Building

Building Works Intruding Into Air Space

- **Denise McGill, Lecturer, Faculty of Law, Queensland University of Technology.**

When undertaking building works it is often convenient to have some temporary intrusion on to the adjoining land or air space above it, particularly in the case of a high rise city building. Developers are often keen to build right up to the boundary, to maximise the floor space of the building on the site, but are sometimes reluctant to pay for this opportunity. In three recent cases a combination of a determined developer and an obstinate neighbour has led to some judicial discussion of the rights of the neighbour in such circumstances. The results were a broad vindication of the property rights of the neighbour.

Title to air space

One matter discussed in all three cases was the concept of how high above the surface of land the concept of ownership of the land extends. The traditional attitude of the common law was that: the owner of the soil owned everything "*up to the sky and down to the centre of the earth*"[1]. With the invention of the aeroplane it became necessary for the common law to grapple with the concept of an intrusion to air space which for practical purposes was irrelevant to the owner of the land. It was established in *Bernstein v Skyviews Ltd*[2] that merely living over land was not a trespass. The Judge justified this conclusion on the basis that the rights in ownership in the air space above land were limited "*to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it*"[3].

This formulation should be understood in the context that that case was about a mere entry into air space as distinct from an intrusion by something erected on other land[4]. However, on the basis of the *Bernstein* test, it was argued in one recent case that an intrusion of scaffolding some distance above ground level was not a trespass because it did not interfere with the ordinary use and enjoyment of the Plaintiff's land and the structures upon it. The Defendants sought to have the Plaintiff's claim relegated to one in nuisance, where it would be necessary for the Plaintiff to show that there was some real interference with the use and enjoyment of land in order to succeed[5].

The argument failed and the relevant test was formulated in this way:

> "*I think the relevant test is not whether the incursion actually interferes with the occupier's actual use of the land at the time, but rather whether it is of a nature and at a height which may interfere with any ordinary use of the land which the occupier may see fit to undertake*"[6].

The same approach was taken in the two subsequent cases.

In these recent cases the Courts have not been prepared to accept that there existed some level above which a temporary intrusion by building works was not a trespass. There is certainly enough title to prevent any permanent intrusion by another building[7], and it now seems that a temporary intrusion by scaffolding may also be prevented by ownership of the air space.

It also appears that entry on a regular basis, for example, by a jib of a crane, is likely to be actionable as a trespass at any height likely to be met with in practice[8].

The cases

In *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*[9], the Defendant wished to construct a commercial building on its property including a wall built up to the boundary of the Plaintiff's land. In order to do this it wanted to erect scaffolding on the Plaintiff's land, most of which began at about 4.5 metres above ground level and extended 16 metres along the boundary, and about 1.5 metres into the air space. It sought the Plaintiff's permission to do this, but the Plaintiff wanted $30,000 plus a significant weekly rent, and the Defendant was not prepared to pay this and just went ahead. The Plaintiff applied for a mandatory injunction requiring the scaffolding to be removed. The Court indicated a willingness to grant such an injunction, although before it was formulated the Defendant in fact withdrew the scaffolding. The Plaintiff pursued a claim for damages against the Defendant, and was awarded "*restitutory damages*" of $37,300[10], the Judge remarking that had he felt he could not award restitutory damages he would have made the same award by way of exemplary damages.

In deciding whether to grant a mandatory injunction the Court noted that compensatory damages would probably be nominal only, and, perhaps more importantly,

the Court would not refuse an injunction so as "*to enable the Defendant to purchase from the Plaintiff against his will his legal right to the easement*"[11]. The fact that to some extent it was a safety requirement and that (so it was originally said) the Defendant would not be permitted to erect the building without it was not conclusive, although the Judge did not intend to require the development to be left unfinished: what he proposed was a modified development which involved the absolute minimum of trespass on the Plaintiff's property.

