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ACCESS AND EASEMENTS - WHERE DO YOU STAND?

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NEIGHBOURS ACCESSING STRATA SCHEMES

A. INITIAL CONTACT FROM NEIGHBOUR

Neighbouring properties often need temporary or permanent access to a strata scheme in order to develop their land. The usual scenario is that the neighbour contacts the executive committee or the strata manager, offering a simple form to sign to expedite the process. The neighbour will not voluntarily make any mention of liability, indemnities, compensation or other costs.

Most types of access only require an ordinary resolution at a general meeting. However, the registration of an easement (such as drainage easements, easements for services etc.) requires a special resolution, in accordance with section 26 of the *Strata Schemes (Freehold Development) Act* 1973.

B. MAIN TYPES OF ACCESS

In my experience, the three most common forms of access are as set out below.

1. Easements, Usually an Easement to Drain Water

When owners of adjoining land obtain development approval to develop their land, Council will always require them to deal with the drainage of water from their land. This may include waste water, or it may include water collected on the site (such as from roofs). Most commonly developments can drain water to the street in front of them. However, in some cases, because of the peculiarities of the land (eg a sloping site), it is easiest for the developer of that land to drain their water over an adjoining property and connect to the street in front of that neighbouring property. This occurs when it is less expensive to obtain an easement than to pump the water back up the hill to the outlet at the street in front.

In those circumstances, the neighbour will usually need to lay pipes in or under an adjoining property in order to drain water through or under it. This is usually a 1 metre wide strip of land along one side of the boundary.

That easement, once created, will be registered on the title of the common property of the strata scheme (CP/SP12345) permanently. Because of the permanence, the possibility of damage, the inconvenience and the general forfeiture of rights in land, the grant of an easement is usually considered to have a value.

If an easement already exists but a new neighbour wishes to tap into it, there will still be a value, but a reduced one.

The *Conveyancing Act* 1919 sets out standard terms for a drainage easement, which are below:

Schedule 8

Part 3 - Easement to drain water

Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the land herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water or any pipe or pipes in replacement or in substitution therefore and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement, and together with the right for the grantee and every person authorised by the grantee, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the grantee and the persons authorised by the grantee will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition.

As can been seen, considering this is only one sentence, it is not the easiest thing to follow.

In short, what the standard easement to drain water means, is that:

- the owner of the land benefited (the neighbour) can drain water across the strata scheme;
- the land benefited can use existing pipes;
- the land benefited can install sufficient pipes within that easement;

- the land benefited can enter on to the strata scheme to lay, inspect or repair pipes;
- the land benefited must cause as little disturbance as possible and restore that surface as nearly as possible to its original condition.

What that standard easement does not say is that the owner of the land benefited is liable for any damage caused by their use of the easement. For example, a water drainage pipe might burst, causing extensive flooding or other damage to the strata scheme. It is not clear from the terms of the easement who is liable for that damage. It might be possible for the owners corporation to pursue the neighbour using other areas of law, but it would be preferable for the easement to include a liability provision.

When neighbours request access through a strata scheme, therefore, we usually ask that a new tailor-made easement be used, rather than the standard form set out above.

2. Ground Anchors

Especially where a larger development is happening next door, access is often sought for the purpose of installing “temporary” ground anchors. These ground anchors are installed, like arrows, under the strata scheme’s land, and then hook on to the land or rocks under it. They are then used either to support and stabilise the crane working on that land, or to support and stabilise an external wall on the property next door until other parts of the building are constructed, which will then provide cross-support.

After the ground anchors are no longer needed for these purposes, they are de-tensioned. That is, they are effectively cut off from the things they are supporting, however the residual part of the ground anchor remains under the strata scheme’s land indefinitely. Therefore, whilst the neighbour will describe them as “temporary” ground anchors, they are only temporary in the sense that they are serving their main purpose temporarily. Parts of them will permanently remain under the strata scheme’s land.

Access for ground anchors is usually done by way of a Deed, often with an accompanying ground anchor plan. The neighbour will have the right to install ground anchors and use them for a certain period, and then to de-tension them and make good the boundary of the land when complete. If there was evidence that the ground anchors remaining in situ under the strata scheme could cause damage to that strata scheme in the future, then an

easement would be appropriate. Under this ground anchor easement, any damage caused by the rock anchors remaining in situ is covered by the owner of that neighbouring land (which may be a future strata scheme). However, the current engineering advice I have seen is that the remaining parts of the rock anchors will not cause any future damage to that strata scheme and the strata scheme is re-developed in the future, they will simply be removed with the other rubble and dirt.

3. Crane Swing

Another purpose for access is where cranes will swing over the strata scheme during construction. Usually, when the crane swings over the strata scheme, it is not carrying anything. There is an obvious risk of damage from something falling from above and the cranes can make a noise from banging in high winds or generally from their use.

C. WHAT IF YOU SAY NO? CAN THEY FORCE ACCESS?

1. Easements

Under section 88K of the *Conveyancing Act* 1919, a court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of the neighbouring land. The strata scheme would have to be *adequately compensated* for any loss or disadvantage and for the court to make an order, all reasonable attempts must have been made to obtain that access. Normally, the costs of the proceedings are paid by the applicant (the neighbour seeking access), however the court can make an order to the contrary. Certain things arise from this:

- The first question is what does *"reasonably necessary for the effective use or development"* of land mean? Originally, the courts interpreted this quite strictly, so that the easement sought would have to be the only way to satisfy that consent condition. However, more recently, the courts have been more liberal in their approach, so that even where another option is possible, if this can be shown to be more convenient or cheaper, then the courts are likely to grant the easement.

