Case No. HC05C02676

Neutral Citation Number: [2006] EWHC 3589 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

4 September 2006

BEFORE:

MR G. MOSS QC,
SITTING AS A DEPUTY HIGH COURT JUDGE

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BETWEEN:

TAMARES (VINCENT SQUARE) LIMITED

Claimant

AND

FAIRPOINT PROPERTIES (VINCENT SQUARE) LIMITED

Defendant

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- -

Mark Wonnacott (instructed by Ashfords) for the Claimant
Philomena Harrison (instructed by Davenport Lyons) for the Defendant

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JUDGMENT

Introduction

1. This is a dispute regarding rights to light between two property companies.

2. The Claimant owns the "dominant tenement" in the technical language used in easement cases, which I will refer to as the "dominant land", an office building not currently in use, known as the "Olsen" building after a previous owner, at *64/65* Vincent Square, Westminster.

3. The Defendant owns the servient land (technically, the "servient tenement"), an adjoining development site. That site was formerly the Rochester Row Magistrates Court and Police Station. As part of the redevelopment, the Defendant has knocked down a single storey flat roofed building and put up a tshaped 3 storey building with a pitched roof. It is this development which the Claimant says will interfere with the light to certain windows in the Olsen building.

4. There are four relevant windows facing the development, each at ground floor level. Although in principle each window should be looked at separately, much of the evidence and discussion has for convenience grouped them into two groups of two windows each. The two groups are respectively the entrance lobby windows and the basement staircase windows.

5. The parties agree that there are three sets of issues to be decided at this trial:

   (i) Does the Olsen building have a right to light through each of the four windows?
   (ii) If so, has there been or will there be an actionable infringement of that right arising from the development in respect of any one or more of the four windows?
   (iii) If so, what is the appropriate remedy?

Issue (1): Have rights to light been established in respect of the entrance lobby windows?

6. Although no admission has been made in respect of the basement staircase windows, there is no real issue that the Claimant can rely on a right for the Olsen building to receive light through those two windows. The nature of that right to light and further questions will be dealt with below.

7. The position of the entrance lobby windows is, however, very different. The Claimant accepts that I must assume that throughout the relevant 20 years prescription period these windows have been completely blocked on the inside by means of panelling which is part of the design of the entrance lobby. It follows that throughout the 20 year period the entrance lobby has received no light through these windows. At the invitation of the Claimant and without objection from the Defendant I visited the site with Counsel and others and saw for myself that the panelling has a solid appearance and it is impossible to tell *from the inside* of the Olsen building that there are two windows behind the

panelling. During the site visit I also looked at the windows from the outside. Whether because of the type of glass or the nature of the lighting, or because of the nature of the internal obstruction, I could not see from the outside anything of the obstruction on the inside. I could not in fact see anything on the inside of the Olsen building from the outside, looking through these two windows.

8. The question that arises is whether such a blockage of the windows from the inside for the entirety of the prescription period prevents a right to light through those windows being acquired on behalf of the Olsen building.

Smith v. Baxter

9. The Defendant relies on the case of *Smith v. Baxter* [1900] 2 Ch 138, a decision of Sterling J. Focusing only on the material parts of the facts of that case, parts of the relevant windows were near printing machines at which printers worked with their backs to the light "and it was found that accidents repeatedly occurred by which these portions of the windows were broken". (At page 140). Those portions were therefore blocked off. With regard to another window, about one half of the area of the window had been covered by open shelving used for drying printing work. The shelves were from 3 inches to 1 foot apart and projected about 2 feet and caused "a material interference with light, though a substantial quantity of light still passed into the plaintiffs building".

10. There was some debate between Counsel before me as to whether in *Smith v. Baxter* the boarding up of those parts of the windows which were repeatedly broken was on the inside or the outside, but it seems to me that as a matter of common sense the boarding must have been on the inside, that being the clear inference from the stated rationale that the boarding took place to prevent the windows (ie the panes) being broken. Boarding from the outside would not have prevented the window panes being broken (or at least it was unlikely to have prevented it) and the possibility that the boarding up was on the outside combined with the removal of the panes, whilst possible, seems a less probable inference than the more obvious one of boarding up from the inside. I was informed that no question of a "window tax" would have arisen. (In fact, I believe it was abolished in 1851.)

11. Sterling J held that since the boarding up of parts of certain windows "absolutely excluded the light which arrived at those portions of the windows" there was no "user of the light actually enjoyed for the prescriptive period". By contrast the shelving did not entirely exclude the light, but allowed a substantial portion of it to pass" and as a result "a sufficient ease" for a right to light was made out with regard to that window.

12. On the basis of *Smith v. Baxter* therefore, it would appear that the complete boarding up in the present case of the windows in the reception area throughout the entire prescriptive period, even though it was on the inside, means that no right to light was acquired. However, Mr Wonnacott for the Claimant suggested that the position one might have derived from *Smith* V. *Baxter* was altered by subsequent case-law, which made it clear that the internal arrangement of the dominant land was irrelevant and he submitted that it

was sufficient that light entered the dominant land through the relevant windows and illuminated the back of the boarding put in place excluding the light from the reception area.

