Case No: A3/2006/1742

Neutral Citation Number: [2006] EWCA Civ 1391
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE CHANCERY DIVISION
MR STEPHEN SMITH QC (sitting as a deputy judge of the High Court)
HC06CO1134

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 26th October 2006

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE TUCKEY
and
LORD JUSTICE WILSON

- -

Between :

DENNIS REGAN	**Appellant**
- and -	
PAUL PROPERTIES LIMITED (1)	**Respondent**
PETER LAHAISE(2)	
JOHN GRISTON(3)	

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

MR STEPHEN BICKFORD SMITH (instructed by **Child & Child**) for the **Appellant**
MR ANDREW FRANCIS (instructed by **Dawsons**) for the **Respondent**

- -

Judgment

Lord Justice Mummery:

The issue

1. This is a case of infringement of rights to light. The appeal, for which permission was given by Neuberger LJ and for which an expedited hearing was ordered, is solely on the question of remedy: whether the proper remedy for infringement in this case is damages for nuisance, as ordered by the court below, or whether a mandatory injunction should be granted requiring part of a building in the course of construction to be pulled down.

2. It is common ground that the choice of remedy is in the discretion of the court and that this court will not interfere with the exercise of the discretion by the trial judge unless there is an error of principle or unless his decision is, for some other reason, plainly wrong. The dispute in this court has therefore focused on the legal principles governing the exercise of judicial discretion in respect of remedies in right to light cases.

Brief introduction

3. The appellant, Mr Dennis Regan, who is the claimant in the action, is a building contractor. Since October 2002 he has lived with his partner and his daughter in a maisonette on the first and second floors at 8 Zion Gardens, Brighton (the maisonette). He owns the maisonette on a long lease with a term of 125 years from September 2002. The front of the maisonette is on the western side of Queen's Road. The living room is on the first floor. It is the principal room for family activities in the home.

4. The defendants, who are the respondents to the appeal, are a development partnership in the course of building a mixed commercial and residential development of two properties across the road, almost directly opposite the maisonette and only 12.8m from it. The development by the defendants at Nos 126-127 and No 128 Queen's Road comprises 16 units in five storeys in place of the previous three and two storey buildings.

5. Mr Regan's claim for an injunction affects only one of the units, a penthouse flat, namely unit 16. It is the prime residential unit in the development with 3 bedrooms, a kitchen, lounge and 3 bathrooms, two of them en suite.

6. Work on the development began on 19 September 2005.

7. On 12 October 2005 Mr Regan wrote to the defendants (Mr Paul Hatley of the first respondent, Paul Properties Limited) voicing his concerns about the development, including the effect on the right to light in his maisonette. The judge accepted the defendants' evidence that they were taken aback by the complaint.

8. The defendants took advice from Mr Kaivin Wong, a surveyor who was an acknowledged expert in the field and who had already advised them on sunlight and daylight issues raised by the planners. In October 2004 Mr Wong

had prepared a report on "Daylight as a result of the re-development at 126-127 Queen's Road" in connection with the defendants' application for planning permission.

9. The planning authorities had provided Mr Regan with a copy of the report. Mr Regan studied it and noted that it did not identify any effect of the proposed development on the daylight to his maisonette. The explanation for this was that Mr Wong had not been instructed to address rights to light of neighbouring properties generally. He was instructed to address more limited concerns raised by the planners about the effect of the development on neighbouring properties to the south east and rear of the site.

10. At that stage Mr Regan did not think that he had a right to light or that there was any action that he could reasonably take. It was not until work began that at Nos 126-127 Queen's Road in September 2005 that Mr Regan appreciated that these works and the development of No 128 were joint.

11. He instructed his own surveyor, Mr Ney, to advise him. It was in those circumstances that he sent his letter of 12 October 2005 to Mr Hatley.

12. On 27 October 2005 Mr Wong advised the defendants by letter that, although there would be a measurable loss of light, he was satisfied that there was "no actionable injury." He formed this view on the basis of a very elementary calculation and without visiting the maisonette. He maintained the advice until 1 March 2006. Even then he remained firmly of the view that the infringement was so limited that no injunction would be granted.

13. On 3 November 2005 Mr Hatley replied to Mr Regan's letter stating that "detailed advice regarding rights of light" had been taken before embarking on the project, as requested by the Council. The advice was that there would be no actionable injury. The judge commented that Mr Hatley's letter was potentially misleading in suggesting that Mr Wong had been given more comprehensive instructions than he had been.

