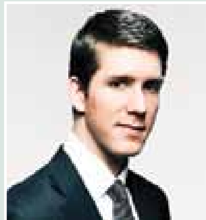
Development Disputes

Current issues for property litigators

Quantification of release fees: principle and practice



Ben Faulkner

Ben was called to the Bar in 2008 and joined Wilberforce Chambers in 2009. He has a broad property practice. His real property practice includes boundary disputes, restrictive covenants, easements, adverse possession, market and fair rights, mortgages, party walls, nuisance, town or village greens, and land registration issues. Ben's landlord and tenant practice includes both residential and commercial disputes, including claims arising following the appointment of LPA receivers, claims arising under the Landlord and Tenant Act 1954, and service charge disputes. A substantial part of Ben's practice also involves property-based professional negligence, such as claims concerning conveyancing solicitors and valuers. Ben is a co-editor of the upcoming *Butterworths Property Law Handbook*.

WILBERFORCE CHAMBERS

Often a development will interfere with the rights of an adjoining landowner (referred to throughout this article as a "**Landowner**"). Examples include developments interfering with rights of light, physically encroaching onto neighbouring land, obstructing a right of way over the development land, or breaching a restrictive covenant against further development. The person carrying out the development ("**the Developer**") might have caused the interference entirely accidentally, not having foreseen the interference at all; he might have caused it knowingly and deliberately; or he might have realised in advance that there was a question as to the extent of the Landowner's rights, and pressed ahead anyway.

The Landowner's primary remedy will be for an injunction, requiring the interference to cease. For example, in the recent case of *HXRUK II (CHC) Ltd v Heaney*[1] the Landowner, who was entitled to rights of light, was granted an injunction requiring the Developer to demolish the offending floors of the development.

The Court has a discretion, however, to grant damages in lieu of an injunction. This article explores some of the issues that can arise when the Courts quantify such damages in lieu.

The jurisdiction to grant damages in lieu of an injunction

The jurisdiction to grant damages in lieu derives from the Chancery Amendment Act 1858 (Lord Cairns' Act), and is now found in section 50 of the Senior Courts 1981. In *Regan v Paul Properties DPF No 1 Ltd*[2] the Court of Appeal repeated the working rule set down in *Shelfer v City of London Electric Lighting Co*[3] as to when the Courts would exercise the jurisdiction. In short, although it is a matter for the discretion of the Court, taking into account all relevant circumstances, the Court will consider whether:

> *"(1) the injury to the plaintiff's legal rights is small;*
> *(2) the injury is one which is capable of being estimated in money and is one which can be adequately compensated by a small money payment;*
> *(3) it would be oppressive to the defendant to grant an injunction;*
> *(4) the adjoining landowner has shown that he only wants money;*
> *(5) the conduct of the adjoining owner has rendered it unjust to give him more than pecuniary relief; and*
> *(6) there are any other circumstances which justify the refusal of an injunction."*

The grant of damages in lieu of an injunction in effect licences the Developer to violate the rights of the Landowner, against his will. The Courts maintain that it is not their function to facilitate such compulsory licences, thereby legalising the Developer's wrongful acts, and that they will only grant damages in lieu in exceptional cases - typically where the interference was accidental, or where there was a genuine question as to the Landowner's rights, and the Developer acted reasonably and in a "neighbourly" fashion.

The most well known example of the award of damages in lieu is *Wrotham Park Estate Co Ltd v Parkside Homes Ltd and Ors.*[4] In that case the Landowner had the benefit of a restrictive covenant over the Developer's land prohibiting development without its consent. The Developer began to construct a residential development, also taking deposits from intending purchasers, without ever

