Injunction or damages

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1. **Balancing exercise** - a finding in proceedings that an actionable interference has occurred then leads on to the need to answer the question as to what relief is to be granted. Will it be an injunction or will damages be awarded? There is no general principle that if there is a wrong in relation to an easement then an injunction should be granted. There is now a long line of authority that an injunction can be refused and damages awarded in lieu of the injunction applying s. 2 Lord Cairns Act 1858 (now s. 50 Senior Courts Act 1981)(such as Jaggard v Sawyer [1995] 1 WLR 269 and Midtown Limited v City of London Real Property Co. Limited [2005] EWHC 33 Ch). The difficulty is in determining in any particular case which relief the Court will award. The onus lies initially with the defendant wrongdoer to avoid an injunction.

2. In reaching a determination which in some cases is a difficult one the court has to weigh up two conflicting outcomes. If an injunction is refused and damages awarded the Court can be said to be authorising the Defendant to expropriate a release from a right upon payment. On the other hand if an injunction is granted, and particularly a mandatory injunction, the Court may be "delivering over the Defendants to the Plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make." (Lord Westbury LC in Isenberg v East India House Estate Co Limited (1863) 3 De GJ&SM 263 at page 273 cited by Millett LJ in Jaggard v Sawyer [1995] 1 WLR 269 at page 287C/E).

3. **Shelfer v City of London Electric Lighting Co** - each case involves the exercise of a discretion by the Court. The starting point for the Court when making such a determination is usually the frequently cited judgment of A. L. Smith LJ in Shelfer v City of London Electric Lighting Co. Limited [1895] 1 Ch D 287. This sets out four conditions as a "good working rule" as to when the Court may award damages instead of an injunction. These are:-

3.3.1 the injury to the Claimant's right is small;

3.3.2 the injury is capable of being assessed in monetary terms;

3.3.3 a small money payment is adequate compensation;

3.3.4 the grant of an injunction would be oppressive.

4. The Regan and the Tamares cases below both concern this issue and interestingly in Regan the judge at first instance had refused an injunction and this part of the decision was overruled on appeal. The Court of Appeal decision in Mortimer v Bailey [2004] EWCA Civ 1514 was a warning to developers who took a chance and acted without first resolving any problems with restrictive covenants. Unless as stated by Jacob LJ there are "very strong circumstances" in such circumstances an injunction will be granted. A similar warning is being sent out by the Court of Appeal in the Regan v Paul Properties DFP No 1 Limited [2006] EWCA Civ 1391 with regard to easements and in particular a right to light. This is reinforced by the subsequent Court of Appeal decision in Jacklin v Chief Constable of West Yorkshire [2007] EWCA Civ 181 concerning a right of way. As against this the decision in the Tamares case illustrates circumstances in which the grant of an injunction will be refused.

5**. <u>The Regan case</u>** – the case concerned a development in Brighton opposite the Claimant's first and second floor maisonette. The defendants were seeking to replace three storey houses with a five storey residential development of 16 units. It was only when the works begun that the Claimant became aware of the problem with light which centred on his first floor living room and as a result an application for an interim injunction was made which was dealt with by undertakings pending trial. The complaint was that the penthouse flat on the fifth floor blocked light to that living room. The expert evidence was that prior to the residential development the living room enjoyed natural light to 65% (Claimant's expert) or 67% (Defendant's expert) of its floor area and after it would be reduced to 42% or 45.2%. At first instance ([2006] EWHC 1941 (Ch)) the judge held this was an actionable interference but refused an injunction. Applying the working rule in Shelfer he considered that the injury could be adequately compensated for by a money payment and it would be oppressive to the Defendant to be subjected to an injunction because it would require the redesigning of the penthouse with a reduction in value of £175,000. In reaching this decision the judge placed the onus on the Claimant to show why the court should not award damages.

6. The finding that there was an actionable interference was not appealed.

The Court of Appeal ([2006] EWCA Civ 1391) also applied the Shelfer working rule which Mummery LJ stated bound it and which for over a century has been the leading case on the power of the Court to award damages in lieu of an injunction (paras. 35-37). However, it held that there was no onus on the Claimant to persuade the Court why an injunction should be granted (Mummery LJ para. 60).

