

*REPLACING PROPERTY RULES WITH  
LIABILITY RULES: ENCROACHMENT  
BY BUILDING\**

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INTRODUCTION

In two recent cases,<sup>1</sup> South African courts adopted a novel approach to instances where someone builds a permanent structure on her own land in such a way that it encroaches upon neighbouring land.<sup>2</sup> In the Roman-Dutch tradition,<sup>3</sup> the default remedy was an order to have the encroachment

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<sup>1</sup> *Rand Wateraad v Bothma* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C). A third case, *Lombard v Fischer* [2003] 1 All SA 698 (O), is less interesting because of its facts. The most complete analysis of the issue, inspired by *Brian Lackey Trust*, is Anne Pope ‘Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles’ (2007) 124 *SALJ* 537. See further Susan Scott ‘Recent developments in case law regarding neighbour law and its influence on the concept of ownership’ (2005) 16 *Stellenbosch LR* 351 at 359–67, and on encroachment in South African law generally C G van der Merwe *Sakereg* 2 ed (1989) 201–3; P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg & Schoeman’s The Law of Property* 5 ed (2006) 121–5; G A Mulligan ‘Encroachment: Damages instead of removal’ (1956) 73 *SALJ* 438; J R L Milton ‘The law of neighbours in South Africa’ 1969 *Acta Juridica* 123 at 237–44; J B Cilliers & C G van der Merwe ‘The “year and a day rule” in South African law: Do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?’ (1994) 57 *THRHR* 587.

<sup>2</sup> I am restricting my discussion to significant encroachment by structural or building improvements on land, where it is permanent and where it had not yet been destroyed or demolished and where the neighbours cannot agree on a mutually satisfactory solution.

<sup>3</sup> I deliberately refrain from historical analysis. See *Rand Wateraad v Bothma* supra note 1; Van der Merwe op cit note 1 at 201–3.

demolished.<sup>4</sup> Exceptions were possible in cases where the effects of the encroachment were minimal.<sup>5</sup> In the two cases under discussion, the encroachments deprived the landowners of the use and enjoyment of their land, but the courts nevertheless refused to grant a demolition order, awarding compensation instead. This raises the question whether these owners had been forced into a compulsory transfer of their land (or rights in their land) — for if they were, this would have constitutional implications.

Anne Pope has indicated that, for purposes of Roman-Dutch law, the problem is to decide whether a legal dispute arising from cases such as these should be treated as a question of attachment (accession) or as a neighbour dispute.<sup>6</sup> If it is treated as an attachment problem, as suggested by the default position, the central principle is that a permanent structure attaches to the land and belongs to the landowner, who can have it demolished. Accordingly, once it is decided that the attachment is permanent, the change in ownership follows by operation of law and the landowner can dispose of the encroaching structure.<sup>7</sup> If encroachment is treated as a neighbour dispute, it appears that it is possible that, in some instances, the encroacher might retain possession of the encroachment against payment of compensation. In this case, the question is whether the encroacher acquires ownership (or another right) in the land. Pope has suggested that the operation of accession is suspended in cases where compensation is ordered instead of demolition, so that the encroaching part of the building does not attach to the land but belongs to the owner of the land upon which the main structure is built, while the affected landowner retains ownership of the land upon which the encroachment infringes.<sup>8</sup> Any other explanation would not account for the fact that the affected landowner is prevented from dealing with the encroachment as an attachment permanently affixed to her land.

Stated differently, the problem is whether conflicts arising from encroachment should be resolved with reference to real (property) remedies (in the form of an order to abate the interference with the landowner's rights) or personal remedies (in the form of compensation). In law-and-economics terminology one could frame this question as being one of whether property rules (injunctive relief) should be replaced with liability rules (compensa-

<sup>4</sup> The statement in Badenhorst, Pienaar & Mostert op cit note 1 at 122 that the landowner has a choice between three remedies (demolition, taking possession of the encroachment and paying compensation for the improvement or transfer of the land) is misleading. The courts exercise the discretion to award compensation; there is no indication that they will give the landowner a choice.

<sup>5</sup> Van der Merwe op cit note 1 at 201–3; Badenhorst, Pienaar & Mostert op cit note 1 at 122.

<sup>6</sup> This is the formulation of Pope op cit note 1 at 537–56.

<sup>7</sup> On the principles of attachment (or accession of movables to land through building), see Badenhorst, Pienaar & Mostert op cit note 1 at 121–5; compare further Pope op cit note 1 at 537–6.

<sup>8</sup> *Ibid.* It is not clear how this explanation would work in a case of total encroachment.

tion), based on efficiency and justice considerations.<sup>9</sup> In the *Bothma* and *Brian Lackey Trust* cases, the courts justified the move to liability rules with reference to civilian property dogma, complemented by considerations of reasonableness. Both judgments also referred to English law and to efficiency considerations, which suggests that the move from property rules to liability rules could be evaluated with reference both to comparative law and to law-and-economics logic.

In the following section, the facts and the decisions in the *Bothma* and *Brian Lackey Trust* cases will be set out and explained, followed by a doctrinal, comparative and economic analysis of the proposed solutions. In the penultimate section it is pointed out that the move to liability rules has constitutional implications, and in the concluding section the proposed solutions are evaluated and a way forward for South African law is suggested.

### THE RECENT CASES

In *Bothma* the respondent erected permanent structures on the unimproved land of the plaintiff, together with a house built halfway across the unmarked boundary line. The applicant approached the High Court for a mandatory interdict to demolish the structures or the encroaching parts thereof. The court emphasized that the question whether it had a discretion to grant compensation instead<sup>10</sup> had not been central to earlier South African cases on this issue.<sup>11</sup> In so far as courts discussed the matter, some held that there was no such discretion,<sup>12</sup> while others found equitable reasons, often based on English law,<sup>13</sup> why there should be one.<sup>14</sup> Arguments in favour of a judicial

<sup>9</sup> This formulation emerges from the (law-and-economics) discourse developing in response to Guido Calabresi & A Douglas Melamed 'Property rules, liability rules, and inalienability: One view of the cathedral' (1972) 85 *Harvard LR* 1089; in turn inspired by Frank I Michelman 'Pollution as a tort: A non-accident perspective on Calabresi's *Costs*' (1971) 80 *Yale LJ* 647. Both articles were influenced by Wesley Newcomb Hohfeld 'Some fundamental legal conceptions as applied in judicial reasoning' (1913) 23 *Yale LJ* 16 and idem 'Fundamental legal conceptions as applied in judicial reasoning' (1917) 26 *Yale LJ* 710.

<sup>10</sup> *Rand Waterraad v Bothma* supra note 1 at 130F-G.

<sup>11</sup> Ibid 130H, citing *Van Boom v Visser* (1904) 21 SC 360; *Hornby v Municipality of Roodepoort-Maraisburg* 1918 AD 278; *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354; *De Villiers v Kalson* 1928 EDL 217; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78; *Naude v Bredenkamp* 1956 (2) SA 448 (O); *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd* 1971 (2) SA 397 (W); *Meyer v Keiser* 1980 (3) SA 504 (D); *Wassung v Simmons* 1980 (4) SA 753 (N).

<sup>12</sup> The most important case in this group is *Higher Mission School Trustees v Grahamstown Town Council* supra note 11 at 366 (the court could find no authority).

<sup>13</sup> See particularly *Higher Mission School Trustees v Grahamstown Town Council* supra note 11 at 366 (there is authority in English law, but the court could find no authority in Roman-Dutch law); *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* supra note 11 at 87 (English law followed).

<sup>14</sup> The most important cases in this group are *Hornby v Municipality of Roodepoort-Maraisburg* supra note 11 at 290 (if damages would satisfy justice the courts would be

discretion to grant compensation instead of demolition were often influenced by considerations of fairness and equity. Hattingh J decided that the courts do have a discretion to grant either demolition or compensation. He relied on two main arguments. First, South African law allows the courts a similar discretion to refuse a claim for specific performance, even when the respondent is in a position to deliver, which confirms that the enforcement of rights cannot be absolute.<sup>15</sup> (His example from contract is, however, questionable because he did not consider the fact that, in the situation at hand, replacing injunctive relief with compensation amounts to a shift from property to contract.) Secondly, South African neighbour law is a collection of casuistic rules and principles aimed at harmonizing the property interests of owners of neighbouring land. It is widely accepted that, if these principles and rules cannot produce an equitable result, the general reasonableness standard of neighbour law should apply as a corrective measure.<sup>16</sup> This principle applied in Holland when Grotius described the Roman-Dutch law of his time, and it therefore also applies in South Africa.<sup>17</sup> For purposes of the second argument the court assumed that the reasonableness standard in South African neighbour law is similar to the equity principle in English law.

The reasonableness principle, as described by Hattingh J, is understood as a guarantee that enforcement of one neighbouring landowner's rights may not cause excessive harm or loss to her neighbour. In a case where enforcement of one owner's right would cause great harm or loss for another, the actual or potential harm or loss should, in the court's view, be divided equally between them.<sup>18</sup> The reason for this equitable arrangement is explained with reference to the notion, formulated by Pothier and developed by Van der Linden, that neighbours' use of their respective contiguous land creates a natural obligation or quasi contract that reciprocally obliges each neighbour not to disturb the other in their normal and reasonable use of the properties.<sup>19</sup> The fact that the reasonableness principle or quasi contract creates a reciprocal duty between neighbours not to use their land so as to be a nuisance to the other was not considered by the court, and neither were the differences between nuisance and encroachment.

slow to order demolition); *De Villiers v Kalson* supra note 11 at 231 (no hard and fast authority that the courts have no discretion); *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* supra note 11 at 87 (if the injury could be compensated fully by money and the injury caused by demolition were to be serious, the courts would grant compensation); *Johannesburg Consolidated Investment Co Ltd v Mitchmor Investments (Pty) Ltd* supra note 11 at 405D (authority in favour of discretion).

<sup>15</sup> *Rand Waterraad v Bothma* supra note 1 at 133D-F.

<sup>16</sup> *Ibid* 133F-134E.

<sup>17</sup> *Ibid* 135D.

<sup>18</sup> *Ibid* 136D-E.

<sup>19</sup> *Ibid* 136F-I, referring to Robert-Joseph Pothier *Traité du Contrat de Société: Zieme Appendice* (1775) para 230 and Johannes van der Linden's Dutch translation: *Verhandeling van het Recht omtrent Sociëteiten of Compagnieschappen en Andere Gemeenschappen* (1802).

On the basis of these arguments, Hattingh J concluded that Roman-Dutch law allowed the development of an equitable rule to supplement the established principles of neighbour law in instances where protection of one neighbour's rights will cause unjustified harm to another. In doing so, Hattingh J opined, the courts would be intent on placing the emphasis where it belongs, namely the neighbour relationship as such, rather than on individual neighbours' rights. The effect would be to distribute the harm or loss equitably between the neighbours, rather than merely enforcing one neighbour's right with no regard to the effect that it has on the other. The court emphasized that such a deviation from established principles could occur only by way of high exception, in order to ensure justice and equity.<sup>20</sup> In the present case, the court concluded, application of this exceptional equity principle was justified and suitable, particularly in view of the fact that the encroachment had been allowed to exist for a long time, even after the plaintiff had become aware of it, thereby demonstrating the absence of urgency and real harm for the plaintiff, whereas granting a demolition order would cause significant loss for the respondent.<sup>21</sup> In *Bothma*, the application for a demolition order was therefore denied and the encroacher was left in possession of the encroachment.

