Property Law – Specialist Accreditation Conference 2025

ICC Sydney

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Disputes in relation to Real Property

The Honourable Justice Ian Pike*

Introduction

1 Thank you for the invitation to speak today about disputes in relation to Real Property. I propose to speak about the Real Property List (**RPL**), providing an overview of the RPL, practical tips of what is expected of practitioners with matters in the RPL and some recent cases in Real Property law.

Historical matters[1]

2 Some of what follows is taken with gratitude from two previous speeches of the previous Real Property List Judge, Justice Peden.

3 The RPL was established by Chief Justice Bathurst in 2015 with the "objective" of facilitating "the prompt and efficient resolution of the real issues in dispute in Real Property Matters".[2]

4 Specialist courts dealing with property disputes are not new. For a very long time courts have been dealing with diverse issues of real property.[3]

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* Justice of the Supreme Court of New South Wales – who thanks his current tipstaff, Marlow Meares, for assistance with this speech.

[1] Some of what follows is taken with gratitude from two previous speeches of the previous Real Property List Judge, Justice Peden: see Justice Elisabeth Peden, 'Real Property List – an Overview' Paper delivered at the UNSW Property Law Intensive on 15 March 2023 and Justice Elisabeth Peden, 'Updates from the Real Property List' NSW Law Society Specialist Accreditation Conference 2024 on 15 August 2024.

[2] Practice Note SC EQ 12 [2].

[3] See, eg, K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876); A W B Simpson, *An Introduction to the History of the Land Law* (Clarendon Press, 1st ed, 1961) 2. More recent developments have seen the need for a specialised property list *usually* but not always as a part of a commercial court. The Supreme Court of Victoria introduced a "Property List" in the Common Law Division in 2016: Supreme Court of Victoria, *Annual Report 2015-16* (August 2017)

5 For example, in feudal times between the time of Conquest and the reign of Henry II,[4] Manorial Courts were convened by lords and had civil jurisdiction over lord-tenant and tenant-tenant disputes. Those courts then diverged into the Court Baron with localised jurisdiction over the lord's freeholders and the Customary Court with jurisdiction over copyholders (so named because they were tenants of mesne lords who held copies of the deed). Those copyholder tenants occupied the lord's land at the lord's pleasure and were obliged to follow the lord's customs.[5]

6 In time, the real actions arrived, and, with them, the centralised jurisdiction administered by the royal courts over real property matters. A uniform land law developed.[6]

The Real Property List

7 The RPL is a case management forum for matters "in respect of land or interests in land".[7] More particularly, the RPL is the appropriate forum for claims:[8]

(a) in respect of contracts for the sale of land;

(b) in respect of leases of land;

32; Overseas, England and Wales consolidated a wide variety of commercial and property cases under the banner of the Business & Property Courts in 2017: Sir Geoffrey Vos, 'A View from the Business and Property Courts in London' (2019) 1 *Erasmus Law Review* 10.

[4] K E Digby, *An Introduction to the History of the Law of Real Property* (2nd ed, 1876, Clarendon Press) 7-8. Criminal jurisdiction was a different matter and more often administered by a "Court Leet" with a grant from the Crown: 53-54.

[5] K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876) 52. See also Edward Coke, *Three Law Tracts; The Compleat Copyholder* (General Books. 2012) xxxi; John Bryson, *Bar, Bench and Land Law* (Svengali Press, 1st ed, 2016) 105-107, 161-168.

[6] William Holdsworth, *An Historical Introduction to the Land Law* (Oxford University Press, 1st ed, 1927) 11-16; K E Digby, *An Introduction to the History of the Law of Real Property* (Clarendon Press, 2nd ed, 1876) 71-72. A W B Simpson, in *An Introduction to the History of the Land Law* (Clarendon Press, 1st ed, 1961) 20. Simpson set out the form of one of the writs, the *Breve de Recto* which initiated litigation in the court of a mesne lord: "The King to Lord X, greetings! We order you that without delay you do full right to D concerning one messuage with its appurtenances in the Manor of Dale which he claims to hold of you by the free service of a rose at midsummer for all service, of which T deforces him. And unless you do so, the Sheriff of … will do so, lest we hear further complaint on the matter for want of right."

[7] Ibid [3].

[8] Ibid.

(c) in respect of easements or covenants over land; and

(d) pursuant to or in relation to the provisions of statutes relating to real property including the *Real Property Act 1900* (NSW), the *Conveyancing Act 1919* (NSW), the *Crown Lands Act 1989* (NSW) and the legislation governing the creation and management of strata schemes and community schemes.

