SUPREME COURT OF QUEENSLAND

CITATION:	*Bunnings Group Ltd v Asden Developments Pty Ltd & Ors* [2013] QCA 347
PARTIES:	**BUNNINGS GROUP LTD** ACN 008 672 179 (appellant) **v** **ASDEN DEVELOPMENTS PTY LTD** ACN 115 851 833 (first respondent) **MELINDA JAYNE NICHOLS** (second respondent) **PETER NICHOLS, DEBRA NICHOLS, GEORGE NICHOLS, JONATHAN PAUL McLEOD & BILL KARAGEOZIS** (third respondents)
FILE NO/S:	Appeal No 4031 of 2013 SC No 2798 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	4 September 2013
JUDGES:	Muir and Gotterson JJA and Margaret Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside orders 2, 5 and 6 made on 9 April 2013.** **3. Leave to the appellant and the third respondents to make written submissions on the costs of the applications before the primary judge and the costs of the appeal in accordance with paragraph 52(3) and (4) of Practice Direction 3 of 2013.**
CATCHWORDS:	REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – statutory trust for sale – effect on rights of co-owners – effect on rights of encumbrancee of the share of a tenant in common – where the second respondent was the registered owner of a one-third share as tenant in common in five lots of land –

where the first respondent entered into a credit agreement with the appellant – where the second respondent guaranteed the performance of the first respondent's obligations under the credit agreement – where the second respondent granted the appellant an equitable charge over "all the guarantor's land" – where the first respondent failed to pay the appellant moneys owing pursuant to the credit agreement – where the second and third respondents, in separate proceedings and without the knowledge of the appellant, obtained an order appointing a statutory trustee for sale of the five lots – where the order vested the land in the statutory trustee subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, and provided for the distribution of the proceeds of sale to the co-owners excluding the second respondent – where the appellant claimed the money owing plus interest, and sought declaratory relief in relation to the charge – where the primary judge determined that the order appointing the statutory trustee had put paid to any interest the appellant could have claimed in any of the five lots or in turn in the proceeds of sale of any of those lots – whether the primary judge erred in so finding – whether the appellants had an equitable interest prior to the appointment of the statutory trustee for sale

PARTNERSHIP – PARTNERSHIP PROPERTY – GENERALLY – NATURE OF INTEREST OF PARTNER – where the third respondents alleged that the land in which the second respondent held a one-third share was partnership property, and could not be subject to the appellant's equitable charge – whether primary judge unable to resolve whether the land was partnership property

Conveyancing Act 1919 (NSW), s 66F, s 66G
Property Law Act 1974 (Qld), s 37, s 37A, s 38(1), s 38(3), s 38(3A), s 38(7)

Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (in liq) (No 5) [2008] FCA 1700, cited
AVCO Financial Services Ltd v Commonwealth Bank of Australia (1989) 17 NSWLR 679, cited
Bank of Queensland Ltd v Dodrill [2011] 2 Qd R 541; [2011] QCA 235, cited
Buhr v Barclays Bank Plc [2002] BPIR 25; [2001] EWCA Civ 1223, cited
Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd (1974) 131 CLR 321; [1974] HCA 22, cited
Crocombe v Pine Forests of Australia Pty Ltd (2005) 219 ALR 692; [2005] NSWSC 151, considered
Federal Commissioner of Taxation v Everett (1980) 143 CLR 440; [1980] HCA 6, cited

Federal Commissioner of Taxation v Everett (1978) 38 FLR 26; [1978] FCA 39, considered
Grovenor v Permanent Trustee Co of NSW Ltd Ltd (1966) 40 ALJR 329, cited
John Alexander's Clubs Pty Ltd v White City Tennis Club Limited (2010) 241 CLR 1; [2010] HCA 19, cited
Law Guarantee and Trust Co Ltd v Mitcham and Cheam Brewery Co Ltd [1906] 2 Ch 98, cited
News Ltd v Australian Rugby Football League Ltd (1996) 64 FCR 410; [1996] FCA 1256, cited
Ramsay v Pigram (1968) 118 CLR 271; [1968] HCA 34, cited
Re Della-Franca's Caveat [1993] 1 Qd R 382; [1991] QSC 190, cited
Victoria v Sutton (1998) 195 CLR 291; [1998] HCA 56, cited

COUNSEL: R J Anderson for the appellants
No appearance for the first and second respondents
M D Martin for the third respondents

SOLICITORS: Bennett & Philp Lawyers for the appellant
No appearance for the first and second respondents
Mills Oakley Lawyers for the third respondents

[1] **MUIR JA:** I agree with the reasons of Margaret Wilson J and the orders she proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Margaret Wilson J and with the reasons given by her Honour.

