



Land and Environment Court
New South Wales

Case Name: Berry v The Owners Strata Plan 1621

Medium Neutral Citation: [2022] NSWLEC 1507

Hearing Date(s): Conciliation conference on 7 September 2022

Date of Orders: 20 September 2022

Decision Date: 20 September 2022

Jurisdiction: Class 3

Before: Peatman AC

Decision: See orders below in [11]

Catchwords: ENCROACHMENT OF WALL AND FOOTING –
conciliation conference – agreement between the
parties – orders

Legislation Cited: Conveyancing Act 1919 s 88B
Encroachment of Buildings Act 1922 ss 2, 3
Land and Environment Court Act 1979 ss 16, 19, 34
Real Property Act 1900

Category: Principal judgment

Parties: Catherine Deanne Berry (First Applicant)
James Gregory Berry (Second Applicant)
The Owners Strata Plan 1621 (Respondent)

Representation: Counsel:

T Sattler (Solicitor) (Applicant)
J Hones (Solicitor) (Respondent)

Solicitors:

Sattler & Associates Pty Limited (Applicant)

Hones Lawyers (Respondent)

File Number(s): 2022/171965

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings are brought by the Applicants seeking an order for the Respondent (Strata Plan 1621) to remove part of a brick wall and the supporting footings on the land owned by the Applicants and known as 3A Stanley Street, Randwick NSW being the whole of the land in Lot 1 Deposited plan 365385 (Applicants' Land). The encroachment is more particularly described in the Partial Identification Survey (western fence and wall) over the Respondent's land at 5-7 Stanley Street, Randwick showing the encroachment as a Face of Brick Wall (FOB) FOB-BDY(0.08), (0.21) and (0.21) by RGM Property Surveys (ABN 37 145 495 825) dated 15 March 2022 being CAD Drawing File No.220267-001 (Annexure A).
- 2 The proceedings have been brought before the Court pursuant to ss3(1) and (2)(c) of the *Encroachment of Buildings Act 1922* (EB Act), and fall within the Court's jurisdiction pursuant to ss 16 and 19(c1) of the *Land and Environment Court Act 1979* (LEC Act).
- 3 The Court shall exercise its statutory power or function pursuant to ss 2, 3(1)-(3) of the EB Act, and ss 16(1), (1A) and 34(3)(a), (b) of the LEC Act, which state as follows:

Legislation

Encroachment of Buildings Act 1922

2 Definitions

In this Act, unless the context or subject-matter otherwise indicates or requires:

...

Boundary means the boundary line between contiguous parcels of land.

Building means a substantial building of a permanent character and includes a wall.

Court means the Land and Environment Court.

Encroaching owner means the owner of land contiguous to the boundary beyond which an encroachment extends.

Encroachment means 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.

...

3 Encroachments

(1) Either an adjacent owner or an encroaching owner may apply to the Court for relief under this Act in respect of any encroachment.

(2) On the application the Court may make such orders as it may deem just with respect to:

- (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,
- (c) the removal of the encroachment.

(3) The Court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters:

- (a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be,
- (b) the situation and value of the subject land, and the nature and extent of the encroachment,
- (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,
- (f) the circumstances in which the encroachment was made.

...

Land and Environment Court Act 1979

16 Jurisdiction of the Court generally

(1) The Court shall have the jurisdiction vested in it by or under this or any other Act.

(1A) The Court also has jurisdiction to hear and dispose of any matter not falling within its jurisdiction under any other provision of this Act or

under any other Act, being a matter that is ancillary to a matter that falls within its jurisdiction under any other provision of this Act or under any other Act.

...

34 Conciliation conferences

...

(3) If, either at or after a conciliation conference, agreement is reached between the parties or their representatives as to the terms of a decision in the proceedings that would be acceptable to the parties (being a decision that the Court could have made in the proper exercise of its functions), the Commissioner—

(a) must dispose of the proceedings in accordance with the decision, and

(b) must set out in writing the terms of the decision.

