THE DUTY OF CARE IN RELATION TO ADJOINING LAND

A PRACTICAL GUIDE TO OBTAINING INTERIM RELIEF

IN ACTIONS BASED ON SECTION 177 CONVEYANCING ACT 1919

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INTRODUCTION

1. Most of us live in towns and cities, cheek by jowl, with buildings constructed side by side, almost all of which, at least during construction, require some degree of excavation. What could possibly go wrong?

2. An owner of land has a right to expect that adjoining owners will not remove support for their land and is entitled to bring an action for orders to enforce that right. However, that action will be of little assistance if, by the time it is determined, the owner's castle is lying in pieces at the bottom of the neighbour's excavation.

3. In this session we are dealing with two aspects of disputes that arise when an owner of land is affected by a removal of support for that land. The presentation has been divided into two parts:

   (a) In the first part of the session I will deal with the steps necessary to obtain interim relief to protect the property from further or anticipated damage; and

   (b) In the second part Richard Cheney will deal with issues that arise under s.177 of the *Conveyancing Act* 1919 which will be relevant when proceedings are brought for final relief.

THE CAUSE OF ACTION FOR FINAL RELIEF

4. As in any potential proceedings, when considering an application for interim relief, it is critical to identify and focus on the nature of the cause of action for final relief. Remember that interim orders are a means to an end. If there are available more than one cause of action, consider whether each is relevant to the claims for both interim and final relief. In some cases, the interim relief will not require all the available causes of action to be pursued.

5. In most, if not all, cases where there has been a removal of support an owner will rely on s. 177 of the *Conveyancing Act*. Richard Cheney will be dealing in due course with the substantive issues arising from reliance on that section. Section 177 provides as follows:

(1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.

(2) Accordingly, a person has a duty of care 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").

(3) For the purposes of this section, "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.

(4) The duty of care in relation to support for land does not extend to any support that is provided by a building or structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supported land.

(5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.

(6) Any such agreement:

(a) has effect in relation to any agent of the person on whom the duty lies, and

(b) has effect in relation to any successor in title of the supported land if the agreement is embodied in a registered easement for removal of support relating to that land.

(7) The right to agree to the removal of the support provided by supporting land to supported land is a right of the kind that is capable of being created by an easement.

(8) Any right at common law to bring an action in nuisance in respect of the removal of the support provided by supporting land to supported land is abolished by this section.

(9) Any action in negligence that is commenced after the commencement of this section in relation to the removal of the support provided by supporting land to supported land

may be wholly or partly based on something that was done before the commencement of this section. However, this subsection does not operate to extend any period of limitation under the Limitation Act 1969.

(10) This section extends to land and dealings under the Real Property Act 1900.

(11) This section does not apply in relation to any proceedings that were commenced before the commencement of this section.

(12) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.

(13) This section binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

6. The Court has express general power in s.66 of the *Supreme Court Act* to order an interlocutory injunction in any case in which it appears to be just or convenient so to do[1] as well as an inherent power to grant interlocutory injunctions.[2]

PREPARING THE APPLICATION

7. The removal of support of land can manifest in different ways. Often there will be voids or depressions appearing in the ground surface, usually near the boundary, cracking or movement in pathways or damage to the structures on the plaintiff's land. Brittle finishes within a building will also be a tell tale sign. It will be necessary to identify:

   (a) damage, either existing or potential; and

   (b) the cause of the damage, as best that can be done in the short time available.

8. It will be important to document that damage and photograph it if possible. Often the time in which these applications must be made does not give a plaintiff owner enough time to obtain expert evidence about the cause and extent of damage. Evidence to the effect that the property was blissfully undamaged until the adjoining owner's excavation commenced when all of the damage visible in the photos suddenly appeared, may be enough for an interim injunction if the cause and effect is sufficiently apparent from the photos.

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[1] *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199

[2] *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345

9. One of the first things the Judge will ask on an application for interim relief, particularly an ex parte application, will be whether the plaintiff has tried to extract from the adjoining owner an undertaking to stop doing whatever it is that is causing the problem. Having identified prima facie evidence of that cause and effect, it is important to make an attempt to get an undertaking, which will avoid the need to apply for interim orders.

10. Once you have exhausted your attempts at self help you will have to make an application to the Court. Most applications will be made in the Equity Division. The daily court list will identify the name of the duty judge each day. Practice Note SC Eq 8 deals specifically with urgent applications before the Equity Division Duty Judge and the expedition list. However, due to the nature of the claim for final relief, the application could, and probably should, be made to the Technology & Construction List duty judge. Practice Note SC Eq 3 which relates to the Commercial and Technology & Construction Lists contemplates urgent applications of this type. It provides in paragraph 46 that for such the applications the moving party should telephone the List Judge's Associate to make arrangements to appear before the Judge. Ordinarily the Associate will simply give you the Court number and the time when you may appear.

11. The time will, necessarily, usually be immediate and so you will have already prepared, copied and bundled together the documents you will need to obtain the orders.

12. The application is made by summons and supported by an affidavit. You will need ready the following documents:

    (a) The summons;

    (b) The affidavit in support;

    (c) Draft orders.

13. There is no need for a notice of motion. The better approach is to separately identify separately in the summons:

    (a) the interim; and

    (b) the final relief.

