Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO 3848/02

In the matter between:

THE TRUSTEES OF *THE BRIAN LACKEY TRUST* **Plaintiffs**

and

STANLEY ANNANDALE **Defendant**

JUDGMENT: DELIVERED 6 OCTOBER 2003

GRIESEL J:

1]The crisp issue in this case is whether or not a *'massive encroachment'*,1 inadvertently erected by the plaintiffs on land belonging to the defendant, ought to be demolished. This issue, in turn, depends on whether or not the court has a discretion to permit the plaintiffs to retain the structure – and effectively acquire the defendant's land in the process – against payment of compensation to the defendant.

1 As described by the plaintiff's counsel in their opening address.

Factual Background

2]The relevant facts are uncomplicated and largely common cause. The plaintiffs are the trustees of the *Brian Lackey Trust*. For convenience, I shall refer to the plaintiffs and the trust jointly as *'the plaintiff'.* The plaintiff owns erven 880 and 881, Laaiplek (subsequently consolidated as erf 737). The defendant owns the adjacent erf 878. All three properties are situated on the main basin of the Port Owen Marina on the West Coast. The plaintiff acquired the two erven during June 2000 at a purchase price of R140 000 each, at more or less the same time as the defendant purchased his property for R130 000. All three were vacant erven at that stage.

3]A substantial luxury dwelling was designed for the plaintiff as a holiday and retirement home and a building contract was entered into at a contract price in excess of R3 million. The intention was that, upon completion, the house would straddle the plaintiff's erven 880 and 881. Building operations commenced during September 2001 and continued until 13 or 14 May 2002, when it was discovered (as a result of an inspection by the local building inspector) that the structure was actually straddling erven 880 and 878, instead of erven 880 and 881. As can be seen from the photographs forming part of the record, the building was by that time at an advanced stage; in fact, according to the evidence, it was approximately 9 weeks away from completion. The cost incurred in respect of the building works up to that stage, as

certified by the plaintiff's architect, amounted to some R1,75 million.

4]It is common cause that the structure covers approximately 80% of the surface area of the defendant's property, thus rendering the property completely useless to the defendant in its present state.

5]The plaintiff originally alleged that, from an early stage, the defendant was aware of the encroachment, but that he *'deliberately refrained from informing the plaintiffs of that fact'*. However, in his opening address, the plaintiff's counsel expressly abandoned this allegation, with the result that it can now be accepted that both parties were unaware of the true state of affairs until it was drawn to their attention by the building inspector during May 2002.

6]When the true position was revealed to the parties, the defendant telephoned the plaintiff's Mr Brian Lackey (*'Lackey'*) and enquired what the plaintiff intended doing about the problem which had arisen. There is a factual dispute between the parties as to the exact content of the telephone conversation, to which I shall presently return. Suffice it to note at this stage that the plaintiff offered to buy the defendant's property at a price of R250 000, which offer was unacceptable to the defendant. Instead, the defendant demanded the removal of the encroaching structure, which demand was, in turn, rejected by the plaintiff.

7]Both parties subsequently consulted their respective attorneys. On 7 June 2002 the plaintiff's attorney wrote to the defendant's attorney, referring to the aforementioned telephone conversation and saying the following:

> *8]'Our clients' representative, Mr Brian Lackey, spoke that day to your client telephonically, and offered your client R250 000,00 for your client's property, which apart from the encroachment is unimproved land. Your client had purchased the property less than two years ago for R130 000,00, and our clients considered their offer to be well in excess of the market value of your client's unimproved property, and indeed well in excess of whatever damages your client may suffer through deprivation of that property.*
>
> *9]Your client's response was to laugh at that, and to tell Mr Lackey that unless he (your client) was paid R750 000,00 he would send a lawyer's letter demanding removal of the encroaching building works within thirty days, and failing such removal he would send in the bulldozers.*
>
> *10]… In the light of your client's threat to take the law into his own hands and remove the encroachment himself, our clients would also apply to court for an interim interdict* ***pendente lite*** *restraining such threatened conduct, unless your client undertakes (in a manner in substance and in form to the reasonable satisfaction of our client) not to take any step towards removal of the encroachment without the sanction of a court order.'*