1 [2010] 3 EGLR 15
2 [2006] EWCA Civ 1391 at paragraph 36
3 [1895] 1 Ch 287
4 [1974] WLR 798

seeking the Landowner's consent. The Landowner issued a claim for an injunction, but the Developer carried on with the works so that the development was complete by the time of trial. Although Brightman J noted that the Developer had *"in the face of the clear and early protest by the plaintiffs and the issue of proceedings…proceed[ed] at his own peril"*, he ultimately concluded that it would be *"an unpardonable waste of much needed houses to direct that they now be pulled down and I have never had a moment's doubt during the hearing of this case that such an order ought to be refused. No damage of a financial nature has been done to the plaintiffs by the breach of the [restrictive covenant]"*. Instead, Brightman J awarded the Landowner 5% of the anticipated profit the Developer was to make from the development. Such a quantification of damages in lieu has become known as a "**release fee**". Although he refused the injunction *"without hesitation"*, Brightman J warned that his conclusion *"does not spell out a charter entitling others to despoil adjacent areas of land in breach of valid restrictions imposed by the conveyances. A Developer who tries that course may be in for a rude awakening"*.

A detailed examination of the circumstances in which the Courts will grant damages in lieu of injunctions is outside the scope of this article. Note, however, that a Developer was met with such a "*rude awakening*" recently in *HXRUK II (CHC) Ltd v Heaney*, where the Chancery Division took a strict approach to the working rule above, and granted an injunction to pull down offending parts of a development, even though the costs of the works required by the injunction were around £1.1 million, but the value of the Landowner's land was decreased by no more than £80,000 as a result of the interference. *HXRUK* is a stark illustration of the judicial reluctance to grant damages in lieu.

The general approach to quantum of release fees

The Court will have to consider what the quantum of damages will be, both in the process of deciding whether to grant damages in lieu of an injunction *(is the injury capable of estimation and compensation by a small money payment?)*, and when making an award once it has decided to grant damages in lieu. It might also consider the quantum when dealing with past infringements of the Landowner's rights: often the Court will grant an injunction going forward, and will award damages for the infringement before the injunction took effect on a similar basis as damages in lieu of an injunction.

It is often said that the aim of awarding damages is to put the injured party back to the same position in which he would have been had he not sustained the wrong.[5] In most claims, the starting point is to award the diminution in value of his property caused by the interference with his rights. However, often the infringement will cause little or no diminution in value to the Landowner's property. For example, in *Wrotham Park* the value of the Landowner's property was *"not diminished by one farthing"* in consequence of the breach of the restrictive covenant. In such cases the Courts are prepared to depart from the diminution in value approach, and instead award a "release fee", which represents the price the Landowner could reasonably have demanded from the Developer for releasing his rights upon a hypothetical negotiation between them at a time before the infringement. Normally that release fee will be quantified by reference to a percentage of the development profit made.

That hypothetical negotiation raises a number of questions, which are considered below. Is the negotiation based upon the actual subjective knowledge, attitudes and objectives of the parties, or can it be based upon the attitudes of reasonable hypothetical parties? Is it based upon the profit anticipated at the time of the hypothetical negotiation, or upon the profit that was in fact realised from the development after it was built? Is a percentage of the profit of the *whole* development awarded, or a percentage of merely the *offending parts* of the development?

5 See *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn

Compensation or restitution?

Before considering such questions, it is necessary to consider the legal basis for the award of release fees. There is some debate, and a clear path through decided cases is not easy to make out. It is a debate that at first glance appears to be of some significance (and certainly is as a matter of principle), but much of its importance melts away in practice.

From first principles, one might think release fees are restitutionary, rather than compensatory: the Developer has been unjustly enriched, and the profits generated by the development typically far exceed the loss suffered by the Landowner, so some of the profits are disgorged to him. The alternative analysis is that release fees compensate the Landowner for the loss of the opportunity to negotiate a "sale" of his rights with the Developer.

The compensatory analysis often jars with reality. The Landowner, if asked, might have adamantly insisted on his strict entitlement to his property rights, and refused to negotiate at all. Indeed, in many damages in lieu cases the Landowner will primarily seek an injunction, and in order to stand a change of success he must persuade the Court that he would not have settled for a money payment. On the Landowner's own case any negotiation would not have resulted in agreement. In such cases there can be no question of a negotiation or compensation for a missed negotiation. It is a legal fiction to suggest that the Landowner is being compensated.

