FINAL INJUNCTIONS

Basic Principles:

1. An injunction is an equitable remedy and as such is within the Court's discretion. Whilst an injunction is the prima facie remedy for an interference with a proprietary right such as an easement or restrictive covenant, there are cases where the Court will not consider it appropriate to grant an injunction on the facts of the case.

2. It is the purpose of our workshop to explore these issues and to consider the tactics that parties should adopt to maximise their positions, both at trial and interim stages of litigation. This paper is intended to provide guidance as to the main legal principles in play and should be read in conjunction with the workshop "answers".

3. It is an established principle that an injunction will not be granted where damages are an effective remedy. In the context of interference with property rights, such as easements and restrictive covenants, most infringements will not be capable of being compensated for in money and the claimant will be prima facie entitled to an injunction: see *Doherty v. Allman*.¹ However, that is not the end of the story.

¹. (1878) LR 3 App Cas 709.
4. In particular, where the interference with the claimant's right is extremely trivial or temporary or in cases where the claimant does not come to the court with clean hands an injunction may be refused. This is so even in the case of trespass.

_Injunction or Damages?_

5. Further, the Court has a general power under the Senior Courts Act 1981, section 50, to award damages in lieu of an injunction. Cases tend to revolve around the question whether the Court should exercise its discretion to award damages _in lieu_ in the face of continuing interference with proprietary rights that is _prima facie_ restrainable by injunction.

6. The leading case is _Regan v Paul Properties DPF Nº. 1 Ltd._ in which the principles laid down in _Shelfer v. City of London Electric Lighting Co._ were considered. Our workshop is loosely based on this case and a detailed commentary follows.

7. Mr. Regan found himself living, literally, in the shadow of a penthouse flat being built in Brighton. He took some advice (from a surveyor) who advised him he had no legal rights. Mr. Regan wrote a letter of complaint to the developer anyway. The developer also took advice, also from a surveyor, and was informed that, although the proposed development would result in a measurable loss of light to Mr. Regan's maisonette, it was insufficient to constitute an actionable injury. The developer passed on the advice they had received and cracked on with the building works.

8. Six months later, work on the development had reached the top floor and half the shell and roof of the penthouse had been completed. At this point Mr. Regan sought an

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4. [1895] 1 Ch 287 (CA).
injunction to stop that part of the development that infringed his rights to light. The developer gave an undertaking to halt work, pending trial, and made an open offer of £15,000.00 to settle his claim.

9. The trial Judge refused to grant an injunction, because he considered damages to be an adequate remedy.\(^5\) Crucially, however, the Judge did so because he analysed the law on the basis that damages would be the usual remedy, and it was up to the person seeking an injunction to persuade the court that this would be inappropriate. The Court of Appeal, speaking unanimously through Mummery LJ, rejected this approach with some vim and vigour.\(^6\) Mummery LJ went back to Shelfer and restated the principles that case stands for as follows:\(^7\)

9.1 a claimant is prima facie entitled to an injunction against a person committing a wrongful act which invades the claimant’s legal rights;

9.2 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;

9.3 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, just because that defendant is able and willing to pay damages.

9.4 The judicial discretion to award damages \textit{in lieu} should be exercised in a way which pays proper attention to well settled principles and should not be

\(^5\) Mr. Stephen Smith QC (sitting as a deputy judge of the Chancery Division).

\(^6\) Mummery, Tuckey and Wilson LJJ.

\(^7\) At paragraph [36].
exercised to deprive a claimant of his *prima facie* right to an injunction, “except under very exceptional circumstances”.

9.5 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 case law shows that it will be relevant to consider the following factors:

9.5.1 whether the injury to the claimant's legal rights was small;
9.5.2 whether the injury could be estimated in money;
9.5.3 whether it could be adequately compensated by a small money payment;
9.5.4 whether it would be oppressive to the defendant to grant an injunction (perhaps because the claimant had shown that he only wanted money);
9.5.5 whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and
9.5.6 whether there were any other circumstances that justified the refusal of an injunction.

10. The Court then applied those principles, noting a striking fact: the expert evidence was that Mr. Regan’s maisonette would be devalued by about £5,000.00, which was one third of the open offer the developer had made him to settle. The loss to the developer, in capital value alone, disregarding wasted building costs, would be £175,000.00. The Court held that such a disparity should not outweigh Mr. Regan's right to an injunction. The developer had taken a “calculated risk” in deciding to proceed with the development after the claim had been asserted against them, and “continued with the construction with their eyes open”. Even though the developer had initially relied upon advice which turned out to be wrong, this reliance could not be allowed to prejudice Mr. Regan.
11. These principles do not apply simply to rights of light cases but apply more generally to other types of claims with which property litigators are familiar, including those arising out of breach of restrictive covenants, interference with easements and nuisance.

12. Every case will of course depend on its own particular facts and the view that the judge takes of the conduct of the respective parties. It is very difficult to predict the outcome in advance, particularly in light of the recent cases of Regan and Heaney. The prevailing attitude of developers prior to those cases was that the Court was unlikely to order demolition on the grounds of oppression in circumstances where no interim injunction had been applied for. That is an assumption that developers probably never and certainly now cannot safely make.

13. We will now look at some of the particular factors that have proved relevant in the cases.

Other Factors 1 - The Relevance of Delay:

14. Staying with Regan v. Paul for a moment, Mr. Regan was not deprived of injunctive relief by reason of the six month delay in enforcing his rights but delay can be a very relevant factor to be taken into account. In the face of a continuing development in breach of his rights, a potential claimant takes a risk if he does not apply for an interim injunction or at the very least clearly assert his rights. Of course, this presents a difficulty for many potential claimants who may not be willing or able to give an undertaking in damages. The question of undertakings is dealt with later in this paper.

15. Moving on, in Gafford v. Graham, the Court of Appeal stated as a general rule that.\(^8\)

\[\text{... someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands while a permanent and substantial structure is unlawfully erected, ought not to be granted an injunction to have it pulled down.}\]

\(^8\) [1999] 3 EGLR 75 (CA).
16. That said, there are cases that demonstrate that delay in taking action will not of itself deprive a claimant of an injunction. There may be very good reasons for the applicant not wanting to commence proceedings. He may not fully understand his rights and even if he does, he may not be able to afford an undertaking in damages or the very significant costs associated with litigating. However a person standing back and saying nothing when he knows of his rights will be in trouble, particularly so if the developer has proceeded in an open manner whilst being blissfully unaware of the potential claim. The relative means and commercial clout of the parties is likely to be relevant here.

17. Thus, in Jaggard v. Sawyer the Court of Appeal upheld the trial judge’s decision refusing an injunction requiring the demolition of houses built in breach of restrictive covenant and granting £700 damages in lieu. The claimant in that case had threatened but not made an application for an interim injunction to restrain the construction of houses in breach of restrictive covenant. This was held to be a relevant albeit not decisive factor. The developer was equally able to seek declaratory relief in advance. In that case it was held to be oppressive to the defendants to require demolition in all the circumstances of the case.

18. Likewise, in the earlier case of Wrotham Park Estate Co.Ltd. v. Parkside Homes Ltd., a developer built a number of houses in breach of covenant requiring him to first have plans approved by the estate company. The estate company issued proceedings claiming an injunction shortly after the building work began, but did not seek interlocutory relief and all the houses were completed by the date of trial. Brightman J, considering the Shelfer principles, refused to grant an injunction. The Judge appears to have been heavily influenced by a sense that it would be oppressive to order

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10. See Sir Thomas Bingham MR at pages 278-279, where he also warns against the application of the Shelfer principles as though they amounted to a rule. The test is one of "oppression", not "balance of convenience"; see Sir Thomas at page 283 and Millett LJ at page 289.
demolition of much needed housing. The case was not decided on the basis that interim relief had not been sought, although the effect of the decision was that the plaintiff had prejudiced his own position by not acting earlier. Had an interim injunction been sought restraining breach, it would have been granted. By the time of the final hearing, the Court had been presented with a \textit{fait accompli} and, looking at the matter as at that date, it would have been oppressive to order demolition.

19. Lastly, in \textit{HXRU}K II (CHC) Ltd. \textit{v.} Heaney, the fact that Mr. Heaney had threatened but not issued proceedings was not fatal to the grant of a mandatory Injunction.\footnote{[2010] 3 EGLR 15 (HH Judge Peter Langan QC, sitting at Leeds District Registry).}

\textit{Other Factors 2 - Acknowledgements Regarding the Adequacy of Damages:}

20. An acknowledgement in open correspondence that the claimant would be prepared to take financial compensation may well be fatal as was the case in \textit{Watson v. Croft Promo-Sport Ltd.}, in which the claimants' frank admissions that they would prepared to take damages, combined with considerable delay, were fatal to their claim for an injunction restraining continued nuisance.\footnote{[2008] 2 EGLR 149 (Simon J).} This is a real “no-no”. Any attempt to propose a financial settlement must be contained in without prejudice correspondence. A usual developer’s tactic is an attempt to engage in discussions regarding financial payments in open correspondence. A potential claimant should not take the bait.

\textit{Other Factors 3 - Clean Hands:}

21. Another relevant factor to consider is whether the claimant comes to equity with “clean hands”. A claimant who has “dirty hands” in a relevant way is likely to be deprived of an injunction. For example, relying on forged documents or untruthful evidence thereby attempting to mislead the other party or the Court, perhaps to exaggerate a claim or to
“Does Your Injunction Function?” - Nicholas Taggart & Camilla Lamont, Landmark Chambers

“improve” some detrimental reliance”. In *Gonthier v. Orange Contract Scaffolding Ltd.* a false account was put forward in order to exaggerate a claim. However, there has to be a connection between the cleanliness of the hands and the relief sought.

**Other Factors 4 - The Defendant’s Conduct:**

22. The conduct of the defendant developer is also a very relevant factor. As we have seen, the developer in *Regan*, pressed ahead regardless of the claimant’s objections, albeit on advice, but still came seriously unstuck. So too did the developer in *Mortimer v. Bailey*, where an extension to a house was built in breach of a restrictive covenant so close to the claimant’s residence as to be described by the trial judge as “somewhat overpowering and claustrophobic.” The trial judge took the view that the defendants had acted high-handedly and ordered demolition of the extension: the Court of Appeal held he was acting well within his discretion in so doing.