The court did not make any ruling with regard to the implications of its decision for ownership of the affected land. Although the landowner would lose the use of significant portions of its land, the court did not make any ruling about loss of rights in the land by the owner or acquisition of rights in the land by the encroacher. Despite the fact that the respondent offered to pay compensation, the court did not make a compensation order either, because the plaintiff never proved any loss or damage.

In *Brian Lackey Trust* the plaintiff inadvertently built a house in such a way that it encroached 80 per cent on the property of the defendant.<sup>22</sup> When a building inspector discovered the error, the plaintiff offered to buy the affected plot from the defendant, but they could not agree on a price and the defendant demanded that the building be demolished. An interesting feature of the case is the fact that the action was brought not by the aggrieved landowner, but by the encroaching party, who applied for a declaratory order that the defendant 'was disentitled to the removal . . . of the encroachment . . . subject to payment of such damages (if any) as the Court may determine'.<sup>23</sup> The applicant was therefore in effect claiming the right to

<sup>20</sup> Ibid 138C-H.

<sup>21</sup> Ibid 138H-139I.

<sup>22</sup> The plaintiff owned two undeveloped plots next to an undeveloped plot belonging to the defendant. The new house that the plaintiff built was intended to straddle the boundary line between its two plots, but was built across the boundary line of its one plot and that of the defendant instead. When the mistake was discovered the house was within weeks of completion. It was accepted that both parties were unaware of the mistake until the mistake was discovered by a building inspector: *Trustees, Brian Lackey Trust v Amundale* supra note 1 para 5.

<sup>23</sup> Ibid paras 9 and 10.

retain possession of the encroachment, against the affected landowner's will, on payment of compensation. In response, the defendant filed a counterclaim for an order to remove the parts of the building that encroached upon its land.

As in the *Bothma* case, the Cape High Court considered the question whether it had a discretion to order 'what in effect amounts to an involuntary deprivation of property'.<sup>24</sup> The parties agreed that the courts have a discretion to order damages instead of demolition, but the defendant insisted that such discretion is limited to trivial encroachment, whereas the plaintiff argued that the court had a wide discretion based on considerations of equity.<sup>25</sup> The court also referred to English law, where the courts employ a 'working rule' to the effect that a damages award can be granted instead of injunctive relief in exceptional circumstances, where the injury to the affected landowner is small and can be compensated by a small money payment. Although the alternative form of relief in damages is exceptional and cannot be used to oblige the affected landowner to sell his land against compensation,<sup>26</sup> it has been stated in English case law that damages could be awarded instead of an injunction in cases of trivial encroachments, or where the plaintiff was plainly just out to get money or to be vexatious or oppressive, where it would clearly be unjust to give him more than pecuniary relief, or in any other instance where a damages award proves to be an adequate remedy.<sup>27</sup> However, the court cautioned that English authority had to be used carefully because of the differences between the two systems.<sup>28</sup>

Eventually, the High Court agreed with the decision in *Bothma* that it has a wide discretion to grant damages instead of demolition on the basis of fairness, although such discretion cannot be unfettered.<sup>29</sup> It could not find any reason to restrict the discretion to trivial or minor encroachments, arguing that 'it makes no sense . . . to allow trivial or minor encroachments to remain, while being obliged to order removal of substantial or "massive" encroachments'.<sup>30</sup>

The court assumed that a landowner is ordinarily entitled to remove encroachments on her land.<sup>31</sup> Weighing the effects of demolition in this case against compensation, the court decided that demolition would produce an

<sup>24</sup> Ibid para 16.

<sup>25</sup> Ibid para 120.

<sup>26</sup> Ibid para 22, referring to the Chancery Amendment Act 1858, s 2 and to *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 (CA); *Jaggard v Sawyer* [1995] 2 All ER 189 (CA); *Holland v Worley* (1884) LR 26 ChD 578 at 587.

<sup>27</sup> Ibid para 25, referring to *Shelfer v City of London Electric Lighting Co* supra note 26 at 316–17; *Fishenden v Higgs and Hill Ltd* [1935] 153 LT 128 (CA) at 139, 141; *Jaggard v Sawyer* supra note 26 at 208ff.

<sup>28</sup> Ibid para 24.

<sup>29</sup> Ibid paras 27 and 30.

<sup>30</sup> Ibid para 29.

<sup>31</sup> Ibid para 32.

unjust result because the prejudice caused by demolition would far outweigh the prejudice caused to the affected landowner if he were to receive compensation instead of injunctive relief<sup>32</sup> and in light of the general principles of fairness and reasonableness in neighbour law.<sup>33</sup> An important consideration was that a landowner should not be allowed to use her bargaining power to extract an unreasonably high amount from the encroacher, especially if it is clear that the landowner is, in principle, willing to accept money.<sup>34</sup> In other words, a landowner who suffers prejudice from encroachment by a neighbour should not be allowed to use the sword of injunctive relief to establish a holdout situation and so to extract extortionate compensation. The court concluded that the defendant was attempting to do just that and held that a remedy in damages 'would fully meet the case'.<sup>35</sup>

Neither the *Bothma* nor the *Brian Lackey Trust* case came to any conclusion regarding the status of the land on which the encroachment was situated, and yet the encroachments in both cases were significant enough to imply, once the demolition order was denied, that the affected landowners would be prevented from using their land. In neither case was it established (or even considered) whether the encroacher acquired any rights in the land affected by the encroachment, nor was the question asked whether the land could or should be transferred to the encroacher by way of a forced sale.

In explaining the discretion to order compensation rather than the demolition of an encroachment, Van der Merwe adds that the courts can also, if they judge it to be fair, order the encroacher to take transfer of the neighbour's land upon which he encroached, the only question being the amount of compensation for the compulsory sale.<sup>36</sup> Van der Merwe finds support for this view in older decisions, the most recent of which emphasized that compensation was the primary remedy and that an order to take transfer of the affected land was incidental to the primary remedy.<sup>37</sup> On the face of it, these cases create the impression that the courts have the authority to order transfer of the affected land to the encroacher, in addition to compensation, when it is practicable to do so.<sup>38</sup> However, it is not clear

<sup>32</sup> Ibid para 36. At paras 37 and 39 the court explained that monetary compensation, including solatium, would compensate the defendant for his losses, whereas the plaintiff would receive no compensation for his losses if demolition is ordered. At para 38 the court added that the courts are loathe to order demolition of 'economically valuable building works'.

<sup>33</sup> Ibid para 40.

<sup>34</sup> Ibid para 41.

<sup>35</sup> Ibid para 44.

<sup>36</sup> Van der Merwe op cit note 1 at 202–3.

<sup>37</sup> *Meyer v Keiser* supra note 11 at 507. See further *Christie v Haarhoff* (1886–1887) 4 HCG 349; *Greeff v Krynauw* (1899) 9 CTR 591; *Van Boom v Visser* supra note 11; *Wade v Paruk* 1904 25 NLR 219; *De Villiers v Kalson* supra note 11. Another unreported case is mentioned by Mulligan op cit note 1 at 438.

<sup>38</sup> In *Meyer v Keiser* supra note 11 the plaintiff challenged the assumption that the court had the authority to grant such an order, but the challenge was overruled on the authority of Van der Merwe op cit note 1 at 129; Hahlo op cit note 1; J E Scholtens

that the early cases succeeded in keeping apart the discrete issues of the discretion to grant compensation instead of demolition and the authority to order transfer of the land. These decisions establish slender support for the existence of such an exceptional judicial authority, namely to order a compulsory sale of land, in a jurisdiction where the power of expropriation is reserved to the state and available only when the power is granted in authorizing legislation<sup>39</sup> — and it remains unclear from where the authority for that power derives. There is no conclusive indication that such a power existed at common law, and s 33 of the Deeds Registries Act 47 of 1937 merely creates the registration procedure for bringing the deeds register in line with original changes in ownership; it does not grant such a power to the courts.

It is highly unlikely that a building erected in such a way that it significantly encroaches upon the land of another person would comply with building regulations and approved building plans, especially in urban areas. Planning and building permissions are enforced quite strictly in most states, and in this respect South Africa is no exception. Despite the court's remarks in *Brian Lackey Trust* about its aversion to ordering the demolition of economically valuable buildings,<sup>40</sup> it must be asked whether an illegal building will, and should be, allowed to stand or proceed, purely from the perspective of the local authority within whose jurisdiction the building falls. In recent cases the South African courts have been willing to order the demolition of buildings erected without, or in conflict with, building regulations. *Van Rensburg v Nelson Mandela Metropolitan Municipality*<sup>41</sup> shows that an encroachment dispute might be settled by a demolition order obtained by the local authority, particularly when the building project was undertaken without building permission or in contravention of building, planning or conservation legislation. Interestingly, the court relied on encroachment language, arguing that the offending builder, by erecting

'Infringement and protection of ownership' 1956 *Annual Survey of South African Law* 129–136; *Christie v Haarhoff* supra note 37: in this case (at 356) the court remarked that a solatium had to be paid because the transfer 'practically amounts to a compulsory expropriation'.

<sup>39</sup> See Antonie Gildenhuys *Onteieningsreg* 2 ed (2001) 9–10; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 258G.

<sup>40</sup> *Ibid.*

<sup>41</sup> [2007] 4 All SA 950 (SE). There was some confusion about the legality of the building works and the planning permission, but eventually it was clear that the offending owner was acting with blatant disregard for both the rights of his neighbours and the requirements of the local authority. It was also clear that permission for the building works could not be granted lawfully due to a restrictive condition registered in favour of the neighbours. See further *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA) (demolition of valuable holiday houses erected without planning permission); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 (4) SA 26 (C) (demolition of building works initiated without the necessary permit from heritage authorities, even when the affected building on the same plot was not proclaimed or registered).

unauthorized building works *on his own land* in contravention of a restrictive condition registered in favour of neighbouring land, was *encroaching upon the rights of the neighbouring landowner*, who was entitled to have the buildings demolished, even though the buildings did not physically encroach upon the land of the neighbour.

## DOCTRINAL PERSPECTIVE

### *Abuse of right and reasonableness*

In *Brian Lackey Trust* the court suggested that the defendant, by insisting upon its counterclaim for a demolition order, was somehow acting improperly:

[T]he defendant's attitude and his counterclaim in these proceedings are based on anachronistic concepts of ownership: it represents a rigid and dogmatic insistence upon his perceived absolute rights as owner, irrespective of broader considerations of social utility, economic waste and neighbourliness.<sup>42</sup>

The notion of so-called absolute ownership and the assumption that the entitlements of ownership are unrestricted by social, economic or moral considerations are anachronistic and no longer accepted, if they ever were accepted.<sup>43</sup> It is also true that neighbour law, more than any other area of property law, demonstrates that ownership, especially of land, cannot be understood or enforced in terms of absolute entitlements. In a neighbour-law setting, where use of one piece of land inevitably affects neighbouring owners, each owner's entitlements are reciprocally limited by the entitlements of other owners. In South African neighbour law, the reasonableness principle embodies the insight that owners cannot exercise their own rights without regard for the rights of others.<sup>44</sup> However, the reasonableness principle applies mostly in nuisance cases and it is not clear that it can be applied to encroachment disputes as if the issues were identical.

