IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
VALUATION, COMPENSATION AND PLANNING LIST

Not Restricted

S CI 2016 00839

WARWICK ALEXANDER MANDERSON — Plaintiff

v

VICKI LOUISE WRIGHT — Defendant

JUDGE:	JOHN DIXON J
WHERE HELD:	Melbourne
DATE OF HEARING:	14-17 November 2017
DATE OF JUDGMENT:	12 April 2018
CASE MAY BE CITED AS:	Manderson v Wright (No 2)
MEDIUM NEUTRAL CITATION:	[2018] VSC 162

PLANNING AND ENVIRONMENT – Interpretation of restrictive covenant – Defendant admitted breach of restrictive covenant – Appropriate remedy for admitted breach.

REMEDIES – Injunction - Breach of restrictive covenant - Mandatory injunction – Whether plaintiff's conduct disentitles him to relief sought - Whether *Lord Cairns Act* damages should be awarded – Application of the 'good working rule' from *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 – Whether mandatory injunction would be oppressive to defendant – *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490, *Break Fast* (2007) 20 VR 311 considered.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff		Mr C Raven, Raven & Associates
For the Defendant	Ms L Hicks	Best Hooper

HIS HONOUR:

Introduction

1 The Warrenbeen Court estate ('Estate') was originally a contiguous area of approximately 8 hectares of Coastal Moonah Woodland ('CMW') within a dairy farm. Now within the Barwon Heads township boundaries, it was subdivided into 14 lots by plan of subdivision 142071E that was first registered on 20 September 1999.

2 The plaintiff, with his wife, are, and have been since 22 March 2005, the registered proprietors of lot 5 in the Estate, the land described in Volume 10546 Folio 031 of the Register. The block is approximately 3876 m^2. The defendant is, and has been since 31 October 2006, the registered proprietor of lot 6, the land described in Volume 10546 Folio 031 of the Register. This block is approximately 3892 m^2. The western border of the plaintiff's block is the eastern border of the defendant's block. The parties are neighbours. The street address is Warrenbeen Court.

3 The titles to the lots in question were created by stage 2 of the subdivision that was registered on 27 September 2000.

4 Each lot in the subdivision (1-14 inclusive) is subject to restrictive covenant PS412071E registered on the titles on 20 September 1999, which benefits and burdens all of the lots in the subdivision. The covenant creates two restrictions, of which the second restriction is presently relevant. That restriction expressly prohibits lot owners in the subdivision from developing their lot other than in accordance with an approved neighbourhood design plan pursuant to Planning Permit 1057/97. One must look outside the plan of subdivision at both the planning permit and the neighbourhood design plan to properly understand the restriction that was imposed. The substance of restriction No 2 is found in the approved neighbourhood design plan which prohibited the erection of a building outside a defined building envelope. I will come to those documents in due course.

5 The defendant has substantially constructed an extension to the house on her property that lies outside that building envelope. For that and other purposes, the defendant has cleared or thinned the CMW on her lot. The plaintiff seeks a mandatory injunction for demolition of the building structures that are outside that building envelope.

6 For the reasons that follow, the plaintiff is entitled to the relief by mandatory injunction for demolition of the building structures that he seeks.

Preliminary questions

7 On 11 November 2016, Emerton J determined preliminary questions in this proceeding.[1]

8 First, her Honour ruled that conditions 16–18 of Planning Permit 1057/97, which concern the purpose of the neighbourhood design plan in specifying building envelopes and restricting rights to remove vegetation, were spent, having been implemented or otherwise directed to the subdivision works and not intended to survive with operative effect after registration of the plan. Only one neighbourhood design plan was contemplated and amendments to the restrictions embodied in the design plan were to be effected by the legal means available for the amendment or variation of restrictions on title. The answer given to the question –

> Have conditions 16, 17 and 18 in the subdivision planning permit survived the certification and registration of the plan of subdivision and the creation of new titles so as to:
>
> (i) limit building and development on the lots?
>
> (ii) prohibit the removal of native vegetation on the lots?
>
> (iii) permit the endorsement or approval of successive or replacement neighbourhood design plans limiting building and development and/or prohibiting the removal of native vegetation on the lots?

[1] *Manderson v Wright* (2016) 222 LGERA 1.

was 'No. The subdivision planning permit is spent. Conditions 16, 17 and 18 have no further work to do and are of no force or effect.'

9 Second, her Honour concluded that restriction No 2 on the plan of subdivision has legal effect as does the neighbourhood design plan. Building on lot 6 may not occur in the hatched areas marked in the neighbourhood design plan.

10 Third, her Honour declared that the restrictive covenant and the neighbourhood design plan do not require lot owners to protect and minimise clearance of existing vegetation on the lots. The neighbourhood design plan neither expressly nor impliedly provided for the protection of vegetation or the minimisation of its clearance making no reference to vegetation at all. Emerton J suggested that the building envelopes, as the only protective measure for the CMW, should be strictly enforced.

11 Emerton J, in answering other questions, ruled that –

(a) neighbourhood design plans endorsed by the Council that post-dated the registration of the plan of subdivision were not 'approved' and were of no legal effect by reason of the restrictive covenant; and,

(b) the proposed decking adjoining the two new pavilions to be accessed via sliding doors from the pool pavilion as shown in the drawings was a 'building' under the *Planning and Environment Act 1987* (Vic).

12 It was no longer in issue that the applicable neighbourhood design plan is the document dated and approved by the City of Greater Geelong on 19 July 2000 ('NDP'), which defines the size, dimensions and location of a permitted building footprint for each Lot on PS412071E including Lot 6 and specifies the areas where no building or part of a building can be located. The defendant accepted that there is a restrictive covenant on her title and she admitted that the works commenced in August 2015 included clearing vegetation and the construction of extensions to the existing house (pavilions) that are located outside of the building envelope ('the

works'). She accepted that the works on her property breached the requirement of the restrictive covenant that no building or part of a building be located out of the building envelope.

Issues at trial

13 The following issues arose for determination in this proceeding.

(a) What is the proper construction of the restrictions on title by reason of the restrictive covenant?

(b) To what remedy is the plaintiff entitled?

(i) Is the plaintiff entitled to a mandatory injunction for demolition of the building structures that are outside the building envelope?

(ii) Is the plaintiff to be denied a mandatory injunction on the grounds of delay or other discretionary considerations?

(c) Is the plaintiff to be limited to an award of damages in lieu of a mandatory injunction, and if so, in what sum should such damages be assessed?

(d) Did the defendant continue with building works, contrary to representations to the plaintiff and to the court, subsequent to the defendant being made aware of the breach of the building envelope, and, subsequent to commencement of this proceeding?

(e) Is the plaintiff entitled to orders directing reinstatement of the CMW, and if so in what way should reinstatement be directed?

Relief sought

14 The real issue in this case was the appropriate remedy for the admitted breach. The applicable legal principles were not in dispute and are considered later in these reasons.

15 The plaintiff sought extensive relief. Primarily, the plaintiff wanted a mandatory injunction requiring the removal of all building works outside the building envelope. If a mandatory injunction is granted, the plaintiff also sought:

(a) a revegetation order in the particular terms costed at $110,680;

(b) damages for loss of amenity being the value of the removed CMW trees assessed at $399,170;

(c) an injunction prohibiting the defendant from any further building outside the building envelope;

(d) interest; and

(e) costs on an indemnity basis.

16 In the event that I was not minded to grant a mandatory injunction for demolition the plaintiff proposed in the alternative:

(a) restitutionary damages of $470,000;

(b) damages for the reduction in value of the plaintiff's property assessed at $65,000;

(c) damages for loss of amenity assessed at the value of the removed CMW trees being $399,170;

(d) an injunction prohibiting the defendant from any further building outside the building envelope;

(e) interest; and

(f) costs on an indemnity basis.

17 The defendant submitted that the plaintiff was not entitled to a mandatory injunction in the terms sought. The proper remedy was:

(a) payment to the plaintiff of $65,000 representing the claimed assessment for the reduction in the value of the plaintiff's property; and

(b) directions that the eastern wing of the bedroom pavilion be partially demolished and reconstructed to a different design and that the defendant at her expense implement a specific revegetation and landscaping plan over a period of years to ameliorate the plaintiff's loss of amenity.

The defendant stated, in effect by open offer at the commencement of the trial, that she would consent to relief in favour of the plaintiff in such terms.

The restrictive covenant construed

18 A key issue on which the parties differed was whether the restrictive covenant had any effect on or was relevant to protecting the CMW on properties within the Estate.

19 The plaintiff submitted the restrictive covenant was intended to, and did, protect the CMW, relying particularly on Emerton J's observation that 'it is tolerably clear that the building envelope was the means chosen to address the mischief of native vegetation removal' on the Estate.[2] While the plaintiff to some extent acknowledged that the restrictive covenant on its terms does not prevent the removal of vegetation, he sought to distinguish removal of vegetation per se from removal of vegetation for the purposes of building works outside the permitted building envelope. The latter activity, he submitted, was impermissible.

20 The defendant submitted that, whatever the intent of the drafters of the covenant in respect of the CMW, in terms it only prevented building construction outside the building envelope. In fact, the defendant would be entitled to remove the CMW from her lot completely without breaching the restrictive covenant.

21 The defendant's submission must be accepted as correct as the express terms of the covenant and Emerton J's ruling on 11 November 2016 make clear.

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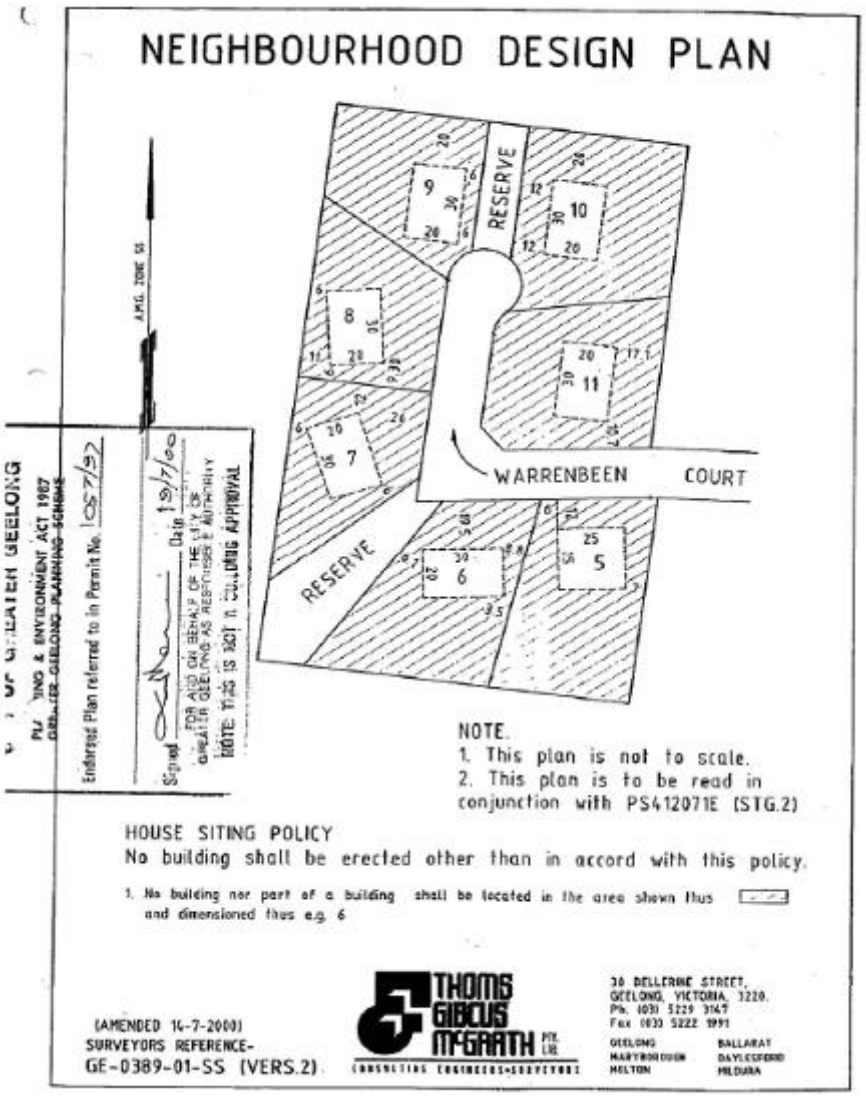
2 Ibid 11 [50].

22 The express terms of the restriction in the covenant is stated on the first page of the plan of subdivision:

> 2. The owners of lots 1-14 (all inclusive) shall not develop the land other than in accordance with an approved neighbourhood design plan pursuant to planning permit No.1057/97 [the subdivision planning permit].

23 The NDP is as follows:



24 Accordingly, the restriction on building created by the covenant on each lot described as 'House Siting Policy' is that building is only permitted in the non-hatched area, which was referred to as the building envelope.[3] The covenant does not expressly identify any vegetation protection or vegetation clearing policy and to

[3] Ibid 10 [31], where Emerton J reached the same conclusion.

find such policies requires that words that are absent be read into the covenant, principally by reference to extraneous circumstances at the time of subdivision. I cannot see any legal basis for construing the covenant in that manner.

25 Turning to Emerton J's ruling, the plaintiff submitted to her Honour that three obligations arose from the wording of the restrictive covenant: 'to protect existing vegetation, to minimise the clearance of vegetation and to preclude building within the hatched areas.'[4]

26 Her Honour concluded that imposing building envelopes in the NDP was 'intended to protect the native vegetation on the subject land' but the NDP failed to impose a direct prohibition on the removal of vegetation or a requirement to minimise its clearance:

> Unfortunately, however, the neighbourhood design plan, while describing building envelopes for each of the lots, does nothing further "to protect and minimise clearance of existing vegetation on the lots". It does not expressly provide for the protection of vegetation or the minimisation of its clearance. Indeed, the neighbourhood design plan makes no reference to vegetation at all.
>
> I have considered whether the neighbourhood design plan contains an implied obligation to protect the native vegetation on the subject land. This involves interpreting the neighbourhood design plan in the context of the controls of which it forms a part to decide whether it is permissible to "read in" words to this effect.
>
> In my view, it is not permissible to "read in" such words. It is not apparent that the drafter of the neighbourhood design plan overlooked by inadvertence, and so omitted to deal with, an eventuality that was required to be dealt with if the purpose of neighbourhood design plan was to be achieved. To the contrary, it is tolerably clear that the building envelope was the means chosen to address the mischief of native vegetation removal in the proposed Warrenbeen Court subdivision. The ambition to protect the native woodland as far as possible was translated into a control based on the imposition of a relatively small building envelope for each lot. In short, the building envelope was the mechanism chosen to protect the native Moonah woodland on the subject land. Neither the neighbourhood design plan nor the plan of subdivision contain any additional protective mechanisms and there is nothing in either that can be construed as imposing a direct

4 Ibid 10 [43].

> prohibition on the removal of vegetation or a requirement to minimise its clearance.[5]

27 It is clear that the Greater Geelong Planning Scheme neither prohibits interference with the CMW nor imposes any positive duty in respect of its conservation. By reason of the area of the lot, vegetation may be removed without a permit. Breach of the covenant cannot provide a basis for the plaintiff's claim for the value of the removed vegetation or, alternatively, for its reinstatement. The final issue must also be determined adversely to the plaintiff. He is not entitled to orders directing reinstatement of the CMW, or directing in what way reinstatement should be achieved?

