

## QUANTIFYING DAMAGES IN LIEU

### IN RIGHTS OF LIGHT CASES

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1. If a court has *jurisdiction*<sup>1</sup> to grant an injunction to remedy (or prevent) an infringement of rights of light, the court may - instead of granting an injunction - award damages.<sup>2</sup>
2. In Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2007] L&TR 6, Neuberger LJ (at paragraphs 22 and 24), whilst stating that the court is not limited to any particular way of assessing “damages in lieu of an injunction”, identified the following three methods of quantifying such damages:
  - **To reflect the traditional way of quantifying compensatory damages.**

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<sup>1</sup> Damages in lieu of an injunction cannot be awarded if there is an equitable defence to a claim for an injunction (such as laches, acquiescence or estoppel); or if, for some other reason, the court has no jurisdiction to grant an injunction (see Loverly v Pursell (1888) 39 Ch.D 508, Surrey v Bredero Homes Ltd [1993] 1 WLR 1361, and Jaggard v Sawyer [1995] 1 WLR 269, per Millett LJ at pages 285 and 287). There is no requirement that damages have been claimed in the proceedings: see Pell Frischmann Ltd v Bow Valley Iran Ltd [2011] Bus LR Digest D1, per Lord Walker at D3.

<sup>2</sup> The jurisdiction was originally conferred by section 2 of the Chancery Amendment Act 1858 (“Lord Cairns’ Act”). Today, section 50 of the Senior Courts Act 1981 provides that:

“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.”

- **“Negotiating damages”**. Namely - in a rights of light case - the “reasonable price” that the dominant owner might have extracted in return for a relaxation of the rights of light so as to enable the development to be undertaken lawfully.
  - **An account** - requiring, in a rights of light case, the payment of a sum equivalent to the profit that the developer was able to make as a result of being able to carry out the development in a manner that interfered with the rights of light.
3. An account can now be excluded. In Forsyth-Grant v Allen [2008] EWCA Civ 505, [2008] Env LR 41 an account was claimed as a remedy for an infringement to rights of light. The cause of action for a right of light infringement lies in nuisance. The Court of Appeal held, by a majority<sup>3</sup>, that an account is not an available remedy in nuisance. An account of profits is a different remedy to an award of damages. And, at least hitherto, an account been awarded only where: (i) the defendant was in a fiduciary (or quasi-fiduciary) relationship with the claimant (the rationale being that a fiduciary ought to be acting for the beneficiary and so the beneficiary should be put in the same position as if the fiduciary had done so); or (ii) where the defendant had unlawfully made some use of the claimant’s property - e.g. in cases of trespass to land, conversion of chattels, and copyright or trademark infringements.

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<sup>3</sup> Patten J and Mummery LJ. Toulson LJ left open whether, in an appropriate case, an account of profits could be awarded as a remedy in nuisance. The learned judge said, at paragraph 47, that: “Having rejected [counsel’s] general proposition that [an account of profits] is available as [of] course on facts such as the present, I would leave open the question whether a restitutionary award may be available on the facts of a particular case of nuisance, given the developing state of the law, because it seems to me better that any such question should be addressed in the light of the particular features said to justify that remedy in the particular case. If it be that the law does develop in such a way as to make such relief available in an appropriate case, I am satisfied that this is not such a case.”

4. Accordingly, at least in most cases, the choice for the court, in a rights of light case, when quantifying damages in lieu will be between: (i) assessing damages using the conventional method for quantifying compensatory damages; and (ii) awarding (what Neuberger LJ referred to as) “negotiating damages”.
5. The choice over which method to adopt will depend upon what is the “just response” to the (actual or threatened) interference: see World Wide Fund for Nature v World Wrestling Fedn [2007] Bus LR 1252, per Chadwick LJ at page 1282.
6. However, typically<sup>4</sup>, a court, when awarding damages in lieu in a rights of light case, will award “negotiating damages”.
7. The starting point of the modern law<sup>5</sup> concerning “negotiating damages” is the famous case of Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798 (which has led to such damages sometimes being referred to as “*Wrotham Park* damages”). A developer, Parkside Homes, built some houses on a plot situated on a housing estate in breach of a restrictive covenant prohibiting developments other than in accordance with plans approved by the estate owner. Brightman J refused to grant an injunction requiring the demolition of the houses: the demolition of the houses would have been an “unpardonable waste”. Instead, the judge awarded damages in lieu. The defendants (being the developer