7. The Court of Appeal also rejected the argument for the Defendants based

on the “stark contrast” between the prospective losses of the parties. The Defendant was at risk of a fall in the market value of £175,000 in the Defendants’ penthouse plus the costs of cutting back the infringing part (£12,000 to £35,000) if an injunction was granted. The Claimant was at risk of a £5,000/£5,500 fall in the market value of the Claimant’s maisonette if no injunction was granted. Although Mummery LJ had doubts as to this figure which he felt was too low. The reasons for ordering an injunction were that:

7.1 the injury was not a small injury. To enjoy adequate light in the most important room in his home the Claimant would either have to use artificial light or move to the part which had adequate light;

7.2 a money payment would not be adequate compensation;

7.3 the diminution in value is not a small sum and the Claimant would receive more linked to the Defendants’ profits if a release was bargained for;

7.4 the fact that the Defendants’ prospective financial loss is substantial and will probably exceed the Claimant’s prospective losses does not by itself conclude the issue of oppression against the Claimant. “It is necessary to consider all the surrounding circumstances of the dispute and the conduct of the parties.” (Mummery LJ at para. 73).

7.5 the Defendants took a calculated risk in continuing with the development after the protest by the claimant at the infringement of his right to light (Mummery LJ at para. 74). The expert advice given to the Defendants was wrong but that should not prejudice the position of the Claimant. The Defendants must take the consequences flowing from acting on wrong advice.

7.6 the Claimant’s property is his home.

In consequence a mandatory injunction was granted by the Court of Appeal. It emphasises the danger in developers continuing with a development when it is known that there is a problem and that the decision as to whether an injunction should be granted is not exclusively a matter of weighing up the respective financial losses of the parties. This approach was followed by Cooke J. in Kettel v Bloomfold [2012] EWHC 1422 (Ch) when granting an injunction to prevent a development of car parking spaces proceeding. An injunction was the prima facie remedy in the face of a wrongful act unless there are special circumstances. The availability of a convenient alternative did not avoid an injunction as it was for the property owner to decide and not for the court or the defendant to compel.

8. **Tamares (Vincent Square) Limited v Fairpoint Properties (Vincent Square) Limited** [2007] EWHC 212 Ch**.** - the case arises from the development of the Rochester Row Magistrates Court and Police Station by replacing a single storey flat roofed building with a three storey building with a pitched roof. The Claimant's complaint was that two sets of two windows at ground level were adversely affected. One set was in the entrance lobby and the other in the basement staircase. The judge found that there was no right to light in respect of the entrance lobby windows because they had been blocked internally during the relevant prescriptive period by panelling and so there had been no actual enjoyment of light.

9. As regards the two windows on the basement staircase they were never well lit by natural light prior to the development and the effect of the new building was that a considerable amount of light was lost from the treads, less from the ground floor landing and there was considerably more light for the half landing. Ignoring electric light the shift of light had made matters worse to a material extent and so this constituted a significant interference with the use and enjoyment of the stairs (Mr. G.

Moss Q.C. sitting as Deputy High Court Judge at paras. 28 to 31). However, he stated at para. 32 that

"I must also emphasise that I have come down on the side of "real injury" in the context of these two windows and on the basis of the rather artificial test I am required to apply: in the context of the entire building and the real world situation in which the stairs should probably, for safety reasons, be properly lit by electric light at all times, the complaint is a *trivial one* which one would expect reasonable people to settle without litigation."

10. This emphasises the difference between a right to light and other easements in this respect mentioned above in section.2.4. The normal use of electric light meant that in reality there was no substantial interference but the normal method of lighting the area has to be disregarded for the purposes of determining this point. This follows Midtown Limited v City of London Real Property Company [2005] EWHC 33. However, although to be disregarded on the actionability issue the judge considered that the point could be taken into account on the question of remedy.