Hodgson J summed up the situation as follows[12]:

> "*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'.*"

One issue which was ventilated was whether the Plaintiff should be refused an injunction because of the unreasonableness of the prior demand for payment. This argument was rejected, essentially on the basis that there was no reason to conclude that the prior demand was unreasonable, the Defendant not having put in evidence the economic advantage it achieved by making use of the Plaintiff's land in this way rather than keeping all construction works on its own land. The Judge thought the question of compensation should logically be referable to this amount rather than some attempt to measure the burden actually suffered by the Plaintiff. A similar approach was adopted when he came to assess damages. He did, however, leave open the possibility that such an argument might carry more weight if the developer had made an offer to pay a sum which was at least some significant fraction of the cost saving to be achieved and that had been refused.

Some doubt may, however, have been cast on this qualification by the second case, *Bendal Pty Ltd v Mirvac Project Pty Ltd*[13]. Here the Plaintiff owned a seven storey office block and the Defendant was building a high rise building on adjoining land coming up to the common boundary, and using a creeping three storey scaffolding surrounded by mesh screens which projected over the boundary. Dealing with the question of whether there was a trespass Bryson J summed up the position in these terms:[14]

> "*The Defendant's own activities demonstrate that putting building works in position at a great height, including screens and the operation of cranes, are ordinary uses of land which an occupier may see fit to undertake, because the Defendants are undertaking them themselves in relation to the Second Defendant's land and at the height complained of. It is not relevant to the ambit of protection of trespass law that the Plaintiff himself is not at present undertaking corresponding activities ... The Defendant's own conduct demonstrates the advantage of owning the land and controlling such activities.*"

In that case there had been other disputes between the parties, and although there was some reference in negotiations to the question of encroachment the Plaintiff's attitude throughout was simply that it would not consent to an encroachment on any terms. This did not assist the Defendant, nor did the fact that, by the time the matter came to trial, the Defendant only required the use of the air space for about five weeks in order to finish the building. Nor was the Judge impressed by the fact that the additional cost which the Defendant would now incur as a result of the order was very much greater than the additional cost which would have been incurred had it been planned from the beginning to use alternative construction methods, since he took the view that the Defendants had simply acted in defiance of the Plaintiff's rights and had brought any such hardship upon themselves.

> "*At the heart of the litigation is a very simple question of using or not using other people's property and this disqualifies the Defendants from any real claim to consideration of the hardships which they have incurred*[15]."

The fact that the matter had taken so long to come to the trial was unfortunate, but the Plaintiff's failure to apply for an interlocutory injunction was not to be criticised since that would have required an undertaking as to damages which might have exposed the Plaintiff to a considerable liability[16]. His Honour also referred to the fact that the height of the screens was such as to prevent the Plaintiff from exercising any self-help remedy, and that the Plaintiff would have difficulties in a claim for damages in discharging the onus of proof in relation to the valuation of a temporary right to use air space, which was said to be a rarely traded commodity, and that the Defendant would be in a much better position to lead evidence in relation to the savings of costs to it through the adoption of this construction technique which was said to be relevant to the value of such right.

The third decision was *Meriton Apartments Pty Ltd v Baulderstone Hornibrook Pty Ltd.*[17] The Plaintiff owned two properties which adjoined a site on which the Defendant was constructing a new building, premises for the Family Court. The Plaintiff was also constructing a new building on one of two adjoining sites, and reconditioning the building on the other. As a consequence, there was an arrangement between the parties which contemplated that each could as required intrude into the air space of the other but subject to cooperation to avoid getting in each other's way. This was treated as a licence to enter. However, relations between the parties deteriorated and the Plaintiff revoked its licence and demanded that encroachments into the air space cease. The Defendant maintained that by that stage it was necessary to continue the intrusion in order to complete the building.

The Judge held that no amount of necessity could give a right to enter the Plaintiff's land, and that normally an injunction would be granted to protect the owner of land from intrusion into air space.

Apart from the factual dispute as to the terms of the licence agreement, there was also a dispute about its significance. The Judge described it as a "*fragile and precarious*" agreement which he contrasted with a "*more or less irrevocable licence*" until the building was completed. He held that it was by implication revocable on reasonable notice which was not more than two or three months at the outside. In those circumstances there could no longer be any entitlement to enter the Plaintiff's air space, and hence on the face of it there was a right to an injunction.

