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NEIGHBOURHOOD DISPUTES – ACCESS TO NEIGHBOURING LANDS, HAZARDS, DIVIDING FENCES AND TREES.

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NEIGHBOURHOOD DISPUTES

ACCESS TO NEIGHBOURING LANDS, HAZARDS, DIVIDING FENCES AND TREES

Introduction

Disputes between neighbours take many forms. This paper will consider the law relating to some of the most common and challenging types of neighbourhood disputes that affect owners corporations and strata managers. These are: disputes about access to neighbouring lands; hazards such as collapsing retaining walls, landslips and rock falls; dividing fences and tree disputes.

In modern cities, neighbourhood disputes involving strata schemes are commonplace. And these disputes are likely to increase as the drive towards urban consolidation literally pushes neighbours closer together and into greater conflict.

It is therefore important that participants in strata schemes, from owners corporations to strata managers, have a basic understanding of the most common types of the disputes and the laws applicable to them.

Whilst strata owners and managers are familiar with the way in which disputes between participants within strata schemes are resolved, they often do not understand the nature of, and laws applicable to, disputes with outsiders. This is understandable given that the law in this area is complex and evolving.

Indeed the law in relation to neighbourhood disputes has undergone much reform in the past 15 years. This reform has overcome many inadequacies in common law rules that were ill-adapted to deal with conditions in modern cities.

So, for example, in New South Wales it is no longer the case that a person is able to excavate his land with impunity, even though his neighbour's home may crumble to the ground; or that a person may charge his neighbour an exorbitant sum to gain access to his land to allow his neighbour to repair his home.

However, as important as these reforms are, there is still a way to go, as will become clear.

Regrettably, neighbourhood disputes often turn into divisive quarrels that present some of the most difficult challenges to stakeholders in the strata industry.

It is hoped that this paper will arm the reader with a basic understanding of, and confidence to move towards solving, some of the most common neighbourhood disputes that affect strata schemes across New South Wales.

Common Law

The common law does not give a person a right to enter a neighbour's land even if access to the neighbouring land is absolutely necessary to repair one's own building: *John Trenberth Ltd v National Westminster Bank Ltd* (1979) 39 P & CR 104. Under the common law, a person whose building is in need of repair has only one option, and that is to demolish as much of his or her own building as is needed to get access to the problem, no matter what the cost: *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd* (1992) 9 BPR17,433.



So the common law gives the owner of land the right to decide who will come on to the land, who will build there, who will stay off and on what terms a person will be able enter the land (whether on payment of money or on no terms at all): *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464.

A person whose enters, or causes some object to enter, a neighbour's land without the neighbour's consent generally commits a trespass to land. This is particularly the case where, in the case of encroaching objects, the person's activities are of a nature which may interfere with any ordinary uses of the land which the neighbour may see fit to undertake: *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2)* (1989) 24 NSWLR 490.

The protection given by the common law to a neighbour's land extends to the airspace of the land and the subterranean space beneath the surface of the land: *LJP* (airspace); *Bendal* (airspace); *Proprietors of SP 20297 v G and S Developments Pty Limited* [2008] NSWSC 257 (subterranean space); *Di Napoli v New Beach Apartments Pty Ltd* [2004] NSWSC 52 (subterranean space).

So, for example, under the common law, a person is not able to do the following without the consent of their neighbour:

- Enter neighbouring land to carry out essential repairs to their building: *Bloom v Lepre* (2008) 13 BPR 24,923;
- erect scaffolding on, or encroaching into the airspace of, neighbouring land: *LJP*;
- place protective mesh screens at a great height which project into neighbouring land: *Bendal*;
- swing the jib of a crane through the airspace of neighbouring land: *Woollerton Wilson Ltd v Richard Costain Ltd* (1970) 1 ALL ER483; *Graham v KD Morris & Sons Pty Ltd* [1974] QD R 1; *Anchor Brewhouse Developments Pty Ltd v Berkley House* (1987) 38 Build L R 87; *London and Manchester Assurance Co Ltd v D & H Construction Ltd* (1990) 6 CONST LG155;
- underpin a building on neighbouring land: *Stoneman v Lyons* [1974] VR 797;
- excavate or tunnel under the surface of neighbouring land: *Mayor, etc of Tunbridge Wells v Baird* [1896] AC 434; *City of Chicago v Troy Laundry Machinery Co* 162 F 678 (1908); or
- insert rock anchors into the subterranean space of neighbouring land: *SP 20297*; *Di Napoli*.

Normally a court will grant an injunction to protect the neighbour's rights, notwithstanding that there may be little or no actual damage and great hardship may be caused to the defendant by the grant of the injunction: *Patel v W H Smith (Eziot) Ltd* [1987] 1 WLR 853, and *Bendal's* case.

Legislation - Section 88K Conveyancing Act 1919

The NSW Parliament recognised that people may require access to neighbouring land for various purposes including to permit construction work to be carried out on their land. Therefore, in 1996 the Parliament introduced section 88K into the *Conveyancing Act 1919* by the *Property Legislation Amendment (Easements) Act 1995*. The focus of section 88K is on the problem of a lack of access to



neighbouring land in closely settled areas for building activities on adjoining land, although it has wider application than merely in that situation: *Bloom*.

Section 88K gives the Supreme Court power to make an order imposing an easement overland if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

In *Khattar -v- Wiese* [2005] NSWSC 1014 at [2] the Court recognised that on an application under section 88K the issues which arise are relevantly:

- a) Is the proposed easement reasonably necessary for the effective use or development of the applicant's land that will have the benefit of the easement (s.88K(1))?
- b) Will the use of the applicant's land having the benefit of the easement not be inconsistent with the public interests (s.88K(2)(a))?
- c) Can the owner of the land to be burdened by the easement, and each other person having an estate or interest in that land, be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement (s.88K(2)(b))?
- d) Have all reasonable attempts been made by the applicant to obtain the easement or an easement having the same effect, but have been unsuccessful (s.88K(2)(c))?
- e) If yes to each of the foregoing questions, should the Court exercise its discretion to impose an easement (s.88K(1))?
- f) Unless there are special circumstances in the case, what compensation is appropriate to be ordered (s.88K(4))?
- g) Is there any reason why the cost of the proceedings should not be paid by the applicant (s.88K(5))?

The conventional view is that the Court should approach applications under section 88K with caution as it involves the compulsory taking of a proprietary right: *McKeand -v- Thomas* [2006] NSWSC 1028 at [27]; *Gittany -v- McDowell* [2009] NSWSC 591 at [87].

So to obtain an order under section 88K the applicant must show that:

- The easement is reasonably necessary for the effective use or development of their land.

The power to impose an easement requires the Court to make a finding that the easement sought is reasonably necessary for the effective use or development of the land which will have the benefit of the easement: *Woodland -v- Manly Municipal Council* [2003] NSWSC 392. The easement may be reasonably necessary for either the effective use or the effective development, or both, of the applicant's land.



“Reasonable necessity” is not absolute necessity. Something less will suffice: *117 York Street Pty Ltd -v- Proprietors of Strata Plan No. 16123* (1998) 43 NSWLR 504 at 508. However, it is

not sufficient that the easement would be “convenient or nice to have”: see *D&D Corak Investments Pty Ltd -v- Yiasemides* [2006] NSWSC 1419 at [13]. The test is “far closer to necessity than it is to convenience”: *O’Shea -v- Athanasakis* [2009] NSWSC 1150 at [121]. The weight of authority suggests that the proposed use or development *with* the easement must be (at least) *substantially* preferable to the use or development *without* the easement: *117 York Street* at [509]. It has been said that an applicant should therefore present evidence of alternative uses of, or developments for, the land and demonstrate that the proposed use or development is substantially preferable: *Blulock Pty Ltd -v- Majic* (2002) NSW ConvR 56-012 at 58,315 (here the plaintiffs have provided no such evidence).

Where a particular proposed use or development is in contemplation, the first question is whether that proposed use or development is a reasonable one (in comparison with the possible alternatives); and the second is whether that use or development with the proposed easement is substantially preferable to that use or development without the proposed easement: *McKeand* at [26]. The confiscatory nature of section 88K requires firm proof of the reasonable necessity for the easement: *McKeand* at [27].

The easement must be reasonably necessary for the effective use or development of the land *itself*, namely the land that will have the benefit of the easement. It is not sufficient for the easement to be reasonably necessary for the enjoyment of the land by any of the persons who, for the time being, are its proprietors: *Hanny -v- Lewis* (1998) 9 BPR 16,205 at 16,209; *Woodland* at [19(5)]. This means that evidence as to the particular problems that one of the existing owners of the land may have, or a hardship suffered as a result of those problems, would not be relevant: *Hanny* at 16,209; *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221 at [28], [33].

Hence the reasonable necessity in question is necessity for the use or development of the *land*, not for use by the current or any other owner: *Woodland* at [19(5)]. That is to say, “use” in section 88K(1) does not connote situations that are specific to a particular person currently on the land: *Bloom -v- Lepre* [2008] NSWSC 79 at [45]. In other words section 88K requires the easement to be reasonably necessary for the use of the dominant *land*, not merely for the convenience of a particular proprietor of that land: *Hanny*; *Bloom*.

So, for example, in *Bloom*, the Court held that it would not be sufficient for a person to claim that an easement should be imposed over land because, for instance, the land is currently being used as a nursing home and access for ambulances is required.

- The use of the applicant’s land (with the easement in place) would not be inconsistent with the public interest.
- It is possible to give the owner of the land that would be burdened by the easement adequate compensation for any loss or other disadvantage that will arise from the imposition of the easement.

The loss or disadvantage for which compensation is available and must be fixed by the Court covers a wide spectrum of losses to the defendant and is not limited to the value of the land: *Bloom*.

Compensation payable under section 88K is not a substitute for the price that could have been expected if the section did not exist: *SJC Construction Co Ltd v Sutton LBC* (1975) 29 P & CR 322 at 326.

