[2010] WASC 127

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	MILLER -v- EVANS [2010] WASC 127
CORAM	**:**	HALL J
HEARD	**:**	14-18 DECEMBER 2009, 12 FEBRUARY 2010
DELIVERED	**:**	9 JUNE 2010
FILE NO/S	**:**	CIV 2093 of 2007
BETWEEN	**:**	COLLEEN MARGARET MILLER Plaintiff AND ANTHONY RHYS EVANS BERYL EVANS Defendants

Catchwords:

Restrictive covenant - Construction of terms - Meaning of 'building' - Breach - Mandatory injunction to remedy breach - Whether discretion should be exercised - Delay - Acquiescence - Disproportion - Unclean hands - Oppressive or vindictive conduct - Whether damages in lieu a proper remedy

Legislation:

Nil

Result:

Judgment for the plaintiff
Mandatory injunction granted

Category: B

Representation:

Counsel:

Plaintiff	:	Mr S J Davis
Defendants	:	Mr G A Rabe

Solicitors:

Plaintiff	:	Curwood & Co Pty Ltd
Defendants	:	Stables Scott

Case(s) referred to in judgment(s):

Black Uhlans Incorporated v New South Wales Crime Commission [2002] NSWSC 1060
Chatsworth Estates Co v Fewell [1931] 1 Ch 224
Dering v Earl of Winchelsea (1787) 1 Cox 318; 28 ER 1184
Dewhurst v Edwards (1983) 1 NSWLR 34
FAI Insurances v Pioneer Concrete Services Ltd (1987) 15 NSWLR 552
Gafford v Graham (1999) 77 P&CR 73
Goddard v The Midland Railway Co (1891) 8 TLR 12
Intel Corporation v Unwired Group [2008] FCA 1927
Jaggard v Sawyer (1995) 2 All ER 189
Jessica Estates v Lennard [2007] NSWSC 1434
Kelsman v Imperial Tobacco Company of Great Britain and Ireland Ltd (1957) 2 QB 334
Leeds Industrial Co-operative Society Ltd v Slack [1924] AC 851
Lindsay Petroleum Company v Herd (1874) LR 5 PC 221
Loffren v Loffren 292 US 216
Miller v Jackson [1977] QB 966
Moody v Cox (1917) 2 Ch R 71
Owen v O'Connor (1964) NSWR 1
Sharp v Harrison [1922] 1 Ch 502
Shaw v Applegate (1977) 1 WLR 970
Shelfer v City of London Electrical Lighting Co [1895] 1 Ch 287
Shepherd Homes Ltd v Sandham (1970) 3 All ER 402
Stockdale v Shire of Mundaring [2007] WASAT 34

Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd [2004] HCA 52; (2004) 219 CLR 165
Wakeham v Wood (1982) 43 P&CR 40
Waterhouse v Pas [1998] WASCA 236
Westfield Management Ltd v Perpetual Trustee Co Ltd [2007] HCA 45
Wood v Conway Corporation (1914) 2 Ch 47
Wooloton & Wilson Ltd v Richard Coston Ltd (1971) All ER 483

HALL J:

Introduction

1 Views of the Swan River are greatly valued by the residents of Minim Cove. The aesthetic pleasure of looking at the river is also one that can have real measurable economic value. The issue in this case is whether the defendants, Mr and Mrs Evans, have wrongfully deprived the plaintiff, Mrs Miller, of her views.

2 The plaintiff and the defendants are neighbours. Both properties are burdened by a restrictive covenant. The restrictive covenant limits what can be built near the rear boundaries of the properties. The rear boundaries are those which are in the direction of the river. Some years ago the defendants built retaining walls, an above ground spa and surrounding fences on their rear boundary adjacent to the plaintiff's land. The plaintiff claims that these structures obstruct her view and are in breach of the restrictive covenant. She seeks, amongst other things, a mandatory injunction to have the structures removed.

3 The defendants claim that the structures do not breach the restrictive covenant. They also say that even if a breach has occurred the court should not grant the orders sought because they are discretionary and there are factors which justify the discretion not being exercised. In particular, they say that the plaintiff has unreasonably delayed seeking any remedy for the breach or has acquiesced in it. Further, they say that any detriment to the plaintiff is trivial and disproportionate to the detriment that would be caused to the defendants by ordering removal of the structures. They also suggest that the court should not grant the orders sought because they say that these proceedings have been brought out of spite or malice. Further, they say that the plaintiff has herself been guilty of breaching the restrictive covenant and does not, therefore, come to the court with clean hands. Finally, the defendants submit that the structures were in place at the time the plaintiff purchased the property, that the purchase price must have reflected such views as then existed and that the plaintiff is seeking to obtain by these proceedings a benefit that she never had.

The restrictive covenant

4 The properties owned by the plaintiff and by the defendants were part of a subdivision undertaken by a developer, Octennial Holdings Pty Ltd in 2000 - 2001. On 21 December 2000 Octennial executed a deed of restrictive covenant. On 25 January 2001 that restrictive covenant was

registered against, amongst others, the titles of the lots that subsequently became owned by the defendants and the plaintiff.

5 On 8 October 2001 the defendants became the registered proprietors of Lot 187. It is not disputed that at that time the property was burdened with the covenant. Nor is it disputed that the neighbouring property, Lot 188, is benefited by that covenant.

6 In 2002 the defendants built their home on Lot 187. Later that year and in early 2003 the defendants built the structures that are the subject of these proceedings in the south east corner of their land. The structures consisted of retaining walls on both the rear and side boundaries, an above ground spa and enclosing fences. The structures were built above a large retaining wall that runs along the rear boundary of Lot 187 and continues to neighbouring properties on either side. This wall retains the land, which then drops 6 m to a road below.

7 In order to provide certainty to the covenant it is important that measurements of height be determined from a fixed point. Such a point is provided by the Australian Height Datum (AHD) level. This enables the height of structures to be measured from the fixed point of sea level rather than the changeable ground level.

8 The height of the various parts of the structures as measured from AHD are as follows:

1. wall on the southern boundary of Lot 187: 27.62 m;

2. dividing wall between Lots 187 and 188: 27.35m;

3. wall parallel to the dividing wall a short distance inside the boundary of Lot 187: 27.31 m;

4. metal roof covering spa equipment between the dividing wall and the parallel wall: 27.31 m;

5. spa 26.62 m (26.69 m with cover).