In nuisance cases, the reasonableness principle implies that the rights of one owner end where the rights of others begin; accordingly, neighbouring owners must exercise their use entitlements — and accept the exercise of use entitlements on neighbouring land — in a spirit of reciprocal respect and accommodation. In terms of this principle neighbours are expected, on the one hand, to use their own land reasonably so as not to cause noise, pollution or other infringements on neighbouring land and, on the other hand, to

<sup>42</sup> Ibid para 43. Contrast this with *Christie v Haarhoff* supra note 37 at 355, where Laurence J stated that he could not find fault with the plaintiff for claiming a much higher sum of compensation than the court would be willing to award, although he was surprised that the defendants, being unlawful encroachers, were not more flexible in their offer of compensation.

<sup>43</sup> See eg D P Visser 'The "absoluteness" of ownership: The South African common law in perspective' 1985 *Acta Juridica* 39.

<sup>44</sup> Van der Merwe op cit note 1 at 190–5; Badenhorst, Pienaar & Mostert op cit note 1 at 111–13.

accommodate and to accept the inevitable immissions (noise, smoke, smells and so on) caused by similar reasonable and normal use of neighbouring land.<sup>45</sup> In all these cases, the duty to act reasonably and to accept the effects of reasonable use of neighbouring land is premised upon the notion of normal use for that kind of land in that area and at that time.<sup>46</sup> However, when one neighbour makes abnormal or unlawful use of his land, other neighbours are not bound by the reasonableness requirement to accept that use in a spirit of neighbourliness, because, logically, unlawful use automatically moves outside the framework of normal use and thereby suspends the principles of reciprocity and reasonableness. Consequently, application of the reasonableness principle is neither self-evident nor clear in cases of encroachment. The encroacher is not exercising his rights lawfully or normally when he builds on the neighbour's land, nor is he merely exercising his rights when attempting to retain possession (and even acquire ownership) of the encroachment. Building works that encroach on neighbouring land unlawfully infringe the neighbour's property rights exactly because the encroaching party is exceeding the limits of his own rights and infringing on the rights of others. The innocent landowner who is protecting her rights against encroachment by insisting upon demolition is, therefore, not in the same position as the neighbour who is expected to accept a certain, reasonable amount of noise from neighbouring properties — there is no reasonable measure of encroachment that neighbouring owners have to accept in a spirit of reciprocal neighbourliness. To suggest that a landowner who refuses to accept an encroachment on her land and who refuses to accept involuntary loss of the land, even against compensation, is somehow abusing her right begs the question.<sup>47</sup> An owner who stands to lose her property by way of a forced sale and who holds out for higher compensation is not abusing her right; she is defending her right of ownership against involuntary loss.<sup>48</sup> In law-and-economics terminology it would be said that the market should be allowed to assign the property to whoever puts the highest value on it — if the price demanded by the unwilling landowner is too high, the encroacher is always able to cut his losses and abandon or demolish the encroachment.

<sup>45</sup> See recently *Allaclas Investments (Pty) Ltd v Milnerton Golf Club* 2008 (3) SA 134 (SCA); *PGB Boerdery Beleggings (Edms) Bpk v Somerville 62 (Edms) Bpk* 2008 (2) SA 428 (SCA). Cf in general Van der Merwe op cit note 1 at 190–6 and Badenhorst, Pienaar & Mostert op cit note 1 at 111.

<sup>46</sup> Ibid at 112.

<sup>47</sup> See generally Van der Merwe op cit note 1 at 193; Badenhorst, Pienaar & Mostert op cit note 1 at 117–19.

<sup>48</sup> In German constitutional case law the mere fact of compensation does not in itself justify expropriation — the expropriation has to be justified independently by the importance of the public purpose. If the purpose for which property was expropriated is not eventually realized by the public use of that property, the original landowner can claim retransfer. See A J van der Walt *Constitutional Property Law* (2005) 220.

When it is considered appropriate to order compensation rather than demolition in encroachment cases, this choice can therefore not be justified with regard to reasonableness arguments that apply in nuisance cases. In encroachment cases, reasonableness refers to something different from the reciprocal respect and forbearance associated with it in the nuisance context, and, if the case law is any guide, the English notion of equity is closer to what courts have in mind when deciding not to enforce demolition in a particular case. In these cases, equity (fairness) comes into play when, for policy reasons, the harm that will result for the encroacher if the encroachment is demolished is weighed up against the potential harm or loss that will follow for the affected landowner if the encroachment is not demolished. When the courts in such a case make a policy call based on the balance of harm, one owner — who might be entirely innocent — could be forced to bear loss purely in order to avoid much greater loss for another.

In *Brian Lackey Trust* the court could not see why it should allow insignificant encroachments to be compensated by a money award while large encroachments had to be demolished.<sup>49</sup> The answer to this apparent conundrum depends on whether one sees the matter from the perspective of the encroacher or the affected landowner. All other things being equal, insignificant encroachments do not cause much harm and they can be left in place more readily; large encroachments cause greater harm and therefore demolition has to be a more serious possibility. Contrary to what the two cases suggest, compensation should be easier to justify in the case of insignificant encroachments, while demolition should be a serious option in case of large or significant encroachments. This perspective only becomes clear when one leaves the logic of reasonable exercise of reciprocal rights and duties behind and considers the matter from the perspective of the landowner affected by an unlawful infringement not covered by the reasonableness standard. An encroaching building is simply not one of the results of normal and reasonable use of contiguous land.

#### *Acquisition of rights by operation of law*

Compensation is exceptional as a solution where ownership in (or use of) land is lost involuntarily to an outsider who infringed the owner's rights, but there are institutions in Roman-Dutch property law where similar solutions apply to comparable dilemmas, especially in the area of original acquisition of property.<sup>50</sup> Common to all these cases is the principle that the law

<sup>49</sup> *Brian Lackey Trust v Annandale* supra note 1 para 29.

<sup>50</sup> The courts in *Bothma* and *Brian Lackey Trust* referred to examples from contract, specifically instances when an order for specific performance can be denied for equitable reasons. In South African contract law a contracting party can usually insist on specific performance (see *Rand Waterraad v Bothma* supra note 1 at 133). Law-and-economics literature indicates that reliance on the specific-performance example provides less-than-perfect authority for a principled choice between injunctive and compensatory relief in a property case.

sometimes, for policy reasons, allows a non-owner to benefit from (often unlawful) interaction with the property, while the innocent owner loses her rights and must be satisfied with compensation. The obvious case is original acquisition of ownership through attachment (accession) by building. If anybody (including the owner) attaches movables to land permanently, ownership in the movable building materials is lost when the movables cease to exist as independent objects of rights and become part of a composite object, of which the land is always the principal part, with the result that the owner of the land will subsequently own the land that has been improved by the addition of the movables.<sup>51</sup> In some instances the previous owner of the movables might have a claim, based on unjustified enrichment, against the landowner. Similar shifts in ownership take place by operation of law when someone uses movable property belonging to another to create a new movable, for instance by making wine with the grapes of another person. What is common to all these examples is that one person is exposed to potential loss, even if she was innocent; that the damaging consequences are brought about by operation of law; and that the application of the legal principles results from a policy call or value judgement aimed at prevention of more serious loss accruing to another party or to society at large if the dispute were solved purely with reference to the stronger rights of the innocent owner. In some cases all or part of the loss might be recoverable through a claim for compensation based on unjustified enrichment or on delict. An important feature of these examples is that there always is either common-law or statutory authority for the involuntary, original loss and acquisition of ownership.

Pope<sup>52</sup> indicates that attachment principles normally favour the affected landowner in encroachment cases, in the sense that these principles provide that movables that had been attached to land permanently lose their independent existence, with the result that the landowner (to whom all permanent structures also belong) can either retain the encroachment (in which case the encroacher might have an enrichment claim) or demolish it. However, she also shows that the courts sometimes, in an as yet undefined group of instances, exercise a discretion to suspend the legal operation of attachment principles in order to create the possibility of an alternative outcome, namely to leave the encroaching building works in place and order compensation in favour of the affected landowner. On the surface, it seems that this option is preferred when the loss for the encroacher (that would result from demolition) is unjustifiably higher than the loss for the landowner (should the encroachment be left in place).<sup>53</sup> In those cases the encroacher might be allowed to benefit from his unlawful action in the sense that the operation of attachment principles is suspended, so that the encroaching

<sup>51</sup> See Van der Merwe op cit note 1 at 247; Badenhorst, Pienaar & Mostert op cit note 1 at 247–54.

<sup>52</sup> Pope op cit note 1 at 537.

<sup>53</sup> Ibid at 544.

building does not attach to the neighbouring land but to the 'land of origin' belonging to the encroacher.<sup>54</sup> In other words, the court exercises its discretion to prevent the landowner from acquiring ownership by accession, instead opting for a solution that apparently involves the encroacher acquiring a right in the affected landowner's land by operation of law.

Generally speaking, both South African case law and literature are not too clear about the implications of denying the innocent landowner affected by a significant encroachment upon her land a demolition order. In *Bothma* the court failed to address the issue and the encroacher was not required to pay compensation either, since the applicant did not prove any loss. In *Brian Lackey Trust* the court also left the encroachment in place, thereby effectively depriving the affected landowner of the use of her land, without saying anything about ownership of the land affected by the encroachment. Especially in cases where the encroachment is significant, one party could effectively lose control over and use of the property while another effectively gains control over and use of it. Unless the change in their respective rights in the land is formalized and reflected in the deeds registry, this situation can cause great uncertainty, as has been pointed out in commentary on *Bothma* and *Brian Lackey Trust*.<sup>55</sup>

The most important issues resulting from this situation are, first, questions of principle about the legal position of the respective parties (does the plaintiff lose ownership and does the defendant acquire ownership of the encroached-upon land?) and, secondly, practical questions about the position of third parties (can they rely on the impression created by possession?)<sup>56</sup> and about responsibility for insurance of the property and for land taxes.

In regard to the encroacher's right in the affected land, three more specific questions should be distinguished. The first question is whether the encroacher automatically acquires a right in the land if the court refuses to grant a demolition order and, instead, orders compensation. It seems clear from the case law that the encroacher does not automatically acquire ownership of the affected land. If the court refuses a demolition order without ordering transfer of the land (as in both *Bothma* and *Brian Lackey Trust*), the principles of attachment are apparently suspended, with the result that the encroaching building work does not attach to the neighbouring land but simply extends over it. (The opposite effect, whereby the encroacher would acquire ownership of the land by building on it, is precluded by the principles of accession, according to which the land is always the principal thing in cases where composite things are created through permanent attachment.) The question is, therefore, whether the encroacher acquires a lesser right in the land when the court refuses to order demolition, in which case compensation is intended to recompense the landowner for the loss of use of her land. If such an explanation could be devised it would obviously

<sup>54</sup> Ibid at 545.

<sup>55</sup> Ibid at 543; Scott op cit note 1 at 361.

