IS SHELFER DEAD?

1. In Coventry and Others v. Lawrence and Another (2014) UKSC 13 (2014) 2 WLR 433, the Supreme Court rewrote the rules on the circumstances in which a court will award damages rather than grant an injunction in cases of nuisance. The case involved noise nuisance from a stock car racing circuit. The Supreme Court did not decide whether or not, in that case, an injunction should be granted or damages instead but, rather, left that to be considered by the judge who had tried the case.

2. The case will be of some relief to developers faced with claims arising out of alleged interference with rights to light. In essence, it appears that the courts, from now on, will be more flexible and readier to award damages instead of an injunction in an appropriate case.

3. In Shelfer v. City of London Electric Lighting Company (1895) 1 Ch. 287, the Court of Appeal had to consider the issue of when a court would award damages instead of an injunction in cases of continuing actionable nuisance (in that case nuisance by vibrations). In that case, A.L. Smith LJ set out the oft cited “good working rule” as to when a court, in such circumstances, might award damages rather than grant an injunction. He stated that where the injury to the plaintiff’s legal rights was small, was one which was capable of being estimated in money, was one which could be adequately compensated by a small money payment and one where it would be oppressive to the defendant to grant an injunction, then damages in substitution for an injunction might be given. He emphasised, however, that “a person by committing a
wrongful act … is not thereby entitled to ask the court to sanction his doing by
purchasing his neighbours rights” and in the same case, Lindley LJ made it clear that
the award of damages instead of the grant of an injunction was reserved for “very
exceptional circumstances”.

4. The apparent strictness of that approach was seemingly relaxed in two very well
known cases, Wrotham Park Estates Limited v. Parkside Homes Limited (1974) 1
WLR 798 and Jaggard v. Sawyer (1995) 1 WLR 269. In the former case, a number of
houses had been built in breach of covenant requiring a layout plan to be agreed in
advance by the successors in title to the vendors of the land. The court (Brightman J.)
held that as the holder of the covenant had suffered no loss and the destruction of the
houses would be an “unpardonable waste”, an injunction would be refused.

5. In the latter case, the Court of Appeal upheld the refusal of an injunction to prevent
the occupiers of a newly built house from using a private roadway on a small
residential development over which they had no right of way, on the ground that the
increase in usage of the road would be minimal and the claimant had held back from
taking action until the house was nearly complete.

6. Jaggard involved trespass and breach of restrictive covenant and Wrotham Park
breach of restrictive covenant alone. Neither were cases of nuisance, but in Jaggard
the Shelfer principles were treated as applicable. What appears particularly to have
tipped the balance in favour of damages rather than in an injunction in each case was
the fact that the loss to the claimant was very small.
7. The Court of Appeal in Regan v. Paul Properties (2006) EWHC Civ. 1319, appeared to return to what might be called a more “orthodox” position when it overturned the first instance judge’s decision to refuse an injunction to prevent the completion of a development of a 5 storey block of flats that would infringe a neighbour’s right to light emphasising that very exceptional circumstances were required to deprive a claimant of an injunction.

8. That led to the very well-known Heaney case reported at HKR UK II (CHC v. Heaney (2010) EWHC 2245 (Ch.) (2010) 3 EGLR 15. In that case, the claimant owned a building in Leeds and wanted to add two floors to it. The defendant (Mr Heaney) owned a neighbouring building and the new floors would interfere with that building’s right to light. The claimant knew that. The claimant began work in September 2008 and work finished in July 2009. The defendant had threatened proceedings in November 2008 and February 2009 but had done nothing.

9. In August 2009, the claimant issued proceedings seeking a declaration as to its freedom from liability and the defendant in those proceedings counterclaimed for an order for the removal of the offending works.

10. The judge held that notwithstanding the delay, the defendant was entitled to the injunction as the infringement was not trivial, it had been committed in the knowledge that it was actionable and with a view to profit and the claimant could have built a non-infringing extension. The claimant appealed but before the appeal was heard it was compromised. In the result, no part of the building has been removed.
11. This brings us to the Coventry case. At first instance, the judge found for the claimants and granted an injunction. Indeed the position was that the defendants accepted that if the judge found for the claimants, then some form of injunction would necessarily follow. The defendants succeeded in overturning the judge’s finding in favour of the claimants on liability in the Court of Appeal, so no question of remedy arose. In the Supreme Court, the defendants sought to reopen the question of remedy and argued that any remedy should be damages not an injunction. Given that this question had not been addressed at all below, it would appear, on the face of it, unpromising ground for the Supreme Court to embark upon a review of the law in this regard.

12. The end result was that all judges agreed that “slavish” following of Shelfer was no longer appropriate. There agreement more or less ended. So far as the case is concerned, that was remitted back to the trial judge to consider whether the injunction (which was restored) should be varied or discharged pursuant to the permission to apply.

13. So far as what the judges said is concerned, Lord Neuberger at paragraph 120 held that the court’s power to award damages in lieu of an injunction involves a classic exercise of discretion which should not, as a matter of principle, be fettered and he adopted what Millett LJ said in Jaggard at 288 namely,

“Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is binding authority on how the discretion should be exercised. The most that any of them can demonstrate is
that in similar circumstances it would not be wrong to exercise a discretion in the same way. But it does not follow that it would be wrong to exercise it differently”.

14. At paragraph 121, Lord Neuberger went on to say, however, that that did not prevent courts from laying down rules as to what practice can and cannot be taken into account and that it was appropriate to give as much guidance as possible. He stated that the prima facie position was that an injunction should be granted so that the legal burden was on the defendant to show why it should not and he approved the observations of Lord MacNaughten in *Colls v. Home and Colonial Store Limited* (1904) AC 179 at 193, where he said

“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 disposed 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”.

