Rights to light, private nuisance, injunctions and damages – more from the London South Bank

This article should be read in conjunction with Chambers' environmental blog for the week commencing 14 July 2025

Cooper v. Ludgate House Ltd. [2025] EWHC 1724 (Ch.) (8 July 2025) is another case consequent on massive construction works on London's South Bank which tells us a lot about remedies in private nuisance, as well as about interferences with the negative easement of the right to light.

Conclusions

Fancourt J. confirmed that the Supreme Court decision in *Lawrence v. Fen Tigers* [2014] AC 1 represents a "new approach" which gives the Court a broad discretion whether to grant an injunction or to award damages. His reasoning may also be interpreted to cast doubt on the use of the diminution in value assessment of damages for loss of amenity in private nuisance cases: this is because such an assessment is unlikely to reflect the real injury to the amenity of those affected by the nuisance. Fancourt J. went on to make his own assessment of negotiating damages in lieu of an injunction, providing some good pointers for such assessments in the case of large-scale developments.

As to the key right to right to light elements, the judgment provides new law on the effect of s.203, Housing and Planning Act 2016 when determining the loss of light (*Power to override easements*), and it also confirms that the current method of assessing whether or not there has been an interference with a right to light, the 'Waldram' method, is satisfactory (save perhaps in a marginal case).

The facts

The location of the incidents giving rise to this judgment is just round the corner from *Fearn v. Tate Gallery Trustees* [2024] AC 1, the Supreme Court case which re-ordered the principles relevant to a private nuisance. Both *Fearn* and *Cooper* are ultimately concerned with resolving the restrictions to a landowner's freedom to build on its own property. Both are about extraordinary buildings. *Fearn* resolved the conflict between the use of the Tate Gallery viewing platform and the use by the claimants of their Richard Rogers-designed flats with floor to ceiling glass accommodation areas. *Cooper was* concerned with a 2.1 hectare development site formerly occupied by the brutalist Sampson House (57,000 sq. metres) and Ludgate House (24,000 sq. metres) and particularly with the 'Arbor' building, all to be built

up so that various shadows would inevitably be cast over the neighbouring Bankside Lofts occupied by the claimants (the roof garden overlooked the Tate Modern).

Before the development of the whole site, a total of 40 residents of Bankside Lofts had been identified by the developer as having realistic claims to infringement of their rights to light by reason of the construction of the Arbor (being just one element of the whole scheme). 38 owners were bought out with modest sums. Two, however, went on to issue the claim for an injunction requiring the defendant to demolish substantial parts of the Arbor, practical completion of which was in December 2022, standing 19 stories high. Immediately next door to the Arbor a second (residential) tower was to be built (with 48 stories) and, all in all, nine separate buildings would be built on the development site (including the Arbor).

Following a resolution by Southwark Council dated 18 January 2022 pursuant to s.203, Housing and Planning Act, 2016 (formerly s.237, TCPA 1990), the developer became entitled to construct all of the buildings on the development site (excepting the Arbor building), notwithstanding their admitted effects once built on the rights to light of the residents of Bankside Lofts (these structures being known as the '203 development'). By reason of s.204 of the Act, the residents would only be entitled to diminution in value as a result of their construction, i.e. they could not claim an injunction to protect their rights to light. To bring these arrangements into full effect there was a complex set of property transactions which provided for a sale back to the developer after the s.203 resolution, enabling the site owner to develop the land. The aim of the s.203 arrangements was to make sure that the developments at the site could be concluded without the risk of an injunction – it was too late to include the Arbor building.

The right to light issues

The judge made new law when having to decide whether the s.203 development should be taken into account when assessing the 'Before' and 'After' effect of the construction of the Arbor building on the rights to light. He decided that it should not, preferring the claimants' approach: "The appropriate comparison (the Claimants say), when assessing whether Arbor causes a nuisance, is between the amount of protectable light coming into the flats before Arbor was built (the "Before" assessment) and the volume of protectable light after Arbor is built (the "After" assessment). Since the light that would be blocked by the 203 development cannot be protected, it is to be left out of account in both assessments." (The claimants would

be entitled to recover statutory compensation once the 203 development constituted an actionable interference with their rights to light.)

