

Stadium Capital Holdings (No,2) Ltd-v- St Marylebone Property Company PLC
(8/11/2011)- Damages for trespass

The Message: The Court will adopt a sensible approach to awarding damages.

The Case: The High Court has had to decide how damages for trespass should be calculated in relation to a lucrative advertising hoarding erected over an adjoining owner's airspace.

The Claimant, Stadium Capital, owns a cleared development site on the Finchley Road in London. The Defendant, St Marylebone, owns the adjoining building and it has displayed an advertising hoarding on its flank wall for many years. This advertising hoarding is very valuable as it is one of the first, as well as one of the few, such hoardings you come to when leaving Central London going north.

As the hoarding projects into the adjoining airspace, permission from the adjoining owner is required if there is to be no trespass. Permission had been granted but, in 2005, such permission was terminated. However, the hoarding was not removed until 2 October 2008 and the Claimant sought the whole of the advertising revenue of £313,000 earned by the Defendant over that 3 ½ year period.

The Court first considered the basis upon which damages should be assessed? It thought that it should apply the modern approach of awarding damages on the basis of what the parties would have negotiated for allowing the use. On this basis, the test for measuring damages is not on the basis of what loss the innocent party has actually suffered but on the basis of the benefit the unlawful party has obtained.

The question for the Court was how to calculate what would have been negotiated by reasonable parties at the time the trespassed commenced? It held that regard was not to be had to the actual parties or to subsequent events but simply as to what reasonable parties acting lawfully would have negotiated.

The Claimant argued that, as the permission of the adjoining owner was a pre-requisite to any lawful use, the adjoining owner (i.e.itself) held the trump card as there could be no use and no revenue without its consent. It therefore argued that the adjoining owner should receive some 75% of the income and that sum was calculated by reference to the costs savings of the adjoining owner not having to erect a hoarding on its own land to gain advertising revenue instead.

The Court did not find favour with the Claimant's expert evidence. It considered that the Claimant's expert, Tony Lorenz, did not have the necessary knowledge or experience in the field of advertising hoardings.

The Defendant's expert was Timothy Thomas who is an acknowledged expert in the management of outdoor media assets. He based his evidence on his own experience of negotiating agreements with adjoining landowners. Although the cases he had dealt with evidenced a split of 62.5:37.5 in favour of the Defendant, he accepted that most cases ended up with the licence fees earned from the advertiser being shared equally.

The Court went through all the relevant case authorities and concluded that, in determining what the letting value was in cases of trespass, it had to assume a negotiation

between 2 willing parties so it could not assume no deal would have been agreed. However, if one party did hold a trump card, that would be very relevant in determining the price that the party seeking to obtain the right to display the hoarding would pay.

The Claimant argued that the adjoining owner had to be assumed to hold 2 trump cards. It could refuse consent and also, subject to obtaining planning permission, erect its own free-standing hoarding on its own site so as to block the Defendant's hoarding.

The Defendant argued that it had the relationship and agreement with the actual advertiser, Clear Channel. Also, its hoarding was a very good site and long established and it commanded a lucrative fee of more than £80,000 per annum and that it would take the adjoining owner time and costs to erect its own hoarding instead.

The Court held that it was to be assumed that any parties would seek expert advice and be told the normal split was 50:50. It did not consider that either party in this case held a trump card. One owned the airspace but the other had the established use and lucrative contract. Accordingly, the Court ordered that Stadium Capital should receive half the revenue earned, being some £157,000.