

Landlord's development of retained parts

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1. It is well recognised that occupying property under a leasehold interest carries inherent risks arising from the fact that other competing, and in some cases superior, interests might interfere with or jeopardise the enjoyment of the premises under such leasehold occupation. Where the leasehold interest is of part of a property or complex in multiple occupation, such risks typically arise from the occupation of the other parts of the property. Where it is the reversioner of the leasehold interest which presents such challenges, the situation is often complicated by the contractual landlord and tenant relationship.
2. The general rule, well understood, is that a landlord that can do anything with the retained parts of the property or with any adjoining land that firstly does not adversely affect the tenant's ability to use its property for the purpose for which it is let, and in the manner contemplated under the relevant lease; and secondly does not substantially interfere with the tenant's exercise of rights granted over the retained parts. Any transgression of the first of those requirements risks being a derogation from grant or a breach of the covenant for quiet enjoyment; for example, a landlord removing the delivery to the demised premises of air-conditioning in a manner which prevents the tenant from using the demised premises for a purpose which is only lawful when air conditioning is provided; and transgression of the second would amount to a trespass or nuisance in relation to the relevant right, for example, a landlord blocking the only access over a right of way through the front door and up the stairs into the demised property.
3. The degree to which a reversioner is entitled to occupy, use, let, authorise the use of, or redevelop retained parts of the premises gives rise to a number of potential problems, requiring careful analysis in order to determine to what extent the leaseholder is entitled to object to the way in which the adjacent parts of the premises are being used. In practice, the questions which arise fall into three categories. The first category arises where the let premises from the outset of the lease suffer a

nuisance emanating from the retained parts, raising the question whether a landlord is liable for nuisance which pre-dates the grant of the leasehold interest. The second category arises where the let premises suffer from a nuisance emanating from other parts of the premises where these are in the occupation of a third party, with the consent of the landlord. The third category arises in situations where landlord expressly reserves the right to do something which would otherwise be a derogation from grant breach of covenant quiet enjoyment, but exercises that right in a way which interferes with the tenant's use and enjoyment of the let premises.

4. Dealing with the first category, nuisance which predates the grant of the lease, it has been confirmed by the Supreme Court in *Coventry v Lawrence* [2014] UKSC 46 that, as a general rule, there is no defence of coming to the nuisance.

“51 In my view, the law is clear, at least in a case such as the present, where the claimant in nuisance uses a property essentially for the same purpose as that for which it has been used by her predecessors since before the alleged nuisance started: in such a case, the defence of coming to the nuisance must fail. For over 180 years it has been assumed and authoritatively stated to be the law that it is no defence for a defendant to a nuisance claim to argue that the claimant comes to the nuisance. With the dubious 16th century exception of Leeds Cro Eliz 571, there is no authority the other way, as the observations of Blackstone and Abbott CJ were concerned with cases where the defendant's activities had originally not been a nuisance, and had only become unarguable nuisance as a result of the change of use (due to construction works) on the claimant's property”.

5. So, bearing in mind the potential (and very fact dependent) exception for the case where the claimant has altered the relevant property or changed its use in such a way that a pre-existing activity on a neighbouring property becomes nuisance (a possibility which is developed at paragraphs 53 and 56 of the same judgment), the law is clear that coming to the nuisance must fail as a defence. However, there is a well-established (although often not appreciated) exception where a tenant takes a lease

knowing of an existing nuisance.¹ In *Jackson v JH Watson* [2008] EWHC 14 (Ch) the claimant was the tenant of the flat on a long lease. There had been an ingress of water into the flat caused by defective laying of the concrete to the light wells that adjoined the flat. The light wells were not within the demised premises but were within the control of the landlord. The tenant had incurred expense in carrying out remedial works and had suffered inconvenience and a diminution in the value of the flat during the relevant period and sought to recover those sums from the landlord. The tenant did not allege any breach of the repairing covenants in the lease. He accepted that all of the defects arose when the building was converted into flats and therefore before the commencement of his lease.

