



Eakin McCaffery Cox successfully defends excessive claim for costs of rectification works

Eakin McCaffery Cox has, on behalf of our clients, successfully defended a claim by our clients' neighbours for compensation to carry out excessive (and costly) works to rectify a defective retaining wall constructed around 40 years ago between two suburban properties.

Our clients were an elderly couple who had built their house at Kareela in Sydney's southern suburbs in the 1980s. As part of their excavation works, they had constructed a retaining wall between their property and their neighbours' land.

The plaintiffs had purchased that neighbouring property a short while later. During the 1990s, they had undertaken substantial landscaping works to their property, including the construction of an external pre-cast staircase down the side of their house, which rested on a brick wall constructed immediately adjacent to the retaining wall.

In 2014 the plaintiffs complained that the staircase was moving, which they blamed on the failure of the retaining wall. Our clients' response was that the staircase built by the plaintiffs was inappropriately relying on the retaining wall for support, when it had never been intended (or constructed) for that purpose.

To the extent that the retaining wall required strengthening to be able to support the current staircase structure, our clients proposed that they carry out shotcreting of the existing wall (which today would cost around \$50,000). However, the plaintiffs rejected this proposal and in 2015 they commenced Supreme Court proceedings seeking various orders, including that our clients compensate them almost \$500,000 to pay for a vastly expanded scope of work, which included the removal of the existing wall and staircase structure, the construction of a new structure involving piles driven deep into the rocky ground, and new landscaping including planter boxes. They also claimed that the existing wall encroached into their property, and they asked for an unquantified amount of compensation.

The Court's approach

Justice Darke held that the retaining wall as constructed by our clients was not sufficient to support the neighbouring structures, in breach of their duties under s.177 of the Conveyancing Act 1919 (NSW).

His Honour also held that the Court would order that our clients carry out the proposed shotcreting works to strengthen the wall. In this regard, he acknowledged the plaintiffs' concerns about whether this would be sufficient to ensure that the wall was strong enough to adequately support the existing staircase structure; however, he also noted that the scope of works requested by the plaintiffs was excessive and unnecessary – particularly given that its cost would be around ten times the cost of the shotcreting works.

His Honour also noted that to require the removal of the retaining wall to remedy its minor encroachment would also be disproportionate and such an order would impose a very significant financial burden on our clients which would also be disproportionate.

In the circumstances, the outcome constituted a very good result for our clients after many years of stressful litigation with their neighbours. Further, since they had always offered to carry out the shotcreting works, our clients are also very well placed to obtain an order from the Court that the plaintiffs pay a substantial portion of their legal costs.

Queries

This was a very difficult and hard-fought case and Eakin McCaffery Cox achieved a highly successful outcome for our clients, with the assistance of the talented Rhea Thrift of counsel.

We provide expert and comprehensive advice about all types of construction and property issues and disputes, and have a proven track record of achieving optimal results for our clients.

If you have any queries, feel free to contact your usual **Eakin McCaffery Cox** contact, a member of the **Eakin McCaffery Cox** Construction Team, email to info@eakin.com.au or call (02) 9265 3000.



Linda Holland

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*The above was prepared by Linda Holland
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