14. There was correspondence between the respective experts, Mr Ney and Mr Wong, between January and March 2006, by which time the parties reached an impasse. In correspondence with Mr Wong and Mr Hatley Mr Ney complained that the living room would suffer substantial loss of light, disclaimed any interest by Mr Regan in compensation and invited the defendants to stop works so far as they affected Mr Regan's rights, giving warning of Mr Regan's intention to seek an injunction.

15. Even after he had inspected the maisonette on 15 February 2006 and produced his own assessment on 1 March 2006 Mr Wong asserted that the loss of light was "very minor indeed" and said that it would be unreasonable for the defendants to delay their works.

16. Work on the development continued in the meantime and reached the 4th floor. No attempt was made to re-design the scheme. By 21 March 2006 half of the shell and roof to unit 16 had been constructed. As the judge said (paragraph 93 of his judgment) the defendants do not appear to have applied "any brake on

the construction of the development", even as regards unit 16, notwithstanding Mr Regan's claims. The judge did not think that this had any material bearing on the exercise of his discretion whether to grant an injunction, though he said that it might be raised on the argument as to costs. Nor was he influenced by the fact that a "subject to contract" agreement for the sale of unit 16 for £450,000 had been made without having to market the unit. Exchange of contracts for unit 16 is awaiting the outcome of these proceedings.

17. On 22 March 2006 Mr Regan issued his claim form seeking an injunction and he applied for an interim injunction to stop that part of the development which infringed his rights to light. The application was disposed of on the defendants giving undertakings to the court on 22 March, 31 March and 6 June 2006 relating to an "exclusion zone" affecting unit 16 on the fourth floor of Nos 126-127 Queen's Road in which no work would occur. The result is that the shell of unit 16 has only been partly constructed. The exclusion zone affects 40% of the living room, the third bedroom and the en suite facilities.

18. If the part in the exclusion zone area the subject of the undertakings is not built, the well-lit area of the living room of the maisonette will be reduced to 48.4% on Mr Ney's calculation or 49.9% on Mr Wong's calculation. If the lounge, 1 bedroom and 1 ensuite bathroom in unit 16 were to be removed the well-lit area of the living room in the maisonette would be increased to 53%. If the third bedroom and en suite remain unbuilt the well-lit area will be at a mid-point between 48.4% -42% (Mr Ney) or 49.9%-45.19% (Mr Wong).

19. On 27 March 2006 the defendants made an open offer to Mr Regan of £15,000 in full and final settlement of his claims. The offer has not been accepted. As the deputy judge said-

> "24. …. Mr Regan has throughout steadfastly maintained that his prime concern is to have his right to light specifically enforced."

Infringement by obstruction of light

20. In his judgment handed down on 27 July 2006 the deputy judge (Mr Stephen Smith QC) held that an actionable nuisance had been committed. The defendants have not cross-appealed against the findings on infringement of the right to light. He handed down a further judgment on 3 August 2006 on his decision not to enforce Mr Regan's cross undertaking in damages.

21. He found that the infringement rendered the enjoyment of the living room significantly less comfortable and beneficial than it previously was. The area which suffered the loss of light was right in the centre of the living room. This would affect ordinary activities in the living room, such as reading. It would force the family to use artificial light or to move into the part of the room close to the bay window, where they would then be in full view of the occupants of the flats in the new development opposite.

22. In statistical terms the position agreed between the experts was that, prior to the development, the living room enjoyed adequate light to 65% (Mr Ney)-67% (Mr Wong) of its floor area, significantly more than the conventional minimum. After the development in full, as proposed, it would enjoy adequate light to an area of only of 42% (Mr Ney)-45.2% (MrWong), which is significantly less than the conventional minimum.

Remedies

23. At the speedy trial which had been ordered the deputy judge concluded that the right course was to award Mr Regan damages in substitution for an injunction. He refused to grant an injunction and ordered Mr Regan to pay half of the defendants' costs.

24. He reviewed the authorities on the circumstances in which the court had a discretion under Lord Cairns' Act 1858 (now contained in section 50 of the Supreme Court Act 1981) to award damages in substitution for an injunction against the continuance of a wrongful act. He reached the following critical conclusion on their effect-

> "85. ….whatever may be the position in cases of other wrongful conduct, in the case of an infringement of a right to light it cannot be said that refusing an injunction and leaving the claimant with an award of damages in lieu is an exceptional course. Indeed, it seems to me, having regard in particular to the guidance given in the decision of the Court of Appeal in the cases of *Kine v. Jolly* and *Fishenden*, that the onus is plainly on a claimant to persuade the court that he should not be left to a remedy in damages."

