

RESEARCH ARTICLE

# Injunctions, land and the cynical breach

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## Abstract

An injunction is typically characterised as the primary remedy to prevent a continuing interference with a claimant's property rights. It can be easier to obtain such a remedy against a cynical defendant who knowingly interfered with those rights, as opposed to a naïve or unwitting party who was unaware of them. It is not obvious, however, why the defendant's state of mind should affect what remedy the claimant is afforded in vindicating their property rights. This paper examines the role played by the defendant's state of mind when considering whether to grant an injunction. It argues that a defendant who knowingly infringes a property right in respect of land for material gain assumes the risk that an injunction will be granted to stop that infringement. As a consequence, the question of whether such an order will create hardship or oppression is either diminished or eliminated as a factor. This approach also vindicates the proprietary nature of such rights, which may be difficult to assess in financial terms.

**Keywords:** land law; injunction; trespass; property law; equity

## Introduction

An order for an injunction is a powerful vindication of a party's property rights. Unlike a judgment for damages, such an order can be enforced through contempt of court proceedings, potentially resulting in a fine or imprisonment if not complied with. An injunction compels a party to prevent something from occurring in the present or the future; in some cases it can require a defendant to take positive steps, such as to tear down a building that is trespassing on the claimant's land or interfering with their rights of light. An injunction is typically characterised as the primary remedy to prevent a continuing interference with a claimant's property rights.<sup>1</sup> It is also, however, a discretionary remedy: the court is not obliged to make an order for an injunction in the same way that it must enter judgment for damages if loss is proven; and even if the claiming party is entitled to an injunction, the court might still award damages in lieu of an injunction under a statutory jurisdiction.<sup>2</sup>

How the court should exercise this discretion when considering whether or not to make an order for an injunction was closely considered by the Supreme Court in *Lawrence v Fen Tigers*.<sup>3</sup> A rigid mechanistic approach to what had become regarded as the 'fourfold *Shelfer v City of London* test'

<sup>1</sup> A Burrows *Remedies for Torts, Breach of Contract of Equitable Wrongs* (Oxford: Oxford University Press, 4th edn, 2019) pp 443–449.

<sup>2</sup> Originally the Chancery Amendment Act 1858, s 2 (better known as Lord Cairns' Act), now the Senior Courts Act 1981, s 50. JA Jolowicz analysed the history of Lord Cairns' Act and how the jurisdiction has been exercised in 'Damages in equity: a study of Lord Cairns' Act' (1975) 34(2) *Cambridge Law Journal* 224.

<sup>3</sup> [2014] UKSC 13, [2014] AC 822. See D Howarth 'Noise and nuisance' (2014) 73(2) *Cambridge Law Journal* 247; M Dixon 'The sound of silence' (2014) 2 *Conveyancer and Property Lawyer* 79; E Lees '*Lawrence v Fen Tigers*: where now for nuisance?' (2014) 5 *Conveyancer and Property Lawyer* 449; P Singh 'Rethinking private nuisance in the 21st century: a critical analysis of *Coventry v Lawrence*' (2016) 32(6) *Construction Law Journal* 606.

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(the *Shelfer* test) was rejected,<sup>4</sup> with Lord Neuberger in particular giving support to the direction given by Lord Macnaghten in *Colls v Home and Colonial Stores Ltd* that, in certain circumstances, the defendant's conduct might make an injunction 'necessary'.<sup>5</sup> A number of leading cases have recognised that the defendant's motivation and knowledge when infringing the claimant's property rights is an important factor in deciding whether or not to grant an injunction. It is not obvious, however, why the defendant's state of mind, knowledge or motivation should affect what remedy the claimant is afforded in vindicating their property rights. The existence of those rights (and the extent of the infringement to them) does not depend on the conduct (bad or otherwise) of the defendant.<sup>6</sup> At first blush, the defendant's state of mind appears irrelevant to the correct form of order that is required to vindicate the claimant's property rights.<sup>7</sup>

This paper will examine the relevance of the defendant's conduct when considering whether or not to make an order for an injunction in a case where a claimant's rights in real property have been infringed. It will ask what the doctrinal role and the specific rationale is for elevating this factor. This is a doctrinal analysis that cuts across the recognised taxonomic divisions of real property (in respect of the interests that are under consideration), tort (in the form of the causes of action typically adopted to vindicate those interests, namely trespass and nuisance), and equity (given the nature of the remedy in question).<sup>8</sup>

The defendant's conduct under consideration goes beyond actual knowledge of the existence of the claimant's proprietary right: instead, it is focused on the defendant who acts in conscious disregard (either knowingly or recklessly) of the claimant's rights in order to achieve a material gain (whether financial or otherwise).<sup>9</sup> This broadly corresponds with, but is not identical to, the reference made by Lord Burrows to the concept of the 'cynical breach' in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*,<sup>10</sup> where the relevance of the defendant's conduct in presenting the claimant and the Upper Tribunal or court with a *fait accompli* was relevant to the question of whether or not to exercise a discretion to discharge a restrictive covenant. In that case, Lord Burrows compared the description of the conduct of the party in breach of the restrictive covenant, Millgate, as 'high-handed and opportunistic' to what commentators had described as 'cynical' in 'deliberately committing a breach of the restrictive covenant with a view to making profit from so doing'.<sup>11</sup> The focus of the paper will be on trespass, nuisance (including infringements of rights of light) and restrictive covenants. It will not consider injunctions granted in respect of waste, or remedies arising from breaches of leasehold covenants.

This paper argues that a party who deliberately embarks on a course of conduct which will infringe another party's property rights, motivated by financial gain, knowingly creates their own predicament.

<sup>4</sup>A reference to the criteria set out in *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, at 316–317, by AL Smith LJ, as to when the 'very exceptional circumstances' applied in which it was appropriate to exercise the jurisdiction under Lord Cairns' Act. As will be discussed below, however, AL Smith LJ had, in fact, prefaced his *indiciae* by saying that he would 'not attempt to specify them, or to lay down rules for the exercise of judicial discretion'.

<sup>5</sup>[1904] AC 179, at 193.

<sup>6</sup>'Proprietary rights in land are not recognised on the grounds of morality or sympathy; they are founded largely on rules of equity in relation to which there needs to be a reasonable degree of certainty': *Brent LBC v Johnson* [2020] EWHC 2526 (Ch) per Mr Michael Green QC (sitting as a Deputy Judge of the Chancery Division) at [9].

<sup>7</sup>The strict nature of trespass is epitomised by the judgment in *Entick v Carrington* (1765) 2 Wils KB 275.

<sup>8</sup>P Birks 'Rights, wrongs and remedies' (2000) 20(1) Oxford Journal of Legal Studies 1 at 6–7; V Ball 'The influence of "loss" in the property torts' (2020) 31(3) King's Law Journal 426 at 438–440.

<sup>9</sup>See the discussion of the definition of 'cynical breach' in K Barnett 'Deterrence and disgorging profits for breach of contract' (2009) 17 Restitution Law Review 79, at 91–92.