8 Proceedings which are in relation to land which are not assigned to the RPL include disputes in relation to the *Residential Tenancies Act 2010* (NSW) and claims for possession. The former are generally dealt with at the NSW Civil and Administrative Tribunal and the latter in the Common Law Division of the Court.

9 The RPL is one of the busiest lists in the Equity Division of the Court, and indeed the Country. In 2024, 384 cases were filed in the RPL and 421 were disposed of.[9] This is to be compared to: the Commercial List where 188 cases were filed and 172 disposed of; the Technology and Construction List where 209 cases were filed and 194 disposed of; and the Corporations List where 218 cases were filed in the Judges' list and 228 cases were disposed of.[10]

10 For the first half of 2025 business seems to be slightly up on 2024 based on new filings.

11 Research published in October 2018 by the Law and Justice Foundation of NSW[11] profiled 245 cases in the RPL and identified the following features:

(1) Parties are a mix of individuals, corporations and government bodies such as local councils. First plaintiffs are more often individuals (around 60%). First defendants are more often organisations, including corporations and government bodies (65%).[12] These are statistics

[9] Supreme Court of New South Wales, *2024 Annual Review* (Report) 36
[10] Ibid 35-36.
[11] Law and Justice Foundation of New South Wales, *Data Insights in Civil Justice* (Report, October 2018) ('*LJF Report*').
[12] Ibid 47.

comparable to the General Equity List but with slightly more organisations in the Real Property List.

(2) There is a higher rate of litigants in person and often they are defendants. 94.3% of RPL cases had a represented plaintiff compared to 64% of defendants.[13] This is a higher rate than the Corporations, Commercial, Family Provision and General Equity lists in the Equity Division.

(3) Efficient completion of matters. The average number of listings in each case is 5.2, sitting between the Protective List and the Corporations List.[14] The RPL is one of the lists with the "shortest average case lengths" at 4.3 months between case creation and case closure.[15]

(4) Motions are less common. There are 1.5 "proceedings" per case in the Real Property List, meaning there is likely to be about 1 motion in 50% of cases.[16]

12 The RPL is heard on a Friday, with the motions callover commencing at 9:15am and the directions list generally commencing at 9:45am. Motions are generally given a marking to be dealt with later in the day.

13 It is important at this stage to point out a few requirements of the RPL Practice Note – Practice Note SC EQ 12. Requirements to keep in mind are:

(1) the Court expects that prior to commencing proceedings parties will have considered Alternative Dispute Resolution and will be in a position to advise the Court whether they have attempted or are willing to attempt a form of Alternative Dispute Resolution. I strongly encourage parties to engage in Alternative Dispute Resolution. It is particularly effective in relation to property disputes which are often disputes between family

[13] Ibid 73.
[14] Ibid 82.
[15] Ibid 118-119
[16] Ibid 80.

members where a negotiated outcome is generally preferable to a court imposed one. The profession should be aware that the Court offers free mediation before highly trained and effective Registrars. The Court generally requires practitioners to advise their clients of this free service before permitting parties to engage a private mediator;[17]

(2) Parties must confer prior to any listing date and make every effort to agree to consent orders. Where consent orders can be agreed, they are to be sent to the List Judge prior to 12 noon on the Thursday before the RPL for orders to be made in Chambers if appropriate;[18]

(3) Motions are not encouraged and cannot be filed without leave. Leave must be obtained from the List Judge either at a directions hearing in the RPL, or where urgent, by email to the List Judge's Chambers.[19] Practitioners must consider whether the motion falls within the delegated authority of the Registrar as such motions will normally be dealt with by the Registrar;[20] and

(4) Hearing dates are not allocated in Chambers and are generally only allocated after evidence is complete. A realistic estimate must be given;[21]

(5) Those appearing at directions hearings – whether solicitors or counsel – should have familiarity with the matter in which they are appearing.

14 Depending on the case load, there are generally two other judges allocated to hear Real Property cases at any time. Additional resources can also always be brought in to deal with urgent cases. There will generally be no need for a party to seek to have a Real Property matter placed in the expedition list. The

[17] Practice Note SC EQ 12 [10]-[14].
[18] Ibid [15]-[19].
[19] Ibid [20]-[26].
[20] Supreme Court of New South Wales, 'Delegation to Registrars' <https://supremecourt.nsw.gov.au/practice-procedure/delegation-of-court-functions/delegation-to-registrars.html>.
[21] Ibid [28]-[30].

bespoke case management of Real Property matters extends to the allocation of hearing dates.

15 My general approach is obviously enough to seek to have matters dealt with as soon as possible. The role of practitioners is crucial in assisting with this. Adjournments, or slow progression of matters will not be permitted absent good reason.