23. Taking a gamble really went wrong in *HXRUK II (CHC) Ltd. v. Heaney:* before adding two new floors to its building, the developer had received advice from a surveyor that the works would result in an actionable loss of light to Mr. Heaney’s building. Nevertheless works were commenced in September 2008 and completed in July 2009. Mr. Heaney’s solicitors had threatened to issue proceedings in November 2008 and February 2009 but that threat was not implemented. An injunction was ordered by HH Judge Langham requiring the developer to cut back its development on the basis that the injury to Mr. Heaney’s rights was not small (£225,000 in loss of “negotiation value”). That alone was fatal, but the judge also went on to consider other factors. In particular

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15. [2006] 3 EGLR 94 (CA).


18. The Judge’s approach might be criticised as treating the *Shelfer* guidelines as a cumulative set of rules, which is contrary to the approach in *Jaggard v. Sawyer* and *Wrotham Park*, which focusses
he held that it was relevant that the works had been done in the knowledge that what
was being done was an actionable interference with right and with a view to a profit. It
could have very easily if somewhat less profitably have built additional floors of reduced
dimensions.

24. Accordingly, a developer should be at pains to demonstrate that it has not sought to
“steal a march”. In Midtown Ltd. v. City of London Real Property Co.Ltd., a process of
engaging with neighbours was a material factor in avoiding an injunction.¹⁹ A developer
would be well advised to investigate possible adverse rights at an early stage and to
enter into an open and productive dialogue with neighbouring owners and occupiers as
to it plans. The developer will protect itself by giving as much information as possible
up front and seeking to negotiate deals with those claiming adverse interests. Try to
engage the other side in a dialogue on monetary compensation in open correspondence
in the hope that they will take the bait. A developer should be encouraged to take expert
advice from a surveyor and lawyers at the earlier opportunity as to the prospects of a
potential claimant establishing an actionable interference with rights.

Other Factors 5 - Injunctions to Restrain Trespass:

25. The position regarding injunctions to restrain a trespass is different. The leading case
is Patel v. WH Smith (Eziot) Ltd. where it was held that 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.²⁰ It was held that there may be exceptional cases
where an injunction would not be appropriate but that such cases would be very rare.
For an example of exceptional circumstances justifying the refusal of an injunction in a
case of trespass, see Armstrong v. Sheppard & Short Ltd. where the interference had

¹⁹. [2005] 1 EGLR 65 (Peter Smith J).
²⁰. [1987] 1 WLR 853 (CA).
inadvertently been encouraged by the landowner and was, in any event, trivial. Moreover, the landowner did not have “clean hands”, having given misleading evidence. It is rather seems from the judgment that the latter point was more determinative of the Court’s decision than the extent of the trespass being “trivial”. This view is confirmed by cases of temporary or permanent trespass of air space, where injunctions are granted pretty much as of right.

INTERIM INJUNCTIONS

Interim Prohibitory Injunctions:

For prohibitory injunctions at the interim stage, the test to be satisfied is that laid down in *American Cyanamid Co. v. Ethicon Ltd.* It is a four-stage test: (1) is there a serious issue to be tried; (2) would damages be an adequate remedy; (3) where lies the balance of convenience; and (4) is it desirable to preserve the status quo. The principles were summarised by Lord Diplock at 407-8 as follows.

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a

financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage.

If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

27. Lord Hoffmann has added his own gloss to the American Cyanamid test, saying this in Commercial Bank Jamaica Ltd. v. Olint Corp Ltd.:25

[17] In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other...

[18] Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court’s opinion of the relative strength of the parties’ cases.

The criteria set out in *American Cyanamid* largely concern cases where the facts are disputed. Where there are no disputes of fact, the Court can resolve points of law at an interim stage and where no arguable defence is offered in response to an injunction claimed at an interim stage in protection of property rights, the court will in most cases grant an interim injunction as of right without needing to consider the balance of convenience.\(^ {26} \)

**Interim Mandatory Injunctions:**

The principles to be applied on an interim application for a mandatory injunction were summarised by Chadwick J in *Nottingham Building Society v. Eurodynamics Systems plc* as follows:\(^ {27} \)

> In my view the principles to be applied are these. First, this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be “wrong” ...

> Secondly, in considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage, may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action thereby preserving the *status quo*.

> Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does feel a high degree of assurance that the plaintiff will be able to establish this right at a trial. That is because the greater the degree of assurance the plaintiff will ultimately establish his right, the less will be the risk of injustice if the injunction is granted.

> But, finally, even where the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist where the risk of injustice if this injunction is refused sufficiently outweigh the risk of injustice if it is granted.

\(^ {26} \) As happened in *Patel v. WH Smith (Eziot) Ltd.* [1987] 1 WLR 853 (CA): once the landowner’s title was put beyond doubt, the injunction to restrain trespass was awarded without further ado.

\(^ {27} \) [1993] FSR 468. This was later approved by the Court of Appeal in *Zockoll Group Ltd. v. Mercury Communications Ltd.* [1998] FSR 354 (CA).
30. The difference in approach between prohibitory and mandatory injunctions was emphasised by Lord Hoffmann in the Commercial Bank Jamaica Ltd. case:

There is however no reason to suppose that, in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in Shepherd Homes Ltd. v. Sandham [1971] Ch 340, 351, “a high degree of assurance that at the trial it will appear that the injunction was rightly granted. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren....What matters is what the practical consequences of the actual injunction are likely to be.”

31. There is a further point to consider which particularly resonates in the case of applications for mandatory injunctions, whether interim or final. The order must clearly set out what it is that the respondent is required to do or not do. This is particularly so where a mandatory injunction is sought. The respondent must be able to understand with precision what as a matter of fact he must do in order to avoid breaching the injunction. Further, the court will not impose an injunction that is likely to require repeated supervision.