The Judge referred to a principle that an injunction may be suspended where a public work would otherwise be held up, but said that that only applied if there was an undertaking as to damages and a viable procedure to assess the damages. Since it would be almost impossible to assess damages in the present case that approach was not applicable. He did not explain why the method used by Hodgson J in *LJP*[18] was not appropriate. He was only prepared to suspend the injunction for a short period to enable alternative arrangements to be made, and to that end suspended the injunction on terms that no new scaffolding would be placed on the Plaintiff's site and that the Defendant pay compensation of $1,000 per day until removal. The exact terms were to be incorporated in minutes settled by Counsel and are not recorded in the Reasons for Judgement.

His Honour rejected the notion that the Plaintiff's termination of the licence was unconscionable, or that there was any estoppel which would assist the Defendants. Even on the basis that it was not reasonable for the Defendant to have relied on such an agreement, this seems, with respect, a hard decision, and in the absence of such a finding, it is not clear why an estoppel was not appropriate if in fact the Defendant had relied on the fact that the agreement was in place. It is also difficult to see why the term of the agreement should by implication be that it was terminable on reasonable notice, rather than that it was to operate during the period of construction of the building.

Conclusion

At the end of the judgment Young J commented that the Law Reform Commission and Parliament might consider some scheme of compulsory licences to encroach in return for a proper payment to overcome difficulties of this nature. Whether it is in the public interest to prefer the interest of developers over the interest of adjoining landowners is a matter on which opinions may differ, and there are other public interest considerations such as whether it is in any event desirable for buildings, particularly high rise buildings, to be built hard up against common boundaries, so as to enable such buildings to stand shoulder to shoulder. Part XI of the *Property Law Act* 1974 (Qld) [for example] dealing with encroachments would not appear to be wide enough to be applicable[19]. In the absence of such legislative intervention developers contemplating works which will require intrusion into neighbouring air space should obtain a clear and irrevocable agreement in writing permitting them to do so before committing themselves to a design requiring intrusion.

These decisions demonstrate that in the context of intrusion into air space, what is important is the nature of the intrusion rather than the height at which it takes place above the ground as the determining factor as to whether an injunction will be granted. ❑

Footnotes

1. *Corbett v Hill* (1870) LR 9 Eq 671 at 673 per James V-C. The Latin was: cujus est solum, ejus est usque and coelum et ad inferos and its origins and application are referred to at [1978] QB 479 at 485.
2. [1978] QB 479.
3. Ibid, p488.
4. See the defendant's argument at [1978] QB 481.
5. See Fleming *The Law of Torts*, The Law Book Co Ltd, 8th Ed, 1992, p418.
6. Hodgson J in *LJP Investments v Howard Chia Investments* infra at 287.
7. *Tarbet Investments Pty Ltd v Overett* [1983] 1 QdR 280 at 285.
8. *Graham v KD Morris & Sons Pty Ltd* [1974] QdR 1. In *Bendal* (infra) Bryson J distinguished (at p467) between a crane when working and a crane not in use allowed to act as a weathervane, a distinction now drawn in *Graham.*
9. (1989) 24 NSWLR 490.
10. *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (No.2)* (1990) 74 LGRA 290.
11. p496, quoting *Cowper v Laidler* [1903] 2 Ch 337 at 341.
12. At p497.
13. (1991) 23 NSWLR 464.
14. At p470.
15. At p472.
16. As to the significance of a failure to apply for an interlocutory injunction, see also *Blue Town Investments Ltd v Higgs & Hill Pty Ltd* [1990] 1 WLR 696; *Oxy-Electric Ltd v Zainuddin* [1991] 1 WLR 115.
17. Unreported, Supreme Court of New South Wales, Young J, 9 March 1992.
18. Supra.
19. See the definition of "*encroachment*" in s.183, and see *Ex parte Van Achterberg* [1984] 1 QdR 160 at 162.