28 It is strictly unnecessary to consider the evidence of the witnesses Mr Mark Trengrove, Mr John Saunders, and Mr Brett Lane that went solely to this issue. My conclusion makes that evidence irrelevant. In case a different conclusion might elsewhere be reached, I will briefly express my findings about that evidence in due course.

The evidence

29 The plaintiff gave evidence and I considered him to be an honest and reliable witness, whose account I have mostly accepted. He called evidence from his neighbour Mr Wayne Maher that was of marginal relevance and I was not assisted by it. The remaining witnesses called for the plaintiff gave, or purported to give, expert opinion evidence. Mr Mark Trengrove is an ecologist with specialist qualifications in resource management. Mr John Saunders is an arborist whose evidence was directed towards establishing the value of the CMW. Mr Les Brown is a property valuer. Mr Stephen Bitmead is a planning consultant.

30 The defendant gave evidence. I did consider her to be mostly but not entirely an honest witness, and there were gaps in the chronology of events that she could not fill from her personal knowledge. She drew on what she had learned from her

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5 Ibid 11 [48]-[51].

architect, her builder and her building surveyor giving her evidence a strong flavour of reconstruction. In relevant respects her evidence was less reliable than that of the plaintiff and in making my factual findings I prefer the plaintiff's evidence where there is a conflict or a gap between them.

31 The defendant called expert evidence from Mr Brian Dudakov who is a property valuer, Mr Brett Lane, an ecologist, Mr Marco Negri, a planning consultant, and Mr Douglas Buchanan, a quantity surveyor.

32 Several witnesses, plainly within the defendant's camp and available to give evidence, whose absence from the witness box was not satisfactorily explained, might have given relevant evidence. They were the defendant's architect, Megan Hamer,[6] her builder, Steve Clark, and the building surveyor, Philip Newey. The defendant's explanation for not calling these witnesses was that she did not want to involve other people in what she was going through. I will say more about their absence in due course.

33 Each of the experts had prepared reports that stood as their evidence in chief. Many documents generated in respect of the building project and the dispute were collated in a digital court book that was tendered by consent.

34 My findings of fact, which now follow, are based on these sources and on the inferences that may properly be drawn from established facts.

35 The defendant bought her property in May 2006, and was registered as proprietor of the property on 31 October 2006. She bought the property with the intention of extending it. She stated that prior to the purchase neither she nor her husband were advised of, shown, or provided with a copy of the NDP identifying the building envelope, nor was she aware that there were building envelopes that were a restriction on the title. The defendant acknowledged that she received and read the vendor's statement which contained a copy of the plan of subdivision. I have set out

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6 As later appears, the architect was providing information to the defendant's solicitors for trial preparation in the months leading up to the trial.

above the terms of the restriction that appears on page 1 of the plan of subdivision under prominent headings 'CREATION OF RESTRICTION' and 'DESCRIPTION OF RESTRICTION'.

36 The s 32 statement, which was not in evidence, may not have included the NDP, but a reasonable reader of the plan of subdivision, particularly one who intended from the time of purchase to develop the property was alerted to the existence of a relevant NDP that in terms restricted the right to develop the land.

37 Mr Trengrove, who had a history of involvement with the CMW, noted that a circular letter issued by the Department of Environment and Natural Resources was sent to 'all original purchasers of lots' in the Estate. It stated '[t]he location of building envelopes, fencing and monitoring of significant plants are issues of importance for the conservation of the natural environment'. He conceded that he could not prove that this letter was in fact sent, and that his observations, and the letter, was sourced from staff employed by the Department of Environment and Natural Resources and City of Greater Geelong. I make no finding that the defendant was aware of the letter or the information that it conveyed.

38 It is reasonable to suppose that a conveyancer acting for a purchaser would read the plan of subdivision and inform the purchaser of a restriction on the right to develop the property. The defendant did not deny knowledge of the restriction evident on the face of the plan of subdivision, she denied having seen the NDP or being aware of the building envelopes that it specified. While the conveyancer was once engaged by the defendant and might be thought to be in her camp, either party could have sought production of the file and, perhaps, the attendance of the conveyancer to support or challenge the defendant's evidence in this respect.

39 I accept that the defendant was ignorant of the building envelopes created by the NDP, but she ought to have been aware of the building envelope and was not aware of it through her own carelessness in failing to follow up information that was in her

possession or the possession of her conveyancer.[7] This failure to make proper inquiries was later compounded.

40 The plaintiff observed the defendant remove some vegetation in 2009, however he could not see all work that had been done following this removal, which included a raised grass area and a deck. The plaintiff was able to see some paths that had been constructed as they were close to his fence. The plaintiff did not take any action at that time. He did not contact the defendant or the local council. He explained that he did not see anything that he considered to be a substantial breach of the covenant.

41 The defendant described the work done in 2009 as a 4 month re-landscaping project that included concrete pathways and a driveway, clearing some vegetation including the removal of approximately 5-10 Moonah trees, installing a watering system and garden beds, installing a decking area at the rear and grass in the back yard. She was informed at the time that council advised the landscaper that no permits were required. I am satisfied that this project involved some removal of CMW in the area where the pool pavilion now stands.

42 The applicable planning scheme does not require land occupiers to obtain a permit for removal of any vegetation where the area of the lot is less than 4000sqm, and the defendant's property is slightly less than that size. A planning permit is not required to construct a single dwelling on a lot with an area over 300sqm.

43 The plaintiff's house is two storey, with two decks, one facing to the north on the first floor, and one which is semi-enclosed with clear blinds facing south on a mezzanine level. Otherwise, his property is heavily vegetated, which restricts his view of the defendant's property, save when he approaches the common boundary or views the defendant's property from the street or an access path that runs from the street to the west of that property.

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7 See *Sargent v ASL Developments Pty Ltd* (1974) 131 CLR 634.

44 Each party lives in Melbourne and regularly uses their property as a holiday home or weekender. Neither is consistently present on their respective properties.

45 In late 2014 or early 2015, the defendant and her husband engaged Megan Hamer of Hamer Architects to design an extension of the house on the property, to obtain any necessary permissions, and to project manage the works. The defendant stated Ms Hamer advised her that the Greater Geelong City Council had told her that only a building permit was necessary. No planning permit or permit for vegetation removal was required. I accept that the defendant delegated to Megan Hamer the roles of architect and project manager for the building works including obtaining of relevant permissions and communicating with the building surveyor and builder. Ms Hamer did not give her any advice or information about the restrictions on the plan of subdivision.

46 I do not accept that, as the defendant asserted, she contemplated extending up within the existing envelope. If, as she says, she was unaware of the restriction, I think it improbable that a second story would be contemplated that could include a swimming pool. It was logical to extend out the back of the current home to reduce the impact from the street, use the original structures that were in a sound state, to adopt a design that fitted with the CMW landscape, and to put the pool in the ground.

47 Ms Hamer did not give evidence and her absence from the witness box was not satisfactorily explained. Accepting, as I do, the defendant's evidence of her role in the project, what Ms Hamer ought reasonably to have known about the building envelope becomes knowledge for which the defendant is constructively responsible.

48 So much was made clear by the High Court in *Sargent v ASL Developments Pty Ltd*.[8] Stephen J stated:

> Now where, as in this case, a vendor employs a solicitor to attend to the carrying out of the legal aspects of a sale he necessarily authorizes that

[8] (1974) 131 CLR 634.

> solicitor to attend to all the usual aspects of conveyancing practice; that authority will here extend to the obtaining of the necessary planning certificate and the solicitor's knowledge, gained from that certificate, may properly be imputed to his clients since it was acquired both for the purpose of that transaction and in the course of it … Again, where a vendor so arranges matters that his solicitor undertakes on his behalf the carrying out of a conveyancing transaction as a whole he thereby not only authorises his solicitor to perform all necessary steps but also places the solicitor in the position of acquiring at first hand knowledge of relevant facts, at the same time depriving himself of the opportunity of acquiring such first hand knowledge.[9]

49 Mason J stated:

> As against a third party the law imputes to a principal knowledge gained by his agent in the course of, and which is material to, a transaction in which the agent is employed on behalf of the principal, under such circumstances that it is the duty of the agent to communicate it to the principal … In my view this principle applies to information acquired by a solicitor in the course of acting for his client in a conveyancing matter … The solicitor is to be regarded as the alter ego of the client and the rights of the other party to the contract cannot be made to depend upon the diligence or lack of diligence exhibited by the solicitor in his dealings with his client.[10]

50 The application for a building permit prepared by the architect and submitted to Mr Newey included a 'copy of title'. In any event, it is inconceivable that a reasonable architect would not have a copy of the plan of subdivision since it would be needed to ensure that the extension to the building was laid out within the title boundaries and for the precise location of the extension on the building to be indicated on drawings for the benefit of the builder. With the architect absent from the witness box without a plausible explanation, I can more comfortably infer that she did have access to the plan of subdivision and, as the alter ego of the defendant, was aware of the existence of a restriction on development that is evident on the face of the plan of subdivision.

51 I cannot however infer that the architect knew about the terms of the NDP prior to 4 February 2016, since that would have required a further inquiry. From other dealings between the defendant and the architect it may be that she did not know of it, but I am satisfied that when it comes time to assess the entitlement of the

9 Ibid 649.
10 Ibid 658-659.

defendant to equity in resisting the plaintiff's claim to a mandatory injunction, I can take into account that, vis a vis the plaintiff, each of the defendant and the architect, in different ways, ought to have discovered the precise terms of the NDP and the existence and dimensions of the building envelope during the development stage of the building project but failed to do so for reasons that have not been satisfactorily explained. The circumstances bespeak a want of diligence on the part of the defendant and those acting for and advising her. Satisfaction in this context is related, as I will later explain, to the concept of whether it would be oppressive for the defendant to suffer a mandatory injunction when she, and her architect, failed to discover the existence of the building envelope and the restriction that is to be enforced in that manner.

52 In mid-2015, the defendant contracted with Clark Homes Pty Ltd to build the works for $1,148,370. The works included renovation of the existing house and construction of an extension comprised of two pavilions with an open deck between them. In August 2015 Clark Homes began clearing the property and gutting the home. The defendant estimated that as a result of this clearing approximately 15-20 trees were removed. The defendant was not present when the trees were cleared and her assessment of the number of trees removed is at best an estimate and at worst a guess. The precise area where trees were removed was not identified, it being relevant to the issue of whether the plaintiff ought, from his opportunities to observe the cleared areas on the defendant's property, to have objected to the works at a much earlier stage.

53 In August 2015 the plaintiff observed that trees had been removed in the north section of the defendants property. A neighbour across Warrenbeen Court told him there had been bulldozers and men working on the land and that a very large area of trees had been removed and that he might be interested to follow that up. The plaintiff's brother visited the property, took photographs, and confirmed that there had been a very significant removal of trees. One photograph was of a builder's board announcing the works, and the plaintiff decided to visit his property the

following weekend to investigate. He estimated he did so around 23 August 2015. His observations confirmed what he had been told.

54 In the week following this visit, the plaintiff called Phil Newey, identified on the building notice as the building surveyor. After introducing himself to Mr Newey he stated why he was contacting him, noting that the advertised building permit notice did not relate to that property. Mr Newey said that was a mistake that he would rectify. The plaintiff asked Mr Newey why works were taking place when he had had no notice, and why had there been no application for a planning permit. Mr Newey replied there was no requirement for that. The plaintiff said to him that his understanding that there was a covenant that needed to be adhered to and that he wanted to be certain that it was not being breached, but Mr Newey said there was not, and there was no requirement for a planning permit. The plaintiff asked for a copy of the building permit for the proposed works, and Mr Newey brushed him off stating he could not give that out without the owner's approval for privacy reasons. The plaintiff gained the impression that he was being brushed off. The plaintiff rang the Geelong council and spoke to senior planning officer Rory O'Loghlen.

55 I pause to observe that the plaintiff submitted at trial that Mr Newey's refusal to permit the plaintiff to inspect plans and drawings for the proposed works that were in his possession was contrary to his statutory obligations, which are not contingent on privacy considerations or the consent of the owner.[11] I was not persuaded that the relevant legislation applied in these circumstances, but privacy considerations could not preclude Mr Newey informing the defendant of the conversation, in order that she might respond or consent to him informing the plaintiff of the works to be undertaken. Further, the reference to privacy considerations was a furphy as Mr Newey could have informed the plaintiff that the *Building Regulations 2006* (Vic) mandated that a person who is in charge of the carrying out of building work on an allotment must take all reasonable steps to ensure that a copy of the building permit and one set of any approved plans, specifications and documents relating to that

11 *Building Act 1993* (Vic) s 92.

permit are available for inspection at the allotment concerned while the building work for which the building permit was issued is in progress.

56 The defendant challenged the plaintiff's recollection of this conversation, although not by calling evidence from Mr Newey of his recollection of it. The defendant put that the plaintiff, in his affidavit of 29 March 2016, had not mentioned the building envelope to Mr Newey during this conversation. Likewise, a letter from his solicitors to the defendant dated 22 February 2016 also did not refer to this portion of the conversation. However, the version of this conversation in his witness statement of 1 August 2016 did refer to the building envelope. The defendant put to the plaintiff that mention of the building envelope to Mr Newey was more recently invented to affix the defendant's agent with knowledge of the building envelope prior to the commencement of the works.

57 The plaintiff denied recent invention and attributed the absence of the full detail of the conversation from the letter and the 29 March 2016 affidavit to the purpose for which each was directed, namely to encourage the defendant to immediately cease work, while his witness statement was directed to the evidence he would give at trial.

58 Having observed the plaintiff in evidence, I accepted his explanation of this discrepancy and find that he did explain the building envelope restriction to Mr Newey in late August 2015. Moreover, Mr Newey did not explain the scope of the works to the plaintiff in terms that might have alerted him to the prospect that the works would breach the building envelope and the cross-examiner put no such suggestion to the plaintiff. Mr Newey was not called to state otherwise and his absence from the witness box was not satisfactorily explained. It was unnecessary for the plaintiff to call Mr Newey to give evidence about a matter within the plaintiff's direct knowledge.

