

Building encroachments and compulsory transfer of ownership

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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Summary

South African courts seem to be adopting a new approach to the problem of building encroachments. For pragmatic and policy reasons courts are now inclined to exercise its discretion in favour of leaving building encroachments in place, against compensation, despite the common law right to demand removal. It has been widely accepted that courts indeed have the discretion to award damages instead of removal of the building encroachment. However, the circumstances involved and the consequences of these orders are uncertain and hence these orders result in confusion. It is unclear how this discretion is exercised. Furthermore, it is uncertain whether this discretion includes the power to order transfer of the encroached-upon land to the encroacher. There are doctrinal and constitutional implications that may be triggered by these court orders that leave building encroachments in place. The doctrinal issues centre on what happens when an encroachment is not removed and nothing is said about the rights of the respective parties after the order is made. Possible solutions are investigated to provide a doctrinally sound outcome in encroachment disputes. It is clear that the encroacher is allowed to continue occupying the portion of property on which the encroachment is erected. It seems as though a use right is indirectly created when the encroachment remains in place. The constitutional difficulty lies in the fact that the court orders may result in infringements that conflict with section 25 of the Constitution. The focus is specifically to determine whether these orders result in the compulsory loss of property or property rights.

With reference to Germany, the Netherlands and Australia, a comparative perspective is provided in order to support the doctrinal and policy arguments. The comparative law provides a source of guidelines for what may work effectively and informs the ultimate suggestion of this project, namely the need for legislation to regulate building encroachments in South Africa. The legislation envisaged would have to prescribe with at least some sort of certainty how and in which circumstances the discretion should be exercised. It should also provide clarity with regard to the right that is created when the encroachment is not removed and how the compensation that is awarded in exchange for removal, should be determined.

The unnecessary confusion and uncertainty that result from court orders made in the context of building encroachments may be cleared up by legislation.

Opsomming

Suid Afrikaanse Howe begin al hoe meer om 'n nuwe benadering te volg ten opsigte van oorskrydende bouwerke. Dit lyk asof Howe meer geneig is om hul diskresie uit te oefen ten gunste daarvan om die oorskryding vir pragmatiese en beleidsredes teen vergoeding in stand te hou, ten spyte van die gemeenregtelike reg om verwydering te eis. Daar word algemeen aanvaar dat Howe wel die diskresie het om in die konteks van oorskrydende bouwerke skadevergoeding toe te ken in plaas van verwydering. Die omstandighede betrokke by en die nagevolge van hierdie beslissings is egter onseker en daarom lei dit tot verwarring. Dit is nie altyd duidelik hoe hierdie diskresie uitgeoefen word nie. Daarbenewens is daar ook onsekerheid oor of die diskresie die bevoegdheid insluit om oordrag van die grond waarop die oorskryding staan, te gelas. Die beslissings kan ook doktrinêre en grondwetlike implikasies hê. In terme van die doktrinêre probleem is daar vrae oor wat gebeur as die oorskryding nie verwyder word nie en niks word gesê oor die regte van beide partye in die dispuut nie. Oplossings word ondersoek om die beste moontlike doktrinêre verduideliking te probeer vasstel. Die eienaar van die oorskrydende bouwerk mag voortgaan om die grond waarop die oorskryding staan te okkuper. Dit lyk asof 'n gebruiksreg indirek geskep word ten gunste van die oorskryder wanneer die oorskryding nie verwyder word nie. 'n Grondwetlike probleem mag veroorsaak word deur die moontlike oortreding van artikel 25 van die Grondwet. Die beslissings mag lei tot die gedwonge verlies van grond of regte, wat aan die vereistes van artikel 25 moet voldoen.

'n Vergelykende perspektief met verwysing na Duitsland, Nederland en Australië word verskaf om die doktrinêre en beleidsargumente te ondersteun. Die vergelykende reg bied 'n bron van riglyne vir wat effektief kan werk en het dus die wetgewing wat in hierdie proefskrif voorgestel word geïnspireer. Die wetgewing wat beoog word sal moet voorskryf hoe en onder watter omstanghede die diskresie uitgeoefen moet word. Dit moet ook sekerheid gee ten opsigte van die reg wat geskep word as die oorskryding nie verwyder word nie en hoe die skadevergoeding bepaal moet word. Die onnodige verwaring en onsekerheid wat veroorsaak word

deur hierdie hofbeslissings kan opgeklaar word deur die promulgering van wetgewing om oorskrydende bouwerke te reguleer.

Acknowledgements

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Chapter 1: Introduction

1.1 Introduction to the research problem

In the most recent case dealing with encroachments in South Africa, the Eastern Cape High Court had to decide whether it had the discretion to refuse an interdict for the removal of an encroachment.¹ In *Phillips v South African National Parks Board*² a fence was erected on the property of the applicants, instead of on the cadastral boundary between the properties of the applicants and the respondents. It resulted in a substantial portion of the applicant's property (the SANParks portion) being incorporated as part of the respondent's land.

The applicant sought an interdict to compel the respondent to remove the fence and relocate it to the cadastral boundary or onto the respondent's property. Four defences were raised against the application. In the first instance, the respondent argued that it had purchased the SANParks portion from the applicant's predecessor in title (Van Rooyen). The second defence was that the applicant had been aware of the agreement between Van Rooyen and the respondent and was therefore bound by the agreement. Thirdly, the respondent argued that fairness dictates that the encroachment should remain in place. In terms of the fourth defence, the respondent claimed a declaratory order in terms of which the applicant would be entitled to damages instead of removal and that the respondent is entitled to the transfer of the SANParks portion of the applicant's property.³

The court considered these defences raised by the respondent. It transpired that there had initially been an agreement between Van Rooyen and the respondent for the sale of the SANParks portion; however the agreement was cancelled and the sale never took place. As a result of the inadequate proof of the sale, the court

¹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010].

² (4035/07) [2010] ZAECGH 27 [22 April 2010].

³ The respondent had also claimed a fifth defence, namely that the court does not have jurisdiction concerning the dispute because the dispute falls to be determined in terms of s 29 of the second Schedule of the Fencing Act 31 of 1963. See *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 3.

rejected the contention that the fence was there lawfully or that the SANParks portion of the applicant's property was sold to the respondents. Consequently, the court had to determine whether the fence that resulted in an encroachment should be removed or remain in place.

The court confirmed that it had the discretion to deny a demolition order in the context of encroachments constructed on the land of another.⁴ It relied on *Rand Waterraad v Bothma en 'n Ander* ("Rand Waterraad")⁵ and *Trustees, Brian Lackey Trust v Annandale* ("Brian Lackey Trust")⁶ to assume the discretion to refuse an interdict even where the applicant has a clear right to removal of an encroachment.⁷ During the last decade since the decision of *Rand Waterraad* it seems as though the courts are now, in line with the global trend in this area of law, more inclined to order that the encroaching structures remain intact and that the encroaching landowner pay compensation to the affected landowner instead of removal. In other words, it seems as if the inclination in the case of building encroachments is towards compensatory awards instead of injunctions or demolition orders. The *Rand Waterraad* decision provided authority for the existence of this discretion of the court, which is deemed to be wide and equitable and dependent on the circumstances in the particular case.⁸

In the case of *Brian Lackey Trust*,⁹ the Cape High Court decided against the established tradition of enforcing the landowner's common law right to demand removal of a building encroachment.¹⁰ It found that a building encroachment covering 80 percent of an adjacent neighbour's property should remain in place and that the encroaching owner should pay compensation to the affected landowner in lieu of demolishing the encroachment. In terms of the South African common law, in the case where a building is erected on the land of another, the affected landowner

⁴ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

⁵ 1997 (3) SA 120 (O).

⁶ 2004 (3) SA 281 (C).

⁷ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130-138.

⁹ 2004 (3) SA 281 (C).

¹⁰ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

can demand that the encroaching structure be removed. This is traditionally said to be the default remedy in the case of encroachment by building.¹¹ This remedy is essentially based on the right to prevent interference with the use and enjoyment of one's property. Therefore, a landowner is entitled, upon becoming aware of the encroachment, to demand removal thereof. However, the *Brian Lackey Trust* decision shows that a court has the discretion (in as yet undefined instances) to award compensation instead of removal.

The court in *Phillips* relied on *Rand Waterraad* and *Brian Lackey Trust* to substantiate the view that the discretion can be exercised despite there being a clear right to removal of an encroachment.¹² The court then proceeded to determine whether the discretion should be exercised in the particular case. It balanced the prejudice for both parties in the dispute by considering the loss that would be suffered by the affected landowner if the encroachment remained intact and the loss for the encroacher if the fence would be removed and placed on the cadastral boundary. It was clear from the outset that the affected landowner was not willing to buy the land from his predecessor in title if the SANParks portion was not part of it; therefore, he valued the SANParks portion very highly. On the other hand, the respondent contended that moving the fence to the cadastral boundary would be costly, inexpedient and impractical. After a careful balancing of the interests of both parties the court concluded that the encroachment should be removed. The reason for this is because the balancing of interests favoured the affected landowner in this case.¹³ The court found that there would not be a disproportionality of prejudice if the encroachment were taken down and moved to the cadastral boundary. It stated that if the encroachment remained in place, there would not be a compelling reason to justify the deprivation that would result. Therefore, it would have the effect of a

¹¹ CG van der Merwe *Sakereg* (2nd ed 1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 121; JRL Milton "The law of neighbours in SA" 1969 *Acta Juridica* 123-244 at 237; CG van der Merwe & JB Cilliers "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* 587-593 at 588. See s 2.5.1 in chap 2 below.

¹² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

¹³ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 51.

forced sale of land which would not be justified.¹⁴ However in the end, the court dismissed the claim and eventually decided the case based on the fact that the respondent could not prove that its prejudice or other reasons for not demolishing the encroachment was stronger than the prejudice the applicant would suffer if it were left intact. Therefore, the court ordered removal of the encroachment.

This case is interesting for a number of reasons. The discretion was exercised by balancing the interests of both parties in order to determine which outcome would be the most appropriate in the particular case. The court ordered that the encroachment should be removed. No mention was made of the rights of the respective parties if removal were denied; it was unnecessary to discuss the rights of the parties because removal was in fact ordered. In this respect the decision simply followed the earlier authorities in *Rand Waterraad* and *Brian Lackey Trust*, assuming that it had a wide discretion and exercising that discretion by deciding the matter purely on the basis of the balance of prejudice.

Another interesting aspect of the *Phillips* case is the fact that the respondent in this case argued that if the court allowed the encroachment to remain in place, it should also make an order for the transfer of ownership of the SANParks portion to the respondent. The court actually considered the possibility of ordering transfer of the land to the affected landowner, but decided against it in this case.¹⁵ It recognised that ordering transfer of ownership of the SANParks portion would constitute a deprivation in terms of section 25 of the Constitution. However, the possible constitutional problem that would have been created by an order for transfer of the affected land did not arise because the encroachment was removed. It should be noted, though, that the court decided against the transfer order purely on the basis of the balance of prejudice and not on any constitutional or doctrinal principle.

¹⁴ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 51.

¹⁵ For a discussion of the extent of the courts discretion in the context of building encroachments, see s 3.6 in chap 3 below.

The *Phillips* case provides the most recent illustration of many of the key issues relating to encroachments. It shows that the courts assume the existence of a wide discretion, how the discretion is exercised by South African courts in the context of encroachments and what the constitutional implications may be if an encroachment is not removed. It also highlights the fact that courts fail to mention what the doctrinal implications may be when an encroachment is not removed. These are some of the aspects that will be addressed in subsequent chapters.

1.2 Outline of the research problem and hypothesis

1.2.1 Outline of research problem

This research project explores the circumstances involved and consequences of an order of court allowing building encroachments to remain intact in exchange for the payment of compensation. The main aim of the dissertation will be to highlight some of the issues that result from these court orders made in the context of building encroachments. I believe that what the courts are doing is developing the common law, without clearly substantiating the reasons or exploring the extent and consequences of the developments they are introducing. For pragmatic and policy reasons courts are beginning to adopt a different approach to the problem of building encroachments in South Africa, consequently denying the idea of an *absolute* right to demand removal of the encroachment in all instances. However, this new approach is not clearly explained and it leaves room for confusion.

It has been widely accepted that courts indeed have the discretion to award damages instead of removal of the building encroachment.¹⁶ However, it seems unclear in exactly which cases a court would award compensation instead of removal and what the consequences of such an order are. There are a number of interrelated questions concerning the discretion of the courts to award compensation

¹⁶ CG van der Merwe *Sakereg* (2nd ed 1989) 202; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 121; JRL Milton "The law of neighbours in SA" 1969 *Acta Juridica* 123-244 at 237; CG van der Merwe & JB Cilliers "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* 587-593 at 588; *Pike v Hamilton* (1853-1856) 2 Searle 191; *Wade v Paruk* (1904) 25 NLR 219; *Smith v Basson* 1979 (1) SA 559 (W); *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

instead of removal. Many of these issues have been raised by a number of authors and have come up in numerous cases dealing with encroachments, but so far they have not been adequately discussed or answered. The questions include whether the discretion to replace removal with compensation does exist in the context of encroachment by building in South Africa; in which cases courts should be willing to deviate from the traditional, long-standing remedy of removal of an encroaching structure; whether the size of the encroachment does (or should) play a role in the determination of whether to allow demolition or not; and what exactly the extent of the discretion of the courts is in this regard. If this discretion includes transfer of property to the encroaching owner, the authority for such an order needs to be determined. Case law has highlighted the issue, but so far has failed to remove the uncertainty regarding whether the court also has the discretion to order that the encroached-upon land be transferred to the encroaching landowner. Furthermore, the courts have so far refrained from explaining what the nature of the parties' rights in the affected land are if the encroachment is not demolished and if the encroacher remains in possession of the encroachment. All these questions pertaining to the discretion of the court in the context of building encroachment cases are addressed in this dissertation.

When courts exercise their discretion in favour of leaving the building encroachment intact, this is contrary to the default remedy of removal. Courts focus predominantly on balancing the interests of the encroaching landowner with the interests of the owner affected by the encroachment. It seems as if courts are more reluctant to allow the remedy of removal of the encroaching building if removal would be excessively burdensome for the encroacher, more so than it would be for the affected landowner if the encroachment remained in place. In these instances the discretion would be exercised in favour of the encroacher, and the encroachment will remain in place. The policy and equity grounds cited for this discretionary choice seem convincing, at least in some cases, but it needs to be determined what the legal implications (both doctrinal and constitutional) are of not ordering removal of the encroaching structures.

After a court order is made where the court opts for a compensation award instead of removal, the biggest concern relates to the consequences of the order. Apart from not ordering demolition of an encroaching building, the effect that the order has for the respective parties becomes problematic. In the absence of an explanation of what happens when the encroachment is not removed, there are doctrinal implications that may be triggered.

The court order could have the effect of changing the law of accession quite dramatically. When the court refuses to order removal of the encroachment, the legal situation regarding ownership of the affected land and ownership of the encroaching building becomes unclear. The result, namely that one person apparently owns the land and another person owns or may occupy the structure that extends over it, is quite foreign to the basic principles of South African law. I consider this problem with reference to the law of accession, with the aim of finding an explanation for what happens doctrinally when the encroaching structure is not removed. The most important questions in this regard are firstly whether the order to leave the encroachment in place results in a limited real right or other use right being established over the affected land, and secondly how this result can be explained doctrinally in the absence of an agreement between the parties.

There may also be constitutional implications. For one thing, the question arises whether the encroacher can acquire ownership of the encroached-upon land without buying it from the affected landowner. It is unclear whether the order automatically results in the encroached-upon land being transferred to the encroaching owner or whether the court could explicitly order such a transfer. As the matter stands it looks as if such an automatic transfer of the land does not and cannot take place. A second possibility is that the court can order that the encroaching owner must take transfer of the encroached-upon land. Van der Merwe writes that if a court deems it equitable it may grant that the portion of land on which the encroachment is erected be transferred to the encroaching owner.¹⁷ However, there seems to be no authority in either common law or legislation that provides for such a power. In either case, it

¹⁷ CG van der Merwe *Sakereg* (2nd ed 1989) 202-203.

needs to be determined whether this result, which involves involuntary loss of ownership of land, could have implications in terms of section 25 of the Constitution. This study will specifically focus on the question whether the order results in the compulsory loss of property or property rights, especially in cases where the encroachment is extensive and causes a serious limitation on the affected landowner's property rights. The possible deprivation of property suffered as a result of these court orders needs to comply with section 25 of the Constitution.¹⁸ With regard to section 25(1), it needs to be considered whether the loss results in an arbitrary deprivation of property.¹⁹ In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance ("FNB")*,²⁰ the Constitutional Court held that a deprivation of property is arbitrary when there is insufficient reason for it or if it is procedurally unfair.²¹ The question in the context of encroachment by building will be whether the policy and pragmatic reasons forwarded for decisions such as *Rand Wateraad* and *Brian Lackey Trust* is sufficient to justify the deprivation that results from the encroachment being left in place. This question is particularly serious when the nett result is that the affected landowner loses property or property rights as a result of the continued existence of the encroachment. Furthermore, the alternative relied on by the courts, namely payment of compensation, creates the illusion that this may be an expropriation. Therefore, I consider whether an expropriation results when a building encroachment is left in place against compensation, because if it does the expropriation would have to comply with section 25(2) and (3) of the Constitution.²²

A comparative analysis of foreign cases and legislation on this topic is undertaken to support the doctrinal and policy arguments. The German, Dutch and Australian approaches to the problem of building encroachments will be discussed in order to determine how these jurisdictions deal with the particular issue. In view of the comparative analysis I evaluate whether it will be feasible to adopt a similar

¹⁸ The Constitution of the Republic of South Africa, s 25.

¹⁹ The Constitution of the Republic of South Africa, s 25(1).

²⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC).

²¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

²² The Constitution of the Republic of South Africa, s 25(2) and (3).

approach in South Africa or to refine the South African approach with reference to these foreign sources.

1.2.2 *Hypothesis*

The hypothesis of this research project is that the current trend in the way that courts deal with the problem of encroachments causes uncertainty and may in some cases be unconstitutional. Therefore, the law needs to be developed. It might well be necessary to consider the possibility of proposing legislation to solve the problem with building encroachments in South African law. South African courts should approach the issue with caution until such time as legislation is enacted to bring clarity as to how building encroachments should effectively be dealt with. In cases where the encroachment is extensive and could possibly lead to a compulsory transfer of property, there needs to be proper authority for it. It will become clear that in some cases it may be necessary or justified to leave even large building encroachments in place; however, in these instances there should be adequate policy considerations to justify the decision. It should also be clear what happens doctrinally in these cases and due consideration needs to be given to section 25 of the Constitution which proscribes arbitrary deprivation of property.

1.3 Overview of chapters

This dissertation consists of seven chapters, this one being the introduction and chapter seven being the conclusion. In the following chapter (chapter two) I provide an introduction to the law regulating building encroachments in South Africa. As a starting point I consider the effect that a building encroachment has on the ownership rights of the affected landowner. Thereafter, I look at the application of the default remedy of removal in early South African case law. This is especially relevant in light of the recent tendency of South African courts not to accept the right of the owner to demand removal in all instances. The origins of the remedy of removal and the possible defences against this remedy are also examined. A brief historical study gives an indication of the remedies and rules that were applicable in terms of Roman and Roman-Dutch law in the case of encroachment by building. The remedy of removal has its historical origins in Roman law; therefore, I analyse how the remedy

of removal was applied in terms of Roman law. The remedy was mitigated in Roman-Dutch law by the defence of the year and a day rule. In terms of Roman-Dutch law, the year and a day rule formed an important stumbling block against the affected landowner's right to claim removal of building encroachments because it allowed for certain instances where removal would be denied. After the rejection of the year and a day rule by South African courts, courts became more concerned with the question whether they had the discretion to award compensation instead of removal of an encroaching structure. Therefore, the question concerning the discretion of the courts in the context of building encroachments is discussed in chapter three.

Chapter three focuses specifically on the discretion of courts to award compensation instead of removal of an encroachment. There are three questions that are addressed in chapter three. In the first instance, it is important to determine whether South African courts have the discretion to leave building encroachments in place and award compensation instead. South African courts seemed inclined to rely on English law principles for the exercise of the discretion to replace injunctive relief with compensation. A comprehensive study of English private law pertaining specifically to building encroachments is undertaken in order to determine how English law deals with the problem. The differences between South African and English law on this topic are analysed in chapter three to determine whether it is in fact possible to use these principles as South African courts have done. Courts have also used neighbour law principles as an argument for exercising the discretion in favour of leaving encroachments in place. Therefore, it is necessary to consider this argument. Another argument for the way in which encroachment cases have been decided lately is the law and economics perspective. The law and economics argument helps to explain why it may be necessary in some cases to prefer liability rules (i e damages) instead of property rules (i e removal). Consequently, the law and economics argument is also investigated in chapter three.

The second question that I evaluate in chapter three is the circumstances that are appropriate for the exercise of this discretion. In order to answer this question, I

analyse case law in which the discretion was exercised either in favour of removal or in favour of leaving the encroachment in place. Finally, I investigate the extent of the courts' discretion. Here, it needs to be determined whether the courts' discretion includes the power to order transfer of the encroached-upon land to the encroacher. In any event, if the discretion is exercised in favour of leaving a building encroachment in place, the effect of the order should be clear. The result needs to be explained in a doctrinally satisfactory way, considering the normal rules of accession. This aspect is considered in chapter four.

Chapter four comprises a discussion of the doctrinal implications of the new approach to the problem of building encroachments in South Africa. I focus on what happens when courts exercise their discretion and deny the default remedy of removal without saying anything about the rights of the parties in the dispute. It is clear that the encroacher is allowed to continue occupying the part of the affected landowner's property on which the encroachment is erected. The effect is apparently that one person owns the land and another person owns or is allowed to occupy the buildings erected on the land. I critically assess why courts take no cognisance of the principle of attachment when an encroachment has occurred. Generally, the principle of accession (specifically *inaedificatio*) governs the situation where buildings are erected on land. Therefore, in chapter four the question is raised why accession does not seem to occur in the case of encroachment by building. Additionally, in chapter four I consider the rights of the respective parties when the court says nothing about what the encroacher gains or the affected landowner loses when the encroachment remains in place. I argue that it is imperative to find doctrinal solutions to some of the uncertainties that exist when the court orders that a building encroachment should remain in place. Besides the doctrinal uncertainty, there may also be constitutional implications of these court orders. These implications are addressed in chapter five.

In chapter five the possible constitutional consequences of denying demolition orders are analysed. The main aim of the chapter is to determine whether the loss suffered as a result of the court orders leaving building encroachments intact complies with

section 25 of the Constitution.²³ I distinguish three outcomes that may result in building encroachment disputes and consider the question whether these outcomes amount to a deprivation of property in terms of section 25(1) of the Constitution.²⁴ If it does amount to a deprivation, I inquire whether the deprivation in the particular outcome can be justified. I also determine whether the deprivation amounts to expropriation that needs to comply with section 25(2) and (3) of the Constitution.²⁵

In chapter six I undertake a comparative analysis to investigate the Australian, German and Dutch approaches to the problem of building encroachments. The Australian Encroachment of Buildings Act²⁶ clearly sets out which factors are taken into consideration in determining whether compensation should be paid instead of removal, how the amount of compensation should be determined, what order the court may make and, more importantly, what the consequences of such an order would be for both landowners affected by the encroachment. This is helpful in order to establish how an encroachment statute might look. Both the German and Dutch civil codes provide for the course of action that should be followed in the case of building encroachments. In terms of German law, if an encroachment is erected and it was not erected due to intentional or negligent behaviour on the part of the encroaching neighbour, or if the affected landowner did not protest immediately after the erection of the encroachment, the affected landowner has a duty to tolerate the encroachment.²⁷ The German solution leaves room for the landowner receiving a kind of rent for as long as the encroachment is not removed, and the possibility is created for the affected landowner to agree to transfer of the affected land. This means that the encroachment remains in place, and the affected landowner receives compensation in respect of the loss suffered as a result of the encroachment.²⁸ According to the Dutch approach, if someone erects a building structure on the property of another, the affected landowner is precluded from abusing his/her right to insist on removal of the encroachment in all cases. The abuse of right argument is used to counter unjust results which would cause greater harm or loss for the builder

²³ The Constitution of the Republic of South Africa, s 25.

²⁴ The Constitution of the Republic of South Africa, s 25(1).

²⁵ The Constitution of the Republic of South Africa, s 25(2) and (3).

²⁶ The Encroachment of Buildings Act 1922 (NSW).

²⁷ *BGB* § 912.

²⁸ *BGB* § 912, 913.

as it would for the affected landowner.²⁹ In the same way as the German law, the option to transfer ownership of the land to the encroaching owner rests with the affected landowner and not the encroacher or the courts. These two jurisdictions provide clarity in terms of some of the issues in the context of building encroachments in South Africa. Therefore, I look to German and Dutch law in order to try and find a solution to the doctrinal and constitutional uncertainties that exist with regard to building encroachments in South Africa.

In the final chapter, I conclude by emphasising the need for legislation in South African law in order to clarify some of the unclear aspects of South African law regulating building encroachments. This chapter investigates the possibility of proposing new legislation in light of the comparative analysis in Chapter 3 (English law) and Chapter 5 (German, Dutch and Australian law). I use the comparative analysis as a source of guidelines for what may work effectively in South African law. I argue that the proposed encroachment legislation (if the current approach is refined) must provide for at least the following:

- Factors that are taken into consideration in the determination of the award of compensation instead of removal.
- How the amount of compensation should be awarded. This should essentially depend on whether the order is for transfer of the encroached-upon land or whether the compensation is for the use of the land on which the encroachment is erected.
- The rights of the respective parties if removal is denied. It should be clear whether (and what kind of) a use right is created in favour of the encroacher when demolition is denied.
- The possibility of transferring the affected land to the encroacher. It should be clear from the legislation whether the court has the power to order that the encroached-upon land be transferred to the encroacher.

I also look at the possibility of suggesting legislation that is different to the *status quo* in South Africa, for example legislation inspired by German law, where the point of

²⁹ BW 5:54.

departure is tolerance of the encroachment. Either of these types of legislation may help to provide clarity in terms of issues addressed. With the above in mind, I try and provide a framework for how such legislation might look, using the uncertainty highlighted in the dissertation as indications of how the law regulating building encroachment may be improved.

1.4 Qualifications

As a start to this dissertation (in chapter two) I provide an introduction to the law regulating building encroachments in South Africa. Although I do look at the historical origins of the remedy of removal, it will not be necessary to provide an in-depth historical analysis of the Roman and Roman-Dutch law regulating building encroachments. Historical analysis of this nature falls outside the scope of this research project. The brief historical analysis that is undertaken is merely intended to show that the remedy of removal in South Africa has its historical origins in Roman law and that removal was also the default remedy in Roman law.

I include a comparative analysis in chapter six with the aim of identifying solutions to some of the uncertainties that may result in the context of building encroachments in South Africa. The jurisdictions that I selected are Australia, Germany and the Netherlands. The main aim is to see whether these jurisdictions can help to explain how courts are deciding building encroachment cases in South Africa and what happens when building encroachments are not demolished in terms of the default remedy of removal.

I chose Australia because the Encroachment of Buildings Act³⁰ (New South Wales legislation), provides a good example of how an encroachment statute might look. This may be helpful considering that the underlying assumption of this research project is that legislation is required in South Africa to reduce the uncertainty regarding encroachment by building.

³⁰ The Encroachment of Buildings Act 1922 (NSW).

German and Dutch law were chosen as suitable comparative jurisdictions because both jurisdictions offer interesting solutions to the doctrinal issues that may be prevalent in the South African context. Therefore, I predict that both these jurisdictions may provide useful insights into the doctrinal uncertainty and possible constitutional infringement that may result when building encroachments are not demolished in terms of the default remedy of removal in South Africa.

It is not my intention in this dissertation to include a discussion of third-party liability. In other words, I recognise that sometimes there could be the likelihood of liability on the part of the architect for not ensuring that the building was in the correct position or the local authority for not ensuring that building regulations or title conditions regarding building lines were adhered to. The intention is not to include this type of third-party liability issues in the discussion. Therefore, this issue is not included in my research.

In this dissertation I specifically focus on certain aspects of the law regulating building encroachments in South Africa. I have narrowed down the topic area (as far as possible) to building encroachments. However, there are some instances where for explanatory and definitional purposes it may be necessary to refer to cases dealing not only with building encroachments, but with encroachments in general, for example fences or trees.³¹ However, the main focus is on highlighting some of the aspects of building encroachments that are simply unclear, that may cause further consequences and should perhaps be reconsidered. The argument is that courts are not giving enough consideration when decisions are made to leave building encroachments in place and the consequence is that the result is not explained and justified adequately. Recognition of the problems identified in this research project may ensure that unnecessary confusion and uncertainty is reduced.

³¹ An example of this would be the recent unreported case of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010], which dealt with the encroachment of a predator fence erected on the land of the applicant. The erection of the fence resulted in a substantial portion of the applicant's property being incorporated as part of the respondent's land. Many of the aspects of the case are imperative for this study and will therefore be discussed, although it concerns the encroachment of a fence. See chaps 3, 5 and 7 below.

Chapter 2: An introduction to the law regulating building encroachments in South African law

2.1 Introduction

In South African law, ownership of land generally assures the holder of the right undisturbed use and enjoyment of his land. However, there may be certain restrictions, either in terms of private or public law, that limit ownership.¹ A question that has been under investigation on numerous occasions is: How much value can a landowner really attach to his title of “ownership”? Courts are continuously faced with difficult decisions that could cause serious inroads on ownership, and this makes the way that courts view ownership very important.²

A landlord (owner) is precluded from simply evicting his tenant who refuses to leave after the termination of the lease period.³ Similarly, in a squatter situation, precaution has to be taken when eviction proceedings are set in motion.⁴ In these instances

¹ CG van der Merwe *Sakereg* (2nd ed 1989) 173; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 91; *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-107; *Gien v Gien* 1979 (2) SA 1113 (T) at 1120.

² PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 94.

³ In terms of the common law, a landlord can seek eviction of a tenant who refuses to vacate after the termination of the lease (the “holding over” situation). The Rental Housing Act 50 of 1999 limits the landlord’s common law right to terminate the lease and introduces “circumstances which the legislature intended to be legally relevant to the question of the eviction of a tenant from his or her home and changes the circumstances under which a landlord could lawfully evict a tenant”. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 429; AJ van der Walt *Property in the margins* (2009) 114-130 at 124-130. The principal statute that protects unlawful occupiers against eviction is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). Van der Walt states that a major question in landlord-tenant eviction cases is whether a landlord can institute proceedings in terms of s 4 of PIE rather than the common law. He notes that this matter was finally settled by the Supreme Court of Appeal in *Ndlovu v Ngcobo/Bekker v Jika* 2003 (1) SA 113 (SCA) in which the court established that anti-eviction proceedings did apply to tenants holding over. This position regarding the applicability of PIE to tenants holding over was confirmed in the recent case of *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* (102/09) [2010] ZASCA 28 (25 March 2010).

⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 652; AJ van der Walt *Property in the margins* (2009) chap 5. Eviction of unlawful occupiers must take place in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land

there are limitations on ownership imposed by legislation. This may result in questions concerning what ownership means for the landowners involved and what protection it offers. It seems to be inevitable that in some cases limitations on ownership are necessary because of the social, economic and political forces at work that necessitate the rethinking of the concept and the institution of ownership.⁵

Building encroachments, that is, instances where a landowner builds a permanent structure on her land in such a way that the structure encroaches upon neighbouring land, pose a question about ownership which is a little different from the examples mentioned above. Yet, what has crystallised from case law on the problem of encroachment is a similar type of question as the one facing a landlord or farm owner. The question that a landowner affected by a building encroachment might ask is: In which cases might I have to accept a limitation on the ownership of my land as a result of a building encroachment?

In this chapter I will provide an introduction to the law regulating building encroachments in South Africa. In the cases where a landowner erects a building encroachment on his neighbour's property, the affected landowner has a right to demand removal of the encroachment. The remedy of removal is based upon ownership and the right to be free from interference by another. By virtue of his status as owner of the land, the affected landowner has the right to ensure

Act 19 of 1998. There are certain procedural safeguards that protect unlawful occupiers against the common law right of the landowner. Post apartheid anti-eviction legislation has been enacted to solve the inadequate common law protection of evictees. At common law, the situation was generally that an owner had the right to exclude any person from his property and to evict any occupier who does not have a valid right to occupy. All that needed to be established was ownership and unlawful occupation.

⁵ Van der Walt notes that the Dutch legal historian Van der Bergh pointed out that "it would be unrealistic to accept that a legal institution such as ownership could occupy exactly the same place and social function in two societies that differ so widely as those of classical Rome and modern western Europe"; see AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 570. Numerous authors have emphasised that rethinking of the institution of ownership within in the modern South African law is necessary. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 93; CG van der Merwe *Sakereg* (2nd ed 1989) 170-173; DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 1-80; DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52; C Lewis "The modern concept of ownership of land" 1985 *Acta Juridica* 241-266 at 262; GJ Pienaar "Onwikkeling van die Suid-Afrikaanse eiendomsbegrip in perspektief" 1986 *TSAR* 295-308; AJ van der Walt "The effect of environmental conservation measures on the concept of landownership" (1987) 104 *SALJ* 469-479 at 474-476.

undisturbed use and enjoyment of his property. The existence of the encroachment may result in the limitation of ownership to varying degrees, depending on the size of the encroachment.⁶ It limits ownership because the affected landowner is forced to tolerate the encroachment and therefore the interference with the use and enjoyment of his property. The finer distinction between significant and insignificant encroachments is obviously important in this regard. This is because the larger the encroachment, the greater the extent of the limitation on ownership.⁷ The aim of this chapter is to highlight that if a significant building encroachment is erected and the court orders that the encroachment should not be removed, this may impose a serious limitation on ownership.⁸

The remedy of removal has its historical origins in Roman law.⁹ However, there has been considerable development and modification of the law regulating building encroachments from Roman law to how it was received in early South African case law. In terms of Roman law, it was clear that the affected landowner could ensure that the encroachment would be removed.¹⁰ This would occur either as a result of him removing the encroachment himself, where the structure had attached to the affected land, or the affected landowner could apply to have the encroachment

⁶ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 121-127. The authors divide the limitations that may imposed on ownership into three categories; namely, public law limitations, restrictions imposed in the interests of neighbour relations and individual restrictions which are imposed in a particular case by reason of the right to or in respect of a thing that is vested in someone other than the owner. An encroachment is discussed as an example of a restriction imposed in the interest of neighbour law, specifically by the common law regulating building encroachments. However, the authors fail to discuss an encroachment as a limitation on ownership in detail or provide any answers to the restriction that an encroachment imposes on ownership. For the limitations imposed on ownership in general, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 95-132.

⁷ The limitation that the continued existence of the encroachment poses for the affected landowner is important when considering the doctrinal effects and constitutional implications of the court orders made in the context of building encroachments. See chaps 4 and 5 below.

⁸ The limitation on ownership will have to be explained and justified adequately. See chaps 4 and 5 below.

⁹ *Corpus Juris Civilis* (D 9 2 29 1) (translated and edited by SP Scott *The civil law: Including the twelve tables: The institutes of Gaius. The opinions of Paulus. The enactments of Justinian. And the constitutions of Leo* (1973), hereafter "D" followed by the specific section of the Digest); JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 234; FP van den Heever *Aquilian damages in South African law* (1944) 84.

¹⁰ D 9 2 29 1; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 234; FP van den Heever *Aquilian damages in South African law* (1944) 84.

removed with the *actio negatoria* in the cases where the encroachment protruded into the airspace over the affected land.¹¹

In Roman-Dutch law as in South African law, the point of departure was also that the affected landowner could demand the removal of the encroaching structure.¹² However, the force of the default remedy of removal was mitigated by the defence of the year and a day rule.¹³ It was disputed among Roman-Dutch authors whether the year and a day rule was applicable as a defence against the affected landowner's right to demand removal. Despite the controversy about the applicability of the rule in Roman-Dutch law, the rule was nonetheless applied in early South African case law. However, the rule was finally rejected in South Africa because it did not form part of the general law which was taken over in South Africa from Roman-Dutch law.¹⁴

Subsequently, courts became more concerned with the question whether they had the discretion to deny an order for removal and award compensation instead.¹⁵ It seems as though the recent inclination of courts is to leave the encroaching structure in place and to rather award compensation instead.¹⁶ This was evident in the two most recent cases dealing with encroachment by building.¹⁷ In these cases, the

¹¹ D 9 2 29 1.

¹² H De Groot 1583-1645 *Inleidinge tot de Hollandsche rechtsgelertheyd* 3 34 8 (translated by RW Lee *The jurisprudence of Holland* (1926), hereafter referred to as "Grotius"); Voet 1647-1713 *Commentarius ad pandectas* 8 2 4 (translated by P Gane *Commentary on the pandect* (1955-1958), hereafter referred to as "Voet"); Voet 8 2 16; Van Leeuwen 1625-1682 *Commentaries on Roman-Dutch law* 2 20 6 (edited and translated by CW Decker & JG Kotzé (2nd ed 1921), hereafter referred to as "Van Leeuwen RDL").

¹³ Grotius 2 36 5; Voet 8 2 6; Voet 8 2 17; Van Leeuwen RDL 2 19 4; CG van der Merwe & JB Cilliers "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* 587-593.

¹⁴ CG van der Merwe & JB Cilliers "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* 587-593; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 126-130.

¹⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

¹⁶ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C). See chap 3 below.

¹⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

default remedy of removal was denied and the affected landowner was forced to accept the continued existence of the encroachment.¹⁸

As a starting point I consider the effect that a building encroachment has on the ownership rights of the affected landowner. Thereafter, I discuss the application of the default remedy of removal in early South African case law as well as the year and a day rule as a defence against the affected landowner's right to demand removal. In the final section of the chapter the two most recent cases dealing with encroachment by building will be considered.

2.2 Ownership and building encroachments

In terms of the common law, if a landowner builds in such a way that a structure crosses the boundary line, a building (or structural) encroachment results.¹⁹ The landowner affected by the encroachment (the "affected landowner") in these circumstances can immediately upon becoming aware of the encroaching structures approach the court and seek an order for removal of the encroachment.²⁰ The basis for the common law remedy of removal is the right to be free from any interference with the use and enjoyment of your property.²¹ Milton describes this as follows:

"The right of an owner to demand removal would, in theory, seem to be absolute for he is vindicating the freedom of his property from unlawful interference."²²

Similarly, Van der Merwe and Cilliers reiterate that:

¹⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹⁹ CG van der Merwe *Sakereg* (2nd ed 1989) 201; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 122.

²⁰ Although it is stated in PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 122 that an affected landowner has a choice between three remedies, this is perhaps somewhat confusing. It will be assumed that the landowner must in all cases approach the court if he wishes to have the structures removed. From the recent cases, the courts then have the discretion to refuse the claim for removal of the encroachment and award compensation instead. See AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628.

²¹ CG van der Merwe *Sakereg* (2nd ed 1989) 201; *Wade v Paruk* (1904) 25 NLR 219 at 225; *Smith v Basson* 1979 (1) SA 559 (W) at 560.

²² JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 241.

"[t]he right to insist on the removal of the encroachment is consistent with the concept of ownership, which is potentially the most extensive real right which a person can have in respect of an object, whether movable or immovable."²³

Based on the above, it is clear that the affected landowner by insisting on removal of the encroachment is asserting the right to be secure from harm, based on ownership. However, ownership may be limited in some cases.

Traditionally, it was said that a landowner may do with his property as he sees fit, subject to the restrictions imposed by both private and public law.²⁴ It is generally difficult to find a definition of ownership that correlates with the needs of society within which the institution of ownership must function at any given time. Therefore, it is vital to find a description of the institution of ownership that encompasses the features and functions of the social and economic context within which ownership should exist.

Even in Roman law, ownership was already seen in terms of relationships organised by society.²⁵ Ownership was perceived as relational, thus for example in terms of the relationship between two landowners with regard to the same property, which for all intents and purposes mean that ownership cannot be unfettered. Therefore, a landowner's rights only stretched as far as and insomuch as it did not interfere with his neighbours' ownership rights.

²³ CG van der Merwe & JB Cilliers "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* 587-593 at 588.

²⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 91; CG van der Merwe *Sakereg* (2nd ed 1989) 170-173; DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 1-80 at 67. Cowen describes the idea that an owner can do with his property as he wants within the restrictions in the interest of neighbouring owners or the general public, as the "totality" of ownership. See further *Johannesburg Council v Rand Township Registrar* 1910 TPD 1314; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106-107.

²⁵ M Radin *Handbook of Roman law* (1927) 332; AM Honoré "Ownership" in AG Guest (ed) *Oxford essays in jurisprudence* (1961) 107-147 at 144-145.

The definition of ownership most often cited in South African law was stated in *Gien v Gien*²⁶ as follows:

"The right of ownership is the most comprehensive real right that a person can have in respect of a thing. The point of departure is that a person can, in respect of immovable property, do with and on his property as he pleases. This apparently unfettered freedom is, however, a half-truth. The absolute power of an owner is limited by the restrictions imposed thereupon by the law."²⁷

With regard to ownership, it is said that Roman and Roman-Dutch law ideas of ownership largely survived in the modern South African institution of ownership.²⁸ However, Van der Walt argues that most of the modern institution of ownership was in fact taken over from the Pandectist theory of ownership.²⁹ He looks at Bernhard Winscheid's theory of ownership and particularly the characteristics of the theory.³⁰ In this investigation Van der Walt highlights that there are fundamental differences between the Roman law concept of ownership and the institution of ownership as described by the Pandectists.³¹ Therefore, he asserts that it would be incorrect to accept that the nineteenth century Pandectist theory of ownership was an accurate description of the Roman law institution.³²

There are some interesting characteristics of Winscheid's theory of ownership that are relevant. In the first place, ownership is considered the most complete property

²⁶ 1979 (2) SA 1113 (T) at 1120.

²⁷ The translation of J Neethling, JM Potgieter & PJ Visser *Deliktereg* (5th ed 2006) 104 is used here; the original is *Gien v Gien* 1979 (2) SA 1113 (T) at 1120: "Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hê. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetrif, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegheid van 'n eiennaar bestaan binne die perke wat die reg daarop plaas." See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 91.

²⁸ CG van der Merwe *Sakereg* (2nd ed 1989) 171.

²⁹ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 568. See DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" 1985 *Acta Juridica* 39-52 at 39.

³⁰ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589. Van der Walt accepts that Windscheid is the main spokesperson for the Pandectists.

³¹ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 588.

³² AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 579. In this section Van der Walt looks at how "[a] number of aspects of the traditional concept of ownership illustrate the underlying assumptions and implications of Winscheid's concept of ownership".

right that entitles the holder of the right the exercise of the right to the exclusion of everybody else.³³ Therefore, the holder of the right would be able to ward off any unlawful interference with the right. Secondly, in terms of Windscheid's theory, ownership was in principle unlimited and any restrictions were abnormal to the concept.³⁴ If there was a restriction, it was temporary and ownership would regain its natural form when the restriction was removed. This is referred to as the elasticity of ownership. It assumes that if anything disturbs the natural form of ownership and that disturbance is taken away, then ownership can return to its natural state.

This is interesting if one considers encroachment by building. The affected landowner may in theory insist upon removal of an encroachment as a result of his right to be free from interference. The encroachment poses a limitation on ownership. If removal is ordered in terms of the default remedy of removal, the affected landowner's ownership rights are restored to its natural complete state. However, if removal is not ordered the encroachment continues to pose a limitation on the affected landowner's rights. The affected landowner is forced to tolerate the interference caused by the encroachment.

The continued existence of the encroachment becomes more problematic the larger the encroachment is. Therefore, as a point of departure, a distinction needs to be drawn between significant and insignificant encroachments because the extent of the limitation on ownership differs.³⁵ However, the Cape High Court recently held that it could find no reason why significant and insignificant encroachments should be treated differently.³⁶ Moreover, the court held in this case that the defendant's counter-claim of insisting on removal was based on a "rigid and dogmatic insistence upon his perceived absolute rights as owner, irrespective of the broader considerations of social utility, economic waste and neighbourliness" and that this

³³ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 579.

³⁴ AJ van der Walt "Ownership and personal freedom: Subjectivism in Bernhard Windscheid's theory of ownership" (1993) 56 *THRHR* 569-589 at 582.

³⁵ This will in turn become important for chaps 4 and 5 when the doctrinal and constitutional consequence of leaving building encroachments in place is discussed. See chaps 4 and 5 below.

³⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

perception of ownership was unacceptable.³⁷ This statement begs two important questions. The first one centres on when it would be acceptable to insist upon removal of an encroaching structure. In other words, the question would be: When will insisting upon removal be considered to be based on an absolutist view of ownership? The second question is linked to the first one: When would it be justifiable to limit ownership by leaving the encroachment in place?

In order to answer the first question it is important to distinguish between significant and insignificant encroachments. With regard to significant encroachments, it is questionable whether insisting upon removal should be considered to be based on an “absoluteness” view of ownership as was stated in *Brian Lackey Trust* or what would be called abuse of right in Dutch law.³⁸ The owner may be insisting upon removal because the encroachment results in a serious limitation on his property rights. In the South African context, it has been questioned whether the above conduct of an affected landowner would amount to abuse of rights.³⁹ The abuse of rights argument is one which is commonly raised in favour of awarding compensation instead of removal. It is based essentially on the idea that an owner whose property has been encroached upon and who insists upon removal of the encroachment is abusing his rights.⁴⁰

Van der Walt argues that a hold-out by an affected landowner, either because he does not want to sell his property to the encroaching owner or because he is trying to obtain a higher amount of compensation, does not necessarily amount to abuse of right. He argues that a landowner is entitled to sell his property at whichever price he wishes. The affected landowner has the prerogative to accept or refuse any offer

³⁷ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 43.

³⁸ See s 6.3 in chap 6 below.

³⁹ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 600-602.

⁴⁰ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 600-602. The idea that an owner is acting in an unacceptable manner when he insists upon removal of the encroachment is also discussed by Scott. She states that a landowner is not abusing his rights by insisting on removal, but is merely trying to take advantage of a situation when he realises how hopeless it has become. See S Scott “Recent developments in case law regarding neighbour law and its influence on the concept of ownership” (2005) 16 Stell LR 351-377 at 363. For a discussion of the abuse of the right argument in the context of Dutch law, see s 6.3 in chap 6 below.

made to him for the property.⁴¹ In the absence of legislation obliging a landowner to accept a specific price according to a determined basis like market value, the owner can thus refuse any price offered. What this effectively means is that an owner who resists the involuntary loss of ownership due to the existence of an encroachment is not necessarily abusing his rights.

However, the same could most probably not be said for insignificant encroachments, where insisting upon removal may be inappropriate and unreasonable due to the size of the encroachment. Scholtens explains this by way of the Dutch case of *Brusse v Holders*.⁴² In this case the defendant had erected a building on his land that formed a minor encroachment on the plaintiff's property. The parties were unable to reach an agreement about the amount of compensation and the plaintiff consequently applied for the removal of the encroachment. The court held that the plaintiff was attempting to obtain an amount of compensation which was not reasonable in comparison to the value of the property. Therefore, he was trying to use his superior bargaining power to extort a large amount of compensation for a minor encroachment not worth the amount. It was held that this conduct amounted to an abuse of right.⁴³ Scholtens notes that at the time this judgement was given, this was in conflict with the law relating to ownership in terms of the Dutch civil code.⁴⁴ He observes that the plaintiff may have succeeded had the Dutch civil code been strictly applied. This is because the plaintiff is able to insist upon removal because he is the owner of the land. However, the court applied the abuse of right doctrine (which at the time was not codified) and protected the defendant against the "unreasonable and inequitable attitude of the plaintiff".⁴⁵ In this judgement the court went against the codified provision pertaining to ownership of land and the right to

⁴¹ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 601. Van der Walt uses a law-and-economics argument to substantiate his point of view that there is in principle nothing wrong with a landowner bargaining for a higher amount for his involuntary loss of ownership due to the encroachment. Within the law-and-economics context, the market determines to whom the property is assigned, which would be the person who puts the highest value on it.

⁴² JE Scholtens "Encroachment: Damages instead of removal?" (1957) 74 SALJ 84-86. Scholtens looks at the problem of building encroachment from a comparative view with reference to the notes made by Hahlo and Mulligan. See *Brusse v Holders*, NJ 1956, 475; HR Hahlo "Encroachment: Damages instead of removal?" (1956) 73 SALJ 241-242; GA Mulligan "Encroachment: Damages instead of removal?" (1956) 73 SALJ 438.

⁴³ JE Scholtens "Encroachment: Damages instead of removal?" (1957) 74 SALJ 84-86.

⁴⁴ JE Scholtens "Encroachment: Damages instead of removal?" (1957) 74 SALJ 84-86 at 84.

⁴⁵ JE Scholtens "Encroachment: Damages instead of removal?" (1957) 74 SALJ 84-86 at 84.

demand removal based on ownership. Scholtens makes the following remark about insisting upon removal in the case of minor encroachments:

"The judgement of the Court of Zutphen in *Brusse v Holders* provides an example of a case where under a codified system the courts went beyond the Code in order to attain justice as between man and man."⁴⁶

Therefore, it may be necessary in some instances to regulate when the affected landowner should be able to insist upon removal, for example when the encroaching structure is really insignificant. The remedy of removal may be completely unreasonable in these cases, where the limitation on ownership is so small that insisting upon removal may result in an abuse of right. This is especially if the affected landowner was willing to accept compensation and is insisting upon removal for the sole purpose of trying to extort unreasonable amounts from the encroacher.

This guides me to the next question namely: In which cases will it be justifiable to limit ownership by denying the affected landowner the removal order and therefore leaving the encroachment in place?⁴⁷ In order to answer this question it is necessary to look at the origins of the default remedy of removal in Roman law. In the following section I investigate the remedies available in Roman law with the aim of establishing how the remedies were received in South African law. Thereafter, I consider how the remedy of removal evolved and was modified in Roman-Dutch law. It was initially accepted in South African case law that in Roman-Dutch law, the

⁴⁶ JE Scholtens "Encroachment: Damages instead of removal?" (1957) 74 SALJ 84-86 at 86.

⁴⁷ This question forms the underlying question for this whole dissertation. The following three chapters will aim at answering this question in different ways. In chapter 3 I investigate the discretion of the courts to award compensation instead of removal. If courts do have the discretion to limit ownership by denying the removal order, it will be important to determine in which cases it would be the most appropriate to leave the encroachment in place. The focus will be on the nature of the discretion (in other words asking how the discretion is exercised) and the extent of the discretion (where I will analyse what the discretion includes). Chapter 4 will assess what the doctrinal implications are of leaving an encroachment in place. Here it will be important to look at when it would be justifiable to limit ownership by leaving the encroachment in place, and still explain what is happening doctrinally. The limitation that results when an encroaching structure is not removed restricts the use and enjoyment of the property in some cases and the affected landowner may even be forced to give up the ownership of the affected land as well. This needs to be explained and justified in line with South African common law principles. It also needs to be explained and, more importantly, justified in terms of the South African Constitution. The constitutional implications of the limitation imposed on ownership when an encroaching structure is not removed are discussed in chapter 5. See chaps 3, 4 and 5 below.

remedy was mitigated by the year and a day rule, which formed a defence against the landowner's demand for removal and therefore a justifiable reason to limit the affected landowner's ownership of the land. However, it subsequently appeared that the rule never formed part of general Roman-Dutch law and that it was therefore never adopted in South African law either.