[3] **MARGARET WILSON J**: This appeal concerns entitlement to the proceeds of sale of land held on a statutory trust for sale pursuant to the *Property Law Act* 1974 (Qld) part 5 division 2. The issue is whether, in the circumstances of this case, the appellant's equitable charge over the second respondent's interest as a tenant in common attached to any of the proceeds of sale of the entirety.

[4] The second respondent was the registered owner of a one third share as tenant in common in five lots of land. She guaranteed the performance of the first respondent's obligations to the appellant pursuant to a credit agreement, granting the appellant an equitable charge over her interest in the land. The first respondent failed to pay the appellant moneys owing pursuant to the credit agreement. In this proceeding the appellant claimed against the second respondent $27,581.84 and interest pursuant to the guarantee, and declaratory and other relief in relation to the charge.

[5] In another proceeding between George Phillip Nichols, George Phillip Nichols as executor of the estate of Jennifer Elizabeth Nichols (deceased), Peter Hercules Nichols and Debra Ann Nichols as applicants and Melinda Jayne Nichols (the second respondent to this appeal) as respondent, a deputy registrar made an order by consent appointing one of the third respondents to this appeal, Mr McLeod, as statutory trustee for sale of the five lots. By the order, the land was vested in the statutory trustee subject to encumbrances affecting the entirety, but free from

encumbrances affecting any undivided shares. The order further provided for the payment of the net proceeds of sale: they were to be paid to the applicants. In other words, none of the proceeds of sale was to be paid to the second respondent to this appeal. The appellant was not a party to that proceeding, and had no notice of it.

[6] An application in the present proceeding came before the primary judge on 9 April 2013. By then the statutory trustee had sold two of the lots, enough of the proceeds of sale of one of the lots to meet the amount then owing to the appellant was being held in the appellant's solicitors' trust account, and contracts for the sale of the remaining three lots were on foot. The appellant sought judgment against the second respondent for the amount owing, and declaratory relief in relation to its equitable charge. Its application was served on the other tenants in common and the statutory trustee, who filed a cross-application seeking the appointment of an additional statutory trustee for sale, the removal of a caveat lodged by the appellant over the second respondent's interest in the remaining three lots, and payment of the moneys in the trust account of the appellant's solicitors to the trust account of the statutory trustees' solicitors.

[7] The primary judge gave judgment for the appellant for the amount claimed pursuant to the guarantee, ordered the removal of the caveat, and appointed Mr Karageozis (one of the third respondents to this appeal) as an additional statutory trustee for sale. Those orders are not challenged in this appeal.

[8] His Honour determined that the deputy registrar's order had put paid to any interest the appellant could have claimed in any of the five lots or in turn in the proceeds of sale of any of those lots. His Honour ordered that the moneys in its solicitors' trust account be paid to the trust account of the solicitors for the statutory trustees. The correctness of that determination is at the heart of this appeal.

[9] The first respondent took no part in the appeal. The third respondents to the appeal are the other tenants in common (Peter, Debra and George Nichols) and the statutory trustees for sale (Messrs McLeod and Karageozis).

Background

The credit agreement and guarantee

[10] The appellant operates a chain of hardware stores. On 12 August 2009, it agreed to supply goods on credit to the first respondent pursuant to its standard form credit agreement. The second respondent, who was a director of the first respondent, guaranteed the performance of the first respondent's payment and other obligations to the appellant.

[11] Clause 7 of the guarantee provided –

> "The Guarantor charges as beneficial owner and as trustee of every trust all the Guarantor's land (including land acquired in the future) in favour of [the appellant] to secure the payment of the Moneys and the performance and observance of the Guarantor's covenants under this deed."

[12] Between August 2009 and December 2010, the appellant supplied goods on credit to the first respondent pursuant to the credit agreement. In late November 2010, the first respondent ceased paying for the goods invoiced. It went into liquidation on 22 December 2010.

The land

[13] This appeal relates to lots 1, 2, 3, 4, and 5 on SP 213917 in the County of Stanley Parish of Tingalpa ("lots 1-5"). From 23 July 2009 the registered owners of those lots were the following persons as tenants in common –

George and Jennifer Nichols (joint tenants inter se)	one third
Peter and Debra Nichols (joint tenants inter se)	one third
The second respondent	one third.

Subsequently, Jennifer Nichols died, and George Nichols acquired her interest by survivorship. There was a mortgage over the entirety in favour of National Australia Bank Limited.