59 There was evidence that Mr Newey contacted the builder, his purpose apparently being to correct the information being displayed about the building permit. The

defendant asserted that she did not learn of the plaintiff's communications with Mr Newey until much later. I do not infer that Mr Newey reported his conversation with the plaintiff to her, or recommend that she discuss the scope of the works with her neighbour but I can infer that Mr Newey's evidence would not have been helpful to the defendant. I was not persuaded to accept the defendant's assertion that she did not know of her neighbour's interest in the scope of the works prior to receipt of the solicitor's letter.

60 There was also evidence of a written explanation provided by Mr Newey to the Victorian Building Authority in response to the plaintiff's complaint. Mr Newey noted that he saw the plan of subdivision on 1 July 2015 and the reference to the NDP but he did not state that he followed up on that reference. He assumed that the siting of the extension on the lot would be governed by Part 4 of the *Building Regulations*. In that response, Mr Newey avoided responsibility for his failure to identify the relevance of the NDP to the issue of siting the building works by arguing, irrelevantly, that building surveyors have no jurisdiction over restrictive covenants. Mr Newey also stated that he 'scaled' the drawing, there being no measurement, to identify the offset from the common boundary which he assessed at 'approximately 4.3 metres, considerably more than the 1.0 metre required by regulation'. As will later be shown, the distance from the boundary to the extension at its closest point is 0.33 metre to the eaves and 1.03 metre to the wall. I will return to this issue.

61 The plaintiff was entitled to inspect the register of building permits maintained by the council,[12] but did not do so. Precisely what the plaintiff would have learned from such an inspection was not made clear by the evidence, but it is likely that he would have seen, or learned, sufficient detail about the proposed works to have pressed the defendant to review detailed drawings.

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12 *Building Act 1993* (Vic), s 31.

62 The plaintiff in August 2015 rang the council and spoke to planning officer Rory O'Loghlen who, he said, told him that council policy was not to give out any information about permits issued by private building surveyors. He added that the council did not check whether building permits submitted by building surveyors complied with regulations. The plaintiff's cross-examiner did not challenge him about this conversation.

63 In the circumstances of the plaintiff's knowledge of the restrictive covenant and his belief about its role in preservation of the CMW, it may have been prudent for the plaintiff to have pressed a further inquiry, but his reliance on the information provided by council was not, in the context of what he had been told by Mr Newey and what he had then observed, unreasonable.

64 However, the issue of the proper relief to be granted for breach of the restrictive covenant does not turn on the diligence of the party with the benefit of the covenant acting to anticipate and prevent breach of it.

65 The defendant did not satisfy me that the plaintiff was on notice of the scope of the works in August 2015 and, with that knowledge, delayed complaining about the prospective breach of the building envelope until after the works had commenced. The builder's noticeboard facing the street was not sufficient for that purpose and without further information, which the defendant's agent Mr Newey either declined to give or to invite the defendant to give, the plaintiff did not act unreasonably in assuming that his neighbour would abide by the restriction and that the works did not involve construction outside of the building envelope.

66 The plaintiff went overseas on 3 September 2015. On his return, he visited the property on the weekend of 26–27 September 2015. By then, the slab on the defendants property had been poured but he did not observe it. At that time, he observed very significant works going on that he assumed were renovations to the existing house. He made no observation of nor gave thought to the area to the rear of the defendant's house at that time.

67 By late October 2015 the slab for the pool pavilion had also been poured. The plaintiff returned to his property on two more weekends in 2015, the first in approximately late October, and the second in early November. On neither occasion did he observe the work being performed on the defendant's land. The plaintiff disputed the cross-examiner's suggestion that the work was then visible from either his terrace or his backyard.

68 I am satisfied that the plaintiff did not observe the works occurring outside the building envelope in October and November 2015 when works were underway. On his visit in late October 2015, the plaintiff had just bought a small boat which he took to his property and which occupied his time and his interest. This activity took place at the front of his property where his garage is and he didn't have occasion to go into the backyard, nor did he use the southern terrace. In early November, the plaintiff stayed at his property but spent little time there. Again, he did not go to the backyard. Further, on each of these occasions, the extension to the rear of the defendant's property was not visible from Warrenbeen Court.

69 Minutes of site meetings record that as at 14 December 2015 the roof of the rear extension had been largely installed and the windows and timber cladding were in the process of being installed with a view to reaching lock-up by the Christmas shut-down of two weeks, although that target was not reached.

70 On 27 December 2015 the plaintiff observed building frames on the defendant's property. He then inspected the property closely from Warrenbeen Court and from his backyard. At this point, the plaintiff believed that the restrictive covenant was being breached and that a very significant area of CMW had been cleared. The builder was not on site. The plaintiff engaged a solicitor in late January and made some inquiries, including on 27 January 2016 seeking information from the Council regarding the protection of vegetation on the Estate. The plaintiff also readily obtained from council copies of the subdivision planning permit 97/1057, title documents and the NDP. The plaintiff discovered from council documents that the works permitted by the building permit extended beyond the building envelope. He

also discovered that he needed to take private action to enforce the covenant. At this point in time, the infringing extensions were at the frame and roof stage with no wall cladding, windows, doors or internal fit out, well short of lock-up.

71 The plaintiff's solicitors wrote to the defendant by letter dated 4 February 2016 complaining of the breach of covenant, noting that the works have included the removal of a substantial area of native vegetation and the construction of buildings outside the designated building envelope and in breach of the restrictions placed by covenant PS412071E on the property title. The plaintiff stated that the defendant, unless justified in what she was doing, should cease all works on the property as he would be pursuing appropriate action to enforce his rights.

72 The extension could not be reasonably described as substantially complete at this time, a proposition rightly rejected by the plaintiff in cross-examination. The defendant's evidence, which I reject when inconsistent with the evidence of the plaintiff, was that on 4 February 2016, the construction of the rear extension was well advanced with walls, windows and the roof constructed and with most of the doors installed. The plaintiff's photographs taken on 31 January 2016 make clear the stage reached by the builder at that time, which was correctly described by the plaintiff.

73 The defendant contacted the solicitor, Mr Raven, on receiving his letter. The defendant explained that she was very confused by the demand and did not understand what the NDP was or the extent of the restriction by the covenant. The defendant told Mr Raven that she had only recently become aware of the restrictive covenant and had acted on advice from council.

74 Building continued, the defendant said, while she investigated the plaintiff's solicitor's allegations. She did not then engage a lawyer and had taken advice from her architect who had apparently already enquired with the council and the building surveyor about the matters that had been raised by Mr Raven in his letter.

75 The defendant accepted when cross-examined that the plaintiff would have clearly understood the scope of the works had he been given a copy of the plan when he

asked for it. She stated that Mr Newey told her the correct process was for the plaintiff to go to council where he could access the plans held as part of the building permit, and she had refused to provide a copy of the plans to Mr Raven on this basis.

76 The defendant's explanation did not sit well with correspondence and I reject it. The defendant already had advice from her architect and understood the problem. Earlier, on 29 January 2016, the architect emailed the plaintiff as follows:

> I have drawn where I think the house is in relation to the proscribed building envelope. It won't be completely accurate as we have never had the property surveyed but I think we can assume that the original house was never within the required space.
>
> I'm assuming your neighbours (who are the only ones who can enforce this) won't have the stomach for it as it may end up backfiring on anyone who has done some work or cleared trees in the intervening twenty years. If any action is taken by a valid complainant it will need to be a Civil complaint.
>
> I recommend we soldier on until or unless we are formally notified of any problem. At the moment it sits as a verbal complaint with the planning department at City of Greater Geelong who have no jurisdiction in this.

77 The drawing that accompanied this email incorrectly shows up to a third of the area of the existing house to be to the south of the building envelope. This drawing is better described as substantially inaccurate, creating a false impression that the restriction has never been substantially observed.

78 It is probable that this is not an isolated communication between the defendant and her architect and that this email followed on conversations between them and was likely followed by further conversations. It is probable that the architect learned of the issue through the plaintiff's inquiries of the council during January. While I have no evidence of the content of other communications, I can comfortably infer that the architect's evidence would not have been helpful to the plaintiff.

79 From this communication alone, it is probable, and I find, that by 29 January 2016, when the builder had just resumed the works, the restriction had been identified as a covenant on title, which created a 'proscribed building envelope.' Enforcement of the covenant was by a civil proceeding and as the plaintiff was not likely to have the

stomach for enforcement proceedings, until formally notified of the problem already identified, the architect recommended that the defendant should soldier on.

80 Her subsequent conduct shows that the defendant accepted this advice. Formal notification of a complaint came days later from Mr Raven, as already noted. She continued with the works following receipt of the letter.

81 In these circumstances, I reject the defendant's evidence that she was very confused by the solicitor's demand and did not understand what the NDP was or the extent of the restriction by the covenant when she first spoke to Mr Raven.

82 On 9 February 2016, Raven & Associates requested a copy of the building plans, building contract and financial details for the works. The defendant told Mr Raven that she could provide a copy of the plans, however 'the building contract and financial information was private and confidential'. She also told Mr Raven that she would not reply to any further correspondence from him.

83 On 22 February 2016, Mr Raven noted that the plaintiff had observed the housing frames being erected in late December 2015. By the letter, Mr Raven stated, in some detail, the plaintiff's view of events and recorded that the defendant was refusing to discuss the dispute while continuing with the works. He stated, emphatically, that the plaintiff intended, by 26 February 2016, to institute Supreme Court proceedings for the removal of all buildings constructed outside of the building envelope, an injunction restraining any further building outside of the envelope and an order for reinstatement of the CMW vegetation. Mr Raven again stated that he strongly suggested that the defendant cease the works so as to reduce possible losses in the event the plaintiff was successful in the proposed proceeding.

84 The defendant now engaged a lawyer. She also promptly agreed to provide some documents and to meet with the plaintiff. At this time, plastering was underway in the pavilions as lining of the ceiling had commenced, and internal wall cladding materials were on site and could be fixed once the concrete floor was polished and the external lining boards completed.

85 In late February 2016, the plaintiff saw a copy of the plans for the works. On 25 February 2016, the plaintiff rejected the suggestion, put by the defendant in a phone conversation with Mr Raven, that he had been aware of the extent of the works being undertaken on the property for a long time through contact with the builder and onsite inspection of the works. The plaintiff rejected such assertions when put by his cross-examiner. The assertions were not supported by evidence, whether from the defendant's builder or otherwise. I accept the plaintiff's evidence that he did not become aware of the extent of the works and the breach of the covenant until December 2015.

86 The defendant informed the plaintiff's solicitor by email that she had arranged that the works cease from 26 February 2016, which direction the plaintiff explicitly required should extend to all building works (including fitout and all internal fixings). The defendant explained that works were stopped voluntarily at this point in time while she enquired about her options and investigated the issues raised by the plaintiff despite financial difficulties for her. The plaintiff accepted this statement, which I have found was inaccurate and misleading.

87 On 28 February 2016 the defendant instructed Ms Hamer to stop all works on the site. On 29 February 2016, by letter, the architect instructed the builder that '[a]ll work is to cease on site until further notice. All external openings are to be made secure prior to cessation of work'. This instruction makes clear that the extension had not reached lock up and that the architect was permitting and directing the builder to carry out further works to achieve lock up. Further, and somewhat inconsistently, the architect has also instructed the builder to perform other work. The letter goes on to require installation of a roof ventilator, fitting of shelving in the recreation room, construction of recesses in the recreation room associated with the proposed bunks, installation of a curtain pelmet and widening of the main kitchen bench.

88 This instruction was not in the terms sought by the plaintiff or as stated by the defendant to the plaintiff on 25 February 2016. The defendant stated that this

decision to proceed to lock up was taken to protect the investment and to enable use of the main house. Whatever the reason, the instruction to the builder did not correlate with the defendant's statement to the plaintiff that all work ceased on 26 February 2016.

89 Soon after, the defendant engaged Hansen Partnership Pty Ltd, Town Planners, to seek a variation of the restrictive covenant or the NDP so as to validate the building envelope constituted by the area and location of the works that she wished to complete. The defendant also sought permission from council to resume works within the building envelope. That application, although not being currently pressed, has not been withdrawn or rejected. That application included the following illustration of the impact of the works on the property, both in terms of the vegetation and the built structure.

90 In 3 March 2016, the architect communicated with council, asserting that inadvertent breaches of the restrictive covenant occurred in August and September 2015 when slabs were poured and that there had not been any further breach of the covenant. The architect sought confirmation from council that it would not object to resumption of renovation works on the building located inside the building envelope.

91 This proceeding was filed on 7 March 2016.

92 On 9 March 2016, a council officer responded that no planning permit was required for the extension and the building works that the defendant intended to recommence

should not breach the covenant. On receipt of this information, the defendant instructed her builder to recommence works within the existing dwelling structure in the building envelope. That instruction was noted in site minutes in early April 2016, although it was not clear from the evidence precisely when the builder returned to the site.

93 The plaintiff contended that the builder continued with works on site after 26 February 2016, outside of the existing building envelope. He took no issue and made no demand about the renovation of the existing house. I accept the plaintiff's contention and reject the defendant's denial that works continued outside of the building envelope. I am satisfied that after she was on notice that the plaintiff was seeking that the extension work outside the building envelope be demolished, the defendant permitted the builder to continue in a limited way with the works. A number of matters supported that finding.

94 First, the builder returned to the site and continued with the works involved in the renovation of the existing building. The scope of the dispute was whether the builder also continued with the works to complete the pavilions.

95 The defendant asserted that until May 2016 she had visited the property fortnightly. Between May and August 2016 she did not visit the property due to work commitments. In late August 2016, the renovations to the existing house were completed. The builder terminated the building contract on 20 October 2016 on the basis the contract had been frustrated given no further works could be completed in light of these proceedings and the interlocutory injunction. The defendant stated that her relationship with Clark Homes Pty Ltd was then completed and there was no outstanding demand of her from the builder.

96 I do not accept the defendant as a reliable witness about what occurred with the works after February 2016. I am not satisfied that she visited the property fortnightly during March and April or that, on the occasions when she did visit, she gained a deep insight into the precise works being carried out. I am satisfied that

she was told that financially it was in her interests that the pavilion works continue after 26 February 2016 to avoid damage that might be sustained if the works were not at lock up. I am also satisfied that while the builder may have been restricting its further pavilion works on site, at least some of the builder's sub-contractors were likely to have been engaged on a fixed sum basis and to have continued to complete their sub-contract obligations to earn payment of their agreed price.

97 Secondly, like the architect, who it will be recalled was the project manager, the builder Steve Clark was not called to give evidence and his absence was not properly explained. I infer that the evidence of neither the builder nor the architect would have assisted the defendant on the question of further work on the pavilions after February 2016. Inferences can be drawn from a number of documents, including site minutes and progress payment invoices, that strongly support the conclusion that sub-contractors continued to complete their sub-contracts by continuing to work after 26 February 2016. In the absence of evidence from the builder and the architect, I can comfortably infer that the joiner was one such sub-contractor.