2.3 Roman law⁴⁸

Milton states that there were two remedies in terms of Roman law that were the most effective in the case of encroachment by building, namely the *interdictum quod vi aut clam* and the *actio negatoria*.⁴⁹ He argues that of the two remedies, the *actio negatoria* seemed to have provided the best protection in the case of encroachment by building. With the *actio negatoria*, the affected landowner could claim removal of the encroachment, as well as damages.⁵⁰

In terms of the Digest, the intention of the builder determined which remedy would be available when a building was constructed on the land of another.⁵¹ A distinction was drawn between a *bona fide* possessor and a *mala fide* possessor.⁵² If someone knowingly erected a building on the land of his neighbour with his own building materials, he would be a *mala fide* possessor and he was deemed to have voluntarily parted with his materials. Therefore, the landowner upon whose land the building materials were erected became the owner of the building materials. Moreover, this landowner would not need to reimburse the encroaching landowner for the value of the materials or any of the labour in bringing the work into effect.⁵³

⁴⁸ For more on Roman law, see D Johnston *Roman law in context* (1999); HF Jolowicz *Historical introduction to Roman law* (1972); A Rodger *Owners and neighbours in Roman law* (1972); P van Warmelo *Die oorsprong en betekenis van Romeinse reg* (1959); HJ Roby *Roman private law* (1902).

⁴⁹ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 236.

⁵⁰ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 236.

⁵¹ D 41 7 9 12.

⁵² D 41 7 9 12; CG Hall *Maasdorp's institutes of South African law* vol 2 *The law of property* (1976) 39.

⁵³ D 41 7 9 12.

The situation was different in the case where the encroacher was a *bona fide* possessor. In other words, in the case where the encroacher was not aware that the land on which the encroachment was erected belonged to his neighbour, he could not be said to have voluntarily parted with his building materials.⁵⁴ The remedy available to the affected landowner in this case depended on the nature of the encroachment.⁵⁵ The nature of the encroachment, in turn, depended on whether the encroachment became part of the affected landowner's property or merely protruded into the airspace over the neighbouring land.

In the case where the buildings were erected on the land, and became part of the land, there was a "direct and intimate" relationship between the owner of the land and the buildings erected on his land⁵⁶ and there would be a greater justification for self-help. Therefore, the encroacher would be able to take the law into his own hands and remove the encroachment himself.⁵⁷ The reason why the affected landowner would be able to remove the encroachment himself was by virtue of the maxim *omne quod inaedificatur solo cedit*.⁵⁸ In terms of this maxim the affected landowner could remove the encroaching structures because he has become owner of the structures erected on his land. This is also in line with the maxim *superficies solo cedit*, which states that everything permanently attached to land belongs to the owner of the land.⁵⁹

If the encroachment took the form of a protrusion into the airspace of a neighbouring property, for example a roof, an overhanging beam or a structure protruding over a common wall, the neighbour was precluded from taking the law into his own hands and removing the encroachment himself.⁶⁰ The most effective remedy in this case

⁵⁴ D 41 7 9 12.

⁵⁵ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 236.

⁵⁶ FP van den Heever *Aquilian damages in South African law* (1944) 84; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 234.

⁵⁷ D 9 2 29 1.

⁵⁸ The maxim *omne quod inaedificatur solo cedit* no longer gives the affected landowner the right of self-help in South African law because our law does not recognise the right to take the law into your own hands. Therefore, in principle the affected landowner would always have to approach the court to have the encroaching structures removed.

⁵⁹ CG van der Merwe *Sakereg* (2nd ed 1989) 247; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147. See chap 4 below.

⁶⁰ D 9 2 29 1.

would be the *actio negatoria* in terms of which the affected landowner could sue for the removal of the encroachment.⁶¹

A distinction is made in the Digest as follows:

"If you cut off my roof which I have permitted to project over your house without any right; Proculus states that I am entitled to an action against you for wrongful damage, as you should have sued me, alleging that I had no right to have a projecting roof; and it is not just that I should suffer damage through your cutting off my timbers. A contrary rule is to be found in the Rescript of the Emperor Severus, who stated in said Rescript to a party through whose house an aqueduct was carried without any servitude existing, that he had a right to destroy it himself; and this seems reasonable, for the difference is that in one instance a man built the roof on land which belonged to him and in the other, the party built the aqueduct on the premises of someone else."⁶²

From what has been discussed above, it is clear that in terms of Roman law removal of the encroaching structure was the default position. Therefore, the affected landowner could either remove the encroachment himself or apply in terms of the *actio negatoria* to have the encroachment removed. As a point of departure, this was also the default position in Roman-Dutch law. The Roman-Dutch law position is discussed in the section below.

2.4 Roman-Dutch law

Most of the Roman-Dutch law remedies in the case of building encroachments were taken over from Roman law.⁶³ Roman-Dutch law recognised the maxim *omne quod inaedificatur solo cedit*, but it was not applied as rigidly as in Roman law. The reason for this was the existence of another principle, in terms of which no one should be enriched at the expense of another.⁶⁴ It seems as if the point of departure remained the same: If anybody suffered as a result of something belonging to his neighbour

⁶¹ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 236.

⁶² D 9 2 29 1.

⁶³ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 241.

⁶⁴ CG Hall *Maasdorp's institutes of South African law* vol 2 *The law of property* (1976) 38-39; JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 236; UBS v Smooklers Trustee 1906 TS 623 at 627.

overhanging or encroaching on his property, he could force his neighbour to remove it.⁶⁵

Grotius, speaking in the context of acquisition of ownership through building, stated that ownership is transferred to an affected landowner in the case where someone builds on his land.⁶⁶ It was clear that everyone had to build within the vertical boundary line of their property and anything that projected beyond that would have to be removed.⁶⁷ According to Huber, if someone built or erected something on my land and the work was completed without notice, and therefore without my knowledge, I could sue the possessor of the building.⁶⁸ Similarly, Voet provided two instances in which he stated disapproval of unlawfully erected buildings.⁶⁹ In the first instance, Voet wrote about the course of action available in the case where someone unlawfully built on or over a common wall.⁷⁰ He stated that if there was the freedom to build up to the middle line and the one neighbour built beyond that point without the consent of his neighbour, the projecting building was unlawful and would have to be taken down.⁷¹

In the second instance Voet made a very important distinction between “[t]hings unlawfully let in” and things “merely projecting”.⁷² The premise of the distinction lies in the following: If anyone erects something on my land without a servitude I can remove it myself; but if someone lets something overhang or jut into the airspace above my land, I am precluded from removing it myself.⁷³ Voet emphasised “that whatever someone lets into or constructs on another’s tenement becomes the property of him to whom the ground belongs.”⁷⁴ Therefore, when you break down that building you are breaking down what is your own. However, in the case where a roof or eave projects into the airspace over your land, it does not attach to your land

⁶⁵ Van Leeuwen *RDL* 2 20 6.

⁶⁶ Grotius 2 10 6.

⁶⁷ Grotius 2 34 8.

⁶⁸ Huber *Heedendaegse rechtsgeleertheyd* 2 4 36 17 (translated by P Gane *The jurisprudence of my time* (1939) 156-158 at 157).

⁶⁹ Voet 8 2 4; Voet 8 2 16.

⁷⁰ Voet 8 2 16,17.

⁷¹ Voet 8 2 17.

⁷² Voet 8 2 4.

⁷³ Voet 8 2 4.

⁷⁴ Voet 8 2 4.

but originates from your neighbour's land, and therefore it belongs to the neighbour and you may not remove it yourself.

Therefore, Voet distinguishes between an encroachment that protrudes into the airspace of a neighbour (or an overhanging beam) and an encroachment that attaches to the affected land and argues that in the case of the latter, it becomes part of the neighbour's land in terms of the maxim *omne quod inaedificatur solo cedit*. It is contended that when you subsequently remove the latter kind of encroachment, you are demolishing not what belongs to someone else, but something that is your own.⁷⁵ This was confirmed by Van Leeuwen, who stated that the right to have your balcony, bow-window or gallery projecting over the land of your neighbour is obtained by way of servitude.⁷⁶ The specific servitude in this case was the *servitus protegendi*. Without such a servitude, you had no right to have the eaves or roof of your house projecting over the land belonging to another and would be compelled to remove it.⁷⁷ However, since it does not attach to the neighbour's land he could not remove it himself.

However, Grotius noted that a praedial servitude could be acquired through prescription if it had stood unprotested for a year and a day.⁷⁸ Therefore, if someone had erected a building on the property of another, and no objection was made within a year and day, a praedial servitude would come into existence and the affected landowner would have to accept the existence of the building in exchange for damages. This was confirmed by Van Leeuwen, who accepted the existence of the rule.⁷⁹

Voet had the following to say about the year and a day rule.⁸⁰

"[I]f without the establishment of a servitude a person to the knowledge of and without interference with the work by his neighbour does some building which

⁷⁵ Voet 8 2 4.

⁷⁶ Van Leeuwen RDL 2 20 6.

⁷⁷ Van Leeuwen RDL 2 20 6.

⁷⁸ Grotius 2 36 5.

⁷⁹ Van Leeuwen RDL 2 19 4.

⁸⁰ Voet 8 2 6.

smacks of servitude on his own or another's ground; or after the work has been finished without his knowledge, the neighbour has not then within a year and a day objected to it and claimed its demolition; by the statutes and customs of various places the rule has been that demolition is never to be ordered against the builder's will, but that judgement for damages in the neighbour's favour is to be given against him who built it up.”⁸¹

It is clear that the year and a day rule had two legs. It had the knowledge element and the time element. The knowledge element required that the person should have known that the encroachment had existed and the time element meant that the affected landowner had to object to the encroachment within a year and a day. Voet explained that the year and a day rule was also applicable to cases where a landowner had unlawfully built beyond a common wall.⁸² He described it as follows:

“An exception [to a demolition order] would be when local custom directs that no one is forced to demolish if he has had the work there for more than a year and a day, though it was done quite wrongfully and to the damaging of the neighbour; but that he is released by paying out the damages.”⁸³

There are two important conclusions that can be drawn from Voet's commentaries. Firstly, Voet makes a very clear distinction between encroachments that attach to the affected landowner's property and those which do not. In the cases where the building does attach to the affected land, and not merely projects into the airspace over the affected landowner's property, it is argued that the buildings become part of the land and he could remove it himself. In the case where the building merely projects into the airspace over the affected landowner's property, it does not become part of the affected land and the affected landowner would have to apply to have the encroachment removed. The basis for this claim would be that the encroaching landowner does not have a right by way of a servitude to have the encroachments protruding over the boundary line.

⁸¹ Voet 8 2 6.

⁸² Voet 8 2 17.

⁸³ Voet 8 2 17.

The second conclusion that can be drawn from Voet's commentaries is that he recognises that a landowner may be precluded from demanding removal of either something on or over his land. This would be in terms of the year and a day rule. However, Voet makes it clear that the year and a day rule was only a local rule which was applied in certain areas by custom.⁸⁴ This means that the rule was not part of the general Roman-Dutch law that was received in South African law.⁸⁵ Nonetheless, the year and day rule was initially applied in early South African case law as a defence against the affected landowner's right to insist upon removal.

In the section below, I discuss early South African cases dealing with building encroachments. A distinction is made between cases where the default remedy of removal was awarded and cases where the year and day rule was applied as a defence against the right of removal. Thereafter, it is necessary to look at the argument of Van der Merwe and Cilliers, who showed the opinion that the year and a day rule is not applicable to South African law.⁸⁶ After the rule was finally rejected in South African law, the major question in building encroachment cases centred on whether the court had the discretion to leave building encroachments in place and award compensation instead.⁸⁷

2.5 Early South African law

2.5.1 *Early South African cases on removal of encroaching structure as default remedy*

In one of the earliest cases dealing with encroachments it was accepted that the default remedy is removal of the encroaching structure.⁸⁸ In this case a common wall existed between the properties of the defendant and the plaintiff. The defendant had constructed a roof on the wall in such a way that it protruded over the plaintiff's premises. It was established that the wall was common and that the rules pertaining

⁸⁴ Voet 8 2 6.

⁸⁵ This argument is made in CG van der Merwe & JB Cilliers "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* 587-593. See s 2.5.2 below.

⁸⁶ See s 2.5.2 below.

⁸⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O). See chap 3 below.

⁸⁸ *Pike v Hamilton* (1853-1856) 2 *Searle* 191.

to common walls were applicable. Therefore, adjacent owners were precluded from doing anything to or on the common wall which could cause any prejudice to a neighbouring landowner.⁸⁹ The protrusion effectively resulted in an unlawful encroachment. This being the case, the court was bound by law to rule in favour of the plaintiff and order the removal of the encroachment.⁹⁰ There seems to have been general consensus among all three judges that if the protrusion amounted to a building encroachment, it had to be removed.⁹¹ There was no doubt that once the protrusion forms an encroachment that the remedy is removal.

In subsequent cases, the remedy of removal was confirmed as the default remedy when a building encroachment should occur. In *Van Boom v Visser*⁹² the court ordered the removal of the building encroachment which was erected on the plaintiff's property.⁹³ In *Stark v Broomberg*⁹⁴ a wall that had been erected by the defendant caused an encroachment of two feet on the property of the plaintiff. The plaintiff applied for the removal of the encroachment, or alternatively for the payment of £250 for damage suffered as a result of the encroachment. The court had no doubt that the plaintiff suffered loss due to the existence of the encroachment, even though it was only a minor encroachment. The court looked at the total inconvenience for the plaintiff, in that he was precluded from building the number of cottages on his property that he would initially have been able to build had the encroaching wall not been there. It was decided by De Villiers CJ that the plaintiff, being the owner of the property on which the encroachment was built, had a *prima facie* right to claim that the encroaching structure erected on land belonging to him should be removed.⁹⁵

Theoretically, the remedy of removal gives the affected landowner the maximum possible protection in the case of a building encroachment. It means that a landowner always has the right to demand that the encroaching structure be

⁸⁹ *Pike v Hamilton* (1853-1856) 2 Searle 191 at 200.

⁹⁰ *Pike v Hamilton* (1853-1856) 2 Searle 191 at 200.

⁹¹ *Pike v Hamilton* (1853-1856) 2 Searle 191 at 196, 198, 200.

⁹² (1904) 21 SC 360.

⁹³ *Van Boom v Visser* (1904) 21 SC 360 at 361.

⁹⁴ 1904 CTR 135.

⁹⁵ *Stark v Broomberg* 1904 CTR 135 at 137.

removed, however small or large the encroachment may be.⁹⁶ The tendency in the early case law to regard removal as the default remedy is confirmed by the early literature. Under the heading of “Rights to Buildings” Wille states that a landowner upon whose land is encroached may order that the encroaching building or projection be removed.⁹⁷ This is confirmed by Maasdorp who, primarily relying on case law as authority,⁹⁸ states the situation of building encroachments as follows: “In such a case the owner of the ground encroached upon may demand that the encroachment be removed”.⁹⁹

2.5.2 Early South African cases applying the “year and a day rule” as a defence against the remedy of removal

There has been a great deal of controversy in early South African cases in which the year and a day rule was applied.¹⁰⁰ The first part of the rule is based on the knowledge of the affected landowner in an encroachment case. There seems to have been uncertainty about whether actual knowledge of the encroachment was required or whether it was enough that the affected landowner merely should have known of the encroachment.¹⁰¹

⁹⁶ One of the issues which will be discussed in the following chapter is whether minor and significant encroachments should be treated the same. English law, which is relied upon by South African courts, has established a “working rule” in terms of which the size of the encroachment is a factor which is taken into consideration in the determination of whether the discretion should be exercised in favour of the encroaching owner or the affected landowner. See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287. See chap 3 below.

⁹⁷ G Wille *Principles of South African law* (1937) 151.

⁹⁸ *Van Boom v Visser* (1904) 21 SC 360; *Pike v Hamilton* (1853-1856) 2 Searle 191.

⁹⁹ CG Hall *Maasdorp’s institutes of South African law* vol 2 *The law of property* (10th ed 1976) 38, 41, 94.

¹⁰⁰ *Adam v Abdoola* (1903) 24 NLR 158; *Wade v Paruk* (1904) 25 NLR 219; *Stark v Broomburg* 1904 CTR 135; *Frank and Co v Duveen* 1919 CPD 299; *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354; *Cape Town Municipality v Fletcher & Cartwrights, Ltd* 1936 CPD 347; *Braunschweig Village Management Board v Frohbus* 1938 EDL 25; *Naudé v Bredenkamp* 1956 (2) SA 448 (O).

¹⁰¹ The impression is that the court in *Rand Waterraad* placed a heavier onus on the affected landowner to be more aware of what is going on with his property. Although it was found in the case that the year and a day rule was not applicable to South African law, the court took into consideration that the applicants delayed in bringing the application, and decided against removal of the encroaching structures.

In the early South African cases, this part of the rule was probably based on estoppel,¹⁰² so that the affected landowner was estopped by his conduct from demanding removal of the encroachment.¹⁰³ The English law principle of estoppel by representation (or more specifically estoppel by “encouragement” or “acquiescence”) was relied upon in interpreting this part of the rule.¹⁰⁴ The idea of estoppel by representation involves a situation where one party wrongfully acts under the mistaken belief that he is entitled to do so, to the detriment of another. If the other party knew of the wrongful exercising of supposed rights and does nothing to stop it, the latter cannot later invoke his rights against the former. Applied to encroachment cases, it would follow that an affected landowner who was aware of the encroaching structure being erected on his land but did nothing to prevent it, would not be able to invoke his right to removal later. His failure to correct the mistaken belief of the encroaching owner could be an indication that he tacitly agreed to the building of the encroaching structure.

In *Higher Mission School Trustees v Grahamstown Town Council*¹⁰⁵ one of the grounds on which the defendant resisted the plaintiff’s claim for removal was acquiescence.¹⁰⁶ The claim came about when a section of an electric power station was built by the defendant on the plaintiffs’ property. The court interpreted the first part of the rule to require actual knowledge. The mere fact that the plaintiff possibly should have known of the encroachment was not sufficient to succeed with a claim for acquiescence. Knowledge was interpreted as consent, which must be proven unambiguously.¹⁰⁷

¹⁰² CG van der Merwe *Sakereg* (2nd ed 1989) 202; JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 239.

¹⁰³ *Adam v Abdoola* (1903) 24 NLR 158 at 160. The court per Bale CJ goes as far as saying that an agreement was reached by the parties, and the defendant proceeded on the basis of this tacit consent (agreement) until such time as the action was brought.

¹⁰⁴ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 239; S Bower *Estoppel by representation* (3rd ed 1977) 283-307.

¹⁰⁵ 1924 EDL 354.

¹⁰⁶ The acquiescence argument relied upon by the defendant in this case is used more in the sense that the property was never fenced in or that the plaintiff never laid claim to ownership of the property. This was rejected for being too burdensome on landowners. See *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354 at 362.

¹⁰⁷ *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354 at 363.

The second part of the rule was concerned with the exact length of time that passed between the erecting of the building encroachment and the bringing of the application for the removal of the encroachment. There was much uncertainty in early South African case law about how long the encroachment had to be in existence before the encroaching owner could raise the defence against the affected landowner's demand for removal of the encroachment.¹⁰⁸ It seems as if the duration of the rule was dependant on the particular "keuren" and did not form part of the *ius generale* in Roman-Dutch law.¹⁰⁹ This lead to much uncertainty with regard to the application of the year and day rule.

In addition to the uncertainty about the requirements for the rule highlighted above, it remained questionable whether the rule itself formed part of general Roman-Dutch law. Although the rule was applied in the early South African case law,¹¹⁰ it has been argued that the historical foundations of the rule had not been established carefully enough. It never formed part of general Roman-Dutch law and therefore could never have been received into South African law.¹¹¹ Relying for the most part on the reasons set forth by Van der Merwe and Cilliers why the rule should not apply, the courts subsequently changed their stance on the applicability of the rule against the claim for removal of a building encroachment and it is now generally accepted that it does not form part of South African law.

¹⁰⁸ This concern was raised in *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

¹⁰⁹ Grotius 2 36 5; *Frank & Co v Duveen* 1919 CPD 299.

¹¹⁰ *Wade v Paruk* (1904) 25 NLR 219; *Frank & Co v Duveen* 1919 CPD 299; *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354; *Cape Town Municipality v Fletcher and Cartwrights, Ltd* 1936 CPD 347; *Braunschweig Village Management Board v Frohbus* 1938 EDL 25; *Naudé v Bredenkamp* 1956 (2) SA 448 (O) at 451. It is interesting to note that in none of these cases was it explicitly argued that the rule was applicable to South African law, it was just assumed to be part thereof.

¹¹¹ CG van der Merwe & JB Cilliers "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* 587-593 at 588.

2.6 Recent South African law

2.6.1 *Rand Waterraad v Bothma en 'n Ander*¹¹²

Rand Waterraad provides the first real noticeable change in the way courts dealt with building encroachments. In this case the applicant and the respondents were neighbours sharing a common boundary. The respondent inadvertently built in such a way that certain building structures were erected on the applicant's property. The applicant subsequently applied for the removal of the encroachment, which was the default remedy in the case where someone built across the boundary line.

The Free State High Court discussed the legal position regarding the year and a day rule. Before the *Rand Waterraad* judgment it was accepted that the year and a day rule was a defence against the landowner's demand for the removal of an encroaching structure.¹¹³ This case provides an illustration of how the year and a day rule was raised by the respondent as a defence to the owner's demand for removal of the encroaching structure.¹¹⁴ The applicability of the rule in South African law was questioned by the court. In its analysis of the rule the court relied on the research of Van der Merwe and Cilliers,¹¹⁵ who argued that the year and a day rule was mainly used for obtaining real servitudes through prescription in Roman-Dutch law. It provided a means for obtaining the work (*opus factum*) and not the land on which the work was built.¹¹⁶ Van der Merwe and Cilliers looked at the works of various Roman-Dutch authors and concluded that the rule was not part of the *ius generale* of Roman-Dutch law that was received into South African law.¹¹⁷ It was not a general rule in Roman-Dutch law that generally applied in the province of Holland. It was part of local statutes and customs that applied to local areas.

¹¹² 1997 (3) SA 120 (O).

¹¹³ This is discussed in the s 2.5.2 above where the two legs of the rule are analysed in terms of how it was applied in early case law.

¹¹⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 126-130.

¹¹⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 126-130; CG van der Merwe & JB Cilliers "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* 587-593 at 588.

¹¹⁶ This aspect is discussed in s 4.3.2 in chap 4 below.

¹¹⁷ CG van der Merwe & JB Cilliers "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* 587-593 at 588-591. See especially Voet's (Voet 8 2 6) work in s 2.4 above.

The court also considered two reasons why the rule should be rejected in South Africa. The first reason is that the rule (as applied in Roman-Dutch law) was used as an exception to the normal ways in which real servitudes could be obtained through prescription. This can be deduced from the words used when referring to the rule.¹¹⁸ Another argument advanced in *Rand Waterraad* for the denial of the rule was uncertainty. There was uncertainty about the exact duration of the period after which the affected landowner could no longer demand removal of the structures, and it was also unclear what the consequences of the rule were.

The conclusion of Hattingh J in *Rand Waterraad* was that the rule does not apply in South African law.¹¹⁹ After this, the court proceeded to determine whether the discretion should be exercised in the particular case. The court denied the application and opted to exercise its discretion in favour of the encroaching owner and to keep the encroachment in place.¹²⁰ The court recognised that the default remedy was removal. However, it decided that there are exceptional circumstances that could allow for a deviation from the common law (default) remedy. This would justify the court exercising its discretion in favour of the encroaching owner. The following factors were taken into consideration:¹²¹

- (a) Most of the structures excluding the pump were already completed. Therefore, the removal order would result in the demolition of completed buildings.
- (b) The applicant only objected to the encroachment in January 1983, although they had been informed of the structures in June 1980. For this reason there

¹¹⁸ In the writings of Roman-Dutch law authors reference is made to the normal ways of obtaining real servitudes, but words like “but” and “notwithstanding” were used to describe prescription by means of the year and a day rule. See CG van der Merwe & JB Cilliers “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* 587-593 at 588. See further Grotius 2 36 5 in which the ways of acquiring praedial servitudes are stated.

¹¹⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130, 139; CG van der Merwe “Law of property (including real security)” 1997 *Annual Survey of SA Law* 304-306 at 305; MJ De Waal “Sakereg” (1997) August *De Rebus* 537-538.

¹²⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138.

¹²¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138. These factors will be discussed in greater detail in chap 3 where a comprehensive study of the courts’ discretion is undertaken.

had been approximately three years before the applicants had filed the objection. This, the court remarked, was despite the fact that the applicants had argued that the encroachments posed a danger of pollution to the public.

- (c) The applicants had insisted on removal, even though respondents had offered to pay damages instead of removal. Furthermore, the applicants failed to provide any evidence for the quantification of the loss that had occurred as a result of the encroachment.
- (d) The applicant argued that the conduct of the respondents posed a danger of pollution to the public. However, even if the removal order was awarded the toilet and septic tanks (causing the pollution) were outside the property of the applicant and the pollution danger would persist even if the encroachment was removed.
- (e) The time period between becoming aware of the encroachment and filing the complaint for the removal of the encroachment, indicated to the court that there was lack of detriment for the affected landowner.
- (f) The applicant tolerates many other encroachments on his land.
- (g) The cost of removal of the encroachment was much less in June 1980, being the time at which the applicant had been sent notice of structures that had been erected on his land. When the encroachment was erected the cost of removal of the encroachment would have been R30 000. As a result of the long wait before the objection was filed, the cost of removal is considerably higher.
- (h) The loss that the applicant would suffer if the encroachment were left intact is much less than the loss the respondent would suffer if the encroachment is left in place.
- (i) The court states that every person has a duty to take reasonable steps to protect himself from harm. The applicant neglected to protect himself from harm caused by the encroachment in this case.
- (j) The removal order would practically result in the respondent's home being destroyed.

- (k) Justice and equity dictate that the tardiness with which the applicant had approached the whole removal process should result in the order for removal being denied.

Therefore, the facts in *Rand Waterraad* were deemed to reveal the “exceptional circumstances”¹²² and the applicant was ordered to endure the encroachment. Moreover, the parties were called upon to reach an agreement as to the amount of compensation to be paid for the encroachment. In terms of the legal position of the parties after the order was made, it seems that the encroaching owner was considered to be a *bona fide* occupier.¹²³ Whether this is correct is unclear.

2.6.2 Trustees, *Brian Lackey Trust v Annandale*¹²⁴

The *Brian Lackey Trust* case provides a good illustration of how the rigid enforcement of the primary remedy of removal was refused because of the possibility that it could produce unjust results. In this case, the plaintiff was the owner of two erven and the defendant owned the neighbouring erf. At the time when the plots were purchased they were all vacant.

When the plaintiff commenced with building operations all three parcels were undeveloped. The intention of the plaintiff was to build in such a way that his luxury home would straddle his two adjacent plots, but instead the building that was erected straddled his one plot and the defendant's. When the mistake was detected by a building inspector, operations had progressed to an advanced stage, with 80 percent of the property of the defendant's land being covered by the encroachment, forming what the court called a “massive encroachment”. The existence of the encroachment effectively resulted in the property being rendered useless to the defendant. The plaintiff offered to buy the property for an amount which according to him was well in excess of the original purchase price which the defendant had paid for the property.

¹²² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138.

¹²³ S Scott “Recent developments in case law regarding neighbour law and its influence on the concept of ownership” (2005) 16 *Stell LR* 351-377 at 361.

¹²⁴ Although the crux of the judgement is discussed in great detail in chap 3, for the sake of comprehensiveness a factual background is provided in this section.

This offer was rejected by the defendant who allegedly claimed either a higher amount or the removal of the encroachment. The plaintiff approached the court for an order claiming that the defendant was not entitled to the removal of the encroaching structure.

The Cape High Court as a point of departure stated that in the case of encroaching structures, the owner of land encroached upon could ordinarily claim the removal of the encroachment.¹²⁵ This is in line with the traditional way of dealing with encroachments, viz demolition of encroaching structures.

The main question to be considered in this case was whether the court had the discretion to order what amounted to an involuntary deprivation of property. The defendant claimed that the courts' discretion was limited to instances where encroachments were small or where there was acquiescence on the part of the affected landowner. On the other hand, the plaintiff averred that the court had a wide and equitable discretion to order demolition or damages.¹²⁶

The law regulating building encroachments was considered and the court found support from the *Rand Waterraad* judgement. It similarly confirmed that deviation from the default remedy of removal was possible in certain instances.¹²⁷ It found in favour of the plaintiff that the discretion was wide and should not only be limited to instances where the encroachment is small.¹²⁸ It held that this was in line with the South African approach in other areas where judicial discretion is exercised.¹²⁹ However, the court emphasised the fact that the discretion was not unfettered. It stated that the strict enforcement of the default remedy of demolition of the encroachment could sometimes lead to unjust results, and should thus not be awarded in all circumstances.¹³⁰

¹²⁵ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 19, 32.

¹²⁶ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

¹²⁷ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 27.

¹²⁸ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

¹²⁹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 27.

¹³⁰ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 32-33.

The court proceeded to determine whether the discretion should be exercised in the particular case. It recognised that there were in essence two possible outcomes in this case. The court could order either demolition of the encroaching structure in favour of the defendant, or payment of compensation resulting in the encroachment being left in place. The aim would be to find the outcome which would lead to the least unjust outcome. There were two considerations that were important in this regard. It considered the possible prejudice for the respective parties and the principles of neighbour law.¹³¹ Based on proportionality of prejudice and principles of neighbour law, it was concluded that demolition would be unjust.

The court acknowledged that the court order could lead to the loss of the defendant's property, but stated that the loss that would be suffered if demolition were granted would be far greater for the plaintiff than the loss for the defendant should damages be awarded. Furthermore, it stated that, unlike the plaintiff, the defendant would be fully compensated if the encroachment were left in place. If the encroachment were demolished the plaintiff would lose his home and not be compensated for his loss. The court assessed the degree of prejudice by considering the fact that courts are generally reluctant to order removal of economically valuable building works.¹³²

The court also took principles of neighbour law into consideration.¹³³ It stated that it was not willing to make an order that would potentially cause further severance of the relationship between the neighbours. Furthermore, judging by the fact that the defendant was initially willing to accept monetary compensation, a demolition order would increase his superior bargaining power which could allow him to extort large amounts of money from the plaintiff. On the basis of all the above considerations, Griesel J came to the conclusion in *Brian Lackey Trust* that compensation was the appropriate remedy.

¹³¹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

¹³² Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 38. See also chap 3 for a further discussion of this aspect.

¹³³ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 40.

The conclusions reached in both *Rand Waterraad* and *Brian Lackey Trust* have far-reaching implications. From both the cases it is clear that courts are able to order damages even in the case of very large encroachments. The result in *Brian Lackey Trust* furthermore creates the impression that courts are also able to award compensation in circumstances that result in a compulsory or involuntary loss of use of a significant part of the affected landowner's property. The court's discussion of this aspect was superficial and incomplete, which leads to the impression that perhaps this new approach to the building encroachment problem was not well thought through.

2.7 Conclusion

In this chapter I provided an introduction to the law regulating building encroachments in South Africa. When a landowner erects a building encroachment, the affected neighbour is ordinarily entitled to the removal of that encroachment. This remedy of removal is based on the idea that a landowner is entitled to undisturbed use of his property, based on his right of ownership. Therefore, when an encroachment interferes with the affected landowner's right to have undisturbed use of his property, this landowner has the right to demand removal of the encroaching structures. It is argued that the basis for the default remedy of removal is the right to enjoy ownership of the land without interference by a neighbour. The encroachment poses a limitation on the ownership rights of the affected landowner and therefore, at least in theory, the affected landowner should be able to insist that the encroachment is removed.

In order to understand how building encroachments are regulated in South Africa currently, it was necessary to consider the historical origins of the default remedy of removal. The remedy which originated in Roman law ensured that the encroachment should as a point of departure be removed. This would occur in Roman law either by way of self-help (where the encroachment became part of the affected landowner's property through attachment) or with an application for the *actio negatoria* (where the encroachment protruded into the airspace over the affected landowner's property).

This remedy was taken over in Roman-Dutch law. However, the enforcement of the default remedy of removal was sometimes mitigated by a defence in the form of the year and a day rule. The order for removal was denied and the encroachment would remain in place if the requirements of the year and a day rule were satisfied. The year and a day rule ensured that in instances where a landowner has stood by for a year and a day and did not object to the encroachment he would subsequently be precluded from insisting upon removal.

In South Africa, especially in the early South African case law, this defence against the default remedy of removal was accepted and applied. However, it subsequently appeared that the year and a day was a rule in fact applied only in terms of local statute and custom in the Netherlands and that it was not part of the *ius generale* of Roman-Dutch law, and therefore it should not be applicable in South African law.¹³⁴ Subsequently, it was decided that the rule did not form part of South African law.¹³⁵ After this, courts became more concerned with asking questions relating to whether it had the discretion to award compensation instead of removal of an encroaching structure.

It seems as though an affected landowner may have to accept the continued existence of the encroachment in certain circumstances. This is evident from the two recent cases dealing with building encroachments in South Africa. The common law remedy of removal, which has been the age-old way of dealing with encroaching buildings, is no longer strictly being enforced. The affected landowner may have to tolerate the encroachment. This could occur despite the fact that the continued presence of the encroachment causes a serious limitation on the rights of the affected landowner, especially in cases of large or significant encroachments.

¹³⁴ CG van der Merwe & JB Cilliers "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* 587-593 at 591; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

¹³⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

Furthermore, it is apparent that although the remedy of removal is based on the right to ensure undisturbed use of the land based on ownership, courts may deny removal in some cases.¹³⁶ Therefore, it was important to ask when it would be acceptable to insist upon removal of an encroaching structure on your land. Stated differently, it is important to determine when it would be justifiable to limit ownership by ordering that an encroaching structure should remain in place, even against compensation.

My conclusion was that in the case of minor encroachments it may be inappropriate to insist upon removal. In this case the limitation on the right of ownership is relatively small and if the landowner insists upon removal it may be considered to reflect an absolutist view of ownership (abuse of right). This is primarily because what is being insisted upon (namely the removal of the encroachment) is unreasonable and disproportionate compared with the minor limitation on the ownership rights of the affected landowner.

However, in cases where the encroachment is significant and imposes a serious limitation on the rights of the affected landowner it seems questionable whether it would amount to an abuse of right or in line with an absolutist view of ownership to insist upon removal. Nonetheless, it was seen this way in the *Brian Lackey Trust* case, where the court saw the demand for removal as an indication that the owner inappropriately viewed ownership as an absolute right.

What has transpired from recent case law is that courts are willing to refuse to order the removal of unlawfully erected encroaching buildings, even in cases of significant encroachments. In both the *Rand Waterraad* and *Brian Lackey Trust* cases the respective courts ordered that the encroachment should remain in place, even though the continued existence of the encroachment resulted in a serious limitation of the affected landowner's right. In the next chapter I question when it will be justifiable to leave an encroaching structure in place and to award compensation instead of removal. Therefore, I assess the discretion of the courts in the context of building encroachments.

¹³⁶ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 43.

Chapter 3: Judicial discretion

3.1 Introduction

A landowner affected by a building encroachment might comprehend how a court could deny an application for the removal of a neighbour's wall that results in a minor encroachment on his property. However, it might be very difficult to understand how a court could find that it would be just and equitable that a large house partially built unlawfully on his property should remain in place, effectively rendering the property useless to him. The difference between the above-mentioned scenarios is important in this chapter.

Judicial discretion can be seen as the highest form of power given to the judiciary to decide a matter based on a value judgement. Herein lies the power given to courts not only to decide against a claimant whose rights were infringed, but also to override certain established rules and law, based on what is considered just and equitable in a particular case. In the following section, it is established that the notion of judicial discretion in the framework of building encroachments is not an idea which is characteristic only of contemporary law pertaining to building encroachments, but that such a wide and equitable discretion is entirely consistent with the approach of our law to similar situations in other areas.¹

There are three questions that are relevant when considering judicial discretion in the context of building encroachments in South Africa. Firstly, it is necessary to question whether South African courts do have the discretion to deny the remedy of removal and leave an encroaching structure intact. South African jurisprudence will be investigated in this regard. Secondly, if it is accepted that the discretion does exist, it needs to be determined in which cases the discretion is (or should be) exercised. I will focus primarily on how the courts make the decision to keep an encroaching structure intact. The cases in which the discretion has been exercised

¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 28.

are mapped out in order to ascertain whether there is some sort of common ground or similar methodology which could indicate the factors that are taken into consideration when the discretion is exercised. Both *Rand Waterraad v Bothma en 'n Ander* ("Rand Waterraad")² and *Trustees, Brian Lackey Trust v Annandale* ("Brian Lackey Trust")³ raised two important issues that will be addressed in the section below: firstly, whether South African courts have the discretion to award compensation instead of removal; and secondly, in which cases it would be appropriate to exercise the discretion and leave the encroachment in place. As with the *Rand Waterraad* decision, the Cape High Court in *Brian Lackey Trust* also relied on neighbour law principles like reasonableness and fairness to reach an outcome that balances the interests of the two property owners. Neighbour law principles and disproportionality of prejudice are justifications prevalent in the case law, and are consequently analysed in the chapter. It will become clear that neighbour law principles - such as reasonableness and fairness - that are generally used in the context of nuisance law are also relied upon to solve the encroachment problem.⁴ The resulting confusion is highlighted below. With regard to the disproportionality of prejudice argument, it seems as if the rights-based paradigm (i e the party with the strongest right will almost always win, based on his entitlement) is being compromised. Instead, the courts decide to award compensation instead of removal by taking into consideration the potential harm that could be suffered either as a result of demolition or as a result of denial of a demolition order.

It seems as though South African courts are influenced by English law in building encroachment cases.⁵ The exercise of discretion is not as problematic in English law

² 1997 (3) SA 120 (O).

³ 2004 (3) SA 281 (C).

⁴ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 552-553 questions whether these reasons are acceptable when solving encroachment problems. She states that these reasons would be more acceptable when dealing with minor encroachments, but where the affected neighbour is deprived of the whole of his land she argues that in terms of the test in *FNB* a more compelling reason would be necessary for the deprivation to be in line with the requirements of s 25 of the Constitution. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC). See further chap 5 below.

⁵ See s 3.4.3 below.

as in South African law, because there is a statute authorising the discretion⁶ and because the English doctrine of estates in land makes it possible for two different rights in the same land to exist simultaneously.⁷ It will accordingly be necessary to look at the English law pertaining to building encroachments to see whether the approach in terms of English law is used or may be useful in the South African context.

Finally, the extent of the discretion is considered. It is necessary to question what the ambit of the courts power is in terms of the discretion, especially considering the uncertainty that exists with regard to this question. The extent of the discretion is important because it needs to be determined what the discretion authorises the court to order. It will become clear in later chapters that the extent of the discretion is pivotal in explaining the outcome that is reached in encroachment cases.⁸ This is because the outcome in an encroachment dispute needs to be explained doctrinally and must be constitutionally compliant. In some cases, leaving the encroachment intact can result in the loss of the entitlement of use and enjoyment of the portion of the property on which the encroachment is erected. In other cases, where transfer of the affected land is explicitly ordered, the discretion-based outcome may amount to a forced transfer of property that needs to comply with section 25(1) of the Constitution.⁹

In light of the three questions mentioned above, this chapter explores the courts' discretion to deviate from the long-standing common law remedy of removal and leave the encroachment in place. The problem with the current approach of South African courts is the inclination of courts to apply the discretion without substantiating the nature and extent of the discretion and the basis upon which the discretion is exercised. This is aggravated by the fact that the authority in South African law for the exercise of this discretion is unclear. It needs to be clear what the courts are

⁶ See s 50 of the Supreme Court Act 1981 (England & Wales), which replaced the Chancery Amendment Act 1858 (Lord Cairns's Act), s 2.

⁷ See s 3.4.2 below.

⁸ See chaps 4 and 5 below.

⁹ The Constitution of the Republic of South Africa 1996. See chap 5 below.

ordering so that the consequences can be set out in a doctrinally and constitutionally acceptable manner.

3.2 Judicial discretion in the context of building encroachments in South Africa

In 1997 the Free State High Court found in *Rand Waterraad*¹⁰ that it had the discretion to award damages instead of removal in the case of a significant building encroachment.¹¹ The idea of judicial discretion was not a novel one. Prior to *Rand Waterraad* similar exercises of discretion have generally been accepted in South African case law pertaining to claims based on specific performance,¹² enrichment¹³ and interdicts.¹⁴

In encroachment cases, the discretion was sometimes explicitly exercised,¹⁵ in some cases it was denied,¹⁶ and in other cases it was quite clear that the existence of the discretion did not form the *ratio decidendi* of the case, but was simply assumed to form part of South African law.¹⁷ For the purposes of understanding how the discretion is exercised in recent South African case law, it is necessary to analyse the earlier judgements where specific reference is made to awarding compensation instead of removal.

¹⁰ 1997 (3) SA 120 (O).

¹¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138. See further CG van der Merwe & JM Pienaar "Law of property (including real security)" 1997 *Annual Survey of SA Law* 304-306; MJ de Waal "Sakereg" (1997) August *De Rebus* 537-538; S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stell LR* 351-377 at 360-362.

¹² This is discussed in *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 31. The court in *Brian Lackey Trust* used the case of *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) 783 to show how the court exercises its discretion in the context of a claim for specific performance. This is confirmed later in the case of *Phillips v South African National Parks Board* (4035/07) [2010] ZAACGH 27 [22 April 2010] par 24.

¹³ *Fletcher and Fletcher v Bulawayo Waterworks Co Ltd* 1915 AD 636 at 648. This case emphasised how the discretion is exercised in cases based on a claim for enrichment as a result of improvements which allegedly increase the value of the land.

¹⁴ CB Prest *The law and practice of interdicts* (1996) 233-253 at 233.

¹⁵ *De Villiers v Kalson* 1928 EDL 217 at 231; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78 at 87, 88.

¹⁶ *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354 at 366.

¹⁷ *Stark v Broomberg* 1904 CTR 135; *Van Boom v Visser* (1904) 21 SC 360; *Naudé v Bredenkamp* 1956 (2) SA 448 (O); *Meyer v Keiser* 1980 (3) SA 504 (D); *Hornby v Municipality of Roodepoort-Maraisburg and Another* 1918 AD 278. This was also identified in *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

*Stark v Broomberg*¹⁸ provides a good early example of how the Supreme Court, without explicitly mentioning it, exercised its discretion in favour of the defendant and ordered that an encroaching wall should remain in place. The court held that the plaintiff was *prima facie* entitled to the removal of the encroachment, but found that the dispute in this case could be resolved more justly without removal of the encroaching wall.¹⁹ In conclusion it was stated that it was not the practice of courts to order removal where the encroachment has been erected without any protest and had stood for a year or more without the affected landowner demanding removal.²⁰ In such a case, courts would be more inclined to order compensation instead of removal.

Likewise, in *Van Boom v Visser*,²¹ the plaintiff applied for a court order compelling the defendant to remove a building that encroached on his land. In the alternative the plaintiff sought an order compelling the defendant to take transfer of the portion of property encroached upon, for a determined amount plus additional damages. The court found in favour of the plaintiff and ordered that the encroachments be removed. However, because the affected landowner was willing to accept damages instead of removal, the court stated that the defendant could pay damages to the plaintiff in exchange for removal. Therefore, in both *Stark v Broomberg* and *Van Boom v Visser*, the court effectively denied the landowner's right to the removal of a building encroachment, inclining instead towards an award of compensation. In *Stark v Broomberg* the award of compensation instead of removal was inspired by the length of time for which the encroachment stood without protest; whereas in *Van Boom v Visser*, the removal order was denied because the affected landowner was willing to accept compensation in exchange for giving up the portion of property on which the encroachment stood.

¹⁸ 1904 CTR 135.

¹⁹ *Stark v Broomberg* 1904 CTR 135 at 137.

²⁰ *Stark v Broomberg* 1904 CTR 135 at 138. The year and a day defence against an affected landowner's claim for removal is discussed in chap 2 above.

²¹ (1904) 21 SC 360.

*Meyer v Keiser*²² is another case where, without actually deciding the point, the court assumed the existence of the discretion to award compensation. The defendant admitted the encroachment but claimed that it was a *bona fide* error and requested the court to exercise its discretion in favour of ordering the transfer of the plaintiff's land to the defendant.²³ The court rejected the defendant's request. Although it did not explicitly deny that it had the discretion in certain cases to refuse to order removal of the encroaching structures, the court found that the transfer of property requested by the defendant could not be the primary remedy. Transfer of property to the encroaching owner would, if ordered, be merely incidental to the award of compensation.²⁴

The defendant in *Meyer v Keiser* relied strongly on the case of *Christie v Haarhoff and Others*²⁵ and on the *Van Boom* judgement. In *Christie v Haarhoff* the facts were similar to those of *Meyer v Keiser*. The plaintiff claimed that the detriment caused by the encroachment was due to the defendant's carelessness in not meticulously ascertaining the boundaries of his property before proceeding with building operations.²⁶ The High Court of Griqualand nevertheless exercised its discretion in favour of the defendants and ordered that compensation be paid by the encroaching owner.

The judgement in *Hornby v Municipality of Roodepoort-Maraisburg and Another*²⁷ once again illustrates how the issue of judicial discretion in encroachment cases is touched upon, but not clarified definitively. Innes CJ stated *obiter* that the court would be slow to order the removal of buildings if the justice of the case could be met

²² 1980 (3) SA 504 (D).

²³ *Meyer v Keiser* 1980 (3) SA 504 (D) at 505.

²⁴ *Meyer v Keiser* 1980 (3) SA 504 (D) at 507; *De Villiers v Kalson* 1928 EDL 217 at 233. The extent of the court's discretionary power is discussed in greater detail in s 3.6 below. Already in these earlier judgements it is clear that the question arises as to what the discretion includes. AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 611, 617, points out that the courts in the early South African judgements did not always keep the two issues of their discretion to award damages instead of removal of the encroachment and the power to order transfer of the land apart.

²⁵ (1886-1887) 4 HCG 349 at 356.

²⁶ *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 352.

²⁷ 1918 AD 278.

by an award of damages.²⁸ Solomon JA investigated the English law on the matter and found that in a similar situation the English courts would be loath to order the removal of the buildings. However, he left open the question whether South African law should be guided by English law. This point of view was confirmed in the subsequent case of *De Villiers v Kalson*.²⁹

The facts of the *De Villiers* case are somewhat different from the case law mentioned above, but the principle remains the same. Here, there had been an encroachment on the *rights* of an adjoining owner rather than a physical encroachment on the property of another. Graham JP stated that there was no reason why this case should in essence be any different in terms of the plaintiff's rights, and found that much the same arguments could be advanced in relation to encroachment on rights as for encroachment on land.³⁰

The plaintiff in *De Villiers* had purchased at auction a number of building lots from the Municipality of East London, subject to certain restrictive conditions. One of these lots was sold to the defendant. One of the conditions stipulated that the owner of the property was precluded from erecting buildings within 8 feet of either side boundary. After a lengthy investigation into what exactly amounted to the "side boundary" of the properties, the court stated that in building in the way that he did the defendant had infringed on the plaintiff's rights, raising the question whether the plaintiff could insist on removal of the structure that had been erected in contravention of the condition.³¹

The court stated that it had discretion to give the defendant an opportunity of paying damages to the plaintiff. Graham J concluded:

"After all there must surely be some discretion vested in a Court even in cases involving breaches of what are termed negative covenants in the English law, and I can find no authority in our law which states that under no circumstances can the

²⁸ *Hornby v Municipality of Roodepoort-Maraisburg and Another* 1918 AD 278 at 290.

²⁹ 1928 EDL 217.

³⁰ *De Villiers v Kalson* 1928 EDL 217 at 230.

³¹ *De Villiers v Kalson* 1928 EDL 217 at 225.

Court exercise such a discretion. It is quite true that for the reasons stated in so many of the English cases, the wrongdoer who encroaches on another's rights cannot be heard to say, unless there are some very special circumstances, that a monetary compensation is sufficient, for that would be tantamount to compelling the plaintiff to consent to expropriation, but on the other hand it would be equally inequitable to place the plaintiff in a position to extort wholly excessive compensation from the defendant by granting an order for the removal of the buildings in cases in which the facts disclose that a remedy in damages would fully meet the justice of the case ... *I therefore come to the conclusion that I have a discretion in this case to grant an order giving the defendant an option of paying damages in place of removing his buildings if the plaintiff has satisfied me that he has sustained damages.*³²

A rather different stance was taken in *Higher Mission School Trustees v Grahamstown Town Council*.³³ In this case the plaintiffs had claimed the removal of a building the defendant council had erected partly on the property of the plaintiffs. The Eastern Districts Local Division confirmed that it had no discretion to "deprive the plaintiffs of their common law right to have the obstruction on their property removed."³⁴ It found that in the absence of any defence to trespass, the court would not be willing to rule in favour of the defendant and award compensation instead of removal.

Any uncertainty regarding the existence of the discretion to award damages instead of removal was clarified in *Rand Waterraad v Bothma en 'n Ander*.³⁵ The Free State High Court in *Rand Waterraad*, after undertaking a thorough investigation of early South African case law in which the discretion was assumed, stated that it would be willing to exercise its discretion in favour of damages instead of removal.³⁶ Similarly, in the subsequent case of *Brian Lackey Trust*, the Cape High Court exercised its discretion in favour of leaving the encroachment in place.³⁷ In *Brian Lackey Trust* Griesel J identified the "crisp issue" that needed to be determined as whether or not

³² *De Villiers v Kalson* 1928 EDL 217 at 231 (my emphasis).

³³ 1924 EDL 354. The facts of the *Higher Mission* case are discussed in chap 2 above with reference to the applicability of the year and a day rule in South African law.

³⁴ *Higher Mission School Trustees v Grahamstown Town Council* 1924 EDL 354 at 366.

³⁵ 1997 (3) SA 120 (O) at 139. For the facts of *Rand Waterraad*, see s 2.6.1 in chap 2 above.

³⁶ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 139.

³⁷ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 1.

the court has a discretion to order what amounts to an involuntary deprivation of property.³⁸ In this case, the plaintiff had erected a house that constituted a significant encroachment on the property of his neighbour. The plaintiff approached the court for an order prohibiting the defendant from removing the encroachment. Both parties agreed that in general courts do have the discretion to award compensation instead of removal of the encroaching structures; but they disagreed on the extent of the discretion.³⁹ The plaintiff argued that the discretion was wide and equitable and the defendant argued that the discretion was limited to instances where the encroachment was insignificant. The court proceeded on the assumption that the discretion did exist and accordingly questioned the circumstances that would be appropriate for the exercise of such discretion.⁴⁰ The discretion of the court in the context of encroachments was confirmed recently in the case of *Phillips v South African National Parks Board*.⁴¹

In *Phillips*, the Eastern Cape High Court again illustrated that the discretion to leave an encroachment in place does exist in South African law.⁴² In this case the court was faced with the question of whether it had the discretion to refuse an interdict for the removal of an encroaching fence despite the applicant having a clear right to removal thereof. The respondent had erected a fence on the property of the applicant with the initial idea of acquiring the portion of land incorporated by the fence (the SANParks portion) from the applicant's predecessor in title. The sale of SANParks failed to take place and it was clear that the fence was an encroachment that resulted in the applicant losing a substantial portion of his property. When the applicant had purchased his property from his predecessor in title, he was aware of the fence and the SANParks portion on the side of the respondent's side of the fence; however, Van Rooyen (the applicant's predecessor in title) had reassured him

³⁸ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 1. For the facts of *Brian Lackey Trust*, see s 2.6.2 in chap 2 above. See further A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 539-541; S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 Stell LR 351-377 at 362-364; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 596-600.