Right to light practitioners will be familiar with the stock Waldram method of measuring whether or not there has been an actionable interference with a right to light. The Defendant described this method as outmoded, preferring the 2018 British Standard *Daylight in Buildings*, but the judge was left concluding that a light surveyor would not be "failing to do their duty if they only use the Waldram method".

***Shelfer v. City of London Electric Lighting Co* [1895] 1 Ch 287 (C.A.)**

Having concluded that the light remaining in the principal bedroom and living area of one flat and that the light remaining in the principal bedroom of the other would be insufficient for the ordinary use and enjoyment of those rooms, the judge had to decide whether to grant an injunction.

This is a discretionary issue which for many years was determined by reference to *Shelfer*, which stated that damages may be given in substitution for an injunction if (i) the injury is small, (ii) it can be estimated in money, (iii) it can adequately be compensated by a small money payment and (iv) it would be oppressive to grant an injunction. Fancourt J. decided that *Fen Tigers* (see above) has marked a new approach. Public interest and local planning permissions were among eight factors to be derived from *Fen Tigers*: "what is required is a balancing of all relevant considerations" (emphasis added).

The judge declined to grant an injunction to demolish any of the building, in particular because it would be futile to do so: planning permission would be granted and when it was granted it would also be supported by a s.203 resolution. In any event, granting an injunction would be a waste of top quality office accommodation with consequential environmental, economic and public harm. The harm done by the grant of an injunction would be "entirely" disproportionate to the harm done to the claimants.

Damages

As to quantum, the judge also decided that *One-Step (Support) Ltd v. Morris-Garner* [2018] UKSC 20 [2019] AC 649 created a "new principled basis for determining whether negotiating damages are available", which included cases where damages are awarded in substitution for an injunction, when the function of the court is "to judge what method of quantification will give a fair equivalent for what has been lost by refusing equitable relief".

For their part, each of the two claimants claimed negotiation damages in excess of £3m by reference to a "fair proportion of the uplift in profits resulting from the lack of constraint in the development", whilst the defendant argued that the modest payments made in settlement to the other 38 residents provided the best evidence (being sums in the low tens of thousands of pounds). The value of the flats as of the relevant date for the assessment of quantum, August 2019, was about £1m.

The judge rejected both approaches and carried out his own assessment of negotiation damages.

The following general points can be applied in all cases where negotiating damages are considered appropriate:

(1) The assumption must be that claimants are willing to sell their rights but at a proper price and not needing grudgingly to sell;
(2) Both parties are to be assumed to be reasonable in their approach and receptive to reasonable points made in opposition;
(3) A main focus will be the gain to the developer;
(4) Further considerations would be the risk of an interim injunction, the risk of having to pay compensation and the delay in construction;
(5) The percentage in increase in value must be assessed (10%-15% in this case);
(6) When the percentage increase is applied to the value, this must be allocated between the claimants;
(7) As the authorities require, the judge must then stand back and consider in the round whether the sum to be awarded is one which would have been negotiated given all the circumstances, the nature of the rights concerned and the impact on each side of not having those rights;
(8) Additional factors may include the value of properties in the area if development takes place (will such values go up or down?).

Fancourt J. decided considered that a "relatively modest" share of the potential gain would have been agreed, namely 12.5% of the increase in value (without the injunction), which he assessed at £3.75m. One third of that sum would be allocated to the Claimants because there were four others with rights which might prevent the building of Arbor. Dividing that sum up to reflect the different injuries to the two flats came out at £725,000 and £525,000. However,

after certain cross-checks, these figures seemed to the judge to be high, so that the damages awarded in lieu were assessed as £500,000 and £350,000.

There is a lot in this judgment. It also raises the question whether diminution in value may be the wrong way to assess damages in many private nuisance cases. Fancourt J. noted that what had been lost from the claimants' perspective was the economic value of the right infringed. "Difference in value is a measure of the exchange value of the flat, not its use value" (para.322). Where a claimant does not obtain an injunction to prevent emissions of dust, or smoke, for instance, it can be argued that the measure of loss should not be limited to diminution in value, since this is just a market-place assessment of value. It does not say enough about the true value of the loss of amenity to the claimant.

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