14. My practice is to include a heading for each of the interim and final relief and list the prayers for relief for each under the respective headings.

THE EVIDENCE

15. Section 177 replaced an action in nuisance with an action in negligence as far as is relevant to an action for the removal of support for land. The principles of negligence are familiar to us all, particularly the concept of a duty to exercise reasonable care. The Court of Appeal in *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 made it clear that s.177, although it does not expressly say so, may be regarded as imposing a duty to exercise *reasonable care* not to do anything on or in relation to land that removes support. That immediately tells you that it will be necessary to support the claim with evidence of:

    (a) What was done by the defendant;

    (b) The effect of those acts (or that failure to act) in removing support for the land; and

    (c) The absence of reasonable care.

    (See *Lym* at [209])

16. The third category of evidence will often require expert evidence at least to support the claim for final relief. Depending on the nature of the problem it may not be possible to obtain expert evidence in the time available for an application for interim relief. The documentary evidence of the cause and effect including the photos I referred to earlier may be sufficient depending on the circumstance of the case.

17. If photos and other documents are to be relied on it will be necessary to prove them by lay evidence. Usually the property owner or a representative of the owner such as an executive committee member of an owners corporation will do that in an affidavit and will depose to:

    (a) the previously undamaged state of the property;

    (b) the activities that have been going on; and

    (c) the observable effects on the property that are said to be due to the activities on the adjoining land.

18. If you have the ability to obtain expert evidence on the cause of the damage all the better. In some cases an expert will be able to express an opinion on questions of whether the activities are necessary for the purpose for which the adjoining land is being used. For example, whether the particular method of excavation or shoring could be replaced by

another less damaging method. That type of evidence may be relevant to questions concerning the balance of convenience.

ONCE YOU ARE IN COURT

19. Once the documents have been prepared and you have contacted the Associate to arrange to appear before the Duty Judge you are almost ready to head up. However, before you go to Court there is a very important remaining step. It is important that you explain to the client and obtain instructions to give the usual undertaking as to damages. You do not want to wait until the Judge asks, only to have to respond by saying you will have to get instructions.

20. The usual undertaking as to damages is given to the Court not to the opposing party. In circumstances where the action for final relief fails, the damages caused by the interim injunction will be assessed on the basis of what is just and equitable or fair and reasonable.[3]

21. To succeed in obtaining interim relief you will have to show:

    (a) there is a serious question to be tried, sometimes described as a good arguable case; and

    (b) that the balance of convenience favours the order.

GOOD ARGUABLE CASE

22. To demonstrate a serious question to be tried or a good arguable case the plaintiff will have to prove that it has a prima facie case with real possibility of success at a final hearing.[4] Whether there is a good arguable case will depend on the evidence you have gathered and will turn on a case by case basis.

BALANCE OF CONVENIENCE

23. The Court will then assess whether the balance of convenience favours the order sought. That will involve weighing up the competing beneficial and adverse effects of the orders. It will be a balance between what may be potentially adverse and irrecoverable effects on plaintiff's property and possible serious costs and other damage that may be suffered by, for example, bringing a major development to a grinding halt.

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[3] *Ansett Transport Industries (Operations) Pty Ltd v Halton* (1979) 25 ALR 639

[4] *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618

24. Other possible relevant factors may be what temporary support may be necessary in the event that the activity were to be stopped and what alternatives were or are available to the party engaging in the activity that is causing the damage.

25. Often the application will be made on an ex parte basis. That us usually due to the urgency of the application and need to have the activity cease to prevent further damage. In an ex parte application an applicant has a *duty of candour* to the Court.

26. The Full Court of the Federal Court in *Town & Country Sport Resorts (Holdings) Pty Ltd v Partnership Pacific Ltd*,[5] setting out the statement of principle from *Thomas A Edison v Bullock*[6] described the importance of the obligation as follows:

> *The rationale behind the principle is clear; it is of the utmost importance in the due administration of law that the Courts and the public are able to have confidence that an ex parte order has been made only after the party obtaining it has complied with its duty to disclose all relevant facts.*

27. Most of us are familiar with that obligation. However, it will often be a strange thing for a client to hear counsel or the solicitor telling the judge all the bad things about their case. It is important for you to explain to the client why you have to do that before the client starts to hear it in Court.

28. If the application is successful the Court will make orders that are often in the form you have prepared. In many cases however, there will be a need for, or the Judge may desire, some changes. I recommend you have a soft copy available on a computer that you can edit and email to the Associate while you are still in Court.

29. Once the Judge is happy with the orders, which will include an order that they be entered forthwith, you will be required to *take them out*. That antiquated term nowadays will mean the Associate will usually accompany you to the Registry for that purpose of having them entered into the Court's system and giving you a sealed original order for service. The orders, together with the other documents, will have to be served on the affected party.

30. The orders should preferably include the method by which that service should be affected.

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[5] (1988) 20 FCR 540

[6] (1913) 15 CLR 679

31. The orders will be for a reasonably short duration, usually a few days. The purpose of that is to have the orders served and require, or give the affected party time to appear before the Court.

32. Usually it will then be stood over to the Friday noon Technology & Construction List for directions to move toward a hearing for final relief. Hopefully by then you will have put in place a regime that will preserve the land and buildings while the substantive dispute is progressed to finality.

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