Others Claiming or Using Your Land: Encroachments & Adverse Possession

With the increasing cost and reducing size of city residential properties, exactly what land is owned by you is becoming a far greater issue.

Typical examples of an encroachment may include:

- a boundary wall that is incorrectly placed over a neighbour's boundary; or
- a garage roof that overhangs across a neighbouring property; or
- someone has been using the land or part of it and is claiming adverse possession / squatters rights; or
- a boundary fence that an owner feels is in the wrong location which is reducing the size of their land.

Let's explore these issues below.

Encroaching wall or structures

If you are either an owner of land upon which an encroachment extends (adjacent owner) or are an owner of a property that encroaches upon another person's land (encroachment owner), you may apply to the Court for relief. Typical examples of an encroachment may include:

- a boundary wall that is incorrectly placed over a neighbour's boundary; or
- a garage roof that overhangs across a neighbouring property.

Pursuant to section 2 of the *Encroachment of* Buildings Act 1922 (NSW) (the "**Encroachment Ac***t*") an encroachment is defined as '*encroachment by a building, and includes encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil*.'

Pursuant to section 3(2) of the Encroachment Act, the Court may order:

(a) the payment of compensation to the adjacent owner;

(b) the conveyance transfer or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest therein or any easement right or privilege in relation thereto; or

(c) the removal of the encroachment.

However, in doing so, the Court must take into consideration the items specified in section 3(3), which are:

(a) the fact that the application is made by the adjacent owner or by the encroaching owner;

(b) the situation and value of the subject land, and the nature and extent of the encroachment;

BANNERMANS LAWYERS
T: (02) 9929 0226 M: 0403 738 996 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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(c) the character of the encroaching building, and the purposes for which it may be used;

(d) the loss and damage which has been or will be incurred by the adjacent owner;

(e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and

(f) the circumstances in which the encroachment was made.

Are there any defences for an encroaching owner?

It is the general position that if an encroachment exists, the encroaching owner is responsible for that encroachment, which is similar to a strict liability offence. However, dependent on the facts an encroaching owner may argue the defence of estoppel. Proprietary estoppel may be raised in the case that it is unfair to allow a landowner to assert their full legal rights, either because they have encouraged another person to build on the land or because they acquiesced in mistake.

The case of B*yron Shire Council v Vaughan & Anor* [2002] NSWCA 158 involved an application by Council to remove an encroaching house. The encroaching owners argued that Council was estopped by reason of its conduct and representations from asserting title over the lot in which the encroachment lies. The Court of Appeal upheld the decision of finding that it would be unjust or unconscionable for Council to retain ownership over the lot on which the portion of the house encroached and so Council was estopped and was held to the representation that it cannot assert conflicting ownership of land within the fences.

Squatters rights / Adverse Possession

In NSW, adverse possession may be claimed by an encroaching owner if they have occupied the encroached land for 12 years or more and have satisfied the requirements under the Real Property Act 1990 (the "**RP Act**").

However, this is a very technical area of law and care must be taken to understand your rights. The general position of section 45D of the RP Act is that adverse possession is only possible if the adverse possessor has occupied the whole of the land parcel.

Some or the relevant case law surrounding this area of law is set out below.

(a) In *McFarland v Gertos* [2018] NSWSC 1629 the court found in a developer who noticed the land was vacant and took continuous possession of the property and held it for 14 years by fixing it up and renting it out through an agent. The descendants of the registered proprietor sought a declaration that the defendant was not entitled to obtain possessory title to the land but the court found sufficient evidence to demonstrate that the defendant had invested their own money in making improvements to the property, changed the locks, paid taxes and water rates, and leased it to rental tenants.

(b) In *Re Riley and* The Real Property Act (1964) 82 WN (Pt 1) (NSW) 373, [381] the court found that fencing or enclosure is not conclusive evidence of adverse possession, though it is an important indication of an assertion of the right to possession over it.