The honest approach would be to accept the restitutionary basis for release fees. Restitution is all about the disgorgement of benefits unjustly obtained. It is common sense that the Developer should not be able to benefit from infringement of the Landowner's rights. If he does so, the Developer has been unjustly enriched, and should accordingly pay over some of that benefit to the Landowner.

The genesis of *Wrotham Park* release fees lies in the line of "wayleave" cases, in which the Courts would award damages for trespass to land based upon the reasonable fee a willing Landowner would charge for the relevant right. For example, the defendant might wrongfully make use of a path over the Landowner's property. The Landowner suffers no loss, but the defendant is ordered to pay damages to reflect what the Landowner might reasonably have demanded for a licence to use the path. Similarly, defendants might occupy the Landowner's otherwise vacant land. If the Landowner had not intended to use or rent out the land, he will not have lost anything by virtue of the defendants' occupation, but they will still be ordered to pay mesne profits, calculated by reference to the market rental value of the property.

The Courts do not appear to have grappled with the underlying legal basis for the award of release fees and damages in wayleave cases at first, but rather assumed that their award was compensatory. Then, in *Ministry of Defence v Ashman*[6] Hoffmann LJ considered that it was time to *"call a spade a spade"* and recognise that the award of mesne profits were restitutionary.

In *Attorney General v Blake*[7] in 2000, Lord Nicholls, with whom the majority of their Lordships agreed, conducted a review of the *Wrotham Park* and wayleave lines of cases. He explained that they were measured by the benefit received by the defendant, and expressed difficulty in

6 [1993] 66 P&CR 195 at 201

7 [2001] 1 AC 268. See also *Stadium Capital Holdings v St Marylebone Properties Company Plc* [2010] EWCA Civ 952 where, in the Court of Appeal, Peter Smith J at [13] described the test of the measure of damages in trespass cases as "*not what the plaintiff had lost but what benefit the defendant obtained*" from the use of the land. He went on "*This introduces a flexible basis for assessment because it requires the court to look at the use that was made*".

categorising them as compensatory:[8]

> *"More difficult is the alignment of this measure of damages within the basic compensatory measure. Recently there has been a move towards applying the label of restitution to awards of this character… However that may be, these awards cannot be regarded as conforming to the strictly compensatory measure of damage for the injured person's loss unless loss is given a strained and artificial meaning. The reality is that the injured person's rights were invaded but, in financial terms, he suffered no loss."*

Similarly, in *Experience Hendrix LLC v PPX Enterprises Inc*[9] Mance LJ agreed that the compensatory analysis did not square with the reality that the Landowner might never have been prepared to negotiate. Instead of awarding an amount that reflected the profits from the use of the claimant's rights in music that the parties thought the defendant might make at the date of the breach, he awarded a proportion of the sums the defendant actually received to date.

In *Field Common Ltd v Elmbridge Borough Council*[10] Warren J conducted a further review of the principles underlying wayleave awards. The Judge elegantly explained how the hypothetical negotiation fits with the underlying restitutionary analysis: the task is to determine the benefit to the landowner that should be paid over.[11] It would be unjust to order all of the profits to be paid over, and instead a proportion is paid over. Ordinarily, in wayleave cases that just proportion is determined by the reasonable fee the Landowner would charge; in mesne profits cases for unlawful occupation of land that proportion is the open market rental value of the property; and in release fee cases that proportion is what the Landowner might reasonably have accepted from the Developer upon a hypothetical negotiation for the release of his rights. Accordingly the task is not to identify the loss to the Landowner by reference to the lost opportunity to negotiate, but instead to identify the benefit obtained by the Developer that ought justly to be returned to the Landowner.