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<sup>4</sup> In Forsyth-Grant (supra) the court, unusually, refused to grant “negotiating damages”. That was because, before the development was undertaken, the dominant owner refused the developer’s offer to enter into negotiations over the payment of compensation. Toulson LJ said at paragraph 39 that:

“In the present case there was every reason not to give the [owner of the hotel] compensation on the basis of what she could have bargained for, because the [developer] had been willing to bargain but she had refused his invitation to do so. Since she refused that opportunity I cannot see, as a matter of justice, why she should be entitled to any greater remedy for the infringement of her rights to light than damages for loss which she actually suffered as a result of the infringement...”

<sup>5</sup> This method of quantifying damages dates from mid-nineteenth century cases relating to unauthorised mining - the “wayleave” cases: see Martin v Porter (1839) 5 M&W 351, Jegon v Vivion (1871) LR 6 Ch App 742 and Phillips v Homfray (1871) LR6 Ch App 770.

and the purchasers of the houses) argued that only nominal damages should be awarded on the ground that the breach of covenant had not - "by one farthing" - diminished the value of the estate.

8. Brightman J held that an award of only nominal damages would not be a fair outcome. At page 815, the learned judge said that:

"...the general rule would be to measure damages by reference to that sum which would place the plaintiffs in the same position as if the covenant had not been broken. Parkside and the individual purchasers could have avoided breaking the covenant in two ways. One course would have been not to develop the...site. The other course would have been for Parkside to have sought from the plaintiffs a relaxation of the covenant. On the facts of this particular case the plaintiffs, rightly conscious of their obligations towards existing residents, could clearly not have granted any relaxation, but for present purposes I must assume that it could have been induced to do so. **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.**"

9. In a rights of light case, "negotiating damages" will be quantified as equivalent to such sum as might reasonably have been demanded by the dominant owner for releasing the rights of light to the extent required to enable the developer lawfully (i.e. without any rights of light infringement) to carry out the development<sup>6</sup>.

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<sup>6</sup> If there are several people enjoying the rights of light, it is necessary to: (i) identify the sum that could reasonably have been demanded by all those with the rights to light; and (ii) allocating an appropriate proportion

10. The object of the exercise is not, at least in any conventional sense, to compensate the claimant for any financial losses that he has suffered. In particular, the court is not concerned with compensating the claimant for any financial losses that he has, in fact, suffered from having lost an opportunity to negotiate a premium in return for the relaxation of the rights of light: in contrast to the exercise under discussion, a “loss of chance” case requires the court, amongst other things, to assess the likelihood that the claimant would, in fact, have taken the opportunity to negotiate the premium<sup>7</sup>. Instead, the court attempts, in an objective sense, to identify the value of right to an injunction that will never be granted; or, to put it another way, the fair price that could have been extracted for the release of the right to an injunction. The process is similar to identifying a market value, albeit in circumstances where there is no market but only a single seller and buyer.
11. To assist the court in the task of establishing the value of the injunction that will not be granted, the courts have found it helpful to imagine a hypothetical negotiation between the dominant owner and the developer over the amount of the premium that the dominant owner might have demanded for the release of the rights of light to the required extent.

### **Assumptions to be made about the hypothetical negotiation**

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of that sum to the claimant or claimants (see Small v Oliver & Saunders (Developments) Ltd [2006] 3 EGLR 141, per Mark Herbert QC (sitting as a Deputy High Court Judge) at paragraph 90).

<sup>7</sup> In Lane v O'Brien Homes [2004] EWHC 303 (QB), David Clark J said at paragraph 22 that:

“Assessing damages on the Wrotham Park basis is not, in my view, the same thing as awarding damages for the loss of a chance, when a two-stage assessment has to be made: first, of the value of the potential benefit lost as a result of the relevant wrong and, secondly, of the degree of probability that this benefit would have accrued but for the wrong. Awarding damages for the loss of that bargaining power does not involve this two-stage approach.”