11]The defendant's attorney responded to the aforesaid letter on 13 June

2002, stating (*inter alia*) the following:

> *12]'Our client denies that his response was to laugh at your client's offer of R250 000,00. During the telephone conversation, Mr Lackey insisted on numerous occasions that out client should name a price which he would accept to part with his property. Our client initially refused to do so but on the insistence of your client, eventually indicated that he will not even consider an amount of less than R750 000,00. In response to this, Mr Lackey laughed at our client and our client also heard laughter in the background. Upon hearing this our client again stressed to Mr Lackey that his property was not for sale and insisted that the encroachment be removed.*
>
> *13]Our client furthermore denies threatening to send in bulldozers but in any event hereby undertakes not to take any steps towards removal of the encroachment without the sanction of a court order.'*

14]This *impasse* led to the issue of summons on behalf of the plaintiff on 26 June 2002, in which the plaintiff claimed an order –

> *15]'declaring the defendant to be disentitled to the removal from erf 878 of the encroachment erected thereon by the plaintiff, subject to the payment of such damages (if any) as the court may determine in these or subsequent proceedings to be payable by the plaintiff to the defendant'.*

16]In opposition to this claim, the defendant filed a plea as well as a counterclaim, claiming an order for the removal of all portions of the building erected on the defendant's erf 878 and the restoration of the property to its original condition.

17]When the matter came to trial, the plaintiff led only the evidence of Lackey, whereupon the defendant himself gave evidence. In addition, a structural engineer, Mr Burger (*'Burger'*), as well as a part-time estate agent, Mr Van der Sandt (*'Van der Sandt')*, were also called to give evidence on behalf of the defendant.

18]The main factual dispute between the parties revolved around the telephone conversation between Lackey and the defendant during May 2002, to which I have already referred. Lackey's version accorded with the content of his attorney's letter, as quoted above. The defendant, on the other hand, denied this version of events, as did his attorney in the aforementioned letter. He confirmed that Lackey offered to pay him R250 000, but stated that he turned down this offer, saying that his property was not for sale. In cross-examination of Lackey by the defendant's counsel it was put that the defendant's version would be that *'he won't even sell it for anything below R750 000'*. The defendant also emphatically denied that he uttered any threat relating to bulldozers.

19]I prefer Lackey's version of the disputed facts. His evidence in court was consistent with the version contained in his attorney's letter, written shortly after the events. The attorney specifically alluded to the defendant's demand for R750 000, coupled with the threat to *'send in the bulldozers'.* So seriously did Lackey and his attorney take the threat that an undertaking was sought from the defendant that he (the defendant) would not take the law into his own hands, failing which an interdict would urgently be sought. These facts tend to lend credence to Lackey's version. It has not been suggested to Lackey that he invented the alleged threat; on the contrary, his evidence relating to the bulldozers was not even assailed in cross-examination.

20]The defendant's evidence, by contrast, was improbable, evasive and contradictory in various respects, as appears from the following examples:

(a) I find it inherently improbable that the defendant would arbitrarily fix an amount of R750 000 if his intention was simply to convey to Lackey that his (the defendant's) property was not for sale at any price. It is far more likely that, as argued on behalf of the plaintiff, the amount represents the sum that the defendant thought he could optimistically (though not realistically) demand without being completely exorbitant.

(b) The response from the defendant's attorney to the letter from the plaintiff's attorney, as well as the statement put to Lackey during cross-examination,2 also lend some support to Lackey's version with regard to the amount of R750 000. Far from saying that his property was not for sale *at any price*, the suggestion appears to be that the defendant *would* be prepared to consider an amount of R750 000 or more.

(c) The defendant's evidence with regard to the partial removal of the encroachment, as proposed in Burger's evidence, was extremely vague and ambivalent. He seemed unsure whether or not he would be prepared to tolerate a continuing encroachment of 0,5m, which would be the effect of Burger's proposal to demolish half of the plaintiff's structure without jeopardising the structural safety of the building.