9 The restrictive covenant relevantly provides as follows:

> The proprietors of each of the Lots will not:
>
> …
>
> (e) construct or cause to be constructed any building appurtenant to dwellings on the Lots including garages and car ports, swimming

> pools and swimming pool fences which exceed 1 metre in height measured from the Australian Height Datum for that Lot for a distance of 7 metres from the southern boundary of Lots 54 to 61 (inclusive) and 66 to 70 (inclusive) and 3 metres from the southern boundary of Lots 62 to 65 (inclusive), 90 to 93 (inclusive), 107 to 110 (inclusive), 180 to 190 (inclusive) and 301 and 302; and
>
> (f) grow any tree or vegetation or cause any tree or vegetation to be grown which exceeds 1 metre in height from the Australian Height Datum for that Lot for a distance of 7 metres form the southern boundary of Lots 54 to 61 (inclusive), 66 to 70 (inclusive) and 3 metres from the southern boundary of Lots 62 to 65 (inclusive), 90 to 93 (inclusive) 107 to 110 (inclusive) 180 to 190 (inclusive) and 301 and 302.

10 The AHD level for Lot 187 as shown on the relevant plan is 25.6 m. Accordingly, the restrictive covenant limited the construction of buildings or growing of vegetation which exceeded 26.6 m within 3 m of the southern boundary of Lot 187. The structures that have been referred to, exceed that height by between 2 cm and 1.02 m.

Has the restrictive covenant been breached?

11 The defendants contend that the dividing wall between the two properties is not a building within the terms of the restrictive covenant. They argue that the dividing wall is the primary barrier to the plaintiff's views and, thus, if it is not covered by the restrictive covenant there would be no utility in granting any injunction in relation to the remaining structures which are behind that wall. The defendants submit that the restrictive covenant should be interpreted in light of local laws and bylaws regarding dividing fences and what constitutes a sufficient fence for these purposes. The defendants' argument is that it can be inferred that Octennial or its advisors were aware of fencing regulations when the restrictive covenant was drawn, could not have intended that there would be a conflict with such regulations and that this leads to a conclusion that such fences were not intended to be covered by the covenant.

12 There was some evidence regarding applicable bylaws relating to dividing fences. Accepting that these provisions were those applicable at the relevant time, the effect of them is to place height limits on brick fences of between 2 and 5 feet, depending on the distance from street frontage and (after 24 February 2004) place a height limit of 1800 mm on any dividing fence, or such other height as approved by a building surveyor (exhibits D27 and D28).

13 It is far from clear that these bylaws are inconsistent with the height limitations imposed by the restrictive covenant. Furthermore, the bylaws relate to what is a sufficient fence and they contain a measure of flexibility in regards to height and are permissive rather than restrictive in this regard. Thus, there is no direct inconsistency between the bylaws and the restrictive covenant. The defendants' argument, however, seems to be more subtle; namely that the existence of bylaws regarding dividing fences made it unnecessary for the restrictive covenant to address this issue and it should be interpreted in that light. It is suggested that it follows from this that the reference to 'building' in the covenant was not intended to cover dividing fences or walls. That is entirely a question of construction of the covenants.

14 The parties agree that the ordinary principles of construction of contracts should be applied to the terms of the restrictive covenant. In this regard reference was made to ***Intel Corporation v Unwired Group*** [2008] FCA 1927 a case relating to the construction of a deed poll executed for the benefit of third parties. The plaintiff submitted that the process of construction involves discerning what a reasonable person would understand from the language used in the restrictive covenant having regard to the objective surrounding circumstances and the purpose and object of the deed: ***Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd*** [2004] HCA 52; (2004) 219 CLR 165, 179.

15 In my view, the reluctance to have regard to the subjective intentions of the parties to an original deed is even more justified in the case of a document that is intended to be registered on the title of land. As the High Court noted in ***Westfield Management Ltd v Perpetual Trustee Co Ltd*** [2007] HCA 45 it is important to take into account the fact that the Torrens system of title by registration requires the maintenance of a publicly accessible register containing the terms of dealings with land under that system. That case involved the construction of an easement and at [39] Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ said:

> The third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing and placing the third party (or any court later seized of a dispute) in the situation of the grantee.

16 The restrictive covenant in this case was intended to provide a clear statement of the restrictions applying to future purchasers of the affected land and of the consequential benefits which would be enjoyed by neighbouring properties. It cannot have been expected that prospective

purchasers or the owners of neighbouring properties would be required to enquire of Octennial or its legal advisors in order to determine the meaning of the terms of the restrictive covenant. If a clear and unambiguous meaning can be discerned from the face of the document there is no need, nor is it appropriate, to go beyond the text.

17 In my view it is clear that the word 'building' in cl (e) of the restrictive covenant is intended to have a wide meaning. This is established by the fact that it is expressed to include swimming pools and swimming pool fences. It is evident that the word was not intended to be confined to houses or even walled and roofed constructions. The word is used in context in its wider sense as being a thing which is built; a structure or edifice: *Shorter Oxford English Dictionary*. There is nothing to suggest that the word 'building' does not cover dividing fences and indeed reference to swimming pool fences clearly implies that it does.

18 Nor can it be said that the word 'building' should be read as being impliedly limited by the specific types referred to. That is because the types referred to are clearly intended to be merely examples of the broader class as is evident from the use of the word 'including'. This is not a case where general words follow specific words and are thus confined by that context: ***Waterhouse v Pas*** [1998] WASCA 236. To the contrary, in this case broad general words are followed by a small number of specific examples that illustrate that the general words have a wide ambit.

19 The word 'appurtenant' means belonging to, appertaining to or relating: *Shorter Oxford English Dictionary*. The expression 'any building appurtenant to dwellings' means a building belonging or relating to a residential construction: ***Stockdale v Shire of Mundaring*** [2007] WASAT 34. The structures in this case are located in the private yard to the rear of Lot 187 and are plainly intended for the use of those occupying the dwelling on that land.

20 In my view, the dividing wall clearly falls within the meaning of 'any building' referred to in the restrictive covenant. To the extent that it is necessary to take the purpose of the restrictive covenant into account, that purpose only serves to reinforce this construction. The evident purpose of the restrictive covenant is to protect views, as was accepted by the defendants at trial. That purpose would be defeated if 'building' was narrowly defined. In particular, as it is apparent that a dividing wall can interfere with views it is inconceivable that the restrictive covenant does not extend to such structures.

21 The circumstances surrounding the creation of the deed of covenant by Octennial also support this construction. The plaintiff called Mr Burditt Krost who worked with Octennial on the design and development of the Minim Cove subdivision. Mr Krost gave evidence that Minim Cove slopes down towards the north bank of the Swan River. He said that during the planning stages of the subdivided lots instructions were given by an officer of Octennial to develop the land in a way which maximised and preserved the integrity of the views of the river from every block and to try to do so in perpetuity. There was an objection to the admissibility of the evidence of Mr Krost and, though I overruled that objection, it was ultimately unnecessary to rely on that evidence because the terms of the covenant were clear.