16 At times there are over 100 matters in the list at the beginning of the week and often 30 to 50 matters are listed for directions by the Friday. The Practice Note permits, and I strongly encourage, parties to agree orders to progress proceedings and to submit those orders to chambers by 12pm on the Thursday before the matter is listed, for consideration by the Court.

17 Bearing that in mind, as a practitioner the greatest way you can assist the Court when appearing in the List is, to the extent possible, achieving a reasonable consent position between the parties. As I said earlier, the Practice Note requires parties to confer and make every effort to achieve consent orders. Often, this will not be possible.

18 To the extent that there is any disagreement between the parties, that should be narrowed and clearly identified. It assists the Court to provide short minutes of order, and where there are competing short minutes, clearly and succinctly identify the relevant differences in the competing orders and reason for the disagreement. Most importantly, be reasonable in your disagreement: don't argue over a week's difference and don't prolong the timetable unnecessarily.

19 When appearing in the RPL, I welcome those who have the greatest knowledge of the matter – whether solicitor or counsel – to come prepared with the next steps to progress the matter efficiently.

Communications with the Court

20 Finally, a far too common occurrence has been inappropriate communications via email to the Court. Far too often practitioners have sent emails without

consent to my Chambers. When communicating with the Court via email in relation to the matter in the RPL be mindful of your obligation under r 22.5 of the ASCR which provides:

> 22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless—
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> 22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court, or
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> 22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

21 Rules 22.6 and 22.7 further provide:

> 22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.
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> 22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

22 Save for limited exceptions, all communication to the Court should be provided to the other parties for their consent. Sending an email without consent, even if the other parties are CC'd to the correspondence is still a breach of the rules. As Kunc J said in *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2]* [2013] NSWSC 1971 at [20], "sending such a communication with a disclosure of the other parties' lack of knowledge or lack of consent does not cure any impropriety".

23 As the Court of Appeal recently affirmed in *Council of the Law Society of New South Wales v Sideris* [2025] NSWCA 159, breaches of the rules are grave. In declaring the respondent to not be a fit and proper person, the Court (Bell CJ, Kirk JA and Griffiths AJA) stated:

> [19] Courtesy and civility by and between practitioners are critical to the administration of justice, respect for and the reputation of the legal profession and ultimately, respect for the rule of law. "The importance of courtesy in the legal system, and in the relationship between the legal

> profession, the court system, and general public should not be understated": *Legal Profession Complaints Committee v in de Braekt* [2013] WASC 124 at [28] (**de Braekt**). The Full Bench of the Western Australian Supreme Court in *de Braekt* at [30] also referred to the admonition of Benham CJ of the Supreme Court of Georgia in *Butts v State* 546 SE 2d 472 at 486 (2001):
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> > "Civility is more than just good manners. It is an essential ingredient in an effective adversarial legal system such as ours. The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible."
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> …
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> [20] The importance of legal practitioners displaying an appropriate standard of courtesy and civility was emphasised by Allsop J in *Barghouthi v ING Custodians Pty Limited* [2003] FCA 636 at [16] who said "[c]ourtesy and civility are not bourgeois affectations. They are not the mark of the effete or inept litigator. They are part of a practitioner's overriding duty to the court, indeed to the standards of the profession and to the public." We agree.

24 Please keep these matters firmly in mind. There is nothing worse for me, as a Judge, than reading unnecessarily aggressive and impolite inter partes correspondence. It does not assist you, or your client's cause!

25 A firm, but polite, statement of position is all that is usually required. You should always assume that your correspondence will be read by the Court at some stage!

26 When exercising the liberty to apply to have a matter restored to the list, the communication should consist of no more than a request to relist and the relief that will be sought on the relisting. The email is not the occasion for a recitation of the history that has led to the relisting or to set out submissions in support of your client's position.

Recent trends, cases and issues in Real Property law

27 Next, I will speak on recent trends and issues I have encountered in running the list including in relation to s 66G of the *Conveyancing Act 1919* (NSW) (**CA**), self-represented litigants, undefended applications, easements and the hot topic of generative AI.

s 66G of the CA

28 In 2023, Justice Peden, who was the then RPL Judge, said that "[s]ection 66G proceedings remain a fixture of the RPL".[22] Two years later, s 66G proceedings still remain a fixture of the RPL and potentially will increase with the worsening global economic outlook. My impression is that they continue to make up a fair proportion of cases in the RPL.

29 Section 66G(1) provides:

> (1) Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

30 While s 66G provides discretion to the Court ("may"), the case law is clear that such an order is "almost as of right".