(d) The defendant's views as to the current market value of his property, viz R960 000, is not only totally unrealistic, but is without any foundation in fact or reason. The highest price for a vacant plot in Port Owen to date was in the region of R350 000 – which was achieved some six weeks before the trial.

2 See para above.

21]Apart from the inherent probabilities of his version, Lackey, in my view, also made a better impression as a witness than the defendant. I would accordingly prefer his evidence above that of the defendant where their versions differ.

22]The weight (if any) to be attached to the foregoing facts and circumstances will be considered later. What needs to be considered at this stage is whether the court has a discretion to order what in effect amounts to an involuntary deprivation of property in circumstances such as the present case.

Legal Position

23]Section 25(1) of the Constitution3 provides as follows:

> *24]'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'*

25]In this context, both sides accept that, for purposes of the Constitution, a *'law of general application'* includes the common law.4 It is accordingly necessary to determine whether our common law provides for the type of discretion contended for by the plaintiff.

3 Act 108 of 1996.

4 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para [44] at 876H–I and para [136] at 915E–F.

26]Unfortunately, as Prof Milton remarked, *'(t)his portion of the law is in a very unsatisfactory state'*.5 A useful starting point to a discussion of the problem in respect of encroachments is found in *LAWSA*:6

> *27]'When a landowner erects a structure on his land he must take care that he does not encroach on his neighbour's land. This rule of neighbour law is not only applicable in cases where the building itself or its foundations encroach on neighbouring land but also where roofs, balconies or other projections encroach on the airspace above a neighbour's land.*
>
> *28]In the case of encroaching structures the owner of the land which is encroached upon can approach the court for an order compelling his neighbour to remove the encroachment. … Despite the above rule the court can, in its discretion, in order to reach an equitable and reasonable solution, order the payment of compensation rather than the removal of the structure. This discretion is usually exercised in cases where the costs of removal would be disproportionate to the benefit derived from the removal. If the court considers it equitable it can order that the encroaching owner take transfer of the portion of the land which has been encroached on. In such circumstances the aggrieved party is entitled to payment for that portion of land, costs in respect of the transfer of the land as well as a* ***solatium*** *on account of trespass and involuntary deprivation of portion of his land.' (my emphasis)*

5 J R L Milton 'The Law of Neighbours in South Africa' 1969 *Acta Juridica* 123 at 234.

6 Vol 27 First Reissue (2002) *sv Things* para [317] (footnotes omitted). See also C G Van der Merwe *Sakereg* 2 ed (1989) 202 and authorities referred to in fn 252; Cilliers and Van der Merwe 'The "year and a day rule" in SA law' 1994 (57) *THRHR* 587; and Milton *op cit* 234 *et seq*.

29]Based on the arguments addressed to me, it would appear that the parties are *ad idem* that the court does indeed have a discretion, *in certain circumstances*, to order damages instead of demolition of encroachments. The underlined passages in the above-quoted extract focus on the main area of dispute between the parties. According to the defendant, the discretion to award damages in lieu of removal of encroachments is limited to instances of trivial or minor encroachments; or to instances where there has been acquiescence or waiver – express or deemed7 – on the part of the innocent owner. The plaintiff, on the other hand, relying on the principles contained in the underlined passages above, argued that the court has a wide, equitable discretion whether or not to grant a demolition order in *any* given case.

30]The South African cases relied upon by the defendant are conveniently collected and discussed by Milton.8 It is true that all those cases were concerned with less substantial encroachments, none of which entailed a complete deprivation of the innocent owner's property.9 It is equally true, however, that none of those cases decided that the court's discretion, as a matter of law, is *not* available in cases of more serious encroachment. More particularly, there is no case in which the court *refused* to exercise its discretion in favour of a damages award on the basis of the substantial extent of

7 Thus potentially giving rise to a defence of estoppel.

8 *Op cit* pp 237 – 244. See also *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Limited* 1971 (2) SA 397 (W) at 405D – 407G as well as *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) 130F – 132H.

9 But compare the *Johannesburg Consolidated Investment* case, *supra* n , at 402D.

an encroachment.