12. The authorities, whilst emphasising that there are no rigid rules<sup>8</sup> (and although the authorities are not, in all respects, consistent), have, in recent years, fleshed out the approach that the court should take when considering the “hypothetical negotiation”.

Parties to the hypothetical negotiation

13. To what extent should the parties to the hypothetical negotiation be taken to share the characteristics of the actual dominant owner and servient owner?

14. Given that the object of the exercise is to identify, in an objective sense, the value of an injunction that will never be granted, the parties to the hypothetical negotiation must each be assumed to be reasonable people who would, following a negotiation, settle on a fair figure for the price of releasing the rights of light to the required extent. That is why, in Wynn-Jones v Bickley [2006] EWHC 1991 (Ch), HHJ Hodge QC (sitting as a Judge of the High Court) said, at paragraph 15, that the court should ignore:

“...the positions and characteristics of the actual parties involved in the dispute, save to the extent that those positions and characteristics were inherent in the position of the hypothetical parties to the negotiation”.

15. So, whilst the parties to the hypothetical negotiation should be taken to share some of the general characteristics of the actual parties (the servient owner should, for example, be assumed to share the actual servient owner’s characteristics as, say, a professional developer or a (rich or poor) owner-occupier), the parties to the hypothetical negotiations should not be taken to share any “personal agendas” of the

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<sup>8</sup> See, for example, Lunn Poly (supra), per Neuberger LJ at paragraph 33, and the WWE, per Peter Smith J r- especially his reference to “the flexibility of the court as to the calculation of the damages under the Wrotham principle when applied to the facts of the case.”),

actual parties. Nor should they be taken to share characteristics or predispositions of the actual parties that would make them more or less likely successfully to exploit any bargaining position that they might have<sup>9</sup>. Instead, each of the parties to the hypothetical negotiation “are to be assumed to act reasonably”<sup>10</sup>. The dominant owner should be assumed to be “a willing seller, but only at a proper price”; the developer should to be taken to be “a willing buyer, wanting to acquire the right...and prepared to pay a proper price but not a large ransom”; and it should be assumed that “the parties would proceed on common ground, put forward their best points and take into account the other side’s best points”<sup>11</sup>.

16. Having said that, the stance taken by actual parties during any communications or negotiations can provide evidence of the likely attitude of the hypothetical parties: see Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2007] L&TR 6, per Neuberger LJ at paragraph 32 and Tameres Ltd v Fairpoint Properties Ltd (No.2) [2007] 1 WLR 2173<sup>12</sup>.

#### Date of the hypothetical negotiation

17. When is the hypothetical negotiation to be taken to have been conducted?

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<sup>9</sup> In HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch), HHJ Langan QC, in quantifying damages in lieu (in the alternative to his grant of an injunction to remedy a rights of light infringement), was wrong to reduce his award on the ground that it was “unlikely that [the actual dominant owner] would have pushed hard in negotiations”.

<sup>10</sup> Pell Frishmann Ltd v Bow Valley Iran Ltd [2011] Bus LR Digest D1, per Lord Walker at page D4.

<sup>11</sup> See AMEC Developments Ltd v Jury’s Hotel Management (UK) Ltd [2002] TCLR 13, per Anthony Mann QC (sitting as a Deputy High Court Judge) at paragraph 35.

<sup>12</sup> In Tameres the Court had regard to the fact that the servient owner’s right to light surveyor, unwisely, had in open correspondence sent to the servient owner’s right to light surveyor a calculation of a potential buy-out of a right to light in which he assumed that the share of the profit would be one-third.

18. The assumed date of the hypothetical negotiation can have a significant effect on its outcome. Generally, a dominant owner might be expected to prefer a later date for the hypothetical negotiation: the more advanced the developer's plans the more likely the dominant owner will be to have him "over a barrel". However, when property prices are falling and that is reducing the anticipated profitability of the development, the dominant owner will prefer an earlier valuation date.