31 As I said in a judgment earlier this year (emphasis added):[23]

> [15] … **The law is tolerably clear that there are only rare circumstances in which a co-owner who wishes to have the Court's assistance to sell a Property should be denied that opportunity.** Among the many statements to this effect are what was said by the Court of Appeal in *Foundas v Arambatzis* [2020] NSWCA 47 at [63]:
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> > Although an order under s 66G is discretionary, such an order is almost as of right, unless on settled principles it would be **inequitable** to make the order. **An order may be refused if the appointment of trustees for sale would be inconsistent with**

[22] Justice Elisabeth Peden, 'Real Property List – an Overview' Paper delivered at the UNSW Property Law Intensive on 15 March 2023 at 17.
[23] *Huynh v Kang* [2025] NSWSC 411.

> **a proprietary right, or the applicant for the order is acting in breach of contract or fiduciary duty, or is estopped from seeking or obtaining the order** (*Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068 at 1068; *Ngatoa v Ford* (1990) 19 NSWLR 72 at 77; *Williams v Legg* (1993) 29 NSWLR 687 at 693; *Hogan v Baseden* (1997) 8 BPR 15,723 at 15,726-15,727; *Tory v Tory* at [42]). **Hardship or general unfairness is not a sufficient ground for declining relief under s 66G** (*Hogan v Baseden* (1997) 8 BPR 15,723 at 723; *Ferella v Official Trustee in Bankruptcy* at [36]-[40]).

32 It is important for practitioners to appreciate this principle and its significance when advising a client thinking of bringing, or one faced with, a s 66G application.

33 A co-owner is generally under no obligation to seek to avoid the need to bring a s 66G application. The usual order is that the costs of the proceedings be paid out of the proceeds of sale. The rationale for this approach is that the costs of such an application are an incident of joint ownership.[24]

34 The costs of the proceedings are paid for by the parties and thus reduce the net amount received by the co-owners. Quite often the trustees appointed are professionals who charge for what they do thus further reducing the net amount received.

35 Serious consideration should therefore be given to whether the property in question can be sold by agreement without the need for proceedings or the appointment of professional trustees.

36 Any dispute about how the proceeds should be divided can then be separately litigated.

37 One aspect of s 66G orders that practitioners should consider is the appropriate remuneration for trustees. The Court can make an order for remuneration at the time that trustees are appointed, and the Court can also increase the

[24] *Stibbard-Leaver v Leaver* [2021] NSWSC 65 at [5] per Darke J

remuneration of the trustees after they have been appointed including when they have completed their work.

38 In *Anson v Anson* [2004] NSWSC 766, Campbell J relevantly summarised the principles governing the remuneration of trustees for sale under s 66G (emphasis added):[25]

> [75] As well, if an order for remuneration of the trustees is to be sought at the same time as they are appointed, evidence to justify that order will be needed. Trustees for sale appointed under section 66G, like all trustees, are not entitled to remuneration for their time and trouble in executing the trust, unless (a) all beneficiaries agree, or (b) a person, or people, agree to pay the trustees from their own money, or (c) a case is made for the Court to authorise, in the exercise of its inherent jurisdiction over trusts, the payment of remuneration to the trustee. If the Court grants authorisation of this lastmentioned kind, the remuneration of the trustees is treated as an expense of administration of the trust and hence can be recouped from the trust property.
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> [76] The sort of circumstances where a court has been prepared to exercise its inherent jurisdiction to allow remuneration to trustees include situations where the duties are extensive and the trustee can perform them only by seriously sacrificing his own interests (*Marshall v Holloway* (1820) 2 Swans 432 at 452-3, 36 ER 681 at 689; *Re Cox's Will* (1890) 11 LR (NSW) Eq 124), where the trustees are not prepared to act without being remunerated and no alternative trustees can be found (*In re Freeman's Settlement Trusts* (1887) 37 Ch D 148), or where it is otherwise advantageous to the trust estate to allow the remuneration (*Plomley v Shepherd* (1896) 17 LR (NSW) Eq 215; *Johnston v Johnston* (1903) 4 SR (NSW) 8 at 11-12). Under this inherent jurisdiction the Court can authorise trustees to retain from the trust property remuneration for work to be done in the future, as well as past work done: *Nissen v Grunden* (1912) 14 CLR 297 at 307-8; *In re Keeler's Settlement Trusts* [1981] 1 Ch 156 at 161-2; *Re White; Tweedie v Attorney-General* (2003) 7 VR 219 at 233. See also generally *Application of Sutherland* [2004] NSWSC 798.
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> [77] If a plaintiff seeking appointment of trustees for sale of land wanted to have those trustees remunerated from the trust property, and no application was made at the time of seeking appointment of the trustees for them to be remunerated, then (a) it would be necessary for an application for remuneration of the trustees to be brought in separate proceedings, and (b) there is a risk that that application might not succeed. Both of these consequences are ones that the plaintiff might well find unattractive. Hence a plaintiff seeking appointment of trustees for sale sometimes also seeks an order empowering the trustees to charge, on a specified basis, for acting as such, and authorising those charges to be paid out of the proceeds of the sale of the land.