31]In seeking to limit the court's discretion in the manner as indicated, the defendant sought support in English law, where the equitable jurisdiction enabling English courts of equity to allow damages instead of mandatory injunctions (interdicts) is derived from *Lord Cairns' Act* (Chancery Amendment Act 1858, sec 2). In applying the discretion conferred by that Act, the English courts have developed a *'working rule'* to the effect that where a party's legal right has been infringed, that party has a *prima facie* right to an injunction, and a party will not be deprived of the remedy of an injunction save in exceptional circumstances. But, if the injury to the plaintiff's rights is small; *and* is one which is capable of being estimated in money; *and* is one which can be compensated by a small money payment; *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 awarded.10

32]Furthermore, the English courts have indeed stated on a number of occasions that the discretion vested in them to award damages instead of an injunction does not go so far as to allow a court to oblige a party to sell his property against compensation.11

10 This principle or *'working rule'* was laid down by SMITH LJ in *Shelfer v City of London Electric Lighting Co* (1885) 1 Ch 287 CA and has been followed in numerous subsequent cases, including in the Court of Appeal. See eg *Jaggard v Sawyer & Another* [1995] 2 All ER 189 (CA) and cases referred to therein.

11 See e.g. *Holland v Worley* (1884) 26 Ch D 578 at 587.

33]I agree with counsel for the plaintiff, however, that these English authorities must be approached with considerable caution. In the first place, as noted above, the discretion of the English courts to allow damages instead of an interdict is derived from a specific statute, which has no counterpart in our law. Secondly, there are many subtle conceptual distinctions in English law which, likewise, have no counterpart in our law. As Van der Merwe points out,12 *'the law of things is one of the branches of* [South African] *law … in which the principles of English law play a very subordinate role'*; or as Schreiner put it:13 *'Our law of property owes little to English law.'*

34]Be that as it may, the English authorities themselves make it clear that the *'working rule'* is, in any event, not a hard and fast rule. This appears *inter alia* from the *Shelfer* case, where the *'rule'* was originally enunciated and where LINDLEY LJ expressed himself as follows in a concurring judgment:14

> *35]'Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in*

12 Lawsa *op cit* para 196.
13 *Contribution of English Law to South African Law* 40 (as quoted in Lawsa *op cit* para 196 fn 1).
14 At pp 316 – 7.

> *which a plaintiff has shewn that he only wants money; vexatious and oppressive cases; and cases where plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy – as where the acts complained of are already finished – an injunction can be properly refused.'*
> *(my emphasis)*

In *Jaggard v Sawyer*,15 where the Court of Appeal remarked that the check list articulated by SMITH LJ had *'stood the test of time',* it was stressed that the rule in *Shelfer's* case was indeed only a *'working rule'* and that it did not purport to be *'an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction.'* MILLETT LJ formulated the test thus:

> *36]'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?' 16*

37]Reverting now to the position in our law, the plaintiff relied strongly on the judgment of HATTINGH J in *Rand Waterraad v Bothma en 'n Ander*17 in support of its argument for a wide, equitable discretion. In that case, the applicant applied for a demolition order against the respondent in respect of certain

15 *Supra* n at 208*d*.
16 At p 208*f*. See also *Fishenden v Higgs and Hill Ltd* (1935) 153 LT 128 (CA) at 139, 141.
17 *Supra* n .

structures that encroached on the applicant's land on the banks of the Vaal River. In the course of his judgment, the learned judge embarked upon a full and exhaustive review of the common law authorities and relevant case law before concluding that the so-called *'year-and-a-day'* rule had not been received into South African law from Roman Dutch law.18 He thereupon turned to consider the question whether the court had a discretion to award damages to the aggrieved party instead of ordering the removal of the encroaching structures. Upon a review of the relevant case law, it appeared that the courts had in the past simply assumed that they had such a discretion without actually deciding the point. It further appeared that when reference was made to the existence of such a discretion, it was done in the context of fairness.19 The court accordingly held that, especially in the field of neighbour law, considerations of reasonableness and fairness were prominent factors in the exercise of the court's discretion. Based on the highly exceptional facts of the case, the court exercised its discretion in favour of the respondents and against the application for a demolition order.

