Getting away with it? Injunctions, damages and the developer

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It often falls to a developer, and those advising the developer, to consider property claims made by neighbouring owners which would have the effect of limiting or even preventing the development. The happy developer will negotiate those claims away. But sometimes those claims lie dormant until the development has started or even completed; claimants sometimes refuse to engage in realistic, commercial negotiations and occasionally the developer decides to lay low and face the claim when and if it comes. This paper considers whether or not neighbouring owners who can successfully bring a property claim against a developer will succeed in obtaining a court injunction to stop the development or, if it has started or completed, to dismantle the offending parts of the development. Recent cases appear to show a greater willingness on the part of the courts to grant such injunctions. If injunctions are not granted then the claimant will often be entitled to damages in lieu of an injunction. This paper also considers how such damages are assessed.

The typical claims

The question of whether the court should award an injunction or damages in lieu of an injunction arises in a variety of property scenarios. The development might offend the restrictive covenant, such as one not to breach

a building line[1] or not to use the premises for certain purposes e.g. a riding school[2]. Infringements of neighbouring rights of light provide a steady source of litigation raising these points. The infringement of more fundamental property rights e.g. trespass (by a landlord blocking up a tenant's fire door[3] or unlawful use of a right of way[4]) and nuisance (e.g. caused by a motor racing circuit[5]) may also give rise to such considerations. However here we are concerned with injunctions. A straightforward trespass case (where there is a permanent or fixed invasion of someone else's property) would normally give rise to a claim for a possession order, rather than an injunction. The right to a possession order gives rise to different considerations from those I discuss below.

Obviously the complaining neighbour will get nowhere if the relevant property right cannot be established. Accordingly this paper takes as read that the claimant will be able to establish that the development will include an actionable infringement of the relevant property right, be it a restrictive covenant, right of light or the like.

Timing of the inquiry

The basic rule is that if someone enjoys a property right he is entitled to have this enforced. Accordingly, if he fears that his rights are about to be infringed he can apply, as soon as circumstances justify such reasonable fear, for an injunction. The injunction he seeks in his claim form will be for a *final* injunction i.e. one which the court would make having heard all the

[1] As in *Amec Developments v Jury's Hotel* [2001] 1 EGLR 81.
[2] As in *Gafford v Graham* [1999] 3 EGLR 75.
[3] See *Lunn Poly v Liverpool & Lancashire Properties* [2006] 2 EGLR 29.
[4] *Jaggard v Sawyer* [1995] 1 WLR 269
[5] *Watson v Croft Prom- Sport* [2009] 2 EGLR 57.

evidence, including expert evidence. If such a full trial takes place before the property right is infringed and if the property right is established then the complaining neighbour ought to be granted his injunction.[6] However it is rare for the timing to work out in this way. With the best will in the world it takes time to prepare for trial and obtain a date from the court and of course the developer will have obtained planning permission, will be keen to get on with the development and so is unlikely to be minded to stay his hand until the outcome of proceedings. Further although this paper proceeds on the basis that the claimant will be able to establish his property rights, in reality, in a typical scenario, the developer will be hotly contesting that such property rights exist. Accordingly the matter usually proceeds in one or two of the following ways.

First, the claimant can apply for an *interim injunction*. The court will decide whether or not to grant such an injunction without hearing any contested evidence and so without deciding whose version of the facts is correct. Thus, whether or not the court grants an interim injunction is not necessarily an indication of the strength of the claimant's case. In one recent case the court refused an interim injunction because the claimant made its application too late but then went on to grant a final injunction at trial, having heard all the evidence[7].

One practical matter which often dissuades claimants for applying for an interim injunction is that the claimant must give the court an undertaking to

[6] But cf *Midtown* [2005] 1 EGLR 65: it is open to question whether the court's approach in this case would wighstand scrutiny in the light of the recent court of appeal caaes, discussed below.
[7] *Mortimer v Bailey* [2005] 1 EGLR 75.

pay any damages to the developer if, after a full trial, the court decided that no injunction should be granted at all.

Accordingly the usual context in which a court decides whether or not to grant a final injunction is that the development has been commenced and possibly completed and there has already been an infringement of the claimant's property rights. This is because, as a matter of practicalities, it has not been possible to organise a full trial prior to the offending work commencing and the claimant has been understandably reluctant to seek an interim injunction to stay the developer's hand in the meantime.