[25] See also *James & Ors v James* (No. 2) [2019] NSWSC 116 at [40]-[45] per Slattery J.

> [78] **However, if such an order is to be made, the plaintiff must notify the defendant (most conveniently, though not necessarily, in the initiating process) that it proposes to seek such an order, and of the evidentiary foundation on which the order is sought. That evidentiary foundation will include evidence that circumstances exist which warrant the Court making an order, under its inherent jurisdiction, for remuneration of the trustees, the basis of charging which the trustees propose to adopt, and that that basis is a reasonable one. If the defendant is notified that the order is to be sought, and the basis on which it is sought, it will then be open to the defendant to file its own evidence on that topic, if it wishes. It might happen, for instance, that the plaintiff cannot find suitable trustees who are prepared to act without remuneration, but the defendant can find suitable trustees prepared to act without remuneration, or suitable trustees prepared to act for a lesser remuneration than that which the candidates of the plaintiff would charge.**

39 Ultimately, the appropriate order for remuneration of trustees will depend on the situation in each proceeding, yet, practitioners should be aware of the nature of remuneration and the ability to seek further remuneration after the appointment of trustees. A usual approach is to at least impose a cap on any hourly rate charged or a cap on total fees, reserving liberty to the trustee to apply for increased remuneration.

Self-represented litigants

40 One difficulty that is often encountered is that the co-owner opposing the order for statutory trustees is a self-represented litigant. This might be because of financial constraints on their ability to retain legal representation or because they wish to oppose the order in a way that a legal practitioner would not consider that they could reasonably and properly do.

41 The Court needs to ensure a fair trial takes place and provide sufficient information to the self-represented litigant to this end, but it is not the role of the Court to give judicial advice to the self-represented litigant.

42 As the Court of Appeal has recently emphasised:[26]

> [69] The question of the extent, if any, of assistance which a trial judge or appellate court should afford to an unrepresented litigant in civil

[26] *Chalik v Chalik* [2025] NSWCA 136 at [66]-[72] per Bell CJ, Payne and Free JJA.

proceedings is nuanced and has been the subject of many intermediate appellate judgments of this Court since Rajski was decided almost 40 years ago. Those decisions have emphasised that an unrepresented litigant should be provided with sufficient information about the practice and procedure of the court to ensure a fair trial takes place: see, for example, *Jae Kyung Lee v Bob Chae-Sang Cha* [2008] NSWCA 13 at [48]; *Jeray v Blue Mountains City Council* [2010] NSWCA 153 at [14]. Even then, care must be taken not to disturb the balance which the rules of practice and procedure are designed to afford both parties: *Mohareb v Saratoga Marine Pty Ltd* [2020] NSWCA 235 at [39], citing *Barton v Wright Hassall LLP* [2018] UKSC 12; [2018] 1 WLR 1119 at [18] per Lord Sumption.

[70] In *Bauskis v Liew* [2013] NSWCA 297 at [69], Gleeson JA (Beazley P and Barrett JA agreeing) noted that the duty of a trial judge to assist an unrepresented litigant "does not extend to advising the litigant as to how his or her rights should be exercised. That is, it is not the function of the court to give judicial advice to, or conduct the case on behalf of, the unrepresented litigant". In *Cicek v Estate of late Solomon* [2014] NSWCA 278 at [130], Ward JA (Meagher and Barrett JA agreeing) held that none of the cases her Honour had reviewed:

> "suggests that the primary judge in the present case had a duty to advise the appellants as to the inadequacies in their evidence having regard to the pleaded case or to adjourn the proceedings in order to permit them further time to re-plead their case in order for it to accord with the statement being made from the bar table as to the forgery complaints. A duty to provide information in order to attempt to overcome the procedural disadvantages faced by a self-represented litigant is not a duty to run the case for him or her."

[71] Handley JA expressed similar views more than 20 years earlier in *Rowett v Westpac Banking Corp* [1993] NSWCA 240:

> "Nevertheless, the role of a judge in a civil case is not to actively assist one party against the other; to advise one party against the other; or in any way to act as the legal adviser or the legal representative for that party even if that party is unrepresented. The role of the judge in a civil case in our system is to act as the umpire and he or she has no active role such as may occur under our system in criminal proceedings where a citizen is facing the State as prosecutor, and the judge has a proper role in protecting the accused, especially an unrepresented accused. Civil cases involve citizen (corporate or otherwise) against citizen, and the judge's role, as I have said, is that of an umpire."

