Neutral Citation: [2010] EWHC 2245 (Ch)

Claim No 9LS70819

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY

Date: 3rd September 2010

Before:
His Honour Judge Langan QC.

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BETWEEN:
HKRUK II (CHC) LIMITED
Claimant
and

MARCUS ALEXANDER HEANEY
Defendant

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JUDGMENT

Introduction

[1] This action is concerned with rights of light. Unusually, the claimant is the servient, not the dominant, owner. The claimant brought the proceedings with a view to obtaining declarations as to its freedom from liability to the defendant, while the substantive relief in the form of an injunction or damages is asked for in the counterclaim.

[2] The following matters are not in dispute. (1) An easement of light exists in favour of windows in the defendant's building, the former head office of the Yorkshire Penny Bank. (2) The claimant, by the addition of two floors to its nearby building, formerly called Block A Cloth Hall Court and now called Toronto Square, has committed an actionable interference with the access of light to the defendant's building. (3) The defendant is entitled to a remedy in respect of that interference. As to (3), until a late stage in the proceedings the claimant maintained that the defendant's conduct had been such as to debar him from obtaining any relief from the court, but that contention was not pursued in closing submissions.

[3] The litigation has thus become focused on the question of remedy. There are two areas in which the court has to come to a decision. (1) The defendant seeks a mandatory injunction requiring the claimant to cut back the offending works. The claimant says that the appropriate remedy is an award of damages, and the matters which would have been raised in support of the 'no remedy' case remain pertinent to this question of injunction or damages. (2) If there is to be an award of damages, there is a dispute as to how the damages are to be quantified. These two issues are inter-related, because the amount of any damages which might be awarded is one of the considerations which will be relevant to the question whether an injunction should be granted.

[4] The leading text book on the subject is Bickford Smith and Francis, *Rights of Light The Modern Law* (2nd ed., 2007). I have been fortunate to have had the assistance of the co-authors as counsel in this case, Mr Francis for the claimant and Mr Bickford Smith for the defendant. I am grateful to them both for their exceptionally helpful written and oral submissions.

Narrative

[5] The buildings with which I am concerned are situated in Infirmary Street, which is in the centre of Leeds. They are familiar to many people, myself included, who commute to work by bus. As one stands at the bus stops on the north side of Infirmary Street, one can see on the other side of the street (1) to one's right, with a frontage to Infirmary Street, the old bank building; (2) to one's left, the claimant's building; and (3) between the two properties, Toronto Street, a private road and pavement with (outside the claimant's building) four mature trees. The light which this case is concerned comes into windows on the left hand elevation of the bank building which faces the claimant's building across Toronto Street.

[6] The defendant purchased the bank building, the address of which is 2 Infirmary Street, in November 2003. In his witness statement, the defendant described his property as "a striking Victorian building… grade II listed… featuring impressive

stone carvings and window apertures along with a very striking turret." The defendant went on to say:

> When I purchased the building it was part let as offices with a vacant banking hall and [was] in need of restoration. Over the years I have spent approximately 3 million pounds restoring the building to its former glory, re-instating the original detail, re-letting the impressive revamped offices, and created a conference and banqueting venue, with what will be residential accommodation on the top floor.
>
> 2 Infirmary Street contains five floors of mixed use accommodation. The total net internal areas of the building are approximately 32,000 square feet. There are various office tenants with a range of lease terms, with the predominant occupier being Aspire, which is my conference and banqueting company.

[7] Cloth Hall Court was constructed as a complex of four office buildings in or about the year 1980. The building with which I am concerned was known as Block A. It was constructed in an L-shape, with the long arm of the L facing on to Infirmary Street and the short arm facing on to Toronto Street, opposite the side elevation of the defendant's building. As it faced the defendant's building, Block A comprised a ground floor and five upper floors, with the fifth and top floor having a mansard roof.

[8] In March 2007 the then owners of Block A, Cloth Hall Realty Limited ('CHRL'), obtained planning permission from Leeds City Council for the redevelopment of Block A. The main elements of the redevelopment were to be: (1) the refurbishment of the accommodation up to fourth floor level; (2) the demolition and reconstruction of the fifth floor; (3) the construction of sixth and seventh floors; (4) the addition of an extension, to be integrated with the remainder of the building, within the elbow of the L, and running from ground to seventh floor levels.

[9] Highcross Strategic Advisers Limited ('HSAL') is a company which, on behalf of a fund known as Highcross Fund 2, concentrates its interest on the industrial and office sectors of the property market throughout the United Kingdom. HSAL, according to the evidence of Mr Christopher Mills, the development director, seeks "to purchase commercial properties that have the potential to offer significant added value through active management or development." The claimant is a Jersey-registered company, which is part of Highcross Fund 2, and was the vehicle used for the purchase of Block A. That property is the claimant's only asset.

[10] In May 2007, CBRE, a firm of commercial property agents based in Leeds, drew Cloth Hall Court to the attention of HSAL as a potential investment. It seems that the idea must have been immediately attractive to HSAL, because due diligence got under way quickly, and solicitors were instructed as early as 7 June 2007. At first, the proposal was that both Block A and Block C should be acquired, but at some stage during the second part of 2007 Block C dropped out of the picture and HSAL's interest was thereafter limited to Block A.

[11] Mr David Parratt is a well-known surveyor who specialises in light cases. On 28 September 2007 he wrote a report on "Right of Light Problems relating to Building

A." The report was written on the instructions of GSD Limited, who were acting as agents for CHRL but I think that it must have come fairly quickly to the attention of HSAL. Mr Parratt has, in fact, acted as an expert witness for the claimant in this action. His conclusions in his report of 28 September 2007 were:
(1) the redevelopment of Block A would not cause any actionable interference with the access of light to the Old Post Office, a side elevation of which is on Infirmary Street, but the owners of the building should be formally notified of the proposals so that, if they had a different view, they could put it forward; (2) he gave the same advice in regard to Block B, Cloth Hall Court; (3) the Yorkshire Penny Bank building would suffer an actionable loss of light, and the owner should be approached with a view to agreeing either that there would be no claim or to a calculation of the losses.

[12] On 1 October 2007 Mr Martin Dalley of GSD Limited wrote to the defendant.