38]I did not understand counsel for the defendant to contend that the reasoning or research in the *Rand Waterraad* case was in any way faulty, misdirected or wrong. The only argument that was directed to me with regard to that judgment was that the court's decision was based on the peculiar and

18 At 125C – 130E.
19 At 130F/G-G and 132H.

exceptional facts before the court in that case, which facts are distinguishable from the facts of the present case. That argument – valid as it may be – does not, however, detract from the conclusion reached by the learned Judge with regard to the existence – in principle – of a wide and equitable discretion, based on considerations of fairness and reasonableness, to award damages in a given situation, rather than to order demolition of encroaching structures. I find myself in respectful agreement with the reasoning and conclusion of the court in the *Rand Waterraad* case, which conclusion finds ample support in our case law and legal literature.20

39]Moreover, the existence of such a wide and equitable discretion is perfectly consistent with the general approach of our law to similar situations, eg with regard to claims for enrichment;21 specific performance22 or interdicts.23

40]In this regard, I can see no reason in principle why the existence of the court's discretion should be limited to cases of *'trivial'* or *'minor'* encroachments. It does not make sense, to my mind, to allow trivial or minor encroachments to remain, while being obliged to order removal of substantial *or 'massive'* encroachments, as in this case. Why, one may ask rhetorically,

20 See e.g. Lawsa *op cit* para 317 and authorities referred to in fn 12.
21 *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648.
22 See para below.
23 See e.g Prest *The Law and Practice of Interdicts* Ch 11 pp 233 – 253.

should the court have a discretion to order damages instead of demolition where the eaves of a roof encroach by 11½ inches;24 or where a 15-storey block of flats encroaches by *'a couple of inches'*;25 but *not* where it encroaches to a considerable extent, as here?

41]Both on principle and authority, I am accordingly of the firm view that the court does indeed have a wide, general discretion – in appropriate circumstances – to award damages instead of demolition in respect of *any* encroachments. Having said this, however, I recognise that such discretion cannot be completely unfettered. I am mindful of the admonition expressed by VAN DEN HEEVER JA in *Preller and Others v Jordaan*26 (with reference to Schorer's Introduction to De Groot's *Inleiding*), *'dat 'n regter wat volgens sy gesonde verstand, na goeddunk en sonder regsreëls kan oordeel meer te vrese is as honde en slange'.*

42]As was said by HEFER JA in *Benson v SA Mutual Life Assurance Society*27 in connection with the court's discretion in the context of a claim for specific performance:

> *43]'… (T)heoretically, I suppose, there may be a rule which regulates the exercise of the court's discretion without actually curtailing it but,*

24 Cf *Greeff v Krynauw* 1899 CTR 591.
25 Cf Hahlo 'Encroachment: Damages instead of Removal?' 73 (1956) *SALJ* 241 at 242.
26 1956 (1) SA 483 (A) at 500G – H.
27 1986 (1) SA 776 (A) 783C – F.

apart from the rule that the discretion is to be exercised judicially upon a consideration of all relevant facts, it is difficult to conceive of one. Practically speaking it follows that, apart from the rule just referred to, no rules can be prescribed to regulate the exercise of the Court's discretion.

44]This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, nor upon a wrong principle… It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant. Another principle is that the remedy of specific performance should always be granted or withheld in accordance with legal and public policy…'

Exercising the court's discretion

45]Against this background, I turn to consider whether the wide discretion enjoyed by the court ought to be exercised in the plaintiff's favour on the facts of this case. In exercising such discretion, the starting point, in my view, should be that an owner is ordinarily entitled to claim a demolition order in respect of the encroaching structure.28 The primary remedy in cases of encroachment is, therefore, an order for removal of the encroachment.

28 See e.g. Milton *op cit* 237 – 8.

However, as with claims for specific performance, rigid enforcement of that primary remedy can sometimes give rise to an unjust result and, as appears from the *Benson* case (*supra*), that is precisely the *raison d'etre* for the court's discretion, namely, so as to enable the court to avoid an unjust result.

