

NOT A LIGHT TOUCH: REMEDIES
IN RIGHTS OF LIGHT CASES

Tom Weekes

Landmark Chambers

March 2012

1. There are many respects in which the law relating to rights of light is unsatisfactory (especially the law relating to *prescriptive* rights of light). The principles governing rights of light law are too far removed from the law relating to other easements. Rights of light law is far too complicated. Prescriptive rights of light can be acquired too easily. It is even questionable whether a right of light (especially a prescriptive right of light) is something that is worthy of legal recognition. For dominant owners (especially those occupying commercial buildings) rights of light often appear to have little intrinsic value – and are valued by dominant owners only as a means of extracting money. If adverse possession can sometimes feel like legal theft, rights of light law can sometime feel like a method of legal extortion¹.

2. However, in part, the current (widespread) dissatisfaction with the law relating to rights of light has resulted from changes that have taken place in

¹The same was true 100 years ago. In Colls v Home and Colonial Stores Ltd [1904] AC 179, Lord Macnaughten said (at page 193) “...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. Often a person who is engaged in a large building scheme has to pay money left and right in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my experience goes, there is quite as much oppression on the part of those who invoke the assistance of the court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.”

the Courts' approach to the remedy granted to a successful litigant. That is the subject of this paper.

3. Today, Courts are more ready than they once were to grant an injunction in response to an actual, or threatened, infringement of rights of light - rather than to make an award of damages in lieu of an injunction. If damages are awarded, more money is likely to be awarded than would once have been the case. This has strengthened the hands of dominant owners. It has heightening the perception that, very often, dominant owners obtain from the Courts a remedy that is out of all proportion to any harm that might result from an infringement.

To injunct or not?

4. There are three reasons why Courts are now more likely than they once were to grant an injunction in response to an actual, or threatened, right of lights infringement.
5. First, in Regan v Paul Properties Ltd [2007] Ch 135 the Court of Appeal laid to rest the suggestion that, when determining whether to grant an injunction, the Courts should adopt a more lenient approach in a rights of light case than when dealing with an infringement of some other property right.
6. The suggestion that a more lenient approach should be adopted in a rights of light cases derived, primarily, from Lord Macnaughten's speech in Colls v Home and Colonial Stores Ltd [1904] AC 179. The learned judge said (at page 193) that, whilst an injunction was sometimes necessary in a rights of light case, at least where there was a question about whether the obstruction was legal or not and the defendant had acted fairly and not in an unneighbourly spirit, "*the Court ought to incline to damages rather than to an injunction*". In some subsequent rights of light cases, the Courts were duly inclined against granting an injunction: see Kine v Jolly [1905] 1 Ch 480 and Fishenden v Higgs & Hill Ltd (1935) 153 LT 128.

7. In Regan v Paul (supra) the Court of Appeal held that this was mistaken. As with any other case involving an infringement of a property right, a claimant in a rights of light case had a prima facie right to an injunction. It was only in “*very exceptional circumstances*” that the Court should refuse an injunction.
8. A second reason why the Courts are now more likely to grant an injunction in rights of light cases is a change in the Courts’ approach to applications for mandatory injunctions (i.e. an injunction requiring a defendant to do something, rather than merely to refrain from doing something).
9. Back in the nineteenth century, the Courts were reluctant to grant mandatory injunctions. That is because, compared to prohibitive injunctions, mandatory injunctions tend to be more costly for a defendant to comply with. That can mean that, if an injunction is granted, a claimant can become unfairly enriched. The costs of complying with a mandatory injunction may so far exceed the harm to a claimant that, if a claimant is granted an injunction, he will be able to extract from a defendant a payment in return for not enforcing the injunction which has a value far surpassing any harm that he has suffered.
10. The Courts were therefore reluctant to make orders requiring the partial demolition of buildings that had been built so as to infringe rights of light. In Isenberg v East India House Estate Co Ltd (1863) 3 De GJ & S 637, a building had been built so as to interfere with rights of light. The building work had proceeded in face of the dominant owner’s protests. The dominant owner sought an injunction requiring the partial demolition of the building. The Court refused to grant an injunction. The Lord Chancellor said (at page 641) that: “*The exercise of [the] power [to grant a mandatory injunction] is one that must be attended with the greatest possible caution. I think, without intending to lay down any rule, that it is confined to cases where the injury done to the Plaintiff cannot be estimated and sufficiently compensated by a pecuniary sum*”. So, in that case, the Court refused to “*deliver over the*

Defendants to the Plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may...make”.

