers in the singular to 'a person' who makes a lasting improvement on land owned by 'another', the proper construction of the section permits relief to be sought in a case such as this where two persons (Mr Plant and Mr Mills) have made a lasting improvement on land owned by another (Mr Plant) in the genuine but mistaken belief that the land was owned by both of them (i.e., the shared boundary). In that respect they rely upon s 32C of the *Acts Interpretation Act 1954,* which provides that, in an Act, words in the singular include the plural.

[169] The Byrnes submit that in all the circumstances it would be just and equitable to grant the relief they seek under s 197.

[170] The Palmers say s 196 is not intended to apply to the present situation. They emphasise the fact that s 196 refers to the mistake being in respect a lasting improvement made by a person on the 'land of another' and submit the section obviously cannot apply here as Mr Plant made the lasting improvement on his own land. They say to construe the section as the Byrnes contend would be contrary to the evident purpose and scope of the provision. They also submit that the section is not intended to apply to a case like this where the application is made decades after the original sinking of the bore.

[171] In any event, the Palmers submit there was no mistake that would enliven s 196, as it is clear on the evidence that it was Mr Plant alone who arranged for the bore to be sunk, and thereby he alone made the lasting improvement, on land he himself owned. In that respect, they contend that while Mr Plant may have thought that the bore was placed on the boundary, there was no mistake about where the bore was actually sunk. They point to his evidence given in cross-examination, where he agreed that the bore was sunk where he directed it to be sunk, entirely on his own property.

[172] The Palmers also stress that as there is no evidence available from Mr Mills, it is not open to find that Mr Mills was mistaken as to the location of the bore.

[173] In the event that I conclude that the Byrnes may properly pursue an application for relief pursuant to s 196, the Palmers nevertheless submit that in all the circumstances it would not be just and equitable to grant the relief they seek under s 197.

Consideration – s 196

[174] I am satisfied that the bore is a lasting improvement that was made on the land now owned by the Palmers. It is a construction of a permanent character inserted into, and now an enduring feature of, the land.

[175] I pause here to observe that whilst the parties at times referred to use of the bore in a way that implicitly incorporated use of the bore, the pump and pump enclosure, it is necessary to draw a distinction between each of these things. The dispute in this case ultimately concerns access to and use of the bore itself. Access to and use of the pump and pump enclosure are peripheral issues. No specific relief is separately sought in respect of those items.

[176] I am satisfied that the Palmers own the bore. The bore has never moved since it was first sunk in 1983. In the absence of any contrary evidence, I conclude that when the Palmers purchased their property in 1991, they necessarily acquired ownership of the bore. Once they registered their interest in their property they acquired indefeasible title to the land, including any improvements or fixtures situated upon it, including the bore.

[177] Nevertheless, I find that the bore was mistakenly placed on the land now owned by the Palmers. In my view the evidence clearly establishes that it was Mr Plant's intention to have the bore sunk on the shared boundary between his property and Mr Mills' property. The fact that Mr Plant agreed in cross-examination that the contractor sunk the bore at the location where he directed and instructed (which happened to be on his own property) does not provide any evidence of a contrary intention on his part.

[178] Furthermore, I am satisfied that Mr Plant's evidence of an agreement with Mr Mills for a shared bore to be placed on the shared boundary provides ample evidence from which I may infer that Mr Mills also intended that the bore would be placed on the shared boundary. There was no challenge to Mr Plant's evidence that Mr Mills agreed with his proposal about a shared bore being positioned on their shared boundary, nor as to his evidence that after the bore had been sunk that they each used the bore on a shared basis, consistent with their agreement.

[179] Had the bore been sunk on the shared boundary as intended and believed, it would necessarily have been located partly on Mr Plant's land and partly on Mr Mill's land. The bore would in effect straddle the boundary line.

[180] Upon these findings, it remains to consider whether I accept the Byrnes' submission that the present case falls within the ambit of s 196. Whether it does or not depends upon the proper construction of the provision. In interpreting the section, I must commence with examining the text of the legislative provision itself, as that is the surest guide to legislative intention. However, the text does not stand alone and I must also consider the context in which the provision appears within the *PLA,* its purpose, and the mischief it seeks to remedy.[1] Further, I bear in mind, as s 14A(1) of the *Acts Interpretation Act* stipulates, the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.

[181] The terms of s 196 provide for two separate situations where relief may be sought under Part 11, Division 2 of the *PLA.* The difference between the two situations lies in the identity of the person who makes the lasting improvement. The first situation is contemplated by s 196(a), where a person makes the lasting improvement on land owned by another in the genuine but mistaken belief that the land is their own. This situation might arise, for example, where a landowner intends to build a dwelling upon their own land, but they mistakenly build it on the land of a neighbour. The second situation is contemplated by s 196(b), where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that the land is the property of a person on whose behalf the improvement is made or intended to be made. This situation might arise, for example, where the landowner engages a construction company to build a dwelling upon their own land, but the construction company mistakenly builds it on the land of another person.

[182] In each of these situations, the relevant state of mind that must be held is a genuine but mistaken belief as to ownership of the land upon which the lasting improvement is made. That state of mind must be held by the person who 'makes' the lasting improvement. In the examples I have given above, the relevant state of mind can be said to be held by the person who actually does the work to make the lasting improvement. However, that is not to say that these are the only situations contemplated by s 196. Neither example identifies what act must be done to 'make' the lasting improvement. The word 'makes' is not defined for the purposes of s 196. The ordinary meaning of the verb 'make' includes 'to bring into existence by shaping material, combining parts, etc…', 'to produce by any action or causative agency', 'to cause to be or become; render' and 'to cause, induce or compel'.[2] I consider these various definitions of the word 'make' are applicable to the interpretation of the word 'makes' in s 196. Accordingly, in my opinion, the word 'makes' is not there intended to be confined simply to the person who physically constructs or builds the lasting improvement. It also includes a person who causes another to do or to carry out the construction or building of the lasting improvement.

[183] In my view, the word 'makes' must be interpreted in this way to ensure s 196 will apply in all intended circumstances. It surely cannot have been Parliament's intention that the provision would apply where a landowner puts up a permanent garden shed on their neighbour's land in the genuine but mistaken belief that they were building on their own property, but would not apply where the same landowner, under the same genuine but mistaken belief, requested a friend to build the garden shed and showed them where to put it. Such an interpretation would

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1 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

2 *Macquarie Dictionary* (online at 14 March 2024) 'make' (defs 1, 2, 3, 7).

potentially produce absurd results. Application of the provision would instead depend entirely upon whether the friend held the mistaken state of mind, irrespective of the landowner's state of mind.

[184] It is apparent that the language s 196 is expressed in the singular throughout. That is evident from the wording of its chapeau in terms of the person who 'made' the lasting improvement and the land upon which it was made, being the land of 'another'. It is further evident in the singular references to a 'person' which follow in ss 196(a) and (b).

[185] The constructional choice posed by the argument advanced by the Byrnes is whether the singular references in the section may be read in the plural, as s 32C of the *Acts Interpretation Act* would seemingly permit.