(c) In *Robinson v Attorney-General (1955) NZLR 1230, [1235]; Shaw v Garbutt [1996] NSWSC 400* the court found that although the payment of rates is not decisive, evidence of payment of rates for the disputed land may be used to support or defeat a claim. If the adverse possessor pays the rates it is evidence that they had the intention of possessing the land to the exclusion of others. However, payment of rates is far

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from determinative and is often of slight significance and therefore does not disprove the fact of possession.

(d) In *Ocean Estates Ltd v Pinder (1969) 2 AC 19* the court found that *t*he making of a survey, pegging of boundaries, or renewal of survey marks by the owner of the documentary title is an assertion of the owners entitlement to possession.

(e) In *Matusik v Maher Farms Pty Ltd & Or*s [2022] VCC 393 (11 April 2022), [189] the court found the intermittent actions on the farm land, such as intermittent fishing and yabbying in the dam, as well as camping, are insufficiently unequivocal to repossess the disputed land from the land possessor.

(f) In *State of New South Wales v Carver* [2023] NSWSC 828) the court found section 13.1 of the *Crown Land Management Act 2016* (NSW) precludes the land possessor from relying on adverse possession to defeat the Crown's claim to recover the land.

What about adverse possession over part of common property in a strata scheme?

There is no authority on point in NSW, however, it is arguable that this applies in respect of part areas of common property, as it is not expressly excluded. The right facts could warrant a test case. The Act allows adverse possession claims in regard to partial lots in limited circumstances, which are:

1. an occupational boundary replaces or represents the boundary of the whole parcel, and the part possessed by the applicant does not lie between the occupational boundary and the legal boundary (section 45D(2) of the RP Act); or

2. a partial lot represents a "residue lot" (sections 45D(2A) and 45D(2B) of the RP Act).

A 'residue lot' is defined in section 45D(2B) to mean an allotment consisting of a strip of land that:

a) was intended for use as a service lane; or

b) was created to prevent access to a road; or

c) was created in a manner, or for a purpose, prescribed by the regulations (at the time of writing this, nothing is prescribed in the regulation).

This 'strip of land' comes from many older subdivisions, in which the subdivider made provision for access to the rear of properties. These access ways or service lanes were occupied by some adjoining property owners.

What about fences and slivers of land created by the conversion from old system title?

From 1 January 2021, the NSW Land Registry Services ("**LRS**") introduced new requirements for landholders, developers, and surveyors dealing with Old System or Limited Title land to minimise the creation of small sliver parcels of land. Slivers are small strips of land that can be formed when an Old System or Limited Torrens Title parcel is surveyed for conversion into full Torrens Title.

These requirements aim to prevent, identify, and simplify the handling of sliver lots, with a focus on obtaining adjoining owner consent or providing evidence for boundary adoption. When a sliver is unavoidable, it can now be identified as a separate, fully defined lot in the new plan.

T: (02) 9929 0226 M: 0403 738 996 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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Furthermore, a pro forma document is available for adjoining owners to maintain their interest in the occupied land, facilitating prompt registration. Without this document, a notice process may be required. Sliver lots are unsuitable for separate Title creation, and a simplified process has been implemented for adjoining owners to claim them through a statutory declaration outlining their period of possession. LRS guidelines offer more detailed information on these processes.

What about fences just simply in the wrong spot?

Normally fences lines are adjusted by agreement or resolution of the method involving Registrar Generals Office following a boundary determination notice as explained in our article Caught in a Boundary Dispute? Know your rights

How do we assist

It is important not to delay seeking expert advice regarding an encroachment issue as you may find yourself in a situation where your neighbour can legally take ownership of part of your land.

If you find yourself in such a property dispute, feel free to reach out for some advice, assistance and representation from our North Sydney Boundary Dispute lawyers.

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Prepared by Bannermans Lawyers
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T: (02) 9929 0226 M: 0403 738 996 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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