<sup>56</sup> Ibid at 365.

imply a less intrusive and less controversial infringement of the affected landowner's rights than automatic loss of ownership would entail. In a few exceptional cases, limited real rights can be acquired by operation of law: acquisitive prescription, expropriation of a servitude and acquisition of a right of way of necessity are significant examples. The origin of these rights could either be legislation (eg the Expropriation Act 63 of 1975, the Prescription Act 18 of 1943 or the Prescription Act 68 of 1969) or a court order based on common-law principles.<sup>57</sup> However, although logic suggests that refusal of a demolition order, in the absence of an order to transfer the land, automatically vests a personal right (such as a lease or a limited real right such as a servitude) in the encroacher, and even though it might perhaps be argued that the applicable common-law principles could, in suitable instances, authorize such a result (much as in the case of a way of necessity), this issue has not been cleared up in the case law as far as encroachment is concerned.

The second question concerns the granting of an ancillary court order to the effect that the land must be transferred to the encroacher: what could the source of the authority for such a forced transfer (or original loss and acquisition) of ownership be? Van der Merwe claims that the courts can order transfer of ownership in encroachment cases,<sup>58</sup> although neither the common law nor legislation provides specifically for such a forced transfer of ownership. The only authority for the proposition that the courts can make such an order consists of a few inconclusive older cases, of which *Meyer v Keiser*<sup>59</sup> is the latest. There are of course instances in South African law where ownership of land 'shifts' from one person to another by operation of law, expropriation and acquisitive prescription being the most obvious. However, in those cases the authority for the loss and acquisition of ownership derives from legislation (e.g., once again, the Expropriation Act 63 of 1975, the Prescription Act 18 of 1943 or the Prescription Act 68 of 1969). In the absence of legislation or common-law authority for such a possibility in the case of encroachment, it is very difficult to see how the forced transfer of ownership of land by court order can be justified.<sup>60</sup> However, as already mentioned, it is not at all clear that the South African courts have the authority to order the transfer of land from one owner to another, even against payment of compensation, when such a transfer amounts to a sale against the will of the affected landowner. In my view, the courts simply do not have that authority and the cases that suggest otherwise are mistaken. In any event, to propose that the courts should have such authority based purely

<sup>57</sup> Van der Merwe op cit note 1 at 484–92; Badenhorst, Pienaar & Mostert op cit note 1 at 328–30.

<sup>58</sup> Van der Merwe op cit note 1 at 202–3.

<sup>59</sup> 1980 (3) SA 504 (D).

<sup>60</sup> See Pope op cit note 1 at 547. Section 33 of the Deeds Registries Act 47 of 1937 merely provides the procedure for bringing the register in line; it does not provide authority for the change in ownership.

on considerations of fairness is in conflict with the basic premises of South African property law.

The third question concerns registration. The South African registration system is a negative one which will normally not reflect real rights in land that vested through original acquisition (by operation of law).<sup>61</sup> Ordinarily, it will be necessary to amend the deeds register to reflect changes that occurred through acquisitive prescription or expropriation.<sup>62</sup> Section 33 of the Deeds Registries Act 47 of 1937 provides the procedure for bringing the deeds register in line with a change in ownership. However, this provision merely provides the instrument for correcting the register; it does not authorize the transfer. The same principle holds in case of a limited real right being created by operation of law in favour of the encroacher: the negative system will not reflect such a right and the register will have to be amended.

### *Justifying the compensation award*

The decision to opt for compensation in lieu of demolition in *Bothma* and *Brian Lackey Trust* can, however, be explained and justified along doctrinal lines (at least as far as Roman-Dutch law is concerned) with reference to encroachment principles and without reference to the equity (or 'reasonableness') argument the courts seemed to prefer. One argument (although it played no role in either *Bothma* or *Brian Lackey Trust*) is that insignificant encroachments are more readily left intact (against payment of compensation) since, dogmatically speaking, harm caused by a small encroachment is usually so small that demolition would appear outrageous. Of course, in some instances a dispute caused by a very small encroachment might be easier to solve by way of demolition, depending upon the circumstances. To demolish the last few inches of an encroaching freestanding wall might offer an easy solution; to demolish a whole multi-story building for encroaching a few inches is clearly not so easy to rationalize. The point, as far as the extent or significance of the encroachment is concerned, is that it is more likely that small encroachments will cause the affected landowner little or no harm, in which case it is easier to justify replacing a demolition order with a compensation award if demolition would cause great loss for the encroacher.

The result in *Bothma* can also be explained with reference to the principle that the affected owner cannot insist on demolition if she either acquiesced in the encroachment, or if it had existed for such a long time that prescription

<sup>61</sup> The Deeds Registries Act 47 of 1937 prescribes formalities with regard to registration of real rights in land. Except for a few well-established instances where rights vest originally by operation of law, ownership in land cannot be acquired in the absence of registration. I am indebted to Gerrit Pienaar for assisting me in setting out these principles accurately.

<sup>62</sup> For example acquisitive prescription, where the change in ownership is authorized and governed by the Prescription Act 18 of 1943 and the Prescription Act 68 of 1969. Section 33 of the Deeds Registries Act 47 of 1937 prescribes the procedure for aligning the register with the change in ownership.

or estoppel precludes demolition.<sup>63</sup> The encroachment in that case had been in existence for such a long time that it would have been necessary for the affected landowner — a state body not using the bulk of its land for any purpose — to establish very good proof of the loss or harm caused to it by the encroachment. The Water Board could not do so and accordingly the encroacher was not even required to pay compensation.

In *Brian Lackey Trust*<sup>64</sup> the decision not to allow demolition could have been justified with reference to the principle that a landowner would be precluded from insisting upon demolition if her actions were inspired purely by malice or bad faith. It is not clear that the landowner was acting in bad faith in *Brian Lackey Trust*, but tradition offers an explanation for a judicial discretion to award damages in lieu of demolition based on the malicious intent or bad faith of the affected landowner, or on the extreme injustice of ordering demolition where compensation would have met the case adequately.

From these considerations it is possible to suggest a tentative formulation of the guiding principle (often explained in the case law as being a reasonableness principle) that seems to inspire the courts in exercising their discretion to grant compensation rather than a demolition order in certain encroachment cases, even when the result is that the innocent landowner thereby loses her land involuntarily. The principle seems to be that the courts would normally grant a demolition order to the affected owner, except if the affected landowner's action or inaction indicates that she acquiesced in the encroachment. This would apply particularly when the encroachment is insignificant and when demolition would also bring about minimal loss. However, if demolition would cause far greater or more serious harm to the encroacher than the affected owner would suffer if the demolition order were not to be granted, the courts are willing to consider replacing the demolition order with a compensation award. Again, this possibility could be excluded if the encroacher acted in bad faith. In cases where a compensation order appears to offer a better solution, the courts seem to ask themselves whether a compensation order would meet the case adequately — if so, the encroachment can be left in place and the encroaching neighbour can be ordered to pay compensation to the affected landowner. In such a case, the normal operation of attachment principles is apparently suspended and the encroaching building does not attach to the neighbour's land. The compensation award is intended to compensate the affected landowner for the loss of use of her land because of the continuous encroachment.

<sup>63</sup> See Cilliers & Van der Merwe op cit note 1 at 587–93. In *Bothma* the court decided that the so-called year-and-day rule that created a prescription-like exception originated in local custom and no longer applied in South African law (at 130A–E). It is possible to argue that a long delay in bringing the application indicates either acquiescence or lack of detriment on the side of the applicant — the court suggests that this is an important consideration in coming to the conclusion (at 139).

<sup>64</sup> And even more in the case of *Lombard v Fischer* supra note 1.

In principle, an order for compensation in lieu of demolition should be regarded as an exceptional remedy, to be used only when the circumstances justify it. This might appear to indicate that the compensation award is better suited for instances where a small encroachment cannot be demolished, but the courts do seem willing to grant such an order even if the encroachment is significant, with the effect that the affected landowner is effectively deprived of all use of her own land.

### COMPARATIVE ANALYSIS

Modern Dutch and German private law both follow roughly the same approach that is offered by Pope as the best explanation of Roman-Dutch law, namely that the normal principles of attachment are suspended so that the encroaching building extends over, but does not attach to the neighbour's land. The respective civil codes provide for consequences that suit that construction.

#### *Dutch law*

The point of departure in Dutch private law is that a landowner is entitled to exclusive possession and use of her land and of the space above and underneath the surface of her land. Accordingly, the landowner can claim removal of building works that extend on, under or over her land. However, the Dutch Supreme Court (Hoge Raad) has decided that the affected landowner is not permitted to abuse her right by insisting upon removal of encroachments under circumstances where the encroachment hardly limits the affected landowner's use and enjoyment of her land, whereas removal would bring about great loss or harm for the encroacher.<sup>65</sup> To provide for those cases, art 5:54 of the Dutch civil code (BW: Burgerlijk Wetboek) determines that if a building or construction is erected partly or completely upon or under the land of another person, and if the owner of the building or works would suffer greater loss from demolition or removal than the landowner would suffer if it were left intact, the owner of the building or works can claim, against suitable compensation, that a real servitude should be created in his favour to maintain the status quo or, if the owner of the land prefers, that the relevant part of her land be transferred to the owner of the building or works. This provision does not apply if the builder had a right to build or if he was malicious or grossly negligent.

Article 5:54 BW is written from the perspective of the encroacher. The point of departure is that the landowner can claim removal, but where removal of the encroachment would bring about greater loss for the encroacher than would be suffered by the landowner if the encroachment were left intact, the encroacher can demand that the encroachment be left

<sup>65</sup> W H M Reehuis & A H T Heisterkamp *Pitlo Het Nederlands Burgerlijk Recht* vol 3 *Goederenrecht* 12 ed (2006) 446; see further the decision of the Hoge Raad: HR 17 April 1970, NJ 1971, 89.

intact against payment of compensation. The legal construction of the respective rights affected by the surviving encroachment is left to the choice of the landowner: normally, a real servitude will be created over the affected landowner's land in favour of the encroacher, but the affected landowner has the option to choose that the relevant piece of land should be transferred to the encroacher against payment of compensation.

The Dutch courts read art 5:54 BW in combination with art 3:13 BW (which prohibits abuse of the owner's right) and they read them in such a way that either or both provisions could be applied to the same effect.<sup>66</sup> However, it should be noted that the Dutch courts' reading of article 5:54 BW in the context of abuse of right is more readily justified than the similar construction in *Brian Lackey Trust*, because in the Dutch cases this interpretation is restricted to instances where the encroachment does not bring about any significant restriction for the affected landowner — to insist on demolition in such a case could indeed bring the doctrine of abuse of right into consideration. In regard to *Brian Lackey Trust* it could be argued that the balance of loss and harm favoured the encroacher, but it could not be said that the encroachment did not bring about any significant harm or loss for the affected landowner — he effectively lost all use of his land.

#### *German law*

The point of departure in German private law is also that the owner of land can demand the removal of encroaching building works that interfere with the use and enjoyment of her land, among other things because of the rule of attachment. The German civil code (BGB: Bürgerliches Gesetzbuch) therefore provides for demolition as the default remedy (§§ 93, 94, 946 and 1004 BGB). However, this solution could bring about unwanted consequences, especially if it is abused by the affected landowner to acquire unfair benefits from the situation.<sup>67</sup> Accordingly, if the encroacher has built across the boundary line onto the land of a neighbour without malice or gross negligence and, unless the affected landowner immediately objected to the encroachment, the affected landowner must accept the existence of the encroachment, against annual payment of a compensatory amount in the nature of a rent or annuity (§§ 912–913 BGB). The amount of compensation is calculated according to the provisions of the civil code and the right to receive the compensation overrides all other rights in the land. Although it is preferable that the right to receive compensation be entered in the land register, this does not happen automatically (§ 914 BGB).