[186] At first sight, it may be said that there is an immediate oddity in the idea that a person who makes the lasting improvement on their own land could bring an application for relief pursuant to s 196. However, such oddity only exists if the parties referred to in s 196 are considered singularly as individuals.

[187] In my view, nothing within the plain text of the section precludes references in the singular being construed as references to the plural in accordance with s 32C. I also do not consider that such an interpretation is contrary to the purpose of s 196 or the mischief which it seeks to remedy.

[188] The words of s 196 must be construed in a way that will embrace all possible instances where a lasting improvement is made on the land of another in a genuine but mistaken belief. For example, the lasting improvement may be made by several persons who are co-owners, being either joint tenants or tenants in common. I see no reason why s 196 would not apply in such a case, permitting the 'person' who makes the lasting improvement to be read in the plural as the co-owners of the land.

[189] Similarly, the reference to land owned by 'another' may naturally be read in the plural as land owned by others.

[190] The use of the word 'another' does of course naturally imply that it is a different person to the person who makes the lasting improvement. On the Palmers' argument, the section is not engaged because Mr Plant is both the person who made the lasting improvement and the owner of the land on which it was made. Therefore, they argue, he is not 'another'.

[191] Again, that argument might hold if the references to 'person' and 'another' in s 196 were restricted to the singular. However, as each of those terms must in my view be construed in a way that also encompasses the plural, the argument cannot be accepted. Despite the commonality of Mr Plant, the persons who made the lasting improvement (Mr Plant and Mr Mills) are not the person who owned the land upon which it was made (Mr Plant). The genuine but mistaken belief of each of them was that the lasting improvement was being made on both their lands, across the shared boundary, when it was actually made only on Mr Plant's land.

[192] There is no temporal restriction or limitation expressed by the terms of s 196 as to when relief may be sought in respect of an improvement made by mistake. I see no reason why one should be implied. In my view, the time between the making of the lasting improvement and the discovery of the mistake about the land upon which it is made may well be a relevant consideration under s 197, but it is not relevant to whether an application may be made pursuant to s 196 for relief under Part 11, Division 2 of the *PLA.*

[193] Aside from the textual analysis that I have undertaken, it is necessary to construe s 196 within the context of the entirety of the *PLA* generally and the specific provisions Part 11 of the *PLA* in particular and to have regard to the purpose of the legislation and the mischief it seeks to address.

[194] The *PLA* is one of the principal enactments dealing with property law in Queensland. The breadth of the *PLA* is revealed by its long title: 'An Act to consolidate, amend, and reform the law relating to conveyancing, property, and contract, to terminate the application of certain statutes, to facilitate the resolution of financial matters at the end of a de facto relationship, and for other purposes'. The *PLA* is not intended to be an exhaustive embodiment of the general law relating to property. It is an Act that supplements, modifies or simplifies the general law in some respects, but in other respects supplants the general law by creating a legislative regime dealing with a particular subject matter. Part 11 of the *PLA* is an example of the latter. It deals with the circumstances in which a person may seek relief from the court by reason of 'encroachment' or 'mistake'.

[195] The legislation is remedial. It is evident that the purpose of the legislation is to provide a convenient and readily available means to rectify or address a mistake that would otherwise result in a person inadvertently acquiring ownership of a lasting improvement, simply because it was wrongly placed on their land.[3]

[196] Given Part 11, Division 1 deals with 'Encroachment of buildings' and establishes a mechanism by which an 'encroaching owner' or an 'adjacent owner' may apply to the court for relief where the adjacent owner's land is affected by an encroachment, it seems to me that Division 2, dealing with 'Improvements made under mistake of title' must necessarily deal with circumstances other than encroachment. Therefore, in a situation where a structure is mistakenly built by a landowner partly on their own land but partly on the land of an adjoining landowner, relief might be sought by either landowner under Part 11, Division 1 but not under Division 2. Division 2 would only apply where the mistake in construction is made wholly on the land of another and not where the structure encroaches upon the land of another by extending across a shared boundary.

[197] Section 196 must also be construed harmoniously and consistently with ss 197 and 198 of the *PLA*.

[198] With respect to s 198, it is notable that whilst s 196 provides for the circumstances in which an application may be made to the court for relief under Division 2, it does not itself identify who may make such an application. Rather, it uses the permissive language 'application may be made to the court for relief'. Consistently with that language, s 198 specifies the persons who may make an application for relief. Such persons are not limited to the owner of the land on whose behalf the improvement was made. Section 198 again uses the singular term 'person' throughout. Its terms do not otherwise suggest that s 196 should be interpreted in the manner contended for by the Palmers. Indeed, they readily, and must necessarily, accommodate the plural as would ordinarily follow from application of s 32C of the *Acts Interpretation Act*. Furthermore, as s 198(1)(d) makes plain, an application for relief may be made by a successor in title of any person upon whose land the improvement was intended to be made. The fact that a successor in title may make such an application further confirms that there is no temporal limitation or restriction upon the making of an application for relief pursuant to s 196.

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3 *Newman v Powter* [1978] Qd R 383.

[199] Similar conclusions follow from a consideration of the terms of s 197. One immediate difference evident in the language employed by s 197 when compared to that used in s 196 is that the expression 'person or persons' is used in s 197(1) when enumerating the various orders that may be made where an application is made pursuant to s 196. Whilst application of s 32C of the *Acts Interpretation Act* might make the references to 'persons' otiose, in my view the express inclusion of the plural term in s 197(1) militates in favour of a construction of s 196 that necessarily incorporates the plural. Such an interpretation would enable a harmonious construction of ss 196, 197 and 198. More than one person may have made the lasting improvement on land owned by another, or others, under a genuine but mistaken belief that they were making the lasting improvement on their own land (s 196). Those persons could then make an application to the court for relief under Part 11, Division 2 of the *PLA* (s 198(1)(a)). Upon hearing such an application, if the court formed the opinion that it was just and equitable to grant relief to those persons, an order might be made under s 197(1), such as a property vesting order under s 197(1)(a).

[200] I consider the context and purpose of the legislation confirms my conclusion as to the proper construction of s 196 and its applicability in the circumstances of this case.

[201] In my opinion, the present case therefore falls within the ambit of s 196. I am satisfied that Mr Plant and Mr Mills were the persons who made the lasting improvement, notwithstanding that they did not themselves physically sink the bore. They did so by agreeing to sink the bore on their shared boundary and arranging for the drilling contractor to do the work. I do not consider the fact that it was Mr Plant who engaged the contractor or directed him where to drill means that it was he alone who 'made' the lasting improvement.

[202] Furthermore, as the lasting improvement was made solely on the land of Mr Plant, I consider it was made on the land of another.

[203] In my opinion, the requirements of s 196 are therefore satisfied and Mrs Byrne, as a successor in title of 8 Tarwine Street, is entitled to make an application under Part 11, Division 2 of the *PLA.*

Consideration – s 197

[204] The forms of relief available are set out in s 197 of the *PLA.* There are no prescribed criteria for granting such relief. The court has a broad discretion to make orders granting relief if it is of the opinion that it is 'just and equitable' to do so. It is not possible, nor desirable, to attempt to identify an exhaustive list of the factors that will be relevant to the exercise of the discretion. Each case will of course be determined according to its particular facts.