98 On 18 May 2016, the defendant wrote to the architect indicating she was happy to proceed with bunks intended for the pool pavilion on the basis of drawings of provided by the joiner. A Contract Variation dated 31 May 2016 recorded an additional cost of $12,810 for Item 5, 'Supply and install bunks as per Architects drawings and instruction'. It is probable that the joiner between March and May substantially completed the joinery for the pavilions.

99 Thirdly, Clark Homes did not charge the defendant any penalties under the contract when the work was stopped.

100 Fourthly, later, on 23 May 2016, the architect prepared what was described as the 'Stop Work Drawing', a drawing with the building envelope in the NDP overlaid to depict the area inside the building envelope where works were to continue. The Stop Work Drawing included the notation that 'all building works outside the designed neighbourhood design plan building envelope are to cease until further notice'.

Apart from the plaintiff's allegation that building works had continued in defiance of the statement made to him on 25 February 2016 that all building work had ceased, it was not clear why the Stop Work Drawing was necessary.

101 Fifthly, in the absence of evidence from the builder and the architect, the progress of the works can be inferred by reference to the documents generated between them. The difficulty, advantage of which may have been taken by the defendant, lay in determining the distinction between works on the pavilions and works to renovate the existing house. On this issue, the defendant's oral evidence could not assist, but there was in evidence a document prepared by the architect that purported to apportion the overall costs between the pavilions and the house.

102 A letter from the architect to the defendant's solicitors dated 13 September 2017 detailed the architectural and related building permit fees associated with all building works on the defendant's property. The architect applied a percentage allocation of those fees referable solely to building works outside the building envelope that varied for each item but was at least 70%. In a second letter of that date, the architect stated that she had, in conjunction with Steve Clark, apportioned 75% of the building construction costs to the new extension. The defendant accepted the architect's figures. The total contract price (including approved variations and, I assume GST) was $1,528,109.38. The assessed cost of the new extension was $1,146,082.04. The builder was paid $1,338,499.71. The amount paid for the rear pavilions was $958,368.47.

103 From these figures it might be inferred that the rear pavilions were about 84% complete when the builder terminated the contract, but it must be borne in mind that the plaintiff had no opportunity to cross-examine either the architect or the builder about this assessment. The question was to what extent the rear pavilions were complete at the end of February 2016.

104 The minutes of a site meeting on 11 December 2015 stated:

> Roof largely installed, windows on site and currently being installed, timber cladding currently being installed, electrical rough-in of existing house

> underway, plumbing rough-in well underway, concrete complete, external brickwork well underway

105 The minutes recorded that the builder anticipated that by the Christmas shutdown from 18 December the roof would be complete, the windows would be all in place and the house would be at lock up. Plastering would commence in the new year, with the next site meeting scheduled for 5 February 2016.

106 By letter dated 5 February 2016 the architect recommended to the defendant full payment of the builder's progress claim 5 that was based on the based on an invoice dated 3 February, 2016. Progress Certificate No 05 stated that 55% of work under the contract was then completed, the value of which was $800,190.61 (incl. GST). As the percentage completed is based on value of work, applying the architect's apportionment of the contract (75%), approximately $600,142.95 or 52% of the new pavilion work was completed at that date. The builder's invoice accompanying Claim 5 indicated the stage of the work of the trades as follows; plumber 50%, carpentry 75%, roofer 90%, windows 100%, masonry 80%, electrician 75%, plaster 30%, painting 10%, heating and cooling 60%. The certificate stated that the value of the work remaining of the contract sum was $657,495.63 (incl. GST). Of that sum, the architect and builder would apportion (75%) $493,121.72 to the work outside of the building envelope. On this assessment, 57% of the work outside the building envelope remained to be done. In broad terms, these figures represent an assessment of the stage of the works when the plaintiff demanded that the works cease. Being averages, these figures do not reconcile.

107 I find, on the probabilities, that 50% of the work outside the building envelope remained to be done when the defendant received the first letter from Mr Raven.

108 On 22 February 2016, a few days prior to the defendant's representation that work had ceased the minutes of a site meeting recorded the works progress on site as:

> Truss glazing complete, Aneeta window inserts in place, plastering well underway throughout, ceiling lining commenced, internal fixing materials on site waiting for first polish of concrete floor, external lining boards almost complete.

The date of the next meeting was 'to be advised'.

109 On 21 March 2016 the architect recommended to the defendant full payment of the builder's Progress Claim 06, that was based on an invoice dated 15 March 2016. Progress Certificate No 06 certified that the total value of work completed was 61% of the contract sum, the value of which was $929,533.17 (incl. GST). The builder's invoice accompanying Claim 6 indicated the stage of the work of the trades as follows; plumber 80%, carpentry 85%, masonry 100%, electrician 75%, plaster 90%, glazing 60%. In broad terms, these figures represent an assessment of the stage of the works when the defendant represented to the plaintiff that work had ceased. The certificate stated that the value of the work remaining of the contract sum was $585,711.79 (incl. GST). These figures suggest that the contract for the work outside of the building envelope was approximately 62% completed.

110 I find, on the probabilities, that 38% of the work outside the building envelope remained to be completed when the defendant told Mr Raven that she had instructed the builder to cease work. In other words, the builder completed 12% of the work to be done outside of the building envelope in February 2016.

111 On 4 April 2016, site meeting minutes recorded restrictions due to the current court action with work continuing on the existing sections of the house, with work on the new pavilions and deck area being subject to pending advice.

112 The minutes of a further site meting dated 11 April 2016, not attended by the defendant, stated that practical completion remained scheduled for 30 June 2016, dependent on restrictions related to the current court action and that work was continuing concentrating on the existing sections of the house with advice pending regarding the new pavilions and deck area.

113 On 11 April 2017, the architect certified Progress Payment 07 recommending full payment of the builder's claim, which was based on an invoice dated 7 April 2016. The total value of work completed was 69% of the contract sum, the value of which

was $1,052,462.38. No amounts for standard works were claimed except for joinery (50%). Approved variations accounted for the remainder of the claim.

114 On 24 May 2016, the architect certified Progress Claim 08. The builder's invoice for this claim was also dated 24 May 2016. The total value of work certified as complete to that date was $1,128,329.65 (incl. GST), being 74% of the contract price. A small proportion of this claim consists of certain variations in favour of the builder, of which no details are in evidence. The documents show the completion of the trades to be; plumber 80%, carpentry 90%, roofer 90%, electrician 75%, plaster 90%, joinery 50%, floor finishes and wall tiles 30%, painting 50% and heating and cooling 80%. The certificate stated that the value of the contract sum for the work remaining was $390,374.63 (incl. GST). At this stage, the percentage of the value of uncompleted work relating to the work outside of the building envelope should be increasing. If all of the uncompleted work was in respect of the new pavilions, the percentage of uncompleted work in respect of the pavilions has reduced to approximately 34%.

115 There were no further progress certificates or a final certificate in evidence that might have permitted this form of analysis to be completed. I am satisfied that it is not probable that in late May 2016 all of the uncompleted work related to the pavilions. Practical completion was scheduled for 30 June 2016. This analysis permits me to more comfortably infer that the builder did further work on the pavilions after the defendant's stop work direction on 28 February 2016 although I cannot identify precisely what that work was.

116 Sixthly, the plaintiff stated that he observed that the builder completed further work outside of the building envelope after the stop work direction and sought to corroborate his observations with photographic evidence. The plaintiff went onto the defendant's land on several occasions, including 31 January 2016, 22 April 2016, 27 April 2016, and on a court-permitted inspection. He took a series of photographs during this period through to August 2016.

117 The plaintiff's solicitor wrote to the defendant on 25 April 2016, advising that the plaintiff had observed work being performed contrary to the cease-work direction. He received a response that advised that no work was occurring outside the building envelope other than sealing a window frame.

118 On 27 April 2016, the plaintiff entered the defendant's property and took a series of photographs. Some of these photographs depict workmen lifting insulation into the roof of one of the pavilions, and scaffolding and other work equipment in the pavilions. The plaintiff stated that he observed workmen on the scaffolding within the pavilions. The defendant stated that, following the cease-work direction, the pavilions were used as a work space for the construction, storage, or preparation of materials to be used in the main house. I reject this explanation of the plaintiff's observations.

119 I am satisfied that the photographs demonstrate that at least some works were occurring in the pavilions after the defendant's instruction on 28 February 2016. For example, a photo taken on 18 May 2017 indicates, consistently with the progress reports, that the bunks ordered had been installed. Additionally, photos taken on 24 June 2016 indicate that panels had been placed on the dividing wall within the bedroom pavilion, and the roof where the plaintiff had observed insulation being inserted had been covered and plastered.

120 The plaintiff was dissatisfied with the defendant's compliance with her commitment to cease work and applied for an injunction. On 28 June 2016, the court, by consent, restrained further work outside the building envelope with the exception of certain works specified in the order. She stated in an email to the architect that she consented to the order 'as we could not prove works had not been done in the bedroom wing.' For the reasons set out above, I consider the defendant made a proper concession as I find that works did continue outside the building envelope after 26 February 2016. I also reject the defendant's statements on oath that since February 2016 she had not observed works outside of the building envelope, and her builders had confirmed to her that no building works had been undertaken in the

area beyond the building envelope since the instruction to stop works, save for some limited exceptions that are not relevant.

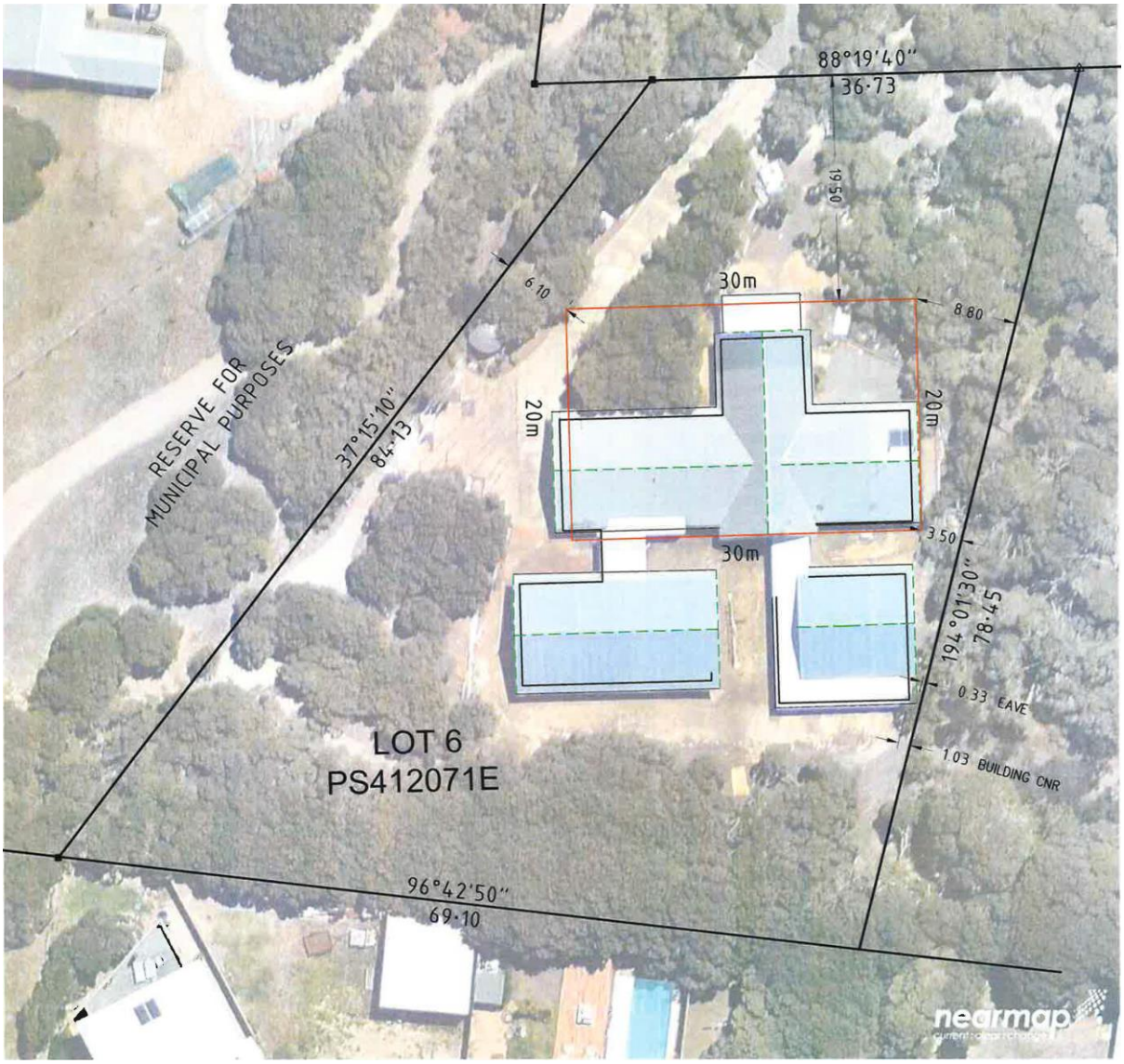
121 Before the works, from the southern deck the plaintiff could see the pitched roof of the defendant's house. The plaintiff could not see any other built form. I accept that he was attracted to the amenity of the block that was created by the size of the allotments in the Estate and the spacing of the houses, the dense CMW, and the screening that effectively gave considerable privacy.

122 Following the works, from the north deck the plaintiff can now see the portico extension constructed by the defendant. The plaintiff agreed that 'in terms of line of sight' the portico is a 'slight extension' and that 'particular element is not particularly significant'. The plaintiff and his wife purchased the property for long term use and have no intention of selling it. I accept that the defendant's removal of screening vegetation and her construction in breach of covenant reduced the plaintiff's sense of privacy and negatively affected his amenity. The plaintiff, as is evident from the management of his own property, clearly values the endangered CMW vegetation and regrets the loss of mature Moonah trees from the defendant's land, replaced by significant buildings in very close proximity to and imposing on his property. I accept that he considers that the work detracted from his bushland amenity.

123 The defendant accepted that she has breached the restriction on title and now understands the operation of the NDP and the effect of the building envelope. She stated that if she had knowledge of the building envelope prior to the construction of the extension, she would have knocked down the original house and built a two-story house within the envelope. She stated that she would not have chosen to deliberately breach the restrictive covenant. The applicable planning scheme permitted a building height of 9 metres.