> **Block A Cloth Hall Court, Infirmary Street, Leeds**
> **Additional two Storeys and Refurbishment Work**
>
> I act on behalf of Cloth Hall Realty, the owners of the above building and I understand you own the Yorkshire Bank Chambers opposite. Having received planning permission for the extension and refurbishment of the building, my clients are currently finalising tender costs and are hoping to start work in the near future. In preparation for start of the re-development, my clients have asked that I write to you to consult over any potential rights of light issues.
>
> I enclose a copy of the planning documentation for which we have received planning permission, which shows you artistic images of the re-development together with floor plans, sections and elevations. I believe this should give you an understanding of what is proposed by Cloth Hall Realty Limited.
>
> There may not necessarily be any effect on light levels, but my clients are keen to raise this matter at an early stage and wish to deal with any claim in a reasonable manner.
>
> If you feel that the proposed alterations may cause a significant loss of daylight, please could you let us have drawings which show floor plans and (if you have them) sections and the elevation which faces Cloth Hall Court. In due course it may also be necessary for my client's right to light surveyor to enter the premises to take some measurements and I would be grateful if you could confirm whether this would be possible.
>
> If there are any matters you wish to discuss please contact me.

[13] The defendant passed this letter to Mr Raymond Rowan, a commercial property consultant who had acted for the defendant for some years.

[14] On 10 December 2007 the Board of the claimant approved a proposal to purchase Block A from CHRL for £18,750,000. The price originally agreed on a subject to contract basis had been £350,000 more than this sum, but had been negotiated downwards in order to allow for rights of light claims.

[15] Contracts were exchanged between CHRL and the claimant on 11 December 2007. The purchase was completed on 20 December 2007.

[16] Between exchange of contracts and completion, on 13 December 2007, Mr Rowan replied to Mr Dalley's letter of 1 October 2007. I should say that there had been some informal contact between the parties' representatives between those dates. Mr Rowan said:

> We have concerns, maybe significant concerns, regarding the potential loss of light at
>
> Yorkshire Bank Chambers and it may well be my client will be appointing a right of light specialist to investigate and act on his behalf. However, before taking this matter any further we require confirmation your clients will be responsible for all the fees and costs of the specialists and for my own fees and costs, whatever the outcome.

[17] Mr Dalley replied on 25 January 2008. He informed Mr Rowan of the change of ownership of Block A and he told Mr Rowan that both he (Mr Dalley) and Mr Parratt were now acting for the claimant. Mr Dalley concluded his letter in this way:

> Highcross' lawyers, Shoosmiths, are shortly to issue formal letters regarding the right to light matter to all the adjoining affected properties to confirm the change of ownership and David Parratt's assessment of the situation regarding loss of light to the Penny Bank will be included within this correspondence. In the meantime if there are matters you wish to discuss, please contact me.

[18] During January 2008, officers of the claimant prepared for the Board a paper seeking Board approval to carry out the redevelopment of Block A. The overall project cost was put at £9,780,000, of which £200,000 was "contingency sums for rights of light issues." Board approval was duly given.

[19] The main contractor engaged by the claimant was ISG Regions Limited, and the first letter of intent was issued to that company in respect of preparatory works on 31 January 2008. ISG Regions Limited went into occupation of the site and commenced the initial works on 18 February 2008. By March 2008 there was scaffolding and sheeting around Block A and, in particular, along the part of Block A which faces the left hand elevation of the defendant's building.

[20] On 3 March 2008 Mr Dalley wrote to Mr Rowan again about the likely loss of light.

> My client is keen to achieve an amicable settlement over this matter. To this end he has agreed, at this stage, to give a maximum undertaking of £4,000 plus VAT to cover your fees and costs and any specialist fees and costs your client incurs. All professional fees will be considered during the course of the negotiations over any potential damages claim which will take place on a without prejudice basis.

[21] At this point, I should record that there have been without prejudice discussions between the parties. I know no more than this. I do not have the dates at which the

discussions began and ended, but it seems that they extended over quite a lengthy period. I do not know what was on offer in these discussions, nor on what rock they foundered, nor whether either party was conducting the negotiations in an unreasonable manner.

[28] On 28 April 2008 the work of removing the mansard roofs and the plant rooms and lift motor rooms on the fifth floor of Block A commenced.

[29] On the same day, 28 April 2008, Mr Rowan wrote to Mr Dalley informing him that the claimant had instructed Drivers Jonas to act in relation to the light issue. The person responsible for the matter within Drivers Jonas was Ms Elizabeth de Burgh Sidley who is, like Mr Parratt, a specialist lighting surveyor.

[30] On 6 June 2008 Mr Dalley sent to Ms de Burgh Sidley a full set of architectural drawings of the redevelopment of Block A.

[31] Later in June 2008 one of Ms de Burgh Sidley's colleagues visited Leeds in order to consider the orientation of the buldings and the likely effect of the redevelopment on the defendant's right of light. On 23 June 2008 Ms de Burgh Sidley wrote to Mr Dalley:

> My initial view, seeing the drawings, is that there will be a serious infringement of our clients' rights of light.
>
> For this reason, please would you advise your clients not to undertake any work along the elevation of Infirmary Street which will take further light away from our clients' building. I would ask for your response to this letter by return confirming that no works will be undertaken? Please confirm that your clients will meet all our clients' costs and fees in this matter.

[32] On the same day, 23 June 2008, the foundation works for the extension to Block A commenced. Steel erection to the extension started on 21 July 2008 and was complete from basement to fifth floor level by 25 August 2008.

[33] Up to August 2008 ISG Regions Limited had been working on the basis of successive letters of intent. The building contract was signed on 14 August 2008. The contract price was £8,642,725 and the date for completion was 12 June 2009.

[34] Before looking at any further correspondence, it will be convenient to summarise in a single paragraph the progress of building works over the next few months. The steel frame erection to form the fifth, sixth and seventh floors started on the Infirmary Street wing of the building, the long arm of the L, on 22 September 2008. The steel frame erection to form these floors started on the Toronto Street wing, the short arm of the L facing the side elevation of the bank building, on 13 October 2008. The steel frame was complete on both wings by 17 October 2008. All steel work to these upper floors was complete by 13 December 2008. The metal decks forming the floors on the sixth and seventh levels were complete, and the concrete to those floors was poured, by 22 December 2008.

[35] On 24 or 25 September 2008 (the precise date is not clear) Mr Parratt wote to Ms de Burgh Sidley with "an open offer of compensation to your client for the reduction in daylight to his building arising from the upward extension of Block A." The offer was formulated in the "book value" form conventional in light cases. I do not propose to set out the calculations put forward in the letter. It is sufficient to say that the offer was of £20,667, together with reasonable professional fees. The offer was expressly made open for acceptance for a period of 14 days.

[36] On 20 November 2008, Pinsent Mason came on the scene as solicitors acting for the defendant. Their letter of that date to the claimant required the claimant by 4.00 pm on 28 November 2008 to do the following:

> 1 expressly acknowledge that the Proposed Development will cause a substantial
> interference with our client's right that is both actionable and injunctable;
>
> 2 undertake not to carry out any part of the Proposed Development that will
> interfere with our client's right to light enjoyed at the Property.

The letter went on to warn the claimant that, absent this confirmation, "our client has instructed us to issue proceedings in the High Court for an injunction", which might be either an interim prohibitory injunction, preventing the continuation of works until a full hearing, or a mandatory injunction, requiring demolition of the offending works. The letter also sought pre-action disclosure of all documentation relevant to the loss of light and an undertaking to pay the defendant's legal costs "in the first instance" of £5,000 plus VAT.

[37] Shoosmiths replied on behalf of the claimant on 28 November 2008. They accepted that their client's development had caused an actionable loss of light to the defendant's building, but they queried whether the defendant would obtain an injunction. In this connection, Shoosmiths referred in particular to (1) "your client's inaction in the knowledge of our client's plans for over a year" and (2) "the vast discrepancy between the likely sum of damages your client might be awarded when compared with the value of the development to our client and the losses which would accrue to our client." Shoosmiths went on to state that the claimant would proceed with the development, and they rejected the requests for pre-action disclosure and a costs undertaking.

[38] Further letters were written between solicitors on 3 and 5 December 2008. Pinsent Mason threatened an application for pre-action disclosure if disclosure were not given voluntarily by 8 December. Disclosure was not offered by Shoosmiths, the threat was not carried out and, at any rate so far as the open correspondence is concerned, silence descended as between the solicitors until 5 February 2009. On that date Pinsent Mason wrote to say that they "were instructed to proceed as outlined in earlier correspondence." Shoosmiths replied on 16 February 2009, confirming that they were instructed to accept service. Once again, the threat of proceedings was not carried into effect, and silence descended, this time for rather longer than previously.

[39] The building works were completed on 10 July 2009, which was less than a month behind schedule, and at some stage Block A was renamed Toronto Square. The final account agreed with ISG Regions Limited was £8,884,971, which was not greatly in excess of the contract sum. The total cost of the works, including such additional matters as professional fees, additional electrical costs, and carpeting, but excluding interest on borrowed money, was £9,775,759.[1] The total cost of the project to the claimant, including the cost of acquisition and finance charges, came to £35,814,161.[2]

[40] The correspondence between solicitors was reactivated by Shoosmiths on 24 July 2009. In their letter of that date to Pinsent Mason, Shoosmiths taxed Pinsent Mason with delay, in that they had threatened to issue proceedings, had not done so, and had been content to keep the threat of an injunction hanging over the claimant's head for 8 months. Shoosmiths expressed the opinion that the defendant had, by his delay, lost the chance of obtaining any remedy, and they called upon Pinsent Mason to issue proceedings by 7 August 2009, failing which Shoosmiths would do so. In the event, it was indeed Shoosmiths which caused the claim form to be issued on 19 August 2009.

[41] Finally, I must deal with the letting of the sixth and seventh floors of Toronto Square.

[42] The seventh floor was let to Zolfo Cooper, chartered accountants, from 1 August 2009, for a term of 10 years, with a break clause at the end of 5 years. I presume that there is to be a rent review after 5 years. The initial rent is of £27 per square foot on an agreed area of 7,050 square feet (i.e. £190,350 per annum), but there are two years rent free to be taken as half-rent for each of the first, second, sixth and seventh years of the term. In addition there was a capital allowance of £18 per square metre (i.e. £1.67 per square foot) to the lessee for carpeting.

[43] Maples and Calder, who are solicitors based in the Cayman Islands, agreed in principle to take a lease of part of the sixth floor on broadly similar terms, with an initial rent of £24 per square foot on an area of 5,560 square feet (giving £133,440 per annum).[3] The intending lessees, however, withdrew from the proposed letting in December 2009, and their agents stated that they were doing so because of the dispute with which I am now dealing.

Expert evidence

Preliminary

[44] There are reports from seven expert witnesses. No application was made for permission to call experts to give oral evidence and counsel agreed that it would be impracticable to have such evidence within the confines of a 3 day trial. This has not given rise to too much difficulty with regard to the specialist lighting surveyors, who are in agreement with each other as to the amount of light which has been lost,

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[1] See the Final Account Statement dated October 2009 at volume 3, page 373, of the trial bundle.
[2] See the CB Richard Ellis Appraisal Summary dated 16 June at volume 2, page 69P, of the trial bundle.
[3] The term was to be 10 years with a break clause after 6 years, and there was to be half-rent for the initial 28 months, and for the sixth and seventh years if the break clause was not operated.

although they are not agreed as to the valuation of the loss. There are, however, real problems with some of the other experts for the simple reason that significant differences between them, whether on general approach or on figures, have not been explored in cross-examination. These problems have not been wholly eliminated by the production during the trial of several supplementary reports, written with a view to commenting on the main reports of other experts.

Specialist lighting surveyors

[45] The lighting surveyors who provided reports were Mr Parratt, to whom I have already referred, for the claimant, and Mr Neil Lovell-Kennedy for the defendant.

[46] As regards measurement of loss of light, the general principles are agreed. A point in a room is regarded as adequately lit if, at a height of 2 ft 9 in (or 850 mm) above floor level, 1-500th or 0.2 per cent of the dome of the sky is visible.[4] A room is regarded as adequately lit for commercial purposes if 50 per cent of the room is well lit. According to the textbook to which I referred earlier in this judgment, (1) if more than 50 per cent of a room used for commercial purposes remains adequately lit after work done by an adjoining owner, there is no actionable loss; (2) if work done by an adjoining owner reduces that area to less than 50 per cent, there is potentially actionable damage; (3) if a room is already poorly lit, to 25 per cent or less, any reduction in light would almost inevitably be regarded as a serious loss and a plain case for an injunction (the available light is regarded as invaluable because there is so little of it.)[5]

[47] The area which has suffered actionable loss of light is expressed in square metres or square feet 'EFZ.' EFZ stands for "equivalent first zone." This is, in effect, a process of weighting the more and less important parts of a room. A room is divided into four zones, the front zone, the first zone, the second zone and the makeweight zone, each comprising 25 per cent of the total area. The front zone is that which is nearest to, and the makeweight zone the furthest from, the window or windows. Losses of sky visibility in the front zone are the most serious, and the area of loss is multiplied by 1.5; first zone loss is taken at par; and second and makeweight zone losses are reduced by applying factors of 0.5 and 0.25 o respectively.

[48] Mr Parratt's calculations have been agreed by Mr Lovell-Kennedy, and I have summarised them on a room-by-room basis in the Table which follows. Areas are given in square metres. Under the heading 'Before', the first figure given is the area which was adequately lit before the erection of the sixth and seventh floors of Toronto Square, and the second figure is the percentage of the whole room which that area represents. Under the heading 'After', there are equivalent figures for the present position. The column headed 'Loss' shows the loss of adequately lit areas in raw figures, with the loss expressed as an EFZ figure in the final column.