Ordinarily the compensation will be: (a) the diminished market value of the affected land (including what is sometimes called the hope value, that is the potential use to which the subject land could have been put); (b) associated costs that would be caused to the owner of the affected land; (c) an assessment of the compensation for in security, loss of amenities such as loss of peace and quiet; and (d) the compensation is to be less compensating advantages if any: *Wengarin v Byron Shire* (1999) 9 BPR 16,985

In *Rainbow Force Pty Ltd –v- Skyton Holdings Pty Ltd & Ors* [2010] NSWLEC 2 Preston CJ of the Land and Environment Court made the following observations on the question of compensation under section 88K at [106] – [116]:

- the adequate compensation referred to in s88K(2)(b) is the same as the compensation that the court may order under s88K(4);
- compensation is for “any loss or disadvantage” that will arise from the imposition of the easement and this includes compensation for disturbance beyond the actual value of the proprietary right taken;
- the compensation is not a substitute for the price that would have been exacted if s88K did not exist meaning there can be no compensation for the loss of bargaining position of the owner of the land to be burdened and the owner is “to receive a just sum and full value for what he or she has to give over, rather than being able to demand the earth”;
- the compensation is for any loss or disadvantage “that will arise from the imposition of the easement” meaning there must be a causal relationship between the loss or disadvantage for which compensation is claimed and the imposition of the easement;
- the court’s task under s88K is to be satisfied that the persons affected by imposition of the easement are “adequately compensated” and to provide for an order for payment of such adequate compensation. In assessing adequate compensation the court “is not to err on the side of generosity or miserliness”;
- ordinarily compensation will have three elements:

- the diminished market value of the affected land (including what is sometimes called the hope value, that is the potential use to which the subject land could have been put);
 - associated costs that would be caused to the owner of the affected land;
 - an assessment of compensation for insecurity and loss of amenities, such as loss of peace and quiet.
- Against these losses and disadvantages should be allowed, as an offset, any competing advantages;
- there may be exceptional cases where it is extremely difficult to assess compensation but it is clear that the applicant will derive a considerable benefit from the easement and in those cases it may be appropriate to assess the compensation on a percentage of the profits that would be made (although there does not yet seem to have been a case where this has been done);
- in the case of a permanent easement, compensation includes the loss of proprietary rights by the imposition of the easement and compensation for the disturbance effected by the carrying out of the initial work, such as construction of a road or laying of pipes in the easement, and subsequent repair and maintenance from time to time (the first aspect is often referred to as the 'bloton title' and the second as 'disturbance');
- in *Mitchell v Boutagy* [2001] NSWSC 1045 (which involved an easement to drain stormwater and sewerage), Austin J held that provision was to be made both for initial disturbance (upon installation of the pipes) and future disturbance (in case in the future there was a need to service and maintain the pipes). Ultimately, His Honour allowed \$2,600 (being the rental value for four weeks during which the initial works would take place), and a further \$2,000 (about three weeks) for future disturbance.
 - if the easement will cause material injury to intangible benefits or the imposition of material intangible detriments, such as reduced amenity, or enjoyment of property, and exposure to increased disruption and interference, which are not readily capable of being estimated in monetary terms, the court may not be able to be satisfied that the owner to be burdened by the easement can be adequately compensated. However compensation is often able to be assessed for injury to intangible benefits or the imposition of intangible detriments and there are several cases where this has been done;
 - as a general rule, compensation should be assessed once and for all when the order imposing the easement is made although liberty can be reserved to the persons affected by the imposition of the easement to apply to the court for further compensation if some unexpected event occurs.
- All reasonable attempts have been made by the applicant to obtain the easement which has been unsuccessful.

In order for an applicant for an order to make all reasonable attempts to obtain an easement:

- a) the applicant for the order must make an initial attempt to obtain the easement by negotiation with the person affected and some monetary offer should be made: *Hanny v Lewis*;
- b) the applicant for the order should sufficiently inform the person affected of what is being sought and provide for the person affected an opportunity to consider his or her position and requirements in relation thereto: *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) 7 BPR 14,638 at 14,654;
- c) the applicant for the order is not required to continue to negotiate with a person affected by making more and more concessions until consensus is reached to the satisfaction of the person affected: *Coles Myer*; and
- d) the whole of the circumstances are to be considered from an objective point of view; once it appears from an objective point of view that it is extremely unlikely that further negotiations will produce a consensus within the reasonably foreseeable future, it may be concluded that all reasonable attempts have been made to obtain the easement: *Coles Myer*; see also *Antipas v Kutcher* at [14].

Reasonableness is a matter of degree. The relative advantages, convenience and costs of the alternative easements are relevant considerations: *Tregoyd Gardens Pty Ltd v Jervis* at 15,856; *Khattar v Wiese* at [55]; *Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482* at [54].

An alternative easement over other land which has manifest disadvantages compared to an easement over the land the subject of the application will not be an easement having the same effect and the applicant for the order need not make attempts to obtain it: *Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482* at [56], [57].

- In its discretion the court ought to make rather than refuse the grant of an easement: *Bloom*.

The commencing words of section 88K(1) "The court may make an order imposing an easement" confers a discretion on the court to make or refuse an order even if all the other factors set out above are decided in favour of the applicant: *Khattar v Wiese* (2005) 12 BPR 23,235; *Bloom* at [100] – [104]; *O'Shea* at [107]; *Ryan* at [84]; *Rainbow force* at [133].

The discretion is to be exercised having regard to the purpose of the section which, to summarise, is to facilitate the reasonable development of land while ensuring that just compensation is paid for the erosion of private property rights: *Khattar* at [60].

If the reasonable necessity for an easement as it presently exists arose from previous unreasonable conduct by the applicant, that could be a discretionary factor counting against the granting of relief: *117 York Street Pty Ltd -v- Proprietors of Strata Plan No. 16123* (1998) 43 NSWLR 504 at 511.

- Usually, if an application is made to the court for an easement, the applicant for the order pays the other party's legal costs, unless the other party has acted unreasonably: section 88K(5).

Section 88K(5) says that the costs of the court proceedings are payable by the applicant for the order unless the Court orders to the contrary. This creates an entitlement in the person affected by imposition of the easement “to have the costs of having it determined by the Court whether the circumstances appropriate for the grant of an easement are established, and the costs of assessing appropriate compensation”: *117 York Street Pty Ltd* at 523.

This entitlement will only be lost if and to the extent that the person affected has engaged in unreasonable conduct, such as making the proceedings more expensive: *117 York*; *Mitchell v Boutagy* at [60]; *King v Carr-Gregg* at [71]; *Khattar v Wiese* at [77].

The basis on which costs should be paid is the ordinary basis and not an indemnity basis, unless the conduct of the applicant for the order has been such as to justify an order for indemnity costs: *117 York* at 523, 524; *Katakouzinos v Roufir Pty Ltd* at [82]; *Mitchell v Boutagy* at [68]; *King v Carr-Gregg* at [71]; *Khattar v Wiese* at [78]; *Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482* at [89].

Cases

Since section 88K came into operation on 12 February 1996 there have been a number of cases where people have used the section to obtain easements for various purposes over neighbouring land. In the strata title context, there have been several cases where owners' corporations have either sought, resisted or been ordered to grant court imposed easements.

In the seminal case of *117 York Street Pty Limited v Proprietors of Strata Plan 16123* (1998) 43 NSWLR 504, section 88K was used to grant the owner of a development site the right to pass a crane through the airspace of a neighbouring strata scheme in the Sydney CBD in return for payment of \$23,000.00 compensation (\$19,200.00 to certain unit owners who would be most affected by the neighbouring development and \$3,800.00 to the owners corporation). There were also easements granted to permit the developer to keep

scaffolding which would partly intrude into the neighbouring scheme during construction work, and to keep gutters which would overhang a minor portion of the neighbouring scheme.

In *Debbula Pty Ltd v Owners - Strata Plan No 6964* (2003) 12 BPR 22,617 an owners corporation successfully resisted a developer's attempt to have a court ordered drainage easement imposed on it on the basis that the easement was not reasonably necessary.

In *Property Partnerships Pacific Pty Ltd v The Owners of Strata Plan 58482* [2006] NSWLEC709 the Land and Environment Court imposed a drainage easement over the common property in a strata scheme in return for payment of \$100,000.00 compensation. The easement was ordered under section 40 of the *Land and Environment Court Act 1979* which is in similar terms to section 88K and allows the Court to order an easement where it grants development consent in an appeal against the refusal of a consent authority to grant development consent.

In *Owners Strata Plan 13635 v Ryan* [2006] NSWSC 221 an owners corporation acquired a court ordered easement over a laneway on neighbouring land.



Practical Tips

Applications to the Supreme Court for easements imposed under section 88K of the *Conveyancing Act 1919* are time consuming and expensive. Usually, an application under section 88K is only worthwhile if the applicant is pursuing permanent rights over neighbouring land, such as a right of way or drainage easement. Often the cost to go to court to obtain an easement for temporary access far exceeds the costs of carrying out the work permitted by the easement. A simpler, cheaper and more accessible forum was needed for granting people rights to access neighbouring land.

Access to Neighbouring Land Act 2000

On 1 January 2001 the *Access to Neighbouring Land Act 2000* ("Access Act") commenced. This Act provides a means for a person carrying out work on his or her own land (or a person carrying out work on their behalf, such as a builder), but who requires access to adjoining or adjacent land to carry out that work, to apply to the local court for a neighbouring land access order: section 7.

An access order may be made in a number of circumstances including to permit work such as the construction, repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures; inspections to ascertain if such work is required; and making plans in connection with such work: section 12.

The Access Act also allows orders to be made authorising access to neighbouring land to carry out work on or in connection with a utility service such as sewerage, drainage, water, gas, electricity or telephone service: section 13.

Usually, the applicant for an access order must give 21 days' notice to the owner of the land to which access is required and the court has to be satisfied that the applicant for the order has made a reasonable effort to reach agreement with every person whose consent to access is needed regarding the access and the carrying out of the work: sections 10 and 11.

The court must also be satisfied that access to the neighbouring land is required to carry out the work and that it is appropriate to make the access order: section 11. Further, the court must be satisfied that the work cannot be carried out, or would be substantially more difficult or expensive to carry out, without access to the neighbouring land and that there is no unreasonable hardship caused to any person affected by the order: section 15.

