

Building Encroachment

Googoorewon Pty Ltd v Amatek Ltd (1991) 25 NSWLR 330

In *Googoorewon Pty Ltd v Amatek Ltd*, the New South Wales Court of Appeal has recently decided that an encroachment by a building as that term is used in the Encroachment of Building Act 1992 (NSW), includes a building constructed wholly on the land of an adjoining owner as well as a building constructed (straddling) partly on the land of the encroaching owner and partly on the land of the adjoining owner.

The Act gives to the court wide ranging powers to make such orders as the court deems "just". Those orders include an adjustment of the boundary line and the payment of compensation or the removal of the encroaching building.

In the early 1980's Compton Park Pty Ltd subdivided a large tract of land near Bowral in rural New South Wales. Three lots (including Lot 18) of the subdivided land were purchased by P on behalf of Googoorewon Pty Ltd ("Googoorewon"). During negotiations for the purchase of those three lots S, on behalf of Compton Park Pty Ltd advised P of the location of the boundary between Lot 18 and Lot 17. Lot 17 was subsequently purchased by Amatek Pty Ltd ("Amatek"). Subsequent to the purchase, Googoorewon then constructed a plant nursery including potting shed, concrete water tank and irrigation pipes.

Amatek's purchase of Lot 17 was part of a large scale purchase of land in the immediate vicinity with the intended purpose of creating a gravel quarry. Googoorewon was a vocal opponent of the proposed quarry development. A survey was prepared on behalf of Amatek of the boundary between Lot 17 and Lot 18 which disclosed that Googoorewon's nursery had wholly been constructed upon Lot 17. Googoorewon then commenced proceedings in the Supreme Court seeking orders in accordance with the Encroachment of Building Act. The trial judge held that the court had no jurisdiction as the building was not an encroachment as it was wholly upon the land of Amatek. It was ClarkeJA's view that the definition of the word "encroachment" was to be determined by policy considerations, namely the mischief addressed by the Act. In summary, the purpose of the legislation was to allow the court to deal with situations that arose when persons mistook the location of boundaries and erected buildings on the land of others. In addressing this mischief, it must have been the legislature's intention that the Act deal with encroachments wholly on the land of another.

This reasoning was also adopted by MahoneyJA. In his opinion, to adopt a narrow definition of encroachment imposed an artificial restriction on the type of encroachments that parliament intended to be dealt with by the Act.

It had been previously widely understood that the Act

only applied to those encroachments which "straddled" boundary lines. As a result of this decision, a whole new class of encroaching buildings are now the subject of the wide discretionary orders available to the court under the Act.

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