

Another Dam Nuisance

Lord v McMahon [2015] NSWSC 1619

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Summary

On 24 November 2015, the Supreme Court of NSW confirmed established common law principles of nuisance and trespass while also taking into consideration that implied consent is a viable defence to a claim in nuisance and trespass.

Background/Facts

Heather Lord ('Lord') and Stephen McMahon ('McMahon') owned adjoining rural property at Mount Coolangatta on the South Coast of New South Wales.

In late 1999, McMahon was experiencing difficulty keeping his plantation of citrus trees properly watered during the drought period.

McMahon consulted with Lord's late husband regarding the prospect of expanding an existing dam on McMahon's property as the expansion would encroach on Lord's property. Mr Lord agreed to the expansion of the dam, which was constructed within two weeks. At no time during the works did Mr Lord voice any concern or intervene. The size of the dam's surface increased by 66 times and the dam wall encroached upon Lord's property by 20 metres as a result of the expansion.

Following Mr Lord's death in 2007, Lord took steps to have the dam encroachment removed from Lord's property on the grounds that her husband did not consent to the size of the construction and that the encroachment was interfering with her use of the property.

The Claims

Lord alleged the dam created a nuisance as it overflowed from time to time and also leaked occasionally, causing damage to her pasture. She also alleged that her husband did not agree to the ultimate size of the dam or the encroachment, which gave rise to an action in trespass.

McMahon issued a Cross-Summons asserting that Lord was estopped from denying the right to maintain the dam in its current state and sought that any damages awarded be offset against the damage caused by Lord's attempts to abate the alleged nuisance.

Nuisance

The Court noted that a plaintiff is required to establish that a third party's conduct caused substantial and unreasonable interference with the use of the land and that such interference must extend beyond a mere inconvenience.

The Court also considered whether Mr Lord had consented to the alleged nuisance, noting that consent is a defence to an action in nuisance.

It was accepted that during times of rain the dam overflowed and that Lord experienced a concentrated inundation of water from the dam that was unreasonable and which materially interfered with her enjoyment of the land and amounted to a nuisance.

Lord also claimed that in addition to the episodic inundation there was nuisance in the form of constant seepage. The Court dismissed this claim as there was no evidence to support the allegation that the seepage caused damage.

The Court also ordered that the relief for nuisance be conditional on Lord arranging for repairs in respect of the damage caused by her attempts to abate the nuisance.

Trespass

McMahon argued that Mr Lord's conduct in failing to speak up amounted to implied consent for him to proceed.

The parties agreed the dam wall encroached on Lord's property by 20 metres.

The Court referred to the need to establish that there was some unjustified entry onto property without

an occupier's consent as an action in trespass can be defended if the occupier gave leave or a licence to enter the property.

The Court found that Mr Lord's conduct in failing to 'draw a line' and allowing McMahon to expand the size of the dam and encroach upon his land amounted to the granting of an implied licence to McMahon to continue what he was doing.

Implications

This case serves as a reminder to land owners and their insurers of the following:

1. An action in nuisance requires evidence of a 'substantial and unreasonable' interference with a party's enjoyment of their property. It is necessary to establish that the interference extends beyond a mere inconvenience or annoyance in order to be successful in a claim for nuisance.
2. It is important to consider whether an insured might have given implied or actual consent to a nuisance or trespass when subrogating an insurer's rights to recover against a third party, as the giving of consent is a viable defence to a claim in nuisance or trespass.
3. Steps taken by a party to abate a nuisance may cause damage and result in a discount of relief otherwise available to that party.

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