However in the most case on the subject, the scenario was rather different. In *CIP Property v Transport for London*[8], the owner of property above Tottenham Court Tube Station had put in an application for planning permission to carry out development once Crossrail had successfully been brought to Tottenham Court Road. Planning permission had not yet been granted and, if the scheme went ahead at all, it was envisaged that there would be various changes to the scheme which, in any event, could not commence until the completion of Crossrail, in 2017 at the earliest. Neighbouring owners claimed rights of light which they said the development applied for would infringe. Negotiations had apparently carried on but had come to nothing, when the neighbours wrote on an 'open' basis claiming an infringement to their rights of light and threatening injunctive proceedings. The resulting claim was roundly rejected by the High Court on the basis that the Court only grants injunctions in advance of infringements to people's rights where that infringement is immediate. Whether or not the

[8] [2012] EWHC 259 (Ch).

neighbour had rights of light (which was a question in dispute), there were no grounds for granting an injunction where the threatened injunction was 5 years away and may never even materialise.

Whether to award injunction or damages in lieu

The very first thing which must be decided at the full trial is that the case is fit for the award of an injunction or damages in lieu (in place) of an injunction, in the exercise of the court's discretion. An injunction is an equitable remedy and if the developer can show that the circumstances are such that a court of equity should not interfere at all with what has occurred, then the claimant will obtain neither injunction nor damages in lieu of an injunction. The sorts of equitable defences which a developer might be able to raise in a given case are excessive delay on the part of the claimant in seeking a remedy or effective consent to what has occurred. This paper proceeds on the basis that no such equitable defences are available to the developer and so he must face either an injunction to cease or to reverse his development or damages in lieu of an injunction.

In these circumstances the Court of Appeal, in *Regan v Paul Properties*[9], has recently emphasised that a claimant who establishes that his rights have been infringed is prima facie entitled to an injunction, rather than damages in lieu. In *Watson v Croft* the Court of Appeal went so far as to say that damages in lieu of an injunction should only be awarded in exceptional circumstances, where the grant of an injunction would be oppressive to the defendant.

[9] [2007] Ch 135.

The "good working rule" for whether to award damages in lieu of an injunction, which has stood the test of time was established by A L Smith LJ in *Shelfer v City of London Electric Lighting Co (No.1)* [1895] 1 Ch 287 is as follows:

(1) if the injury to the claimant'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.

In another cases the Court of Appeal has emphasised that the test is indeed one of "oppression" and warned that "the court must not slide into application of a general balance of convenience test"[10].

Following on from some much-publicised pro-developer decisions, (notably *Midtown*[11] and *Tamares (No.1)*[12]) the overall impression is that the law, not just the economy, has got a tougher for developers in recent years.

The sort of things which will weigh with the court in deciding whether or not to grant an injunction include:

(i) whether the claimant has indicated that he was prepared to settle for a monetary sum in any event[13]; thus the well-advised developer might be wise to make open offers at an early stage to lure the claimant to discussing money on an open basis

[10] Per Sir Thomas Bingham MR in *Jaggard v Sawyer* [1995] 1 WLR 269.
[11] [2005] 1 EGLR 65.
[12] [2006] 3 EGLR 87.

whereas the claimant would be well advised to ensure that all negotiations are conducted strictly on a "without prejudice" basis;

(ii) whether or not the developer has gone ahead and built anyway, irrespective of the claimant's remonstrations[14]; the fact that the developer has attempted to engage in constructive dialogue to describe and possibly minimise the impact of plans may[15] or may not[16] assist; certainly a constructive response by the claimant will not assist the developer[17].

(iii) the fact that the developer took advice and genuinely believed that there was no infringement to his neighbour will not necessarily save him[18]

(iv) whether or not compliance with an injunction would involve an unpardonable waste of resources (pulling down an entire development) as against little or no damage suffered by the complainant[19]; there will always be cases where the *fait accompli* simply cannot be ignored and where, at least in hindsight, the claimant should have sought an interim injunction[20];

[13] *Gafford v Graham* but see c.f. *Watson v Croft*.
[14] *Mortimer v Bailey*; *Regan v Pau; HXRUK II v Heaney* [2010] 3 EGLR 15.
[15] *Midtown*
[16] *HXRUK II*, where an open offer was made, the complainant often did not or was dilatory in responding to correspondence and did not, until proceedings were served on him, follow up his threat to seek an injunction
[17] *Mortimer v Bailey*
[18] *Regan v Paul* but cp *Jaggard v Sawyer* and the first instance decision of *Tamares (No1)*
[19] *Wrotham Park v Parkside Homes* [1974] 1 WLR 798.
[20] See also *Jaggard v Sawyer* but cp *Mortimer v Bailey* on the relevance of seeking an interim injunction

Recent examples

Although it is helpful to consider the recent approach of the courts to specific facts the Court of Appeal has said, time and again, that each case involves an exercise of judicial discretion turning on its own facts and therefore it is unsafe to take comfort from the attitude of the court in any one case[21]. This is undoubtedly so as the ambit of judicial discretion is wide and another judge could quite properly arrive at a different decision on exactly the same set of facts.