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[4] 2 foot 9 inches is taken as being desk-top or work-bench height. The concept of sky visibility eliminates variables which arise from the season of the year, the time of day, and climatic conditions when the measurement is taken and from the effect on light produced by structures outside the building (e.g. whether a wall is whitewashed or is painted in a dark colour).

[5] Bickford Smith and Francis, *op. cit.*, paragraphs 12-42, 12-45.

No	Room	Area	Before	After	Loss	EFZ
1	Board Room (ground floor)	20.9	13.9 (66%)	9.0 (23%)	4.9	3.20
2	Stair Hall (ground floor)	31.2	10.1 (32%)	8.6 (27%)	1.5	1.50
3A	Toilet (ground floor)	2.9	2.9 (100%)	2.8 (96%)	0.1	0.05
3B	do.	1.7	1.6 (94%)	1.5 (88%)	0.1	0.05
4	Open Area	314.0	78.5 (25%)	76.3 (24%)	3.2	3.20
5	Bar Annex/Cloakroom (g.f.)	7.6	5.5 (72%)	4.1 (54%)	1.4	0.70
6	Office (mezzanine floor)	20.9	5.5 (26%)	5.0 (24%)	0.5	0.25
7	Small Office (mezzanine)	9.9	1.5 (15%)	0.7 (7%)	0.8	0.80
8A	Toilet	2.9	2.9 (100%)	2.8 (96%)	0.1	0.03
8B	Toilet	1.6	1.6 (100%)	1.5 (94%)	0.1	0.03
9	Stairwell	11.4	3.6 (32%)	2.2 (19%)	1.4	0.04
10	Workshop	11.6	5.0 (43%)	3.1 (27%)	1.9	1.90
11	Upper Bar	306.0	72.7 (24%)	72.2 (24%)	0.5	0.75
12	Large Office (first floor)	51.5	35.5 (69%)	32.8 (64%)	2.7	1.35
13A	Toilet	11.0	5.4 (49%)	2.0 (18%)	3.4	0.85
13B	do.	1.7	1.6 (94%)	1.4 (62%)	0.2	0.05
14	Stairwell	11.4	7.6 (67%)	4.6 (40%)	3.0	0.75
15	Office (first floor)	19.2	7.5 (39%)	3.0 (16%)	4.5	2.70
16A	do.	7.3	3.5 (48%)	1.9 (26%)	1.6	1.60
16B	do.	14.7	5.6 (38%)	3.2 (28%)	2.4	2.65
17	Office (second floor)	59.1	51.2 (86%)	51.2 (86%)	0.0	0.0
18A	Toilet	3.2	3.0 (94%)	2.8 (87%)	0.2	0.05
18B	do.	1.6	1.5 (94%)	1.4 (87%)	0.1	0.03
19	Stairwell	11.4			3.0	0.75[6]
20	Office (second floor)	18.8	16.3 (87%)	12.4 (66%)	3.9	1.95
21	do.	21.8	16.3 (71%)	12.4 (53%)	3.9	1.95
24	Attic Storeroom	12.1	3.6 (30%)	3.0 (25%)	0.6	0.60
25	Office	20.1	17.0 (85%)	17.0 (85%)	0.0	0.0

[6] Mr Parratt states that the layout of this space is such that the normal method of calculation is impossible, and what he has provided is "a reasonable assessment."

I have not included in the Table rooms 22 and 23: 22 is a storeroom of 32.3 square metres, which has suffered no loss of light, and 23 is an unmeasured void area. On these agreed calculations, the total loss of light expressed as EFZ is 27.78 square metres.

[49] When it comes to assessing the value of the light which has been lost, the experts part company.

[50] Mr Parratt has been advised that the rental value of the whole of the bank building as office space in October 2008 would have been about £102.00 per square metre which would mean that loss of light should be calculated at £25.50 per square metre of EFZ loss: save that, for special reasons connected with Room 24, the small area of loss there should be taken at only £20.00 per square metre. This gives an annual conventional book value loss thus:

27.18 square metres at £25.50	693.09
0.60 square metres at £20.00	12.00
	£705.09

On the assumption that the loss will continue, and on the basis of advice that a yield of 10 per cent would be appropriate, standard valuation tables give a multiplier of 10 to convert the annual loss into a loss in perpetuity of £7,051.

[51] Mr Lovell-Kennedy takes, on the basis of information provided by the defendant, a rental of £215.28 per square metre in October 2008. As Mr Parratt had done, he takes one-fourth of this figure as "light rental value", i..e. £53.82 per square metre which, applied to 27.87 square metres EFZ (a slightly higher figure than Mr Parratt's 27.78), gives an annual book value loss of £1,500. To capitalise this into a loss in perpetuity, Mr Lovell-Kennedy takes a yield of 6.5 per cent, which gives a multiplier of 15.385, and a loss of £23,077.50. To this he applies the so-called *Carr-Saunders* uplift,[7] using a multiplier of 3.5, and arrives at a compensation figure of £80,771.25.

[52] There are therefore, on the face of their reports, three points at which these experts differ: (1) the rental value to be taken as the starting-point; (2) the appropriate yield to produce the multiplier for a loss in perpetuity; (3) the *Carr-Saunders* uplift. Mr Francis accepts that the application of such an uplift, in order to compensate the dominant owner for loss of amenity as well as financial loss, is conventional among specialist lighting surveyors, and it may be that Mr Parratt has simply left unsaid something which he assumed. Mr Francis says, however, that the multiplier usually taken is 2.66, which would bring Mr Parratt's figure up to £18,755, which is not far short of the open offer which had been made in September 2008 (paragraph [35]).

Valuation

[52] The first report to consider under this heading is that of Mr Kevin Bramley, the chartered surveyor who acted as the claimant's valuation expert. I do not find it necessary to do more than describe his general approach and the resulting figures. Mr Bramley takes as his valuation date 13 October 2008. This was, of course, after the onset of the major banking crisis, the effects of which are still with us. What Mr

[7] *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922.

Bramley does is to value Toronto Square as an investment. On one side of the sheet, he calculates the capitalised value of the anticipated rental income. On the other side, he places the outlay on the acquisition of the property, construction costs, professional fees and finance charges. He performs this exercise on two different assumptions: (1) that at the valuation date, the claimant decided to proceed with the development as planned; (2) that at that date, an injunction had been served and the claimant decided, rather than abandoning the development, to carry it through with modifications which would ensure that there would be no actionable interference with the defendant's right to light. Clearly (2) will produce a less favourable result than (1), because a reduced lettable area will pull down the rental income, and alterations put in hand at a late stage of the construction will increase the outlay. In fact, each of the exercises carried out by Mr Bramley produced a loss on the investment: on (1), the 'as built' scheme, a loss of £8,720,330; and on (2), the modified scheme, a loss of £10,752,270.

[53] Next, there is the report of Mr Bruce Allan, who is also a chartered surveyor, and who was instructed on behalf of the defendant. He takes as his starting point the sale of Block C Cloth Hall Court in October 2007. He takes the price paid for Block C as equivalent to £231 per square foot. If one assumes that the same figure is applicable to Block A at the time when the claimant acquired Block A, of the price of £18,750,000, £14,679,000 will have been attributable to the building as it then existed and the balance of £3,021,000 for the development potential. The development potential was, however, attributable both to the extension and to the sixth and seventh floors and, again on a square footage basis, £1,865,000 can be regarded as having been paid for the top floors in isolation.

[54] Then, as a separate exercise, Mr Allan carried out an analysis of anticipated revenue and outlay. His methodology is not dissimilar from Mr Bramley's, but there are significant differences between them. In particular, Mr Allan's analysis is restricted to the sixth and seventh floors, and he uses a lower yield, 5.75 per cent compared with Mr Bramley's 7.25 per cent. The result would have been (1) an anticipated development profit for the two upper floors of £2,398,740 in December 2007; (2) with a change in yield to 6.5 per cent in October 2008, an eroded profit figure of £1,445,000.

[55] Mr Allan then concludes that, with an anticipated profit of (in round terms) £2,400,000 from the sixth and seventh floors in January 2008, he would have expected the parties to negotiate for a release of the defendant's rights within a range from 33 to 50 per cent of that profit, i.e. a bracket of £800,000 to £1,200,000.

[56] These reports were exchanged less than a month before trial. There seems to have been no meeting of the valuers, and there is certainly no joint statement. The reports are, unfortunately, ships which pass each other in the night, each ignorant (if I may pursue the analogy) of the cargo carried by the other. However, three supplemental reports or notes have been provided to me during the trial.

[57] First, there is a supplemental report from Mr Bramley, dealing with the bank building. His main points are these: (1) he has not conducted an inspection of the building; (2) the valuation is on a vacant possession basis and on specified assumptions as to floor areas, rental value and yield; (3) on this basis, he values the property at £4,000,000 to £4,500,000 plus or minus 10 per cent; (4) the loss of light

would only have a limited impact on value; (5) the redevelopment of Cloth Hall Court has enhanced the attractiveness of the bank building in a number of respects.

[58] Next, Mr Allan provided a note of observations on Mr Bramley's supplemental report. His main points are: (1) Mr Bramley's failure to inspect the building; (2) the building is let or occupied by the defendant and his trading company; (3) the floor areas may well be wrong and the rents being received are much higher than the values assumed by Mr Bramley; (4) the difference between Mr Bramley's lower figure less 10 per cent, £3,600,000 and his higher figure plus 10 per cent, £4,950,000, is 37 per cent, which is outside a normal tolerance range; (5) he regards Mr Bramley's view on the limited impact of loss of light on value as "very difficult" and "subjective."

[59] Finally, Mr Allan produced a further report, which takes as its starting-point an appraisal which was prepared in December 2007 for the meeting at which the Board of the claimant was to consider whether to proceed with the purchase of Block A. This appraisal set against a capitalised value of anticipated rental income of £41,783,822 an anticipated outlay (once again covering acquisition and construction costs, professional fees and finance charges) of £34,875,075. This would give a profit of £6,908,747. Mr Allan then re-ran the appraisal, taking out 4,498 square feet which, is the area by which, on Mr Bramley's evidence, the sixth and seventh floors would have to be reduced in order to avoid infringing the defendant's right to light. On this basis, he arrived at the following figures: capitalised rental, £39,682,163; outlay, £34,176,724; profit, £5,505,439. Accordingly the difference between profit for the whole and profit excluding the cutback area is £1,408,000, which Mr Allan regards as "the figure that ought to have been used in negotiations with the defendant in early 2008."

Architect

[60] Mr Leppington was instructed on behalf of the claimant. There is no corresponding expert witness on the defendant's side. Mr Leppington's instructions were to prepare scheme drawings for an alternative development at Toronto Square which would not cause an actionable interference with the right to light at the bank building. He calls this alternative "option B." Mr Leppington summarised the principal design changes which would be involved as follows: (1) reinstatement of the fifth floor mansard roof and dormer windows; (2) a reduction of the floor area at sixth floor level; (3) a reduction of the floor area at seventh floor level; (4) reconfiguration of the tower at the corner of Infirmary Street and Toronto Street. Mr Leppington provides a table showing the loss of gross and net internal space as between Toronto Square "as built" and the redesigned building. I have simplified his calculations for the purposes of the following Table, by omitting the gross areas (which do not impact on rental values) and the figures for the fifth floor (where, although there is some loss of gross internal area, there is a loss of only 3 square feet of net internal area).

Floor	**As**	**Built**	**Option**	**B**
	Net area sq m.	**Net area sq ft.**	**Net area sq m.**	**Net area sq ft**
Sixth	893	9,612	670	7,212
Seventh	652	7,015	461	4,962

Total	1,545	16,627	1,131	12,174
Loss			414	4,453

The area calculated by Mr Leppington as lost through cut-back, 4,453 square feet, is slightly less than that taken by other witnesses, 4,498 square feet, but the difference is not of any significance.

Quantity surveyors

[61] Quantity surveyors were instructed by each side, Mr John Pillinger for the claimant and Ms Kay Williams for the defendant. They produced a joint report which demonstrated that they had reached agreement on one matter, namely, the additional cost to the claimant if in October 2008 it had revised its plans and had carried out the remainder of the construction work in a manner which would not have caused interference with the defendant's right to light. They agreed that the net additional cost (which is a figure derived from savings set against extra expenditure) would have been £1,010,494.

[62] One figure which appeared to me to be central to the main issue which I have to decide is the current cost of cutting back the sixth and seventh floors so that they do not interfere with the right to light. Ms Williams had provided a figure of £1,115,500 but, as I pointed out to counsel at an early stage of the trial, there was nothing on the subject either in Mr Pillinger's report or in the joint statement. Mr Pillinger then produced a supplementary report and, most unfortunately, his conclusion is very different from that of Ms Williams and, as I have already indicated, it has not been possible to test their respective opinions through cross-examination. Mr Pillinger costs the work at £2,455,327, which is more than double Ms Williams' estimate. Of the difference between the figures, just over half is accounted for by Mr Pillinger's regarding Ms Williams' sums as too low and just under half by his inclusion of sums for matters for which Ms Williams has made no allowance. These additional matters are: (1) work required to existing beams, columns, floors and walls to accommodate changes to sixth and seventh floors, £50,000; (2) new escape stairs from ground to fifth floors, £150,000; (3) reconfiguring toilets from ground to sixth floors, £280,000; (4) craneage and associated lifting costs, £75,000.

First issue: injunction or damages

The law

[63] The law is clear, although how a judge is to apply the established principles in a given situation is often problematical. The present is a difficult case, as both counsel recognised. Mr Francis began his closing submissions by acknowledging that the burden of dissuading me from granting a mandatory injunction rested on him: the sub-text appeared to me to be that, although he had reached the summit, he had only just

managed to complete the climb. Mr Bickford Smith said in the course of his final speech that the court was faced with "a close call."

[64] The leading case is *Shelfer v City of London Electric Lighting Company*,[8] which was decided by the Court of Appeal in December 1894. That case has remained good law to this day. In *Regan v Paul Properties DFP No 1 Ltd*,[9] Mummery LJ (with whom Tuckey and Wilson LJJ agreed) said this:

> 35 *Shelfer* is the best known case. It is a decision of the Court of Appeal. It has never been overruled and it is binding on this court. The cause of action was nuisance, as in this case, though in the form of noise and vibration rather than interference with a right of light.
>
> 36 *Shelfer* has, for over a century, been the leading case on the power of the court to award damages instead of an injunction. It is authority for the following propositions which I derive from the judgments of Lord Halsbury and Lindley and A L Smith LJJ. (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is "a tribunal for legalising wrongful acts" by a defendant, who is able and willing to pay damages: per Lindley LJ at pp 315 and 316. (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right "except under very special circumstances": per Lindley LJ at pp 315 and 316. (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether it could be adequately compensated by a small money payment; whether it would be oppressive to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to grant him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see A L Smith at pp 322 and 323, and Lindley LJ at p 317.
>
> 37 In my judgment, none of the above propositions has been overruled by later decisions of
> any higher court or of this court.

[65] I was taken by counsel through several of the modern cases in which the courts have had to consider whether the dominant owner should have an injunction or be left

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[8] [1895] 1 Ch 287.

[9] [2007] Ch 135: counsel in the case were Mr Francis and Mr Bickford Smith.

to an award in damages. The journey was a helpful one, but I do not propose to retrace it here. I have in mind what was said by Millett LJ in *Jaggard v Sawyer*:[10]

> Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting the injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.

[66] There is, however, one other modern case to which I should refer specifically because it re-emphasises an important point of principle. In a famous passage in his judgment in *Shelfer* A L Smith LJ said:[11]

> In my opinion, it may be stated as a good working rule that –
> (1) If the injury to the plaintiff's legal rights is small,
> (2) And is one which is capable of being estimated in money,
> (3) And is one which can be adequately compensated by a small money payment,
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction –
> then damages in substitution for an injunction may be given.

The modern case to which I wish to refer is *Jacklin v The Chief Constable of West Yorkshire*,[12] in which Lloyd LJ (with whom Buxton and Rix LJJ agreed) stressed that, in order to avoid the grant of an injunction, a defendant must show that all four of A L Smith LJ's criteria have been satisfied.

> True it is that the *Shelfer* principles are only a working rule, although a long hallowed and reliable working rule, but it is clear that the four elements in that are cumulative and that it is necessary for a defendant to satisfy the first three, but that it is by no means sufficient for it to do so. There has to be some additional factor, characterised in *Shelfer* and in *Jaggard v Sawyer*[13] as oppression, to justify withholding the injunctive remedy, which is the claimant's prima facie right as ancillary to his property rights.

[67] I propose now to deal separately with each of the four *Shelfer* considerations. As will appear from what I have to say in a moment, all but one of them raises a difficult question.

(1) Small injury

[68] The first question is whether the injury to the defendant's legal rights is to be characterised as small.

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[10] [1995] 1 WLR 269 at 288, adopted by Nourse LJ in *Gafford v Graham* (1999) 77 P & C R 73 at 84.
[11] *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 at 322, 323.
[12] [2007] EWCA Civ 181 at paragraph 34.
[13] [1991] 1 WLR 269.

[69] If one returns to Mr Parratt's calculations which I summarised in the Table in paragraph [48], one finds that the total loss of adequately lit space expressed in EFZ is 27.78 square metres. But it is necessary to make a detailed examination of the Table.

[70] First of all, one finds two areas which were adequately lit before the works to Block A were carried out, but are no longer so. (1) Area 1, the Board Room on the ground floor, which has suffered a serious deprivation of light on all three possible measures: percentage reduction, from 66 per cent to 23 per cent; actual area lost, 4.9 square metres; EFZ loss, 3.20 square metres. It is clear from the photographs which I have seen that the Board Room is the 'star room', or one of the star rooms, of the refurbished bank building. (2) Area 14 is a stairwell, not a working area, but I do not think that the loss here should be downgraded on that account: well lit routes of passage enhance the feel of any building.

[71] There are then areas which were not adequately lit prior to the works, but which have lost more than a minimal amount of light as a result. Dealing just in percentages, there is a loss of 5 per cent or more in each of areas 2, 7, 9 (a significant loss), 10 (another substantial loss), and 15, 16A and 16B (these last three are offices, each of which has suffered a serious loss on any measure).

[72] Finally, there are notable losses, although ones which would not be actionable on their own as they leave the rooms concerned with more than 50 per cent of space adequately lit, in areas 5, 20 and 21.

[73] Mr Francis relies heavily on the disproportion between the quantum of light deprivation and the total area of the bank building. Mr Bramley has taken the bank building to contain 40,000 square feet. The EFZ loss expressed in Imperial measures (the papers are bedevilled by failure to use a single system throughout) is 300 square feet. That is no more than 0.75 per cent of the internal area of the building. Even if Mr Bramley (on whose figure doubt has been cast by Mr Allan) was a long way out, and the net lettable area building extended to no more than 32,000 square feet (which is the defendant's own figure), the EFZ loss would still be less than 1 per cent.

[74] The other comparison made by Mr Francis is between the conventional book value damages for loss of light and the value of the bank building. Taking the damages at the upper end of the range which emerges from the lighting surveyors' evidence (see paragraphs [50] and [51]) and an admittedly broad brush stab at the value of the building (see paragraphs [57] and [58]), the figures are £80,000 and £4,000,000 respectively. The former is only 2 per cent of the latter.