13. It is true that subsequent eases such as *Price v. Hiliditch* [1930] Ch 500 (the "scullery" case) show that the use to which an internal room or space is put does not restrict the width of the easement acquired. Thus in that case, whilst the light that remained after the new obstruction may have been sufficient for the use of the room as a scullery, the prior use as a scullery had not restricted the width of the right to light obtained by the dominant land. This approach can for convenience be called the "internal arrangement rule", namely that the extent of the property right by way of easement that is acquired is not restricted by the particular internal arrangement of the building at the time the right to light is acquired.

14. It seems to me, however, that the internal arrangement rule relates to the <u>width</u> of the right acquired and not as to the question of *whether it is acquired at all.* Acquisition of the right in the first place requires in the present case compliance with section 3 of the Prescription Act 1832, which in turn requires that the "access and use of light to and for any dwelling house ... shall have been actually enjoyed therewith . . . ". This strikes me as being a completely separate and anterior question which has to be answered before one can consider the width of the right acquired. For the purposes of the anterior question, what matters is whether the access to light is "actually enjoyed" within the statute.

15. In this context, the word "enjoyed" plainly does not refer to taking delight or pleasure. Sterling J in *Smith v. Baxter* [1900] Ch 138 at page 144 stated:

> "I take "enjoyed" to mean "having had the amenity or advantage of using" the access of light; that is nearly equivalent to "having had the use", the intention being that the owner of a house may acquire the right to have the access of light over adjoining land to an opening which he has used in such manner as suited his convenience for the passage of light during 20 years".

This passage is itself part of a quote from the judgment of Kay J in *Cooper v. Straker* (1888) 40 Ch D 21. A further passage in that case, even more relevant to the facts of the present ease, deals with the non-acquisition of rights to light: in the case of 'windows with iron shutters fixed behind them," ... the essential word in that sentence is 'fixed,' which obviously means either shutters that will not open, or shutters that are never, in fact, opened during the twenty years." [emphasis added]

That passage seems to be exactly in point: the partition which entirely blocks the windows in the present case "will not open" and was "never, in fact, opened during the twenty years".

Even in the absence of authority, if one were to ask oneself the question whether the dominant land in this case enjoyed the amenity or advantage of using the access of light through the two relevant windows the answer seems to be clear: it did not. The dominant land could have used the access of light for any purpose that suited its convenience "for

the passage of light" but in reality did not use it at all.
I cannot accept Mr Wonnacott's suggestion on behalf of the Claimant that the light was used to illuminate the back of the wooden blockage erected to stop the light getting in. I do not consider this notion of "use" to be meaningful in this context. Where boarding is used to *block* the entrance of light into the building, it does not seem to be a meaningful use of words to describe the light as *illuminating* the rear side of the blockage. That is not the kind of "actual enjoyment" that section 3 of the Prescription Act 1832 appears to have had in mind.

16. My conclusion, therefore, on the first issue is that the dominant land has not acquired any right to light in respect of the entrance lobby windows. However, in case the matter goes further, I will also set out my views on the remaining issues in respect of these windows on the basis of the hypothesis that a right to light was acquired.

Issue (2): Is the new building on the servient land a suffcient interface with rights to light to be an actionable nuisance?

Legal Principles

17. In the House of Lords case of *Colls v. Home and Colonial Stores Limited* [1904] AC 179, Lord Macnaghten at page 187 approved as the test the jury direction of Chief Justice Best in the case of *Back v. Stacey* (1826)2 C. & P. 465:-

> "Chief Justice Best told the jury, who had viewed the premises, that they were to judge rather from their own ocular observation than from the testimony of any witnesses, however respectable, of the degree of diminution which the plaintiff's ancient lights had undergone. It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before; nor does his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formally done. His Lordship added that it might be difficult to draw the line, but the jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises".

18. In the present case I have to fulfill the role of both judge and jury. I have been to the site with Counsel, solicitors and the parties but the inspection cannot by itself give rise to a satisfactory answer to the question. First of all, the old building was gone and I was not able to see the amount of light available when it was still there. Secondly, in relation to the new building, although the structure is largely built, it is surrounded by scaffolding and therefore there may be a greater obstruction of the light than will be the case when it is finished. The Claimant has called no factual witnesses to support its case. It can

currently suffer no inconvenience because the dominant land is currently unused. I have to rely, therefore, to a large extent on expert evidence. That itself has various problems, including the fact that the true role of the experts must be to do with scientific matters such as the nature of the access of light and not with judgments distinguishing between a partial inconvenience and a real injury, which are part of my jury function.

19. Before I turn to examine the evidence in detail, I need to direct myself as to certain further key points of legal principle. I have to bear in mind the internal arrangement rule mentioned above, I have to deal with the *Sheffield Masonic Hall* principle, to which I will refer to below. I will have to consider the correct position in relation to artificial lighting. I have to bear in mind "... that no actionable wrong is committed if the amount of light remaining is sufficient for the comfortable enjoyment of his property by the dominant owner according to the ordinary notions of mankind." (Millett J in *Carr-Saunders v. Dick McNeil Associates Limited* [1986] 1 WLR 922 at 928). I have to bear in mind the underlying policy of the need adequately to protect the rights to light on the one hand, and freedom from unnecessary burdens on the other: see Lord Lindley in *Coils v. Home & Colonial Stores Limited* [1904] AC 179 (HL) at page 213.