22 The defendants also sought to take some comfort from the use of the word 'from' where the restrictive covenant refers to restrictions on the construction of buildings for a distance of '3 metres from the southern boundary'. It was submitted that as a matter of construction a wall built on the boundary cannot be the point of departure from which the 3 m distance referred to in the covenant is measured and therefore cannot itself be a building within the terms of the covenant. If this interpretation is correct then nothing built on the boundary would itself be covered by the restrictive covenant and it would be rendered almost completely ineffective. Philosophical questions might arise as to whether at least part of a wall built on the boundary could be measured from it, given that a boundary is an infinitely small line having no width of its own. But I do not intend to engage in such arguments because in my view the only reasonable reading of the restrictive covenant is that the word 'from' must include the boundary itself, insofar as any owner is permitted to build upon it.

23 Given my view that the dividing fence is a building within the terms of the restrictive covenant and that there is no argument that the remaining structures are also buildings, it is unarguable that all of those structures are in breach of the covenant. The question then is whether the plaintiff is entitled to a mandatory injunction requiring the defendants to remove the offending structures or, alternatively, is entitled to damages.

Principles relating to a mandatory injunction

24 The basis for an application for a mandatory injunction is that if the plaintiff had taken proceedings at an earlier stage she would have obtained an injunction restraining the defendants from committing the acts in question. However, the imposition of a positive requirement may be more

likely to give rise to hardship or disproportionate expense on the part of the defendant. Factors of this type may influence the court against exercising the equitable jurisdiction to enforce a restrictive covenant or to confine the plaintiff to equitable damages in lieu of an injunction. The basic concept is that of producing a fair result and this involves the exercise of a judicial discretion: ***Shepherd Homes Ltd v Sandham*** (1970) 3 All ER 402, 412.

25 Factors relevant to the exercise of the court's discretion include the extent of the defendants' knowledge of the wrongful nature of his or her acts. In ***Jaggard v Sawyer*** (1995) 2 All ER 189, 209 Millett LJ said:

> At one extreme the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights and thereby inadvertently placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortion and demands or expose him to substantial loss. At the other extreme the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases like the present fall somewhere in between.

26 The hardship that will be caused to the plaintiff by the refusal of an injunction has to be weighed against the hardship that would be caused to the defendant by the grant of an injunction. In this regard the court must consider the extent to which the injuries suffered by the plaintiff are compensable by an award for damages: ***Wood v Conway Corporation*** (1914) 2 Ch 47, 60. However, the normal remedy for a threatened or actual breach of a restrictive covenant is an injunction and the court's power to award damages in lieu of an injunction is discretionary and should be exercised with caution: ***Leeds Industrial Co-operative Society Ltd v Slack*** [1924] AC 851, 861. Damages may be a sufficient remedy only if the injury to the plaintiff's legal rights is small, is capable of being estimated in money terms, can be adequately compensated by a small money payment and it would be otherwise oppressive to the defendant to grant an injunction: ***Shelfer v City of London Electrical Lighting Co*** [1895] 1 Ch 287, 322; ***Kelsman v Imperial Tobacco Company of Great Britain and Ireland Ltd*** (1957) 2 QB 334; ***Owen v O'Connor*** (1964) NSWR 1312; ***Wooloton & Wilson Ltd v Richard Coston Ltd*** (1971) All ER 483.

27 Whilst the occasioning of hardship to the defendant is a relevant consideration in the exercise of the discretion to grant an injunction, the mere fact of hardship is not itself sufficient. Hardship will usually only

justify refusal of a mandatory injunction if the hardship that would be inflicted on the defendant is disproportionate to the benefit to the plaintiff: ***Jessica Estates v Lennard*** [2007] NSWSC 1434 and ***Sharp v Harrison*** [1922] 1 Ch 502.

28 In ***Wakeham v Wood*** (1982) 43 P&CR 40, 43 - 45 consideration was given to the difficulties in quantifying the damage where the restrictive covenant breached is one that protects views. In that case Waller LJ said:

> The authorities show that in the case of express negative covenants, that is where an agreement has been made and a particular thing is not to be done, an injunction will be granted to restrain a breach. And where a defendant commits a breach of a negative covenant with his eyes open and after notice the court will grant a mandatory order, although there must be some limitation to this practice: eg see per Astbury J and Sharp v Harrison and in that case the Judge found reasons for awarding damages.
>
> …
>
> The present case does not in my view qualify in any particular with paragraphs 1 to 4 mentioned by AL Smith LJ. Here is a man who had been living in his house for 33 years with a view of the sea protected by restrictive covenant. The defendant purchased the land subject to the restriction with knowledge of it at the time of purchase. He did not make any enquiry of the plaintiff either directly or indirectly, he did not inform his architect of the restriction, he took no notice of his builder telling him of the plaintiff's objection and he put the roof trusses up in spite of letters from the plaintiff's solicitor. A more flagrant disregard of the plaintiff's rights is difficult to imagine. As I have already indicated the Judge concluded that there was a serious interference with the plaintiff's legal right to a view of the sea. *I find it difficult to say that where one has a view protected by covenant the denial of that view is capable of being estimated in money terms and therefore it seems to me it cannot be adequately compensated by a small money payment. Indeed in this case the judge awarded a substantial money payment. It no doubt would be oppressive to the defendant if a mandatory injunction is granted against him but that is entirely his own fault for proceeding with the construction in breach of the covenant after warning.* (emphasis added)

29 There is another consideration which will constrain the award of damages in lieu of an injunction. If a court grants damages it in effect licenses the defendant's unlawful act for the future, subject to the payment of compensation to the plaintiff. In ***Shelfer v City of London Electrical Lighting Co*** Linley LJ said at 315:

> The court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict … 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.

The conduct of the defendants

30 The defendants, Mr and Mrs Evans, had notice of the restrictive covenant prior to their purchase of the property. Mr and Mrs Evans gave evidence that they had received a copy of the deed of covenant at the time of purchase of their land in 2001. Mr Evans also said that he had received a copy of the Minim Cove Additional Design Guidelines. This document indicated the same height restriction as the covenant. Although the version of the Additional Design Guidelines that the defendants received did not refer to Lots 187 and 188 (it being an earlier version) this was not something that Mr Evans appreciated at the time. In any event, there appears to be no doubt that the restrictive covenant always burdened the Evans' property and that they appreciated that fact.

31 Mr Evans said in evidence that he did not understand the concept of the AHD level and assumed that the ground level at Lot 187 was the level from which they could build their home and from which any relevant measurements were to be taken. Mrs Evans also stated that she thought the AHD level meant ground level. That assumption was wrong. The AHD level was in fact some 600 ml below the top of the rear retaining wall and below the ground level.