11 Predictably the judge started consideration of the question of remedy with the Shelfer good working rule and a statement emphasising the unfettered discretion conferred on the judge. He considered that the four conditions of the working rule had been satisfied. The judge was strongly of the view that to grant an injunction would be oppressive.

12 From the judgment of Millett LJ in Jaggard v Sawyer he took the following important matters of principle:-

12.1 damages in lieu of an injunction will cover future as well as past damage;

12.2 the question of remedy is determined by reference to the circumstances at the date of the hearing;

12.3 a refusal to grant an injunction has the practical consequence of authorising the continuance of the unlawful state of affairs;

12.4 establishing the infringement of a right prima facie entitles the person harmed to the right to an injunction unless special circumstances are shown;

12.5 whether an injunction is granted is always an exercise of a discretion by the Court;

12.6 expropriation of a right must be balanced against binding a person hand and foot (see para. 2 above);

12.7 the Shelfer good working rule is a check list which has stood the test of time but which is not an exhaustive statement;

12.8 all reported decisions on the question are illustrations of the exercise of a discretion and not binding authority on how the discretion should be exercised;

12.9 usually the important question is whether in all the circumstances it would be oppressive to grant an injunction;

12.10 the conduct of the parties will be a significant influence and particularly whether the Defendant has acted in good faith and without knowledge of the right.

13. Applying these principles the judge considered that the facts of the case which were relevant to the decision were:-

13.1 no interim relief was sought and the bulk of the structure has been constructed;

13.2 a mandatory injunction would require considerable demolition and in the judge's eyes would deliver the Defendant to the Claimant bound hand and foot;

13.3 the real injury is trivial taking account of the use of electric light;

13.4 the Defendant's honestly believed, and not unreasonably, that the reduction in the Claimant's light was not an actionable nuisance. This was not a case in which the Defendant had taken a deliberate chance knowing that the action would constitute an actionable interference.

The judge as a result concluded that the grant of an injunction would cause loss to the Defendant "out of all conceivable proportion to any loss that might be suffered by the Claimant" (para.66).

14. **HKRUK II (CHC) Limited v Heaney** [2010] EWHC 2245 – the only issue in this case was whether an injunction should be granted or damages awarded. It was accepted that the upper two floors of a refurbished building in Leeds centre were an actionable interference with a right to light to the Defendant's building. The work had been carried out. No application for an interim injunction had been made. The Claimant's originally sought a declaration that no remedy was available to the Defendant. It was accepted during the trial that damages could be awarded. The judge held that an injunction should be granted because applying the Shelfer principles the damage was not small even taking account of the fact that the Defendant's building was not a home but commercial premises.

15. The Defendant had been sluggish in pursuing the matter with long gaps in the correspondence and threats which were never acted upon but as against that the judge considered that the infringement was not trivial; it was deliberate; the claimant committed it with a view to profit; it was not necessary.

16. Had there been a need the judge would have assessed damages on the "release fee" basis at £225,000 which was not a percentage of the profit but a slight increase on the reduction in the price achieved by the Claimant due to the existence of

the Defendant's right to light. It was this amount rather than the smaller amount that would have been awarded at common law for nuisance which would need to be taken into account when applying the Shelfer principles.

17. The outcomes of these cases serve to emphasise that it is dangerous to continue with a development when there is a known problem with easements. The potential for heavy financial loss is high in the event that a mandatory injunction is granted. The Court can still grant a final injunction particularly at the end of a speedy trial as in the Regan case. The absence of an application for an interim injunction does not mean that the developer can safely assume that no permanent injunction will be granted. Failure to act on the part of the person entitled to the right to light does not cause the right to an injunction to be lost. This emphasises the need for the developer to have a careful and proper assessment of whether any problems exist prior to the start of the development. If there is a problem then it needs to be addressed rather than ignored.

18 The conduct of the developer will be an important factor. Continuation with the development with knowledge of the problem will count against a developer strongly. The Courts have little sympathy for developers who chance their arm and take no notice of rights or objections. This was further emphasised in the Court of Appeal decision of Jacklin v Chief Constable of West Yorkshire supra in which a police headquarters was developed in such a manner as to obstruct a private road. The existence of rights over the road was known and an injunction granted and upheld on appeal notwithstanding arguments concerning the public nature of the developer and the need for security.

19. <u>Heads of damage</u> - Before considering how the damages are to be

calculated it is first necessary to consider the types of damage that can be recovered in the event that there is an actionable interference with an easement. This is relevant regardless of whether or not an injunction is granted because even if an injunction is granted there may still be a claim for damages in relation to past acts. In the context of damages the principal attention is focused on the amount payable if no injunction is granted. However, there are other concerns for the defendant in such a case.

20. Owers v Bailey supra is illustrative of this point. It was a dispute between neighbours involving a farmer who was blocking a way and whose conduct was found to be aggressive. Three heads of damage were considered as well as the grant of an injunction. These were

20.1 Loss in value of dominant tenement due to actionable interference – no immediate award was made because the judge wanted to find out how the Claimant's efforts to sell got on once there was an injunction in place. He adjourned that aspect of the claim on the basis of a finding that the Claimants would have sold for £550,000 but for the dispute. The judge considered that the Defendant would probably be liable for the difference between that sum and the market value at the time that the property can first reasonably be sold following the judgment. This was put on the basis that either the loss was reasonably foreseeable or the Defendant was a deliberate wrongdoer. A desire to sell which is stopped by the Defendant's conduct seems to be a pre-condition of seeking an award under this head of damage. In the appropriate circumstances it is a serious concern for a defendant as the level of damages under this head could be very high and far out of proportion to the subject matter of the dispute.

20.2 loss of amenity – traditionally the amounts awarded under this head

have been restrained but there has been a tendency to increase them. They are to compensate for the temporary loss of the right (Perlman v Rayden [2004] **EWHC** 2192 (Ch) Patten J. at para. 110**).** In Owers v Bailey £2,000 was awarded under this head.

20.3 Aggravated damages – this head is awarded when the manner of the Defendant's conduct or motive has caused distress. In Owers v Bailey the Defendant's behaviour was "intimidatory and unpleasant" and malicious as the Defendant knew that the Claimants had a right and that his conduct caused severe distress. The judge awarded a total of £4,500 under this head.

20.4 damages in lieu of an injunction did not arise in that case as an injunction was granted and this head of damages is considered in para. 21 and following.

21. Calculation of Damages in lieu of an injunction - When calculating the damages to be awarded in lieu of the grant of an injunction the general rule is that the correct measure of damages is the greater of damages for loss of amenity to the dominant owner and damages for loss of the opportunity to obtain an injunction. Normally the former will be much less than the later. For example, in the Tamares case (the damages judgment is reported under citation [2007] EWHC 212 (Ch)) the damages for loss of amenity the rival figures put to the judge were £3,030 or £680.09.

22. Damages for loss of the opportunity to obtain an injunction require the judge to determine what would be paid for the release of the right in hypothetical negotiations between two willing parties (Lunn Poly Limited v Liverpool and Lancashire Properties Limited [2006] EWCA Civ 430). It is to be assumed in these negotiations that each party will make "reasonable use of their respective bargaining positions without holding out for unreasonable amounts."(Anthony Mann Q.C. in

Amec Developments Limited v Jury's Hotel Management (UK) Limited [2001] 1 EGLR 81). A modest sum for loss of amenity will not satisfy the person entitled to the right (Millett J. in Carr-Saunders v Dick McNeil Associates Limited supra at page 931).

23. A important factor in such hypothetical negotiations will be the profits to be made by the Defendant as a result of the refusal to grant an injunction. This will be a matter for experts in that it is to be assumed that the parties in the negotiations will be receiving the same advice as is contained in the experts' evidence. How that figure is then used in the calculations varies from case to case dependent on the particular circumstances.

24. In the Tamares case the judge set out the following principles from the authorities:-

24.1 the overall objective of the Court is to find a "fair result";

24.2 the context of the hypothetical negotiations must be borne in mind including the nature and seriousness of the infringement;

24.3 the ability to prevent a development is a significant bargaining position;

24.4 to release that position a payment related to the profits from the development will normally be required;

24.5 in the absence of evidence of such profits the Court will use the damages for loss of amenity as a starting point. This occurred in Carr-Saunders v Dick McNeil Associates Limited supra in which there was no evidence of the anticipated development profits so Millett J. started with the figure of £3,000 for loss of amenity and went from this figure to an award of £8,000 by way of general damages.

24.6 the sum will normally take into account a fair share of the profit but it should not be so large that it would have prevented the development from happening;

24.7 having arrived at the figure the court must then consider all the circumstances to decide whether the "deal feels right" (.Anthony Mann QC in Amec Developments Limited supra at page 87).

25. In some circumstances there has to be the exercise of "great moderation" by the Court as in Wrotham Park Estate Co. Limited v Parkside Homes Limited ([1974] 1 WLR 798). In that case the Claimant has been aware of the development and that objection would be taken to it but did not alert the Defendant who would not have purchased the land if it had been aware of the problem. Damages were accordingly limited to 5% of the profits. The judge did not consider that this applied to the Tamares case.

26. In Tamares the calculation carried out by the judge was

26.1 the judge split the difference between the competing estimates of profits of £163,000 and £186,000 which comes to £174,500;

26.2 a one third share is then used which the judge justified by reference to the risk that the development would not proceed and by analogy to the Stokes v Cambridge decision. This produces a share of profits of £58,166;

26.3 this figure is then reduced to £50,000 due to the modest nature of the infringement and the need not to put the Defendant off the development;

26.4 then the judge has to ask whether this figure feels right. For a trivial injury it appears high but the judge considered that it is right as the price of avoiding the grant of an injunction.

27. It shows that even with trivial infringements a significant sum can be

obtained. The reason for this is that the Defendant is having to pay for the removal of a block to the intended development. However, the Claimant was not as successful in that case as might have appeared to be the case at first sight. The Claimant had sought an injunction rather than damages in order to secure a strong negotiating position. It had been seeking damages of £100,000 which it failed to achieve. When it came to costs the Claimant was only given 75% of its costs up to the liability judgment plus all the assessed costs of the assessment of damages ([2007] EWHC 828 upheld on appeal [2007] EWCA Civ 1309). From figures mentioned in the costs judgment it appears that each sides costs exceeded £165,000. The judge stated that "the costs of the proceedings are out of proportion on each side to the award of £50,000….".

28. Although a warning to developers not to ignore the possibility of rights to light, the case is also a warning to persons entitled to such rights not to adopt too hard a bargaining position. If such a person attempts to obtain an injunction with a view to extracting a greater sum from the developer this tactic may be defeated by the Court to the cost of the Claimant.

29. **Pre-emptive declaration** - It is often desirable to ascertain in advance whether a particular course of conduct will constitute a substantial interference or if it does whether damages will be awarded in lieu of an injunction. It will be preferable for a developer to know whether a proposed development can proceed without a problem before commencing the development. Similarly, an owner of land may need to have the position clarified before being able to sell to developers. In some circumstances a negative declaring preventing an injunction being granted in the future may be the appropriate answer or a "reverse summary judgment" whereby the injunctive relief sought by the Claimant is struck out.

30. Lightman J. held in Greenwich Healthcare NHS Trust Limited v London

& Quadrant Housing Trust and Others [1998] 3 AER 437 that there is a jurisdiction for the Court to make a declaration that an injunction will not be granted on the occurrence of certain events which will be a substantial interference with an easement but that the only relief available will be a claim for damages. In that case a public body wanted to realign a private right of way to enable the development of a hospital to be carried out. It was argued that this was not a substantial interference because it did not adversely affect the owner of the dominant land. The judge was sympathetic to such an argument on the basis that there was no loss but did not need to decide the point because he made a declaration that no injunction could be obtained if the specified realignment took place. In Crane Road Properties LLP v Hundalani [2006] EWHC 2066 (Ch) it was held that a relatively minor change in the route of a right of way which caused no loss would not result in the grant of an injunction as it would not be a substantial interference (para. 105 and 106).

31. The grounds for holding that no injunction would be granted in such circumstances were that no reasonable objection could be taken to such a realignment; full notice had been given and no objection raised; the realignment is necessary for an object of public and local importance. Although not mentioned the four conditions of the Shelfer working rule appeared to be easily satisfied.

32. The making of such negative declarations is not limited to matters involving public developments. In Well Barn Shoot Limited v Shackleton [2003] EWCA Civ 02 it was hoped to sell farmland for residential development but there was an issue as to whether this would interfere with sporting rights. A negative declaration was obtained that the proposed development would not be a substantial interference with the sporting rights. The Court of Appeal accepted that great care should be taken with the making of such a declaration particularly when the matter is not as clear cut

as in the Greenwich Healthcare case. It may be that it is not possible to lay down with sufficient clarity the future circumstances which will be covered by the declaration in which case no declaration can be made. The Court of Appeal also accepted that a desire to sell to developers which was being hindered by the dispute could be litigated and the case should not be characterised as hypothetical even if there was no-one ready at that time to carry out the development.

33. Such a remedy is undoubtedly a considerable assistance in the appropriate circumstances but a negative declaration is made at the end of a full trial. When time is important financially is there a speedier route that can be taken?

34. Site Developments (Ferndown) Limited v Barratt Homes Limited [2007] EWHC 415 (Ch) considered this aspect. Barratt and another developer had built out a residential development of 34 houses on land formerly part of Wimborne Railway Station. When this land was sold off a ransom strip was retained. A number of disputes arose between the successor to the original vendor and the developers. One involved access to the development over the strip. The developers claimed that it was not owned by the Claimant or if it was it was subject to a public highway or the Claimant was estopped from denying the access. When the Claimant commenced proceedings the Defendant developers applied for summary judgment to reject the claim for an injunction or an order for possession on the ground that the grant of such relief is oppressive and that it is inevitable that damages will be awarded in lieu of such relief if the Claimant were to succeed.

35. The issues affected not just the developers including the Claimant but also the householders who had been joined as defendants and some of whom wished to sell but were said to be unable to do so. The proceedings were in that respect unusual.

36. The judge set out the well known principles with respect to such an

application:-

36.1 the applicant must show the respondent that there is no real prospect of success;

36.2 a “real” prospect of success is one which is more than fanciful or merely arguable;

36.3 if it is clear that the respondent will not be able at trial to establish facts on which reliance is placed then the prospects are not real;

36.4 on such an application the Court should not conduct a trial on documents without disclosure and cross-examination;

36.5 there is no other compelling reason for a trial (CPR r.24.2(b)).

37. The judge concluded that there was a strong case for damages to be granted in lieu of an injunction and that the Claimant is unlikely to succeed in its claim to injunctive relief because to grant an injunction would be oppressive. The completion and sale of 34 houses at a cost of £5 million was put forward on behalf of the Defendants as an overwhelming factor. Added to this was the absence of vigour on the Claimant’s part including a failure to seek an interim application. But notwithstanding the presence of such powerful factors this was not considered sufficient by the judge to justify a summary judgment.

38. The reasons given for refusing the application (save as regards some minor aspects) indicates the general difficulty in obtaining such an outcome. The judge was reluctant to reach decisions on matters on which further evidence could be produced at the trial of the remaining issues in the proceedings. This was particularly so when if the application had been successful those issues would still have to be argued at trial in the context of the damages claim. This applied to matters such as the state of knowledge of the problem on the part of all parties; whether the developer

Defendants took a chance; and whether there was a mistake regarding the ownership of the ransom strip.

39. There may be a greater chance of success with such a summary judgment application if the wrong alleged is an interference with an easement rather than ownership and possession of a ransom strip. The judge was swayed in part by

39.1 the Court of Appeal decision in Harrow LBC v Donohue [1995] 1 EGLR 257which held that there was no real discretion as to the grant of an injunction when the Claimant had been dispossessed. This would not apply to a claim for infringement of an easement.

