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Update Summary

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**INJUNCTIONS:
Law and Practice**

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COMMENTARY HIGHLIGHTS

RESTRAINING A NUISANCE

Significance of locality

In *Sturges v Bridgman* (1879) 11 Ch D 852, 865, Thesiger LJ, giving the judgment of the Court of Appeal, famously observed that whether something is a nuisance "is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances", and "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey".

See [29.155].

Fault element in nuisance: general introduction

To constitute unlawful conduct in tort, the conduct must be unreasonable having regard to a number of factors, including not only the *extent of harm* – harm is usually an element that is required, but arguably also the social or public interest value in the activity: see the discussion by President McLure in *Southern Properties v Executive Director of the Department of Conservation* [3012] WASCA 79; [3012] 189 LGRA 359 at [298].

See [29.165].

Defences- Coming to the nuisance

"... It has been generally accepted that it is not a defence to a claim in nuisance to show that the claimant acquired, or started to occupy, her property after the nuisance had started – i.e. that it is no defence that the claimant has come to the nuisance". This proposition was clearly stated in *Bliss* 4 Bing NC 183, 186 per Tindal CJ.

Coming to the nuisance appears to have been assumed not to be a defence in *Sturges v Bridgman* 11 Ch D 852. And in *London, Brighton and South Coast Railway Co v Truman* (1885) LR 11 App Cas 45, 52, Lord Halsbury LC described the idea that it was a defence to nuisance as an "old notion ... long since exploded" and he also said that "whether the man went to the nuisance or the nuisance came to the man, the rights are the same" in *Fleming v Hislop* (1886) LR 11 App Cas 686, 697

See [29.490].

Remedy by injunction and damages/ compensation

General

Damages may be awarded for reasonably foreseeable harm caused by the defendant's activity that amounted to the nuisance: *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1967] 1 AC 617 at 639-640 per Lord Reid.

See [29.800].

To obtain injunction, damages must not afford adequate relief

A mandatory injunction *to restrain a nuisance* is only appropriate where it is the only way to remedy the nuisance: *Anderson v Pender* [3002] NSWSC 1005, where an order was made for the removal of a fence that encroached into an easement.

See [29.820].

Nuisance must be imminent or likely to be repeated

In *Grasso v Love* [1980] VR 163; 39 LGRA 101 at 167 (VR), the Full Court of the Supreme Court of Victoria, without expressing a concluded view, said that it considered the true position to be that to obtain a quia timet injunction, the applicant must prove that there is a real probability that activities of the respondent are imminent which, if performed, will cause substantial damage to the applicant.

See [29.830].

Where damages awarded in lieu of injunction

An example which seems out of step with authority of damages being awarded in lieu of an injunction, is afforded by *Miller v Jackson* [1977] QB 966; [1977] 3 WLR 20; [1977] 3 All ER 338; where the plaintiffs had moved next to an established cricket club that had been used for seventy years. Cricket balls were hit over the boundary into the plaintiff's property. The club conceded this was actionable nuisance but sought refuge in the proposition that the court should exercise its jurisdiction and grant damages in lieu of an injunction.

See [29.840].

Impact on the public; whether affected statutory utilities and affected neighbours joined in the proceedings

If an injunction is sought to counter a nuisance caused by the flow of water from a drain, it weighs in the balance against relief (both injunctive and declaratory) if the result of the relief would be that there would be serious consequences to public safety and property and would cause great uncertainty: *Hazelwood Power Partnership v Latrobe City Council* [3016] VSCA 129 at [270].

See [29.890].

LORD CAIRN'S ACT

This is a comprehensively revised chapter.

Commentary Highlights include:

INTRODUCTION

Applicable legislation [30.100];

Shelfer's "good working rule" [30.120];

Exploration of *Shelfer's* "good working rule" [30.130];

Status of *Shelfer* in the UK and Australia [30.140];

GENERAL PRINCIPLES

Principles which emerge from the main cases [30.150];

TRESPASS CASES

Trespass generally [30.250];

Trespass and breach of covenant: damages in lieu of mandatory injunction [30.260];

RESTRICTIVE COVENANT CASES

Breach of restrictive covenant --where an order for demolition would constitute unpardonable waste: damages awarded but no mandatory injunction [30.400];

Mandatory injunction to demolish valuable structure

built in contravention of a covenant [30.410];

NZ case law on breach of covenant [30.450];

DAMAGES / COMPENSATION

Claiming Lord Cairn's Act damages/ compensation: what to put in the pleadings [30.600];

Shelfer damages/ compensation: principles of assessment [30.610];

Damages / compensation where the wrong complained of, is a nuisance [30.620];

Wrongdoer cannot pay to continue a nuisance [30.630];

Where the person liable for the nuisance not an occupier or owner [30.640];

Mitigation of loss and Lord Cairns' Act [30.650].

NEW CHAPTER HIGHLIGHTS: TRESPASS

[28.20] Common law and statute

[28.30] Trespass to goods and to the person

[28.40] Invasion of proprietary rights, prima facie basis for injunction

[28.50] Joint tortfeasors

[28.60] Defences to an action in trespass

[28.70] Remedies for trespass: damages, declaration, injunction

[28.80] Lord Cairn's Act damages in lieu of final injunctions

[28.90] Trespass by building and excavation

[28.100] Trespass by building on one neighbour's land

[28.110] Trespass by building on a neighbour's right of way

[28.120] Trespass where discharge of water plus intention to repeat that act

[28.130] Trespass by encroachment into one's neighbours airspace: where enforcement of no value to the plaintiff

[28.140] Encroachment into a neighbour's airspace by scaffolding and cranes

[28.150] Trespass by crane swing/ weathervaning

[28.160] Trespass where discharge of water plus intention to repeat that act

[28.170] Restraining trespasser use of material obtained during trespass

[28.180] Restraining third party use of material obtained during trespass

[28.190] Balance of Convenience: Discretionary factors relating to trespass