The affected landowner can at any time demand that the encroacher should buy the affected piece of land from her against a price that reflects its value when the encroachment first occurred (§ 915 BGB), whereafter the

<sup>66</sup> See generally Reehuis & Heisterkamp *op cit* note 65; see further the decision of the Hoge Raad: HR 15 November 2002 para 3.7.2 (available at <http://www.rechtpraak.nl>, last accessed on 3 March 2008).

<sup>67</sup> See Fritz Baur, Jürgen F Baur & Rolf Stürner *Sachenrecht* 17 ed (1999) 278.

rights and liabilities of the parties are determined by the provisions of the sale. German law therefore normally allows the encroachment to stand, regardless of the balance of loss or inconvenience, and also grants the owner of the affected land a choice to demand that the affected land be transferred to the encroacher. Judging from the provisions regarding the payment of compensation, a limited real right is not initially created in favour of the encroacher, but in favour of the affected landowner, with reference to her right to receive compensation. From the literature it appears as if the accepted construction is that attachment of the encroachment is suspended, so that the encroacher remains owner of the building that encroaches upon the land that belongs to the neighbour.<sup>68</sup> Like Dutch law, §§ 912–915 BGB do not apply if the encroacher acted with malice or gross negligence or if the affected landowner immediately objected to the encroachment.

### *English law*

In English law the erection of an unlicensed building or structure upon neighbouring land constitutes a continuing trespass, for which the courts could award either injunctive relief or damages.<sup>69</sup> Although it is sometimes said that injunctive relief is, or should be, a *prima facie* right because a landowner whose title is not in issue is entitled to an injunction to restrain trespass on her land whether she is harmed by it or not,<sup>70</sup> Gray & Gray argue that ‘it is increasingly apparent that the remedy of injunction is no longer an automatic or necessary judicial response to trespass’ and state that ‘the courts increasingly exercise a power to license, on payment of compensation, a broadly acceptable compromise of conflicting interests’.<sup>71</sup> This tendency is explained with reference to what are described as ‘modern imperatives of social accommodation and of “reasonableness between neighbours”’, supported by the contemporary equivalent of the Lord Cairns’s Act,<sup>72</sup> which allows the courts to withhold injunctive relief in favour of an award of equitable damages in respect of future or continuing acts of trespass.<sup>73</sup> These changing circumstances support the shift of emphasis in English law from injunctive to compensatory relief in trespass cases, despite the fact that damages is an inadequate form of relief for future and continuing acts of trespass, which encroachment inevitably is.

<sup>68</sup> Ibid at 279, citing § 95 BGB and the decision of the Civil Supreme Court in BGH NJW 1985, 789.

<sup>69</sup> Kevin Gray & Susan Francis Gray *Elements of Land Law* 4 ed (2005) 247–52. See further, on Australian and New Zealand law, P O’Connor ‘An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?’ in Elizabeth Cooke (ed) *Modern Studies in Property Law IV* (2007) 197–217; idem ‘The private taking of land: Adverse possession, encroachment by buildings and improvement by mistake’ (2006) 33 *University of Western Australia LR* 31.

<sup>70</sup> Gray & Gray op cit note 69 at 248, citing English and Irish case law.

<sup>71</sup> Ibid.

<sup>72</sup> Section 50 of the Supreme Court Act 1981 (UK).

<sup>73</sup> Gray & Gray op cit note 69 at 248.

In *Shelfer v City of London Electric Lighting Co*<sup>74</sup> the court emphasized that landowners, especially those who are certain of their title, have a prima facie right to injunctive relief, but the court also formulated the ‘good working rule’ (later relied upon by South African courts), according to which courts should exercise their discretion in choosing between injunctive relief and compensation on the basis of equity, taking into account factors such as the scope of the injury caused to the landowner’s rights, whether the injury can be estimated in money and be compensated adequately by payment of a sum of money, and also whether it would be oppressive to the defendant if an injunction were to be granted. In *Jaggard v Sawyer*<sup>75</sup> the Court of Appeal emphasized that encroachers cannot expect, on the one hand, to have an unlawful continuing trespass committed by them further continued simply because they could and were willing to pay for it; but also that, on the other hand, a landowner subjected to a continuing trespass cannot expect automatically to be able to have the building demolished simply because she wanted undisturbed possession. In some cases the encroachment might just have to be accepted by the affected landowner as a *fait accompli*, particularly when the encroaching buildings are houses now occupied by people and families — and then compensation might be a better solution.

Gray & Gray argue, on the basis of case law, that monetary relief is often preferred to injunctive relief when the encroachment has had no more than a slight impact on the affected landowner; where compensation is easy to calculate; where the claimant has delayed in seeking injunctive relief; or where the affected landowner unreasonably demands excessive compensation or refuses to consider reasonable compensation offers.<sup>76</sup> Injunctive relief is indicated for cases of especially flagrant or repeated trespass or permanent and continuing annexation of land; where the interference is significant and not easily compensable in money; or where the complainant would otherwise be subjected to an oppressive compulsory purchase of her land by the trespasser.<sup>77</sup> A preference for monetary compensation instead of injunctive relief could imply that the courts are authorizing the continuation of an unlawful state of affairs or that they allow the trespasser to purchase

<sup>74</sup> *Supra* note 26. See further *Jaggard v Sawyer* *supra* note 26. In US law, the tendency is either to force transfer of the land to the encroacher or to allow the landowner to buy the improvement — in both cases against market price. Most states have legislation that will allow either option. In most cases, relief will be denied altogether if the encroachment is minor, and injunctive relief (demolition) will always be granted if the encroacher acted in bad faith. Richard A Posner *Economic Analysis of Law* 6 ed (2003) 54–5 argues that the latter rule is efficient. In some cases the US courts grant injunctive relief if the encroachment was significant, depending on how the courts construe the balance between competing interests; see *Amkco Ltd Co v Welborn* 21 P 3d 24 (2001). I am indebted to Gregory Alexander for information on US law.

<sup>75</sup> *Jaggard v Sawyer* *supra* note 26 at 280 and 282.

<sup>76</sup> Gray & Gray *op cit* note 69 at 250.

<sup>77</sup> *Ibid* at 250–1.

immunity for his unlawful actions, but the English courts have accepted that they sometimes are forced to follow this route to avoid granting injunctive relief that would deliver the trespasser 'bound hand and foot' to the claimant, exposing him to extortionate compensation demands.<sup>78</sup>

Despite the attractions of the obvious similarities, South African analysts should be careful not to embrace English law on trespass too easily — the developments in South African case law described earlier resulted from uncritical borrowing from English law. There are differences between the two systems that render comparison — and creative borrowing — a dangerous undertaking. The first difference is that the links between nuisance and trespass in English law are not the same as those between nuisance and encroachment in South African law — hence the apparent ease with which reasonableness logic can be applied in English trespass cases, whereas the same cannot be said for South African encroachment law. The second difference is that trespass is a much wider concept in English law than encroachment in South African law. For one thing, trespass relates to any unlicensed entry upon land and therefore extends to physical presence of persons on land, while encroachment does not. Thirdly, although there are certain similarities between English and South African law as far as moving away from an absolutist notion of ownership is concerned,<sup>79</sup> any comparison between the English notion of trespass by building and the South African law of encroachment by building is complicated by the notion of relative title in English law, since access to remedies in trespass and in nuisance traditionally rests upon possession rather than title in English law and,<sup>80</sup> more pertinently, multiple 'overlying' estates can be created with regard to the same land in English law.<sup>81</sup> The pressure to find a doctrinally acceptable solution without dividing the property into horizontal slices is therefore much stronger in South African law, whereas English law is more receptive to the idea that multiple property interests can exist simultaneously with regard to horizontal layers of the land and the airspace above it. Finally, the English distinction between common law and equity obviously does not apply in South African law and, given the prominent role of the Lord Cairns's Act in extending the possibilities of granting compensation in lieu of injunctive relief, comparative analysis is inevitably complicated.

### *Evaluation*

Comparatively speaking, English law looks like a somewhat more developed version of the position that is apparently being explored in the recent South African cases, but at the same time the solutions adopted in English law do not necessarily fit comfortably into South African law because of the

<sup>78</sup> Ibid at 252.

<sup>79</sup> Ibid at 226 and 238–9.

<sup>80</sup> Kevin Gray 'Property in thin air' (1991) 50 *CLJ* 252 at 257n27.

<sup>81</sup> Ibid at 258. Something similar is possible in South African law only in the context of the Sectional Titles Act 95 of 1986.

institutional differences between the two systems mentioned directly above. Nevertheless, in cases where compensation was ordered in lieu of demolition — and probably cases in which transfer of the land was ordered — the South African courts relied on the justificatory reasoning and the tests developed for this purpose in English law. The test laid down in *Shelfer* seems to have played a particularly prominent role. The most striking feature of the English example followed by the South African courts is the absence of concern, in English law, about the exact structuring of rights in the affected land, once a compensation order has been given. As we have seen, the creation of multiple rights in the same land is not problematic in English land law, but in South African law this creates a problem because of the abstract nature of ownership. The early South African decisions in which transfer of the affected land was ordered together with the compensation award were possibly inspired by the need to account for this problem.

Modern German and Dutch law both proclaim an outright preference for replacing the property option of a demolition order with a compensation order, at least when the encroaching party was not acting in bad faith or grossly negligently and (in Dutch law) when the affected landowner did not complain immediately — and provided that the balance of loss or inconvenience favours the encroaching party. German law opts for the simplest solution by creating a preferent right, in favour of the affected landowner, to receive compensation in all cases of encroachment, regardless of the balance of loss. Demolition therefore does not feature as an option at all. In both German and Dutch law provision is explicitly made for formalization of the resulting land rights of the respective parties by establishing a special kind of servitude or a rent in favour of the encroacher, complemented by the option — given to the affected landowner — to demand transfer of the affected land against payment of a fair price. Neither system seems to be unduly concerned about the fact that the affected innocent landowner is effectively forced into involuntary sale of her land in the process; and both formalize the procedure for establishing a fair price in legislation.

Perhaps the most interesting result of the comparative analysis is the fact that in all four systems the same considerations inspire the search for alternative solutions and the choice of conditions under which a particular alternative would be considered acceptable. First, an owner affected by encroachment is generally deprived of his right to insist on demolition if he acquiesced in the situation (or seemed to acquiesce, through long-standing failure to act), if he is affected only very slightly by the encroachment, or if he insists upon demolition simply to create a holdout situation that will bring him extortionate compensation. Secondly, an encroacher will be deprived of the opportunity to retain possession of the encroachment against payment of compensation if he acted in bad faith or with gross negligence. Thirdly, the choice in favour of compensatory rather than injunctive relief follows either in all instances without any differentiation (German law), or in all cases where the encroacher would suffer much greater loss from enforcement of

demolition than the landowner would if it were not enforced (Dutch law); or if enforcing the demolition order would cause unjustifiable oppression for the encroacher, whereas replacement of injunctive relief with compensation would not cause unjustifiable oppression for the landowner (English law). South African law seems to follow a route somewhere inbetween English and Dutch law. Neither German nor Dutch law pays any attention to the size or scope of the encroachment; both English and South African law profess to reserve the compensation alternative for exceptional cases where the encroachment and the impact of the affected landowner are small, but both seem to extend the practical application of the replacement remedy beyond that point.