15. Lord Neuberger qualified his approval of that observation in the next paragraph where he put a gloss on the words “ought to incline to damages” emphasising that there should not be any inclination either way (subject to the legal burden that he had indicated was placed on the defendant).
16. So far as the *Shelfer* test is concerned, at paragraph 123 he said that the four tests should not fetter the court’s discretion, that in the absence of additional relevant circumstances pointing the other way, if the four tests were satisfied it might well be right to refuse an injunction, but the converse is not necessarily true, namely that the mere fact that all four tests were not satisfied does not necessarily mean that an injunction should be granted.

17. He then emphasised that the public interest was a relevant factor and that planning permission was a factor that could be in favour of refusing an injunction. It would be a factor of real force where it was clear that the planning authority had reasonably and fairly been influenced by the public benefit of the activity. He then noted that Lord Sumption had wanted to go further in the development of the law in this regard. Lord Neuberger stated that he did not consider that the case was the appropriate moment to do so.

18. Lastly, he dealt with damages in lieu and held that where appropriate the damages could include the loss of the claimant’s ability to enforce his rights which might often be assessed by reference to the benefit to the defendant of not suffering injunctions. In other words, he considered that damages could be awarded on the basis of what a willing buyer and seller would have negotiated as a price for a release of rights. In so doing, he again referred to *Jaggard* where that approach had been approved in relation to trespass and breach of restrictive covenant cases. He ended his discussion on that point by saying that his position on that would be reserved.
19. That approach to damages has, in fact, been applied (albeit obiter) in a recent case concerning an infringement of a right to park (a nuisance), namely *Kettel v. Bloomfold Limited* (2012) EWHC 1422 (Ch.) (2012) L&TR 30. At least where a property right is being infringed (in that case a right to park but similar considerations would apply to a right to light), there would seem to be no real policy reasons why the *Jaggard* approach to assessment of damages should not apply.

20. Lord Mance agreed that the appeal should be allowed for the reasons given by Lord Neuberger save that (at paragraph 167), he stated that he did not consider that the grant of planning permission could give rise to any presumption that there should be no injunction. He also stated that cases on right to light, although technically nuisance, give rise to the same considerations as the type of nuisance involved in the *Coventry* case. His concluding remarks were that he did not consider that the right to enjoy one’s home without disturbance is one that he believed that many, or indeed most, people valued simply in terms of money. He therefore, along with Lord Neuberger, disagreed with the proposition put forward by Lord Sumption that damages would ordinarily be an adequate remedy for nuisance.

21. Lord Carnwath agreed with Lord Neuberger that the court should take the opportunity to signal a move away from the strict criteria derived from Shelfer, notwithstanding the fact that, technically, the issue did not arise for consideration in the case. At paragraph 245, he stated that he generally agreed with the observations of Lord Neuberger and Lord Sumption, but with three particular reservations. Firstly, he did not consider the grant of planning permission as giving rise to a presumption against the grant of an injunction although it would be a relevant and possibly important
factor. Secondly, he did not consider that there was a too direct comparison with
cases relating to rights of light. He also agreed with Lord Mance about the special
importance to be attached to the right to enjoy one’s own home without disturbance
independently of financial considerations. Lastly, he stated his reluctance to open up
the possibility of an assessment of damages on the basis of a share of the benefit to
the defendants. He accepted that there was Court of Appeal authority in *Jaggard* for
that basis of assessment for trespass or breach of restrictive covenant, but that the
same approach had not been extended to nuisance including interference with rights
of light. He stated that in cases relating to clearly defined interference with the
specific property right it was not difficult to envisage a hypothetical negotiation, but
that such an approach was more difficult to apply in cases such as the present (that is
to say nuisance by noise).

22. Lord Clarke agreed with the conclusions and reasoning of Lord Neuberger subject to
some qualifications. He agreed that planning permission was relevant. He stated,
however, that the issues of burdens of proof and how the discretion should be
exercised should be reserved pending fuller argument. He seemed, at paragraph 171,
to be lending some support to Lord Sumption’s view that where damages is an
adequate remedy, it would be inappropriate to grant equitable relief. Lastly at
paragraph 173, he appeared keener on the principle of extending damages measured
by a reasonable price for a licence to cases of nuisance by noise (and by inference to
nuisance by interference with rights to light etc.).

23. Lastly, Lord Sumption, at paragraph 161, expressed his view that there was much to
be said that damages would ordinarily be an adequate remedy for nuisance and that an
injunction should not usually be granted in a case where it was likely that conflicting interests were engaged other than the parties’ interests. In particular, he said, it might well be that an injunction should as a matter of principle not be granted in a case where the use of land to which objection was taken, requires and has received planning permission.

24. This case leaves the law in an unfortunate state of flux and uncertainty. Good news for lawyers, perhaps, bad for clients. The “slavish” following of the Shelfer rule did, at least, mean that parties knew where they were. It also upheld the, perfectly reasonable in this writer’s view, principle that a wrongdoer ought not to be able to come to court to buy off his wrongdoing. That is akin to the courts developing, without statutory approval, a de facto private compulsory purchase system. The point does not appear to have been argued, but, in particular in relation to trespass, Protocol 1, Article 1 of the European Convention on Human Rights would appear to be engaged.

25. We will have to wait for further litigation (no doubt costly to the parties) for these principles to be fully developed. In the meantime, lawyers will have to advise their clients that there is, now, far more uncertainty as to the circumstances in which the courts will grant injunctions to restrain nuisances (and indeed trespass, breach of restrictive covenant and the like) and that, if an injunction is not granted, the basis of the damages to be awarded is, also, open to debate.

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