32 On behalf of the defendants it was submitted that it was a reasonable assumption that ground level was the relevant baseline from which measurements should be taken. In this regard it is relevant to take into account that Mr and Mrs Evans had signed an annexure to the offer and acceptance (exhibit D51) which included an acknowledgement by them as purchasers that:

> The datum specified on the attached Minim Cove ODP is the level used by Council to ascertain the maximum height of any intended structure on the lot. The current levels of the retaining wall and approximate mid point of the lot will be provided within seven days of acceptance of this Offer and Acceptance.

33 The attached plans indicated a datum level of 25.6 m for Lot 187. Mr Evans confirmed that he must have read this annexure because he signed it, although that did not necessarily mean he understood it. Mrs Evans said she also signed the annexure to acknowledge it and that she thought the estate agent specifically pointed out that there would be

some further information coming about what the levels of the block were. They both said that that further information was never forthcoming. Shortly before trial Mrs Evans wrote to Octennial asking for the information and it was provided. It shows the height of the original retaining wall at the rear of Lot 187 as being at 26.21 m AHD (exhibits D74 and D75).

34 In my view the acknowledgement to the offer and acceptance referred to above should have served to alert the defendants to the possibility that the current levels of the retaining wall and the lot might not be the same as the AHD level indicated on the plan. Whether or not Mr and Mrs Evans fully appreciated the significance of that acknowledgment, Mrs Evans, at least, appeared to be aware that further information regarding the ground levels would be provided. To merely assume that the AHD level was equivalent to the ground level in these circumstances does not appear to be reasonable. The importance of complying with the restrictive covenant could not have been lost on Mr and Mrs Evans and a reasonable amount of care and attention would require that they enquire as to the meaning of the AHD level if, as they say, they did not understand the term.

35 Mr and Mrs Evans proceeded to build the structures in the south east corner of Lot 187 in late 2002 and early 2003. Mr Evans conceded that he was aware at this time of the need to comply with the restrictive covenant and that its purpose was to maintain views and amenity. He also knew that the covenant had the effect of imposing a 1 m height restriction in an area of 3 m measured from the southern boundary of his land.

36 At the time plans were submitted to Council in respect of the structures Mr Evans appreciated that the walls surrounding the spa would breach the maximum 1 m height stipulated by the covenant, even on the mistaken basis that ground level coincided with AHD. This is because the surrounding walls were to be built to 1.2 m from ground level. Thus, Mr Evans knew that the structures would breach the covenant though he was mistaken as to the extent of that breach. Mr Evans gave evidence that he relied on advice from a Shire officer that safety regulations in respect of swimming pools, which required surrounding fences to be 1.2 m high, overrode the restrictive covenant. No witness was called to confirm that any such advice had been given. In any event, such advice would have been plainly misconceived.

37 Any understanding on the part of Mr Evans that safety regulations relating to swimming pools could override a restrictive covenant could

only have been based upon the assumption that there was a necessary inconsistency between the restrictive covenant and such regulations. Of course, as would have been obvious to Mr Evans, any such inconsistency was not one raised by necessity but arose out of the desire of him and his wife to construct a spa in the south east corner of their property. It must have been clear to Mr Evans that it was possible to comply both with the restrictive covenant and the swimming pool regulations by either lowering the spa so that the fences around it remained at the right height or by foregoing the pleasure of a spa entirely.

38 Compliance with the restrictive covenant was, of course, no business of the Shire. The Shire was concerned that any proposed structures and dividing walls met the requirements of building bylaws and other regulations. It had no role to play in ensuring that the restrictive covenant was complied with.

39 The plans were approved and the structures were built. This occurred at a time prior to the purchase of the neighbouring property by Mrs Miller, the plaintiff, and her husband. At the time of building Mr Evans appreciated that to the extent the structures exceeded the height restriction they could impact adversely on the view from the neighbouring lot. He said, however, that in relation to the structures on his rear boundary wall any impact was minimised by the fact that the upper part of that wall was constructed of supported glass panels. I will return to this issue in considering whether the damage suffered by the plaintiff is trivial.

40 Mr Evans said that he had 'engaged with' the previous owner of Lot 188 in relation to the building of the dividing fence. Some correspondence in that regard was tendered in evidence. It is apparent from that correspondence that it related to the quality and cost of the dividing wall (exhibit D56). There is reference to the walls being 1.2 m high from ground level, but no reference to the covenant. It is not evident that the previous owner was ever told that the structures were in breach of the covenant or that he agreed to any such breach. Accordingly, those communications offer little comfort to Mr and Mrs Evans that subsequent owners of Lot 188 would not seek to remedy the breach. There is nothing to suggest that Mr and Mrs Evans brought the breach to the attention of Mr and Mrs Miller. Indeed, Mr Evans said in this regard that:

> My understanding would be that the owner of the property would either tell the new owners or the new owners would ask the seller so the seller would tell the buyer.

41 Later in cross-examination Mr Evans said that he did not in fact make any such assumptions at the relevant time. In any event it is hard to understand how such assumptions could properly be made given that Mr Evans had never advised the former owner that the structures were in breach of the covenant.

42 In March 2007, after the plaintiff had purchased Lot 188 and the Millers had raised complaints about the structures breaching the covenant the defendants wrote to the plaintiff (exhibit P17) stating:

> Prior to fence construction we worked closely with the previous owner of Lot 188 and consulted widely with authorities to obtain the necessary approvals to ensure that we were compliant with all fencing requirements and existing covenants.

43 Mr Evans said that he wrote this letter. It is difficult to reconcile the reference to compliance with existing covenants in circumstances where Mr Evans' evidence was that he was conscious that the structures did, in fact, breach the covenant. When it was put to Mr Evans in cross-examination that this statement was untrue he said:

> Its true to the extent that the building services manager from the Town of Mosman Park told us that the safety requirements overrode the restrictive covenant.

44 When asked why he had not included that qualification in the letter Mr Evans said that the letter was written in great haste because there had been a demand that they do something within five days. Even if that is correct the letter was at least misleading insofar as it suggested that everything possible had been done to ensure compliance with the covenant.

