BREAK FAST INVESTMENTS PTY LTD v PCH MELBOURNE PTY LTD

COURT OF APPEAL

ASHLEY and DODDS-STREETON JJA and CAVANOUGH AJA

29 November, 21 December 2007

[2007] VSCA 311

Tort — Trespass — Airspace — Encroachment — Projection from building — Remedies — Prima facie entitlement to mandatory injunction — Equitable damages in lieu of injunction — Discretion — Oppression test — Disproportionate hardship to trespasser — *Shelfer* guiding rule — Office building — Wall cladding protruding into airspace of adjoining property — Potential interference with plaintiff's ordinary future use of land — Defendant proffering conditional undertakings to remove cladding — Adequacy of undertakings — Defendant failing to establish disproportionate hardship.

In 2001 or 2002, BFI Pty Ltd ("BFI") refurbished its 12 storey office building in Wellington Parade, East Melbourne by attaching metal cladding to sections of the western face of the building. PCHM Pty Ltd ("PCHM") was the owner of the adjoining properties on which the Melbourne Hilton Hotel and the historic two-storey MCG Hotel were situated. The MCG Hotel was built on the eastern boundary with the BFI property. In 2005, after becoming aware that the cladding projected between 3 and 6 cm into its airspace, and at which time it was seeking approval for a major redevelopment of part of its property, PCHM applied for a mandatory injunction requiring BFI to remove the cladding which would cost in the order of $300,000. Prior to trial, the trespasser made a conditional offer and undertaking to remove the cladding. Smith J granted the injunction and BFI appealed against the judge's refusal to award damages in lieu of the injunction.

Held, dismissing the appeal: (1) In most cases, a landowner would be entitled to an injunction to restrain a trespass. In exceptional cases of demonstrated disproportionate hardship constituting oppression of the trespasser, equitable damages were available as a discretionary remedy. By way of guidance, a good working rule was that (a) if the injury to the landowner's legal rights was small, (b) and was one which was capable of being estimated in money, (c) and was one which could be adequately compensated by a small money payment, (d) and the case was one in which it would be oppressive to the trespasser to grant an injunction, then damages in substitution for an injunction might be given as a matter of discretion. The working rule did not, however, involve a balancing in which the potential harms to parties were accorded equal status and weighed as in a conventional interlocutory injunction application. [36], [39], [40], [46]–[49], [120].

> *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490; *Jaggard v Sawyer* [1995] 2 All ER 189; [1995] 1 WLR 269 applied.
>
> *Beswicke v Alner* [1926] VLR 72; *Harrow LBC v Donohue* [1995] 1 EGLR 257 distinguished.
>
> *Pettey v Parsons* [1914] 1 Ch 704 considered.
>
> *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334; *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 All ER 483; [1970] 1 WLR 411; *Bendal Pty Ltd v Mirvac Project Pty Ltd* (1991) 23 NSWLR 464 referred to.

(2) In the exercise of his discretion whether or not to award damages in lieu of an injunction for trespass, the trial judge had not erred in considering the alleged hardship

caused to the trespasser by a requirement to remove the cladding. In particular, the trespasser's offer and undertaking were wholly inadequate to remove the potential interference with the landowner's ordinary future use of the land. [104]–[133].

Decision of Smith J [2007] VSC 87 affirmed.

Appeal

This was an appeal by the defendant against a decision of Smith J granting a mandatory injunction requiring the defendant to remove cladding attached to part of an office building and which encroached on the airspace over the plaintiff's adjoining property. The facts are stated in the judgment of Dodds-Streeton JA.

P W Collinson SC with *D F Hyde* for the appellant.

S R Horgan for the respondent.

Cur adv vult.

1 **Ashley JA.** I have had the advantage of reading in draft the reasons for judgment of Dodds-Streeton JA. I consider, for the reasons given by her Honour, that the appeal should be dismissed.

Dodds-Streeton JA.

Introduction

2 In this appeal, the appellant, Break Fast Investments Pty Ltd ("Break Fast") appeals against the decision of a judge of the Trial Division to grant a mandatory injunction requiring it to remove metal cladding attached to parts of the western face of its 12 storey building in Wellington Pde, East Melbourne. The metal cladding extends between 3 and 6 cm into the airspace over the respondent's adjoining property. The primary judge found that the encroachment was not merely trivial and constituted a trespass. The appellant appeals, however, only in relation to his Honour's refusal to award damages in lieu of a mandatory injunction to remove the cladding, in circumstances where, inter alia, the appellant at trial offered an undertaking to remove portions of the cladding if the respondent constructed an approved development of its land, and to pay damages for the balance of the cladding. The appellant also offered a more extensive amended undertaking after judgment was handed down, and before us sought to rely on a further amended undertaking.

Facts

3 Break Fast and the respondent, PCH Melbourne Pty Ltd ("PCH"), are registered proprietors of adjoining properties in Wellington Pde, East Melbourne. PCH is the proprietor of the property at 178 Wellington Pde, on which both the Hilton Hotel and the MCG Hotel are situated. The MCG Hotel is an historic two storey building subject to heritage protection, which occupies a portion of the front of PCH's land and is built on the (eastern) boundary with Break Fast's property. A portion of PCH's land behind the MCG Hotel and adjacent to the boundary with Break Fast's land is vacant. Break Fast is the proprietor of the adjoining property to the east, 170–176 ("176") Wellington Parade, on which, since 1976, a 12 storey office building has been situated, for the most part along the common boundary.

4 In 2001 or 2002, Break Fast attached metal cladding to sections of the western face of its building along the top and at the northern and southern ends. PCH was aware of the affixing of the cladding and expressed the view that the proposed refurbishment of Break Fast's building would be a major positive contribution to the area. It is not suggested, however, that PCH was, at the time, aware that the cladding would protrude into its airspace. Break Fast also attached or permitted the attachment of signage to the top of its building's south western face, made up of letters cut out of the cladding with the resulting openings illuminated. The signage was the subject of an independent dispute between the parties which was settled. The signage, although cut out of the cladding, is now contained within Break Fast's boundary.

5 In December 2004, PCH obtained an amendment to the applicable Planning Scheme and began the process of seeking a planning permit to develop its land further by constructing a 14 or 15 storey apartment building. The proposed development would extend to PCH's eastern boundary.

6 There was evidence that a panel of the cladding fell off Break Fast's building at some point. We were informed that a portion of the cladding was recently damaged by fire caused by an electrical fault associated with the illuminated sign.

The judgment below

7 At trial, PCH alleged that the cladding projected up to 60 mm into its airspace. Break Fast denied that the cladding constituted a trespass, contending that there was no encroachment, or alternatively, that its extent could not be established. Break Fast relied on s 272 of the Property Law Act 1958 which implies the phrase "a little more or less" into descriptions of boundary dimensions on title documents. Break Fast also argued that any encroachment was trifling and therefore did not constitute a trespass.

8 The parties disputed the location of the title boundary between their properties, on which the extent of any encroachment depended. Break Fast contended that the title boundary was located 20 mm to the west of the eastern wall of the MCG Hotel at site level and the western wall of its building. PCH, however, contended that the boundary coincided at site level with the eastern wall of the MCG Hotel and the western wall of Break Fast's building.

9 The different identification of the boundary line arose from the adoption of different starting points and the application of different land dimensions by the parties' respective expert witnesses. The trial judge preferred the evidence of PCH's expert, Mr Nicholson, who, in his view, conducted a more thorough survey and correctly accorded primacy to monumentation over later survey measurements, in contrast to Break Fast's expert witness, Mr Norman. His Honour also observed that there were indications of partiality in Mr Norman's approach, as he made a serious criticism of Mr Nicholson's survey, based on a misinterpretation. Further, Break Fast did not permit Mr Norman to sign a joint experts' report.

10 His Honour accepted that, on the basis that the boundary was as identified by PCH's expert, the cladding extended over PCH's land by between 5 and 6 cm into the airspace at various points. He rejected Break Fast's contention that s 272 of the Property Law Act permitted a tolerance of up to 5 cm, more or less, in fixing boundaries, so that even on the basis of PCH's expert evidence of a 6 cm protrusion, the encroachment was, at most, a trifling 1 cm, which did not constitute a trespass or warrant the grant of an injunction.