46]On the evidence before me, it is clear that the only realistic alternative to an award for damages would be an order for the *complete* demolition of the plaintiff's dwelling. This is what the defendant claims in his counterclaim and, although a half-hearted attempt was made on his behalf to show that it would notionally be possible to demolish portion of the dwelling in such a way as to save roughly one-half of the existing structure, the defendant's own expert, Burger, refrained from expressing any opinion as to the practicality of such a *'solution'*. I agree with the plaintiff's counsel that this proposal can best be described as *'bizarre'*. Not only would such an option leave the plaintiff with one-half of a carefully designed luxury dwelling in rubble; it would leave the defendant with a continuing encroachment of some 500 mm along the entire length of the structure, which encroachment the defendant, on his own version, is not even prepared to tolerate. In the circumstances, I have difficulty understanding why this evidence was placed before the court at all.

47]Weighing up, therefore, the option of *complete* demolition, on the one hand, against payment of compensation (including a *solatium*), on the other, I

am satisfied that the former option would indeed produce an unjust result. The considerations leading me to this conclusion fall broadly into two categories, viz (a) disproportionality of prejudice; and (b) principles of neighbour law.

Disproportionality of Prejudice

48]Its is true that this part of the trial was not concerned with questions of value and *quantum* as such. Nonetheless, having regard to the facts as a whole, it is abundantly clear to me that there would be a striking disproportionality of prejudice if a demolition order were to be granted, as opposed to the position if damages were to be ordered. Apart from the direct costs of demolition (approximately R100 000), the bulk of the building costs incurred by the plaintiff to date (approximately R1,75 million) would be wasted. Moreover, in the intervening two years since the original building operations commenced, building costs have escalated by more than 30%, with the result that the same house would now cost more than R4 million to build. In addition, there is likely to be further intangible prejudice, for instance, the inconvenience of a lengthy delay before eventual completion.

49]As against the plaintiff's prejudice, as mentioned above, the defendant would undoubtedly also suffer prejudice, in that he would inevitably lose his property if a demolition order were refused. However, it is clear to me that

this would not have nearly the same disastrous consequences for the defendant as demolition would have for the plaintiff. Notwithstanding the praises sung by the defendant with regard to erf 878 (*'perfekte erf', 'perfek geleë',* etc), I am not persuaded of its uniqueness. It is also not as if the defendant had already designed or planned an irreplaceable dream home for that property and was ready to start building. He had only acquired it some two years before the problem arose, having disposed of his previous (similar) property in the same development at a very handsome profit within a period of only six months after purchase. He had as yet made no concrete plans to develop the property in question.

50]Be that as it may, the crucial distinction between the position of the defendant and that of the plaintiff in the context of prejudice is the fact that the defendant will be fully compensated for his loss, whereas, in the event of demolition, the plaintiff will not be so compensated.

51]A factor that weighs particularly heavily with me in evaluating the relative degrees of prejudice is the fact that there is a natural aversion on the part of the courts to order the destruction of economically valuable building works. I share such aversion. As SOLOMON JA pointed out in *Hornby v Municipality of Roodepoort-Maraisburg,*[29] more than 80 years ago:

29 1918 AD 278 at 296 –7. See also the judgment of INNES CJ at 290 of the same case.

52]'Now the English Courts are extremely loth to grant what is called in their practice a mandatory injunction ordering the removal of a building which has been entirely completed. Some cases indeed almost go so far as to lay down that in such circumstances a Court is powerless to make such an order. But in ***City of London Brewer Co v Tennant*** *(9 Ch. Ap. 219) this extreme view was discountenanced by Lord Selborne, who said:*

> *53]"I am not prepared to assent to the opinion, if such an opinion exists, that in every case in which a building has been completed, even entirely completed before the filing of a bill, this Court is powerless. The Court has power, if it thinks fit, to grant a mandatory injunction – that is, an order directing the removal of a building. We know of course that the Court is not in the habit of doing so except under special circumstances, but those special circumstances may exist."*

54]And where damages would afford sufficient compensation to the person injured, the practice has been not to grant a mandatory injunction.'