45 I accept that Mr Evans 'acted with his eyes open and in full knowledge that he was invading the plaintiff's rights': ***Jaggard v Sawyer*** (Millett LJ). Whilst the building of the structures was not a contemptuous disregard of the restrictive covenant, it is clear that the defendants knowingly breached the terms of it. Whilst that conduct could be seen as mitigated by the failure to appreciate where the AHD level was and therefore the extent of the breach, any mistake in that regard could not be described as reasonable. Nor was it reasonable to rely upon any advice from the Shire that the restrictive covenant was overridden by safety regulations, even assuming that such advice was given. Unlike ***Jaggard v Sawyer***, this is not a case where it could be said that the defendants acted openly and in good faith and through inexperience had not appreciated the

problem of a covenant. In those circumstances the conduct of the defendants does not weigh against a mandatory injunction.

Is there a disproportion between the damage that will be suffered by the defendants compared to that of the plaintiff?

46 It is necessary to understand that any views of the river enjoyed by Lot 188 are angle views along a corridor between houses on the next level down in the direction of the river. The structures in question are built directly in the line of views that would be enjoyed from rooms on the ground floor of the plaintiff's home.

47 Mr Miller gave evidence that he had measured the areas from which views are blocked by the structures and those areas were marked on a plan (exhibits P7 and P24). Objection was taken to this evidence on the basis that any such plan should have been prepared by a qualified person. That objection was overruled and in my view Mr Miller's plan was relevant to the question of whether the breach of the covenant had caused and is causing damage to the plaintiff that could be described as trivial. It was not necessary for Mr Miller's plan to be accurate in a mathematical or surveying sense. What the plan depicted were the areas alleged by Mr Miller to be those from which his view of the river was obscured. The plan was therefore nothing more than a pictorial depiction of his own evidence in this regard. It is noteworthy that the plan also depicted areas which would have no view regardless of the structures and other areas which have views notwithstanding those structures.

48 Mr Miller also produced a number of photographs taken at eye level from each of four areas of the house on Lot 188 (exhibits P28 - P32). It is clear from examination of these photographs that the river views are being obscured by the relevant structures and in particular the dividing wall.

49 There was also evidence that in January 2005 Mr and Mrs Miller increased the height of the retaining wall behind their own property by 1 m making it level with the rear wall and dividing wall on Lot 187. In 2007 the Millers lowered the height of this wall on the southern boundary because it was blocking the views from downstairs rooms. The effect of heightening the wall on the rear boundary tends to confirm the effect which the adjacent structures on Lot 187 have on the views from Lot 188.

50 Mrs Miller also testified that there were areas of her house from which views were blocked by the structures on Lot 187. She was taken through the photographs and confirmed that she had taken those photographs and that they accurately depict the aspect from various

locations of her house. This evidence was not challenged in cross-examination and I accept it.

51 The evidence of Mr and Mrs Miller was also supported by independent witnesses. A valuer, Mr Gorman, was called in order to give evidence as to an assessment of the effect which the loss of views had on the value of the property of the plaintiff. In order to prepare his valuation report Mr Gorman conducted an internal and external inspection of the plaintiff's home. Mr Gorman's report stated that from the lower level of the house views from the living room were obscured. He confirmed that this was based on his own observations as at the date of inspection. He said that views were obscured by a fence, by which I took him to be referring to the dividing wall. He said that he had a clear recollection from his inspection that the views were obscured from both a sitting and standing position and affected both the lounge room and the outdoor patio area. A builder, Mr Chamberlain, was also called by the plaintiff and he said that he undertook a visual inspection and that on his observation the spa and the walls associated with it restrict the views from the plaintiff's property to a significant extent. Neither Mr Gorman's nor Mr Chamberlain's evidence was challenged in cross-examination in these respects.

52 Mr Gorman's evidence in regards to the effect upon value was also unchallenged. He expressed a view that the negative effect on market value of the plaintiff's property due to the construction of the structures was in the order of $105,000. This was the difference between his estimate of market value and his view as to the value if the views were not obstructed. Mr Gorman based his analysis upon comparable sales. He said that whilst he had prepared his report in mid-2008 subsequent changes in the market did not affect his opinion as to the diminution of value in regard to the loss of view.

53 There was a suggestion that any detriment to the plaintiff was mitigated by the fact that the top portion of the boundary walls are constructed of glass panels. It was submitted that these glass panels, being clear, did not obstruct the plaintiff's views. However, the plaintiff and her husband gave evidence that these panels become cloudy with condensation in some weather conditions. I accept that evidence. I also note that the panels are supported by brackets that are not transparent. Furthermore, the glass panels and their supports remain visible and are a distraction and impediment to an unhindered view. I do not, therefore, accept that the part of the structures which is glass represents only a trivial impost on the plaintiff. In any event it is unhelpful to treat the structures

as if different parts were severable. Even if this were true, it is certainly not true of the top parts of the boundary walls (which obviously depend on what supports them).

54 In my view the damage suffered by the plaintiff could not on any fair view be described as trivial. In coming to this conclusion I take into account not only the effect upon the value of the property but the inherent value to the plaintiff and her husband of the views of the river to which they are entitled. The loss of such pleasure is difficult to estimate in monetary terms and equally, therefore, difficult to compensate by any small damages payment: ***Wakeham v Wood*** (Waller LJ).

55 Much of the evidence at the trial related to the detriment that the defendants would suffer if a mandatory injunction was ordered. An injunction would require that the structures be lowered from between 0.02 m and 1.02 m. In practical terms the effect of this would be that the spa would either have to be removed or would not be useable in its present position. That is because although the spa itself is only fractionally above the permitted height, safety regulations would not allow that spa to be used as such unless it was surrounded by a safety isolation fence. The walls and fences presently around the spa are more significantly above the maximum height. For this reason evidence was called by both the plaintiff and the defendants in regard to the cost of relocating the spa on the property of the defendants.

56 The builder called by the defendants, Mr Brackenreg, gave evidence that there was no other area in the back courtyard area where the spa could be relocated without concerns being raised about the structural integrity of the retaining wall at the rear of the land or the defendants' house. In coming to this conclusion Mr Brackenreg made certain assumptions regarding the subsoil construction of the retaining wall and whether excavation to a depth necessary to accommodate the spa would be possible. In particular, he assumed that the supporting structures below the surface (referred to as 'battering') would act as an impediment to any excavations near the wall. He also suggested that if soil was excavated engineering works may be required to ensure the retaining wall was properly supported.

57 Mr Brackenreg also gave an opinion as to the costs of work required on the assumption that relocation was possible. In this regard Mr Brackenreg's costings were based upon Mr Evans' view of what work would be required. However, Mr Evans accepted that he was not an engineer or building professional, though he did say he had taken some

advice from a person (who was not called as a witness and did not appear to be a structural engineer).