6. The Court held that the principle of caveat lessee applied, and no liability attached to the landlord. The tenant took the premises as he found them, and was not in a position to complain about the pre-existing defect. If the damage had been done after the lease had been entered into that would have founded liability. Moreover, it matters not whether the relevant nuisance causes physical damage to property or person, or interferes with the enjoyment of the relevant property; the principle applies equally in both cases.²
7. The second category of case concerns the landlord's potential liability for works or acts done on premises which are occupied by third parties. The primary liability for acts amounting to a nuisance lies with the person committing them. It also extends to anyone authorising such acts. These propositions were confirmed by *Coventry v Lawrence (No. 2)* [2014] UK SC 46 (the second part of the decision of the Supreme Court in that case). The test for such liability was considered by the Supreme Court, which confirmed the application of the test set out by Lord Millett in *Southwark London Borough Council v Mills* [2001] 1 AC 1 228 that where activities constitute a nuisance, the general principle is that “*the persons directly responsible for the activities in question are liable; but so too is anyone who authorises them*”. The

¹ *Baxter v Camden Borough Council* [2001] Q.B. 1; *Jackson v JH Watson Property Investment* [2008] EWHC 14 (Ch).

² *Jackson v JH Watson Property Investment* [2008] EWHC 14 (Ch) @ [44], referring to the judgments of both Tuckey LJ and Stuart-Smith LJ in *Baxter v Camden Borough Council*

boundaries of this extension of liability are tightly drawn: “*it is not enough for them to be aware of the nuisance and take no steps to prevent it*”. A landlord cannot be made liable simply because it lets premises which are capable of being used, and are being used, in a way which causes nuisance to the claimant. And the Supreme Court confirmed what had been held almost a century earlier by the House of Lords in *Malzy v Eichholz* [1916] 2 KB 308 that even if the landlord knows that its tenant is creating a nuisance to another tenant, liability does not arise merely by accepting rent and refraining from taking any proceedings against the tenant. To be liable as having authorised a nuisance, the landlord “*must either participate directly in the commission of the nuisance, or must be taken to have authorised it by letting the property*”. The circumstances must be such as to found an inference that the landlord has actively participated in the use of the property causing the nuisance: the phrase “*actual participation*” provides the litmus test for imposing on a landlord such liability.

8. In reaching this conclusion, the Supreme Court had to address two earlier decisions of the Court of Appeal which have often been invoked by claimants wishing to fix the landlord with liability, but which equally have caused unease among those looking for consistency of principle. The first, *Sampson v Hodson-Pressinger* [1981] 3 All ER 710, fixed the landlord with liability for nuisance caused by a use of flooring on an external balcony over the Claimant’s demise. Lord Neuberger shared the doubts about this case implied by Lord Hoffmann in the *Southwark v Mills* case, but said that the decision could only be on the basis that the ordinary residential user of the neighbouring flat which they had let out would inevitably have involved nuisance as a result of the use of that flat’s balcony. The second case, *Chartered Trust Plc v Davies* [1997] 2 EGLR 83, found a landlord of a shopping mall liable for the nuisance caused to the tenant of one of its units resulting from people assembling in the common parts outside another demised unit (a pawnbrokers from memory). In that case the landlord had a contractual power to make regulations governing the use of the common parts, and were held liable as being in possession and control of them.
9. So subject to these observations on those two cases which have never fitted easily within the law concerning a landlord’s liability for its tenant’s nuisance, the principle

which requires participation in or authorisation by a landlord of the tenant's nuisance as a prerequisite of liability remains intact. The strictness of the application of this principle reflects the overriding principle, reflecting common sense and fairness, that liability attaches to the person who has possession and control of the premises from which the nuisance emanates. It was this principle which led the Court in *Leaky v National Trust*³ to conclude that a landowner who knows or ought to know of the potential danger to neighbours caused by natural deterioration of his property is liable in nuisance if he fails to take reasonable steps to avert such a danger. That case concerned a landslide occurring after the landowner had been informed by the claimant that a crack appeared in a mound of earth above the level of the claimant's land. It has further been held that the duty under *Leakey* applies to naturally flowing water. The basis for the liability of an occupier for a nuisance on his land stemmed from the power that an occupier had to take the measures necessary to prevent or eliminate the nuisance, and there was no reason in principle why that basis of liability should not apply to floodwater.⁴