43 Practitioners also have a role to play in assisting the Court where a party is a self-represented litigant. In *Serobian v Commonwealth Bank of Australia* [2010] NSWCA 181, Macfarlan JA (Tobias JA and Sackville AJA agreeing) said of the duty of practitioners (emphasis added):

> [42] … Section 56(3) of the *Civil Procedure Act* 2005 imposes an obligation upon parties to civil proceedings to assist the court to further the overriding purpose identified in s 56(1) of facilitating "the just, quick and cheap resolution of the real issues in the proceedings". **Where, as here in the case of the respondent, a party is represented by competent and experienced lawyers and is opposed by litigants in person, the party and its lawyers have a duty to assist the court to understand and give full and fair consideration to the submissions of the litigants in person. In particular such a party must refer the court to evidence in the proceedings that is relevant to those submissions. This duty is accentuated where, again as here, the party is a substantial institution accustomed to litigating cases involving issues such as are involved in the present case, often against litigants in person.**

44 Further guidance has also been provided by the Law Society of New South Wales in the 'Guidelines for dealing with self-represented parties in civil proceedings' with useful recommendations in that guideline including:[27]

(1) a solicitor "should deal with a self-represented party to the same standard as they would with a represented party";

(2) a solicitor "should confirm communications in writing, using plain language";

(3) a solicitor "should provide the self-represented party with authorities prior to the hearing";

(4) a solicitor "should not burden a self-represented party with unnecessary material"; and

(5) "[i]n interlocutory applications, it is good practice to provide self-represented parties with a copy of the orders that will be sought prior to the date of the interlocutory hearing or directions hearing".

[27] Law Society of New South Wales, 'Guidelines for dealing with self-represented parties in civil proceedings' December 2016 at [2.6]-[2.7].

Undefended applications

45 Another difficulty is that s 66G proceedings are sometimes undefended. The paramount duty of any solicitor is "to the court and the administration of justice".[28] Practitioners should keep in mind the recent statement of Griffiths AJ in *Take Off Opportunities Pty Ltd atf The Clear Runway Trust v Susan Quinn Pty Ltd atf The Susan Amelia Quinn Trust* [2025] NSWSC 231 at [18]:

> [18] The defendant's non-attendance does not mean that the plaintiff becomes liable to a more demanding obligation to assist the Court as would apply if, for example, the defendant was absent because the Court was dealing with an ex parte application. I respectfully agree with Barrett J's observations in *Satz v ACN 069 808 957 Pty Ltd* [2010] NSWSC 365 at [68] where, after referring to several authorities, including Isaacs J's observations in *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679; [1912] HCA 72 at 681 concerning a "most serious responsibility" imposed upon a party who comes to court seeking relief in the absence of the other party, Barrett J stated:
>
> > It seems to me that the "most serious responsibility" to which Isaacs J referred is attracted only in those cases where a party has not been given proper notice of a hearing and is absent when an application is pressed. In those cases, the applicant is obliged to bring to the court's attention all relevant facts known to the applicant, including those unhelpful to the applicant's case. That "most serious responsibility" is not attracted if the defendant has been served and given ample opportunity to attend. Such a defendant's non-attendance does not give rise to an entitlement to some especially favourable treatment. The plaintiff is, in such a situation, under the generally prevailing obligation to assist the court and not to mislead it. If the case is one of interlocutory hearing of the "limited inquiry" type to which Young J referred, the duty to assist the court is particularly pronounced. But where, as here, the application is an application for final relief and the defendant has not only received the originating process and supporting affidavit but also presented a somewhat relaxed demeanour in the face of the claim (see paras [42]–[45] above), it seems to me that the duty or expectation is confined to honestly [sic], frankness and absence of conduct apt to mislead the court in relation to any material matter.

46 Practitioners should be aware of their "most serious responsibility" when a proceeding is undefended, bearing in mind that the Court has the power to set

[28] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) (**ASCR**).r 3.

aside or vary a judgment given or made in the absence of a party under r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW).

Easements

47 There have been a number of recent judgments of the New South Wales Court of Appeal on easements which I will briefly touch on.

48 The first case is *Theunissen v Barter* [2025] NSWCA 50 (***Theunissen***). Joshua and Michelle Theunissen and Marie Barter live on adjoining blocks in Mosman. There are a number of easements on the blocks and the relevant Easement relates to a flat rooftop terrace area on Ms Barter's block of land (the servient tenement). The Theunissens' are able to access the rooftop via glass sliding doors. Ms Barter is able to access the rooftop by ascending a ladder through an openable skylight.

49 In dispute was whether the Easement grants the Theunissens', the owners of the dominant tenement, an exclusive set of rights to use the rooftop for "the use and enjoyment of the servient tenement for the purposes of recreation and enjoyment and as a balcony, terrace or garden".