³⁹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

⁴⁰ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

⁴¹ (4035/07) [2010] ZAECGHC 27 [22 April 2010].

⁴² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 [22 April 2010] par 21.

that the sale of SANParks failed to take place. The applicant had been adamant that he was not willing to buy the property without the SANParks portion.

The applicant applied for an interdict to remove the fence from the current position. He argued that the fence should be moved to the cadastral boundary between the two properties.⁴³ The respondent's initial claim was that the SANParks portion was sold to him by Van Rooyen. With regard to this defence, the court found that there was inadequate proof of the sale and therefore the question arose whether the encroaching fence should be removed or remain in place. The respondent claimed that it would be costly, inexpedient and impractical to move the fence to the cadastral boundary. He argued that the court has the discretion to order that an encroachment should remain in place on the basis of fairness.⁴⁴ Furthermore, he argued that damages should be awarded instead of removal.

The court confirmed that it had the discretion to deny a demolition order in the context of encroachments constructed on the land of another.⁴⁵ It relied on *Rand Wateraad* and *Brian Lackey Trust* to assume the discretion to refuse an interdict even where the applicant has a clear right to removal of an encroachment.⁴⁶ The court then proceeded with the question whether the discretion should be exercised in the particular case.⁴⁷ Therefore, this case provides a good illustration of the courts discretion to leave encroachments in place in South African law.

Based on the above discussion of the discretion of courts in the context of encroachments, it seems as though South African courts do have the discretion to deny the common law remedy of removal and leave the encroachment in place. It is clear that, while the affected landowner can approach the court for an order

⁴³ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 2.

⁴⁴ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 3.

⁴⁵ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

⁴⁶ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

⁴⁷ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

compelling removal, the court has the discretion to deny removal and leave the encroachment in place.⁴⁸ The question surrounding the circumstances that would be appropriate for the exercise of such discretion is considered in the section below. This was an issue in the *Rand Waterraad*, *Brian Lackey Trust* and the *Phillips* judgements. In all three cases, the respective courts accepted that the discretion existed, but had to determine whether the discretion had to be exercised in the particular case.⁴⁹

3.3 When should the discretion be exercised?

In *Rand Waterraad*, the Free State High Court questioned whether the discretion should be exercised in the particular case.⁵⁰ It found that the discretion to deny the removal order was dependent upon the circumstances of the case. The circumstances in *Rand Waterraad* involved the respondent erecting several structures which either completely or partially encroached upon the land of the applicant. As a result, the applicant applied for the removal of the structures that the respondent had unlawfully built on his land. The court held that the facts in *Rand Waterraad* were exceptional enough to justify a departure from the default remedy of removal which is usually applicable in the case of building encroachments.⁵¹ The court did, however, attach a proviso, specifying that the discretion should be exercised only in exceptional circumstances.⁵² It took numerous factors into consideration in its decision to keep the encroachment in place.⁵³ The court began by looking at the time lapse from the implementation of the encroaching structures (1979) to the lodging of the application for the first time (1983). It found that the applicant delayed for some 4 years in bringing the application. Moreover, the applicant had already been informed in 1980 by the municipality of Sasolburg of the existence of a servitude on their land, but neglected to question the servitude and only lodged the application for the denial of the servitude nine years subsequent to

⁴⁸ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 27.

⁴⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130; Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 17-31; *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 21.

⁵⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁵¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138.

⁵² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138.

⁵³ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138-139. See s 2.6.1 in chap 2 above.

the notification. The court regarded the tardiness with which the application was brought as an indication that the disadvantage suffered by the applicant was not as serious as it alleged. The applicant had initially claimed that the conduct of the respondent posed a danger of pollution to the public. Based on the delay in bringing the application, the court denied the applicants' contention that the structures caused pollution which was a danger to the public. The court concluded that the applicant would have approached the situation with more urgency had there been such supposed danger. Additionally, the court considered the fact that the cost of removal was considerably higher as a result of the long time between being notified of the structure and the application for removal. Consideration was also given to the fact that the application was brought only when most of the structures had already been completed. Therefore, if removal was ordered, the completed ("economically valuable") buildings would have to be demolished. The court emphasised that the applicant had a duty to take reasonable steps to protect itself from the harm it was complaining about. According to the court, the applicant in this case had neglected to do this. This view was taken on the basis that had the applicant been more prompt in its approach, the harm that resulted may have been prevented. The court also stated that the toilet and septic tanks (being the cause of the alleged pollution) were in any event outside the property of the applicant and would persist even if the order for removal was granted.

After taking the above-mentioned considerations into account, the court then proceeded to investigate the loss that would be suffered if the encroachment were left intact and compared it with the loss if the encroachment were removed. In this case the defendant was willing to pay damages for the loss suffered by the applicant, but the applicant insisted on the removal of the encroachment. Therefore, the court concluded that the loss that the applicant would suffer if the encroachment were left intact was less than the loss that the defendant would suffer if the encroachment were removed. The court also held that the order for removal would be unjust because it would result in the defendant's home being destroyed.

Hattingh J concluded his judgement in *Rand Waterraad* with perhaps the most compelling factor swaying the court towards awarding compensation instead of removal. On the basis of the ideal of fairness, the court assessed the potential prejudice to the encroaching owner if removal should be ordered and compared it with the prejudice to the affected landowner, should the claim for removal be denied.⁵⁴ According to the court, this weighing up of potential loss is necessary in order to reach a fair and just outcome.⁵⁵ Furthermore, the court found that the applicant did not prove the extent of the loss caused by the encroachment or quantify the loss that it suffered because of the encroachment. The court held in favour of the defendant after determining that the disadvantage that would have to be suffered by the plaintiff would be less than that of the defendant should removal be allowed. As a result, it ordered that the encroachment should remain intact. Therefore, the court found that as a result of the exceptional nature of the circumstances of the case, the discretion should be exercised in favour of the encroacher.⁵⁶ The consideration of fairness emphasised in *Rand Waterraad* was illustrated even more pertinently in *Brian Lackey Trust*.⁵⁷

In *Brian Lackey Trust* the plaintiff sought an order precluding the defendant from removing the encroachment that covered 80 percent of his property. It was questioned whether removal should be ordered in favour of the defendant, or whether the court should exercise its discretion in favour of the applicant, leaving the encroachment in place. Both parties involved in this encroachment dispute agreed that the court did have the discretion to deny removal; however, there was disagreement about when the discretion should be exercised.⁵⁸ The plaintiff claimed that the court has a wide and equitable discretion to grant or deny a demolition

⁵⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 136. The court stated that a constant normative content must be given to the ideal of fairness in terms of which the actual or potential prejudice is distributed equally between the neighbours. In *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 35, the Cape High Court confirmed the view in *Rand Waterraad*, and found that there would be a striking disproportionality of prejudice if a demolition order was granted.

⁵⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138. This was again reiterated in *Brian Lackey Trust* case. See *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

⁵⁶ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 138-139.

⁵⁷ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

⁵⁸ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

order.⁵⁹ It is was noted in *Brian Lackey Trust* that case law prior to *Rand Waterraad* did not provide clarity on this issue. The plaintiff relied on the judgement of *Rand Waterraad* in support of the argument that the court had a wide and equitable discretion to award compensation instead of removal based on the surrounding circumstances of the particular case.⁶⁰ Therefore, on the plaintiff's contention, the court can exercise its discretion even in cases where the encroachment is significant, provided the circumstances of the case dictate such an outcome. The defendant argued that the discretion was limited to instances where the encroachment was minor or trivial, or where there had been acquiescence or waiver on the part of the affected landowner.⁶¹ He relied on English law for arguing that the English courts have developed the good working rule for deciding between injunctive relief and money damages.⁶² This would mean that, on the basis of one of the indicators in terms of the good working rule as established in *Shelfer*, the discretion will only be exercised in the case of minor encroachments.⁶³ The court rejected the defendant's contention that the discretion was limited only to minor encroachments as indicated in terms of the English approach.⁶⁴ Therefore, Griesel J stated that the discretion is not limited only to cases where the encroachment is minor or trivial, but that the discretion may be exercised in relation to any encroachment.⁶⁵ He also stated that it can be argued that none of the earlier cases explicitly stated that as a matter of law the discretion was not available when dealing with serious encroachments.⁶⁶ Therefore, the court confirmed that the discretion may be exercised in the case of significant encroachments. The court proceeded to determine whether the discretion should be exercised in the particular case after having overcome the hurdle of deciding whether the discretion applies to significant encroachments. It concluded that the main reason for exercising the discretion in favour of denying demolition is to ensure that removal of the encroachment would

⁵⁹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

⁶⁰ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 20, 26, 27. See also *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130, 132.

⁶¹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 20.

⁶² Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 22.

⁶³ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 22. For the English approach to the problem of building encroachments, see s 3.4.2 below.

⁶⁴ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 29-30.

⁶⁵ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

⁶⁶ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

not lead to an unjust outcome. Based on the circumstances of the case, the outcome would be unjust if demolition was awarded.⁶⁷

There are two important aspects of the *Brian Lackey Trust* judgement that need further consideration. Firstly, there is the reliance upon South African neighbour law principles in determining whether the discretion should be exercised in the particular case and secondly, the rejection of the defendant's claim that the discretion is limited to minor or insignificant encroachments. These two aspects will be discussed in the section below as possible arguments in favour of the discretion to award compensation instead of the remedy of removal in the case of encroachment by building. With regard to the first aspect, namely the applicability of South African neighbour law principles, the following is important. The court in *Brian Lackey Trust* decided in favour of the plaintiff and denied the order for removal of the encroachment. It decided this on the basis of a wide and equitable discretion as emphasised in the *Rand Waterraad* judgement. In *Rand Waterraad* the court found that the discretion should be exercised when all surrounding circumstances are taken into consideration. If the circumstances are exceptional enough – as they were in *Rand Waterraad* – then the discretion should be exercised in favour of the encroacher and the encroachment should not be removed. The circumstances that justified leaving the encroachment intact in *Brian Lackey Trust* were the following two considerations: firstly that the prejudice for the encroaching owner should demolition be ordered would far outweigh the prejudice for the affected landowner should the demolition order be denied; and secondly of the general principles of fairness and reasonableness in terms of neighbour law.⁶⁸ These two considerations are discussed in the section below.

With regard to disproportionality of prejudice, the court looked at the cost of demolition, the cost of rebuilding the house and the inconvenience due to the lengthy delay before completion, and compared that with the prejudice potentially suffered by the plaintiff. The court took into consideration the fact that the defendant effectively lost all use and enjoyment of the property, but found that unlike the plaintiff, the

⁶⁷ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

⁶⁸ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

defendant would be fully compensated for his loss if compensation were awarded.⁶⁹ The court relied on neighbour law principles to justify its decision to award compensation instead of removal. Furthermore, an important additional consideration was the fact that the encroaching owner was willing to offer monetary compensation, but the affected landowner refused to accept it. It was found that, should demolition be granted, the affected landowner would be able to use his bargaining power to extract unreasonably high amounts from the encroaching owner. The conclusion in *Brian Lackey Trust* was that the remedy of compensation would fully meet the justice of the case, and that the encroachment should remain in place.⁷⁰ The court in the *Phillips* case relied on *Brian Lackey Trust* and the balancing of prejudice in order to determine which outcome would be the most appropriate in the particular case.⁷¹ In *Phillips*, the prejudice for both parties was balanced by looking at the loss that would be suffered by the encroacher if the encroachment were removed and the loss for the affected landowner if the encroachment was left intact. The court carefully considered the arguments highlighted by the respondent, for example costs, environmental damage and inexpedience. On the other hand, it considered the loss for the applicant if the fence were allowed to remain in place. The court relied on the language in *Brian Lackey Trust* and concluded that there was not a “striking” disproportionality of prejudice if the fence was removed and placed on the cadastral boundary.⁷² Therefore, it found in favour of the affected landowner and ordered that the encroachment be removed.

The second aspect that is important in *Brian Lackey Trust* is the court’s rejection of the defendant’s claim that the discretion is limited to minor or insignificant encroachments. As mentioned above, the defendant in this case had relied upon English law for his claim that the discretion is limited to instances where the encroachment is small. English courts have the discretion to award damages instead of injunctions in terms of section 50 of the Supreme Court Act.⁷³ The court in *Shelfer*

⁶⁹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 36-37.

⁷⁰ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 34, 39.

⁷¹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 51.

⁷² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 51.

⁷³ See s 3.4.2 below.

*v City of London Electric Lighting Co*⁷⁴ established a good working rule in terms of which the choice between the two remedies may be made easier. Although removal is still the default remedy in the case of building encroachments in terms of English law, damages should be preferred in lieu of injunction if (amongst other things) the injury to the plaintiff's rights is small. The English approach to building encroachment problems will be considered below, as well as the influence that English law has had on early South African case law.

3.4 Arguments in favour of judicial discretion

3.4.1 South African neighbour law principles

It was held in *Rand Waterraad* that courts must always endeavour to harmonize the neighbouring owners' property interests.⁷⁵ Similarly, it was found in *Brian Lackey Trust* that the aim of neighbour law is to achieve harmony in the relationship between neighbours when conflict arises between the respective owners' interests.⁷⁶ Therefore, in both these cases the respective courts appealed to neighbour law principles to justify the exercise of discretion in favour of ordering compensation rather than removal. However, reference to these principles in the encroachment framework has caused uncertainty.

Van der Walt considers the courts' use of the reasonableness standard to solve encroachment disputes.⁷⁷ He distinguishes between nuisance and encroachment cases.⁷⁸ The reasonableness standard is fundamental in nuisance law. It is an objective standard that requires reciprocity, mutual respect and neighbourly

⁷⁴ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

⁷⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 133, 134. See further CG van der Merwe & JM Piernaar "Law of property (including real security)" 1997 *Annual Survey of SA Law* 304-306 at 305; MJ de Waal "Sakereg" (1997) August *De Rebus* 537-538 at 537; S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stell LR* 351-377 at 360.

⁷⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 40.

⁷⁷ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *SALJ* 592-628 at 600.

⁷⁸ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *SALJ* 592-628 at 600.

forbearance.⁷⁹ In other words, each neighbour is required not to exceed the limits of his rights and unlawfully infringe upon the rights of his neighbour, but also to reasonably tolerate a certain level of intrusion (noise, dust) caused by the use of the neighbouring land.⁸⁰ However, the idea of mutual forbearance and accommodation cannot find application in cases where a neighbour physically invades the other's land by unlawful building works. In nuisance law, the idea of reasonableness rests on the assumption of otherwise normal and lawful use of one's property, and an encroaching building is neither of those.

Based on this view of reasonableness in the context of nuisance law, Van der Walt argues that what South African courts have in mind when they speak about "reasonableness" in the context of encroachment situations is something equivalent to the English law notion of equity.⁸¹ He further asserts that the use of the word "reasonableness" in encroachment cases should be restricted to what he refers to as a "policy call" in favour of the encroaching owner, based on the unfairness of enforcing removal. What courts are called upon to do is to weigh up in the particular case the possible loss or harm for the encroaching owner should demolition be ordered, as opposed to the possible loss for the affected landowner if the demolition order were denied. Therefore, reasonableness really means fairness in this context, so that the most equitable outcome is reached by assessing the harm, loss or inconvenience for either party in an encroachment case.

The real difficulty arises when assessing the harm or loss suffered as a result of the encroachment. On the one hand, the affected landowner relies on the loss of his property right. On a strictly market related approach, the allocation of resources should take place independent of any property rights. Furthermore, if the "endowment effect" is taken into consideration it could be argued that the harm or loss is not only of the physical property but also the value which the affected

⁷⁹ CG van der Merwe *Sakereg* (2nd ed 1989) 193; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 112.

⁸⁰ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 600.

⁸¹ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 602.

landowner places on the property lost.⁸² This is based on the hypothesis that someone values something that they already own more highly than the actual price necessary to acquire it. Stated differently, people will very often demand more to give up something than they would be willing to pay to acquire it.⁸³ The endowment effect is inconsistent with the standard economic theory, in terms of which someone's willingness to acquire the property should be equal to their willingness to accept compensation to be deprived of the property.⁸⁴

On the other hand, the encroaching landowner would be relying not on a right, but on consideration of the fact that the rigid enforcement of the common law remedy of removal may possibly lead to a grossly unjust outcome. The strength of this contention was recognised in *Brian Lackey Trust*, where it was stated that the strict application of the default remedy of removal could lead to unfair results and thus should *not* be applied without careful consideration.⁸⁵

Susan Scott identifies the "policy call" mentioned earlier as a value judgement.⁸⁶ She argues that equity or fairness necessitates a value judgement in every particular case. However, she disagrees with the contention that so-called "billikheid" (equity or fairness) has a normative content as was stated in *Rand Waterraad* and finds it unnecessary for the court to have proceeded to an evaluation of equity, which tries to fit encroachment cases into the normal neighbour law framework.⁸⁷

Confusion results from the way in which both *Rand Waterraad* and *Brian Lackey Trust* relied on the neighbour law concept of reasonableness⁸⁸ to explain or justify

⁸² D Kahneman, JL Knetsch & RH Thaler "Anomalies: The endowment effect, loss aversion, and status quo bias" (1991) 5 *The Journal of Economic Perspectives* 193-206 at 194-197.

⁸³ D Kahneman, JL Knetsch & RH Thaler "Anomalies: The endowment effect, loss aversion, and status quo bias" (1991) 5 *The Journal of Economic Perspectives* 193-206 at 194.

⁸⁴ D Kahneman, JL Knetsch & RH Thaler "Anomalies: The endowment effect, loss aversion, and status quo bias" (1991) 5 *The Journal of Economic Perspectives* 193-206 at 194.

⁸⁵ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

⁸⁶ S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stell LR* 351-377 at 361.

⁸⁷ S Scott "Recent developments in case law regarding neighbour law and its influence on the concept of ownership" (2005) 16 *Stell LR* 351-377 at 361.

⁸⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 133, 134; Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 40.

exercising judicial discretion in favour of leaving the encroachment in place.⁸⁹ It is clear from the conclusions drawn in *Rand Waterraad* with regard to reasonableness that the courts are applying their “normal or business-as-usual” manner of dealing with neighbour law cases to encroachment cases.⁹⁰ However, if the principles of neighbour law were applied strictly, it is not at all clear that the encroaching owner would pass the reasonableness test. Should a reasonable objective person be prepared to accept a certain extent of encroachment which condemns him to the effective loss of the use and enjoyment of the affected property, in the same way that he should be willing to tolerate a certain level of noise from neighbouring land?

Van der Walt criticises the use of the reasonableness standard to explain encroachment cases.⁹¹ He argues that the justifications for awarding compensation in lieu of removal can be explained along doctrinal lines and that it is unnecessary in these cases to use the reasonableness argument. The first argument is the assumption that it would be easier in principle to justify the compensation award for minor encroachments. An award of demolition might seem “outrageous” in cases where the encroachment is small.⁹² It is also suggested that the outcome in both the *Rand Waterraad* and *Brian Lackey Trust* decisions can be explained with reference to the conduct of the affected landowner.

In *Rand Waterraad*, there was a long delay in the bringing of the application. Therefore, the choice for a compensation award could have been explained in terms

⁸⁹ Pope argues that the confusion and uncertainty arises as a result of the interplay between principle and policy. Policy is by its nature flexible and allows each case to be decided based on its own merits. However, policy that becomes too flexible can cause confusion and therefore Pope is in favour of strict adherence to principle. See A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 SALJ 537-556 at 544. Van der Walt disagrees with Pope on this point. He argues that the problem is not principle vs policy, but which one kicks in when; reasonableness (principle) applies before an unlawful act was committed, policy (equity) afterwards, when the results have to be rectified. See AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 601.

⁹⁰ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 595.

⁹¹ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 606-607.

⁹² AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 606.

of some form of prescription (such as the year and a day rule) or estoppel.⁹³ The delay could either give an indication of acquiescence or that the negative impact for the affected landowner was minimal. The result in *Brian Lackey Trust* could possibly be explained by arguing that the affected landowner was acting in bad faith by insisting upon demolition when it was clear that he was willing to accept money.⁹⁴

From the discussion above, it can be deduced that the term “reasonableness” should be applied with care in the context of encroachment cases. It must mean something different in encroachment cases than a reciprocal duty to accept the encroaching structures, which is what reasonableness means according to the normal nuisance law principles.⁹⁵ The preferable argument is thus that reasonableness as used in encroachment cases is similar to equity or fairness and that it requires a balancing of the potential loss for the encroaching owner if demolition is ordered against the likely loss for the affected landowner if it is not. Therefore, if courts continue using neighbour law principles in the context of building encroachments it should be clear what they mean, especially if notions such as reasonableness, equity and fairness are used as in *Rand Waterraad* and *Brian Lackey Trust*.

In the early South African judgements,⁹⁶ as well as in the most recent cases,⁹⁷ South African courts have followed the English law approach when dealing with building encroachments. It is necessary to look at the English law on continuing trespass in order to ascertain the influence of English law principles in South African law and to assess the acceptability of these principles in the South African context.

⁹³ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 607.

⁹⁴ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 607.

⁹⁵ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 602.

⁹⁶ *Myburgh v Jamison* (1861) 4 Searle 8; *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 356; *Greeff v Krynauw* (1899) 9 CTR 591; *Van Boom v Visser* (1904) 21 SC 360; *Stark v Broomberg* 1904 CTR 135 at 137; *Hornby v Municipality of Roodepoort-Maraisburg and Another* 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; *Naudé v Bredenkamp* 1956 (2) SA 448 (O); *Meyer v Keiser* 1980 (3) SA 504 (D) at 505.

⁹⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

Although some academics take the stance that English law principles regulating property law should not be applicable to South African law,⁹⁸ what appears from South African jurisprudence is something different. In *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd*⁹⁹ the following statement was made in relation to the use of English law principles in South African law:

"The general rule in the English law, which I shall assume to apply in this Court, ... appears to be that where the injury done by the encroachment is capable of being fully compensated by a pecuniary sum while the inconvenience to the trespasser from granting an injunction would be serious, the Court will grant damages and not an injunction, but where such injury cannot be so compensated or is so serious and material that the restoration of things to their former condition is the only method by which justice can adequately be done, then an injunction will issue."¹⁰⁰

Therefore, it is vital to determine where South African law stands in terms of adopting English law principles in building encroachment disputes.

3.4.2 English law

The notion of trespass can be defined in terms of English law as the "unauthorised and unjustifiable entry upon land in the possession of another."¹⁰¹ The fundamental nature of trespass seems to be embedded in the fact that every citizen has a right to the control and enjoyment of his own property, including the right to determine who can and cannot enter the property.¹⁰² This common law right supposes that the law regards any property as sacred to the owner or possessor, and no one may enter the land of another without permission from the owner. Gray and Gray call this the "absolutist dogma" which is deep-rooted in the notion of trespass.¹⁰³

⁹⁸ CG van der Merwe "Things" in WA Joubert, JA Faris & LTC Harms (eds) *The Law of South Africa* vol 27 (2002) par 196; OD Schreiner *The contribution of English law to South African law; and the rule of law in South Africa* (1967) 5-70 at 40.

⁹⁹ 1932 WLD 78.

¹⁰⁰ *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78 at 87-88.

¹⁰¹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1260. See also *Peck v United Kingdom* (2003) 36 EHRR 719 par 44; *Coco v The Queen* (1994) 179 CLR 427 at 435.

¹⁰² K Gray & SF Gray *Elements of land law* (5th ed 2009) 1261.

¹⁰³ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1261.

Trespass is per se actionable, irrespective of the extent of the trespass.¹⁰⁴ The remedy available depends on the type of trespass. Depending on whether the trespass is recurring or an isolated incident, the court has a discretion to determine which remedy should be awarded in the particular case. In general, the possible remedies are a declaration of rights, an award of damages or any form of injunctive relief.¹⁰⁵

What South African law would commonly call a permanent building encroachment is known in English law as a continuing trespass, which results in a new cause of action arising daily.¹⁰⁶ The common law remedy of damages seems to be inadequate when dealing with a continuing trespass, as was explained in the case of *Jaggard v Sawyer and Another*.¹⁰⁷ Here the Court of Appeal stated:

“Historically, the remedy given by courts of common law was damages. These afforded retrospective compensation for past wrongs. If the wrongs were repeated or continued, a fresh action was needed. Courts of equity, in contrast, were able to give prospective relief by way of injunction or specific performance.”¹⁰⁸

In other words, equity requires that the remedy awarded in the case of a continuing trespass should go beyond the relief of common law damages.¹⁰⁹ Injunctive relief is deemed to be a better option than damages in the case of a continuing trespass.

Injunctive relief means one of two things: a court can issue either a negative or prohibitive injunction, restraining someone from doing something or alternatively, a mandatory injunction resulting in the reversal of the trespass.¹¹⁰ Therefore, if someone builds a permanent structural encroachment on the property of another, the court may issue either a prohibitive injunction to forbid further building or a mandatory injunction to order removal of the encroaching structures.

¹⁰⁴ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1261. See also *Daniells v Mendonca* (1999) 78 P &CR 401 at 408.

¹⁰⁵ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1260.

¹⁰⁶ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280. See further *Earle v Martin* (1998) 172 Nfld & PEIR 105 par 15.

¹⁰⁷ [1995] 1 WLR 269. See further *Attorney-General v Blake* [2001] 1 AC 268 at 281C; C Sara *Boundaries and easements* (4th ed 2008) 474-482.

¹⁰⁸ *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 276.

¹⁰⁹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280.

¹¹⁰ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280. This is also explained by Sir Thomas Bingham MR in *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 276.

In the case of continuing trespass, English courts may deviate from the normal practice of granting injunctive relief according to additional powers available in terms of the Supreme Court Act.¹¹¹ Section 50 of the Act stipulates that any court having jurisdiction to award injunctive relief may in terms of this provision award equitable damages, either in substitution for or in addition to the injunctive relief.¹¹² The court can therefore decide whether to order the removal of the encroachment or to award equitable damages in respect of future or continuing wrongs.¹¹³ This raises the next question: how does the court decide whether and when to order removal or to award damages?

Gray and Gray state that injunctive relief is not as popular as 20 years ago, and that the modern, but volatile, trend of courts is rather to use their power in terms of the Supreme Court Act¹¹⁴ to award damages instead of removal.¹¹⁵ Courts are now taking considerations of reasonableness, equity and social accommodation into account, to rule in favour of damages instead of injunctions. It is argued that the absolutist dogma which was originally thought to be the backbone of the law of trespass might slowly be weakening with owners having to accept more and more

¹¹¹ See s 50 of the Supreme Court Act 1981 (England & Wales) which replaced the Chancery Amendment Act 1858 (Lord Cairns's Act), s 2.

¹¹² See s 50 of the Supreme Court Act 1981 (England & Wales). To avoid confusion about the use of the term "damages" as a remedy in the case of trespass in the English law context, a distinction needs to be drawn between the common law remedy of damages and equitable damages in terms of s 50 of the Supreme Court Act. The common law remedy of damages affords retrospective compensation for wrongs committed in the past. Therefore, the damages relate to a past act of trespass. In the case of future or continuing acts of trespass, the common law remedy of damages is inadequate because the remedy has retrospective effect and does not cover future acts of trespass. Gray and Gray state that "[f]or this reason equity has long asserted a power to afford the trespass victim a prospective form of relief which goes far beyond the common law remedy of damages for a series of past wrongs." See K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280. Therefore, a court has the discretion to award either a negative or mandatory injunction to give prospective relief in the case of past or continuing trespass. Additionally, a court could award equitable damages "in addition to or in substitution for such injunction". The monetary relief or equitable damages is granted in terms of the power conferred to the courts by the Supreme Court Act. See K Gray & SF Gray *Elements of land law* (5th ed 2009) 1276-1282; *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 276, 277 (per Sir Thomas Bingham MR), 284 (per Millet LJ); JA Jolowicz "Damages in equity – A study of Lord Cairns's Act" (1975) 34 *Cambridge LJ* 224-252.

¹¹³ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280-1283.

¹¹⁴ The Supreme Court Act 1981 (England & Wales).

¹¹⁵ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280. This statement is made with reference to a comparison between the recent *Jaggard* case, and one of the older cases where injunctive relief was sought. See *Patel v WH Smith (Eziot) Ltd* [1987] 1 WLR 853 at 863.

interferences with their property.¹¹⁶ Furthermore, the modern law of trespass is being modified by an “overriding proviso of reasonableness”.¹¹⁷ This trend is evident not only in case law, but also in various pieces of recent legislation which have imposed limitations on proprietorship.¹¹⁸ Therefore, English courts are more readily willing to enforce infringements on the affected landowner’s rights based on the discretion in terms of the Supreme Court Act.

In *Burton v Winters*,¹¹⁹ the Court of Appeal exercised its discretion against the owner of a property who insisted on the removal of her neighbour’s encroaching garage. The court denied the injunction because in the circumstances the garage resulted in a minor encroachment and only a slight infringement on the proprietary rights of the affected landowner. Therefore, the landowner had to endure the encroachment in exchange for the payment of damages to her.

In *Jaggard v Sawyer*¹²⁰ the court in a similar fashion found that the plaintiff had to be content with the interference with his property. In this case the defendant had built in contravention of a restrictive covenant under the mistaken belief that he was entitled to do so. He had purchased a plot adjoining that of the plaintiff and which formed part of a residential development. This residential development was served by a public road which formed a cul de sac. All the plots in the residential development were sold subject to restrictive covenants. In terms of these covenants none of the owners or successive owners was allowed to build anything immediately in front of the plot up to the centre of the roadway. The plaintiff applied for an injunction for the

¹¹⁶ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280. See also *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 287 where the court found that some proprietors had to endure unlawful interferences with their rights and be content with damages.

¹¹⁷ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280.

¹¹⁸ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280-1281. Gray and Gray consider modern statutes that have limited what they call the “rigour of trespass law”. The Access to Neighbouring Land Act 1992 gives a limited right of access to a neighbour’s garden or land for certain specified reasons. Before the passing of this Act, adjoining owners had virtually no rights to a neighbour’s property. The Party Wall etc Act 1996 allows an owner to obtain an injunction against his neighbour for the removal of a wall or fence which causes a trespass. However, if the injunction is refused, the claimant is precluded from taking the law into his own hands and removing the wall or fence himself. These are two acts that illustrate how there has been an extensive erosion of trespass law on account of reasonableness and social accommodation in English law.

¹¹⁹ [1993] 1 WLR 1077.

¹²⁰ [1995] 1 WLR 269 at 272.

removal of the driveway which was built by the defendant and which allegedly formed a continuing trespass. At first instance the judge in the Weymouth County Court denied the plaintiff the injunction for the continuing trespass as a result of the breach of the covenants, and awarded damages instead.¹²¹

On appeal, the main issue involved the factors to be taken into consideration in deciding whether to grant injunctions or to award damages instead. Millett LJ indicated that:

“... it was therefore necessary for the judges to remind themselves from time to time that the discretion to withhold it [an injunction], which had existed as well before 1858 as after it, was to be exercised in accordance with settled principles; that a plaintiff who had established both a legal right and a threat to infringe it was *prima facie* entitled to an injunction to protect it; and that special circumstances were needed to justify withholding the injunction.”¹²²

The court analysed these “settled principles” or “special circumstances” by reference to the “good working rule” that was established in the *Shelfer* case.

*Shelfer v City of London Electric Lighting Company*¹²³ is a very important case in the history of English property law. It set the precedent for what has been the long established “good working rule” which allows for deviations from the principle of granting injunctive relief. In *Shelfer* the City of London Electric Lighting Company had erected powerful engines and other works on land near a house which was subject to a lease. As a result of the excavations for the foundations of the engines, structural injury was caused to the house and a substantial amount of interference and discomfort ensued for the lessee. The injury effectively resulted in a continuing trespass and the plaintiffs subsequently applied to the court for injunctive relief. In the Chancery Division Kekewich J held that the appropriate relief for the plaintiffs was damages and not an injunction.¹²⁴

¹²¹ *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 272.

¹²² *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 287.

¹²³ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

¹²⁴ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 300.

The plaintiffs appealed against the decision. AL Smith LJ reiterated in the Court of Appeal that the plaintiff is ordinarily entitled to injunctive relief as a *prima facie* remedy, but established a “good working rule” which was subsequently used not only in English cases, but also in many South African judgements. This “good working rule” sets out guidelines in terms of which the awarding of injunctive relief could be relaxed in favour of damages. The court stated that damages could be awarded in substitution for an injunction in the following instances:

- “(1) If the injury to the plaintiff’s legal rights is small,
- (2) And is one which is capable of being estimated in money,
- (3) And is one which can be adequately compensated by a small money payment,
- (4) And the case is one in which it would be oppressive to the defendant to grant an injunction.”¹²⁵

From the guidelines established in *Shelfer* it can be deduced that certain indicators will sway the court in favour of a monetary award. Gray and Gray conclude that, although a range of factors are considered, damages is more easily preferred when the impact of the trespass is small, while injunctive relief is often reserved for instances where the trespass is repeated or continuous.¹²⁶ If it would be oppressive towards the encroaching owner to award an injunction,¹²⁷ or if the infringement could easily be compensated by a monetary award,¹²⁸ damages would also be the preferred remedy. Other factors that have favoured the award of damages include delay in bringing an application for an injunction,¹²⁹ the willingness of the affected

¹²⁵ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322.

¹²⁶ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1280-1284. When courts are dealing with large or substantial encroachments, injunctive relief would be the appropriate remedy in terms of the English approach. This is contrary to the recent trend of South African courts to award compensation instead of removal even in the case where there has been a significant encroachment. See *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹²⁷ *Gafford v Graham* (1998) 77 P & CR 73; *Seine International SA v Park Lane Holdings Inc* [2002] EWHC 2284; *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch); *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch).

¹²⁸ *Seine International SA v Park Lane Holdings Inc* [2002] EWHC 2284; *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch); *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch).

¹²⁹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1282; *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 283, 289; *Gafford v Graham* (1998) 77 P & CR 73; *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15. In *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 283, 289, the

landowner to accept compensation,¹³⁰ and the fact that the claimant has tried to demand extortionate compensation from the encroacher.¹³¹ In terms of English law, if the claimant had refused a reasonable offer of compensation, a court would be reluctant to award injunctive relief.¹³² The most important reason for this is stated in *Jaggard v Sawyer and Another*:

“The jurisdiction to grant a mandatory injunction in those circumstances cannot be doubted, but to grant it would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and would indeed deliver him to the plaintiff bound hand and foot to be subjected to any extortionate demands the plaintiff might make.”¹³³

Another indicator in favour of monetary relief is illustrated in both *Jaggard v Sawyer*¹³⁴ and *Bracewell v Appleby*,¹³⁵ namely where the granting of an injunction would not necessarily result in removal of an unlawful development, but would have the effect that the property becomes incapable of beneficial use. If an injunction is awarded in these cases, the affected landowner is left landlocked because he would not be able to access his property. Therefore, an injunction in these circumstances prevents the claimant from beneficial use of his property.

English courts have noted that they would generally be reluctant to order injunctive relief where houses would be demolished.¹³⁶ In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,¹³⁷ the plaintiffs sought an injunction to restrain the defendants from building if it was not in accordance with the approved lay-out plans. Additionally, a mandatory injunction was sought for the demolition of any building in breach of the covenant. The court found that although the developers had built in blatant contravention of a restrictive covenant, an injunction was not the appropriate remedy

English Court of Appeal found that the plaintiff could have interrupted the continuing trespass had he sought an interlocutory injunction.

¹³⁰ *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15.

¹³¹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1282; *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) 24 NSWLR 490 at 497.

¹³² K Gray & SF Gray *Elements of land law* (5th ed 2009) 1282.

¹³³ *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 288 per Millet LJ.

¹³⁴ [1995] 1 WLR 269 at 288.

¹³⁵ [1975] Ch 408.

¹³⁶ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798; *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch).

¹³⁷ [1974] 1 WLR 798.

in this case. On the basis of social and economic reasons the court denied a mandatory injunction that would result in the houses being demolished. Brightman J stated that:

“a plaintiff is not entitled “as of course” to have everything pulled down that was built after the issue of the writ. The erection of the houses, whether one likes it or not, is a fait accompli and the houses are now the homes of people. I accept that this particular fait accompli is reversible and could be undone. But I cannot close my eyes to the fact that the houses exist. It would, in my opinion, be an unpardonable waste of much needed houses to direct that they now be pulled down and I have never had a moment’s doubt during the hearing of this case that such an order ought to be refused.”¹³⁸

Therefore, although the developer had not built according to the restrictive covenants, the court was unwilling to order a mandatory injunction because of the dire consequences that such an order would have socially and economically. With regard to the question whether damages should be preferred instead of a mandatory injunction, AL Smith LJ stated that the guidelines developed in *Shelfer* are not exhaustive and that there could be instances where, notwithstanding these guidelines, the court could still award injunctive relief. The examples provided in case law are situations where a landowner would be totally dispossessed as a result of the encroaching building¹³⁹ or similarly where the claimant would be permanently deprived of a part of her property.¹⁴⁰

The granting of injunctive relief seems to be particularly apt where the harm to or loss of the plaintiff’s rights is significant or not easily compensable in money.¹⁴¹ Although the inclination of English courts recently is to grant damages in lieu of injunctive relief, there are instances where injunctive relief is inevitable, especially in cases where the encroacher acts in blatant disregard for the rights of the claimant.¹⁴² The attitude of the builder clearly plays an important role in the determination of the

¹³⁸ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811.

¹³⁹ *Harrow LBC v Donohue* [1995] 1 EGLR 257 at 259.

¹⁴⁰ *Daniells v Mendonca* (1999) 78 P & CR 401 at 407-408.

¹⁴¹ One of factors taken into consideration in *Earle v Martin* is the fact the encroachment or continuing trespass could possibly jeopardise the sale of the property in future.

¹⁴² *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 at 347; *Jaggard v Sawyer* [1995] 1 WLR 269 at 283.

appropriate remedy. In *Regan v Paul Properties*¹⁴³ it was found that the defendants, when deciding to proceed with the development, had taken a calculated risk and that they continued the construction with their eyes open. Therefore, it was decided that injunctive relief was the appropriate remedy in this specific case. In *Mortimer v Bailey*¹⁴⁴ the respondent, being the affected landowner, had warned the appellant of his intention to bring proceedings should the construction continue. This conduct by the claimant played a role in the awarding of injunctive relief rather than damages. An injunction was similarly awarded in *Nelson v Nicholson*¹⁴⁵ where it was decided that, in the absence of any equitable defence, the claimant was *prima facie* entitled to an injunction.

From the analysis of the English law pertaining to continuing trespass it is clear that a claimant, as in South African law, can seek an injunction in order to remove the encroaching structure. The defendant in turn can ask the court to award damages instead. The claimant should be entitled to the injunction if he can prove that his legal right has been infringed by the defendant, provided that there are no defences like acquiescence or estoppel that favour the defendant.¹⁴⁶ The court has the discretion in terms of the Supreme Court Act to take all relevant circumstances into consideration before deciding whether to award an injunction or damages. Important considerations that influence the exercise of the discretion include the size of the encroachment, the attitude of the parties, delays in bringing the application to oppose the encroachment and the balance of the effect that awarding either removal or compensation would have on the parties.

There is one question that has received little attention in English law. This question relates to the proprietary impact of awarding damages in lieu of an injunction. Section 50 of the Supreme Court Act empowers the court to award damages in addition to or in substitution for an injunction. This power imports the ability on the part of the court to give an equivalent for what was lost by denying the injunction.¹⁴⁷

¹⁴³ [2006] EWHC 1941 (Ch).

¹⁴⁴ [2005] 2 P & CR 175.

¹⁴⁵ Unreported, Court of Appeal, 1 December 2000.

¹⁴⁶ *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 287.

¹⁴⁷ *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 859.

Stated differently, “[t]he measure of damages awarded in this type of case is often analysed as damages for loss of a bargaining opportunity or, which comes to the same, the price payable for the compulsory acquisition of a right.”¹⁴⁸ It has been argued in the recent case of *Horsford v Bird*¹⁴⁹ that what the award for damages amounts to is a *de facto* expropriation. The Council found that the expropriation could not be undone and concluded that damages be paid in lieu of an injunction. Therefore, the substitution of an injunction with damages results in a *de facto* expropriation of the portion of the property on which the encroachment stood.¹⁵⁰ The Privy Council stated that neither the trial court nor the Court of Appeal recognised that since the encroachment was completed the respondent had exclusive use and enjoyment of the part of the appellant’s property on which the encroachment stood. Therefore, neither the trial court nor the Court of Appeal emphasised the proprietary effect of leaving the encroachment in place. This is perhaps because the necessity for explaining the consequences of the order in terms of ownership of the land is less fraught in English than in civil law. It is necessary to analyse how ownership is viewed in terms of English law, because this will show why the proprietary effect of leaving an encroachment in place is different and arguably not such a major issue in English law.

English law is based on the doctrine of estates in land.¹⁵¹ An estate is an “artificial proprietary construct” that explains various forms of entitlements to land.¹⁵² Gray and Gray state that the doctrine of estates provides an alternative to direct ownership or *dominium*.¹⁵³ Therefore, they assert that “the holistic idea of *dominium* (or direct ownership of the land itself) which was part of the European heritage derived from Roman law” is not recognised in English law.¹⁵⁴ Consequently, there is no overarching notion of ownership in terms of an absolutist idea of having ownership in the land itself.¹⁵⁵ A “tenant” – being the one who holds the right in the land – is considered to own an estate *in* the land and not the land itself. By implication this

¹⁴⁸ *Attorney General v Blake* [2001] 1 AC 268 at 281.

¹⁴⁹ [2006] UKPC 55.

¹⁵⁰ *Horsford v Bird & Others* [2006] UKPC 55.

¹⁵¹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 56-68.

¹⁵² K Gray & SF Gray *Elements of land law* (5th ed 2009) 57.

¹⁵³ K Gray & SF Gray *Elements of land law* (5th ed 2009) 56.

¹⁵⁴ K Gray & SF Gray *Elements of land law* (5th ed 2009) 56.

¹⁵⁵ K Gray & SF Gray *Elements of land law* (5th ed 2009) 56.

would mean that a claim, in terms of which you would protect a proprietary interest in the land, would be based on an intangible thing (i.e. the estate) and not a tangible thing (i.e. the land).¹⁵⁶ This has a fundamental effect on the way one thinks about property rights. Generally speaking, one would say that you have property in a thing and not that the thing is your property.¹⁵⁷ Gray and Gray identify certain characteristics of “property” that are important in order to understand why it may be less problematic to ask questions about the proprietary consequences of leaving a building encroachment in place in English law.¹⁵⁸ In the first instance, property is relative.¹⁵⁹ This means that property is not a “unitary phenomenon, monolithic in stature and unqualified in scope”, but rather an abstract right.¹⁶⁰ This right in property may vary on a wide spectrum ranging in proprietary content. Therefore, there may be weaker and stronger rights even in relation to the same piece of land.¹⁶¹ Secondly, property in land is more about fact than law.¹⁶² Therefore, property is seen as a socially constituted fact that exists in terms of empirical realities of life, as opposed to an abstract theory of ownership.¹⁶³ The question is rather whether a person can assert *de facto* possessory control over land because effective possession vests a claim of property in land. As a result possession (even if initially obtained unlawfully) is ultimately the root of all common law title.¹⁶⁴ Thirdly, Gray and Gray assert that property is a quantum of socially approved control.¹⁶⁵ Property is described as concentrations of power over things and every claim in respect of the thing represents a different degree of control.¹⁶⁶ The amount of “property” that a person has in a thing depends on the size of the estate or interest that a person has in a thing.¹⁶⁷ There is a sliding scale between maximum and minimum property value.¹⁶⁸

¹⁵⁶ K Gray & SF Gray *Elements of land law* (5th ed 2009) 56-57. See also K Gray & SF Gray “The idea of property in land” in S Bright & JK Dewar (eds) *Land law: Themes and perspectives* (1998) 15-51 at 27-29.

¹⁵⁷ K Gray & SF Gray *Elements of land law* (5th ed 2009) 87.

¹⁵⁸ K Gray & SF Gray *Elements of land law* (5th ed 2009) 87-94, 104-105.

¹⁵⁹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90-91.

¹⁶⁰ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90.

¹⁶¹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90.

¹⁶² K Gray & SF Gray *Elements of land law* (5th ed 2009) 104-105; K Gray “Property in common law systems” in GE van Maanen & AJ van der Walt (eds) *Property law on the threshold of the 21st century* (1996) 235-283 at 265.

¹⁶³ K Gray & SF Gray *Elements of land law* (5th ed 2009) 104.

¹⁶⁴ K Gray & SF Gray *Elements of land law* (5th ed 2009) 105.

¹⁶⁵ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90.

¹⁶⁶ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90.

¹⁶⁷ K Gray & SF Gray *Elements of land law* (5th ed 2009) 91.

¹⁶⁸ K Gray & SF Gray *Elements of land law* (5th ed 2009) 91.

Maximum property value would usually be fee simple, where a person holding this right in the property would be able to dictate matters relating to the property to a large extent. However, the quantum of socially accepted control is considerably less for someone who for example holds an easement in the property.¹⁶⁹ Therefore, depending on where someone is on the sliding scale he would hold a different degree of control over the property. Finally, Gray and Gray emphasise that there are different grades of property in a resource. As a result of the gradation of property, a number of people could have distinct allocations of property with regard to the same parcel of land.¹⁷⁰ Therefore, property is capable of fragmentation.¹⁷¹

From the above analysis, it is clear that the way in which English law views ownership and property makes it less problematic to explain the proprietary effect of denying an injunction. The doctrine of estates in land provides an alternative to direct ownership of the land, and makes it possible to have different forms of entitlements in the same land. This means that you don't own the land itself, but an estate in the land. This has a direct effect on property, because it means that you don't own a thing, but property in a thing. This proprietary interest in a thing can vary depending on the level of socially approved control that a person has over the thing. Therefore, a person can have maximum property value with a stronger degree of proprietary content as with fee simple, or a minimum property value with a weaker degree of proprietary content as in the case of an easement. These two entitlements can relate to the same land, because property is gradable and a number of people can hold property in the same land.

With regard to building encroachments, the person with fee simple – the affected landowner – would generally have the maximum claim in the property. His bundle of entitlements in terms of English law would allow a greater amount of socially approved control over the property. His proprietary rights may be curtailed by his duty to tolerate the encroachment.¹⁷² When courts order that the encroachment should remain in place, it vests an entitlement in the encroacher to continue having

¹⁶⁹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 91.

¹⁷⁰ K Gray & SF Gray *Elements of land law* (5th ed 2009) 93.

¹⁷¹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 95.

¹⁷² K Gray & SF Gray *Elements of land law* (5th ed 2009) 92.

the encroachment there. Therefore, different bundles of power may be exercisable over the same land.¹⁷³ Consequently, apart from potential registration issues, it is unnecessary to explain what happens in relation to ownership of the land or the nature of the right that the encroacher obtains when demolition is denied.¹⁷⁴

From the discussion above, English law can be described as a well worked out system of dealing with a continuing trespass. Therefore, it is almost inevitable that “creative borrowing” will take place by other jurisdictions.¹⁷⁵ South African law pertaining to building encroachments has been influenced by English law. It is essential to ask questions about the use of these principles by South African courts.

3.4.3 English influence on South African law

Van der Walt warns against the indiscriminate use of English law principles and argues that they should be approached with caution.¹⁷⁶ The most important reasons provided for the warning against the adoption of English law principles are three-fold. The first reason is the distinction between the law of nuisance and the law of encroachment in the South African context. This is different from the English law relationship between nuisance and trespass. The relevance of this distinction is that reasonableness used as a justification for the deviation from the remedy of removal fits nicely within the notion of trespass in the English law context, whereas using reasonableness language for encroachment cases in the South African context could be confusing.¹⁷⁷

¹⁷³ K Gray & SF Gray *Elements of land law* (5th ed 2009) 90.

¹⁷⁴ This aspect may be problematic in the South African context as a result of the need to explain doctrinally what happens when the encroachment is not demolished. See chap 4 below.

¹⁷⁵ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628.

¹⁷⁶ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 612.

¹⁷⁷ See s 3.4.1 above.

The second problem, linked to the first one above, is the fact that trespass in English law is a wide concept that has no South African counterpart.¹⁷⁸ Trespass is considered to include not only the case of buildings erected on the property of someone else – as illustrated as a continuing trespass - but also unlicensed entry onto the property of another.¹⁷⁹ In this lies the link between the first and second reasons mentioned. Because trespass closely borders upon nuisance, the reasonableness standard is more at home in English law. In South African law the law of nuisance and the law of encroachments are two distinct branches of law and the reasonableness standard fits in the framework of the law of nuisance but not necessarily that of encroachment.

Finally, English law, in contrast with South African law, does not have to establish clarity about the status of the affected land after an order is made for damages in lieu of an injunction, as the courts should do in South African law.¹⁸⁰ The remedies that are available in the case of trespass largely depend on possession rather than title (or ownership).¹⁸¹ Based on the above reasons, Van der Walt concludes that although English law might seem like an attractive solution for the problem of building encroachments in South Africa, the institutional differences between the two systems provide a reason why the English law should be approached with care.¹⁸²

¹⁷⁸ JRL Milton "The law of neighbours in South Africa" 1969 *Acta Juridica* 123-244 at 234; A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 *SALJ* 537-556 at 547.

¹⁷⁹ K Gray & SF Gray *Elements of land law* (5th ed 2009) 1260. See s 3.4.2 above.

¹⁸⁰ See s 3.4.2 above. In this section I illustrate that the proprietary effect of leaving the encroachment in place is not as problematic in English law as in South African law. This is because English law recognises estates in land; therefore there may be multiple interests with regard to the same land. Once a court refuses an injunction and orders that damages be paid in lieu in an English court, this fact is noted on the register of title relating to the affected land. That portion of property encroached upon is not necessarily transferred to the encroaching landowner, but is indicated as being subject to a court order. I am indebted to Susan Francis Gray for setting out the practical implications of a court order granting damages in English law. Therefore, questions relating to the status of the land and the ownership of the encroached-upon land are less problematic in English law. However, these questions are not as easily escapable in South African as in English law. This issue is addressed in chap 4 below, where a doctrinal assessment of the situation is done.

¹⁸¹ See s 3.4.2 above.

¹⁸² AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *SALJ* 592-628 at 612-613.

