SUPREME COURT OF QUEENSLAND

CITATION:	*HS South Brisbane Pty Ltd v United Voice* [2019] QSC 274
PARTIES:	**HS SOUTH BRISBANE PTY LTD ACN 167 150 638** (Plaintiff) **v** **UNITED VOICE (FORMERLY LIQUOR HOSPITALITY & MISCELLANEOUS WORKERS UNION) (ABN 19 845 540 893)** (Defendant)
FILE NO/S:	BS No 13598 of 2017
DIVISION:	Trial Division
PROCEEDING:	Determination of separate question
DELIVERED ON:	8 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 September 2019
JUDGE:	Bowskill J
ORDER:	**The answer to the separate question, "[w]hether, as a matter of law, the reference to loss and damage in sections 185(2)(d) and 186(2)(b) of the *Property Law Act* 1974 (Qld) is properly to be construed as pleaded in paragraph 9(b) of the further amended defence" is no, although the proper construction of ss 185 and 186 reflects some elements of that pleading.** **The parties will be heard in relation to the formal orders and declarations to be made, consequent upon the answer to the separate question; in relation to the application to strike out parts of the statement of claim; and in relation to costs.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – PARTICULAR WORDS AND PHRASES – GENERALLY – where a building on the defendant's land encroaches upon the plaintiff's land by intrusion in or upon the soil of the plaintiff's land – where the encroachment was created prior to the defendant becoming the owner of the land, and the defendant did not know, and had no reasonable means of becoming aware, of the existence of the encroachment – where the plaintiff brings proceedings seeking payment by the defendant of compensation under *Property Law Act* 1974 (Qld) ss 184, 185 and 186 for loss

and damage resulting from the encroachment, including additional construction costs incurred following discovery of the encroachment – where the defendant contends that, on the proper construction of s 185 and s 186 of the *Property Law Act*, inter alia, the compensation that may be awarded to an adjacent owner is limited to compensation for the grant of title to the encroaching owner, and loss or damage to the adjacent owner's title, or interest in their land; but does not extend to consequential losses which may be incurred because of the encroachment, and does not extend to loss and damage incurred because of an encroachment which was not caused by the encroaching owner's conduct – determination of the separate question, under r 483 of the *Uniform Civil Procedure Rules* 1999, whether, as a matter of law, the reference to loss and damage in ss 185(2)(d) and 186(2)(b) is to be construed as pleaded by the defendant – analysis of the context and purpose of the relevant provisions of part 11, division 1 of the *Property Law Act* – consideration of s 185 of the *Property Law Act,* including the breadth of the discretion conferred by the section and the meaning of "compensation" in s 185(1)(a) – consideration of s 186 of the *Property Law Act*, including analysis of the reference to "minimum" compensation in s 186 and the proper construction of s 186(2) – consideration of the factors relevant to the exercise of the discretion under ss 185 and 186

Acts Interpretation Act 1954 (Qld) s 14, s 14A, s 14B, schedule 1
Property Law Act 1974 (Qld) s 182, s 183, s 184, s 185, s 186, s 187, s 188, s 189, s 191, schedule 6
Uniform Civil Procedure Rules 1999 (Qld) r 483

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27
Amatek v Googoorewon Pty Ltd (1993) 176 CLR 471
Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (2018) 262 CLR 157
Bade v Rural City of Murray Bridge [2008] SASC 9
Boed Pty Ltd v Seymour (1989) 15 NSWLR 715
Bropho v Western Australia (1990) 171 CLR 1
Bunney v South Australia (2000) 77 SASR 319
Burton v Winters [1993] 1 WLR 1077
Carlin v Mladenovic (2002) 84 SASR 155
Cartwright v McLaine & Long Pty Ltd (1979) 143 CLR 549
Certain Lloyd's Underwriters v Cross (2012) 248 CLR 378
Coco v The Queen (1994) 179 CLR 427
CPT Custodian Pty Ltd v Commissioner of State Revenue (2005) 224 CLR 98
Cuthbert v Hardie (1989) 17 NSWLR 321

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503
G & R Wills & Co Ltd v Adelaide Corporation (1962) 108 CLR 1
Gladwell v Steen (2000) 77 SASR 310
Glenn v Federal Commissioner of Land Tax (1915) 20 CLR 490
Haddans Pty Ltd v Nesbitt [1962] QWN 44
Hardie v Cuthbert (1988) 65 LGRA 5
Hill v Higgins [2012] NSWSC 270
J and T Lonsdale v P Gilbert & Ors [2006] NSWLEC 30
Kemp Investments (NSW) Pty Ltd v Valuer-General (2013) 195 LGERA 1
Lacey v Attorney-General (Qld) (2011) 242 CLR 573
Llavero v Shearer [2014] NSWSC 1336
Montana Hotels Pty Ltd v Fasson Pty Ltd (1986) 69 ALR 258
Morris v Thomas (1991) 73 LGRA 164
Nominal Defendant v GLG Australia Pty Ltd (2006) 228 CLR 529
Perpetual Trustees Victoria Ltd v Suncorp-Metway Ltd [2009] NSWLEC 1326
Potter v Minahan (1908) 7 CLR 277
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
R v Slade [1995] 1 Qd R 390
Re De Luca & De Luca [1984] QSC 579
Re Marsh (1941) 42 SR(NSW) 21
Re Melden Homes No 2 Pty Ltd's Land [1976] Qd R 79
Sedleigh-Denfield v O'Callaghan [1940] AC 880
Shadbolt v Wise [2002] QSC 348; [2003] ANZ ConvR 161
State of Queensland v Michael Vincent Baker Superannuation Fund Pty Ltd [2019] 2 Qd R 146
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362
The Queen v A2; The Queen v Magennis; The Queen v Vaziri [2019] HCA 35
The Ombudsman v Moroney [1983] 1 NSWLR 317
Thiess v Collector of Customs (2014) 250 CLR 664
Torette House Pty Ltd v Berkman (1940) 62 CLR 637
Wherry v Trustees of the Sisters of Charity of Australia (2000) 111 LGERA 216
XR Property Developments Pty Ltd v Denning Real Estate Pty Ltd (No 2) [2016] NSWSC 556

COUNSEL: M Williams for the plaintiff
D J Ananian-Cooper for the defendant

SOLICITORS: McInnes Wilson Lawyers for the plaintiff
Plastiras Lawyers for the defendant

Introduction

[1] The plaintiff owns land in South Brisbane. The defendant owns adjoining land. There is a building on the defendant's land, which was already in place when the defendant purchased the land in 2004. The building was constructed in about 1991 or 1992. Part of the concrete footings of the building encroach upon the plaintiff's land, by intrusion in or upon the soil of the plaintiff's land.

[2] It is uncontroversial that this is an "encroachment" within the meaning of s 182 of the *Property Law Act* 1974 (Qld). The plaintiff is the "adjacent owner" and the defendant is the "encroaching owner", within the meaning of those terms in s 182.

[3] It is also agreed that the encroachment cannot be removed without risk of collapse to the building on the defendant's land; and that the encroachment fits within an area of about 42 m^3, now comprised in a volumetric lot created in March 2016, the unimproved value of which is agreed to be $76,500.[1] The encroachment itself was described, by counsel for the defendant, as comprising an intrusion into the plaintiff's land of about 34 cm, about 3.5 m underground.[2]

[4] The existence of the encroachment was discovered in the course of building works being undertaken on the plaintiff's land in 2014.

[5] In late 2017, the plaintiff commenced proceedings in this court, seeking an order for payment of compensation under ss 184, 185 and 186 of the *Property Law Act*, for loss and damage claimed to have been suffered by it by reason of the encroachment. The amount claimed is about $524,000, comprising:

(a) the unimproved value of the volumetric lot ($76,500);

(b) various costs associated with the creation and proposed transfer of that volumetric lot (adding up to about $18,500); and

(c) additional amounts required to be paid to the plaintiff's builder, by way of variations under the construction contract, following discovery of the encroachment (about $353,800), and other costs and expenses associated with the builder's claim for additional payment (about $75,600).[3]

[6] In defence of the plaintiff's claim, the defendant raises a question of law as to the meaning of "loss and damage" within s 185(2)(d) and s 186(2)(b) of the *Property Law Act*. On the defendant's construction, the amounts falling within subparagraph (c) above are not within the scope of the compensation which may be ordered under s

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1 Paragraphs 5, 10, 17 and 19 of the amended statement of claim; paragraphs 3(f), 4 and 7(a) of the further amended defence.

2 T 1-4.

3 See paragraphs 16, 19, 20 and 21 of the amended statement of claim.

185(1)(a). As pleaded in paragraph 9(b) of the further amended defence, the defendant's case is that:

> "… the reference to loss and damage relevant to the exercise of the Court's discretion within the meaning of sections 185(2)(d) and 186(2)(b) of the *Property Law Act 1974*…:
>
> (i) is limited to loss and damage that has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner;
>
> (ii) properly construed, is exclusively a reference to compensation payable in respect of any grant to the encroaching owner of some title to allow the encroachment to continue to exist, alternatively also in respect of the recognition of the historical existence of the encroachment;
>
> (iii) properly construed, is not a reference to damages that might be available to a plaintiff in an action for trespass or nuisance or other tortious act in respect of the encroachment;
>
> (iv) further and in the alternative, properly construed, does not extend to loss and damage incurred by reason of the fact that the adjacent owner was not aware of the existence of the encroachment;
>
> (v) further and in the alternative, properly construed, does not extend to loss and damage incurred by the adjacent owner through the encroachment if not caused by the encroaching owner's conduct."

[7] On 4 June 2019 an order was made, under r 483 of the *Uniform Civil Procedure Rules* 1999 (Qld), that the following questions be determined separately, before the trial:

(a) Whether, as a matter of law, the reference to loss and damage in sections 185(2)(d) and 186(2)(b) of the *Property Law Act* is properly to be construed as pleaded in paragraph 9(b) of the further amended defence.

(b) Whether the encroachment was created prior to the defendant acquiring title to its land.

(c) Whether the defendant had no knowledge of the existence of the encroachment prior to its receipt of the plaintiff's letter dated 5 September 2014, as pleaded in paragraph 3(d) of the defence, and had no reasonable means of being aware of its existence prior to 5 September 2014 as pleaded in paragraph 3(e) of the defence.

[8] By the time of the hearing, there was no dispute as to the factual matters the subject of questions (b) and (c). The plaintiff concedes that the encroachment was created prior to the defendant becoming the owner of the land; that the defendant did not know of the

encroachment prior to being told about it by the plaintiff's solicitor in September 2014; and that the defendant had no reasonable means, at the time of purchasing its land, of being or becoming aware of its existence.[4]

[9] Accordingly, only question (a) remains to be determined.

[10] In short, the defendant contends that, on the proper construction of ss 185(1)(a) and 186 of the *Property law Act*, the compensation that may be awarded to an adjacent owner in respect of any conveyance, transfer, lease or grant under s 185(1)(b) is limited to compensation for the grant of title to the encroaching owner (in accordance with s 186(1)) and loss or damage to the adjacent owner's *title*, or interest in their land; but does not extend to consequential losses which may be incurred because of the encroachment, which remains within the exclusive province of the common law of trespass. On the other hand, the plaintiff contends the compensation able to be awarded by the court under s 185(1)(a) is not limited, either to that which may be ordered under s 186 (in respect of a conveyance, transfer etc of the subject land) or, even in that respect, in the manner submitted by the defendant. The plaintiff emphasises the breadth of the discretion conferred by s 185. The plaintiff submits that, as a matter of construction, compensation for loss of title is an incident of the power under s 185(1)(b), and that it is only in respect of that matter that s 186 applies. That leaves for operation a broad discretion to award compensation, under s 185(1)(a), to which s 186 does not apply.

[11] For the reasons set out below, the answer lies somewhere in between these two positions. The proper construction of ss 185 and 186 is not, in my view, quite as pleaded in paragraph 9(b) of the further amended defence, although reflects some aspects of it.

[12] There is also before the court an application by the defendant to strike out various paragraphs of the statement of claim.[5] It was uncontroversial that, if the court answered the question of construction of the legislation in the way contended for by the defendant, those paragraphs should be struck out. No other submissions were made about this. Since I have not answered the question in that way, the proper disposition of the strike out application remains to be determined. Accordingly, I will give the parties an opportunity to be heard further in relation to this, following delivery of these reasons.

The legislation

[13] The relevant provisions are found in part 11, division 1 (encroachment of buildings) of the *Property Law Act,* which includes ss 182-187. Relevant parts of s 182 (definitions) and ss 183 to 187 of the *Property Law Act* provide as follows:

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4 See paragraphs 11 to 31 of the defendant's submissions and paragraph 3 of the plaintiff's submissions.
5 Paragraph 3 of the application filed 17 May 2019 (CFI 7).

"**182 Definitions for div 1**

In this division –

adjacent owner means the owner of land over which an encroachment extends.

…

encroaching owner means the owner of land contiguous to the boundary beyond which an encroachment extends.

encroachment means encroachment by a building, including encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

owner means any person entitled to an estate of freehold in possession –

(a) whether in fee simple or for life or otherwise; or

(b) whether at law or in equity; or

(c) whether absolutely or by way of mortgage, and includes a mortgagee under a registered mortgage of a freehold estate in possession in land under the *Land Title Act 1994*.[6]

…

subject land means that part of the land over which an encroachment extends.

183 Application of div 1

This division applies despite the provisions of any other Act.

184 Application for relief in respect of encroachments

(1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this division in respect of any encroachment.

(2) This section applies to encroachments made either before or after the commencement of this Act.

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[6] The expression "estate of freehold *in possession*" has been held to connote an estate of which a person has a present right of beneficial enjoyment, whether accompanied by physical possession of the land or not (as distinct from an interest in the remainder or reversion): *Glenn v Federal Commissioner of Land Tax* (1915) 20 CLR 490 at 497-498 per Griffith CJ and at 500-501 per Isaacs J; *CPT Custodian Pty Ltd v Commissioner of State Revenue* (2005) 224 CLR 98 at [26].

185 Powers of court on application for relief in respect of encroachment

(1) On an application under section 184 the court may make such order as it may deem just with respect to –

(a) the payment of compensation to the adjacent owner; and

(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and

(c) the removal of the encroachment.

(2) The court may grant or refuse the relief or any part of the relief as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider, amongst other matters –

(a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be; and

(b) the situation and value of the subject land, and the nature and extent of the encroachment; and

(c) the character of the encroaching building, and the purposes for which it may be used; and

(d) the loss and damage which has been or will be incurred by the adjacent owner; and

(e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and

(f) the circumstances in which the encroachment was made.

186 Compensation

(1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant under section 185 to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise form negligence, be the unimproved capital value of the subject

land, and in any other case 3 times such unimproved capital value.

(2) In determining whether the compensation shall exceed the minimum and if so by what amount, the court shall have regard to –

(a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and

(b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner; and

(c) the circumstances in which the encroachment was made.

187 Charge on land

(1) The order for payment of compensation may be registered in the land registry in such manner as the registrar determines and shall, except so far as the court otherwise directs, upon registration operate as a charge upon the land of the encroaching owner, and shall have priority to any charge created by the encroaching owner or the encroaching owner's predecessor in title.

(2) In this section, the land of the encroaching owner means the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part of the land as the court may specify in the order."

[14] These sections were enacted as part of the *Property Law Act* in 1974.[7]

Relevant principles of statutory construction

[15] The principles were stated by the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47]:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the

[7] Apart from a minor amendment to s 187 in 1992 (to change "office of the Registrar" to "land registry") and to the definition of "owner" in s 183 in 1994 (to refer to the *Land Title Act* 1994), they have not been amended since.

> clear meaning of the text. The language which has actually been employed in the text of the legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."[8]

[16] Section 14A(1) of the *Acts Interpretation Act* 1954 (Qld) instructs that:

> "In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose[9] of the Act is to be preferred to any other interpretation."

[17] Section 14B enables consideration to be given to extrinsic material capable of assisting in the interpretation of a provision of an Act, in the circumstances set out in s 14B(1). This includes, in sub-s (a), if the provision is ambiguous, to provide an interpretation of it; and, in sub-s (c), to confirm the interpretation conveyed by the ordinary meaning of the provision. As defined in s 14B(3), "ordinary meaning" means the ordinary meaning conveyed by a provision having regard to its context in the Act and to the purpose of the Act.

[18] As the plurality said in *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44]:

> "The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction."

[19] Appropriate reference to extrinsic materials, and the legislative history of a provision, may assist to elucidate the purpose of the Act (or provision).[10] But as French CJ and Hayne J said in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25]:

> "Determination of a statutory purpose neither permits nor requires some search for what those who promoted or passed the legislation may have had in mind when it was enacted. It is important in this respect, as in others, to recognise that to speak of legislative 'intention' is to use a metaphor. Use of that metaphor must not mislead. '[T]he duty of a court is to give the words

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8 References omitted. See also *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 at [32]-[37] per Kiefel CJ and Keane J.

9 Defined as including "policy objective" (see schedule 1 to the *Acts Interpretation Act*).

10 See *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [25] per French CJ and Hayne J, at [70] per Crennan and Bell JJ and at [88]-[80] per Kiefel J (as her Honour then was); see also *Nominal Defendant v GLG Australia Pty Ltd* (2006) 228 CLR 529 at [22]; and *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 262 CLR 157 at [103] and [107] per Keane, Nettle and Gordon JJ.

of a statutory provision the meaning that the legislature *is taken to have intended* them to have'[11] (emphasis added). And as the plurality went on to say in *Project Blue Sky*:

> 'Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction[12] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'

To similar effect, the majority in *Lacey v Attorney-General (Qld)*[13] said:

> 'Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.'

The search for legal meaning involves application of the processes of statutory construction. The identification of statutory purpose and legislative intention is the product of those processes, not the discovery of some subjective purpose or intention."[14]

Context and purpose of the provisions

[20] As already noted, the relevant provisions are found within part 11 (encroachment and mistake), division 1 (encroachment of buildings) of the *Property Law Act* 1974. The *Property Law Act* is described, in its long title, as "[a]n 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,[15] and for other purposes".

[21] As the following discussion, culminating in reference to the 1973 Queensland Law Reform Commission Report, makes clear, the provisions in part 11 were included "for the sake of completeness and convenience", and so fall within the consolidation object of the *Property Law Act*. In applying the relevant principles of construction, it is to those provisions of part 11 as a whole that regard is to be had, in construing the disputed sections, as opposed to the *Property Law Act* as a whole.

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11 Referring to *Project Blue Sky* (1998) 194 CLR 355 at 384 [78].

12 "eg, the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427 at 437."

13 (2011) 242 CLR 573 at 592 [43].

14 Some references omitted.

15 The reference to de facto relationships was added by amendment in 1999.

[22] Prior to enactment of the *Property Law Act*, almost identical provisions to those which now comprise part 11, division 1 appeared in *The Encroachment of Buildings Act* 1955 (Qld).[16] The long title of the 1955 Act described it as "an Act to make provision for the adjustment of boundaries where buildings encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith".

[23] The provisions of the 1955 Queensland Act replicated legislation enacted in New South Wales in 1922: the *Encroachment of Buildings Act* 1922 (NSW).[17] The long titles are identical.

[24] A question of construction of the 1922 New South Wales Act was dealt with by the High Court in *Amatek v Googoorewon Pty Ltd* (1993) 176 CLR 471. The issue in that case was a different one, concerning the meaning of "encroachment"; it being held that the encroachment to which the Act related was an encroachment by a building, not by a person; and that the remedial provisions in s 3 (the equivalent of s 185) applied only when a building encroached from the land of the encroaching owner across the boundary onto the contiguous land of the adjacent owner.[18] However, relevantly for present purposes, the High Court said (at 477):

> "The purpose of the Act is to be ascertained from its language. So far as one may define the purpose of the Act from its long title, that purpose does not extend to the conferring of a general power to change the boundaries between contiguous parcels of land. It is an Act 'to make provision for the adjustment of boundaries *where buildings encroach on adjoining land*; to facilitate *the determination of boundaries;* and for purposes connected therewith'. The twin purposes of the Act are to facilitate the determination of existing boundaries (provided for by s 9[19]) and to permit the adjustment of boundaries when, but only when, buildings encroach on adjoining land (provided for by s 3). …"

[25] Reflecting the long title, in debates in the Queensland Parliament on 30 March 1955, upon the introduction of the Bill which became the 1955 Act,[20] it was said that the

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16 Tab 3 of the defendant's bundle. The provisions are identical as a matter of substance.

17 Tab 5 of the defendant's bundle.

18 The issue arose in circumstances where the parties owned contiguous parcels of land; the plaintiff erected a number of structures on what it thought was its land, although no survey of the boundary was ever done; it was later discovered that the structures erected by the plaintiff stood wholly within the defendant's lot. The plaintiff brought proceedings under the 1922 New South Wales Act, seeking orders for the relevant part of the defendant's lot to be conveyed to it. At first instance, it was held that the court had no jurisdiction to make the order sought, as there was no "encroachment" as defined (because the structure was wholly within the contiguous lot). That decision was reversed by the Court of Appeal; but the High Court held that the decision at first instance was correct, as the "encroachment by a building of which the Act is speaking is a horizontal encroachment '*beyond the boundary*' between the land of the encroaching owner and the land of the adjoining owner" (at 477-478).

19 The equivalent of what is now s 191 of the *Property Law Act*, which empowers the court to make "such orders as it may deem proper for determining, marking, and recording the true boundary", where a question arises as to whether an existing building encroaches or a proposed building will encroach.

20 Tab 4 of the defendant's bundle.

"object of the Bill is to make provision for the adjustment of boundaries where buildings encroach on adjoining land and to facilitate the determination of boundaries". It was noted that there are many cases of buildings and walls built on land which have not been built on the true boundary, due very frequently to not having a check survey made before the building was commenced. It was then said, by the Attorney-General:

> "Fences are frequently erected in positions where they encroach on the adjoining land, but this position is not so serious as the fence can be moved. It is where a substantial building or wall encroaches that a true difficulty arises and frequently causes many legal arguments which eventually result in costly court actions. In many cases, this trouble arises years after the building has been erected and the ownership of the land affected has changed several times.
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> …
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> Many adjustments are made on an amicable basis by transferring the strip of land to the encroaching party for a reasonable consideration. In other cases it is not so readily adjustable, and the object of the Bill is to enable the parties concerned to go to the Supreme Court and have the adjustment made for them by a judge who will also fix the compensation for the land transferred at the same time.
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> …
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> Every endeavour has been made in this Bill to have the question dealt with as expeditiously as possible and with the minimum cost. Similar Acts are in force in New South Wales and South Australia. Sometimes exorbitant prices are asked for the piece of land on which the building has encroached but the amendments I have submitted set out the basis on which compensation shall be allowed by the court."[21]

[26] Similarly, the explanatory notes to the Bill which became the 1922 NSW Act[22] stated:

> "The object of the Bill is to protect owners of land where there is a slight encroachment of a building beyond the boundary of land of the adjacent owner. In many cases advantage has been taken of the difficulties of an owner, where there has been a wall encroachment of a few inches, and sometimes he has been blackmailed or put in a very serious position by reason of the power which the adjacent owner has, through the unwitting act either of the builder, architect, surveyor, or the owner.
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> The Bill provides for an application by either owner to the Supreme Court for relief under the Bill. On such an application the Court may make an

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[21] Underlining added.
[22] Tab 9 of the defendant's bundle.

> order, as it deems just, for payment of compensation to the adjacent owner, and for a title to be given to the encroaching owner…"

[27] In the 1922 Bill, clause 3 (the equivalent of s 185) only provided that, on an application by either an adjacent owner or an encroaching owner, "the court may make such orders as it may deem just with respect to –

> (a) the payment of compensation to the adjacent owner; and
>
> (b) the conveyance transfer or lease of the subject land to the encroaching owner, or the grant to him of any estate or interest therein or any easement right or privilege in relation thereto."

[28] That is, the Bill did not include a provision, as later appeared in the 1922 Act (and now appears in s 185(1)(c) of the *Property Law Act*) for the court to make an order for the removal of the encroachment.

[29] That issue was addressed in debate on the second reading of the Bill in the Legislative Council on 26 July 1922,[23] with it being suggested an amendment to add the power was necessary, to protect the owner whose land has been encroached upon, "which might be destroyed in regard to the purpose for which he has brought it", and "[i]n such a case it cannot be sufficient compensation to say to him, 'We will buy your land.'"

[30] Further debate, in the Legislative Assembly on 13 September 1922, addressed another amendment, which was to add the words "in respect of any conveyance, transfer, lease, or grant to the encroaching owner" in clause 4[24] (the equivalent of what is now s 186). Of that amendment, which was agreed to, it was said:

> "This amendment is designed to make it quite clear that the compensation is to be in consideration of the transfer of the piece of land concerned, <u>and not in respect of the removal that has been necessitated on account of the wrong-doing of the encroacher</u>."[25]

[31] The debate in the Legislative Assembly continued the next day, 14 September 1922, with a further amendment (to reduce the minimum compensation from three times the unimproved capital value to simply the unimproved capital value).[26]

[32] When the Bill returned to the Legislative Council, on 5 October 1922, there was a motion to accept the Legislative Assembly's amendment to clause 4. The debates record the following statement, before noting that the motion was agreed to:[27]

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[23] Tab 10 of the defendant's bundle (at p 595).

[24] Tab 11 of the defendant's bundle (at p 1807). Clause 4 of the Bill had previously simply commenced with the words "[t]he minimum compensation to be paid to the adjacent owner" (tab 8 of the defendant's bundle, at p 3).

[25] Underlining added.

[26] Tab 12 of the defendant's bundle.

[27] Tab 13 of the defendant's bundle (at p 2288).

> "I think that makes the matter clear. Compensation is to be in respect of any conveyance, transfer, lease, or grant to the encroaching owner. It is not merely compensation for encroaching. It is compensation for the grant or conveyance necessary in order to vest the title in the applicant."

[33] The purpose of the 1922 New South Wales Act was referred to by Young J in *Hardie v Cuthbert* (1988) 65 LGRA 5 at 6:[28]

> "The *Encroachment of Buildings Act* 1922 (NSW) was passed in New South Wales as remedial legislation to overcome a problem where innocent and in some cases not so innocent people were being held to blackmail by neighbours as a result of faulty surveys that were carried out earlier this century and by other surveying errors or building errors which were not their fault. I have been referred to the second reading speech and committee debate on the Act pursuant to s 34 of the *Interpretation Act* 1987 (NSW) and it would seem that there were quite a few cases in the early part of this century where children had moved surveyor's pegs or builders' pegs or otherwise monuments were in the wrong place without any real fault on anyone where the legal owner was exacting unconscionable compensation or alternatively refusing to accept compensation and insisting on demolition. The Act was passed to enable the Court to adjust rights in that situation…
>
> The Act was remedial legislation and in the light of s 33 of the *Interpretation Act* one must bear in mind its purpose and give it the effect to secure the purpose rather than to defeat the purpose of the legislature.
>
> The Act has not been before the courts for consideration on very many occasions. This, it would appear, in fact fulfils what the legislature intended because the ministers when introducing the Act made it clear that the government thought that 99 per cent of cases would be settled because neighbours would know that the court had an overriding duty to do what was fair, people would accept themselves what was fair and not try and blackmail their neighbours. Those half a dozen or so cases which have come before the courts have, almost without exception, shown that the court is construing this legislation in a purposive and beneficial way."

[34] As already mentioned, the provisions of the 1922 (NSW) Act were replicated in the 1955 (Queensland) Act, which then found their way into part 11 of the *Property Law Act*. In that regard, a report from the Queensland Law Reform Commission, prepared

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[28] Although this decision was reversed, in part, on appeal (*Cuthbert v Hardie* (1989) 17 NSWLR 321), his Honour's observations as to the purpose of the legislation were not the subject of challenge, and have been referred to with approval subsequently (for example, in *Bunney v South Australia* (2000) 77 SASR 319 at [29] per Debelle J). The issue on the appeal concerned whether the disputed structures were "buildings" for the purposes of the definition of "encroachment" in the meaning of the legislation.

in February 1973, included the following, under the heading "Part XI – Encroachment and Mistake":[29]

> "182-193. Encroachment of buildings. At common law the owner of land owns not only the land itself but anything permanently affixed thereto and also owns or is prima facie entitled to possession of the airspace above it: cf Davies v Bennison (1927) 22 Tas S R 52 (bullet entering airspace above land held to be a trespass to land). Hence, the unauthorised encroachment by an overhanging projection of a building or sign is a trespass which will be restrained by injunction: Kelsen v Imperial Tobacco Co Ltd [1957] 2 QB 334, and the owner of the land is entitled to any encroachment which is affixed to the surface of his land.
>
> Since boundaries are not always perfectly well defined or marked, the common law rule has serious consequences for those who mistakenly or inadvertently exceed the limits of their boundaries in building upon land. The Encroachment of Buildings Act of 1955 (4 Eliz. 2 No. 18) provides a procedure by which the court may, on terms of payment of compensation, make orders for the transfer, etc., of the land encroached upon to the encroaching owner or the removal of the encroachment. The Act which is based on a similar New South Wales statute (the Encroachment of Buildings Act 1922) seems to have worked reasonably well, and few practical problems seem to have arisen in the course of its application and enforcement. For a general account of the principles applicable under these Acts, see Haddens Pty Ltd v Nesbitt [1962] QWN 44 and Re W H Marsh (1942) 42 SR (NSW) 21. A possible conflict between the encroachment relief provisions under the Act and the minimum subdivision provisions of local authorities was, in Re Star Mirrors Pty Ltd [1967] QWN 31, resolved in favour of the former, so that subdivisional approval is not necessary for the validity of an order under the Act. As a matter of convenience we consider this to be the correct approach since the number of orders under the Act is so small as not materially to affect any major principle of town planning law, but we think that the decision in the Star Mirrors case should be made explicit by legislation so that the question does not arise again in any future case: see cl. 182 of this Division.
>
> In other respects the provisions of the Act of 1955 are adopted without material alteration and are included in this Bill simply for the sake of completeness and convenience."

[35] Having regard to the text of the provisions, and the legislative history discussed above, the purpose of part 11, division 1 of the *Property Law Act* is aptly described as providing a means of resolving questions or disputes as between owners of contiguous

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[29] Tab 2 of the defendant's bundle.

parcels of land in relation to encroachment (or potential encroachment) of buildings across the boundary between those parcels, either:

(a) by a determination of the true boundary, where a question arises about whether a building encroaches or will encroach (under s 191); or

(b) by providing a fair and efficient process by which a dispute about an encroachment can be resolved by the court, by the adjustment of the boundary to take account of the encroachment, with payment of compensation to the adjoining owner if considered appropriate, calculated in accordance with the legislation, or for removal of the encroachment (under ss 185 and 186).

Interpretation of ss 185 and 186

Broad discretion conferred by s 185

[36] Section 185(1) confers a broad discretion on the court,[30] on an application under s 184 (which may be made by either an adjacent owner or an encroaching owner) to "make such order as it may deem just with respect to –

(a) the payment of compensation to the adjacent owner; and

(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and

(c) the removal of the encroachment."

[37] Section 185(2) provides that the court may grant or refuse the relief or any part of the relief (in s 185(1)) "as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider, amongst other matters" the things set out in (a) to (f), namely:

(a) who made the application;

(b) the situation and value of the subject land, and the nature and extent of the encroachment;

(c) the character of the encroaching building, and the purposes for which it may be used;

(d) the loss and damage which has been or will be incurred by the adjacent owner;

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[30] Relevantly, the Supreme Court (see definition of "court" in schedule 6 to the *Property Law Act*).

(e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and

(f) the circumstances in which the encroachment was made.

[38] It has been consistently held that the discretion conferred by s 185 (and its equivalents, both in the earlier Queensland legislation and in New South Wales and South Australia, which also have the same legislation) is a very wide one. In *Haddans Pty Ltd v Nesbitt* [1962] QWN 44 Gibbs J (then of the Supreme Court of Queensland) described s 3 of the 1955 Queensland Act (the equivalent of s 185(1)) as conferring "a most ample discretion in determining matters of this kind" (at 99), later describing the discretion as "extremely wide" (at 101).

[39] In *Bunney v South Australia* (2000) 77 SASR 319 at [27] Debelle J said that, when read together, the [South Australian] equivalent of s 185(1) and (2) conferred a "very wide discretion" and said that the list of factors in s 185(2) is not exclusive, and those are not the only factors that may affect the exercise of the discretion, observing that the court has a "very wide discretion fettered only by the fact that the discretion must be exercised having regard to the scope and objectives of the Act".[31]

[40] In *Hardie v Cuthbert* (1988) 65 LGRA 5 at 8 Young J said that [the New South Wales equivalent of s 185(2)] "sets out matters which the court may consider and normally would, as guidelines, but the court's consideration of the matter is really a free-ranging one". His Honour reiterated this view, many years later, in *Llavero v Shearer* [2014] NSWSC 1336 at [109]-[110], [125]-[126]. See also, in relation to the NSW legislation, *Boed Pty Ltd v Seymour* (1989) 15 NSWLR 715 at 719 per Bryson J.

[41] In the Queensland case of *Re De Luca & De Luca* [1984] QSC 579 Shepherdson J similarly adopted the approach that s 185(2) sets out matters to be considered in the exercise of the discretion, but that the court is not limited to those matters. A matter that his Honour considered very relevant in that case was the failure by the applicants (the adjoining owner) to have an identification survey made of their lot 8 before completing their purchase of it. In that case, the applicants purchased lot 8 as vacant land in June 1983, intending to build a commercial warehouse on the land. The adjoining land, lot 9, was at that time owned by Kubinia Pty Ltd and had a warehouse building already on it. In September 1983, lot 9 was transferred to the respondent. The applicants obtained a quote from a builder to construct a warehouse building on lot 8. Before the builder started work, he arranged for a survey, and the encroachment was discovered. It is not clear from the case what the encroachment was; but I infer that it was part of the warehouse building itself (rather than a subsoil encroachment). The builder advised that the construction costs would increase by $5,000 as a result of the encroachment. The dispute was resolved by agreement for transfer of the subject land to the owner of lot 9. The applicants sought to recover compensation, including the

[31] See also *Carlin v Mladenovic* (2002) 84 SASR 155 at [39].

unimproved value of the land transferred, associated costs, and the increased cost of building. On the evidence in that case, Shepherdson J was satisfied that, had the applicants carried out a survey at the time of their purchase, such survey would have revealed the encroachment and "the picture now presented … would have been quite different". In addition, Shepherdson J observed that neither the owner of the encroaching lot at the time of the applicant's purchase (Kubinia) nor the subsequent purchaser (the respondent) were responsible for building the warehouse on lot 9. The warehouse was already there when Kubinia purchased the land. As such, there was no onus on either of them to disclose to the applicants the existence of the encumbrance (there is no suggestion in the decision that they were aware of it in any event). But for the respondent's agreement to pay some of the expenses associated with the transfer of the subject land, Shepherdson J said he would have awarded nothing more than a sum representing the value of the 5 square metres transferred.

[42] Also confirming the breadth of the discretion, under the New South Wales equivalent of s 185(1), in *Morris v Thomas* (1991) 73 LGRA 164 at 168 Bignold J said that "[c]onduct of the parties, and particularly conduct giving rise to the encroachment, is in my judgment a very important consideration in the exercise of the statutory discretion conferred by s 3". In that regard, Bignold J adopted a similar approach to Gibbs J in *Haddans Pty Ltd v Nesbitt,* holding that in the exercise of the discretion, "[a]n initial question of considerable importance" is whether the encroaching owner was aware of the fact of the encroachment, when it was constructed, "for it would be a rare and exceptional case in which the court would make an order under this Act in favour of a person who, with full knowledge, encroached on his neighbour's land".[32]

[43] That observation was referred to by Mullins J in *Shadbolt v Wise* [2002] QSC 348; [2003] ANZ ConvR 161 at [50]. In that case, her Honour was critical of the applicant (encroaching owner) for not having undertaken a survey before constructing their swimming pool, part of which ultimately encroached on the land of the adjoining owner, in circumstances where the taking of such a simple step would have ensured they did not encroach. Her Honour nevertheless concluded that the applicant's recklessness fell short of being "full knowledge" of the encroachment, and therefore it could not be said the encroachment was deliberate (at [52]). In those proceedings the encroaching owner applied for an order for transfer of the subject land, subject to payment of compensation; the adjoining owner cross-applied for removal of the encroachment. Mullins J found that removal of the encroachment would result in the destruction of a significant asset at a significant cost, that easily outweighed the loss and damage to the respondents caused by the encroachment (found to be minimal, amounting to no more than annoyance) (at [56]-[57] and [59]). Her Honour therefore proposed to order the transfer of the subject land, or some lesser interest if the transfer was unable to be implemented (there was a complexity in that case involving a body corporate, because the encroaching owner's lot was part of a community titles scheme).

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[32] *Haddans Pty Ltd v Nesbitt* [1962] QWN 44 at 99-100.

Meaning of "compensation" in s 185(1)(a)

[44] As discussed above, there is a broad discretion conferred on the court by s 185(1) to make orders with respect to: (a) the payment of compensation to the adjacent owner; (b) the conveyance, transfer etc of the subject to the land; and (c) the removal of the encroachment.

[45] Section 186 deals specifically with "compensation". Section 186(1) provides for the "minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant under section 185 to the encroaching owner" (the unimproved capital value of the subject land or, where the encroachment was intentional or resulted from negligence, three times that amount). Section 186(2) then provides that, in determining whether the compensation shall exceed the minimum and, if so, by what amount, the court "shall have regard to" the things in (a), (b) and (c), namely:

> (a) the value, whether improved or unimproved, of the subject land to the adjacent owner;
>
> (b) the loss and damage which has been or will be incurred by the adjacent owner <u>through the encroachment</u> and <u>through the orders proposed to be made</u> in favour of the encroaching owner; and
>
> (c) the circumstances in which the encroachment was made.

[46] One of the questions which arises in considering the proper construction of ss 185 and 186 is, what is the meaning to be given to "compensation" in s 185(1)(a)? Is it a reference to compensation under s 186? Or does it have a broader meaning?

[47] The plaintiff submits that, as a matter of construction, compensation for loss of title is an incident of the power under s 185(1)(b), and that it is only in respect of that matter that s 186 applies. That leaves for operation a broad discretion to award compensation, under s 185(1)(a), to which s 186 does not apply.