Relationships

[14] The second respondent Melinda Nichols (formerly Brown) was married to Philip Nichols. George and Jennifer Nichols were her parents-in-law. Peter and Debra Nichols were her husband's uncle and aunt.

[15] The marriage of Philip Nichols and the second respondent broke down, and in 2010 Philip Nichols commenced property proceedings against the second respondent in the Federal Magistrates Court.[1]

[16] Subsequently George and Jennifer Nichols and Peter and Debra Nichols were joined as respondents to that proceeding in the Federal Magistrates Court. Early in 2012[2] they filed an amended defence and counterclaim, in which they alleged relevantly –

> that there was a partnership of George and Jennifer Nichols, Peter and Debra Nichols, and the second respondent for the development of lots 1-10 on SP 213937;
> that those lots were partnership property;
> that the partnership appointed the first respondent (Asden Developments Pty Ltd) to manage the development;
> that George and Jennifer Nichols and Peter and Debra Nichols were to share the costs of carrying out the development;
> that George and Jennifer Nichols and Peter and Debra Nichols were to be reimbursed the costs of the development from sale proceeds before any profits were distributed;
> that the profits of the partnership were to be shared in the proportions of one-third for each couple and one third for the second respondent;
> that the second respondent's only interest in those lots was a one third interest in the partnership.

[17] The position the second respondent took in relation to the land in the Federal Magistrates Court proceeding is not clear on the material before this Court. I note that in February 2013 the statutory trustee's solicitors asserted in correspondence with the appellant's solicitors that she had "abandon[ed] her claim to a one third interest". They also asserted (perhaps inconsistently) that in her "position statement" she had said that the value of her one-third interest in lots 1-5 was nil.[3]

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1 BRC 12087/10.

2 The precise date is indecipherable on the copy at AR 276.

3 AR 111.

Commencement of this proceeding (BS 2798/11)

[18] On 4 April 2011, the appellant commenced this proceeding against the first and second respondents, seeking (inter alia) a declaration that it held an equitable charge over another parcel of land of which the second respondent was the registered owner (lot 62 on RP 132086 in the County of Stanley Parish of Cleveland) and, against the second respondent, $27,581.84, together with interest, pursuant to the guarantee, and declaratory and other relief in relation to the charge.

[19] The appellant was made aware of the Federal Magistrates Court proceeding between the second respondent and her husband by the second respondent's conditional notice of intention to defend, which was filed on 1 June 2011.

[20] The appellant subsequently discovered that the second respondent held a one-third share as a tenant in common in lots 1-5 at Wakerley, registered in her maiden name. On 20 July 2011 it lodged a caveat over her interest in those lots, as equitable chargee pursuant to clause 7 of the guarantee.

[21] In October 2011, the appellant amended its statement of claim in this proceeding to include the plaintiff's interest in lots 1-5, and amended its prayer for relief so that the declaration claimed related also to that interest.

[22] There is nothing in the appeal record to suggest that the appellant had any knowledge of the allegation made by the other tenants in common in the Federal Magistrates Court proceeding that lots 1-5 were partnership property.

Appointment of statutory trustee for sale (BS 9666/12)

[23] On 16 October 2012 George Nichols, George Nichols as executor of the estate of Jennifer Nichols deceased, Peter Nichols and Debra Nichols[4] filed an originating application for the appointment of a statutory trustee for sale of lots 1-5 (BS 9666/12). The second respondent to this appeal was made the respondent to that application. The appellant was not a party to it, and had no notice of it.

[24] On 13 November 2012, a deputy registrar of this Court made an order in those proceedings with the consent of all the tenants in common, appointing Jonathan Paul McLeod (one of the third respondents to this appeal) as statutory trustee for the sale of lots 1-5. The order continued –

> "and such property is vested in Jonathan Paul McLeod subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by him on the statutory trust for sale.
>
> The applicants receive all surplus settlement proceeds from the sale of the properties, if any.
>
> The applicant's costs of and incidental to this application be paid from the proceeds of sale of the properties."

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[4] George and Jennifer Nichols held a one-third share as joint tenants inter se. Accordingly, on Jennifer Nichols' death her interest passed by survivorship to George Nichols. It is not clear why one of the applicants was George Nichols in his capacity as executor of her estate. In particular, it is not clear whether this was because of the position they had taken in the family law proceedings that the land was partnership property.

[25] There should have been at least two persons appointed as statutory trustees.[5] It was not argued before the primary judge or on appeal that because only one was appointed the statutory trust for sale did not arise. Rather, the oversight was treated as an irregularity, which was remedied by the order of the primary judge in the present proceeding varying the earlier order to include Bill Karageozis as an additional trustee for sale. In that capacity, Mr Karageozis is one of the third respondents to this appeal.

