Disputes between neighbours

Michael Barnett reviews a NSWLRC discussion paper on settling disputes between neighbours about noise, trees and sewer pipes.

The regulation of neighbourhood noise, trees and sewer pipes may sound a rather dull and insignificant legal topic compared to the drama of the criminal law or the machinations of corporations but it affects more people more directly and personally than most other aspects of the law. Moreover, sometimes tragically, or even farcically, a minor dispute between neighbours will escalate into a full scale feud. The NSWLRC has a reference to examine laws relating to neighbourhood relations, particularly in respect to access to adjoining property, easements, trees and noise. It has issued a discussion paper. (DP 22, April 1991). Submissions and comments are requested by 31 August 1991.

Noise

This is the most frequent cause for complaint. Noise control is dealt with primarily under the Noise Control Act 1975 (NSW). That Act prohibits offensive noise and regulates noise from certain premises and goods for sale. Offensive noise is defined as noise which because of its level, nature or quality, or the time at which it is made, or any other circumstances, is likely to affect another person by being harmful, offensive, or an unreasonable interference with his or her comfort or repose. The DP suggests the following reforms:

- a new definition of offensive noise to clarify the factors to be taken into account — the current one is linked too much to the broad concept of unreasonableness and should instead refer more specifically to matters such as intensity, frequency and duration.
- more immediate relief for aggrieved neighbours eg a power for the police to enter a vehicle with an alarm on.
- strict liability offences whereby the prosecution does not have to prove a mental element
- education programs to make people more sensitive to noise issues.

Recent developments

The Environmental Offences and Penalties (Amendment) Act 1990, as proclaimed on 1 July 1991, increases the penalties for offences committed under the Noise Control Act and introduces on- the-spot fines for certain contraventions. For the more serious offences the new maximum for a corporation is $30 000 and for a continuing offence $3 000 per day; for individuals it is a maximum of $15 000 and for a continuing offence $300 per day. For breaches of the regulations the maximum for a corporation is $20 000 and for an individual $10 000. The contravention of noise abatement orders or directions may now result in a penalty of $1 500. An on-the-spot fine can issue for offences including:

- failure to cause noise emission to cease in accordance with a noise direction order or direction ($200)
- permitting the use of a noisy intruder alarm on premises ($150)
- failure to ensure that a motor vehicle exhaust system is free of defects ($150)
- sounding, causing or allowing a motor vehicle alarm to sound continuously or intermittently for more than 90 seconds after the alarm has first sounded ($150).

A person who is issued with an on-the-spot fine can elect to have the matter dealt with by a court, but then runs the risk of facing a greater penalty and the inconvenience of court proceedings.

Trees

Generally there is no restriction on the type or number of trees a landowner may plant or allow to grow. Tree preservation orders made under the Environmental Planning and Assessment Act 1979 (NSW) only prohibit the cutting down or lopping of trees over a certain size without council permission. The two available remedies, nuisance and abatement, have defects. The former is costly, is generally only available once the damage has occurred, cannot compensate for future difficulties and the damage must be actual phsyical damage (obstruction of view or sunlight as such is not enough). Abatement is limited to allowing a landowner to sever encroaching branches and roots. In practice it is the person who severs who pays for the removal and the position at law is not settled. Abatement may in some cases exacerbate a dispute. The DP proposes:

- consideration of regulated garden planning (in similar fashion to building planning)
- requiring the owner of encroaching trees to pay the costs of their removal
- incorporating view and light as factors.

Access to maintain fixtures

There is no general right of entry upon neighbouring land to effect work upon one's own property. Indeed to enter without consent will be trespass. A landowner may grant an express right which can bind successors in title. This is known as an easement. An implied easement may also be allowed under the common law.— however this is rare under Torrens land. The DP suggests that a balance be struck whereby a right of access, if necessary, subject to conditions, should be available in certain circumstances on application to an appropriate Tribunal.

Access to maintain services

Some properties are serviced by sewerage or drainage pipes which pass through neighbouring land. In most of these cases there will be a valid easement allowing the owner of the serviced property entry to carry out any necessary repairs. However, if there is no easement the owner of the burdened property may not only refuse entry but also seek an order for the pipes' removal. The DP suggests a statutory right to have pipes traverse neighbouring land if circumstances require.

Easements for joint services

In the Sydney metropolitan area there are approximately 20,000 properties that rely on joint services. When these properties were built they were not connected to sewerage mains by individual pipes, but by means of a joint service. Similar issues arise as for maintaining services. A special difficulty is where a blockage occurs and only some of the owners are affected. There is no legal obligation for all the owners to contribute nor any guidelines to apportion costs. The DP opts for the Queensland model which has a statutory right of user including the right to access to land to place any utility up such as electricity, gas, drainage or sewerage. The courts can give effect to such a right after considering things such as whether it is reasonably necessary for the use of the applicant's land, the public interest and compensation to the servient land owner. In respect of costs the DP suggests something similar to the law on dividing fences which requires adjoining owners to contribute equally.

Dispute resolution

What distinguishes disputes between neighbours from many others is that the former often have ongoing relationships and the disagreement may have a personal or emotional element. The Community Justice Centres have noted that in many "fence disputes", the fence was a convenient way of punishing the other party for earlier real or imagined wrongs. The vast majority of neighbour disputes come before the Local Courts which is a relatively costly and time consuming method of dealing with them. Formal adjudication may also not address the underlying causes of the dispute and worse, may only exacerbate the bad relations. Accordingly the DP advocates mediation through the Community Justice Centres in the first instance but suggests that futher work is necessary to determine what significance factors, such as the nature of the dispute or the characteristics of the parties, should have on the use, if any, of mediation.

Comment

The DP offers a common sense and pragmatic approach to the legal issues involved. It sensibly highlights the role of education. However, on a more macro level, neighbour disputes are only one aspect of fundamental questions such as urban and rural planning, distribution of resources and amenities, aggression, alienation and the pursuit of perceived self — interest. In that sense reform of the technicalities of the current legal system, whilst useful, is unlikely to address the underlying causes. Nevertheless, mediation in particular offers much promise. The major task of its supporters will be to convince governments that it can save them money, even in the short term. □