In the *Brian Lackey Trust* judgement Griesel J warned against the acceptance of the English approach of the discretion to award compensation instead of removal.¹⁸³ He stated that English law should be approached with caution, firstly because a damages award in English law is permitted by a statute for which there is no equivalent in South Africa, and secondly because of the subtle conceptual distinctions between South African and English law.¹⁸⁴ Moreover, it is clearly established in English law that the rule is not fixed and can sometimes be inapplicable even though all the indications for it are present.¹⁸⁵ Nonetheless, besides the apparent differences between the two systems, and the arguments against the adoption of English law to South African law as illustrated above, it seems as if South African courts are not reluctant to be influenced by English law.¹⁸⁶

However, in some cases English law has not been applied in the same way by South African courts. An example of this is the use of the good working rule that was established in *Shelfer*.¹⁸⁷ English courts are clear that in terms of one of the indicators of the good working rule, if the encroachment is relatively small it might be less likely to order an injunction. Therefore, a clear distinction is drawn in English law between minor and large encroachments.¹⁸⁸ Conversely, South African courts apparently treat all encroachments, small or large, the same.¹⁸⁹ Griesel J said the following in *Brian Lackey Trust* in relation to the discretion in the context of encroachment by building:

“In this regard, I can see no reason in principle why the existence of the Court’s discretion should be limited to cases of ‘trivial’ or ‘minor’ encroachments. It does not make sense, to my mind, to allow trivial or minor encroachments to remain, while being obliged to order removal of substantial or ‘massive’ encroachments, as in this case.”¹⁹⁰

¹⁸³ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 24.

¹⁸⁴ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 24.

¹⁸⁵ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 25. See also the case of *Jaggard v Sawyer and Another* [1995] 1 WLR 269 at 287, where the court emphasised that although the guidelines established in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322 had stood the test of time, it is not to be considered an exhaustive statement which should be applied in all circumstances where damages may be awarded instead of an injunction.

¹⁸⁶ *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78 at 87-88.

¹⁸⁷ See s 3.4.2 above.

¹⁸⁸ See s 3.4.2 above.

¹⁸⁹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

¹⁹⁰ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

Therefore, the court concluded that the discretion is available regardless of the extent of the encroachment.¹⁹¹

Van der Walt discusses the differences between small and large encroachments and the opinion of the court in *Brian Lackey Trust* with regard to the statement that all encroachments should be treated the same.¹⁹² He argues that it depends on whether courts are looking at it from the perspective of the encroaching landowner or the affected one. He explains that smaller encroachments cause less harm and thus in principle should more readily be left in place.¹⁹³ This is precisely the argument that Milton made when he discussed the discretion of the court to deny removal.¹⁹⁴ Milton stated that:

“On principle alone there appears to be no good reason why the courts should not take upon themselves this discretion, especially where there is only a trifling encroachment. This seems to be the view of the majority of the decisions considered above and it is certainly only just.”¹⁹⁵

However, larger encroachments have a more dramatic effect for the property rights of the affected landowner and thus demolition should be a more serious option.¹⁹⁶ Similar to the English law approach, compensation should be easier to justify in the case of smaller encroachments. However, this cannot be the case when dealing with significant encroachments, where the affected landowner stands to lose all use and enjoyment of a substantial portion of his property. Assuming that one looks at the situation from the perspective of the affected landowner and the unlawful infringement caused by the encroaching structure, the argument advanced by the *Brian Lackey Trust* court in respect of the shared loss in terms of reasonableness has to be rejected.¹⁹⁷

¹⁹¹ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 29-30.

¹⁹² AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 602. See also Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 30.

¹⁹³ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 602.

¹⁹⁴ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 243.

¹⁹⁵ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 243.

¹⁹⁶ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 602.

¹⁹⁷ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 602.

It is clear from the majority of South African cases,¹⁹⁸ including the two most recent judgements dealing with building encroachments,¹⁹⁹ that courts are empowered with the discretion to deny an order for removal in the case of encroachment by building. The discretion to leave the encroachment in place is wide and equitable and depends on the circumstances of the case. According to *Rand Waterraad*, if the circumstances are exceptional enough to justify a deviation from the common law remedy of removal, the encroachment may remain intact.²⁰⁰ This was confirmed in *Brian Lackey Trust*, where the court agreed with the *Rand Waterraad* judgement that there is a wide and equitable discretion to award damages instead of removal of a building encroachment.²⁰¹ The court in *Brian Lackey Trust* made it clear that the discretion is not limited to only minor encroachments, as is the established practice in English law. The court rejected the argument by the defendant that the discretion is limited to minor encroachments as it is in terms of English law. Therefore, *Brian Lackey Trust* provides precedent for the fact that the extent of the encroachment does not play a role in determining whether the discretion to deny removal exists.²⁰² However, it is unfortunate that in the exercise of the discretion in this case, the court neglected to mention the extent of the encroachment as a consideration in favour of demolition. In fact, the court did the opposite. It considered the fact that the building was completed (and extensive) as a factor indicating that demolition should not be awarded. It was argued that courts have a natural aversion to deny demolishing economically valuable building works.

If courts are in principle loath to order the removal of buildings that have been completed, it is difficult to explain other recent judgements in which demolition of buildings was ordered. In the South Eastern Cape Local Division, Froneman J ordered the demolition of offending buildings that were infringing on a neighbour's

¹⁹⁸ *Stark v Broomberg* 1904 CTR 135; *Van Boom v Visser* (1904) 21 SC 360; *Naudé v Bredenkamp* 1956 (2) SA 448 (O); *Meyer v Keiser* 1980 (3) SA 504 (D); *Hornby v Municipality of Roodepoort-Maraisburg and Another* 1918 AD 278; *De Villiers v Kalson* 1928 EDL 217 at 231; *Town Council of Roodepoort-Maraisburg v Posse Property (Pty) Ltd* 1932 WLD 78 at 87-88.

¹⁹⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

²⁰⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

²⁰¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 27.

²⁰² *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 29.

right.²⁰³ In *Van Rensburg and Another v Nelson Mandela Metropolitan Municipality and Others*,²⁰⁴ the applicant and respondents were residential neighbours. The dispute arose as a result of certain buildings on the urban property that had been erected in blatant contravention of a restrictive covenant registered on the title deed.²⁰⁵ The applicants sought an order for the demolition of the offending buildings and an interdict to prevent further nuisance by the respondent. The respondent claimed that this was a type of encroachment for which the court had the discretion to award compensation instead of removal. He further argued that there is authority for the contention that what this amounts to is an encroachment on the *rights* of another in respect of use of adjoining property.²⁰⁶ The court found in *Van Rensburg* that it did have the discretion to award compensation instead of removal but, based on the conduct of the respondent, amongst other things, demolition would be the appropriate remedy.²⁰⁷ There have also been other recent decisions in which the impression has been created that courts are not shy to order the demolition of unlawfully erected, but nevertheless so-called “economically valuable buildings”.²⁰⁸ Therefore, this argument is not conclusive as a justification for denying demolition.

There is another argument that could help explain the way in which property law cases – specifically encroachment by building – have been decided recently. This argument has not been raised in South African case law, but could aid in understanding why one remedy is preferred over another in certain circumstances. This is the law and economics argument. Van der Walt argues that the law and

²⁰³ *Van Rensburg and Another v Nelson Mandela Metropolitan Municipality and Others* [2007] 4 All SA 950 (SE) par 11.

²⁰⁴ [2007] 4 All SA 950 (SE).

²⁰⁵ *Van Rensburg and Another v Nelson Mandela Metropolitan Municipality and Others* [2007] 4 All SA 950 (SE) par 10.

²⁰⁶ *Van Rensburg and Another v Nelson Mandela Metropolitan Municipality and Others* [2007] 4 All SA 950 (SE) par 9. This argument is similar to the one stated in *De Villiers v Kalson* 1928 EDL 217 at 230, where the court found that encroachment on the rights of adjoining owners and physical encroachment on property are in principle the same.

²⁰⁷ The factors that the court took into consideration were: the blatant disregard of a warning letter sent to the respondents, the appreciable diminution of the value of the applicant's property as a result of the unlawful activities of the respondents and the possibility that continued enjoyment by the applicants would be destroyed if the demolition order was not made. See *Van Rensburg & Another v Nelson Mandela Metro Municipality* [2007] 4 All SA 950 (SE) paras 10-11.

²⁰⁸ *Barnett v Minister of Land Affairs* 2007 (6) SA 313 (SCA); *Qualidental Laboratories (Pty) Ltd v Heritage Western Cape* 2007 (4) SA 26 (C); *PS Booksellers (Pty) v Harrison* 2008 (3) SA 633 (C); *Transnet Ltd v Proud Heritage Properties* (405/08) ZAEHC 42 (20 March 2008). See also AJ van der Walt “Regulation of building under the Constitution” (2009) 42 *De Jure* 32-47.

economics framework can be used to cast light on the encroachment problem.²⁰⁹ In the next section, I consider the law and economics argument for explaining why liability rules may be preferred over property rules in certain instances.

3.5 The law and economics argument

Law and economics theory distinguishes between property rules and liability rules.²¹⁰ The applicability and functioning of these rules were encapsulated in the influential article of Calabresi and Melamed,²¹¹ entitled “Property rules, liability rules, and inalienability: One view of the cathedral”, providing a conceptual framework within which property law and the law of torts can be viewed from one perspective.²¹²

From the point of departure that in a pollution situation there is usually conflict between a polluter and the resident affected by the pollution, Calabresi and Melamed argue that the primary issue in such a situation should be the determination of whose entitlement should initially be protected.²¹³ Various interests or entitlements enjoy varying degrees of protection in law. “Entitlements” are described as rights established and protected by law.²¹⁴ In this case there would be conflict between the

²⁰⁹ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 592-628 at 618-620.

²¹⁰ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128.

²¹¹ See G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1115. This article was written in response to pre-existing law and economics literature. The aim was to provide an expanded version of the law regulating the pollution problem. One of the forerunners of the pre-existing literature was Michelman, who argued that the theoretical framework provided by Calabresi in his book on the costs of accidents could similarly be applied to air pollution control: F Michelman “Pollution as a tort: A non-accidental perspective on Calabresi’s costs” (1971) 80 *Yale LJ* 647-686.

²¹² G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128.

²¹³ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1090.

²¹⁴ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128. Defining “entitlements” could be quite difficult because it could refer to a concept that is wider than a right. Using Hohfeld’s description of legal relations, Van der Walt explains that with regard to property, there could be a claim-right to that property, a correlative duty to respect that property as well as an opposite to the claim-right, essentially being a no-right. All of this is defined in relation to legal subjects with regard to one another and not with regard to the legal object. See AJ van der Walt “Marginal notes on powerful legends: Critical perspectives on property theory” (1995) 58 *THRHR* 396-420 at 407-408. This provides for the understanding of the fact that there could be choices between “the *entitlement* to make noise versus the *entitlement* to have silence, the *entitlement* to pollute versus the *entitlement* to breathe clean air,

entitlement to be pollution-free and the entitlement to pollute.²¹⁵ Two fundamental questions arise: How should it be determined to whom the initial entitlement should be assigned? And, how could (or should) that entitlement then be protected?

If it is not determined to whom the initial entitlement should be assigned and how that entitlement should be protected, it may result in the strongest one always winning. This, according to Calabresi and Melamed, is problematic. Hence, they argue that a certain level of state intervention is necessary to solve the problem of “might makes right”.²¹⁶

Property rules protect an entitlement to the degree that the holder of the entitlement is assigned the initial protection and anyone who subsequently wishes to acquire that entitlement could negotiate with the holder thereof.²¹⁷ This transaction will be concluded in terms of a voluntary agreement between the holder and the infringer. From an economic perspective, as envisaged in terms of the Coase theorem, the assumption is that there is a perfect market where there are no transaction costs and both parties negotiate on equal footing.²¹⁸ Coase assumed that, if transaction costs are zero, the initial allocation of resources are irrelevant because private transactions would result in the most efficient distribution. Therefore, the party who values the resource the most will end up with the resource. It has been argued that society should limit itself to property rules if the above conditions are present.²¹⁹ This is

the *entitlement* to have children versus the *entitlement* to forbid them.” It is clear that entitlement in this sense stretches further than the mere right in relation to the property: G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1090.

²¹⁵ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1090.

²¹⁶ In terms of the law and economics framework, state intervention is apt when market failure has occurred. It can be argued that the market has failed when conflicting parties cannot negotiate because one party is in a better bargaining position. See G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1095-1096. See further R Coase “The problem of social cost” (1960) 3 *Journal of Law and Economics* 1-23.

²¹⁷ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1092.

²¹⁸ R Coase “The problem of social cost” (1960) 3 *Journal of Law and Economics* 1-23.

²¹⁹ C Ott & H Schäfer “The dichotomy between property rules and liability rules: Experiences from German law” (2008) 1 *Erasmus LR* 41-58 at 43; R Coase “The problem of social cost” (1960) 3 *Journal of Law and Economics* 1-23. Coase considers the harmful effects of business firms on others. Coase’s theorem is based on the assumption that when trade is possible and there are no transaction costs, bargaining will lead to an efficient outcome regardless of the initial allocation of property rights.

important for two reasons. Firstly, it will ensure the efficient allocation of resources.²²⁰ Secondly, protecting entitlements to the extent that the entitlement can only be lost if it is given up voluntarily, is in line with the autonomist view of law.²²¹ The above assessment of property rules begs the question whether liability rules might even be necessary at all.²²² Calabresi and Melamed answer this question in the following way:

“In terms of economic efficiency the reason is easy enough to see. Often the cost of establishing the value of an initial entitlement by negotiation is so great that even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur.”²²³

Miceli, although not looking specifically at why liability rules are necessary, nonetheless provides an answer as to why the exclusive existence of only property rules would be unrealistic in any given society:

“To this point we have considered a world in which transaction costs are zero or low. In most real-world settings, however, significant transaction costs are present. In those cases, the assignment of rights may have allocative effects, suggesting that property law needs to be sensitive to the bargaining cost of the parties to a dispute.”²²⁴

²²⁰ See TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 at 247.

²²¹ TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 at 246. In this chapter Miceli argues that an economic approach to property law emphasises its role in promoting an efficient allocation of resources. Using the Coase theorem as authority, Miceli’s argument is that legal rules should be designed – or *defined* - in such a way that the property rights regime should ideally lead to efficient outcomes. Moreover, this should as far as possible be arranged by the parties themselves through effective bargaining. Only if this cannot occur should intervention be considered. Krier and Schwab question the objective which a judge should keep in mind when resolving a pollution dispute. They argue that the outcome must ensure “efficiency” and “justice”. Efficiency is described as the maximum value of the resource with regard to the willingness to pay for it, given the initial distribution of wealth. This is usually determined according to who values it the most. On the other hand, justice implies everything else necessary to make a sensible resolution. See JE Krier & SJ Schwab “Property rules and liability rules: The cathedral in another light” (1995) 70 *New York University LR* 440-483 at 445-447.

²²² C Ott & H Schäfer “The dichotomy between property rules and liability rules: Experiences from German law” (2008) 1 *Erasmus LR* 41-58 at 43, 46-50.

²²³ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1106.

²²⁴ G Calabresi & A Melamed “Property rules, liability rules and inalienability: One view of the cathedral” (1972) 85 *Harvard LR* 1089-1128 at 1106.

²²⁵ TJ Miceli “Property” in JG Backhaus (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 at 248, 249. Miceli argues that the biggest difference between property rules and liability rules is related to consent. In the case of property rules, consent will ensure that a mutually beneficial outcome is reached, thereby ensuring economic efficiency. Although consent is

As a consequence, liability rules foresee the possibility that there could be transaction costs and externalities causing market failure. This would preclude voluntary transactions and as such, state intervention is essential to bypass private transactions.²²⁵ Therefore, instead of freely buying entitlements parties may then be forced to buy entitlements by state rules. In short, in terms of Calabresi and Melamed's framework, property rules should generally be preferred when transaction costs are low, whereas liability rules should generally be preferred when transaction costs are high.²²⁶ Applying the above rationale they provide a framework to solve the pollution problem.

In a clash between the interests of a polluter and that of a resident affected by the pollution, the application of the property rule and the liability rule can be explained with regard to four rules. Rule one is a property rule in terms of which the initial entitlement is assigned to the resident.²²⁷ This rule ensures that an injunction is ordered against the polluter, putting an end to the pollution. The only way that the polluter will be able to continue polluting is if he negotiates with the resident. Because of this veto right, rule one will only be functional if there are no transaction

compromised with liability rules, the subjective valuation of the entitlement may not be taken into consideration.

²²⁵ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1092. Krier and Schwab divide transaction costs that preclude bargaining into two types, depending on which part of the negotiations is problematic. On the one hand, type 1 transaction costs focus on the possibility that there could be pre-negotiation difficulties. This could be for instance in cases where there are numerous parties involved in a dispute. On the other hand, type 2 transaction costs arise when bargaining between parties is made difficult because they cannot negotiate on equal footing. See JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *New York University LR* 440-483 at 440.

²²⁶ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128. Polinsky disagrees with the *a priori* basis of favouring liability rules when transaction costs are high. He argues that in a real world situation where there are realistic circumstances, damage remedies are not always the best option. Furthermore, the actual extent of the damage caused as a result is not always certain. It is argued that this could lead to high assessment costs and therefore inefficient calculation of damages. Additionally, a judge might not always have the necessary information to determine the amount of damages correctly in terms of a liability rule. See AM Polinsky "Resolving nuisance disputes: The simple economics of injunctive and damage remedies" (1980) 32 *Stanford LR* 1075-1112 at 1079. Krier and Schwab agree with Polinsky's view. They assert that the virtual dogma that prefers liability rules when transaction costs are high is problematic, given the fact that damages cannot always be assessed accurately by judges. See JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *New York University LR* 440-483 at 452-454.

²²⁷ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1116; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *SALJ* 592-628 at 614-622.

costs, making negotiation possible. Rule two, a liability rule, will have the consequence that the initial entitlement is assigned to the resident.²²⁸ Consequently, although the nuisance is recognised, the polluter can continue polluting, provided he pays damages. The damages amount should reflect an objective assessment and any subjective valuation is irrelevant for the court.²²⁹ This will typically be in cases where there are high transaction costs that render a voluntary transaction impossible. The third rule, again a property rule, begins from the point of departure that there is no nuisance.²³⁰ The initial entitlement is assigned to the polluter, who can continue polluting without paying damages.

Initially only these three rules were identified in the law regulating the pollution problem. However, Calabresi and Melamed took this approach further and proposed another rule that has not been given consideration in prior law and economics literature.²³¹ In terms of rule four, no nuisance is recognised with regard to the pollution.²³² The initial entitlement is assigned to the polluter, who may continue polluting unless the resident pays him damages to stop. In effect, the resident would be paying the polluter not to pollute. The practical application of this rule was illustrated in a nuisance case of *Spur Industries, Inc v Del E Webb Dev Co*.²³³ This case involved a dispute between a residential developer of a retirement community (Dell Webb) and a pre-existing feedlot owner (Spur Industries). Del Webb sued for an injunction in an attempt to shut down the feedlot because of offensive odours being emitted. It was argued that these odours formed the alleged nuisance. The Arizona State Supreme Court found that the activities did result in a nuisance.²³⁴ However, as a result of the fact that Del Webb had come to the nuisance and had not been there first, Dell Webb was ordered to pay for the relocation of the feedlot to another area. Accordingly, Spur Industries was ordered to shut down only if Dell

²²⁸ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1116.

²²⁹ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1092; TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 at 249. See fn 224 above.

²³⁰ G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1116.

²³¹ See fn 211 above.

²³² G Calabresi & A Melamed "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harvard LR* 1089-1128 at 1116-1118.

²³³ 494 P 2d 700 (Ariz 1972).

²³⁴ *Spur Industries, Inc v Del E Webb Dev Co* 494 P 2d 700 (Ariz 1972) par 3.

Webb would pay the relocation costs. In essence, Dell Webb could decide whether the relocation of Spur Industries would cost them more than having to endure the pollution.²³⁵

In an article honouring the contribution of Calabresi's work to the field of law and economics, reference is made to two experiences in German law that can be explained with regard to the rules.²³⁶ The interplay or dichotomy between property rules and liability rules is used to explain how the legal development of industrialisation and the protection of privacy rights in German civil law evolved.²³⁷ What follows below is a brief overview of the functioning of the rules in the context of industrialisation in Germany in the nineteenth century.²³⁸ This may be useful to determine how the rules are applied, which could provide clarity as to how they could be applied to the building encroachment problem.

Nineteenth century civil law in Germany was based on the concept of absolute property in the *ius commune*.²³⁹ The nineteenth century also saw an increase in the development of industries in Germany as a result of the Industrial Revolution. The greatest fear with regard to industrialisation was that individual autonomy would be undermined.²⁴⁰ It was for this reason that there was "a conservative bias against industrialisation."²⁴¹ Ott and Schäfer explain in two ways what was at the heart of the reason why industries struggled to take form in Germany:

²³⁵ *Spur Industries, Inc v Del E Webb Dev Co* 494 P 2d 700 (Ariz 1972) par 7. See further TJ Miceli "Property" in JG Backhaus (ed) *The Elgar companion to law and economics* (2nd ed 2005) 246-260 at 248.

²³⁶ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 43.

²³⁷ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 43.

²³⁸ I deliberately refrain from a discussion of the application of the rules with regard to privacy rights. The use of the rules in relation to industrialisation is more relevant for this study. For a discussion of the utilization of the rules to explain the movement towards a stronger protection of privacy rights under German civil law, see C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 50-57.

²³⁹ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 43.

²⁴⁰ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 43.

²⁴¹ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 43.

"The balancing of interests between the incompatible economic activities of the new industry and the traditional economy was not in accord with the concept of absolute property rights, which was generally accepted in Germany during the phase of early industrialisation."²⁴²

The second reason, which is similar to the above-mentioned one, is described as follows:

"The development of nuisance law in Germany during the process of early industrialisation is an example of the gradual transformation of norms from an autonomist protection of property to a welfarist balancing of interests."²⁴³

In essence, there was inconsistency between the continued existence of the industries and the neighbouring landowners' rights. Industrial use of land was not recognised as a defence against a traditional absolute property right.²⁴⁴ Accordingly, entitlements could not be acquired through exchange because owners would assert their absolute property rights and demand injunctions.²⁴⁵ Property rules, in terms of which normal exchange of the entitlements would be able to take place, became dysfunctional. The possibility of concluding a voluntary transaction as envisioned in terms of the property rules became impossible because of the high transaction costs. Consequently, Coasean bargaining, said to lead to efficient allocation of resources, was precluded.²⁴⁶ Legislation was enacted to protect industries, gradually moving towards compensation awards and away from injunctions.²⁴⁷ The more necessary the industries became for the so-called "general well-being", the less likely it was that an injunction would be awarded.²⁴⁸ It is contended that this also marked the movement from autonomy, encompassing the idea of absolute protection of

²⁴² C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 47.

²⁴³ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 46.

²⁴⁴ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 47.

²⁴⁵ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 48.

²⁴⁶ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 48. See fn 219 above.

²⁴⁷ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 49.

²⁴⁸ C Ott & H Schäfer "The dichotomy between property rules and liability rules: Experiences from German law" (2008) 1 *Erasmus LR* 41-58 at 48.

property, towards a welfare balancing of interests type of approach.²⁴⁹ This provides a classic example of the shift from property rules to liability rules envisioned in the framework of Calabresi and Melamed. Whether this framework can be used to explain the problem of encroachment by building is the next question.

Van der Walt contends that “one might attempt to reformulate the different options presented by the four rules for solving an encroachment problem.”²⁵⁰ It seems as though the distinction between property rules and liability rules and the alleged shift from the former to the latter could perhaps provide a conceptual framework for answering questions relating to why the shift from the default remedy of removal to the compensation awards has taken place.²⁵¹ In other words, it could be argued that what is happening when courts decide to deny removal and rather opt for compensation, can be explained using this law and economics model.

When conflict arises as a result of an encroachment by building, the affected landowner will ordinarily assert his property right in terms of an absolute entitlement to enjoy undisturbed possession of his property.²⁵² The encroaching landowner, on the other hand, might perhaps rely on policy and pragmatic considerations for seeking the denial of injunctive relief. The affected landowner could in this case try and hold out for a larger sum of money, due to his supreme bargaining power. A holdout situation created by the affected landowner results in high transaction costs,²⁵³ especially if it is a significant encroachment in terms of which the affected landowner would be less willing to give up his property.²⁵⁴ As a consequence, property rules might in this case be inefficient and a certain level of legislative or other regulatory intervention could be necessary where the market fails to bring

²⁴⁹ C Ott & H Schäfer “The dichotomy between property rules and liability rules: Experiences from German law” (2008) 1 *Erasmus LR* 41-58 at 46.

²⁵⁰ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 592-628 at 618.

²⁵¹ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 592-628 at 618-620.

²⁵² See chap 2 above.

²⁵³ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 592-628 at 616. See also TJ Miceli & CF Sirmans “An economic analysis of adverse possession” (1995) 15 *International Review of Law and Economics* 161-170 at 163.

²⁵⁴ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 592-628 at 616-617. Van der Walt argues that the strategic behaviour of an affected landowner may result in type 2 transaction cost as described by Krier and Schwab. See fn 225 above.

about an efficient result. Courts in a building encroachment situation may intervene to enforce an involuntary transaction between the encroacher and the affected landowner if it becomes apparent that a voluntary transaction is precluded by high transaction costs. Judging by *Rand Waterraad*²⁵⁵ and *Brian Lackey Trust*,²⁵⁶ it seems as though the recent tendency to prefer liability rules to property rules in settling building encroachment disputes may have been inspired by exactly this kind of argument. Perhaps the circumstances in the case are of such a nature that the transaction costs are too high and negotiation between the parties is impossible. As a result, courts need to intervene and reach an equitable outcome. In the absence of such intervention, the affected landowner would always be able to assert the property rule resulting in the removal of the encroachment. Therefore, the law and economics perspective provides another alternative for answering when the remedy of removal (in other words the property rule) should be replaced with the remedy of compensation (in other words the liability rule).

The law and economics perspective, the English law approach and South African neighbour law principles (if interpreted in terms of fairness so that the most equitable outcome is reached) assist in understanding when one remedy should be preferred over another. Therefore, these explanations may all be useful when determining whether the discretion should be exercised in the particular case. There may be exceptional circumstances in a particular case that may dictate favouring one remedy over another.²⁵⁷ This may provide a degree of certainty with regard to when and how the discretion should be exercised. However, it does not provide clarity in terms of what the extent of the discretion is. In the next section, I consider whether courts have the additional power to order that the encroached-upon land be transferred to the encroacher. Therefore, the question centres on whether courts may deny removal and order that the encroacher take transfer of the affected land against compensation. This issue is analysed with the aid of case law in the following section.

²⁵⁵ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

²⁵⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

²⁵⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 130.

3.6 The extent of the discretion

The question that needs to be dealt with in this section concerns the power of courts to order that the encroacher take transfer of the encroached-upon land against the payment of compensation. What is evident from earlier parts of the chapter is that courts do have the discretion to award compensation instead of removal.²⁵⁸ In the previous section it has been argued that there are various approaches and arguments on the basis of which the courts could decide when to exercise this discretion. However, it is uncertain whether the discretion includes the power to order that the portion of the property on which the encroachment stands may also be transferred to the encroacher.

This was emphasised recently in the case of *Phillips v South African National Parks Board*.²⁵⁹ The *Phillips* case demonstrates the confusion surrounding whether a court has the discretion to order that the encroached upon land be transferred to the encroacher. In this case the respondent argued that if the court ordered that the encroachment should remain in place, it should also make an order in terms of which the respondent would be entitled to the transfer of the encroached-upon land.²⁶⁰ Had the court ordered transfer of the land affected by the encroachment, there may well have been infringement of section 25 of the Constitution.²⁶¹ The Eastern Cape High Court actually considered the claim for transfer of the land seriously without probing questions about whether such a claim can be made and whether the court can make such an order.²⁶²

Van der Merwe states that a court can, in addition to awarding compensation instead of removal and if it deems it equitable, order that the portion of property encroached

²⁵⁸ See s 3.2 above.

²⁵⁹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010]. For the facts in the *Phillips* case, see chap 1.

²⁶⁰ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] par 3.

²⁶¹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] paras 22-24. For a discussion of the possible effect that the order could have for s 25 of the Constitution, see chap 5 below.

²⁶² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] paras 22-24.

upon be transferred to the encroaching landowner.²⁶³ The authority from which this power to order transfer derives is uncertain. The legal ground for the transfer of the property in these instances is most probably the court order, with section 33 of the Deeds Registries Act²⁶⁴ bringing the deeds register in line with the real situation. If this order is made against the will of the affected landowner, the court will be enforcing a unilateral involuntary sale of property that needs to be constitutionally compliant.²⁶⁵ Therefore, there needs to be clear authority before it can simply be assumed that such a power falls within the discretion of the court.²⁶⁶ The early South African case law that seems to be relied upon as authority for the view that courts have the discretion to order a transfer of the encroached-upon land to the encroacher is discussed below. It will become clear that these cases may not provide adequate authority for such a discretion. At best, the court in these cases merely facilitates a bilateral transaction between the parties where they cannot agree on a solution.

There are four early South African decisions that may be important in determining the ambit of the courts' discretion in the case of encroachment by building. In *Christie v Haarhoff and Others*²⁶⁷ the defendants had erected a substantial encroachment - approximately thirteen square metres - on the property of the plaintiff. The plaintiff applied for the removal of the encroachment or, in the alternative, damages for the trespass.²⁶⁸ He claimed that as a result of the encroachment he had been unable to dispose of his property and moreover that he had been deprived of the use of the property on which the encroachment stood.²⁶⁹

The then High Court of Griqualand assessed the legal situation and found that:

"In this case, however, the plaintiff very properly does not press his strict rights to the extreme point; and it is *practically agreed* that the proper course will be for the

²⁶³ CG van der Merwe *Sakereg* (2nd ed 1989) 202-203.

²⁶⁴ The Deeds Registries Act 47 of 1937. This Act merely provides a procedure for bringing the register in line with the change of ownership; it does not give the power to order transfer of ownership. See further AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 606; DL Carey Miller (with A Pope) *Land title in South Africa* (2000) 145-147.

²⁶⁵ See chap 5 below.

²⁶⁶ H Mostert, A Pope, PJ Badenhorst, W Freedman , JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 140.

²⁶⁷ (1886-1887) 4 HCG 349.

²⁶⁸ *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 352.

²⁶⁹ *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 352.

plaintiff to transfer to the defendants the ground built upon, upon their paying all expenses of and incidental to the transfer, together with reasonable compensation for depriving him of the ground.”²⁷⁰

The court exercised its discretion in favour of denying removal and awarding compensation instead. Additionally, it ordered the transfer of the encroached-upon land to the encroacher. However, this was not enforced against the will of the affected landowner. The parties were both amenable to the transfer. The court merely facilitated a bilateral transaction where the parties could not agree on a reasonable amount of compensation.²⁷¹

The next case in which the issue of transfer of the encroached-upon land was dealt with was *Van Boom v Visser*.²⁷² In this case the court gave judgement in favour of the affected landowner and ordered that an encroachment be removed.²⁷³ In the same way as *Christie v Haarhoff* the plaintiff in *Van Boom* did not press his rights strictly but claimed, as an alternative to removal, that the encroacher pay £100 to continue having the encroachment on the affected landowner's property.²⁷⁴ The court gave judgement in favour of the affected landowner and found that he was entitled to the claim for removal. However, the court stated that as an alternative the defendant could pay £25 for the transfer of the piece of ground on which the encroachment stood.²⁷⁵ Although the judgement is not very clear, it seems as though the transfer of the encroached-upon land was dependent on the consent of the affected landowner and was not a unilateral involuntary transfer of the land.

In *Meyer v Keiser*²⁷⁶ a significant encroachment was erected on the plaintiff's property and he applied for the removal of the encroachment. The defendant argued that the encroached-upon land should be transferred to him for an amount of

²⁷⁰ *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 354 (my emphasis).

²⁷¹ H Mostert, A Pope, PJ Badenhorst, W Freedman , JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 140.

²⁷² (1904) 21 SC 360.

²⁷³ *Van Boom v Visser* (1904) 21 SC 360 at 362.

²⁷⁴ *Van Boom v Visser* (1904) 21 SC 360 at 361.

²⁷⁵ *Van Boom v Visser* (1904) 21 SC 360 at 362.

²⁷⁶ 1980 (3) SA 504 (D).

compensation. He relied on the fact that the court has a discretion to order that the encroached upon land be transferred to him. The defendant wanted the court to order a forced sale of the land. Therefore, the question to be determined in the judgement was whether a court has the discretion to order the transfer of the portion of the property encroached upon. The court rejected the defendant's claim and stated that his argument was based on a misconception of the nature and extent of the courts' discretionary authority.²⁷⁷ It was stated that any order which brings about a transfer of property to an encroaching owner is merely incidental to the awarding of damages.²⁷⁸ It was decided that damages, or compensation for loss, should be the primary remedy sought in these circumstances.

The court in *Meyer v Keiser* relied on the earlier case of *De Villiers v Kalson*.²⁷⁹ In this case the court exercised its discretion in favour of leaving the building encroachment in place. However, it did not order transfer of the encroached-upon land to the encroacher. Therefore, this case illustrates that an order for transfer of property need not necessarily be made. Such an order would be ancillary, but would not be given if it was either impractical or impermissible by law to do so.²⁸⁰

From what has been discussed above, it seems as though there is considerable confusion concerning the question whether the courts' discretion includes the power to order that the encroached-upon land be transferred to the encroacher. Even after investigating the early South African judgements, it is still unclear whether the discretion includes the power to order transfer of the encroached-upon land. The judgements that seemingly provide authority for the contention that such a power does exist are not really adequate in this regard because there was consent (or at least the willingness to give up the property) in the cases discussed. Therefore, the transfer of the affected land in these cases was not against the will of the affected landowner. However, what is clear from *De Villiers v Kalson* and *Meyer v Keiser* is that the order for transfer of the encroached-upon land does not have to be made and the primary remedy in terms of the discretion is damages. Therefore, the

²⁷⁷ *Meyer v Keiser* 1980 (3) SA 504 (D) at 507.

²⁷⁸ *Meyer v Keiser* 1980 (3) SA 504 (D) at 507.

²⁷⁹ *De Villiers v Kalson* 1928 EDL 217. For the facts of *De Villiers v Kalson*, see s 3.2 above.

²⁸⁰ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 (3) SA 504 (D) at 507.

encroacher would always have to claim damages instead of removal as the primary remedy and cannot directly argue that the court should order transfer of the affected land. The court will then determine whether transfer should be ordered in addition to damages, but my guess is that this should depend on the willingness of the affected landowner to give up his property. Therefore, as the matter stands, there is no authority in either common law or legislation in terms of which the court can sanction a forced sale of land in the context of building encroachments. If the affected landowner would not want to give up the encroached-upon part of his property and the court orders the transfer, the involuntary transfer may be problematic in light of section 25(1) of the Constitution.²⁸¹

3.7 Conclusion

In this chapter I examined three questions concerning judicial discretion in the context of building encroachments in South Africa. In the first instance, it was important to ask whether South African courts have the discretion to deny a demolition order and award compensation instead. After an investigation into South African case law, it is clear that such a discretion does exist and courts have the power to deviate from the default remedy of removal in the case of building encroachments and award compensation instead. Prior to the recent *Rand Waterraad* decision there were numerous judgements where courts merely assumed the power to order that the encroaching structures remain intact, and that the encroaching owner pay compensation to the affected landowner instead.²⁸² However, in *Rand Waterraad* the question was raised and answered in the affirmative. Similarly, the discretion to deny removal and award compensation instead of removal was accepted in the *Brian Lackey Trust* case.

The second question that was analysed in this chapter was which circumstances would be appropriate for the exercise of the discretion in favour of compensation instead of removal. It was a difficult task to try and establish in which cases courts

²⁸¹ See chap 5 below.

²⁸² *Stark v Broomberg* 1904 CTR 135; *Van Boom v Visser* (1904) 21 SC 360; *Naudé v Bredenkamp* 1956 (2) SA 448 (O); *Meyer v Keiser* 1980 (3) SA 504 (D); *Hornby v Municipality of Roodepoort-Maraisburg and Another* 1918 AD 278.

will deny the default remedy of removal and award compensation instead. It required an investigation into how the discretion had been exercised in the past and a determination of whether there was any coherent methodology that could be identified. The court in *Rand Waterraad* questioned when it would be appropriate to exercise the discretion and deny removal. It found that it is important to look at the surrounding circumstances of the particular case to determine when the discretion should be exercised in favour of the encroacher. The facts in this case were deemed to be exceptional enough to justify a deviation from the common law remedy of removal. The main reason for denying the removal order in *Rand Waterraad* was the tardiness with which the applicant had approached the situation. However, the court also placed emphasis on the principles of neighbour law in its decision to deny demolition of the encroaching structures. In the *Brian Lackey Trust* judgement, the court also had to determine when the discretion may be exercised in favour of leaving the encroachment intact. In doing so, it was confronted with the question whether the discretion was limited to minor encroachments, or whether the discretion could be exercised even in the case of significant encroachments. The court found that the discretion was wide and equitable and was not only limited to minor encroachments. Subsequently, the court could proceed in determining whether the discretion should be exercised in the specific case. It relied on neighbour law principles and the argument of disproportionality of prejudice to reach the conclusion that the encroachments should not be removed.

There are three possible arguments that have been used or could be used to explain why (and when) it may be necessary (or justified) to deviate from the common law remedy of removal in terms of the courts' discretion in a building encroachment case. In the first instance, South African neighbour law principles seem to have been provided as reasons why an encroaching structure should not be removed. The underlying principle is that if harmony between neighbouring landowners could be preserved by not demolishing encroaching structures, this should be done. Courts are using the neighbour law reasonableness standard to argue that the most suitable outcome should be sought. However, with regard to the above-mentioned argument, it seems as though courts probably mean fairness in the sense that there should be a balancing of conflicting interests to reach the most just outcome. This is assuming

that all the circumstances of the case are taken into consideration, including for example whether an affected landowner would suffer virtually no harm if the encroachment remained intact, while the encroacher would be greatly harmed if demolition was ordered.

The second argument that was investigated in the chapter was English law. English law is being used as authority by South African courts for identifying cases where compensation might be favoured instead of removal. The inclination of English courts is to opt for the remedy of compensation even in cases where there has been a blatant disregard for the rights of the claimant. Similarly, this is becoming prevalent in encroachment cases in South Africa. However, English law has in some cases not been applied correctly in South African law. It seems as if South African courts are using English law principles as a basis for the deviation from the default remedy of removal, yet it has not been used in the same way as it has in English law. Although the English Supreme Court Act²⁸³ gives a wide discretion to award monetary instead of injunctive relief to reach an equitable and just outcome, the size of the encroachment plays a role in determining which remedy should be applicable in the specific case.²⁸⁴ The established practice or settled principles of English courts to award monetary instead of injunctive relief in cases where the encroachments are generally small, was clearly not adopted consistently in South African law.²⁸⁵ In fact, Griesel J in *Brian Lackey Trust* strongly warned against the use of English law in South African cases. Therefore, he rejected the defendant's claim that the size of the encroachment would preclude the exercise of the discretion in the same way as in English law. Courts are apparently willing to treat all encroachments in the same way, whether the effect is so small that it virtually has no impact on the affected landowner, or whether it results in the loss of all use and enjoyment of the property affected by the encroachments. In the South African context, this could cause serious doctrinal and constitutional issues.²⁸⁶

²⁸³ The Supreme Court Act 1981 (England & Wales).

²⁸⁴ See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322.

²⁸⁵ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

²⁸⁶ See chaps 4 and 5 below.

In the final instance, law and economics arguments may be used to explain how the discretion is exercised. In other words, the law and economics argument could assist in understanding why one remedy (compensation) is preferred over another (removal). It is argued that the approach of courts to award compensation instead of removal can be explained with regard to the tendency to prefer liability rules to property rules in solving building encroachment disputes, where the transaction costs would mostly be high. The law and economics framework may help clarify why it would be better to prefer liability over property rules in certain cases. In cases where there are high transaction costs bargaining becomes difficult or impossible, and accordingly there should be a certain level of government intervention in the form of liability rules. With regard to encroachment by building, this would primarily occur in cases where the encroachment is significant. Therefore, a large part of what is happening when courts exercise its discretion in favour of compensation instead of removal may be explained using the law and economics arguments.

The three arguments mentioned above and the rationale in *Rand Waterraad* in terms of which the surrounding circumstances of the case should be taken into consideration proved helpful in explaining when the discretion should be exercised in favour of compensation instead of removal. However, the issue of what the discretion includes is important for a discussion of judicial discretion in the context of building encroachments. In the final section of the chapter the extent of the courts' discretion was examined. Even after an investigation into early South African case law it is uncertain whether the court has the power in terms of the discretion to order that the encroached-upon portion of the property be transferred to the encroacher. The two cases that are generally relied upon as authority for the discretion to order transfer of the encroached-upon land are unclear. In both *Christie v Haarhoff* and *Van Boom v Visser*, it seems as though the order was not made against the affected landowner's will. There was some sort of indication that he would be willing to accept compensation for the continued existence of the encroachment and subsequently the loss of the encroached-upon portion of the property. There is authority for the fact that the order for transfer of the encroached-upon land does not have to be made when the discretion is exercised in favour of compensation instead of

removal.²⁸⁷ Damages would be the primary remedy in terms of the discretion. As a result, an encroacher cannot argue that a court should exercise its discretion in favour of transfer of affected land. An order like this would be ancillary to the damages award. This creates the impression that transfer may be awarded if the court, like Van der Merwe argued, deems it equitable. However, this aspect of the law regulating building encroachments is very unclear and consequently there may be implications that need to be addressed.

If a court orders the transfer of the affected land to the encroacher and the affected landowner does not consent, this court ordered transfer results in a unilateral involuntary transfer of the affected property. This needs to comply with section 25(1) of the Constitution.²⁸⁸ If a court does not order transfer and the encroachment remains in place, it is necessary to find a doctrinal solution for explaining the rights of the parties to the affected land once the compensation order has been given. The doctrinal problem that may arise is discussed in the chapter below.

²⁸⁷ *De Villiers v Kalson* 1928 EDL 217.

²⁸⁸ See chap 5 below.

Chapter 4: Doctrinal implications of the new approach to building encroachments

4.1 Introduction

Forty years ago Milton pointed out the “unsatisfactory state” of the law regulating building encroachments in South Africa.¹ It seems as if contemporary law on the matter is in no better state. Anne Pope argues that a possible explanation for the unsatisfactory *status quo* is the confusion that exists between principle and policy.² The interplay between what Pope calls principle (supporting the default remedy of removal) and policy (the instances where deviation from the default remedy of removal is permitted), will be important in this chapter. The intention of this chapter is not to try and set out the most ideal property law system within which building encroachment problems could be solved. The idea is rather to identify some uncertainties in the current way courts are dealing with an encroaching structure, and possibly provide clarification on the issue. Therefore, in this chapter I try to identify the doctrinal implications of the outcomes resulting from building encroachment disputes. It will be important to look at the effects of keeping an encroaching structure in place, especially in the case where the encroachment is significant.

Chapter 3 created a platform for highlighting the courts’ discretion in the context of building encroachments. It is clear that the recent tendency of courts dealing with building encroachment disputes is that the discretion to award compensation rather than order removal is more readily exercised in favour of the encroacher where policy considerations dictate such an outcome.³ It was established that this discretion is wide and equitable and dependant on the particular circumstances of

¹ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 234.

² A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 *SALJ* 537-556 at 544.

³ See chap 3 above for a discussion of the court’s discretion in *Rand Waterraad v Bothma en ‘n Ander* 1997 (3) SA 120 (O). In *Rand Waterraad* the court found that it had a wide and equitable discretion to replace a removal order with compensation. This was confirmed in the case of *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

the case.⁴ It was confirmed that the discretion was not limited to minor encroachments but that it may be exercised even in the case of significant encroachments.⁵ It was also clear from the previous chapter that there is still uncertainty regarding the extent of the courts' discretion. It remains unclear whether the discretion authorises only the replacement of injunctive relief with compensation (which could result in the effective transfer of use rights), or additionally allows the court to order that ownership of the affected land be transferred to the encroaching landowner.⁶

In this chapter I focus on what happens when the court denies the demolition order but says nothing about the rights of the respective landowners in a building encroachment dispute. If it is possible to leave a building encroachment in place on policy grounds even if the encroachment is extensive, what needs to be explained is what happens when the land is not transferred to the encroacher when the encroachment remains in place. The effect is that one person owns the land and another the buildings erected on the land. I will question whether this is possible in the South African context with reference to the principle of attachment. If attachment takes place normally, the affected landowner would own the land and everything that forms part of the land. Therefore, he would be able to have the encroachment demolished. To explain why he does not have the right to have the encroachment demolished, one would have to get past the principle of attachment. I examine the principle of attachment in order to determine why it does not take place in the case of encroachment by building.

Generally speaking, the principle of accession (specifically *inaedificatio*) governs the situation where buildings are erected on land.⁷ The rules of accession are applicable in cases where one person builds on the land of another.⁸ Encroachment indicates

⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁵ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

⁶ See s 3.6 in chap 3 above.

⁷ CG van der Merwe *Sakereg* (2nd ed 1989) 247; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147.

⁸ For the principle of accession (*inaedificatio* specifically), see CG van der Merwe *Sakereg* (2nd ed 1989) 247-258; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of*

“the situation where a building is erected wholly or substantially on a neighbour’s land”.⁹ When building materials are used in building on land, they usually attach to the land and the materials cease to exist independently and become part of the land. The owner of the land owns the structure erected on the land because it forms part of the land and therefore he can claim demolition of the structure. Therefore, the remedy of removal is based on the principle of attachment. It will become clear that no mention is made of the principle of attachment in the case of encroachment by building. The implications that these building encroachment court orders have for the law of attachment are identified and investigated below. It is necessary in this chapter to give a brief introduction to the principle of accession in South African law. This will be important in order to establish how it may be possible to preclude the normal occurrence of accession. The role of the subjective intention of the owner of the movable is important in this regard, especially considering recent accession case law in which the subjective intention of the owner of the movable was considered to be the deciding factor. As a result of the development that has taken place in the law regulating accession, it seems as though it is possible to preclude the occurrence of accession despite the buildings having been permanently affixed to the land, if accession was not in accordance with the subjective intention of the owner of the movable. Even when the objective, physical factors indicate that attachment did occur, accession could still be precluded according to the subjective test. This new approach in accession cases may be important in the context of encroachment by building. When a court refuses to order the removal of an encroachment, it is in effect denying the occurrence of attachment. I will consider whether the occurrence of accession can be precluded by arguing that it was never the intention of the encroacher that accession should occur. If accession did not take place, it would mean that the building belongs to the encroacher and the land to the affected landowner. This may provide a doctrinal explanation for the situation that results when a building encroachment is left in place.

property (5th ed 2006) 147-154; DL Carey Miller *The acquisition and protection of ownership* (1986) 22-36.

⁹ JRL Milton “The law of neighbours in South Africa” 1969 *Acta Juridica* 123-244 at 234. For the principle of encroachment (building encroachments specifically), see CG van der Merwe *Sakereg* (2nd ed 1989) 201-203; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* (5th ed 2006) 121-125.

Another possibility that may provide a doctrinal explanation for what happens when a building encroachment remains in place is the argument that accession would normally have taken place, but the court decides that the principle is suspended for policy reasons. I examine several examples of such an argument for suspension of the normal principles of attachment below. The first example is Pope's approach, in which she looks at the likelihood of suspending the principle of attachment in limited instances. In terms of her approach, the extent of the encroachment should determine whether accession or encroachment rules should apply. Pope argues that encroachment rules should apply in the case of minor encroachments, in which case the principle of attachment is apparently suspended. This is necessary to eliminate the drastic consequences of accession, namely the original *loss* of ownership by operation of law. In line with Pope's argument the normal common law principle of attachment is apparently suspended in some cases of encroachment by building. However, she limits this to instances where the encroachment is minor. By suspending the principle of attachment, the result is that ownership of the encroaching structure remains with the encroaching landowner, while ownership of the affected land remains with the affected landowner.¹⁰ Arguing that the encroaching structure does not attach to the affected land in certain cases is therefore a second doctrinal explanation for the fact that the encroaching structures do not become part of the land by operation of law.¹¹ The alternative, namely that one person owns the land and another the structure that extends over it, looks quite foreign to the basic principles of South African law. Although this seems to be what happens in the above case, it is clear that courts take no cognisance of the rules of attachment in the case of building encroachments and consequently the doctrinal

¹⁰ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 537; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 603-604.

¹¹ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 537; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 593. In *Rand Waterraad* the court, relying on old authorities, stated that in the context of the 'year and a day rule', building works could be acquired through prescription. It was only the work that was acquired, and not the land on which the building was erected. This effectively indicates the suspension of the principle of attachment. See *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); H De Groot 1583-1645 *Inleidinge tot de Hollandsche rechtsgeleertheyd* 2 5 8 (translated by RW Lee *The jurisprudence of Holland* (1926), hereafter referred to as "Grotius"); Grotius 2 36 5; Groenewegen *De Leg Abr ad C* 3 34 2 (translated and edited by B Beinart & ML Hewett *A treatise on the laws abrogated and no longer in use in Holland and neighbouring regions* vol 3 (1984) 144, hereafter referred to as "Groenewegen *De Leg Abr ad C*"). See also s 4.3 below.

situation is not always explained clearly. It is necessary to determine in this chapter whether it would be possible to apply Pope's rationale of suspension of the rules of attachment to large encroachments to explain the doctrinal effect in cases where a demolition order is denied.

I will also consider whether Roman-Dutch law provides another example of how the principle of attachment is suspended in the case of praedial servitudes acquired through prescription. It will become clear that the right to have building works on the land is kept separate from the right to the land itself in the case where a praedial servitude is acquired through prescription. Therefore, this provides an early example of the principle of attachment being suspended and may help to explain what happens when the court leaves the encroachment in place.

Pienaar and Eiselen provide another argument that looks as though it may prove that the principle of accession can be suspended to prevent unfair results in certain cases.¹² They argue that it is sometimes possible that ownership of an accessory can remain "slumbering" until the principal and the accessory are separated. I investigate whether this may help to provide a doctrinal result in the case of encroachment by building by adding weight to the idea that the principle of attachment can be suspended.

Therefore, in this chapter I consider two possibilities to explain what happens in the case where a court decides to leave a building encroachment in place. The first possibility is in line with the new approach in accession cases. The argument is that accession never took place because the encroacher did not want to transfer ownership. The other argument is that the principle of attachment is suspended to preclude its normal consequences of accession for the sake of fairness or policy. Both of these results will make it possible to order compensation instead of removal, making it possible for the encroacher to remain in possession of the encroachment. However, both of these solutions cause the same problem, namely one person owns a building on land belonging to another without any clarity about the respective rights

¹² S Eiselen & G Pienaar *Unjustified enrichment: A casebook* (2nd ed 2005) 241.

to that piece of affected land. Therefore, it is unclear what the relationship is between the owners when the encroachment remains in place. It is also uncertain what the encroacher gains and the affected landowner loses when the encroaching structure is not demolished. Therefore, it will be necessary in the subsequent sections to determine what the consequence of the new approach and of the suspension argument is, with specific focus on the rights of each party involved in the case. When a court says nothing about the rights of the parties after it decides to leave the encroachment intact, we are left to infer what the affected landowner loses and the encroacher gains. This is especially problematic in the case of significant encroachments where, as a result of leaving the encroachment intact, the affected landowner stands to lose the use of a significant portion of his property. It seems as though it results in a transfer of a use right created by court order.¹³ The courts' inability or failure to determine and deal with the loss that results when demolition is denied causes confusion and needs to be explained adequately. I will argue in this chapter that an explanation of the doctrinal effects of these court orders is imperative.