25. He rejected the submission of Mr Bickford Smith, who appears for Mr Regan, that, once it had been established that his rights had been infringed, "the default position is that the court should grant an injunction to protect them."

26. The main ground of Mr Regan's appeal is that the deputy judge misdirected himself in law in this part of his judgment, first in ruling that the refusal of an injunction in cases of an infringement of right to light cases and the grant of damages in lieu was *not* an exceptional course; and, secondly, in putting the burden of proof in a right to light case on the claimant to persuade the court that he should *not* be left to a remedy in damages.

27. The deputy judge also rejected submissions on behalf of Mr Regan criticising the conduct of the defendants in "stealing a march" on him and in "acting in a less than frank manner." He did not consider that their conduct had been "oppressive or high-handed." (see paragraph 94).

28. He gave the following four reasons for awarding damages in substitution for an injunction. In so doing he purported to apply the well known passage in the judgment of AL Smith LJ in **Shelfer v. City of London Electric Lighting Company** [1895] 1 Ch 287 at 322 and 323 **(Shelfer)** laying down a "good

working rule" for cases in which damages for an injunction may be given in substitution for an injunction.

29. First, the injury to Mr Regan's legal rights was small. Although one third of the previously available light in the living room would be lost, one third of it remained well lit. The room was not rendered uninhabitable. The effect of the infringement on the market price of the maisonette was agreed to be a maximum of £5,500, less than 2.5% of the pre-development value.

30. Secondly, the injury was one which was capable of being estimated in money.

31. Thirdly, the injury could be adequately compensated by a small money payment.

32. Fourthly, the case was one in which it would be oppressive to the defendants to grant an injunction. The effect of a cut back so as to leave light of 53% or 48% on the internal floor area of unit 16 would be very substantial, as would be the effect on the likely selling price of the unit and significant further expense. An injunction to take the skyline of unit 16 back to a point where Mr Regan's living room would receive 53% of adequate light would require the removal of all of the proposed lounge, 1 bedroom and 1 en-suite bathroom. The value of unit 16 in the modified state would be £300,000. (The fall-back position of Mr Regan allowing 48% of his living room to receive adequate light would reduce the value of unit 16 to £325,000 -£350,000.) This would be "disproportionate to the amount of harm caused to Mr Regan." There might also be planning and building regulation difficulties raised by the modified plans.

33. The grounds of Mr Regan's appeal also include criticism of the way in which the deputy judge applied the "good working rule" in **Shelfer** to the facts of this case.

Damages in lieu of injunction: the authorities and the general principles

34. A review of the authorities is required to see whether the deputy judge was correct in stating their effect in paragraph 85 of his judgment (quoted in paragraph 24 above.)

35. **Shelfer** is the best known case. It is a decision of the Court of Appeal. It has never been overruled and it is binding on this court. The cause of action was nuisance, as in this case, though in the form of noise and vibration rather than interference with a right of light.

36. **Shelfer** has, for over a century, been the leading case on the power of the court to award damages instead of an injunction. It is authority for the following propositions which I derive from the judgments of Lord Halsbury and Lindley and AL Smith LJJ:

    (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right.

(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.

(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, who is able and willing to pay damages: per Lindley LJ at pages 315 and 316.

(4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right "except under very exceptional circumstances." (per Lindley LJ at p 315 and 316).

(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 judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see AL Smith LJ at pages 322 and 323 and Lindley LJ at page 317.

37. In my judgment, none of the above propositions has been overruled by later decisions of any higher court or of this court. Only one case in the House of Lords was cited, **Colls v. Home and Colonial Stores Limited** [1904] AC 179 (**Colls)**. The case is authority for the proposition that the test for infringement of the right to light is whether the obstruction complained of is a nuisance, that is whether there is a substantial loss of light so as to render the occupation of the house less fit for occupation and uncomfortable according to the ordinary notions of mankind. It is not enough for the claimant simply to prove that the light is less than it was.

38. As the House of Lords restored the decision of Joyce J dismissing the action, the issue of remedies did not arise for decision. Lord Lindley said (at page 212) that, even if there was a cause of action, the case was not one for a mandatory injunction, as the damages that could properly be awarded were small and to grant a mandatory injunction would be unduly oppressive and not in accordance with the principles on which equitable relief has usually been granted. He cited a number of authorities including **Shelfer** to which he had been a party**.**

39. Lord Macnaghten was the only other member of the House who said anything about remedies for infringement of ancient lights: see pages 192-195. He prefaced what he described as "practical suggestions" with the comment that

he did not "put them forward as carrying any authority." This is important, as some later cases citing Lord Macnaghten's obiter "practical suggestions" seem to have treated them as having an effect which they did not and were never intended to have. The weight attached to them is no doubt explicable by the very high judicial reputation enjoyed by him. Lord Macnaghten made no adverse comment on **Shelfer.**

40. He rightly described the giving of damages in addition to or substitution for an injunction as "a delicate matter" of judicial discretion. He doubted whether the amount of damages which could be recovered was a satisfactory test. He recognised that in some cases an injunction is necessary to do justice to the plaintiff and as a warning to others. He commented at page 193 -

> " But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction."

41. Lord Macnaghten agreed that a man ought not to be compelled to part with his property against his will or to have the value of his property diminished, but, in the following terms on the same page, warned against allowing the action for infringement of ancient lights being used as a means of extorting money:

> "Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises."

42. In **Kine v. Jolly** [1905] 1 Ch 480 the Court of Appeal allowed an appeal against the grant of a mandatory injunction in an action for obstruction of ancient lights. The majority (Vaughan Williams and Cozens-Hardy LJJ) held that there was a cause of action, but held that the remedy should be damages. Romer LJ held that the plaintiff had no cause of action.

43. Vaughan Williams LJ said (at page 495) that he proposed to apply either the test in the speech of Lord Macnaghten in **Colls** or that laid down by AL Smith LJ in his judgment in **Shelfer.** He concluded that nothing in either test made it right to grant a mandatory injunction. The injury could fairly be compensated by damages. Both parties had acted honestly in accordance with what they not unreasonably believed to be their legal rights. The defendant had not acted in a high-handed manner or tried to steal a march on the plaintiff.

44. Cozens-Hardy LJ also said at page 503-504 that it was not a case for a mandatory injunction.

> "There is no case of sharp practice or unfair conduct on the part of the defendant. It is not a case of irremediable damage, or of the house being rendered uninhabitable, nor is it a case in which damages cannot be regarded as reasonable and adequate compensation. I think it is impossible to doubt that the tendency of the speeches in the House of Lords in **Colls …**is to go a little further than was done in **Shelfer** …, and to indicate that as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by."

45. The decision in **Kine v. Jolly** does not affect the authority of the propositions derived from **Shelfer.** With great respect to Vaughan Williams LJ I do not read the obiter remarks of Lord Macnaghten as laying down a different "test" from that in **Shelfer.** He made practical suggestions that should inform the exercise of judicial discretion. Even on the view expressed by Lord Macnaghten, he felt free to apply the test in **Shelfer.**

46. As for the comments of Cozens-Hardy LJ, the tendency to which he refers is only evident in the speech of Lord Macnaghten, who made it clear that what he was saying was not intended to be authoritative.

47. That **Shelfer** remained the leading authority, notwithstanding **Colls,** is borne out by the next decision of the Court of Appeal in **Slack v. Leeds Industrial Co-operative Society Limited** [1924] 2 Ch 475. This was a quia timet action for a threatened obstruction to ancient lights. The court substituted an inquiry as to damages for the injunction granted by the trial judge. In so doing it held that **Shelfer** was not affected by anything said in **Colls.**

48. The case of **Slack** had already been to the House of Lords on the question whether the court had jurisdiction to give damages in lieu of an injunction in a case of a threatened injury. By a majority the House held that the court had such a jurisdiction and remitted the case to the Court of Appeal to be heard on its merits.

49. At the remitted hearing there was argument about the effect of **Colls** on **Shelfer.** As appears from the judgment of Warrington LJ at page 492 it was contended by the defendants that the "stringency" of the general statement of the law by AL Smith LJ in **Shelfer** that a plaintiff is prima facie entitled to an injunction against the invasion of his legal right had not been relaxed by what was said by Lord Macnaghten and Lord Lindley in **Colls.** He said-

> " I think the rule remains where it was. The jurisdiction which the Court has must be exercised upon the same principles as those which guided the Court in its exercise before the decision in *Colls' Case***;** but it is to be observed that AL Smith LJ himself in dealing with the matter in *Shelfer's Case* has suggested the good working rule as one to be applied under the stringent restrictions to which he had already expressed his adherence. Therefore I think we may quite safely act under that "good working rule," and we are not concerned to say

> whether or not since *Colls' Case* it is easier to obtain the substitution of damages than it was before."