10. This rationale has found recent exposition in the case of *Cocking v Eacott* [2016] EWCA Civ 140. In this case an owner of property was found liable in nuisance for the acts of her licensee, who was her daughter. The daughter had created a nuisance by shouting and by letting her dog bark excessively. The mother, the owner of the freehold of the property who did not occupy any part of it, defended the claim against her on the basis that her position was akin to that of a landlord, who would not be liable for such nuisance committed by tenant. The mother's argument found no favour either at first instance or on appeal to the Court of Appeal. The Court of Appeal had regard to the test which must be satisfied in order to fix a landlord with its tenant's liability: to be liable for nuisance, the landlord had to either participate directly in the commission of the nuisance, or be taken to have authorised the nuisance by letting the property. The fact that the landlord, even knowing of tenant's nuisance, took no steps to stop that tenant from causing the nuisance could not, on the authorities, amount to participating in that nuisance. That is because, as the Court of Appeal held, the tort of

³ [1980] QB 485, CA

⁴ *Green v Lord Somerleyton* [2003] EWCA Civ 198; [2004] 1 P. & C.R. 33, CA

nuisance focuses the blame the person who causes the nuisance. A landlord had neither control over nor possession of the property from which the nuisance emanated.

11. Nuisance by an occupier, by contrast, is qualitatively different. The occupier has control or possession of the property. Where the property is merely licensed for another to use, as opposed to the subject of a grant of exclusive possession to the tenant, then the owner is properly regarded as an occupier of property for those purposes. As we know, an occupier is liable if he continues or adopts the nuisance by failing to abate it with undue delay after he became aware of it or with reasonable care should have become aware of it: *Sedleigh-Denfield v O'Callaghan* [1940] A.C. 880.
12. So the Court of Appeal found that the mother in this case was in control or possession of the property, and fell to be treated as an occupier of the property as distinct from the treatment given in the same circumstances to a landlord. By failing to take steps to abate the nuisance once she became aware of it, the property owning mother was liable in nuisance. The judge at first instance had found that the daughter never had more than a bare licence, and specifically had no right to exclude her mother from the property. Moreover the mother had within eight months of the nuisance arising terminated any licence that her daughter enjoyed. So the mother was in possession of the property in a very real sense, in the same way as Ewell Borough Council was in occupation and control of land on which travellers had encamped and could have removed them in the Court of Appeal case of *Page Motors Ltd v Epsom and Ewell Borough Council* [1980] EGLR 337. Just as the council in that case took a policy decision to leave the travellers on their land, notwithstanding obtaining an order for possession against the travellers, when they could have removed them, so the mother in this case also obtained an order for possession but chose not to enforce it. In *Page Motors*, the council provided the travellers with facilities on the site; in this case, the mother continued to pay the daughter's utility bills.
13. On those facts, the mother was both in possession or control of the property throughout the daughter's residence, and had been able to abate the nuisance but chose to do nothing notwithstanding her knowledge of her daughter's act and her

unreliability. In giving the lead judgment Vos LJ made it clear that notwithstanding the facts of the instant case were analogous to those of *Page Motors*, the decision of the court on liability was very fact specific, and he emphasised that the Court of Appeal was of course bound by the facts as found by the Judge at first instance. He acknowledged the fact that there may be cases where something that was called a licence was held to be a tenancy, or was found to be “*so much akin to a tenancy*” that the licencor could not properly be regarded as an occupier in the relevant sense. He made no findings or even suggestion as to what the outcome would be in such a case. As a matter of law, it is possible to have an exclusive licence, that is to say, an agreement for a party to occupy land which whilst not being a tenancy nonetheless entitles that party to occupy the land to the exclusion of all others. It must be at the very least in doubt as to whether a landlord could be held liable in those circumstances for nuisance committed by the licensee.

14. Another potential loss on this particular category might arise where a landlord was contractually entitled to retake possession of tenanted premises in circumstances where he became aware that the tenant was perpetrating a nuisance against another tenant. Which side of the line would that fall on? The landlord would be in the position of being able to abate the nuisance by exercising his right to take possession of the offending tenant’s premises in such circumstances. However the landlord could not prior to taking possession to be said in any realistic sense to be in occupation or control of those premises. If the litmus test is the ability to abate the nuisance by reason of the relationship between the owner and the occupier of the premises, then the landlord would in these circumstances be liable. If the litmus test is that the landlord must in reality be in occupation and control of the premises, then the landlord would in the circumstances not be liable. As Vos LJ indicated, “*further examination of the position in such a situation can only wait for case in which such facts arise.*”

