

## **Comment on *HKRUK II (CHC) Limited v Marcus Alexander Heaney 2010 ALL ER (D) 101***

**The recent confidential settlement of the *HKRUK II (CHC) Limited v Marcus Alexander Heaney 2010* (“the Heaney Case”) has left the law on rights of light in an interesting position.**

### Background to rights of light claims

Potential rights of light claims should be taken into consideration when planning any development where there are neighbouring buildings which are likely to enjoy less light than they had previously.

Assuming the affected property has the benefit of rights of light in the first place (and this needs to be checked carefully) the next step is to consider if there has been an actionable interference with the right to light. This will require the services of a specialist right to light surveyor. Assuming there has been an actionable interference, the next question is whether the owner of the affected property would be entitled to an injunction to prevent (or remove) the interference with their right to light by the proposed development.

There are two types of injunction:

1. Prohibitive - to prevent the infringement of the rights to light
2. Mandatory - where the development has already been built and the court therefore orders that the offending part of the new building should be removed

The court's starting position is that, once it is satisfied that there has been an actionable interference with the right to light, there is a presumption in favour of an injunction. However, the court can award damages (ie compensation) instead of an injunction where compensation would be an adequate remedy in all the circumstances. Historically mandatory injunctions were rare (especially in commercial cases) but this has changed recently.

### The Heaney Case

The case of *HKRUK II (CHC) Limited v Marcus Alexander Heaney 2010 ALL ER (D) 101 (Sep)* highlights these issues.

In this case HKRUK (the developer) decided to proceed with their development (of a central Leeds office block, Toronto Square) without first resolving its neighbour's (Marcus Heaney's) right to light claim. The building work was completed at the end of 2008 and, unusually, the judge granted a mandatory injunction (rather than damages) which required the developer to remove part of two floors of the office block two years after completion of the works. This decision has therefore been understandably described by some commentators as a severe blow for developers.

### Facts

HKRUK sought a declaration from the court that they were free from liability in relation to the right to light claim brought by Mr Heaney who owned the neighbouring building.

During the course of the dispute the parties agreed that redevelopment had interfered with the right to light enjoyed by Mr Heaney's building. However, they disagreed as to the appropriate remedy. Mr Heaney requested a mandatory injunction which would require HKRUK to remove parts of the redeveloped building that were interfering with the light to his building. HKRUK contended that damages was the appropriate remedy.

The court granted a mandatory injunction (in accordance with the principles laid down in *Regan v Paul Properties Limited* (2006)). The court also made it clear that with the presumption being in favour of an injunction, any defendant would fail to rebut that presumption if it failed at just one of the hurdles set out in *Shelfer v City of London Electric Lighting Company* (1895) which is the leading case that set out clearly the criteria for the award of damages as a substitute for an injunction.

The criteria are:

1. the injury to the claimant must be small; and
2. the injury must be capable of being estimated in money; and
3. the injury can be adequately compensated by a small money payment; and
4. it would be oppressive to the offending party to grant an injunction.

When applying the criteria the court considered two main points:

- Mr Heaney's building was a character property (Victorian Grade II listed building) and he had spent a considerable amount of money, time and commitment investing in its restoration. The judge therefore concluded that there had been damage which could not be compensated by a money payment and the injury was not small.
- The total development had cost HKRUK in excess of £35 million and the works required to rectify the offending works would cost between £1-2 million. The judge therefore concluded that this was a small proportion of the overall development costs and therefore there would be no oppression caused to the developer if he granted an injunction.

The judge also did not criticise Mr Heaney for delaying in taking action when historically the courts penalised claimants for not acting quickly to obtain an injunction (Mortimer v Bailey (2005)).

Although not relevant to his findings, the judge did consider what damages might have been awarded. He felt that the difference in value of property with and without the issue was £1.4 Million. The developer had negotiated a reduction (of £350,000) when purchasing the site due to the light issues and had a budget of £200,000 for settling them. In view of the reduction in the purchase price the developer could be expected to go beyond the budgeted figure and that a damages figure of £225,000 would be reasonable. When one considers the level of the potential damages as compared to the cost of the reinstatement works it is perhaps surprising that the judge did not consider that damages was a first remedy.

The Judge also made it clear that in his opinion it was reasonable to expect a developer to obtain certainty (with regard to right to light issues) before starting work.

This case was due to be appealed and all commentators waited eagerly to see how the case would play out in the Court of Appeal. However, before it reached the Court of Appeal the parties agreed a settlement the terms of which are confidential. There are no reports of HKRUK taking down two floors of their development and therefore Marcus Heaney must have settled for a large monetary payment – presumably somewhere between the level of damages and the likely cost of the reinstatement works.

## Comment

Since the High Court decision there has been raised awareness of rights of light claims, with both developers and their neighbours seeking advice as to their legal position. Any developer contemplating a major development, especially in central London, must be cautious to address their neighbours' potential claims before carrying out any work. This case means that many neighbours can hold a developer to ransom if they can establish that the development will result in an injunctable interference with their rights to light.

Therefore as the current case law stands an extremely cautious approach must be taken and the issues in relation to rights to light should be settled before works begin; unless and until a developer is prepared to challenge the principles of the Heaney case.



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