Interim Injunctions and Cross-Undertakings in Damages:

32. An undertaking in damages is almost invariably required on an application for an interim injunction of either type. If the defendant offers an undertaking in lieu of an injunction, the claimant will still be required to give a cross undertaking in damages. Further,

evidence should be adduced to demonstrate that the applicant (or the giver of the undertaking if different) is good for the money.

33. However, it should be noted that an interim injunction may on appropriate facts be granted even if the means of the applicant are brought into question. The adequacy of the undertaking is a factor to be taken into account but it may not be conclusive against the applicant. In *Allen v. Jambo Holdings Ltd.* an injunction was granted, even though it was self-evident that the Legally-Aided claimant/applicant would not be able to meet the losses the defendant would suffer if the cross-undertaking was “called in”. Nonetheless in practice, fear of an undertaking being “called in” will deter clients from seeking interim relief. This, perhaps, explains the apparent willingness of the Courts in the recent cases to grant final mandatory injunctions, particularly in cases where the claimant has made his objections known and the developer has pressed on regardless.

34. The criteria to be satisfied on an application for interim injunctions depend to some extent on whether the injunction has prohibitory or mandatory effect, although the underlying test is fundamentally the same.

“Shady” Sam Black’s Billiard Rooms are located on the basement, ground and first floors of a converted Victorian 6-storey town-house on Kew Road. It is accessed at the front by a short staircase over a basement courtyard to a raised ground floor. The rear of the building used to face over a small walled garden, which gives on to small passageway, Skew Lane.³₀

A couple of years ago, Sam decided he needed space for more billiard tables, so he built an extension over the basement level garden. He decided not to trouble the planning authority or fire authority for permission,³¹ as the forms are very long. To extend the property, he removed the existing three basement windows from their present location, but as they were in decent

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³₀. Nowhere does either party make the point that Shady Sam needs to have established a prescriptive easement to light, although it is a reasonable inference from the facts that the house is Victorian and the basement is recently extended by Shady Sam. But, will anybody ask the basic question? Also, no-one puts in issue if Shady Sam owns the Billiard Hall freehold or leasehold. If the seminar needs re-igniting, try dropping in that Shady Sam is only a lessee, and that his landlord has just served a hostile Section 25, relying on Grounds (b), (c), (f) and (g) (rent, “other conduct”, redevelopment and own occupation). How will that change the balance of convenience?

³¹. This means the local authority could still seek an order that he remove the extension: as this is unauthorised “operational development”, the enforcement period is 4 years: Town & Country Planning Act 1990, section 171B(1). This gives rise to the question whether Sam can rely on the risk of the planning authority enforcing against him to restore the basement as a way of clawing back any rights of light lost on ground floor and basement. For a discussion of the need to have “clean hands”, see note 10 below.

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repair, he re-used them in his newly built wall, 8 feet closer to the boundary.\textsuperscript{32} He also had to remove half of one of the three huge ground floor windows, as he enlarged the opening to make a covered stairway. This stairway also has a window in it, albeit a bit smaller that the old one.\textsuperscript{33}

Backing onto the opposite side of Skew Lane are more Victorian town houses, which face a small open common, The Green. These houses have been acquired for lateral conversion into very flash offices and posher flats by Cushideal Developments. Opposite Sam's, Cushideal are extending the houses up by two new floors, and opposite Shady Sam's premises, the seventh floor is to be a huge boardroom for the offices; the eighth is to be a luxury penthouse flat.

Five weeks ago, Shady Sam wrote this letter to Cushideal:

\begin{quote}
Dear Sirs,

\textit{Subject to Contract}\textsuperscript{34}

I have been increasingly concerned that your building works are going to overshadow my very profitable billiard hall, which needs lots of natural light during the day, particularly for my partially-sighted customers who find it hard to play in artificial light.\textsuperscript{35} It is also going to make the bar I run on the first floor dark and forbidding by spoiling my view of The Green.\textsuperscript{36} I also have a solar-panel
\end{quote}

Has Shady Sam lost his rights to light by these changes? Possibly, but it is a triable issue on the facts: see \textit{Scott v. Pope} (1886) 31 ChD 554 (CA), \textit{WH Bailey & Son Ltd. v. Holborn and Frascati Ltd.} [1914] 1 Ch 598 (Sargent J) and \textit{Carr-Saunders v. Dick McNeil Associates Ltd.} [1986] 1 WLR 922, 927 (Millett J). Tactics: if this is triable, does Sam chance his arm with an interim or does he sit it out and hope that a final injunction will be awarded by analogy with \textit{Regan v. Paul Properties DPF No.1 Ltd.} [2006] EWCA Civ 1319; [2006] 3 EGLR 94 (which the facts here are a version of), \textit{HXRUK II (CHC) Ltd. v. Heaney} [2010] 3 EGLR 15 (HH Judge Peter Langan QC, sitting at Leeds District Registry) and \textit{Mortimer v. Bailey} [2004] EWCA Civ 1514; [2005] 1 EGLR 75 (CA).

Has Sam lost his right to light by reducing the amount of light available to this floor by installing a smaller window? Difficult, and the cases are not wholly clear, but probably not: see \textit{Scott v. Pope} and \textit{WH Bailey & Son Ltd.}, above. It seems that a radical alteration in size may amount to an abandonment of the right of light to that aperture, but that aperture alone.