More recently, however, in *Pell Frischmann Ltd v Bow Valley Ltd*[12] the Privy Council agreed with Neuberger LJ's analysis in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd*[13] that release fees *"are meant to be compensatory"*. The compensatory analysis has since then been adopted in some first instance decisions, such as *Kettel v Bloomfold Ltd*.[14] A return to the compensatory analysis would be unfortunate; confusingly, there is at present no clear statement of which analysis should prevail. Since Pell Frischmann the Supreme Court decided *Bocardo SA v Star Energy UK Onshore Ltd*,[15] and although not asked to consider whether wayleave damages were restitutionary or compensatory, Lord Walker described Warren J's judgment in *Field Common* as *"comprehensive and scholarly"* and considered that the starting point (that the measure of damages was the price that reasonable persons in the position of the parties would have negotiated for a grant of the relevant rights) might have been *"open to argument"* following *Field Common*.

8 At 279D. Lord Hobhouse, in his dissent at 298E, likened Wrotham Park damages to a compulsory acquisition of land, and stated that they were "*an example of compensatory damages. They are damages for breach. They do not involve any concept of restitution and so to describe them is an error. The error comes about because of the assumption that the only loss which the plaintiff can have suffered is a reduction in the value of the dominant tenement*".

9 [2003] FSR 46 at [25] and [45]

10 [2009] 1 P&CR 1

11 See [77] to [79]

12 [2009] UKPC 45 at [50] per Lord Walker

13 [2006] EWCA Civ 430 at [27] to [29]

14 [2012] EWHC 1422 (Ch) at [62]

15 [2011] 1 AC 380 at [47]

At first glance the importance of identifying the underlying principle is considerable: whilst restitutionary damages would be assessed by reference to the profits the Developer in fact made owing to the infringement of the Landowner's rights, the assessment of compensatory damages would be limited to reference to the profits the parties thought the Developer might make at the time of the hypothetical negotiation, since the actual profits made would not be known at that time. However, Warren J's analysis in *Field Common* brings the results of the two different approaches much closer together in practice, since in both cases the Court will assess damages by reference to the hypothetical negotiation on the information available at the time of that hypothetical negotiation. That is because in the compensatory case the Court is awarding the Landowner the sum that would have been agreed but was lost, and in the restitutionary case the Court is awarding the sum which is fair, assessed by reference to that hypothetical negotiation.

There ought to be an inherent flexibility in the award made if the restitutionary approach is adopted. The task is to award a fair amount, and the hypothetical negotiation starting point does not need to be adhered to slavishly. Suppose at the time of the hypothetical negotiation the parties thought that the Developer would make £1 million owing to the release of the Landowner's rights, but in fact the Developer makes £10 million. A strict compensatory approach would award a release fee based upon a proportion of the £1 million: the Landowner would have "lost" no more than the opportunity to negotiate for a payment in the anticipation that the Developer would make £1 million. That seems inherently unfair: the Developer has only been able to make such huge profits because of his unlawful interference with the Landowner's rights. A restitutionary approach would more easily allow the Court to stand back and award a greater sum to reflect the profits that were in fact made.

That said, the Courts are adopting an increasingly flexible approach to the quantification of compensatory damages. For example, in *Lunn Poly* Neuberger LJ started by explaining that compensatory damages are *"normally to be assessed or valued at the date of the breach"* (being the date of the hypothetical negotiation) and that *"principle and consistency indicate that post-valuation events are normally irrelevant."* Importantly though, that apparently clear rule can be departed from: *"given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account"*.[16]

In summary, whichever of the two analyses is adopted will rarely make a difference to the outcome in practice. The restitutionary approach however, whilst boiling down to the same hypothetical negotiation, has the advantage of being intellectually honest. Furthermore, in a valuable and difficult case the conceptual difference between the two approaches could tip the balance: the restitutionary approach ought to allow for greater flexibility than the compensatory approach.

Quantification of release fees in practice

It will be apparent that there is little clarity as to the underlying analytical basis for release fees. What has emerged, fortunately, is increasingly clear guidance as to what factors the Court should take into account <u>in practice</u>.

16 At [29]

The following guidance can be derived from the existing cases.[17]

(1) The primary aim is to ascertain the sum of money which might reasonably or fairly be demanded as a quid pro quo for permitting the infringement of the Landowner's rights.

(2) That sum is arrived at by considering a hypothetical negotiation between the parties.

(3) The negotiation is to take place immediately before the breach occurred. Consequently, the information available to the parties in the hypothetical negotiation should be the information that was reasonably available to them at the time, and not information which was only later available (such as the profits the Developer in fact made).

(4) The negotiation is between a willing buyer (the Developer) and a willing seller (the Landowner), in which the subject matter of the negotiation is the release of the relevant proprietary entitlement. Even if in fact the parties would never have negotiated, the parties are assumed to be reasonably willing to negotiate. The Landowner will not be assumed to have held out for an unreasonable amount.

(5) That said, the hypothetical Landowner is entitled to make use of the significant bargaining position he has: if he does not agree to release his rights, the development cannot go ahead. It is for that reason that he might be expected to receive some part of the profit that the Developer was likely to make.

(6) In the course of arriving at a figure which would have been agreed, the Court will consider all the relevant circumstances, including the extent of the infringement, what alternatives the Developer had to infringing the Landowner's rights, what profits the Developer thought he might obtain from the infringement, and what risk the Developer was taking on in agreeing to purchase the release.

(7) The Court will ordinarily award a share of the profits from the development. In so doing it may be assisted by expert evidence. That share needs to "feel right" once the analysis is complete. It should not be so high as to mean that the Developer would not have proceeded with the development in the first place.

Some examples of this guidance in practice

It is particularly difficult to predict the outcome in any particular case. Since each case will turn on its own unique facts, it is not even helpful to rely upon what particular awards were made in the reported cases. However, it is possible to try to predict how the Court might approach any given case by reference to the guidance above, and examples of its application below.

17 See the cases below, and in particular Field Common at [70]; Pell Frischmann at [48] to [51]; *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* (No 2) [2007] 1 WLR 2167 at [22]; and *Amec Developments Limited v Jury's Hotel Management (UK) Limited* (2001) 82 P&CR 22.

Information available after the hypothetical negotiation

The Court establishes the relevant date of the hypothetical negotiation by *"planting its feet in the real world"* and ascertaining when the negotiations would need to be concluded for the development to proceed.[18]

The general rule is that information only available after the hypothetical negotiation will not be relevant to quantify the release fee. In *Pell Frischmann* the parties had attempted to negotiate a release fee, but in the end agreement could not be reached. The Privy Council considered that it was unnecessary to give a detailed account of the actual profits made by the defendant as a result of the breach, because it could instead use the expectations of the parties during the negotiations as the basis for the release fee. In that case the parties thought that the defendant would make greater profits than it in fact did, but profits were still awarded on the basis of that higher figure.

Post-negotiation information can still be of importance. In *Wrotham Park* damages were awarded on the basis of the profits the Developer actually made. As explained in Pell Frischmann,[19] the Court is entitled to consider the profits in fact made as a "*useful guide to what the parties would have thought at the time of their hypothetical bargain"*. In other words, the eventual outcome is <u>evidence</u> of what the parties might have expected the profits to be.

Furthermore, there may be cases in which the Court will depart from the general rule. As discussed above, the door was expressly left open in *Lunn Poly*, and if the restitutionary approach is embraced, the door may well be open wider.

The Courts have not yet squarely considered the situation in which the Landowner is led to believe by the Developer that the development profit will be modest, but in fact the Developer expects to make a large profit. The hypothetical negotiations have, to date, been on the basis that both parties have the same information available to them. It remains to be seen whether the Courts will accept the reality that often Developers will know something everyone else does not, and that it can be perfectly legitimate for them to keep such sensitive information to themselves.

Parties not in fact able to agree

In *Perlman v Rayden*[20] the Developer trespassed on the Landowner's land for a period of time in order to carry out works to his own property. At that date the parties were locked in a bitter dispute, so there was very little prospect of any agreement being reached. Patten J refused to award damages on the basis that the Landowner would seek a hugely inflated price by exploiting the Developer's wish to carry out extensive works. Although the Landowner was strongly opposed to the works, the Judge considered that *"the wayleave principle assumes a willing and reasonable claimant and not one who would seek an exorbitant fee for the use of his land in order to deter consent being sought"*. The Judge awarded £10,000 as a reasonable sum the parties might have negotiated before carrying out the works.

The Landowner's bargaining position

In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)*[21] the Developer infringed the Landowner's rights to light in a fairly inconsequential way. Gabriel Moss QC awarded £50,000 damages based upon the profits that the Developer was likely to make, rather than merely on the much smaller loss of amenity the Landowner would suffer. The Landowner was entitled to take his bargaining position into account.

---

18 *HXRUK II (CHC) Ltd v Heaney* at [84]
19 At [51]
20 [2004] EWHC 2192 (Ch) at [102]
21 [2007] 1 WLR 2167

Similarly, in *Deakins v Hookings*[22] Judge Roger Cooke, sitting at the Mayors and City of London County Court, considered that two questions were important: *"(i) is it a ransom situation, ie is the development stuck without it or merely inconvenienced; (ii) does the loss of the right inconvenience the seller?"*. The Judge clearly felt that the Landowner would be entitled to exploit his bargaining position (even in a ransom situation), at least to some extent, in the hypothetical negotiation.

Particular attitudes of the parties

In *Field Common* Warren J expressed his clear view that the hypothetical negotiation was not to be conducted between entirely objective hypothetical parties, but instead *"it is designed to establish the value of the wrongful use to the defendant and not some objective figure as between hypothetical persons negotiating for a hypothetical license:…that negotiation would be one between the actual parties, albeit that they are to be treated as parties willing to deal with each other with a view to reaching a reasonable result"*.[23]

Warren J's subjective principle has been repeated in other cases. In *Jones v Ruth*[24] the Developers caused a nuisance and trespassed on the Landowners' property in carrying out their development. The Court of Appeal calculated the release fee at one-third of the prospective increase in the value of the Developers' property by virtue of the works. This proportion specifically took into account the parties' attitudes, and in particular the Landowners' sensitivity about interference with their property, and the Developers' keen desire to tie the development in with the development of other neighbouring property.

Also in *HXRUK II (CHC) v Heaney HHJ* Peter Langan QC took very specific characteristics of the parties into account. He thought it relevant to consider the Landowner's reluctance to commence proceedings, the improbability of the Landowner pushing unduly hard in negotiations, and the sums budgeted by the Developer for settling the remaining issues.

By contrast, in *Lunn Poly*[25] Neuberger LJ considered that the Court's task was to ascertain not what the actual parties would have done in a negotiation, but instead what hypothetical, reasonable parties would have done: matters relating to the specific parties should not be taken into account. That approach was adopted by Vos J in *Stadium Capital Holdings (No 2) Ltd v St Marylebone Property Co Plc*[26] where he held that it was clear from the authorities that the *"personal characteristics of the parties, as opposed to the objective facts with which they were faced, are to be ignored"*. He accordingly paid no attention to the aggressive approach of the Landowner, or the "easygoing" characteristics of the defendant. That, too, was the approach in *Kettel v Bloomfold*.[27]

This second, objective approach seems preferable, for three reasons. First, it makes the most practical sense. Valuation experts are well used to making objective assessments of the value of property, and are well placed to assist the Court on how a hypothetical negotiation might play out on an objective basis. The introduction of the subjective characteristics of the parties leads to confusion, and real complication in establishing what might have happened. Secondly, it is conceptually problematic to ignore some characteristics of the parties (the fact that the parties would not have come to an agreement), but to pay attention to others. Where is the line to be drawn? It is more conceptually coherent to ignore all characteristics personal to the parties, and instead focus on the objective facts

22 [1994] 1 EGLR 190 at 196
23 At [78]
24 [2011] EWCA Civ 804
25 At [35]
26 [2012] 1 P&CR 7 at [71]
27 [2012] EWHC 1422 (Ch)

available to them. Third, as a matter of principle if, as it should be, the restitutionary approach were adopted, the Court should not be bound to the question of what would have been agreed between the particular parties, but could instead ask itself as a matter of fairness what ought to have been agreed. Fairness ought to be an objectively assessed target.

The hope is that Vos J's return to approaching the negotiation on an objective basis will last, but for the moment the approach a Court will take is somewhat uncertain.

The extent of the infringement

In *Tamares* the Judge reached a provisional view to award one third of the development profit, which equated to £58,000. However, he decreased it slightly to £50,000 to account for the modest interference with the Landowner's rights to light.[28]

The alternatives available to the Developer

Sometimes the Developer will have available to it an alternative to infringing the landowner's rights. This will bolster its bargaining position in the hypothetical negotiation, In *Sinclair v Gavaghan*[29] the Developer trespassed over the Landowner's small triangle of land to gain access to his property. The way over the triangle was merely a more convenient means of access to the Developer's land, but the development could have taken place, and access could have been obtained, by other less convenient means. Patten J considered that the alternative access routes open to the Developer were *"of course highly relevant as factors which would have influenced the hypothetical negotiations"*.[30] He awarded only £5,000 on that basis.

Matters become more difficult where the alternative open to the Developer entirely negates the need to use the Landowner's land at all. In *The Mayor and Burgesses of the London Borough of Enfield v Outdoor Plus Ltd*[31] the defendant had erected an advertising hoarding on its own land, but had unwittingly placed its support posts on the Landowner's land. It would have been possible for the defendant to move the advertising hoarding back into its own land. The trial judge awarded the Landowner nominal damages, on the basis that in a hypothetical negotiation the defendant could have relied upon his ability to move the hoarding, ending the trespass. The Court of Appeal disagreed with this approach: it held that such an approach undermined *"the basic assumptions upon which the hypothetical negotiation is predicated, and loses sight of the need to compensate the [Landowner] for the trespass which actually took place"*. Henderson J said *"I fully accept that any ability on the part of a trespasser to achieve the object of the trespass by alternative means is a factor which must be taken into account in the hypothetical negotiation. The alternative must, however, be one which is consistent with the trespass and which can co-exist with it. An alternative cannot be taken into account if it would eliminate the trespass itself, because that would again negate the very basis of the exercise"*. He contrasted *Sinclair*, where he said the alternative access routes were *"true alternatives to the more convenient route through the Red Triangle"*, with the case before him where moving the hoarding was relied upon *"not as an alternative to the admitted trespass, but as a means of eliminating it"*.[32] The Court of Appeal accordingly ignored the alternative open to the defendant, and awarded the claimant half of the profits from the hoarding.

With respect to the Court of Appeal, this is a distinction without a difference. Had in *Sinclair* the defendant used an alternative, less convenient, route the trespass would have been eliminated.

---

28 At [37]
29 [2007] EWHC 2256 (Ch)
30 At [17]
31 [2012] EWCA Civ 608
32 At [50] and [51]

Equally, had in *Outdoor Plus* the defendant moved the hoarding back, which would have been less convenient to it, the trespass too would have been eliminated. The negotiation would certainly have taken on a different flavour, but that does not mean that the hypothetical negotiation would have been subverted. Instead, the negotiation would have been on the basis that all the defendant should pay for is a proportion of the cost of moving the hoarding back.

It is not just the alternatives available to the Developer that can be taken into account. It may be that the Landowner has a mechanism, other than refusing to release his rights, to "trump" the Developer's attempts to profit. In *Stadium Capital Holdings* the defendant erected an advertising hoarding on a wall of its property, which projected into the Landowner's airspace, constituting a trespass. The defendant received over £300,000 from advertisers' licence fees. The Landowner could have constructed a hoarding entirely on its own land, which would have blocked the defendant's hoarding, and entirely deprived the defendant of any profit. Vos J considered that such a trump card could in principle be relevant to establishing what price might be agreed in the hypothetical negotiation.[33] However, on the facts, the alternative was not particularly attractive because of the uncertainties and delays that might be caused by applying for planning permission for a new hoarding.

