

TRESPASSERS BEWARE

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The recent Victorian decision in *PCH Melbourne Pty Ltd v Break Fast Investments Pty Ltd* [2007] VSC 87 serves as a timely reminder that builders or owners who allow material to intrude into an adjoining property without the adjoining owner's consent may face costly removal orders.

THE FACTS

The dispute centred over adjoining properties near the Melbourne CBD. The plaintiff's land included the site of the Hilton Hotel and the MCG Hotel. A 12 storey office building, constructed in 1976, sat on the defendant's adjoining block.

In 2002, the defendant erected metal cladding on the 12 storey office building, along the shared boundary. In 2006, a cut out was made in the south western corner of the cladding for the insertion of an illuminated sign.

Following the preparation of plans by the plaintiff to develop its own site, it brought an action in the Supreme Court claiming that the metal cladding intruded into the airspace above its property by up to 60 millimetres. It sought a permanent injunction requiring the defendant to remove the cladding.

The court had to determine the boundary location and whether the cladding extended over the boundary. It found that it did, by as much as 60mm, and then had to consider whether that encroachment into the plaintiff's airspace constituted a trespass.

THE TEST

In determining whether there was a trespass, Smith J applied the following test: namely, whether the encroachment is of such a nature and at a height which may interfere with the ordinary use of the land which the occupier may see fit to undertake, regardless of whether the incursion actually interferes with the occupier's use of the land at the time.

In this instance, the defendant argued, amongst other things, that the intrusion was trifling and that the plaintiff may not in any event be permitted to build into the airspace above that part of its land on which the MCG Hotel sat due to planning and heritage constraints.

However, having considered the impact of the cladding as a whole, including both the length and height of the interference, Smith J found that the intrusion was not at all trivial and did interfere with the plaintiff's intentions for future development, which were consistent with a landowner's ordinary use. Further, Smith J refused to distinguish between the intrusion into that part of the plaintiff's airspace that was above the MCG Hotel and the intrusion into the other part of the plaintiff's airspace.

REMEDY

The court had to decide whether an injunction restraining the trespass from continuing, or damages, was the appropriate remedy.

Despite the time that had elapsed between the cladding being erected and the claim being brought, along with the cost that the defendant said it would suffer in having to remove the cladding and the consequent loss of improvement to the appearance of its building, the court granted the injunction. To do otherwise would have the effect of allowing

the defendant to acquire the right to use the airspace without the plaintiff's consent.

LESSON

In Victoria, the case law demonstrates that trespass into airspace resulting in a commercial benefit to the trespassing party at the expense of the aggrieved owner or occupier will not be viewed favourably. This is even the case where, for instance, the trespass is as little as between 30mm and 60mm. Builders should be aware that movement of construction equipment such as cranes into an adjoining owner's airspace during construction may also constitute trespass to airspace, if such occurs without the adjoining owner's consent.

* Deacons editor's note: At the time of writing this decision had been appealed. The defendant was granted a stay of the decision and was not required to remove the cladding pending determination of the appeal.

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