50. In his judgment Sargant LJ specifically rejected the submission that no relief at all could be granted unless the damage has been substantial. He said that the submission was "misapprehending the effect of *Colls' Case*." (page 494).

51. Pollock MR cited **Shelfer** for its statement of the relevant rules and Lord Macnaghten's speech in **Colls** and commented (page 488)

> " It is said that the decision of the House of Lords in *Colls' Case* has made some inroad upon those rules, and that some different canons are now to be applied. For my part I do not think so. In my opinion, when that case is looked at it will be seen that it definitely intended to lay down that the question of choice between an injunction and damages was still one which was for the exercise of the discretion of the Court, because Lord Lindley-who had been a party both to the decision in *Shelfer's Case* and to that in *Martin v. Price*- there speaks of the difficulty which must always be presented to the Court when the choice is open to it. ….It seems to me, therefore, when one looks at the judgment in *Colls' Case* it is quite clear that side by side with that judgment there is an intention to maintain and uphold the rules laid down in *Aynsley v. Glover* and *Shelfer* ….; and the decision of the House of Lords in the present case is to the same effect."

52. **Slack** was cited to the deputy judge. He mentioned it in paragraph 87 of his judgment as a case in which an injunction was granted to restrain an infringement of a right to light. He did not mention the case in the key paragraph 85 quoted above. He referred to several subsequent cases, in particular **Fishenden v. Higgs and Hill Limited** (1935) 153 LT 128 (**Fishenden)** a case in which the plaintiff was left to a remedy in damages when the court reversed the decision of Crossman J to grant an injunction

53. In **Fishenden** Crossman J dealt with the question of remedy in detail (p 133 onwards). He cited **Shelfer** as having been consistently upheld and said that it was not in any way affected by what was said in **Colls.** He cited **Slack,** which he treated as binding on him, as an example of an injunction granted on the application of the "good working rule" laid down in **Shelfer** unaffected by the decision in **Colls.** On the facts of the case none of the exceptions to that rule existed and so he granted an injunction.

54. The Court of Appeal reversed his decision on remedy, which Lord Hanworth MR described as another "very difficult question." He cited **Shelfer,**which he described as "the high water mark of what might be called definite rules." He cited **Colls** as a case in which the application of those rules was left "more at large" than in **Shelfer.** He cited **Slack** and referred to his own judgment in it saying that "it must not be taken [he] held that the rules in the **Shelfer** case by themselves were now prescribed as the guiding tests for the court." **Colls** also had to be borne in mind. He added that "we ought to incline against an injunction if possible." (p139) He concluded that damages was a sufficient

remedy in that case and said that the mandatory injunction should be discharged.

55. Romer LJ arrived at the same conclusion. He held that Crossman J had proceeded on the wrong principle that the court must grant an injunction if any one of the four conditions laid down by AL Smith LJ were not fulfilled. The four conditions were not intended to be a fetter on the exercise of the court's discretion. He considered that there really was a question whether the obstruction was "legal or not" and it could not be said that the defendants had not acted fairly or in a neighbourly spirit. He was also influenced against an injunction by the conduct of the plaintiff in extending his complaint of obstruction at a late stage after the defendants had proceeded with the building.

56. Maugham LJ said that the statement of the four conditions in **Shelfer** were obiter and that the working rule laid down by AL Smith LJ was "not a universal or even a sound rule in all cases of injury to light." He preferred the rule as suggested by Lindley LJ in **Shelfer** and in **Colls** and the passage in the speech of Lord Macnaghten in **Colls.** The amount of damages in a light case, unless considered in relation to all the other circumstances of the case, did not afford a satisfactory test. (p145). He agreed with the approach of Sargant LJ in **Slack** that there were borderline right of light cases "in which the injury might be sufficiently substantial to justify some relief and yet may be of so comparatively small a character as to be properly and adequately compensated by damages."