[205] In this case I consider the following factors are relevant:

(a) the nature, extent and purpose of the lasting improvement;

(b) the size, location, value and features of the land upon which the lasting improvement has been made;

(c) the nature and circumstances of the mistake and what the parties knew about those matters;

(d) the time that has elapsed between the making of the lasting improvement, the discovery of the mistake and the application for relief;

(e) the relationship between the parties;

(f) the conduct of the parties in respect of use of the lasting improvement and the mistake;

(g) the nature of the relief sought;

(h) the consequences for the applicants if the relief sought is not granted; and

(i) the consequences for the respondents if the relief sought is granted.

Nature, extent and purpose of the lasting improvement

[206] The lasting improvement is a water bore. Its purpose is to provide access to subterranean water supplies. The water it supplies is primarily used for the irrigation of residential gardens or other non-potable purposes. It is occasionally used for topping up residential water tanks.

[207] The bore itself is a small hole that has been drilled down into the earth on the Palmers' property, in which a steel pipe casing has been inserted to maintain the aperture. Although there is no evidence of its actual size or depth, I infer that the bore has a relatively small diameter, at least less than the width of the pump enclosure, and is at least about 30 metres deep.

Size, location, value and features of the land

[208] The land in question is a small portion at the rear of the Palmers' property. It is a relatively flat, grassed area that is part of the Palmers' backyard. It has no other obvious use. The bore sits 7cm inside the boundary they share with the Byrnes. Taking into account the area covered by the bore, pump and pump enclosure, the area of land concerned is 700cm^2.

[209] As to the value of the land, I accept Mr Anderson's evidence and conclude that the land alone is worth $105.

Nature and circumstances of the mistake and the parties' knowledge

[210] As previously noted, I accept the evidence of Mr Plant as to the nature and circumstances of the mistake which led to the bore being unintentionally sunk solely on the property now owned by the Palmers.

[211] This not a case where the mistake as the placement of a lasting improvement was immediately apparent or known by one or both of the parties to this application. Neither owned their properties at the time that bore was sunk.

[212] As I have already concluded, it seems to me that when the bore was originally sunk it was simply located at a point which, wrongly, was estimated and believed to be on the boundary. Whether it was positioned precisely and equally on the boundary or not does not seem to have mattered too much to the previous owners of the adjoining properties, Mr Plant or Mr Mills, as their agreement was to share the costs and use of the bore regardless. On the basis of Mr Plant's evidence, I conclude that he and Mr Mills each believed that the bore was on their shared boundary and neither was aware that the bore was actually situated wholly on Mr Plant's property.

[213] There is no evidence as to what the Jones', the next owners of 11 Tailor Street, knew about ownership of the bore or its location or that it had mistakenly been positioned on their side of the shared boundary.

[214] Both Terrence and Ashley Palmer confirmed in their evidence that they were not aware of the facts and circumstances relating to the sinking of the bore. Their evidence is that it was simply operational when they purchased their property.

[215] Similarly, there is no evidence that any of the subsequent owners of 8 Tarwine Street, before the Byrnes, were aware of the mistake.

[216] It seems to me that the Byrnes only became aware of the apparent mistake at about the time when Mr Plant provided his first affidavit, sworn 6 March 2023, for the purposes of this proceeding, shortly before they filed their application for relief.

[217] I conclude that the Palmers also only became aware of the matter after the proceeding was commenced.

The time elapsed since the mistake, discovery and the application for relief

[218] The bore was sunk in 1983. The precise position of the bore, as being solely on the land of the Palmers, was only confirmed by the survey they had done in November 2022. It was about this time that the Palmers first positively asserted to the Byrnes that they owned the bore. The Byrnes became aware of the bore being solely on the Palmers' property when they received a copy of the survey and the accompanying notice of encroachment in respect of the pump enclosure.

[219] The present application for relief was filed by the Byrnes on 30 June 2023.

Relationship between the parties

[220] The Byrnes and the Palmers are neighbours. The Palmers own the property at 11 Tailor Street. Mrs Byrnes owns the rear adjoining property at 8 Tarwine Street.

[221] It seems to me that the parties intend to remain as owners of their respective properties and they will therefore continue to be neighbours.

Conduct of the parties

[222] Whilst I consider the Palmers are the owners of the bore, as it is situated on their land, I am not satisfied that they have always known or believed that they exclusively owned it, whether because they knew or believed it was on their land or otherwise.

[223] In that respect, I do not accept the evidence given by Terrence Palmer that he always knew the bore was on his land, as it was next to the survey pegs. His ability to make such an observation is entirely inconsistent with his inability to make a similar observation in respect of the patent encroachment across the boundary by the pump enclosure. Whilst he was certain about the bore being on his land because of its proximity to survey pegs, he was inexplicably uncertain about the position of the pump enclosure. When it was put to him that, on his evidence, it must have been obvious from the 'get go' that the pump enclosure encroached on the neighbouring property, he answered 'not obviously'. His evidence is inconsistent. I cannot accept that he was unable to estimate the larger and more obvious 47cm encroachment by reference to the position of survey pegs, yet he was able to discern the smaller 7cm distance between the bore and the boundary by reference to the same markers.

[224] Similarly, I do not accept Ashley Palmer's evidence that he always knew that the bore was on the Palmer's land. He too claimed his knowledge of this matter was due to the previous location of survey pegs, which had since apparently been moved. I consider it unlikely that Ashley would have paid much attention to the position of the bore and its proximity to any survey pegs when his parents first purchased the property. It is to be recalled that he was only 11 years old at the time.

[225] It seems to me that there has been a degree of post-fact reconstruction by both Terrence and Ashley Palmer as to their knowledge of the location of the bore, informed by the results of the 2022 survey. In my opinion the more probable state of affairs is that the Palmers simply did not turn their mind to the issue of the precise location of the bore, or the question of whether they exclusively owned it, until recently, as it was unnecessary to do so.

[226] In many respects, it does not really matter whether the Palmers previously knew or believed that they owned the bore. To my mind it is more important to consider what they knew or believed about its use by others and how they behaved with respect to the use of the bore by others.

[227] In that respect, I find that the bore has always been used as a shared bore since its inception. That was the consistent evidence given by each witness, including Terrence and Ashley Palmer. I further find that at all times before the present dispute the Palmers knew or believed that the bore had always been used as a shared bore and they treated it as such. In my view, the evidence supporting these conclusions was again consistent across all witnesses.

[228] In addition, the previous configuration of the pump and pump enclosure supports the conclusion that the bore was always used as a shared bore. I accept Mr Plant's unchallenged evidence that the pump initially had hoses which connected to both sides. It is apparent that at some point the connections have been upgraded to a dual valve tap arrangement, whereby the water flow could be switched between one or the other of the adjoining properties. That seems to have been the position when the Palmers purchased 11 Tailor Street. Further, it is apparent that at some stage both sides had underground pipes and sprinkler systems installed to carry the water from the bore, via operation of the pump, though to taps and outlets on their respective properties. Again, this seems to have been the state of things when the Palmers bought their property.