19. There is no inflexible rule. However, at least generally, the hypothetical negotiation will be taken to have taken place on date on which the parties would, had they acted reasonably, have chosen to conduct the negotiation. Usually, that will be assumed to be before building works commence. In Heaney (supra), the judge said (at paragraph 89):

"Reasonable people want to know at an early date where they stand, and a reasonable developer does not risk his money on works which he may be ordered to pull down"<sup>13</sup>.

#### Form that the negotiation will take

20. If there are "spoils" to be yielded from being able to infringe rights of light, the court is likely to assume that the negotiation would take the form of an argument about how those spoils should be split between the dominant owner and the servient owner.

21. If the servient owner is a for-profit-developer, the dominant owner will be assumed to want a share of the anticipated profits of being able to

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<sup>13</sup> See also Lane v O'Brien Homes [2004] EWHC 303 (QB), per David Clarke J at paragraph 24 – (in the context of a case in which a collateral contract imposed a limitation on the number of houses per plot): "the relevant time is the time at which the defendants would have sought to be released from their contractual commitment to build no more than three new houses on the land: namely the time at which the planning permission for four had been granted".

undertake the development in a manner that interferes with the rights of light. In the case of a not-for-profit-development, the dominant owner will be taken to want a share of the “notional profit”, namely a share of the difference between the increased construction costs, and increase in the value of the property, of being able to undertake the development in a way that infringes the rights of light: see, for example, Bracewell v Appleby [1975] 1 Ch 408). All this may raise evidentially complex issues relating to the alternative ways in which the development could have been undertaken which would not have involved any rights of light infringement. In turn, may raise questions, not only about the scope for a physical re-configuration of the development, but also of whether any re-designed development would have obtained planning permission.

Actual profits and (actual) anticipated profits?

22. In the case of a for-profit-development, should the court have regard to the developer’s actual anticipated profits at the relevant time? That may appear problematic if the (actual or hypothetical reasonable) developer would not, in fact, have provided the dominant owner with those figures if he had entered into a negotiation for the relaxation of the rights of light? Further, given that “principle and consistency indicate that post-valuation events are normally irrelevant”<sup>14</sup>, should the court take account of any actual profits (or, perhaps, losses) that the developer was ultimately able to make?

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<sup>14</sup> See Lunn Polly (supra), per Neuberger LJ at paragraph 29. In World Wide Fund for Nature v World Wrestling Federation Entertainment Inc [2006] EWHC 184 (Ch), [2006] FSR 663, Peter Smith J said at paragraph 174 (of his first instance judgment) that:

“The outcome of [the] hypothetical negotiation must be determined by reference to the parties’ actual knowledge at the time that negotiations would have taken place”.

23. In the event, the courts have, not only taken account of developers' estimates of profits, but they have also had regard to the actual profits that have been made: see, for example, Wrotham Park v Parkside Homes (supra), per Brightman J at p.815 ("with the benefit of foresight the developer would, in the present case, have said about £50,000 for that is the profit which Parkside concedes it made from the development"); Carr-Saunders v Dick McNeil Associates [1986] 1 WLR 923, per Millett J at p.931 ("no one recognised that documents which would throw light upon the profit to be made from the development were material and ought to be disclosed on discovery"); and AMEC (supra), per Anthony Mann QC at paragraphs 13 and 32 ("The negotiation analysis should not be taken to its logical end. I do not have to guess at something that events have in fact made certain").

24. Various possible justifications emerge from the case law.

25. The actual profits made by the developer may, of course, provide a useful guide to what the parties would have thought, at the time, about the likely profits: see Pell Frischmann (supra), per Lord Walker at page D4. It might also be thought to be disproportionate for the court to undertake the difficult task of ascertaining what the parties would have anticipated the profits to be, in light of the information known to them at the time, when the actual profits are known: see, in relation to a similar issue, Lunn Poly (supra), per Neuberger at paragraph 31. Finally, given the "quasi-equitable nature of such damages"<sup>15</sup> (whilst awarded under a statute, they are in lieu of an equitable remedy), fairness, and a sense that the developer should pay the true value of the loss of the

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<sup>15</sup> See Lunn Poly (supra), per Neuberger LJ at paragraph 29.

right to an injunction, might be said to require the quantification of damages to be based on actual profits<sup>16</sup>.