[48] I do not accept that as an appropriate construction of the provisions. The court is empowered to make orders with respect to three things in s 185. The fact that compensation may be regarded as a matter ancillary to the conveyance, transfer etc of the subject land is not to the point. There is an express power in (a) to make orders for compensation. There is no need to resort to an implied power, because there is an express power in (a). However, that does not answer the question as to the meaning of "compensation" in s 185(1)(a).

[49] Opposing views have been expressed in the cases. For example, in *Wherry v Trustees of the Sisters of Charity of Australia* (2000) 111 LGERA 216 at [44] Bignold J expressed the view that, in light of the express objects of the Act:[33]

> "Properly interpreted, the reference in s 3(1) [s 185(1)(a)] to the payment of compensation to the 'adjacent owner' is limited to 'compensation' of the type specified in s 4 of the Act [s 186], subs (1) of which specifies 'minimum compensation' and subs (2) of which specifies the matters that the Court shall have regard to 'in determining whether the compensation shall exceed the minimum and if so, by what amount."

[50] That view was also adopted by Harrison J in *Hill v Higgins* [2012] NSWSC 270 at [30].

[51] Bignold J had earlier taken this approach (without discussing the issue) in *Morris v Thomas* (1991) 73 LGRA 164. In this case, Bignold J made orders for removal of some of the encroachments (for which the encroaching owner was responsible) and also made orders for the grant of an easement in respect of other encroachments for which the encroaching owner was not responsible (that is, they were constructed by a predecessor in title). It is apparent his Honour did not consider the question of compensation arose in respect of the removal of the encroachments; but did consider it arose in respect of the grant of the easement (see at 169).

[52] It is also consistent with the approach taken by Mullins J in *Shadbolt v Wise* [2002] QSC 348 at [66], where her Honour said "[o]n the basis that I will be ordering a transfer under s 185(1)(b) of the *PLA* or, some lesser interest if that transfer is unable to be implemented, s 186 of the *PLA* is applicable…".

[53] However, a contrary view was expressed by Debelle J in *Bunney v South Australia* (2000) 77 SASR 319 at [31], where his Honour said:

> "… there is nothing to prevent the court ordering compensation even where there is no transfer of any interest to the encroaching owner. It may be fair to order compensation to be paid to the adjoining owner when an encroachment has been removed. For example, the removal of the encroachment may require remedial work to be done to the adjoining owner's land or building. Thus, compensation is a form of relief which is not necessarily linked to a transfer of interest in the land to the encroaching owner."

[54] That construction does find support in the broad language of s 185(1), empowering the court to "make such order as it may deem just with respect to" the matters in (a) and (b)

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[33] Which I take to be a reference to the object as stated in the long title to the *Encroachment of Buildings Act* 1922 (NSW): "An Act to make provision for the adjustment of boundaries where buildings encroach on adjoining land; to facilitate the determination of boundaries; and for purposes connected therewith".

and (c); and in s 185(2), that the court "may grant or refuse the relief or any part of the relief as it deems proper in the circumstances of the case".

[55] On the other hand, the narrower interpretation is supported by the following things: the purpose of the legislation, which relevantly is to make provision for the adjustment of boundaries where buildings encroach onto adjoining land and to deal with the issue of compensation in connection with that adjustment; relatedly, the mischief the legislation was designed to cure (as evidenced by the discussion of the legislative history above); a textual analysis of the whole of part 11, including that there is no other provision dealing with compensation (in terms of how that is to be determined, as opposed to how that may be enforced[34]) and, albeit in only a minor way, the heading to s 186; and the discussion in the debates on the 1922 NSW legislation, referred to at paragraphs [29] to [31] above.

[56] At common law, the victim of a trespass (such as an encroachment) could apply for a mandatory injunction requiring the trespasser to remove the encroachment. Depending on the nature of the encroachment, if the court was not persuaded to mandate removal, the court may order compensation instead (for the diminution in value of the subject land, by reason of the encroachment, and for any consequential loss).[35] In that context, the inclusion of a power to order removal of the encroachment in s 185(1)(c), as part of the suite of powers available to a court when faced with a dispute about an encroachment, is consistent with the common law principles. It is also consistent with those principles that the powers in s 185(1)(a) and (b) on the one hand, and s 185(1)(c) on the other, are logically to be seen as alternatives. One can readily imagine that where, in an appropriate case, the court exercises the discretion in favour of ordering removal of the encroachment, that would be at the cost of the encroaching owner; but that is to be distinguished from a broader concept of "compensation" to the adjoining owner.

[57] That construction is also consistent with the extrinsic materials referred to at paragraphs [29] to [31] above, which may be understood as an express statement of intention that the reference to "compensation" under the relevant provisions was not to be in respect of the removal of the encroachment which may be ordered. However, as the authorities caution, care must be taken not to supplant the words of the statute with the subjective intention of those involved in making, relevantly, the 1922 (NSW) legislation.

[58] In terms of a contextual analysis of the provisions of part 11, it is noteworthy that there is no other provision in part 11 dealing with compensation (apart from s 186). It is reasonable to infer that, if it was intended that the compensation to be awarded under s 185(1)(a) may be for loss and damage associated with an order for removal of the encroachment under s 185(1)(c), provision would have been made for that (as it has been, in relation to compensation in respect of any conveyance, transfer etc), in the

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[34] Cf in that regard ss 187, 188 and 189 of the *Property Law Act*.

[35] See, for example, *Burton v Winters* [1993] 1 WLR 1077; referred to in *Bade v Rural City of Murray Bridge* [2008] SASC 9 at [75].

context of legislation fairly extensively debated, and enacted to address a particular mischief, and provide a fair and efficient means of resolving disputes between contiguous land owners.

[59] That analysis is supported by reference to the factors the court may have regard to, in s 185(2), which expressly includes "the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment" (s 185(2)(e)); but makes no reference to any loss or damage the adjoining owner may suffer if the encroaching owner were required to remove the encroachment (although there is reference more generally to "the loss and damage which has been or will be incurred by the adjacent owner"). In addition, read as a whole, the reference to "order for payment of compensation" in s 187 and "the compensation" in each of ss 188 and 189, are logically to be read as references to the compensation ordered to be paid in accordance with s 186.

[60] The last matter of textual analysis is a minor point, having regard to the heading to s 186. This section was included (with the rest of part 11) when the *Property Law Act* was enacted in 1974. Accordingly, the heading to the section it is not regarded as part of the Act.[36] But it is nonetheless permissible to have regard to this heading (which is consistent with the side note which appeared adjacent to the equivalent s 4 of the 1955 Queensland Act) as an aid, albeit a minor aid, in the interpretation of the provision.[37] The heading is simply "compensation", consistent with a construction of s 186 as providing for the (only) "compensation" the court is empowered to order under s 185(1)(a).

[61] The task in construing a statute is to ascertain the intended meaning of the words used, a process which must undertaken having regard to the context for the provision.[38] Looking at the text of s 185 alone, the ordinary or grammatical meaning of the words used in s 185 supports the broad interpretation favoured by Debelle J in *Bunney v South Australia* – that there is nothing to prevent the court ordering compensation even where there is no conveyance, transfer etc. However, when one has regard to the whole of part 11, and the broader context of the provisions, including the purpose and policy of the provisions, in particular the mischief they were intended to remedy, and the contextual considerations discussed above, the narrower construction favoured by Bignold J in *Wherry* is well supported. In my view, that is the preferred construction:

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[36] See s 14(2) of the *Acts Interpretation Act* 1954 (Qld) (headings to sections are considered part of the Act if the Act is enacted after 30 June 1991, or the heading is amended or inserted after 30 June 1991).

[37] See the discussion in Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed) at [4.56], in particular the reference to *The Ombudsman v Moroney* [1983] 1 NSWLR 317 at 324, applied by Lee J in *R v Slade* [1995] 1 Qd R 390 at 398. As to the need to authenticate the presence of the heading in the Bill (therefore, as part of the materials before the parliament), it is clear the heading to the section did appear in the Bill which became the *Property Law Act* (see p 85 of the Queensland Law Reform Commission's report dated February 1973, to which the Bill is attached).

[38] *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 at [32]-[33] and [36] per Kiefel CJ and Keane J.

that the reference in s 185(1) to "the payment of compensation to the adjacent owner" is properly construed as compensation calculated in accordance with s 186.

[62] Strictly speaking, this aspect of the construction question does not arise for determination in the context of the present case, because there is no question of an order that the encroachment be removed. However, it has been necessary for me to consider it, as part of the overall task of construing these provisions, as it is an aspect of the construction contended for by the defendant.

[63] What is abundantly clear, however, is that if the court exercises its discretion under s 185(1), to make an order under sub-s (b) for the conveyance, transfer, or lease or grant of the subject land, or some interest in it, to the encroaching owner, *and* to make an order under sub-s (a) to order payment of compensation to the adjacent owner [which is not necessarily a given, as discussed below], that compensation is to be determined in accordance with s 186. As discussed at the outset of this section of the reasons, I do not accept that the provisions are properly construed as leaving the determination of compensation in those circumstances to the discretion of the court, unbound by the parameters of s 186. Such a construction, as pressed for by the plaintiff, is inconsistent with the clear words of the statute.

Reference to "minimum" compensation in s 186

[64] The next point to note is that despite the reference in s 186(1) to a "minimum" compensation, it has consistently been held that before one reaches s 186, at the point of exercising the discretion under s 185(1), the first question is whether any compensation should be paid at all.

[65] That was the view expressed by Dunn J in *Re Melden Homes No 2 Pty Ltd's Land* [1976] Qd R 79 at 81, where his Honour said (in relation to the identical provisions in the 1955 Queensland Act):

> "When an application for a determination of compensation is made, the first question (which arises under s 3) is whether compensation should be ordered to be paid at all. Ordinarily there will be such an order, particularly in a case in which the adjoining owner is required to transfer land to the encroaching owner. But even in such a case it may on occasions be appropriate not to make an order for compensation, having regard to the conduct of the parties."