The court often imposes conditions when making access orders which include conditions imposed for the purpose of avoiding or minimising loss, damage or injury to the owner of the land to which access is granted, and conditions requiring the taking out of insurance cover by the person granted access pursuant to the order: section 16.

Any access order must specify the land to which it permits access, the work which may be carried out, the date on or from which access is permitted and the date when access ceases to be permitted and, if appropriate, the times during which access is permitted: section 17.

Normally, any person granted an access order must restore the neighbouring land to the same condition it was in before the access, so far as is reasonably practicable, and indemnify the owner of the neighbouring land against damage to the land or personal property arising from the access:



section 21, although the standard indemnity does not extend to cover personal injuries attributable to the access. An access order binds the successors in title to the owner of neighbouring land to which access is granted: section 23.

The Access Act allows the local court to make orders for compensation to persons affected by access orders for loss, damage or injury: section 26, although the scope for compensation is far more limited than under section 88K of the *Conveyancing Act 1919*. For example, compensation is not payable for loss of privacy or inconvenience suffered by an owner solely as a result of the access authorised by the access order. The Access Act allows claims for compensation to be made for damage to personal property, financial loss and personal injury arising from access obtained under the order, although any compensation claim must be made within three years after the last date on which access occurred under the order: section 26. This envisages that parties to access disputes in which an access has been made are able to return to the court to deal with compensation claims arising out of damage to personal property, financial loss and personal injury arising from the access.

Usually, if an application is made to the court for an access order, the applicant for the order pays the other party's legal costs, unless the other party has acted unreasonably: section 27.

Comment

There are few reported cases concerning the Access Act because decisions under the Act are generally made by Magistrates in the local court whose judgments are not widely reported. This can make predicting the outcome of certain aspects of an access dispute, such as there cover of compensation and costs, difficult, because there is little precedent to draw on to guide the court or the participants in the litigation. Nonetheless, the local court has proved, in general, to be a quick, cheap and accessible forum for resolving neighbourhood access disputes.

Comparing the Use of the Legislation

There is a degree of overlap between section 88K of the *Conveyancing Act 1919* and the *Access to Neighbouring Land Act 2000*. A person may apply for a neighbouring land access order even if access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K: section 7(4).

However section 88K is far broader in its reach than the Access Act, and is able to be deployed in many more circumstances than the Access Act, for example, to create easements that are not limited to conferring on land owners access rights.

Also, in practice, section 88K is now rarely used for obtaining access orders because of the expense and delay associated with Supreme Court proceedings. So developers, for example, are more frequently turning to the local court as the forum in which to obtain quick and cheap access orders to secure rights to erect scaffolding and swing crane jibs through neighbouring land for minimal compensation.

Conclusion

The legislative reforms introducing section 88K into the *Conveyancing Act 1919* and the *Access to Neighbouring Land Act 2000* have overcome significant problems concerning neighbourhood access rights created by common law rules which were ill-adapted to deal with conditions in modern cities.



Neighbours are no longer able to hold each other to ransom before allowing access to their land. This is to be commended.

HAZARDS: COLLAPSING RETAINING WALLS, LANDSLIDES, ROCK FALLS

Introduction

An owner corporation, much like any land owner, is often confronted by dangers or hazards on its land or neighbouring land. In suburban areas these typically include: collapsing retaining walls and landslides; rock falls; and subsidence. This section of the paper will address these types of hazards and the duties imposed on land owners to respond to them.

The Law Concerning Hazards

The common law has for many years recognised that a land owner owes some form of duty to his or her neighbours to prevent hazards on the land of which he or she is aware or should be aware causing damage to their neighbours or neighbouring land.

So, under the common law, a land owner has a duty, when he or she is aware or ought to be aware of a hazardous condition on his or her land which puts neighbouring land at risk, to take such steps as are reasonable in all the circumstances to prevent or minimise the risk of injury or damage to the neighbour's property: *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] QB 485. This duty applies in a wide variety of circumstances.

It means, for example, that the law imposes a duty on an owners corporation, as a landowner, to take reasonable care to abate any nuisance caused to neighbours by soil slipping from its land into, or rocks falling from its land onto, neighbouring lands: *Owners Strata Plan 4084 v Mallone* [2006] NSWSC 1381.

The law places a *measured* duty on an owners corporation in relation to its neighbours. This duty is not to take *every* possible step to eliminate the risk of a hazard, such as soil slippage or rock fall, and consequent damage to neighbouring properties. Rather, the duty is to take those steps which are *reasonable* in all of the circumstances to prevent or minimise the risk of damage to neighbouring properties as a result of a hazard: *Goldman v Hargrave* (1966) 115 CLR 458. The duty of care is not that of the reasonable person in negligence, but rather it is measured by the reasonable capabilities and circumstances of the person on whom the duty is imposed: *Goldman v Hargrave* [1967] 1 AC 645; *Leakey*.

So what is reasonable for an owners corporation to do depends on all of the circumstances. The most relevant factors include:

Objective factors such as:

- the cause of the hazard;
- the probability that a personal injury will be suffered or neighbouring properties will be damaged if nothing is done about the hazard;
- the likely seriousness of any such personal injury or property damage;
- the effort involved in solving the problem (simple v complex);
- the expense of solving the problem;

(see, for example, section 5B of the *Civil Liability Act 2002*)



Subjective factors will also be relevant such as:

- the financial circumstances of the owners corporation and its neighbours, particularly their respective abilities to afford to pay to implement a solution to the problem;
- the size of the properties affected by the problem;
- the time available to solve the problem; and
- the age and physical condition of the neighbouring land owners.

In *Leakey v National Trust for Places of Historical Interest or Natural Beauty* [1980] QB485, the English Court stated the duty in these terms:

"The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one's neighbour or to his property. The considerations with which the law is familiar are all to be taken into account in deciding whether there has been a breach of duty, and, if so, what that breach is, and whether it is causative of the damage in respect of which the claim is made. Thus, there will fall to be considered the extent of the risk; what, so far as reasonably can be foreseen, are the chances that anything untoward will happen or that any damage will be caused? What is to be seen as to the possible extent of the damage if the risk becomes a reality? Is it practicable to prevent, or to minimise, the happening of any damage? If it is practicable, how simple or how difficult are the measures which could be taken, how much and how lengthy work do they involve, and what is the probable cost of such works? Was there sufficient time for preventive action to have been taken, by persons acting reasonably in relation to the known risk, between the time when it became known to, or should have been realised by, the defendant, and the time when the damage occurred? Factors such as these, so far as they apply in a particular case, fall to be weighed in deciding whether the defendant's duty of care requires, or required, him to do anything, and, if so, what."

So, in *Goldman v Hargrave*, the land owner was held liable for damage caused to a neighbouring property by the escape of fire from his land for failing to take the very simple and reasonable step of dousing the flames in water to prevent the spread of fire to neighbouring properties. In that case, the court observed that:

"...where the hazard could have been removed with little effort and no expenditure, no problem arises [for determining what reasonable steps should have been taken]. But other cases may not be so simple ... less must be expected of the infirm than of the able bodied; the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them. If the smaller owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty; he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstances should, have done more."

The easiest way to illustrate how the courts have arrived at a determination of what reasonable steps a land owner needs to take to prevent a hazard on his or her land from causing damage to a neighbour's land is by reference to some of the cases.

Cases

Soil Slippage



In *Leakey's* case, the National Trust owned a conical shaped hill composed of soil which regularly slipped into neighbouring properties at the base of the hill including Mrs Leakey's property. After a prolonged summer drought Mrs Leakey pointed out to the Trust that a large crack had opened up in the hill above her house and that there was a grave danger of a major collapse of part of the hill onto her house. The Trust did nothing about the problem and some weeks later a large portion of the hill fell onto Mrs Leakey's property. Mrs Leakey asked the Trust to remove the fallen soil and debris but it refused saying it was not responsible for what occurred. Mrs Leakey went to court and obtained an injunction requiring the Trust to remove the fallen soil and debris and to prevent future soil slippage onto her land. The court held that having regard to all of the circumstances of the case, particularly those of the parties, the Trust had a duty to take reasonable steps to stop soil slipping from the hill into Mrs Leakey's property and that duty made the Trust responsible for doing whatever was necessary to prevent further landslips.

In *Macquarie City Council v Hicks* [1993] NSWCA 184, the council owned a reserve. Soil on the reserve had a tendency to slip which posed a significant danger to Mr Hick's property. The council knew about the problem since as early as 1983. The council carried out some remedial works to stabilise the soil during 1984 and 1985 but these were ineffective. In 1988 the council engineer became concerned about further soil slippage and engaged a geotechnical engineer to provide recommendations for stabilising the soil. In September 1989 the council was told by its geotechnical engineer that unless appropriate remedial works were carried out there was a high risk of serious and violent soil slippage, particular if there was heavy rain, which could pose a risk to life. The council allocated \$300,000 in its 1990 works budget to carry out remedial works. However before these works were done, in February 1990 there was a significant land slip after intense rainfall which damaged Mr Hick's property. The court held that in all of the circumstances the council was negligent largely because it did not follow the recommendations of its experts, it made no significant response to continual complaints from neighbouring owners about soil instability and the risks to their properties, and even when it was compelled to obtain geotechnical engineering advice it did not move to implement the engineer's recommendations with any urgency.

In *Holbeck Hall Hotel Ltd v Scarborough Borough Council* [2000] 2 All ER 705, Holbeck owned a Hotel which stood on a cliff overlooking the sea and the council owned the cliff between the hotel grounds and the sea. Due to erosion, the cliff was inherently unstable and prone to slip. The council was aware of the slippage and called in engineers to report on the slippage and make recommendations for implementing remedial measures. In 1993 there was a massive slip, far greater than any previous slips, of the cliff and adjacent land which caused part of the hotel to collapse. The rest of the hotel had to be demolished because of safety reasons. The English court held that the council's duty was limited to an obligation to take care to avoid damage which it ought to have foreseen without further geological investigations and it was not necessarily incumbent on the council to carry out extensive and expensive remedial work even to prevent damage which could have been foreseen. The scope of the council's duty might have been limited to warning the hotel owner of those that it had acquired relating to those risks.