11 He considered that s 272 of the Property Law Act merely introduced flexibility into the dimensions shown on title documents, so that minor discrepancies between them and the monumentation could not give rise to disputation, and monumentation would prevail. He observed that s 272 did not introduce margins for error when it referred to the actual title boundary "as found by admeasurement on the ground". As such, it did not apply to the determination of the extent of the cladding's encroachment over the actual title boundary.

12 His Honour held that the encroachment constituted a trespass, because it intruded into airspace available for the ordinary use of the respondent's land. He rejected Break Fast's argument that the encroachment was trifling. He concluded that because the encroachment prevented PCH from building to the boundary on a continuing basis, when all the panels were considered "in combination and regard is had to the height and length of the interference, it seems to me that, on the objective evidence, the interference is not trifling".[1]

13 His conclusion that the encroachment was not trifling was fortified by the evidence of PCH's Victorian Development Director, Mr Kolomanski, who testified that, partly because of the cladding, he stood down the respondent's entire project team to avoid waste in production of documents and negotiations on the design and construction contract. Mr Kolomanski also testified that the cladding would necessitate an occupational health and safety inquiry, as a panel had fallen off. Further, PCH's development design detail would be "rather strange" if the cladding remained, which could detract from the design and affect value.

14 The judge concluded:[2]

> Having regard to the objective evidence and the evidence of Mr Kolomanski as to the practical consequences of the panels, it is clear that the encroachment is not trifling. It creates major issues for anyone wishing to construct a building up to the boundary line of a height similar to or greater than that of the defendant's building.
>
> This conclusion applies without qualification to any proposed building adjacent to the cladding on the northern end of the western wall of the defendant's building and along its top. The plaintiff is wishing to use the land to build a structure that will in fact be built along the boundary and it wishes to use the air space for that purpose. This is an ordinary use of the land. The encroachment is not trivial and plainly constitutes a trespass. I do not understand the defendant to be seriously suggesting otherwise in the event I find that the encroachment is not trifling.

15 The trial judge also rejected Break Fast's contention that, due to the heritage status of the MCG Hotel, no realistic use could be made of the airspace above it, so that the encroachment by the majority of the cladding at the southern end of the western wall did not constitute a trespass. His Honour recognised that currently the amendment under the planning scheme permitted development only well to the north of the airspace in question, and that there were obstacles to any future use of airspace. He noted, however, that there were a number of possible options and the proposed development was uncertain, because the application for a permit was not yet resolved.

---

1. *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 at [37] per Smith J.
2. At [39]–[40].

16 His Honour concluded:[3]

> In my view building in the air space above the MCG Hotel and up to the eastern boundary of 178 Wellington Parade is an example of an ordinary use of the land particularly in that area. Subject to planning permission, any owner would be entitled to regard all the land, including any part of it along the entire eastern boundary, as land the ownership of which entitled him or her to use in any building development. The fact that the building on the land immediately below the cladding has a heritage listing, and that, therefore, that land may not ultimately be available for use in any development, does not, in my view, detract from the proposition that using that land for the proposed development is an ordinary use of the land which an owner may see fit to undertake. If it was clear that the presence of the MCG Hotel would prevent the owner of the land from *ever* erecting any structures above it adjacent to any of the cladding, the situation might be different. But the Melbourne City Council has argued that there should be a zero set-back from Wellington Parade. This would require demolition of the MCG Hotel and highlights the fact that a building development abutting on to the eastern boundary of the land at the southern end of the land is an ordinary use and a realistic one notwithstanding that it would involve the demolition of the heritage listed MCG Hotel. I note that the heritage listing is not an insurmountable obstacle. It arose from social not architectural features. As Mr Kolomanski put it, the heritage listing arose not from the fabric of the building but from the social matter connected to the site. It is believed that the rules for Australian Rules Football were written in or about 1859 or 1860 on the premises of the Hotel. Mr Kolomanski said that their advice is that if they construct something sympathetic to the social issue of the site, then it will be acceptable. I accept his evidence about how that could be done. [Emphasis in original.]

17 The appellant argued that damages should be awarded in lieu of a permanent mandatory injunction because the encroachment was trivial in nature, the plaintiff had disregarded it for five years and was not really concerned about the intrusion into the airspace, but rather about the effect of the sign on the amenity of the proposed penthouses.

18 His Honour rejected those contentions, finding that the trespass was not trivial, that PCH only became aware of the encroachment in 2005 and that the evidence did not indicate that the signage was PCH's major concern.

19 Break Fast also argued that two offers it had made to remove a part of the cladding were relevant to, and supported, an award of damages instead of an injunction. The primary judge, by implication, accepted that the offers were relevant, but did not consider that they justified an award of damages in lieu of an injunction. He observed that Break Fast made an open offer on 31 October 2006 (four months after the proceeding was commenced) to remove cladding from the development commencement mark only, at its own cost. It made no offer as to costs or damages, and there was no suggestion that the removal would involve hardship to Break Fast. Break Fast had subsequently put forward a more complicated offer and proposal, showing that it sought "to retain as much of the cladding as may be possible depending on the location of the ultimate apartment that is approved".

20 The trial judge accepted that the open offer should be viewed in the light of Break Fast's associated conduct. PCH had made various attempts to contact Break Fast from 8 December 2005 onwards, but received a response only on 18 January 2006. PCH's subsequent attempts to communicate with Break Fast

3. At [45].

met with a lack of, or an unsatisfactory, response, until February 2006, when Break Fast proposed to obtain a survey. It did not do so, however, until August 2006. The survey confirmed some encroachment.

21 His Honour was critical of Break Fast's intransigent attitude, which blocked an attempt to obtain a joint survey report on 13 October 2006. He also noted that Break Fast raised the alleged surveying error by Mr Nicholson late in the proceedings. The judge summed up as follows:[4]

> The defendant plainly refused to face up to the problem and made some half-hearted attempts to find a solution by way of settlement — for example, the attempt to suggest that a deal might be struck on the basis that the sign application did not go ahead. They allowed the matter to drag on and did nothing notwithstanding that by February 2006 the defendant knew that the plaintiff then had two surveyors who had identified encroachment by the cladding of up to six centimetres. If it had looked at its as built drawings in respect of the cladding, it would have observed that the cladding would overhang the plaintiff's property if the western side of its building was on the boundary. What motivated the defendant's behaviour was in part the loss of the improvement to the appearance of the building that would be involved if the cladding was removed. This fact is relied upon by the defendant as part of the case for saying that removal would cause undue hardship. I turn to that issue.

22 The primary judge accepted Break Fast's submission that it would cost in the order of $300,000 to remove the cladding and the resulting improved appearance of Break Fast's building would be lost.

23 Break Fast submitted that it would suffer hardship if ordered to remove the cladding. It acknowledged that it gained a commercial benefit from the improved appearance, resulting from the cladding encroaching upon PCH's airspace. It argued, however, that the fate of the cladding was trivial to the plaintiff, but of considerable significance to it. The judge adopted the observation of Hodgson J in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* ("*LJP Investments*"),[5] that "as a general principle a person should not be permitted to use the land of another for considerable commercial gain for himself simply because his use of the other person's land causes no significant damage to that land".[6]

24 His Honour observed that, although "[c]onsideration by the defendant's representatives of the 'as built' drawing provided to the owners as an accurate record of what had been constructed would have drawn their attention to the probable intrusion", there was insufficient evidence to support a finding that they knowingly brought about the encroachment. It was nevertheless relevant to the issue of hardship that Break Fast "only has itself to blame for the situation in which it finds itself".

25 His Honour concluded:[7]

> On the authorities, the plaintiff has a strong *prima facie* entitlement to the injunction sought. The encroachment into the air space over the plaintiff's land is a continuing one and interferes in the actual and potential ordinary use of the plaintiff's land. The encroachment confers a commercial benefit on the defendant. There are no special countervailing considerations. There has been no relevant delay by the plaintiff. The

4. At [57].
5. (1989) 24 NSWLR 490.
6. At [60].
7. At [62].

defendant has made no serious offers to resolve the issues. It has not offered to pay costs and made no reasonable offer of damages. Its latest offer will involve more complications, delays and costs. The history of the matter makes the proposal of undertakings an unrealistic one. True there will be hardship for the defendant if the injunction sought is granted. But, assuming the defendant did not know that the cladding encroached, the fact that it would encroach and did so was easily ascertainable by it before and after its erection of the building and the placement of the cladding. It may be fairly described as having gone ahead in negligent disregard of its neighbour's rights. The awarding of damages would be inappropriate in this case because it would have the result of enabling the defendant to acquire from the plaintiff against its will the legal right to use the air space.