20. Lord Lindley (at the same place) also refers to "... elements of uncertainty which render it impossible to lay down any definite rule applicable to all cases. First, there is the uncertainty as to what amount of obstruction constitutes an actionable nuisance ... the good sense of Judges and juries may be relied upon for adequately protecting rights to light on the one hand and freedom from unnecessary burdens on the other. There must be consideration for both sides in all these controversies."

The Evidence

21. I have the benefit of experts' reports from both parties. The Claimant's expert report produced by Ms Delva Patman is very concise and apparently had to be compiled in something of a hurry. She told me that she would have liked to have carried out her own technical analysis but apparently was never requested to do so. She had to base herself on drawings by previous experts which she did not find entirely accurate but thought they were sufficiently indicative. She would have wanted to revise the results on the basis of her own technical analysis. She agreed in cross-examination that the Defendant's drawings were agreed to he accurate.

22. The Claimant's expert accepted that there was no "rights to light injury" in relation to the 1st to 4th floor levels because of the light coming from the Square.

23. With regard to the reception area windows, her evidence was rather obscure and during cross-examination she accepted that there was no right to light injury on the basis of the current room configuration. I will have to consider below submissions in relation to different potential configurations.

24. With regard to the two windows which illuminate the staircase to the basement, the Claimant's expert stated very briefly that "the staircase area goes from a relatively well

lit space to a poorly lit space." This is not a very satisfactory conclusion, since it makes a judgment which is really in my province as part of my jury function. Nor do I find it to be accurate, since on the basis of the drawings as explained to me by the experts and on the basis of the oral evidence, I prefer the view of the Defendant's expert, Mr. Harris, based on his careful and thorough work and exposition of the situation, that ". . .in the original condition the staircase was no more than moderately lit with quite limited natural light available in part."

25. The two relevant windows illuminate two landings and some stair treads. On the basis of Mr Harris' drawings, with which Ms Patman agreed, I cannot accept that the stairs to the basement were at any material time "well lit" by natural light, since a lot of such light was blocked out by the old building. There certainly was *some* natural light left, but as Mr Harris points out, "... it is entirely possible that other than on quite bright days it might have been advisable to employ artificial lighting when using the stairs".

26. Mr Harris' evidence is that the change caused by the new building actually produces considerably *more* light on the "half landing" but considerably less light on the treads and a little less light on the ground floor landing.

27. Mr Harris concludes that "if it were safe and appropriate to use the staircase without the benefit of artificial lighting in the original condition, the same would still be true in the proposed condition" By contrast Ms Patman took the view that making the landings lighter and the treads darker actually produced a more dangerous situation: she was able to say, not as an expert but from her own experience, that walking down such stairs is dangerous, since she has had an accident in that type of situation as a result of the contrast between light and dark.

28. On the basis that the experts are there to deal with the technical questions relating to the amount of light and where it falls, and applying my judgment to this very question as a matter of fact and common sense, it seems to me that the shift of the light from the treads to the landing has probably made matters worse and has done so to a material extent if the use of electric light is ignored. On the basis that I must decide whether what has happened is merely a "partial inconvenience" or a "real injury" to the Claimant in the enjoyment of the premises, I would, after some hesitation, come down on the side of "real injury", if artificial lighting is left out of account.

29. It seems to me that the moderate amount of natural light allowed in by the old adjoining structure has been redistributed and reduced in the key area of the treads by the new building in such a way as to make it more difficult to use the stairs safely, if only natural light is considered. In my judgment that is a significant interference with the use and enjoyment of the stairs.

30. In coming to a conclusion on this, it seems that I have to ignore the fact that, in a relatively modern office block, the artificial lights might well be on the whole time: *Midtown Limited v. City of London Real Property Company* [2005] EWHC 33 at

paragraphs 5 5-64, but I can bear that in mind on the question of remedy.

31. Whilst I am aware that strictly speaking I should look at each window on its own, the evidence is not presented in a way which would enable me to do that and I must do my best by looking at the two windows together and then assuming that what is true in relation to both is true in relation to each.

32. 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.

33. In view of my conclusion in relation to the existing use of the internal space illuminated by the staircase windows, it has not been necessary for me to consider the effect of the diminution of light on alternative reasonable uses. The Claimant's expert report does not deal with these and I do not accept that Ms Patman's speculations about this during cross-examination would be a satisfactory basis for a finding based on alternative uses. The Claimant called no factual evidence on this (or any other) point. Accordingly, if there were no nuisance based on the present arrangement, I would not feel able to find one on the basis of any alternative reasonable user.

34. I need now to return to the two windows boarded up in the entrance lobby in case I am wrong in my conclusion that no right to light was acquired. The starting point here is that the Claimant's own expert witness accepts, as a result of cross examination, that there is no injury to light given the very substantial amounts of light streaming in from the square by alternate means, as long as only the present arrangement is looked at.