124 In the following diagram, prepared by a licensed surveyor David Rendle of TGM Group, the building envelope designated by the NDP is shown in red. The extent of

the breach is starkly revealed as is the encroachment towards the common boundary with the plaintiff's property. The defendant produced a survey by Mr Richard Hockley of AGS to substantially similar effect. To the extent that there is any material difference or omission, I prefer the work of Mr Rendle.



125 I noted earlier that the building surveyor believed the permit authorised siting of the extension at least 4.5 metres from the common boundary, which did not occur. On 7 May 2016, Mr Newey issued a Building notice addressed to the defendant in respect of this infraction. There was no evidence of any response.

126 I accept, as appears above, that the defendant incurred considerable expense in construction of the extension outside the building envelope that would be thrown away in the event the Court required the building works outside the building

envelope to be removed. These expenses include associated fees such as architectural fees, building fees, building materials fees, and building surveyor fees. Although no detail was provided by evidence, I accept the defendant's statement that the works were paid for, at least in part, by borrowed funds, secured by a mortgage over the property and collateral securities over other unidentified properties. The construction cost of the building works outside the building envelope are estimated, as noted above, at $958,368.47.

127 I do not give any weight to the defendant's suggestion that she might have built a two-story house within the envelope had she been aware of the envelope. That statement was self-serving. It was improbable that the architect would have supported that suggestion, particularly as it was not consistent with the intended future use of the property recorded by the architect as her instructions in her retainer letter dated 22 April 2014.

128 The plaintiff called evidence from Mr Maher who, with his wife, owns the lot directly opposite the plaintiff and defendant's properties. He has lived there for 14 years. I had no reason not to accept his evidence but I did not gain any assistance from it and say no more about it.

Expert evidence

Real estate valuation

129 The parties tendered property valuation evidence from two very competent and experienced property valuers that assessed whether there was any change in the market value of each property as a result of the works. The plaintiff relied on the opinion of Mr Les Brown while the defendant instructed Mr Brian Dudakov.

130 For the following reasons, I preferred the evidence of Mr Brown.

131 Mr Brown concluded, and I find, that as a result of the works, there was a detrimental impact on the plaintiff's amenity from the property which he assessed at $65,000, and the defendant's property had increased in value by $470,000.

132 Mr Brown accepted that his estimate of a detrimental effect on the value of the plaintiff's property was subjective. The major cause of a reduction in value was loss of an amenity, namely privacy through the thinning of the CMW that reduced screening towards the plaintiff's property and the location of the extension outside of the building envelope and within 1 metre of the common boundary. The loss of amenity was the impact on privacy primarily from overlooking and the visibility of the neighbouring structures. Mr Brown noted that this loss of amenity was evident in the grounds and from the balcony areas of the plaintiff's property. He considered that the plaintiff could do little to mitigate this loss of amenity, largely because the impact arose from the use of the defendant's land in contravention of the covenant. Mr Brown explained that there was no overlooking or overshadowing from the property to the east of the plaintiff's land and rejected the suggestion in cross-examination that an amenity of privacy was illusionary.

133 Mr Brown observed that in a relatively low-density subdivision, purchasers would expect 'a fair degree of privacy given the significant lot sizes in the area and the established vegetation'. He allocated a reduction of 5% to the unaffected land value to assess the loss of value at $65,000.

134 The works increased the value of the defendant's land because the works doubled the size of the building envelope. Mr Brown assessed the area now actually occupied by buildings at approximately 1,200m^2. He identified a key difference between his valuation and that of Mr Dudakov was that, being premised on a building envelope of approximately 1,200m^2, his valuation identified the actual effect of the breach of the covenant if the building was permitted to remain. Mr Dudakov's valuation was premised on the permitted building envelope with a hypothetical two-story structure. The value of the defendant's property in that hypothetical circumstance was irrelevant.

135 A single storey building of that floor area on an enlarged envelope brought advantages such as a flowing design, increased natural light, more harmonious integration into the environment of the Estate, appeal to retirees and an in-ground

swimming pool when compared to a multiple-storey building of the same floor area on the restricted building envelope. Mr Brown acknowledged that it was possible that similar improvements could have been built over two storeys within the permitted envelope but that had not occurred. It was unlikely that a pool could have been included in a redevelopment within the restriction of the covenant.

136 The maximum use of the height restriction under the planning scheme was a red herring. Properly accounted for, the comparison would be the value of the property with a two story development on a 600sqm building envelope with a two story development on a 1200sqm building envelope. Mr Brown agreed with Mr Dudakov that an owner can get more floor area within the envelope by going up but he doubted whether the market would support overcapitalisation to that extent.

137 The defendant instructed Mr Dudakov to estimate:

(a) any loss of value to the plaintiff's property as a result of the breach of restrictive covenant. In doing so, to also consider whether there would be a loss of value to the plaintiff's land by a permissible alternative extension within the building envelope;

(b) any increase to the value of the defendant's land as a result of a breach of the restrictive covenant and of the extension outside the building envelope. Again, in doing so, to also consider any value to the defendant's land by a permissible alternative extension within the building envelope; and

(c) any loss of value to the plaintiff's property as a result of the breach of restrictive covenant assuming only the western extension had been constructed.

138 Mr Dudakov concluded that there was no change in value in any of these alternative scenarios.

139 The basis for Mr Dudakov's market value definition in relation to an interest in land was the amount of money that would have been paid for that interest if it had been

sold on that date by a willing but not anxious seller to a willing but not anxious purchaser. He did not define the precise nature of the interest, a matter discussed in due course.

140 He noted, regarding any reduction in the value of the plaintiff's land, that a hypothetical purchaser would observe that the adjoining property to the east had a greater visual impact on the property than that of the defendant, and there had been significant clearing on the eastern property between it and the shared boundary with the plaintiff's land. He concluded that the bulk of the defendant's property extension is to the south of the plaintiff's dwelling, and is accordingly further away from it that the defendant's original house and the improvements on the adjoining property to the east.

141 He considered whether extending the building envelope to accommodate the building improvements as currently being erected would enhance the value of the defendant's land, rather than whether the actual building works enhance value.

142 Mr Dudakov considered that this question ignored the alternative option of building up rather than outwards. Given that this alternative option was open, he concluded that there would be no increase in value as a hypothetical purchaser could simply build up instead of out should they wish to accommodate further rooms on the land.

Stephen Bitmead

143 Mr Bitmead concluded that the defendant's building works impacted 'significantly and detrimentally' on the plaintiff's amenity in the following six ways:

(a) the extension comes within less than one metre of the plaintiff's boundary;

(b) the extensions are clearly visible from the plaintiff's land;

(c) the extensions include two pitched, gabled roofs approximately 5.5 metres high, which extend above the CMW canopy on the plaintiff's land, and which are 'not in keeping with the limited development and spacious bushland amenity of Warrenbeen Court';

(d) the building extensions, being greatly in excess of the permitted building envelope, reduce the spacious setting between the houses, and remove the isolated ambience;

(e) the bushland setting 'at the entrance' of the defendant's land has been reduced; and

(f) by substituting the CMW with built form.

144 I accept this assessment.

145 Mr Bitmead concluded that the work 'offends the covenant's evident purpose of restricting development so as to protect the Coastal Moonah Woodland vegetation and the unique amenity that exists throughout Warrenbeen Court'.

146 Mr Bitmead explained that he would take into account the following matters when consider amenity impact:

(a) the legitimate expectations of a beneficiary to the covenant;

(b) council policy about retention of vegetation; and,

(c) social and psychological impact of removal of tree canopy, including sense of spaciousness.

He explained that amenity 'is a multi-faceted consideration and not just restricted to line of sight from an adjoining property'.

147 Mr Bitmead said that although all trees on the lots could be removed without consequence under the planning scheme, he did not agree that this was an appropriate aspect to consider in analysing the reasonable expectations of the beneficiaries to the covenant. He explained this was because the vegetation clearance was linked directly to buildings. He said this expectation on the part of beneficiaries was relevant by virtue of s 60(2) of the *Planning and Environment Act*.

148 Mr Bitmead did not incorporate into his consideration of the impact on the plaintiff's amenity of buildings on adjacent properties to the east and south of the plaintiff's property. He also agreed that only the eastern wing of the defendant's extensions was in fact visible from the plaintiff's land.

149 Mr Bitmead had read Mr Negri's report, considered below. He agreed that the removal of the gabled roofs on the extensions would reduce the amenity impact, as would articulating the eastern elevation through variation in alignment. He also agreed with Mr Negri that the impact of the garage was inconsequential, but disagreed that the impact of the western wing was inconsequential.

150 Mr Bitmead presented as a truthful and honest witness, however for the following two reasons I needed to exercise extreme care in assessing his evidence.

151 First, there were serious issues as to Mr Bitmead's independence. Although perhaps well-intentioned, it was evident that the plaintiff and his solicitor played an active role in the preparation of Mr Bitmead's report.

152 The plaintiff had engaged Mr Bitmead prior to these proceedings to assist in relation to planning matters, including lodging an objection to the defendant's application seeking retrospective approval for the variation of the NDP and building envelope.

153 Mr Bitmead first provided advice to the plaintiff on 7 July 2016, about preparation for the hearing before Emerton J. The defendant raised the question of whether Mr Bitmead could impartially assist the court because he was an advocate for the plaintiff.

154 Mr Bitmead's expert report incorporated an affidavit affirmed by him on 30 January 2017. The plaintiff and his solicitor had some role in its preparation. On 30 December 2016, Mr Raven sent Mr Bitmead an email, copied to the plaintiff, stating:

> Dear Stephen
>
> Please find attached some draft notes that [the plaintiff] has prepared. This is a guide which may be of assistance. The second section 'Affidavit' may be of assistance to you in drafting your report.

155 Mr Bitmead recalled that the draft notes included the plaintiff's views in relation to amenity impacts of the building works. Mr Bitmead gave evidence that he viewed these notes as material he should consider in preparing and resolving his statement and he stated that he agreed with some of the plaintiff's views.

156 Then by email dated 25 January 2017 to the plaintiff's solicitor, copied to the plaintiff, Mr Bitmead stated:

> Good afternoon Chris, I am generally happy to sign the affidavit prepared by both yourself and [the plaintiff].

157 Mr Bitmead explained:

> If I recall, it went was that there was a decision made by myself that a planning report in the normal sense of the planning report was not necessary and it was merely my witness statement could be in the form of a legal document, if you like, because of the work I had done previously and so there was a document provided to me which outlined the witness statement in terms of what things I was requested to consider saying and signing off on, and there were a number of matters which I wasn't happy with because I didn't have the documentation, I hadn't fully assessed, in particular, the subpoenaed RA and the state government, I hadn't read that material so I was asking for all the material to be provided so we could work on the submission together and then I could indicate whether or not I was satisfied with what it was saying in terms of my opinion.

158 Mr Bitmead also explained:

> It was no more than a situation where you work on a submission together, there's input. I indicate whether or not I'm happy with that. I review what's being said, I make up my own opinion and it was more being guided by the structure of the report that this is referring to, and that's why I was asking for the material that was contained in the notes and in the affidavit, but it wasn't an affidavit, so that I could be sure what I put in my statement of evidence was true and correct.

159 He agreed that he had read and understood the Expert Witness Code of Conduct, that it required him to be independent, and he said that an expert report was 'a different job to the writing of a planning submission where you work together with the client'. He also agreed that his first duty was to the Court, not his client, and this was why when provided with the notes and proposed report structure, he 'took a very independent look', asked for and reviewed all documentation he didn't have, and resolved his own opinion.

160 When the cross-examiner put to Mr Bitmead that the affidavit he affirmed differed in very limited respects from that prepared by the plaintiff's solicitor, Mr Bitmead said:

> The affidavit and the statement were worked up in that type of situation based on numerous discussions and the emails and research that I undertook.

161 Second, Mr Bitmead's amenity impact assessment was based on the plaintiff's mistaken view that the restrictive covenant had some practical role to play regarding the removal of vegetation. Mr Bitmead did not accept as a relevant consideration in assessing the plaintiff's amenity the fact that all vegetation could be removed without offending the restrictive covenant.

Mr Marco Negri

162 The defendant instructed Mr Negri to consider:

> The effect of the proposed development on the subject site comprising of alterations and additions to the existing dwelling that has been the subject of the previous building permit issued on 29 July 2015 on the Plaintiff's property and amenity to the extent that those alterations and additions encroach outside the building envelope approved in the neighbourhood design plan;
>
> - The impacts on neighbourhood character based on the proposed building and works on the subject site to the extent that they encroach outside the building envelope on the approved neighbourhood design plan;
>
> - A comparison between any impacts on amenity on the Plaintiffs property or on neighbourhood character between the proposed building and works and an alternative alterations and additions to the existing dwelling within the confines of the building envelope.

163 Mr Negri observed that the NDP did not protect or include control over the removal or lopping of vegetation. His report was based on what he considered to be the practical benefit of the restrictive covenant, which was the establishment and maintenance of a low density residential environment with building sited within defined locations. He stated that, as regards the amenity benefits from the covenant, the restrictions provide a clear understanding of where buildings were to be sited but did not protect vegetation, or otherwise manage amenity implications such as 'privacy, building height, shadows, building materials etc'.

164 Mr Negri concluded that the eastern pavilion caused an unacceptable visual imposition having regard to the amenity expectations derived from the restriction.

165 Mr Negri had not considered the removal of CMW because the restrictive covenant did not protect it, and accordingly it could not be considered to be a practical benefit of the restrictive covenant. The cross-examiner put to him that the maintenance of the vegetation since the subdivision was created indicated that the covenant was in fact effective. Mr Negri described this as a 'sheer fluke' attributable to the 'commitment of the owners … not as a result of the restriction'.

166 Mr Negri opined that the western pavilion and proposed deck would have inconsequential amenity implications, given the set back and concealment of these elements of the works. He also concluded that the extensions will have no consequence on the neighbourhood character 'from a public realm perspective but will have an impact from a private realm perspective'.

167 As to the third scenario he was asked to consider, Mr Negri observed that it would be possible to develop the entire building envelope to a height of 9m. He considered that such a building would be visually imposing and would impact on the character of the neighbourhood.

168 Mr Negri made the following recommendations to ameliorate the amenity and neighbourhood character 'disbenefits' of the existing extension:

(a) modify the eastern pavilion to reduce its visual impact and to enable planting of CMW along the eastern boundary by:

(iii) removing the gable roof and replacing it with a flat roof to reduce the building's height from 6m to approximately 3.4m;

(iv) setting-back the building a minimum of 3.5m from the eastern boundary to make space for planting Moonah trees; and

(v) articulating the eastern elevation through variation in alignment.

(b) revegetating the CMW through a revegetation program guided by an ecologist and a landscape architect which would involve planting guidance and an ongoing management regime.

169 Mr Negri considered that the removal of the eastern gabled roof would not unduly emphasise the gabled roof of the western pavilion, due to the distance of that pavilion from the eastern boundary that would limit its visibility.