Grounds of appeal

26 The amended notice of appeal sets out the following grounds:

1. The learned trial judge erred in preferring the evidence of the Respondent's surveying expert (Mr Nicholson) to the evidence of the Appellant's surveying expert (Mr Norman) with respect to the location of the title boundary the subject of the proceeding to the extent that the learned trial judge ought to have found upon the whole of the evidence that the cladding affixed to the western boundary of the Appellant's land encroached into the Respondent's air space by a maximum of four (4) centimetres (only), rather than by up to six (6) centimetres.
2. The learned trial judge erred in finding that section 272 of the *Property Law Act* 1958 (Vic) did not provide for a "margin of error" of up to five (5) centimetres in the determination of the position of the title boundary between the Appellant's land and the Respondent's land.
3. The learned trial judge erred in finding that the encroachment of the cladding into the Respondent's airspace (as found by his Honour) was not, in all of the circumstances:
   (a) a "trifling" encroachment;
   (b) an encroachment which attracted the doctrine "*de minimis non curat lex*".
4. The learned trial judge, in finding as set out at ground (3) above, erred in giving undue weight to the evidence of the Respondent's witness Mr Kolomanski with respect to:
   (a) the standing down of the Respondent's entire project team;
   (b) the commencement of the negotiations on the design & construct contract;
   (c) occupational health & safety concerns;
   (d) water-proofing problems;

   in circumstances where the Appellant had undertaken to remove all cladding affixed to its building at its own expense in any area where the Respondent would construct to the boundary line.

4A. The learned trial judge erred in finding that:
   (a) the directors of the Appellant either knew or should have reasonably known that the cladding encroached into the Respondent's airspace by reference to the "as-built drawings"; and
   (b) the Melbourne City Council either sought or were in favour of a "zero-setback" option to Wellington Parade with respect to the Respondent's intended development on its land.

5. The learned trial judge erred in finding that the affixing of the cladding immediately above the MCG Hotel on the Respondent's land constituted a trespass at law by reason of the fact that the relevant airspace immediately

above the MCG Hotel was land reasonably capable of being put to the Respondent's use as an ordinary user of that land.

6. The learned trial judge erred in all of the circumstances in granting in the exercise of his discretion a permanent mandatory injunction in favour of the Respondent compelling the removal of the cladding rather than making an award of damages in favour of the Respondent by reason of the found encroachment, together with consequential orders.

The appellant's principal contentions

27 The appellant abandoned grounds 1 and 2 of the amended notice of appeal prior to the hearing of the appeal. Further, some grounds of appeal were not addressed in submissions. Before us, the appellant pursued, as the sole substantive ground, the contention that the trial judge erred in refusing to award damages instead of granting a mandatory injunction. The remaining grounds of appeal were effectively subsumed by the primary complaint. The appellant submitted that, in exercising his discretion, the trial judge "acted on wrong principles, failed to give weight to relevant considerations, attached weight to irrelevant considerations and made some erroneous factual findings".

28 The appellant acknowledged that, prima facie, a landowner is entitled to an injunction to restrain trespass, but contended that, in the present case, damages should have been awarded instead, pursuant to "the good working rule" enunciated in *Shelfer v City of London Electric Lighting Co*[8] *("Shelfer")*, which was approved and applied by the Court of Appeal in *Jaggard v Sawyer* ("*Jaggard*")[9] and by Sargant J in *Pettey v Parsons*,[10] where, although trespass was established in each case, an injunction was refused.

29 The appellant argued that the authoritative statement of principles in *Jaggard* and the approach of Sargant J in *Pettey v Parsons* were to be preferred to those of certain conflicting single instance decisions, including *LJP Investments*, on which the trial judge principally relied.

30 The appellant contended that, although the trial judge referred to the principles in *Shelfer*, he did not recognise that the facts of the case attracted their application or analyse the issues in the case in accordance with them.

31 The appellant submitted that, contrary to the caveat in *Jaggard*, the primary judge, as demonstrated by his observation in [62], erroneously ordered an injunction on the ground that to do otherwise would permit the forced expropriation of the non-consenting plaintiff's property at the behest of the trespasser.

The respondent's principal contentions

32 The respondent argued that the appellant's approach subjugated the prima facie rule and elevated the exceptions. Counsel contended that the decision whether to grant damages in lieu of an injunction is not a "conventional discretionary case" and that the trial judge correctly adopted the approach of Hodgson J in *LJP Investments*.

---

8. [1895] 1 Ch 287.
9. [1995] 2 All ER 189; [1995] 1 WLR 269.
10. [1914] 1 Ch 704.

33 The respondent submitted that the present case involved a permanent, as distinct from a transient, intrusion. The nature of the decision to award an injunction or damages was discretionary and a number of considerations applied. In the present case, the four tests set out in *Shelfer* were not satisfied on the evidence.

34 Counsel contended that there was no requirement for a balancing of the respective harms to the parties, but if there were, an injunction was justified, because the respondent might seek to build over the MCG Hotel by some means, and a large amount of its airspace, taken altogether, was involved.

35 The respondent also submitted that, where the encroachment was permanent, an award of damages in lieu would amount to a court-approved acquisition of property, against the consent and interests of the registered proprietor. It relied in that context on *Beswicke v Alner*[11] and *Harrow London Borough Council v Donohue*.[12]

Relevant legal principles

36 According to longstanding equitable principle, the breach or invasion of a proprietary right, or a sufficient risk thereof, founded a prima facie entitlement to an injunction or specific performance. The unavailability of equitable damages prior to Lord Cairns' Act entrenched that principle.

37 The nineteenth century decision in *Shelfer* emerged as the leading authority on the correct approach to the then relatively new statutory jurisdiction under Lord Cairns' Act to award damages in equity for, inter alia, trespass, including compensation for both past and future conduct. Prior to Lord Cairns' Act, Courts of Chancery, although on the better view inherently empowered to award damages, as a matter of practice and principle ordinarily did not do so. Common law courts could award damages, but were limited to compensation for past wrongs, so that repeated or continued wrongs would require a new proceeding.[13]

38 Lord Cairns' Act thus provided an express statutory basis for an award of equitable damages which was not limited to cases where damages could properly be awarded at law or as compensation for past injury. That development introduced the possibility of damages for, inter alia, trespass to freehold land, which could represent compensation "once and for all", in circumstances where the trespass was permanent or continuing, thus obviating repeated applications for relief.

39 In *Shelfer*, the Court of Appeal made plain that the unprecedented statutory power to award damages in equity did not introduce damages as the standard remedy for trespass, whereby wrongful acts could routinely be sanctioned by the effective "purchase" of the landowners' rights. Rather, it was necessary to make out a special case for the court to exercise its jurisdiction to award damages under Lord Cairns' Act. Although the Court of Appeal emphasised that an injunction remained the prima facie remedy for trespass, AL Smith LJ articulated, in "a good working rule", guidance as to when, exceptionally, damages would be appropriate.

---

11. [1926] VLR 72.
12. [1995] 1 EGLR 257.
13. Spry, *The Principles of Equitable Remedies*, 7th ed, (2007), pp 625–6.

40 His Lordship emphasised that, according to the "well known rule", when a plaintiff's legal right was invaded, "he is prima facie entitled to an injunction". The rule could be relaxed when the plaintiff had disentitled himself to an injunction (by conduct such as delay) or where the four conditions of the good working rule were satisfied. The four criteria applied cumulatively. AL Smith LJ stated:[14]

> Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.
>
> In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is *primâ facie* entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section.
>
> In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.
>
> In my opinion, it may be stated as a good working rule that —
>
> (1) If the injury to the plaintiff's legal rights is small,
> (2) And is one which is capable of being estimated in money,
> (3) And is one which can be adequately compensated by a small money payment,
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction:
>
> then damages in substitution for an injunction may be given.
>
> There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction.
>
> It is impossible to lay down any rule as to what, under the differing circumstances of each case, constitutes either a small injury, or one that can be estimated in money, or what is a small money payment, or an adequate compensation, or what would be oppressive to the defendant. This must be left to the good sense of the tribunal which deals with each case as it comes up for adjudication. For instance, an injury to the plaintiff's legal right to light to a window in a cottage represented by £15 might well be held to be not small but considerable; whereas a similar injury to a warehouse or other large building represented by ten times that amount might be held to be inconsiderable. Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception. In the present case it appears to me that the injury to the Plaintiff is certainly not small, nor is it in my judgment capable of being estimated in money, or of being adequately compensated by a small money payment.