15. I turn now to the third category, in which a landlord in effect reserves the right to cause what would otherwise be a nuisance and/or a derogation from grant and/or a breach of covenant for quiet enjoyment. It is not uncommon for a lease to contain a provision reserving to the landlord the right to redevelop the building of which the

demised premises form part and/or the landlord's adjoining land. The question arises whether this gives carte blanche to the landlord to redevelop the premises in whatever way, and causing whatever disruption to existing occupational tenants, that it wishes, or whether by contrast there is a fetter on the landlord's exercise of the rights reserved. Another way of asking the same question is to ask whether the tenant's twin and overlapping rights both to quiet enjoyment of the demised premises and not to have its grant derogated from takes precedence over, or is by contrast subject to, the landlord's contractual right to deal with the adjoining in neighbouring premises which it owns entirely in its own interest, without regard to any effect on the ability of the tenant to use the premises for the purpose for which the grant was made.

16. This question was considered in the case of *Timothy Taylor Ltd v Mayfair House Corporation* [2016] EWHC 1075 (Ch), a decision of Mr Alan Steinfeld QC sitting as a deputy High Court judge. In that case, the landlord was relying on its reserved rights firstly to erect scaffolding for any purpose connected with or related to the building or premises and in that regard to use all reasonable endeavours to minimise the time for which scaffolding is erected; and secondly at any time to alter, raise the height of, or rebuild the building or any other building and direct any new buildings of any height on any adjoining property of the landlord in such manner as the landlord thinks fit; in each case even if doing so may obstruct, affect, or interfere with the amenity of or access to the premises, subject to the landlord being obliged to reduce the tenant service charge percentage if the landlord increased the size of the building. What the court was concerned with was with the interrelationship of the covenant for quiet enjoyment on the one hand and the landlord's right to build on the other.

17. It was held that there is a balance to be struck between the tenant's right to full enjoyment of the premises and the landlord's right to build. But neither of those rights takes precedence, and neither can trump the other. All the relevant circumstances have to be considered in order to reach a view as to what the parties would have contemplated at the date of the grant. In particular, without the absence of very clear words, the landlord's reserved rights will be construed as including a requirement that

it has acted reasonably. The landlord is not entitled simply to plough on regardless of the tenant's interests.

18. From *Timothy Taylor* one can derive a number of factors relevant to the assessment of whether or not the landlord is acting within the ambit of the reservation, or outside it, so as to render his actions unlawful. Of some relevance is the question of the knowledge of the tenant at the time of the grant. Although the judge found, contrary to the tenant's evidence at trial, that it had been aware that there were plans for some redevelopment of the building of which the demised premises formed part, he rejected the landlord's case that the tenant had been aware of at least the scale, if not the specifics, of the scheme of redevelopment works.

19. It was also said that whether or not the landlord offered a discount on the rent is a relevant factor. My personal view, and with respect to the learned Deputy Judge, is that this is a surprising factor. The rent is agreed at the outset of the lease (and/or reviewed, as in *Timothy Taylor*) on the basis of the bundle of rights and obligations that each party undertakes under that lease. The lease in question included the right for the landlord to redevelop the building. The rent agreed under that lease will have reflected those rights, and the burden that it was likely to impose in terms of reduced enjoyment of the premises on the tenant. The tenant was entitled to those rights, and subject to those burdens, and agreed to pay its rent accordingly. Why therefore would there be any scope for the landlord to offer a discount on the rent? The offer of a discount on the rent could only signify that the landlord acknowledged that the works he was about to do were in excess of those which he was entitled to do under the reservation. It seems to me therefore that the offer of a discount on the rent is tantamount to an acknowledgement that the landlord's proposals will involve some sort of reduction in or derogation from the rights granted under the lease. The fact that it may be reasonable for the landlord to offer to pay for an unlawful act does not of itself render the act lawful, albeit if the tenant were to accept such an offer it is not then able to complain that the extent of the works or manner in which the works were performed are in excess of the landlord's reserved right.

20. In addition to the knowledge of the tenant at the date of the grant of the lease, the purpose for which the premises were let, the location of the premises, and the degree of interference imposed by the proposed works will be relevant. These are all factors which in accordance with the conventional approach focus on that the parties' intention at the time the lease was granted. At first blush it would appear that the focus on the reasonableness of the landlord in implementing the works may depart from this conventional approach and instead focus on matters arising well after the grant of the lease. It might be thought that this represents a worrying and unwarranted departure from the well established rule that the intention of the parties is to be determined as at the date of the grant, based on the words they have used to represent that intention. However, in my view the better answer is that the reasonableness of the landlord in performing the works so as to minimise what would otherwise be a breach of the covenant quiet enjoyment or a derogation from grant or a common law nuisance is to be implied into the reservation from the outset. With due obedience to what is now established as the strictness with which the implication of the term must comply, it seems to me to make both legal and common sense to base the requirement that the landlord behave reasonably in exercising the reserved right on the construction of the lease, rather than on some extrinsic factor to be brought into play only when the reserved right is exercised, the basis of which requirement would be judicial imposition rather than contractual.