Retaining Wall Collapse

In *Carter v Murray* [1981] 2 NSWLR 77 a 100 year old sandstone block retaining wall about 17.5 metres long and 2-3 metres high separated neighbouring properties in Balmain, Sydney. The wall stood on the higher property but its face ran along the common boundary of the properties. Some of the sandstone blocks in the wall, and soil from the higher land, fell down onto the lower land from time



to time and it was clear that the wall was likely to collapse. Vegetation, including two large trees, on the higher property contributed to the deterioration of the wall. The owner of the lower land obtained an injunction to restrain the owner of the higher land from permitting debris from their land to fall onto and remain on the lower land. The Court held that the retaining wall was not a dividing fence, and that the collapse of the wall and soil from the higher land onto the lower land constituted a nuisance for which the higher land owner was liable from the time she knew or ought reasonably to have known of the collapse or its likelihood under the principle laid down in *Leakey's* case. The Court concluded that the threat of further collapse of the wall and the prospect of substantial damage to the lower land as a result of the collapse was sufficient to justify the granting of an injunction to prevent any further collapse.

In *Gollan v Cranfield* (1985) 3 BPR 9387 a sandstone retaining wall up to 2.6 metres high separated neighbouring properties in Collaroy, Sydney. The wall was situated on the higher property adjacent to the common boundary and was close to the house which had been built on the lower property. The roots of a tree on the higher property had, over time, forced apart and dislodged some of the stones in the wall. The owners of the lower property claimed that the wall was in such a dangerous or unstable condition that it constituted a potential nuisance to them by being liable to fall on and damage their home. The Court agreed and held there was a potential nuisance with a risk of danger to property and that this required some further work to be done to the wall itself, in order to make it safe. The Court ordered the owner of the higher property to take all steps necessary in the construction of the wall in order to prevent the collapse of any part of the wall or the falling of stones from the wall on to the lower property. In doing so, the court rejected an argument advanced by the owner of the higher property that the retaining wall was a dividing fence and that accordingly the responsibility for the reconstruction of the wall should be shared between the owners.

In *Yared v Glenhurst Gardens Pty Ltd* [2002] NSWSC 11, a retaining wall on the boundary of two properties in Darling Point, Sydney collapsed without warning after heavy rain carrying with it a significant amount of soil and debris from the higher land into the lower land, which partially destroyed the cottage at the rear of the lower land. The collapse of the retaining wall was not anyone's fault. The owner of the lower land applied to the Supreme Court for an injunction to require the owner of the higher land (a home unit company of a substantial company title apartment scheme) to rebuild the retaining wall wholly at its own cost. The court concluded that the owner of the higher land had a duty to do what was reasonable in the circumstances but that this did not extend to the owner replacing the retaining wall wholly at its own expense. Ultimately, the court concluded that the higher land owner's duty with respect to the risk of further land slip could be discharged by contributing half of the cost of the remedial work necessary to reconstruct the retaining wall and by giving contractors access to its land so that the work could be carried out.

Building Collapse

In *Wringe v Cohen* [1940] 1 KB 229 the landlord of a building adjacent to a highway was responsible for keeping the building in good repair. The landlord permitted the building to fall into disrepair. Part of the gable end of the building collapsed owing to a storm and fell through the roof of a neighbouring shop. The landlord was held liable for the damage to the shop even though he did not know about the defective gable. The English Court of Appeal laid down a rule that "if, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passer-by or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable, whether he knew, or ought to have known, of the danger, or not ...". This decision has been heavily criticised for placing liability on the landlord for a defect in the building of which he was not aware and it is unclear whether it forms part of Australian law.



Rock Fall

In the *Mallone* case, Mrs Mallone, an elderly pensioner with limited resources, owned land which was situated above a neighbouring strata title property in Undercliffe, Sydney. A large cliff stood between the properties, the majority of which was on Mrs Mallone's land. As a result of quarrying many years before, rocks were falling from Mrs Mallone's land onto the owners corporation's land. The owners corporation applied to the Supreme Court for an injunction to require Mrs Mallone to undertake the work that was necessary to solve the rock fall problem. The solution to the problem was very expensive. The court had regard to all of the circumstances of the case and concluded that Mrs Mallone was not responsible for solving the problem wholly at her own cost. The court held that the duty under which Mrs Mallone fell to take minimise or eliminate the rock fall hazard was a *measured* duty which required her to use her best endeavours in co-operation with the owners corporation and others to find a reasonable solution to the rock fall problem. What this meant was that if the owners corporation convened a meeting to consider possible solutions to the problem, Mrs Mallone would need to attend the meeting and co-operate in seeking a solution which would include giving access to her land for contractors to carry out the remedial works which were required to stabilise the cliff.

The Anomaly: The Right to Support of Land

At common law an owner of land is entitled to have his or her land in its natural state supported by neighbouring land, or more correctly, is entitled not to have that support withdrawn: *Dalton v Henry Argus & Co* (1880-81) LR 6 App Cas 740. So if a neighbour excavates their property and undermines the support for their neighbour's land, they would be liable in nuisance "for which strict liability attaches without proof of any negligence": *Fennell v Robson Excavations Pty Ltd* [1977] 2 NSWLR 486.

There was, however, a qualification to this rule. If a person built on their property, and in doing added unnatural weight to their land, they could not recover compensation if their neighbour excavated and removed support for their land and caused damage to their building. This is because, although neighbours were required to provide support for each other, their obligations did not extend to supporting the additional weight that buildings placed on adjacent but separately owned lands: *Pantelone v Alaquie* (1989) 18 NSWLR 119.

This meant that, under the common law, if my neighbour's land is in its natural undeveloped state, I could not remove the soil on my land without providing support for my neighbour's land. However, if my neighbour spends money building a house on his land, I could excavate with impunity, even though his house might crumble to the ground: see *Xpress Print Pty Ltd v Monocrafts Pte Ltd* [2000] 3 SLR 545, where Yong CJ demonstrated how the application of this rule could lead to unfair and somewhat absurd results.

It is hardly surprising therefore that the NSW Parliament introduced, in 2000, section 177 of the *Conveyancing Act 1919* which imposes a duty on a land owner not to do anything on his or her land which removes the support provided by that land for neighbouring land, buildings or structures: *Piling v Prynew Nemeth v Prynew* [2008] NSWSC 118. However, because of the way the section is worded, the duty of care under the section does not extend to omissions. A person is liable for acts of commission, such as excavating a hole, but not for omissions to act, such as failing to prevent a loss of support from occurring: see *Piling*. This is illogical and a significant flaw in the legislation. It means, for instance, that an owners corporation which sits back and does nothing for many years to prevent the obvious collapse of a retaining wall is not guilty of negligence under the section (although, of course, the owners corporation may be liable in nuisance, or possibly negligence, under the *Leakey* principle).



The section was used by the neighbours in *Yared's* case to argue that they were both negligent by failing to prevent the collapse of the retaining wall. The argument was unsuccessful because section 177 had not commenced at the time the wall collapsed and, in any event, neither party could be negligent because it was not reasonably foreseeable that the wall would collapse before it did.

Statutory Disputes

Legislation imposes further duties on an owners corporation, that are owed to lot owners and occupiers (rather than neighbours), to remove dangers or hazards on common property.

Section 62 of the *Strata Schemes Management Act 1996* ("Strata Act") imposes on an owners corporation a strict duty to properly maintain and keep in a state of good and serviceable repair the common property.

The section 62 duty is not one to use reasonable care to maintain and keep in good repair the common property, nor one to use best endeavours to do so, nor one to take reasonable steps to do so, but a strict duty to maintain and keep in repair: *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157.

This duty involves an obligation to keep the common property in proper order by acts of maintenance before it falls out of condition in a state which enables it to serve the purpose for which it exists. This means the owners corporation must take preventative measures to ensure that there is no malfunction or defect in the common property. As soon as something in the common property is no longer operating effectively or at all, or has fallen into disrepair, there has been a breach of the section 62 duty.

The strict nature of this duty makes whether or not the owners corporation took all reasonable steps irrelevant if ultimately it failed at any time to meet the strict requirements of the duty. Because of the strict nature of the duty it is irrelevant whether the owners corporation fixes defects in the common property with due diligence and expedition.

However, the section 62 duty probably only applies to dangers or hazards on common property of which the owners corporation is aware or could be made aware through inspection (although probably not by expert inspection): *Ridis v Strata Plan 10308* [2005] NSWCA 246.

The section 62 duty is very different to the legal duties imposed on the owners corporation for the benefit of neighbouring property owners which were discussed above. This is because: The section 62 duty is absolute (not a measured duty to act reasonably); and The section 62 duty does not benefit and cannot be enforced by the owners of neighbouring properties.

Nonetheless, the section 62 duty to repair is owed to each unit owner and occupier in the strata scheme and its breach gives rise to a private cause of action under which damages may be awarded to a unit owner or occupier for breach of statutory duty: *Seiwa*; *Trevallyn-Jones v Owners Strata Plan 0358* [2009] NSWSC 694; *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68; see also *Wu v Carter* [2009] NSWSC 355

It follows that, so far as unit owners and occupiers are concerned, the section 62 duty will often require an owners corporation to eliminate any hazards on the common property as soon as possible to avoid liability.



There may be other statutory obligations imposed on an owners corporation in relation to dangers or hazards on common property. These include the duties imposed on controllers of work premises under the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2011*.

Anything Else?

When land is excavated during the course of a property development, the local council may impose development consent conditions which require the developer to provide adequate support for neighbouring land. Occasionally, these types of development consent conditions will require the developer, and its successors, to install and maintain a retaining wall.

For example, clause 33 of the *Local Government (Approvals) Regulation 1993* (now repealed) made it a condition of an approval to erect a building that, if the soil conditions required it, retaining walls or other approved methods of preventing the movement of soil had to be provided. Nowadays, clause 98E of the *Environmental Planning and Assessment Regulation 2000* makes it a condition of any development consent for development which involves an excavation that extends below the level of the base of the footings of a building on adjoining land, that the person having the benefit of the development consent protect and support the adjoining premises from possible damage from the excavation.