- The neighbouring property has to first try to negotiate with the strata scheme, so that all reasonable attempts can be shown to have been made.

- Whilst normally the neighbour would have to pay the costs of the proceedings, it is possible for the court to provide otherwise. Therefore, if an owners corporation acts unreasonably, it is possible that if the matter goes to court, it will have a costs order made against it. The best way to protect itself against this is to obtain a valuation, and ask for the amount in the valuation. Additionally, the owners corporation would ask for its strata manager's fees, legal fees and valuer's fees. The compensation in the valuation should be net of other costs. It would in those circumstances be pointed out to the neighbour that paying those costs is a lot cheaper (and quicker) than paying the costs of going to court.

- Another benefit of negotiating with the neighbour is that we could have a say in the terms of the easement. As stated above, the standard wording does not relate to liability and indemnities.

Therefore, when an owner of neighbouring land asks for an easement over the strata scheme, the strata scheme cannot simply say "no" with impunity. In order to protect itself, the owners corporation should:

(i) obtain a valuation; and

(ii) negotiate the terms of the easement.

2. Ground Anchors

As stated above, it is not necessary to have an easement for ground anchors. However, access to the strata scheme for the purpose of ground anchors is not temporary, as the de-tensioned ground anchors will remain in situ indefinitely. Therefore, the only way that a neighbour can force an owners corporation to agree to ground anchors is via an easement under section 88K. The comments set out above for easements therefore apply when access is sought for ground anchors.

3. Crane Swing

Access for the purposes of a crane swing is only temporary. The cranes are used during certain stages of the construction process, and then removed from site.

Under section 7 of the *Access to Neighbouring Lands Act* 2000, a person who requires access to adjoining or adjacent land may apply to the Local Court for a Neighbouring Land Access Order.

Under section 12 of that Act, the usual types of purposes for which access is sought include inspections, ascertaining the course of drains, replacing/removing hedges or trees and carrying out construction, repair or demolition of a structure.

When determining an application, the Local Court considers whether the work would be substantially more difficult or expensive to carry out without that access, and whether the access would cause unreasonable hardship to the person affected. Based on these two criteria, it appears likely that a Local Court would grant an access order for the purposes of a crane swing.

The Local Court may make an order for compensation during any such proceedings, but compensation is not payable for loss of privacy or inconvenience. Compensation is only ordered for loss, damage or injury, including damage to personal property and financial loss.

The costs of an application for an access order are usually payable by the applicant (the person seeking access). However, the court can order that the costs are payable in another fashion, taking into account the conduct of the parties, including whether a refusal to consent was unreasonable in the circumstances.

The most important things to note about access orders for crane swing under the *Access to Neighbouring Lands Act 2000* are:

(i) There will most likely be no compensation;

(ii) The court will decide what the terms of access are.

As the Local Court can make such orders for access, it is preferable to negotiate this with the neighbour, rather than offer outright refusals.

D. WHAT SHOULD YOU DO?

The simple answer to this question is that when you or an executive committee member is contacted for the purposes of access, contact us!

The usual process we would follow when dealing with one of these requests for access is the following:

(i) Assist with the calling of an executive committee meeting (assuming our costs are under the threshold) or general meeting for the purposes of engaging us;

(ii) Before any actual work is carried out to incur costs, write to the neighbour, informing them that we are acting and that our costs, the strata manager's fees and any other consultant costs are payable by that neighbour seeking access. If necessary, we point out that that owner's alternative is to go to court, where most likely the court costs would also be payable by them. The requirement for access is usually left to the last minute and urgent, so time is as much or more of an issue than cost. We provide a cost estimate to the neighbour and tell them that the amount of the cost estimate must be paid in to trust account on a non-refundable basis on account of our legal fees (and any estimated strata manager's fees). Any surplus is refunded to them.

(iii) We then provide initial advice to the owners corporation. This might include a recommendation to obtain a valuation, and could include a recommendation to engage an engineer, depending on the type of access sought.

If any damage is caused to the strata scheme during construction, then that damage must be rectified by the neighbour. The state of the property before construction is recorded by an initial dilapidation report and the subsequent state of the strata scheme is recorded by a final dilapidation report. Whilst the neighbour will usually have to obtain the dilapidation reports as a condition of the development approval, it is usually preferable for the owners corporation to engage its own engineer and rely on its own dilapidation reports.

(iv) Once any valuation and engineering reports are received, we negotiate the terms of access with the neighbour. This might involve negotiating the terms of an easement, and will usually involve negotiating the terms of access, including the period of access, detailing the purposes for which access is granted, liability and indemnity issues, insurance, repairing damage etc.

(v) Once the valuation and Deed are agreed, we then assist with the calling of an extraordinary general meeting to approve execution of the Deed. If requested, we will attend the EGM to explain the process to the owners present.

(vi) Once the Deed is finalised and approved by the owners corporation, then to finish off the matter, we arrange execution, exchange of Deeds, payment of compensation and, if appropriate, registration of an easement on the common property title.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for almost 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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