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## **REMEDIES AFTER COVENTRY V LAWRENCE:**

### **SHELPER SHELVED?**

by

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#### **INTRODUCTION**

1. Until recently, the principles applicable when a court had to decide whether to grant an injunction or award damages in lieu were, if not exactly crystal clear, at least flexible and generally applied by courts with a degree of commercial common sense. However two comparatively recent Court of Appeal decisions (REGAN V PAUL [2007] Ch 135 and WATSON V CROFT PROMO-SPORT [2009] EWCA Civ 15) had, in seeking to clarify the law in this regard, apparently greatly reduced this flexibility by emphasising the “exceptional” nature of the court’s jurisdiction to grant damages in lieu.
2. This area (amongst others) has now been the subject of a review by the Supreme Court in the very recent case on LAWRENCE V FEN TIGERS [2014] 2 WLR 433 (“the Coventry case”). The effect of this decision is, in my view, to restore the previously applied flexibility albeit at the expense of a greater degree of uncertainty. The case also has some interesting things to say about the calculation of damages in lieu should a court decline to grant injunctive relief.

THE COVENTRY CASE: THE FACTS

3. The case concerned a claim for injunctive relief in respect of noise nuisance. A brief chronology is as follows.
  
4. In 1975 Planning permission was granted to the Defendants for the construction of a stadium on agricultural land near Mildenhall in Suffolk. The permission allowed use for speedway purposes for a period of ten years. The stadium was constructed and use began. In 1984 the stadium started to be used for stock car and “banger racing”. This was not permitted by planning permission. In 1985 the speedway planning permission was renewed on a permanent, albeit personal, basis. In 1992 an additional use of greyhound racing commenced at the stadium. In 1992 a motocross track was constructed to the rear of the stadium pursuant to a one-year personal planning permission in respect of motocross events. This permission was renewed from time to time thereafter, subject to conditions relating to times of use and noise levels. In 1997 a certificate of lawful existing use was granted for specified numbers of stock car and “banger racing” events due to such use having become lawful in planning terms by the passage of time. In 2002 permanent planning permission was granted for motocross events, subject to conditions relating to times of use and noise levels. In January 2006 the Claimants moved into an existing bungalow (called “Fenland”), less than a kilometre from each of the stadium and the track, and half a mile from any other residence. In April 2006 the Claimants begin to complain to the local authority in relation to the noise from the track. Noise Abatement notices were served, requiring noise mitigation works to be carried out at the defendants’ land. These noise

mitigation works were carried out (late) by 2009. However, and despite this, in 2009 the Claimants brought a claim in the High Court in private nuisance against the Defendants, (who were various owners and operators of the track connected with the alleged nuisance). In 2010 “Fenland” suffered a serious fire (and is not rebuilt prior to judgment).

5. In 2011 following trial, Judge Richard Seymour QC (sitting as a deputy judge of the High Court) granted an injunction preventing activities producing noise above particular levels.
6. The Court of Appeal overturned the decision, holding that it had not been established that there was a nuisance.
7. The Claimants successfully appealed to the Supreme Court. The issues before the court were as follows:
  - (i) Whether the right to emit noise can be acquired by long user, whether as an easement by prescription or otherwise;
  - (ii) Whether the fact that a Claimant “came to the nuisance” is capable of being a defence;
  - (iii) Whether a Defendant’s activities are to be taken into account when assessing the “character of the locality”;
  - (iv) Whether and to what extent the existence of a planning permission is relevant to the question of private nuisance;

- (v) As to remedies: when the court should grant an injunction to restrain private nuisance, and on what basis should the court calculate damages.

8. In this paper, I would like to concentrate on the Supreme Court's discussion of the last of these issues. In order to put this into perspective it is necessary to spend a little time recounting the state of the law prior to the Supreme Court's decision.

#### DAMAGES IN LIEU OF INJUNCTION: BACKGROUND

9. Historically, the remedy given by courts of common law was damages. These afforded retrospective compensation for past wrongs. If the wrongs were repeated or continued, a fresh action was needed. Courts of equity, in contrast, were able to give prospective relief by way of injunction or specific performance. A mandatory injunction would require the defendant to observe a legal obligation or undo the effects of a past breach of legal obligation. A negative injunction would restrain a defendant from committing breaches of legal obligation in future. But these courts could not award damages.

