The Power of the Right to Light

Developers will be concerned to learn about the recent High Court decision in the case of HKRUK II (CHC) v Heaney [2010] All ER (D) 101.

Result: a developer was ordered to take down part of its (completed and part let) development.

Reason: a neighbouring property suffered loss of light.

Background

In March 2007, planning permission was granted to redevelop a five storey building in Leeds, now known as Toronto Square. Work was to include the addition of two floors. The developer bought the property in December 2007, by which time its predecessor had already provided Mr Heaney, a neighbouring owner, with details of the proposed works. The parties entered into settlement negotiations in which the developer acknowledged Mr Heaney's property would suffer an actionable loss of light. When settlement discussions broke down, Mr Heaney threatened injunction proceedings but no action was taken. The building work was completed in July 2009. Surprisingly, it was the developer who brought the matter to court, seeking a declaration that Mr Heaney was not entitled to an injunction for the removal of the two extra floors.

Injunction v Damages

With no dispute as to the existence of the right to light, the case focused on which remedy should be applied – an injunction (to remove the addition of the two extra floors) or damages.

The initial presumption is in favour of an injunction. The burden was therefore on the developer to show the court that one should not be granted and damages should be awarded instead.

The judge used the principles set out in the _Shelfer v City of London Electric Light Company_ case - damages will only be awarded in place of an injunction if:

(a) the injury to Mr Heaney's legal rights is small;

This test was not satisfied and so the developer fell at the first hurdle. However, despite this, the court went on to consider the other three limbs of the test.

(b) the injury is capable of being estimated in money;

This test was satisfied.

(c) the injury can be adequately compensated by a small money payment; and

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The judge concluded any damages payment would be £225,000, which was not considered to be small.

(d) it is not oppressive to the developer to grant an injunction.

It is the rejection of the developer's two arguments in relation to this test that will particularly worry developers. First, the developer ran an argument regarding the cost of the works – (de) construction costs were estimated at between £.1.1 and £2.5 million. Office space would be lost and the already signed up tenant would need temporary relocation. Second, the developer alleged the defendant was dilatory in correspondence and highlighted that despite threats, it had not issued proceedings. The court rejected both of these arguments- the developer had acted" in the knowledge that what was being done was actionable" , it "was with a view to a profit", and was "not driven by necessity".

Going forward

The developer is understood to be seeking leave to appeal. All cases will be decided on their own merits, but nonetheless this decision should raise alarm bells and focus developers' minds on the resolution of any potential issues with neighbours (a) before development begins and (b) out of court. Having said that, the developer attempted to do both in this case, and it is difficult to see how it could have forced the neighbour to agree a settlement short of going to Court, which obviously did not produce the desired result.

For more information on this case and/or rights of light issues, please contact:

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