<sup>10</sup>[2020] UKSC 45, [2020] 1 WLR 4783. See T Sutton 'LPA 1925 s 84 and cynical breaches: *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*' (2021) 2 Conveyancer and Property Lawyer 213.

<sup>11</sup>In particular, at [36], referring especially to P Birks 'Restitutory damages for breach of contract: *Snep* and the fusion of law and equity' [1989] Lloyd's Maritime and Commercial Law Quarterly 421. This paper adopts the term 'material gain' as opposed to 'profit', as some deliberate breaches (especially in the domestic or residential sphere) are aimed at increasing an amenity rather than at pure financial gain, such as building an extension in violation of a building line, trespassing on a neighbour's land, or interfering with their right of light.

Such a party assumes the risk of an adverse and potentially oppressive court order for an injunction which reverses the steps they have taken. The court's findings as to the defendant's state of mind are capable of reducing the weight to be given to arguments as to the oppressiveness of the order, which can be neutralised altogether. Beyond the interests of the two parties, there are strong policy reasons to protect property rights, rather than allowing for their effective discharge against an interfering party in exchange for monetary compensation. Damages in lieu of an injunction have the effect of legitimising an interference with property rights by reducing them to a monetary payment in return for their discharge. By this analysis, the defendant's conduct does not outweigh all other considerations (such as the smallness of the damage done, or the claimant's own conduct such as delay in seeking relief or expressing a willingness to accept monetary compensation), but should be given appropriate weight alongside the other circumstances of the case.

This paper will be structured into the following parts. The first part will consider the equitable nature of the remedy of an injunction, and the actual nature of the discretion that the court exercises. Following *Lawrence v Fen Tigers*, cases such as *Ottercroft Ltd v Scandia Care Ltd* and *Rahimian* have made it clear that the defendant's conduct can be a highly important consideration, and even the most important one, in deciding whether or not to order an injunction.<sup>12</sup> The second part will consider the extent to which vindication is one, highly important, but not sole, element in the exercise of the discretion whether or not to order an injunction. The oppression that might be caused to the defendant by such an order is also a relevant consideration.

The third part will develop these competing factors to consider the effect of deliberateness on property rights. It will first be argued that the strong protection afforded to property rights is corroded by intentional conduct which is permitted to infringe them in return for the payment of monetary compensation. As a result, there should be caution to ensure that property rights are not undermined by a system that too readily acquiesces in their infringement in exchange for damages. Secondly, the party who knowingly infringes property rights with a view to gain assumes the risk that their steps will be reversed by an order for an injunction, displacing oppression as a factor. With the role of the defendant's conduct clarified, its importance in relation to other factors (such as the claimant's own conduct, for example, delay) can be given proper weight. Finally in this part, the weighting to be given to the defendant's conduct and state of mind will be considered in relation to the Law Commission's proposals as to rights to light.<sup>13</sup>

## 1. The nature of the discretion to grant an injunction and the importance of the defendant's conduct

The power to grant injunctions which is now enacted in section 37 of the Senior Courts Act 1981 is expressed in broad terms, being available 'in all cases in which it appears to the court to be just and convenient to do so'.<sup>14</sup> An injunction is an equitable remedy which is not available as of right: instead, the power to grant an injunction is a discretionary one.<sup>15</sup> This discretion must, however, be exercised judicially: notwithstanding judicial dicta that this discretion should not be fettered by rules,<sup>16</sup> a combination of judicial precedent and rules of court have placed significant limitations on how that discretion can properly be exercised in some circumstances.<sup>17</sup> While the court must still consider

<sup>12</sup>[2016] EWCA Civ 867.

<sup>13</sup>Law Commission *Rights to Light* (Law Com No 356, 2014).

<sup>14</sup>Senior Courts Act 1981, s 37. The County Courts Act 1984, s 38 provides that the county court may make any order which could be made by the High Court if the proceedings were in the High Court.

<sup>15</sup>*Kirklees MBC v Wickes Building Supplies Ltd* [1993] AC 227 at 271 per Lord Goff.

<sup>16</sup>See, for example, Lord Goff's observations in respect of interim injunctions in *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603 at 674.

<sup>17</sup>*Fourie v Le Roux* [2007] 1 WLR 320 at [25] per Lord Scott.

whether, in all the circumstances, it is just to grant the relief sought against the particular defendant, as a matter of principle the breadth of the court's discretion may be very limited indeed.<sup>18</sup>

The starting point as to whether or not to grant an injunction in a case where the claimant's proprietary rights were being wrongfully interfered with was set out clearly by Lord Evershed MR in *Pride of Derby and Derbyshire Angling Association Ltd v British Celanese Ltd*.<sup>19</sup> In that case, the claimants sought an injunction to restrain a number of defendants, including a commercial company, the Derby Corporation and the British Electricity Authority, from polluting the Rivers Trent and Derwent. The argument that the question of whether to grant an injunction was purely discretionary, to be determined on the balance of convenience, was robustly rejected.<sup>20</sup> Instead, it was regarded as 'well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is prima facie entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered'.<sup>21</sup> In many cases involving the infringement of property rights, such as where a claimant has been totally dispossessed by a trespasser,<sup>22</sup> or where a defendant has breached a negative covenant,<sup>23</sup> it might well appear that an injunction is available as of course, if not as of right. It should still be emphasised, however, that even if an injunction appears to be the almost inevitable outcome, this result has still been achieved by the exercise of a discretion.<sup>24</sup>

Where the claimant is entitled to an injunction, the court has a statutory power to order the defendant to pay damages in lieu of an injunction. Andrew Burrows observed that, before the decision of the Supreme Court in *Lawrence v Fen Tigers*, the general approach that the courts adopted in respect of injunctions restraining a continuing nuisance or trespass to land was that 'the prohibitory injunction was the primary remedy which would rarely be denied'.<sup>25</sup>

It is generally accepted that it is only permissible to exercise this jurisdiction in special circumstances, otherwise the defendant would compulsorily purchase the right to continue the wrongful act.<sup>26</sup> The way in which the court should approach this exercise has been the subject of a number of decisions, with the courts oscillating between a fluid and a more rigid test and back again. What has remained constant, however, is that the oppression caused to the defendant, as well as the defendant's own conduct and state of mind in infringing the claimant's property rights, are relevant considerations. Even before *Shelfer*, it had been acknowledged that the court had to inquire as to the defendant's state of mind when considering whether or not to award damages in lieu of an injunction. In *Smith v Smith*, Sir George Jessel MR noted that, 'Without laying down any absolute rule, in the first place it is of great importance to see if the Defendant knew he was doing wrong, and was taking his chance about being disturbed in doing it'.<sup>27</sup>

The case of *Shelfer* itself was a nuisance case: the electric lighting company had excavated foundations for its engines, which it was alleged created vibration and noise, leading to both structural damage and physical discomfort. Kekewich J, at first instance, had found that the defendants had committed a nuisance and had caused structural damage; however, having regard to the fact that

<sup>18</sup>*South Bucks DC v Porter* [2003] UKHL 26, [2003] 2 AC 558 at [28]–[29] per Lord Bingham. In that case, the Court of Appeal ([2001] EWCA Civ 1549, [2001] 1 WLR 1359) allowed the appeal of travellers living in caravans against an order for injunctive relief arising out of planning breaches, a decision that was upheld by the House of Lords on the grounds of proportionality.