10. This anomaly was mitigated by the Common Law Procedure Act 1854 which gave courts of common law a limited power to grant equitable relief as well as damages. It was further mitigated by the Chancery Amendment Act 1858 ("Lord Cairns's Act") which gave the Court of Chancery the power to award damages.

11. This enabled the Chancery Court on appropriate facts to award damages for unlawful conduct in the past as well as an injunction to restrain unlawful conduct in the future. It also enabled the Chancery Court to award damages instead of granting an injunction to restrain unlawful conduct in the future. As the courts have subsequently confirmed, such damages can only have been intended to compensate the plaintiff for future unlawful conduct the commission of which, in the absence of any injunction, the court must have contemplated as likely to occur. Despite the repeal of Lord Cairns's Act, it has never been doubted that the jurisdiction thereby conferred on the Court of Chancery is exercisable by the High Court and by county courts.
12. The jurisdiction is currently embodied in section 50 of the Senior Courts Act 1981 which reads:
- “Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance”*
13. There was from the outset, a debate as to the principles applicable. When should the court exercise this power?
14. Prior to the Coventry case, the leading case was of course SHELPER V CITY OF LONDON ELECTRIC LIGHTING COMPANY [1895] 1 Ch 287. That case involved what the Court of Appeal described as “nuisance of a very serious character” caused

by the Defendant's electricity generating machinery. This caused the pub tenanted by one Plaintiff and owned by another Plaintiff to suffer physical damage as well as noise disturbance.

15. In discussing the applicable principles Lindley LJ said (at pages 315 to 317):

*“But in exercising the jurisdiction thus given attention ought to be paid to well settled principles; and ever since Lord Cairns' Act was passed the Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or in other words, **the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict.** Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g. a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation, even for a money consideration, is only justifiable when Parliament has sanctioned it... Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, **such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances.** I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shewn that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief.”(emphasis added)*

In an even more famous passage, AL Smith LJ had this to say (at pages 323-4):

*“Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction...”*

*In my opinion, it may be stated as a good working rule 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. There may also be cases in which, though the four above-mentioned requirements exist, the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction."*

16. It is these passages, and in particular the emphasis on the "exceptional" nature of the jurisdiction together with the four enumerated conditions, which, in my view, have bedevilled discussion on this area of the law ever since this case. What is worth bearing in mind is the passage which I have omitted from the last quote from AL Smith LJ in which he says:

*"There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by this section. In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out."*

17. Following this case, there was what Lord Neuberger in the Coventry case (at paragraph 117) described as "a tension and at worst an inconsistency between two sets of judicial dicta". One strand emphasised (in my view rightly) the flexible and fact sensitive nature of the jurisdiction. The second strand emphasised the so-called "exceptional" nature of the jurisdiction and bases itself on the argument that the courts are not there effectively to sanction wrongs at the suit of those who can afford to pay.

18. The first strand was, in my view, evident in the next significant case, the House of Lords decision in COLLS V HOME AND COLONIAL STORES [1904] AC 179.

This was a right to light case. Lord Macnaghten said (at 192-3):

*“...with regard to giving damages in addition to or substitution for an injunction—that, no doubt, is a delicate matter. It is a matter for the discretion of the Court, and the discretion is a judicial discretion. It has been said that an injunction ought to be granted when substantial damages would be given at law. I have some difficulty in following out this rule. I observe that in some cases juries have been directed to give 1s. damages as a notice to the defendant to remove the obstruction complained of. And then, if the obstruction was not removed, in a subsequent action the damages were largely increased. In others a substantial sum has been awarded, to be reduced to nominal damages on removal of the obstruction. But the recovery of damages, whatever the amount may be, indicates a violation of right, and in former times, unless there were something special in the case, would have entitled the plaintiff as of course to an injunction in equity. I rather doubt whether the amount of the damages which may be supposed to be recoverable at law affords a satisfactory test. In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money.”*

19. He would not thus appear to be endorsing the rather stricter approach embodied in AL Smith LJ’s “good working rule”.

20. However in, for example, in LEEDS V SLACK (No.2) [1924] 2 Ch 475 (another rights to light case) the Court of Appeal specifically rejected a submission that



anything said in the Colls case has undermined what were described as “the rules laid down in Shelfer” which the judge had applied.