35. Mr Wonnacott however pressed hypotheses of alternative arrangements in which he says serious injury is caused.

36. 1 need to stress right away that the suggestions are highly speculative. The building is currently an unused office building, plainly designed and built as an office building. The Claimants have been refused planning permission to convert the office block into residential accommodation. They are appealing that refusal, but the current position is that they have no planning permission for what they propose. In these circumstances, and without any proper evidence of likely alternative user, I find the question of other reasonable uses and the light which may be required for them a difficult one.

37. However, Mr Wonnacott for the Claimant submits that the test is one of expected reasonable user as viewed from the outside of the building and is therefore an objective matter. I agree that alternative reasonable user must be an objective matter, but the Claimant has not produced any satisfactory evidence on which a safe judgment could be made. Speculation by Counsel based on old drawings is not an adequate substitute for such evidence. For reasonable alternative user to be made out, it should be established by

credible evidence.

38. Mr Harris, in his Expert's Report for the Defendant, considers other possible reasonable arrangements. Although he is not an expert architect or builder, he is an experienced surveyor and qualified as a member of the Building Surveying Division of the RICS in 1988. 1 find his evidence more valuable than mere speculation based on drawings. He concludes: "...although in theory it would be possible to divide up the building on a different basis internally, it is my opinion that any arrangement that would create a technically actionable loss would be neither realistic nor practical in the circumstances."

39. The question of what is or is not "actionable loss" is of course a question for me and not for the expert and it would be better if in the future experts in this area avoided such terminology. However, what the expert for the Defendant is saying here in substance is that on no other realistic arrangement would the interference with light be substantial.

40. One of Mr Wonnacott's suggestions was based on some drawings put in during the trial itself and not dealt with by the Claimant's own expert. These drawings were prepared for a previous owner of the dominant land and are marked "initial feasibility study... 17 July 1992. ". They show a potential bathroom at a higher level with a window facing out in the same direction as one of the ground floor blocked off windows in the reception area. On the basis of this drawing, Mr Wonnacott suggests that a potential reasonable user at ground floor level would be a bathroom of a similar nature.

41. Miss Harrison, for the Defendants, objected to the bathroom theory on the basis that if one leaves the lift and stairs where they are, that being the most convenient way of developing the building, it is probable that the entrance will be near the lift and stairs and therefore very unlikely that such a conversion would take place at ground floor level. I agree with Miss Harrison and, in addition to my view that speculations on behalf of the Claimant are not satisfactory without proper evidence, hold that the ground floor bathroom conversion is not a reasonably predictable use.

42. The Claimant does apparently have permission to demolish and rebuild, and could therefore rebuild with the stairs and lift in a different place, but at this stage this is wholly speculative. The Claimant has adduced no evidence that this is a realistic possibility. Moreover, it would also depend on the hypothetical bathroom on the ground floor of the rebuilt building being placed in such a way that it has a window so located that it could enjoy the right to light I am assuming to exist. Again, this is pure speculation unsupported by any satisfactory evidence.

43. Mr Wonnacott also suggested that a partition could be placed between the two windows at the front. He suggests that there would then be a substantial loss of light to the room created behind the partition, because it would not benefit from light from the square. The bathroom theory, I suppose, is one particular example of the partitioning approach. The partitioning theory in my view fares no better than the bathroom theory, for the reasons I have already set out.

44. In my judgment, Mr Wonnacott's speculations do not accord with anything that can objectively be deduced from the outside of the building and lack any proper evidential basis.

45. I would conclude therefore, subject to consideration of the *Sheffield Masonic Hail* principle, that there is no nuisance in relation to the entrance hall windows, even if I were wrong in my conclusion on issue 1.

Sheffield Masonic Hall Co Limited v. Sheffield Corporation [1932] 2 Ch 17

46. The principle in this case appears from the following statement in the judgment of Maughan J at page 22:-

> "At the moment when the right is acquired by the plaintiff company in respect of both of the two windows on the North and the two windows on the East, I think that the nature of the restrictive obligation imposed upon people facing those two windows is that they were not so built as by their joint action to cause a nuisance to the plaintiff company within the meaning of that term as used by the House of Lords in *Coils v. home & Colonial Stores.*. in other words, I think that the proper view is that the owner of Blackacre can build to such height as, with a similar building by the owner of Whiteacre, will yet leave sufficient light for the Masonic Hall. The obligations of both owners are the same; neither has a greater obligation than the other in the simple case which I am considering."

47. Mr Wonnacott suggests on the basis of this that I have to assume that a building similar to that being built by the Defendants is placed on the square in front of the dominant land and I should take into account the loss of light from that direction, since it would severely affect the light coming into the dominant property. In fact, the Defendant's expert has performed such an exercise, placing the second building on the square facing the dominant land and has found that it makes no material difference to the light coming into the relevant parts of the dominant land.

48. But Mr Wonnacott objects to the way in which the exercise has been done by the Defendant's expert. He says that since this is a purely hypothetical exercise, the other building should have been placed, in the expert's drawing, not on the other side of the road and on the Westminster School playing fields in the square itself, but at the point half way across the street from those fields towards the Olsen building, since the presumption is that the adjoining landowner's land goes to the middle line of the street between the square and the dominant land.