11. This caution when faced with an application for a mandatory injunction persisted well into the twentieth century.
12. In Morris v Redland Bricks Ltd [1970] AC 652 a landowner extracted clay on his land to make bricks. The excavations caused a slippage of neighbouring land. The owner of that neighbouring land sought a mandatory injunction requiring the brick manufacturer to take all necessary steps to restore support to his land. Unless such works were undertaken, it was probable that further damage would be caused. Nevertheless, the House of Lords refused to grant a mandatory injunction. Lord Upjohn commented (at page 665) that: *“The grant of a mandatory injunction is...entirely discretionary and unlike a negative injunction can never be “as of course”*”. He said (at page 666) that, when deciding whether to grant a mandatory injunction, *“...the amount to be expended under a mandatory order by the defendant must be balanced...against the anticipated possible damage to the plaintiff and if, on such balance, it seems unreasonable to inflict such expenditure...then the court must exercise its jurisdiction accordingly”*².
13. That caution when faced with an application for a mandatory injunctions has, over recent years, dissipated.
14. A well-known recent illustration of this, in the context of a rights of light claim, is provided by HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245,

² In Jaggard v Sawyer[1995] 1 WLR 269 Millett LJ said at page 288 that: *“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”* (see also Gafford v Graham (1999) 77 P&CR 73, per Nourse LJ at page 85 - *“as a general rule, someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by whilst a permanent and substantial structure is unlawfully erected, ought not to be granted an injunction to have it pulled down”*).

[2010] 3 EGLR 15. A property had been built in Leeds City Centre so as to infringe a neighbouring property's rights of light. The dominant owner applied for an injunction requiring the partial demolition of the building. The Court granted that injunction. In doing so, the judge applied guidelines contained in Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287. However, the judge, together with the judges in a number of other recent cases, lost sight of the fact that Shelfer was a case about an application for a prohibitive injunction (not a mandatory injunction); and that, at least traditionally (and certainly when Shelfer was decided), the Courts adopted a much more cautious approach to applications for mandatory injunctions.

15. As a result of the very high costs of demolishing the top storeys of the building that was the subject of the Heaney case, the judge, by granting a mandatory injunction, did deliver the developer to the dominant owner "*bound hand and foot*". The case has settled. The terms of the settlement are not known. But the top stories of the building have not been removed. It is therefore reasonable to suppose that the dominant owner was able to extract from the developer a handsome payment out of all proportion to any harm that may have been caused by the rights of light infringement.

16. The final reason why the Courts are now more likely than they once were to grant injunctions in rights of light cases is that, over recent years, they have adopted a rather narrow approach to the exercise of their discretion over whether or not to grant an injunction.

17. In recent cases (including Heaney) the Courts have, when determining whether to grant an injunction, focussed somewhat narrowly on A.L. Smith LJ's "good working rule" in Shelfer v City of London Electric Lighting Company [1895] 1 Ch 287. That rule is as follows (see pages 322 to 323):

...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 which it would be oppressive to the defendant to grant an injunction;

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

18. In the past, judges have emphasized that this “working rule” is just that. It should not be applied inflexibly. In Gafford v Graham (1999) 77 P&CR 73, Nourse LJ said (at page 85) that “*it is important to emphasize that the principles [set out in A.L. Smith LJ’s judgment in Shelfer], being principles of discretion, must always remain adaptable to the facts of the case.*” In Jaggard v Sawyer [1995] 1 WLR 269, Millet LJ said at pages 287 to 288 that “*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.*” The learned judge went on to say that: “*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?*”

19. Nevertheless, recent cases (in particular, Regan v Paul Properties Ltd (supra), Jackson v Chief Constable of West Yorkshire [2007] EWCA Civ 181, per Lloyd at paragraph 48, and Heaney (supra)), rather than regarding oppressiveness as the touchstone, have, when determining whether to grant an injunction, focussed much more intently on A.L. Smith LJ’s checklist.