This is obviously the wrong label to have applied. Should the Court treat this as “without prejudice” as a matter of substance, even if it is wrong as a matter of form? See the discussion in note 13.

Leaving on one side the plausibility of this claim (which may have consequences, see note 10 on exaggeration and note 23 on contested facts), it does seem that case that a building which is designed or adapted for a use which needs a lot of light is entitled more light than a building which is not used for light-sensitive purposes: \textit{Allen v. Greenwood} [1980] Ch 119, 130 per Goff LJ (CA); \textit{Midtown Ltd v. City of London Real Property Co.Ltd.} [2005] EWHC 33 (Ch); [2005] 1 EGLR 65 (Peter Smith J).

Is this relevant to a claim for an injunction for interference with a right of light? It is a right to light, not a right to a view: \textit{Dalton v. Angus} (1881) 6 App Cas 740, 824 per Lord Blackburn (HL).
on the wall for my ball-washing machine, which will probably not receive enough light after your
development is built.37

My solicitors, Frame, Case & Co., say that I ought to investigate whether I have a claim against you
for this.38 I don’t want to waste money on lawyers, and I am a bit strapped for cash after a
misunderstanding with the Revenue about the money from the bar going through the books.39 In
the circumstances, if you pay me £100,000.00 by the end of the month, we’ll say no more about it.40

Sam Black.

Obviously, by “misunderstanding”, Shady Sam meant “successfully prosecuted once for tax
evasion, with another prosecution pending in the autumn”.41

A week later, Shady Sam received this reply from Cushideal’s in-house lawyer (and failed
barrister), Mr. Pinktape:

37. Leaving on one side how long it has been there, a right to light probably does not extent to a right to
have solar panels illuminated. There is no authority on point, but the articles by Colby and Williams,
“Shedding light on solar panels” (2012) 1217 EG 105 and Hobson & Dowden, “Reversal of fortune”
(2012) 162 NLJ 22 are pretty convincing.

was advised he had no claim by a surveyor, but wrote a letter anyway. It was six months before he
then sought the injunction, and the Court of Appeal held that it was not reasonable to criticise him for
this delay. Does it make any difference that Shady Sam has been informally advised by a solicitor
to investigate whether what is going on is actionable?

39. This gives rise to two inter-related questions: can Sam rely on the loss of profits to his business to
claim either an injunction and/or damages, if he has been previously been failing to declare it to the
Revenue. More generally, would he becoming to equity with “clean hands”? Shady Sam will probably
not have a “clean hands” problem with a claim for either an injunction or damages in lieu, as they will
be focussed more on Cushideal’s profits. For a recent round-up on damages in lieu, see Enfield
thorough discussion of the “clean hands” doctrine, see the judgment of Lindsay J, sitting in the Court
Willis [1986] 1 EGLR 62 (CA). There has to be a causative relationship between the cleanliness of
the hands and the relief sought, so if debate runs dry, we could introduce the idea of Shady Sam
sending a forged valuation report to Cushideal. In Orange the Court said that a forged document
used to exaggerate detriment was enough to prevent a proprietary estoppel from being given effect to.

40. Oh-oh: a claimant who openly admits he will be happy with damages in lieu should automatically be
refused an injunction, according to Simon J in Watson v. Croft Promo-Sport Ltd. [2008] EWHC 759
(QB); [2008] 2 EGLR 149, at[87]. That’s going to make the status of this letter quite interesting.

41. Tactically, that’s interesting. How do you make sure the financial claim stacks up without risking
landing Shady Sam in it, if he is hiding things. How far does the duty to make full disclosure go?
Dear Mr. Black,

Open Letter

Thank you for your letter, which we consider to be no more than outrageous blackmail. We have no intention of paying you one penny. As an adjoining owner, you will have been sent copies of our planning application months ago, and in any event, we have a large artist’s impression of our shiny new development on the hoarding at the front of our building. It will also have been obvious that we are extending the building upwards for weeks, and yet you have sat back and done nothing.

This company has previously employed the services of the finest rights to light expert, Mr. Wun Liu-Minh, and as a lawyer I can assure you that your case does not have a leg to stand on. It is also

Can Mr. Pinktape do that unilaterally? Not if Shady Sam’s letter is genuinely “without prejudice”, even though he has used the wrong label: see Rush & Tompkins Ltd. v. Greater London Council [1989] AC 1280, 1299 per Lord Griffiths (HL); Unilever plc v. The Proctor & Gamble Co. [2000] 1 WLR 2436, 2441-6, per Robert Walker LJ and R v. K [2009] EWCA Crim 1640, [2010] QB 343 at [61] per Moore-Bick LJ (CA). A letter can be treated as “without prejudice” if, on a fair reading, it is intended to settle an existing dispute or avoid an impending one: see Rush & Tompkins, Unilever and Cutts v. Head [1984] Ch 290 (CA).

Hmmm. Well, it is fair to say that there is nothing to say Shady Sam’s £100,000.00 is not just plucked out of the air, but some Judges might think that this letter is not necessarily consistent with the Protocol on Pre-Action Conduct, either. Also, if the figure really is “blackmail”, does that undermine Sam’s letter being privileged, because it is evidence of “unambiguous impropriety”? See Unilever plc v. The Proctor & Gamble Co. [2000] 1 WLR 2436, 2444, per Robert Walker LJ, applying Hoffmann LJ in Forster v. Friedland (unreported), 10 November 1992; Court of Appeal (Civil Division) Transcript N°. 1052 of 1992. Not that recherché a case: it is referred to in both Hollander on Documentary Evidence (11th edn, 2012) para 20-21 and Foskett on Compromise para 19-06 et seq.