49. I am afraid I find this mode of applying the *Sheffield Masonic* principle rather far-fetched. At page 23 of his judgment, Maughan J says: *"...J see no reason to suppose that at some not distant date the owners of those*

premises will not desire to erect a substantial building right up to the corner of the building line.".

50. In other words, Maughan J was dealing with a realistic possibility in the near future. In the present case, there seems to be no reasonable prospect for the foreseeable future that the square, currently used as the playing fields of Westminster School, will either want to apply for, or will receive planning permission to have a building of the type being erected by the Defendants on the site of their playing fields. It is even less conceivable that such a building could in the foreseeable future be placed *where the middle of the road now stands* rather than on the playing fields in the square itself. It seems to me that if I were to take notice of such far-fetched and utterly remote possibilities that would impose a wholly unreasonable burden on the Defendant.

51. On the basis of the very remote possibility that the square could ever be built on, the Defendant's expert has demonstrated that no injury to light would take place in relation to the two relevant windows, namely the ones boarded up in the entrance hail. No question of injury to the remaining two windows arises at all in this context. I simply cannot see that it would be right to take account in the present case of a further even more remote hypothesis piled on top of the previous one to the effect that that the road will cease to be used as such and can be built on, up to the half way line. Even if I had been prepared to contemplate that, I would have to add in a third remote possibility that the owner of the playing fields would want to build up to that line when, presumably, on the basis of the previous hypotheses, the owner of the Olsen building could also build up to the same line, so there would potentially be no space, light or air between the buildings.

52. Even if I were wrong in my approach to the *Sheffield Masonic* principle, the only evidence of the effect of a building constructed in the middle of the road and similar to the Defendant's building that I have, is some evidence in the cross-examination of Mr Harris in which he accepted that such a building would have an impact on the front window of the dominant land that illuminates the entrance area. This is hardly sufficient for a finding of nuisance. Without proper evidence and calculations as to the loss of light in such a situation, I could not make a satisfactory finding in any event, even if I had accepted Mr Wonnacott's submissions as to where the hypothetical building would be.

53. Accordingly, my conclusion on this part of the case is that even if I had found that there was a right to light in respect of the two windows blocked up in the entrance hall, the Claimant has not made out any actionable injury to such supposed right. Again, however, when it comes to considering remedies, I will consider the matter not only in relation to the two windows illuminating the staircase to the basement, but also the two windows blocked off in the entrance hail, in ease my conclusions so far have been wrong.

Issue (3) : Remedies

54. The Claimant seeks an injunction in respect of all four windows in contention which would result in the demolition of a considerable part of the Defendant's structure. The

Claimant did not at any stage seek an interlocutory injunction to prevent the structure going up and I will have to deal with the arguments relating to that in due course. A number of cases were cited on the correct approach to the grant of a final injunction in such a case. However, even cases of the highest authority only set out the judicial principles which have to guide the exercise of my discretion. The particular decision in any other case, of whatever authority and level, is not directly binding upon me unless it is on identical, or at least indistinguishable, facts.

The Shelfer Rule

55. In the case of Shelfer v. City of London Electric Lighting Company [1895] Ch 287 at page 322, A L Smith U set out what he described as a "good working rule":-

> "1.) If the injury to the Plaintiff's legal right 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 is which it would be oppressive to the Defendant to grant an injunction:then damages in substitution for an injunction may be given."

56. Although this "good working rule" has been referred to in subsequent cases, as Romer LJ pointed out in *Fishenden v. Riggs & Hill Limited* (1935) 153 LT 128 at page 141, A L Smith U "could not have intended to have fettered the discretion imposed upon the courts by Lord Cairns' Act.". Romer U at the same reference further stated:"It is plain, therefore that in every case, even though the four conditions laid down by A L Smith Li are not to be found, the court has, having regard to all the circumstances of the case, an exercise of its discretion in the matter."

57. In fact I consider that all the *Shelfer* conditions are met in the present case. The injury I have found in relation to the staircase windows is small. If there were any right to light and any injury in relation to the lobby windows, it has not been established that the injury would be more than small. The injury, both that established and that assumed, is in each case capable of being estimated in money. It can in each case, as a matter of common sense, be adequately compensated by a small money payment. I am not impressed by the argument that since the question of damages have been put off at the suggestion of the Defendant it has prevented itself from establishing this point, since it seems to me an obvious one in the circumstances of the case. For detailed reasons I set out below, I also consider that it would be oppressive to the Defendant to grant the Claimant an injunction.

Jaggard v Sawyer

58. Since the Claimant currently suffers no harm from the reduction of light to the four windows in respect of which it claims, and since it did not apply for an interlocutory injunction, its demand for a mandatory injunction to demolish a significant part of the Defendant's structure brought to mind the phrase "...deliver him to the Plaintiff bound

hand and foot be subjected to any extortionate demands the Plaintiff might make.". I asked Counsel to find the case where this phrase occurred and to cite it if it were of any relevance. Counsel discovered and cited the ease of *Jaggard v. Sawyer* [1995] IWLR 269, a decision of the Court of Appeal. Although the case itself deals with a claim to breach of covenant and trespass, the judgment of Millett U also touches upon rights to light.