4.2 New approach to the problem of building encroachments and the doctrinal uncertainty that it creates

In terms of the new approach to the problem of building encroachments in South Africa, courts are now more inclined to keep the encroaching structures in place and award compensation instead.¹⁴ The remedy of removal, which was said to be the default remedy in the case where someone builds across the boundary line, is thus not applied.¹⁵ Pragmatic and policy considerations seemed to have formed the underlying justifications for the move away from the traditional remedy of removal.¹⁶ It was clear from the previous chapter that it should be possible, on policy and fairness grounds, in some cases to deviate from the default remedy of removal and leave an encroaching structure in place, even in the case where the encroachment is extensive. In cases where the negative impact for the affected landowner is relatively

¹³ The inferences drawn in this regard could be supported with guidelines from foreign jurisdictions. See chap 6 below.

¹⁴ See chap 3 above.

¹⁵ See chap 2 above.

¹⁶ See chap 3 above.

small compared with the loss that the encroaching owner would suffer if demolition was ordered, leaving the encroachment in place may be a likely outcome.¹⁷ This is more complex in the case of large encroachments; however, I found in the previous chapter that it should be possible in exceptional circumstances to allow even substantial encroachments to remain intact.¹⁸ The particular circumstances in the case would obviously be important in this regard.

In some cases courts have gone even further and ordered the transfer of the encroached-upon land to the encroacher.¹⁹ The right that the affected landowner obtains is clearer in the case where transfer of the affected land is ordered. In that case, the right that the encroacher obtains is ownership of the land on which the encroachment is erected. Although it is questionable whether this order may be made, at least in the case where transfer is ordered the right that the encroacher obtains is certain. However, my main concern in this chapter is with the instances where we are left to guess what rights the encroacher obtains, in other words where the court says nothing about the transfer of rights to the encroacher. If demolition is denied and the court says nothing about the rights of the parties in the dispute, the question here is how to explain what happens when the land is not transferred but the encroachment is left in place. The effect is that one person owns the land and another the building erected on the land. This is only possible in our law if the person who owns the building has a use right (either personal or real) over the affected land.

Therefore, there are two important issues that are unclear about the outcome that results when demolition is denied in a building encroachment dispute. The first question concerns the principle of attachment and why it does not occur in the case of encroachment by building. Generally, buildings erected on land accede to the land in terms of the principle of attachment. The building materials lose their independence and become part of the land and the owner of the land is owner of everything erected on the land. If demolition is denied, the occurrence of attachment

¹⁷ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 606.

¹⁸ See chap 3 above.

¹⁹ The uncertainty with regard to the extent of the discretion to award compensation instead of removal is discussed in s 3.6 in chap 3 above.

is denied, because if attachment principles were applicable in the case of building encroachments, the owner of the land would be able to claim demolition of anything built on his land. In the next section I consider the basic principles of attachment in South African law, and then proceed to identify the doctrinal problems that the outcomes in encroachment disputes have for the principle of attachment.

The second uncertainty that is created when demolition of the building encroachment is denied are the rights of the parties involved in the dispute. Currently, it is uncertain what the nature of the right is that the encroacher obtains when he is allowed to have continued possession of the encroachment. In section 4.3 below I discuss the uncertainty surrounding the right that indirectly comes into existence when demolition is denied.

4.3 Accession

4.3.1 Introduction

In terms of South African common law, if someone builds a permanent structure on the land of another, the principle of accession or more specifically *inaedificatio* is applicable.²⁰ If the building is permanent, the building materials lose their independence and attach to the immovable property (land). The owner of the land owns the previously independent building materials and the structure erected on his land, as part of his land, by operation of law.

The underlying foundation of this principle is the Roman law maxim *superficies solo cedit* – also referred to as *omne quod inaedificatur solo cedit* - which states that that which attaches permanently to land accedes to and becomes part of the land.²¹

²⁰ CG van der Merwe *Sakereg* (2nd ed 1989) 247; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147. Pope discusses the relationship between encroachment and accession. She distinguishes between on the one hand, complete or large partial encroachments (in other words significant encroachments) and on the other hand, small partial encroachments. She argues that the large partial encroachments should be treated as instances of accession and should be removed according to the rules of attachment. A Pope "The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 537.

²¹ CG van der Merwe *Sakereg* (2nd ed 1989) 247; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147.

Therefore, the owner of the land is also owner of everything attached to the land through accession. Since a landowner affected by a building encroachment would, according to the principle of accession, be the owner of the land and everything attached to the land, he can demand removal of the attachments. Therefore, the principle of attachment forms the foundation of the common law remedy of removal in the case of encroachment by building. As owner of the land and permanent structures on the land, the landowner can demand removal of structures he does not wish to have on his land.

Accession, which is considered a form of original acquisition of ownership in South African law, does not occur through transfer from one owner to another. Transfer of ownership is derivative rather than original acquisition of ownership because the acquirer derives his title from the transferor.²² In the case of accession the owner of the movable building materials does not transfer ownership in them to the affected landowner; they lose their independent existence by operation of law and therefore, in so far as the landowner 'acquires' ownership of the movables when they accede to his land, the acquisition is original and independent of the cooperation or title of the previous owner.

The distinction between these two forms of acquisition of ownership is sometimes blurred.²³ It has been argued that this is caused when courts place too much emphasis on intention as a factor in determining whether accession has occurred.²⁴ When the courts attach too much weight to the intention of the annexor to decide whether accession has occurred, they are in essence moving away from the very

²² For derivative acquisition (or transfer) of ownership of land in general, see CG van der Merwe *Sakereg* (2nd ed 1989) 333-345; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 201-239. See further CG van der Merwe "Law of property (including mortgage and pledge)" 1977 *Annual Survey of South African Law* 231-237 at 235.

²³ DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real and personal rights?" (1984) 101 *SALJ* 205-211 at 210; C Lewis "*Superficies solo cedit – sed quid est superficies?*" (1979) 96 *SALJ* 94-107 at 106; CG van der Merwe *Sakereg* (2nd ed 1989) 257.

²⁴ DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real and personal rights?" (1984) 101 *SALJ* 205-211 at 210; C Lewis "*Superficies solo cedit – sed quid est superficies?*" (1979) 96 *SALJ* 94-107 at 106; CG van der Merwe *Sakereg* (2nd ed 1989) 257.

premise of the principle of accession, namely that it does not depend on an act of will but takes place by operation of law.²⁵

Accession will occur if it can reasonably be ascertained that the movable is permanently affixed to the immovable.²⁶ There are two objective factors and one subjective factor that indicate whether accession was permanent. In *Olivier & Others v Haarhof & Co*²⁷ a test was established to confirm whether the building in the particular case had attached to the land. It was found that the occurrence of accession depends on the nature and purpose of the attached thing, the manner and degree of the attachment and the intention of the owner of the movable.²⁸ This three-factor test was given the stamp of approval by the Appellate Division of the Supreme Court in the subsequent case of *MacDonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd*.²⁹ The court in *Newcastle Collieries Co Ltd v Borough of Newcastle*³⁰ stated that each case depended on its own set of facts, but confirmed that the elements established in *Olivier v Haarhof* could prove helpful in determining whether the materials had attached to the land.³¹ It is usually said that the two objective factors should be decisive, but as the discussion below indicates, there has been a shift towards the importance of the subjective intention of the owner of the movable in recent case law on accession.

For purposes of building encroachments, the question is: Can someone preclude the occurrence of accession - which happens by operation of law - by claiming that it was never his or her intention that accession should happen and that ownership of the movables should be lost? In order to answer this question, it is necessary to look

²⁵ DL Carey Miller "Fixtures and auxiliary items: Are recent decisions blurring real and personal rights?" (1984) 101 SALJ 205-211 at 210; C Lewis "Superficies solo cedit – sed quid est superficies?" (1979) 96 SALJ 94-107 at 106.

²⁶ CG van der Merwe Sakereg (2nd ed 1989) 248: "Ten eerste moet die aard van die saak sodanig wees dat dit permanent met die grond of ander onroerende saak verbind kan word"; *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 466: "The thing must be in its nature be capable of acceding to realty."

²⁷ 1906 TS 497 at 500.

²⁸ *Olivier & Others v Haarhof & Co* 1906 TS 497 at 500.

²⁹ 1915 AD 454 at 466.

³⁰ 1916 AD 561 at 564.

³¹ *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 564.

at each factor as it has typically been used in the determination of the occurrence of accession.

The importance of the nature of the movable thing may be self-evident from the inquiry.³² An example of such a movable is cement.³³ Cement, as a building material, can be assumed to have been attached permanently and become immovable once it has become part of a building erected on land, unless the contrary can be proven.³⁴ However, it would be very difficult to prove that building materials like cement did not become part of land once a building is completed.

The manner of annexation is the second factor that can indicate whether a permanent attachment has taken place. It depends on the way in which the movable has been attached to the soil or the structure.³⁵ There are two questions to be asked here. Firstly, it needs to be determined whether and to what extent the attached thing had been fixed to the land or the permanent structure in such a way that it lost its identity and inherently became part of the immovable. Secondly, the attachment must have secured itself to the land to such an extent that separation would cause substantial injury to either the movable or the immovable or both.³⁶ Once it can reasonably be determined that the movable has become part of the immovable to such an extent that separation would cause substantial injury to either the movable or immovable, it can objectively be assumed that accession has occurred.

The intention of the owner of the movable should generally be determined by looking at the nature and purpose of the movable thing as well as the manner and degree of the annexation. The intention of the owner of the movable, which is assumed to be indicated by the nature of the movable and the manner of the annexation, is

³² *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 466.

³³ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147.

³⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 147.

³⁵ CG van der Merwe *Sakereg* (2nd ed 1989) 249-251; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 148.

³⁶ CG van der Merwe *Sakereg* (2nd ed 1989) 250; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 148.

commonly referred to the “inferred” or “imputed” intention. Lewis emphasises the distinction between the “inferred” or “imputed” intention, which can be deduced from the physical factors, and the so-called “professed” or “stated” intention of the annexor.³⁷ The difference between the inferred and the professed intention becomes problematic in cases where the inferred intention that is deduced from the physical facts is different from the professed intention of the annexor. In these cases, it seems as though the “professed intention of the owner cannot be allowed to contradict the realities of a given fact-situation.”³⁸ Stated differently, it is argued that “the stated intention, must give way to the inferred or imputed intention.”³⁹ However, in recent case law this distinction has become blurred and more emphasis was placed on the stated intention, even when it apparently contradicted the objective factors.

The first two factors are typically considered to be the objective determinants of accession, whereas the intention of the owner of the movable is considered to subjectively indicate accession. None of the Roman-Dutch law authors provided a detailed analysis of what constituted an accession. Voet wrote that the focus should be on the physical circumstances as the primary indication of accession.⁴⁰ Grotius confirmed this by stating that the builder’s state of mind or his intention does not affect the result from a proprietary point of view.⁴¹ The intention of the builder only becomes relevant at the determination of compensation that can be claimed on the basis of unjustified enrichment.⁴² Determining how much weight should be attached

³⁷ C Lewis “*Superficies solo cedit – sed quid est superficies?*” (1979) 96 SALJ 94-107 at 99.

³⁸ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* (5th ed 2006) 149.

³⁹ C Lewis “*Superficies solo cedit – sed quid est superficies?*” (1979) 96 SALJ 94-107 at 99. Lewis relies on the statement of Van Winsen AJA in *Standard Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) at 678.

⁴⁰ Voet 1647-1713 *Commentarius ad pandectas* 41 1 24 (translated by P Gane *Commentary on the pandect* (1955-1958), hereafter referred to as “Voet”).

⁴¹ Grotius 2 10 6-8. Specifically s 7 of chap 10 states: “Therefore, if any one builds upon his land, with another man’s timber or stone, he is held to be owner of the building, so long as it stands, provided that he is bound to compensate the owner of the material: but if the building happens to fall to pieces, then the owner of the material may take possession of or reclaim his property: this rule was introduced because it is to the common interest that houses once built should not be torn down.”

⁴² See W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse reg* (2nd ed 1971) 94, where De Vos draws a distinction between someone who knowingly builds on someone else’s property – a *mala fide* possessor – and someone who accidentally builds on the property of another – a *bona fide* possessor. In the latter case accession still takes place, but the builder is entitled to fair compensation for the building materials lost on the basis of unjustified enrichment. The intention of the builder thus

to each of the factors has proved problematic in the past.⁴³ The biggest issue was whether the intention of the owner of the movable can override what is evident from the physical factors.

In the development of the law regulating the principle of attachment in South Africa there seems to be inconsistency in the relative importance attached to the three factors. Initially, the traditional approach was that the intention of the owner of movable only became relevant to prove accession if the first two factors were inconclusive or ambiguous.⁴⁴ In other words, if the first two objective factors gave a clear indication that attachment had occurred, it could reasonably be assumed that accession did in fact occur. In these circumstances it would be unnecessary to look at the intention of the owner of the movable. In any event, it was assumed that the intention of the owner of the movable was unlikely to change the situation.

This approach was nicely illustrated in the case of *R v Mabula*,⁴⁵ where the court stated that:

"The main elements of that test have been repeatedly indicated by this court. The nature of the structure, the manner of its annexation to the realty, and the intention of the person who annexed it; these are the factors chiefly to be considered. But it

plays a role in determining whether and to what extent compensation would be paid. See also D 41 7 9 12: "On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom ground belongs. If he knew that the land was owned by another, he is understood to have lost ownership of the materials voluntarily; and therefore if the house is demolished he will have no right to claim them." See further Grotius 2 10 8: "Again, if any one builds upon another's ground with his own timber or stone, he loses the ownership, which lapses to the owner of the land. But the owner of the land is bound to compensate him, if he built thinking that he was owner, or as lessee, unless the building was erected not for need or profit, but for pleasure, in which case the landowner has the option of keeping the building with compensation, or of permitting the builder to remove it: but if a person has built in bad faith he has no recourse save for necessary expenses."

⁴³ *Olivier & Others v Haarhof & Co* 1906 TS 497 at 500; *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 466; *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561 at 564; *R v Mabula* 1927 AD 159 at 161; *Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council* 1961 (2) SA 669 (A) at 677; *Western Bank Bpk v Trust Bank van Afrika Bpk & Andere NNO* 1977 (2) SA 1008 (O) at 1020; *Theatre Investments (Pty) Ltd & Another v Butcher Bros Ltd* 1978 (3) SA 682 (A); *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W); *Senekal v Roodt* 1983 (2) SA 602 (T); *Sumatia (Edms) Bpk v Venter en 'n Ander NNO* 1990 (1) SA 173 (T); *Konstanze Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A); *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T).

⁴⁴ CG van der Merwe *Sakereg* (2nd ed 1989) 254-256; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 148-149.

⁴⁵ 1927 AD 159.

by no means follows that they all require consideration equally or at all in every case. In many instances the nature of the thing or the mode of attachment may conclude the enquiry. But where the application of these is indecisive the element of intention may settle the matter.”⁴⁶

From this it can be concluded that at least in some cases the intention of the owner of the movable did not even need to be considered.⁴⁷ However, where the physical factors were inconclusive, the intention of the owner of the movable would determine the outcome in the case.⁴⁸

In one of the earliest cases dealing with the issue of *inaedificatio* the above point was illustrated.⁴⁹ *MacDonald Ltd v Radin NO and The Potchefstroom Dairies & Industries Co Ltd*⁵⁰ confirmed the traditional approach.⁵¹ It was reiterated that if the two objective factors did not give a definite indication of attachment then the intention of the annexor/owner could be the deciding factor.⁵² The appellant company in this case had appealed against the decision of the Transvaal Provincial Division in which it was found that because the defendant had installed the machinery with the intention that it should remain permanently, it had become immovable.⁵³ The defendant company had owned a portion of an erf in Potchefstroom on which a dairy plant was erected. After selling the whole plant to a syndicate of which Jacobson was a member, Jacobson concluded a contract with the appellants for the purchase of machinery. In terms of the contract, even upon installation of the machinery, ownership thereof would not be transferred to the defendants until the full purchase price was paid. Jacobson subsequently fell into arrears with the payments and his estate was sequestrated. The appellants applied for the removal of the machinery,

⁴⁶ *R v Mabula* 1927 AD 157 at 161.

⁴⁷ *Newcastle Collieries Co Ltd v Borough of Newcastle* 1916 AD 561; *R v Mabula* 1927 AD 157.

⁴⁸ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 45; *Van Wezel v Van Wezel's Trustee* 1924 AD 409; *Western Bank Bpk v Trust Bank van Afrika Bpk & Andere NNO* 1977 (2) SA 1008 (O) at 1020.

⁴⁹ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

⁵⁰ 1915 AD 454.

⁵¹ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454.

⁵² *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 467.

⁵³ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 466.

arguing that ownership thereof still vested in them. In terms of what was evident from the physical factors it was described as follows:

“Part of it is held in position by long bolts and nuts, the former embedded in a solid concrete foundation; another part is attached to the wall also by bolts and nuts; pipes connecting the various portions pass through holes in the walls, and certain tanks and coiled piping are supported and fixed in manner described.”⁵⁴

Therefore, the conclusion reached by the trial court was that the machinery could easily be removed without any substantial injury to the plant. The court *a quo* nevertheless found that the machinery became immovable because of Jacobson’s intention for it to become permanently affixed. However, the Appellate Division rejected the approach of the court *a quo* and found that where an owner/seller did not intend for machinery to become permanently affixed to land until all the payments were made, the machinery would remain movable.⁵⁵ Therefore, what this case shows is that if there is any doubt as to whether the machinery had or had not become part of the realty, the intention with which the machinery was attached would become important.⁵⁶

On the other hand, courts have recently developed a “new” approach which elevates the intention of the owner of the movable to the most important factor in the determination of accession.⁵⁷ This approach regards the first two criteria as *indicative* of the third factor. In terms of the new approach the imputed intention must be considered in light of the professed intention with the aim of determining on a balance of probabilities whether the movable has attached to the immovable.⁵⁸ From the point of departure that accession occurs objectively by operation of law and thus independent of an act of will, it seems odd that one would be able to preclude the occurrence of accession through the subjective intention of the owner of the

⁵⁴ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 465.

⁵⁵ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 472.

⁵⁶ *MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd* 1915 AD 454 at 467.

⁵⁷ *Theatre Investments (Pty) Ltd & Another v Butcher Bros Ltd* 1978 (3) SA 682 (A) at 688; *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W).

⁵⁸ CG van der Merwe *Sakereg* (2nd ed 1989) 255.

movable. Yet, the question whether a movable has been permanently affixed to an immovable and specifically the role that intention has played has been questioned on numerous occasions.⁵⁹ The cases that I discuss below illustrate how recent case law has dealt with the question of the occurrence of accession.

*Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council*⁶⁰ shows how the objective factors should give an indication of the intention with which the movable was affixed. In this case the imputed intention and the professed intention was the same; therefore the objective factors pointed to the intention of the annexor.⁶¹ The Standard Vacuum Refining Co of SA owned and operated an oil refinery on land that fell within the municipal territory of the respondent. The municipality took the tanks situated on the land into consideration when it valued the land. The company objected, arguing that the tanks were movable because it was never the intention that the tanks should become part of the land. The court held that the physical factors indicated that the tanks formed a permanent part of the land and were thus immovable.⁶² It was confirmed that only if the first two factors produced equivocal results should the intention of the annexor be relevant.

In *Theatre Investments (Pty) Ltd v Butcher Brothers Ltd*⁶³ the court had to determine whether chairs and equipment had attached to a theatre building. The Appellate Division held that:

“If a court, on a consideration of all the evidence, direct and influential, were to conclude on a balance of probabilities that the annexor intended a permanent annexation it would hold that the movable had become part of the immovable. If on

⁵⁹ Olivier & Others v Haarhof & Co 1906 TS 497 at 500; MacDonald Ltd v Radin NO & The Potchefstroom Dairies & Industries Co Ltd 1915 AD 454 at 466; Newcastle Collieries Co Ltd v Borough of Newcastle 1916 AD 561 at 564; R v Mabula 1927 AD 159 at 161; Standard-Vacuum Refining Co of SA (Pty) Ltd v Durban City Council 1961 (2) SA 669 (A) at 677; Western Bank Bpk v Trust Bank van Afrika Bpk & Andere NNO 1977 (2) SA 1008 (O) at 1020; Theatre Investments (Pty) Ltd & Another v Butcher Bros Ltd 1978 (3) SA 682 (A); Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl) 1980 (2) SA 214 (W); Senekal v Roodt 1983 (2) SA 602 (T); Sumatia (Edms) Bpk v Venter en 'n Ander NNO 1990 (1) SA 173 (T).

⁶⁰ 1961 (2) SA 669 (A) 678.

⁶¹ C Lewis “*Superficies solo cedit – sed quid est superficies?*” (1979) 96 SALJ 94-107 at 99.

⁶² Standard Vacuum Refining Co of SA (Pty) Ltd v Durban City Council 1961 (2) SA 669 (A) at 677-678. Other cases where the new approach was applied: *Theatre Investments (Pty) Ltd & Another v Butcher Bros Ltd* 1978 (3) SA 682 (A); *Melcorp SA (Pty) Ltd v Joint Municipal Pension Fund (Tvl)* 1980 (2) SA 214 (W).

⁶³ 1978 (3) SA 682 (A).

the other hand it were to conclude on a balance of probabilities that, in light of such evidence, the annexor's intention was not to effect a permanent annexation or if it found itself unable to draw any inference one way or another as to the annexor's intention then it would conclude that the annexed movable had not lost its character as such.”⁶⁴

Therefore, the subjective intention of the owner of the movable should be considered and weighed against the objective assessment of the physical factors to determine whether accession occurred.

The importance of intention of the owner-annexor was emphasised in the case of *Trust Bank van Afrika Bpk v Western Bank*,⁶⁵ as well as *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk*.⁶⁶ In *Trust Bank van Afrika Bpk*, Trengove AJA disagreed with the court *a quo* in so far as it denied that intention was the most important element in the determination of accession.⁶⁷ In the *Konstanz Properties* case it had to be determined whether an irrigation system which had been sold and installed onto the land had attached to it. The court held that although the pumps were installed, it was done in terms of a hire-purchase agreement and thus ownership would not be transferred until the full purchase price was paid.⁶⁸ The intention of the annexor was the decisive factor in determining whether accession had taken place. Therefore, it can be deduced that recent courts consider the intention of the owner the movable as the most important factor to determine accession.

Van der Merwe criticises the new approach.⁶⁹ The biggest criticism put forward by him against the new approach is the fact that accession is a form of original acquisition of ownership, which means that it should in principle occur irrespective of the intention of the annexor.⁷⁰ He argues that one should be able to determine whether accession has taken place objectively by looking at the relationship between

⁶⁴ *Theatre Investments (Pty) Ltd & another v Butcher Bros Ltd* 1978 (3) SA 682 (A) at 688.

⁶⁵ 1978 (4) SA 281 (A) at 295.

⁶⁶ 1996 (3) SA 273 (A).

⁶⁷ *Trust Bank van Afrika Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) at 299.

⁶⁸ *Konstanz Properties (Pty) Ltd v Wm Spilhaus en Kie (WP) Bpk* 1996 (3) SA 273 (A) at 284.

⁶⁹ CG van der Merwe *Sakereg* (2nd ed 1989) 256-258.

⁷⁰ CG van der Merwe *Sakereg* (2nd ed 1989) 256-257.

the building works and the land to which it has been incorporated.⁷¹ Furthermore, he argues that too much weight has been attached to the intention of the annexor as a factor in the determination of accession. As a result of this, *traditio* as a form of derivative acquisition (or loss) of ownership is arguably incorrectly applied in this case.⁷² Similarly, Carey Miller questions the “unjustifiably elevated role” that intention has played in the various cases dealing with attachment.⁷³ The same view is taken by the authors of *Silberberg and Schoeman’s The law of property*, who argue in favour of the traditional approach when determining the occurrence of accession.⁷⁴

The authors of *The principles of the law of property in South Africa* argue that, when deciding whether accession had occurred, there is no fundamental difference between the traditional approach and the new approach.⁷⁵ They use *MacDonald v Radin* (which is usually used to illustrate the traditional approach) and *Theatre Investment* (which is used to show how the new approach works) to emphasise that some degree of subjectivity played a role in both these cases in reaching the conclusion. In both cases the court looked at the intention of the owner of the movable because the objective factors did not reach a conclusive result. The authors suggest an approach in terms of which policy considerations should guide the court in determining whether accession has occurred. As a point of departure, the objective factors should be assessed to decide whether there was a permanent attachment. Accession should be confirmed if a conclusive answer is reached in terms of an objective assessment of the factors. The normal consequences of accession should follow. In other words, the buildings accede to the land, lose their independence and become part of the land. Ownership of the building materials passes to the owner of the land. However, if an objective assessment of the physical

⁷¹ DL Carey Miller *The acquisition and protection of ownership* (1986) 22-36 at 32; A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 SALJ 537-556 at 537; DL Carey Miller & A Pope “Acquisition of ownership” in R Zimmermann, DP Visser & K Reid (eds) *Mixed legal systems in comparative perspective* (2004) 671-701 at 681.

⁷² CG van der Merwe *Sakereg* (2nd ed 1989) 247-255. See also CG van der Merwe “Law of property (including mortgage and pledge)” 1977 *Annual Survey of SA Law* 231-237 at 235.

⁷³ DL Carey Miller “Fixtures and auxiliary items: Are recent decisions blurring real and personal rights?” (1984) 101 SALJ 205-211 at 209.

⁷⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman’s The law of property* (5th ed 2006) 150.

⁷⁵ H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 173-175.

factors leads to an ambiguous result and it cannot be determined whether the movables have been permanently affixed to the land, the court should make a policy decision. It can either recognise the “new composite thing” by confirming that accession has occurred, or the court can choose to preserve the independence of the movable by denying the occurrence of accession.⁷⁶ Therefore, this policy-driven approach will either ensure upholding the publicity principle associated with original acquisition of ownership, or protect ownership of the movable in terms of the constitutional obligation not be arbitrarily deprived of your property.⁷⁷ It is argued that either choice will result in a theoretically sound outcome, because the publicity principle and protection of ownership (which forms the underlying principles of accession) are adequately considered.⁷⁸ Therefore, they argue that the subjective intention of the owner of the movable cannot on its own force the court to hold that accession had not taken place.

On the other hand, Lewis, discussing various judgements dealing with accession, supports the judgement of Van Winsen AJA in *Theatre Investments*. She states:

“It is submitted, with respect, that the approach of Van Winsen AJA in this case is a sound one. It is in accordance with the principle that a change in ownership should not be effected without an intention to change it ... This is more equitable test than one which excludes a consideration of the annexor/owner’s *ipse dixit*, save where physical features are equivocal.”⁷⁹

Therefore, Lewis favours the approach where ownership cannot be transferred without the consent of the owner, even when original acquisition or loss is at stake.

From the above discussion of case law it is clear that a development has taken place in the law regulating the principle of accession in South Africa. Initially, the occurrence of accession was determined according to the traditional approach. In terms of this approach, the objective factors are assessed and only if they are

⁷⁶ H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 174.

⁷⁷ H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 174.

⁷⁸ H Mostert, A Pope, PJ Badenhorst, W Freedman, JM Pienaar & J van Wyk *The principles of the law of property in South Africa* (2009) 175.

⁷⁹ C Lewis “*Superficies solo cedit – sed quid est superficies?*” (1979) 96 SALJ 94-107 at 106-107.

inconclusive will it be necessary to look at the intention of the owner of the movable. However, recently courts have adopted a new approach for determining when accession has occurred. The nature and purpose of the movable as well as the manner and degree of attachment are indications of the inferred or imputed intention. This must be weighed against the expressed intention (*ipse dixit*) of the owner of the movable in order to establish on a balance of probabilities whether accession has occurred. This new approach followed by recent courts in accession cases may be important to answer some of the doctrinal questions present in the law regulating building encroachment. The approach to accession creates the possibility that the stated intention of the owner of the movable can override the objective factors, especially in cases where the objective factors are not conclusive. Therefore, the argument is that if the encroacher did not intend for ownership of the encroaching structures to pass, the court can decide that accession did not occur. The possibility of this argument is discussed in the section below.

4.3.2 Accession and encroachment by building

The occurrence (or denial) of accession becomes important in the context of building encroachment. If attachment is confirmed in an encroachment dispute, the affected landowner can demand removal of the encroachment because it is building works on his land. Therefore, the remedy of removal is based on the principle of attachment. The affected landowner can decide what happens in this case because it is his land and the building works are part of the land. If the encroacher does not want to remove the encroachment, he would want to argue that accession did not occur. The relevance of the section discussed above was to show how the first argument may be possible. Therefore, I tried to show how courts look at the subjective intention instead of objective factors in order to determine whether accession has occurred. This may lead to the conclusion that accession did not take place because it was not the intention of the encroacher for accession to occur. Therefore, even if the objective factors may lead to the conclusion that accession did occur, it might be impossible to obtain a removal order if the encroaching builder can convince the court that he never intended the building materials to accede to someone else's land. In these instances a court may decide, in line with the new approach, that accession

did not take place and therefore that the building belongs to the encroacher and the land belongs to the affected landowner.

The result would be the same where it is held that accession would normally have taken place, but the court decides to suspend it based on policy or fairness reasons. Therefore, one could argue that the normal working of accession is suspended. In the next section I discuss the possibility of suspending the rules of attachment in order to explain what happens when a building encroachment is left in place.

Pope argues that the current approach to building encroachments does not give due consideration to the rights of the affected landowner because it does not give full effect to the principles of accession.⁸⁰ Her argument is based on the assumption that the principle of accession forms the basis of the default remedy of removal. Therefore, if accession was applicable, the owner of the land is owner of everything erected on the land and would be able to demand removal thereof.⁸¹ The approach that she suggests requires that the extent of the interference should be determined as a preliminary step in the case where someone builds on another's land. Therefore, the size of the encroachment should play a more significant role in encroachment law.⁸² The extent of the encroachment should give an indication whether the rules of accession or encroachment should be applicable.⁸³

If the encroachment is minor, encroachment rules should apply; therefore, the normal principles of accession are suspended and the encroachment could in principle be left in place. The extent of the encroachment should guide the court in deciding whether it should be removed or remain intact. If the discretion is exercised in favour of leaving the encroachment in place,⁸⁴ the extent of the encroachment

⁸⁰ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556.

⁸¹ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556.

⁸² A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 538.

⁸³ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 538.

⁸⁴ See chap 3 above.

should guide the court in assessing the amount of compensation that should be awarded. Therefore, encroachment rules will only be applicable in cases of minor encroachments, where the extent of the interference on the affected landowner's property rights is small. According to Pope, the principle of attachment is suspended when courts make a policy judgement and leave the encroachment in place. This is because the normal effects of accession which would have resulted in the removal of the encroachment would have been unfair in the circumstances. On the other hand, the principle of accession should apply when dealing with significant encroachments. This is in effect the default common law position, where the affected landowner would be able to demand removal as of right because he is owner of the land and everything permanently attached to the land.

Pope's approach may result in the demolition of all significant encroachments. Therefore, the possibility is precluded of a discretion-based outcome (as illustrated in the previous chapter) in the case of large encroachments, even where policy considerations may dictate such an outcome. This is because in terms of her approach, once courts have determined that the encroachment is significant, accession rules will apply and the affected landowner may demand removal without the court having the discretion to decide otherwise. Courts will be bound to order demolition of all significant encroachments regardless of the fairness of the result. According to Pope, this approach will promote a principled-based structure of property law; one where the extent of the encroachment dictates which rules are applicable.⁸⁵ She argues that property law should be principled, structured and certainty-based, but recognises that sometimes it is necessary to deviate from principle for policy reasons. However, this should be limited and she warns that it becomes problematic when the policy considerations become too flexible and cause great uncertainty in law. It is for this reason that she suggests that deviation from the common law remedy of removal should be limited to minor encroachments. Therefore, the encroachment rules in terms of which a court may exercise its discretion, should only apply when the extent of the encroachment is small.

⁸⁵ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556.

Case law shows that courts are willing to deviate from the common law remedy of removal for policy reasons, even if the encroachment is significant.⁸⁶ Therefore, it is important to find a doctrinal explanation for the cases where demolition for policy reasons is denied in all cases and not just minor encroachments as illustrated in Pope's approach. The question is whether it would be possible to use the rationale of suspension of the principle of accession in the case of significant encroachments where policy reasons dictate this. This question is important in order to open up the possibility that the principle of attachment can be suspended even where the encroachment is significant, so that ownership of the land remains with the affected landowner whereas ownership of the buildings remains with the encroacher. If suspension of the principle of attachment were possible in these cases, this may provide an alternative solution to explain what happens in cases like *Rand Waterraad v Bothma en 'n Ander* ("Rand Waterraad") and *Trustees, Brian Lackey Trust v Annandale* ("Brian Lackey Trust"). Therefore, it is necessary to consider further examples where attachment was suspended to see whether it would be possible to use this argument in the context of even large building encroachments.

As mentioned above, the underlying foundation of the principle of attachment is the Roman law maxim of *superficies solo cedit*. In terms of this principle, whatever is permanently attached to land accedes to the land.⁸⁷ Therefore, the movables lose their independence and become part of the land. In principle, the owner of the land owns everything erected on the land that forms part of the land.⁸⁸ The principle of attachment has always been an obstacle in the way of acceptance of new forms of ownership such as sectional title ownership,⁸⁹ a problem that was emphasised in a

⁸⁶ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

⁸⁷ Corpus Juris Civilis (translated and edited by SP Scott *The civil law: Including the twelve tables: The institutes of Gaius. The opinions of Paulus. The enactments of Justinian. And the constitutions of Leo* (1973), hereafter "D" followed by the specific section of the Digest): D 41 7 9 12 "On the other hand, if anyone constructs a building on the land of another with his own materials, the building will become the property of the person to whom the ground belongs."

⁸⁸ See DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 57-63; E Perry Von Savigny's *treatise on possession* (6th ed 1848) 388-389; *Van Wezel v Van Wezel's Trustee* 1924 AD 409 at 417; *Durban Corporation and Another v Lincoln* 1940 AD 36 at 42.

⁸⁹ I deliberately avoid an in-depth discussion of sectional title ownership. For the purposes of this work it is merely necessary to emphasise the fact that although initially an idea foreign to our law, there are now instances where the ownership of land and the ownership of the buildings erected on the land are not the same. For a discussion of sectional titles in general, see CG van der Merwe

ground-breaking article of Denis Cowen.⁹⁰ The most important difficulty lay in the idea that parts of buildings were to be regarded as separate objects of private ownership.⁹¹ It was argued that the institution of sectional title departed from the premise of the Roman principle of *superficies solo cedit* (also referred to as *omne quod inaedificatur solo cedit*) in the sense that “one person or body cannot own the land and another person or body own the buildings or parts of the buildings on it.”⁹² Cowen explained how the obstacles were overcome in order to accept sectional title within the ambit of traditional land ownership. Because of economic considerations, the need for “apartment ownership”,⁹³ which would allow for the building and parts of land to be owned by different people, was too strong to avoid the development of this institution, even against the strong traditional notions of landownership.⁹⁴ Therefore, although there were obstacles that made acceptance of sectional title as a form of landownership difficult, sectional title ownership was eventually recognised in South African law as a result of legislation.⁹⁵ This is just one example of how apparently insurmountable doctrinal objections against exceptions on the accession principle can be overcome, if necessary through legislative intervention, to accommodate social and economic needs.

There is evidence in early case law that the rules of attachment can be suspended without legislative intervention, which could prove helpful in finding a solution to the problem of attachment in the encroachment context.⁹⁶ The court in *Rand Waterraad* had to decide on the availability of the year and a day rule as a defence against a

⁹⁰ *Sakereg* (2nd ed 1989) 395-456; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 441-492. See also CG van der Merwe “Is sectional ownership true ownership?” (1992) 3 *Stell LR* 131-136.

⁹¹ DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 57-63.

⁹² DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 57.

⁹³ DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 58.

⁹⁴ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 441.

⁹⁵ DV Cowen *New patterns of landownership: The transformation of the concept of ownership as plena in re potestas* (1984) 59; CG van der Merwe *Sakereg* (2nd ed 1989) 396; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 441.

⁹⁶ The first act promulgated to regulate sectional ownership was the Sectional Titles Act 66 of 1971. This Act was later replaced by the Sectional Titles Act 95 of 1986, which has subsequently undergone a number of amendments.

⁹⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 125-130.

landowner's claim for removal.⁹⁷ Although it decided that the year and a day rule was not received into South African law because it was never a part of general Roman-Dutch law, a very important point crystallised from this specific aspect of the case. The court found, without explaining it further, that in certain encroachment cases it was possible that the rules of attachment could be suspended. In this specific case, it would be acceptable if the owner of the land and the owner of the building on the land were two different people. This occurred in the case of praedial servitudes obtained through prescription, although it was clear that this was an exception to the normal ways of obtaining praedial servitudes.⁹⁸ Grotius argued, as a point of departure, that when accession occurs, the building materials become part of the land.⁹⁹ He differentiated in different chapters between acquisition by consent and original acquisition by birth, accession, building and cultivation.¹⁰⁰ The exception would be the cases where ownership of the building materials remained vested in the builder and a praedial servitude was established over the affected land through prescription.¹⁰¹ If a building has stood for a year and a day, a praedial servitude came into existence through prescription.¹⁰² This section says nothing about transfer of the land to which the praedial servitude pertains. Therefore, we have to assume that the builder obtains the right to have his building materials on the affected landowner's property. In order to assume this, it looks as though the principle of attachment is suspended so that ownership of the building materials remains with the builder and ownership of the land with the affected landowner. This means that in certain cases where a building had been erected on another's property, ownership of the building materials did not pass to the affected landowner, but remained with the builder.¹⁰³

⁹⁷ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 125-130. See chap 2 above.

⁹⁸ Grotius lists the normal ways in which praedial servitudes could be obtained (Grotius 2 36 2-4), after which the year and a day rule is described as another way of sufficiently obtaining ownership of a building (Grotius 2 36 5).

⁹⁹ Grotius 2 5 8: "Again, if any one builds upon another's ground with his own timber or stone, he loses ownership, which lapses to the owner of the land."

¹⁰⁰ Grotius 2 5 10.

¹⁰¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 126. See further CG van der Merwe & JB Cilliers "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* 587-593 at 588.

¹⁰² Grotius 2 36 5.

¹⁰³ Grotius 2 36 5: "But a building which has stood for a year and a day without any objection being made is thereby sufficiently prescribed, saving reasonable compensation to the party injured."

This view of the law was supported by Groenewegen, who argued, much in the same manner as Grotius, that ownership of the building work was acquired through prescription.¹⁰⁴ Therefore, it was clear from a very early stage that the order asked for in these encroachment cases was not for transfer of the land on which the encroaching building stood, but rather for transfer of the right to have the buildings on the land. The compensation awarded in terms of the court order was for the right acquired through prescription.

Judging from the works of these authors it seems as though it was possible in at least this specified case of praedial servitudes that the attachment principle could be suspended to preclude its natural consequences, namely that ownership of the building materials would otherwise pass to the affected landowner. When the servitude comes into being, the builder acquires the servitude over the land and not the land itself. Therefore, suspending the principle of attachment in this case makes it possible to see the building materials erected on the land as distinct from the land itself. The encroaching owner acquires a limited right to have his buildings on the land of the affected landowner, while the affected owner retains ownership of the land. Compensation is awarded to the affected landowner for the loss as a result of the servitude.

Eiselen and Pienaar provide a further argument for what may look like suspension of the rules of attachment in yet another context. They state that in Roman law, it was possible that ownership of the accessory did not pass to the owner of the immovable in certain enrichment cases.¹⁰⁵ Ownership of the accessory remained “slumbering” until the principal and the accessory were separated. Once separation occurred, the owner of the accessory could reclaim it from the owner of the immovable. However, Carey Miller and Van der Merwe argue that this principle is no longer applicable in

¹⁰⁴ Groenewegen *De Leg Abr ad C 3 34 2*: “Clearly, if someone erected a building on his own land or on that of his neighbour *nec vi nec clam nec precario*, when he had no right so to build, and he occupied that building for a year and a day with the knowledge of, and without prohibition by, his neighbour, then in accordance with the statutes of many towns he acquired the work so constructed by prescription, but the neighbour none the less has an action for loss and for compensation.”

¹⁰⁵ S Eiselen & G Pienaar *Unjustified enrichment: A casebook* (2nd ed 2005) 241.

South African law.¹⁰⁶ They argue that the owner of the accessory loses ownership when the accessory is permanently affixed to the land. Van der Walt recognises that although the argument of Eiselen and Pienaar does not provide clear-cut answers for doctrinal questions in the context of building encroachments, it may help to “add weight to the notion that the effect of accession may be suspended to prevent unjust outcomes in specific circumstances, even when the encroachment is significant in size.”¹⁰⁷

If the rules of attachment were to be suspended even with regard to significant encroachments by building, the following line of argument becomes possible: When a court orders, for policy reasons, that an encroaching structure should remain in place, the normal principle of attachment is suspended. This will ensure that ownership of the building materials and ownership of the land are kept separate. The builder does not acquire the land itself, but retains ownership of the encroaching structure and, by virtue of being allowed to remain in possession of it, indirectly acquires a use right over the land. This would provide a defensible doctrinal explanation of the outcome in recent building encroachment cases in South Africa. Therefore, it should be possible in at least some instances to keep even significant encroachments in place and suspend the principle of accession if policy considerations are taken into account. The policy analysis may include various considerations that were relevant when the discretion was exercised in favour of leaving the encroachment in place. These may include unfairness of ordering demolition of the encroachment,¹⁰⁸ delay in bringing the application,¹⁰⁹ the duration for which the encroachment has stood,¹¹⁰ malicious intent by either parties involved in the dispute,¹¹¹ whether the loss can adequately be compensated,¹¹² the size of the

¹⁰⁶ S Eiselen & G Pienaar *Unjustified enrichment: A casebook* (2nd ed 2005) 241; CG van der Merwe *Sakereg* (2nd ed 1989) 231; DL Carey Miller *The acquisition and protection of ownership* (1986) 33-35.

¹⁰⁷ AJ van der Walt *The law of neighbours* (2010) chap 4.

¹⁰⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹⁰⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

¹¹⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

¹¹¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹¹² *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

encroachment, whether removal will result in people's homes being demolished¹¹³ or any other factor that may be relevant in the dispute.¹¹⁴ All these policy considerations will be important to justify why it may be necessary to suspend the principle of accession even in the case of significant encroachments. Obviously, because the encroachment is significant, this argument should be approached with caution. However, it should be justifiable if two important qualifications are taken into account. Firstly, the choice to leave a significant encroachment in place and suspend the principle of accession must be a policy-based decision taking all the surrounding circumstances into consideration. In this regard, the policy considerations for exercising the discretion in favour of leaving the encroachment in place will be important to justify suspending the principle of attachment. In any event, the size of the encroachment will be important when considering the surrounding circumstances of the case. Secondly, courts will have to give due consideration to section 25(1) of the Constitution which proscribes arbitrary deprivation of property.¹¹⁵ In cases where the encroachments are significant, this may result in the forced transfer of use-rights of a substantial portion of the affected property to the encroaching landowner.¹¹⁶ Therefore, suspension of the principle of attachment may provide a doctrinal solution to the uncertainty that exists with regard to attachment in the context of encroachment by building.

From what has been discussed above, the situation that results when a building encroachment is left intact can possibly be explained doctrinally by saying that accession was either suspended, or that it did not take place and the encroacher remains owner of the building, indirectly acquiring some kind of use right over the affected land. This right that the encroacher indirectly obtains when the encroachment is not removed is not explained by the courts. Therefore, in the section below I discuss the uncertainty that exists in terms of the rights of the parties

¹¹³ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (UK); *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch) (UK).

¹¹⁴ See chap 3 above.

¹¹⁵ The Constitution of the Republic of South Africa, s 25(1). If the policy considerations do not adequately justify the infringement of the affected landowner's property rights, it may result in the arbitrary deprivation of property. See chap 5 below.

¹¹⁶ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 606. If the court order results in the compulsory transfer of property to the encroaching landowner it needs to comply with s 25(1) of the Constitution. See chap 5 below.

when demolition is denied and if one assumes that the order results in one person owning the land and another the building that is erected on the land.

4.4 Rights of the parties when demolition is denied

When a court denies a demolition order and the encroacher is allowed to continue having possession of the encroachment, he indirectly obtains a use right (either personal or real) to have the buildings on the affected landowner's property. There is no acknowledgement by the courts of the existence of this right, nor is there an explanation of its nature. Therefore, it is unclear from the outcome of encroachment disputes in South Africa what the relationship is between the owners if the encroachment remains intact and nothing is said about transfer of property or property rights. What is clear is that one person owns the land and another the buildings erected on the land. As I have mentioned above, this would only be possible if there was some kind of use right (either personal or real) in favour of the person who owns the buildings. What is needed is clarity about the right that the encroacher gains and the affected landowner loses in this case.

Speaking about the way forward for South African law relating to building encroachments Van der Walt suggests that:

"South African law with regard to encroachment would benefit from several improvements, the most important of which would be greater clarity about the respective rights of the encroacher and 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."¹¹⁷

Generally speaking, the need to obtain clarity with regard to this aspect is imperative for the law regulating building encroachments to be doctrinally sound. It needs to be determined what the nature of the right is that the encroacher gains when courts

¹¹⁷ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 628.

refuse to remove the encroachment. This right can be a personal right or a limited real right (if it is registered).¹¹⁸ If a court says nothing about the rights of the parties after the order is made, it seems as though the affected landowner loses the entitlement of use and enjoyment over the portion of the property on which the encroachment is erected. Obviously, in the case of significant encroachments he loses the use and enjoyment of a substantial portion of his land. The court is indirectly transferring a use right to the encroacher against the affected landowner's will.¹¹⁹ It is clear that the right is created by court order and not by agreement. If compensation is awarded, this would be in exchange for the use right that was created.

4.5 Conclusion

South African courts have, in line with modern trends in this field of law, adopted a new approach to the age-old problem of encroachment by building. Courts seem to be more inclined to leave the building encroachment in place and award compensation instead.¹²⁰ The Cape High Court recently stated that the discretion to leave an encroaching structure in place may be exercised despite the size of the encroachment.¹²¹ Removal is denied if considerations of fairness and equity dictate such an outcome.¹²² Recent case law has also emphasised that the discretion to award compensation instead of removal in the case of building encroachments is wide and equitable and consideration should be given to the surrounding circumstances of the particular case.¹²³ There may be various reasons why a move away from a rigid and dogmatic existing principle might be necessary. However, change must be clearly defined, so that the doctrinal effects can adequately be explained. In essence, what courts are doing is developing the common law; to give them the room within which they can make what seems to be the most equitable

¹¹⁸ This is in line with the Dutch approach where a servitude is created in favour of the encroacher. See chap 6 below.

¹¹⁹ The constitutional implications of the forced transfer of the use rights are discussed in chap 5 below.

¹²⁰ The English approach to the problem of building encroachments is discussed in chap 3 above. The German, Dutch and Australian are studied in chap 6 below.

¹²¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹²² See chap 3 above.

¹²³ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

order in certain encroachment cases. However, courts are doing this without clearly substantiating the reasons or exploring the extent and consequences thereof. For pragmatic reasons courts are beginning to adopt a different approach to the problem of building encroachments, consequently denying the idea of an *absolute* right to demand removal of the encroachment in all cases. However, this new approach is not clearly defined and it leaves room for confusion. The implications of these court orders could be far-reaching and thus need to be reconsidered.

In this chapter I highlighted the uncertainty that exists when the court in a building encroachment dispute decides to deny removal for policy reasons and says nothing about the transfer of property or property rights. In effect, this order results in the encroacher remaining in possession of the encroachment, while the affected landowner owns the land on which the encroachment is erected. I questioned why the principle of attachment was not applicable in these instances. If the principle of attachment were applicable, the affected landowner would be able to demand that the removal order be given because it is building works on his land. Therefore, the remedy of removal is based on the principle of accession, because the principles of *inaedificatio* govern the situation where buildings are erected on land. Generally, that which is built permanently on the land accedes to the land and the building materials lose their independence and become part of the land. As a result, the owner of the land can demand removal of the building works because they become part of his land. If removal is denied, one would have to question why accession did not occur. Or, stated differently, it would need to be determined why the natural consequence of accession (i e original acquisition of ownership) did not occur in some cases of encroachment. This can be explained doctrinally either by arguing that accession did not take place because the encroacher did not intend for ownership to transfer, or that the principle of accession is suspended.

With regard to the first argument, in other words that accession did not occur because it was not the intention of the encroacher that ownership should pass, it was necessary to analyse how courts have started focussing on the subjective intention of the owner of the movable instead of objective factors in order to determine the

occurrence of accession. This may lead to the conclusion that accession did not occur because the encroacher did not want it. Therefore, courts may, in terms of the new approach in accession cases, decide that accession did not take place and the result will be that the building belongs to the encroacher and the land to the affected landowner. This would provide an explanation for why attachment did not take place in the case of encroachment by building.

The second argument that I considered in this chapter was that the normal working of accession is suspended. In order to establish whether this was possible, I considered Pope's approach to the problem of building encroachments, Roman-Dutch law authority pertaining to praedial servitudes obtained through prescription and the argument of Eiselen and Pienaar made in the context of unjustified enrichment.

Anne Pope suggests an approach in terms of which the extent of the encroachment guides the court in solving this problem. She argues that in the case of large encroachments, the rules of accession should be applicable. Accession should govern the situation in so far as the owner of the land is owner of the structures on the land because they become part of the land; therefore the owner of the land can demand removal of the building works on the land. However, in the case of minor encroachments, the rules of encroachment should determine that a court may exercise its discretion either in favour of leaving the encroachment in place or ordering the removal thereof. If the encroachment is not removed, she provides a doctrinal solution to explain why accession does not occur. She argues that the principle of attachment should be suspended in the case of minor encroachments so that ownership of the encroaching structures remains with the encroaching landowner and ownership of the land remains with the affected landowner. Therefore, when courts decide to keep encroaching structures in place, the building materials do not attach to the affected landowners property. Instead, the encroacher remains owner of the encroaching structures and obtains some kind of use right to the property on which the encroachment is erected. This solution becomes more difficult to explain and justify the larger the encroachment becomes; hence her

suggestion that large encroachments should be governed by the rules of accession. I concluded that Pope's approach would eliminate the possibility of keeping large encroachments in place, even in cases where policy may dictate such an outcome. Therefore, I found that Pope's argument of suspension of the rules of attachment would have to be expanded to allow suspension even in the case where the encroachment is significant. However, this should be possible in cases where the decision to leave the significant encroachment in place is made on policy grounds taking all circumstances into consideration and the decision is made giving due consideration to section 25 of the Constitution. The policy reasons that are used to justify suspending the principle of accession in the case of significant encroachments will most probably be the same reasons for denying the removal order in terms of the court's discretion. A court will have taken various factors into consideration in order to establish whether the encroachment should have been removed. These factors will again be important to explain why it would be required and justified to go against the common law logic of accession. The choice in terms of policy considerations will be sound if cognisance is taken of the constitutional prohibition against arbitrary deprivation of property.¹²⁴ Therefore, the result is that accession would normally have taken place, but the court decides that it is suspended for policy reasons.

Suspension of the principles of attachment was also evident in terms of Roman-Dutch law. Ownership of a building work erected on the land of another could be acquired through prescription, resulting in a praedial servitude coming into existence. It was very clear from an early stage that the order that was made in this regard was for the transfer of the right to have the buildings on the land and not for transfer of the land on which the building work stood. Therefore, ownership of the land and ownership of the building works erected on the land were kept separate. This illustrates how the principle of attachment may be suspended.