58 The plaintiff called its own expert builder, Mr Chamberlain. He expressed the view that there was no need to lower and support the retaining wall and that the spa could be accommodated in an excavated area of the defendants' backyard. He expressed the view that lowering the spa and excavating the adjacent land would have no direct affect upon the retaining wall because it would reduce, rather than increase, the load that was being borne by that wall. As to concerns that battering of the wall below the soil surface would make excavation impossible, Mr Chamberlain gave evidence that in his experience it was unlikely that such battering would prevent excavation or that excavation would affect the engineering integrity of the retaining wall. Mr Chamberlain accepted that it may be necessary for any excavated hole to itself contain a retaining wall in order to retain soil next to it. However, he said that such a retaining wall would be perfectly feasible.

59 Mr Brackenreg did not consider whether any of the work he costed was actually necessary in order to comply with the covenant. His instructions were that in his report he should only consider the costs of carrying out the works that he had been instructed to consider but not express any view as to their necessity. He accepted that, subject to an engineer looking at possible interference with subsoil battering, it was possible for the ground level to be lowered on Lot 187 to accommodate the spa. Thus, that part of the retaining wall that was above ground could be used as part of the isolation fencing. It should be noted that both the defendants and the plaintiff have excavated the ground level to below the original retaining wall at the rear of their properties. This tends to support the proposition that there would be no need to carry out the major structural works asserted as necessary by the defendants.

60 To the extent of any inconsistency, I prefer the evidence of Mr Chamberlain. That evidence was soundly based on many years' experience as a working builder and was clear. On the other hand, Mr Brackenreg's evidence was based upon assumptions that the defendants asked him to make, the validity of which was not established. Importantly Mr Brackenreg's costings were based not upon what work was necessary in order to comply with any mandatory injunction but on what works Mr Evans considered would be needed in order to accommodate the spa in another location. Accordingly, I prefer the evidence of Mr Chamberlain that the spa could be relocated for a cost of approximately $20,000. However, I accept that even Mr Chamberlain's

evidence is based upon some assumptions which may prove to be incorrect and in that event relocation may be more expensive than anticipated. However, in my view, the expense of relocating the spa is not ultimately decisive.

61 Much of the evidence proceeded upon the presumption that it was necessary to relocate the spa. Of course any mandatory injunction might necessitate the removal of the spa, but it would not necessitate its relocation. At some indefinable point the costs of retaining the spa at another location would overwhelm the desire of the defendants to have such a facility. For the sake of these proceedings I am prepared to consider that the effect of a mandatory injunction may be to require that the spa be removed without being relocated. The detriment in these circumstances would be the cost of the removal of the spa, which I understand would be significantly less than $20,000, the loss of the value of the spa and the loss of any use of such a facility. There is no evidence as to the exact cost of originally installing the spa, nor whether the building of the spa improved the value of the defendants' land and the loss of pleasure of enjoyment of the spa is impossible to quantify.

62 As difficult as the comparison between the detriment suffered by the plaintiff and the prospective detriment that could be suffered by the defendants is, I cannot conclude on the basis of the evidence that the detriment to the defendants would be disproportionate such as to justify the refusal of a mandatory injunction. As the plaintiff's counsel pointed out, views of the river are protected by the restrictive covenant but entitlement to a spa is not. It must be remembered that the evidence was that the defendants chose what they considered to be the optimal location for the spa in their yard, a location which maximised the views that could be enjoyed from it. Accordingly, the spa was deliberately built in that area protected by the restrictive covenant and in full knowledge of that covenant and the importance of complying with it.

63 As I have earlier noted, it is a good working rule that if the injury to the plaintiff's legal rights is small, is one capable of being estimated in money, is one that can be adequately 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 of an injunction may be given: ***Shelfer v City of London Electric Light Co***, (Smith LJ) (322 - 323) cited in ***Jaggard v Sawyer*** (207 - 208); ***Wakeham v Wood*** (43 - 45).

64 In the present case I am satisfied that the injury to the plaintiff's legal rights is not small. This is not a case where the denial of the view to the plaintiff is capable of being estimated in money terms. In any event it is not one that could be adequately compensated by a small money payment. Even accepting that the loss of value of $105,000 in 2008 is correct, that could not be viewed as a small sum and in any event does not take account of any loss of pleasure of the view to the plaintiff. I am also mindful that an award of damages in lieu of an injunction would effectively license a breach of the restrictive covenant. The covenant applies to many lots in the area and to permit the structures to remain could be seen as undermining the authority of the restrictive covenant to control the height limitations.

Delay and acquiescence

65 The defendants raise as a defence to any breach of the covenant, the alleged delay by the plaintiff in bringing this proceeding and her alleged acquiescence in the breach by failing to take any action within a reasonable period. The defendants also refer in their submissions to the defence of laches.

66 The equitable defence of laches arises if two conditions are satisfied. Firstly, that there be unreasonable delay on the part of the plaintiff in commencing or prosecuting proceedings. Secondly, that in view of the nature and consequences of that delay it must be unjust in all the circumstances to grant the specific relief in question: ***Lindsay Petroleum Company v H***erd (1874) LR 5 PC 221, 240; Spry, *The Principles of Equitable Remedies* (7th ed, 2007) Law Book Company (431). The questions to be answered are whether the plaintiff by delaying the institution or prosecution of her case has either acquiesced in the defendants' conduct or caused the defendants to alter their position in reasonable reliance on the plaintiff's acceptance of the status quo or otherwise permitted a situation to arise which it would be unjust to disturb. Accordingly, it is necessary to consider the length of the delay and the nature of any acts done during the interval. Mere delay on its own is insufficient to invoke the defences of laches or acquiescence.

67 However, the defendants also allege that the plaintiff with full knowledge of her rights has refrained from exercising them in circumstances from which it can be inferred that she has abandoned them. It is further alleged that the delay has occurred in circumstances which has involved prejudice to the defendants.

68 In regard to acquiescence the question is whether the plaintiff has by her acts and omissions represented to the defendants that the covenant is no longer enforceable and that they are therefore entitled to maintain the structures at heights in breach of it: ***Chatsworth Estates Co v Fewell*** [1931] 1 Ch 224, 231. A plaintiff who is said to have acquiesced in a breach of covenant must have sufficient knowledge of the facts constituting the breach: ***Lindsay Petroleum*** (241). The test of acquiescence is whether on the facts of the particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff to continue to seek to enforce the covenant: ***Gafford v Graham*** (1999) 77 P&CR 73 (Nourse LJ) following ***Shaw v Applegate*** (1977) 1 WLR 970, 978.

69 The evidence was that the plaintiff had become the registered proprietor of Lot 188 on 3 December 2003. At that time the structures on the defendants' property were already built. Lot 188 was vacant and the plaintiff and her husband made arrangements for a home to be designed and built. Construction of that home was completed in 2005.