41 His Lordship recognised that, although each case must be decided upon its own facts, in order to escape the "well known rule" of prima facie entitlement to an injunction, it must be brought within the exception. The satisfaction of the four criteria did not guarantee an award of damages, because, for example, the

14. [1895] 1 Ch 287 at 322–3.

defendant's conduct, such as acting with reckless disregard to the plaintiff's rights, may have disentitled him to the alternative remedy.

42 The good working rule of AL Smith LJ in *Shelfer* has been criticised as the most influential exemplar of "a tendency to formulate as a series of inelastic rules the general principles that are applied by the court in exercising its discretion whether or not to substitute damages for relief in specie" which introduces an inappropriate rigidity to "general equitable principles that depend essentially on the balance of justice between the parties and especially on the weight that must be given to considerations of hardship".[15]

43 Dr Spry cautions that the preferable approach is that the matters mentioned in the working rule should be seen as relevant, but not decisive. He also identifies an essential circularity of the *Shelfer* working rule, in that whether the injury to the plaintiff can be adequately compensated by damages is not only a discrete element of the working rule but is also the whole purpose of the inquiry. Further, oppression must be evaluated by reference to the prejudice to the plaintiff and other relevant considerations.[16]

44 Dr Spry also observes that the potential hardship caused to the defendant depends on the kind of relief sought and that the granting of a mandatory injunction properly involves the application of general equitable principles to special circumstances, rather than special principles.[17]

45 Such criticism of the working rule in *Shelfer* was, to a degree, anticipated by AL Smith LJ, who acknowledged the limitations of formulae in the context of an essentially discretionary inquiry. The status of the working rule remains high.[18] Despite its limitations, it has been frequently approved and applied in subsequent authorities as a useful guide to the factors fundamental to determining the crucial question whether it would be unjust to do more than award damages in all the circumstances of a given case.

46 While the factors potentially relevant to the exercise of the discretion cannot be exhaustively stated, *Shelfer*, in my opinion, correctly accorded primary importance to identifying a small injury to the plaintiff, and disproportionate hardship constituting oppression, to the defendant.

47 In determining whether a substitution of damages for in specie relief is just, the interests of the parties are not of broadly equivalent weight. It will not suffice that the hardship entailed to the defendant by an injunction marginally outweighs the relief that the plaintiff will obtain thereby. Rather, the courts have typically required a significantly disproportionate damage to the defendant, reflected in the criterion of oppression in the *Shelfer* working rule.

48 In that sense, the *Shelfer* working rule itself implicitly assumes that in order to justify the substitution of damages, it is ordinarily necessary that there be a relationship of significant disproportion between the relief afforded to the plaintiff's injury and hardship to the defendant entailed by the grant of an injunction.

---

15. Spry, p 640.
16. Ibid.
17. Ibid.
18. See *O'Brien v President, Councillors and Ratepayers of the Shire of Rosedale* [1969] VR 645 per Winneke CJ and Little and Menhennit JJ; *Jeffrey v Honig* [1999] VSC 337 per Hedigan J; *Pekel v Humich* (1999) 21 WAR 24 per Templeman J.

49 The question whether to substitute damages for an injunction for trespass to land is necessarily determined after the plaintiff (in contrast to an applicant for an interlocutory injunction) has established the invasion or breach of its property right. Ordinarily, in such circumstances, unless the hardship to the defendant entailed by a specific remedy is out of all proportion to the relief thereby assured to the plaintiff, the plaintiff should not be compelled to exchange or suffer continuing invasion of its proprietary right for a money payment at the behest of the wrongdoer.[19]

50 The appellant in the present case did not question the authority of *Shelfer* and relied principally on *Jaggard* and the earlier decision of Sargant J in *Pettey v Parsons*.[20] In *Pettey v Parsons*, Sargant J awarded damages in lieu of a mandatory injunction for a trespass constituted by a pilaster erected by the defendant, which projected about 20 inches over the plaintiff's private road at a height of about 12 feet. The defendant had a right of eaves.

51 The case was, in Sargant J's view:

> so far as the plaintiff is concerned … a trumpery, a trivial, and perhaps I might say a petty action. The plaintiff is seeking to enforce alleged rights which are plainly of no value to her, but whose enforcement would cause great embarrassment to, and inflict considerable loss upon, the defendant.[21]

52 The plaintiff had acquired her land from the defendant, who reserved a right of way which the plaintiff had obstructed by erecting a rail and gate. The obstruction of the right of way gave rise to "the real questions in the action"[22] and trespass by the defendant's pilaster was a subsidiary issue.

53 The plaintiff contended that, as the projection of the pilaster amounted to a continuing trespass, she had an absolute right to have it removed and the court had "no discretion whatever, but is bound to grant a mandatory injunction to have it removed".[23]

54 Sargant J observed that, on the contrary, the jurisdiction established by Lord Cairns' Act was "perfectly well settled", and the question was rather, whether he ought, in his discretion, to exercise the jurisdiction to award damages in lieu of an injunction.

55 His Honour referred to *Shelfer* and considered that the case before him was "precisely the sort of case" contemplated in *Shelfer*, in which the discretion could be used "in the direction of alleviating the extreme hardship which might be caused by an injunction".

56 Sargant J concluded:[24]

> In my judgment, extreme hardship would be caused to the defendant if a mandatory injunction were granted for the removal of this pilaster, for though much of it may be ornamental, some part of the projection, at any rate, is part of the main structure of the building, and I cannot see that any practical advantage could possibly be gained by the plaintiff by its removal except the satisfaction of a desire to enforce strict legal rights.

---

19. See Spry, p 641 and cases there cited, especially *Sharp v Harrison* [1922] 1 Ch 502 at 515 and *Kennaway v Thompson* [1981] QB 88.
20. [1914] 1 Ch 704.
21. At 715–16. That characterisation was criticised on appeal: see *Pettey v Parsons* [1914] 2 Ch 653 at 664 per Swinfen Eady LJ.
22. At 722.
23. Ibid.
24. At 723.

57 Therefore (on the defendant's undertaking that the existence of the projection below the eaves should not be used to prevent the plaintiff or any of her successors in title from building in future) Sargant J awarded damages.

58 The decision of Sargant J in *Pettey v Parsons*[25] on the principal issue of obstruction of the easement was reversed on appeal. It would appear that the question of trespass by the pilaster was not raised on appeal.

59 In *Jaggard*, the Court of Appeal upheld the trial judge's decision to award damages in lieu of an injunction for the defendants' continuing trespass over the plaintiff's road and their breach of a covenant in her favour.

60 The parties each owned one of 10 lots in a residential cul-de-sac with a central private road. The owners of each lot also owned half of the portion of the private driveway in front of their lot (up to the centre of the road). Each lot was the subject of mutual covenants not to use the remaining vacant land other than for a private garden and, it would seem, had right of way over the other privately owned parts of the road for the purpose of access.

61 The defendants, in order to accommodate their growing family, purchased the land at the back of their lot and built a larger house on it, leaving their original residence intact. The larger house was accessed through their lot, on which the original dwelling remained. The construction of the larger house involved a breach of covenant, as it used part of the vacant land otherwise than for a private garden.

62 It also involved a continuing trespass on the portion of the private road belonging to the plaintiff, as it was necessary (for all practical purposes), for access to the new dwelling, which was constructed on land which did not have the benefit of a right of way.

63 It was clear, however, that when the defendants commenced to build, they were under the misapprehension, induced or fortified by the local council (but subsequently corrected), that the road was a public road.

64 The plaintiff maintained throughout that the road was private and, through her solicitors, warned the defendants that their proposed construction would constitute a trespass and a breach of covenant, for which she would issue proceedings for an injunction. The plaintiff made no application, however, until the walls and roof were erected. The new residence was completed several years prior to the trial of the action.

65 The primary judge determined to award damages in lieu of an injunction in circumstances where: (a) the defendants (although they could have investigated the position more carefully) believed that the road was public and did not go ahead regardless of the legal position, which they misunderstood; (b) the trespass simply involved the intermittent additional light traffic on the plaintiff's part of the road caused by one extra house in the cul-de-sac; (c) the plaintiff did not apply promptly for interlocutory relief; (d) the plaintiff's principal concern was that the defendants' acts were in defiance of the law, which she wanted to be upheld; and (e) the grant of the injunction would, practically speaking, deprive the new residence of access. The trial judge awarded damages calculated by reference to the plaintiff's share of what the defendants might reasonably have paid for a right of way and the release of the covenant. (As the other lot owners in the cul-de-sac did not sue, this was one-tenth of the total.)