In the last instance, I looked at the argument of Eiselen and Pienaar that is made in the context of unjustified enrichment. They argue that ownership of the accessory can sometimes remain "slumbering" until the principal and accessory is separated.

¹²⁴ See chap 5 below.

Their argument assumes that the principal and the accessory can be separated which, in most cases of attachment is not always possible; however, their argument does add weight to the idea the principles of attachment may in certain instances be suspended.

It is clear from this chapter that there are arguments in favour of suspending the principle of attachment. Therefore, in at least some cases where the court is faced with the decision to keep significant encroachments in place, it should be possible to use the rationale of suspension of the rules of attachment to explain what happens doctrinally when the encroachment is not removed. Both the argument in favour of suspension of the principle of attachment and the one that suggests that accession should not occur because it was not the intention of the encroacher to transfer ownership, may provide doctrinal solutions in the case where a building encroachment is left intact. However, both these explanations result in the same problem, namely that one person owns a building on land belonging to another without clarity about the respective rights to that piece of affected land. It seems as though a use right (which could include a right to build) is indirectly created in favour of the encroacher and he has continued possession of the encroachment. It is clear that courts have not mentioned this use right and therefore failed to explain the nature of the right. This results in unnecessary confusion that needs to be explained doctrinally.

In the next chapter I consider the constitutional implications of these court orders in terms of which the court leaves the encroachment in place. It will be important to examine whether denying a removal order in the case of encroachment by building causes an infringement of section 25(1) of the Constitution because it results in an arbitrary deprivation. I will identify three outcomes that result from the new approach and test whether they are constitutionally valid. I focus on the deprivation that is suffered as a result of courts refusing the demolition order. According to the *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue*

Service; First National Bank of SA Ltd t/a Minister of Finance (“FNB”)¹²⁵ methodology it is necessary to determine whether the deprivation of property or property rights meets the requirements of section 25(1) of the Constitution. I also question whether the deprivation of property may result in an expropriation that needs to comply with section 25(2) and (3) of the Constitution.

¹²⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC).

Chapter 5: Constitutional implications of the new approach to building encroachments

5.1 Introduction

What has been echoing throughout this dissertation is the uncertainty of certain aspects of the law regulating building encroachments in South Africa. The uncertainty lies in the fact that some of the consequences of the court orders made in the context of building encroachments are uncertain. In the previous chapter, I identified some of the shortcomings with regard to the doctrinal implications of the court orders. I considered the doctrinal implications of courts denying an affected landowner the right to removal. If the encroachment is left intact the most important questions centre on the status of the affected land and the nature of the right obtained by the encroacher, especially in cases where the encroachment is significant.¹ In terms of the status of the land, it is uncertain why the principle of attachment does not apply in the case of encroachment by building, in other words why the owner of the land does not own the building materials permanently attached to his land.² With regard to the nature of the right obtained if demolition is denied, it is difficult to determine whether the encroached-upon land is transferred to the encroacher (when nothing is said about transfer) or whether the encroacher merely obtains a use right in the form of a servitude or another right, either personal or real.

In this chapter I consider the possible constitutional implications of denying a demolition order. The main aim of this chapter will be to determine whether the loss suffered as a result of these court orders may cause constitutional infringement in view of the property clause.³

On the one hand, if the loss of property (or a right with regard to that property) results in a deprivation as meant in section 25(1) of the Constitution, it will have to

¹ See chap 4 above.

² See chap 4 above.

³ The Constitution of the Republic of South Africa, s 25(1).

comply with the requirements of that provision. In other words, the deprivation would have to be in terms of law of general application and it may not be arbitrary.⁴ On the other hand, if the loss of property amounts to an expropriation, section 25(2) and (3) need to be complied with.⁵ I will refer to *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance ("FNB")*⁶ in order to show how the Constitutional Court interpreted section 25 of the Constitution.⁷ FNB has highlighted how the relationship between deprivations and expropriations should be understood.

I have distinguished three different kinds of outcomes that could follow if the court does not order removal of a building encroachment. The difficulty with identifying and discussing the problems with the different outcomes is that courts do not make concrete distinctions between the various outcomes. I have tried as far as possible to distinguish between three outcomes in order to analyse them according to section 25 of the Constitution. With reference to FNB methodology, I will question whether these three outcomes could result in a deprivation of property in terms of section 25, and if so, whether the deprivation can be justified.⁸

When a court exercises its discretion in favour of leaving an encroaching structure in place, it could result in any one of three different outcomes, each of which raises different issues that need to be tested for constitutional compliance. In terms of the courts' discretion it will balance the interests of both parties in order to determine whether the discretion should be exercised in favour of the encroacher (i e denying

⁴ The Constitution of the Republic of South Africa, s 25(1).

⁵ The Constitution of the Republic of South Africa, s 25(2) and (3).

⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC).

⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC). See further T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2 – 46-5; AJ van der Walt *Constitutional property law* (2005) 71-72, 145-168.

⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 46. The focus will be specifically on the questions posed in FNB with regard to how the property clause enquiry should be done. See s 5.3 below.

removal) or in favour of the affected landowner (i.e. enforcing the removal order).⁹ The first discretion-based outcome occurs when the court denies the affected landowner his right to demand removal and orders compensation instead in the case of insignificant encroachments. In this case, it seems as though the affected landowner is deprived of the use and enjoyment of a small portion of his property. I will question whether the deprivation that results in these instances complies with section 25(1). Various factors were taken into consideration when the discretion was exercised in favour of the encroacher. These factors were important in order to balance the interests of the parties involved in the dispute. The factors will again be relevant in order to determine whether the deprivation can be justified.

In the second outcome a court exercises its discretion in favour of leaving a significant encroachment in place. The result is that the affected landowner loses the use and enjoyment of a significant part of his property on which the encroachment is erected. The extent of the encroachment is usually of such a nature that keeping the encroachment intact results in a serious restriction on the rights of the affected landowner. Therefore, the deprivation that results causes a serious limitation on the right of use and enjoyment of the property. I will question whether the permanent restriction on the use and enjoyment of the property results in a deprivation in terms of the requirements of section 25(1). Besides the scope of the encroachment, it is unclear what is ordered in these cases and what the practical effects of the court orders are. As a result of this, it may be more difficult to determine whether these court orders would comply with section 25(1), (2) and (3) of the Constitution. I also consider whether a *de facto* servitude of use is created in favour of the encroacher in this outcome and whether this could possibly result in an expropriation of an incident of ownership or an expropriation of a use right. If the answer to this question is affirmative, the expropriation would need to comply with section 25(2) and (3) of the Constitution.

The third outcome is more direct in the sense that one can clearly ascertain what order is being made. In this instance the court will not only refuse to order removal of

⁹ See chap 3 above. In this chapter I discuss the discretion of the court to award compensation instead of removal.

the encroachment, but also order that the encroached-upon land be transferred to the encroacher. This kind of order has been raised and therefore it is important to test whether the deprivation of ownership that results complies with section 25(1) of the Constitution.¹⁰ Whether the court has the power to make such an order is questionable. Therefore, the authority for such an order is unclear and it needs to be determined whether the order is procedurally unfair in terms of section 25(1).¹¹

As a preliminary step before embarking on constitutional analysis of these court orders, there is a very important issue that needs to be considered. It concerns the question of whether and when the Constitution should apply in a private matter. In an encroachment case, it is a purely private dispute governed by common law. Therefore, the question whether the Constitution can or should apply is relevant. It needs to be considered whether horizontal application is possible and if so, whether it is applicable directly or indirectly. Direct horizontal application implies a direct reliance on the constitutional right to acquire a remedy or defence.¹² The possibility of direct horizontal application in the case of building encroachments is important for this chapter.¹³ Van der Walt argues that the law regulating building encroachments may be the place in property law where direct horizontal application would be possible.¹⁴ In the case of encroachment by building, the affected landowner might actually be able to rely directly on section 25 to found a claim that there was an arbitrary deprivation or an invalid expropriation without authority or compensation. In any event, indirect horizontal application is always possible in the form of

¹⁰ See s 3.6 in chap 3 above.

¹¹ The Constitution of the Republic of South Africa, s 25(1).

¹² AJ van der Walt *Constitutional property law* (2005) 44-45.

¹³ There is an academic debate about whether direct horizontal application is possible in the case of section 25 of the Constitution. Woolman opines that the reluctance of courts to apply a constitutional provision directly is problematic if it could result in courts shying away from their constitutional duty to do so. See S Woolman "Application" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2005 original service Feb 2005) chap 31 at 31-136 – 31-161, where Woolman looks at various opinions about the application debate. AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 CCR 77-128 at 126. Van der Walt agrees with Woolman that the subsidiarity principle should not be interpreted too narrowly or invoked for the wrong reasons. "Subsidiarity should be understood in terms of its constitutional purpose and justification, as that has been spelled out in 2007: to preserve the constitutional power and obligation of the courts to control the constitutional validity of legislation, while at the same time paying due respect to the democratic power and legitimacy of policy makers and legislatures in giving effect to their reform obligations under the Constitution."

¹⁴ AJ van der Walt *Constitutional property law* (2005) 144.

development of the common law in line with the Constitution.¹⁵ Here the parties may rely on the indirect application of section 25 in order to ask the court to develop the common law. The possible infringement of section 25 could show that in some cases it may be important to develop the common law so that it is in line with the Constitution. To question whether this is possible it is important to consider the subsidiarity principle, which helps to determine when to rely on the Constitution and when to base a claim on the common law.¹⁶ In terms of the subsidiarity principle, courts should rather avoid a constitutional matter when a case can be decided in a non-constitutional manner, ensuring that private law matters are dealt with in terms of private law as far as possible.¹⁷ Therefore, the first question should be whether the common law can be interpreted in a constitutionally compliant way or developed to bring it in line with the Constitution. However, sometimes the common law is insufficient to protect rights in the Constitution or courts are not willing or able to develop the common law because the extent of the development may be too difficult. This may be the case with significant encroachments. Therefore, development of the common law is not always possible and there are limits as to how and to what extent it can be developed. In these instances it is necessary to point out the shortcomings and justify specific developments, which may take the form of legislation, that are required to get the desired result.¹⁸ In the South African context, legislation may be needed to eliminate some of the uncertainties that are currently prevalent in the law regulating building encroachments. In this chapter I focus specifically on the uncertainty that may result in constitutional infringement.

5.2 Analysis of three outcomes

5.2.1 *Insignificant limitations on the affected landowner's rights*

The first possible outcome occurs when courts decide to leave insignificant encroachments in place according to their discretion in the context of building encroachments. This outcome results in a limitation on the affected landowner's right

¹⁵ AJ van der Walt *Constitutional property law* (2005) 45.

¹⁶ LM du Plessis “Subsidiarity”: What’s in the name for constitutional interpretation and adjudication?” (2006) 17 *Stell LR* 207-231 at 211.

¹⁷ LM du Plessis “Subsidiarity”: What’s in the name for constitutional interpretation and adjudication?” (2006) 17 *Stell LR* 207-231 at 211; AJ van der Walt “Normative pluralism and anarchy: Reflections on the 2007 term” (2008) 1 *CCR* 77-128.

¹⁸ See chap 7 below.

to the use and enjoyment of his property. However, the limitation is minor because the affected landowner only loses the use and enjoyment of a small portion of his property. It is evident from early South African case law¹⁹ that this outcome involves cases where there is an encroachment of a foundation of a wall or a really insignificant building encroachment that extends a few inches into the property of a neighbour, without any perceptible effect on his use and enjoyment of the property.

5.2.2 Significant limitations on the affected landowner's rights

This is a difficult outcome to define because of the nuances that exist in this category. In this outcome a court exercises its discretion in favour of leaving a significant encroachment in place. Because of the considerable extent of the encroachment, it causes a significant limitation on the rights of the affected landowner. The outcome results in the permanent loss of use and enjoyment of a significant portion of the affected landowner's property. The bigger the encroachment, the greater the implications will be for the affected landowner. In most cases compensation is awarded in exchange for the loss of property rights, but compensation does not always have to be ordered.²⁰ The effect of this type of loss for the affected landowner is similar to the creation of a servitude or limited real right over the affected land, resulting in the landowner losing use and enjoyment of the portion of the property on which the encroachment stands.

5.2.3 Transfer of the affected land to the encroacher

In terms of this outcome, a court explicitly orders that the encroached-upon land be transferred to the encroacher. Some courts have acknowledged that these orders result in compulsory transfer of property that amounts to an effective acquisition of the defendant's land²¹ or a "compulsory expropriation".²² This outcome has featured in case law, although it is not common. The court in the recent *Phillips* case considered the claim for transfer of the land affected by the encroachment. It stated that:

¹⁹ *Adam v Abdoola* (1903) 24 NLR 158; *Naudé v Bredenkamp* 1956 (2) SA 448 (O).

²⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

²¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 1.

²² *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 356.

"It is indisputable that an encroachment of this nature in issue in the instant case constitutes an interference with the applicant's property rights such as to constitute a deprivation in terms of the provisions of section 25 of the Constitution."²³

However, the court dismissed the claim and eventually decided the case based on the fact that the respondent could not prove that its prejudice or other reasons for not demolishing the encroachment was stronger than the prejudice the applicant would suffer if the encroachment were left intact.²⁴ The Eastern Cape High Court actually considered the claim for transfer of the land seriously without considering whether such an order can be made.²⁵

It is evident from early case law that the order for transfer is made in addition to the replacement of removal with compensation.²⁶ Therefore, the order for compensation instead of removal is the primary remedy and the order for transfer is additional. There is uncertainty about the authority for this order, but the possibility of this kind of order has been raised and therefore it is necessary to test whether it is constitutionally compliant.²⁷

5.3 Constitutional analysis of three outcomes according to FNB methodology

5.3.1 Introduction

The Constitutional Court in *FNB* provided an interpretation of the property clause in terms of which future courts may be guided in determining whether a deprivation of property occurred and, if it did, whether it was unconstitutional.²⁸ Roux argues that the *FNB* decision has added greater clarity on how the South African property clause

²³ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) par 24.

²⁴ For a discussion of the extent of the courts discretion in the context of building encroachments, see s 3.6 in chap 3 above.

²⁵ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010] paras 22-24.

²⁶ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 (3) SA 504 (D) 507.

²⁷ See s 3.6 in chap 3 above.

²⁸ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC).

should be interpreted to fulfil the goal of balancing private and public interests in property.²⁹

In *FNB*, the Constitutional Court developed separate stages in order to facilitate a property clause enquiry.³⁰ These stages have been linked to seven questions, namely:

- "(a) Does that which is taken away from [the property holder] by operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?"³¹

In the next section I will apply the *FNB* methodology to the three outcomes identified earlier to determine whether each of them would comply with the requirements of section 25 of the Constitution.

²⁹ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2. Although it is argued that *FNB* provided a framework within which the property clause can effectively be interpreted, there are some cases subsequent to *FNB* that have not followed the *FNB* methodology as astutely as would have been expected, for example *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

³⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 46.

³¹ I use Roux's formulation of the questions in *FNB*. See T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-3.

5.3.2 FNB methodology³²

5.3.2.1 Does that which was taken away amount to property in terms of section 25?³³

This question centres on whether the interest that is affected amounts to property that should be protected for constitutional purposes. Very little attention is given in the *FNB* decision to this question.³⁴ The court held that it would be “practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25.”³⁵ Therefore, the court merely accepted that property as envisaged in terms of section 25 should be interpreted widely.³⁶ Van der Walt explains the question of “property” with regard to the property clause as follows:

“For purposes of section 25 ‘property’ can therefore relate to a wide range of objects both corporeal and incorporeal, a wide range of traditional property rights and interests both real and personal, and a wide range of other rights and interests which (in civil-law tradition) have never been considered in terms of property before.”³⁷

Therefore, it seems as though “property” in terms of section 25 includes a wide range of rights, objects and interests in property.³⁸

In the case of building encroachment disputes, what we are dealing with is land, in other words tangible immovable property. If one looks at the three outcomes where the court decides not to demolish the encroachment, it needs to be determined which entitlement with regard to the land is lost in each particular case. If the court

³² This is not a comprehensive analysis of the stages of interpretation in *FNB*; it is merely a brief overview of the various questions that could help in assessing whether there could be constitutional problems with court orders made in relation to building encroachments. For more on *FNB*, see T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46.

³³ For an extensive discussion of what constitutes “property” for purposes of s 25 of the Constitution, see AJ van der Walt *Constitutional property law* (2005) chap 3.

³⁴ The fact that very little attention is given to this question is problematic because this should be the threshold requirement that determines entry into s 25 or not. Van der Walt foresees the possibility that future courts will take more cognisance of this threshold requirement. See AJ van der Walt *Constitutional property law* (2005) 72.

³⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 51.

³⁶ It was found in *FNB* that a corporeal movable would constitute property under s 25 and that ownership of land should therefore “lie at the heart of our constitutional concept of property.” See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 51.

³⁷ AJ van der Walt *Constitutional property law* (2005) 77.

³⁸ AJ van der Walt *Constitutional property law* (2005) 72-78.

orders that the encroaching structures should remain intact and says nothing about the transfer of the land on which the encroachment stands, the affected landowner loses the entitlement of use and enjoyment of the affected part of his property, both in the case of significant and insignificant encroachments.³⁹ Therefore, the right that is affected in both the first and second outcomes is the entitlement of use and enjoyment of the property. Where the encroachment is insignificant, it results in the loss of use and enjoyment of a small portion of the affected property. However, where the extent of the encroachment is large (as in the second outcome), the affected landowner loses use and enjoyment of a significant portion of his property. In the case where the court orders that the encroaching landowner take transfer of the encroached-upon land, the affected landowner does not only lose the entitlement of use and enjoyment of his land, but also ownership of the land on which the encroachment is erected. In fact, it could also be argued that he also loses the entitlement of disposal, since the transfer takes place without his cooperation and against his will. This is particularly clear in the third outcome, where the court orders the transfer of property against the will of the affected landowner and therefore he loses his right to choose whether to sell or not.

Therefore, depending on the particular outcome in the case there is a different interest at stake or entitlement that is lost when the court does not order removal of the encroachment. Sometimes (as in the first two outcomes) the affected landowner loses the entitlement of use and enjoyment of the land; whereas in the case where transfer of the land is ordered he may lose ownership of the land itself (as in the third outcome). Consequently, the property rights that are affected when a court denies a demolition order may either be an entitlement in the land or ownership of the land. In the section below I question whether the limitation of the affected landowner's property rights amounts to a deprivation of property in terms of section 25(1).

³⁹ See s 4.4 in chap 4 above.

5.3.2.2 Has there been a deprivation of property?

In *FNB* the court interpreted “deprivation” widely.⁴⁰ Therefore, “any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned”.⁴¹ Roux argues that in most cases courts will quite easily accept that a deprivation has occurred and proceed with the requirements of section 25(1), being the third stage in the *FNB* methodology.⁴²

The deprivation in an encroachment dispute would sometimes involve loss of use of the land (as in the first two outcomes) and sometimes the loss of ownership (as in the last outcome). The only issue is the scope of the deprivation. In insignificant cases, the loss is so small that it is questionable whether it should be regarded as a deprivation at all. There are conflicting views on this matter in case law. In *Nhlabathi and Others v Fick (“Nhlabathi”)*⁴³ the Land Claims Court had to determine whether the appropriation of a grave by an occupier in terms of section 6(2)(dA) of the Extension of Security of Tenure Act (“ESTA”)⁴⁴ would deprive a landowner of the use of that portion of his property in a way that conflicted with section 25. The court found that the landowner’s undoubted loss of the entitlement of use and enjoyment pertained to a small portion of the affected landowner’s property. However, it still constituted a deprivation in terms of section 25(1) of the Constitution.⁴⁵ Therefore, in terms of *Nhlabathi*, no matter how small the interference with the property is, it may amount in a deprivation of that property. In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council of Local*

⁴⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 57. See also AJ van der Walt *Constitutional property law* (2005) chap 4; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-17 – 46-20.

⁴¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 57. It was stated in the case that “[i]f section 25 is applied to this wide genus of interference, ‘deprivation’ would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference.”

⁴² T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2 – 46-5, 46-18, 46-23 – 46-25.

⁴³ [2003] 2 All SA 323 (LCC).

⁴⁴ The Extension of Security of Tenure Act 62 of 1997.

⁴⁵ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) par 29.

*Government and Housing, Gauteng and Others (“Mkонтwana”),*⁴⁶ the Constitutional Court followed a different approach.⁴⁷ It stated that in order to determine whether there was a deprivation, the “extent of the interference or limitation on the use, enjoyment and exploitation” is important.⁴⁸ There would be a deprivation if it can be shown that there was at least a “substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society”.⁴⁹ Van der Walt criticises the approach of Yacoob J in *Mkонтwana*.⁵⁰ He argues that all regulatory limitations on the use and enjoyment of property that are legitimate will be normal in a society.⁵¹ He also rejects the restriction of the concept of deprivation because this is contrary to the purpose of section 25(1) because ‘the purpose of section 25(1) is to legitimize the imposition of regulatory control and the deprivation of property that goes with it generally, not only in excessive cases.’⁵² Therefore, Van der Walt suggests that the idea that a deprivation is only a substantial or abnormal limitation or interference of the use and enjoyment of property should probably be ignored and that all restrictions on the use and enjoyment of land should be regarded as deprivations, regardless of their scope.⁵³

I would argue that in the context of building encroachments, even if the encroachment is minor, it should still be seen as a deprivation of the entitlement of use and enjoyment of the property. This is in line with argument of Van der Walt and

⁴⁶ 2005 (1) SA 530 (CC).

⁴⁷ *Mkонтwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 32.

⁴⁸ *Mkонтwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 32.

⁴⁹ *Mkонтwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 32.

⁵⁰ AJ van der Walt *Constitutional property law* (2005) 126-128.

⁵¹ AJ van der Walt *Constitutional property law* (2005) 127.

⁵² AJ van der Walt *Constitutional property law* (2005) 127.

⁵³ AJ van der Walt *Constitutional property law* (2005) 127. Van der Walt recognises the possibility that the *de minimis* principle may be applicable in some cases where the interference is really insignificant. The principle will ensure that these minor interferences will not be litigated. However, the purpose of s 25 was to prohibit any interference with property rights, no matter how small that interference may be.

the approach followed in the case of *Nhlabathi*,⁵⁴ where the insignificant scope of the loss played a role in determining whether the deprivation was justifiable, instead of relying on the scope of the loss to decide that there was no deprivation. Therefore, all three outcomes may result in a deprivation of property or property rights and it is necessary to question whether the deprivation complies with section 25(1).

5.3.2.3 Is the deprivation consistent with section 25(1)?

Once it has been established that there was a deprivation of property, the next question in the *FNB* methodology is whether the deprivation is constitutionally valid in terms of section 25(1). The requirements for a valid deprivation in terms of section 25(1) of the Constitution are two-fold.⁵⁵ Firstly, the deprivation must be in terms of law of general application and secondly, the deprivation must not be arbitrary.

In terms of the first requirement, the deprivation must be in terms of law of general application. The law of general application regulating building encroachments is the common law. The common law allows for certain instances where a court may deviate from the default remedy of removal and award compensation instead.⁵⁶ Both *Du Plessis v De Klerk*⁵⁷ and *S v Thebus*⁵⁸ provide authority for the fact that the common law is law of general application.⁵⁹ Therefore, it needs to be determined whether the second requirement of section 25(1) has been complied with in the case of building encroachments.

The second leg of section 25(1) requires that the deprivation must not be arbitrary.⁶⁰ There are two criteria, in terms of *FNB*, that determine whether a deprivation is

⁵⁴ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC).

⁵⁵ The Constitution of the Republic of South Africa, s 25(1).

⁵⁶ See chap 3 above. This is the common law as it has developed to what I refer to as the new approach to the problem of building encroachments.

⁵⁷ *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) par 44 at 876.

⁵⁸ *S v Thebus and Another* 2003 (6) SA 505 (CC) paras 64-65.

⁵⁹ See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC) par 44 at 876, par 136 at 915; *S v Thebus and Another* 2003 (6) SA 505 (CC) paras 64-65.

⁶⁰ The Constitution of the Republic of South Africa, s 25(1).

arbitrary.⁶¹ A deprivation would be arbitrary if it is procedurally unfair⁶² or if there is insufficient reason for it.⁶³

Essentially, procedural fairness in the context of section 25(1) means that there must be procedural mechanisms available to ensure protection of the right to property. This aspect was not extensively discussed by the Constitutional Court in *FNB*, but it was examined in *Mkontwana*⁶⁴ and touched upon briefly in *Reflect-All 1025 CC and Others v Member of the Executive Council for Public Transfer, Road Works, Gauteng Provincial Government and Another* (“*Reflect-All*”).⁶⁵

The applicants in *Mkontwana* argued that section 118(1) of the Local Government: Municipal Systems Act⁶⁶ was in contravention of section 25(1) of the Constitution because it resulted in an arbitrary deprivation of property.⁶⁷ Section 118(1) of the Local Government: Municipal Systems Act⁶⁸ limited the owner’s power to transfer his immovable property.⁶⁹ The provision limited the power to transfer in so far as the Registrar of Deeds was prohibited from effecting the transfer without a certificate from the municipality stating that all consumption charges due for a period of two years before the date of issue of the certificate was paid.⁷⁰ The applicants argued

⁶¹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

⁶² The Constitutional Court in *FNB* merely stated that procedural fairness could play a role in determining whether the deprivation was arbitrary. There are two cases in which the court did find that a deprivation was arbitrary because due process was not followed. In *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204 (T) at 221, it was held “that section 8(5)(a) of the Harmful Business Practices Act 71 of 1988 violated section 25(1) in allowing the Minister of Trade and Industry to seize assets before the completion of an investigation.” Similarly, the Cape High Court in *Director of Public Prosecutions” Cape of Good Hope v Bathgate* 2000 (2) BCLR 151 (C) par 82 found that the Proceeds of Crime Act 76 of 1996 that permitted the seizure of possessions amounted to an arbitrary deprivation in terms of s 25(1).

⁶³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

⁶⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 65-67.

⁶⁵ *Reflect-All 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

⁶⁶ The Local Government: Municipal Systems Act 32 of 2000.

⁶⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC).

⁶⁸ The Local Government: Municipal Systems Act 32 of 2000.

⁶⁹ The Local Government: Municipal Systems Act 32 of 2000, s 118(1).

⁷⁰ The Local Government: Municipal Systems Act 32 of 2000, sec 118(1).

that section 118(1) was procedurally unfair because it did not impose an obligation upon municipalities to keep property owners informed of the amounts owing by the occupiers.⁷¹ The Constitutional Court found that procedural fairness is a flexible concept that is dependent on all the circumstances in the case.⁷² The court reached the conclusion that it would be impractical to expect municipalities to supply the owner with information regarding outstanding amounts owed by occupiers of his property.⁷³ Such an obligation would require additional resources and processes, of which the practical implications would be considerable. Moreover, the owner has a duty to monitor the occupation and use of the property. Therefore, the court found that the law was not procedurally unfair simply because it did not impose a duty on the municipality to furnish information about outstanding amounts.⁷⁴

In *Reflect-All* the Constitutional Court had to decide whether section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act⁷⁵ were in conflict with section 25(1) of the Constitution. The impugned provision, which provided for planning of provincial roads, imposed certain restrictions on the use, enjoyment and exploitation of privately owned property belonging to the applicants. The court had to determine whether the deprivation was procedurally unfair. It confirmed, in line with *Mkontwana*, that procedural fairness is a flexible concept, which depends on all relevant circumstances in the case.⁷⁶ The applicants argued that the roads could be determined without consultation with the landowners and this resulted in the process being procedurally unfair. They also argued that the designs of the routes should

⁷¹ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 65.

⁷² *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 65.

⁷³ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 66.

⁷⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) paras 66-67.

⁷⁵ The Gauteng Transport Infrastructure Act 8 of 2001.

⁷⁶ *Reflect-All 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) par 40. The court relied on *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 65.

have been reconsidered before publishing and accepting it, and neglecting to do so would be procedurally unfair because it did not afford them the opportunity to be part of the process. The Constitutional Court rejected both these arguments and found that section 10(1) and 10(3) was not procedurally arbitrary, because it would be impractical and unrealistic to follow the process argued by the applicants.⁷⁷

Therefore, both *Mkontwana* and *Reflect-All* illustrate that procedural fairness is determined in a context- and fact-sensitive analysis. It is flexible and it depends on the circumstances of the particular case. Therefore, to question whether the deprivation in the case of building encroachment was procedurally unfair one would have to assess this according to the circumstances of the particular case. In the context of encroachment by building the question will be whether the legal process involved is procedurally unfair. This probably means that there must be some form of recourse to the law for the affected landowner. The recourse would either be in the form of an appeal or a claim for compensation in terms of common law, or the affected landowner has a claim based on section 25 or 33 of the Constitution in terms of constitutional law. Therefore, the procedural unfairness argument is unlikely to succeed in the context of building encroachments, at least as long as the loss of a property right in terms of the common law is open to judicial control.

With regard to the order for transfer of the encroached-upon land to the encroacher, it is important to consider whether the deprivation that results in this instance is procedurally unfair if the court does not have the legal authority to make the order involved. This would typically be in the case of the third outcome, where the court orders transfer of the encroached-upon land to the encroacher. In chapter three it was pointed out that it is uncertain what the extent of the courts' discretion is.⁷⁸ It transpired from an investigation into early South African cases in which transfer was ordered that in these cases the affected landowner was willing to give up the affected land in exchange for compensation. Therefore, these cases do not provide adequate authority for the view that the court may, in terms of its discretion, effect a

⁷⁷ *Reflect-All 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) paras 46-47.

⁷⁸ See s 3.6 in chap 3.

forced sale of the encroached-upon land. As the matter stands, there is no authority in either common law or legislation in terms of which the court can sanction a forced sale of land in the context of building encroachments.⁷⁹ If the affected landowner would not want to give up the encroached-upon part of his property and the court orders the transfer, the outcome is not authorised in these instances and therefore it would be procedurally unfair.⁸⁰ The deprivation would be arbitrary in these circumstances because it does not comply with the section 25(1) requirement that the deprivation may not be procedurally unfair.

In terms of the second criterion, the effect of the *FNB* decision is that a deprivation would be arbitrary if there is insufficient reason for it. In the context of building encroachments it would need to be established whether the reason for ordering compensation instead of removal (usually insignificance of the encroachment or policy reasons such as balance of convenience) is sufficient under the circumstances to justify the deprivation that results.⁸¹ With regard to the reasons for the deprivation, Van der Walt explains that:

“In the context of encroachment, the reason that is required [to justify the deprivation] 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 greater loss for the encroaching party that the landowner would suffer if the encroachment is kept intact?”⁸²

⁷⁹ See s 3.6 in chap 3.

⁸⁰ The recent case of *Phillips v South African National Parks Board* also shows another aspect that might indicate procedural arbitrariness. In that case the respondent (the South African National Parks Board) may have been able to expropriate the property in terms of its public function. There is an argument that by allowing the respondent to acquire the land indirectly through a transfer order in an encroachment case would have been procedurally unfair. Fortunately the court did not allow the transfer but ordered that the encroachment be removed. For a discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 [22 April 2010], see chaps 1 and 3 above.

⁸¹ In chap 3 above I investigated the reasons for courts exercising their discretion in favour of leaving the encroaching structures intact and not ordering demolition in terms of the common law.

⁸² AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2005) 125 SALJ 592-628 at 623.

In the *FNB* case, Ackermann J applied a number of factors to determine whether a sufficient reason existed for the deprivation.⁸³ These factors are discussed below in the context of building encroachments.

The first factor identified in *FNB* is an evaluation of the relationship between the means employed and the ends sought to be achieved by the compensation order. In all three of the outcomes in encroachment cases identified earlier, the means employed in bringing about the deprivation is that the court decides to leave the encroaching structure intact, which results in either a deprivation of land or a deprivation of the entitlement of use of the land. The most important reason why a court would leave the encroachment in place is fairness and equity in the sense of preventing the encroaching owner from suffering an even greater loss than the affected owner would suffer if the encroachment was not removed. In other words, the purpose of the deprivation is to ensure that a just outcome is reached that is not too burdensome on only one party (even if that party is the one who unlawfully created the encroachment).

In the case of insignificant encroachments, it seems as though there is a rational relationship between what courts are doing (the means) and why they are doing it (the ends). Considering the fact that the encroachment is minor, for example where the foundation of a wall or a really insignificant building encroachment extends a few inches into the affected property, not removing the encroachment does not have a significant negative effect for the affected landowner. In this case the courts will balance the harm and most likely come to the conclusion that less harm results if the encroachment is kept intact than when the encroachment is removed. In most cases of this nature, if the encroachment is insignificant the deprivation is justified by the better balance that is created when ordering compensation instead of removal.

⁸³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

When dealing with significant encroachments, it is more complex and this line of argument is not that obvious. Courts are deviating from the common law remedy of removal to reach what they regard as a fair and just outcome, but in doing so they leave the encroachment in place and this may be excessively burdensome for the affected landowner. Because of the greater complexity involved in this outcome, the judgement on whether the means is justified by the purpose has to be made in every individual case with reference to all the circumstances of the case.⁸⁴ These circumstances may include things like the exact extent of the encroachment, its effect on the affected landowner, knowledge of the building works and delay in bringing the application, the value of the building and the loss if it was demolished, the conduct of the parties involved (whether the encroacher was *bona fide*) and whether the affected landowner would be sufficiently compensated by money for his loss. The balance of these considerations would provide the policy reasons that would indicate whether a particular decision to leave the encroachment in place was justified and would subsequently have to provide the reasons to justify the deprivation that results when significant encroachments are left intact.

Where transfer of the encroached-upon land is ordered in addition to keeping the encroachment in place, the balancing of the considerations mentioned above with regard to the second outcome will again be necessary to determine whether the deprivation in the third outcome was justified. Like in the previous outcome, these considerations will also be important in order to justify the deprivation of property in this case. In some cases (assuming there is authority for the order) the judgement resulting in the transfer of ownership may be justified by the balancing process of all the considerations.

The second factor deals with the complexity of relationships that need to be considered.⁸⁵ With regard to encroachment by building there is not such a complex

⁸⁴ The substantive arbitrariness requirement in *FNB* is context-sensitive. Therefore, the test may vary according to the facts of the particular case. In some cases a lower level of scrutiny is required; whereas in other cases the test may require a higher level of scrutiny. This depends on the factors and the context of the particular case. See AJ van der Walt *Constitutional property law* (2005) 153-155.

⁸⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

web of relationships as there was in *FNB*. In *FNB*, it was found that the deprivation is insufficiently justified because the affected party had nothing to do with the customs debt for which the deprivation took place.⁸⁶ For encroachment, what we are dealing with is an affected landowner attempting to assert his common law right of removal against an encroacher who argues that the rigid application of the common law causes extreme hardship for him. In all three outcomes this is the extent of the relationship between the parties. However, there is an argument for saying that the affected landowner (like the owner affected by the deprivation in *FNB*) had nothing to do with the encroacher's loss and should therefore not be expected to assist in reducing it because it was not his fault. The affected landowner in the case of building encroachments had nothing to do with the encroachment, he was not consulted about it and in most cases he was not even aware of it. This may be an argument that the court can take into consideration when it balances the interests of the parties. Therefore, it should play a role in order to determine whether the deprivation is justified. However, this argument assumes that the affected landowner was innocent and that there was no bad faith or delay or knowledge of the encroachment. In some cases the affected landowner may actually benefit from the encroachment, especially if it is almost totally on his land and it is ordered to remain in place. Therefore, this argument also assumes that the affected landowner actually wants the encroachment removed and not to have the benefit which may be offset by an enrichment claim. It may assist in balancing the scale in favour of the affected landowner and prove that the deprivation was not justified in this particular case.

The third factor states that regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.⁸⁷ In a building encroachment dispute, the purpose of a deprivation is to ensure that the most fair and equitable outcome is reached, and that the outcome is not too burdensome on only one party. The party whose property is affected stands to lose either the land (where transfer is ordered) or a substantial right to use the land (where the order effectively transfers a limited real right or other right to use the land). With

⁸⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 108.

⁸⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

insignificant encroachments (in other words the first outcome) the extent of the deprivation is small. Therefore, the limitation on the affected landowner's property rights is small, in relation to the effect for the encroacher if demolition is ordered. However, with significant encroachments (the second outcome) and the case where transfer is ordered (the third outcome), the effect of leaving the encroachment in place is significant. The limitation on the affected landowner's rights is substantial. Therefore, the deprivation that results when the encroachment is not demolished causes a serious burden on the affected landowner. This deprivation may be justified if the court balances the interests of both parties and takes various factors into account to ensure that the most just and fair outcome is reached. The factors will have to play a role in order to prove that the burdensome effect on the affected landowner's property rights is justified. These may include the extent of the unfairness of ordering demolition of the encroachment,⁸⁸ delay in bringing the application,⁸⁹ the duration for which the encroachment has stood,⁹⁰ malicious intent by either party involved in the dispute,⁹¹ whether the loss can adequately be compensated,⁹² the size of the encroachment, whether removal will result in people's homes being demolished⁹³ or any other factor that may be relevant in the dispute.⁹⁴ If the balancing of the various factors favours the encroacher, the purpose of the law causing the deprivation is reached and the deprivation will be justified.

In terms of the fourth factor in *FNB*, the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation must be considered.⁹⁵ In all three outcomes it seems as though the reason why courts decide to leave the encroachment in place is because the common law remedy of removal has become too rigid, and its strict application would lead to unfavourable results in cases where the effect of the encroachment is significantly

⁸⁸ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

⁸⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁹⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

⁹¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

⁹² *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

⁹³ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (UK); *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch) (UK).

⁹⁴ See chap 3 above.

⁹⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

smaller than the effect of removal. Therefore, if the reason for the deprivation is fairness and equity, the purpose of the deprivation is the same in all three outcomes, namely to prevent an unjustifiably harsh outcome for the encroacher, considering the extent and effect of the encroachment. In the first outcome, the encroachment is insignificant because the affected landowner loses only the entitlement of use and enjoyment of a small portion of land. A good illustration of why the courts might disregard such an insignificant loss is the case of *Nhlabathi v Fick*.⁹⁶ As mentioned earlier, the Land Claims Court in this case had to determine whether the appropriation of a grave by an occupier in terms of section 6(2)(dA) of the Extension of Security of Tenure Act⁹⁷ would deprive a landowner of the use of that portion of his land. After finding that there was a deprivation,⁹⁸ the court questioned whether that deprivation was arbitrary.⁹⁹ The court relied on the *FNB* methodology to determine whether the reason for the deprivation was sufficient¹⁰⁰ and decided that the loss of the entitlement of use and enjoyment was insignificant because of the small piece of land that was affected and therefore the deprivation was justified.¹⁰¹ The extent of the deprivation causing only a small limitation on the affected landowner's right of use and enjoyment could also in the same way as it did in *Nhlabathi* help justify the deprivation that results in the context of insignificant building encroachments.

However, this may not be true in the case of significant encroachments where a landowner loses use and enjoyment of a substantial portion of his property or even the whole of his land. In these instances it would be more difficult to justify the deprivation, because it could be excessively burdensome on the affected landowner. The larger the encroachment, the bigger the limitation on the entitlement of use and enjoyment and therefore a stronger reason is needed to justify the deprivation. The circumstances of the case would need to be considered and need to be exceptional enough to justify the deprivation considering the significant limitation on the affected landowner's rights. The considerations mentioned above in terms of the third factor

⁹⁶ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC).

⁹⁷ The Extension of Security of Tenure Act 62 of 1997.

⁹⁸ See s 5.3.2.2 above.

⁹⁹ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) paras 27-31.

¹⁰⁰ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC) paras 30, 31.

¹⁰¹ *Nhlabathi and others v Fick* [2003] 2 All SA 323 (LCC).

are again important to justify the deprivation in terms of this factor. In other words, it will again be important to consider if it would be unfair to order demolition in the particular case because there was delay in bringing the application, or the encroachment had stood for a considerable amount of time. It should also be determined whether there was bad faith by either party involved in the dispute, or whether the loss can adequately be compensated in money. The size of the encroachment will obviously need to be considered, especially in order to prove who would suffer more harm in the particular case either if demolition was ordered or if the encroachment was kept intact. The nature of the property will be an important consideration in the context of building encroachments because courts may be reluctant to order removal where it may result in people's homes being destroyed. Any of these factors may help balance the scale in favour of the encroacher and therefore justify the deprivation even in cases where it is significant.

Factor five states that a more compelling purpose is needed where the deprivation affects the ownership of land or corporeal movables.¹⁰² In *FNB* the affected right was ownership and therefore a very strong reason for the deprivation was required in those circumstances. The property in question in the case of building encroachment is land, and the right that is affected is either an entitlement in that land (a use right) or ownership of the land (if transfer is ordered). Therefore, the reason for the deprivation would need to be more compelling when the court orders transfer of the affected land than when limited use rights are involved.

The sixth factor requires the courts to consider the effect of the deprivation on the incidents of ownership.¹⁰³ Where all the incidents of ownership are affected a more compelling reason is required. In cases where only some incidents of ownership are affected, or where they are only partially affected, the reason need not be as compelling. In the first two outcomes the affected landowner loses use and enjoyment of his property as a result of the encroachment not being demolished. In the first outcome, he loses use and enjoyment of a small portion of his property;

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

¹⁰³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance 2002 (4) SA 768 (CC) par 100.*

whereas in the second outcome he loses the use and enjoyment of a significant portion of his property. Therefore, naturally, the reason required to justify the deprivation in the second outcome would have to be stronger than in the first outcome. In *Mkontwana*, the court found that even if it is only one incident of ownership that is affected by the deprivation, that incident of ownership may be a significant element of ownership.¹⁰⁴ It was found in *Mkontwana* that the right to alienate property is an important incident of ownership.¹⁰⁵ However, in this case the court stated that the deprivation was minor because it was only one incident that was temporarily limited. Therefore, the limitation was justified. This may help to explain why, in the case of the first outcome, the deprivation can be justified. Although use and enjoyment is an important incident of ownership, the limitation on the use and enjoyment pertains to a small portion of property. Therefore, in the case of insignificant encroachments the deprivation only affects a small portion of property and the balance of harm in this case is on the side of the encroacher. The deprivation can be justified more easily in these cases.¹⁰⁶ However, this may not be as easy in the case of significant encroachments. Although it is also only one incident of ownership in this case - namely the use and enjoyment of property - it is a large portion of property that is affected. Therefore, the deprivation is significant and stronger reasons are required to justify the deprivation. In the case where the court orders transfer of the encroached-upon land (the third outcome) the effect of the deprivation is even more intrusive. As in *FNB*, the affected right is ownership and all the incidents of ownership are affected. Therefore, a stronger reason is required to justify the deprivation. There are various factors that may be taken into consideration in order to justify the deprivation. Most of the factors that were taken into consideration when the decision was made to leave the encroachment in place will be relevant when attempting to justify the deprivation. For example, balance of harm or loss for either party, fairness of ordering demolition, *mala fide* behaviour by either party involved in the dispute, tardiness in bringing the application or any other factor

¹⁰⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 33.

¹⁰⁵ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset and Others v Buffulo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 (1) SA 530 (CC) par 33.

¹⁰⁶ This is assuming that there is no other factor that may dictate that removal should be ordered. An example of this would be where there was *mala fide* behaviour by the affected landowner.

that may help to provide a more compelling reason for the deprivation. These factors may provide a strong enough reason to justify the deprivation in the case where the affected landowner loses ownership or use of a substantial portion of his land.

The seventh factor requires a number of aspects to be taken into consideration when determining whether a sufficient reason for the deprivation exists,¹⁰⁷ including what the law that causes the deprivation seeks to achieve and whether it actually achieves this goal. Additionally, the property or property right that is affected and the extent to which the property right is affected should be considered. According to these considerations, it can be determined whether a mere rational relationship between the means and ends is required or whether a proportional evaluation is necessary.

In encroachment cases, the law that causes the deprivation is the common law in terms of which courts have the discretion to deny removal orders when a compensation order is more likely to ensure that the outcome is just and equitable and not excessively burdensome on only one party. The balance between the rights of the encroacher and the affected landowner would need to be proportionate.¹⁰⁸ The proportionality investigation has to favour the compensation award in order for the court to decide to leave the encroachment in place. In other words, the balance of harm must be on the side of the encroacher and the compensation order must be able to correct the effect on the affected landowner's rights. If this goal is reached, the law would be justified. This needs to be questioned in all three outcomes to assess whether the deprivation is justified.

The area affected by insignificant encroachments is small. Sometimes it will be foundations of a wall that encroach or it may be a small part of a building that extends a few inches into the affected landowner's property. The limitation on the right is generally insignificant as it pertains to a small piece of land. Therefore, the deprivation of use and enjoyment that results is insignificant.¹⁰⁹ In insignificant

¹⁰⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance 2002 (4) SA 768 (CC) par 100.*

¹⁰⁸ This approach is similar to the Dutch approach. See chap 6 below.

¹⁰⁹ *Nhlabathi and others v Fick [2003] 2 All SA 323 (LCC).*

encroachment cases the law that causes the deprivation could reach its goal if the effect of removal would have been much harsher for the encroacher than the effect of denying removal would be for the affected landowner. This assumption would hold, provided that both parties acted in good faith and there are no other factors indicating that demolition should be the appropriate remedy. Therefore, after a balance of interests is done in the case of insignificant encroachments and compensation is found to be the appropriate remedy, the deprivation would in most cases be justified.

When dealing with the deprivation of the entitlement of use and enjoyment of a substantial portion of the property or of the ownership of the land itself, as indicated before, it is more difficult to justify the deprivation. The extent of the deprivation makes the limitation on the right significant. Therefore, a more stringent level of scrutiny is required in the second and third outcomes.

Therefore, in all three cases the court must balance the interests of the parties involved in an encroachment dispute. In order to establish sufficient reason for the deprivation a proportional relationship between means and ends should be established. In this regard the court must make a proportional assessment by balancing the interests of both parties involved in an encroachment dispute. Where the balance favours a compensation award (mostly in the case of insignificant deprivations), the law would have reached its goal and the order would more easily justify the deprivation. However, the scale would not as easily favour the encroacher when the encroachment is significant. In this case a higher level of scrutiny is required to justify the deprivation. A court will need to consider whether there are exceptional circumstances that justified keeping the encroachment intact that will serve as justification for the deprivation. In this regard the last factor in the *FNB* methodology to determine sufficient reason for the deprivation is important.

The last factor that can be used to prove sufficient reason for the deprivation in *FNB* is the requirement that all relevant circumstances in the case should be taken into consideration.¹¹⁰ This would depend on the facts of each case.

In terms of outcome one, a court leaves the encroachment in place in the case of insignificant encroachments. The effect is a loss of use and enjoyment of a small portion of the affected landowner's property. The deprivation that results may be reasonably easily justified. This is because the balance of interests of the parties in this dispute will most likely indicate that demolition will be unduly burdensome on the encroacher. In most cases where the deprivation is minor this will be a good enough reason not to demolish the encroachment and would probably justify the deprivation. This is assuming that there are no circumstances that dictate that the demolition should occur and therefore that the deprivation would not be justified. However, in cases of extensive encroachments, the affected landowner loses the use and enjoyment of a substantial portion of his property. It becomes more difficult to justify this outcome because the larger the encroachment, the greater the extent of the deprivation. The outcome has to be calculated in every case based on its set of facts. The deprivation will need to be justified on a balance of all considerations and circumstances in the case. There is no straightforward rule that removal is or is not justified in the case of all significant encroachments. As is evident in case law, there may be exceptional circumstances that may justify keeping the encroachment intact and these circumstances will be important for the justification of the deprivation.¹¹¹ These may include unfairness of ordering demolition of the encroachment,¹¹² delay in bringing the application,¹¹³ the duration for which the encroachment has stood,¹¹⁴ malicious intent by either party involved in the dispute,¹¹⁵ whether the loss can adequately be compensated,¹¹⁶ the size of the encroachment, whether removal will

¹¹⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 100.

¹¹¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹¹² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹¹³ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

¹¹⁴ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

¹¹⁵ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

¹¹⁶ *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287.

result in people's homes being demolished¹¹⁷ or any other factor that may be relevant in the dispute.¹¹⁸

In case law the conduct of the parties was one of the deciding factors in determining the encroachment dispute.¹¹⁹ According to the court in *Trustees, Brian Lackey Trust v Annandale*, the right of removal should not allow an affected landowner to exploit his power and demand removal of the encroachment out of "pure malice".¹²⁰ It is argued in this case that where a landowner insists upon removal in the case of a significant encroachment he is abusing his right to demand removal.¹²¹ This is a factor that would need to be taken into consideration when justifying the deprivation. Another reason that may be sufficient to justify the deprivation is tardiness in bringing the application for removal.¹²² If the affected landowner does not object to the existence of the encroachment promptly, this may justify keeping the encroachment in place. The delay in bringing the application could be an indication of acquiescence and might also show lack of detriment.¹²³ Therefore, the conduct of the parties should play a role in determining which outcome would be the most suitable and should therefore be taken into consideration when justifying the deprivation. All the considerations mentioned above will be important to justify the deprivation that results from the continued existence of even a significant encroachment.

If the court orders transfer of the encroached-upon land, as in the case of the third outcome, the deprivation is significant and greater justification is required for the

¹¹⁷ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (UK); *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch) (UK).

¹¹⁸ See chap 3 above.

¹¹⁹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 43; *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 139.

¹²⁰ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 43. See also AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2009) 125 SALJ 592-638 at 607. Van der Walt argues that the most likely explanation for the consequence in the *Brian Lackey Trust* judgement was that the court wanted to punish the affected landowner for trying to extort a large sum of money from the encroacher, by holding the sword of removal over his head. The court was not tolerant of this type of conduct.

¹²¹ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 43. For a discussion of the abuse of right argument, see s 2.2 in chap 2 above. In chap 2 I argue that this statement made in the *Brian Lackey Trust* case is a bit too strong and a landowner who really does not want to lose his land (like the applicant in *Phillips v South African National Parks Board*) is entitled to insist on removal. It is only an abuse of right when he tries to extort more money from the encroacher.

¹²² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O) at 139.

¹²³ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

deprivation. Like *FNB*, ownership is the affected right and all the incidents of ownership are lost. Therefore, in order to prove that there is sufficient reason for the deprivation, a more compelling purpose is required. It is necessary to make a careful assessment in order to establish whether the effect on the encroacher (when the encroachment is demolished) is harsher than the effect on the affected landowner (when the encroachment remains intact). Again, the factors mentioned above will be important in this assessment. Therefore considerations like delay, *bona fides*, unfairness, the extent of the encroachment and whether the loss can adequately be compensated by money will again be important in terms of this requirement in *FNB*. All of these considerations and the circumstances of the case may determine whether the deprivation can be justified even if it is significant. Of course, as mentioned earlier the order for transfer may still be arbitrary because it is procedurally unfair even if it can be proven that there is sufficient reason to justify the deprivation. It is clear that there is uncertainty surrounding whether this order may be made at all.¹²⁴ In the absence of clear authority, it will result in an arbitrary deprivation of property because it is procedurally unfair.

Therefore, if it is proven that the deprivation is arbitrary, either because it is procedurally unfair or because there is insufficient reason for the deprivation, the third step of the *FNB* enquiry is to determine whether the arbitrary deprivation can be justified under section 36.