70 Mr and Mrs Miller were aware of the restrictive covenant from the time they purchased their property but said that they did not appreciate that the structures might be in breach of the covenant until about April 2006. It was at this time that they moved into their new house and noticed that the river views from downstairs were obstructed by the dividing wall. It should be noted that when the land was originally purchased houses on the next tier down had not yet been built. Accordingly, it was difficult to determine exactly where the corridor of views would be. Mr Miller also gave evidence that the building of the house involved some excavation and thus prior to completion it was hard to anticipate exactly what views would be enjoyed from the ground floor.

71 In April 2006 a dispute arose between the parties about a balcony screen on the second storey of the plaintiff's home. The defendants were concerned about the degree to which the balcony overlooked their property and affected their privacy. The Millers were obliged to obtain Council approval and in this connection Mr Miller began considering cones of vision from the balcony and the height of the structures in that context. He said that it was at this time that he learnt about the AHD concept and how heights of structures could be determined from the plans. It took Mr Miller from April until about August 2006 to be sure in his mind that the defendants' structures were in breach of the restrictive covenant.

72 There was then a short delay until March 2007 before the plaintiff first complained to the defendants. Mr Miller said that the reason for this delay was to have the balcony screen dispute resolved by Council before making any complaint about the breach of covenant. In cross-examination it was put to Mr Miller that in fact he raised the defendants' breach of covenant at a meeting of the Council as a reason for allowing the Millers their balcony screen. Notes that Mr Miller made at the time were put to him. Those notes refer to the restrictive covenant and could be read as suggesting that the defendants' spa contravened it, however Mr Miller said that the notes were used by him as a prompt rather than being read out and that he did not refer to any breach of the covenant at this time. Mr Miller said that the point he made at the meeting was that he and his wife should be allowed their balcony screen in circumstances where the defendants had been granted an indulgence by the Council with respect to their own balcony and balcony screen. I accept Mr Miller's evidence in this regard. In any event, even if Mr Miller was at this time relying upon the breach of the covenant as a reason why the Council should not accede to the defendants' objections relating to the privacy of their spa, the relevant council meeting appears to have been in February 2007 so any delay in complaining to the defendants was slight (the first letter of complaint being dated 7 March 2007 - exhibit P16).

73 I find that neither the plaintiff nor her husband at any time acquiesced in the defendants' conduct in constructing the structures in breach of the covenant. Any suggestion of delay or acquiescence can only be measured from the time Mr and Mrs Miller became aware of the breach. I accept the evidence of Mr Miller that that awareness did not arise until April 2006. The subsequent delay of some seven months before the plaintiff and her husband raised the matter with the defendants is explained by their concern not to prejudice the application to the Council in respect of the balcony screen. That process continued until about the end of February 2007 and the plaintiff then reasonably quickly raised the restrictive covenant issue with the defendants. Accordingly, the relevant delay was neither lengthy nor was it unreasonable.

74 There was no evidence to suggest the defendants had in any way been prejudiced by the fact that complaint was not made until March of 2007. The plaintiff did not by word, action or inaction induce the defendants to believe that the breach of the covenant was known by the plaintiff and accepted by her. There is nothing to suggest that any prejudice has occurred to the defendants by the lapse of time. Prejudice may occur where there is a loss of evidence, the impossibility of granting equitable relief because a property has passed through various hands and

successive owners have spent money on it, or where the defendants have reasonably acted to their detriment in reliance on the plaintiff's delay. Whilst they are merely examples, none of those issues arise in this case. Accordingly, in my view, there is no basis for denying the plaintiff a mandatory injunction on the grounds of delay, acquiescence or laches.

Oppressive, harsh or vindictive conduct?

75 The defendants assert that the plaintiff purchased the property on the basis of the views that were then existing with the structures in place and that the price she paid for the property must have reflected this. It is suggested that there were no issues in regards to the structures until the dispute arose regarding the plaintiff's balcony screen. It is submitted that the true nature of the case of the plaintiff and her husband is that they were happy with the property with the defendants' structures in place and bought it for what they believed was a fair price having regard to those structures which they believed would be there for as long as they lived there and consequently they never expected nor paid for a river view from the ground level. The implication that is said to flow from this is that the real reason for the complaint was vindictiveness and a desire for revenge following the dispute regarding the balcony screen.

76 There is no doubt that the dispute between the parties descended to the level of personal animosity. There was contesting evidence regarding who said what to whom, but it is not necessary for the purposes of this matter for me to make any resolutions as to who was in the right or wrong in that regard. Mr Evans gave evidence that there was a verbal confrontation with Mr Miller in front of his property in late March 2007. According to Mr Evans he referred to legal requirements relating to swimming pools and dividing fences and that Mr Miller then abused him and said that Mr Evans and his wife had 'started this'. Mr Evans took this to be a reference to the balcony dispute. Mr Miller accepted that there had been a heated discussion, however he said that Mr Evans had refused to provide any information to support his claims regarding legal requirements. Mr Miller accepted that he had used an abusive term but denied saying anything about Mr and Mrs Evans having started the matter.

77 Suffice it to say that notwithstanding that the parties have a mutual aversion to each other, it is my view that this animosity is largely a product of the dispute and not the cause of it. I do not accept that the Millers have only sought to initiate and pursue these proceedings out of malice and not out of any genuine desire to vindicate their rights. The

suggestion that they complained about the breach out of revenge for the objection by Mr and Mrs Evans to the balcony screen is not supported by the evidence. Whilst the balcony screen dispute no doubt caused some ill-feeling, there is nothing to support a conclusion that it caused the Millers to bring these proceedings. The fact that they have suffered a real detriment, and continue to do so, as a result of the existence of the structures, supports this conclusion. Despite cross-examination as to their motives Mr and Mrs Miller impressed me as being careful and honest witnesses. They rejected all suggestions that these proceedings were only brought out of vindictiveness.

78 As regards the claim that the plaintiff is seeking to recover something that she never had, namely a view unobscured by the structures, it seems to me that this is an inversion of the nature of the claim made. The plaintiff did not purchase a view, she purchased a piece of land that had the benefit of a restrictive covenant. There was nothing to suggest at the time of purchase that the benefit of that restrictive covenant had in any way been compromised. There is no obvious reason why the defendants should be relieved from an order to remove the structures they knowingly built in breach of the covenant on the basis that they were living there before the plaintiff.

79 The implication that the beneficiary of a restrictive covenant who 'comes to a breach' should be prevented from enforcing it, appears to be unsupported by any authority. If it is thought that there is some analogy with coming to a nuisance, which I doubt, it should be noted that it is no defence that a plaintiff comes to a nuisance by occupying land adjoining it: ***Miller v Jackson*** [1977] QB 966. The effect of denying an injunction on this basis would be to licence a knowing breach on the part of the defendants even though it was not appreciated by the plaintiff at the time of purchase.