21. In the course of analysing the applicable legal principles, the Deputy Judge noted, following *Southwark LBC v Tanner*, that acts which would have founded a claim in nuisance will also be sufficient to establish a breach of the covenant of quiet enjoyment. Until then, the covenant was largely regarded as an assurance of good title. Moreover, there had existed uncertainty as to whether physical interference with the tenant's enjoyment of the property demised which does not involve direct and physical injury to the land was capable of amounting to a breach of the covenant for quiet enjoyment. The House of Lords in *Southwark v Mills* confirmed that the covenant is broken if the landlord or someone claiming under him does anything which substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary unlawful enjoyment of them. The interference need not

be direct or physical, and indeed in *Southwark LBC v Mills*, it was accepted that excessive noise could found a claim based on the covenant, although in that case the claim failed for other reasons.

22. It is therefore clear there is at least an overlap between common law nuisance, derogation from grant, and breach of the covenant for quiet enjoyment. They are not however in my view coextensive. Whilst it seems likely that anything which may be a nuisance at common law would be perpetrated by the landlord also be a breach of covenant of quiet enjoyment and/or derogation from grant (I have failed to devise an example where this is not the case), there may well be breaches of covenant of quiet enjoyment or of derogation from grant which would not necessarily found a claim in common law nuisance. This lack of equivalence is a reflection of the different tests which apply in each case. A nuisance is defined as an action (or on occasion a failure to act) on the part of the defendant, where that action is not otherwise authorised, and which causes an interference with the claimant's reasonable enjoyment of his land, or to use a slightly different formulation, which unduly interferes with the claimant's enjoyment of his land: *Coventry v Lawrence*, per Lord Neuberger at paragraph 3. A breach of covenant for quiet enjoyment by contrast is broken if the landlord or someone claiming under him does anything that substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary lawful enjoyment of them. As one can see, there is plenty of scope for overlap between these causes of action, but they are not identical.

23. At this point we return to *Coventry v Lawrence* for the most recent guidance from the Supreme Court as to when an injunction should be granted to restrain unlawful acts. Following that decision the four stage test set out and relied upon for over a century in *Shelfer v City of London Electric Lighting Company* remains relevant, but must not be applied in a mechanical fashion. Thus it is still a "good working rule" (as indeed it was initially said to be) that

"(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 – then damages in substitution for an injunction may be given.”

24. But the idea that damages should only be awarded in lieu of an injunction in exceptional circumstances been disapproved. In fact the court’s power to award damages in lieu of an injunction involves a classic exercise of discretion which should not be fettered. In addition, each case is likely to be so fact sensitive that any firm guidance is likely to do more harm than good. Any application of the Shelfer test must be against that background. Even with that health warning, it was confirmed that in the absence of additional relevant circumstances pointing the other way it would normally be right to refuse an injunction where the four tests were satisfied; conversely the fact that the four tests are not all satisfied does not mean that an injunction should be granted: per Lord Neuberger, [120] – [123].
25. If an injunction is to be sought, decisions need to be made as to the timing of any application to the court. There is a trade-off between making the application at a very early stage, in which case the apprehension of the claimant that interference would ensue and continue would be well demonstrated, but the intrusiveness and excessive levels of the works may be hard to evidence; alternatively waiting until sufficient evidence of the intrusiveness has been gathered, and warning shots fired, in which case sufficient time may have passed that it may be hard to demonstrate that there is anything particularly urgent about the situation. It may possible to obtain a *quia timet* injunction if sufficient is known about the landlord’s plans in advance of them happening. However very clear evidence would be needed that what is proposed will necessarily be outside the ambit of any contractual reservation in order to succeed in obtaining an injunction prior to the relevant works actually having started. In particular where the complaint is going to be based on noise and vibration, it will require very clear facts to demonstrate that the claimant’s fear of disruption is well-founded. All these matters will feature in the decision on when to make the relevant application.
26. To state the obvious, the evidence will be crucial. It will be vital for the claimant to monitor and log the occurrence of the unlawful incidents and their effect on the