A development consent operates in rem and runs with the land: *Ryde Municipal Council v Royal Ryde Homes* [1970] 1 NSW 277; (1970) 19 LGRA 321. This means development consent conditions bind not only the present owner or occupier of land but all future owners and occupiers of the land: *Davlon Pty Ltd v Ku-ring-gai Municipal Council* [1968] 3NSW 638.

A condition of development consent has the force of law by virtue of the provisions of the *Environmental Planning and Assessment Act 1979* ("EPA Act"). Section 76A(1) of the EPA Act says that where an environmental planning instrument requires development consent to be obtained to carry out development, that development must not be carried out unless a development consent has been obtained, and is in force, and the development is carried out in accordance with the consent. Section 122 of the EPA Act says that a breach of the Act includes an actual, threatened or apprehended contravention of, or failure to comply with, a condition of development consent granted under the EPA Act. Therefore the EPA Act makes it unlawful to contravene development consent conditions. Any person can apply to the Land and Environment Court for orders to remedy or restrain a breach of a development consent condition under section 123 of the Act.

This makes it possible that a property owner may fall under an obligation to maintain or repair, at its own cost, a retaining wall that was constructed, typically during the development of the property, to a development consent issued by the local council which required the wall to be maintained, and that a neighbour may enforce this obligation through the Land and Environment Court, irrespective of the parties' obligations under the general law.

Complicating Factors

Dealing with disputes between neighbours concerning hazards on land is often complicated by administrative action taken by a local council or the Workcover Authority of NSW.



Section 121B of the EPA Act gives a local council power to issue orders requiring the repair of buildings and structures (such as retaining walls) where those buildings or structures are or are likely to become a danger to the public or are so dilapidated as to be prejudicial to persons or property in the neighbourhood. In some circumstances emergency orders can be issued which require urgent remedial action.

Section 90 of the *Work Health and Safety Act 2000* permits a Work cover inspector to issue a provisional improvement notice if any person is contravening any provision of the Act or the regulations, such as the duty of a controller of work premises to ensure the premises are safe and without risks to health. An improvement notice may require the person to remedy the contravention or the matters occasioning it within a specified period. So, for example, an improvement can be issued to require an owners corporation to strengthen a collapsing retaining wall or to rebuild a collapsed wall in certain circumstances.

Often negotiations between neighbours to resolve a dispute about a hazard, such as a collapsed retaining wall, continue for a considerable period. Usually, there is not enough time to conclude these negotiations before the period for compliance with any order or notice issued by a local council or Workcover expires. This places any owners corporation which becomes embroiled in this type of neighbourhood dispute in a difficult position because often more time is required to reach a satisfactory compromise with the neighbour but the sanctions which apply for a failure to comply with a council order or Workcover notice are potentially onerous. Occasionally a local council or Workcover will grant an extension of time to comply with their requirements, particularly if any immediate danger posed by the hazard has been eliminated or controlled, and it is clear that the owners corporation concerned is working hard to solve the problem.

However, frequently an owners corporation is forced to shoulder the burden of solving the problem posed by the hazard entirely at its own cost in order to comply with local council or Workcover requirements. In these circumstances, the owners corporation is then placed in the difficult position of having to seek reimbursement or compensation from the neighbour after the necessary remedial work has been completed and paid for.

Conclusion

The duty placed on an owners corporation by the common law in relation to hazards on its land, such as collapsing retaining walls, is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to the neighbour or to his or her property.

What this duty will require the owners corporation to do will depend on all the circumstances. This means that in some cases an owners corporation's duty may be to contribute to the cost of the remedial work necessary to remove the hazard, rather than to pay the whole of the cost.

If, for example, the owners corporation caused (or exacerbated the problem of) soil slippage and rock fall from a cliff face its owns, when it engaged contractors to clear vegetation from the top of the rock face; the owners corporation has considerable financial resources having the benefit of funds contributed by many unit owners; it is capable of employing contractors to carry out the stabilisation work necessary to the rock face; and the neighbours are of limited financial means and do not have the resources to undertake the necessary remedial works; then it is likely that the owners corporation



will be responsible for carrying out whatever remedial works are reasonably required to solve the soil slippage and rock fall problem within a reasonable period probably at its own cost.

However, if the soil slippage and rock fall problem was not caused by anybody; the solution to the problem is complex and costly; the neighbours are able to take steps to protect their properties from damage through either a financial contribution to the remedial works or erecting physical barriers on their land; the owners corporation may be required to cooperate with the neighbours, share information with them provided by geotechnical engineers and other experts, arrange the necessary remedial works and have them carried out within a reasonable period, and be entitled to claim contributions from the neighbours towards the costs for carrying out the works.

However these considerations do not apply to the statutory duty an owners corporation owes the lot owners and occupiers in its scheme under the Strata Act in relation to dangers or hazards on the common property of which it is aware or could be made aware. In the case of this statutory duty, the owners corporation needs to act immediately and do more than take reasonable steps to eliminate the hazard. This, when coupled with potential administrative action taken by a local council or Workcover, can, at times, place an incredibly onerous burden on an owners corporation. This, in turn, underscores the importance of taking a proactive, rather than reactive, approach towards solving problem posed by hazards in strata schemes and neighbouring properties.

DIVIDING FENCE DISPUTES

Dividing Fences Act 1991

Disputes between neighbours about fences are one of the most common neighbourhood disputes.

The *Dividing Fences Act 1991* ("Fencing Act") deals with the apportionment of costs for repairing or replacing dividing fences.

A dividing fence is broadly defined in section 3 of the Fencing Act: *Brown v Doyle and Ors* [2010] NSWSC 1269; *Warringah Properties Pty Limited v Babij (Snr)* [2006] NSWSC 702. It encompasses any structure enclosing land, whether or not continuous or extending along the whole of the boundary separating neighbouring lands, which separates neighbouring lands, and whether on the common boundary of the lands or on a line other than the common boundary, and includes gates and even retaining walls which provide the foundation or support necessary for the support and maintenance of a dividing fence. However this extended definition of a dividing fence does not include a wall which is part of a house, garage or other building.

Generally, in order to be a dividing fence, the structure in question must enclose or bound land: *Kontikis v Schreiner* (1989) 16 NSWLR 706. However the structure may have more than one purpose and still be a dividing fence. For example, the structure could be erected for the purpose of separating properties and retaining land and still be a dividing fence: *Warringah Properties Pty Ltd*. However, if the structure's only purpose is to retain land, and the structure is not a retaining wall which provides the foundation or support necessary for the support and maintenance of a dividing fence, then the structure will not be a dividing fence, and a local court or land board cannot order neighbours to erect it under the Fencing Act: *Brown v Doyle*.



Generally, neighbours are liable to contribute in equal proportions to the costs of carrying out work that is necessary to provide a sufficient dividing fence on or adjacent to the common boundary: see sections 6 and 7.

However, where there is a need to repair or replace a dividing fence because of a negligent or deliberate act of a neighbour or a person who has entered the neighbour's land, the neighbour can be made responsible for up to the whole cost of carrying out the work required to fix the fence: section 8.

The Fencing Act sets out a procedure to be followed for neighbouring owners to reach agreement on the manner in which they will carry out and pay for fencing work to provide a sufficient dividing fence. Generally, the Fencing Act requires one neighbour to serve a fencing notice on the other putting forward a proposal for carrying out fencing work and for sharing the costs of the work: section 11. The fencing notice needs to contain details about:

- The boundary line on which the fencing work will be carried out or, if the work will not be carried out on the boundary, the line on which it will be carried out;
- The type of fencing work proposed to be carried out (these details are usually provided by attaching a quotation from a fencer specifying the type of fence which will be installed);
- The estimated cost of the fencing work (again this information is normally provided by attaching a quotation from a fencer); and
- The proportions in which the costs for carrying out the fencing work will be shared by the neighbours.

If an agreement cannot be reached between the neighbours within one month of a fencing notice being served, then either neighbour may apply to the Local Court or a local Land Board for an order determining the manner in which the fencing work will be carried out: section 12.

The land board is the forum usually chosen by neighbours for relief under the Fencing Act. It has considerable experience and an informal process for dealing with fencing disputes which is particularly attractive to unrepresented litigants: *Alwiah v Watts* [2004] NSWSC948.

Under the Fencing Act, jurisdiction to make orders depends on the Local Court or land board finding that there is an insufficient dividing fence between the adjoining lands. Unless that finding is made, no orders can be made: *Alwiah v Watts*.

The Court or Land Board can make a range of orders to determine: the boundary or line on which the fencing work will be carried out; the type of fencing work to be carried out; and the manner in which contributions for the fencing work will be apportioned by the neighbours: section 14.

A neighbour is not liable to contribute to the cost of carrying out fencing work if the work is carried out before a fencing notice is served on the neighbour (unless the fencing work needs to be done urgently) or before agreement is reached between the neighbours concerning the fencing work or the Court or Land Board has determined the dispute: section 11(5).

As mentioned above, the Fencing Act only allows a person to force his or her neighbour to pay for the costs of repairing or replacing a dividing fence if the fence does not constitute a "sufficient dividing



fence” for the purposes of the Fencing Act. The Court or Land Board considers a number of factors when determining what is a sufficient dividing fence including: the existing dividing fence, the

purposes for which the properties are used, the privacy or other concerns of the neighbouring owners, the kind of dividing fence usually in the locality, any fencing policies or codes adopted by the local council and any relevant planning instruments that are applicable to the properties: section 4. Normally, the Court or Land Board will be satisfied that there is no sufficient dividing fence when a person is able to prove through evidence, such as photographs of the dividing fence, that the fence is in a clearly dilapidated condition and needs to be repaired or replaced.

Further, a land owner is only able to compel his or her neighbour to pay for the costs of installing a “sufficient dividing fence”. If an owner wants to install a new fence which is of a greater standard than a sufficient dividing fence, then owner needs to pay the additional costs for installing the superior type of fence: section 7(2).

