



JS MUELLER & CO
LAWYERS



UNDER THE GROUND, UP IN THE AIR AND EVERYWHERE IN BETWEEN: DEALING WITH ADJOINING OWNERS

Warwick van Ede

Lawyer

BEd LLM Acc Spec (Property)

[Email](#) | [LinkedIn](#)

UNDER THE GROUND, UP IN THE AIR AND EVERYWHERE IN BETWEEN DEALING WITH ADJOINING OWNERS

Introduction

As a strata scheme, you often have to deal not only with your fellow lot owners, but also with your “neighbours” outside of the scheme – those landowners located adjacent to you.

You may have had reason to deal with one or more of the examples of matters which are set out below – but if you haven’t, then get ready, because you almost certainly will at some point in time!

Here are some of the circumstances which can arise for owners corporations dealing with adjoining owners.

Easements – Under the Ground

It’s not uncommon for a neighbouring land owner to seek a permanent right over some part of your common property. A frequently-occurring example is where an adjoining owner requires an easement to drain water, to enable them to properly develop their land. An easement of this type will, when properly documented, enable the owners corporation to set limits on the physical boundaries of an easement, specify the terms of the easement, ensure that any physical works carried out on the common property are done properly, that the common property is properly restored once any work has taken place, and that these rights are granted in return for an appropriate amount of compensation.

Although persons such as developers may have the right to obtain such an easement by other means, by engaging them in appropriate documentation the owners corporation is likely to have better control over the process. It’s also likely to be advantageous for a person such as a developer, who can expect to obtain approval and be able to move forward more quickly by negotiating directly with the owners corporation than if they were required to obtain their easement rights by commencing legal proceedings, for example.

The *Conveyancing Act 1919* (NSW) provides the Supreme Court of NSW with the power to make an order imposing an easement over land, if that easement is “reasonably necessary for the effective use or development of other land”.

For the court to make an order of this kind, the court needs to be satisfied about various matters, including that reasonable attempts have been made to obtain the easement by other means.



The courts have interpreted these provisions relatively generously toward parties seeking the benefit of an easement against an adjoining land owner, but the courts have also taken the view that appropriate compensation has to be part of the offer process, and therefore it is important that there be some valuation evidence in relation to this.

However, it's of course a "last resort" for parties to have to resort to seeking an order from the Supreme Court of NSW, and as indicated above, it is likely to be preferable for an owners corporation to set out the terms of an easement in a document (particularly if the easement is likely to be granted by the Court anyway), and to reach agreement about this with an adjoining owner at a stage where that adjoining land owner (such as a developer) has money to spend on compensating the owners corporation for the easement, rather than spending money approaching the Supreme Court of NSW!

Further Down - The Case of Ground Anchors

Owners corporations are often approached by adjoining owners, seeking to use "ground anchors" or "rock anchors".

These anchors (known by both names) are a means by which land can be stabilised during excavation work, and the use of these anchors greatly assists persons carrying out construction works which involves relatively deep excavation, such as digging out the ground for the purpose of constructing basement car-parking.

As with easements (referred to above), the right to use rock anchors is theoretically obtainable for an adjoining land owner using the Supreme Court process under the *Conveyancing Act*. Also as in relation to easements generally, it is usually advantageous to both parties, and certainly beneficial to the owners corporation, if the process can be agreed and set out in appropriate documentation, and appropriate compensation paid, without the need for either party to resort to litigation.

Up in the Sky – Crane Air Space Rights

Almost everywhere you look these days there are construction cranes appearing on the skyline. However, there is no automatic right to swing a crane through the airspace above another building – this is a right which, once again, needs either to be obtained by negotiation, or by the means under either the *Access to Neighbouring Land Act* or the *Conveyancing Act*, referred to above.

It is important that various matters are set out clearly in appropriate documentation to properly protect the owners corporation, including specific insurance requirements, operational matters relating to the



erection and operation of the crane, Work Health and Safety issues, matters relating to the indemnification of the owners corporation, the carrying of loads, and the rectification of any damage and of course the amount to be paid to the owners corporation.

Back On the Ground – Various Rights

Strata schemes regularly enter into arrangements with the owners of adjoining land in relation to a multitude of other rights.

These can be as diverse as the need to temporarily locate scaffolding on common property to enable cleaning works to take place next door, allowing owners corporation property to be used for commercial purposes such as a murals or painting for advertising purposes, allowing the installation of equipment (such as cameras and lighting) to be located on common property, and to allow the installation of other commercial equipment on common property.

Again, these are all matters where the owners corporation needs adequate protection, in allowing an adjoining owner to exercise those rights. Normally the owners corporation also needs to be compensated. Whatever the arrangement you have with your adjoining land owner, and even if it is “friendly”, it is important that the arrangement be properly documented for the protection of the owners corporation and its property.

For example, you need to be able to control the hours during which certain work takes place, the qualifications and insurance of any persons entering upon the owners corporation’s property, the size and appearance of equipment to be located on common property, and various other matters for the protection of the owners corporation.

Down to Earth – Trees and Fences

Being a strata scheme which exists pursuant to the strata titles legislation does not stop owners corporations from having to deal with the types of problems which face all adjoining owners of land – these include issues relating to the responsibility for dividing fences and walls, and the damage which is caused to owners corporation property by trees located on adjoining land. Of course, sometimes it is the owners corporation which is the subject of complaint and allegations relating to these matters.

Where possible it is best to navigate these circumstances by negotiation and to produce adequate and protective documentation for the owners corporation when agreement is reached without tricky and troubling disputes.



Sometimes, a negotiated outcome is not possible, and a dispute with an adjoining owner can only be resolved by litigation in various Courts and Tribunals where such matters are dealt with.

Other Miscellaneous Disputes

Of course, it is possible for adjoining owners to have disputes about any number of matters, quite apart from trees, fences and walls. For example, disputes arise in relation to issues of parking, the law of Nuisance, questions of damage and liability between adjoining owners, and even commercial disputes.

You should obtain clear advice regarding your strata scheme's legal position, and the best means of dealing with such disputes.

Conclusion

As owners of real property, owners corporations find themselves dealing with the owners of adjoining land in a multitude of circumstances. It is highly recommended that in protecting the interests of owners corporations in such dealings talk to an expert who will help you negotiate and document these matters to the advantage of your strata scheme.

Warwick van Ede

Lawyer | BEc LLM Acc Spec (Property)
warwickvanede@muellers.com.au

About JS Mueller & Co

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

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au



Disclaimer: The information contained in this newsletter is provided for your personal information only. It is not meant to be legal or professional advice nor should it be used as a substitute for such advice. You should seek legal advice for your specific circumstances before relying on any information herein. Contact JS Mueller & Co Lawyers for any required legal assistance.