21. Perhaps the clearest and most detailed account of the court’s jurisdiction to award damages in lieu prior to the REGAN and WATSON cases was the Court of Appeal decision in JAGGARD V SAWYER [1995] 1 WLR 269. That case involved the breach of a restrictive covenant and the consequent trespass on a private road which occurred when one householder built another dwelling on land which required access over the private roadway and part of their garden. The County Court Judge refused to grant an injunction to prevent use of what was the only access to the new house over the private roadway and part of the garden. He awarded damages in lieu in the sum of £694.44, such sum being one ninth share of the total sum of £6,250 which he valued as the price the defendants might reasonably have been required to pay the nine residents of the cul de sac for release from the covenant and for a right of way. The Court of Appeal refused to overturn his ruling.
22. Of particular interest in my view are certain observations in the judgment of Millett LJ (as he then was) when, having cited from AL Smith LJ’s judgment in Shelfer, he said (at 287-8):

*“Laid down just 100 years ago, A. L. Smith L.J.’s check-list has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction. Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them*

*can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently. The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is prima facie entitled? Most of the cases in which the injunction has been refused are cases where the plaintiff has sought a mandatory injunction to pull down a building which infringes his right to light or which has been built in breach of a restrictive covenant. In such cases the court is faced with a fait accompli. The jurisdiction to grant a mandatory injunction in those circumstances cannot be doubted, but to grant it would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and would indeed deliver him to the plaintiff bound hand and foot to be subjected to any extortionate demands the plaintiff might make...In considering whether the grant of an injunction would be oppressive to the defendant, all the circumstances of the case have to be considered. At one extreme, the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights, and thereby inadvertently placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortionate demands or expose him to substantial loss. At the other extreme, the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights, and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases, like the present, fall somewhere in between”*

23. It has always seemed to me that in this passage Millett LJ struck exactly, or at least somewhere close to, the right balance.
24. However in my view (and, more importantly in the view of their Lordships in the Supreme Court) the law took a wrong turning in the REGAN and WATSON cases.
25. The REGAN case was another rights to light case in which the owner of a maisonette on the first and second floors of a building in Brighton had sought injunctive relief to stop the construction of a penthouse flat in the building opposite which was 12.8 metres away. The first instance Judge had refused injunctive relief despite finding

that the completed construction of the building would constitute an actionable interference with his right to light. He awarded damages in lieu of £5000. He held on the authorities that, in a right to light case, the burden was on the party applying for an injunction to persuade the court that an injunction, rather than damages, should be awarded.

26. The Court of Appeal overturned his order and granted the injunction to prevent any further building. Now the result in that case is very probably right. However, in addressing the law, and in particular the judgments in Shelfer Mummery LJ said this (at paragraph 36):

*“I derive from the judgments of Lord Halsbury and Lindley and A L Smith LJJ. (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is “a tribunal for legalising wrongful acts” by a defendant, who is able and willing to pay damages: per Lindley LJ, at pp 315 and 316. (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right “except under very exceptional circumstances”: per Lindley LJ, at pp 315 and 316. (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction:*

In setting out the factors which persuaded the court to grant an injunction, Mummery LJ went through the Shelfer tests. The court held that the loss of light was not a small injury and that £5000 was not a “small money payment”. Further it was not oppressive to the Defendant to grant the injunction despite the fact that the loss to it in cutting back its development was significantly more than the loss to the value of his flat which the Claimant would suffer if the development went ahead.

27. This emphasis on the “exceptional” nature of the jurisdiction to award damages in lieu and the narrow application of the so-called Shelfer principles was taken up again by the Court of Appeal in the subsequent case of WATSON V CROFT PROMO-SPORT. In that case an injunction was sought to restrain noise nuisance at a former aerodrome which had been used for motor sport. In overturning the trial judge’s decision to refuse an injunction and award damages in lieu instead, Sir Andrew Morritt VC referred with approval to the judgment of Mummery LJ in the REGAN case and (at paragraph 44) stated:

*“It is clearly established by the decision of the Court of Appeal in Shelfer that damages in lieu of an injunction should only be awarded under ‘very exceptional circumstances’. It also established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction”*

He continued (at paragraph 47) by referring to:

*“...the limitations on [the court’s] discretion to withhold an injunction...”*

28. These dicta, in my view, imposed an unwarranted and unnecessary straitjacket on the court's jurisdiction to award damages in lieu of an injunction. This new-found and rigid emphasis on the so-called Shelfer principles and the exceptional nature of the jurisdiction lead to the result in the case of HKRUK II V HEANEY [2010] 3 EGLR 15. In that case a Judge at first instance granted an injunction to compel the partial demolition and removal of the (already completed) top two floors of a commercial building which admittedly constituted an actionable interference with the right to light in another nearby commercial building. The Judge, rigidly applying the Shelfer principles and having cited the REGAN case, granted an injunction despite the fact that (a) he would have awarded damages in lieu of £225,000 and (b) he held that the works necessitated by the grant of the injunction would cost the Defendant between £1.1 and £2.5 million to carry out to which would be added the loss of future revenue from the much reduced floor area which resulted.
29. It is hardly surprising in my view that the outcome of this case caused "something of a stir" (to say the least) amongst developers.
30. However, it seems to me that, in this regard, the Coventry case has restored the law to a much more sensible and flexible state.

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THE COVENTRY CASE

31. Having reviewed the authorities, Lord Neuberger stated (paragraphs 116 to 118) that

there were two problems with the current state of the authorities:

- (i) The first was what “at best might be described as a tension, and at worst as an inconsistency, between two sets of judicial dicta since Shelfer”
- (ii) The second was “the unsatisfactory way in which it seems that the public interest is to be taken into account when considering the issue whether to grant an injunction or award damages”

32. He stated that, when asked to award damages in lieu instead of an injunction, the courts approach should be much more flexible than suggested in the REGAN and WATSON cases. Thereafter made a number of points which I derive as follows.

33. Firstly, he re-emphasised that the courts power to award damages instead of an injunction is a classic exercise of discretion and should not, as a matter of principle, be fettered as had been suggested in REGAN and WATSON. He cited with approval that part of the judgment of Millett LJ in the JAGGARD case (set out above).

34. Secondly, he confirmed that the prima facie position is that an injunction should be granted and that the legal burden was therefore on the defendant to show why one should not be granted.

35. Subject to that, however, there was, he emphasised, no presumption or inclination by the court one way or the other.

36. Fourthly, he reiterated that one of the relevant factors which can militate against the award of damages can be that the defendant has acted in a high-handed manner and/or attempted to steal a march on the claimant or to evade the jurisdiction of the court. This has been a constant theme running through many of the authorities.

37. According to Lord Neuberger, there are no special rules applicable to rights to light cases. On this point there was some disagreement. Both Lord Carnwath and Lord Mance (at paragraphs 167 and 247) expressed caution at too direct a comparison being made between the facts of cases such as the Coventry case (where the injunction would limit rather than prevent altogether the activities complained of) and rights to light cases (where the effect of an injunction may be “drastic” and result in the demolition of an already constructed building). Lord Neuberger himself recognised that, in cases involving nuisance by noise:

*“there may be more wide ranging issues and more possible forms of relief than in cases concerned with infringements of a right to light.*

38. He held that, where it arose, public interest was as a matter of law a relevant factor in the courts determination. He stated (at paragraph 124):

*“The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the*

*court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.”*

This would presumably also allow the court to take into account the fact that the wrongdoer was (to quote Lindley LJ in *Shelfer*) a “public benefactor” such as a utility company.

39. In some cases, he held, the grant of planning permission for the complained of activity may provide strong support for the contention that the activity is of public benefit.

40. In an appropriate case, the court could take into account the following factors, namely that to grant an injunction would either:

- (i) involve loss to the public or a waste of resources on account of the rights of a single claimant; and/or
- (ii) involve the defendant in financial loss disproportionate to the damage done to the claimant if left to a claim in damages.