Sale of the properties

[26] Lots 2 and 3 were sold by the statutory trustee Mr McLeod. There is no evidence of the amount of the net proceeds of each sale.

[27] The sale of lot 2 was completed on 18 March 2013. The appellant withdrew the caveat over the second respondent's interest in that lot to allow settlement to be effected, and $45,984.82 of the sale proceeds were paid into the appellant's solicitors' trust account. That was the amount owing to the appellant under the credit agreement for trade debt, interest and costs at the time of the sale.

[28] The sale of lot 3 was completed on 20 March 2013, the appellant withdrawing the caveat over the second respondent's interest in that lot to allow settlement to be effected.

[29] At the time of the hearing before the primary judge, there were contracts for the sale of lots 1, 4 and 5 on foot. The appellant refused to withdraw the caveat over the second respondent's interest in those lots.

The primary judge's reasoning

[30] The primary judge determined the applications before him on the assumption that prior to the deputy registrar's order, the second respondent had a legal and equitable interest in the five lots which was charged in favour of the appellant.[6]

[31] His Honour said –

> "… the essential question is whether the appointment of Mr McLeod, as trustee of the five lots, put paid to the charge which is claimed by the plaintiff. By that order it was further provided that the proceeds of sale of the properties, after deduction of the costs of the applicants for the order, be paid to those applicants, that is to the present respondents. In other words the order provided that none of the proceeds of sale would be paid to the present second defendant.
>
> The consequence of that order, in my view, was to put paid to any interest which could be claimed by the plaintiff in any of the five lots or in turn to the proceeds of sale of any of those lots. According to the terms of section 38(1), the effect of the order was to vest the five properties in Mr McLeod as a trustee, free from any encumbrance affecting any undivided share. According to the plaintiff's claim, its charge was such an encumbrance.

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5 *Property Law Act* s 38(3).

6 AR 11-12.

> The plaintiff – on its argument – would have been entitled to a charge on any property constituted by the second defendant's entitlement to some of the proceeds of sale. But she has no such entitlement because of the terms of the order. The present case differs from *Crocombe & anor v Pine Forests of Australia Pty Ltd* at (2005) 219 ALR 692.
>
> The position then is that the plaintiff has no entitlement to a charge over any of the lots or of the moneys presently held in trust…"[7]

Property Law Act

[32] Part 5 division 2 of the *Property Law Act* provides –

> **37 Definitions for div 2**
> In this division—
> ***co-owner*** has a corresponding meaning and includes an encumbrancee of the interest of a joint tenant or tenant in common.
>
> ***co-ownership*** means ownership whether at law or in equity in possession by 2 or more persons as joint tenants or as tenants in common.
>
> **37A Property held on *statutory trust for sale***
> Property held upon the *statutory trust for sale* shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners.
>
> …
>
> **38 Statutory trusts for sale or partition of property held in co-ownership**
> (1) Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.
>
> …
>
> (3) Where the entirety of the property is vested at law in co-owners the court may appoint … 2 or more individuals … to be trustees of the property on either of such statutory trusts.
>
> (3A) On such appointment under subsection (3), the property shall, subject to the *Trusts Act 1973*, section 90, vest in the trustees.

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7 AR 14-15.

…

(7) Where property becomes subject to such statutory trust for sale—

…

(b) in any case—land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs."

Crocombe v Pine Forests of Australia Pty Ltd

[33] In the New South Wales case of *Crocombe* the plaintiffs sought the winding up of an investment scheme or the appointment of a receiver over it. By cross-claim one of the defendants sought the appointment of statutory trustees for the sale of the scheme land. Sections 66F and 66G of the *Conveyancing Act* 1919 (NSW) were relevantly in similar terms to ss 37A and 38 of Queensland's *Property Law Act*. One of that defendant's objections to the appointment of a receiver was that there was a mortgage over the undivided shares registered in the name of the one of the investors. The following observations of Young CJ in Eq are pertinent to the present appeal –