- 4 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 7 September 2022. I presided over the conciliation conference.
- 5 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved upholding the application, and pursuant to s 3(2)(c) of the EB Act, by consent the Applicants remove or procure the removal of part of a brick wall (wall) in the location marked with the letter “A” and shaded blue as depicted on Annexure A to the extent the wall encroaches on No. 3A Stanley Street Randwick within 28 days of the making of the orders set out below.
- 6 The parties further agreed on a joint Experts’ Engineering Report which includes, inter alia, advice from the engineers as to whether any part of the footing needs to remain in situ for a distance along the wall of approximately 10m in length and of varying width in the location shaded green and marked with the letter “B” as depicted in Annexure A, and on the terms to the grant of an easement pursuant to s 88B of the *Conveyancing Act 1919* and s3(a), (b) of the EB Act, as set out in Annexure B.
- 7 Under s 34(3)(a) and (b) of the LEC Act, I must dispose of the proceedings in accordance with the parties’ decision if the parties’ decision is a decision that the Court could have made in the proper exercise of its functions. The parties’ decision involves the Court exercising its function under s 3(2)(a)-(c) of the EB

Act and ss 16(1), (1A) and 34(3)(a), (b) of the LEC Act for the offending encroachment to be moved. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be:

- (1) The parties agree that the terms reached as set out in the Section 34 Agreement bring about a just, quick and cheap determination of the matter.
- (2) The Class 3 application 2022/171965 seeks the removal of an encroaching brick wall (also described as an engaged pier) and its footing from the Applicants' Land.
- (3) The owners of the Applicants' Land are Catherine Deanne Berry and James Gregory Berry.
- (4) The Owners Strata Plan 1621 is the owner of the adjoining land from which the encroaching structure extends (Respondent's Land).
- (5) The Applicants have the benefit of Development Consent DA/20/2019 for alterations and additions to provide 2 additional one bedroom dwellings as a part of a new upper level to the existing building, alterations to the existing driveway and additional hardstand parking spaces. Of relevance to these proceedings is the additional parking space number '3'.
- (6) In relation to the Applicants' Land, on the east side of the existing building and adjacent to the common boundary with the Respondent's Land (boundary) is the proposed location of the new car space number '3'. This car space is approved to be 2.4m wide.
- (7) Between the Applicants' and Respondent's land, the brick column to the boundary set back is approximately 2.45m. Annexure A shows the encroachment the subject of these proceedings to be in the order of 210mm or 0.210m.
- (8) Both parties agree that the encroachment can be removed, and on 5 September 2022 filed an Expert Engineering Report dated 27 January 2022 by Mr R Grava of Burgess Arnott & Grava which demonstrates a proposed treatment of the encroaching wall and footings to protect the adjoining brick wall on the boundary between 3A Berry Street and 5-7 Stanley Street, Randwick. A copy of the Mr R Grava, Burgess Arnott & Grava Expert Engineering Report dated 27 January 2022 and filed on 5 September 2022 is Ex 1 to this judgment.

Jurisdiction

- (1) The Applicants are the adjacent owners as defined in the EB Act.
- (2) The Respondent is the encroaching owner as defined in the EB Act.
- (3) The Applicants filed these proceedings on 14 June 2022 pursuant to s 3(1) of the EB Act.

- (4) The Land and Environment Court accepts matters commenced pursuant to the EB Act in Class 3 of its jurisdiction pursuant to ss 16 and 19(c1) of the LEC Act.
- (5) The Applicants and Respondent have agreed on terms to resolve the proceedings and the Court has power to make final orders pursuant to ss 3(2)(a)-(f) of the EB Act, and ss 16(1), (1A) and 34(3)(a) and (b) of the LEC Act.
- (6) The parties have also reached agreement, as set out in their Section 34 Agreement concerning an easement pursuant to s 88B of the *Conveyancing Act* 1919, and the payment of monies by the Respondent to the Applicant, and in respect of which the Court has power to make the orders pursuant to ss 16(1), (1A) and 34(3)(a), (b) of the LEC Act, and s 2(a)-(c) of the EB Act.
- (7) The parties consider that the resolution of the proceedings by the making of the orders sought in the Section 34 Agreement does not result in the contravention of the EB Act or any other Act, Regulation or any environmental planning instrument. As such, the Court should be satisfied that it can exercise its functions under the EB Act and make the orders sought in the Section 34 Agreement.