**The percentage of anticipated profits that will be awarded?**

26. A reasonable, if rather crude, starting-point for thinking about what the court is likely to regard as the probable outcome of the hypothetical negotiations is 1/3 of the anticipated profits, or anticipated “notional profits”, of being able to undertake the development in a manner interfering with the rights of light.

27. In Tamara Ltd v Fairpoint Properties Ltd (No.2) [2007] 1 WLR 2167, Gabriel Moss QC (sitting as a Deputy High Court Judge) said at page 2173:

“The use of a third share perhaps illustrates expectations in a negotiation of this kind, and seems to accord with common sense, which requires the proposed share of profit not to be so high as to put the developer off the relevant part of the development. It must be remembered that if a developer agrees to pay a third of an expected development profit regardless of whether it is actually made or not, he is taking a risk and the other party is not. This helps to explain the reasonableness of the one-third/two-thirds split rather than say a 50/50 or 40/60 split in a commercial context. The one-third approach can also be derived by analogy from the approach of the Lands Tribunal in the compulsory

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<sup>16</sup> Perhaps this is what Anthony Mann QC (sitting as a Deputy High Court Judge) was alluding to when, in AMEC (supra), he said at paragraph 32 that taking account of actual profits “makes sure that the hypothetical negotiations have at least one foot in the realms of reality and limits the possibility of over- or under- compensation.”

purchase decision of *Stokes v Cambridge Corpn* (1961)  
13 P&CR 77.”

28. However, circumstances vary widely. In AMEC, Anthony Mann QC (sitting as a Deputy High Court Judge) emphasized, at paragraph 35(n), the need to arrive at a figure that “feels right.” Very often, there will be factors in a case that will push damages substantially below, or substantially above, one third of the anticipated profits.
29. The extent to which the development detrimentally affects the dominant land will obviously have an impact on the sum that the dominant owner would be prepared to accept. In Tamares (supra) damages were reduced from £58,166 (being 30% of anticipated profits) to £50,000 as a result of the modest nature of the infringement<sup>17</sup>. In Wrotham Park (supra) the court awarded only 5% of anticipated profit. That was, in part, due to the fact that the impact of the development on the remainder of the estate was minimal. The court also took account of the fact that the estate owner enjoyed the benefit of the restrictive covenants, not for its own commercial benefit, but for benefit of residents of estate - included most of the defendants, who were owners of houses that had been built in breach of the restrictive covenant.
30. If the servient owner is an owner-occupier that might increase the amount of damages. In Bracewell v Appleby [1975] 1 Ch 409, in which the dominant owners were awarded 40% of notional profit, the court had regard to the fact that the servient owner wanted “to live in, and does now live in, [the property that had been built] and...would have been prepared to pay what is relatively to his notional profit quite a large

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<sup>17</sup> See also Bracewell v Appleby [1975] 1 Ch 408, Carr-Saunders v Dick McNeil Associates [1986] 1 WLR 922, per Millett J at p.931, Deakins v Hookings [1994] 1 EGLR 190, per HHJ Cooke at page 196, and Small v Oliver & Saunders (Developments) Ltd [2006] 3 EGLR 141, per Mark Herbert QC (sitting as a Deputy High Court Judge) at paragraph 93.

sum...to achieve the building of his new home.” Equally, in Wynn-Jones v Bickley [2006] EWCA 1991 (Ch), it was held that a wealthy owner-occupier would have paid a sum equivalent to 50% of the (quite modest) notional profit of a residential building extension.

31. Finally, the courts have made it clear that, in assessing damages in lieu, it is permissible to have regard to factors that, at least on the face of it, have nothing whatsoever to do with the outcome of any hypothetical negotiations; but, rather, relate to the extent to which the parties have behaved well or badly. In AMEC (supra), the judge said, at paragraph 32, that damages should be increased if the servient owner has concealed his intentions so as to steal a march on the dominant owner; and, in Wrotham Park (supra), damages were reduced because the estate owner had stood by and allowed the development site to be sold without indicating that it would not consent to the development.
32. Taking account of the conduct of the parties is, perhaps, justifiable on the basis that “damages must be assessed in such a case on a basis which is fair” (see Wrotham Park (supra), per Brightman J at page 816).

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