<sup>19</sup>[1953] Ch 149.

<sup>20</sup>*Ibid.*, at 181 per Lord Evershed MR.

<sup>21</sup>*Ibid.*

<sup>22</sup>*Harrow LBC v Donohue* [1995] 1 EGLR 257.

<sup>23</sup>*Doherty v Allman and Dowden* (1878) 3 App Cas 709 at 720 per Lord Cairns LC.

<sup>24</sup>*Wakeham v Wood* (1982) 43 P & CR 40 at 46 per Watkins LJ. In that case, the defendant built in breach of a restrictive covenant not to obstruct a view of the sea, and on appeal, was ordered to remove the building. This case will be considered further below.

<sup>25</sup>Burrows, above n 1, p 444.

<sup>26</sup>J Glistler and J Lee *Hanbury and Martin: Modern Equity* (London: Sweet & Maxwell, 22nd edn, 2021) at para 28-051.

<sup>27</sup>(1875) LR 20 Eq 500, at 505.

the plaintiff's business profits had not been interfered with and that it would be greatly inconvenient to stop the defendants' business, he refused to grant an injunction and awarded damages instead. Lindley LJ was in no doubt that, before Lord Cairns' Act, the tenant would have been 'entitled' to an injunction.<sup>28</sup> He rejected the notion that the court should allow a wrong to continue simply because the wrongdoer could pay for the injury inflicted: instead, the jurisdiction should only be exercised in 'exceptional circumstances'.<sup>29</sup>

AL Smith LJ agreed that a person committing a wrongful act was not entitled to ask the court to 'sanction' his doing so 'by purchasing his neighbour's rights' through an assessment of damages. He accepted, however, that there were cases where this rule may be 'relaxed'.<sup>30</sup> He then set out the fourfold 'good working rule' based on whether (1) the injury to the claimant's legal rights was small, (2) it was one capable of being estimated in money, (3) and could be adequately compensated by a small money payment, and (4) it would be oppressive to the defendant to grant an injunction.<sup>31</sup> He immediately went on to note that, even if those requirements were satisfied, there may be cases where 'the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff's rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction'.<sup>32</sup>

While *Colls v Home & Colonial Stores Ltd* was another case involving nuisance, the interference with the claimant's enjoyment of his land was substantially less serious. The case concerned an alleged interference with rights of light. The trial judge, Joyce J, had found that the proposed building would only interfere with the light to two windows, would not affect the value of the premises, and would still be sufficiently lit for its normal business purposes. Joyce J dismissed the claim, but his decision was reversed by the Court of Appeal, who granted an injunction ordering the defendant to pull down all of the building that had been built that darkened the claimant's ancient lights.<sup>33</sup> In *Colls*, the House of Lords corrected the high degree of protection afforded to rights of light which had threatened to stymie urban development.<sup>34</sup> The order of Joyce J was restored: strictly, the comments in the case on the jurisdiction to order damages in lieu of an injunction were obiter. Lord Macnaghten's observations have, however, been influential. They came down to a balance of oppression. His examples of cases where an injunction was 'necessary' on account of the defendant's conduct – including where the defendant had acted in a high-handed manner, if he had endeavoured to steal a march on the plaintiff, or to evade the jurisdiction of the court – were similar to those recited by AL Smith LJ in *Shelfer*. He gave two reasons why an injunction was necessary in these cases: 'in order to do justice to the plaintiff and as a warning to others'.<sup>35</sup> He accepted that a party should not be compelled to part with their property; but he balanced this against using rights of light 'as a means of extorting money'. He reflected that there was 'quite as much oppression' in the invocation of the court's power to protect rights which had not previously been held to be valuable as in the improvement of the neighbourhood in a way that must necessarily interfere with a neighbouring premises' light.<sup>36</sup>

Prior to the *Fen Tigers* case, two lines of case law had developed as to how to apply the four-fold test in *Shelfer*.<sup>37</sup> In *Jaggard v Sawyer*, the Court of Appeal upheld the trial judge's decision to award damages instead of an injunction; the test was not the 'application of a general balance of convenience test', but one of oppression judged as at the date that the court is asked to grant the

<sup>28</sup>*Shelfer*, above n 4, at 314, citing *Imperial Gas Light and Coke Co v Broadbent* (1859) 7 HL Cas 600, 11 ER 239.

<sup>29</sup>*Shelfer*, above n 4, at 315–316.

<sup>30</sup>*Ibid*, at 322.

<sup>31</sup>*Ibid*, at 322–323.

<sup>32</sup>*Ibid*, at 323.

<sup>33</sup>[1902] 1 Ch 302.

<sup>34</sup>C Rotherham 'Remedies for breaches of rights to light: averting a tragedy of the anticommons' in B McFarlane and S Agnew (eds) *Modern Studies in Property Law: Volume 10* (London: Hart Publishing, 2019) ch 9.

<sup>35</sup>*Colls*, above n 5, at 193 per Lord Macnaghten.

<sup>36</sup>*Ibid*.

<sup>37</sup>See Lord Neuberger's review of the case law in *Fen Tigers*, above n 3, at [102]–[117].

injunction.<sup>38</sup> The Court of Appeal considered the circumstances of the case without limiting their observations to the guidance provided by *Shelfer* test. On the other hand, in *Regan v Paul Properties DPF No 1 Ltd*,<sup>39</sup> the Court of Appeal applied the *Shelfer* test more systematically, granting an injunction on the basis that three of the four criteria were not satisfied. Mummery LJ did, however, emphasise in his review of the previous cases that the *Shelfer* test had been advanced as practical suggestions, and that they were never intended to be a decisive test.<sup>40</sup> In considering the facts of the case itself, Mummery LJ noted the oppression to the defendant in cutting back on its plans, but held that this was not determinative of the choice of remedy; instead, 'It is necessary to consider all the surrounding circumstances of the dispute and the conduct of the parties'.<sup>41</sup> He noted that Mr Regan had protested against the infringement of his right to light, but the developers took 'a calculated risk' and 'continued with the construction with their eyes open'.<sup>42</sup> The fact that the advice to the developers that there would be no infringement was wrong 'should not prejudice the position of Mr Regan'.<sup>43</sup> In these circumstances, it was not oppressive, unreasonable or inequitable to grant an injunction.<sup>44</sup> In a case which has been taken as the 'high water mark' of the *Shelfer* test approach, the defendant's knowledge and conduct was still a very important factor when considering whether or not oppression would be caused by an injunction.