20. The application of that checklist, in essence, restricts awards of damages in lieu to cases in which an interference has been trivial *and* it would be oppressive to grant an injunction.

21. At least in rights of light cases in which a mandatory injunction is sought requiring the partial demolition of a building, this “good working rule”

might be thought to be a rather bad way to decide whether or not to grant an injunction. The checklist pays insufficient regard to features of a case which might be thought to be central to the question of whether it would be just to grant an injunction. Namely, in a case in which an injunction is sought for the partial demolition of a building, such things as the waste in requiring the partial demolition of a socially valuable asset; the extent to which the dominant owner has been vigilant in protecting his rights; whether should have been obvious that the building would infringe the rights of light; and whether a servient owner has deliberately built so as to interfere with the rights of light (rather than having believed that there would be no such infringement)³.

22. Moreover, at least as these guidelines are currently being interpreted by the Courts, it is very difficult for a servient owner in a rights of light test ever to satisfy the criteria imposed by A.L. Smith LJ's "good working rule".

23. In Colls (supra) the House of Lords held that the test for determining whether there is an actionable interference with rights of light is whether there has been a substantial loss of light so as to render the occupation of the house less fit for occupation and uncomfortable according to the ordinary notions of mankind. If the cause of action is established only if the interference is substantial, it is, on the face of it, difficult to understand how a servient owner could establish, when it came to the question of whether an injunction should be granted, that the interference is trivial. This point was considered by the Court of Appeal in Slack v Leeds Industrial Co-operative Society Ltd [1924] 2 Ch 475, in which Sargant LJ suggested (at page 494) that there was only "a border line of cases" where "*the obstruction of light where the injury may be sufficiently substantial to justify some relief, and yet may be of*

³ Traditionally, the fact that a servient owner has proceeded on the basis of professional advice that a development will not interfere with rights of light, has been thought to provide a reason for not granting an injunction: see Snell & Prideaux Ltd v Dutton Mirrors Ltd [1995] 1 EGLR 259 and Tamaraes Ltd v Fairpoint Properties Ltd [2007] 1 WLR 21 48. However, in Regan v Paul (supra) Mummery LJ said (at page 149) that: "*The defendants who took and acted on the wrong advice [of a rights of light surveyor] must take the consequences and not throw them on to [the Claimant] in order to deny him his prima facie right to protect his property by injunction.*"

so comparatively small a character as to be properly and adequately compensated in damages.”

24. Another point is that, in both Regan v Paul (supra) and Heaney (supra), the Court, departing from a number of previous authorities⁴, considered that, for the purposes of ascertaining whether the claimant’s injury “*can be adequately compensated by a small money payment*”, it is relevant to ask whether, if the Court awarded damages in lieu of an injunction, a substantial sum would be awarded. This poses a problem for a servient owner because an award of damages in lieu will *invariably* result in an award of a substantial sum. That is because such damages are usually quantified by reference to the sum that, before the start of building works, a reasonable person in the position of the servient owner could have negotiated with a reasonable person in the position of the dominant owner for the relaxation of the rights of light to permit the development. Typically, that will be a substantial proportion of the profits (or notional profits) of the development.

25. It is little short of perverse to think that the Courts should be more likely to grant an injunction if the profits (or notional profits) of the development would be large rather than modest. Surely, the fact that great value can be derived from a development should make the Court less, not more, inclined to grant an injunction. The Court should not be more disposed to prevent a big profitable development than a small unprofitable development.

Damages in lieu of an injunction

26. The final point to make is that, today, very substantial sums can be awarded as damages in lieu of an injunction. This has been the subject of a paper delivered at a previous Landmark Chambers seminar on rights of light (available on our website), so little need be said about it. Over the years, awards of damages in lieu have tended to increase. In Tamares (supra) the Court accepted that an appropriate starting point for thinking about the

⁴ See, Gafford v Graham (supra) , per Nourse LJ at page 80 Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch), Peter Smith said at paragraph 74, and Site Developments (Ferndown) Ltd [2007] EWHC 415 (Ch), per Richard Arnold QC at paragraph 63.

amount of damages that should be awarded is one third of profits (or nominal profits).

This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents.