**Injunction or damages**

1 **Balancing exercise** - a finding in proceedings that an actionable interference with an easement 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:-

3.1 the injury to the Claimant’s right is small;

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

3.3 a small money payment is adequate compensation;

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 The Regan case – 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 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.

14. 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).

15. **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.

16. 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.
17. 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.

18. 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.

19. 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.

20 **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 20176 at the earliest. In consequence the claim was premature so no declaration and there was no imminent threat so no injunction. 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.