[75] Mr Francis also reminded me that I am dealing with a commercial property. He contrasted the present case with that of *Regan v Paul Properties DPF No 1 Ltd*,[14] where the loss of light was in the living room of the claimant's maisonette.

[76] It seems to me that the injury done to the defendant's rights in this case lies close to the margin of what is, and what is not, small for the purposes of the first of the *Shelfer* criteria. In such a situation, it is no more than realistic to recognise that the

[14] [2007] Ch 135.

decision carries a subjective element and is, perhaps to quite a large extent, dependent on impression as much as on analysis. I accept that comparisons of the kind put forward by Mr Francis are considerations which I have to take into account. I accept also that good light is relatively more important in a person's home than it is in industrial or commercial premises. But these matters do not deflect me from the view that the injury done to the defendant's rights exceeds what can properly be defined as small. In my judgment, (1) the character of the defendant's building, (2) the commitment which the defendant has demonstrated to the restoration of the property, in which he has invested heavily and in which he operates several businesses, and (3) the extent to which the claimant's works have reduced the flow of light to the building as summarised in paragraphs [69] to [72], together establish that what has occurred constitutes real damage of a kind for which the defendant should not be expected to content himself with a money payment. In other words, the injury is not small.

[77] If the conclusion just stated is correct, one does not have to proceed any further, because as soon as the claimant falls at just one of the *Shelfer* hurdles, it has failed to dislodge the defendant from his prima facie right to an injunction. It is, however, possible that my view about the nature of the injury might be held to be wrong: and, if it were, an appellate court would wish to have my conclusions on the other *Shelfer* questions.

(2) Injury capable of being estimated in money

[78] Notwithstanding what is said in Mr Bickford Smith's closing written submissions, I take the view that this criterion is satisfied. What the defendant has lost is not something so intangible as not to be susceptible of calculation in terms of money.

(3) Compensation by a small money payment

[79] There are two ways in which, in theory at least, the defendant could be compensated in money for the loss of light to his building: (1) an award of damages for nuisance at common law, or (2) an award of damages in lieu of an injunction under what is now section 50 of the Senior Courts Act 1981, which is in a line of descent from section 2 of the Chancery (Amendment) Act 1858, commonly called 'Lord Cairns's Act.' An award under (1) would ordinarily follow the book value or conventional method. An award under (2) would nowadays inevitably follow the 'release fee' or 'buy out' path which, so far as the modern law goes, was first mapped out by Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.[15]

[80] Mr Francis said in the course of his submissions that, in answering the third of the *Shelfer* questions, the court should look only at the damages which would be awarded at common law. One has, he said, to assume that the court is not looking at the price of a release from the grant of an injunction, because one has not yet reached the stage of deciding whether or not to grant the injunction. There is an apparent logic in this, but I do not accept that Mr Francis is correct, and that for two reasons. First, it is artificial when one is looking at the question of remedies generally to exclude from consideration one remedy which may become available to the court. Second, when

[15] [1974] 1 WLR 798.

the Court of Appeal was considering whether the damages would be small in *Regan v Paul Properties DPF No 1 Ltd*,[16] it did so expressly, and separately, in relation to diminution in value damages and release fee damages.

[81] For reasons which will be found later in this judgment, I would have assessed *Wrotham Park* damages in the sum of £225,000. This is not, in my judgment, a sum which can be regarded as small within the third *Shelfer* question, even if one looks at it, not in absolute terms, but in relation to the value of either of the properties involved or to the cost of the works which payment of the sum would avoid.

(4) Oppression

[82] Mr Francis assembled a catalogue of reasons why, in his submission, the grant of an injunction would be oppressive in all the circumstances of the case. The reasons can be grouped under two headings: those connected with the effect of an injunction on the claimant and those connected with the conduct of the defendant.

[83] Most of the points made about the effect of an injunction on the claimant cannot be gainsaid. (1) The carrying out of the necessary works would be expensive. The best I can say about the cost is that one has a range from the evidence of the quantity surveyors and, if the range at least is accurate, the cost of the works would fall, in round terms, between £1,100,000 and £2,500,000. (2) There would be a consequential loss of prime office space, which is of value both to the claimant as an investment and to the commercial community more generally. (3) There would be general disruption within Toronto Square while the work was being carried out. (4) There would be particular disruption to the tenants of the seventh floor, who would have to be 'decanted' to other premises, at least for the duration of the work. (5) A final point under this heading was that the claimant might encounter difficulty in obtaining planning permission for a rebuild. I do not regard this point as realistic. Mr Leppington stated in his report that "the overall architectural style [of a reconstruction] remains sympathetic to the existing development and its surroundings."

[84] Mr Francis was critical of the conduct of the defendant in two respects. (1) He failed to commence legal proceedings: it was, unusually if not uniquely, the infringing party who had to inject some certainty into the situation by commencing the present action. Mr Francis accepted that the defendant could not be heavily criticised for his failure to apply for an interim injunction, given the possible consequences of the cross-undertaking in damages. The defendant could, however, have demonstrated activity by giving instructions for the issue of a claim form and by seeking a speedy trial. (2) The defendant was dilatory in correspondence and in responding timeously to communications from the claimant. There were lengthy periods during which, at any rate so far as the open correspondence goes, nothing was heard from him or his representatives. When the silence was broken on the defendant's side, there were threats of litigation which were not carried into effect, inappropriate suggestions (such as the demand for pre-action disclosure), and attempts to impose unreasonable time limits. Mr Francis made good this criticism by a detailed analysis of the

[16] [2007] Ch. 35 at paragraphs 71 and 72.

correspondence: the material on which he relied has been set out in an earlier section of this judgment (see, generally, paragraphs [12] to [40]).

[85] The points made by Mr Francis all have force, although I think that, in view of the total cost of the venture to the claimant, which exceeded £35,000,000, too much can be (and has been) made of the cost of eliminating the infringement of the defendant's right to light. Nonetheless, there is a rock on which, in my judgment, Mr Francis's case, both on hardship to his own client and on the conduct of the defendant, comes to grief. I refer to the nature of the infringement of the defendant's rights by the claimant. (1) The infringement was not a trivial one. (2) The infringement was not inadvertent. It was, rather, committed in the knowledge that what was being done was actionable. (3) The infringement was committed with a view to profit. (4) The claimant was not driven by necessity, but could have very easily, if somewhat less profitably, built sixth and seventh floors of reduced dimensions. In my judgment, it would be wholly wrong for the court effectively to sanction what has been done by compelling the defendant to take monetary compensation which he does not want.

Second issue: quantum

[86] I now come to what is, in view of conclusions reached earlier, yet a further theoretical question. This is the amount of damages which I should have awarded to the defendant, if I had refused an injunction.