25. [1914] 2 Ch 653.

66 On appeal, the plaintiff contended that the decision effectively licensed a continuing invasion of her property rights. She argued that the defendants took a chance and her failure to take prompt action should not be penalised. The defendants' additional property could be reached by use of the other half of the road, and the fact that damages properly calculated were merely nominal argued in favour of an injunction.

67 The Court of Appeal dismissed the plaintiff's appeal.

68 Sir Thomas Bingham MR (with whom Kennedy LJ agreed) regarded the decision below as an application of the good working rule in *Shelfer* "to the particular facts of the case before the court".[26]

69 His Lordship analysed extensively a number of relevant authorities. He regarded the grant of an injunction in some cases as resulting from a failure to understand the scope of the power entailed by Lord Cairns' Act to award damages for both past and future breaches on "a once and for all" basis. In particular, in *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd*,[27] McNair J had apparently failed to recognise that it would be unnecessary to make repeated applications for damages which were merely nominal, if the trespass continued. In *Woollerton & Wilson Ltd v Richard Costain Ltd*,[28] Stamp J had wrongly treated the absence of damage as a factor favouring the grant of an injunction instead of nominal damages.

70 In contrast, his Lordship approved the approach adopted in *Wrotham Park Estate Co v Parkside Homes* ("*Wrotham Park*").[29] In that case, houses were constructed in breach of covenant. The plaintiff had held its hand, allowing them to be completed. It had sustained no financial damage and the use of its land was in no way impeded. Brightman J observed that it would be "an unpardonable waste" to order demolition and instead awarded damages on the basis that:[30]

> a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs from the developer as a quid pro quo for relaxing the covenant …

71 Sir Thomas Bingham MR endorsed the award in *Wrotham Park* of more than nominal damages calculated by reference to the defendants' gain. While noting that the jurisprudential basis of damages in that context had provoked controversy, he regarded *Wrotham Park* as based on compensatory principles under Lord Cairns' Act, directed at compensation for the continuing invasion of the plaintiff's right, not to deprive the defendants of unjust gains, but because of the obvious relationship between the profits the defendants made and what they would have been willing to pay.

72 Although he was critical of cases in which an unjustifiably narrow view of damages had influenced the grant of an injunction, the Master of the Rolls' approach did not suggest any revision of the fundamental principle that, prima facie, an injunction remains the appropriate remedy, unless special circumstances, typified by, if not exhaustively stated in, the *Shelfer* working rule, exist. His Lordship expressly reaffirmed the principle that "a plaintiff who can

26. [1995] 2 All ER 189 at 198; [1995] 1 WLR 269 at 278.
27. [1957] 2 QB 334.
28. [1970] 1 All ER 483; [1970] 1 WLR 411.
29. [1974] 2 All ER 321; [1974] 1 WLR 798.
30. [1995] 2 All ER 189 at 199–200; [1995] 1 WLR 269 at 279.

show that his legal right will be violated by the defendant's conduct is prima facie entitled to the grant of an injunction" and "the court will only rarely and reluctantly permit such violation to occur or continue".[31]

73 He considered that the case before him fulfilled the four criteria laid down in *Shelfer* to bring the case within the exception. The injury to the plaintiff's right was small (involving a minimal increase in traffic) and was capable of being estimated in money or as what a reasonable seller would sell it for. Further, it would be oppressive to the defendants to grant the injunction. In that context, the Master of the Rolls stated:[32]

> It is important to bear in mind that the test is one of oppression, and the court should not slide into application of a general balance of convenience test.

He also observed that "It would weigh against a finding of oppression if the defendants had acted in blatant and calculated disregard of the plaintiff's rights, of which they were aware …".[33]

74 In *Jaggard*, Millett LJ also affirmed that the court was undoubtedly empowered to award damages for trespass on a once and for all basis. He was critical of the view that it could not do so because the effect of such an award would be effectively to confer the right which was violated on the defendant. He acknowledged that, analysed accurately, the discretionary refusal of injunctive relief, rather than the award of damages in lieu, had the practical effect of authorising the defendant to commit the wrong. The failure to award "once and for all" damages on the ground that it expropriated the plaintiff's property was therefore misconceived.

75 Millett LJ endorsed the enduring authority of AL Smith LJ's approach in *Shelfer*, but noted its status as a "check list".

76 He stated:[34]

> Laid down just 100 years ago, AL Smith LJ's checklist has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.
>
> Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.

77 While acknowledging that the "working rule" was not an inflexible code and that the discretion would necessarily be exercised on a case by case basis, his Lordship recognised that oppression to the defendant was frequently the crucial issue. He stated:[35]

---

31. At All ER 202; WLR 282.
32. At All ER 203; WLR 283.
33. Ibid.
34. At All ER 208; WLR 287–8.
35. At All ER 208; WLR 288.

> The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled?

78 He observed that most of the cases in which an injunction was refused involved the pulling down of a building which had been constructed as a fait accompli, so that its demolition would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and could expose the defendant to exorbitant demands.

79 While his Lordship clearly regarded cases in which a defendant's building would be demolished or rendered landlocked (and thus incapable of beneficial enjoyment) as typifying oppression, he considered that cases of oversailing cranes and other trespasses to the plaintiff's airspace were likely to be treated differently, as:

> the court has not been faced with a similar fait accompli. The grant of an injunction would merely restore the parties to the same position, with each of them enjoying the same bargaining strength, that they had enjoyed before the trespass began.[36]

80 Millett LJ stated: "In considering whether the grant of an injunction would be oppressive to the defendant, all the circumstances of the case have to be considered."[37] One factor relevant to the determination of oppression was the degree to which the defendant acted openly and in good faith and in ignorance of the plaintiff's rights, or acted with his eyes open hoping to present the court with a fait accompli, or on some intermediate basis.

81 His Lordship's comment did not mandate a balancing of equally weighted potential harm to each party, as when determining the balance of convenience in the context of an application for an interlocutory injunction. Indeed, Sir Thomas Bingham MR expressly rejected such an approach. Rather, Millett LJ's comment was directed to what constituted oppression in cases where a building was a fait accompli. His Lordship also expressly distinguished cases of invasion of airspace, where removal of the relevant structure would simply restore the status quo, albeit at cost to the defendant. As such, they were less likely to represent that degree of hardship to the defendant so out of proportion to the plaintiff's loss as to constitute oppression.

82 In *LJP Investments*, the defendant, prior to commencing the commercial development of its property, sought permission to erect scaffolding which would extend over land owned and leased by the first and second plaintiff respectively. No consent was forthcoming, but the first plaintiff indicated that he would consent in return for a lump sum payment of $30,000 and substantial weekly rental payments.

83 The defendant regarded the first plaintiff's demand as unreasonable and erected the scaffolding, which was necessary for safety requirements, and was likely to be in place for six months.

---

36. Ibid.
37. At All ER 209; WLR 288.

84 Hodgson J considered that the scaffolding's incursion into the plaintiff's airspace constituted a trespass, because it was of a nature and height which might interfere with any ordinary uses of the land which the occupier might see fit to undertake.[38] It was not necessary that the incursion interfered with the occupier's actual use of land at the time.

