Negligence is a nuisance!

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CONTRACTORS HAVE ALWAYS needed to be aware and take steps to avoid the risks of causing harm to land and property belonging to others.

The foundations required to support new technologies (for instance) and the incidents of growth currently driving the need for new infrastructure in many of our cities and regions, means that there is an ever-increasing range of circumstances that have the potential for such risk.Here we provide a brief overview of the two main bases of tortious (rather than contractual) liability for contractors who damage land and property in the course of their work: nuisance and negligence.

Nuisance – general principles

A nuisance is an unreasonable interference with a person's right to use or enjoy land in which they have an interest. It can take many forms, from emissions of smells, fumes, noise, to removal of support of land, and the escape of water or other substances, to name a few.

Liability for a nuisance is 'strict'. This means that the creator of the problem is liable for the effects it has on neighbours, without those neighbours having to prove that the nuisance was caused by any fault of the creator, provided that the damage was a predictable consequence of the work carried out. This is because the underlying principle in nuisance actions relates to risk allocation, ie, the party who creates the relevant risk (however unintentionally), and has control over the work being done, should bear the risk that his actions may affect adjoining land.

It follows that if a contractor carries out earthworks which have the effect (sometimes many years later) of causing subsidence of neighbouring land, the contractor can be held liable for any damage caused, even if the earthworks were undertaken in accordance with the acceptable industry standards at the time. Further, the fact that the work was permitted for instance by resource consent, is not necessarily a defence to an action in nuisance.

The court of appeal case of Brouwers v Street illustrates the application of the strict liability principle. The case concerned a landslip in Taranaki. The slip occurred mainly within a property owned by Street, but it also encroached upon the boundary of the adjoining property owned by Brouwers. The key issue was whether a drainage system that Street had installed caused the landslip, or whether it was caused by the forces of nature.

The court confirmed that the focus was on the removal of support through non-natural means (the installation of the drainage system) and that such removal can be accidental, ie, not negligent.

However, it held that Street had constructed the drainage system on his land and that he had thereby created the potential nuisance. This was because he had control over the drainage system and as a failure of a component of the drainage system was the cause of the damage to the land owned by the Brouwers, proof of fault was unnecessary.

Negligence

A negligence action can also follow from similar or the same circumstances as a claim in nuisance. The difference is that while a nuisance claim focuses on the right of the affected land owner, a negligence claim focuses on the behaviour of the party said to be responsible. In a negligence claim, it must be proven that the company or individual blamed was at fault, for example by failing to follow the accepted industry standards or failing to take reasonable care when carrying out their work and, that had the standards been followed the damage complained of would have been avoided.

While the contractual terms can assist in determining liability, the terms do not necessarily serve to protect a contractor for a claim in negligence, particularly if the claim is brought by a third party not involved in the contract. In the case of T&T Drainage Ltd v Rennell , T&T had a contract on a charge up basis with the owners of a rural property it was developing as an equestrian centre. T&T agreed to undertake various works, including building an arena and stables and associated drainage and earthworks. However, T&T left the site after its invoices went unpaid and without completing the work it was engaged to carry out.

During the course of its ground work it had brought large quantities of metal, rocks and stones on to the land which had spilled on to the owners' paddocks, rendering them unsuitable for the keeping and training of horses. Among other things, the owners subsequently claimed against T&T for the cost of remedying damage caused by the stones and other materials to the property rendering it unsuitable for horses.

T&T argued that the spillage was a natural consequence of the work it carried out, and that a degree of spillage was both unavoidable and to be expected, given the volume of metal transported across the property. It also argued it was entitled under its contract with the owners to charge them for the cost of its removal. However, the high court had no problem in implying into the contract that T&T was under an obligation to reinstate the property so as to bring it back to a condition similar to what it was when the works began. The court further held that T&T was liable to the owners on the basis that it had been negligent and should have exercised greater care when carrying out the work

Caution required

Against the above, when taking on projects which may involve or affect the land or property of others, contractors should be mindful of the need to: identify who might be affected by the work and the associated risks of that work; establish what the usual industry practices are for that type of work; and ensure that appropriate steps are taken to avoid risk or harm.

Upfront proper care and consideration to the measures required for any particular project, particularly one that may extend beyond the scope or nature of work typically undertaken by the contractor, may not eliminate risk altogether, but will go a long way to minimising the potential for harm and the liability that may follow.

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