[87] Under the principle which was established by Brightman J in *Wrotham Park Estate Limited v Parkside Homes Limited*,[17] the court assesses damages in accordance with the figure which the party entitled to a right (in that case the right to enforce a restrictive covenant) could reasonably have demanded for relaxing that right. In *Tamares (Vincent Square)Limited v Fairpoint Properties (Vincent Square) Limited*,[18] Mr Gabriel Moss QC, sitting as a deputy High Court judge, deduced from previous cases the principles which the court should apply when assessing *Wrotham Park* damages in a right to light case. I have found Mr Moss's restatement of the law most helpful, and I gratefully adopt it.

(1) The overall principle is that the Court must attempt to find out what would be a 'fair' result of a hypothetical negotiation between the parties;
(2) The context, including the nature and seriousness of the breach, must be kept in mind;
(3) The right to prevent a development (or part) gives the owner of the right a significant bargaining position;
(4) The owner of the right with such a bargaining position will normally be expected to receive some part of the likely profit from the development (or relevant part);
(5) If there is no evidence of the likely size of the profit, the Court can do its best by awarding a suitable multiple of the damages for loss of amenity;
(6) If there is evidence of the likely size of the profit, the Court should normally award a sum which takes into account a fair percentage of the profit;

[17] [1974] 1 WLR 798.
[18] [2007] EWHC 212 (Ch) at paragraph 22.

(7) The size of the award should not in any event be so large that the development (or relevant part) would not have taken place had such a sum been payable;
(8) After arriving at a figure which takes into account all the above and any other relevanrt factors, the Court needs to consider whether the 'deal feels right.'

[88] There is in this case a controversy as to the date of the hypothetical negotiation which the court has to examine. Mr Francis argued for October 2008, when the claimant's interference with the defendant's right became permanent, in the sense that it was set in the form of a building structure: any previous interference from scaffolding or sheeting should be disregarded as temporary. Mr Bickford Smith argued for the early weeks of 2008, before any works on the ground had been started and around the time when before the first letter of intent was issued to ISG Regions Limited.

[89] There is not, so far as I can see, any hard and fast rule which ties the court to a particular date as a point of principle.[19] The court should, in my judgment, although dealing with a hypothetical situation, (1) plant its feet in the real world and (2) assume that both parties would act reasonably. In the circumstances of this case, a reasonable developer in the situation of the claimant would have wished to conclude negotiations by March 2008, so as to be able to reach a decision one way or another as to the additions which were to be made to Block A – whether to build it as planned (if terms were concluded with the defendant), or with the sixth and seventh floors attenuated so as to accommodate the defendant's right to light, or in some third, non-offending manner. 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.

[90] Counsel have come up with widely differing figures for *Wrotham Park* damages in this case. Mr Francis's primary submission is that there should be no such damages. If there are any, they should be a fair percentage, which he puts at 5 per cent, of the value of the net benefit to the claimant created by the offending parts of the sixth and seventh floors. Mr Bickford Smith's final bid, at the end of his closing submissions, was for the round sum of £500,000.

[91] I am bound to say that I have not found the opinions of Mr Bramley or, so far as his first report goes, Mr Allan of any real assistance. Mr Bramley (paragraph [52]) starts from what I regard as the wrong date. He postulates a capital loss for the claimant's venture which leads to the conclusion that the defendant's potential for obstructing the development as planned was worth little or nothing in negotiating terms: that conclusion simply does not correspond with reality. Mr Allan's first exercise (paragraph [53]) rests on an assumption, which is untested, that Block C can be used as a base from which to value the top floors of Block A. His second exercise (paragraphs [54] and [55]) uses a method similar to Mr Bramley's, but there is nothing in the evidence to show that the yield figure taken by either is more accurate

[19] See *Amec Developments Limited v Jury's Hotel Management (UK) Limited* (2001) 82 P & C R 22 at paragraphs 31, 32. I do not read the recent decision of the Judicial Committee of the Privy Council in *Pell Frischmann Engineering Limited v Bow Valley Iran Limited* [2009] UKPC 45 as requiring a judge inflexibly to adopt the date of breach.

than that used by the other, and so there is no starting-point for an intelligent comparison of their respective conclusions.

[92] The one solid piece of evidence which I do have is the estimate of profit which was prepared for the meeting of the claimant's Board in December 2007. This is dealt with in Mr Allan's further report (paragraph [59]). The anticipated profit from the whole development was £6,908,000. The claimant would have had this figure in mind at the time of the hypothetical negotiations, and would also have had in mind that the profit would inevitably have been less if it had been forced to reduce the areas of the sixth and seventh floors. Mr Allan's calculation of a profit differential of £1,408,000 *looks* credible but it does not, in my judgment, support the conclusion that reasonable negotiators would have arrived at a figure anywhere close to the £500,000 for which Mr Bickford Smith contends. Further, I am reluctant to use as a base a calculation which was produced at a late stage of the proceedings and one which, like so many other opinions which have been put forward in this case, has not been tested by cross-examination. Even if the figure is accurate, an award of more than one-third of the profit differential appears to me to be extravagant. In the *Wrotham Park* case itself, Brightman J said that, on the facts before him, the court should "act with great moderation."[20] The apparent reluctance of the defendant to issue legal proceedings is, I think, a factor which in this case should have a similar influence on the level of the award.

[93] The following are the matters which appear to me to be relevant in arriving at the figure on which the parties would have settled at the end of the hypothetical negotiation. (1) The claimant had obtained a reduction of £350,000 in the purchase price to take account of the lights issue, so to that extent was resting on a cushion which could be regarded as expendable. It would, however, have wished to retain at least some of that cushion. (2) The claimant had budgeted for £200,000 as the price of settling all lighting issues and, in the event, the defendant had turned out to be the only dominant owner with a claim. (3) In view of the price reduction, the claimant could be expected to go beyond the budgeted figure in order to obtain a settlement of the issue before starting work. (4) The uplift on £200,000 should be modest, because the defendant's seeming reluctance to commence proceedings would have made it unlikely that he would have pushed unduly hard in negotiations.

[94] Taking these matters into account, I have arrived at a figure of £225,000. The evidence in the case is not such as would enable any judge to produce a scientifically justifiable figure. This makes all the more important the last part of the process, which is to stand back and ask myself whether the sum which I have mentioned 'feels right' – or, put another way, whether it looks either extravagant or mean. To my mind, £225,000 survives this final test.

Disposal

[95] Counsel will no doubt wish to make submissions at a convenient date as to the terms of the injunction which is to follow this judgment and as to costs.

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[20] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] Ch 798 at 815.

Peter Langan
Mercantile Judge, North Eastern Circuit

3 September 2010