41. And what of the Shelfer guidelines? In this respect there was a difference of emphasis.

42. Lord Neuberger said this (at paragraph 123):

*“First, the application of the four tests must not be such as “to be a fetter on the exercise of the court’s discretion”. Secondly, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to*



*refuse an injunction if those four tests were satisfied. Thirdly, the fact that those tests are not all satisfied does not mean that an injunction should be granted.”*

This might be seen to accord the guidelines some residual relevance as, perhaps, a starting point in the exercise of the court’s jurisdiction

43. Lord Carnwath stated (at paragraph 239):

*“I agree with Lord Neuberger PSC and the rest of the court that the opportunity should be taken to signal a move away from the strict criteria derived from Shelfer [1895] 1 Ch 287 . This is particularly relevant to cases where an injunction would have serious consequences for third parties, such as employees of the defendant's business, or, in this case, members of the public using or enjoying the stadium.”*

44. However Lord Sumption and Lord Clarke went much further. Lord Sumption said (at paragraph 161):

*“In my view, the decision in Shelfer [1895] 1 Ch 287 is out of date, and it is unfortunate that it has been followed so recently and so slavishly. It was devised for a time in which England was much less crowded, when comparatively few people owned property, when conservation was only beginning to be a public issue, and when there was no general system of statutory development control. The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission.”*

This approach was endorsed by Lord Clarke who (at paragraph 171) said that:

*“...the general principle is or should be that equitable relief will be granted where it is appropriate and not otherwise and that, where damages are an adequate remedy, it is inappropriate to grant equitable relief... I entirely agree with Lord Sumption, at para 161, that the decision in Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 is out of date and that it is unfortunate that it has been followed so recently and so slavishly. Indeed, I would so hold now in this appeal, although (in the absence of submissions) I would not now lay down*

*precise principles which should be followed in the future. They must be developed on a case by case basis and in each case all will depend on the circumstances.”*

45. Thus these two Judges (both former commercial practitioners) appear to have little time for the principle that a court is not “*a tribunal for legalizing wrongful acts*”. Indeed they might even have gone as far as to disapprove the proposition that the burden was on the defendant to persuade the court that an injunction should not be granted.

46. Whilst Lord Neuberger indicated (at paragraph 127) he “could see much merit” in Lord Sumption’s proposals, he was not at present prepared to go further along that route. Lord Mance, on the other hand, was not persuaded. He said, at paragraph 168:

*“...the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money. With reference to Lord Sumption JSC's concluding paragraph (para 161 above), I would not therefore presently be persuaded by a view that “damages are ordinarily an adequate remedy for nuisance” and that “an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests”—a suggested example of the latter being given as a case where a use of land has received planning permission. I would see this as putting the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance.”*

Lord Carnwath (at paragraph 247) agreed with Lord Mance as to the importance of the right to enjoy ones home without disturbance.

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INJUNCTION OR DAMAGES IN LIEU: CONCLUSIONS AFTER THE COVENTRY  
CASE

47. What conclusions can one draw from this important case? Whilst there is much that is left undetermined, there are in my view a number of points that can be made.

48. Firstly, any statement that the court can only award damages in lieu in an “exceptional” case has been strongly disapproved. Although the burden is on the defendant to persuade the court to award damages rather than an injunction, the matter is one for the discretion of the court. To that extent the dicta in REGAN and WATSON have (rightly in my view) been overruled.

49. The Shelfer guidelines, if relevant at all, are at most just that: guidelines. They are not principles to be rigidly applied. They are almost certainly no longer a “good working rule”. They cannot trammel the exercise of the court’s discretion.

50. As the Court emphasised that the matter is one of the flexible and fact sensitive exercise of discretion, even Millett LJ’s “oppression” test is probably not appropriate. There are no artificial constraints on the factors which the court can take into account in the exercise of its discretion. If relevant, the court can take into account: the public interest; the grant of planning permission; the disproportionate effect on the defendant if an injunction is granted when compared to the loss to the claimant if damages are awarded.

51. There may be different considerations in rights to light cases. Courts may be more reluctant to grant mandatory injunctions to compel the removal of buildings in rights to light cases than they are to grant injunctions to control or limit (but not totally prevent) activities which cause noise nuisance. My view is that the HKRUK II V HEANEY case would almost certainly be decided differently now.

52. On the other hand courts may be more ready to grant injunctions to protect the rights of homeowners than they will be to restrain activities which interfere with the occupation of commercial premises.

53. As I stated at the outset of this paper, the decision in the Coventry case is, in my view, to be welcomed. Albeit at the expense of a degree of uncertainty, it restores a welcome degree of flexibility to this area of the law and will permit courts to apply that law in a much more sensible and commercial way.