80 The defendants appear to be asserting that the burden was on the plaintiff before buying a vacant block to ascertain that the defendants had not breached the covenant. In fact Mr Miller said in evidence that he paid for the property on the assumption that the restrictive covenant had been complied with by his neighbours. Whilst Mr Miller agreed with the proposition that with hindsight he should have measured the AHD levels of the structures, this was no more than a recognition that had he done so he might have appreciated the breach at an earlier stage. I do not accept that the plaintiff was motivated by malice nor that she is trying to obtain a benefit over and above that to which she is properly entitled.

No clean hands

81 The defendants assert that the plaintiff herself breached the restrictive covenant, albeit inadvertently, in constructing an extension to the retaining wall on her southern boundary to the same height as the defendants. The wall in question was subsequently reduced in height by Mr and Mrs Miller. It is also suggested that a dividing fence with the neighbour on the other side of the Millers is also in breach of the restrictive covenant.

82 Where the plaintiff and the defendant are both bound by restrictive covenants arising under a common building scheme and the plaintiff is in serious breach of the covenant, unclean hands provides a basis on which the plaintiff can be denied an injunction to require the defendant to observe the restrictive covenant: ***Goddard v The Midland Railway Co*** (1891) 8 TLR 126. However, the unclean hands maxim does not arise upon any act of wrongful conduct by a defendant regardless of its nature or connection to the subject matter of the suit. Equity does not demand that its suitors shall have led blameless lives: ***Loffren v Loffren*** 292 US 216, 229 quoted in ***Black Uhlans Incorporated v New South Wales Crime Commission*** [2002] NSWSC 1060 [163].

83 In ***FAI Insurances v Pioneer Concrete Services Ltd*** (1987) 15 NSWLR 552, 554 Young J said:

> Unless there is established one of the equitable defences then general naughtiness or the desire of the court to censor the plaintiff's conduct does not enter into the equation when one is considering whether the plaintiff should get relief.

84 In ***Dering v Earl of Winchelsea*** (1787) 1 Cox 318; 28 ER 1184 Lord Chief Baron Eyre said at 319 - 320 of Cox and 1184 - 1185 of ER:

> A man must come into a Court of Equity with clean hands but when this is said it does not mean a general depravity. It must have an immediate and necessary relation to the equity sued for. It must be a depravity in a legal as well as in a moral sense.

85 In ***Moody v Cox*** (1917) 2 Ch R 71 Scrutton LJ said at 87 - 88.

> Equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand has an immediate and necessary relation to the equity sued for.

86 In the present case there are several impediments to the application of the unclean hands maxim. Firstly, it is far from clear that there is any

impropriety at all on the part of the plaintiff. Secondly, if there is, it is not directly related to the equity sued for, rather than being of merely a similar type.

87 As regards the erection of a higher wall on the rear boundary of the plaintiff's property, from the evidence of the Millers, which I accept, the erection of this wall occurred at a time they were in ignorance of the AHD levels and in any event that wall was ultimately removed by them and thus any breach was remedied. It must be doubtful that that breach was a breach in respect of any duty owed to the defendants insofar as there is no suggestion that the wall in question ever interfered with the defendants' views. In any event it was not an impropriety that had an immediate and necessary relation to the equity sued for: ***Dewhurst v Edwards*** (1983) 1 NSWLR 34, 51. That is to say, it does not relate to the enforcement of the restrictive covenants registered on the defendants' title. Furthermore, a plaintiff may resist the defence by 'washing his hands' that is by showing that any misconduct ceased well before the suit or that it occurred by accident. In my view that is the case with the rear retaining wall and it does not present an impediment to equitable relief.

88 As regards the fence with the neighbour on the other side of the Millers, the evidence in this regard did not establish that the Millers were responsible for building that fence. Whilst Mr Miller conceded that the fence may well be in breach of the restrictive covenant, he said that there had been no complaints in regard to it and that he would be prepared to agree to it being lowered if it was in breach. Even assuming that that fence is in breach of the restrictive covenant there was no evidence from which it could be concluded that the plaintiff was responsible for that breach.

Conclusion

89 There has been a breach of the restrictive covenant by the defendants. The breach is not trivial nor is the detriment suffered by the plaintiff. The conduct of the defendants does not mitigate the breach or make equitable relief inappropriate. Whilst the defendants would suffer a detriment from the granting of a mandatory injunction such detriment is not so disproportionate as to make an injunction inappropriate. Damages are not a suitable alternative in the circumstances of this case. Therefore a mandatory injunction should be ordered requiring the defendants to lower the structures to the maximum levels allowed by the restrictive covenant.

90 The injunction will also relate to a plant the defendants have allowed to grow above the maximum height and that was a subject of the

statement of claim. In this regard Mr Miller gave unchallenged evidence that the plant had been trimmed so that it was about level with the top of the limestone wall that is parallel to the dividing fence. Accordingly, that plant must also be in breach of the covenant.

91 I am also satisfied that it is appropriate to order a prohibitory injunction restraining the defendants from breaching the covenant again. I do so because I consider it desirable to bring this dispute to an end and to ensure that any future breaches of the covenant are prevented so far as possible. The dispute in this matter has been on foot since 2007 and has been strenuously resisted. Whilst the plaintiff would continue to have the benefit of the covenant into the future, any further breaches would have to be remedied by bringing new proceedings. The effort and expense required to vindicate her rights should not have to be repeated by the plaintiff. The advantage of a prohibitory injunction would be that the obligation to comply with the covenant would be reinforced and any future breach would have potentially more serious consequences. I am satisfied that that additional incentive to ensure future compliance is justified given the circumstances I have referred to.

92 In final submissions the plaintiff also sought damages under s 25(10) of the *Supreme Court Act* in addition to an injunction. This was on the basis that the plaintiff had lived at Lot 188 for nearly four years and that in that period the structures had been blocking the river views from downstairs and adversely affecting amenity on an ongoing basis. It was submitted that the plaintiff should be entitled to compensation for this loss of amenity for the whole of that period until the structures are lowered. There are two significant difficulties with that submission. Firstly, no claim for damages in addition to an injunction was made in the statement of claim. Damages were only sought in lieu of an injunction. The case was not fought on the basis of damages being an additional rather than alternative remedy. It is entirely possible that the evidence may have been different had the prayer for relief been differently worded. Secondly, there was no evidence adduced upon which any reasonable assessment of the damages described could be made. Accordingly, I do not consider it appropriate to make any order in that regard.

93 I will hear from the parties as to the form of the orders.