The Supreme Court in *Lawrence v Fen Tigers* was considering a nuisance by noise. A rigid application of the *Shelfer* test was rejected.<sup>45</sup> Lord Neuberger considered the court's power to award damages in lieu of an injunction to involve 'a classic exercise of discretion'.<sup>46</sup> He did, however, give two lines of guidance. First, the legal burden was on the defendant to show why an injunction should not be granted. Secondly, he approved (with some modification) Lord Macnaghten's observations in *Coll* on the relevance of the defendant's conduct on the one hand, and the care that the court should take in not allowing an action for an injunction to be used as a means of 'extorting' money on the other.<sup>47</sup> Lord Neuberger also agreed with Lord Mance's view that 'the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money'.<sup>48</sup>

Following *Lawrence v Fen Tigers* and Lord Neuberger's endorsement of Lord Macnaghten's citation of the relevance of the defendant's conduct, this has remained a central consideration. The clearest example of a defendant's high-handed and cynical behaviour was *Ottercroft Ltd v Scandia Care Ltd*, where the defendant failed to comply with the Party Walls etc Act 1996 or even an undertaking not to interfere with a right to light given both by the company and by the person controlling it.<sup>49</sup> Lord Neuberger's reference to Lord Macnaghten's statement was noted; Lewison LJ held that they fit the facts of the case 'exactly'.<sup>50</sup> The judge had been right to attach weight to the undertakings: 'To hold the defendants to their contractual undertakings cannot, in my judgment, be said to be oppressive'.<sup>51</sup> The appeal from the order granting an injunction was robustly dismissed.

<sup>38</sup>[1995] 1 WLR 269 at 283 per Sir Thomas Bingham MR. See 'Damages in lieu of an injunction under Lord Cairns' Act' (1995) 14(Jan) Civil Justice Quarterly 16.

<sup>39</sup>[2007] EWCA Civ 1391, [2007] Ch 135.

<sup>40</sup>*Ibid.*, at [39].

<sup>41</sup>*Ibid.*, at [73].

<sup>42</sup>*Ibid.*, at [74].

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.*, at [75].

<sup>45</sup>For a careful and systematic argument against the rigid application of this test, see S Tromans 'Nuisance – prevention or payment?' (1982) 41(1) Cambridge Law Journal 87.

<sup>46</sup>*Fen Tigers*, above n 3, at [120].

<sup>47</sup>*Ibid.*, at [121].

<sup>48</sup>*Ibid.*, at [168].

<sup>49</sup>*Ottercroft*, above n 12.

<sup>50</sup>*Ibid.*, at [14].

<sup>51</sup>*Ibid.*

It is possible to point to a number of cases where the defendant's conduct has outweighed the other considerations that the court has taken into account. *Pugh v Howells* is another clear example where an appellate court considered that the trial judge gave the factor too little weight.<sup>52</sup> The defendant had been advised that his proposed extension would affect the rights of light of the plaintiff's kitchen. When the plaintiffs became suspicious about demolition works to the defendant's lean-to, he hurried up construction of the extension, building it over a bank holiday weekend. The trial judge's decision that damages could be awarded on the basis that the nuisance was not serious was overturned. Waller LJ cited AL Smith LJ's observations in *Shelfer* that a defendant is not entitled to ask the court to sanction his wrongful acts by purchasing his neighbours rights, and that the defendant may disentitle himself through his conduct from asking that damages be assessed in substitution for an injunction.<sup>53</sup> The defendant came within the group that AL Smith LJ had excepted from his propositions. What the defendant had done, in Waller LJ's view, was take a risk: 'they cannot complain if such risk is one that should not have been taken and results in their being ordered to pull down that which they have put up'.<sup>54</sup> Fox LJ agreed: 'Having regard to the conduct of the defendant in this case, I do not think that it would be oppressive at all to grant an injunction'.<sup>55</sup>

The starting point, therefore, is that the court will as of course, if not as of right, make an order for an injunction where there is a continuing infringement of a party's proprietary interests in land. As to whether, however, the court should then order damages in lieu of an injunction is a matter of discretion for the court. While the *Shelfer* test is still a 'good working rule', the approach adopted in *Colls, Jaggard v Sawyer* and by the majority in *Lawrence v Fen Tigers* was to consider the oppression caused to the defendant by an order for an injunction together with and alongside a concern not to allow an injunction to become a tool to extort money from developers for rights that had, hitherto, not been considered to be valuable, as part of all the circumstances of the case. A defendant's cynical disregard for the claimant's rights, however, can cut across these two factors. It takes the case out of the 'working rule' set out by AL Smith LJ and reduces a defendant's arguments as to oppression.

What is not so clearly stated in the cases is exactly why this should be the case. Mummery LJ's comments that the validity of the advice given to the developer should not prejudice whether or not Mr Regan was granted his injunction in the *Regan v Paul Properties DPF No 1 Ltd* case can be turned around: why should Mr Regan's remedy depend on the developer's state of knowledge or motivation? Before this question can be answered, the purpose and effect of an order for an injunction will be framed in the next section.

## 2. The role of vindication in the exercise of the discretion

An order for an injunction vindicates a claimant's proprietary rights by providing an adequate remedy for the infringement of those rights.<sup>56</sup> Whether or not a 'right to exclude' is placed at the core of property law or not, the right to exclude the rest of the world from, and the liberty to use, the thing or land that is the subject of those rights are typically regarded to be highly important aspects of property rights, imposing corresponding negative obligations on other persons.<sup>57</sup> Proprietary rights in land,

<sup>52</sup>(1984) 48 P & CR 298.

<sup>53</sup>*Shelfer*, above n 4, at 322–323.

<sup>54</sup>*Pugh v Howells*, above n 52, at 304.

<sup>55</sup>*Ibid*, at 307.

<sup>56</sup>JNE Varuhas 'The concept of "vindication" in the law of torts: rights, interests and damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253, at 258; D Pearce and R Halson 'Damages for breach of contract: compensation, restitution, and vindication' (2008) 28(1) *Oxford Journal of Legal Studies* 73.