> [75] … If an order is made under s 66G, then the trustees for sale will be able to sell subject to any encumbrances affecting the whole property, but free from encumbrances affecting any independent individual undivided shares. This is provided for in s 66G(1).
>
> [76] I have not been able to find any authority as to what happens to registered mortgages of an undivided share when the trustee for sale is appointed of the whole parcel. It would seem that the Registrar General would need to cancel the certificates of title and issue a new certificate for the whole property. The mortgagee of individual shares, however, could not protect its interest by caveat as they would have no right as against the trustee other than the right to have him administer the trust. It would seem that the rights of the mortgagee of an individual undivided share are simply to claim the share of proceeds of sale which otherwise would pass to the mortgagor and that he or she has a charge over that share.
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> [77] *Mitra's Co-Ownership and Partition*, 7th ed, Eastern Law House, Calcutta, 1994 suggests that this is the case (see pp 151 and 413) and although there may be some difficulty in attachment at law, there should be no difficulty about rights in equity. This appears to be the situation in New South Wales. This matter was not argued before me…"[8]

Appellant's submissions

[34] There seemed to be some contradiction in counsel for the appellant's submissions. On the one hand he submitted that –

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8 *Crocombe v Pine Forests of Australia Pty Ltd* (2005) 219 ALR 692 at 703-704.

> "21. … [The second respondent] was a one third owner, as tenant-in-common of each of the Lots. She did not lose that quality of ownership by the November 2012 orders."[9]

On the other hand he submitted that, upon the appointment of the statutory trustee for sale, the second respondent's interest in the land (a proprietary right) was converted to a right to a proportionate share in the proceeds of sale (a personal right).[10]

[35] The essence of his submissions seemed to be that the appointment of the statutory trustee did not itself extinguish the second respondent's right to share in the proceeds of sale. The further order made on 13 November 2012 that "the applicants receive all surplus settlement proceeds from the sale of the properties if any" merely reflected an agreement she made with the other co-owners as to what was to happen to her share in the proceeds.

[36] He submitted that upon the appointment of the statutory trustee for sale the appellant's equitable charge over the second respondent's one-third share as tenant-in-common became a charge over her proportionate share in the proceeds of sale. It did so by one of two mechanisms – either as a single continuous security interest which moved from the asset (the one-third share in the land) to its proceeds or by attaching directly to her continuing interest in the proceeds of sale.[11] At all material times the other co-owners had notice of the appellant's interest through the caveat.[12]

[37] He submitted that s 38 is concerned with the vesting of the property in statutory trustees free from encumbrances affecting undivided shares, but not with what is to become of the proceeds of sale. Section 37A is concerned with the trustees' obligation in relation to the sale proceeds: they are to stand possessed of the net proceeds subject to "such powers and provisions as may be requisite for giving effect to the rights of the co-owners". He submitted that "[i]n the present case those rights included a right to share in the proceeds as co-owner, a right that was encumbered with the appellant's charge."[13]

Respondent's submissions

[38] Counsel for the respondent submitted that upon the appointment of the statutory trustee the property was vested in him free from any interest claimed by the appellant.

> "2. … Pursuant to s 37A the statutory trustees were to sell the properties and 'stand possessed of the net proceeds of sale'. There is nothing in ss 37A or 38 which provides that the appellant had a charge over the net proceeds of sale. Such a construction would be inconsistent with the wording of s 38(1) that the statutory trustees are vested with the properties for sale 'free from encumbrances affecting any undivided shares'."[14]

[39] He submitted that, on the proper construction of s 38, on the appointment of statutory trustees for sale, the co-owners cease to be such, the property is vested in

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9 Outline of submissions on behalf of the appellant at para 21; T 1-6.
10 T 1-6.
11 T 1-9.
12 T 1-11.
13 Outline of submissions in reply at para 4.
14 Amended outline of submissions on behalf of the third respondents at para 2.

the trustees legally and beneficially, and any charge affecting an undivided share is extinguished. The statutory trustees are in a position akin to that of a purchaser without notice, notwithstanding the caveat: the land vests in them free of any charge over an undivided share, notwithstanding that a caveat may have been lodged by the chargee of that undivided share before their appointment.[15] A former co-owner's only right against the statutory trustees is to see the trust administered. Like the statutory trustees' interest in the land, a former co-owner's interest in the proceeds of sale is not subject to a charge which encumbered his undivided share in the land, because the charge was extinguished upon the appointment of the statutory trustees.

