Let there be light

Christopher D Berry, Partner in the London office of Hogan & Hartson, describes the effects of any significant development project on the enjoyment of light by neighbouring properties

WHILE NOT REPRESENTING a change in the law as such, a recent decision of the Court of Appeal serves as a timely reminder that, save in exceptional circumstances, the courts will take firm action to safeguard the property rights of an aggrieved claimant. It is apparent that the conduct of the parties is a relevant factor, such that a developer would be well advised not to adopt a cavalier or obstructive attitude when faced with concerns raised by parties who consider themselves likely to be affected.

An action for an interference with a claimant's right to light is an action founded in nuisance. That being said, it is not every interference which is actionable; the interference must be substantial.

The facts in Regan v Paul Properties Limited (and others) [2006] EWCA Civ 1391 are instructive.

The claimant, Mr Regan, lived in a two-storey maisonette in Brighton. His principal living room was on the first floor. Directly opposite the maisonette and within a distance of 12.8 metres, the developer, Paul Properties Limited, was in the course of building out a mixed commercial and residential development comprising 16 units on five storeys in place of a demolished and significantly smaller building (which had been just two and three storeys high). Prior to the development, Mr Regan's living room had enjoyed light to 67 percent of its floor area; following the completion of the development, the evidence suggested that this would be reduced to something between 42 percent and 45 percent. Clearly, a substantial interference.

Work on the project began in mid-September 2005. In October 2005, Mr Regan wrote to the developer to voice his concerns about a number of aspects of the proposed development and, specifically, so as to

include the detriment to the flow of light to his living room. Having taken advice from an expert surveyor, the developer chose to dismiss Mr Regan's concerns and continued with the work. No attempt was made to carry out any further investigation or, indeed, to re-design the scheme around Mr Regan's complaint. In March 2006, Mr Regan issued proceedings for an injunction.

The focus of Mr Regan's concern was that part of the development comprising a penthouse flat (Unit 16). This was valued at £475,000. A redesign of Unit 16 to a profile and configuration which would afford a satisfactory degree of light to Mr Regan's living room would require the removal of its proposed lounge, a bedroom and a bathroom. The evidence laid before the court of first instance was that the value of Unit 16 in this modified state would be in the reduced sum of £300,000. To the estimated loss in value of £175,000, the developer would need to add the building cost of the reconfiguration, a total "loss" in excess of £200,000.

At first instance, the judge found in favour of Mr Regan, but declined to grant an injunction; instead, he awarded Mr Regan damages.

The Court of Appeal (which was concerned solely with the question of remedy) recognised that the burden of proof was very firmly with the developer to show why an injunction should not be granted and that the courts' discretion to award damages in lieu would only be exercised under very exceptional circumstances. As to this, the court was clearly influenced by the conduct of the developer, in that Mr Regan had expressed his concerns at a relatively early stage but the developer had continued with the »

project regardless.

Regan is important as it follows closely on the heels of Midtown, a decision which was thought at the time to represent something of a watershed in rights to light cases. In Midtown, both the freeholder and occupational lessee of an office building in Central London sought an injunction to restrain the development of an adjoining building which (in part, at least) would have impacted on the claimants' prescriptive rights of light. The judge at first instance declined the application, ruling that damages would be an appropriate and sufficient remedy in the circumstances. In reaching that conclusion, the judge took the view that the availability of artificial light could not influence the question of whether or not a substantial interference had taken place but might well be relevant (in a modern office context) to the nature of the appropriate remedy.

A clear distinction can be made between the facts of Regan and those of Midtown, in that the dominant tenement in the former case was a residential building whilst in the latter it was a commercial building. That being said, the later and weightier of the two authorities is Regan and no express distinction was made in the reasoning of the Court between residential and commercial use. This leaves open the possibility, therefore, that Regan might have been decided differently (on the facts) had the complainant been the lessee of a business premises rather than a residential maisonette. The burden would still be on the developer to show reason why an injunction should not be granted and financial compensation given in its place, though there would be scope for argument that the availability of artificial light should incline the remedy away from injunctive relief toward financial compensation. It remains to be seen to what extent Midtown proves to be of any persuasive authority in the future.

The recent High Court decision in Tamares (Vincent Square) Limited is authority for the proposition that – where financial compensation is (exceptionally) the appropriate remedy – the measure of damages for an infringement of rights to light will be the value attributable to the loss of opportunity to obtain an injunction. The exercise requires the judge to recognise that the aggrieved claimant has a "bargaining position"; viz. a prima facie right to an injunction preventing the proposed development, which right the claimant might be prepared to bargain away in exchange for a monetary payment.

It is important to recognise that, when looking at development profit, one is not necessarily concerned with the profit anticipated to be generated by the development in its entirety. What the judge is required to assess is the level of profit that would be derived from that part of the development scheme which infringes the claimant's right to light. In Regan, therefore, the assessment would have been by reference to that element of profit which might have been anticipated as deriving from the construction of Unit 16 in the manner envisaged.

In Tamares, the court was inclined to the view that the bargaining position of the parties was such that the developer might have been prepared to buy out the claimant's objection on the basis of a payment equating to one-third of the apportioned development profit. This rule of thumb is then subject to an overriding (though somewhat inchoate) requirement that the outcome should "feel right". ■

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Practice points

Developer

■ Recognise from the outset that the courts have indicated an increasing willingness to safeguard a claimant's property rights by granting an injunction. The developer can no longer expect to use financial muscle to escape an infringement.

■ At the outset, seek specialist advice on whether (and the extent to which) a proposed scheme might impact on adjoining owners' rights to light.

■ Consider whether an alternative scheme could be implemented which could:
(a) be equally acceptable (to the planning authority and others)
(b) generate a similar level of profit
(c) minimise the impact on the claimant.

■ Communicate with the affected adjoining owners, be responsive and act reasonably. Among all the other factors, the conduct of the parties will be a relevant consideration in the event of the developer seeking to persuade the court to exercise its discretion not to grant an injunction but to make a financial award instead; likewise, the apparent willingness of the claimant in negotiations to accept a financial award.

Claimant

■ On becoming aware of a potential problem, act promptly and raise the issue with the developer.

■ Recognise the enhanced bargaining position conferred by Regan and Tamares and, if financial compensation is the desired result, make that clear in negotiations by enquiring as to the expected level of development profit.

■ Conversely, and if an injunction is what is required, be cautious in negotiations in response to any financial offer that is put forward on the developer's behalf. The courts will look less sympathetically on a claimant which has clearly indicated its willingness to bargain away its entitlement to an injunction. Likewise, as in any legal case, act throughout in a reasonable, responsive and consistent manner.