

Damages for infringement of right to light based on share of profit

In another recent decision that will cause concern to developers, *Tamares (Vincent Square) Limited v Fairpoint Properties (Vincent Square) Ltd* [2007], the High Court has awarded a claimant substantial damages (despite the very limited loss of amenity) based on one third of the profit generated by that part of the development built in breach of the claimant's right to light.

Injunction or damages?

As we reported in November 2006 the Court of Appeal in *Regan v Paul Properties and Others* reasserted the previously established principles that a claimant is, prima facie, entitled to an injunction against a person committing a wrongful act interfering with a legal right. The Court made clear that the judicial discretion to award damages in lieu of an injunction should only be exercised in very exceptional circumstances. Nevertheless in *Tamares* the High Court decided not to grant an injunction to restrain an infringement of a right to light as the developer was able to demonstrate exceptional circumstances. In particular the loss of light was to a stairwell which was generally artificially lit and was not habitable.

Quantum of damages

However the Court awarded substantial damages against the developer. The Court confirmed that the appropriate measure of damages in such a case is the higher of the value attributed to: (1) the loss of amenity suffered by the claimant and (2) the loss of the ability for the claimant to claim an injunction.

Clearly where the infringement of light is modest and therefore the loss of amenity is small a greater value is likely to be attributed to the claimant's loss of the ability to claim an injunction. This measure of damage is assessed as the sum which would have been arrived at in negotiations between the parties had each been making reasonable use of their respective bargaining positions, without holding out for unreasonable amounts.

In *Tamares* the Court accepted that the reasonable starting point for calculating damages was one third of the profit generated by that part of the development built in breach of the claimant's right to light. As the infringement of the claimant's right to light was relatively minor the court made a modest reduction in the level of damages to reach a result that satisfied the final check of "does the deal feel right".

Developers will now have to consider more carefully than ever whether or not the Court is likely to grant an injunction and, if not, what the likely level of damages might be. In particular, if the infringement of the claimant's right to light enables the developer to increase the potential profit of the development significantly then the damages awarded for such breach are likely to be substantial.

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