[40] He submitted that the second respondent lost the "quality of ownership" of any interest in the properties when the order appointing the statutory trustee was made as "[t]hat is the effect of such an order." He submitted that the primary judge was correct in finding that the order appointing the statutory trustee put paid to any interest the appellant could claim in any of the five lots or in turn in the proceeds of their sale.[16]

[41] In the alternative, he submitted that the second respondent's interest in the land was separate and distinct from her interest in the proceeds of sale, and whether the appellant's charge extended to the proceeds of sale depended upon the wording and proper construction of the charge.[17] The charge was limited to all the "Guarantor's land (including land acquired in the future)", and did not extend to the proceeds of its sale.[18]

[42] He submitted that the present case is distinguishable from *Crocombe*, where there was no contemplation of an order whereby one of the co-owners would not be entitled to any of the proceeds of a sale effected by the statutory trustees.[19] The obiter observation of Young CJ in Eq that the mortgagee of an individual undivided share had no right against the trustee other than to see the trust administered was, in his submission, correct. In this case, he submitted, the administration of the trust required compliance with the order appointing the statutory trustee whereby the second respondent had no monetary entitlement.[20] Even if a charge over an undivided share in the land extended to part of the net proceeds of sale (which could not be the case on the proper construction of ss 37A and 38), in this case there was nothing to which the charge could attach.[21]

[43] He submitted that there was an explanation for the second respondent's not being entitled to any share of the net proceeds of sale. The land was partnership property. The other partners were entitled to reimbursement of partnership expenses they had funded. As the whole project had run at a significant loss, there was no surplus in which the second respondent could share.[22] He suggested that she had acknowledged this in the family law proceedings.[23]

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15 T 1-13.

16 Amended outline of submissions on behalf of the third respondents at para 3.

17 Supplementary submissions on behalf of the third respondents at para 1.

18 Supplementary submissions on behalf of the third respondents at para 2.

19 Amended outline of submissions on behalf of the third respondents at para 4.

20 Amended outline of submissions on behalf of the third respondents at para 5.

21 Amended outline of submissions on behalf of the third respondents at para 6.

22 A partner has no title to specific property owned by a partnership. His or her share in the partnership consists of a right to a proportion of the surplus after the realization of assets and the payment of debts and liabilities. See *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321 at 327; *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447.

23 Amended outline of submissions on behalf of the third respondents at para 7, T 1-18.

Discussion

[44] Upon the appointment of statutory trustees for sale of land held in co-ownership, the legal and beneficial ownership of the land is vested in the statutory trustees,[24] and the co-owners' interests in the land are converted into interests in the proceeds of its sale.[25] The trustees hold the land on the statutory trust in s 37A – that is, upon trust to sell the land and to stand possessed of the net proceeds of sale "upon such trusts, and subject to such powers and provisions as maybe requisite for giving effect to the rights of the co-owners".

[45] The statutory scheme for the appointment of statutory trustees for sale reflects the commercial reality that it is generally easier to sell the entirety than it is to sell a fractional interest, let alone a fractional interest that is encumbered. By s 38 the land vests in the statutory trustees "subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares". They can, and must, deal with the entirety free from any charge affecting an undivided share, as opposed to a charge over the entirety. Neither a former tenant in common nor an encumbrancee of a tenant in common's undivided share has any ongoing interest in the land which would sustain a caveat, whether lodged before or after the appointment of the statutory trustees.[26]

[46] Sections 37A and 38 must be read together. The entirety is to be sold, and the net proceeds are to be held to give effect to the rights of its former co-owners.

[47] There is nothing to suggest that the Legislature intended that the interests of an encumbrancee of an undivided share should be defeated by the appointment of statutory trustees for sale. Indeed, such an encumbrancee's position is expressly protected by the definition of "co-owner" in s 37: a co-owner includes an encumbrancee of the interest of a tenant in common. In its report which recommended the introduction of the *Property Law Act*, the Queensland Law Reform Commission described the purpose of this inclusive definition as being "to enable a mortgagee of the interest of a co-owner to apply for an order which will result in sale of the property and the realisation of his security".[27]

[48] Thus, the statutory trustees are to hold the net proceeds of sale not only to give effect to the rights of a former tenant-in-common, but also to give effect to the rights of an encumbrancee of that tenant-in-common's undivided share in the land.

[49] This statutory scheme is consistent with the principle that, subject to the proper construction of a particular charge, a security interest is generally a single continuous interest which moves from the original asset to the proceeds of its sale.[28] A mortgagee is entitled to a security interest in the fruits of mortgaged property.[29]

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24 *Property Law Act* s 38(1) and (3A).

25 *Property Law Act* s 38(7); *Re Della-Franca's Caveat* [1993] 1 Qd R 382 at 387-388.

26 *Re Della-Franca's Caveat* [1993] 1 Qd R 382.

27 Queensland Law Reform Commission, *Bill to consolidate, amend and reform the law relating to conveyancing, property and contract and to terminate the application of certain imperial statutes*, Report No 16 (1973) 28.