[66] That has been followed in a number of cases, in Queensland, New South Wales and South Australia. For example, in *Re De Luca & De Luca* [1984] QSC 579 at pp 4-5; *Hardie v Cuthbert* (1988) 65 LGRA 5 at 9; *Morris v Thomas* (1991) 73 LGRA 164 at 169; *Wherry v Trustees of the Sisters of Charity of Australia* (2000) 111 LGERA 216 at [48]; *Bunney v South Australia* (2000) 77 SASR 319 at [30] and [32]; *Carlin v Mladenovic* (2002) 84 SASR 155 (a decision of the Full Court of the Supreme Court of

South Australia) at [38] and [39]; *Kemp Investments (NSW) Pty Ltd v Valuer-General* (2013) 195 LGERA 1 at [13]; *Llavero v Shearer* [2014] NSWSC 1336 at [109]-[110] and [125]-[132]; and *XR Property Developments Pty Ltd v Denning Real Estate Pty Ltd (No 2)* [2016] NSWSC 556 at [7].

[67] In *Llavero*, Young AJA considered the appropriate remedy, for a relatively small encroachment, was to grant an easement. His Honour did not consider the "minimum compensation", calculated by reference to the value of the subject land, would be appropriate, and instead ordered compensation in a nominal amount of $1,100 (consistent with *Re Marsh* (1941) 42 SR(NSW) 21). Similarly, in *XR Property*, the encroachment dispute was resolved by the grant of a licence, with compensation (effectively the licence fee) fixed in the amount of $3,250, plus a nominal amount of $500 for inconveniences (see at [5]-[7]).

[68] In *Bunney v South Australia* (2000) 77 SASR 319 Debelle J found the question whether compensation should be awarded a difficult one, in circumstances where the adjoining owner purchased his land knowing of the encroachment and the encroachment did not cause any impairment of the use of the remainder of the adjoining owner's land; but on the other hand his Honour found the encroaching owner (the Minister) knew of the existence of the relevant part of the adjacent land (a private road, never used as such) before building the encroachment. In the end, Debelle J ordered compensation, on the basis that "[t]he court should not be seen to be acting in a manner which would appear to endorse the Minister's appropriation of this land without payment" (at [50]). Compensation was awarded, on the basis of three times the unimproved value of the subject land (due to the Minister's negligence).

What is the proper construction of s 186(2)?

[69] In the event the discretion under s 185(1) is exercised in favour of making an order for payment of compensation, s 186(1) provides for a minimum compensation, depending on the circumstances in which the encroachment was made (that is, whether it was intentional, or resulted from negligence, or not), referable to the unimproved capital value of the subject land (or three times that, in the case of intentional or negligent conduct on the part of the encroaching owner).

[70] Section 186(2) then sets out some things the court "shall have regard to" in determining whether the compensation shall exceed the minimum. Those things include, in (b):

> "the loss and damage which has been or will be incurred by the adjacent owner *through the encroachment* and *through the orders proposed to be made in favour of the encroaching owner*"

[71] That brings me to the question at the heart of the present dispute, namely, what is the proper construction of s 186(2), in particular, the reference in s 186(2)(b) to the "loss and damage which has been or will be incurred by the adjacent owner through the

encroachment and through the orders proposed to be made in favour of the encroaching owner"?

[72] The defendant urges a construction that would limit those words to loss and damage to the adjoining owner's title, and excluding consequential losses.

[73] However, in my view neither a textual analysis of s 186, nor consideration of the context of the provisions or the application of the various rules of construction, supports such a narrow construction.

[74] In *Re Melden Homes*, at 81, Dunn J said:

> "The Act does not define 'compensation', nor specify how it is to be calculated. The ordinary meaning of the word is 'recompense' or 'amends'. As the legislation is remedial in character, the Court should not in my opinion be unduly critical or restrictive when an applicant for compensation specifies any head of loss or damage, so long as that head of loss or damage has arisen by reason of the encroachment, and not by reason of for instance a combination of the encroachment and unreasonable conduct".

[75] In that case, the encroachment involved the eaves of the applicants' house partly overhanging the respondent's land. There was no evidence or suggestion this was intentional or occurred because of any negligence on the part of the applicants. When the matter could not be amicably resolved, the applicants applied for relief under the 1955 Act. An order was made for a small part of the respondent's land to be conveyed to the applicants, and vice versa, resulting in a rearrangement of the boundary between the two lots. That was dealt with in an earlier decision. The matter before Dunn J was the question of compensation. His Honour found that the re-arrangement had not resulted in any substantial detriment to the respondent; that the respondent had suffered no loss or damage for which it had not already been recompensed by the applicants' transfer of land to it; and therefore ordered no compensation be paid.

[76] In *Wherry v Trustees of the Sisters of Charity of Australia* (2000) 111 LGERA 216 Bignold J took a slightly different approach:

> "43 Although the matter was not the subject of detailed argument, I am of the opinion that when the Act refers to 'compensation' payable to the adjacent owner, it is referring exclusively to compensation payable in respect of any grant to the encroaching owner of some title to allow the encroachment to continue to exist, on the land of the adjacent owner.[39]

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[39] Followed in *Perpetual Trustees Victoria Ltd v Suncorp-Metway Ltd* [2009] NSWLEC 1326 at [38]; and by Harrison J in *Hill v Higgins* [2012] NSWSC 270 at [29] and [30].

> 44 This conclusion, I think, inevitably flows from the proper interpretation of ss 3 and 4 of the Act, in the light of the express objects of the Act. Properly interpreted, the reference in s 3(1) to the payment of compensation to the 'adjacent owner' is limited to 'compensation' of the type specified in s 4 of the Act, subs (1) of which specifies 'minimum compensation' and subs (2) of which specifies the matters that the Court shall have regard to 'in determining whether the compensation shall exceed the minimum and if so, by what amount'.
>
> 45 Accordingly, the relief provided for under the Act does *not* include compensation in the nature of damages for trespass or nuisance or other tortious act. The perceived deficiencies in the law which gave rise to the enactment of the Act in 1922 (such as are discussed in *Boed's* case[40]) do not involve, as I would understand it, deficiencies in the law of trespass or nuisance etc.
>
> 46 It is true that s 4(2)(b) of the Act refers to 'the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner' cf s 3(3)(d). However, this reference does not elevate into claimable compensation *directly* payable under the Act, such 'loss and damage'.
>
> 47 Nonetheless such 'loss and damage' is relevant to the questions posed by s 4(2) of the Act, namely (i) whether compensation should exceed the minimum and (ii) if so, by what amount?
>
> 48 Another preliminary observation to make is that despite the Act's reference in s 4(1) to 'minimum compensation', the question of whether or *not* there should be an order for payment of compensation to the adjacent owner, is entirely within the Court's discretion as conferred by s 3(2) and (3) of the Act: see *Morris v Thomas* (1991) 73 LGRA 164."[41]

[77] His Honour referred to the observations of Dunn J in *Re Melden Homes* as to the meaning of "compensation", but said at [66]:

> "Notwithstanding these dicta, I adhere to the view that I have earlier expressed that compensation payable to the adjacent owner under the Act is compensation that is payable in respect of the transfer or lease or grant of easement in respect of the adjacent owner's land that is the subject of the encroachment. It does *not* extend to compensation otherwise arising."

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[40] A reference to *Boed Pty Ltd v Seymour* (1989) 15 NSWLR 715.

[41] Underlining added; italic emphasis in the original.

[78] In *Wherry* the area of the encroachment measured about 1.7m^2 (in the context of an overall area of 230m^2). The applicant sought orders for the removal of the encroachments (involving parts of the building on the adjacent land overhanging the applicant's land) and compensation for the cost and inconvenience occasioned by the interference with the applicant's use and enjoyment of his land, including additional building costs. By the time of the hearing, the applicant no longer pressed for removal of the encroachments, and there was agreement that the encroachments should be regularised by the grant of an easement, but the applicant maintained the claim for substantial compensation (see at [11] and [40]). In *Wherry,* the encroaching building had been constructed in 1966. It was a school boarding house. At the time of construction, the respondent owned all the relevant land. So at the time the encroachment physically came into existence, it was not an encroachment in respect of which the legislation would operate, because the encroaching owner and the adjacent owner were one and the same person (see at [18]). The applicant acquired his lot from the respondent in 1998. It was held that, at that point in time, an "encroachment" for the purposes of the legislation came into existence (see at [26]). The existence of the encroachment was in fact disclosed in the contract of sale (at [28]). On that basis, and quite apart from the discretionary considerations under the legislation itself, Bignold J found (at [34]) that:

> ".. it would be self-evidently unconscionable for the applicant to claim relief under the Act in the circumstances of this case, where, according to my earlier analysis, his entitlement thereunder wholly depends upon his purchase of the residential property in 1998 pursuant to a contract for sale which fully disclosed the existence of the encroachment and in terms of which he expressly waived his rights as purchaser to raise objections or requisitions or to claim compensation or to rescind the contract."

[79] But his Honour dealt with the discretionary considerations under the legislation in any event (from [38] onwards). He found that none of the applicant's alleged loss and damage was incurred "through the encroachment" (at [67] and [75]) and accordingly concluded that, if any compensation should be ordered, it would be no more than the minimum under the equivalent of s 186(1) (the agreed value of the subject land) (at [55] and [76]). However, having regard to a range of circumstances (at [79]) Bignold J held that no compensation should be awarded; a conclusion reinforced by the earlier finding about the effect of the contract of sale (at [80]).

[80] The question of construction of s 186 was not directly addressed in *Re De Luca & De Luca* [1984] QSC 579. In this case, the applicant adjoining owner did seek to recover, as part of the compensation for the transfer of a small area comprising the subject land, consequential losses including the additional construction costs incurred following discovery of the encroachment. That claim was rejected, as discussed above. However, it does not appear to have been argued that such a loss could not form part of the compensation awarded, as a matter of construction of s 186.