<sup>57</sup>AM Honoré 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) p 107; TW Merrill 'Property and the right to exclude' (1998) 77 *Nebraska Law Review* 730; JE Penner 'The "bundle of rights" picture of property' (1996) 43 *UCLA Law Review* 711. For an overview of this debate, see S Douglas and B McFarlane 'Defining property rights' in J Penner and H Smith (eds) *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2014) ch 10. It was noted by the Court of Appeal in *Fearn v Tate Gallery Board of Trustees* [2020] EWCA Civ 104, [2020] Ch 621 at [32] that 'although private nuisance is sometimes broken down into different categories,

by their nature, are enforceable against the land itself, rather than being limited to recovery of a sum for interference with or loss of use.<sup>58</sup> In some cases, an order for an immediate injunction will be the only possible way to vindicate a claimant's property rights. The decision in *Woollerton and Wilson Ltd v Richard Costain Ltd* came under sustained criticism because the decision to grant an injunction restraining a crane overhang of a neighbouring plot, but then to suspend it pending completion of the works, emptied the claimant's property rights of any content.<sup>59</sup> The Court of Appeal decision in *Patel v WH Smith (Eziot) Ltd* reflected the orthodox approach that, save in exceptional circumstances, a landowner whose title was not disputed was prima facie entitled to an injunction to restrain trespass on his land, even if the trespass did not harm him.<sup>60</sup>

Whereas an award of damages is available as of right if the claimant has established a cause of action and loss, an order for an injunction is an equitable remedy that is a matter for the court's discretion. As was noted in *Jaggard v Sawyer*, the common law does not directly protect a claimant's proprietary rights by making an award for damages: 'If he wants to be protected he must seek equitable relief, and he has no absolute right to that'.<sup>61</sup> There may well be powerful reasons pointing against the making of an order for an injunction.<sup>62</sup> This was re-asserted by Chamberlain J in *University College London Hospitals NHS Foundation Trust v MB*,<sup>63</sup> where the applicant NHS Foundation Trust seeking possession of a bedroom from a patient was unable to obtain a possession order due to temporary restrictions imposed by CPR PD 51Z because of the Covid-19 pandemic. Instead, the Trust applied for an interim injunction to recover possession. As Chamberlain J noted, absent the restrictions on possession orders, the Trust would normally obtain a possession order as of right.<sup>64</sup> A property owner is, in general, entitled to enforce its rights as against a trespasser. However, as the making of an interim injunction would be tantamount to final relief, the court had to be satisfied that there was clearly no defence to the action; the court also had to take into account discretionary factors that might affect the grant of the remedy.<sup>65</sup>

An order for damages for the past infringement of a claimant's property rights typically reflects the loss that has actually been inflicted on the claimant, even if this cannot easily be calculated by reference to financial loss. In *One Step (Support) Ltd v Morris-Garner*, Lord Reed reviewed the use of damages awarded at common law for the invasion of rights to tangible moveable or immoveable property.<sup>66</sup> For a claim in tort, the general principle was that such damages were compensatory.<sup>67</sup> User damages were

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these are merely examples of a violation of property rights'; the interplay between ownership and nuisance is discussed by Emma Lees in the context of this case in 'Fearn v Tate Galleries: privacy and the law of nuisance' (2021) 23(1) *Environmental Law Review* 49, at 51–52. The appeal from the Court of Appeal has been heard by the Supreme Court; at the time of writing, judgment is awaited.

<sup>58</sup>M Dixon 'Proprietary and non-proprietary rights in modern land law' in L Tee (ed) *Land Law: Issues, Debates, Policy* (Cullompton: Willan, 2002) ch 1, pp 9–10.

<sup>59</sup>[1970] 1 WLR 411. See, for example, G Dworkin 'Trespass to air space and injunctions. A pointless remedy' (1970) 33(5) *Modern Law Review* 552.

<sup>60</sup>[1987] 1 WLR 853, at 858. In that case, the Court of Appeal granted an injunction to prevent car parking on the claimant's land. In the subsequent crane overhang case of *Anchor Brewhouse Developments Ltd v Berkley House Docklands Developments Ltd* [1987] 2 EGLR 173, an injunction was granted despite the lack of damage, even if Scott J's conclusion at 178 that the claimants were 'entitled to their injunction [stuck] a little in [his] gullet'.

<sup>61</sup>*Jaggard v Sawyer*, above n 38, at 287 per Millett LJ.

<sup>62</sup>*University College London Hospitals NHS Foundation Trust v MB* [2020] EWHC 882 (QB); S Palmer and S Martin 'Public health emergencies and human rights: problematic jurisprudence arising from the COVID-19 pandemic' (2020) 5 *European Human Rights Law Review* 488. See also K Gray and S Gray 'Civil rights, civil wrongs and quasi-public space' (1999) 4 *European Human Rights Law Review* 46.

<sup>63</sup>*Ibid.*

<sup>64</sup>*Barnet Primary Care Trust v H* [2006] EWHC 787 (QB), (2006) 92 BMLR 17, where an order for possession in 14 days was made: at [22], and at [63]–[65] per Wilkie J.

<sup>65</sup>*University College London Hospitals NHS Foundation Trust v MB*, above n 62, at [38].

<sup>66</sup>[2018] UKSC 20, [2019] AC 649.

<sup>67</sup>*Ibid.*, at [25] per Lord Reed.



placed into this framework.<sup>68</sup> Damages for past trespass might well be based on a hypothetical negotiating exercise, based on the actual duration of the trespass.<sup>69</sup>

By contrast, an order for an injunction looks to the present and into the future, to prevent continuing or further infringements of the claimant's property rights. It places limitations on a defendant's freedom of action. There are, however, logical limits to this argument. The defendant never has a 'freedom' to commit trespass if there is no lawful excuse for their intrusion. Likewise, in a case involving a breach of a restrictive covenant, the defendant never acquired the 'right' to carry out the conduct forming the basis of the claim, as this did not form part of the conveyance to them.<sup>70</sup> Given the open-textured nature of nuisance cases (including those involving rights of light) there is more uncertainty as to the parameters of the defendant's freedom of action, but as a prerequisite to a finding of liability the defendant necessarily did not have a 'right' to commit a nuisance over their neighbour's land.<sup>71</sup> The better argument is that an injunction can also require a defendant to take positive steps that can cause financial or other hardship that greatly exceeds the actual interference with the right or the loss caused to the claimant. While on the one hand, an injunction directly protects the claimant's property interests, and in so doing provides a very strong form of vindication for them, an injunction can also cause hardship to a defendant that is out of proportion to the right that has been infringed. It is appropriate that the decision whether or not to make such an order is discretionary, to ensure that the defendant's own legal rights are not unjustifiably affected by its coercive effects.<sup>72</sup>

Vindication of the claimant's property rights is a highly significant factor as to whether or not to grant an injunction, but it is not the only consideration. The hardship or oppression caused to the defendant by an order for an injunction is, however, another highly important factor in deciding whether to make an order for an injunction, or instead whether to order damages in lieu. In a case concerning a negative covenant in a conveyance not to make an external alteration without the vendor's consent, *Astbury J in Sharp v Harrison* noted that, 'Prima facie, where a defendant commits a breach of a negative covenant with his eyes open, and after notice, the Court will grant a mandatory order, but there is, and must be, some limitation to this practice... if the granting of a mandatory order would inflict damage upon the defendant out of all proportion to the relief which the plaintiff ought to obtain, the Court will, in my opinion, and ought, in my judgment, to refuse it'.<sup>73</sup> The defendant offered undertakings to keep the window frosted and to fasten up the lower part. The plaintiff's claim for an injunction was rejected on the basis that no damage of any sort would be suffered.<sup>74</sup>

The outcome in *Sharp v Harrison* is resonant of the remark of Lord Westbury LC in *Isenberg v East India House Estate Co Ltd*, in respect of Lord Cairns' Act, that it was 'the duty of the Court in such a case as the present not, by granting a mandatory injunction, to deliver over the Defendants to the Plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained'.<sup>75</sup> Millett LJ cited this passage in his judgment in *Jaggard v Sawyer*, while observing that warnings as to the expropriation of the claimant's property had to be balanced against the duty not to cause injustice to the defendant.<sup>76</sup> Especially in the case of a mandatory injunction aimed at preventing future damage, the amount to be

<sup>68</sup>*Ibid.*, at [30] per Lord Reed.