5.3.2.4 Can the deprivation be justified in terms of section 36?

According to the Constitution, any limitation of a protected right may be justified in terms of section 36.¹²⁵ The Constitutional Court in *FNB* started off the justification question by stating that the fact that a deprivation was arbitrary may sometimes render the section 36 question redundant.¹²⁶ Nonetheless, the court embarked on a section 36 enquiry and concluded that the arbitrary deprivation in that case was not

¹²⁴ See s 3.6 in chap 3 above.

¹²⁵ The Constitution of the Republic of South Africa, s 36. Van der Walt states that s 25 of the Constitution is not immune from limitation in terms of s 36. See AJ van der Walt *Constitutional property law* (2005) 56. This was confirmed in *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) par 34.

¹²⁶ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 110.

reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹²⁷ Van der Walt states that it is highly unlikely that a deprivation that fails the section 25(1) enquiry would ever reach the section 36 limitation analysis if courts follow the procedure as set out in *FNB*.¹²⁸ This is because deprivations that fail to meet the requirements of section 25(1) and prove to be arbitrary, will probably also fail to meet the requirements of section 36.¹²⁹ Similarly, Roux argues that if the procedure of *FNB* is followed, it would be impossible to get through all the stages of *FNB*.¹³⁰ Therefore, in all constitutional property disputes if a deprivation is struck down in terms of section 25(1) because of the arbitrariness analysis, section 36(1) will probably never be reached.¹³¹ Furthermore, Roux states that, depending on what end of the spectrum the conclusion about arbitrariness was reached, the role of section 36 will differ.¹³² If arbitrariness were measured in terms of mere rationality, this would provide the strongest case against the applicability of section 36.¹³³ The reason for this is that if there is no rational connection between means and ends for the deprivation, it could never be justified in terms of section 36.¹³⁴ In the case where proportionality was required, like in the *FNB* decision, section 36 will generally just confirm the conclusion already reached in section 25(1), and the section 36 justification would probably never succeed.¹³⁵ In *Nhlabati v Fick*¹³⁶ the Land Claims Court nevertheless decided that the deprivation brought about by the appropriation of a grave in terms of section 6(2)(dA) of the Extension of

¹²⁷ The Constitution of the Republic of South Africa, s 36.

¹²⁸ AJ van der Walt "The limits of constitutional property" (1997) 12 SA *Public law* 275-330 at 325-327; T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27; AJ van der Walt *Constitutional property law* (2005) 55-57.

¹²⁹ AJ van der Walt "The limits of constitutional property" (1997) 12 SA *Public law* 275-330 at 325-327; T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27; AJ van der Walt *Constitutional property law* (2005) 55-57.

¹³⁰ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2 – 46-5; 46-21 – 46-25.

¹³¹ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2 – 46-5; 46-21 – 46-25.

¹³² T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27.

¹³³ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27.

¹³⁴ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27.

¹³⁵ T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27.

¹³⁶ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC).

Security of Tenure Act¹³⁷ would, even if it were arbitrary, be justified in terms of section 36(1) because it was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.¹³⁸

If it is found in an encroachment dispute that the encroachment results in a deprivation that is arbitrary, the literature suggests that it would most probably not be justifiable in terms of section 36.¹³⁹ If the loss of use and enjoyment of the property (the first two outcomes) or the loss of ownership (as in the last outcome) amounts to an arbitrary deprivation, it would probably not be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking the factors listed in section 36(1) into consideration.¹⁴⁰ If this is the case, the property enquiry in terms of the *FNB* methodology would stop here and the law would be deemed unconstitutional. However, if the deprivation was not arbitrary or if it can be justified in terms of section 36, the next step is to determine whether an expropriation has occurred in terms section 25(2) of the Constitution.

5.3.2.5 Has there been an expropriation for purposes of section 25(2)?

As a result of the methodology proposed in *FNB* it will always be necessary to test for deprivation before it can be established whether an expropriation took place. Therefore, in terms of *FNB*, all expropriations are deprivations, but not all deprivations are expropriations.¹⁴¹ Roux states that:

“In South Africa, by contrast, the distinction between deprivation and expropriation has lost much of its significance. The *FNB* Court treated expropriations as a form

¹³⁷ The Extension of Security of Tenure Act 62 of 1997.

¹³⁸ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) par 35.

¹³⁹ This is assuming Van der Walt and Roux’s argument that a deprivation that is arbitrary will never be justified under s 36. See AJ van der Walt “The limits of constitutional property” (1997) 12 SA *Public law* 275-330 at 325-327; T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-27; AJ van der Walt *Constitutional property law* (2005) 55-57.

¹⁴⁰ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 113.

¹⁴¹ T Roux “Property” in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-2 – 46-5, 46-23 – 46-25.

of deprivation and insisted that an impugned law, even where it clearly provided for the expropriation of property, first be tested for compliance with s 25(1)."¹⁴²

Once it has been established that a deprivation is arbitrary and not justifiable in terms of section 36 that would be the end of the matter; the law that authorises the deprivation is unconstitutional and invalid. The deprivation in *FNB* was constitutionally invalid because it was arbitrary in terms of section 25(1) and could not be justified according to section 36.¹⁴³ Therefore, it was unnecessary for the Constitutional Court to decide whether the deprivation amounted to an expropriation that needed to comply with section 25(2) and (3) of the Constitution.

If it can be established that the deprivation has resulted in an expropriation, the expropriation would need to comply with the requirements of section 25(2) and (3) of the Constitution.¹⁴⁴ This was shown in *Nhlabati v Fick*,¹⁴⁵ where the Land Claims Court decided that even if the appropriation of a grave in terms of section 6(2)(dA) of the Extension of Security of Tenure Act,¹⁴⁶ amounted to an expropriation without compensation that was in conflict with section 25 (2), it would be justifiable under section 36(1) of the Constitution.¹⁴⁷

When applied to encroachment cases, the deprivation that results when courts leave the encroaching structure in place may look like an expropriation in some instances. This will be especially in cases where the court decides not to order removal and the effect is that the affected landowner loses either the land (when transfer of the land is ordered) or a right to use the land (when the order effectively transfers a limited real or other right to use the land). Furthermore, the alternative relied on by the courts, namely the payment of compensation, creates the illusion that this may be an

¹⁴² T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-29.

¹⁴³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC) par 113.

¹⁴⁴ I do not discuss the relationship between deprivations and expropriations in detail. For a detailed discussion of this, see AJ van der Walt *Constitutional property law* (2005) chaps 4 and 5.

¹⁴⁵ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC).

¹⁴⁶ The Extension of Security of Tenure Act 62 of 1997.

¹⁴⁷ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) par 35.

expropriation. Therefore, it needs to be determined whether what is taking place when the encroachment remains in place is expropriation of either a use right or ownership of the land on which the encroachment is erected.

With regard to the first and second outcomes, the argument would be as follows: When the court orders that the encroachment should not be removed and the affected landowner loses the right to use that portion of his land, he is effectively being expropriated of that right. What would be expropriated in this case is a use right and not ownership. It could also be argued that when a court decides to opt for monetary compensation instead of removal of an encroachment, it is effectively creating a servitude of use (a limited real right) in favour of the encroaching landowner. Praedial servitudes are usually created by way of agreement between the dominant and servient tenement owners, but the courts have the power to create a servitude of right of way of necessity by court order.¹⁴⁸ Imposing this limitation on a landowner without his consent could arguably be seen as an expropriation of a use right or, possibly, a servitude.¹⁴⁹

In *Nhlabathi v Fick*, it was acknowledged that a permanent restriction on the use of property could not only amount to a deprivation of some of the landowner's property rights, but also to an expropriation of those rights.¹⁵⁰ Therefore, assuming the loss of property passes the section 25(1) requirement and does not amount to an arbitrary deprivation, the loss may amount to an expropriation of the right to use and enjoy the affected part of the property.¹⁵¹ The respondent in *Nhlabathi* argued that if an expropriation did result in this case, it would be unconstitutional and void because the provision authorising the appropriation of the grave did not provide for the payment of just and equitable compensation, which is a requirement for a valid

¹⁴⁸ Consent is a prerequisite for the creation of a praedial servitude. The only servitude that can be created without the consent of the owner of the servient tenement is the right of way of necessity. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* (5th ed 2006) 328.

¹⁴⁹ A Gildenhuys *Onteieningsreg* (2nd ed 2001) 61, 70-71.

¹⁵⁰ *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) par 32.

¹⁵¹ A Gildenhuys *Onteieningsreg* (2nd ed 2001) 70-71. Gildenhuys argues that rights can also form the subject of expropriation.

expropriation.¹⁵² Similarly, in *Serole v Pienaar*, which was a case also dealing with the appropriation of graves on property, it was found that the unilateral establishment of a grave on private land could be equated with the granting of a servitude over the property and that the granting of a servitude without the consent of a landowner may well constitute an expropriation. Therefore, it is possible to expropriate a right such as a use right or a servitude by imposing a permanent limitation on the owner's use right.

In the context of encroachment by building a court order that grants monetary compensation rather than removal of the encroachment practically amounts to the involuntary establishment of a permanent presence on and use of a specific part of the affected owner's property, similar to the establishment of a servitude or a similar use right. This use right does not have to be a limited real right, it could amount to a sort of lease, which is a personal use right if not registered.¹⁵³ In my view, it seems as though a better argument in these instances is that what a court does is not to expropriate (and therefore transfer) a use right, but rather establishes a use right in favour of the encroacher. As in the case of a servitude of right of way of necessity established by the court, a use right is created by the court in favour of the encroacher when the encroachment is left in place.¹⁵⁴ The compensation that is awarded in this case is based on fairness and the balancing of interests, which is the foundation of the court's power to establish these rights in the first place. It is not compensation for expropriation of the use right, because that is not authorised.

The third outcome, where the court specifically orders that the encroached-upon land should be transferred to the encroacher, could also be seen as an expropriation of land. Therefore, in all three outcomes where a court decides to leave an encroaching

¹⁵² S 25(2) of the Constitution requires that an expropriation is subject to just and equitable compensation. The authorising provision in question in *Nhlabathi* is s 6(2)(dA) of the Extension of Security of Tenure Act ("ESTA"). The court provided various possibilities of what could happen if a statutory provision, which allows an expropriation, did not provide compensation. One of the possibilities is that it can be justifiable under s 36 of the Constitution. Consequently, it was found in *Nhlabathi* that "[t]he statutory obligation of a landowner under section 6(2)(dA)" was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. See *Nhlabathi and Others v Fick* [2003] 2 All SA 323 (LCC) paras 33-35.

¹⁵³ This is the German approach. See chap 6 below.

¹⁵⁴ When a use right is established, the question that remains is what the nature of the right is. This is discussed in chap 4 above.

structure intact, it may look like an expropriation of either a use right or of ownership of the affected land. However, an expropriation in the context of building encroachment is not possible and the deprivation that results from leaving an encroachment in place against compensation should not be regarded as an expropriation. This is because, in addition to the requirements in section 25(1), which according to *FNB* should always be complied with first in any property enquiry, there are additional requirements for an expropriation to be constitutionally valid. There is a threshold requirement in terms of which the expropriation must also be imposed in terms of law of general application.¹⁵⁵ Furthermore, expropriation is possible only for a public purpose or in the public interest¹⁵⁶ and must be accompanied by just and equitable compensation.¹⁵⁷ As will be argued below, these requirements probably stand in the way of accepting that the deprivation results in an expropriation in the context of building encroachments.

In the context of building encroachment, the regulating law is the common law.¹⁵⁸ Therefore, the source of the deprivation is the common law and specifically common law principles aimed at balancing conflicting private interests in land. The common law allows the court, in certain instances, to leave encroaching structures in place, which could result in a deprivation of a use right. This clearly amounts to a deprivation of land rights, but there is no common law authority for expropriation.

Gildenhuys argues that there must be statutory authorisation for a valid expropriation to occur.¹⁵⁹ The expropriation must be undertaken by the state or any person authorised to do so on behalf of the state. Van der Walt relies on this argument to substantiate the view that the loss of property that results in the case of building

¹⁵⁵ The Constitution of the Republic of South Africa, s 25(2).

¹⁵⁶ It is argued that it would be highly unlikely that a law that permits an arbitrary deprivation would be for a public purpose or in the public interest. Therefore, a law that allows a deprivation that is not for a public purpose or in the public interest will generally not have passed the arbitrariness test of s 25(1) in the first place because there would not be sufficient reason for the deprivation. For this reason it is unlikely that a deprivation that failed the s 25(1) test could satisfy the s 25(2) test for expropriation. See AJ van der Walt "The limits of constitutional property" (1997) 12 SA *Public law* 275-330 at 325-327; T Roux "Property" in S Woolman, T Roux & M Bishop (eds) *Constitutional law of South Africa* (2nd ed 2003 original service Dec 2003) chap 46 at 46-33; AJ van der Walt *Constitutional property law* (2005) 55-57.

¹⁵⁷ The Constitution of the Republic of South Africa, s 25(2)(a) and (b).

¹⁵⁸ See fn 56 above.

¹⁵⁹ A Gildenhuys *Onteieningsreg* (2nd ed 2001) 13.

encroachments being left intact can never be an expropriation, because there is lack of authority for such an expropriation.¹⁶⁰ Generally speaking, expropriation is impossible unless a particular law authorises expropriation. In short, without explicit statutory authority expropriation is impossible and any common law principle (or action or judicial decision based on such a principle) that in effect results in an expropriation is invalid and unconstitutional for lack of authority.

Van der Walt argues that the lack-of-authority argument could have been used in the *Reflect-AII*¹⁶¹ case to explain why the deprivation did not amount to an expropriation.¹⁶² In *Reflect All*, the Constitutional Court had to decide whether section 10(1) and 10(3) of the Gauteng Transport Infrastructure Act¹⁶³ allowed an expropriation of property without just and equitable compensation. The impugned provisions provided for planning of provincial roads and imposed certain restrictions on the use, enjoyment and exploitation of privately owned property belonging to the applicants. The court held that the action in terms of section 10(1) and 10(3) did not amount to an expropriation because the state did not acquire the property rights in this case. Using *Harkson v Lane NO and Others*¹⁶⁴ as authority, the Constitutional Court confirmed that a decisive way of establishing whether an expropriation had taken place was to determine whether the state had acquired the property in question.¹⁶⁵

Van der Walt criticises the narrow interpretation by the Constitutional Court for determining whether an expropriation occurred in this case.¹⁶⁶ He argues that acquisition of property by the state is merely an indication of whether there was an expropriation. He uses the example of land reform to argue that in certain cases, although the state does not acquire the property rights, compulsory acquisition and

¹⁶⁰ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2009) 125 SALJ 592-638 at 622; AJ van der Walt *Property in the margins* (2009) 200 & 201.

¹⁶¹ *Reflect-AII 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC).

¹⁶² AJ van der Walt *Constitutional property law* (2005) 131.

¹⁶³ The Gauteng Transport Act 8 of 2001.

¹⁶⁴ 1998 (1) SA 300 (CC).

¹⁶⁵ *Reflect-AII 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) par 64.

¹⁶⁶ AJ van der Walt *Constitutional property law* (2005) 131.

transfer of the land can still amount to an expropriation. Furthermore, he asserts that a convincing argument for the reason why an expropriation did not occur in *Reflect-All* was that the legislation did not authorise expropriation. The same argument can be made in the context of building encroachments. The common law does not authorise expropriation and therefore expropriation does not occur. The fact that the property (either the land itself or a use right) was taken from one private person (the affected landowner) and transferred to another (the encroacher), without the state acquiring any property, may be an indication that a forced transfer of the property took place, but not an expropriation.

The Constitutional Court in *Reflect-All* did mention the question of whether a deprivation that has gone too far (so-called constructive expropriation) could amount to an expropriation, but failed to explore the possibility.¹⁶⁷ Van der Walt argues that any regulatory restriction on property rights that goes too far should, instead of being regarded as a constructive expropriation, most likely be invalid because it would amount to an arbitrary deprivation in terms of section 25(1) of the Constitution.¹⁶⁸ Accordingly, he states that:

“It is therefore unnecessary and misleading to even consider the question whether any particular regulatory restriction on the use of property, which was obviously not formally intended or authorised to function as an expropriation, could amount to an expropriation simply because it is extraordinarily harsh, unfair or burdensome.”¹⁶⁹

Considering the fact that there is no common law authority for the expropriation, it may be concluded that the compulsory transfer of property or property rights that results when the encroachment is not demolished can never amount to an expropriation. Leaving the encroachment in place may in some cases effectively result in forced transfer of a use right, and in certain cases it may purport to effect forced transfer of ownership, but it would never amount to an expropriation. Therefore, in encroachment cases, expropriation should not come into the picture at

¹⁶⁷ *Reflect-All 1025 and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) par 66.

¹⁶⁸ AJ van der Walt JQR Constitutional Property law 2009 (3) 2.2.

¹⁶⁹ AJ van der Walt JQR Constitutional Property law 2009 (3) 2.2.

all. Consequently the justification leg of the *FNB* test for expropriations does not need to be considered.

5.4 Conclusion

In this chapter I emphasised the uncertainty in the outcomes reached in building encroachment disputes in South Africa. I distinguished three outcomes that may result from the new approach to the problem of building encroachments. The main aim of this chapter was to question the constitutional validity of these outcomes in order to ultimately prove that legislation is required to eliminate some of the uncertainties in this area of law. When courts deny the common law remedy of removal and leave the encroaching structures in place, there may be constitutional implications, especially if the encroachment is significant. If a court goes even further and orders that the encroached-upon land be transferred to the encroacher, this is even more problematic because there is not common law or statutory authority for such an order.

The justification for denying demolition of an encroachment seems to be considerations of equity and fairness. In other words, if the encroachment were removed it would lead to unjust results which would be too burdensome on the encroacher; therefore compensation is deemed to be the better remedy. However, the consequences of these orders are not always considered adequately. Besides the doctrinal implications, which were discussed in the previous chapter, these court orders may also have constitutional implications. The deprivation of property or property rights that occurs as a result of leaving the encroachment in place needs to comply with section 25 of the Constitution.

In the case of insignificant encroachments, this is generally reasonably easy to justify because the limitation on the affected landowner's property rights is reasonably small. The affected right in this case is the entitlement of use and enjoyment of the small portion of property on which the encroachment stands. Therefore, the result is a deprivation of a use right pertaining to a small portion of the affected landowner's

property. This deprivation, however small, must comply with the requirements of section 25(1) of the Constitution. It is clear from *FNB* that the smaller the extent of the encroachment, the smaller the limitation on the right affected and the easier it becomes to justify the encroachment. However, a careful assessment of the facts of the case is still necessary. If a balance of interests shows that demolition would be unduly harsh for the encroacher, this could be a reason to justify the deprivation that may result from not ordering removal of the encroachment. This balancing of interests is context-sensitive; therefore, there is no clear-cut rule that all insignificant encroachments will always remain in place because the size of the encroachment is of such an extent that greater harm will result if demolition is ordered. There may be exceptional circumstances that may indicate that demolition should be the appropriate remedy even in the case of insignificant encroachments, for example *mala fide* behaviour by the encroacher. However, because of the insignificant nature of the encroachment, the goal of reaching the most equitable outcome will no doubt be achieved by replacing demolition with compensation in the majority of cases where the encroachment is insignificant. In most cases where the encroachment is really insignificant, the means employed – leaving the encroachment in place resulting in the deprivation – will be justified, provided all things are equal and there is no other factor that dictates that demolition should be ordered. In these circumstances the deprivation that results from leaving really insignificant encroachments in place, would not amount to an arbitrary deprivation.

In the case of significant encroachments, the problem becomes more complex. If a court orders that a significant encroachment should remain in place, it causes a deprivation of the entitlement of use and enjoyment of a substantial portion of the affected landowner's property. If we assume that the encroachment is significant enough to cause a substantial limitation on the right of use and enjoyment of the affected landowner's property, an arbitrary deprivation may result if that deprivation is not adequately justified. It was established in this chapter that although it is only one incident of ownership that is affected in this case, namely the use and enjoyment of the portion of the property on which the encroachment is erected, the use and enjoyment is affected to a significant extent in so far as the deprivation of the use and enjoyment of the property pertains to a large part of the affected landowner's

property. It is clear that the larger the encroachment, the greater the limitation on the affected right and the more difficult it is to justify the deprivation. Obviously, this enquiry is different depending on the circumstances in each case. When balancing the interests of the parties in this dispute, it will be more difficult to prove that the effect that demolition would have would be harsher for the encroacher than the result for the affected landowner if demolition was denied. Other factors will have to be taken into consideration to prove that the balance should favour the encroacher. This may help to justify keeping even a significant encroachment in place, even if it causes a deprivation of property to a significant extent. The examples that I illustrated are evident from case law, namely delay, the duration for which the encroachment had stood as a sign of acquiescence or lack of detriment, bad faith, if the result would be demolition of people's home, if the loss can adequately be compensated in monetary terms and any other factor that may assist in the balancing of the interests of the parties involved in the dispute. I emphasised that it would be impossible to furnish extensive examples of when a deprivation that results from significant encroachments would be justifiable, because it depends on the circumstances of each case. However, judging from case law it seems as though it should be possible in exceptional circumstances to leave a significant encroachment in place even if it results in a significant deprivation of property. Due consideration of the circumstances in the particular case should ensure that this outcome does not result in an arbitrary deprivation.

In terms of the third outcome, the court orders transfer of the encroached-upon land to the encroacher. This outcome is the most problematic outcome to justify in terms of section 25(1), because the affected right is ownership for which a more compelling purpose is required in terms of *FNB*. In this outcome, like in *FNB*, the affected landowner loses ownership and all the incidents thereof. Therefore, a very strong reason is required in these circumstances. Again, all the considerations and circumstances would need to be balanced in order to prove that the deprivation is justified. However, even if it can be proven that the deprivation is justified because there is sufficient reason for the deprivation, the deprivation that results from this outcome may prove to be arbitrary on the basis of procedural unfairness. It was found in this chapter that there is inadequate authority for such an order. Therefore,

section 25(1) will possibly not be complied with in this case, because it is procedurally unfair.

I also questioned whether the deprivation could amount to an expropriation. In all three outcomes where a court decides to leave an encroaching structure intact, it may look like an expropriation of either a use right (i e the first two outcomes) or of ownership of the affected land (i e the third outcome). However, an expropriation in the context of building encroachment is not possible. Therefore, the deprivation that results from leaving an encroachment in place against compensation should not be regarded as an expropriation. The reason why the deprivation could not be considered an expropriation of either a use right or an expropriation of land itself in the case of building encroachments is because the common law does not authorise the expropriation and there is no legislation to authorise such an order either. Therefore, the possibility that this could amount to an expropriation is not accepted.

In conclusion, the new approach to the problem of building encroachment has proved that there are some shortcomings in the court orders made in building encroachment disputes. There is uncertainty and inability to explain what happens as a result of the encroachments being left in place. At least in some cases it should be possible to leave encroaching structures in place. However, in terms of constitutional compliance, the deprivation that results needs to be justified adequately. Legislation may be needed to eliminate some of the uncertainties that currently exist in the law regulating building encroachments.

Foreign law provides good examples of effective approaches to the problem of building encroachments; therefore in the next chapter I consider the Australian, German and Dutch approaches to building encroachment disputes. The Australian Encroachment of Buildings Act¹⁷⁰ helps to see what an encroachment statute might look like. It contains a list of factors that may assist the court in making the choice between demolitions and keeping the encroachment in place. However, it does not take us further in terms of doctrinal and constitutional issues which are important in

¹⁷⁰ The Encroachment of Buildings Act 1922 (NSW).

the South African context. The German and Dutch approaches help in this regard. Therefore, in the next chapter I undertake a comparative analysis with these three jurisdictions with the aim of finding a solution to some of the problems in the context of South African law.

Chapter 6: Comparative analysis

6.1 Introduction

It has become evident from the previous chapters that South African courts are adopting a new approach to the problem of encroachment by building. The new approach denies the affected landowner the right to demand removal as of right in some encroachment cases and grants courts the discretion to decide to leave the encroachment in place, generally against the payment of compensation. This is in line with the global trend in this area of law. However, there are some difficulties with the approach in South African law.

I have argued throughout the dissertation that this new approach has resulted in uncertainty regarding certain doctrinal and constitutional questions. Generally, ownership of land and the buildings erected on that land vests in the same person. However, in the case of encroachment by building it seems as though this does not happen. The only explanation of what happens when the encroachment is left in place is to say that accession is precluded, either because it does not come into existence in line with the new approach in accession cases, or accession would normally have taken place, but the court decides that it is suspended for policy reasons. Therefore, what ordinarily happens by operation of law, namely that permanent attachments to land belong to the landowner, is precluded in both cases to make it possible to order compensation instead of removal. However, this assumption about what actually happens when the encroachment remains in place poses further questions. These questions relate primarily to the right that the encroacher obtains when the encroachment is not demolished. Directly related to this is the right that the affected landowner loses when demolition is denied. These are doctrinal questions that remain unanswered because insufficient consideration is given to them in the case law. In the South African context it is important to ask questions concerning the land on which the encroachment is erected, the rights to the encroached-upon land and the rights to the building materials which are attached to that land. In terms of English law, from where the discretion was borrowed, it is

perfectly feasible to have land rights in horizontal layers of land, so that the buildings belong to one person and the land to another.¹ However, this is only possible in South African law if the person who owns the building has a use-right (either personal or real). It was emphasised that the courts say nothing about the nature of the rights, but it is clear that the encroacher has continued possession of the encroachment. Therefore, when a court says nothing about the rights of the parties after a demolition order is denied, we are left to infer what the encroacher obtains and the affected landowner loses in this case.

A further issue that I addressed in the previous chapter was the constitutionality of a court order that leaves a building encroachment in place. In terms of constitutional validity, once it has been established what right the affected landowner is deprived of, that deprivation needs to comply with section 25 of the Constitution. Therefore, whether the affected landowner loses the remedy of demolition, is forced to give up the right to use the encroached-upon land or actually loses ownership of the portion of property on which the encroachment stands, it needs to be justified in terms of the Constitution. It seems as though it should be fine in certain cases to keep the encroachment in place. Where the encroachment is insignificant, it may be explained and justified relatively easily. However, in the case of large encroachments, the loss suffered becomes more difficult to explain and justify. Without adequate justification, the deprivation that results may be in conflict with section 25(1) of the Constitution. It has been argued that it is difficult to justify the deprivation without greater clarity about the use right that is presumably established when the encroacher is left in possession of the encroachment against compensation. Furthermore, it has been argued that the courts probably do not have the authority at all to order transfer of the affected land and that such an order may amount to arbitrary deprivation in any event.

To my mind, these problems can be solved with legislation. Therefore, it is the ultimate aim of this dissertation to suggest legislation to regulate the matter in South African law. How such legislation might look and what such provisions would

¹ See s 3.4.2 in chap 3 above.

encompass are investigated in this chapter by way of a comparative analysis of the German, Dutch and Australian approaches. The comparative analysis done in this chapter is solution based; therefore the analysis is sensitive to the institutional differences between the jurisdictions. The jurisdictions selected, namely Germany, the Netherlands and Australia, were chosen with the specific aim of establishing a comparative framework with reference to countries where the shift has taken place from the default remedy of removal to compensatory awards, similar to the recent shift in South Africa, but based on legislative regulation instead of leaving the matter to the courts to decide on the basis of a vague discretion. There are essentially two issues that are important in the South African context. Firstly, the factors that are taken into consideration when the decision is made to keep an encroaching structure in place need to be clear. Secondly, the consequences of the order denying demolition should be unambiguous. Legislation regulating building encroachment would need to stipulate what the consequences are of not demolishing an encroachment. There are some good examples in comparative law that can help solve the issues mentioned above.

The Australian Encroachment of Buildings Act² provides guidelines that would make the choice between injunctive relief and compensation easier. In other words, in order to understand how courts may decide to deny demolition, the Australian legislation may be helpful. In terms of the second issue; namely, what right the encroacher obtains when demolition is denied, the German and Dutch approach is more useful. In the case where demolition is denied in terms of the German and Dutch law, the rights of the parties in the dispute are made reasonably clear in the respective civil codes.³

The German and Dutch civil codes contain specific provisions regulating the case where someone erects a building encroachment across the boundary line onto the property of another.⁴ It is necessary to assess these provisions in light of the difficulty in the South African context. Although the affected landowner is ordinarily

² The Encroachment of Buildings Act 1922 (NSW).

³ *BGB: Bürgerliches Gesetzbuch; BW: Burgerlijk Wetboek.*

⁴ *BGB: Bürgerliches Gesetzbuch; BW: Burgerlijk Wetboek.*

entitled to claim removal of the encroaching structures, he is in some cases precluded in terms of the German and Dutch civil codes from demanding removal.⁵ The specific cases where removal would be appropriate are ascertainable from the provisions of the respective civil codes. In German law in the case where the encroachment is left intact, something equivalent to a lease in favour of the encroacher comes into effect. The encroacher will be liable for making annual payments until such time as the affected landowner wishes to sell that portion of the property to the encroacher. In Dutch law, a servitude is created to preserve the existing situation in exchange for compensation. In terms of transfer of the encroached-upon land, the civil codes also provide clear guidelines about transfer of the affected land to the encroaching builder, the approach being to leave the decision to transfer at the discretion of the affected landowner and not the courts or the encroacher. Additionally, the civil codes also prescribe that compensation should be paid, both for cases where land is transferred and in cases where compensation is awarded for interim or long-term use of the land, and prescribe how the compensation should be calculated. Both these approaches provide at least some sort of answer to the question that is uncertain in the South African context. In both cases it is clear what right the encroacher obtains when the encroachment is left in place; either a lease in the case of German law, or a servitude in terms of Dutch law.

Essentially, the hypothesis is that it should be acceptable in some cases to deny demolition of a building encroachment. An important caveat should be attached in this regard based on two separate issues. Firstly, exactly how the choice is made between demolishing the encroachment and allowing it to remain intact. Here, careful consideration needs to be given to the policy and pragmatic reasons that are forwarded for the choice to keep the encroachment in place. I will consider the factors that are listed in the Australian Encroachment of Buildings Act.⁶ Secondly, when the decision is then made to deny an order for removal based on policy grounds, it becomes important to ask questions about the rights of the parties after the order is made. In this regard the German and Dutch approaches are important.

⁵ *BGB* § 912; *BW* 5:1, 5:54.

⁶ The Encroachment of Buildings Act 1922 (NSW).

Both these concerns are important in the South African context and are addressed in this chapter.

6.2 Australian law

Some of the questions that arise from recent South African case law on building encroachments relate to the factors that need to be taken into consideration when the decision is made to keep encroaching structures in place.⁷ It needs to be clear how the policy decision is made in favour of denying a demolition order in the context of building encroachments in South Africa. The Australian Encroachment of Buildings Act⁸ has provisions specifically regulating how the discretion should be exercised and which factors should be taken into consideration. Therefore, it will be important to discuss some of the provisions in the Act in order to see how the discretion is exercised in terms of the Act.

In an article on encroachment disputes in Australian law, Pam O'Connor takes the view that an encroachment statute is the best way to solve building encroachment disputes.⁹ In a different article addressing the possibility of building encroachments resulting in a private taking of land, she argues that building encroachment disputes require special legislation.¹⁰ She explains this as follows:

“Building encroachments require special provision. The area of land involved is typically small, while the costs of removing an encroaching building may be prohibitively high. The non-salvageable investment made by the encroaching owner who builds across the boundary renders him or her vulnerable to rent-seeking by the adjacent owner during the limitation period, or at any time if there is no applicable limitation period. Building encroachment laws are best suited to the

⁷ South African authors have commented on the possible problems that could arise as a result of these recent developments in the law regulating to building encroachments. See S Scott “Recent developments in case law regarding neighbour law and its influence on the concept of ownership” (2005) 16 *Stell LR* 351-377; A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 *SALJ* 537-556; AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 *SALJ* 604-640.

⁸ The Encroachment of Buildings Act 1922 (NSW).

⁹ P O'Connor “An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?” in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 216.

¹⁰ P O'Connor “The private taking of land: Adverse possession, encroachment by buildings and improvement under a mistake” (2006) 33 *Univ of Western Australia LR* 31-62.

purpose. They give courts a wide discretion to provide relief to the encroaching neighbour on just terms, while also discouraging deliberate or negligent encroachment.”¹¹

In 1922 the Encroachment of Buildings Act was enacted in New South Wales. The Act came into being as a result of the “perceived need to control rent-seeking by adjacent landowners in cases in which buildings encroached across boundaries through inadvertence of the encroaching owner or through the fault of his or her predecessor in title.”¹² The Act clearly stipulates what the ambit of the courts’ power is; specifically which orders can be made should a building encroachment occur.¹³ The discretion of the court is entirely dependent on the circumstances of the case, and as such it is very difficult to provide a single approach to a building encroachment problem. However, the Act does provide guidelines in terms of what can be taken into consideration when determining which outcome would best suit the particular situation.¹⁴

Section 3(1) of the Act provides for the possibility that both landowners involved in a building encroachment dispute can apply to the court for the relief encapsulated in the Act. In a “normal” building encroachment situation one would expect the affected landowner to apply for relief, based on the fact that he is ordinarily entitled to removal of the encroachment because of his right to ensure undisturbed use and enjoyment of his property. This is probably why, in the South African context, some

¹¹ P O’Connor “The private taking of land: Adverse possession, encroachment by buildings and improvement under a mistake” (2006) 33 *Univ of Western Australia LR* 31-62 at 62. This article is written especially with due consideration of the fact that in certain cases the building of one person’s materials onto the land of another could result in the private taking of land. Therefore, emphasis is placed on the possible involuntary loss of property. In the South African context, this is dealt with in chap 5 above.

¹² P O’Connor “An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?” in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 210; P O’Connor “The private taking of land: Adverse possession, encroachment by buildings and improvement under a mistake” (2006) 33 *Univ of Western Australia LR* 31-62 at 58. In *Hardie v Cuthbert* (1988) 65 LGRA 5 (NSWSC) it was found that the aim of the Encroachment of Buildings Act 1922 was to ensure that innocent people were not blackmailed by their neighbours if the encroachment resulted from a genuine mistake or faulty surveys.

¹³ The Encroachment of Buildings Act 1922 (NSW), s 3(2).

¹⁴ The Encroachment of Buildings Act 1922 (NSW), s 3(3).

South African authors have found it “unusual”¹⁵ and “interesting”¹⁶ when an encroaching landowner applies for relief. Nonetheless, it has been contended that very little weight is attached to this factor as a consideration in encroachment cases in Australia.¹⁷

There are numerous factors that the court may take into consideration in determining which outcome would be appropriate in the given case.¹⁸ The list in the Act is not exhaustive and other factors not listed may also be taken into account. In essence this means that the court has the discretion to consider anything relevant to determine the most suitable order, but it has to consider the factors in the list and therefore the discretion is not unfettered.

The first interesting factor is the nature and extent of the encroachment.¹⁹ With regard to the nature of the encroaching structure, it could be argued that in some cases it would be very difficult to demolish only the encroachment. This is especially in instances where the encroachment is part of a house, in which case it would not be practically feasible to demolish a part thereof. On the other hand, when dealing with encroachments like walls or minor structures, demolition would not be such an impractical option.²⁰ The extent of the encroachment is an equally important consideration in terms of the Act. It is inevitable that small and large encroachments have varying effects. Finer attention needs to be given in cases where the

¹⁵ A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 SALJ 537-556 at 544. Pope considers it unusual for the encroaching landowner to apply for relief. Her main argument against an application made by the encroaching landowner is that there is no legal basis for the application. When an affected landowner brings an application for the removal of the encroachment, his claim is based on his right to be able to enjoy undisturbed use and enjoyment of his property. By contrast, what the encroaching landowner is claiming is a right to compensation on the basis of unjustified enrichment which should override the neighbour’s right to resist interference with possession.

¹⁶ AJ van der Walt “Replacing property rules with liability rules: Encroachment by building” (2008) 125 SALJ 592-628 at 596.

¹⁷ P O’Connor “An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?” in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 212.

¹⁸ The Encroachment of Buildings Act 1922 (NSW), s 3(3)(a)-(f).

¹⁹ The Encroachment of Buildings Act 1922 (NSW), s 3(3)(b).

²⁰ A Pope “Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles” (2007) 124 SALJ 537-556 at 548. Pope (commenting on South African law) argues that reallocation of rights can take place more readily in cases involving an encroaching wall.

encroachment is significant. This is especially the case if the consequence of the continued existence of the encroachment could result in the loss of all use and enjoyment of the encroached-upon property. Therefore, the extent of the encroachment will play a role when deciding whether demolition is the appropriate remedy.

The character of the encroachment is also a factor that may play a role in the determination of whether the encroachment should be removed or not.²¹ This could mean that when the encroachment forms part of a home, a court should be more reluctant to order demolition.²² Consideration is given to the fact that although the encroachment is unlawful, it is someone's home and as such demolition should be carefully awarded in these instances. This argument finds support in the English case of *Wrotham Park Estate Company Limited v Parkside Homes Limited*.²³ This case concerned the contravention of the restrictive covenants, where the developer had built in blatant disregard of the building regulations. He was, in terms of the regulations, prohibited from developing without the consent of the neighbouring landowner. The court denied the application for a mandatory injunction and found that it would be inappropriate in the specific case to order demolition of the houses.²⁴

The cumulative effect of section 3(3)(d) and (e) allows courts, in exercising its discretion, to consider the loss that the respective parties would suffer or have suffered in determining what the outcome should be. This is similar to Dutch law (discussed below), in terms of which a balancing of interests approach is followed.²⁵ Consideration needs to be given to the potential or already suffered loss to ensure that the outcome opted for is not unnecessarily burdensome on only one party. Courts should also have regard for the loss that would be suffered by the affected landowner should the encroachment be left intact.²⁶

²¹ The Encroachment of Buildings Act 1922 (NSW), s 3(3)(c).

²² The Encroachment of Buildings Act 1922 (NSW), s 3(3)(c).

²³ [1974] 1 WLR 798.

²⁴ See s 3.4.2 in chap 3 above.

²⁵ See s 6.4 below.

²⁶ It could be important to consider that the loss suffered by the affected landowner is not limited to the loss of the value of the land on which the encroachment is standing. It needs to be considered that the encroachment can be so extensive that the affected landowner does not only lose the subject

Commenting on the criteria for exercising the discretion in terms of Australian law, Pam O'Connor argues that the factors should be weighed up in relation to one another in determining the outcome in encroachment disputes.²⁷ She divides the factors into three sets.²⁸ Firstly, the conduct of the encroaching owner should be considered. This, she argues, fulfils a "deterrence objective" that ensures that landowners take special care to avoid boundary encroachments when deciding to invest in improvements.²⁹ Secondly, the conduct or response of both parties to the existence of the encroachment is to be taken into consideration.³⁰ In this context, the following questions may be appropriate: Was there a delay in seeking relief? Does the delay in bringing an application for relief possibly mean that the negative impact of the encroachment is minimal? Did the affected landowner try to use his superior bargaining power to demand excessive amounts from the encroaching landowner? All these questions could be relevant in determining the outcome in the particular case. Thirdly, a number of factors should be taken into consideration in order to balance the interests of the respective parties. This should be done so that minimum cost can be ensured once an encroachment has occurred.³¹

land, but could stand to lose use and enjoyment of all his land. The existence of the encroachment, especially if it is significant, can also have the effect of decreasing the market value of the whole of the affected landowner's property. In the South African context, in the *Brian Lackey Trust* case, the fact that the affected landowner lost all use and enjoyment of his property due to the existence of the encroachment was given very little attention. See *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

²⁷ P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 213-214.

²⁸ P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 213.

²⁹ P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 202. See also TJ Miceli & CF Sirmans "An economic theory of adverse possession" (1995) 5 *International Review of Law and Economics* 161-170 at 164.

³⁰ P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 213.

³¹ P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 213.

The Act does not only allow for how the discretion should be exercised, but also sets out how compensation should be determined.³² Section 4(1) provides for a minimum compensation amount in the case of encroachment by building.³³ This amount is set equivalent to the land value of the part of the land encroached upon, assuming that the encroachment was not intentional or as a result of negligence. Whether the amount will be set at the minimum or an amount in excess of the minimum, determined according to the Act as three times the land value of the encroached-upon land, will depend on the conduct of the encroaching landowner before and after the encroachment was erected. Judging by the wording of the compensation provision in the Act, it seems as though the compensation is a one-off payment, unlike the German approach, which allows for compensation payable in annual amounts.³⁴

The Encroachment of Buildings Act provides a useful insight into how legislation regulating building encroachment disputes might look. The Act is written specifically to discourage deliberate or negligent encroachments erected to purposively acquire another's property.³⁵ What is evident is that there is no standard way of dealing with the problem, and therefore the legislation regulating it needs to provide for a wide range of factors. However, the guidelines listed in the Act in terms of which courts can decide which outcome is the most appropriate, is useful in order to provide a degree of certainty regarding how the discretion should be exercised. In the South African context this may be helpful in order to determine how a court will exercise its discretion when deciding encroachment disputes. However, the uncertainty regarding the rights of the respective parties when demolition is denied still exists. The German and Dutch approaches to the problem of building encroachments are helpful in this regard and are therefore discussed in the sections below.

³² The Encroachment of Buildings Act 1922 (NSW), s 4.

³³ The Encroachment of Buildings Act 1922 (NSW), s 4(1).

³⁴ See s 6.3 below.

³⁵ P O'Connor "The private taking of land: Adverse possession, encroachment by buildings and improvement under a mistake" (2006) 33 *Univ of Western Australia LR* 31-62 at 58; P O'Connor "An adjudication rule for encroachment disputes: Adverse possession or a building encroachment statute?" in E Cooke (ed) *Modern studies in property law IV* (2007) 197-217 at 210. This sort of behaviour is also precluded in terms of German and Dutch law. See s 6.3 and s 6.4 below.

6.3 German law

In terms of the German civil code, parts of a thing that cannot be separated without one or the other thing being damaged or undergoing a change in nature, cannot be subject to separate property rights.³⁶ This unity principle means that things that are permanently attached to the land cannot be subject to separate rights from the rights to the land itself.³⁷ Stated differently, ownership of the land cannot be distinguished from ownership of buildings erected on the land.³⁸

The essential parts of a plot of land include those things that have been firmly attached to that land, for example buildings. The essential parts of a building include that which is inserted in order to construct the building. With this in mind, it seems as though the point of departure in respect of ownership of buildings and the land on which the buildings are erected, is that of attachment. This is confirmed when § 93 and § 946 of the German civil code are considered together. It will have the effect that if a movable thing is combined with a plot of land in such a way that it becomes an essential part of the land, then ownership of the plot of land extends to the movable thing. This provides the starting point for any problem relating to buildings that are erected on the land of another. Consequently, it is clear that in German law the law of attachment regulates where ownership rests in cases where buildings are constructed on a plot of land belonging to someone else, similar to the position in South African law.³⁹ The owner of the land may claim removal of any interference or may seek an injunction if further interference is feared.⁴⁰ However, the claim for removal could be precluded if the owner is obliged to tolerate the interference.⁴¹

³⁶ *BGB* § 93. See F Baur, JF Baur & R Stürner *Sachenrecht* (18th ed 2009) 317; H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 374.

³⁷ *BGB* § 93. See F Baur, JF Baur & R Stürner *Sachenrecht* (18th ed 2009) 317; H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 374.

³⁸ This is also the basic principle in South African law. See chap 4 above.

³⁹ See chap 4 above. For German law, see H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 608-611.

⁴⁰ *BGB* § 1004(1). See H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 780-786.

⁴¹ *BGB* § 1004(2). See F Baur, JF Baur & R Stürner *Sachenrecht* (18th ed 2009) 317-318; H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 372-375, 608-611.

Building encroachment is one instance where a landowner might be compelled to accept the interference. If someone builds across the boundary line onto the property of his neighbour, the German rule is that if it was not done intentionally or as a result of gross negligence, then the affected landowner has a duty to tolerate the encroachment.⁴² However, an objection filed before or immediately after the encroachment might sway the court to decide to order removal instead of the affected landowner having to accept the encroachment.⁴³ Therefore, the point of departure in terms of German law is that encroachments are to be tolerated and left in place, unless the encroacher acted intentionally or in gross negligence, or unless the affected landowner protested immediately. In these cases, removal is the default position.

In cases where the affected landowner has a duty to accept the encroachment there is a reciprocal duty on the encroaching landowner to pay compensation.⁴⁴ The compensation is payable in annual periodic payments to the affected landowner for as long as the encroachment remains in existence. The period for which the encroachment had stood across the boundary plays a role in the determination of the amount of compensation.⁴⁵

The burden on the affected landowner created by this encroachment, in conjunction with this right to receive compensation, creates a lease-like right in favour of the encroaching landowner. The encroacher makes annual payments to continue having the encroachment on the affected landowner's property. This right to receive compensation is only extinguished in two instances: either as a result of the removal of the encroaching structure, or if the part of the land built over is offered to the encroaching landowner for purchase.

⁴² BGB § 912(1). See F Baur, JF Baur & R Stürner *Sachenrecht* (18th ed 2009) 317; H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §§854-1296 (2nd ed 2008) 372-373.

⁴³ BGB § 912(1). The most likely explanation for this is the fact that the longer the affected landowner waits before filing a complaint against the existence of the encroachment, the more indication there is that the encroachment's detrimental effect was minimal. See H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §§854-1296 (2nd ed 2008) 378-379.

⁴⁴ BGB § 912(2). See H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §§854-1296 (2nd ed 2008) 380-381.

⁴⁵ BGB § 912(2), 913. See H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §§854-1296 (2nd ed 2008) 388-390.

The encroaching structure may be removed if the court orders removal in light of the relevant factors in the case. However, even if the court orders that the encroachment should remain intact and the encroaching landowner should pay compensation to the affected landowner, the encroaching owner always has the option of removing the encroachment rather than to pay the specified compensation.⁴⁶ This could occur if it would be more economically viable for him to have the encroachment removed than to pay the compensation.

The decision to transfer the portion of the property on which the encroachment is erected is left to the affected landowner.⁴⁷ The German civil code does not allow for the involuntary loss of the portion of land encroached upon.⁴⁸ Therefore, ownership of the land on which the encroachment stands is only transferred if the affected landowner offers it to the encroacher.⁴⁹

There are four interesting aspects of the German approach that could be relevant for South African law. Firstly, § 93 and § 94 indicate the unity or attachment principle in terms of which the building erected on another's property becomes part of the land. This appears to be based on the principle of attachment which is similar to the South African position in the sense that building materials erected on land essentially become part of the land.⁵⁰ However, the encroachment provisions in German law (§ 946 and § 1004) make it clear that the default position is tolerance of the

⁴⁶ H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 380; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 604-640 at 619.

⁴⁷ *BGB* § 915. See H Grziwotz, A Keukenschrijver & G Ring *BGB Sachenrecht* Vol 3: §854-1296 (2nd ed 2008) 393-395.

⁴⁸ See fn 47.

⁴⁹ See fn 47. The attachment of the encroachment is suspended and the encroacher remains owner of the building: F Baur, JF Baur & R Stürner *Sachenrecht* (18th ed 2009) 318; BGH NJW 1985, 789.

⁵⁰ See chap 4 above. Pope argues that there are two sets of rules that apply in the case where someone erects a building structure on the property of another. If a part of a building is erected on the property of another, the rules of encroachment are applicable. However, if there is a whole building erected on the property of another, the rules of attachment are activated. See A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 541.

encroachment, unless the encroacher was intentional, grossly negligent or the affected landowner had protested immediately.

Secondly, the German provisions regulating the duty to tolerate building encroachments are explicitly clear that the compensation that is awarded in the case where the encroachment is not demolished is for the right to have continued possession of the encroachment. In other words, the affected landowner is in effect being paid to tolerate the encroachment until the encroachment is removed or the portion of the land is transferred to the encroaching landowner in terms of a voluntary agreement. Accordingly, the encroaching landowner pays for a use right to have his structures on his neighbour's land. The use-right in the case of German law resembles a lease that is awarded in favour of the encroacher.

The third interesting aspect of the German approach is the question about transfer of ownership of the encroached-upon land to the encroaching landowner. When German courts order that the encroachment should remain in place, it does not mean that ownership of the portion of the land on which the encroachment is standing is, or may be, transferred to the encroaching landowner by court order. In fact, judging by the words of § 913, compulsory transfer of ownership is explicitly excluded. Only if the affected landowner who is entitled to receive compensation offers the part of the land encroached upon to the person paying the compensation, can any sale and transfer of the land be effected.⁵¹ Specifically, German courts do not make the order for transfer, nor may the encroaching owner demand transfer.

Finally, the compensation payable in terms of § 915 is not a one-off payment.⁵² This gives another indication that the encroaching landowner is not acquiring the land

⁵¹ BGB § 915; see fn 47. See further AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 604-640 at 609-610.

⁵² No mention is made in South African case law regarding how compensation should be determined or more specifically what the compensation amount should reflect. It is unclear whether it should be a one-off payment for the sale of the land or long-term annual payments for the use of the land. Moreover, it is uncertain whether the amount of compensation should reflect the fact that the affected landowner might lose all use and enjoyment of his property as a result of the encroachment which could even result in the decrease of the market value of the affected landowner's land. It is clear from comparative law that the type of loss gives an indication of the calculation of the

when the court order is made to leave the encroachment intact. He is in effect buying the right to have his building (or part thereof) on the land of his neighbour, similar to a servitude or a use-right.⁵³ Therefore, the compensation serves as interim (or long term) payment for the use of the land.

The German approach provides adequate clarity regarding when the encroachment should be tolerated; the function the compensation should serve; and more importantly clarity in terms of the rights of the parties when the encroachment remains in place. For South African law this clarity in German law with regard to the rights obtained when demolition is denied is very important. What is evident from the German provisions is that the right of the encroacher relative to the affected landowner is clear. This is similar to the provisions of the Dutch civil code, which is discussed in the section below.

6.4 Dutch law

Dutch commentators discussing the problem of encroachment by building, known in terms of Dutch law as *overbouw*, usually begin from the point of departure that ownership is the most complete right that a person can have in relation to a thing.⁵⁴ A landowner has the exclusive right to the use of his land, the airspace over and the surface underneath it.⁵⁵ This property right gives a landowner the sword with which to protect his property from interference. Therefore, in the case where the interference takes the form of an encroaching structure, the landowner is ordinarily

compensation. If it is merely a use right that the encroacher obtains, this will be different from the case where the transfer of the property occurs. See s 6.3 and s 6.4 below.

⁵³ The rules of attachment would be suspended so that ownership of the building materials does not pass to the affected landowner by operation of law. This will allow for the possibility of ownership of the land and ownership of the buildings on the land to be separated. See chap 4 above.

⁵⁴ WHM Reehuis & AHT Heisterkamp *Pitlo Het Nederlands burgerlijk recht* vol 3 *Goederenrecht* (12th ed 2006) 572; FJ Mijnssen, SE Bartels & AA van Velten *Mr C Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht* vol 5 *Zakenrecht Eigendom en beperkte rechten* (15th ed 2008) 147.