57. The deputy judge correctly treated **Fishenden** as a case relevant to determining, in the light of **Colls,** the proper approach to the "good working rule" and to the four conditions laid down in **Shelfer.** In my judgment, however, he went too far in treating it as plainly placing the onus on a claimant to persuade the court that he should not be left to a remedy in damages. It was decided on a narrower ground that the amount of damages was not in itself determinative of whether an injunction should be granted.

58. The later cases cited by the deputy judge did not place the onus on the claimant to persuade the court that he should not be left to a remedy in damages. In **Pugh v. Howells** (1984) 48 P & CR 298 the Court of Appeal applied the criteria of AL Smith LJ and Fox LJ added that they were a "useful working test", but not to be "construed as if they were a statutory provision." (p307).

59. The judgments of Sir Thomas Bingham MR and Millett LJ in **Jaggard v. Sawyer** [1995] 1 WLR 269 did not place such an onus on the claimant. Indeed as Millett LJ said at p 287 "AL Smith LJ's check-list has stood the test of time; but it needs to be remembered that it is only a working rule and does not purport to be an exhaustive statement of the circumstances in which damages may be awarded instead of an injunction." Further, the reported cases are merely illustrations of the circumstances in which particular judges have exercised their discretion. In particular all the circumstances of the case have to be considered.

Discussion and conclusion

60. In my judgment, the deputy judge acted on a wrong principle in placing the onus on Mr Regan to persuade him that he should not be left to his remedy in damages. Although Mr Francis for the defendants appeared to argue to the contrary in his skeleton argument (paragraphs 3.3 and 3.4), he ultimately accepted that the proposition stated by the deputy judge in the final sentence of paragraph 85 was not a correct statement of the law as laid down in authorities reviewed earlier, which are binding on this court.

61. Mr Francis also accepted that it was open to this court to exercise afresh the discretion on remedies. He sought to persuade the court that a mandatory injunction should not be granted in this case for the reasons stated by the judge in paragraph 95 of his judgment. He submitted that this court should not interfere with the exercise of discretion refusing an injunction and awarding damages instead, as the deputy judge did not exceed the "generous ambit within which a reasonable disagreement is possible" (see **G.v G (Custody Appeal)** [1985] 1 WLR 647 at 652D-F per Lord Fraser). As trial judge he had the benefit of seeing and hearing the witnesses and of visiting the respective properties. He had taken account of everything he should have done and of nothing that he should not have done and properly struck a balance in what was a borderline case. His decision should be left alone by this court. The discretion to award damages instead of an injunction was not fettered by any fixed rules and it was not to be declined simply because to exercise it would convert Mr Regan's right into money. As Millett LJ pointed out in **Jaggard v. Sawyer** [1995] 1 WLR 269 at 287-8 the "expropriation" factor was "somewhat overdone" in the authorities, because the grant of an injunction is discretionary, not an absolute right, and there are cases in which the claimant must be content with damages

62. In particular, Mr Francis argued that that the injury to the claimant's rights was in a very small area of the living room, as illustrated in a drawing produced by him showing that the loss of light was caused by a narrow strip of actionable infringement across the middle of the living room of the maisonette and that a large proportion of the loss lies behind the 50% line. The reduced area of light was either 45% or 42% of the room. There were no losses of light in the most valuable part of the room.

63. In my judgment, this argument is unconvincing. The defendants must take the natural consequences of their acts in interfering with the right to light. What matters is not so much the amount of light that is taken as the amount of light that is left as a result of the infringement. The consequence of the obstruction to the light in the middle of the living room was that Mr Regan would suffer a substantial interference with the enjoyment of natural light in his living room.

64. Mr Francis also relied on the "stark contrast" between the financial loss to Mr Regan and the financial loss to the defendants in the event of an injunction. Mr Regan had a living room, one third of which would remain well lit and not rendered uninhabitable as the use of the room and the activities carried on in it could still be substantially carried on.

65. Furthermore the market value of the maisonette would not be substantially affected. It was valued at £220,000. The diminution in value was between £5,000 and £5,500, which was between 2% and 2.5% of the capital value of the maisonette, a small percentage. This was to be contrasted with the defendants' loss in the value of unit 16, which in its planned form was £475,000 and, in its cut back form to give Mr Regan 53% of adequate light, would be reduced to a two bedroom flat with a large roof terrace valued at £300,000. The estimated loss in value would be £175,000

66. There would also be the extra cost of reducing the unit in the event of the grant of an injunction, being between £12,000 and £35,000, depending on the amount of cut back required to comply with the terms of the injunction.