39.2 an argument that as the Claimant's case is based on ownership of land rather than a lesser right there could be an issue as to whether future acts by the owner could give rise to a dispute – for example obstruction of the sight lines by planting trees. The Claimant could still resort to self-help when acting as owner of the land.

39.3 to order summary judgment in such circumstances is expropriation of the strip and contrary to Article 1 (First Protocol to the European Convention on Human Rights). The judge was inclined to accept the submission that the award of damages in lieu of an oppressive injunction would be a fair balance in accordance with J. A. Pye (Oxford) Limited v United Kingdom.([2005] 3 EGLR 1).

40. The arguments outlined in para. 44 should not apply to an application concerning an alleged infringement of an easement. There should, therefore, be a greater chance of success with a summary judgment application in such proceedings than in the Site Developments case. In spite of this there will inevitably be reluctance to give a summary judgment without a full trial and denying the respondent the opportunity to explore the matter further (Chertsey Bridge Developments Limited v Laing Homes Limited [2006] EWCA 2637 Hart J. at para. 25).

41. **Premature Applications** – the construction of the new Crossrail link resulted in Aviva commencing proceedings for a declaration and injunction against TfL, London Underground and Derwent Valley Central on the ground that there was a risk that development was proposed to be carried around Tottenham Court tube station which would infringe rights of light which had been acquired by nearby properties owned and let by Aviva. Sir Andrew Morritt dismissed the claims in CIP Property (AIPT) Limited v Transport for London and others [2012] EWHC 259 (Ch). As against TfL and the London underground the reason for dismissal was that they had no plans to develop the land surrounding that tube. As against Derwent it was not the owner of the land but only entitled to a conditional right of pre-emption; had assured the Claimant that account would be taken of its position; had no planning permission; and no development could start until 2017 at the earliest. In consequence the claim was premature so no declaration and there was no imminent threat so no injunction.

42. If needed to bring finality to a real dispute then a declaration will be made (Pavledes v Hadjisavva [2013] EWHC 124 concerning possible alleged infringement of rights of light). This is in contrast to Hooper v Rogers [1975] Ch.43 where the defendant without warning deepened and levelled a track about 80 feet from the plaintiff's house thereby removing support from a bank for the house and putting at risk the stability of the house. The Court of Appeal upheld an award of damages in favour of the plaintiff in lieu of an injunction.

43. **Conclusions** - the following points can be drawn from the recent cases.

43.1 Right to light – the cases emphasise yet again that this is an area which

it is vitally important to assess prior to any development and that it is a particular area of law which has its own peculiar rules. There is a risk that it gets overlooked until it is too late. It needs to be treated with a great deal of caution.

43.2 There is value in defending a right to light but such defence should not be pushed too far otherwise the benefits will be seriously reduced by the costs.

43.3 Even if a claimant pushes too hard the developer defendant may suffer as well as the claimant.

43.4 Carefully judged Part 36 offers are vitally important for developers defending such a claim.

43.5 The Regan case is a warning to developer who take a chance which warning is repeated by Jacklin v West Yorkshire Police. Both these cases and subsequent cases serve to emphasise the risks run by developers who ignore rights and to alert those entitled to such rights to the possibility of an injunction.

43.6 The Tamares case emphasises the point that payments in lieu of an injunction will normally be determined by reference to a share of the developers' profits and the starting point will often be a third. It will make it harder for developers to negotiate lower payments.

43.7 In such cases it is important that the Claimant takes steps to produce evidence as to the developer's profits and obtains evidence from the developer. If it fails to then the court will be left with damages for loss of amenity as the basis for assessing damages in lieu.

43.8 An application for a negative injunction should be considered if there is a

problem which prevents development. Failure to make such an application may be used against the developer if there are subsequent proceedings (as was done in the Site Developments case).

43.9 Notwithstanding the decision in the Site Developments case there may still be scope for a reverse summary judgment application provided that the case is not "fact-sensitive".

43.10 A desire to prevent acquiescence being alleged should not push a property owner into a premature application for an injunction.

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