[229] I am satisfied that the Palmers knew that Mr Mills, the Summersons and the Leathams each used the bore. I am further satisfied that the Palmers never asserted their exclusive ownership of the bore and never required their previous neighbours to seek or obtain their express permission to use the bore. It seems to me that it has always simply been understood by both sides that the neighbours at 8 Tarwine Street had shared access and use of the bore.

[230] I find that sometime before Mrs Byrne bought the property at 8 Tarwine Street, Ashley Palmer had complained to each of Mr Summerson and Mr Leatham about the Wilkinsons' use of the bore. I do not accept Ashley Palmer's evidence that he had raised this matter with Mr Leatham as far back as 2015, or that he had ever threatened Mr Summerson or Mr Leatham that he would cut off the water supply if the use of the bore water by other neighbours continued. This evidence only emerged in cross-examination and is inconsistent with Ashley Palmer's affidavit evidence, in which he simply said he had raised his objection to the use of the bore

by the Wilkinsons with Mr Leatham, who apparently responded by stating that he was in control of the bore not the Palmers.

[231] I am satisfied that, until the recent dispute emerged with the Byrnes, the Palmers have not at any previous time asserted that they were the exclusive owners of the bore.

[232] In respect of the more recent conduct between the Palmers and the Byrnes, I do not accept Ashley Palmer's evidence that he had a telephone conversation with Mrs Byrne on the evening of the day his father-in-law gave the Byrnes a key for the pump enclosure. Mr Palmer did not directly refer to or describe the supposed telephone call in his affidavit evidence. Rather, that detail emerged for the first time when Mr Palmer gave oral evidence in chief at the hearing of the application.

[233] Had Mr Palmer had such a conversation directly with Mrs Byrne, then I would have expected it would have featured clearly and prominently in his affidavit evidence. Instead, to the extent that he made an apparent reference to the conversation, Mr Palmer simply stated, employing the passive voice to do so, that when Mrs Byrne was given a key 'she was advised that we were happy for her to use the bore pump for her use on her property only, but due to previous issues with neighbours, we did not allow anybody else to access it.' The expression used by Mr Palmer in his affidavit evidence suggests that it was his father-in-law, rather than he himself, who had the conversation with Mrs Byrne.

[234] I accept Mrs Byrne's evidence as to what was said on this occasion and by whom it was said, namely that it was 'Gary', Ashley Palmer's father-in-law, who when giving the Byrnes the key for the pump enclosure had said to them that 'one of the neighbours had been using the bore without permission, so they had felt the need to put a padlock on'.

[235] I find therefore that the Palmers did not tell Mrs Byrne during this first interaction that they exclusively owned the bore, nor did they intimate that it was theirs and it could only be used by the Byrnes with their permission. The statements made by Gary and the giving of the key to the Byrnes are entirely consistent with the neighbouring properties having shared use and shared ownership of the bore.

[236] At some point after the initial padlocking of the pump enclosure, the Palmers changed the lock. It seems the Palmers did this because they were unhappy that the Wilkinsons were using the bore without their permission. The Palmers did not give Mrs Byrne a key for the new lock. As a result, Mrs Byrne instructed Mel Byrne to cut the lock so she could access the bore on her behalf. This scenario was repeated several times thereafter.

[237] Mrs Byrne ultimately spoke to Ashley Palmer about the matter during their telephone conversation in August 2022. At that time the Byrnes had again been locked out of the pump enclosure and had not been given a key. I am satisfied that during that conversation Ashley Palmer advised Mrs Byrne, for the first time, that the Palmers owned the bore and that he had been padlocking the pump enclosure because the Wilkinsons had been using the bore without permission. I am also satisfied that Mrs Byrne advised Mr Palmer that she understood it was a jointly owned bore and that the Wilkinsons had been occasionally using the bore with her permission.

[238] I do not accept Ashley Palmer's evidence that although Mrs Byrne asked for a key, he did not provide it because they were unable to come to an agreement about the

Wilkinsons using the bore. This aspect of the conversation was disputed. I prefer Mrs Byrne's evidence that Ashely Palmer agreed to leave a key with Mel Byrne as she had requested, but that he never did. Mrs Byrne's evidence, both in her affidavit evidence and when tested in cross-examination, was consistent on this point. In contrast, the content of the conversation was not a matter that Ashley Palmer explained in his affidavit evidence at all. Indeed, he made only passing reference there to the fact that there had been 'contact' with Mrs Byrne on that date. He only elaborated upon the conversation for the first time during the oral evidence in chief he gave, by leave, at the hearing. Given the importance of this evidence to the issues in dispute, I find it completely inexplicable and implausible that, if it occurred as he said, it was not part of his affidavit evidence. It seems to me his evidence about what was said in this conversation was simply an expedient attempt to explain his decision to refuse to provide the Byrnes with any further access to the bore.

[239] In November 2022, the Palmers arranged for their property to be surveyed. The survey confirmed the bore was on their land and that the pump enclosure encroached on the Byrnes' property.

[240] On 3 December 2022, Ashley Palmer sent the text message to Mrs Byrne, advising that he had had the survey done which confirmed the bore was on the Palmers' property but that the pump enclosure encroached on Mrs Byrne's property. He advised that he would rebuild the pump enclosure so that it would not cross the boundary but that the Byrnes' would no longer have access to the bore due to what he described as 'unfortunate circumstances', by which he meant the Wilkinsons' use of the bore without the Palmers' permission.

[241] Ashley Palmer then removed the encroachment. In doing so, he disconnected the connections from the pump to the Byrnes' side, removed the pump from its previous position and relocated it within a reconfigured pump enclosure constructed entirely on the Palmers' land. Since that time the pump and bore has continued to be inaccessible to the Byrnes as the new pump enclosure remains locked.

[242] Thereafter, lawyers acting for the Byrnes' and the Palmers' exchanged correspondence about the bore dispute.

[243] By way of summary with respect to the most recent events, it is plain in my view that the Palmers started locking the pump enclosure some time after Mrs Byrne had purchased her property. They did so because they were unhappy that persons other than their adjoining neighbours had been using the bore water. They saw the change of ownership of 8 Tarwine Street as an opportunity to prevent access by persons other than the Byrnes. The Palmers were unhappy when, despite locking the pump enclosure and telling Mrs Byrne that they had had issues with other persons using the bore without permission, the Wilkinsons continued to use the bore. As a result, Ashley Palmer replaced the lock and did not provide a key to Mrs Byrne. Consequently, Mrs Byrne instructed Mel Byrne to cut the lock. This repeated several times, culminating in the August 2022 conversation. Following that conversation, the Palmers decided they would not provide a key to the Byrnes. They subsequently obtained the survey to confirm their belief that the bore was on their land and applied a larger chain and padlock on the pump enclosure to assert a claim of exclusive ownership and to prevent access to the bore by others. I am satisfied that since receiving confirmation that the bore was on their land they have disingenuously maintained that they have always known it to be so and insisted that any prior use by others, including their adjoining neighbours, was only ever with their permission.