28 *Avco Financial Services Ltd v Commonwealth Bank of Australia* (1989) 17 NSWLR 679 at 682; *Bank of Queensland Ltd v Dodrill* [2011] 2 Qd R 541 at [36]-[37]; *Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd (in liq) (No 5)* [2008] FCA 1700 at [9]; *Buhr v Barclays Bank Plc* [2001] EWCA Civ 1223; Gullifer J (ed) *Goode on Legal Problems of Credit and Security* (4th ed, Sweet & Maxwell, London, 2008) at 47.

29 See *Buhr & Ors v Barclays Bank Plc* [2001] EWCA Civ 1223; [2002] BPIR 25 per Arden LJ at [40].

Thus, a mortgagee may claim a security interest in money paid in compensation for compulsory acquisition of property, even where the interest is not expressed in the deed.[30] Similarly, where a mortgagee exercises its power of sale over land subject to an equitable charge, the equitable charge attaches to any surplus proceeds of sale even though the chargee no longer has an interest in the land itself.[31]

[50] In the present case, the second respondent charged "as beneficial owner and as trustee of every trust all [her] land (including land acquired in the future)". The charge was a fixed charge over land she then held, and it attached to any land she subsequently acquired as soon as she acquired it. It did not need to be expressed as a charge over real and personal property before this general principle could apply. Assuming for the moment that the second respondent had a beneficial interest in the land prior to the appointment of the statutory trustee, in my view the charge extended to a proportionate share in the proceeds of its sale, and I do not accept counsel for the third respondents' submission to the contrary.

[51] In my view, the primary judge erred in proceeding on the assumption that the second respondent held a legal and beneficial interest in the land.

[52] On the material before the primary judge, it was not possible to determine whether the second respondent had a beneficial interest in lots 1-5 before the appointment of the statutory trustees. The other tenants in common claimed that the land had been partnership property, and that there was no surplus in which the second respondent could share. These were matters his Honour could not resolve.

[53] In *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd* McTiernan, Menzies and Mason JJ said –

> "The nature of a partner's interest in the partnership property has often been explained. The partner's share in the partnership is not a title to specific property but a right to his proportion of the surplus after realization of assets and the payment of debts and liabilities. However, it has always been accepted that a partner has an interest in every asset of the partnership and this interest has been universally described as a 'beneficial interest', notwithstanding its peculiar character. The assets of a partnership, individually and collectively, are described as partnership property (*Partnership Act*, 1892, as amended (NSW), s 20). This description acknowledges that they belong to the partnership, that is, to the members of the partnership."[32]

[54] In *Federal Commissioner of Taxation v Everett* Deane J considered the nature of a partner's interests in partnership assets in some detail. His Honour said in that regard –

> "As between the partners, the rights and duties of a member of a partnership are primarily contractual. They flow from the express or implied terms of the particular partnership agreement. Questions of illegality aside, any implication, by statute or rule of law, of

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30 *Law Guarantee and Trust Co Ltd v Mitcham and Cheam Brewery Co Ltd* [1906] 2 Ch 98.

31 *Avco Financial Services Ltd v Commonwealth Bank of Australia* (1989) 17 NSWLR 679.

32 (1974) 131 CLR 321 at 327. See also *Federal Commissioner of Taxation v Everett* (1980) 143 CLR 440 at 446-447.

> provisions into the relationship between partners is ordinarily subject to any contrary intention appearing from the agreement between the partners. The rights of a member of a partnership will commonly (but not necessarily) include rights relating to any partnership assets which may exist. They will almost invariably (but, conceivably, not necessarily) include rights relating to any partnership profits which may be earned.
>
> In the absence of agreement to the contrary, a member of a partnership has no definite or separate share or interest in any particular partnership receipt or other item of partnership property. He has an undivided beneficial interest in the totality of partnership assets (including receipts and choses in action) and is entitled to insist that they be applied for legitimate purposes of the partnership. The precise content of that undivided beneficial interest will be affected by any separate right of the partner to share in any partnership profits or in any distribution of partnership assets in the sense that the distribution of partnership profits and assets, in accordance with the provisions of the partnership contract, is a legitimate purpose of the partnership. If the partnership agreement so provides or all the partners so agree, there is no general rule of law which prevents the partners dividing or applying partnership receipts and other assets at any time or in such manner as they see fit. In the absence of such provision or consensus, however, a partner's separate interest in relation to partnership assets is to share, either equally or in such other proportion as the partners may agree, in any surplus remaining, upon a dissolution, after the realization of the assets and payment of the debts and liabilities of the partnership."[33]

[55] If lots 1-5 were partnership property, the second respondent had a legal interest and a beneficial interest of the "peculiar character" described above. The appellant's charge was confined to those limited interests.