⁵⁵ BW 5:1. WHM Reehuis & AHT Heisterkamp *Pitlo Het Nederlands burgerlijk recht* vol 3 *Goederenrecht* (12th ed 2006) 572; FJ Mijnssen, SE Bartels & AA van Velten *Mr C Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht* vol 5 *Zakenrecht Eigendom en beperkte rechten* (15th ed 2008) 147; AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 604-640 at 608.

entitled to removal of the structure. However, this “exclusive” right is limited in certain instances in terms of *BW* 5:1.1.⁵⁶

In terms of *BW* 5:1.2, limitations based upon statutory rules and rules of unwritten law are observed.⁵⁷ An example of this would be the limitation imposed in terms of *BW* 5:54.⁵⁸ This provision stipulates that if a building encroachment is erected and removal of the encroachment would be disproportionately more prejudicial to the encroacher than the disadvantage of the existing situation for the affected landowner, then the encroachment should not be removed.⁵⁹ This is different from the German approach discussed above, because in terms of Dutch law there is clearly a discretion on the courts to balance the interests of both parties in order to determine who would suffer more loss either by removal or by leaving the encroachment in place. In German law, there is no discretion or balancing of interests that occurs.⁶⁰

In terms of the Dutch law, the encroacher can demand that a servitude be granted to preserve the existing situation, in exchange for compensation.⁶¹ If the affected landowner wishes, he can offer the encroached-upon portion of the property to the encroacher instead. However, this provision would not apply if the encroacher had acted in bad faith or gross negligence when the building work was constructed.⁶² Therefore, the intention of the encroacher plays a pivotal role in determining whether the encroachment should be removed. Essentially, the affected landowner should enjoy the right to claim removal if it can be proven that the encroacher acted in bad faith or gross negligence.⁶³ Consequently, *BW* 5:54 is limited by the conduct of the

⁵⁶ *BW* 5:1.2.

⁵⁷ *BW* 5:1.2.

⁵⁸ *BW* 5:54.

⁵⁹ *BW* 5:54.1.

⁶⁰ See s 6.3 above.

⁶¹ The compensation that would have to be paid in this regard would be a one-off payment for the creation of a servitude over the affected landowners property. This is different from the German approach, where annual payments are made for the duration of the existence of the encroaching structures. See s 6.3 above.

⁶² *BW* 5:54.3.

⁶³ F.H.J. Mijnssen, S.E. Bartels & A.A. van Velten *Mr C Assers Handleiding tot de beoefening van het Nederlands burgerlijk recht* vol 5 *Zakenrecht Eigendom en beperkte rechten* (15th ed 2008) 147. See HR 28 March 2008, where the Hoge Raad found that there was gross negligence on the part of the encroacher. Therefore, in terms of *BW* 5:54.3, the encroachment would have to be removed. The

encroacher. This is similar to the German approach, where removal is likely to be awarded in cases where the encroacher's conduct was intentional or grossly negligent, or where the affected landowner did not complain of the encroachment immediately.⁶⁴

An interesting part of *BW* 5:54 is that the court can deny a demolition order on the basis of a proportionality assessment. This is done by determining the loss or damage of either preserving the existing situation or demolishing the encroachment. All relevant factors would be taken into consideration in determining who would suffer the most loss in the particular situation. This would be one way in which the encroacher would be safeguarded against the right to demand removal of the encroachment.⁶⁵

There is another defence that an encroacher can use against the affected landowner's right to demand removal, namely the abuse of right argument.⁶⁶ The abuse of right argument is encapsulated in article 3:13 of the Dutch civil code.⁶⁷ *BW* 3:13.1 states that a holder of a right may not exercise the right to the extent that its

court acknowledged that the encroachment resulted due to the mistake of the encroacher's architect, but stated that if the encroacher had taken reasonable care it would have been clear that the building once erected would exceed the surface area of the premises. Therefore, the court found that the encroacher was guilty of gross negligence.

⁶⁴ See s 6.3 above.

⁶⁵ This is different from German law because the point of departure is tolerance of the encroachment. Therefore, the balancing of interests is therefore not an issue in German law. See s 6.3 above.

⁶⁶ *BW* 3:13. It was argued in HR 15 November 2002, NJ 2003, 48 that *BW* 5:54 does not have exclusive operation, it is limited by *BW* 3:13. With regard to the relationship between *BW* 5:54 and *BW* 3:13, the Hoge Raad in HR 25 June 2004, *LJN* AO7805 and HR 28 March 2008 reiterated that a landowner who has erected a building on the land of another could defend the claim for removal (which would be based on *BW* 5:54) by relying on *BW* 3:13, because *BW* 5:54 does not have exclusive operation. However, in HR 28 March 2008, the defence of abuse of right could not be used because the encroacher had only asserted this defence on appeal and by that time gross negligence had already been proven. See further GE van Maanen "De grensoverschrijdende villa. Enkele gedachten over eigendom in deze tijd, naar aanleiding van Hoge Raad 25 juni 2004 en Hoge Raad 28 maart 2008" (2008) 25 *Nederlands Tijdschrift voor Burgerlijk Recht* 249-254 at 250-251, where Van Maanen discusses why the abuse of right defence failed in this case. Van Maanen also discusses questions about the relationship between *BW* 5:54 and *BW* 3:13, whether the encroacher becomes owner of the encroached upon land and the conflicting rights of both parties in an encroachment dispute. See further GE van Maanen "De grensoverschrijdende villa. Enkele gedachten over eigendom in deze tijd, naar aanleiding van Hoge Raad 25 juni 2004 en Hoge Raad 28 maart 2008" (2008) 25 *Nederlands Tijdschrift voor Burgerlijk Recht* 249-254 at 252.

⁶⁷ The relationship between *BW* 5:54 and *BW* 3:13 was investigated in HR 25 June 2004, *LJN* AO7805 and HR 28 March 2008.

exercise may constitute an abuse.⁶⁸ Furthermore, the provision explains what “abuse of right” means. Someone would be abusing their right when they are attempting to exercise their right for the sole purpose of harming another, or where the exercise of the right was unreasonable because of the disproportion between the interest in its exercise, and the harm caused thereby.⁶⁹ The balancing of the interests of both parties ensures that a landowner who suffers little or no loss as a result of the existence of the encroachment should be unable to exploit his supreme bargaining power and demand removal in all cases. This would be especially in cases where the encroachment is really insignificant and removal thereof would be disproportionate.

If *BW* 3:13 were applied in the context of encroachment by building, an example of this would be in cases where an affected landowner is trying to enforce his removal right where the encroachment is insignificant or any other case where enforcement of the remedy of removal would be considered disproportionate to the harm caused by it. This was illustrated clearly by the Dutch Supreme Court, where it was decided that a landowner affected by an encroachment was abusing his rights by demanding removal in cases where the encroachment was minor or trivial.⁷⁰ The court held that by allowing an affected landowner the right to demand removal of an encroaching garage, it would be allowing him to abuse his rights.⁷¹ The plaintiff in this case was the encroacher who had erected a garage that crossed the boundary line between him and his neighbour. As a result of this, the defendant had lost all use of that portion of the property on which the encroaching garage was erected. It was found that although removal was the default remedy, it could not be awarded in all cases.⁷² This could be for instance in cases where there is the possibility that the defendant’s insistence upon removal could result in the abuse of his right. If the disadvantage that would be suffered by the plaintiff if removal was ordered would be substantially more than the loss for the affected landowner if removal was denied, the removal order should not be granted. Therefore, the size of the encroachment is clearly important in determining the outcome of encroachment cases in terms of Dutch law.

⁶⁸ *BW* 3:13.

⁶⁹ *BW* 3:13.2.

⁷⁰ HR 17 April 1970, *NJ* 1971, 89.

⁷¹ HR 17 April 1970, *NJ* 1971, 89.

⁷² HR 17 April 1970, *NJ* 1971, 89.

In cases where the encroachment is so minor that it has virtually no negative or detrimental impact on the affected landowner, he should be precluded from abusing his right to demand removal of the encroachment.

Article 5:54 in the Dutch civil code seems to be written from the perspective of the encroacher, providing substantial protection against the demand for removal. There are two arguments that support this contention. Firstly, the code specifically allows for the prohibition against the abuse of power to demand removal of an encroaching structure in all cases. This is an exception to the default remedy of removal in the case of encroachment by building. However, it is clear that this is not the case and that specific provision is made to ensure that adequate consideration and protection is given to the encroacher irrespective of the fact that he initially infringed on the affected landowner's property rights. Secondly, the fact that the interests are being weighed up to assess who suffers more disadvantage due to the existence of the encroachment, is an indication that the issue is not just about the infringement of a right that should be rectified.⁷³ The enquiry does not simply end with the question of whose rights are the strongest. The fact that the encroachment is *per se* unlawful can be seen merely as a factor that is taken into consideration in determining whether the encroachment should remain or be removed.

The recent judgments on encroachment in South Africa contain sections that bear a striking resemblance to the Dutch law proportionality assessment in terms of article 5:54. In *Trustees, Brian Lackey Trust v Annandale*,⁷⁴ a substantial part of the judgment encapsulates exactly this idea. In deciding to exercise its discretion in favour of the encroaching landowner, the court had the following to say about (dis)proportionality of prejudice:

⁷³ I deliberately refrain from using "rights" in this regard, but rather opt for "interests". The main reason for this is to avoid the inclination towards the supposition that the person with the strongest rights should ordinarily win. This is in essence what the Dutch civil code is aiming to do. There seems to be a move away from the common law way of dealing with building encroachment towards a modern approach requiring a more equitable outcome. All the jurisdictions recognise that as a starting point the affected landowner should be able to ensure no interruptions on his property, but recognise that in some instances this could lead to unjust results. Therefore, even if someone has a right to demand removal, sometimes it may be necessary to deny that right so as to protect the interest of the other party if justice and equity require it.

⁷⁴ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

"Weighing up, therefore, the option of *complete* demolition, on the one hand, against payment of compensation (including a *solatium*), on the other, I am satisfied that the former option would indeed produce an unjust result."⁷⁵

The Cape High Court continued by assessing the loss or damage for each party that would result from removal of the encroaching structure on the one hand and if the structure were to remain intact on the other. On this specific aspect it was decided that

"the defendant would undoubtedly also suffer prejudice, in that he would inevitably lose his property if a demolition order were refused. However, it is clear to me that this would not have nearly the same disastrous consequences for the defendant as demolition would have for the plaintiff."⁷⁶

As a result, it seems clear that sufficient consideration is being given to both landowners' interests in an encroachment situation even in the South African context. This is contrary to the traditional approach followed in an encroachment situation. The court went further than the question of whose common law right has been infringed and should subsequently be protected.⁷⁷

In summary, the Dutch approach provides that a landowner is able to claim uninterrupted possession of his property, but this right is not absolute. The possibility of a landowner enforcing his right to demand removal of a building encroachment is specifically precluded if the demand is unreasonable or improper, or if it is done for the sole purpose of causing harm to the encroacher.⁷⁸ The right to demand removal of the encroaching structures is also restricted in cases where there was either bad faith or gross negligence on the part of the encroacher. In these instances where demolition is denied, the affected landowner obtains a use-right in the form of a servitude in terms of which he must pay compensation to the affected landowner. It

⁷⁵ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 34.

⁷⁶ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 36.

⁷⁷ This is emphasised in the discussion of the shift from property rules to liability rules in the law and economics framework. It is asserted that although the initial assignment of rights (or entitlements) is important it should also be determined how the rights should be protected. See s 3.5 in chap 3 above.

⁷⁸ *BW* 3:13.

is clear what the rights of both parties are with regard to the land and the encroachments erected on the land. Therefore, the Dutch approach provides clarity in terms of the question which remains unclear in the South African context, namely the rights of the respective parties after demolition is ordered.

6.5 Conclusion

In this chapter I assessed how three jurisdictions deal with the problem of encroachment by building. This was helpful to see how the problem can effectively be dealt with. I discussed the Australian Encroachment of Buildings Act, because it provided a good example of how an encroachment statute might look. I also considered the German and Dutch approaches, because they provide answers to some of the questions that are uncertain in the South African context.

Any new approach to the problem of encroachment by building should essentially consider two important aspects. Firstly, the new approach would have to show how and why the decision is made to deviate from the common law remedy of removal to order compensation instead, keeping the encroachment in place. Secondly, and perhaps more importantly, any change in the established practice would have to explain what the consequences of such an order would be. There may be doctrinal and constitutional implications that could be triggered if courts do not provide answers to what is effectively happening when an encroaching structure is not demolished.

In the South African context, I am arguing in favour of legislation to eliminate some of the uncertainties that are currently prevalent in the law regulating building encroachments. The legislation envisaged would have to prescribe with at least some sort of certainty how and according to which criteria the discretion should be exercised, and also give answers to the doctrinal ambiguities and constitutional issues that may arise when an encroachment is left in place. The German approach of identifying certain instances in which removal should be ordered is very useful and may be followed. If the encroacher acted intentionally or grossly negligent, or if the

affected landowner protested immediately, the affected landowner will not be expected to tolerate the encroachment and removal will be the default. The German approach is simpler, considering that there is no discretion and no balancing of interests to determine which outcome would be more prejudicial. Therefore, adopting legislation with the German approach in mind may provide a simpler approach to the problem of encroachment of building. The approach to make tolerance the default remedy is different from Australian, English,⁷⁹ Dutch and South African law,⁸⁰ which is based on balancing of interests to justify exceptions to the default remedy of removal.

The Australian legislation is useful to determine how and in which circumstances the discretion should be exercised in favour of keeping the encroachment in place; therefore it could help to make the choice between demolition and compensation easier. It gives an example of how specific legislation should be structured to regulate the problem. To help the court in determining which outcome would be the most appropriate in the specific case, there are factors in the Act that serve as guidelines. Having a non-exhaustive list of factors may guide the court in making the decision between removal and compensation. It will be clearer in which cases the court will – or *should* – let the encroachment stand and in which cases the encroachment should be removed. These factors will be the policy considerations that will ultimately be important to justify the deprivation that may result when the encroachment remains in place.⁸¹ The Dutch civil code provides an interesting way of determining whether the encroachment should be removed. In terms of *BW* 5:54, the court should balance the interests of both parties in order to assess who will suffer more loss by either of the outcomes in the particular case. Based on the assessment of possible prejudice, the court will determine whether the encroachment will be removed or remain intact. Therefore, both the guidelines in the Australian Encroachment of Buildings Act⁸² and article 5:54 of the Dutch civil code⁸³ may help the court to decide which remedy would be most appropriate in the circumstances.

⁷⁹ See chap 3 above.

⁸⁰ See chap 3 above.

⁸¹ See chap 5 above.

⁸² The Encroachment of Buildings Act 1922 (NSW).

⁸³ *BW* 5:54.

However, having guidelines aiding the choice between which remedy would be the most suitable in the particular case does not take us closer to answering questions concerning doctrinal or constitutional issues. Having clear answers about what actually happens when an encroachment is not demolished is very important in the South African context. Therefore, the uncertainty about the rights of the parties after demolition is denied still exists. The German and Dutch approaches are helpful in this regard.

The Dutch civil code provides for a servitude to be established to preserve the existing situation, in exchange for an amount of compensation which is a one-off payment. In terms of German law, something equivalent to a lease is created, where the encroacher is obliged to pay an annual sum for the use of that portion of land on which the encroachment is erected. Therefore, there is a large degree of certainty regarding the rights that are lost and obtained when an encroachment is not demolished. It is clear in both cases that a use right is obtained with regard to the portion of property on which the encroachment is erected. Additionally, both German and Dutch law makes it clear that the choice for the transfer of the affected land should be with the affected landowner and not the courts or the encroacher.

South African law regulating building encroachments could benefit greatly from greater clarity regarding pre-order considerations and post-order implications of leaving encroachments in place. In some cases it may be completely understandable that an encroaching structure will not be removed; however it should be clear under which circumstances this will be permissible and what the consequences of such an order are. Therefore, it may seem viable in certain cases to deny a demolition order on the basis of pragmatic and policy reasons; however, these reasons should be prescribed in terms of relatively strict parameters contained in legislation. In the following chapter I will try and establish what would be the most workable framework in the South African context to eliminate some of the uncertainties with the law regulating building encroachments. My argument is that this is the only way to

ensure that there is clarity about what happens when courts leave encroaching structures in place.

Chapter 7: Conclusion

7.1 Introduction

The main aim of this dissertation was to highlight some of the uncertainties that are prevalent in the law regulating building encroachments in South Africa currently. South African courts have, in line with the modern trend in this field of law, adopted a new approach to the age-old problem of encroachment by building. Courts now seem to be more inclined than before to exercise their discretion on the basis of policy considerations in favour of leaving the encroaching structure in place and awarding compensation instead of demolition. However, some of the implications of these court orders made in the context of building encroachments are not explained adequately and this research project explores some of the consequences of these court orders.

In the case of *Rand Waterraad v Bothma en 'n Ander* ("Rand Waterraad"),¹ the court emphasised that the discretion to award compensation instead of removal in the context of building encroachments is wide and equitable and consideration should be given to the surrounding circumstances in the particular case.² With regard to the discretion of the court, the Cape High Court in *Trustees, Brian Lackey Trust v Annandale* ("Brian Lackey Trust")³ recently stated that the discretion to leave an encroaching structure in place could be exercised regardless of the size of the encroachment.⁴ In both these cases the respective courts took considerations of fairness and equity into account to come to the conclusion that the default remedy of removal should not be awarded. Therefore, the court ordered that the encroaching structures should remain in place in both cases.

If the court orders that the encroachment should remain in place, based on policy reasons, and says nothing about transfer of property or property rights, the effect is

¹ 1997 (3) SA 120 (O).

² *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

³ 2004 (3) SA 281 (C).

⁴ *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

that the encroacher may remain in possession of the encroachment, while the affected landowner owns the land on which the encroachment is erected. This creates uncertainty about rights in the land and the building, because the courts fail to explain what happens doctrinally when the encroachment is left intact. The doctrinal implications of the court orders resulting in the encroachment remaining in place are explored in this dissertation. I specifically focus on questions about the principle of accession and why it does not seem to take place in the case of encroachment by building. I also consider the fact that the courts fail to mention what right the encroacher obtains (and the affected landowner loses) when the encroachment is not demolished. South African courts have failed to provide doctrinal solutions to explain what happens when the discretion is exercised in favour of the encroacher and the result is that the encroachment remains in place. This leads to confusion and uncertainty.

When courts deny the common law remedy of removal and leave the encroaching structures in place, there may also be constitutional implications, especially if the encroachment is significant. The conclusions reached in both *Rand Waterraad* and *Brian Lackey Trust* make it clear that courts may in some instances leave even significant encroachments in place. The result in *Brian Lackey Trust* furthermore creates the impression that courts are able to award compensation even in circumstances where this order results in a compulsory or involuntary loss of use of a significant part of the affected landowner's property. However, the court's discussion of this aspect is superficial and incomplete; therefore, it is necessary to establish whether these court orders could cause an infringement of section 25 of the Constitution.⁵ In the recent decision of *Phillips v South African National Parks Board* ("Phillips"),⁶ the court considered the possibility of ordering that the portion of property incorporated as a result of an encroaching fence, should be transferred to the encroacher.⁷ Therefore, it seems as though courts are actually willing to consider the option of transfer. If the court does order that the encroached-upon land be

⁵ The Constitution of the Republic of South Africa, s 25.

⁶ (4035/07) [2010] ZAECGHC 27 (22 April 2010). See chap 3 above.

⁷ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 [22 April 2010] paras 22-24.

transferred to the encroacher, it is necessary to consider whether this is possible and constitutionally compliant in terms of section 25 of the Constitution.

The underlying assumption throughout the dissertation is that legislation is required in order to eliminate the uncertainty that exists in the law regulating building encroachments in South Africa, as the common law position seems to be inadequate in this regard. A comparative study was undertaken in order to see how the German, Dutch and Australian law deal with the problem of encroachment by building. This was done in order to see whether it would be feasible to adopt a similar approach in South Africa with legislation regulating the problem.

7.2 Conclusions

7.2.1 *The law regulating building encroachments*

Chapter two provides an introduction to the law regulating building encroachments in South Africa. When a building encroachment is erected on the land of another, the affected landowner is traditionally said to be entitled to claim removal of the encroaching structure. The remedy of removal is premised on the idea that a landowner is entitled to have uninterrupted possession of his property, based on the right of ownership. The encroachment results in a limitation on the right of ownership. Therefore, in theory the landowner is entitled to insist upon removal.

The remedy of removal originated in Roman law and allowed for removal of the encroachment as a point of departure. In Roman law removal of the encroachment would occur either by way of self-help (if the encroachment had become part of the affected landowner's property through attachment) or with an application for the *actio negatoria* (where the encroachment protruded into the airspace over the affected landowner's property).

The remedy of removal was taken over in Roman-Dutch law, but was modified slightly. The remedy was sometimes mitigated by the defence of the year and a day

rule, which ensured that in instances where a landowner has stood by for a year and a day and did not object to the encroachment, he would be precluded from demanding removal of the encroachment. This rule was accepted and applied in early South African case law. However, as a result of the fact that the rule was only applied in terms of local statute and custom in the Netherlands and that it was not part of the *ius generale* of Roman-Dutch law, it was subsequently decided that the rule did not form part of South African law.⁸ Once this possible defence against the claim for a removal order fell away, courts became concerned with the question whether they had the discretion to award compensation instead of removal of the encroaching structure, based purely on considerations of equity or fairness. This was shown in two recent cases dealing with building encroachments in South Africa.⁹ In both *Rand Waterraad* and *Brian Lackey Trust*, the respective courts exercised their judicial discretion in favour of denying the order for removal. Therefore, the court ordered that the encroachment should remain intact even though the encroachment was significant enough to pose a serious limitation on the affected landowner's rights. The encroachment situation was therefore allowed to continue despite the encroachment having caused a serious limitation on the rights of the affected landowner, especially because the encroachment in both cases was significant.

Furthermore, it was suggested in *Brian Lackey Trust* that the affected landowner would be precluded in certain cases from demanding removal of the encroachment because it may amount to abuse of right. With regard to the abuse of right argument, it is considered in chapter two whether insistence by the affected landowner on the remedy of removal could amount to abuse of right. I argued that this may be possible in the case of minor encroachments, but unlikely in the case of large encroachments. This is because in the case of minor encroachments the limitation on the right of ownership is relatively small and to insist upon removal in those cases may be unreasonable and disproportionate, considering the minor limitation on the ownership rights of the affected landowner. However, in cases where the encroachment is significant and imposes a serious limitation on the rights of the affected landowner, it is questionable whether insisting upon removal could amount

⁸ See chap 2 above.

⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

to abuse of right or is informed by what the court in *Brian Lackey Trust* described as an outdated and absolutist idea of ownership. In that case, the court saw the demand for removal as an indication that the owner inappropriately viewed ownership as an absolute right when he insisted on removal of a significant encroachment. Therefore, the court exercised its discretion in favour of leaving the encroachment in place.

7.2.2 Judicial discretion in the context of encroachment by building

In the South African context, it seems as though an affected landowner may have to accept the continued existence of the encroachment in certain instances, even when the encroachment is significant. Therefore, chapter three dealt with the courts' discretion in the context of building encroachments. My main aim was to determine when it would be justifiable for courts to order that an encroachment be left intact and compensation be awarded instead. Firstly, it was important to ask whether South African courts have the discretion to deny a demolition order and award compensation instead. After an investigation into South African case law, it was clear that such a discretion does exist and courts may deviate from the common law remedy of removal and award compensation instead. Prior to *Rand Waterraad*, there were various decisions in which the discretion to award compensation instead of removal was merely assumed, but in *Rand Waterraad* the question was raised and answered definitively. It was found that South African courts do have the discretion to deny the default remedy of removal in certain cases. This was confirmed in the *Brian Lackey Trust* case and more recently in the *Phillips* case.

The second question examined in chapter three concerned the circumstances that would justify the exercise of the discretion in favour of compensation instead of removal. In other words, it was important to determine when it would be appropriate to deny removal and allow the encroachment to stand. It was clear that this question depends on the circumstances of the particular case. Courts may particularly deviate from the common law remedy of removal where policy grounds, such as the balance of equity and fairness, dictate an outcome other than removal. The court in *Rand Waterraad* considered when it would be appropriate to exercise the discretion and

deny removal. It found that it is important to look at the surrounding circumstances of the particular case to determine when the discretion should be exercised in favour of the encroacher. The facts in the case were deemed to be exceptional enough to justify a deviation from the common law remedy of removal. The court found that the applicant in *Rand Waterraad* had delayed bringing the application for removal and that this was an indication of lack of detriment, or even acquiescence. The court took principles of neighbour law into consideration in its decision to deny removal of the encroaching structures. Similarly, in the case of *Brian Lackey Trust*, the Cape High Court also had to determine when the discretion should be exercised in favour of leaving the encroachment in place. In *Brian Lackey Trust*, the court raised the question whether the discretion was limited to minor encroachments, or whether the discretion could be exercised even in the case of significant encroachments. The Cape High Court found that the discretion was wide and equitable and was not only limited to minor encroachments. Therefore, it proceeded with the question whether the discretion should be exercised in the particular case. It relied on principles of neighbour law and the argument of disproportionality of prejudice to reach the conclusion that the encroachments should not be removed.

Three arguments discussed in chapter three were used or could be used to determine when it may be justified to deviate from the common law remedy of removal and leave the encroachment in place. In the first instance, South African neighbour law principles were relied on as reasons why an encroaching structure should not be removed. This was based on the underlying idea that if harmony between neighbours could be maintained by not demolishing an encroaching structure, this should be done. Courts use the neighbour law standard of reasonableness to argue that the most suitable remedy should be sought in the particular case. However, I concluded that with regard to this argument courts actually mean fairness when they speak about reasonableness, in that they try to reach the most “fair” outcome. The factors in the particular case will then be taken into consideration in order to reach a fair outcome that is not too burdensome on

only one party. The courts will balance the interests of both parties in order to determine who would suffer more prejudice from either outcome.¹⁰

The second argument in favour of a wide judicial discretion investigated in chapter three was based on English law. It was necessary to look at English law because it is used as authority by South African courts for identifying cases where compensation might be favoured instead of removal. In terms of English law, compensation should be awarded instead of removal when there has been a blatant disregard for the rights of the claimant. The English Supreme Court Act¹¹ gives English courts a wide discretion to award monetary instead of injunctive relief in order to reach a just and equitable outcome. The size of the encroachment plays a role in determining which remedy would be the most appropriate in the circumstances. This is the settled principle of English courts in terms of *Shelfer v City of London Electric Lighting Company*.¹² In *Shelfer*, it was established that the award of monetary compensation instead of injunctive relief should be made in cases where the injury to the plaintiff's legal rights is small, is capable of being estimated in money, where it can adequately be compensated by a money payment and it would be oppressive to the defendant to order removal of the encroachment.¹³ Analysis of case law in chapter three suggested that South African courts use English law principles as a basis for the deviation from the default remedy of removal, yet not in the same way as it has been used in English law. In fact, it was stated in *Brian Lackey Trust* that English law should be approached with caution.¹⁴ Therefore, Griesel J in *Brian Lackey Trust* found that the discretion could even be exercised in cases where the encroachment is significant.¹⁵ South African courts are apparently willing to treat all encroachments in the same way, whether they result in the loss of all use and enjoyment of the affected property or not.

¹⁰ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C); *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010).

¹¹ The Supreme Court Act 1981 (England & Wales).

¹² [1895] 1 Ch 287.

¹³ *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 at 322.

¹⁴ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) par 24.

¹⁵ Trustees, *Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C) paras 29-30.

In the final instance the law and economics argument was considered in order to explain how the discretion should be exercised in the context of building encroachments. The law and economics argument could help explain why one remedy (the compensation award) is preferred over another (the remedy of removal). It is argued that the approach of courts to award compensation instead of removal in solving building encroachment disputes can be explained with regard to the tendency to prefer liability rules to property rules when transaction costs would mostly be high.¹⁶ The law and economics framework may help to explain why it may be better to prefer liability rules over property rules in certain cases. In cases where there are high transaction costs, bargaining becomes difficult or impossible and therefore there should be a certain level of government intervention or regulation, which would probably assume the form of liability rules. With regard to encroachment by building, this could primarily occur in cases where the encroachment is significant. Therefore, a large part of what is happening when courts exercise their discretion in favour of compensation instead of removal may be explained using the law and economics argument.

The final question in chapter three was the extent of the courts' discretion. Here the question was whether South African courts have the power in terms of the discretion to order that the encroached-upon land be transferred to the encroacher. The two cases that are generally relied upon as authority for the discretion to order that the affected land be transferred to the encroacher are unclear. In both *Christie v Haarhoff*¹⁷ and *Van Boom v Visser*,¹⁸ it seems as though the order for transfer was not made against the affected landowner's will. There was some indication in both these cases that the affected landowner was willing to accept compensation for the continued existence of the encroachment and the subsequent loss of the encroached-upon portion of the property. There is authority for the fact that the order for transfer of the encroached-upon land does not have to be made when the discretion is exercised in favour of compensation instead of removal.¹⁹

¹⁶ AJ van der Walt "Replacing property rules with liability rules: Encroachment by building" (2008) 125 SALJ 592-628 at 618-620.

¹⁷ *Christie v Haarhoff and Others* (1886-1887) 4 HCG 349 at 356.

¹⁸ *Van Boom v Visser* (1904) 21 SC 360.

¹⁹ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 (3) SA 504 (D) 507.

Compensation would be the primary remedy in terms of the discretion.²⁰ As a result, the encroacher cannot argue that a court should exercise its discretion in favour of transfer of the affected land. An order for transfer would be ancillary to the damages award. The impression is created that transfer may be awarded if the court, like Van der Merwe argued, deems it equitable. However, my conclusion was that this aspect of the law regulating building encroachments is very unclear.

The court very recently in the *Phillips* case demonstrated the confusion that exists with regard to the transfer of the land affected by an encroachment.²¹ The respondent in *Phillips* argued that if the court exercised the discretion in favour of leaving the encroachment in place, it should additionally order that the portion of property be transferred to him.²² The court actually considered granting an order to transfer the portion of the applicant's property incorporated as a result of the fence, without questioning whether such an order could be made. It considered that the order for transfer would amount to a deprivation of property for which the court could not find a compelling reason to justify the deprivation.²³ In the end, the court dismissed the claim and eventually decided the case based on the fact that the respondent could not prove that its prejudice or other reasons for not demolishing the encroachment was stronger than the prejudice the applicant would suffer if it were left intact.²⁴

On the one hand, if a court exercises its discretion in favour of leaving the encroachment in place and additionally orders that the encroached-upon land be transferred to the encroacher, this court order results in an involuntary transfer of the affected property. This loss of property or property rights needs to comply with section 25 of the Constitution. On the other hand, if a court does not order transfer and the encroachment remains in place, there still are doctrinal uncertainties that

²⁰ *De Villiers v Kalson* 1928 EDL 217; *Meyer v Keiser* 1980 (3) SA 504 (D) 507.

²¹ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010).

²² *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) par 3.

²³ *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGH 27 (22 April 2010) par 51.

²⁴ For a discussion of the extent of the courts discretion in the context of building encroachments, see s 3.6 in chap 3 above.

need to be cleared up. The aspect of constitutional compliance and the question of doctrinal implications were questioned in chapters four and five respectively.

7.2.3 *Private law implications*

The doctrinal issues were addressed in chapter four. This chapter highlighted the uncertainty that ensues when a court in a building encroachment dispute leaves the encroachment in place and says nothing about transfer of property or property rights. This order results in the encroacher remaining in possession of the encroachment, while the affected landowner apparently still owns the land on which the encroachment is erected. The question is why the principle of attachment was not applicable in these instances. If the principle of attachment had been applicable, it would have resulted in the affected landowner being able to demand removal of the building works erected on his land. The principle of *inaedificatio* governs the situation where buildings are erected on land. *Inaedificatio* ensures that that which is built permanently on the land accedes to the land and the building materials lose their independence and become part of the land. As a result, the owner of the land can demand removal of the building works because they become part of his land. If removal is denied and the encroacher is left in possession of the encroaching structure, one has to question why the natural consequence of accession (i e original acquisition of ownership) did not occur in the case of encroachment by building. I found that this outcome could be explained doctrinally, either by arguing that accession did not occur because the encroacher did not intend for ownership to transfer, or that the principle of accession was suspended to preclude an unfair outcome that would otherwise follow by operation of law.

In terms of the first argument, the principle of accession did not occur because the encroacher did not intend for it to occur. This argument could perhaps be supported with reference to the new approach of South African courts in accession cases. As a point of departure in chapter four, it was emphasised how courts have started to focus on the subjective intention of the owner of the movable instead of objective factors in order to determine the occurrence of accession. This may lead, in the context of building encroachments, to the conclusion that accession did not occur

because the encroacher did not intend it to occur. In other words, courts may decide, in line with the new approach in accession cases, that accession did not take place and that the building belongs to the encroacher and the land to the affected landowner. This argument would provide an explanation for why the principle of attachment did not take place in the case of building encroachments.

The second argument considered in chapter four was that the normal working of accession is suspended in encroachment cases for policy reasons. To determine whether it is possible to explain what happens doctrinally when courts deny a demolition order and leave an encroachment in place, I considered three different arguments that could justify suspension of the normal accession principle. These arguments are Pope's approach to building encroachment problems in South Africa; Roman-Dutch authority with regard to praedial servitudes obtained through prescription; and the argument of Eiselen and Pienaar in the context of unjustified enrichment.

In terms of Pope's approach, the extent of the encroachment should guide the court in an encroachment dispute. She argues that in the case of large encroachments, the principle of accession should be applicable.²⁵ Therefore, the building materials used in the construction of the encroaching structures would cease to exist independently and will become part of the affected landowner's property. The affected landowner would be able to demand removal of anything that forms part of his property, including the encroaching structures. However, Pope argues that in the case of minor encroachments, encroachment principles should govern the situation, while accession principles are suspended. Therefore, a court can exercise its discretion in favour of either removing the encroachment or leaving the encroaching structures intact. If the court decides to leave the encroaching structures in place, she argues that the principle of attachment is suspended, so that ownership of the building materials remains with the encroacher and ownership of the affected land remains with the affected landowner. This solution is more difficult in the case of larger encroachments. It is for this reason that Pope limits the rules of encroachment

²⁵ A Pope "Encroachment or accession? The importance of the extent of encroachment in light of South African constitutional principles" (2007) 124 SALJ 537-556 at 538.

to minor encroachments, and in chapter four I argued that Pope's approach may eliminate the possibility of keeping large encroachments in place, even where policy reasons dictate such an outcome. Pope's narrow discretion-based outcome would mean that the courts can never exercise their discretion in cases where the encroachment is extensive and therefore she cannot provide an acceptable doctrinal reason for instances where the courts have ordered that large encroachments should remain in place against compensation. In Pope's view these decisions must be wrong, but I concluded that it should be possible to justify them in cases where the decision to leave the significant encroachment in place is made on policy grounds, taking all circumstances into consideration, and the decision gives due consideration to section 25 of the Constitution. It should therefore be possible to provide a doctrinal explanation for cases like *Rand Waterraad* and *Brian Lackey Trust*, where the court left significant encroachments in place on policy grounds. A court will take policy considerations into account when deciding to leave the encroachment in place and these considerations will justify the suspension of the rules of accession in the case. Therefore, the assumption that the normal working of accession is suspended in the case could provide a doctrinal explanation for decisions of this kind, but not on Pope's narrow construction of the discretion.

Roman-Dutch law also provides evidence that the rules of attachment can sometimes be suspended. A building work that was erected on the land of another could be acquired through prescription, resulting in a praedial servitude coming into existence. The praedial servitude resulted in the transfer of the right to have the buildings on the land of another and not for transfer of the land on which the building stood. Therefore, from this early stage it was evident how ownership of land and ownership of the building works erected on land could be kept separate. This provides an example of how the principle of accession may be suspended in certain cases for policy reasons.

Eiselen and Pienaar provide another explanation that may add weight to the notion that suspension of the rules of attachment is possible when policy reasons dictate a different outcome. They refer to suspension of attachment in the context of

unjustified enrichment.²⁶ They argue that in some instances ownership of an accessory could sometimes remain “slumbering” until the principal and accessory are separated. However, the argument of Eiselen and Pienaar is limited in that it assumes that the principal and the accessory can be separated, which is not always possible in building cases. Furthermore, the historical evidence that they refer to was possibly not accepted in South African law, but their argument does add weight to the idea that suspension of the principle of attachment can occur for policy reasons.

Judging by the assessment in chapter four, I concluded that it seems as though there is authority for the view that the principle of attachment may be suspended in certain instances. Therefore, it should be possible in at least some cases where the court decides to leave the encroachment intact to explain what happens doctrinally when an encroachment is not removed by using the rationale of suspension of attachment principles. Either the argument that accession did not take place because it was not the builder’s intention for it to occur or the argument that the principle of attachment is suspended for policy reasons could therefore be used to provide doctrinal answers to some of the questions that arise from a building encroachment situation. In either case it should be possible to argue that, when the necessary policy grounds (fairness, equity, balance of injustice) indicate that accession should not take place in a building encroachment conflict, the principles of accession may be suspended to give the courts the required discretion to not order removal of the encroachment. Ultimately, if such a doctrinal argument is not accepted by the courts, it could be entrenched in legislation.

However, these doctrinal solutions raise another doctrinal question that has not been considered by South African courts adequately when the decision is made to leave an encroaching structure in place. If the court does not order removal of the encroachment, and if one assumes that this is possible because accession did not take place, the result is that one person owns a building (or at least has the right to occupy it) on land belonging to another. In the absence of a use right negotiated between the parties, this would mean that there is no clarity about the rights of the

²⁶ S Eiselen & G Pienaar *Unjustified enrichment: A casebook* (2nd ed 2005) 241.

respective parties when removal of an encroaching structure is denied. Therefore, it was necessary in chapter four to highlight the fact that courts do not mention this right, nor do they explain the nature of the right that is acquired by the encroacher when demolition is denied. It is clear that the encroacher is allowed continued possession of the encroachment and it seems as though a use right indirectly comes into existence in favour of the encroacher. Chapter four highlighted the fact that this situation causes unnecessary confusion that needs to be explained doctrinally. Failure to explain adequately what the nature of the right is that the encroacher gains (or the affected landowner loses) when the encroachment is left in place, may also have constitutional implications. When courts decide to deviate from the common law remedy of removal and leave the encroachment in place, it may result in infringement of section 25 of the Constitution, especially if the encroachment is significant. This aspect was dealt with in chapter five.

7.2.4 Public law implications

In chapter five, consideration was given to the possible constitutional implications of courts denying a demolition order in the context of building encroachments. The main purpose of the chapter was to determine whether the loss suffered as a result of these court orders may cause a constitutional infringement in view of the property clause. A distinction was drawn between three outcomes that could result when courts decide to leave building encroachments in place. The aim was to evaluate the constitutional validity of these outcomes with reference to the methodology in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance ("FNB")*.²⁷ The deprivation of property or property rights that results when the encroachment remains in place needs to comply with section 25 of the Constitution.

In terms of the first outcome, the court denies the affected landowner the right to demand removal in the case of insignificant encroachments and orders compensation instead. In this case the affected landowner is deprived of the right to

²⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Minister of Finance* 2002 (4) SA 768 (CC).

the use and enjoyment of the portion of the property on which the encroachment is erected. The question is whether the loss that results in these instances amounts to a deprivation of property or property rights in terms of section 25(1) of the Constitution. I found that the loss, however small, does amount to deprivation that needs to comply with section 25(1). However, the smaller the encroachment, the smaller the limitation on the affected landowner's property and the easier it becomes to justify the deprivation that results when the encroachment remains in place. Generally, courts use considerations of fairness and equity to justify denying demolition. Therefore, courts deviate from the common law remedy of removal to reach a more fair and just outcome. The interests of the parties are weighed up in order to determine who would suffer more loss from either outcome. If a court decides that it would be unduly harsh for the encroacher if demolition were awarded, as opposed to the loss that would be suffered if the encroachment were left in place, this may be enough justification for the deprivation that may result in the case of insignificant encroachments. However, there is no clear-cut rule that leaving small encroachments in place will always be justified because the limitation on the affected landowners' property rights is small. It depends on the circumstances of each case. There may be exceptional circumstances that may indicate that demolition would be the appropriate remedy even in the case of minor encroachments, for example *mala fide* behaviour by the encroacher or if the encroachment, even though it is small, causes unjustifiable harm for the affected owner. However, in the majority of cases where the encroachment is insignificant, the goal of reaching the most equitable outcome will no doubt be achieved by denying demolition and leaving the encroachment in place. In these cases, the deprivation that results will most likely be justified and it would not amount to an arbitrary deprivation of property.

The second outcome that was identified was where the court leaves a significant encroachment in place on policy grounds and it causes a deprivation of the entitlement of use and enjoyment of a significant portion of the affected landowner's property. The limitation on the affected landowner's property rights is significant in these cases and it needs to be adequately justified. It is clear from *FNB* that the larger the limitation on the affected landowner's rights, the more justification is

needed in order to comply with section 25(1) of the Constitution.²⁸ The court in an encroachment dispute will balance the interests of the parties involved. It is more difficult in the case of significant encroachments to prove that leaving the encroachment in place would be less harsh for the affected landowner than demolition would be for the encroacher, because the limitation on the affected landowner's rights is significant. Therefore, other factors may be taken into consideration in order to prove that the balance should favour the encroacher and the encroachment should remain in place. The examples that were used to illustrate this were evident from case law. These may include the extent of the encroachment, unfairness of ordering demolition,²⁹ delay in bringing the application,³⁰ the duration for which the encroachment has stood,³¹ malicious intent by either parties involved in the dispute,³² whether the loss can adequately be compensated,³³ whether removal will result in people's homes being demolished³⁴ or any other factor that may be relevant in the dispute.³⁵ Consideration of all these factors in the case would indicate whether it could be justifiable to leave a significant encroachment in place and ensure that the deprivation that results is not arbitrary.

The third outcome that may result when a court denies a demolition order occurs when the court, in addition to leaving the encroachment in place, orders that the encroached-upon land be transferred to the encroacher. I found that this order was the most difficult to justify because the affected right is ownership, for which a more compelling purpose is required. Also, because of the uncertainty regarding whether the courts have the authority to make an order like this at all, it may be difficult to justify this order. Like in *FNB*, the affected landowner loses ownership and all the incidents of ownership when a court makes an order like this. Therefore, a very strong reason is required in order to justify the deprivation that results. The circumstances in the particular case would need to be considered in order to

²⁸ The Constitution of the Republic of South Africa, s 25.

²⁹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O); *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

³⁰ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

³¹ *Rand Waterraad v Bothma en 'n Ander* 1997 (3) SA 120 (O).

³² *Trustees, Brian Lackey Trust v Annandale* 2004 (3) SA 281 (C).

³³ *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287.

³⁴ *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 (UK); *Site Developments (Ferndown) Ltd v Barratt Homes Ltd* [2007] EWHC 415 (Ch) (UK).

³⁵ See chap 3 above.

establish whether the deprivation is justified. However, even if it can be proven that the deprivation is justified because there is sufficient reason for it, the deprivation that results from this outcome may prove to be arbitrary on the basis of procedural unfairness. I found in chapter five that it seems as though there is inadequate authority for such an order, therefore section 25(1) would possibly not be complied with in this outcome because the deprivation that results is procedurally unfair.

It was also investigated in chapter five whether the deprivation could amount to an expropriation that would need to comply with section 25(2) and (3) of the Constitution. This is because in all three outcomes it may look like an expropriation of either a use right (like in the first two outcomes) or an expropriation of the land itself (as in the third outcome) when the court orders compensation to be paid to the affected landowner. However, I found that an expropriation in the case of encroachment by building was not possible because the common law does not authorise expropriation and there is no legislation that authorises expropriation of this kind of court order either. For that reason, it seems highly unlikely that an expropriation was possible in the context of building encroachments.

Therefore, chapter five highlights the doubt in terms of constitutional compliance of court orders made in the case of building encroachments. It was clear that the deprivation that results from all three outcomes needs to comply with section 25 of the Constitution and in some cases it may be a problem. Although it should be possible to leave even significant encroachments in place, due consideration needs to be given to section 25 in order for it not to amount to an arbitrary deprivation of property.

7.2.5 Comparative law

It has been the aim throughout the dissertation to emphasise that legislation is required in order to eliminate some of the uncertainties that exists in the law regulating building encroachments in South Africa. Foreign law, specifically in Australia, Germany and the Netherlands, provides good examples of effective approaches to the problem of building encroachments. Therefore, chapter six

comprises an analysis of the three jurisdictions with the aim of establishing how building encroachment disputes could effectively be dealt with in legislation.

The Australian Encroachment of Buildings Act³⁶ provides an illustration of what a special encroachment statute might look like. It contains a list of factors that a court can take into consideration to determine whether demolition should be ordered, or whether the encroachment should remain in place. However, this Act does not provide clarity in terms of the doctrinal and constitutional implications of the court orders made in the context of building encroachments in South African law, because the same problems do not exist in Australian law. Having clear answers in terms of what happens when an encroachment is not demolished is very important in the South African context, as was emphasised in chapters four and five. In this regard, the German and Dutch approaches were more helpful.

The Dutch civil code provides for a servitude to come into existence to preserve the existing situation, and a one-off payment of compensation is awarded in exchange for the servitude.³⁷ In German law, something equivalent to a lease is created where the encroacher is obliged to make periodic payments for the use of the portion of property on which the encroachment is erected.³⁸ Therefore, there is clarity and certainty in both instances about the rights of the parties after the order is made to leave the encroachment in place. Additionally, in both jurisdictions the choice for the transfer of the affected land is left to the affected landowner, and not the courts or the encroacher. Therefore, the issue in the South African context concerning the forced transfer of the land on which the encroachment stands is solved satisfactorily in German and Dutch law.

The comparative analysis undertaken in chapter six was useful because it provided answers to some of the questions that exist in the South African context when building encroachments are left intact. Therefore, I will take the approaches of these

³⁶ The Encroachment of Buildings Act 1922 (NSW).

³⁷ See s 6.4 in chap 6 above.

³⁸ See s 6.3 in chap 6 above.

jurisdictions into consideration when looking at the way forward for South African law regulating building encroachments.

7.3 The way forward for South African law

South African law could benefit from legislation to regulate building encroachments. The legislation envisaged can go one of two ways. In the first instance, the legislation can be a codification of the *status quo*. In other words, there can be a choice to maintain the current approach, where the courts have a wide discretion not to grant a demolition order on fairness grounds. It would explain the current approach and provide clarity in terms of the issues addressed in this dissertation. It would need to provide clarity with regard to pre-order considerations and post-order consequences of court orders made in the context of building encroachments. In other words, the legislation would have to prescribe how and in which circumstances the discretion should be exercised and provide answers to the doctrinal uncertainties and possible constitutional implications of leaving an encroachment in place. As a point of departure, this type of legislation should provide guidelines that may make the choice between demolition and compensation easier. It should be clear that these guidelines are a non-exhaustive list of factors that may guide the court to reach the most appropriate outcome; however, the circumstances in the particular case are important in determining which outcome would be the most appropriate. These factors will make it clearer in which cases the court will let the encroachment stand and in which cases the encroachment will most likely be removed.

This legislation would also have to explain what happens when the encroachment is not removed. In other words, it should be clear that when demolition is denied, a use right is created in favour of the encroacher. Additionally, the legislation should also stipulate that the compensation that is paid in this regard is in exchange for the use right that is created. It is also important that the legislation should contain a provision concerning the transfer of the encroached-upon land. It should be clear whether the discretion of the court includes the power to transfer the encroached-upon land in certain instances. However, I would argue in line with the German and Dutch

approaches, that the decision for the transfer of the encroached-upon land should be left to the affected landowner and not the courts or the encroacher.

Therefore, the first type of legislation described can be explained as follows: The point of departure is still the remedy of removal. However, in terms of this legislation the court has the discretion to deviate from the remedy of removal in certain instances. The discretion is wide and equitable and dependent on the circumstances of the particular case. Therefore, there may be exceptional circumstances that dictate an outcome other than removal. The legislation would provide factors that may guide the court in deciding which remedy would be the most appropriate in the particular case. There are some factors that would undoubtedly have to form part of this legislation, for example, the extent of the encroachment, the duration for which the encroachment has stood, the conduct of the parties both before the construction of the encroachment and afterwards, the potential harm for the encroacher should the encroachment be removed and the potential harm if the encroachment should remain intact. The legislation is not exhaustive and the court may take other factors that are relevant to the dispute into consideration. In some instances, a court may decide to leave the encroachment in place, which will result in a use right being created in favour of the encroacher. The legislation should specify the nature of this use right, which in the South African context should be a servitude created in favour of the encroacher. In terms of the legislation the encroacher would have to pay compensation to the affected landowner for the use of the portion of property on which the encroachment stands. Additionally, the court would not make an order for transfer of the encroached-upon land, because the legislation would prescribe that the choice for transfer is left to the affected landowner.

The second type of legislation would be inspired by German law. This legislation would be much simpler as there is no discretion or balancing of interests required. The point of departure of this legislation would be that the encroachment should remain in place in all instances, unless the encroacher was grossly negligent or had malicious intent in constructing the encroachment, or if the affected owner immediately protested against the encroachment as soon as it occurred. There may

be other instances that could provide an exception to the default position in terms of this type of legislation. An example of this would be illegal or dangerous buildings; the legislation should provide that in these instances the affected landowner may at any time demand that measures be taken to remove the danger. Only in those exceptional cases would the court have a discretion to order demolition of the encroachment. If the encroachment is left in place, the legislation would have to contain a provision stipulating that a use right like a lease or, preferably, a servitude is created as a result of the continued existence of the encroachment and that the encroacher is obliged to pay compensation to the affected landowner. The legislation would also have to state that the choice for transfer of the encroached-upon land should be left to the affected landowner.

Both types of legislation should reflect the calculation of compensation in the case where a court opts for compensation instead of removal. The legislation should indicate how the compensation should be determined and how it should be paid. The calculation of compensation and how the amount of compensation will be paid will differ depending on whether a servitude or a lease is created. If a servitude is established, the compensation would most probably be a one-off payment or an annual payment, much like in the case of a servitude of right of way of necessity. On the other hand, if a lease is created, the legislation should prescribe that compensation should be payable in either monthly or annual payments. Regardless of the direction the legislature opts for, both types of legislation should also stipulate that the encroacher has the option of rather removing the encroachment if he does not want to pay the amount of compensation, provided that removal is possible and does not cause harm to the affected landowner's property.

Either of these forms of legislation may be useful in the South African context to ensure that we are not left guessing in future what the nature of the right is that is established when courts exercise their discretion in favour of leaving (even significant) encroachments in place. The legislation should also ensure that the property rights of the affected landowner are adequately considered and protected in

view of the property clause. The unnecessary confusion and uncertainty that results from the inability to explain and justify the outcomes needs to be cleared up.

Abbreviations

Cambridge LJ	<i>Cambridge Law Journal</i>
CCR	<i>Constitutional Court Review</i>
Edinburgh LR	<i>Edinburgh Law Review</i>
Erasmus LR	<i>Erasmus Law Review</i>
Harvard LR	<i>Harvard Law Review</i>
JQR	<i>Juta's Quarterly Review of South African Law</i>
New York University LR	<i>New York University Law Review</i>
SALJ	<i>South African Law Journal</i>
SA Public Law	<i>South African Public Law</i>
Stanford LR	<i>Stanford Law Review</i>
Stell LR	<i>Stellenbosch Law Review</i>
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
Univ of Western Australia LR	<i>University of Western Australia Law Review</i>
Yale LJ	<i>Yale Law Journal</i>

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