Is Shady Sam going to be in trouble getting an injunction because he could have known about the development long before he wrote his letter? Equity aids the vigilant? See also the cases discussed in the next footnote, but is the test - at least for a final injunction - really any more than whether the grant of the injunction is oppressive:

Quite a good point, that: not only is this hardwired into the decision in Wrotham Park Estate Co. Ltd. v. Parkside Homes Ltd. [1974] 1 WLR 798, 810-811 (Brightman J), albeit intertwined with policy considerations about loss of housing, but see also Gafford v. Graham [1999] 3 EGLR 75, 79 per Nourse LJ (CA), “As a general rule, someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by while a permanent and substantial structure is unlawfully erected, ought not to be granted an injunction to have it pulled down”. More recently, see Greenmanor Ltd. v. Pilford [2012] EWCA Civ 56. However, there are cases the other way...

Note that he did not say “in respect of this development”: weasel words? Also, in Regan, the developer actually gave Mr. Regan their rights of light report which disclosed a “measurable but not actionable loss of light”.

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obvious you could never afford to give a cross-undertaking, because you have no money and, if the Court stopped us now, our bank would pull the plug on us.

We have already pre-let the office space to a reputable financial institution, Disposable Pensions LLP, who are getting ready to move in when the works are finished. The penthouse will provide much needed unaffordable housing to this area, thereby improving the area as a whole, which might even benefit you.

In any event, the so-called facts in your letter are obviously untrue. Our company’s Financial Director, Mr. “Red” Balls, is a regular attender of your billiard hall. He assures us that the lights are almost always on in the ground and basement floors anyway and there are blinds behind the windows of the bar which are almost always drawn.

In the circumstances, we are going to carry on our development.

Shady Sam says he never opens any post that looks official, and has never been to The Green, because of his hay-fever. However he perfectly accepts that he sometimes stands at the back window of his bar, sipping his morning Jäger-Bomb, and watching the builders working on Cushideal’s development. It never really occurred to him that it would be a problem for him until his solicitor, Freddie Frame, visited to take a statement for the tax “misunderstanding”. Shady

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0. Does there always have to be a cross-undertaking? Perhaps not: Allen v. Jambo Holdings Ltd. [1980] 1 WLR 1252 (CA), which is still good law, despite it being a Lord Denning decision.

48. An argument which got the developer precisely nowhere in HXRUK II (CHC) Ltd. v. Heaney [2010] 3 EGLR 15 (HH Judge Peter Langan QC, sitting at Leeds District Registry), although the developer there was clearly a “bad person” in the Judge’s view. Mr. Heaney got his injunction after a year’s worth of acquiescence.

49. Again, this is a Wrotham Park Estate point, but this did not get the developer anywhere in Mortimer v. Bailey [2004] EWCA Civ 1514; [2005] 1 EGLR 75 (CA), where the demolition of an occupied extension to a house was ordered. Was that because the developer in Mortimer was just a bad person? Is there a difference between ordering demolition of a whole house and just an extension?

50. The public interest can be relevant to whether or not a development can be halted by an injunction: see Greenwich Healthcare NHS Trust v. London and Quadrant Housing Trust [1998] 1 WLR 1749 (Lightman J). The facts have to be a lot better than these.

51. Exactly the sort of thing that caused the developers in Regan, Heaney and Mortimer v. Bailey to get into a lot of trouble. By contrast, a process of engaging with neighbours was a material factor in avoiding an injunction in Midtown Ltd. v. City of London Real Property Co.Ltd. [2005] EWHC 33 (Ch); [2005] 1 EGLR 65 (Peter Smith J).
Sam disputes that “Red” Balls is a regular at his Billiard Rooms and also disputes what is said about the lights and the blinds.52

Two weeks ago, Mr. Pinktape sent Shady Sam a letter headed “open letter”, which made no reference to any previous correspondence. This letter enclosed a report, dated the day the letter was sent, from Mr. Liu-Minh stating that there could be a diminution in Shady Sam’s light. He estimated the capital loss to Shady Sam’s premises would be worth about £5,000.00. Mr. Pinktape wrote that it would cost Cushideal £50,000.00 to undo the work done to date and would take perhaps £175,000.00 - £200,000.00 off the capital value of their development.53

What do we do with contested but potentially material facts? If “Red” Balls and Mr. Pinktape are right, there may be a defence here based on <i>Midtown Ltd. v. City of London Real Property Co.Ltd.</i>, which might make it in Cushideal’s interests to foment a claim by Shady Sam, in the same way that the developer tried a pre-emptive strike in <i>HXRUK II (CHC) Ltd. v. Heaney</i> by going for a negative declaration? (Is going for a swift negative declaration ever a good idea? - look where it got HXRUK and the claimant in <i>CIP Property (AIP) Ltd. v. Transport for London</i> [2012] EWHC 259 (Ch); [2012] BLR 202 (Sir Andrew Morritt, C). If Shady Sam does go for an interim injunction, then he does not have to do too much on the balance of convenience test, but what if he wants a mandatory injunction? See the discussion in footnote 30, below. If he does go for it, should he - or Cushideal - try for summary judgment in whole or in part, given the degree to which the Court can take a rough and ready view of the facts: see <i>Easyair Ltd. v. Opal Telecomms Ltd.</i> [2009] EWHC 339 (Ch) at [15] (Lewison J).