8 The parties, by consent, seek the orders as set out in paragraph 11 below.

9 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3)(a), (b) of the LEC Act and ss 3(2) and (3) of the EB Act:

- (1) The Applicants commenced proceedings pursuant to ss 3(1), and (2)(c) of the EB Act.
- (2) The Respondent is an encroaching owner in accordance with the definition in s 2 of the EB Act.
- (3) The proceedings fall within Class 3 of the Court's jurisdiction pursuant to 19(c1) of the LEC Act.
- (4) The parties have negotiated an agreement to resolve their dispute by removal of the encroaching wall and footings which will enable the Applicants to comply with their development application consent No. DA/20/2019 granted by Randwick Council by constructing the new car space number '3', and, if required, the creation of an easement together with payment of monies by the Respondent to the Applicants the sum of \$1.
- (5) The Court has the power to make those orders as requested by the parties in accordance with s 2(a)-(c) of the EB Act after considering the issues raised in s 3(3)(a)-(f) of the EB Act, ss 16(1), (1A) and 34(3)(a), (b) of the LEC Act.
- (6) I am satisfied that I have power to make the orders as sought by the parties.

- 10 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under ss 16(1), (1A) and 34(3)(a), (b) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 11 The Court orders:
- (1) Pursuant to s 3(2)(c) of the *Encroachment of Buildings Act 1922* the Applicants remove or procure the removal of part of a brick wall in the location marked with the letter "A" and shaded blue as depicted on the Partial Identification Survey (western fence and wall) over the Respondent's land at 5 Stanley Street, Randwick showing the encroachment as a Face of Brick Wall (FOB) FOB-BDY(0.08), (0.21) and (0.21) by RGM Property Surveys (ABN 37 145 495 825) dated 15 March 2022 being CAD Drawing File No. 220267-001 (Annexure A) within 28 days of the making of these orders.
 - (2) That both the Applicants' and the Respondent's respective engineers (who are to be separately engaged by the respective parties) jointly confer within 21 days of the making of these orders in respect of the appropriate method of removal and cutting back of the encroaching concrete footing supporting the wall, as identified as "A" and marked in blue on the survey in Annexure A, and prepare a report (Engineers' Expert Report) in respect of that agreed methodology and deliver the report to the Applicants' and Respondent's lawyers within 21 days of jointly conferring.
 - (3) The Applicants shall carry out or procure the carrying out of the cutting the encroaching footing in accordance with the Engineers' Expert Report within 28 days of the completion of the Report.
 - (4) To the extent specified in the Engineers' Expert Report, an easement pursuant to s 88B of the *Conveyancing Act 1919* permitting an existing structure (i.e. any part of the footing that is to remain) to remain, at a maximum of 10m (distance to be determined by the engineers in the Engineers' Expert Report) in length and of varying width in the location shaded in green and marked with the letter "B" as depicted in Annexure A and on the terms as set out in Annexure B, be granted pursuant to s 3 of the *Encroachment of Buildings Act 1922* that burdens No 3A Stanley Street and benefits to 5-7 Stanley Street Randwick (**Easement**).
 - (5) If the Easement is required, the Respondent shall do all things and execute all documents which are proper and necessary, including executing a Transfer Granting Easement and associated sketch to enable registration of the Easement in accordance with the *Real Property Act 1900* (NSW) within ninety days (90) days of the making of the order in accordance with order (1).
 - (6) If the Easement is required, the Respondent shall pay the Applicants \$1.00 in full and final settlement of their claim for compensation within 90 days of the making of the order in accordance with order (1).

- 12 The Court notes the parties have agreed that each party pay its own costs of the proceedings and their respective engineers' costs incurred in preparation of the Engineers Expert Report.

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M Peatman

Acting Commissioner of the Court

Annexure A (135552, pdf)

Annexure B (171410, pdf)

Ex 1: Mr R Grava, Burgess Arnott & Grava Expert Engineering Report dated 27 January 2022 and filed on 5 September 2022

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