Regan v Paul

Mr Regan lived in a residential flat in Brighton with his family. The developer, Paul, began developing neighbouring premises to include a penthouse flat. The proposed penthouse flat would seriously affect Mr Regan's rights of light in his living room. The injunction was applied for some 6 months after work started and part way through the construction of the penthouse suite. The developer had obtained and proceeded upon rights of light advice to the effect that Mr Regan would suffer only minimal loss of light. At trial it was established that he would suffer substantial loss of light although this only translated into a diminution in value of his flat of £5,500 whereas the cut-back necessary to the penthouse suite so far constructed would be between £12,000 and £35,000 resulting in an estimated loss of value of £175,000 to the developer. The Court of Appeal overturned the trial judge and ordered an injunction, Mummery LJ emphasising that the developer had continued in the face of protestations and taken a "calculated risk". The fact that they had relied upon incorrect expert advice "should not prejudice the position of Mr Regan, against whose conduct no criticism can

[21] In particular per Millett LJ in *Jaggard v Sawyer* at 288.

be made and who acted on advice which was correct. The defendants who took and acted on the wrong advice must take the consequences and not throw them on Mr Regan in order to deny him his prima facie right to protect his property by injunction".

Watson v Croft Promo-Sport[22]

The claimants were residential owner occupiers who sought an injunction to stop excessive noise emanating from the defendant's nearby motor-racing circuit. The trial judge held that anything in excess of 40 track days per year amounted to excessive use, constituting a nuisance. This was upheld by the Court of Appeal. However, the trial judge refused an injunction because the claimants had demonstrated a willingness to accept 40 track days upon payment of compensation. The Court of Appeal overturned this decision: the mere fact that a claimant may be prepared to accept monetary compensation up to a certain level of inconvenience does not mean that he is either willing or capable of being compensated with money for inconvenience suffered in excess of that level. This was a case of substantial injury to the claimants and their enjoyment of their property and this consideration outweighed of other factors such as the delay in bringing the claim (during which the developer had not acted to his detriment) and the fact that the circuit was the only one in the area, was a well run business, provided local employment and provided a measure of public enjoyment. The fact that there was also some expenditure on unsuccessful measures to avoid a nuisance hardly supported a case for refusing an injunction.

HXRUK II v Heaney[23]

[22] [2009] 2 EGLR 57.
[23] [2010] 3 EGLR 15.

The developer developed neighbouring property by building two new floors which interfered with Mr Heaney's rights of light in respect of his neighbouring, recently restored commercial office space. Although Mr Heaney remonstrated before and during the development, he did not ever commence proceedings. Instead, after the development had been completed, the developer commenced proceedings for a declaration to the effect that Mr Heaney was not entitled to any remedy. Mr Heaney counterclaimed for an injunction in those proceedings. The developer knew all along that Mr Heaney's rights would be infringed. Judge Langan QC nevertheless granted an injunction on the basis that (i) the infringement was not a trivial one, (ii) the infringement was deliberate and carried on in the knowledge that it was actionable, (iii) the infringement was committed with a view to profit and (iv) the infringement was not necessary but could easily, if somewhat less profitably, have been carried out by reducing the dimensions of the offending storeys. The judge concluded by saying "it would be wholly wrong for the court effectively to sanction what has been done by compelling the defendant to take monetary compensation that he does not want".

Quantum of damages in lieu of an injunction

Although the origin of such damages is equitable, nowadays the jurisdiction to award such damages appears in section 50 of the Superior Courts Act 1981. Having regard to the equitable nature of such damages, the courts have emphasised the flexibility of approach open to their assessment. However the normal 3 bases of assessment are (a) traditional compensatory damages for loss (eg loss of amenity or diminution of value) (b) negotiating damages (ie a sum based upon what reasonable people in the position of the parties would

negotiate for a release of the claimant's rights) and (c) a sum based upon an account of the profits the developer is likely to make.[24]

In cases such as ours the contest is likely to be between (a) and (b). An account of profits (ie all the profit) for the building of offending parts of a structure would require very special circumstances indeed: it is not easy to envisage a situation where the court considered it appropriate to deprive the developer of all the relevant profit but then did not award an injunction against him.

In the normal case where the court is considering awarding compensatory damages and negotiating damages, the court could be expected to award the greater of the two.[25]

As far as negotiating damages are concerned, the court is in the business of ascertaining such sum of money as might reasonably have been demanded by the claimant from the developer as a quid pro quo for permitting the part of the development which would otherwise offend the claimant's rights.[26]

Typically, the first step is to ascertain the likely profit to be obtained from the development and then to see what proportion of this the parties might have agree should be paid over. In practice percentages ranging from 5%[27] to 40%[28] have been awarded. Since by definition the damages are supposed to be small (see the *Shelfer* test above), the figure should not be too high.