The developer did this in <i>Regan</i>, with similar figures: The diminution in value was estimated at trial as between £5,000 to £5,500: a 2% - 2.5% reduction in capital value. By granting the injunction, the Court obliged the developer to demolish part of the penthouse at a cost of between £12,000 and £35,000, with a consequential reduction in capital value of about £175,000. Nevertheless, Mummery LJ held that the grant of an injunction was “not oppressive”, <i>inter alia</i>, because the disparity between the loss suffered by the developer and that suffered by Mr Regan was not determinative.

If those figures look curious, the Judge’s findings in <i>HXRUK</i> were that the difference in value of the development, with and without the offending parts of the upper floors was £1,408,000. On top of that, the cost of removing those parts of the building (about 4,500 feet²) was between £1.1M and £2.5M and would require a tenant of the seventh floor to move out while the works were undertaken. By contrast, Mr Heaney’s premises would be devalued by something between £18,755 and £80,771.25: less than 2% of their capital value.

How do those decisions square with the test of test of “oppression” in <i>Jaggard v. Sawyer</i> [1995] 1 WLR 269 (CA)? This is what Millett LJ said, at 287: “The outcome of any particular case usually turns on the question: would it in all the circumstances be oppressive to the defendant to grant the injunction to which the plaintiff is <i>prima facie</i> entitled? Most of the cases in which the injunction has been refused are cases where the plaintiff has sought a <i>mandatory</i> injunction to pull down a building which infringes his right to light or which has been built in breach of a restrictive covenant. In such cases the court is faced with a <i>fait accompli</i>. The jurisdiction to grant a mandatory injunction

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the circumstances, he repeated his “advice” to Shady Sam that an injunction would fail. Shady Sam opened this letter, in case it contained a cheque, but on reading it decided he did not like the way the odds looked against him.\textsuperscript{54}

\begin{itemize}
  \item What are Shady Sam’s \textit{ultimate} prospects, should he go for a final injunction, and how does that influence your decision whether to go for an interim injunction? Looking at the figures in Mr. Pinktape’s letter, you might agree with Shady Sam that it looks like an injunction would be oppressive, because of the disproportionate impact on Cushideal compared to the small impact on his rights. On the other hand, remember that the test for final injunctions is counter-intuitive, because of the test in \textit{Shelfer v. City of London Electric Lighting Co.} [1895] 1 Ch 287, 322-3 (CA): an injunction is more likely to be ordered when the loss to the claimant is small and difficult to quantify. In \textit{Regan}, Mummery LJ restated the \textit{Shelfer} principles at paragraph [36], in a way which can be summarised thus:

  \begin{enumerate}
    \item a claimant is \textit{prima facie} entitled to an injunction against a person committing a wrongful act which invades the claimant’s legal rights;
    \item 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;
    \item 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, just because that defendant is able and willing to pay damages.
    \item The judicial discretion to award damages \textit{in lieu} should be exercised in a way which pays proper attention to well settled principles and should \textit{not} be exercised to deprive a claimant of his \textit{prima facie} right to an injunction, “except under very exceptional circumstances”.
    \item 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 case law shows that it will be relevant to consider the following factors, as identified in \textit{Shelfer}:
      \begin{enumerate}
        \item whether the injury to the claimant’s legal rights was small;
        \item whether the injury could be estimated in money;
        \item whether it could be adequately compensated by a small money payment;
        \item whether it would be oppressive to the defendant to grant an injunction; the claimant had shown that he only wanted money;
        \item whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and
        \item whether there were any other circumstances that justified the refusal of an injunction.
      \end{enumerate}
  \end{enumerate}
\end{itemize}
Last week, Shady Sam became aware that some new and unusual works were going on at Cushideal’s. Over the next few days, it became apparent that a small tower crane was being erected on a part of their site a few doors across from the Billiard Rooms. If the wind blows, the boom and jib swing right over his garden, temporarily making the loss of light to the Billiard Rooms even worse. He sent Mr. Pinktape a rude e-mail, and was told to “get lost”, because the loss of light was only temporary.  

Two days ago, Shady Sam was awoken early in the afternoon by a huge amount of noise coming from Cushideal’s development. A load slung under the crane jib had caught the chimney of one of Cushideal’s adjoining properties and knocked it crashing onto the Lane and Shady Sam’s remaining patch of garden. By that evening, scaffolding has been erected to prop up the tottering chimney, which not only completely blocked Shady Sam’s back door onto Skew Lane but was also resting on top of his garden wall.

Mummery LJ then went onto uphold the trial Judge’s decision to grant an injunction. The relative losses of value in Regan are comparable to those in Mr. Pinktape’s letter.

