Encroaching Walls – What can you do?

The recent decision in *Hickey v The Owners Strata Plan 78825* [2022] NSWLEC 135 gave consideration to the characterisation of the Encroaching and Adjacent Owner under the Encroachment of Buildings Act 1922 (NSW). This case concerned a retaining wall that had been constructed by previous owners on the boundary between the Applicants and the Respondents. This wall was built primarily on the Applicant's land, despite being contracted by the previous owners of the Respondent's land. The main issue considered by Dutton J was which party should be characterised as the 'Encroaching Owner', as the relief sought by the Applicants was only available for the 'Adjacent Owner' under the Encroachment of Buildings Act 1922 (NSW).

Defining 'Adjacent Owner' and 'Encroaching Owner'

The definitions of 'adjacent owner' and 'encroaching owner' are given in section 2 of the *Encroachment of* Buildings Act 1922 (NSW), and are as follows:

> ***Adjacent owner*** means the owner of land over which an encroachment extends.
>
> ***Encroaching owner*** means the owner of land contiguous to the boundary beyond which an encroachment extends.

In *Hickey,* Dutton J interpreted these definitions as indicating that the encroaching building would have a "primary location" – which is the land from which the building "extends" – and a "secondary location", which would be the area across the lot boundary from the primary location. The Encroaching Owner will be the owner of the land where the primary location is. In *Hickey,* as the "overwhelming majority" of the retaining wall was located on the Applicant's land, they were determined to be the Encroaching Owner.

Irrelevant Considerations in Determining the 'Encroaching Owner'

In *Hickey,* Dutton J held that a consideration of the subjective circumstances which led to the construction of the retaining wall, or the reason for the encroachment would be irrelevant in determining over which land the encroachment extends. Therefore, the intention in the construction of the building, or the cause of the encroachment is irrelevant in characterising the 'Encroaching Owner'.

However, Dutton J noted that these factors may be relevant in determining an enquiry under section 3 of the Encroachment of Buildings Act 1922 (NSW).

Retaining walls and encroachments can be tricky. If you are experiencing issues with a retaining wall or an encroachment, Bannermans Lawyers have experience in these issues and can assist.

BANNERMANS LAWYERS

T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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Key takeaways

- The case of Hickey v The Owners Strata Plan 78825 clarifies the definitions of adjacent and encroaching owners.
- An encroaching owner is defined as the owner of land where the encroachment extends from.
- Subjective circumstances surrounding the construction of a retaining wall are irrelevant in determining the encroaching owner.
- Understanding these definitions is crucial for resolving disputes related to encroachments.

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BANNERMANS LAWYERS
T: (02) 9929 0226 ABN: 61 649 876 437
E: dbannerman@bannermans.com.au W: www.bannermans.com.au
P: PO Box 514 NORTH SYDNEY NSW 2059 AUSTRALIA

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