The Crown, local council’s and roads authorities are exempted from the operation of the Fencing Act: section 25. This means that, often, boundary fences dividing strata schemes from footpaths and roads will not be caught by the Fencing Act.

Comments

Much like decisions under the Access Act, there are few reported cases concerning the Fencing Act, for the same reasons. This can make predicting the outcome of certain aspects of a fencing dispute difficult because there is little precedent to draw on to guide the court or the parties to the dispute. Nonetheless, the Local Court and Land Board have, in general, provided a quick and relatively cheap forum in which to resolve disputes between neighbours about dividing fences.

Retaining Walls

Amendments made to the Fencing Act in 2009 operate to bring certain types of retaining walls within the statutory regime for dealing with disputes about dividing fences. This is an important reform because it facilitates the resolution of what are often difficult disputes between neighbours over the responsibility for repairing or reconstructing a defective or collapsed retaining wall in a relatively cheap and quick way through the Local Court or Land Board. So, where a retaining wall provides the foundation or support necessary for the support and maintenance of a dividing fence, the wall becomes a dividing fence for the purposes of the Fencing Act, and its repair or replacement is subject to the provisions of the Act.

Practical Tips

An owners corporation wanting to force its neighbour to share the costs of replacing a dividing fence should do the following:

- Obtain at least one quotation containing details of the new fence which will replace the dividing fence on the common boundary;
- Prepare a notice to fence under the Fencing Act which attaches the quotation; Serve the notice on the neighbour (personal service is recommended);



- If agreement cannot be reached with the neighbour within one month, apply to the Local Court or Land Board for fencing orders.

Conclusion

Dividing fence disputes are able to be dealt with relatively quickly, cheaply and simply in the Local Court or Land Board. Reforms to the dividing fences legislation mean that certain retaining walls are now considered dividing fences which opens up the possibility of resolving what are often difficult, protracted and costly disputes, quickly and inexpensively.

TREE DISPUTES

Common Law

Under the common law, where a tree causes damage to property, there are three types of claim the affected land owner can make against the owner of the land on which the tree grew. These are claims in trespass, nuisance and negligence. These types of claims were analysed in detail by the Land and Environment Court in the seminal case of *Robson v Leischke* [2008] NSWLEC 152 and what follows is largely extracted from the Court's judgment in that case.

A claim in trespass requires direct physical intrusion onto the affected person's land: *Bathurst City Council v Saban* (1985) 2 NSWLR 704. Hence, it is a trespass for a person to cut off a part of a tree growing on his or her land and drop it over the boundary directly into their neighbour's land. Further, a person who enters a neighbour's land to cut away branches or roots that encroach over the boundary commits a trespass: *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337. However, the intrusion of branches or roots of a tree into neighbouring land due to the operation of natural forces is indirect and is treated as a nuisance, not a trespass: *Lemmon v Webb* [1894] 3 Ch 1 at 24.

A private nuisance involves an act or omission which interferes with a person's use or enjoyment of his or her land or some right used in connection with the land without direct entry by the culprit: *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

A person can be liable for either creating a nuisance or adopting or continuing a nuisance.

A person will create a nuisance if he or she deliberately or recklessly uses land in a way which they know will cause harm to their neighbour, or if the person knows or ought to know that their conduct will cause harm to their neighbour. So a person may create a nuisance by planting trees, of a kind or in a location or in a condition, which are likely to cause harm to a neighbour as they grow: *Mandeno v Brown and Wilkie* [1952] NZLR 447.

A person who occupies land continues a nuisance if, with actual or constructive knowledge of its existence, he or she fails, within a reasonable period of time, to take reasonable measures to bring it to an end. An occupier of land adopts a nuisance if he or she makes use of "the erection, building, bank or artificial contrivance" or the natural object (such as a tree) which constituted the nuisance: *Sedleigh-Denfield*. So if the person did not plant the tree which causes a nuisance, such as by encroaching branches or roots, but instead the tree was planted by a third party or was self-sown, the person, as occupier of the land on which the tree grows, will not be liable unless he or she had or ought to have had knowledge of the growth of the tree and the damage created by it, and fails to act without undue delay to remedy it upon becoming aware of it: *Sedleigh-Denfield*.



Branches or roots of a tree growing on land frequently encroach into the air above or the soil below neighbouring land. The mere encroachment into the neighbour's land is insufficient. Damage must be

suffered by the neighbour as a result of the encroachment to obtain compensation or an injunction: *Asman v MacLurcan* (1985) 3 BPR 9592.

Examples of cases where overhanging branches have been held to constitute a nuisance include where:

- branches of a poisonous tree projected over the neighbour's land where the leaves were eaten by the neighbour's horse, which later died from poisoning: *Crowhurst v Amersham Burial Board* (1878) 4 ExD 5;
- branches of a tree overhanging the neighbour's land interfered with the growth of fruit trees on the neighbour's land, the injury being a natural consequence of the trees being allowed to overhang: *Smith v Giddy* [1904] 2 KB;
- branches of trees projected to such an extent over the neighbour's land that they brushed against the neighbour's house, disturbing them in their sleep, and leaves from the overhanging branches blocked the downpipe on the house causing two rooms to be flooded: *Rose v Equity Boot Co Ltd and Hannafin* (1913) 32 NZLR 677; and
- branches of a row of pine trees, planted close to the boundary, overhung the neighbour's property and, by reason of the encroachment, deposited pine needles and rubbish on the neighbour's property which corrupted and poisoned the soil: *Mandeno v Brown and Wilkie* [1952] NZLR 447.

Examples of cases where encroaching roots have been held to constitute a nuisance include where:

- roots encroached into the neighbour's property extracting moisture from the ground, causing shrinkage of the soil, undermining the foundations, and/or causing cracking or subsidence of the buildings on the neighbour's land: *Davey v Harrow Corporation* [1958] 1 QB 60; *Valherie*;
- encroaching roots damaged storm water and sewerage drains: *Peisley v Ashfield Municipal Council* (1970) 21 LGRA 243; *Young v Wheeler* (1987) Aust Torts Reports 80–126;
- encroaching roots damaged retaining walls: *Elliot v Islington London Borough Council* [1991] 10 EG 145 (and even when the roots do not encroach, but exert pressure behind a retaining wall on the common boundary, a nuisance might be caused: *Owners of Strata Plan No 13218 v Woollahra Municipal Council* (2002) 121 LGRA 117);
 - encroaching roots caused damage to a neighbour's lawn and patio and interfered with their enjoyment of their land: *Mendez v Palazzi* (1976) 68 DLR(3d) 582;
 - encroaching roots caused substantial interference with a neighbour's gardening operations: *Woodnorth v Holdgate* [1955] NZLR 552;

A neighbour has a right to abate a nuisance by cutting away at the boundary so much of the branches and/or roots that encroach: *Lemmon v Webb*; *Young v Wheeler*. There is no right to cut away branches or roots growing between the tree and the boundary, for to do so would be a trespass: *Gazzard v Hutchesson* (1995) Aust Torts Reports 81–337. As the overhanging branches or encroaching roots are still part of the property of the owner of the land on which the tree grows, the neighbour who cuts away the branches or roots should return them to the tree owner to avoid liability for conversion of the tree owner's property: *Mills v Brooker* [1919] 1 KB 555. Generally, the neighbour is not entitled to recover the costs incurred abating a nuisance by cutting away encroaching roots and



branches: *Young v Wheeler* except where that abatement is a reasonable step taken in mitigation of damage, unless the abatement involves going on to another's land and interfering with it or property on it: *Proprietors of Strata Plan No 14198 v Cowell* (1989) 24 NSWLR 478.

The third cause of action for damage caused by a tree is in negligence. To succeed in a cause of action in negligence, the plaintiff must prove: the defendant owed the plaintiff a duty, recognised by law, requiring the defendant to adhere to a certain standard of conduct; the defendant breached that duty; the plaintiff suffered loss; the loss was caused by the defendant's breach of duty; and the loss suffered by the plaintiff was not too remote, that is, the injury complained of was not only caused by the alleged negligence, but was also an injury of a class or character which was reasonably foreseeable as a result of the possible negligent act or omission: *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1997) 77 FCR 307.

A person can be liable in negligence for damage caused by a tree which collapses and causes damage to a person or their property particularly where the tree is in a state of decay and the risk of it causing damage was obvious: *Smibert Group Transport Pty Limited v Clifford* [2005] SADC 80; *Dudley v Meadowbrook Inc* (1961) 166 A2d 743. In contrast, a person is not likely to be negligent where the tree is apparently sound and healthy and inspection would not have revealed that it was dangerous: *Noble v Harrison* [1926] 2 KB 332; *Caminer v Northern & London Investment Trust Ltd* [1951] AC 88; *Dungog Shire Council v Babbage* (2004) 134 LGERA 349 at 377; *Bruce v Caulfield* (1918) 34 TLR 204.

An owner or occupier of land on which a tree grows can be liable in negligence for damage caused by the tree's roots to neighbouring property. So, an owner of a public park was liable in negligence for the damage caused to neighbours' dwellings by roots of the trees desiccating the soil, which resulted in cracking of the dwellings: *South Australia v Simionato* (2005) 143 LGERA 128.

Comment

Actions based in nuisance or negligence can be expensive and difficult. Experience showed that the community required a faster and cheaper way of resolving disputes between neighbours about trees.

Trees (Disputes Between Neighbours) Act 2006

In 2007 the NSW Government introduced legislation to allow the Land and Environment Court to make orders to resolve disputes between neighbours about trees. The legislation is called the *Trees (Disputes Between Neighbours) Act 2006* ("Trees Act") and it commenced on 2 February 2007.

What is the Trees Act all About?

The aim of the Trees Act is to enable owners of land, including owners corporations, to bring proceedings in the Land and Environment Court ("Court") to resolve disputes about trees. There are two types of disputes the Court deals with.

Dispute 1 - Where a tree has caused, is causing or is likely to cause property damage. Dispute 2 - Where a tree poses a risk of personal injury.