67. In balancing these factors Mr Francis submitted that it was not unjust or wrong to conclude that it was disproportionate to require the defendants to cut back part of the existing building at Unit 16 in order to give Mr Regan 53% or 48% of adequate light in his living room. His loss could be compensated adequately by an award of damages.

68. There was nothing in the defendants' conduct, Mr Francis submitted, which outweighed the evidence of loss to the defendants as compared with loss to Mr Regan. The defendants had relied on expert advice. They had not behaved in a reckless or high handed manner.

69. I have reached the conclusion that the judge acted on a wrong principle of law in placing the burden on Mr Regan to show why damages should not be awarded and that, on the basis of the correct legal principles deduced from the authorities, the proper course is to grant an injunction against the defendants. I would make the following points.

70. First, the light in the living room would be reduced so that the area receiving adequate light would be 42-45% in place of 67%. I would not regard this obstruction as a "small injury" to Mr Regan's right to light for the living room of his maisonette. In order to enjoy adequate light Mr Regan would now either have to use artificial light in the part of the living room where the natural light has become inadequate or he would have to move into the area of the living room into or close by the bay window, where he would be in full view of the occupants of the defendants' development. The deputy judge's comment (in paragraph 95(a) of his judgment) that the living room "is certainly not rendered uninhabitable" by the obstruction to light is not a correct approach to the question whether the injury to the rights was small.

71. Secondly, although the injury is capable of being estimated in money, I would not regard this injury as adequately compensated by "a small money payment." So far as the diminution in the value of his maisonette is concerned it was more than a small amount. The valuers agreed that the loss of value of the maisonette, if unit 16 were cut back so as to give 53% adequate light, would be £5,000-£5,500. This is not a small figure. It is no doubt smaller than the cost to the defendants of having to comply with a mandatory injunction, but that is not, in my view, the correct approach to whether the injury to Mr Regan was small. Further, according to Mr Regan's valuer, the diminution in

the value of the maisonette is twice that figure if a comparison is made between pre- and post-development situations.

72. Further on the evidence available I do not think that it can be said that the sum of equitable compensation which Mr Regan could reasonably ask the defendants to pay for the negotiated release or modification of his right to light for the future would, when linked to a proportion of the net profit of the defendants from that part of the development of Unit 16 which infringes the light, be small.

73. Thirdly, as to whether an injunction would be oppressive to the defendants, it would obviously be serious in its effect on cutting back the defendants' plans for unit 16 which would reduce the sale price, create extra costs in cutting back unit 16 and possibly cause planning and building regulation difficulties. In total the defendants' losses would be substantial and would probably exceed Mr Regan's losses, but those things on their own are not determinative of the issue of oppressiveness and of the choice of remedy. It is necessary to consider all the surrounding circumstances of the dispute and the conduct of the parties.

74. In my judgment, the deputy judge wrongly directed himself on the relevance of the conduct of the parties to the exercise of his discretion. In paragraph 93 he held that the continued construction of the development in the face of Mr Regan's claims was not a material factor bearing on the exercise of his discretion whether to grant an injunction. The position is that Mr Regan protested against the infringement of his right to light five months before the development reached the fifth floor level. The defendants had taken a calculated risk in deciding to proceed with the development after the claim had been asserted against them by Mr Regan. They continued with the construction with their eyes open. They relied on advice that there was no infringement of Mr Regan's right to light, but the advice they were given turned out to be wrong. That fact should not prejudice the position of Mr Regan, against whose conduct no criticism can be made and who acted on advice which was correct. The defendants who took and acted on the wrong advice must take the consequences and not throw them on to Mr Regan in order to deny him his prima facie right to protect his property by injunction.

75. In these circumstances I do not regard it as oppressive to the defendants or as unreasonable or inequitable to grant an injunction to protect Mr Regan's right to light in relation to his property. On the contrary the court would not be justified in denying him an injunction and effectively forcing him to accept compensation from the defendants for losing the light in respect of his home.

Result

76. At the end of legal argument on September 6 the court announced that it had unanimously decided to allow the appeal and to grant an injunction, but the court would take time to consider the detailed reasons for the decision. The above are the reasons why I was in favour of allowing the appeal and granting a mandatory injunction against the defendants.

77. The parties should attempt to agree the wording of the injunction in the light of this judgment.

Lord Justice Tuckey:

78. I agree.

Lord Justice Wilson:

79. I also agree.