#### CALCULATION OF DAMAGES IN LIEU

54. It is finally worth spending a little time on what was said in relation to the calculation of damages in lieu.

55. Recent case law has supported an approach to the calculation of damages in lieu on the “wayleave” or “negotiating” basis. In WROTHAM PARK V PARKSIDE HOMES [1974] 1 WLR 798, Brightman J said this:

*“In my judgment a just substitute for a mandatory injunction would be such sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant”.*

This measure has been contrasted with damages based on the diminution of value of the wronged party’s property on the assumption that the latter is a significantly lesser sum than the former.

56. Negotiating damages have been awarded for many years in cases of trespass (see JEGON V VIVIAN (1871) LR Ch App 742, BRACEWELL V APPLEBY [1975] Ch 408). This measure has also been applied in cases involving breaches of restrictive covenant (WROTHAM PARK and JAGGARD V SAWYER) and nuisance, in including interference with rights to light, (CARR-SAUNDERS V McNEIL [1986] 1 WLR 922 and TAMARES V FAIRPOINT (No.2) [2007] 1 WLR 2167).

57. Such damages have frequently been calculated based on a percentage share of the profit made by the wrongdoer. There is a good general discussion of the applicable principles in EATON MANSIONS V STINGER [2013] EWCA Civ 1308.

58. However, the propriety of awarding negotiating damages in lieu of an injunction in nuisance cases (at least) was doubted (albeit obiter) by several of their Lordships in the Coventry case.

59. Lord Carnwath made the point most forcefully. He said (at paragraph 248):

*“...without much fuller argument than we have heard, I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants....Jaggard v Sawyer [1995] 1 WLR 269, to which Lord Neuberger PSC refers, gives Court of Appeal support for an award on that basis for trespass or breach of a restrictive covenant, but the same approach has not hitherto been extended to interference with rights of light: see Forsyth-Grant v Allen [2008] Env LR 877. In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate “price”. The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority.”*

60. Lord Carnwath’s approach no doubt derives from his vast experience of planning law.

Claims for what is known as injurious affection following exercise by a local authority of powers under section 237 of the Town and Country Planning Act 1990 or compulsory purchase under section 68 of the Land Clauses Consolidation Act 1845 and section 109 of the Compulsory Purchase Act 1965 are calculated on the basis of diminution in value and not on a negotiating damages basis. He presumably thinks that it is wrong for landowner’s loss to be calculated in one way for an interference with the enjoyment of his land following the exercise of statutory powers but in a different and more advantageous way for loss following the exercise by a court of its discretion to refuse injunctive relief.

61. His views attracted some support from Lord Neuberger who (at paragraph 128) said:

*“It seems to me at least arguable that, where a claimant has a prima facie right to an injunction to restrain a nuisance, and the court decides to award damages instead, those damages should not always be limited to the value of the*

*consequent reduction in the value of the claimant's property. While double counting must be avoided, the damages might well, at least where it was appropriate, also include the loss of the claimant's ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction."*

But added (at paragraph 131):

*However, there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted, as pointed out by Lord Carnwath JSC in para 248 below. For that reason, as well as because we have not heard argument on the issue, it would be inappropriate for us to seek to decide on this appeal whether, and if so in what circumstances, damages could be recoverable on this basis in a nuisance claim."*

62. Lord Clarke however seems not to share these doubts. He said (at paragraph 173):

*"I would leave open the question whether it may in some circumstances be appropriate to award what have been called gain-based damages in lieu of an injunction...it does seem to me that, where a claimant is seeking an injunction to restrain the noise which has been held to amount to a nuisance, it is at least arguable that there is no reason in principle why a court considering whether or not to award damages in lieu of an injunction should not be able to award damages on a more generous basis than the diminution in value caused by the nuisance, including, for example, an award which represented a reasonable price for a licence to commit the nuisance...If that can be done in trespass I do not at present see why it should not in principle be done in nuisance in a case like this, where a similar payment would give the respondents the right to commit what would otherwise be a nuisance by noise. Moreover...there may be scope for assessing the claimant's loss by reference to the benefit to the defendant of not suffering an injunction"*

63. As already stated, Lord Sumption's view was that damages should ordinarily be an adequate remedy for nuisance. He added that:

*"The whole jurisprudence in this area will need one day to be reviewed in this court"*

64. In this regard, as with the circumstances in which damages in lieu will be awarded in the first place, it seems that there is much further to come.

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