What Does the Trees Act Say?

The Trees Act allows an owners corporation apply to the Court for an order to remedy, restrain or prevent damage to the common property, or to prevent a personal injury, as a result of a tree situated on adjoining land: section 7. The types of orders which the Court can make include:

- An order requiring the tree owner to pay compensation to the owner of the damaged property;
- An order requiring the tree owner to repair or prevent damage (e.g. trimming or removal of the tree or the installation of root barriers);
- An order authorising the person asking for the order to repair or prevent damage at the cost of the owner of the tree (e.g. authorising entry onto land for the purpose of pruning): see section 9.

When Will the Court Make Orders?

The Court will not make orders unless it is satisfied that: The person asking for the order has made a reasonable effort to reach agreement with the owner of the tree.

- The owner of the tree and the local council have been given 21 day's notice of the applicant's intention to go to court.
- The tree has caused, is causing or is likely in the near future to cause, damage to the applicant's property or the tree concerned is likely to cause injury to a person.
- The damage or risk of injury is sufficiently serious: see section 10.

The Court will also need to take into account a variety of factors before making any order including the location of the tree relative to the boundaries of the property on which it is situated and any premises, the environmental impact of the tree including any historical or cultural significance and the value of the tree to public amenity, and any steps taken by the owner of the tree and the neighbour to prevent any property damage or injury being caused by the tree: section 12.

How does it Work?

After giving the neighbour and local council 21 days' notice, the applicant must fill out an application form, lodge it with the Court and pay a filing fee (currently \$410 for court or the Court in the Sydney CBD and the parties attempt to resolve the dispute. If the matter cannot be resolved, about 2-3 months later an on-site hearing is held and the Court usually makes a decision on the day of the hearing.

How Long Does it Take?

The Court usually finalises an application within 3-4 months.

How Much Does It Cost?

Lawyer's fees will typically range between \$3,300.00 - \$7,500.00 depending on the complexity of the dispute. Expert's fees are usually in the order of \$2,000.00 - \$7,500.00. If the applicant is successful, an application can be made to the Court for an order for the tree owner to pay the applicant's costs.



What About Tree Preservation and Heritage Orders?

The Court can order the removal or lopping of a tree without the consent of a local council under a tree preservation order thereby bypassing the need for approval from the local council: section 6.

What About the Common Law?

The Trees Act abolishes any claim in nuisance as a result of damage caused by a tree to which the Act applies: section 5, although common law actions in trespass and negligence can be maintained: *Robson v Leischke* [2008] NSWLEC 152.

What are the Penalties for Ignoring the Court's Orders?

If a person fails to comply with an order made by the Court they will be able to be fined up to \$110,000.00. Criminal sanctions can also apply: section 15.

The Latest from the Land and Environment Court

The Court has now handed down over 200 decisions under the Act. These decisions provide guidance on the circumstances in which the Court will make orders for compensation, repairs to property or the removal of or interference with a tree. The following themes emerge from the Court's decisions:

Threshold Issues

- Before making any order, the Court must, first, be satisfied that there has been a reasonable effort to reach agreement.
- Then the Court must be satisfied that one or more of the following four tests are met before making an order regarding the tree:
 - Has the tree caused damage to the applicant's property?
 - Is the tree now causing damage to the applicant's property?
 - Is the tree likely in the near future to cause damage to the applicant's property?
 - Is the tree likely to cause injury to any person?
- Only if one or more of these tests is satisfied, can the Court move to consider the discretionary questions of:
 - Is the damage or risk of injury sufficiently serious to warrant the Court intervening?
 - If so, what should the Court order?
 - Who should pay to carry out those orders?
- The Court also needs to be satisfied that there is a genuine dispute between neighbours about the tree at the time the application is made before it will make any orders: *Hung v Bird* [2008] NSWLEC 1246. For instance, neighbours cannot agree to remove a tree and then apply to the Court for an order for removal to circumvent the need to apply to the local council for permission to remove the tree.



What are Trees?

- A tree includes a tree that has been reduced to a bare trunk or stump connected to the soil of the land and a tree that has died: *Robson v Leischke* [2008] NSWLEC 152.
- The tree must be in existence at the time the application is made to the court: *McCormack v Spencer* [2008] NSWLEC 1285 unless the tree is removed following damage or injury that gave rise to an application under the Trees Act and the tree was situated wholly or principally on the land immediately before the damage or injury occurred: section 4.
- The tree must be located on the land of the person against whom the application is made or be situated *principally* on that land. For boundary trees, the Court considers the location of 50% of the trunk measured at ground level compared to the property boundary: *Brown & anor v Weaver* [2007] NSWLEC 738; *McCormack v Spencer* [2008] NSWLEC 1285; *Drolz v Sinclair* [2008] NSWLEC 34. That is, more than 50% of the trunk at ground level must be on the neighbour's land in order for the tree to qualify.
- Trees must be "situated on adjoining land" and this includes trees separated from the applicant's land by a public road: *P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128. An applicant cannot complain about trees which are not on neighbouring properties.

What Land is covered by the Trees Act?

- Trees on council land are exempt from the operation of the Trees Act. This means claims against local councils for damage caused by trees owned by, or under the care or management of a council, are based on the common law actions of nuisance and negligence and are made in the Local, District or Supreme Court.
- Even though the NSW Government indicated when the Trees Act was introduced that trees owned or managed by local councils would be brought within the regime of the Act when the Act was reviewed, this did not occur. Nonetheless, the possibility remains that at some stage local councils will be made subject to the legislation.

Animals, Insects, etc

- Damage caused by animals, birds or insect is not caused by the tree which attracts the mor provides a habitat for them.
- The Court does not have the power under the Trees Act to make orders in response to property damage or risk of injury to persons where that property damage or risk of injury has or would arise from a tree attracting or hosting an animal, bird or insect: *Dooley & anor v Nevell* [2007] NSWLEC 715.

Removal of Trees

- The Court is reluctant to order the removal of trees.





- The Court prefers to manage tree problems in other ways such as by ordering pruning, lopping, periodic removal of deadwood and cones, regular arborist inspections, installation of root barriers, etc.
- The Court believes that trees are an important environmental asset and it will not order any interference with them unless there are clear and compelling reasons to do so.
- The Court will not normally order the lopping or removing of trees just because they:
 - a) block views;
 - b) block the passage of light;
 - c) drop leaves, flowers, fruit, seeds or small elements of deadwood: *Barker v Kyriakides* [2007] NSWLEC 292;
 - d) cause minor damage which only causes aesthetic problems such as hairline cracking or minor lifting of concrete slabs.
- The Court is more likely to order the removal of a tree where it is in poor health or decline (significant decay, wood rot, deadwood or major limb failure - see *Resevsky v Smith & Di Stefano* [2007] NSWLEC 519 and *Taseska v Kelly and Kober* [2010] NSWLEC1009) or it has caused serious damage.
- Dead trees having degraded branches that are likely to fail and which support a termite colony is likely to be ordered to be removed: *Coutts v Haydon* [2007] NSWLEC 863.
- Mature trees which are unlikely to grow any further and cause any more damage, and healthy trees in the early stage of maturity that make a positive contribution to the streetscape will only be removed as a last resort when no other measures are available to alleviate the problems they are causing: *Vella v The Owners of Strata Plan 8670* [2007] NSWLEC 365.
- The Court's decision to order the removal of a tree will not be influenced by whether the tree existed before the structure it damaged was built. However this will be relevant when the Court decides who should pay for the removal of the tree: *Black v Johnson (No2)* [2007] NSWLEC 513
- If the Court orders the removal of a tree it can also order its replacement but only on the same land: *Prasad v Dyster* [2008] NSWLEC 21.
- The Court will normally order the owner of the tree to arrange and pay for the cost of removal unless the neighbours have done something to bring about a need to remove the tree (e.g. poisoning its roots which causes part of the tree to die – see *Horn & Anor v Latter* [2007] NSWLEC 744).

What is Damage?

- Damage extends beyond just physical damage. It can include injury or harm that impairs value or usefulness (e.g. where a rear yard cannot be used because a tree has caused damage to a wall which threatens to collapse into the rear yard and needs to be supported by props installed in the rear yard rendering use of the yard impossible – see *Levitus v Colvin and Anor* [2007] NSWLEC 708).
- The tree which is the subject of the application does not need to be the sole cause of the damage. An application can still be made where there are multiple causes or possible causes of the damage and the tree is one of them: *Robson v Leischke* [2008] NSWLEC152.



Property Damage in the Near Future

- The Court will only be satisfied that a tree is likely to cause damage “in the near future” if the damage is likely to occur within 12 months (as a rule of thumb): *Yang v Scerri* [2007] NSWLEC 592. Therefore for claims based on the potential for future damage (such as a tree branch which threatens to fall onto a building causing damage or tree roots which threaten to undermine the foundations of a building), an applicant needs

Repair of Property Damage

- The Court has ordered, in appropriate cases, the undertaking of repairs to an applicant's property. The work is undertaken by the applicant and is accompanied by an order for whole or partial reimbursement of the costs by the tree owner. Some examples of the types of orders appear below:
 - Re-laying of paths or driveway: *Spence v Syed and Anor* [2008] NSWLEC 1331;
 - Relaying of courtyard paving: *Collaro v Tate and ors* [2008] NSWLEC 1337;
 - Replacement of sewer pipes: *Gan v Anderson & anor* [2008] NSWLEC 1257;
 - Repair of retaining walls: *Bentley v Hinchin* [2008] NSWLEC 1348;
 - The grinding of trip hazards in order to eliminate the likelihood of future injury to people: *Tomasetta v Gregory* [2007] NSWLEC 420.