The most significant difference between the various systems is that Dutch and German law formalize the respective land rights of the affected landowner and the encroacher, whereas English law does not consider that a problem. South African law follows the English example but does consider the structuring of the respective rights to be problematic and therefore opts for a further judicial discretion, allowing the courts to order transfer of the land to the encroacher where it is practicable. This solution reflects the comparable choice in Dutch and German law, except for the fact that the forced transfer is provided for by legislation in those systems, whereas it is apparently (and unconvincingly) left to judicial discretion in South African law.

#### LAW-AND-ECONOMICS ANALYSIS

The terminological and conceptual distinction between ‘property rules’ and ‘liability rules’ was developed in law-and-economics analyses of pollution disputes.<sup>82</sup> The famous and influential article in which the choice between property rules and liability rules was originally set out, generally known as Calabresi and Melamed’s ‘Cathedral article’,<sup>83</sup> was written in response to

<sup>82</sup> Joseph William Singer *Entitlement: The Paradoxes of Property* (2000) 131–9 explains that the rights-as-relationships discourse, of which the discourse about property rules and liability rules forms part, originated in Hohfeld’s analysis of jural relations (see the works by Hohfeld in note 9 above); and that it combined with the literature on the Coase Theorem: Ronald H Coase ‘The problem of social cost’ (1960) 3 *J of Law & Economics* 1 argued that when transaction costs are absent or minimal, Pareto optimality (or economic efficiency, where the allocation of resources cannot be improved in such a way that those who benefit from the change can compensate those who suffer from it and still be better off) will occur regardless of the initial entitlement assigned. In the distinction between property rules and liability rules, the Coase Theorem implies that when transaction costs are low or absent, economic efficiency will follow regardless of where the original entitlement is placed (encroacher or affected landowner) and of whether a property rule or a liability rule is followed. See further Robert Cooter & Thomas Ulen *Law and Economics* 4 ed (2004) 85–91.

<sup>83</sup> Calabresi & Melamed op cit note 9. On the influence of this article see James E Krier & Stewart J Schwab ‘*The cathedral* at twenty-five: Citations and impressions’ (1997) 106 *Yale LJ* 2121.

Michelman's<sup>84</sup> view, in his review of Calabresi's book on accidents law,<sup>85</sup> that Calabresi's argument about economic analysis of accidents law can fruitfully be applied to pollution disputes. Michelman showed that this argument, when applied to pollution cases, would involve a choice between three rules, all of which presuppose a dispute between a polluter, P, and an affected resident, R. The three rules were: (1) the court finds a nuisance and grants injunctive relief against P in favour of R (if P wants to continue polluting he must bargain with R); (2) the court finds a nuisance but allows P to continue polluting against payment of judicially determined compensation to R (P has to decide whether to continue polluting and pay compensation or abate); (3) the court finds no nuisance and allows P to continue polluting without payment to R (to terminate the pollution, R would have to buy P out). The first and third rules can induce voluntary and bilateral post-judgment transactions between P and R, while the second rule establishes a unilateral and involuntary 'sale' of R's entitlement, against a 'price' imposed by the court, that P can enforce against R if he so chooses, but without the option of further negotiation with R about the price.

In their subsequent article, Calabresi and Melamed argued that Michelman failed to formulate a fourth rule: (4) the court finds a nuisance and grants R injunctive relief to force P to abate, against R paying compensation to P as determined by the court. This is a further unilateral, involuntary transaction; R can decide to endure the pollution or to enforce abatement by paying compensation, which amounts to 'buying P out'. Calabresi and Melamed concluded that there are two solutions that allow the parties to either go with the court order or to enter into voluntary, bilateral post-judgment transactions to amend it, as well as two solutions that enforce a unilateral, judicially imposed buy-out that one party can either enforce against the other party, against a judicially pre-determined price, or decide not to enforce. Calabresi and Melamed described the first set of two solutions as applications of property rules and the last set of two as applications of liability rules.

In the terminology of Calabresi and Melamed, property rules protect entitlements (property rights) that are transferred, if at all, through voluntary transactions in a market.<sup>86</sup> Rules 1 and 3 are examples of property rules: either R gets injunctive relief to stop the pollution (but the parties can negotiate a different outcome, for example, P buys the right to pollute from R); or R gets no relief and P can continue to pollute (but the parties can

<sup>84</sup> Michelman *op cit* note 9.

<sup>85</sup> Calabresi *op cit* note 9.

<sup>86</sup> Calabresi & Melamed *op cit* note 9 at 1092: 'An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is agreed upon, the state does not try to decide its value.'

negotiate a different outcome, for example, R buys P out to ensure abatement). Liability rules can reach substantially the same outcomes, but in these cases the holder of the entitlement is obliged either to go with the court order or sell in a unilateral, involuntary transaction, without negotiation, against a price predetermined by the court.<sup>87</sup> Rules 2 and 4 are examples of liability rules: either P forces R to sell its entitlement not to suffer from pollution (P decides to continue polluting and pay compensation); or R forces P to sell its entitlement to pollute (R decides to enforce abatement and pay compensation).

Twenty-three years after publication of the original Cathedral article, Krier & Schwab<sup>88</sup> argued that the mainstream reading of the Cathedral analysis developed into a 'virtual dogma' that implies a choice for property rules when transaction costs are low and for liability rules when transaction costs are high. The transaction costs associated with this choice are usefully divided into Type-I transaction costs (pre-negotiations difficulties involved in identifying and assembling numerous interested parties) and Type-II transaction costs (difficulties created during the negotiations stage by parties who display strategic behaviour to extract maximum benefit).<sup>89</sup> Since the general assumption is that both Type-I transaction costs (when there are multiple affected owners) and Type-II transaction costs are usually high in pollution cases, the assumption has taken root that nuisance cases of the pollution variety are typically best solved by way of liability rules, in other words by damages awards.

Type-I transaction costs typically play little if any role in encroachment disputes, which normally involve just one encroacher and one affected owner, but as appears from the two recent South African cases set out above, Type-II transaction costs (strategic behaviour) are central to these disputes because the landowner who is affected by encroachment could create a holdout situation to extract extortionate compensation. Similarly, a wealthy and determined encroacher can practically buy the right to bring about a forced sale by encroaching on land that is not for sale in the market. The higher the costs of the encroachment and the larger the scope of the encroachment, the higher the stakes and consequently the risk of strategic behaviour will be, if any party is given the opportunity. Based on these somewhat oversimplified observations, one might be tempted to conclude that, in law-and-economics terms, the potentially high risk of strategic

<sup>87</sup> Ibid: 'Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule', and '[o]bviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves', which precludes private bargaining.

<sup>88</sup> James E Krier & Stewart J Schwab 'Property rules and liability rules: The cathedral in another light' (1995) 70 *Northwestern University LR* 440.

<sup>89</sup> The distinction is explained by Carol M Rose 'The shadow of the cathedral' (1997) 106 *Yale LJ* 2175 at 2184.

behaviour would always raise Type-II transaction costs in encroachment disputes, at least when the encroachment is significant, to such a level that liability rules would always be preferable to property rules in solving these disputes. In view of these conclusions, one might be tempted to deduce that injunctive relief, in other words demolition of encroaching building works, is only an option in respect of encroachments of insignificant scope or impact. However, later publications have diminished the force of the mainstream law-and-economics argument in favour of liability rules.

The first significant counter-argument was raised by Polinsky,<sup>90</sup> who argued that the dogma that favours liability rules when transactions costs are high is incoherent in the context of real-world assumptions, which are significantly different from the assumptions on which the mainstream 'dogmatic position' in favour of liability rules was developed. Krier & Schwab, following Polinsky, argued that the true extent of the damage caused by pollution is often uncertain (high assessment costs)<sup>91</sup> and, moreover, that high assessment costs are often linked to high transaction costs. Accordingly, when private bargaining is impeded by high transaction costs, judicial damages awards are sometimes rendered inaccurate or even speculative because of similar or related reasons, with the result that there is no a priori basis for favouring liability rules over property rules. Krier & Schwab argued that a combination of high transaction costs and high assessment costs often reflects real-world conditions more accurately than the low-assessment-cost assumption of mainstream post-Cathedral literature,<sup>92</sup> and that that undermines the seemingly self-evident mainstream preference for liability rules over property rules in complex pollution cases. As far as encroachment disputes are concerned, transaction costs are usually restricted to the results of strategic behaviour by the affected landowner, which might suggest that it could be more efficient to employ a liability rule (along the lines of Michelman's rule 2) to allow the encroacher — who might in these circumstances be what Krier & Schwab describe as the 'best [in the sense of more rational] chooser'<sup>93</sup> — to make the choice between payment and

<sup>90</sup> A Mitchell Polinsky 'Resolving nuisance disputes: The simple economics of injunctive and damage remedies' (1980) 32 *Stanford LR* 1075; 'Controlling externalities and protecting entitlements: Property right, liability rules, and tax-subsidy approaches' (1979) 8 *J of Legal Studies* 1; 'On the choice between property rules and liability rules' (1980) 18 *Economic Inquiry* 233.

<sup>91</sup> See generally Krier & Schwab op cit note 88.

<sup>92</sup> In response, Krier & Schwab developed the 'reverse-reverse' or 'double reverse twist' version of the fourth rule, based on the principle of 'the best chooser', so that the party who can best choose between payment or deferral (usually a single party rather than many) should be given the choice. That could overturn rule 4, so that P gets the choice to pay or abate in the fourth instance set out in the *Cathedral* article, rather than granting the liability remedy to R (who, on real world assumptions, is very likely to be multiple people rather than a single person and therefore a 'bad chooser'). See Krier & Schwab op cit note 88 at 459–64. This does not apply in encroachment disputes, where there is typically just one affected landowner.

<sup>93</sup> *Ibid.*

abatement. However, a more or less mechanical preference for liability rules in these cases runs the risk of losing sight of the reason why we do not simply replace all property rules with liability rules. Calabresi and Melamed formulated one part of the answer to that question clearly and convincingly:

‘The answer is, of course, obvious. Liability rules represent only an approximation of the value of the object to its original owner and willingness to pay such an approximate value is no indication that it is worth more to the thief than to the owner.’<sup>94</sup>

Holding on to a systematic preference for liability rules simply because transaction costs are high (in this case because of the risk of strategic behaviour by the owner) would allow the encroacher always to make the choice between abatement and payment, on the basis of a price determined by the court, while excluding any possibility of the parties negotiating a different outcome on the basis of the affected owner’s preferences. If the uncertainty of damage assessment (high assessment costs) is taken into consideration, this option does not provide such a clear preference for liability rules as one would like to think. At least in some cases, a property rule (granting the affected owner a demolition order) would allow the parties to negotiate a different outcome that could be more efficient and more equitable than one which relies on judicial evaluation of unclear assessment factors.