Douglas Buchanan

170 The defendant engaged Mr Buchanan to estimate the cost to demolish and remove the buildings outside of the building envelope, the cost of removing and demolishing the eastern pavilion, and to consider whether salvaged materials could be resold or reused elsewhere on the property. He estimated the cost of demolishing the work outside the building envelope, including the cost of the requisite building permit, and the cost of making it safe and secure at $65,591. This estimate did not include any reinstatement of the site. He concluded that a portion of the unused materials could be reused, or sold, albeit at a very low cost.

171 Mr Buchanan considered that the cost of demolition of the eastern pavilion, again including the cost of making it safe and secure, was $27,224.

172 Mr Buchanan was provided with plans and elevations of 14 September 2017 contained in Mr Negri's report for proposed alterations to the Eastern pavilion. He concluded that the cost of modifying the pavilion, to a similar stage of completion as he observed on his inspection of the current pavilion, would be $135,383.

173 The plaintiff did not challenge Mr Buchanan's evidence.

Experts regarding the CMW

174 As indicated earlier in these reasons, I will digress to briefly summarise my findings from the evidence of Mr Trengrove, Mr Saunders and Mr Lane in case it might later be thought relevant.

Mark Trengrove

175 The plaintiff engaged Mr Trengrove to:

(a) assess the existing conditions of the CMW vegetation prior to the works; and

(b) provide prescriptions for the restoration of vegetation on the defendant's lot.

176 In forming his views, Mr Trengrove relied on, amongst other things, his work in the area in relation to the CMW in 1999, aerial photographs of the Estate, and regular informal visits to the area.

177 He concluded that on the lot:

(a) approximately 20-30 mature Moonah trees had been removed from the area outside the permitted building envelope for the works;

(b) the works resulted in significant clearance and degradation of understory vegetation;

(c) soil profiles 'have been altered in connection with the building works', which may impact the future health of the CMW;

(d) the clearance of vegetation has 'significantly diminished the ecological quality' of the lot, including the ecological quality of the 'overall contiguous CMW that characterizes' the Estate;

(e) the construction of new buildings and the spread of mulch limits the potential regrowth of the vegetation;

(f) restoration of the site vegetation can be achieved with a 5-year managed program.

178 He also opined that the findings of the report commissioned by the City of Greater Geelong, prepared by Ecology and Heritage Partners in October 2016 which classified the site as being in 'Poor-Moderate Condition' was largely a direct

consequence of disturbance at the defendant's lot in connection with the works outside the permitted building envelope.

179 The restoration plan proposed by Mr Trengrove included restoration of soil profile and contours; revegetation; natural regeneration; weed management, and monitoring and evaluation including any additional works as required. The plan also incorporated a supervising ecologist. The total cost of the plan estimated by Mr Trengrove was $110,680. This costing did not include the cost of removal of 'inappropriate infrastructure' and contaminated or imported soil or fill. There was no evidence of such soil or fill being present on the site.

180 There was no reason not to accept Mr Trengrove's evidence and had it been relevant to do so, I would have found that the revegetation plan that he proposed was reasonable and reasonably costed.

John Saunders – arborist

181 The plaintiff engaged Mr Saunders to value the CMW, particularly Moonah trees removed from the defendant's lot. He used three different valuation methods to obtain three different values, but concluded that the most appropriate method was the Thyer Method, which produced a total value of $399,170.

182 Mr Saunders had very limited, almost non-existent, prior experience in valuing trees. He had never valued CMW or similar vegetation. Apart from the valuation prepared for this proceeding, he has undertaken four other valuations, each of which was of a freestanding individual tree on private land in Fairfield in 2015. Mr Saunders used the Burnley and City of Melbourne methods of valuation for those trees. He had been engaged to value the four trees as assets.

183 Mr Saunders concluded that the Thyer Method was most appropriate to value the CMW as it had the most relevant data criteria, and was the only one that took account of indigenous trees and environmental significance. The two other valuation methods Mr Saunders identified and used were the i-Tree Eco method

which produced a value of $169,717, and the City of Melbourne method, which produced a value of $480,463.

184 I was not persuaded that Mr Saunders has specialised knowledge based on his training study or experience. On that basis, had I been of the view that his evidence was relevant to a fact in issue, it would have been excluded by operation of s 76 of the *Evidence Act 2008* (Vic) as the exception to the opinion rule under s 79 of that Act was not shown to be applicable.

185 I was also not persuaded that any of the valuation methods identified in his evidence was appropriate for assessing the value of the area of CMW that was removed or interfered with as part of the works. He agreed that there is no consensus in Australia as to the preferred method of tree valuation. Moreover, the exercise that was needed was not individual tree valuation but the valuation of the CMW.

186 Mr Saunders acknowledged that the Thyer method was designed to value trees on public or community owned land in city, town or suburban locations, and is not intended for use within bushland areas, or on rural land except near residences. Nonetheless, he considered the method appropriate as the 'Introduction to the Thyer Tree Valuation Method' also stated '[v]alues calculated for trees on private land indicate the value of those trees to the community'. Mr Saunders agreed that this was the only element he relied on to conclude that the Thyer method was suitable and appropriate for his task.

187 I remain unpersuaded that there are not significant conceptual differences between valuation of a tree and valuation of an area of woodland scrub. Further, the values were inherently unrealistic and unrelated to the value of the land on which the CMW had stood.

188 Mr Saunders assessed that there were 47 trees in the relevant area of the defendant's lot. He acknowledged the significant difference between his estimate of 47 trees removed and that given by Mr Trengrove. He adopted a conservative calculation of 47 trees in the relevant area, based upon the average space occupied by each

Moonah tree in a sample area. He did not inspect the defendant's land basing his assessment on observations made on the plaintiff's land. I am satisfied that it was inappropriate to compare the CMW on the plaintiff's land with the CMW on the defendant's land as the vegetation in each place was in significantly different condition. He acknowledged that he did not identify which trees had been removed as a result of the recent building works, as opposed to those which had been removed at a time prior to 2012. He attributed this difference to his methodology, which he considered to be reliable. The calculation of the average size of trees and the identification of a sample area appeared susceptible to incorrect assumptions and error. I was not persuaded that it was probable that there were 47 trees removed and I prefer Mr Trengrove's evidence in that respect.

189 The valuation methods were based on multiplying the average value per tree generated by each of the methods by 47. The value per tree using the Thyer method was $8,493, using the i-Tree Eco method it was $3,611, and using the City of Melbourne method it was $10,223. I was not persuaded that the methodology employed, particularly the calculations used to obtain an individual tree cost were appropriate.

190 On those alternative cases, I would also have rejected Mr Sanders' evidence.

Brett Lane - ecologist

191 The defendant engaged Brett Lane to:

(a) provide his opinion on the quantity and quality of CMW vegetation removed from the defendant's property;

(b) comment on whether there is any substantive or material connection between removal of CMW vegetation from the defendant's property and the vegetation on the balance of the defendant's property, the plaintiff's property or the subdivision as a whole; and

(c) comment on the revegetation proposal recommended by Mr Mark Trengrove, the valuation of the trees assessed by Mr John Saunders and the landscape plan proposed by the defendant.

192 As he had been informed that mulching and removal of understorey vegetation had occurred on the defendant's property in 2009, Mr Lane observed that the vegetation would have been of low to moderate quality, comprising the canopy only with a highly modified ground cover and understorey. He also observed that the understorey had been removed from the remaining Moonah canopy, resulting in weeds and disturbance to the earth. He concluded that his observations of lack of disturbance to adjacent native vegetation and of its resistance to weed invasion from disturbed areas that support weeds on the defendant's property indicate that the site works have had and will have little effect on the extent and quality of native vegetation beyond the boundaries of the defendant's property.

193 Mr Lane considered that the revegetation plan proposed by Mr Trengrove would be a suitable approach where reinstatement were required by, for example, an order of VCAT in response to a council's application.

194 Mr Lane also considered the valuation provided by Mr Saunders. He noted that while he was not an expert in amenity tree valuation, he was able to provide some comments on the methodology employed by Mr Saunders, by comparing it with a process he was familiar with, being the 'Biodiversity Assessment Guidelines'. These guidelines are incorporated into the City of Greater Geelong Planning Scheme, and are used when a planning permit for the removal of native vegetation on lots greater than 0.4 hectares is required. Essentially, the guidelines prescribe a method for measuring the ecological value of removal and offsets based on 'biodiversity equivalence units'. Offsets can be purchased from approved suppliers, thereby placing a value on native vegetation. Mr Lane valued the offset value of the removal at between $200 and $360. However, given that the lot in question is less than 0.4 hectares and the permit system does not apply to it, there is minimal relevance in this comparison with the approach undertaken by Mr Saunders. For reasons I have

already given, I do not accept that Mr Saunders' methodology was appropriate. It is pointless to compare Mr Lane's vastly varying approach which itself appears to be of questionable, if any, relevance to the defendant's land.

Principles

195 Longstanding equitable principle established that the breach or invasion of a proprietary right, or a sufficient risk thereof, founded a prima facie entitlement to an injunction or specific performance.[13] The benefit of a restrictive covenant is such a right.[14] As Dodds-Streeton JA explained in *Break Fast*,[15] a trespass case, the express statutory basis - by *Lord Cairn's Act* for an award of equitable damages that was not limited to cases where damages could properly be awarded at law or as compensation for past injury - introduced the possibility of damages for, inter alia, trespass to freehold land, which could represent compensation 'once and for all', in circumstances where the trespass was permanent or continuing, thus obviating repeated applications for relief.

196 The issue before the Court of Appeal in *Break Fast* was whether the primary judge had erred in refusing to award *Lord Cairns' Act* damages, having instead granted the plaintiff a mandatory injunction requiring the removal of cladding attached to the face of a 12 storey office building that trespassed into the airspace above the plaintiff's property in respect of which approval was being sought for a major re-development. The Court of Appeal held that it was necessary to make out a special case for the court to exercise its jurisdiction to award *Lord Cairns' Act* damages, which were not a standard remedy, whereby wrongful acts could routinely be sanctioned by the effective 'purchase' of the landowners' rights. Although the Court of Appeal emphasised that an injunction remained the prima facie remedy for trespass, it approved of 'a good working rule' articulated by AL Smith LJ in *Shelfer v*

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13 *Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd* (2007) 20 VR 311, 319 [36] ('*Break Fast*').

14 *Wrotham Park Estate Co v Parkside Homes Ltd* [1974] 2 All ER 321, 336 ('*Wrotham Park*'); *Jaggard v Sawyer* [1995] 2 All ER 189, 196, 202 ('*Jaggard*'); *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490, 496 ('*LJP*').

15 (2007) 20 VR 311.

City of London Electric Lighting Co that provided guidance as to when, exceptionally, damages would be appropriate.[16]

197 A special case can be made out that the plaintiff should be compensated by an award of damages in lieu of an injunction either when the plaintiff had disentitled himself to an injunction (by conduct such as delay) or where the four conditions of the good working rule were satisfied. The four conditions, which are cumulative, are –

(a) the injury to the plaintiff's legal rights is small;

(b) the injury is capable of being estimated in money;[17]

(c) the injury can be adequately compensated by a small money payment;[18] and

(d) it would be oppressive to the defendant to grant an injunction.

198 Whether these conditions are found will be fact sensitive in each case. Further, there may also be cases in which, though these four requirements are established, the defendant has, by conduct evidencing disregard for the plaintiff's rights, disentitled himself from asking that damages be assessed in substitution for an injunction.

199 Dodds-Streeton JA acknowledged judicial and academic criticism of the 'good working rule' stating:[19]

> While the factors potentially relevant to the exercise of the discretion cannot be exhaustively stated, *Shelfer*, in my opinion, correctly accorded primary importance to identifying a small injury to the plaintiff, and disproportionate hardship constituting oppression, to the defendant.
>
> In determining whether a substitution of damages for in specie relief is just, the interests of the parties are not of broadly equivalent weight. It will not suffice that the hardship entailed to the defendant by an injunction marginally outweighs the relief that the plaintiff will obtain thereby. Rather, the courts have typically required a significantly disproportionate damage to the defendant, reflected in the criterion of oppression in the *Shelfer* working rule.

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16 [1895] 1 Ch 287 ('*Shelfer*'); see also *LJP* (1989) 24 NSWLR 490; *Jaggard* [1995] 2 All ER 189.

17 For the consideration a reasonable seller in the plaintiff's position would sell the right see *Jaggard* [1995] 2 All ER 189.

18 *Cowper v Laidler* [1903] 2 Ch 337, 341.

19 *Break Fast* (2007) 20 VR 311, 321 [46]–[48].

> In that sense, the *Shelfer* working rule itself implicitly assumes that in order to justify the substitution of damages, it is ordinarily necessary that there be a relationship of significant disproportion between the relief afforded to the plaintiff's injury and hardship to the defendant entailed by the grant of an injunction.
>
> The question whether to substitute damages for an injunction for trespass to land is necessarily determined after the plaintiff (in contrast to an applicant for an interlocutory injunction) has established the invasion or breach of its property right. Ordinarily, in such circumstances, unless the hardship to the defendant entailed by a specific remedy is out of all proportion to the relief thereby assured to the plaintiff, the plaintiff should not be compelled to exchange or suffer continuing invasion of its proprietary right for a money payment at the behest of the wrongdoer.

200 Dodds-Streeton JA identified other statements of principle emerging from the cases since *Shelfer* that are presently apposite and which I will summarise.

(a) The court's inquiry remains essentially a discretionary enquiry and although the status of the *Shelfer* working rules are high, they are no more than a useful guide to the factors fundamental to determining the crucial question whether it would be unjust to do more than award damages in all the circumstances of a given case.[20]

(b) Primary importance must be accorded to the questions of identifying a small injury to the plaintiff, and disproportionate hardship constituting oppression, to the defendant.[21] It is ordinarily necessary that there be a relationship of significant disproportion between the hardship to the defendant and the relief that the plaintiff would obtain by an injunction, because interests of the parties are not of broadly equivalent weight.[22]

(c) The plaintiff should not be compelled to exchange or suffer continuing invasion of his proprietary right for a money payment at the behest of the

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20 *Break Fast* (2007) 20 VR 311, 321 [45]; *Jaggard* [1995] 2 All ER 189, 208; *LJP* (1989) 24 NSWLR 490, 496-497.

21 *Break Fast* (2007) 20 VR 311, 321 [46]; see also *Pettey v Parsons* [1914] 1 Ch 704, 723.