[56] The primary judge was apparently of the view that the order that the co-owners other than the second respondent "receive all surplus settlement proceeds from the sale of the properties, if any" negated what would otherwise have been the second defendant's entitlement to some of the proceeds of sale. His Honour said that the case differed from *Crocombe*, and held that the appellant had no entitlement to a charge over any of the proceeds of sale.

[57] The terms of the trust upon which the statutory trustees held the land and would in due course hold the net proceeds of its sale were prescribed by ss 37A and 38. They could not be varied by agreement of the former tenants-in-common inter se. This was so a fortiori where the undivided share of one of the tenants-in-common had been encumbered, as the encumbrancee was a "co-owner" whose rights had to be respected in the statutory trustees' holding the net proceeds of sale.

[58] The appellant was not a party to the proceeding in which the order for the disposition of the sale proceeds was made, and it had no notice of the application for the order. In my view it was not bound by that order.[34]

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33 (1978) 38 FLR 26 at 40-41.

34 *Ramsay v Pigram* (1968) 118 CLR 271 at 279.

[59] Although the Court has power to alter a statutory trust,[35] it would not exercise that power so as to extinguish the rights of a co-owner except on an application on notice to the affected co-owner. As McHugh J said in *Victoria v Sutton* –[36]

> "77. The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of the courts to require such a person to be joined as a party if there is an arguable possibility that he or she may be affected by the making of the order.[37] That practice also assists in avoiding duplication of hearings on the same issues and in avoiding the spectre of inconsistent decisions by courts or the judges of the same court."

[60] When they applied for the appointment of statutory trustee for sale and for the order relating to the disposition of the sale proceeds, the applicants (who were co-owners) had notice of the appellant's interest as a result of its having lodged a caveat in July 2011. They failed to inform the court about it. The appellant could have applied to have the deputy registrar's order set aside or could have appealed against it. However, I did not understand counsel for the third respondents to submit that the appellant lost any interest it had in the proceeds of sale by failing to do so.[38]

[61] The primary judge ordered that the $45,984.82 be paid to the trust account of the statutory trustees. It is clear from his Honour's reasons that he considered that the appellant had no entitlement to the money, and that it would be proper for the statutory trustees to distribute it among the other tenants in common.

Conclusion

[62] If the second respondent held a beneficial interest in the land before the appointment of a statutory trustee for sale, that interest was charged in favour of the appellant. Upon the appointment of the statutory trustee, the second respondent's interest in the land was converted to an interest in the proceeds of its sale, and the appellant's charge attached to the second respondent's interest in those proceeds of sale. The appellant's charge was not defeated by the order of the deputy registrar as to the disposition of the sale proceeds.

[63] However, the primary judge was unable to resolve whether the land was partnership property, and so unable to resolve whether the second respondent had a conventional beneficial interest in it before the appointment of a statutory trustee.

[64] His Honour erred in proceeding on the assumption the second respondent had such an interest. He erred in determining that, on that assumption, the deputy registrar's order put paid to that interest and in turn to any interest in the proceeds of its sale. And he erred in concluding that, on that assumption, the appellant had no entitlement to a charge over any of the lots or any of the moneys then held in trust.

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35 *Property Law Act* s 38(6).

36 (1998) 195 CLR 291 at 316.

37 *News Ltd v Australian Rugby Football League* (1996) 64 FCR 410; *Grovenor v Permanent Trustee Co of NSW Ltd* (1966) 40 ALJR 329. This rule is derived both from the common law and by implication through the power of courts to join parties who are necessary and proper for hearing, for example, *Supreme Court Rules* (NSW) Pt 8 r 8, *High Court Rules* O 16 r 4.

38 *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* (2010) 241 CLR 1 at [137]-[144].

[65] In the circumstances, his Honour erred in ordering the release of the moneys held in trust.

Subsequent events

[66] On the hearing of the appeal this Court was informed of several things which had occurred since the primary judge's decision.

[67] There was no stay of the primary judge's order. The $45,984.82 was paid to the statutory trustees, who on-paid it to the other tenants in common.

[68] The caveat was removed, and the sales of the remaining lots (1, 4 and 5) were completed.

[69] The second respondent became a bankrupt.

Disposition

[70] I would make the following orders.

1. Appeal allowed.
2. Set aside orders 2, 5 and 6 made on 9 April 2013.
3. Leave to the appellant and the third respondents to make written submissions on the costs of the applications before the primary judge and the costs of the appeal in accordance with paragraph 52(3) and (4) of Practice Direction 3 of 2013.