Crossing the Boundary: A Cautionary to Developers

Case Note: Kalantzis v Brown; Brown v Kalantzis [2026] NSWCA 17

Executive Summary

The NSW Court of Appeal has confirmed that developers and their associated family-run building entities face significant personal liability exposure when excavation works encroach on neighbouring land. This was held to be the case even where the defendant claims ignorance of the boundary location. The Court upheld findings of trespass and negligence against multiple members of the neighbouring family arising from excavation works that caused the collapse of the owner's driveway.

Critically, the Court allowed the cross-appeal and held that, because the trespass was intentional, the proportionate liability regime under Part 4 of the Civil Liability Act 2002 (NSW) does not apply. As a result, each of the appellants are individually liable for the full quantum of damages not merely their apportioned share.

Facts

Edmund Brown and his partner Irena Saric (the **Owners**) owned and occupied a residential property in Gosford. Next door, Etna Developments Pty Ltd (the **Developer**) engaged Nutek Constructions Pty Ltd (the **Builder**) to construct a 55-unit apartment building with an underground carpark on the adjoining development site. The Kalantzis family controlled the entire enterprise Frank Kalantzis was the builder's sole director, his father Kon and uncle Nick were its de facto directors and Alex (also Frank's brother) worked on-site as a subcontractor through his own company (together the Neighbours).

Geotechnical reports had specifically recommended that CFA (contiguous flight auger) piles be installed along the western boundary prior to any deep excavation, to prevent ground collapse. These recommendations were not followed. As excavation works progressed from at least 2017 through to 2023 the Owner's driveway collapsed into the earth, cutting off their street access and leaving their vehicles inaccessible. The Owners alleged trespass and negligence and claimed the full cost of rectification.

Procedural History

At first instance, the Court found the Neighbours, together with the developer, liable for both trespass and negligence. The Owners were awarded $2,172,232 in damages, assessed by reference to rectification costs rather than the lower diminution in value of the land ($745,000), and awarded an additional $50,000 in general damages for trespass. Liability was apportioned 70% (Frank, Nick and Alex jointly and severally) and 30% (Kon), on the basis that the claims were apportionable under the Civil Liability Act.

Court of Appeal Decision

The Court of Appeal dismissed Alex's and Nick's appeals and allowed the Owner's cross-appeal in alleging that the primary judge erred in finding that the claim in trespass was apportionable.

The Court confirmed that trespass does not require a defendant to have known where the boundary was located. The relevant test is whether the defendant intended to excavate where they in fact excavated and that the excavation encroached below the surface of the neighbouring land. The Neighbours were found to have done exactly that entry below the surface at any depth constituted trespass and removal of soil at a location near the boundary contributed to the driveway collapse. Expert evidence was not necessary to draw that inference from the sequence of events.

The Court upheld the award of rectification costs ($2,172,232) over the diminution in value ($745,000). Because the Neighbours had never put to the Owners that they did not intend to rectify the property, it was open to the primary judge to treat that forensic omission as significant consistent with the principle in Tabcorp Holdings Ltd v Bowen Investments Pty Ltd that rectification costs are the appropriate measure where a plaintiff has a legitimate interest in performance.[1]

The Court also held that where trespass is established as an intentional tort, proportionate liability does not apply.[2] The Owners argued from the outset that trespass was intentional, and the primary judge had so found. It was therefore an error in apportioning liability. Each of Alex and Nick are individually liable for the whole of the Owners damages. The Court was unable to make the same order against Frank and Kon as they were not parties to the cross-appeal.

Key Takeaways

Trespass does not require knowledge of the boundary. Developers and their contractors cannot escape liability in trespass by claiming they did not know where the neighbouring boundary was. If they intended to excavate where they excavated, and that work crossed the boundary even below ground, trespass is established.

Intentional trespass takes the claim outside the proportionate liability regime. Where a claim in trespass is made out as an intentional tort, Part 4 of the Civil Liability Act does not apply. Each tortfeasor is liable for the whole of the plaintiff's loss, not merely their proportionate share.

Pleading strategy matters. The plaintiff's decision to pursue trespass as an intentional tort (alongside negligence) proved decisive. Had the claim been framed only in negligence, apportionment would have applied and the recovery per defendant would have been significantly reduced.

Proportionate liability defences must be carefully pleaded. A defendant who fails to identify a particular co-defendant as a concurrent wrongdoer in their defence cannot rely on that co-defendant's share on appeal. The Court will hold parties to their pleaded case.

More information

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1. Tabcorp Holdings Ltd v Bowen Investments Pty Ltd (2009) 236 CLR 272.
2. Civil Liability Act 2002 (NSW) s 35.