22 *Break Fast* (2007) 20 VR 311, 321 [47]–[48].

wrongdoer unless the hardship to the defendant entailed by a specific remedy is out of all proportion to the relief thereby assured to the plaintiff. [23]

(d) Where a plaintiff had stayed his hand and allowed a building in breach of a restrictive covenant to be completed, had sustained no financial damage, and the use of its land was in no way impeded, such that it would be 'an unpardonable waste' to order demolition, the application of the *Shelfer* rules permitted damages assessed on the basis of such a sum of money as might reasonably have been demanded by the plaintiffs from the developer as a quid pro quo for relaxing the covenant.[24]

(e) Alternatively, it may be appropriate to deter high-handed disregard for the plaintiff's rights, where by breaching those rights a defendant secures a great advantage to himself while causing little damage to the plaintiff, by awarding damages which bear some relationship to the advantage which the defendant sought to gain for himself.

(f) The plaintiff's unreasonable refusal of an offer on terms referable to the defendant's gain might justify the refusal of an injunction.[25]

(g) Whether it is oppressive to the defendants to grant the injunction is a factual inquiry, but it is important to avoid a general balance of convenience test, which is not the issue.[26] Most of the cases in which an injunction was refused involved the pulling down of a building which had been constructed as a fait accompli, so that its demolition would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and could expose the defendant to exorbitant demands.[27] Trespass by invasion of airspace, for example, gave rise to different considerations. All the circumstances have to be considered. Further, the defendant's conduct is

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23 *LJP* (1989) 24 NSWLR 490, 496-7; *Break Fast* (2007) 20 VR 311, 322 [49].
24 *Wrotham Park* [1974] 2 All ER 321, 337-339; *Jaggard* [1995] 2 All ER 189, 199-200.
25 *LJP* (1989) 24 NSWLR 490, 497.
26 *Jaggard* [1995] 2 All ER 189, 203.
27 Ibid 208.

relevant when assessing oppression. For instance, whether the defendant acted openly and in good faith and in ignorance of the plaintiff's rights, or acted with her eyes open hoping to present the court with a fait accompli, or on some intermediate basis:

> It would weigh against a finding of oppression if the defendants had acted in blatant and calculated disregard of the plaintiff's rights of which they were aware ...[28]

201 There is no general standard of 'oppression' or converse general standard of 'reasonableness' to which appeal can be made on this factual inquiry and it is desirable to consider the content of the concept of oppression that sets the standard for this factual inquiry. This issue was not addressed in submissions, although each party contended respectively that an injunction for demolition would not or would be oppressive.

202 In *Wrotham Park*, Brightman J spoke of 'an unpardonable waste' if the court ordered demolition. This phrase evokes a notion of 'economic waste'. It might well be thought to be economic waste to order the demolition of a new structure that cost more than $900,000 to construct but the fact of 'waste' is not the determinative consideration. Cases of breach of a restrictive covenant or of trespass by construction will usually feature the prospect of economic waste in this sense when ordering demolition. Plainly there is waste when a new substantially completed building is demolished but why such waste might be classified as unpardonable and oppressive was revealed by the circumstances in *Wrotham Park*.

203 The plaintiff in that case held its hand allowing houses constructed in breach of covenant to be completed. It had sustained no financial damage and the use of its land was in no way impeded. Construction of the houses had a public benefit aspect in adding to the local stock of housing in a growing area. Brightman J observed that it would be 'an unpardonable waste' to order demolition and instead awarded damages on the basis that a just substitute for a mandatory injunction would be such

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28 *Jaggard* [1995] 2 All ER 189, 203; *LJP* (1989) 24 NSWLR 490, 496-497.

a sum of money as might reasonably have been demanded by the plaintiffs from the developer as a quid pro quo for relaxing the covenant.

204 Against such considerations, *Lord Cairns' Act* damages should not be a basis for a compulsory purchase of a plaintiff's right, which can be the effect of an award of damages for breach of a restrictive covenant where the award is made to compensate a plaintiff for past and future loss by reason of the defendant's continuing wrong.[29] Having regard to the plaintiff's conduct, economic waste was, as Brightman J characterised it, unpardonable. Brightman J considered substitution of a hypothetically negotiated sale price for the right to be just.

205 Bearing in mind that relief by way of mandatory injunction for demolition is a claim for equitable relief for breach of a proprietary right, the notion that waste may be unpardonable, or the infliction of it by a legal remedy, oppressive, may also be regulated by equitable notions of unconscionability. As the remedy for breach of the proprietary right will usually raise issues of economic waste, such waste may be oppressive if it be unconscionable in equity for the beneficiary of the covenant to insist on injunctive relief in the circumstances.

206 The considerations identified by Dodds-Streeton JA in *Break Fast* as relevant to the ultimate question of whether it would be unjust to do no more than award damages in all the circumstances of a given case are compatible with an inquiry into whether it would be unconscionable in equity for the beneficiary of the covenant to insist on injunctive relief.

207 Those considerations would be relevant in determining whether conduct is in equity unconscionable and capable of disentitling a plaintiff from equitable relief or disentitling a defendant from an award of *Lord Cairns Act* damages in lieu of a mandatory injunction. I do not accept the defendant's submission that the distinctly different concept of reckless disregard of the plaintiff's rights under the covenant

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29 *Shelfer v City London Electric Lighting Co* [1895] 1 Ch 287, 322; *Lawrence v Fen Tigers Ltd* [2014] AC 822, 855 [121]; *Emprja Pty Ltd v Red Engine Group Pty Ltd* [2017] QSC 33 [64].

needs to be satisfied. I prefer the notion of unconscionability because of its central role in conditioning the circumstances where equity grants its remedies.

208 In *Giumelli v Giumelli*,[30] the High Court explained that the doctrinal basis of relief by way of proprietary estoppel involved recognition of a constructive trust of property whereby the legal title of the owner of property is subjected by order of the court to limitations necessary to meet the requirements of good conscience. Where the expectation of the party asserting the estoppel which led to detrimental reliance was not reasonably attributable to the conduct of the 'opposite party', then the conscience of the opposite party is not fixed with an obligation not to resile from the expectation.

209 By analogy, the doctrinal basis for relief from the oppressive features of a mandatory injunction to remediate a breached proprietary right by awarding *Lord Cairns Act* damages may be that the right of the beneficiary of the covenant to enforce it is subjected by order of the court to limitations necessary to meet the requirements of good conscience. Those requirements can affect both the right of the beneficiary to equitable relief and the entitlement of the wrongdoer to *Lord Cairns Act* damages. The existence of the proprietary right created by the covenant, *per se*, or the fact of breach of it by the wrongdoer demonstrates entitlement to the equitable remedy. The denial of equity is conditioned by the consequences of the conduct of the parties and whether that conduct is accepted by the application of equitable principle to be in good conscience.[31]

210 In this sense the concept of oppression identified in the authorities is given content consistent with the nature of the remedy being considered by the court.

211 Although this approach has attractions, the parties did not address any submission to it and I will say no more about it. It is unnecessary to do so as the circumstances of

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30 (1999) 196 CLR 101, 111-114 [2]-[10]; see also *Sidhu v Van Dyke* (2014) 251 CLR 505, 511 [2].

31 *Riches v Hogben* [1985] 2 Qd R 292, 301; *Sidhu v Van Dyke* (2014) 251 CLR 505, 522-523 [58].

this case do not challenge the limits of the concept of oppression identified in the authorities.

212 As I discuss below, three particular considerations that arise in the present case, were identified in the authorities as shedding light on the circumstances where economic waste as a consequence of a mandatory injunction for demolition must be borne by a defendant and will not be thought to be an oppressive outcome. They are:

(a) Has there been a high-handed disregard by the defendant of the plaintiff's rights? Relevantly, has the defendant acted openly and in good faith and in ignorance of the plaintiff's rights, or acted with her eyes open hoping to present the court with a fait accompli, or on some intermediate basis?

(b) Was an offer to resolve the issue of breach of the covenant made in terms referable to the defendant's gain and unreasonably refused by the plaintiff?

(c) Whether it would be oppressive of the defendant to grant a mandatory injunction is a factual inquiry. It is not an exercise of balancing the convenience of the parties.

To what remedy is the plaintiff entitled?

Entitlement to an injunction

213 As *Break Fast* makes clear, the plaintiff has a prima facie entitlement to a mandatory injunction for demolition of building structures that are outside the building envelope. To deny the plaintiff that relief once breach of the covenant is found, the defendant must demonstrate a special case that there are countervailing considerations justifying refusal to grant this relief on the grounds that it would be unjust to do more than award damages. Such considerations in the present circumstances were:

(a) whether the plaintiff delayed in seeking to enforce his rights, or otherwise was, by his conduct, disentitled to equitable relief;

(b) the scope of the injury to the plaintiff; whether the injury was small and capable of being adequately compensated by a money payment;

(c) if so, whether a money payment would effectively enable the defendant to purchase from the plaintiff, against his will, the legal right to breach the covenant;

(d) whether granting a mandatory injunction would impose disproportionate hardship on and be oppressive to the defendant.

214 For the reasons which follow I do not consider that the defendant has demonstrated a special case that the plaintiff has, by his conduct or delay, disentitled himself to the relief he has sought. Nor am I persuaded that on discretionary grounds it would be unjust to do more than award damages and that a mandatory injunction would be oppressive to the defendant.

Did the plaintiff delay in seeking legal redress?

215 The defendant submitted that the plaintiff was aware in August 2015 that building works were being undertaken at the defendant's property. However he only instructed his solicitor to write to the defendant in February 2016, and only commenced proceedings in March 2016. It was contended that the built form would have been readily apparent to the plaintiff many months before the defendant was contacted regarding the restrictive covenant. By reason of this delay, the defendant faces a substantially greater economic loss and the plaintiff has disentitled himself to mandatory injunctive relief.

216 I reject this submission. First, I have found that the plaintiff was not on notice as to the scope of the works in August 2015 and that he did not become aware that the scope of the works involved breach of the covenant until 27 December 2015. Once the plaintiff became aware of the breach of the covenant he acted expeditiously and appropriately. A little over 5 weeks later, the plaintiff's solicitor demanded that all work cease. Bearing in mind that those 5 weeks included the Christmas/January holidays period, that the plaintiff needed to make some inquiries and that for part of

that time there was no work on the project, there was no delay in the plaintiff's response.

217 Secondly, the defendant has not persuaded me what economic loss she would have sustained had the plaintiff's demands been made in August 2015. She already had contractual obligations to the builder and it is a matter of speculation what might have happened. That said, I accept that she was in a position in August 2015 to negotiate a better outcome for her than demolition of the structure outside of the building envelope, but the defendant did not demonstrate at trial what that alternative outcome might have been. It is speculative to compare the position the defendant might have been in following a hypothetical negotiation with her present position.

218 Thirdly, and following on from the last point, I do not accept the premise that the defendant faces a substantially greater economic loss because of conduct of the plaintiff.

219 Fourthly, the defendant's conduct was the reason why the plaintiff did not discover that the scope of the proposed works involved breach of the covenant at a time when the defendant might sustain a significantly smaller economic loss. Had the defendant provided the plaintiff with a copy of the drawings for the proposed work at the time of his first inquiry of Mr Newey, the plaintiff would have been aware that the works would breach the covenant before construction began. At that time trees had been removed and I am persuaded that once the plaintiff understood from precisely where on the property and for what purpose trees were cleared, he would have immediately objected. No aspect of the plaintiff's conduct in making inquiries disentitled him to injunctive relief.

220 Fifthly, the defendant's contributing conduct was not limited to failing to respond to the plaintiff's inquiry as to the scope of the works. The defendant was aware, before she received the first solicitor's letter on 4 February 2016, of the plaintiff's complaint to council and she accepted her architect's recommendation that the plaintiff would

not have the stomach to enforce the covenant by civil action and that the defendant should soldier on. This assessment, which plainly proved false, caused the defendant to continue with work outside the building envelope that increased the value of the works exposed to demolition.

221 The plaintiff did not by delay or other conduct disentitle himself to the equitable relief that he seeks.

Ought the plaintiff be limited to an award of damages in lieu of a mandatory injunction?

222 Next I turn to the four conditions identified in *Shelfer* for finding a special case that the plaintiff should be compensated by an award of damages in lieu of an injunction. The four conditions, which are cumulative, are –

(a) the injury to the plaintiff's legal rights is small;

(b) the injury is capable of being estimated in money;[32]

(c) the injury can be adequately compensated by a small money payment; and

(d) it would be oppressive to the defendant to grant an injunction.

223 Turning to the first consideration, the plaintiff's legal right is to the benefit of the restrictive covenant. That benefit follows if the burdened lots were restricted to construction of buildings within the permitted envelope. The benefits are multi-faceted. As Emerton J concluded, the NDP might have been intended to protect the native vegetation on the Estate, but it failed to impose a direct prohibition on interference with the vegetation outside of the building envelope. Thus Mr Negri observed, correctly, that the NDP did not protect, or include control over the removal or interference with, vegetation. Mr Negri considered the practical benefit of the restrictive covenant to be the establishment and maintenance of a low density residential environment with building sited within defined locations. The restrictive

[32] For the consideration a reasonable seller in the plaintiff's position might sell the right see *Jaggard* [1995] 2 All ER 189.

covenant delivered an amenity benefit by providing a clear delineation of where buildings were to be sited on each lot within the subdivision, but it did not otherwise manage amenity implications such as privacy, building height, shadows, or building materials.

224 The injury to the plaintiff's legal rights is substantial. A number of considerations support this assessment. First, the works effectively doubled the size of the building envelope from 600sqm to approximately 1200sqm. Secondly, Mr Bitmead identified a loss of amenity, through the detrimental impact of the extension, in six different ways.[33] Mr Negri concluded that the eastern pavilion caused an unacceptable visual imposition having regard to the amenity expectations derived from the restriction. Thirdly, Mr Brown assessed a detrimental impact on the plaintiff's amenity, mainly privacy, from the expansion of the envelope at $65,000, although this assessment was subjective and within the commonly accepted margin for error in land valuation of 10%. He noted that the plaintiff could do little to mitigate this loss of amenity because its impact was occasioned by the defendant's use of her land in breach of the covenant. The modest assessment of the market value of the loss of amenity is not determinative of the nature of the injury to the plaintiff's rights. All circumstances must be synthesised. I am satisfied that the injury to the plaintiff's legal rights was not small, it was substantial.

225 The second consideration is whether compensation for the injury is capable of being estimated in monetary terms? At common law almost any injury is capable of being estimated in monetary terms because damages are the remedy of common law courts which do the best they can to assess fair compensation on a once and for all basis. The present inquiry is more nuanced. In this case, the parties attempted to estimate the proper compensation for the injury. The starting point for such an assessment can be the defendant's open offer. The value of that offer[34] was $200,383 (being $65,000 for loss of market value due to loss of amenity, $135,383 for

33 See above at [143].
34 See above at [17].

modifications to the eastern pavilion) plus the value of a specific revegetation and landscaping plan over a period of years designed by Mr Negri. However, there was no evidence of the cost of implementation of that plan. A revegetation plan for the restoration of the CMW after the lawful building envelope was restored by demolition proposed by Mr Trengrove was costed at $110,680.