59. Some very important matters of principle can be seen from Millett U's illuminating judgment: -

> (i) damages in substitution for an injunction relate to the future, not the past. They inevitably extend beyond the damages to which the Claimant may be entitled at law (at page 284 B-F);
> (ii) the nature of the cause of action is immaterial. "The jurisdiction to award damages in substitution for injunction has most commonly been exercised in cases where the Defendant's building has infringed the Plaintiff's right to light.. .";
> (iii) the question of whether to grant an injunction or award damages instead is decided "by reference to the circumstances as they exist at the date of the hearing" (at page 284 H-285 A);
> (iv) "It has always been recognised that the practical consequence of withholding injunctive relief is to authorise the continuance of an unlawful state of affairs, If, for example, the Defendant threatens to build in such a way that the Plaintiff's light will be obstructed and he is not restrained, then the Plaintiff will inevitably be deprived of his legal right.". This results not from the award of damages, but from the refusal of the injunction (at page 286 B-H);
> (v) a Claimant who has established both a legal right and a threat to infringe it is *prima facie* entitled to an injunction to protect it; "special circumstances" are needed to justify withholding the injunction" (at page 287 B);
> (vi) nevertheless, the grant of an injunction, like all equitable remedies is discretionary. Many proprietary rights cannot be protected at all by the common law and the owner must submit to unlawful interference with his rights and be content with damages. "If he wants to be protected, he must seek equitable relief, and he has no absolute right to that. In many cases, it is true, an injunction will be granted almost as of course; but this is not always the case, and it will never be granted if this would cause injustice to the Defendant." (at page 287 C);
> (vii) the danger of misappropriating the Claimant's property rights needs to be balanced by the danger that a mandatory injunction would "deliver over the Defendants to the Plaintiffs bound hand and foot, in order to be made subject to any extortionate demand that he may, by possibility, make...". The "bound hand and foot" expression is taken by Millett U from Lord Westhury LC in *Isenberg v. East India House Estate Co Limited* (1863) 3 Dc G.J.& S 263, 273 (see page 287 C-E);

(viii) A L Smith U's "good working rule" is a "check-list" that "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 exhausting statement of the circumstances in which damages may be awarded instead of an injunction." (at page 287 0-H);

(ix) "Reported cases are merely illustrations in 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 for 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 a discretion in the same way. It does not follow that it would be wrong to exercise it differently." (at page 288 A-B);

(x) "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 for 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 delivery him to the Plaintiff bound hand and foot to be subjected to any extortionate demands the Plaintiff might make." (at page 288 B-D); [Emphasis added]

(xi) "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 right and thereby inadvertently placed himself in the 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 carried on his work in the hope that by presenting the court with a fait accompli, he would compel the Plaintiff to accept monetary compensation. Most cases, like the present, fall somewhere in between." (at pages 288 H - 289 A).

60. In the case of *Jaggard v. Sawyer,* the facts mentioned as being significant by Millett U for refusing an injunction and substituting damages included the fact that the Defendants acted "openly and in good faith" and "in the not unreasonable belief that they were entitled. . .". They had, however, had a warning and went ahead at their own risk. "On the other hand, the Plaintiff did not seek into interlocutory relief at a time when she would have almost certainly have obtained it. She should not be criticised for that, but it follows that she also took a risk, namely, that by the time her case came on for trial the court would be presented with *a fait accompli."* In those circumstances, the case was described as "difficult" but the trial judge could not be faulted for exercising his discretion in such a way that injunction was refused and damages substituted.

The Facts Relevant to Relief in this Case

61. In the light of the Authorities and in particular the very helpful material set out in Millett U's judgment in the *Jaggard* case, it seems to me the following factual circumstances are relevant in the present case:

(i) the Claimant did not apply for an interlocutory injunction and since the bulk of the structure is now complete, there is *afait accompli.* I do not in any way blame the Claimant for not applying for an interlocutory injunctions, but as Millett U points out, it does thereby run the risk of not getting injunctive relief at trial;

(ii) to make a mandatory injunction now which would require substantial demolition, either in the case of a right to light to all the four windows, or even in the case of a right to light to the two basement stairs windows and would amount to delivering the Defendant bound hand and foot to the Plaintiff and subjecting it to any extortionate demand that the Plaintiff might make;

(iii) the injury to the right to light to the basement stairs, although sufficient to be a nuisance, is, in the whole context of the buildings and the reality of the use of artificial light in office buildings, trivial. With regard to the alleged right to light in relation to the entrance lobby windows, I have held that there is no such right, alternatively, if there is there is not substantial injury to it and no nuisance. Even if I were wrong about that, it seems to me the injury is likely to be of little significance in the real world in relation either to the present user or any reasonable contemplated user. Accordingly, a mandatory injunction requiring demolition of a substantial part of the Defendant's structure would be wholly out of proportion to the injury caused to the Claimant on any possible view;

Conduct

iv) in terms of the Defendant's conduct, I find that they have throughout acted honestly and have genuinely believed that the present development does not sufficiently diminish the Claimant's light to be an actionable nuisance:

(1) In the very early stages after the Defendant purchased the development site, it was concerned about possible infringement of any right to light relating to the Olsen building.