[24] See per Neuberger LJ in *Lunn Poly v Liverpool & Lancashire* [2006] 2 EGLR 29
[25] Conceded in *Tamares (No.2*) [2007] 1 WLR 2167
[26] Adapting the language of Brightman J in *Wrotham Park Estate Co v Parkside Homes* [1974] 1 WLR 798 at 815D
[27] *Wrotham Park*

However, this will surely depend upon the context. One of the largest payments awarded to date is £375,000, a figure plumbed at without specific reference to the likely profit to be made, although the claimant claimed that this was £2.3m.[29]

Whereas the assessment takes place at the point of breach[30], the courts will not be a slave to this concept if it leads to unreality. As stated above the jurisdiction is a flexible one and there is no "valuation date" as such which must be strictly adhered to. Thus, in one case the court considered that the developer of two additional stories to a building would need to know he had the all-clear some months before the erection of the offending structure commenced[31]. Accordingly this earlier date became the date for assessment of damages in lieu.

The modern approach of the courts to the assessment of negotiation damages has been helpfully set out[32] as follows:

(1) The overall principle is that the court must attempt to find what would be a "fair" result of a hypothetical negotiation between the parties;
(2) The context, including the nature and seriousness of the breach, must be kept in mind;
(3) The right to prevent a development (or part) gives the owner of the right a significant bargaining position;

[28] *Bracewell v Appleby* [1975] Ch 408
[29] *Amec v Jury* [2001] 1 EGLR 81
[30] *Lunn Poly* at [29]
[31] *HXRUK II*

(4) The owner of the right with such bargaining position will normally be expected to receive some part of the likely profit from the development (or relevant part);

(5) If there is no evidence of the likely size of the profit, the court can do its best by awarding a suitable multiple of the damages for loss of amenity;

(6) If there is evidence of the likely size of the profit, the court should normally award a sum which takes into account a fair percentage of the profit;

(7) The size of the award should not in any event be so large that the development (or relevant part) would not have taken place had such a sum been payable;

(8) After arriving at a figure which takes into consideration all the above and any other relevant factors, the court needs to consider whether the "deal feels right".

Role of the valuer in the assessment of negotiation damages

The role of the expert falls into two broad categories

First, the court will need to know what the level of profits will be. By the time of the trial, in a straight forward case (eg building houses which the developer had no right to build) these may well be known. Of course the parties to any negotiation would not know the relevant figure and whether or not it is appropriate to work with the known figure will depend upon the

[32] By Mr Gabriel Moss QC sitting as a deputy judge in *Tamares (No.2);*adopted by Judge Langan QC in *HXRUK*

circumstances[33]. In any event it is not always easy to say what the profits of an as-built scheme are, particularly if it is not yet completed or has not yet been let etc. However in many cases, the relevant profit figure will be uncertain, even after the event, since it will involve hypothesising the difference in profit between the as-built scheme and the scheme which might have been built if the developer had respected the claimant's rights.

However, the cases show that the court is not necessarily concerned to decide what the profit level is. Since the court is postulating negotiations, the uncertainty will often be embraced: the court will have in mind the credible positions taken by the parties during the negotiations. Accordingly, as ever, the expert for any party needs to put forward a credible case which the court accepts would carry weight in any negotiations.

The second area where the court may be assisted by expert evidence is in the reasonableness of the negotiated amount as representing a figure which the parties might have arrived at themselves. However in the *Tamares (No.2)* cases, the judge suggested[34] that such an expression of opinion by the expert would not be helpful, since it was a matter for the court. In so far as the court was warning off experts giving their opinion as to what the level of damages should be I would not disagree (for that is a matter exclusively for the court in the exercise of judicial discretion); but for my part, I would suggest that it is potentially helpful to have the view of the valuer on the outcome of any such postulated negotiations and the influencing factors, assuming that the expert witness had sufficient experience and expertise to back up an opinion.

[33] See the discussion of Neuberger LJ in *Lunn Poly v Liverpool & Lancashire* [2006] 2 EGLR 29 at [25] to [29]
[34] Paragraph 11

Real examples of market practice (eg the application of the Stokes v Cambridge ratio, if applied); or assessments of where the tipping point lies (for the suggested sum to become unviable) are the sorts of things with which a valuer may well be able to assist the court as a matter of expertise gained from his or her experience. Needless to say any report should emphasise such experience or the empirical evidence upon which the opinion is based.

Having said this, judges, quite rightly, like to keep their feet firmly on the ground (where they can see it) and recent cases show that the court naturally puts great weight on contemporaneous material indicating what the actual parties (a) thought the profit would be or (b) had provided for or were prepared to offer by way of settlement. Thus in *HXRUK* the fact that the developer had earmarked £200,000 for rights of light issues and had also, when purchasing the site, negotiated a £300,000 reduction in price on account of such matters, was the decisive factor in fixing on the sum of £225,000 had the judge been minded to awarded damages in lieu of an injunction, which of course he was not.