The risk to the Developer

The Courts can consider the inherent risks on the Developer when carrying out the negotiation. By contrast with the Landowner, who at the end of the negotiation would receive an immediate cash sum for the release of his rights, the Developer might be uncertain as to whether the development will really go ahead, or whether he will make the profits he hopes he will. For that reason, it is legitimate to reflect the balance of risk in the proportion of profits the Developer is hypothetically willing to pay. In *Tamares* Gabriel Moss QC held that roughly one third of the profits reflected the reality of the balance of risk.[34] In *Kettel v Bloomfold* HHJ David Cooke awarded a 50/50 split of the net profits, but only after first hiving off to the Developer a development profit of 25% of the gross development value, to account for the Developer's risk.

The relevant development profits

Technically, it should not matter whether the Court awards a proportion of the profits from the whole development (such as the profits from developing a whole building), or a proportion of the additional profits that were made by virtue of the infringement (such as the profits from the offending upper two floors of the building): that is because the Court is simply considering what the parties would have done, and ought to adjust the proportion to arrive at the same figure in either case. A development might make a total of £10 million, £2 million of which is attributable to the infringement. The Court might award 10% of the total profits, or 50% of the profits attributable to the infringement: the result will be the same.

However in practice, the Courts typically award somewhere between 15% and 50% of the "relevant" profits, so presentationally it is important to focus on the correct profit figure. In most cases, the proper figure will be the additional profits, and not the total profits. For example, in *Amec Developments Limited v Jury's Hotel Management (UK) Limited*[35] the Court awarded a release fee by reference to the additional hotel rooms that could be constructed by virtue of the Developer's breach of restrictive covenant. Similarly, although ultimately granting an injunction, in *HXRUK II (CHC) Ltd V Heane*y HHJ Peter Langan QC assessed the quantum as one third of the "profit differential", being the additional profits that would have been generated from the offending sixth and seventh floors of the development.

33 At [69]
34 At [34]
35 (2001) 82 P&CR 22

In a number of cases the figure used is the total profits, but that is because the development could not have proceeded at all without the infringement, such as *Wrotham Park*. In these cases the total profits are the same as the additional profits.

However, there are some cases that will be on the edge. In Deakins the offending part of the development was treated as integral to the development as a whole, and accordingly the 15% awarded was of the total profits from the development. This was notwithstanding the fact that the offending flat could have been removed.

The use of expert evidence

The Court will often be assisted by expert evidence as to what might likely be negotiated. In *Outdoor Plus* the Court of Appeal was assisted by expert evidence as to what licence fees for advertising hoardings were typically agreed, and how those fees might be apportioned between the two owners of land where the hoarding straddled land owned by each of them.

In *Tamares* the Judge found the expert evidence of assistance, but he did not need to resolve the conflicting expert evidence.[36] Instead, he used both expert reports as the background to the hypothetical negotiation: *"as part of that hypothetical negotiation, I am content to accept the position that each side would have produced arguments based on its own expert's opinion and that those two opinions would have differed to the extent that they do in the present case"*. In reality the parties would *"split the difference in the valuations which were produced on the basis of these opinions"*.[37] The Courts may often not need to resolve differing expert opinion and decide one way or another: the key is what the parties would have done in the circumstances.

Conclusions

Regrettably the principles underlying the grant of release fees are still in some doubt. Nevertheless, increasingly clear guidance is emerging as to how release fees should be quantified in practice, although it remains difficult to predict what award might in fact be made. The decided cases typically award between 15% and 50% of the relevant profits, but the possible outcomes are still widely variable, each case turning on its own particular facts. The answer will ultimately come down to what the particular judge thinks "feels right", and the answer to that question inevitably depends upon who the judge is, and how he is "feeling" that particular day.

36 See the similar approach adopted in *Kettel v Bloomfold* at [67]

37 At [6] and [7]