[81] There is, however, some assistance to be gained from observations of Keane JA (as his Honour then was) in *Shadbolt v Wise* [2006] 1 Qd R 553. At an earlier stage of this litigation, in *Shadbolt v Wise* [2002] QSC 348 Mullins J found that the encroachment arose from negligence on the part of the encroaching owner, and so the minimum compensation of three times the unimproved capital value applied (at [67]); which was determined to be $15,000 (at [69]). In addition, there was an order for the encroaching owner to pay the adjoining owner all costs and expenses reasonably incurred by the latter in order to give effect to the transfer (by reference to s 186(2)(b)). No other loss and damage was claimed (and, as discussed above, Mullins J otherwise found that apart from annoyance, the encroachment had no significant impact on the adjoining owner's existing and possible future use or enjoyment of their land).[42]

[82] The dispute between the Shadbolt and Wise parties continued, in relation to the mechanics of facilitating the transfer of the subject land, resulting in a further application being made to the court, and a further appeal.[43] By this stage of the dispute, the mechanics of giving effect to Mullins J's original orders included an order for the adjoining owners to consent to a relaxation of the setback requirements of the *Building Act,* to facilitate consent being obtained from the Council to a development application for subdivision of the land. The adjoining owner contended such an order was not one "with respect to" the conveyance, transfer etc of the subject land, for the purposes of s 185(1). That was rejected by the Court of Appeal (see at [22] to [28]). Part of the reasoning process of Keane JA (with whom McPherson and Williams JJA agreed) on this issue was as follows:

> "[23] The question which must then be addressed is whether other legal rights and duties are affected by the order in a way which is not so incidental to the transfer of the subject land as to deny the character of the order as one with respect to the conveyance or transfer of the subject land. In this regard, the Wise parties [adjoining owners] assert that the order under challenge is correctly characterised as an order with respect to some subject other than the conveyance or transfer of the subject land because it obliges them to forgo their 'rights' to object to the swimming pool and associated structures on the basis that the relevant setback requirements have not been fulfilled.
>
> [24] In this regard, it may be noted that the order that the Wise parties consent to the relaxation of the setback requirements of the *Building Act* has not been shown adversely to affect in any material way the use and enjoyment by the Wise parties of the land to be retained by them. There has not been, for example, a suggestion that the relaxation of the setback requirements will actually impede the use and enjoyment of the land which they are to retain because of the proximity of the structure on the subject

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[42] An appeal against Mullins J's decision was dismissed: *Shadbolt v Wise* [2003] QCA 241.
[43] See the summary in *Shadbolt v Wise* [2006] 1 Qd R 553 at [4]-[11].

land, or that the relaxation is likely to reduce the value of the retained land to any extent not already compensated for by the $15,000 compensation ordered to be paid by the Shadbolts by Mullins J. At the hearing before the learned primary judge, no attempt was made on behalf of the Wise parties to suggest that an infringement of the 'rights' involved in requiring them to consent to the relaxation of the setback requirements to facilitate the conveyance of the subject land would cause material loss to the Wise parties. That is hardly surprising given the relatively tiny area of the subject land and the structures thereon in comparison with the large balance area retained by the Wise parties. If any such loss had been identified, an order for compensation under s 186(2)(b) of the *Property Law Act* could have included compensation for such loss.

…

[26] Section 186 provides relevantly as follows:

> '(1) …
>
> (2) In determining whether the compensation shall exceed the minimum and if so by what amount, the court shall have regard to –
>
> (a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and
>
> (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and **through the orders proposed to be made in favour of the encroaching owner**; and
>
> (c) the circumstances in which the encroachment was made.' (emphasis added).

[27] That part of s 186(2)(b) which has been highlighted above indicates that loss or damage may result to the adjacent owner through the making of orders in favour of an encroaching owner under s 185. That is to say, the rights or interests of the adjacent owner, other than as the owner of the land to be transferred, may be adversely affected by an order under s 185(1)(b). To the extent that an order under s 185(1)(b), such as that in question here, may be apt adversely to affect the rights of an adjacent landowner such as the Wise parties, that loss may be the subject of an award of compensation. Thus the circumstance that such rights or interests, other than those inhering in the adjacent landowner as such, are adversely affected by such an order

> cannot deny to an order the character of an order with respect to the conveyance or transfer of the subject land."[44]

[83] In this case, Keane JA was particularly concerned with the part of s 186(2)(b) which refers to loss or damage which has been or will be incurred by the adjacent owner "through the orders proposed to be made in favour of the encroaching owner". His Honour found that such loss or damage was not limited to the rights and interests of the adjacent owner *as the owner of the land*.

[84] The same reasoning applies to the other part of s 186(2)(b), referring to loss and damage which has been or will be incurred by the adjacent owner "through the encroachment".

[85] For completeness, I note that in *Llavero v Shearer* [2014] NSWSC 1336 Young AJA, similarly, did not regard the compensation under s 186 as limited to the loss of property rights. At [116] Young AJA noted, of the New South Wales equivalent to s 186, that "the compensation is to be paid not for the fact that there is an encroachment but because of the loss of property by virtue of a transfer lease or grant to the encroaching owner of the land over which there is an encroachment". But at [127] his Honour said that "[t]he compensation to be paid needs to cover two heads of damage (a) loss of property rights and (b) damages for disturbance". His Honour reiterated this view in *XR Property Developments Pty Ltd v Denning Real Estate Pty Ltd (No 2)* [2016] NSWSC 556 at [6], referring by analogy to resumption cases such as *G & R Wills & Co Ltd v Adelaide Corporation* (1962) 108 CLR 1. Young AJA would seem to be capturing the loss and damage referred to in s 186(2)(b) within the concept of "damages for disturbance".

[86] The parties pitted the approach of Dunn J in *Re Melden Homes* against the approach of Bignold J in *Wherry* – with the defendant arguing that *Wherry* is right, and *Re Melden Homes* is wrong; and the plaintiff arguing the contrary. I am not persuaded, as urged by the defendant, to the conclusion that the approach of Dunn J in *Re Melden Homes* should be rejected as being incorrect. Other aspects of that decision have been repeatedly followed, in other cases, and it is not in my view obviously wrong. It is a subtle point, but the only distinction I would make, in relation to Dunn J's observations set out at [74] above, is that it is to the words of the statute that close attention must be paid. In order for loss and damage to appropriately be factored into any increase in the minimum compensation to be paid, it must be loss and damage which has been or will be incurred by the adjacent owner "through the encroachment" and [or] "through the orders proposed to be made in favour of the encroaching owner". The ordinary meaning of the word "compensation" ought not be relied upon as expanding what is otherwise properly captured within the meaning of the words used in the section itself.

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[44] Underlining added; bold emphasis in the original.

[87] Similarly, though, I do not find myself in disagreement with the analysis of Bignold J in *Wherry,* subject to two qualifications. The first relates to the use of the word "exclusively" in [43] of *Wherry*. If that paragraph is read, consistently with what Bignold J says at [44] of *Wherry,* as a reference to the "compensation" referred to in s 185(1)(a), being construed as the compensation dealt with in s 186, I agree, for the reasons discussed above. However, if it is read as a statement that (assuming any compensation is to be ordered at all, and then assuming the court is persuaded to increase the compensation above the minimum) the compensation is "exclusively" for any grant of title, then I disagree, as in my view that is not supported by a textual analysis of the words used in s 186(2)(b). It may be correct to conclude, as Bignold J does at [46], that the words used in s 186(2)(b) do not elevate into claimable compensation *directly* payable under the Act such consequential loss as may be captured by the words used. But, as his Honour acknowledges, such (consequential) loss and damage is, expressly, relevant to the question whether the compensation shall exceed the minimum and, if so, by what amount. To say that, is decidedly *not* to say, that such consequential loss or damage (as may be captured by the words used in s 186(2)(b)) is not recoverable at all by an order for compensation.

[88] Once again, it is the words of the statute that have primacy. In short, I consider Dunn J's approach in *Re Melden Homes*, possibly merely by virtue of expression rather than intent, may be a bit wide; and depending upon how it is construed, Bignold J's approach in *Wherry* a bit narrow. Keane JA in *Shadbolt v Wise* focusses on the words used in the legislation, and I respectfully agree with his Honour's analysis.

[89] Accordingly, as a matter of the construction of s 186, in my view the compensation which may be ordered to be paid to an adjacent owner is not limited to the value of the subject land, or the loss caused to the adjacent owner's *title* to their land, but could include other consequential losses which have been or will be incurred by the adjacent owner "through the encroachment" and [or] "through the orders proposed to be made in favour of the encroaching owner".

Factors relevant to the exercise of the discretion under ss 185 and 186

[90] Whether the discretion is exercised in a particular case will depend on all the circumstances: in the first instance, under s 185(1), whether to award compensation at all; and, if so, in the application of s 186.

[91] Under both s 185(2)(f) and s 186(2)(c), the circumstances in which the encroachment was made is, expressly, a relevant consideration.

[92] Where, as in a case such as the present, the encroaching owner was not responsible for the encroachment, and in fact did not know about it and had no means of knowing about it, as the cases demonstrate, that will be a particularly important factor in the exercise of the discretion.

[93] Assuming there is to be an order for payment of compensation at all (s 185(1)(a)), in such a case, as a starting point, under s 186(1) the minimum compensation would be the unimproved capital value of the subject land.

[94] Then, in determining under s 186(2) whether the compensation should *exceed* that minimum and, if so, by what amount, the court is required to have regard to the things in s 186(2). In my view that does not mean the court may *only* have regard to those things. If there are other factors, relevant to the exercise of the discretion, the court ought properly to take those into account. However, "the circumstances in which the encroachment was made" is a broad consideration, capable of including the responsibility, or otherwise, of the relevant parties for the encroachment.

