

Fences, Trees and Retaining Walls

Boundary Issues between adjoining owners

We have recently seen a significant increase in the number of disputes concerning retaining walls, dividing fences and damage by trees from adjoining properties.

This area of law has undergone considerable legislative reform in recent years and there are many interesting aspects to consider, including:

- Dividing Fences Act 1991: This Act now specifically excludes retaining walls in the definition of a 'fence' unless the retaining wall falls into the exemption of being a 'foundation or support necessary for the support and maintenance of (a) fence' separating the land of adjoining owners, whether on the common boundary of adjoining land or on a line other than the common boundary. Interestingly, the fence may be a gate, ditch, hedge or similar vegetative barrier.
- Section 177 of the Conveyancing Act 1919 states that a duty of care exists in relation to the right of support for land. It allows a person (e.g. an adjoining land owner) to bring an action in negligence for any damage caused by the removal of any natural support or of any structure that has replaced that natural support.
- Easements, although not registered on title at the NSW Land and Property Management Authority, may effectively exist under a development application condition specifying liability for repair or maintenance.
- The Tree (Disputes Between Neighbours) Act 2006 now provides the right to seek full compensation for damage caused by trees to fences and retaining walls.

Jurisdiction of NCAT to make orders with respect to Retaining Walls:

- In the recent decision of *Philip McKay v Stuart Earl Greentree and Nadeen Maree Greentree* [2014 NSWCATD 69] it was held that 'when considering whether a retaining wall is part of fencing work, the Tribunal uses the 'principle purpose test' of the retaining wall. If a wall's principle purpose is to provide a foundation or support to a dividing fence, then the Tribunal has jurisdiction. It becomes more difficult to make a determination if the principle purpose of a retaining wall is to support or retain earth and the support of a fence is ancillary'.
- The earlier decision of Commissioner Fakes following the 2009 amendments in the Land and Environment Court decision of *Riggio v The Estate of the late Phyllis Annette Lockard* [2001] NSWLEC 1292, was supported. Commissioner Fakes concluded that 'the power of the Court under the Dividing Fences Act is limited to only ordering compensation for fencing work necessary for the immediate support of a fence and not to the entirety of the retaining wall'.

There are also many practical considerations, including:

- What actions should occur to preserve rights for contribution from the adjoining owners.
- What proportion of repair and maintenance should be sought from the adjoining owner.
- What role do Tree Preservation Orders take in these types of matters.
- What role does the Access to Neighbouring Land Act 2000 have.
- Which forum or legislation best applies to the individual situation.
- Disclosure issues to notify the scheme's insurer.

Key Points

- (1) Dealing with fencing, tree disputes and tree disputes is a specialised area.
- (2) Owners corporations should consider advice to ensure that rights are preserved and adequate compensation is sought.
- (3) This area of law continues to evolve.

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