Proceeding from these premises, one might attempt to reformulate the different options presented by the four rules (the original three formulated by Michelman and the fourth added by Calabresi and Melamed) for solving an encroachment problem as follows:

According to the first rule, the court would find that there is an encroachment and protect the affected landowner’s entitlement with a property rule; in other words, she receives injunctive relief to the effect that the encroachment must be removed. This leaves the option open for the owner and the encroacher to negotiate an alternative outcome, mostly in the form of an agreement about a price against which the affected owner would be willing to sell her right to demolish. This is exactly the case in which it is feared that rational negotiations would be prevented by strategic acting on the affected landowner’s part. It is said that such an order delivers the encroacher ‘bound hand and foot’ to the owner because the owner can make any price she fancies, given the sword of demolition over the encroacher’s head. The *Brian Lackey Trust* case illustrates the point well. In terms of economic analysis it could perhaps be said that there is nothing wrong with the affected owner holding out for the highest possible compensation, because the encroacher will always have the option of abating (demolition) if the price goes too high. Interestingly, in both Roman-Dutch and in English law this first option is said to be the default position, but it seems to be followed less often than one would expect. In fact, this option only seems

<sup>94</sup> Calabresi & Melamed op cit note 9 at 1125.

convincing if the encroachment is of little use or value to the encroacher, cheap to demolish or to remove, and, if not abated, would be oppressive for the affected landowner. The crucial fact is that the affected landowner is given the primary choice, while the encroacher retains the option of pulling out and cutting his losses if the stakes are raised too high.

If the second rule is followed, the court finds that there is an encroachment, but it elects to apply a liability rule: the encroaching party remains in possession of the building and must pay compensation to the landowner according to a calculation done by the court itself. In this case the encroaching party retains some choice; he can either remain in possession of the building works and pay the prescribed compensation or he can decide to abate the encroachment, if that is cheaper or easier. This seems to have become the *de facto* working rule for most significant encroachments in English and South African law, at least in cases where demolition or removal of the encroachment would pose a significant threat or loss for the encroacher and if the landowner's loss can be quantified reasonably easily. This solution enjoys wide support where the threat of demolition creates a holdout situation in which the affected landowner can strategically attempt to extract extortionate compensation. The crucial fact is that the encroacher is given the choice and that the affected landowner is not given an option to negotiate a different outcome because the price is set down by the court. In German law this is the official default rule; in Dutch law it only comes into operation if the encroacher would suffer more from injunctive relief than the owner would from having to accept compensation. (In Dutch and German law the calculation of compensation is regulated by the civil code.) However, significantly, in both Dutch and German law the landowner is given the choice whether to enforce a buyout by the encroacher.

If the court decides in favour of the third rule, it will find that there is no encroachment and therefore no compensation. This solution can only work in encroachment cases if the encroachment is either illusory or really insignificant. Being a solution based on a property rule, the parties are left with the choice to negotiate a different outcome, which would mostly involve the owner buying out the encroacher: if the affected owner really wants to get rid of an insignificant encroachment she will have to negotiate a price with the encroaching party.

Calabresi and Melamed's proposed fourth rule means that the court allows the encroaching party to continue encroaching, but protects that entitlement only by a liability rule (adapted from their pollution example),<sup>95</sup> which, gives the affected landowner the option of demolishing the encroachment and paying damages for it. In this case it is the landowner who has the choice to act or not to act, according to her judgement on whether it is worth the prescribed amount of damages. This option does not seem to have enjoyed serious attention in the case law yet, but it could offer an equitable outcome

<sup>95</sup> *Ibid* at 1123.

in cases where the owner attaches a higher personal value to unencumbered use of the land than the value that the encroacher attaches to not demolishing the encroachment.

Of the four possibilities, the tendency in South African case law seems to be a move from a preference for the first to a preference for the second rule, in other words from a simple property-based demolition order to a court-imposed compensation remedy; ie a move away from a property and towards a liability rule. The tendency in English, Dutch and German law is similar, although the Dutch and German civil codes allow the landowner to enforce a buyout of the affected land. Are lawyers therefore, perhaps instinctively, following the dictates of economic efficiency in moving away from property rules and towards liability rules in solving encroachment disputes?

Within the ranks of lawyers who make use of law-and-economics analysis, Carol Rose<sup>96</sup> formulated a strong argument against the general tendency to prefer liability rules over property rules, at least in pollution cases. Rose emphasizes that property rules are supposed to encourage individual investment, planning and effort, which in property disputes tends to counteract or reduce the threat of transaction costs (both in the pre-bargaining sense of identifying and assembling multiple parties and in the sense of post-bargaining strategic behaviour). Based on the pollution cases discussed in the Cathedral literature, Rose argues that courts often fall back on liability rules, not because they are inherently or strategically superior, but because using a liability rule allows the courts to make a relatively accurate assessment of damages and to allow the polluter to choose whether to pay or abate.<sup>97</sup> Far from illustrating economic efficiency in instances where transaction costs between the parties are high, this preference illustrates *judicial* strategic behaviour in cases where the assessment costs are high. In Rose's view, the most convincing examples and arguments supporting a preference for liability rules in instances with high transaction costs are really to be found only in contract or accident cases; and the preference for liability rules in property cases with high transaction costs, based on the logic of the Cathedral article, is not stable. Rose therefore argues that there are solid reasons for retaining at least some property rules that protect individual investment, planning and effort in property. Although there is a generally acknowledged high risk of strategic behaviour in encroachment holdouts, the advantage to be gained from such behaviour is not necessarily the only reason why landowners affected by encroachment are unwilling to sell or lose (ownership or use of) their land.

There are several possible ways out of the impasse created by the risk of strategic behaviour. One is to follow the rule established in English case law,

<sup>96</sup> See generally Rose op cit note 89.

<sup>97</sup> Rose argues that this only works if one keeps in mind that pollution is not the same as accidents in the sense that the pollution damage rises proportionately and also that there are usually many Ps and many Rs involved in a pollution case.

namely that the affected landowner loses her right to injunctive relief if the court thinks that she is simply acting strategically — and in that case, a liability rule is followed. Economic analysis suggests that this option is not efficient, since it interferes with strategic behaviour that could arguably be corrected by the market itself, if negotiation between the parties is allowed to take its course. Another option is to explore the fourth rule developed by Calabresi and Melamed, according to which the affected landowner is given the option either to endure the encroachment against payment of compensation or to buy out the encroacher. Buying out the encroacher when the continued existence of the encroachment is already subjected to compensation payment might seem strange, but there is no reason in principle why the owner cannot be given the option to make good the difference between the compensation that the encroacher must pay in any event and the value of the encroachment for the encroacher and for the landowner. In cases where the landowner for some reason attaches a higher personal value to continued unencumbered use of the land, giving her the choice might be fair. A third option is the one suggested by the German and Dutch civil codes, which solve the problem with two hands by establishing (i) a real right to protect the interests of the encroacher (in Dutch law only when the encroacher will lose more from injunctive relief than the affected owner will from being reduced to receiving compensation), but (ii) also giving the affected innocent landowner the option to enforce a sale of the affected land at a legislatively regulated price. At the moment South African law seems to follow English law, which suggests a preference for the first option, but at the same time South African law seemingly wants to employ the transfer aspect of Dutch and German law as well, albeit without the necessary statutory authority. Following either the third or the second option (or a combination of the two) in South African law would require legislation.

A further aspect that deserves consideration in view of the economic analysis is transfer of the land to the encroacher. Several aspects should be mentioned. First, if the courts have the power to order transfer of the land to the encroacher when granting a compensation award, as some South African cases indicate, it is of course also possible that the encroacher could act strategically by forcing a sale of land that is not for sale in the market. Preventing such strategic behaviour is clearly the reason for the rule, formulated in English law and followed in South African law, that an encroacher cannot expect to get away with paying compensation for the encroachment if he acted in bad faith. A similar rule operates in Dutch and German law (and in US law), indicating that the preference for a liability rule falls away as soon as it appears that the encroachment was built in bad faith to enforce transfer of the land. Secondly, if the courts are given the power to order transfer of the land together with granting a monetary award of compensation, the preference for a liability rule is exacerbated in the sense that not only an intrusion is involuntarily imposed on the landowner — for which compensation could well be an acceptable remedy — but a forced sale of her land. The implications of this choice are obviously much wider than

just the choice in favour of compensation instead of demolition. By giving the choice to transfer ownership of the land to the landowner, Dutch and German law avoids these implications to a certain extent, in the sense that the owner in those systems is given the choice to accept compensation for involuntary loss of a real right or for involuntary loss of the land as such.

### CONSTITUTIONAL ISSUES

It has been pointed out that the unilateral and involuntary loss of property resulting from encroachment disputes governed by a liability rule could result in an arbitrary deprivation, or perhaps even an expropriation, that needs to be justified in terms of the property guarantee in s 25 of the Constitution.<sup>98</sup> If the owner's loss is seen as a deprivation, the relevant requirement in s 25(1) is that the deprivation may not be arbitrary;<sup>99</sup> if it is seen as an expropriation, s 25(2) requires that the expropriation should be for a public purpose and that just and equitable compensation has to be paid according to s 25(3).

Two kinds of loss resulting from encroachment should be distinguished. If the court decides not to grant a demolition order and instead to grant compensation while allowing the encroacher continued possession of the building works, the most likely dogmatic explanation is that the rules of attachment are suspended, so that the building intrudes into, but does not attach to, the affected landowner's land. What the landowner loses then, involuntarily, is something in the nature of a limited real right such as a servitude that reduces her unencumbered use and enjoyment of her land. The compensation should make good that loss, taking into account that the loss is involuntary. Imposition of similar burdens is not unknown in South African law and in most cases explaining it in terms of s 25(1) would be relatively unproblematic. However, if the court also orders — as some older cases suggest that it could — that the land should be transferred to the encroacher, the affected landowner loses ownership of the affected land. In this case it is said that the amount of compensation should also make good that loss, once again considering that the loss was involuntary. However, the forced transfer that takes place in these cases is much more serious and accordingly more problematic in terms of s 25.

Generally, loss of property by operation of the rules of the common law cannot be treated as expropriation in South African law, simply because expropriation can only be undertaken by the state (or a person so authorized in the place of the state) on the authority of legislation. There is no room in

<sup>98</sup> Pope op cit note 1 at 541–2. At 551 Pope states that a court order to transfer the land would amount to an expropriation. In *Christie v Haarhoff* supra note 38 at 356 the court remarked that a solatium had to be paid because the transfer 'practically amounts to a compulsory expropriation'.

<sup>99</sup> I assume that a rule of the common law satisfies the requirement in s 25(1) that a deprivation must be brought about by a law of general application; see *S v Thebus* 2003 (6) SA 505 (CC) paras 64–5.

South African law for judicial expropriation without authority.<sup>100</sup> Generally speaking, therefore, instances where someone loses property by operation of law and on the authority of the common law are to be treated as instances of deprivation of property that must comply with the non-arbitrariness requirement in s 25(1). Undoubtedly many (or all) instances where someone loses property by way of forced transfer in terms of the operation of the common law will also involve a real loss of property, but it is clear by now that the distinction between deprivation and expropriation cannot simply be based on the presence or absence of such loss. Expropriation is characterized by the forced transfer of property to the state, for a public purpose, on the basis of the state's power of eminent domain and according to established expropriation procedures, contained in legislation. According to the *FNB* decision of the Constitutional Court, challenges based on s 25 analysis should in any event begin with a consideration of deprivation in terms of s 25(1) and it can probably also be assumed that there is very little, if any, possibility that the US doctrine of 'regulatory taking', 'inverse condemnation' or (more suitably for South African circumstances) indirect or constructive expropriation would be accepted or imported into South African law.<sup>101</sup> A forced transfer that does not amount to a proper (authorized and intended) expropriation for a public purpose and also clearly exceeds the boundaries of a deprivation will probably not ground a claim for compensation (as in US regulatory takings cases), but rather establish a case for the invalidity of the deprivation in issue (as in German law). The rules of the common law that govern encroachment must therefore first of all comply with the requirements for a valid deprivation in terms of s 25(1).