50 The trial judge, Richmond J, held the set of rights was not exclusive.

51 On appeal, Kirk JA with Mitchelmore JA and Griffiths AJA agreeing, held that the rights are exclusive.

52 The judgment contains a useful analysis of the law in relation to the use of physical characteristics in construing the easement. After a long review of the case law, Kirk JA said at [108] in summation:

> [108] In sum, it is sufficient to say the following for the purposes of resolving this matter. When construing a registered easement it is permissible to take into account relevant physical characteristics of the servient and dominant tenements, and the surrounding land, at the time of the grant which were reasonably ascertainable by a third party at that time. The significance (if any) of those characteristics will depend upon the particular case. The characteristics which may be considered are the broad and reasonably enduring characteristics, not fine details

> of the land or of its fixtures. Relevant sources generally would include, for example, what can be observed from outside the properties along with publicly available maps. It would not include material that could have been ascertained by searches under freedom of information laws.

53 Further, in relation to the validity of an easement, Kirk JA, after a detailed consideration of the case law, stated at [140]:

> [140] Every easement prevents some ordinary use of the servient tenement, perhaps to a very significant extent. The question is whether a putative easement substantially deprives the servient owner of proprietorship or legal possession to such an extent as to be inconsistent with ownership. That assessment is a matter of fact and degree. That assessment involves considering the physical area affected by the putative easement by reference to the servient tenement as a whole. The greater the proportionate area affected, the more likely that the restriction cannot be characterised as an easement. The assessment also involves considering the effect of the easement on the rights of the servient owner with respect to the burdened land. Those rights are positive: what the servient owner may do on and with the land. They are also negative: what the servient owner may require the dominant owner not to do on the easement area; or, put conversely, the extent of the positive rights held by the dominant owner. If there is a complete transfer of the servient owner's rights, as in *Bursill Enterprises*, the instrument cannot be an easement. Anything less than that is a question of degree. That the instrument grants a sole right to the dominant owner to use the subject area for some particular purpose (as opposed to having exclusive possession for all purposes) does not of itself establish that the easement is invalid.

54 The second case is *Owners Corporation Strata Plan 533 v Random Primer Pty Ltd* [2025] NSWCA 8 (***Random Primer***). The Owners Corporation Strata Plan 533 and Random Primer Pty Ltd own adjoining properties in Roseville. The dispute concerned whether owner's consent must be given for the making of a development application with respect to a proposed extension of a shared driveway. The shared driveway is on the property of the Owners Corporation and is subject to an easement creating a right of way in favour of Random Primer. Random Primer wants to replace the building on its property with an apartment block which involves widening the driveway onto its own land. The Owners Corporation declined to provide consent to the development application.

55 The trial judge, Williams J, held that it was not an unreasonable interference with the Owners Corporation rights, as servient owner, for vehicles exiting the

servient tenement to be required to use the part of the driveway on the dominant tenement to make way for vehicles entering the driveway.

56 The Court of Appeal upheld Williams J's decision and Kirk JA, with Gleeson and Mitchelmore JJA agreeing, provided a clear explanation of the principles in relation to the respective rights of the parties.

57 At [39]-[41], Kirk JA expressed the relevant test as follows:

> [39] The ultimate issue is whether the refusal of the owner of the servient tenement to give consent constitutes a substantial interference in the rights held by the owner of the dominant tenement. The issue can also be expressed in converse terms of whether the servient owner's refusal of consent was a reasonable exercise of its property rights. If it was then there would be no substantial interference in the rights of the dominant owner.
>
> [40] A number of considerations may throw light on the answer to the question of whether the failure to give consent is a substantial interference in the dominant owner's rights. Those considerations may include, but are not necessarily limited to, the two matters identified by Sackville AJA at [100]. It is of course relevant to identify what rights are held by the dominant owner and whether those rights encompass what is involved in the proposed development. If the use proposed in the development application is outside the scope of the right of way then to decline to consent to the making of that application cannot be a substantial interference in the dominant owner's rights.
>
> [41] Similarly, if the use proposed would unreasonably interfere with the reasonable use of the servient tenement by the servient owner then, again, there cannot be any such substantial interference in the dominant owner's rights by failing to consent. Such unreasonable use includes excessive use because such use "goes beyond what is authorised": *Annwrack Pty Ltd v Williams* (Supreme Court (NSW), Waddell CJ in Eq, 8 February 1989, unrep), BC8902584 at 12; see also Sertari at [20]; *Westfield Management Limited v Perpetual Trustee Company Limited* (2007) 233 CLR 528; [2007] HCA 45 at [26]-[27]. In general, unreasonable interference by the dominant owner with the reasonable use of a right of way by the servient owner will itself be outside of the scope of the rights held by the dominant owner. So much was recognised in Lowe at [101] (see also [107]). This reflects the principle that each owner has rights which must be accommodated.