55. Yeah but; no but - it’s a trespass. Even a de minimis and temporary trespass to air-rights is likely to result in an injunction: Woollerton and Wilson Ltd. v. Richard Costain Ltd. [1970] 1 WLR 411 (Stamp J); John Trenberth Ltd. v. National Westminster Bank Ltd. (1980) P&CR 104; [1980] 1 EGLR 102 (Walton J); Anchor Brewhouse Developments Ltd. v. Berkley House (Docklands) Developments Ltd. (1987) 38 BLR 82 (Scott J). That said, it is a bit odd that a temporary trespass to air-rights gets an injunction but it’s OK to permanently brick up a tenant’s fire exit from a shopping centre: Lunn Poly Ltd. v. Liverpool & Lancashire Properties Ltd. [2006] EWCA Civ 430; [2006] 2 EGLR 29 (CA). The latter is a case where the remedy was refused essentially through delay, but it rather underlines the fact that the test in Shelfer v. City of London Electric Lighting Co. [1895] 1 Ch 287 (CA) as applied in Regan v. Paul Properties works rather capriciously - a point made in Jaggard by Millett LJ expressly in the context to trespass to “air-rights”.

56. Assuming Skew Lane is not a highway, what are the circumstances in which a injunction to restrain an interference with a right of way be granted? The cause of action here in nuisance, so the question is whether the scaffolding constitutes an “actionable interference”. See, for example, Ceilsteel Ltd. v. Alton House Ltd. [1985] 1 WLR 204, 217, per Scott J, “The interference will be actionable if it is substantial. And it will not be substantial if it does not interfere with the reasonable use of the right of way”. More pertinently, perhaps, see West v. Sharp (2000) 79 P&CR 327, 333 per Mummery LJ: “An injunction ... is a discretionary equitable remedy available only in cases where it is just to grant it. It is not usually granted in cases of trivial or temporary infringements or in cases where there is no continuing interference or threat of interference with enjoyment or in cases where damages would be an adequate remedy. It is only granted if there is a substantial interference such as to justify the intervention of equity” (This case has been further refined by Blackburne J in B&Q plc v Liverpool & Lancashire Properties Ltd. (2001) 81 P&CR 20, [2001] 1 EGLR 92. For an example of an injunction being refused because the interference was only temporary, see Barrie House Freehold Ltd. v. Merie
Mr. Pinktape came round personally to apologise, and has offered to pay for any damage, give Shady Sam an indemnity for any losses caused by the crane and the scaffolding, and produced a cheque for £20,000.00, “to settle everything else”. Shady Sam was so fed up, he made an ungalant suggestion as to where the cheque should be put and told Mr. Pinktape that he will go and get an injunction to make Cushideal undo everything they have done.

58

Bin Mahfouz Company (UK) Ltd. [2012] EWHC 353 (Ch) (Roth J).

57. In cases of physical trespass, perhaps this is a “slam dunk” - a bit like the chimney. In Patel v. WH Smith (Eziot) Ltd. [1987] 1 WLR 853, 858 Balcombe LJ approved this passage from Stamp J in Woolerton and Wilson “It is in my judgment well established that it is no answer to a claim for an injunction to restrain a trespass that the trespass does no harm to the plaintiff. Indeed, the very fact that no harm is done is a reason for rather than against the granting of an injunction: for if there is no damage done the damage recovered in the action will be nominal and if the injunction is refused the result will be no more nor less than a licence to continue the tort of trespass in return for a nominal payment”. Neill and May LJJ agreed, but Neill LJ added “I, for my part, am prepared to assume that there may be exceptional cases ... where notwithstanding that a continuing trespass is proved or admitted, the court can properly decline to grant an injunction. But such cases are likely to be very rare.” Is this an exceptional case, if the scaffolding is holding a now dangerous building up? And how would the Court deal with damages in lieu, if the trespass is “involuntary”? Indeed, is it a trespass at all if it is the result of an emergency? See Cope v. Sharpe [1910] 1 KB 168 (KBDC) and Rigby v. Chief Constable of Northumberland [1985] 1 WLR 1242, 1253-4 (Taylor J): necessity is not a defence if it arises from the trespasser’s own negligence. Great case: police fire a CS Canister into a gunsmith’s and are then surprised when the place catches fire.

59. A similar offer of an indemnity and cash did not get the developer anywhere in Regan v. Paul Properties.

58. In other words, a mandatory order is being sought in respect of the seventh floor and a prohibitory one in respect of the eighth. If Sam seeks an interim order now, is it an application of the “usual suspects”: for mandatory orders, Zockoll Group Ltd. v. Mercury Communications Ltd (Nº.1) [1998] FSR 354 (CA) and National Commercial Bank Jamaica Ltd. v. Olint Corp Ltd. (Practice Note) [2009] UKPC 16; [2009] 1 WLR 1405 (PC); for prohibitory, good old American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 (HL). Or are rights of light cases now different, after Regan and Heaney? Apparently, though, it is not necessary to claim the injunction to go to damages in lieu: WWF World Wide Fund for Nature (Formerly World Wildlife Fund) v. World Wrestling Federation Entertainment Inc. [2007] EWCA Civ 286, [53]-[54] per Chadwick LJ (CA). So, if Sam wants the money, he does not need to risk the injunction. On the other hand, will he be able to extract a better deal if he gets the injunction and puts Cushideal over a barrel than if he just goes for Lord Cairns’ Act damages?
The seventh floor offices are now almost finished. Work has just started on putting in the struts which will support the eighth floor penthouse walls, which will be constructed with a significant amount of curtain glazing.

What can “Shady” Sam Black do now? What should he do, either now or later? What could or should Cushideal Developments Limited do now, either by acting or reacting? Discuss (not too heatedly).

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Agonizing: do you tell Sam to wait and see how bad the extra floor will make his loss of light. Do you tell Cushideal to crack on, and hope for the best? Or maybe think about a re-design of the scheme to reduce any problems if they can?