<sup>69</sup>*Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, [2014] 1 P & CR 5.

<sup>70</sup>*Rhone v Stephens* [1994] 2 AC 310, at 317–321 per Lord Templeman.

<sup>71</sup>The possibility of acquiring a 'right' to commit what would otherwise be a nuisance by noise was considered in the *Lawrence v Fen Tigers* case, at [28]–[46] per Lord Neuberger, *Lawrence v Fen Tigers*, above n 3.

<sup>72</sup>PG Turner 'Inadequacy in equity of common law relief: the relevance of contractual terms' (2014) 73(3) Cambridge Law Journal 493, at 496.

<sup>73</sup>[1922] 1 Ch 502, at 515.

<sup>74</sup>*Ibid.*

<sup>75</sup>(1863) De Gex, Jones & Smith 263, 46 ER 637; 273, 641.

<sup>76</sup>*Jaggard v Sawyer*, above n 38, at 287.

expended by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the claimant.<sup>77</sup>

What should be rejected is the suggestion that the court should adopt a punitive approach to the cynical defendant. Burrows was concerned that in cases such as *Ottercroft Ltd*, in circumstances where the defendant has appeared to try to ‘steal a march’ on the claimant or has otherwise acted ‘unreasonably’, the courts may be ‘only too willing to grant even an interim mandatory injunction against the defendant, revealing, seemingly, a punitive approach’.<sup>78</sup> Some of the comments expressed in the cases have come close to this.<sup>79</sup> An injunction is an equitable remedy: the court should not exercise a penal jurisdiction in exercising its discretion.<sup>80</sup> Instead, a different basis ought to be found as to why the different considerations referred to above are so radically re-weighted when it comes to a defendant who knowingly infringes a claimant’s property rights for gain. The next section will consider how the defendant’s conduct affects the balance between the importance of vindicating property rights and the need to avoid unjustifiable oppression and hardship to that defendant.

### 3. Deliberateness and oppression

If a cynical breach of property rights is met only with an award of damages, there is a risk that a defendant will decide that the cost of infringing such rights is lower than the gain they will receive as a consequence. Part of the calculation of such a defendant will be that any award of damages will be less than the likely profit or gain obtained from such an interference, whether it is by speeding up a development, swinging a crane jib over another party’s land, building an extension that interferes with rights of light or violating a building line enforced by a restrictive covenant. In so doing, property rights are reduced to a monetary award based on the outcome of a hypothetical negotiation. In such circumstances, injunctive relief may be the only way that the claimant’s property rights can be appropriately vindicated.<sup>81</sup> While the danger of the ‘hold-out’ who seeks to extort money for trivial infringements of property rights needs to be guarded against, it is part of the established property law regime that the infringement or acquisition of property rights by others is very carefully regulated and supervised, limited to cases of necessity or with suitable supervision and safeguards.<sup>82</sup>

The importance of vindicating property rights is highlighted in those cases where the claimant seeks to protect a right to something that is difficult to reduce to financial terms or which might, on a market valuation, have little economic value but which is valuable to them. In *Wakeham v Wood*, for example, the defendant breached a restrictive covenant that no building was to be erected that could obstruct the view of the sea and beach from the claimant’s house, despite the claimant’s protests.<sup>83</sup> The Court of Appeal overturned the trial judge’s refusal to grant an injunction. As Waller LJ noted, the effect of the order was ‘to enable the defendant to buy his way out of his wrong’.<sup>84</sup> Likewise, in *Rogers v Humphries*, Slade J upheld the trial judge’s decision to enforce a restrictive covenant not to erect a new building: she noted that, ‘the Claimants were not aiming to secure a sum of money from surrendering the covenant; their aim of imposing that covenant, and in moving to the country, was to enjoy a quiet life’.<sup>85</sup> As Benjamin Pontin has discussed, ‘the point

<sup>77</sup>*Redland Bricks v Morris* [1970] AC 652 at 666 per Lord Upjohn.

<sup>78</sup>Burrows, above n 1, p 464.

<sup>79</sup>For example, in *Pugh v Howells*, above n 52, Fox LJ noted at 307 that ‘the conduct of the defendants is very much deserving of criticism’.

<sup>80</sup>*Vyse v Foster* (1872–73) LR 8 Ch App 309 at 333 per James LJ, in the context of a trustee’s misconduct.

<sup>81</sup>J Murphy ‘Rethinking injunctions in tort law’ (2007) 27(3) *Oxford Journal of Legal Studies* 509.

<sup>82</sup>RA Epstein ‘A clear view of the cathedral: the dominance of property rules’ (1997) 106(7) *Yale Law Journal* 2091.

<sup>83</sup>Above n 24.

<sup>84</sup>*Ibid*, at 45.

<sup>85</sup>[2017] EWHC 3681 (QB) at [64].

is well made that nuisance claimants who occupy land for residential purposes are often seeking to protect an interest in something relatively permanent and central to their life'.<sup>86</sup>

One part, therefore, of Lord Macnaghten's rationale for taking into account the defendant's conduct – 'a warning to others' – can only be accepted with modification.<sup>87</sup> There is a policy interest that goes beyond the immediate circumstances of the parties in the instant litigation in vindicating property rights by granting an injunction rather than awarding damages. It is not necessary, however, for the resulting remedy to exact retribution against the defendant in order to vindicate the claimant's rights. Once the claimant's property rights have been vindicated by the court's order, it is not then necessary or appropriate to go further in order to punish the defendant.

