BROADLEY REES HOGAN | NEWS

E-alert: Common Law Trespass by Overhanging Crane: Is it Sunnier in Queensland?

By ,

A recent decision in the Supreme Court of Victoria concerned a successful injunction application by a neighbour, against an adjoining builder who was trespassing over the airspace of the neighbour's land with the arm of a crane. This decision from Victoria is in contrast to the mechanisms found in Queensland's *Property Law Act 1974,* which assists developers by permitting, in some circumstances, for a statutory right of user to be granted allowing a development to proceed.

The Facts

The decision of *Janney & Ors v Steller Works Pty Ltd*[1] concerned the development of a four storey building comprising of 27 dwellings in Elwood, Victoria.

The Plaintiffs lived next door to the development site and the Defendant was the builder who was proposing to use an overhead crane, with a jib having a reach of 38 metres.

In February 2017, the Plaintiffs received notice from the Defendant that a crane would be erected on the development site. The crane would not be lifting materials over the property line however it would overhang the Plaintiffs' land while not in use and weathervaning. That is, the crane would be allowed to rotate freely with the wind, as a safety measure to avoid stresses on the crane tower in the event of high winds.

The Plaintiffs asserted to the Defendant that they were concerned for the safety of their family by the proposed crane which was to encroach the airspace above their house. The Plaintiffs informed the Defendant that the crane, as proposed to be erected, would be a trespass over their property. The parties sought to negotiate compensation for the Plaintiffs' family's relocation during construction, in return for the issuing of a licence to the Defendant over the airspace for which the crane was to overhang.

On 16 May 2017, the crane was erected by the Defendant.

Negotiations between the parties broke down and on 5 June 2017 an Application for an interlocutory injunction was filed by the Plaintiffs seeking to restrain the Defendant from intruding into the airspace of the Plaintiffs' land.

The Decision

The Defendant submitted that the incursion of the crane overhead was not a trespass to the Plaintiffs' land. The submission was on the ground that the incursion was only to be occasional and was at such a height as not to interfere with the ordinary use of the Plaintiffs' land.[2]

Justice Riordan rejected this submission and ruled that the crane, in these circumstances, was a trespass to the Plaintiffs' property. The stress and fear caused by the presence of the crane encroaching over the airspace above the property was held to constitute a trespass. Even though the chance of the crane collapse was slight, his Honour observed that an interest in land should include the enjoyment an owner has in being able to exercise the power to veto others from using their land.[3]

His Honour further found that an injunction, not damages, was the appropriate remedy in these circumstances, on the grounds that:

- the injury risked to the Plaintiffs, being a crane coming crashing down on their home, was significant;
- the trespass would be for a prolonged time, approximately 6 months;
- that the concerns of the Plaintiffs as to their safety could not adequately be compensated with a nominal amount of money;[4]
- the Defendant had acted highhandedly and recklessly with regard to the Plaintiffs' legal rights.[5]

His Honour granted an injunction on the grounds sought by the Plaintiffs and awarded the Plaintiffs indemnity costs against the Defendant.[6]

Contrasting this Decision Against the Queensland Position

In the judgment, his Honour highlighted the legislative amendments of other states, including Queensland, which allows developers to apply to Courts for a statutory right of user to allow access to land to assist in undertaking development.[7]

This recent case from Victoria (where there are no statutory right of user provisions), demonstrates the lacking in the common law with respect to the promotion of the effective use of land which is destined to be densely developed.

Fortunately for developers in Queensland, if these set of circumstances were to have arisen and negotiations with the neighbouring landholder are unsuccessful, under section 180 of the *Property Law Act 1974* a developer would have the ability to apply to the courts for a statutory right of user,.

Any persons interested in issues concerning the accessing of neighbouring land for development should consider our previous article *What Can A Developer Do If A Neighbour Does Not Allow Access to the Neighbouring Property?*

In any event, an affected party should seek detailed legal advice.

---

[1] [2017] VSC 363.

[2] Ibid, [19]-[20].

[3] Ibid, [34].

[4] Ibid, [38].

[5] Ibid, [39].

[6] Ibid, [40].

[7] Ibid, [32]; see *Conveyancing Act 1919*(NSW) s 88K; *Law of Property Act 2000*(NT) ss 163-5; *Property Law Act* (Qld) s 180(1); *Conveyancing and Law of Property Act 1884*(TAS) s 84J.

Should you wish to discuss any matters arising out of this article, please contact the author:

,

,

Broadley Rees Hogan (BRH Lawyers) is an independent boutique firm, specialising in corporate, commercial, property, construction and litigation. Based in Brisbane, we act for clients across the country and internationally – **for an unassuming firm, we know how to deal big**.

For more information, please visit **www.brhlawyers.com.au** or **contact us** on (07) 3223 9100.