The Court of Appeal’s decision in Regan is a reminder to developers that the courts are prepared to fully enforce rights to light, say Stephen Bickford-Smith and Keith Shaw.

The law before Regan
Once a claimant has established that he has a legal right of, or over, property, and that the defendant has infringed it, the court may either grant an injunction or award damages in lieu of an injunction. Lord Cairns’ Act of 1858.

The decision by the court of appeal in Regan v Paul Properties DPF No 1 Ltd [2006] EWCA Civ 1319 requiring developers to take down part of their building infringing the applicant’s right to light has sent shock waves through the development community. Since the earlier decision of Peter Smith J in Midtown v City of London Real Property Co [2005] 1 EGLR 65, it was generally believed that there was virtually no risk of this.

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The court will readily order a ‘prohibitory’ injunction to restrain nuisances, trespasses and breaches of negative obligations – see Doherty v Allman (1878) 3 App Cas 709. However, case law including Chiska Ltd v Hammersmith and Fulham London Borough Council (No 2) (1999) (The Independent) establishes that the court retains a discretion to award damages in lieu.

But where the defendant has erected a building that infringes the claimant’s easement of light, or trespasses on his property, for example, any injunction will have to be ‘mandatory’ requiring removal of the offending works. In deciding whether to grant such an injunction or award damages instead the court will look mainly at two factors, the seriousness of the injury, and whether the claimant has stood by and allowed the work to proceed without objection. The two factors do not always point in the same direction.

On seriousness of injury, it was held in Shelfer v City of London Electric Lighting Co (1895) 1 Ch 287 that an award of damages in lieu of an injunction will normally be appropriate where:

- the injury to the claimant’s legal right is small;
- the injury is capable of being estimated in monetary terms;
- the injury can be adequately compensated for by a small monetary payment; and
- the grant of injunctive relief would be oppressive.

The defendant might still be faced with an injunction even if the four tests were satisfied, if he had hurried up his work or acted with reckless disregard of the claimant’s rights. Lord Cairns’ Act, said Lindley LJ, had not turned the court into “a tribunal for legalising wrongful acts”. The jurisdiction should only be exercised in “very exceptional circumstances”.

An example of hurrning up work occurred in Pugh v Howells (1984) 48 P & CR 298. Over a weekend, the defendant had built an extension to his house, which seriously interfered with the plaintiff’s rights of light, and was ordered to demolish it.

Shelfer was applied in Jaggard v Sawyer [1995] 1 WLR 269, in which a group of householders sought an injunction to restrain the construction of a house on a nearby plot in breach of a restrictive covenant. The Court of Appeal upheld the first instance decision to refuse an injunction. Points emphasised were that the new house had no impact on the claimants’ properties, and that an injunction would be oppressive due to the delay by the claimants in starting proceedings, and the fact that the defendants had not acted in blatant and calculated disregard of the claimants’ rights.

In his judgment, Millett LJ put the emphasis on the criterion of oppression, which he said would now usually be determinative of whether an injunction would be granted.

On delay, the cases were not consistent. Some held that a claimant who fails to take action to protect his rights promptly by putting the defendant on notice and seeking an interim injunction to prevent the infringement will fail to get a mandatory injunction. In Gafford v Graham [1998] 77 P & CR 73, Nourse LJ said that a claimant ought not to be granted an injunction if, knowing he had an enforceable right, did not act diligently to stop construction.

On the other hand, in Mortimer v Bailey [2005] 1 EGLR 75, the grant of a mandatory injunction was upheld where building work had been done in breach of a restrictive covenant. The Court of Appeal distinguished Gafford on the basis that, in that case, the claimant had made it clear he would settle for a money payment. But Peter Gibson LJ expressed doubt as to whether it was appropriate “to say that a person who does not proceed for an interlocutory injunction when he knows that a building is being erected in breach of a restrictive covenant, but who has made clear his intention to object to the breach and to bring proceedings for that breach, should generally be debarred from obtaining a final injunction to pull down the building”. This was consistent with the earlier county court case of Deakin v Hookings (1994) 1 EGLR 190.

In some cases, it was also said that the court should be reluctant to grant an injunction to protect rights of light. In some cases it was also said that the court should be reluctant to grant an injunction to protect rights of light. The origin of this was remarks of Lord Macnaughten in the House of Lords in Collins v Home and Colonial Stores [1904] AC 179:-

“In some cases, of course, an injunction is necessary – if, for instance, the injury cannot fairly be compensated by money – if the defendant has acted in a high-handed manner – if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. 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 dis-
posed to think that the court ought to incline to damages rather than to an injunction. It is quite true 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, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

In *Kine v Jolly* [1905] 1 Ch 480, decided shortly after *Colls*, Cozens-Hardy LJ said: "I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls v Home Electric Stores Ltd*, is to go a little further than was done in *Shelfer v City of London Electric Lighting Co*, 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."