As between the parties themselves, a defendant who, in the knowledge that they are infringing the claimant's property rights, presses on regardless (and perhaps even takes steps to present the claimant with a *fait accompli*, such as by hurrying on building works), voluntarily assumes the risk that the court will grant the claimant an injunction. In these circumstances, the submission that an injunction would cause hardship or oppression carries little or no weight as the defendant knowingly created the situation themselves. Eastham J held in *Wakeham v Wood* that, through his conduct, the defendant had 'disentitled himself' from asking for an award of damages in lieu of an injunction.<sup>88</sup> The language of 'risk taking' conduct on the part of the defendant is frequently used in a number of the cases. In *Pugh v Howells*, Waller LJ considered that the defendant took a risk, and that 'they cannot complain if such risk... results in their being to pull down that which they have put up'.<sup>89</sup> Risk taking, and the assumption of the risk of an injunction being granted notwithstanding the effect of such an order on the defendant, does not require an inquiry into the moral blameworthiness of that defendant. It is therefore possible to move away from the perception that the courts are adopting the 'punitive approach' that Burrows warns against.<sup>90</sup>

This analysis, taking into account the risk-taking conduct by the defendant with regard to the chance of an oppressive order being made against them, is also capable of encompassing claimants who are slow themselves to enforce their rights. In *Jaggard v Sawyer*, the claimant threatened to bring proceedings to restrain a breach of a restrictive covenant and to prevent a trespass over a roadway that the defendants had believed was a public road. The claimant did not bring these proceedings, and only commenced them once the works were substantially progressed. The trial judge held that the defendants had not acted in calculated disregard of the claimant's rights but had failed to appreciate the effect of the covenant. As Millett LJ noted, the defendants 'went ahead, not with their eyes open, but at their own risk', but the claimant 'also took a risk... the court would be presented with a *fait accompli*'.<sup>91</sup>

The assumption of a state of affairs by a defendant is even clearer in a case where the defendant is in breach of a binding agreement. In *Rogers v Humphrey*, it was held that there was no oppression in holding someone to their bargain,<sup>92</sup> a sentiment that was echoed in respect of the undertakings given by the defendants in *Ottercroft*.<sup>93</sup> A claimant who delays too long, however, might well find themselves barred from being able to claim an injunction at all, on the grounds of laches and delay.

An analysis based on the defendant's voluntary assumption of the risk of an injunction is more likely to give this factor an appropriate weight, rather than to treat it as the trump card against other indicia. In *Ketley v Gordon*, the defendant deliberately trespassed on the claimants' land in order to provide an access to three blocks of flats.<sup>94</sup> The trial judge found that he had acted with

<sup>86</sup>BJ Pontin 'Private nuisance in the balance' (2015) 27(1) *Journal of Environmental Law* 119, at 132.

<sup>87</sup>*Colls*, above n 5, at 193.

<sup>88</sup>Above n 24, at 46.

<sup>89</sup>Above n 52, at 304.

<sup>90</sup>Burrows, above n 1, p 464.

<sup>91</sup>Above n 38, at 289.

<sup>92</sup>Above n 85, at [70].

<sup>93</sup>Above n 12, at [14].

<sup>94</sup>(1997) 73 P & CR 305.

reckless disregard to their rights and granted a mandatory injunction. The Court of Appeal allowed the appeal against the injunction. Given the smallness of the permanent injury, damages were an appropriate remedy. The Court of Appeal rejected the trial judge's proposition that a mandatory injunction had to be granted where there had been a reckless disregard of rights. He was wrong not to take into account the delay in seeking relief. Even if, therefore, a defendant has cynically breached a party's property rights, the correct order may still be an award of damages. Even if the question of oppression or hardship to the defendant is partially or entirely dissolved by the defendant's own cynical motivation, other factors (such as the triviality of the interference with the property right) may still militate against the making of an order for an injunction.

One of the most difficult areas, where the tension between the right infringed and the availability of remedies is most acute, is in respect of rights of light. While it is not always straightforward to determine if a party has rights of light, or if a building will substantially interfere with those rights, and the likely monetary value of such rights is typically small, the consequences of an injunction on the developer can be significant. The loss to the developer (in terms of either reducing the proposed mass of the development, or cutting back an existing building) can be out of proportion to the injury to the owner of the right of light (either in terms of the amount of light interference, or the financial injury expressed in terms such as the lettable value). Lord Carnwath in *Lawrence v Fen Tigers* observed that rights of light cases often involve 'drastic alternatives' (interference with the right or demolition) which are absent in cases involving other types of nuisance, such as noise.<sup>95</sup> There is also the long-standing concern that the threat or granting of a mandatory injunction can allow the owner of the right of light to obtain a far greater financial settlement than they would otherwise be entitled to.<sup>96</sup>

In the notorious *HKRUK II (CHC) Ltd v Heaney* case, the developer had planning permission to construct additional sixth and seventh floors to an existing office building in the centre of Leeds. The defendant owner of a Grade II-listed restored office building had rights of light which the new floors interfered with. The parties entered into discussions but could not resolve a way forward; in the interim, the developer carried out and completed the construction of the additional floors. The 'book value', or common law, damages for the loss of light was assessed at £80,000.<sup>97</sup> The developer applied for a declaration that damages were an appropriate remedy; the neighbouring office owner counterclaimed for an injunction. The court applied the *Shelfer* test mechanically, considering that the developer had to establish each one of the four considerations; otherwise, an injunction would be ordered.<sup>98</sup> The area which ceased to be adequately lit was less than 5 m<sup>2</sup>, but this was regarded as not a small injury. The court therefore ordered the developer to tear down part of a building even though those parts had already been let, at an estimated building cost of between £1 million and £2.4 million.<sup>99</sup>

Following the rights of light case of *Regan v Paul Properties DPF No 1 Ltd*, where a loss of adequate light from circa 65% to circa 45% of the floor area also resulted in a mandatory injunction,<sup>100</sup> there was considerable concern that inadequate weight was being given to the question of oppression (the fourth limb of the *Shelfer* guidance), as well as at the lack of proportion between the losses suffered by the owner of the right of light and the losses to the developer.<sup>101</sup> At the same time, and as the Law

<sup>95</sup>*Lawrence v Fen Tigers*, above n 3, at [247].

<sup>96</sup>See, for example, the concern expressed in *Colls* that the protection of rights of light should not be used as a means of 'extorting money': above n 5, at 193. Some of the responses to the Law Commission consultation considered that the threat of an injunction could be used to increase the amount of compensation paid to release such rights in a settlement agreement (Law Commission, *Rights to Light* (Law Com CP No 210 (Analysis of Responses), 2014): see, for example, the reference to 'extortionate ransom demands' at para 7.50, and the British Research Establishment's opinion at para 5.29 that 'adjoining owners hold out for an injunction to maximise the damages available'.

<sup>97</sup>[2010] EWHC 2245 (Ch), [2010] EGLR 15.

<sup>98</sup>*Ibid*, at [61]–[62].

<sup>99</sup>*Ibid*, at [56]–[57].

<sup>100</sup>Above n 39, at [22] per Mummery LJ.

<sup>101</sup>Law Commission *Rights to Light* (Law Com CP No 210, 2013), para 5.42, which quoted S Bickford-Smith and N Taggart 'Don't be left in the dark' (2012) 1235 *Estates Gazette* 64, at 66.