58 *Theunissen* and *Random Primer* have since been considered by the Court of Appeal in *Dickson v Petrie* [2025] NSWCA 110 (***Dickson***) with further summation of the principles in relation to construction and validity of easements and their application to the various easements in dispute.

59 *Dickson* considered a duplex residential building in Palm Beach. In 2003, three easements were created by the registration of an instrument and accompanying plan under s 88B of the CA. The easement the object of the disputes was described as an "Easement for Garden Use" which relevantly granted the dominant owners rights in relation to gardening, pacing and landscaping, and the storage of related equipment and materials.

60 At issue was whether, properly construed, the easement conferred exclusive or sole rights on the dominant owners for the stated purposes. The Court of Appeal agreed with the trial judge that they did. The Court of Appeal disagreed with the trial judge that by reason of this exclusivity the easements were invalid by reason of the ouster principle – namely whether the rights exclude the proprietorship or possession of the servient owner. The Court of Appeal held that the servient owners retained considerable positive and negative rights in respect of the servient area.

Generative AI

61 I thought I would conclude with some brief remarks on the use of Generative AI – a hot topic at many levels but relevantly in relation to litigation.

62 The Court's current view on the use of Generative AI is reflected in Practice Note SC Gen 23 – Use of Generative Artificial Intelligence (Gen AI). As there set-out, great care is required by practitioners.

63 In *Ayinde v The London Borough of Haringey* [2025] EWHC 1383 (Admin) at [5]-[9], Dame Victoria Sharp, President of the King's Bench Division of the High Court of Justice recently observed:

> This comes with an important proviso however. Artificial intelligence is a tool that carries with it risks as well as opportunities. Its use must take place therefore with an appropriate degree of oversight, and within a regulatory framework that ensures compliance with well-established professional and ethical standards if public confidence in the administration of justice is to be maintained. As Dias J said when referring the case of Al-Haroun to this court, the administration of justice depends upon the court being able to rely without question on the integrity of those who appear before it and on their professionalism in only making submissions which can properly be supported.

> In the context of legal research, the risks of using artificial intelligence are now well known. Freely available generative artificial intelligence tools, trained on a large language model such as ChatGPT are not capable of conducting reliable legal research. Such tools can produce apparently coherent and plausible responses to prompts, but those coherent and plausible responses may turn out to be entirely incorrect. The responses may make confident assertions that are simply untrue. They may cite sources that do not exist. They may purport to quote passages from a genuine source that do not appear in that source.
>
> Those who use artificial intelligence to conduct legal research notwithstanding these risks have a professional duty therefore to check the accuracy of such research by reference to authoritative sources, before using it in the course of their professional work (to advise clients or before a court, for example). Authoritative sources include the Government's database of legislation, the National Archives database of court judgments, the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales and the databases of reputable legal publishers.
>
> This duty rests on lawyers who use artificial intelligence to conduct research themselves or rely on the work of others who have done so. This is no different from the responsibility of a lawyer who relies on the work of a trainee solicitor or a pupil barrister for example, or on information obtained from an internet search.
>
> We would go further however. There are serious implications for the administration of justice and public confidence in the justice system if artificial intelligence is misused. In those circumstances, practical and effective measures must now be taken by those within the legal profession with individual leadership responsibilities (such as heads of chambers and managing partners) and by those with the responsibility for regulating the provision of legal services. Those measures must ensure that every individual currently providing legal services within this jurisdiction (whenever and wherever they were qualified to do so) understands and complies with their professional and ethical obligations and their duties to the court if using artificial intelligence. For the future, in Hamid hearings such as these, the profession can expect the court to inquire whether those leadership responsibilities have been fulfilled.

64 These observations were recently endorsed by Bell CJ in *May v Costaras* [2025] NSWCA 178 (***May v Costaras***) at [12].

65 In *May v Costaras*, a litigant in person used Generative AI to prepare her oral submissions to the Court which included references to non-existent and irrelevant cases.

66 At [17], Bell CJ observed:

> [17] At least at this stage in the development of the technology, notwithstanding the fact that Generative AI may contribute to improved

> access to justice which is itself an obviously laudable goal, the present case illustrates the need for judicial vigilance in its use, especially but not only by unrepresented litigants. It also illustrates the absolute necessity for practitioners who do make use of Generative AI in the preparation of submissions – something currently permitted under the Practice Note – to verify that all references to legal and academic authority, case law and legislation are only to such material that exists, and that the references are accurate, and relevant to the proceedings.

67 Thank you for your time and attention this afternoon.