(2) As a result, in June 2003 a right to light expert, a Mr Ian Absolon, was approached. He verbally advised that the scheme then under consideration would affect the light and suggested some angles which would limit any loss of light to a point where it was not actionable.

(3) The Defendant wanted, if possible, to increase the height of the development, but recognised that it if was to do so it would require the agreement of the owner of the Olson building.

(4) The Defendants' subjective view was that the existing

development, which came to pass, did not infringe any right to light, but that the desired building of increased height would have done so.

(5) In February 2004, the Defendant's contractors began to demolish the existing buildings, whilst Mr Absolon continued to have discussions with the then adjoining owners right to light surveyor to see if an agreement could be reached to enable the Defendant to build the higher building.

(6) The adjoining owners were looking for £100,000, whereas the Defendants thought £20,000 would be more equitable in respect of the interference to light from the proposed higher building.

(7) Demolition of the previous buildings was completed by approximately May/June 2004.

(8) The Defendant subsequently understood that the Olson building had been sold and wanted to negotiate the position with the new owners. There is no doubt however, that the Defendant's own frame of mind was that the scheme which would go forward without the adjoining owner's consent did not infringe any rights to light, and this can be seen from the Defendant's Board minutes,

(9) The view was based on the advice of Mr Absolon. No agreement was in fact reached in relation to a higher building and the original scheme was built and has now reached an advanced stage.

(10) Restoring the light previously enjoyed would require substantial demolition of the present structure.

(11) An account of the Defendant's subjective position was given by the witness, Mr Mansell, who was cross-examined. I found him to be truthful and credible and to have believed throughout that the present development did not infringe the Claimant's right to light.

(12) I find this belief to have been reasonable, since it is only on the basis of the Defendant's own expert evidence when combined with views given during cross-examination by the Claimant's expert that I have come to the view that there was any actionable infringement at all. A belief can have been reasonably held even if a judge subsequently disagrees with it.

(13) Moreover, in the context of the entire development and in the context of the entire Olson building, the infringement is in relative and in real world terms, trivial.

(14) The Defendants also called Mr Absolon, whom I also found to be a completely credible witness. There is no doubt whatsoever that he believed that the present building scheme as he understood it did not constitute any actionable infringement. Not only that, but during his discussions with the right to light expert employed by the previous owner, they agreed that an appropriate payment by way of consolation would be £5,000-£10,000 and even that it seems was only on the table in order to induce the then owner to give favourable consideration to the desired larger development.

(15) Mi Wonnacott, for the Claimant, has pressed me with the view that Mr Absolon did not have the correct drawings of the actual development and that had he had them, he would have realised that there probably was an actionable interference. Even assuming that he is right about that, I have not the slightest doubt that both the Defendant and Mr Absolon acted in good faith and on the basis of a genuine belief in the correctness of their position throughout.

(16) Thus, on the basis of Mr. Absolon's advice, whether or not the basis of it was mistaken, the Defendant honestly and reasonably believed throughout that there was no actionable wrong.

(17) On the negative side, at a time when piling works, which lasted between 24 January 2005 and 16 May 2005, were incomplete, the Defendants received a very important letter from solicitors acting for the Claimant dated 12 April 2005. This letter stated *inter alia* :-"In the circumstances arid, as we are instructed that you have commenced piling works on the site, we requiring (~jç) your unequivocal undertaking that your company will not carry out any further works pending agreement between our clients and yourselves regarding the light issues. In the event of this undertaking not being received in such terms by close of business on Friday 15 April 2005 our client will have no option but to take injunctive action against you. We look forward to receiving your undertaking by return together with dates for a meeting and a copy of the light model produced by your consultants."

(18) It is very unfortunate that the reply dated 22 April 2005 does not appear to have been received, but there is good contemporaneous evidence which shows that the Defendant genuinely believed that it had been sent. This letter referred to discussions with previous owners about possible rights to light. Mr Wonnacott, for the Claimant, has criticised a particular passage as being incorrect:-"As a result of these discussions [the Defendant] reviewed the design of the development.. .and as such amended the design thus protecting against possible infringement on your client's right to light.".

(19) Read literally, it seems to be saying that some existing design was specifically amended to protect against possible infringement of the right to light, whereas the important thing which actually happened was that it was decided not to proceed with the more ambitious development that would have breached the right to light.

(20) I have not heard any evidence from Mr Walton, the author of this letter, and cannot be sure how the mistake arose but I cannot infer anything sinister from the inaccuracy. There is no credible evidence that the Defendant was trying to mislead the Claimant.

(21) What is however significant about the letter of 12 April 2005 is that the Defendant, despite the threat in the letter of 12 April 2005, decided to proceed and thereby take a risk that its expert's judgement may have been wrong. On the other hand, the Defendant knew that the Claimant's predecessor's expert had been willing to accept a nominal sum in respect of the present development and although the Claimant in the letter of 12 April 2005 had threatened to apply for an injunction at a time when none of the superstructure had been built, it did not do so, and in fact did not even start proceedings for some months. A reasonable inference by the Defendant from that might have been that the Claimant had no real belief in its own case.