55]In my considered opinion, damages – including an appropriate *solatium* – would afford the defendant sufficient compensation in the present case.

Principles of Neighbour Law

56]I am fortified in this conclusion by the rules and principles of neighbour law, which place certain restrictions on the unencumbered exercise of

powers of ownership. Neighbour law is aimed at achieving harmony in the relationship between neighbouring landowners in the case of conflicting ownership interests.30 Considerations of reasonableness and fairness are prominent factors in the exercise of the court's discretion in this field.31 Unfortunately, these qualities of reasonableness and fairness have been sadly lacking in the relationship between these parties thus far. It would certainly bode ill for their long-term relationship as neighbours, were the defendant to succeed in the present application for complete demolition of the plaintiff's home. This is a further consideration, in my view, why it would be better to sever their relationship as potential neighbours at this point.

57]Closely connected with the previous point, is the consideration that a court should be most reluctant to order demolition where it knows that the innocent party was in fact prepared to accept monetary compensation. On the evidence of this case, the inference is irresistible that the defendant was prepared to accept monetary compensation for his erf and that he attempted to use his superior bargaining position in an endeavor to extract from the plaintiff a much higher amount than he was entitled to.32 It stands to reason that he would be in an even stronger position to continue doing so if he were to be armed with a demolition order. This was the precise concern expressed

30 Lawsa *op cit* para 301.
31 See eg *Regal v African Superslate (Pty) Limited* 1963 (1) SA 102 (A) at 111G; *Rand Waterraad v Bothma, supra* n at 133J.
32 See para *supra*.

by the South African as well as the English courts and on the basis of which those courts considered themselves empowered to exercise the discretion not to order removal of an encroachment.33 In *De Villiers v Kalson*34 GRAHAM JP put it as follows:

> *58]'It is quite true that for the reasons stated in so many of the English cases, the wrongdoer who encroaches on another's rights cannot be heard to say, unless there are some very special circumstances, that a monetary compensation is sufficient, for that would be tantamount to compelling the Plaintiff to consent to expropriation. But on the other hand it would be equally inequitable to place the Plaintiff in a position to extort wholly excessive compensation from the Defendant by granting an order for the removal of the buildings in cases in which the facts disclose that a remedy in damages would fully meet the justice of the case.'*
> *(my emphasis)*

59]In my view, granting a demolition order in favour of the present defendant would have precisely the above-mentioned effect. It would indeed *'…deliver* [the encroacher] *to the* [encroachee] *bound hand and foot to be subjected to any extortionate demands the* [latter] *might make'*, as MILLETT LJ put it so graphically in *Jaggard v Sawyer.*35

33 See e.g the *dictum* of JESSEL MR in *Aynsley v Glover* (1874) LR 18 Eq 544 at 555 as well as the passage from *Shelfer's* case, quoted in para *supra*.
34 1928 EDL 217 at 231.
35 *Supra* n at 208*h.*

60]In the final analysis, the defendant's attitude and his counterclaim in these proceedings are based on anachronistic concepts of ownership: it represents a rigid and dogmatic insistence upon his perceived absolute rights as owner, irrespective of broader considerations of social utility, economic waste and neighbourliness.36

Conclusion

61]For the reasons set out above, I conclude that a remedy in damages would fully meet the justice of the case. I am satisfied, therefore, that a demolition order should be refused and an order should instead be granted as prayed by the plaintiff.

62]An order is accordingly granted in the following terms:

a) **It is declared that the defendant is not entitled to the removal from erf 878 of the encroachment erected thereon by the plaintiffs, subject to payment by the plaintiffs to the defendant of such damages as the parties may agree or the court may determine to be payable.**

b) **The defendant's claim in reconvention is dismissed.**

c) **The defendant is ordered to pay the costs of suit herein,**

36 See e.g. Lawsa *op cit* paras 297 *et seq* and A J van der Walt *Constitutional Property Clauses* (1999) 349 – 358.

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including the costs of two counsel.

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65]B M GRIESEL