What`s Holding You Up? Neighbouring Excavations: The Right to Support

Sydney's Geology

Starting 300 million years ago, a swamp forest started to subside, forming what we now known as the Sydney Basin. Then a river, 5 times bigger than the Amazon, with its origins south-west of Broken Hill, ground down a mountain range in Antarctica (which was then attached to the Australian continent) depositing silica sands into the basin, later to become the region's most noted geological characteristic, sandstone. As the river slowed, instead of sand, it deposited shale. Then the mix was all jumbled up with uncompacted alluvial soil, by tectonic movement, glacial climate shifts, volcanic eruptions, and changing sea levels. The result is the varied and unpredictable geology that today can make construction work in Sydney fraught, and provides a boon to geotechnicians.

The Common Law Position

As our cities have become denser and higher, we have become more and more dependent upon what our neighbour is doing with his or her property, particularly when it comes to conditions below ground level which may be unknown.

At common law, this concern between neighbours was managed by the law of nuisance. Basically, this enabled a person who suffered a nuisance as a consequence of something a neighbour had, or had not done, to seek a remedy, either in the form of abatement, or damages for any loss suffered. This law included a right to the support one's land enjoyed from neighbouring properties.

However, a 19th century English precedent limited this right to natural land, and excluded the buildings on the land. This was known as the rule in *Dalton v Angus*. A rule followed but much criticized by Australian courts. In 1997 a Law Reform Commission report found the rule had:

"… little relevance to the reality of modern urban conditions, and formulated prior to the Torres system of land title registration and major developments this century in the law of negligence."

Section 177

In 2000, the *Conveyancing Act* (1919) (NSW), was amended by the introduction of section 177, which introduced a statutory duty of care into the common law of negligence. That duty is:

" … not to do anything on or in relation to land (the "supporting land") that removes the support provided by the supporting land to any other land (the "supported land")."

The word *'land'* includes buildings and other fixtures for the purposes of the section, (notably overcoming the rule in in *Dalton v Angus*).

The term *'supporting land'* includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.

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Reasonableness

The stricture *"not to do anything on or in relation to land"* could suggest a strict liability test, but the courts have found that because section 177 imports the common law of negligence, it also imports the notion that the duty is only to 'exercise reasonable care'. This is best encapsulated in a three step test set out of Campbell JA in *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 at [209]:

1. Has the defendant done anything on or in relation to land? and
2. If yes, has what the defendant has done removed the support, and
3. If yes, did the defendant exercise reasonable care in doing that thing?

Non –delegable Duty of Landowners

Claims under section 177, will commonly involve multiple defendants. Contractor, subcontractor, consultants and developer/owner may all be held proportionately liable, depending on the circumstances of each case. However, it appears the owner/developer will rarely escape. This might seem strange given a developer/owner will usually be depending on the advice on specialist contractors and consultants. But in *Llavero v Shearer* [2014] NSWSC 1336, Young AJA held:

> *"...if a land owner is involved with removing his or her neighbour's support then that is a tort which involves breach of a non-delegable duty to the neighbour, so that the land owners are liable even though they may have retained a competent independent contractor."*

Liavero's case would also seem to support the proposition that an act of omission may constitute a breach of section 177. This is a much considered proposition, on which there is mixed judicial opinion, see *Piling v Prynew* [2008] NSCC 118.

Prevention

There is a right to damages for a breach of section 177, but what proactive protection does it afford prior to actual damage?

Theoretically, section 177 could be used as a basis to seek an injunction, but this would require extraordinary evidence, particularly given that at a practical level monitoring is usually incorporated into the local council's development consent conditions. In particular, clause 98E of the *Environmental Planning and Assessment Regulation 2000,* requires development consent for a development that involves excavation below the level of the base of the footings of a structure on adjoining land to:

> *"(a) protect and support the building, structure or work from possible damage from the excavation, and*
>
> *(b) where necessary, underpin the building, structure or work to prevent any such damage."*

Hence, a person may be more likely to raise the matter with council if they consider neighbouring excavations put them at risk, rather than commence their own court action.

Council can raise more specific conditions as they see fit when granting development approval. One such condition is sometimes the preparation of dilapidation reports, so that any movement or

damage to the building at risk can be monitored or measured. Where that is not a condition of development approval, owners may wish to nevertheless obtain such a report at their own cost.

Of course effected neighbours have a much stronger bargaining position where the proposed excavation or structure involves an incursion into their property. Earthwork support via rock anchors is a common example in Sydney. In that case, the developer/owner will require the permission of the neighbour to intrude into their property. This is usually settled through a monetary consideration, but other conditions can be brought into any such agreement also, such as a right to access plans and reports in relation to proposed excavations.

Agreements

Subsections 177 (5) to (7) of the *Conveyancing Act*, permit and regulate agreements which exclude or modify the statutory duty of care provided by subsections 177 (1) and (2). Thus the owner of supported land may agree to waive a right to support, usually in exchange for money.

However, it must be noted that such agreements will not bind the subsequent owners of the supported land, unless the agreement is embodied in an easement duly registered. (Schedule 8 of the *Conveyancing Act* contains a standard form of words used to create 'an easement for removal of support'.

Mascot Towers: A Cautionary Tale?

On 22 October 2019, the *Sydney Morning Herald*[1] reported suggestions that the structural concerns which have required the evacuation of 132 residential units at Mascot Towers, may have their origins in the removal of support caused by neighbouring excavations. Further investigation is required, but with rectification costs likely to involve multiple millions any rights under section 177 could become highly relevant.

The case points up the importance of owners keeping themselves advised of proposed excavations on neighbouring property, particularly during the development application phase with local council, and monitoring any effects to their property once excavation has begun so as to ensure the early identification of any potential problems. This will normally involve the assistance of specialist consultants.

Section 177 cases run from major high rise developments to boundary retaining walls. Given it will be a long long time before Sydney's geological inheritance changes, section 177 has a lot of work to do yet.

Prepared by Bannermans Lawyers
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[1] "Mascot Towers owners claim 'loss of soil' beneath cracked building", Sydney Morning Herald, 22 October 2019. https://www.smh.com.au/national/nsw/mascot-towers-owners-claim-loss-of-soil-beneath-cracked-building-20191022-p5337m.html [Accessed 05.11.19]

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