Sewer Lines

- The Court expects the owner of a sewer line to proof it against root invasion unless to do so would be extremely expensive (e.g. if the sewer line is situated under a building or a concrete floor - see *Sandford -v- Pearce* [2007] NSWLEC 464).
- The Court will not ordinarily make an order for the removal of a tree which roots have invaded a sewer line if it is feasible to root proof the sewer line.
- Where a sewer line consists of terracotta pipes of some age the Court usually takes the view that tree root invasion must have been caused by some defect in one or more joints in the pipes permitting the roots to obtain initial access and for that reason normally apportions repair costs between both property owners for the cost of past and future works: *Harvey v Harding* [2007] NSWLEC 489; *Rootes v Parmeter* [2007] NSWLEC444.
- In relation to reimbursement for plumber's expenses to clear blocked sewer lines, or for costs to root proof a sewer line, the Court tends to apply a rule of thumb when dealing with terracotta sewer pipes of considerable age which is to usually require the owner of the offending trees to pay 60% of the plumber's costs and about 60% of the costs for root proofing: see *Sutton -v- Killin* [2007] NSWLEC 668.
 - The Court is unlikely to order a neighbour to pay any plumber's costs which were incurred before the neighbour was put on notice about the tree root problem: *P. Baer Investments Pty Limited v University of New South Wales* [2007] NSWLEC 128. Orders can be made for the neighbour to pay for any necessary future clearing and repairs of sewer lines: *Smith v Thomson* [2008] NSWLEC 18.



Compensation

- In determining a compensation claim, the Court may consider a wide range of factors on the question of apportionment of any damages. The factors include:
 - how long has the person making the application known of the damage;
 - what steps, during that period, have been taken in order to prevent further damage; and what other factors unrelated to the tree might have contributed to or cause some or all of the damage

(see *Zhang & anor v Long & anor* [2007] NSWLEC 632 as an example of substantial property damage and the factors considered by the Court in dealing with the circumstances of that case)

- When determining the application, sections 12(h) and 12(i) of the Trees Act provide that fault of the tree owner is a matter for consideration as the Court is required to consider “anything, other than the tree, that has contributed, or is contributing to any such damage”: *Robson v Leischke*.
- Where a person’s property suffers damage as a consequence of a tree located on the adjoining land, the mere fact that the tree is situated on a person’s land is insufficient reason by itself to justify making that person an insurer of other persons for any harm the tree may have caused to them or their property.
- So if the owner of the tree is not at fault there will generally be no reason to justify shifting the incidence of loss from the applicant to the owner of the tree unless the factors in section 12 justify making an order for the owner of the tree to compensate the applicant (which would be rare).
- The usual practice of the Court is to award compensation only for that portion of the damage that occurs after the owner of the tree is notified that a problem exists: *Osborne v Hook* [2008] NSWLEC 1231; *Ding & anor v Phillips* [2008] NSWLEC 1268.
- A further practice of the Court is to award compensation only where the owner of the tree has the opportunity for input into the manner and cost of repair: *Osborne*. Therefore the Court normally does not order the tree owner to pay compensation for past repairs if the repairs were done before the tree owner was advised of any problem with the tree or did not know about any problem: *Robson v Leischke* [2008] NSWLEC 152 at [207]; *Ding & anor v Phillips* [2008] NSWLEC 1268.
- If an applicant becomes aware of damage being caused to their property and does not inform the tree owner in a timely fashion of the damage, this failure can be taken into account by the Court when considering whether or not to make orders relating to the damage: *Osborne v Hook* [2008] NSWLEC 1231.
- Claims for compensation for past repairs can be statute barred if brought more than 6 years after the repairs were carried out: *Moroney v John* [2008] NSWLEC 32.



- Claims for compensation for past damage will be unsuccessful if it was reasonable for the neighbour to do nothing in response to complaints about the potential for damage being caused by the neighbour's tree: *Agius v Forrester* [2007] NSWLEC 857. Claims for compensation for past damage will be discounted if the claimant did nothing for some time after first becoming aware of the problem or the claimant's property was poorly maintained which encouraged tree root incursion: *Zhang v Long* [2007] NSWLEC632.
- The Court may discount the amount of compensation payable by the tree owner for damage to old structures, such as pergolas, roof gutters and terracotta sewer lines, so that the neighbour does not end up receiving "new for old" compensation: *Jefford v Shubert* [2007] NSWLEC 547; *Maguire v State of New South Wales* (North Ryde Public School) [2007] NSWLEC 587; *Rootes v Parmeter* [2007] NSWLEC 444.
- Claims for loss of quiet enjoyment, stress, anxiety and personal exertion are outside the jurisdiction to make orders as compensation is limited to compensation for damage to property: section 9(2)(1)); *Langtip v Granstrom* [2008] NSWLEC 44; *Ridley v Gylar* [2007] NSWLEC 220.
- Generally repair costs are shared between neighbours with the claimant being ordered to obtain three quotations for work and the neighbour being ordered to pay a fixed percentage of the lowest quotation after the work is complete.

Compensation or re-imbursement?

- The Act draws a distinction between payment for or reimbursement of the cost of works: section 9(2)(h)) and financial compensation for damage: section 9(2)(j). The Court prefers reimbursement for the cost of works carried out and usually requires repairs to be carried out before payment needs to be made by the tree owner particularly if this will encourage rectification of the damage: *Zhang v Long* [2007] NSWLEC 632.
- The Court has ordered payment of financial compensation where the property affected by the damage might be sold before the repairs are carried out to compensate the owner for the diminution in value of the property: *Zhang v Long* [2007] NSWLEC 632.

Effect of Orders in the Future

- Orders are binding on successors in title if served on them. This is important when the Court makes orders for the ongoing management of trees such as annual arborist inspections or when the tree owner fails to comply with an order and sells their property. There are now warranties imported into every contract for sale of land whereby vendors promise that no orders under the Trees Act have been made. This requires vendors to disclose any such orders to any potential purchaser.

Costs

- The general presumption in relation to legal costs is that there be no order as to costs. Costs are only awarded if it is fair and reasonable to do so in the circumstances: *Low v Elliott* [2008] NSWLEC 111.
- Applications for costs need to be made to a Judge of the Court and cannot be dealt with at the hearing.



- The cost of the application to the Court and associated paperwork by self represented applicants is not a compensable matter.
- Costs for expert reports can be recovered particularly where the applicant is represented by a lawyer: *Zhang v Long* [2007] NSWLEC 632; *Wright v Adamski* [2007] NSWLEC 787.

Practical Tips

If your strata scheme is in dispute with a neighbour about a tree you should do the following:

1. Write to the neighbour and:
 - (a) Describe the problem being caused by the tree.
 - (b) Identify the offending tree.
 - (c) Tell the neighbour what you want them to do (i.e. remove the tree, prune roots or branches, pay compensation, repair property damage).
 - (d) Send any available quotations for repairs or work to the tree and any expert's reports.
 2. Get a lawyer to send a letter of demand to the neighbour.
 3. Get an expert's report from (if necessary):
 - (a) An Arborist – identifying the offending tree and proving it is the cause of the damage or that it is likely to cause a personal injury.
 - (b) An engineer – identifying the cause of the property damage.
 - (c) A building consultant– setting out a scope of works and quotations for any repairs.
 - (d) A surveyor – showing the tree on the neighbour's land (if there is any doubt about this - e.g. where the tree is right on the boundary).
- A lawyer can be retained to brief the expert so you get the right type of report. Usually you only need one expert report normally from an arborist to prove that the offending tree is causing damage and you also need quotations for any repairs.
4. Have the executive committee or owners corporation pass a resolution to commence legal proceedings in the Court and to retain a lawyer for that purpose.
 5. Write to the neighbour:
 - (a) giving 21 days' notice of your intention to apply to the Court for orders and setting out the precise terms of the orders you will seek; and
 - (b) enclosing the expert's reports and quotations to the neighbour to support your claims.
 - (c) It is always advisable for a lawyer to do this.
 6. Write to the Local Council and the Heritage Office (if the tree is heritage listed) giving 21 days' notice of your intention to apply to the Court for orders and setting out the terms of the orders you will seek. It is always advisable for a lawyer to do this.
 7. Fill in an application form and one or more of the supplementary forms. These forms can be downloaded from the Court's website. You will need to fill in the application form and answer all the questions in the form. You will also need to fill in one or more of the supplementary application forms



depending on what you are asking the Court to order. There is a fee to make an application. The fee must be paid when lodging the application. It is always advisable for a lawyer to do this.

8. Attend the first court conference (usually held at a Local Court or at the Land and Environment Court in the Sydney, CBD about 2-4 weeks after you lodge the application) and try to resolve the dispute. If a lawyer has been retained, you do not need to attend the court conference.

9. Prepare for and attend the on-site hearing with your lawyer, experts and any witnesses. It will be an informal hearing and is not likely to take more than 2 or 3 hours.

Conclusion

The Trees Act is designed to make it easier, quicker and simpler for neighbours to resolve disputes about trees. Whilst people who approach the Court for compensation for relatively minor damage or inconveniences (such as slightly cracked or lifting concrete driveway slabs) will be disappointed, those whose property is suffering serious damage from neighbouring trees are able to get compensation or orders for repairs relatively quickly and inexpensively. The Court is dealing with applications quickly and informally and is proving to be a sound forum for resolving disputes between neighbours about trees.

Owners corporations and strata managers are often involved in property related neighbourhood disputes. These disputes can prove difficult to solve quickly and inexpensively.

However legislative reforms over the last 15 years have made it easier for property owners, including owners corporations, to deal with these disputes.

It is now possible for an owners corporation to gain access to neighbouring lands to enable repairs to be carried out to its property without having to be held to ransom by neighbours. Neighbours can no longer excavate their land with impunity, in blissful ignorance of the damage that will be caused to neighbouring buildings.

And difficult neighbours who are not interested in paying to repair retaining walls that are on verge of collapse can now, in some cases, be forced to share the costs for supporting the wall, through quick and relatively inexpensive means under the Fencing Act.

However reforms to the laws governing property related neighbourhood disputes still have a way to go. There is still pressing need for legislative intervention to deal with all retaining wall disputes, not just those that are now covered by the Fencing Act. And the Trees Act arguably has not gone far enough, leaving untouched trees which cause a nuisance to neighbouring land owners, but which do not pose a risk of injury or property damage.

It is hoped that further law reform in this area will make resolution of neighbourhood disputes quicker, simpler and cheaper for all stakeholders in the strata industry.

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