Commission observed, the building that infringed the rights of light in the *HKRUK II (CHC) Ltd v Heaney* case still stands: ‘The result of the decision was not the protection of light itself, but an increase in risk for those infringing rights to light’; the case itself created the perception that rights owners ‘have developers “over a barrel”’.<sup>102</sup>

In June 2011, the Law Commission completed its project on the law of easements and other rights over land.<sup>103</sup> The decision in *HKRUK II (CHC) Ltd v Heaney* prompted the Department for Communities and Local Government to express an interest in the Law Commission following up that project with one focused on addressing perceived problems with rights to light.<sup>104</sup> The resulting Rights to Light Consultation noted that, ‘If a defendant has acted badly and has, for example, built with a reckless disregard for the claimant’s rights, then the argument of oppression will be likely to fail: the defendant proceeded with his or her eyes open to the risk of a court granting an injunction’.<sup>105</sup> In particular, it was observed that such conduct was most relevant where it had attempted to expedite the works to present the court with a completed building.<sup>106</sup> In the responses to the Consultation, some appetite was expressed for further direction and clarification as to what counted as unreasonable conduct.<sup>107</sup>

The 2014 Law Commission report made a number of recommendations to reform the law as to rights to light, supported by a draft Bill.<sup>108</sup> Between the consultation process and the final report, the Supreme Court handed down its decision in *Lawrence v Fen Tigers*.<sup>109</sup> It was noted that the case itself, while emphasising that the discretion to award damages instead of an injunction should not be fettered, provided little guidance on the exercise of that discretion, save that the court must consider all factors that are relevant.<sup>110</sup> The report did adopt the concept of proportionality that Lord Neuberger made reference to.<sup>111</sup> While the decision had resolved some of the mischief caused by the rigid application of the *Shelfer* test, it was observed that there still remained uncertainty in respect of how the court’s discretion would be exercised.<sup>112</sup>

When it came to the decision whether an injunction or damages should be awarded in clause 2 of the proposed draft Bill, therefore, the Law Commission proposed a new statutory test placing the emphasis on the proportionality of the grant of an injunction. By clause 2(2), ‘The court must not grant an injunction if, in all the circumstances of the case, an injunction would be a disproportionate means of enforcing the claimant’s right to light’. The conduct of both the claimant and the defendant are factors that the court has regard to in clauses 2(3)(d) and 2(3)(f) respectively, alongside other consideration such as the claimant’s interest in the dominant land, the loss of amenity attributable to the infringement, whether damages would be adequate compensation, any delay in claiming an injunction, the impact of an injunction on the defendant, and the public interest, as part of all of the circumstances.<sup>113</sup> The Law Commission’s proposed new test would ensure that the defendant’s conduct would become one part of a larger consideration of proportionality. Beyond this, no further statutory guidance was recommended as to the relevance of the defendant’s conduct. The Explanatory Notes to the draft Bill, however, go into a little further detail: ‘where a defendant has knowingly or recklessly infringed a right to light without first making reasonable attempts to negotiate with the claimant then it is to be expected that a court will lean towards the grant of an injunction’.<sup>114</sup>

<sup>102</sup>Law Commission Final Report, above n 13, para 1.8.

<sup>103</sup>Law Commission *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011).

<sup>104</sup>Law Commission Consultation, above n 101, at para 1.9.

<sup>105</sup>*Ibid*, at para 5.29.

<sup>106</sup>*Ibid*, at para 5.32.

<sup>107</sup>This was from the British Property Federation: Law Commission Analysis of Responses, above n 96, at para 5.20.

<sup>108</sup>Above n 13, ch 4.

<sup>109</sup>Above n 3.

<sup>110</sup>Above n 13, at paras 4.19–4.20.

<sup>111</sup>Above n 3, at [126]; above n 13, at para 4.22.

<sup>112</sup>Above n 13, at paras 4.26–4.38.

<sup>113</sup>*Ibid*, at para 4.116.

<sup>114</sup>*Ibid*, at p 207, para B.13.

The reference to the defendant's conduct in clause 2(3)(f) of the draft Bill, while appropriately left open in the proposed statutory wording, should not be the opportunity for a free-wheeling inquiry into the moral rectitude of a developer. It should, instead, lead to a more sharply focused analysis of whether the oppression that the defendant complains of is, in fact, a situation that it chose to enter into when it infringed the claimant's property rights. Such an analysis, based on the assumption of the risk of an injunction and risk-taking, is capable of distinguishing between the situation in *HKRUK II (CHC) Ltd v Heaney*, where the developer was aware that it was infringing its neighbours rights, had entered into negotiations, but chose to proceed (which led to the court holding that the defendant's submissions on hardship came 'to grief'<sup>115</sup>) and the 'calculated risk' adopted by the perhaps poorly advised developer in *Regan v Paul Properties DPF No 1 Ltd*; and the far more extreme circumstances in cases such as *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* and *Ottercroft Ltd v Scandia Care Ltd*, where the developer has knowingly created a *fait accompli*. In the former cases, the assumption of risk is partial and often balanced by positive engagement with the affected neighbour (giving them the opportunity to seek an injunction or negotiate a modification of the proposed scheme), while in the latter cases the defendant's own deliberate act has led directly to the infringement of the property right and therefore a wholesale assumption of the risk and associated cost of being required to cease that infringement.

What this analysis does not require, however, is a rigid application of fixed criteria in the way that the *Shelfer* test was being applied prior to *Lawrence v Fen Tigers*. Cases such as *Ketley v Gordon* demonstrate that even deliberate conduct needs to be weighed as part of the overall assessment in deciding whether to exercise a discretion to order an injunction. The decisions in *Jaggard v Sawyer* and *Lawrence v Fen Tigers* highlight that the decision whether or not to grant an injunction is, ultimately, a discretionary one, and that while guidance in the exercise of that discretion is both useful and appropriate, it does not supersede the discretionary nature of the remedy itself.

## Conclusion

An order for an injunction is a powerful vindication of a claimant's property rights. Vindication, however, is not the only consideration for the court when deciding whether or not to grant an injunction or to award damages in lieu of an injunction. An injunction is a discretionary remedy, not least because of the potential for oppression that a coercive order can have on a party. There are two reasons why the defendant who has cynically breached a claimant's property rights might well find that an argument based on hardship or oppression is given little weight. First, there are important policy reasons why parties should not be entitled to weigh up the likely award of damages for the appropriation of another party's property rights. These rights might be incapable of being valued in a way commensurate to the importance given to their owners. Such an approach to property rights would also give legitimacy to the ad hoc appropriation of property and be corrosive of property rights altogether. Secondly, as between the parties, a defendant who deliberately infringes a claimant's property rights for material gain assumes the risk that an order will be made by the court forcing them to cease a continuing infringement. Any oppression that that party will endure has therefore been taken on voluntarily. This is not, however, the only material consideration for the court, which must still consider other circumstances, such as any delay in seeking relief on the part of the claimant or the smallness of the damage actually caused.

This analysis moves an inquiry into the defendant's conduct away from questions of blameworthiness or retribution. It also re-affirms the distinction between remedies which are available as of right – such as damages – and equitable remedies, which are a matter of discretion for the court and which impact on a party's future freedom of action. This analysis also provides additional detail to the interpretation of the Law Commission's proposed draft Bill in respect of remedies for breaches of rights of light.

<sup>115</sup>Above n 97, at [80].