85 His Honour rejected the defendant's contention that damages were appropriate, rather than a mandatory injunction for the removal of the scaffold. The defendant argued that any trespass was both temporary and trivial, and public safety required the retention of the scaffolding until the defendant's development work was completed. Thus, it was said that an injunction would impede the reasonable use of the defendant's land without conferring any practical benefit on the plaintiff.[39]

86 Hodgson J referred to the principles of *Shelfer*, noting the plaintiff's prima facie entitlement to an injunction, the four-fold test which may justify an award of damages and the fact that the defendant could be "disentitled to this approach, for example, by reckless disregard of the plaintiff's rights".[40]

87 Hodgson J stated:[41]

> Furthermore, as pointed out by Buckley J in *Cowper v Laidler* [[1903] 2 Ch 337] (at 341), the jurisdiction to give damages instead of an injunction is not to be exercised so as "to enable the defendant to purchase from the plaintiff against his will his legal right to the easement".
>
> In the present case, the plaintiffs are not disentitled from an injunction by laches, and the only act which could be considered to disentitle the plaintiffs is what is said to be the unreasonable demand for payment. There is no substantial injury caused to the plaintiffs, and compensatory damages would probably be nominal only. I do not think an injunction could be said to be greatly oppressive to the defendant: the defendant knowingly put itself in a position where it needed to use the first plaintiff's land in order to carry out a commercial development, and I think the law establishing that what the defendant did was a trespass was reasonably clear, so that the defendant has not been taken by surprise in this regard.
>
> In my view, the case really comes down to the question of whether one person should be permitted to use the land of another person for considerable commercial gain for himself, simply because his use of the other person's land causes no significant damage to that other person's land. As a matter of general, though not universal, principle, I would answer this question "no". I think this approach is reflected in the principles applied in relation to exemplary damages: it is considered appropriate to award exemplary damages in cases where a defendant shows high-handed disregard for the plaintiff's rights, and by breaching those rights secures a great advantage to himself while causing little damage to the plaintiff. In those circumstances, it is sometimes considered appropriate to seek to deter that kind of conduct by awarding damages which bear some relationship to the advantage which the defendant sought to gain for himself.

88 In my opinion, his Honour's approach was an orthodox application of the *Shelfer* working rule. Crucially, the injunction was not greatly oppressive to the defendant. The defendant was not required to demolish a building, but simply to

38. (1989) 24 NSWLR 490 at 495.
39. Ibid.
40. At 496.
41. At 496–7.

remove a temporary structure. Further, the defendant had knowingly put itself in the position of needing to use the plaintiff's land.

89 While the appellant contended that the approach of, and certain statements in, *LJP Investments* were in conflict with *Jaggard*, in my opinion they accorded with the fundamental principles there expressed, although the very different set of facts understandably invoked a different exercise of the discretion.

90 Hodgson J acknowledged that no substantial injury was caused to the plaintiff and damages would probably be nominal. (The first plaintiff's contention that the presence of the scaffolding increased his insurance risk was not made out.) His Honour, in accordance with the principles recognised in *Jaggard*, nevertheless expressed the view that where a defendant highhandedly secured a great advantage to himself while causing little damage to the plaintiff, it might be appropriate to award damages which bore some relationship to the advantage, financial gain or saving which the defendant achieved by the use of the plaintiff's land. Hodgson J contemplated that the plaintiff's unreasonable refusal of an offer on such terms might justify the refusal of an injunction.[42] In the case before him, however, the defendant proffered no evidence of the difference in value, or savings, which would enable the court to adopt that approach. His Honour granted an injunction in terms aimed at minimising the hardship to the defendant.

91 Hodgson J's observation that the jurisdiction to award damages instead of an injunction was not to be exercised to enable the defendant to purchase the plaintiff's legal right against his will, is no more than a reiteration of the traditional view that, although when the exception applies, that may be the practical result, the potential availability of appropriate damages does not entitle defendants as of right to purchase rights from unwilling landowners.

92 The respondent relied on *Beswicke v Alner* and *Harrow London Borough Council v Donohue* ("*Harrow*") to contend that damages should not be awarded in lieu of an injunction where that would enable the trespasser to purchase the proprietary rights of any unwilling landowner. In such a context, it was said, the court had no, or minimal, discretion to award damages in lieu of an injunction.

93 In *Beswicke v Alner*, the trespass consisted of discharge of waste water over the plaintiff's land. An injunction had been refused at first instance because the actual damage to the land was minimal. The defendant, however, expressed an intention frequently to repeat the trespasses. On appeal, Cussen J observed that, in the circumstances, damages were not an adequate remedy. As the plaintiff had established an invasion of his common law right and repetition of the wrong was likely "he is, in the absence of special circumstances, entitled to an injunction against such repetition".[43]

94 Cussen J, delivering the judgment of the Full Court, stated:[44]

> We think that the learned Judge paid too much attention to the fact that the actual damage proved up to the beginning of the action was small or negligible and not enough [attention] to the combined effect of the following matters:
>
> (1) that possessory and proprietary rights are involved;
>
> (2) that a number of actions for nominal damages would not afford an adequate remedy; and

42. At 497.
43. [1926] VLR 72 at 76–7.
44. At 77.

(3) that the defendant had expressed his intention of repeating the wrongful act.

95 While its statement of fundamental principle is uncontroversial, *Beswicke v Alner* is of limited relevance to the present case. A mandatory injunction was not claimed, and the court noted that cases dealing with mandatory injunctions were "all clearly distinguishable".[45]

96 More fundamentally, *Beswicke v Alner* was decided at a time when there was no legislation in Victoria corresponding to Lord Cairns' Act giving the court power to award equitable damages to the injured party in lieu of an injunction, such as damages for anticipated future harm.

97 *Harrow* is likewise of limited relevance to the present case. The Court of Appeal there doubted its discretionary power to award damages in lieu of an injunction where a plaintiff had been altogether dispossessed of its proprietary rights. The court observed that the case had proceeded below as a conventional discretionary case, presenting a choice between the remedies of an injunction or damages for a proved or admitted act of trespass.

98 Waite LJ (with whom Hurst LJ and Brown P agreed) stated:[46]

> That approach to the matter was reproduced in the notice of appeal and the skeleton arguments that have been presented in this court and I do not think it would be inaccurate to say that bench and bar both came to this appeal expecting a review of the familiar authorities in this discretionary field. In fact an entirely different approach has been adopted in the hearing of this appeal, an approach which can fairly be said to owe a good deal to prompting from the court itself. The case has been looked at here on a more fundamental footing. Was there really any discretion at all? If a defendant acts in total breach of the plaintiff's proprietary rights, by dispossessing him altogether through the erection of building works which have the effect of excluding him totally from the land to which he has title, does the court have any real choice in the matter? Is it not rather the plaintiff who has the option; either of accepting the building works as an accretion to his title (keeping them or demolishing them or dealing with them out of court in whatever way he chooses) or, alternatively, of coming to court and insisting as of right upon either an order for possession of the encroached land or an order for demolition of the encroaching building works? If the plaintiff makes the latter choice, does the court have any discretionary power beyond the right perhaps to make a choice as between those last two remedies?

99 As Bryson J noted in *Bendal Pty Ltd v Mirvac Project Pty Ltd*,[47] although some strong judicial statements have indicated that the range of discretion is very narrow in the context of trespass, it is:

> wrong in principle to think that the discretion has disappeared or disappeared for practical purposes or has become vestigial. That would be wrong in principle, having regard to the nature of equitable remedies which can always be moulded to the needs of justice presented by a particular case.[48]

45. [1926] VLR 72, compare Spry, op cit, p 547.
46. [1995] 1 EGLR 257 at 259.
47. (1991) 23 NSWLR 464.
48. At 471.

Appeal from a discretionary judgment

100 A decision whether or not to award damages in lieu of an injunction for trespass is a discretionary judgment, despite the prima facie disposition in favour of an injunction and the evolution of "working rules" which articulate characteristically relevant considerations. On appeal against such a decision, the rule in *House v R* applies.

101 In *House v R*, Dixon, Evatt and McTiernan JJ, in a joint judgment, said:[49]

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges comprising the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.

102 Therefore, an appellate court can intervene only if there is specific error of one of the kinds mentioned or if the decision on the facts was unreasonable or plainly unjust, so that a failure properly to exercise the discretion may be inferred.

Issues on appeal

103 The appellant contends that the trial judge erred on 13 stated bases, some of which overlap. Where appropriate, I deal with related issues together.

104 The appellant submitted that the applicable authorities required the court, in determining whether to award damages in lieu of an injunction, to balance the loss or detriment occasioned to the trespasser by the injunction against the detriment, loss or harm suffered by the landowner if an injunction were not granted. The appellant contended that, in the present case, the primary judge erred because he failed to consider adequately or at all the hardship caused to the appellant by a requirement to remove the cladding and, most significantly, failed to perform "a relativity analysis" of the effect on each party of granting or refusing the injunction.

105 The appellant contended that the trial judge failed to consider the undertakings both in the context of the required relativity analysis and in relation to whether they rendered the trespass trivial. It also submitted that the relativity analysis must take into account the undertakings offered not only before the trial judge, but in amended forms on appeal.

106 In my opinion, the trial judge did not fail to consider the harm which the appellant would sustain if required to remove the cladding. Contrary to the appellant's submission, his Honour expressly noted the harm to the appellant posed by the approximately $300,000 in removal costs together with the loss of the improved appearance of its building and consequent loss of value.