In *Fishenden v Higgs and Hill Ltd* [1935] 135 LT 128, Lord Hanworth, after citing these cases, went even further, saying: "It seems to me, therefore, that these rules in the *Shelfer* case must now be taken with the concomitant passages to which I have referred in the later cases, in *Colls* and in *Kine v Jolly*, and that we ought to incline against an injunction if possible."

However, on the other hand, no reference to there being a presumption against an injunction in rights of light cases was made in *Pugh, Deakins or Jaggard*.

The high point of the ‘no injunction’ approach was in *Midtown*, where Peter Smith J refused a prohibitory injunction to the freeholder and tenant of offices near a proposed major development, despite the prospective injury being massive and the scheme not having started. The reasoning was:

- the tenant worked by artificial light at all times;
- the freeholder’s only interest in the premises was as an investment;
- there was probably no present loss to the freehold value;
- the freeholder’s plans for redevelopment might make the loss of light academic;
- both freeholder and tenant had rebuffed approaches from the developer to negotiate unreasonably; and
- the grant of injunctive relief would be “oppressive” as the defendant’s development was “worthwhile and beneficial”.

Many saw this decision as encouraging a ‘darker side’ of development and effectively inviting potential defendants to go ahead regardless of the likely infringements to third party rights.

**Regan at first instance: monetary compensation**

Mr Regan owned a maisonette situated on the first and second floors of a property. The defendants were developing two adjacent properties across the street from him into shops and flats, including a penthouse. Regan’s view that the penthouse would interfere with his light was supported by an expert surveyor whose opinion was forwarded to the defendant. The developer only agreed to suspend the work after Regan applied for a mandatory injunction and an interim prohibitory injunction until trial.

The court (Stephen Smith QC) accepted Regan’s contention. In particular, his lounge would be reduced from 67 per cent well-lit to about 42-45 per cent. Regan used his lounge for reading, painting and model-making all of which would be affected. On the other hand, the injury to the value of his maisonette was only about 2-2.5 per cent of its value. The injury to the defendants if they could not go ahead was significant, reducing the value of the truncated penthouse to £300,000 from £450,000. There would be additional building costs of between £12,000 and £35,000. Applying the guidelines laid down in *Shelfer*, the judge considered the injury to Regan’s legal rights was small, capable of being estimated in monetary terms, capable of being adequately compensated for by a small monetary payment and that the grant of injunctive relief would be oppressive. He also considered and adopted the suggestion in *Colls, Kine and Fishenden* to the effect that injunctions should be less readily granted in rights of light cases. He held that the burden was on Regan to justify the grant of an injunction, which he had failed to do. He awarded damages to be assessed and refused an injunction.

Regan was granted permission to appeal, essentially on the ground that the judge was wrong to say that the burden of persuading the court to grant an injunction was on him.

**Court of Appeal: no onus on claimant**

In the only judgment, Mummery LJ reaffirmed the authority of *Shelfer*. As regards the views of Lord Macnaughten in *Colls*, Mummery LJ pointed out that Lord Macnaughten prefaced what he described as practical suggestions with the comment that he did not put them forward as carrying any authority. Nor did he comment adversely on *Shelfer*. Later judges who had suggested that he intended to cast doubt on *Shelfer* were in error. Further, the suggestion that Lord Macnaughten intended to lay down a rule that injunctions would be less readily granted in rights of light cases was expressly denied by the Court of Appeal in *Slack v Leeds Industrial Co-operative Society Ltd* [1924] 2 Ch 475.

Mummery LJ held that *Fishenden* did not have the effect of placing the onus on a claimant to persuade the court that he should not be left to his remedy in damages. Further, this was not supported by *Pugh* or *Jaggard*.

Since the judge had applied the wrong test, the Court of Appeal was free to come to its own decision on the merits. He held that the injury to Regan was significant, in terms of loss of amenity, and that the injury to the value of his maisonette, was more than could be compensated by a small money payment. Further, the amount of damages which he would be entitled to in lieu of an injunction would be substantial, as it would be linked to the value of the penthouse.

On the question of whether it would be oppressive to grant an injunction, Mummery LJ said that the defendants had taken a calculated risk in proceeding with the works despite Regan’s protests, and could not complain about the consequences. It was not therefore oppressive.

**Warning to developers**

*Regan* establishes that the *Shelfer* guidelines still apply, and that there is no principle that injunctions are less readily granted in rights of light cases. It also suggests that where the injury is to the claimant’s home, the court will readily grant a mandatory, as well as a prohibitory, injunction provided he has acted promptly and the defendant has chosen to ignore his protests.

The big unanswered question is the status of *Midtown*, ignored by Mummery LJ despite Regan’s legal team arguing that it should be overruled. It is probably ‘dead in the water’ but, whatever its status, developers now need to move rights of light issues up their agendas, and resolve these before starting work.

Stephen Bickford-Smith is a barrister at Landmark Chambers and appeared for Mr Regan at first instance and on appeal. Keith Shaw is a solicitor at Pinsent Masons.