226 It follows that the plaintiff could not recover both the loss of market value through the detrimental impact on amenity and the cost of restoration of the benefit of that amenity, an objective to which the defendant's offer was mostly directed.

227 The plaintiff has no intention of selling his property and I am not persuaded that Mr Brown's subjective estimate of the impact of the loss of amenity on market value is apposite in the circumstances. Being compensated for a notional loss of market value is not the same as receiving the estimated value of the injury suffered because the plaintiff would continue to experience the loss of amenity. The cost of substantially restoring the lost amenity is much greater, possibly in excess of $150,000 but it cannot be accurately determined on the evidence. That cost, whatever it be, approximates the estimated value of the injury sustained by reason of the breach of the covenant.

228 Alternatively, I have found that the market value of the defendant's property has increased by $470,000 if the pavilions remain and can be completed. This sum represents the gain, at least in market value, enjoyed by the defendant by reason of her breach of the covenant. By reason of the defendant's intentional overcapitalisation of the property, it would appear that the value of the gain made through the breach is greater than that sum by an incommensurable amount. The estimated value of the breach of the covenant to the defendant as purchaser of the right, is discussed further below. A hypothetical reasonable seller of the right enjoyed by reason of the covenant would likely negotiate in the range of $65,000 - $470,000 (+). Bearing in mind the evidence of Mr Dudakov and the extent of overcapitalisation of the land identified by both valuers, it is difficult to envisage a

hypothetical reasonable purchaser in the defendant's circumstances negotiating outside of the range of nil to $65,000.

229 In these circumstances, although it cannot be said that a money payment estimating the value of fair compensation for the injury might never be assessed, such a payment cannot be fairly assessed on the evidence in this case, except as a judicial damages assessment.

230 The defendant has failed to establish the third of the *Shelfer* conditions as I conclude the injury to the plaintiff's rights cannot be adequately compensated by a small money payment.

231 Finally, I need to consider whether it would be oppressive to the defendant to grant an injunction. In support of the conclusion that a mandatory injunction would be oppressive, I refer to:

(a) The estimated value of the extension works that lie outside of the building envelope and which are in a state of substantial completion. I found the construction cost of that work to be $958,368.47. In addition there were associated fees and expenses that have not been calculated or estimated. That is a very substantial loss.

(b) At least in part, the defendant has used borrowed funds to finance the renovation and the defendant mentioned in passing that the building loan was secured by mortgage security, including collateral security over other properties. The defendant could have informed the court about her financial position and the likely financial detriment that would flow from a mandatory injunction for demolition. All that was stated was that the defendant's husband managed the financing of the project. He did not give evidence. The plaintiff might have explored in cross-examination, but did not, whether the defendant had sufficient means to absorb the economic waste consequent on demolition. I am disinclined to draw inferences in the absence of any evidence, but, that said, the defendant alluded to the breakdown of her

marriage and given the sums involved and the use of borrowed funds, I will for present purposes assume that the defendant is likely to suffer a very substantial financial detriment consequent on a demolition of the pavilions that may have consequential ramifications.

(c) The valuers agreed that the property would be significantly overcapitalised by the works and I accept that its value would be increased by $470,000 on completion of the works.

(d) The defendant's application to council for a planning permit to extend the envelope to incorporate the existing structure remains undetermined before council. However, the prospects of its success are not highly rated.

(e) The cost of demolition is $65,591 plus the cost of any reinstatement of the site.

232 On the other hand, the amenity impact on the plaintiff is measured, at least in financial terms for its amelioration, in significantly lesser sums, perhaps less than half the losses associated with demolition. Thus, the defendant contended that the losses that she would bear if required to demolish were grossly disproportionate to both the benefits that would be returned to the plaintiff and the cost to her of amelioration of the breach.

233 Bearing in mind this *prima facie* assessment, I have concluded for the following reasons that demolition would not, in the circumstances, be oppressive.

234 I am persuaded that the defendant did not act openly and in good faith. There was evidence of the defendant's high-handed disregard of the plaintiff's rights when –

(a) the defendant and her agents refused to make details of the proposed works available to the plaintiff before such works substantively commenced. The plaintiff drew Mr Newey's attention to the restrictive covenant at that time and, in any event, it ought to have been discovered by the defendant, her architect and Mr Newey prior to August 2015;

(b) the defendant accepted and acted on the advice from her architect to continue with the works, as the plaintiff would not have the stomach for enforcement proceedings. This advice implicitly acknowledged, as I have found, that at least from that time, the defendant knew that she had breached the covenant. She did not, once aware of the breach, act openly and in good faith towards the plaintiff. As I have found, she pretended confusion about her circumstances when the substance of her breach, if not the full ramifications in terms of legal rights, had been explained to her by her architect.

235 On the other hand, the plaintiff's solicitor made clear demands, which the defendant rejected for a month, that the works immediately cease, during which time significant work towards completion of the pavilions was carried out.

236 I am also satisfied that the works continued after the defendant represented to the plaintiff that she had directed that all work would cease. As I have explained, the most likely explanation for this was that the defendant was acting to protect her own interests that followed on the breach of the covenant. She sought to protect her existing investment from damage and deterioration by moving to lock up and to minimise her loss in her dealings with the builder, particularly in relation to sub-contractor trades who had not completed their contracted works and services. The absence of the architect and the builder from the witness box permitted me to infer that their evidence would not have assisted the defendant in answering the contention that she was not high handed towards the plaintiff's rights in these respects.

237 The defendant's conduct was high handed.

238 Another matter of significance was the open offer made by the defendant that I set out earlier in these reasons. In *LJP*, Hodgson J (as he then was) was considering a claim of trespass into airspace above a person's land by scaffolding. In respect of an

offer made by the builder to the owner to pay a lump sum and a weekly rental to maintain the scaffold, Hodgson J stated:[35]

> It may be that if the landowner effecting the development makes an offer to the adjoining D landowner to pay, for the use of his land, a sum of money which bears some relationship to the gain or saving which the landowner effecting the development will thereby make, and the adjoining landowner refuses that offer, then there may be circumstances in which a court might find the adjoining owner's conduct unreasonable so that a mandatory injunction would be refused, particularly if a similar unconditional offer of payment is made at the hearing of the case. What relationship the amount offered should have to the gain or savings made by the landowner effecting the development will depend on all the circumstances: it could, I suppose, in some circumstances be as much as one half the gain or savings, although it may be some other and lesser proportion.
>
> In the present case, there is no evidence from the defendant as to the difference in value between the development actually being undertaken and the development which could be undertaken without any use of the plaintiff's F land, or of the savings in the cost of development which can be achieved by using the first plaintiff's land rather than not using it. There is no basis upon which I could find, on this approach, that the first plaintiff's initial demand was unreasonable, or that the first plaintiff's non-acceptance of the defendant's most recent offer is unreasonable.

239 A similar issue arose in this proceeding. For convenience in assessing the submission, I will restate the key features of the offer. The defendant offered to pay the plaintiff $65,000, to partially demolish the eastern wall of the bedroom pavilion to be reconstructed to a different design that would reduce its visual impact and proximity to the common boundary, and to implement a specific revegetation and landscaping plan over a period of years to ameliorate the plaintiff's loss of amenity. The plaintiff refused the offer. He stated that Mr Negri's proposals for redesign of the eastern wall of the pavilion and for landscaping and revegetation would ameliorate the impact on him of his loss of amenity by only 2-5 per cent. He was not cross-examined on this evidence nor did the cross-examiner suggest to him that his refusal of the defendant's offer was unreasonable, let alone establish factually that the plaintiff's refusal was unreasonable. Such findings might have been available had the plaintiff been cross-examined about it, depending on the plaintiff's responses.

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35 *LJP* (1989) 24 NSWLR 490, 497.

240 A finding that the plaintiff acted unreasonably in refusing that offer would have materially contributed in a synthesis of the relevant factors in favour of a conclusion that it would be oppressive to demolish the pavilions.

241 Further, the defendant's open offer was not in terms referable to the defendant's gain. The defendant secured a great advantage if she was able to breach the restrictive covenant with impunity and significantly increase the market value of her property on the basis that she contended that the plaintiff's loss of amenity was either nil or $65,000, or could be satisfactorily ameliorated by further works. As I have noted, in a hypothetical sale of rights negotiation, a reasonable vendor amenity would be likely to value the right being sold at a much higher figure. The defendant's gain was well in excess of $470,000, and $65,000 was in reality a derisory offering while the amelioration program was uncertain, ongoing, and productive of future dispute. It was common ground that the property would be significantly overcapitalised by the renovation, meaning that its value to the defendant in her long term aspirations from ownership of that property were much greater that a sum that represented the increase in market value.

242 Although I might have compared the defendant's offer with the plaintiff's alternative claim in the proceeding, set out above at [16], that exercise does not permit me to conclude that the plaintiff's rejection of it was unreasonable, or that in rejecting it he acted unconscionably. It needs to be borne in mind that his primary claim in the proceeding was that set out above at [15]. Although the plaintiff's primary claim might appear exorbitant in the light of my conclusions, that is because the plaintiff did not persuade me of his claimed entitlement to revegetation or to a loss of amenity calculated by reference to the value of the CMW. I do not conclude that this claim was fanciful, merely that it was not established.

243 I find that the defendant's open offer, if accepted, would have effectively enabled the defendant to purchase from the plaintiff, against his will, the legal right to breach the covenant and I am unable in the circumstances to find that the plaintiff acted unreasonably in rejecting the offer or unconscionably in pressing for the injunction

to which he is *prima facie* entitled. In this sense, I am satisfied that the plaintiff did not act oppressively towards the defendant in refusing to accept the offer.

244 A relevant point of distinction between the present case and *Wrotham Park* is that in that case the housing that was constructed in breach of the covenant fulfilled a public need for housing. In this case, only the defendant benefits from the breach.

245 A program for amelioration would require court supervision, most likely over a period of 3 – 5 years. It is well established that relief in that form will rarely, if ever, be appropriate.

246 Finally, I am not persuaded in all of the circumstances that the hardship to the defendant from a demolition order is out of all proportion to the relief assured to the plaintiff. That assessment is properly made in the circumstances when the dispute first crystallised, which, in this case, was 4 February 2016.

247 For these reasons, the defendant has not persuaded me that this is a special case in which the plaintiff should be limited to an award of *Lord Cairns Act* damages. I will order that the defendant demolish the pavilions to the south of the house that constitute the major extension and which stand outside of the building envelope constituted by the restrictive covenant on title. By reference to the survey drawing reproduced at [124], demolition of the structures to the south of the red line that delineates the boundary of the building envelope is required within 90 days. Any other instance of a building structure outside of the surveyed building envelope is not to be affected by the injunction and will be permitted to stand.

248 In case it should elsewhere be determined that this conclusion cannot be sustained, I will assess *Lord Cairns Act* damages with brief reasons.

249 The plaintiff claimed damages by way of restitution of the profit gained by the defendant, assessed at $470,000, plus the loss through destruction of the CMW on the defendant's property assessed at $399,170, plus Mr Brown's assessment of the loss of market value at $65,000, a total of $934,170.

250 Consistent with the approach taken in *Wrotham Park,*[36] the measure of damages is the amount which the plaintiff could reasonably have expected to have received from the defendant for his release from her obligation to demolish the improvements that lay outside of the envelope. The question for the court is the amount of damages that equates to a proper and fair price which would be payable for the release of the property from the covenant. The court's task is to endeavour to arrive at a fair price that the parties would have struck in a hypothetical negotiation.

251 I note that each of the lot owners within the subdivision is entitled to the benefit of the covenant and the hypothetical negotiation would be between the defendant on the one hand and all of the remaining lot owners in the subdivision on the other hand. I will assume that from their absence from the proceeding, other lot owners have no interest in this question, notwithstanding that there was neither an interlocutory process to give notice to those lot owners nor evidence of the attitude of any one of them on the issue.

252 In *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd,*[37] the Judicial Committee of the Privy Council considered an assessment of damages awarded in a breach of confidence claim on the basis of the principle in *Wrotham Park* concerning compensatory damages awarded in lieu of specific performance or an injunction. Pell appealed the adequacy of an assessment of damages in its favour. Pell had established good relations with an oil company and obtained recognition as pre-qualified to bid for a contract with it concerning the development of an oil field. The second and third respondents later entered into confidentiality agreements with Pell as prospective members of a consortium to undertake the project. The agreements included provisions that they would work exclusively with Pell and would not approach the oil company without Pell's consent. Pell's negotiations eventually collapsed. Discussions began within the consortium about buy-outs but no agreement was concluded. Pell lost the exclusivity it had enjoyed in its commercial

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36 [1974] 2 All ER 321, 341; see also *Bracewell v Appleby* [1975] Ch 408, 419, 420; *Jaggard v Sawyer* [1995] 2 All ER 189, 202, 212, 213.

37 [2011] 1 WLR 2370.

relations with the oil company and the second and third respondents instead entered into a contract with the oil company.

253 The Privy Council concluded that the Court of Appeal erred in taking the cost of producing the confidential information as its starting point. The critical point was that the confidentiality agreements gave Pell a power of veto which stood between its former collaborators and what they saw as a valuable opportunity. The view that the release of the obligations was nothing more than an inevitable and necessary concomitant of the loss of exclusivity was also an error of principle. The Court of Appeal had brushed aside the continuing importance of those obligations and had significantly understated the commercial value of Pell's veto.

254 Lord Walker reviewed the authorities and identified the following general principles:[38]Damages under *Lord Cairns Act* are intended to provide compensation for the

> court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief. Most of the recent cases are concerned with the invasion of property rights such as excessive user of a right of way. The breach of a restrictive covenant is also generally regarded as the invasion of a property since a restrictive covenant is akin to a negative easement …;
>
> Damages under this head (termed "negotiating damages" by Neuberger LJ in *Lunn Poly*) represent "such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for [permitting the continuation of the breach of covenant or other invasion of right"].

255 Lord Walker also observed that the negotiation is 'between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation'.[39] Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored. Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant.

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38 Ibid [48] (citations omitted).

39 Ibid [49] (citations omitted).

However, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account.[40]

256 Taking account of these principles, had it been necessary to do so I would have assessed *Lord Cairns Act* damages in the sum of $250,000.

257 For the reasons given above, the plaintiff is not entitled to any of the orders he seeks regarding the reinstatement of the CMW.

258 I invite counsel to submit a minute of order reflecting the relief I propose to grant as set out in these reasons and I will hear counsel on the question of costs.

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[40] Ibid [50] citing *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] 2 EGLR 29 (Neuberger LJ).