107 Pursuant to the offers or undertakings considered by the trial judge, the appellant did not undertake to remove the cladding affixed adjacent to the MCG Hotel (being the bulk of the cladding), on the assumption that, due to the MCG Hotel's heritage status, no permit for development of that part of the land would ever be obtained. The appellant first offered to remove the cladding up to the

49. (1936) 55 CLR 499 at 504–5.

proposed development line and subsequently undertook to remove only the cladding along the western boundary to the extent necessary for the construction of any development for which the respondent should obtain approval. That undertaking still excluded the cladding adjacent to the MCG Hotel. The appellant instead offered to buy or lease the land it occupied.

108 Following the delivery of reasons for judgment, the appellant proffered an amended undertaking to remove all the cladding, including that adjacent to the MCG Hotel, to the extent necessary for such development of the respondent's site as received approval. The amended undertaking was doubtless formulated in order to address the trial judge's finding that the possibility of planning approval for the demolition of the MCG Hotel could not be excluded.

109 On appeal, the appellant sought to rely on a further amended undertaking (which extended to the respondent's successors in title), to remove the cladding when necessary for any development for which approval was obtained and further (if the appellant sold the property), to exact a like undertaking from the purchaser, failing which the appellant would itself remove the cladding prior to the sale.

110 This court's tentative view was that, in an appeal from a discretionary judgment, unless, at least, relevant error below were demonstrated (requiring re-exercise of the discretion), it could not properly receive the further amended undertaking which constituted, or was analogous to, new evidence on appeal, rather than a new submission or point. Clearly, as Ashley JA observed in the course of the hearing, it would be inappropriate to receive the proposed further amended undertaking as evidence to buttress the appellant's contention that the judge below, who considered an earlier offer and undertaking, had erred.

111 Although the further amended undertaking did not appear relevant to the identification of error in his Honour's judgment, it was received because it might prove relevant should the discretion be re-opened.

112 It is clear that the offer and undertaking considered by the primary judge were inadequate satisfactorily to address the possibility of serious interference with the ordinary use of the respondent's land. First, they did not cover the majority of the cladding (which was affixed adjacent to the MCG Hotel), due to the appellant's assumption that, contrary to the trial judge's finding, future development of that area was not possible.

113 More fundamentally, the offer and undertaking considered by the primary judge were not enforceable against the appellant's successors in title. The appellant could, by sale of its property, render itself powerless to comply with the undertaking. In such circumstances, the respondent's future development of its land could be impeded, but it would be restricted to a claim for damages for breach of the undertaking against the corporate defendant, which liquidation or deregistration might render worthless.

114 As stated below, in my opinion the trial judge did not err on any of the bases alleged, so it is unnecessary to consider the undertakings proffered after trial in a re-exercise of discretion. For completeness, however, I observe that the later undertakings were also deficient.

115 The further amended undertaking proffered on appeal was aimed at binding the appellant's successor in title in the event of sale of its land but would not, in my view, satisfactorily secure the position of the respondent, as the undertaking was not to be imposed beyond the immediate purchaser from the appellant.

116 The deficiencies of the amended undertakings serve to underline the fundamental inadequacy of the undertakings before the primary judge. His Honour concluded, correctly, in my opinion, that they were wholly inadequate to remove the potential interference with the ordinary use the respondent might in future seek to make of its land. The appellant's contention that the learned trial judge erred in attaching no weight to the effect of the undertakings in removing interference with the ordinary use of land, or rendering the trespass trivial, is not borne out.

117 The appellant's related contention that the trial judge erred in relying on Mr Kolomanski's evidence on the impact of the cladding on the proposed development because the undertakings removed any inconvenience attributable to it, is likewise not established. The offer and undertaking considered by the trial judge did not remove "any inconvenience". Further, Mr Kolomanski's evidence concerning damage or inconvenience was not challenged at trial, whether on the basis that it could be addressed by the undertaking, or otherwise. His evidence principally fortified the trial judge's conclusion, reached on the basis of the objective evidence of all the panels in combination and the height and length of the interference, that the interference was not trifling.

118 The appellant also argued that the primary judge erred in attaching undue weight to a finding that the appellant made half-hearted attempts to find a solution by way of settlement and allowed the matter to drag on.

119 In my opinion, the primary judge did not err as alleged. The appellant's unsatisfactory approach to dealing with the respondent in relation to the claim of encroachment was clearly relevant to whether damages coupled with an undertaking would be a satisfactory alternative remedy to an injunction. The appellant's evasive attitude and its reluctance promptly to communicate, respond or resolve the dispute, diminished the prospects of its ready and conscientious observance of any undertaking. Given that the proffered undertaking was, in any event, deficient, the appellant's apparently unco-operative attitude properly weighed against the refusal of an injunction.

120 Further, the appellant's insistence on "a relativity analysis", which contemplates a weighing of potential detriment to interests of equivalent value, is misconceived in the present context. A balancing in which the potential harms to parties are accorded equal status and weighed as in a conventional interlocutory injunction application is not contemplated under the cumulative tests of *Shelfer's* working rule, in which the injury to the plaintiff from the trespass must necessarily be small and the loss to the defendant oppressive. The working rule in *Shelfer* and the broad equitable principles which underpin it indicate that, as a usual precondition of substituting damages for an injunction, the injury to the plaintiff will be small and the hardship to the defendant will be oppressive.

121 The appellant submitted that the primary judge erred by taking into account, in reliance on *LJP Investments*, the extraneous consideration that the cladding conferred a commercial benefit on the appellant. Despite the appellant's criticisms of *LJP Investments*, it contended that, on that issue, the trial judge misconstrued it, because, according to the appellant, Hodgson J attributed relevance to the trespasser's commercial benefit only if the trespass were deliberate or in high-handed disregard of the plaintiff's rights.

122 I am not persuaded that the approach of taking into account the advantage of the defendant where the injury to the plaintiff is nominal, as approved in *Jaggard*, is properly restricted to cases of deliberate or high-handed conduct.

123 Hodgson J's observation, far from conflicting with *Jaggard*, accords with its recognition that the gain to the trespasser may be the correct measure of damages where there is no substantial injury to the plaintiff. The defendant's failure to make an offer calculated on the basis of its gain counted against the refusal of an injunction in *LJP Investments*. Conversely, Hodgson J considered that a plaintiff's rejection of an offer of compensation calculated in that way could be seen as unreasonable, and as such, relevant to the discretionary issues.

124 In the present case, the trial judge accurately observed that the appellant's first open offer dated 31 October 2006 to remove some of the cladding up to the proposed development commencement mark at its own expense was of limited scope, and the appellant, although seeking to obtain some advantage, did not offer any compensation for the encroachment, which conferred a commercial benefit by improving and modernising the appearance of its building. His Honour repeated Hodgson J's observation that "as a general principle a person should not be permitted the use of another's land for considerable commercial gain simply because the use causes no significant damage to the land" in the context of determining that the appellant did not suffer hardship in the relevant sense. In my opinion, his Honour did not err as alleged.

125 The appellant also contended that the trial judge erred in his factual finding that consideration by the appellant's representatives of the as built drawings would have drawn their attention to the probable intrusion caused by the cladding. The appellant submitted that the drawings did not support an inference that the boundary would be exceeded, and said that the trial judge had expressly recognised that in the course of the hearing. It complained that the proposition was not put to the appellant's witnesses in cross-examination. The appellant further complained that the judge erred in placing weight on the finding that the encroachment was readily ascertainable before and after the affixing of the cladding, in order to conclude that the appellant had gone ahead in negligent disregard of its neighbour's rights. The appellant submitted that this should have drawn attention to the consideration that there was nothing to suggest that the intrusion was deliberate and calculated for commercial advantage, the implication being that his Honour found otherwise.

126 His Honour did not, in my opinion, err as alleged. The appellant's submission does not accurately characterise the trial judge's finding. On a fair reading, he did not conclude that the encroachment was readily ascertainable before the cladding was affixed, but simply that, at the highest, the defendant ought to have known that the cladding would intrude.

127 His Honour's statements at [57] and [61] of the judgment do not indicate that the as built drawings would have revealed the probability of intrusion before the cladding was affixed. Rather, his Honour was aware that the as built drawings post-dated the affixing of the cladding, but considered that in the course of the parties' dealings after PCH alleged the encroachment, an inspection of the as built drawings would have indicated to Break Fast the probability of the intrusion.

