

A tall storey about rights of light!

Hogan Lovells' Paul Tonkin and Dellah Gilbert examine a recent case which highlights the need for developers to resolve rights of light claims at an early stage.

The case of *HKRUK II (CHC) Limited v Heaney*¹ involved the redevelopment of a six storey office building in Leeds. HKRUK purchased the building in 2007 with the benefit of planning permission which permitted the addition of two further floors. HKRUK identified at an early stage that the construction of the additional floors would infringe rights of light enjoyed by the neighbouring building owned by Heaney and sought to engage him in correspondence with a view to reaching an early settlement of his rights of light claim. These early discussions floundered and, although Mr Heaney's solicitors made threats to issue proceedings for an injunction if works commenced, those threats were not followed through. Works began in September 2008 and were completed in June 2009. The new seventh floor was then let to a tenant on a 10 year lease from 1 August 2009.

Unusually, and presumably in a bid to obtain certainty, HKRUK started court proceedings for a declaration that Mr Heaney was not entitled to relief for any infringement of his rights of light caused by the additional storeys. Mr Heaney counter-claimed for an injunction requiring the additional storeys to be pulled down insofar as they infringed his rights of light.

In a decision which is likely to send a shiver down the spines of developers, the court granted Mr Heaney an injunction and ordered HKRUK to reconfigure the two additional storeys so as to avoid infringement of Mr Heaney's rights of light. This was despite the fact that it would cost £1m - £2.5m to carry out the works and would involve relocating the seventh floor tenant.

The court's starting point was that, once an infringement had been established, Mr Heaney was entitled to an injunction unless HKRUK could persuade it to exercise its discretion to award damages instead. Although this is in itself uncontroversial, it has generally been assumed that, in exercising that discretion, the court will take into account a variety of factors including, for example, whether the injured party has delayed in seeking to assert his legal rights (which Mr Heaney almost certainly had) or whether he was using the threat of an injunction to ransom the developer. However, the judge appeared to consider that his discretion was considerably narrower than this. He held that, unless all four of the tests set out in the leading case of *Shelfer v City of London Electric Lighting Company*² were met then he was, in effect, bound to grant an injunction.

According to *Shelfer*, an injunction ought not be granted where:

- (a) the injury to the claimant's rights is small;
- (b) that injury is capable of being estimated in money;
- (c) the injury can be adequately compensated by a small money payment; and

(d) an injunction would be oppressive.

Even though the loss of light affected less than 1% of Mr Heaney's building, the Judge was not prepared to say that the injury was small. HKRUK therefore fell at the first hurdle. The judge went on to say that, even if he was wrong on this, he did not think that the injury could be compensated by a small monetary payment and did not think that an injunction would be oppressive. Whilst he accepted that it would be expensive and disruptive for the additional stories to be reconfigured, he was influenced by the fact that HKRUK had proceeded to build with a view to profit in full knowledge of the fact that they would be infringing Mr Heaney's rights.

In our view, the case applies an unnecessarily strict approach to what should be a broad judicial discretion and we understand that permission to appeal has been sought. However, the decision highlights the need to identify and resolve rights of light issues at an early stage and the potential financial consequences of starting works while issues remain unresolved.

This case is the latest in a trend which has strengthened the bargaining position of those with the benefit of rights of light. Whilst some may welcome these constraints on developers, the extent of the detrimental impact should not be overlooked. Councils are finding it increasingly difficult to regenerate town and city centres because land owners and developers are having to factor in greater sums to pay off beneficiaries which in turn may make uneconomical an otherwise profitable development. As such, there has been growing unrest, which will only be galvanised by this decision, if it is not overturned on appeal. Is this now the time for a change in the law?



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¹ (Unreported) Leeds District Registry, 3 September 2010
² [1895] Ch 135