claimant's ability to operate in the premises in the manner contemplated under the lease. Assuming that the claimant obtains legal advice, there is also likely to be a period of correspondence between the two parties' solicitors, the claimant's seeking undertakings as to the future conduct of the works, and the defendant's relying on its contractual rights and denying that the works taking place or due to take place will exceed the ambit of those rights. This period can impose a considerable strain upon the claimant in particular, who will be weighing up whether further delays will prejudice its case on urgency should it wish to seek interim relief or whether by contrast ignoring the landlord's denials and/or proposals going forwards will be seen as unreasonable by the court if the claimant applies without giving the landlord a chance to demonstrate that it will improve or will conduct the works in such a manner as to fall within the ambit of the reservation. Nonetheless it is always wise if not strictly imperative for the claimant to contact the defendant first, and almost always on more than one occasion, so that the defendant has a reasonable opportunity to address the claimant's concerns and so that the court can be satisfied, should interim relief sought, that the claimant is being reasonable. If matters escalate and a without notice interim injunction is sought, the court is going to be particularly keen to know that the defendant has been given a reasonable opportunity to address the situation, or provide undertakings, but has failed to do so.

27. Similar evidence will be required, albeit obviously over a longer period, if a final injunction is sought. Some claimants may become overenthusiastic at the thought of a final injunction, reasoning that if it is possible to prevent the development in its entirety there is likely to be a financial inducement available to overcome the objections emanating from the claimant. However, particularly where development rights are reserved in a lease, it will be very hard in practice to persuade the court to prevent the development altogether. The court is far more likely to impose restrictions on the scheme of works which require the landlord to continue its development in a manner which does not unduly interfere with the ability of the tenant to use the premises purpose for which they were let. This will reflect the balancing act which was identified in *Timothy Taylor* as being required between the covenant of quiet

enjoyment in favour of the tenant and the reserved right to develop in favour of the landlord.

28. There are a number of bases on which damages might be assessed. If the claimant can demonstrate loss of profit as a result of the unlawful interference, then these will be recoverable. However it can be hard to demonstrate a causal link between the works and any alleged loss of profits (on the facts there was none in the *Timothy Taylor* case); the tenant like any other claimant would have been required to mitigate its losses; and (albeit this might be an unlikely outcome) the tenant must also give credit for any increased profit it might achieve in other outlets as a result of the inaccessibility of the affected premises: *Platt v London Underground Ltd* [2001] 2 EGLR 121.
29. Where no loss of profit can be shown, then the standard measure of damages would be loss of use or amenity in relation to the premises, which would sound in a reduction in the rent payable over the relevant period. In the way of things, this is likely to be an impressionistic exercise, based on a number of disparate factors which are unlikely to be susceptible to ready financial quantification. Each case will be very fact specific. For example, it is difficult to see precisely how quantification could take place where staff decide to work at home because the noise or dust caused by the works makes working in the demised premises uncomfortable or productive of headaches or allergies. Where staff do continue to work in the premises, it is not obvious how the nuisance to them of continuous noise or dust or vibrations could be calculated in financial terms. Some guidance may be gained from the authorities the landlord's on breach of repairing covenant residential cases where a similar exercise is required.
30. Lastly, I am not aware that the damages payable in this kind of case have ever been claimed on the basis of loss of bargaining power, unlike for example interference with a right to light or a breach of restrictive covenant. Is there any reason why the same reasoning would not apply in such a case? The landlord has unlawfully continued with its plans, in order to increase the value of its property holdings, in breach of the

tenant's rights. Assuming, as must almost invariably be the case, that the landlord anticipates an increase in value of its property holding, it would seem arguable at the least that the tenant should be compensated by that amount which the landlord would have had to pay if it had been prepared to bargain for the right to do the works, conventionally calculated as a percentage of the development profit the landlord expects to achieve.

31. As to the evidence necessary to provide loss, whether of profits or of amenity, again a systematic log should be created of all conditions which are adversely affected by the nuisance, whether by noise, vibration, dust, inaccessibility, obstruction of frontage, or whatever it may be. Whilst the measure of damages may be elusive, the more hard facts the court has to work on, the more specific and robust it can be in its award.

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