

The pitfalls of development: dealing with rights to light

The recent decision in **HKRUK II (CHC) Ltd v Heaney** has emphasised the risk to developers of progressing their construction works without first resolving issues with neighbours who claim that the development will effect their right of light. The claimant developer was ordered by the High Court to cut back part of its Toronto Square office scheme in Leeds at a cost of up to £2.5 million because of its effect on the defendant's neighbouring property.

The facts of the case were that, in 2007, the then owners of Toronto Square obtained planning permission for a redevelopment which included the addition of two floors. The defendant was contacted by the owners with a view to discussing the potential effect the redevelopment would have on the light to his building. The claimant then acquired Toronto Square in late 2007. During 2008, the claimant notified the defendant of the scope of the planned works and the defendant claimed that the works would cause a serious infringement to the right of light enjoyed by the defendant's property. Whilst some limited discussions did take place between the parties and an offer was made by the claimant, no settlement was achieved. The defendant, through his rights of light surveyor and his solicitors, did seek confirmation from the claimant that works would not be carried out that would diminish the light enjoyed by the defendant's property and threatened an injunction if such confirmation was not provided. However, the claimant commenced the preliminary works in February 2008 and the substantive work to construct the additional two floors began in October 2008 without providing such confirmation. No injunction was sought by the defendant during this period and the works were completed in July 2009.

The court proceedings were commenced shortly after the completion of the works. Unusually, they were commenced by the claimant developer who sought a declaration from the court that the defendant was not entitled to injunctive relief and could be adequately compensated by a small money payment. The defendant counter-claimed for an injunction for the removal of the extra two floors.

The Court of Appeal in **Regan v Paul Properties Limited (2006)** had confirmed that the primary remedy available to a property owner who had had his right of light infringed was an injunction. The affected property in the **Regan** case, however, was a residential property and some commentators considered that a different approach may be taken in the commercial context. The Judge in **Heaney** though confirmed that the defendant's entitlement was to an injunction and that damages should only be substituted if all the criteria set out in **Shelfer v City of London Electric Lighting (1895)** were satisfied, namely:

- If the injury to the complainant's legal rights is small;
- If the injury is capable of being estimated in money;
- If the injury can be adequately compensated by a small money payment; and
- If it would be oppressive to the infringing party to grant an injunction.

Whilst the Judge acknowledged that it was a borderline case, he did not consider that the injury to the defendant's right of light was small. He was particularly influenced by the character of the defendant's property (a former bank), the commitment which the defendant had demonstrated to the restoration of the property and to the fact that the worst affected areas included some of the "star rooms" of the former bank, such as the "board room".

Although not strictly necessary, the Judge went on to consider the other **Shelfer** criteria. He did consider that the injury was capable of being estimated in money. Following the decision in **Wrotham Park Estate Limited v Parkside Homes Limited (1974)**, he considered that he had to assess damages in accordance with the figure the defendant could reasonably have demanded from the claimant for relaxing his right to light. The Judge said he was assisted in this assessment by the principles set out in the case of **Tamames (Vincent Square) Limited v Fairpoint Properties (Vincent Square) Limited (2007)**, namely:

1. The overall principle is 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 size of the profit, the Court should normally award a sum which takes into account a fair percentage of the profit;
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 relevant factors, the Court needs to consider whether the "deal feels right".

Applying these principles, the Judge arrived at a figure of £225,000. He was aware that the claimant had obtained a reduction in the purchase price of £350,000 to take account of the lights issue and that the claimant had budgeted a figure of £200,000 for settling all lighting issues. The Judge considered that, in view of the price reduction, the claimant could be expected to go beyond the budgeted figure, although the uplift should be modest. Having reached the figure of £225,000 he felt it survived the test of whether the sum "felt right".

The Judge held that £225,000 did not constitute a small money payment even if one looked at it, not in absolute terms, but in relation to the value of either of the properties involved or to the costs of the works which payment of the sum would avoid.

The claimant unsurprisingly forcefully argued that there were a number of reasons why it would be oppressive to grant an injunction. In relation to the effect of an injunction on the claimant, these included the fact that the necessary works to cut back the development would be expensive, there would be a consequential loss of prime office space and the tenants of one of the floors would have to be relocated during the works. The claimant criticised the defendant for failing to commence legal proceedings and for being dilatory in correspondence. The Judge, however, considered that there was a “rock” on which the claimant’s case both on hardship to the claimant and the conduct of the defendant, “comes to grief”:

“I refer to the nature of the infringement with 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 easily, if somewhat less profitably, built sixth and seventh floors of reduced dimensions. In my judgment, it would be wholly wrong for the court to effectively sanction what has been done by compelling the defendant to take monetary compensation which he does not want”.

Practical Advice

In light of the above case, the following points should be noted:

- Developers should consider rights of light issues at an early stage and obtain appropriate surveying and legal advice;
- The availability of insurance cover should be explored;
- If there will be an actionable loss of light (and insurance cover is not obtained), the neighbour should be approached with a view to agreeing a settlement before works commence;
- If the developer does not consider that the neighbour will be entitled to an injunction he should consider whether to apply to a court for a declaration to this effect prior to commencing the works;
- If the neighbour openly acknowledges that he is seeking a financial settlement rather than an injunction then this will probably preclude him from seeking injunctive relief;
- A neighbouring owner should make clear its objection to the proposed works at an early stage. To simply sit back and only raise a complaint after the works have been (substantially) completed is very likely to preclude the remedy of an injunction;
- Similar considerations apply to interference with other easements, such as rights of way.

Jon Mowbray is a Partner in IBB’s Real Estate Dispute Resolution team who advises both developers and adjoining owners in relation to disputes concerning rights to light and other neighbour matters.



If you would like to talk to us about the issues raised by this note, please contact:

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