Nature of the relief sought

[244] The court may grant relief by making one or more of the types of orders identified in s 197(1)(a) to (d). Any order made by the court may include or provide for any of the associated or ancillary matters set out in s 197(2).

[245] In this case, the primary relief sought is a property vesting order, under s 197(1)(a). By such an order, the Byrnes seek that there be vested in them such part of the Palmers' land that will result in the bore being located on the boundary between the two properties. It seems that the intended effect of such an order would be that the shared property boundary between the adjoining properties would be slightly adjusted, by the Palmers ceding and transferring a small portion of their land to the Byrnes, so that the imaginary line of the boundary would run directly through the centre of the borehole.

[246] If such relief was granted, then it would be necessary to make any associated, consequential orders to give effect to the property vesting order. It seems to me that such orders would likely need to make provision for mutual easements to enable each of the owners of the adjoining properties to be able to access, use and maintain the shared bore.

Consequences for the applicant if the relief sought is not granted

[247] In the event that the primary relief sought by the Byrnes is not granted, the immediate consequence would be that I would then need to further consider what other relief might be available to the Byrnes and the prospects of such relief being granted.

[248] In that respect, I am cognisant that if the primary relief sought is not granted, the Byrnes alternatively seek orders granting them an easement for access to, and use of, the pump and bore located on the Palmers' property. The Byrnes seek this alternative relief by way of an order in respect of a statutory right of user under s 180 of the *PLA* or alternatively by recognition of an easement by prescription.

[249] Whilst an easement might in theory involve a lesser interference with Palmers' property rights, in reality I consider it might actually cause a greater negative impact upon the Palmers' ability to use and enjoy their land. An easement would of course not result in the Palmer's losing a portion of their land to the Byrnes. However, if granted in terms consistent with the relief sought, it would likely result in the Palmers' being compelled to permit their neighbours to enter upon their land in order to access and use the pump and bore, whenever they desired.

[250] The ultimate consequences for the Byrnes if they are unsuccessful in obtaining any of the forms of relief they seek is that they will not have access to a more reliable, consistent water supply. They are not connected to the mains water. They would instead be forced to rely on rainwater and their tank supplies to water their garden and for other purposes.

[251] There is no real evidence that an additional water supply is a necessity. The bore water is said to be potable, but there is no evidence it is used for drinking purposes by anyone or that the Byrnes would intend to use if for that purpose.

[252] There was no evidence adduced as to whether any other alternative water sources existed at Teewah. There is however some evidence, given by Ashley Palmer, that water can be trucked in if necessary. However, no satisfactory evidence was

adduced about the costs and viability of the Byrnes purchasing water from another external source and having it transported to their property.

[253] Aside from that possibility, the only other option available to the Byrnes would be to sink their own bore. Mr Brandt confirmed that it would be possible for the Byrnes to sink their own bore on their property, however it would have to be located in their front yard. It is not possible to reliably estimate the expenses involved in doing so, however I accept Mr Brandt's evidence that it would cost about $20,000 plus GST for him to drill a suitable hole for a bore on the Byrnes' property. The Byrnes would of course need a pump for any new bore, but there is no evidence before me about the costs of a pump.

[254] It seems to me that if the Byrnes are denied the relief they seek and are unable to access and use the bore, they will be inconvenienced as they will no longer have a water supply that they would otherwise wish to use for non-essential, domestic purposes. They might well then decide to pursue another option for an alternative source for their water supply, however it is not possible to know with any certainty what costs and expenses might be incurred by them as it is not clear what option, if any, they might wish to pursue.

Consequences for the respondent if the relief sought is granted

[255] If the relief sought by the Byrnes is granted the Palmers would lose a small portion of their existing land. They would also be left with a small irregularity in the otherwise straight rear boundary they share with the Byrnes.

[256] Another consequence for the Palmers would be that the previous practice of shared use of the bore would of course be restored and they would no longer be able to claim a right of exclusive ownership over it. It would also be likely that the necessary consequential orders that would be made would extend to the granting of an easement permitting the Byrnes to enter their land for any reasonable purpose associated with use and maintenance of the bore, pump and pump enclosure.

[257] I do not accept the submission made on behalf of the Palmers that it would not be possible to adequately compensate them for any transfer of the small portion of land in question. There is no evidentiary basis for the submission and no special use or feature of the land was identified that might justify a conclusion that it was worth anything more than the value determined by Mr Anderson.

[258] I also do not accept the further submission made on behalf of the Palmers that any transfer of the land would affect their ability to erect a boundary fence. There is no evidence that they have any current plans to put up a fence and no evidence that if they did that it could not be built in such a way that would provide a secure enclosure for their yard but also provide them and the Byrnes with the ability to access and use the bore, pump and pump enclosure.

[259] I do not consider granting the relief sought would have any noticeable impact whatsoever on the Palmers' use and enjoyment of the rest of their land.

Conclusion

[260] In my opinion, it is just and equitable to make a property vesting order of the kind sought by the Byrnes.

[261] Of the various factors I have set out above, I consider the original intentions of Mr Plant and Mr Mills, the nature and circumstances of the original mistaken placement of the bore, the many subsequent years of shared use of the bore and the small size

and value of the land in question are the most significant and carry the greatest weight. In my view, those factors clearly demonstrate that it would be just and equitable to grant the relief sought.

[262] Although I am satisfied that it is appropriate to grant the primary relief sought by the Byrnes, I will nevertheless briefly consider the alternative claims for relief as I consider the potential availability of other forms of relief is relevant to the exercise of the discretion to grant relief under s 197.

Can and should an order be made for a statutory right of user by way of an easement?

[263] The first alternative claim for relief sought by the Byrnes is an order for a statutory right of user, in the form of an easement, under s 180 of the *PLA*.

[264] Section 180 provides:

> **180 Imposition of statutory rights of user in respect of land**
>
> (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (the dominant land) that such land, or the owner for the time being of such land, should in respect of any other land (the servient land) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
>
> (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—
>
> (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
>
> (b) on 1 or more occasions; or
>
> (c) until a date certain; or
>
> (d) in perpetuity or for some fixed period;
>
> as may be specified in the order.
>
> (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—
>
> (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
>
> (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and

(c) either—

(i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or

(ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

(4) An order under this section (including an order under this subsection)—

(a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; and

(b) may include such other terms and conditions as may be just; and

(c) shall, unless the court otherwise orders, be registered as provided in this section; and

(d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the court where it is satisfied that—

(i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or

(ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and

(e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.

(5) The court may—

(a) direct a survey to be made of any land and a plan of survey to be prepared; and

(b) order any person to execute any instrument or instruments in registrable or other form necessary

for giving effect to an order made under this section; and

(c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and

(d) give directions for the conduct of proceedings; and

(e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

(6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.

(7) In this section—

owner includes any person interested whether presently, contingently or otherwise in land.

statutory right of user includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.

utility includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.

(8) This section does not bind the Crown.

[265] The form of the statutory right of user sought by the Byrnes is in the nature of an easement for access to and use of the pump and bore located on the Palmers' property. The land of the Byrnes would be the dominant tenement and the land of the Palmers the servient tenement.

[266] The granting of relief under s 180 is discretionary. The court may consider granting such relief where the requirements of s 180 are satisfied.

[267] The first requirements that must be satisfied are expressed within s 180(1). An applicant must establish that the proposed use is 'reasonably necessary' in the interests of the effective use in any 'reasonable manner' of the land that is the dominant tenement.

[268] In *2040 Logan Road Pty Ltd v Body Corporate for Paddington Mews CTS 39149*,[4] Burns J considered the scope of the requirements of s 180(1), stating:

> The enquiry whether what is proposed is "reasonably necessary in the interests of the effective use in any reasonable manner of any land" involves two steps, although they are more often than not taken together. The first is whether the proposed use of the dominant tenement is a use in a reasonable manner of that land and the second is whether that use is reasonably necessary. That said, an applicant for relief does not have to demonstrate that "each and every use (in a

4 [2016] QSC 40, [28] (footnotes omitted).

reasonable manner) of its land is one for which the obligation of user is reasonably necessary" for it is enough if the applicant "can point to a particular use and seek to make its case in relation to it".

[269] In *Lang Parade Pty Ltd v Paluso*,[5] Douglas J summarised the principles in respect of the requirements of s 180(1):

> One should not interfere readily with the proprietary rights of an owner of land.
>
> (a) The requirement of 'reasonably necessary' does not mean absolute necessity.
>
> (b) What is 'reasonably necessary' is determined objectively.
>
> (c) Necessary means something more than mere desirability or preferability over the alternative means; it is a question of degree.
>
> (d) The greater the burden of the imposition that is sought the stronger the case needed to justify a finding of reasonable necessity.
>
> (e) For a right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.
>
> (f) Regard must be had to the implications or consequences on the other land of imposing a right of user.

[270] The second requirements are those listed in s 180(3)(a) to (c), whereby an order of the kind referred to in s 180(1) is not to be made unless it is consistent with the public interest that the dominant land should be used in the manner proposed; that the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and that the owner of the servient land has unreasonably refused to agree to accept the imposition of the obligation.

Submissions

[271] The Byrnes submit that the requirements of s 180 are satisfied and that I should exercise the discretion to grant the statutory right of user sought. They say it is reasonably necessary in the interests of the effective use of 8 Tarwine Street that the court should impose a statutory right of user upon the Palmers' land to enable their continued access to, and use of, the bore and pump. They point to *McClymont v Nelson,*[6] as a recent example of a case in which an easement of the kind they seek was accepted to be within the scope of an order for a statutory right of user under s 180. They further say they are willing to pay reasonable compensation to the Palmers for the imposition of the obligation and that the Palmers unreasonably refused their earlier request to agree to registration of an easement of the kind now sought.

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5 [2006] 1 Qd R 42, 47– 48 [23].

6 [2023] QSC 59 (North J) (***'McClymont'***).

[272] The Palmers accept that the proposed use by the Byrnes of the bore by way of an easement over their land for the purpose of accessing water for their property is *prima facie* a use of the Byrnes' land in a reasonable manner. They also accept that the proposed use could be considered as consistent with the public interest. However, they make these concessions only insofar as the proposed access to and use of the bore would be restricted to access and use by the Byrnes for their property. They say any proposed or suggested use by third parties would not be reasonable and would be contrary to the public interest.

[273] Irrespective, the Palmers submit that the general requirements of s 180 are not satisfied. They say there is no evidence that the easement sought is reasonably necessary in the interests of the effective use of the Byrnes' property. They point to the fact that there are other alternative water supply options available to the Byrnes. They submit that this is not a case of established reasonable necessity, rather the Byrnes simply desire or prefer access to, and use of, the bore on the Palmers' property. They further note that no compensation has actually been offered by the Byrnes and say that it was not unreasonable for the Palmers to refuse the Byrnes' demand to agree to the imposition of an easement.

Conclusion

[274] The first point to consider is whether an easement of the kind sought may properly be the subject of an order under s 180.

[275] In my opinion, it may.

[276] Although the Byrnes cited *McClymont* in support of their argument, the easement in question in that case was not the same as that sought here and the issues were different. *McClymont* was a decision on an application for summary judgment. The parties in that case owned adjacent cattle properties, separated by a highway and railway line. An artesian water bore was present on the defendants' property. The bore had been used for many years by the owners of each of the adjacent properties, including the parties when they became the owners of their respective properties, to source water for the cattle grazing businesses they each ran on those properties. In 2018, the defendants were granted a water licence under the *Water Act 2000* (Qld), permitting them to take underground water, which they did by means of the bore. The defendants subsequently demanded that the plaintiffs cease using water from the bore. In response, the plaintiffs commenced proceedings in which they sought relief pursuant to s 180 of the *PLA* for a statutory right of user in the form of an easement granting them reasonable use of water from the bore for stock purposes. They claimed they had an entitlement to the flow of water to their property. The defendants applied for summary judgment on the basis that, amongst other things, the plaintiffs could not succeed as the right to take or interfere with water was not a right in respect of land and therefore not within the ambit of s 180.

[277] North J agreed with the defendants and struck out the plaintiffs' application. In doing so, his Honour noted that the *Water Act* regulated water and water rights in Queensland and the starting point was that under s 26 of the Act all rights to the use, flow and control of all water vest in the State. His Honour further noted that by granting the licence to the defendants, the State had allowed them to take or interfere with water from the bore, but that nothing in the Act said anything about the rights and interests in the land upon which water may be found. His Honour observed that the licence did not give the plaintiffs any right or interest in the water.

[278] In a passage of his Honour's judgment which the Byrnes cite, North J stated:

> I have no difficulty with the proposition that a land owner with an established entitlement to water can obtain a statutory right of user in the form of an easement under s 180 of the PLA to facilitate the movement of water over the land of another to his land, *Ward v Hull* is an example. But the circumstances applying here are very different. The State has not allowed or authorised the plaintiffs to take water from the subject bore. There is a certain circularity in the plaintiffs' case in light of Sections 26 and 27 of the *Water Act*. They seek an easement to protect water flow which flow the statute does not protect and simultaneously they assert their interest in a water flow to establish the easement.[7]

[279] The situation in the present case is different. Neither of the parties here have, or require, a licence to access and use the underground water extracted by the bore on the Palmers' property. Under 27 of the *Water Act,* the State may allow the use of water by authorising persons to take or interfere with water. Amongst other means, such authorisation may be given by legislation or by a providing a water allocation, water licence or water permit.

[280] In *McClymont* a water licence was needed to authorise the taking of the water from the bore. That is not the case here. In this case there is legislative authorisation provided by s 101(1)(c) whereby, subject to any relevant alteration or limitation prescribed under a moratorium notice, water plan or regulation made under s 1046 of the Act, a person may take or interfere with underground water for any purpose. No moratorium notice or regulation under s 1046 exists here. The relevant water plan covering land defined as the 'Cooloola Sandmass', which incorporates the township of Teewah, is the *Water Plan (Mary Basin) 2006*. Section 70 of that water plan imposes a limitation on any person taking or interfering with subartesian water in the Cooloola Sandmass, with relevant exceptions being provided. Those exceptions include where the taking or interference with water is for domestic purposes where either the works used for taking or interfering with the water were in existence immediately before the commencement of the water plan or where they were installed at a time when the person did not have access to a reticulated town water supply. Each of those exceptions apply here.

[281] However, whilst I am satisfied that the easement as sought may properly be the subject of an order under s 180 of the *PLA,* I am not satisfied that the requirements of s 180(1) are met.

[282] I have already set out above the relevant facts and circumstances relating to the nature and location of the adjoining properties and the position, purpose and use of the bore. The Byrnes use their property as a family holiday home and short-term holiday rental. The easement sought would primarily enable the Byrnes to access and use the Palmers' bore water for watering their garden and for other outdoor purposes on their property. I accept that what is proposed would be in the interests of the effective use of the Byrnes' land in a reasonable manner. The difficulty I have though is with the suggestion that it is 'reasonably necessary' in the interests of the effective use of the Byrnes' land as a family holiday home and short-term holiday rental that they should have a statutory right of user to access and use the Palmers' bore.

[283] It is true that the Byrnes' property is located in a small, relatively isolated village and that it is not connected to the mains water. Aside from water from the Palmers'

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7 *McClymont,* [26] (footnotes omitted).

bore, the Byrnes are otherwise reliant upon rainfall and the water tanks on their property for a water supply. It is also true, as I have found, that there has long been shared use of the water bore and I accept the Byrnes likely purchased the property with an expectation that they would continue to have access to, and use of, the water bore.

[284] According to Mrs Byrnes, the water supply from the bore is important as they use it to fill their water tanks during drought and for watering their garden. As I understand Mrs Byrnes' evidence, there is a need to fill the water tanks about three times per year, depending on rainfall.

[285] Furthermore, I doubt the present conditions at Teewah are much different to those described by Mr Plant which led to him and Mr Mills deciding to sink the bore in the first place. As he explained in his affidavit evidence 'I wanted to have a bore sunk because water was scarce in Teewah in those days and a source of water would be very beneficial. The weather was often dry and hot which meant that the gardens of our properties suffered during dry spells.'

[286] I am mindful that any order made in this case for a statutory right of user by way of an easement would of course burden the Palmers' land. However, in that respect I do not consider the burden would be unduly onerous nor that it would have anything other than a minimal impact upon the Palmers' use and enjoyment of their land. The bore is located very close to the boundary between the adjoining properties. It has been used as a shared bore for nearly forty years. There has been little to no interference with the Palmers' use and enjoyment of their land over the years that they have been the owners of their property.

[287] Although these factors might support a conclusion that the proposed easement is reasonably necessary, there are of course factors that point the other way. I proceed on the basis that the case for imposing such an obligation must be clearly established.

[288] A fundamental difficulty for the case put by the Byrnes is that there was no evidence presented to show they could not make effective use of their land as a holiday home and a short-term rental without access to, and use of, the Palmers' bore. Most of the evidence, and the submissions made in support of this aspect of the Byrnes' case, focused upon the reasonable use that had been made, and would be made, of the bore water, to water the garden on the Byrnes' property. However, what must be established is that the statutory right of user sought is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land.

[289] The fact that there may be alternative water sources available for the Byrnes' property does not preclude a conclusion that the easement sought is reasonably necessary in the interests of the effective use of their land. However, it remains a very relevant considerations in my view.

[290] As I have already noted, the evidence adduced at the hearing showed that the Byrnes have two large water tanks on their property. The water from these tanks is primarily used by the Byrnes to water their garden and other outdoor purposes. It is not said that the bore water is directly used for drinking, showering purposes or other household purposes, but I infer that is what the tank water is used for and therefore if the bore water is used to top up the tanks, then it may also ultimately be used for those purposes. But there was no evidence adduced by the Byrnes that these tanks would not provide sufficient water for the effective use of the Byrnes'

property. In particular, they did not adduce any evidence about the capacity of their water tanks or the likelihood that they might run dry if the Byrnes were unable to access and use the bore to top them up.

[291] The evidence also showed another potential alternative was for water to be purchased and trucked to the Byrnes' property. But no evidence was adduced by the Byrnes as to whether it was feasible for that to be done and, if so, what the costs of doing so might be, or whether it was necessary for this to be done and, if so, how often.

[292] There was also some evidence about the possibility of the Byrnes sinking their own bore. That evidence showed that it may be possible and that it might costs at least $20,000 for the bore to be sunk. Other than obtaining a verbal quote for the estimated costs of sinking a bore the Byrnes had not otherwise pursued this option and have not seriously investigated the potential viability of sinking their own bore.

[293] Whilst reasonable necessity does not require proof that something is essential or absolutely necessary, it does in this context require more than a mere preference, desire or convenience. It is of course a question of degree, but I consider the circumstances here do not go beyond mere desire, preference or convenience on the part of the Byrnes to use the Palmers' water bore. Although it would no doubt be beneficial for the Byrnes to have access to and use of the Palmers' bore as a source of water for their property, that does not demonstrate reasonable necessity in my view.

[294] Accordingly, I am not satisfied that the Byrnes have established the necessary requirements for me to consider granting relief under s 180 of the PLA.

Have the Byrnes acquired an easement by prescription?

[295] The final aspect of the Byrnes' application concerned their claim that through long use of the bore they had acquired an easement by prescription.

[296] Under the common law an easement may be acquired by prescription in certain circumstances where there has been open, uninterrupted use of the servient land by another for at least twenty years, and where such use occurred to the knowledge of the servient landowner and absent any permission by them for such use. In such a case a trespasser may acquire rights in respect of the servient land, by way of an easement, consistent with the use. There is no express grant of the easement. Rather, the right is acquired through the legal fiction of the lost modern grant, which assumes the existence of an express grant that cannot be found.[8]

[297] Use with the permission of the dominant landowner at any stage during the period of at least twenty years will preclude the acquisition of an easement by prescription. Permission may be express or implied.

[298] The Byrnes say that in the circumstances arising here they have established the requirements for an easement by prescription.

[299] The Palmers' primary opposition to this aspect of the Byrnes' claim relies upon the operation and effect of s 198A of the *PLA,* which they say expressly precludes acquisition of an easement by prescription.

[300] Section 198A provides:

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8 *Delohery v Permanent Trustee Co of New South Wales Ltd* (1904) 1 CLR 289, 308-309 (Griffith CJ).

198A Prescriptive right of way not acquired by user

(1) User after the commencement of this Act of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant.

(2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act, the existence and continuance of the easement or right shall not be affected by subsection (1).

(3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded.

[301] The effect of s 198A was an issue in dispute between the parties. Both parties agreed that the provision has not been authoritatively considered.

[302] The Palmers say that easements by prescription have been extinguished by s 198A. They rely on a statement made by Nettle J in *Western Australia v Manando*,[9] where his Honour noted that in most Australian jurisdictions the doctrine of lost modern grant did not operate, citing s 198A by way of example.

[303] Irrespective of the application of s 198A, the Palmers argued that no easement by prescription could arise here as the Byrnes had not established that prior use of the bore was without permission.

[304] The Byrnes say that s 198A does not preclude an easement by prescription in this case. They say the provision is, by its clear terms, confined only to 'easements of way' and that is not the nature of the easement they say they have acquired here. They submit that the remarks of Nettle J in *Manando* were clearly *obiter* and are not binding.

[305] They also point to *Connellan Nominees Pty Ltd v Camerer,*[10] as an example of a case where this Court has accepted a claim based on prescription was capable of succeeding, notwithstanding s 198A of the *PLA*.

As to the issue of permission, the Byrnes say that it is clear on the evidence that they Palmers never gave permission, either expressly or impliedly, for the use of the bore.

Consideration

[306] I do not consider it is necessary to resolve the dispute as to the proper interpretation of s 198A of the *PLA* and whether it has extinguished the doctrine of lost modern grant in respect of an easement of the kind in issue here.

[307] In my opinion there is a much simpler reason why this aspect of the Byrnes' claim cannot succeed. That is, that the suggested acquisition of an easement by prescription cannot impugn the Palmers' indefeasible title to their land.

[308] The Palmers are the registered proprietors of a lot in which they have the fee simple interest under the *Land Title Act 1994* (Qld) ('*LTA'*). Although they became

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9 (2020) 270 CLR 81.

10 [1988] 2 Qd R 248 **('*Connellan'*)**.

registered proprietors of their lot before the commencement of the *LTA,* by virtue of ss 200 and 201 of the *LTA* their interest in their land was automatically taken to be a registered interest under the *LTA* when that Act commenced. Thus, unless a relevant exception applied, by virtue of s 184 of the *LTA*, they enjoy indefeasibility of title in respect of their land, free from all other interests, including the suggested easement by prescription. The only possible exceptions to the indefeasibility of their interest are those provided by s 185. The Byrnes do not contend that any of those exceptions arise in this case.

[309] At best for the Byrnes, it might be suggested (but was not) that the easement is an 'omitted' easement within the scope of s 185(1)(c). However, even if I were to accept that the requirements for an easement by prescription were satisfied here, the suggested easement would not constitute an 'omitted' easement. As s 185(3) makes plain, an easement is taken to have been omitted for the purposes of s 185(1)(c) only when, relevantly, the easement was in existence when the lot burdened by it was first registered, but the easement particulars have never been recorded in the freehold land register against the lot.

[310] That is not the situation here. Any easement by prescription could not have arisen before the Palmers' registered interest in their land was brought under the *LTA.* The Palmers purchased their property in 1991. From that date, the minimum period of twenty years necessary for acquisition of an easement by prescription would have been 2011 at the earliest. The *LTA* commenced operation in 1994. From that time onwards the Palmers have held indefeasible title in respect of their land under the provisions of the *LTA*. Even if the period of user dated back to the original owners of the adjoining properties, such an easement could not have been acquired before 2003, again after the Palmers had acquired indefeasible title under the *LTA*.

[311] The case of *Connellan* supports my conclusion. That was a decision given on a strike out application where the issue of whether an easement by prescription might qualify as an 'omitted easement' under the former *Real Property Acts 1861-1986* (Qld) was considered. The plaintiffs had filed a statement of claim which pleaded, amongst other things, that they had acquired by prescription an easement of way over the land of the defendants. The plaintiffs argued that no such easement could arise because of the operation of certain legislative provisions, including s 198A of the *PLA* and s 44 of the *Real Property Acts*, which provided a similar 'omitted easement' exception to indefeasibility of title as that now provided by s 185(1)(c) of the *LTA.*

[312] In refusing to strike out the plaintiffs' claim, Master Weld accepted that an easement by prescription could be acquired through long user according to the doctrine of lost modern grant, provided that the easement existed before 1 December 1975, being the date that s 198A of the *PLA* commenced.[11] In other words, the period of at least twenty years of long use must have accumulated before that date. Similarly, Master Weld accepted that such an easement might be an 'omitted easement' for the purposes of s 44 of the *Real Property Act,* provided that the easement by prescription had existed when the land was brought under the provisions of that Act.[12]

[313] The circumstances of the present case are dissimilar on both points.

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11 Ibid, 253.

12 Ibid, 255.

[314] Accordingly, I am satisfied that there is no basis to consider whether an easement by prescription may have been acquired by the Byrnes.

Conclusion

[315] The water bore in issue in this case is situated on the land owned by the Palmers. They are therefore the present owners of the bore.

[316] However, this state of affairs is a windfall for the Palmers. They only became owners of the bore because of a mistake made by Mr Plant and Mr Mills when the bore was originally sunk. It was only after the Palmers had their property surveyed that they knew for sure that the bore was on their land and that they could claim exclusive ownership over it. Before that time, they knew the bore had been used as a shared bore for nearly forty years and they had never sought to assert exclusive ownership over it.

[317] I find that the original intention of Mr Plant and Mr Mills was to sink the bore on the shared rear boundary of their respective properties, so that they would each own it and have the benefit of it. Contrary to their intentions at the time, Mr Plant directed that the bore be sunk at a point that was actually on his property, seven centimetres from the shared boundary. In doing so, both Mr Plant and Mr Mills made a lasting improvement on the land owned by Mr Plant, under the genuine but mistaken belief that it was being made on both of their properties.

[318] In these circumstances, I am satisfied that relief in the form of a property vesting order may be granted under s 197. I am further satisfied that it is just and equitable for such an order, and necessary consequential orders, to be made in this case. The effect of the property vesting order and consequential orders to be made will be that the rear shared boundary will be slightly realigned so that the bore is situated on the boundary and will be jointly owned by both the owners of the adjoining properties, as had originally been intended by Mr Plant and Mr Mills. In return, the Byrnes will be required to pay compensation to the Palmers in the sum of $105.

[319] It seems to me that the consequential orders to be made to give effect to the property vesting orders will necessarily include orders:

(a) for the Byrnes to prepare a transfer instrument in registerable form in respect of that portion of the Palmers' land that is to vest in Mrs Byrne;

(b) directing the Palmers to execute the transfer instrument once prepared;

(c) for the preparation and execution of mutual easement instruments in registerable form to enable the Palmers and the Byrnes to enter upon each other's land so that the owners and agents of each property may access, use and maintain the bore, pump and pump enclosure;

(d) directing the Palmers and Mrs Byrne to execute the mutual easement instruments once prepared; and

(e) that the Byrnes pay the costs and expenses associated with each of the above matters, including any legal costs.

[320] I am not satisfied that the Byrnes have established a basis for either of their alternative claims for relief by way of an order for a statutory right of user under s 180 of the *PLA* or to recognise acquisition of an easement by prescription.

Orders

[321] I make the following orders:

1. The application for relief pursuant to s 196 of the *Property Law Act 1974* (Qld) is granted;

2. The applicants and respondents are to prepare a minute of the orders necessary to give effect to my reasons for granting the relief under s 197 of the *Property Law Act 1974* (Qld); and

3. The application in respect of the alternative relief sought is dismissed.

[322] I will hear the parties further as to any other orders that may be required and on the issue of costs.