The most significant requirement in s 25(1), for present purposes, is that deprivation of property should not be arbitrary. In the *FNB* case<sup>102</sup> the Constitutional Court explained what this requirement means: a deprivation of property is arbitrary in terms of s 25(1) if there is inadequate reason for it. In the context of encroachment, the reason that is required has to be evaluated in view of the discretion that the courts exercise in this regard. The question that they are obliged to ask is this: when do the circumstances, particularly the balance of loss and inconvenience, justify a solution that involves overriding ownership rights and replacing them with monetary compensation, purely to avoid causing a greater loss for the encroaching party than the landowner would suffer if the encroachment is kept intact? From the discussion above it is clear that the answer to this question can only

<sup>100</sup> *Gildenhuys* op cit note 40 at 9–10; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) at 258G. See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC) para 63.

<sup>101</sup> See Van der Walt op cit note 48 at 209ff. I am indebted to Gregory Alexander for confirming that a taking would not be found in these cases in US law, for much the same reasons. The reference to the *FNB* case is given in the next note.

<sup>102</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

be given with clarity if the court takes a number of considerations into account.

The first factor that will have to be taken into account to ensure that the court's exercise of its discretion is not arbitrary is the scope of the encroachment.<sup>103</sup> If the encroachment is really small or insignificant there is a simple choice: the matter could be solved by applying either a property rule (demolition; especially when demolition causes hardly any loss or inconvenience for the encroacher, while continued existence of the encroachment causes some harm or loss for the affected landowner) or a liability rule (compensation; especially when encroachment causes hardly any loss or inconvenience for the affected landowner, whereas demolition would cause disproportionately greater loss or inconvenience or harm for the encroacher or for society). If the encroachment is significant or massive or total, application of a liability rule (compensation) might be easier to justify in most circumstances, since the balance of loss or inconvenience would almost always indicate compensation rather than demolition of significant building works. The only exception would be where the encroachment is reasonably easy and cheap to remove and where the affected landowner attaches greater value to the land than the encroacher attaches to not demolishing the encroachment — opting for a compensation order in those circumstances might be more difficult to justify.

The second factor is the attitude of the parties. If the encroacher was acting with malice, in bad faith or with gross negligence, the liability rule does not seem to be an option. This observation is confirmed by the fact that injunctive relief seems to be the remedy of choice in most other legal systems under these conditions. If the affected owner was aware of the encroachment and did not protest immediately or reasonably quickly, acquiescence could be assumed and a property rule (and even a liability rule) might be excluded completely. This sub-rule also indicates that there is a very strong presumption against a property rule when the encroachment had been in place for a considerable time (in Roman-Dutch law one year and one day was used as a rule of thumb).<sup>104</sup> If the affected owner insists on demolition out of pure malice, the court should be swayed towards a liability rule.

The third, and apparently often decisive, factor is the balance of loss or inconvenience. In modern law this seems to be the main consideration, although Gray & Gray (on the strength of English case law) prefer to ask whether injunctive relief would be oppressive for the encroacher. If demolition would cause much greater loss or harm for the encroacher (or arguably for society) than the loss or harm the landowner would suffer if the

<sup>103</sup> Pope op cit note 1 regards this as an important consideration that should guide the court in its decision to suspend attachment rules and apply encroachment rules.

<sup>104</sup> Cilliers & van der Merwe op cit note 1 concluded that the year-and-a-day-rule was not adopted in South African law, and this was confirmed in *Rand Waterraad v Bothma* supra note 1 at 130. The rule, which functioned as a prescriptive principle, formed part of local law and not general Roman-Dutch law.

encroachment is left intact and the landowner is protected by a compensation order only, a liability rule is preferable. The approach here seems to be that a liability rule is preferable whenever the case is adequately covered by payment of suitable compensation. The flip side is probably that a liability rule is less attractive when leaving the encroachment in place is unjustifiably oppressive for the affected innocent landowner, regardless of the amount of compensation. The court's judgement on this issue would in many cases inform the subsequent decision on arbitrariness as well.

The constitutional argument would, in view of the *FNB* decision, probably follow the logic of the factors above: if denial of injunctive relief and restriction of the landowner's rights to compensatory relief can be justified with reference to the balance of loss and inconvenience, considering all the circumstances, it should be possible to argue that there is sufficient reason for the resulting deprivation of property that the landowner would undoubtedly suffer if injunctive relief were to be denied. This conclusion should, however, be qualified. First, it is necessary to bolster the court's evaluation of the balance of loss and inconvenience with factors such as the first two set out above — if the encroacher was acting improperly from the outset and the landowner was not, the court should be extra careful not to allow the deprivation too easily. Secondly, note should be taken of the sentiment, formulated in the German constitutional case law, that the mere existence or availability of compensation does not in itself justify unilateral, involuntary loss of property.<sup>105</sup> Apart from the question whether the amount of compensation satisfies the exigencies of the case, it should also be asked whether the reason for the deprivation, in other words the result of the balancing test, justifies the deprivation. It is important to consider here Carol Rose's explanation<sup>106</sup> of the purpose of property rules and of the reason why we do not simply replace all property rules with liability rules: in most property disputes it is preferable to leave the choice between enforcement of the property interest and satisfaction with the compensation to the property owner, because that is the only way in which the law can encourage individual investment, planning and effort with regard to property. That preference should only change when the affected landowner clearly acts purely out of malice. In all instances, removing the choice to negotiate a different outcome from the affected landowner and allowing the encroacher alone to decide whether to enforce the transfer or to abate is probably questionable. In this regard the modern Dutch and German solution, which upholds the encroachment but gives the owner the choice to enforce a transfer of the land, is always more readily justifiable.

Finally, combining a compensation award with an order to transfer the land to the encroacher is a serious and extraordinary step in South African law. Such an order would have to be justified under s 25(1) separately from

<sup>105</sup> *Supra* note 48.

<sup>106</sup> *Op cit* note 89.

the decision to deny injunctive relief, and special care should be taken to consider the effect that such an order would doubtlessly have on decisions to invest in property. It should not easily be accepted that the affected landowner has to be satisfied with receiving compensation — involuntary loss of property is sometimes necessary and unavoidable in property law, but it should not be treated lightly and it must be justified properly in every individual instance. Considering all these factors, and given the slight historical and doctrinal authority for the proposition that the courts have the power to order a forced transfer of the land to the encroacher, I tend towards the view that there is insufficient authority for this proposition in South African law and that it would always be difficult to provide sufficient reason for such an involuntary loss in the absence of stronger authority. In my view, such an order is open to an attack on the non-arbitrariness requirement in s 25(1), simply because there is insufficient authority for the courts exercising such a radical discretion in the absence of legislation.

It should be said that decisions to uphold an encroachment and award monetary compensation to the affected landowner could, even in the absence of an ancillary order to transfer the land, also be open to attack for establishing an arbitrary deprivation of property where the choice in favour of a liability rule effectively deprives the affected landowner of all possible use of her land. If the encroachment is so large as to immunize effectively the land, it is conceivable that a monetary award could effectively transfer ownership without even mentioning the subject. I would suggest that s 25(1) scrutiny of decisions of that nature should be particularly careful.

## CONCLUSIONS

Generally speaking, it seems as if South African law has taken a decisive step towards acceptance of liability rules in encroachment cases. Despite — in fact contrary to — the traditional rhetoric, injunctive relief does not appear to be the default remedy in cases where the encroachment is significant and a compensation award is much more likely. Enforcement of the landowner's right to have encroachments on her land demolished seems to be restricted to cases where the encroachment is insignificant (either in size or value) or where it had been erected in bad faith. Moreover, there is authority for the proposition that South African courts can, in suitable cases, order the affected land to be transferred to the encroacher, although the authority for this proposition seems insufficient and unconvincing in the absence of legislation. If an order for transfer of the land does not accompany a monetary compensation award, the affected land still belongs to its original owner and the normal operation of attachment is apparently suspended, so that the encroaching building attaches to its land of origin and merely intrudes upon the affected land without attaching to it. It is uncertain whether the encroacher acquires a personal right or a kind of servitude over the affected land. In either case the courts would have to identify sufficient reasons for the deprivation of property (ownership or another right) to prevent the

infringement from being an arbitrary deprivation in terms of s 25(1) of the Constitution. It was suggested above that it should be possible to prove non-arbitrariness in at least some cases where the encroachment is upheld against compensation, but that it would be much more difficult, if not impossible, to defeat an allegation of arbitrariness with regard to a forced transfer by court order. Both decisions constitute deprivations rather than expropriation of land and the monetary compensation order can probably mostly be justified satisfactorily as not conflicting with the non-arbitrariness requirement in s 25(1) of the Constitution, depending upon the reasons for the court's decision and the circumstances, but the order to transfer the land is insufficiently authorized in South African law and establishes such a dramatic interference with ownership that it could well be argued to be arbitrary.

It is clear that the South African courts have relied upon, and been influenced by, English law in coming to the conclusions that shaped the law of encroachment as it stands. The positive side of that conclusion is that the principles according to which the courts exercise their discretion to award compensation instead of injunctive relief are fairly sophisticated. The negative side is that the respective rights of the affected landowner and the encroacher are unclear and that the authority for the order to transfer the land to the encroacher is questionable, since neither of these aspects feature to any significant degree in English law. In other Roman-Germanic systems (German and Dutch law) these shortcomings have been rectified by explicit provisions in the respective civil codes. The most attractive aspects of the relevant provisions is that the infringement constituted by the encroachment is treated as a limited real right created by operation of law; that payment of compensation for that right is regulated by the civil code; and that the affected landowner is given a choice to accept this situation (establishment of a real right in favour of the encroacher over her land, against compensation in the nature of a rent) or to insist that the land be bought from her at a fair price.

South African law with regard to encroachment would benefit from greater clarity about the respective rights of the encroacher and the affected landowner in cases where injunctive relief is denied. It would be a great improvement if it were clear that the encroacher acquires some kind of limited right over the affected land and that the landowner's right to receive compensation equally establishes a real right over the encroacher's land or building (if compensation is payable in the form of an annual rent instead of a one-off sum). It is essential that the choice whether to transfer the affected land to the encroacher should be left to the affected owner, instead of it being in the discretion of the courts. These changes should probably all be brought about by legislation, which could then also bring greater clarity about the considerations that influence the decision when to deny injunctive relief and grant compensation instead (always, or just when the balance of loss favours the encroacher?) and the basis for calculation of compensation (both for denial of injunctive relief and for forced sale of the land). In the meantime,

the courts should be careful with orders that deny the affected landowner injunctive relief, especially in large or total encroachments, and they should abstain completely from ordering forced transfer of the affected land to the encroacher.