(22) There was sonic argument about the fact that the Defendants did not at that stage supply time plans of the development, despite being asked to do so, but it seems to be accepted that the plans were available over the internet since they had to be lodged with the Local Planning Authority when planning permission was obtained.

(23) Mr Wonnacott argued that the development might differ from the design lodged, but there is no evidence in the present case that it did so or that the Claimant was misled.

(24) Accordingly, it seems to me that the key features relating to conduct are the following. The Defendant throughout believed, not unreasonably, that its development would not infringe any right to light. If I am correct in my other conclusions in this judgment, it was actually correct in that belief in relation to all potential windows affected by the development, save the two basement stairs windows and even there, it was perfectly reasonable for it to believe, prior to the evidence given at the trial, that no infringement had taken place. As against that, the Defendant continued at its own risk after a warning from the Claimant's lawyers. Nevertheless, the Claimant has suffered relatively trivial injury in the context of its building, did not apply for injunction at a time when it threatened to do so and could, in principle, have prevented the infringement altogether, but waited until *aftiit accompli* had taken place, thereby taking a risk that it would not

be granted an injunction.

Blackv. Scottish Temperance Assurance Co [1908] 1 IR 541

62. Out of deference to Mr Wonnacott's forceful submissions on behalf of the Claimant, I need to deal with time House of Lords case of *Black v. Scottish Temperance Assurance Co* [1908] 1 IR 541. In that case, the Defendant had been warned repeatedly by the Plaintiff not to block his right to light. The Defendant did not suggest for a moment that he would not be breaching the Plaintiff's rights, but simply pointed to an indemnity he had from the vendor of the servient land. Accordingly, the facts revealed an outrageous and deliberate invasion of the Plaintiff's rights. It was in these circumstances that Lord Loreburn, C., stated that if it had been a question of discretion, he would "feel almost insuperable difficulty" in differing from the judges of the Irish Court of Appeal, but that the undisputed or undisputable facts of the case removed it from the realm of discretion (at page 577). That case, therefore, was not really about the exercise of discretion, but about situations in which there is in effect no discretion to exercise at all. It is in that context that one has to consider Lord Loreburn's statement about not applying for an interlocutory injunction:-

> "He did not apply for an interim injunction, very sensibly, I think, because he would have been obliged to give an undertaking as to damages which might have proved ruinous if his case failed. He was not bound to stake his all, or indeed, anything, on the possibility of error or mischance at the trial. He was entitled to await the trial, especially as he was not the aggressor, and was merely resisting a high-handed claim to defy his lawful rights." (at pages 577-57 8).

To my mind, all that shows is that if a Defendant commits a flagrant and inexcusable wrong, with no belief in the rightness of his actions, the failure to apply for an interlocutory injunction cannot be a significant factor at the trial, since as Lord Loreburn points out, there is no real discretion in such a case. In my judgment, that says nothing about the significance of failing to apply for interlocutory injunction in eases where a real discretion exists, and in particular where the Defendant has acted honestly and reasonably in the belief that he had a right to do what he did. In such a case there is no "high-handed claim to defy [the Claimant's] lawful rights."

63. Lord Robertson in the *Black* case at page 580 points out that that was not a case "in which the aggressor can excuse himself by a pardonable error".

64. I conclude therefore that the *Black* case does not compel me to grant an injunction. As I have already pointed out, that was not a case in which there was any scope on the facts for the exercise of a real discretion. There was no honest and reasonable belief held by the Defendants as in the present case, but only a flagrant violation of the Plaintiff's rights.

Oxy-Electric Limited v. Zainuddin [1991] 1 WLR 115

65. On the subject of the relevance of not applying for an interlocutory injunction, Mr Wonnacott, for the Claimant, also relied on the judgment of Hoffmann J (as he then was) in *Oxy-Electric Limited v. Zainuddin* [1991] 1 WLR 115. The judgment related to a motion to strike out a claim for injunctive relief in relation to the enforcement of a restrictive covenant. I could not, myself, find any relevant statement of principle in the judgment. As Miss Harrison, for the Defendant, pointed out, Hoffmann U (as he then was) explained in *Snell v. Prideaux Limited v. Dutton Mirrors Limited* [1995] 1 EGLR 259 in relation to the *Oxy-Electric* case:-

> "That case goes no further than deciding that failure to apply for an interlocutory injunction is not a reason for striking out the action as frivolous and vexatious." (at page 265 A).

Conclusion in Relation to Remedies

66. In the special circumstances of this case set out above, I consider that it would be "oppressive" to grant a mandatory injunction which would create loss to the Defendants out of all conceivable proportion to any loss that might be suffered by the Claimant. The grant of a mandatory injunction would be unjust and inequitable and, in the exercise of my discretion, I am not prepared to grant it. I am not asked to assess danmages at this stage and that must be the subject of a separate enquiry.

67. I would add that, even if I were to assume that I was wrong in relation to the reception area windows and in relation to the questions of nuisance in relation to those windows, I would still not grant a mandatory injunction for the demolition demanded by the Claimant. The grant of such relief would still be oppressive in time special circumstances of this particular case for the reasons set out above.