[95] That is significant, because it should be accepted that the presumption against alteration of established common law doctrines, in the absence of "irresistible clearness" [45] applies, in the process of construing part 11 of the *Property Law Act,* in particular ss 185 and 186. This point was emphasised by the defendant, in support of its construction argument. I do not accept that the presumption supports the narrow construction of the meaning of "loss and damage" which the defendant urges. But I do accept that the presumption supports the proposition that in considering the circumstances in which the encroachment was made, it is appropriate, indeed necessary, for the court to consider the liability (or otherwise) which an encroaching owner would have had, at common law. The plaintiff accepted that such matters would be relevant to the exercise of the court's discretion.

[96] Relevantly in that regard the authorities referred to by the defendant (and not controverted by the plaintiff) support the proposition that a person is not liable for a nuisance (such as an encroachment) unless they caused it; by neglect of duty allowed it to arise; or, when it has arisen without their act or default, omitted to remedy it within a reasonable time after the person did, or ought to have, become aware of it.[46] And an occupier of land is under no duty to search for nuisances which may or may not exist.[47] As articulated by Lord Wright in *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 904-905:

> "… it has I think been rightly established in the Court of Appeal that an occupier is not prima facie responsible for a nuisance created without his knowledge and consent. If he is to be liable a further condition is necessary, namely, that he had knowledge or means of knowledge, that he knew or should have known of the nuisance in time to correct it and obviate its mischievous effects. The liability for a nuisance is not, at least in modern

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[45] *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; and *Coco v R* (1994) 179 CLR 427 at 437, referred to in Pearce and Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed) at [5.28].

[46] *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 646 and 657. See also *State of Queensland v Michael Vincent Baker Superannuation Fund Pty Ltd* [2019] 2 Qd R 146 at [196]-[198] per McMurdo JA (Morrison JA agreeing, at [172]).

[47] *Torette House Pty Ltd v Berkman* (1940) 62 CLR 637 at 657.

> law, a strict or absolute liability. If the defendant by himself or those for whom he is responsible has created what constitutes a nuisance and if it causes damage, the difficulty now being considered does not arise. But he may have taken over the nuisance, ready made as it were, when he acquired the property, or the nuisance may be due to a latent defect or to the act of a trespasser, or stranger. Then he is not liable unless he continued or adopted the nuisance, or, more accurately, did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it. This rule seems to be in accordance with good sense and convenience. The responsibility which attaches to the occupier because he has possession and control of the property cannot logically be limited to the mere creation of the nuisance. It should extend to his conduct if, with knowledge, he leaves the nuisance on his land. The same is true if the nuisance was such that with ordinary care in the management of his property he should have realised the risk of its existence."[48]

[97] It follows that, at common law, a person in the position of the defendant – the successor in title to the person who in fact caused the encroachment; who did not know of the encroachment prior to being told of it by the plaintiff's solicitor; and who had no reasonable means, at the time of purchasing its land, of being or becoming aware of the existence of the encroachment – would not be liable for any loss or damage caused to the adjoining owner "through the encroachment" (to use the words from s 186(2)(b)).

[98] In my view, that is an important consideration in the exercise of the discretion under ss 185 and 186 of the *Property Law Act*. There is nothing in the text of the relevant sections, nor in the extrinsic materials referred to above, which supports a conclusion that it was the intention of the legislature to expand the liability of, relevantly, an innocent encroacher. Where there is to be a transfer of the land, it *may* nevertheless be appropriate to award compensation, in the form of the unimproved capital value of the land to be transferred (because that is, expressly, a purpose of the legislation – to facilitate the adjustment of boundaries to deal with an encroachment, on payment of fair and reasonable compensation for such transfer). But as to whether the compensation should exceed that amount, "the circumstances in which the encroachment was made", are likely to militate against such an exercise of the discretion – in the case of an innocent encroaching owner.

[99] Although not expressly adverted to in the various cases dealing with applications under legislation such as part 11 of the *Property Law Act,* it can be seen that the courts have not imposed liability for compensation (beyond the value of the land transferred, where that is considered appropriate) on innocent encroaching owners: see, for example, *Re De Luca & De Luca* [1984] QSC 579; *Morris v Thomas* (1991) 73 LGRA 164 (as to the

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[48] Adopted in *Cartwright v McLaine & Long Pty Ltd* (1979) 143 CLR 549 at 553 per Gibbs ACJ and 566-567 per Jacobs J; and *Montana Hotels Pty Ltd v Fasson Pty Ltd* (1986) 69 ALR 258 at 261-262 (Privy Council, on appeal from the Supreme Court of Victoria).

significance of the circumstances in which the encroachment came into existence); *Gladwell v Steen* (2000) 77 SASR 310; and *J and T Lonsdale v P Gilbert & Ors* [2006] NSWLEC 30.

[100] In short, the fact that s 186(2)(b) requires the court to have regard to the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner *does not mean* that the amount of compensation required to be paid in respect of any transfer etc of the subject land must be increased to incorporate an amount reflecting that loss and damage. Whether that is appropriate will depend on the circumstances, including the responsibility (or otherwise) of the encroaching owner for the encroachment.

[101] The defendant submitted that it would be arbitrary to permit loss and damage to be recovered for trespass under the statute in some cases (ie where the current owner would in fact be liable in trespass for the encroachment, such as where they created it themselves), but not in others (where the encroacher is an innocent successor in title). This was said to support a construction of the provisions which limits the scope of allowable compensation to compensation for the conveyance of the subject land.

[102] I do not accept that argument. Sections 185 and 186 confer a broad discretion on the court, as discussed above. In the exercise of that discretion, the court is required to take into account the circumstances in which the encroachment was made. In determining whether any compensation is payable at all (s 185(1)(a)) and, if so, in what amount (s 186), the court can readily distinguish between an encroaching owner who would have been liable at common law and one who would not. That encroaching owners in varying circumstances might be the respondents to such applications does not necessitate giving the words of s 186(2) a restricted meaning that they otherwise do not have. These are matters to be taken into account in the exercise of the wide discretion conferred on the court.

[103] Lastly, the defendant relies upon s 187 (which enables an order for payment of compensation to be registered in the land registry and take effect as a charge on the land of the encroaching owner) as supporting its argument for a narrow construction of ss 185 and 186. I am not persuaded the terms of s 187 support any different conclusion on the proper construction of these provisions. There is a broad scope for discretionary consideration in the application of s 187, in terms of whether the order for payment of compensation is registered at all; whether it does operate as a charge, and if so to what extent; and also as to the part of the encroaching owner's land to which it applies.

Answering the question

[104] For the reasons set out above, the answer to question (a):

> "Whether, as a matter of law, the reference to loss and damage in sections 185(2)(d) and 186(2)(b) of the *Property Law Act* is properly to be construed as pleaded in paragraph 9(b) of the further amended defence."

is no, although the proper construction of ss 185 and 186 reflects some elements of that pleading.

[105] In summary:

1. The court has a very wide discretion in terms of the relief to be granted under s 185(1).

2. In so far as s 185(1)(a) enables the court to make an order with respect to the payment of compensation to the adjacent owner, that is compensation within the meaning of, and worked out in accordance with, s 186.

3. Where the court proposes to exercise the discretion by making an order with respect to the conveyance, transfer, lease or grant of the subject land, or some interest in it under s 185(1)(b), the court nevertheless retains a discretion whether or not to order payment of any compensation at all.

4. The circumstances in which the encroachment was made is one of the relevant considerations in the exercise of that discretion (s 185(2)(f)).

5. If the court exercises the discretion to order payment of compensation under s 185(1)(a), that is to be worked out in accordance with s 186.

6. In the first instance, that involves consideration of the minimum compensation to be paid under s 186(1) (depending on whether the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence).

7. In determining whether the compensation shall exceed that minimum and, if so by what amount, the court is obliged to have regard to the matters in s 186(2) (although may also consider other relevant matters), including "the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner" (s 186(2)(b)). The loss and damage referred to in this sub-section is not limited to loss and damage to the rights and interests of the adjacent owner as the owner of the land, and may extend to consequential losses, incurred "through the encroachment" or "through the orders proposed to be made in favour of the encroaching owner".

8. Another matter the court is obliged to have regard to under s 186(2) is the circumstances in which the encroachment was made (s 186(2)(c)). This would include the responsibility, or otherwise, of the parties (or either of them) for the

existence of the encroachment; and would include consideration of the liability (or otherwise) which the encroaching owner who is a party to the proceeding would have had, at common law, for the encroachment.

Orders

[106] It is appropriate to give the parties the opportunity to be heard before making any formal orders or declarations, consequent upon the answer to the separate question.

[107] In terms of the draft order provided by the defendant at the end of the hearing, it is uncontroversial that there should be declarations made in terms that:

1. The subterranean encroachment of the footings of the building on 27 Peel Street, South Brisbane into the land on 25-27 Hope Street, South Brisbane (the Encroachment) was created prior to the Defendant acquiring title to the building on 27 Peel Street.

2. The Defendant had no knowledge of the existence of the Encroachment prior to it being informed of its existence by the Plaintiff on or about 5 September 2014.

3. The Defendant had no reasonable means of being aware of the existence of the Encroachment prior to being informed of its existence by the Plaintiff on or about 5 September 2015.

[108] However, I am not prepared to make the declaration sought at paragraph 4 of the defendant's draft order, as to the interpretation of relevant parts of ss 185 and 186, for the reasons set out above.

[109] In addition, it is appropriate to give the parties the opportunity to be heard further in relation to the application to strike out the various paragraphs of the statement of claim (in which the particularly disputed consequential losses, comprising additional construction costs, have been pleaded and claimed), as their position may (or may not) be different, in light of these reasons.

[110] I will also hear the parties as to costs.