128 The appellant contended that the trial judge was not entitled to draw even that limited conclusion, because the as built drawings did not show the boundary, but only the protrusion of the cladding from the edge of the appellant's building. His Honour was, however, alive to that point. He observed that the as built drawings were not engineering drawings designed to show the relationship between the two buildings. Rather, they depicted the affixing of the cladding to the edge of the appellant's building. The trial judge noted that "before you can assume that it encroaches 50 millimetres, one has to align the building as built with the boundary". His conclusion that "consideration by the defendant's representatives of the 'as built' drawing provided to the owners as an accurate record of what had been constructed would have drawn their attention to the probable intrusion" was, however, (as Cavanough AJA observed in the course of the hearing) justified by the combination of the drawings depicting the protrusion from the building edge and the apparent silence of the appellant's witnesses in relation to their knowledge of the possibility of encroachment.

129 The appellant's witnesses gave no evidence at trial of their state of knowledge or intent in relation to the encroachment and were not cross-examined on it. It was submitted for the appellant, in effect, that the failure of the respondent to cross-examine the witnesses about their state of knowledge at the critical time should attract the operation of the rule in *Browne v Dunn*.[50] But it appears that *Browne v Dunn* was not called in aid at the trial. That is unsurprising. The drawings were the appellant's documents, and they were put in by the respondent accompanied by some viva voce evidence given by a respondent's witness. In those circumstances I think that it was for the appellant's witnesses to address an inference that seemed readily available on the then state of evidence. Further, given that the defendant's state of knowledge and intent is relevant, although not decisive, in determining oppression and displacing the injunctive relief to which the plaintiff is prima facie entitled, it may be that the appellant properly bore the evidentiary burden of establishing its state of knowledge. His Honour, however, appeared to proceed on the basis, more favourable to the appellant, that the respondent bore the burden of excluding the appellant's knowledge. He concluded that there was insufficient evidence to support a finding that the appellant knowingly brought about the encroachment. There was no suggestion that his Honour considered the intrusion deliberate or calculated for commercial gain, or that such an assumption influenced his approach. He expressly concluded that "the highest it can be put for the plaintiff is that the defendant ought to have known that the cladding would intrude into the airspace of the neighbouring property".

130 Irrespective of whether the post-construction drawings were properly a basis on which persons of reasonable competence would recognise the probability of intrusion, the appellant, as the owner of valuable real estate was obliged, and had the capacity, accurately to ascertain its boundaries prior to affixing material to its building. As his Honour recognised, it was responsible for that task, whether satisfactorily performed by its representatives or not.

131 The appellant submitted that the primary judge erred in failing to consider whether the injury to the respondent's legal right could be adequately compensated by a money payment. The primary judge did not, in my view, err

50. (1893) 6 R 67.

as alleged. The appellant sought to displace the prima facie remedy, but, as in *LJP Investments* the appellant did not adduce evidence of the value of the cladding to it, make an offer on that basis or advance detailed argument on the issue. It should be recognised, moreover, that the working rule in *Shelfer* is not a code, and Dr Spry's caveat regarding circularity is relevant in this context.

132 The appellant, in written submissions, contended that the primary judge erred "in failing to heed the legislative developments in various states which provide for more flexible solutions to building encroachments", which therefore, it was suggested, favour a more liberal approach to an award of damages in lieu of an injunction. The appellant did not strongly pursue that submission before us. As the respondent pointed out, similar ameliorating legislation applied in Victoria between 1904 and 1914, but was repealed.

133 Further, the legislation in force in some other States cannot assist the appellant in the present context. In *Esso Australia Resources Ltd v Federal Commissioner of Taxation*[51] ("*Esso*") the High Court considered the relevance of an Act adopted in three jurisdictions of Australia. Kirby J stated:[52]

> It is one thing for a court to act to repair defects in the common law where legislators have failed to act. It is quite another for courts to intrude and change the established common law when relevant legislative change has been proposed and, in part, has already been adopted. In such circumstances, there are reasons for a measure of caution on the part of courts in the performance of their functions of law-making in societies such as ours where that function is primarily the responsibility of elected parliaments. This is especially so where what is proposed is not the invention of a new rule adopted in other jurisdictions but the abandonment of an established rule which for some time has been accepted as the common law in Australia.

In *Esso*, Gleeson CJ, Gaudron and Gummow JJ made clear that because there is a unified common law of Australia, it is, generally speaking, inappropriate to develop the common law by reference to State or Territory based developments, as distinct from national or uniform developments.[53]

Conclusion

134 In my opinion, the discretionary judgment below does not demonstrate specific error or a plainly unjust or unreasonable result such as to justify appellate intervention. The hurdle faced on an appeal from a discretionary judgment was heightened in this case, because his Honour exercised his discretion in favour of the "prima facie" remedy of an injunction for trespass, in accordance with established principles.

135 The appellant's reliance on an alleged divergence of principle in the applicable authorities was, in my view, ill-founded. The relevant authorities evince no fundamental difference of principle. They uniformly uphold the established view that an injunction is the prima facie remedy for trespass and that the alternative remedy of damages will be ordered exceptionally, as indicated by the working rule in *Shelfer* or by such other relevant considerations as may apply in a particular case. The authorities do not dictate or authorise the balancing of potential detriment to the parties on the basis of equivalent entitlement, or indicate that trespass may be negatived by undertakings to minimise its potential

51. (1999) 201 CLR 49.
52. At 89–90, [105].
53. At 59–64, [17]–[34].

effect on future use. The tests embodied in the working rule of *Shelfer* are cumulative, and assume a significant inequality of entitlement between the parties (as the injury to the plaintiff from the trespass must ordinarily be small and the harm occasioned by an injunction to the defendant must be so disproportionate as to constitute oppression). Oppression in that context imports consideration of, inter alia, specific detriment, including disproportionate harm to the defendant relative to injury to the plaintiff, the deliberate or unintended quality of the trespass and all other relevant circumstances.

136 The authorities' consistent recognition that damages in this context may properly be assessed by reference to the advantage or gain to the defendant where the injury to the plaintiff is small facilitates an award of damages where that is otherwise appropriate, but does not disturb the traditional primacy of injunctive relief.

137 The authorities which, in the appellant's submission, adopted a more persuasive, liberal approach to the ordering of damages in lieu of an injunction, had very different facts from those of the present case. The facts in those other cases clearly satisfied the *Shelfer* test and reflected a persuasive application of the relevant equitable principles. *Pettey v Parsons* involved trespass by a pilaster in airspace which was part of the defendant's building structure; and the injury to the plaintiff was merely the breach of her legal rights per se, so that an injunction entailed no advantage other than the strict enforcement of her legal rights. Similarly, in *Jaggard*, the injury to the plaintiff of possible additional intermittent traffic to one extra house was small, while an injunction would have deprived the defendants, whose trespass was not deliberate, of access to their property.

138 In contrast to those cases in which the injury to the plaintiff from the trespass was small, (including *LJP Investments*, which involved temporary scaffolding), in the present case, as the learned judge found, the five to six centimetre protrusion, when multiplied by the total length and the height of the cladding, amounts to a permanent encroachment of very considerable proportions into the respondent's airspace in a prime commercial location. The respondent does not seek simply to enforce a legal right for its own sake, but seeks the certainty of complete and permanent removal of a potential impediment to future development of its valuable site. The character and seriousness of injury to the plaintiff cannot properly be defined by reference to proffered undertakings, which are, in any event, inadequate to address the detriment and inconvenience to the respondent and would leave it vulnerable to the co-operation of the appellant to secure what is its by right.

139 The harm posed to the defendant by an injunction is, as in *LJP Investments*, the removal of a non-structural addition which will restore the status quo. It will not require demolition of the building or result in loss of access or other major detriment, although it entails cost and a loss of improved appearance. As his Honour implicitly recognised, an injunction will not impose hardship on the defendant out of all proportion to the injury to the plaintiff from a refusal of such relief, and will not constitute oppression.

140 It follows that, in my opinion, the primary judge did not err in the exercise of his discretion and, had it been necessary to re-exercise the discretion, a mandatory injunction would have been appropriate.

141 **Cavanough AJA.** I agree with Dodds-Streeton JA.

Appeal dismissed.

Solicitors for the appellant: *Rigby Cooke*.

Solicitors for the respondent: *Best Hooper*.

L W MAHER
BARRISTER-AT-LAW