

BLUNDELL LECTURES

TOPICAL ISSUES IN PROPERTY LAW

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Illuminating Nuisance at Bankside

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SPEAKERS

Kevin Francis, GIA Surveyors

Kevin is a Board Director at GIA Surveyors, a multidisciplinary surveying and environmental practice which includes the UK and Ireland's largest Rights of Light department. Since joining GIA in 2013, Kevin specialises in creating customised strategies and advisory services for Rights of Light and Daylight & Sunlight matters, working across GIA's London and Irish offices. Notable projects he has worked on include 1 Undershaft and 100 Leadenhall Street in the City of London, Bankside Yards in the London Borough of Southwark, as well as a City-wide Solar PV research study commissioned and published by the Northern Ireland Department for Economy. Kevin holds an LLB (Hons) Law Degree from Queen's University Belfast.

Elizabeth Fitzgerald, Falcon Chambers

Elizabeth specialises in commercial property litigation and, in particular, disputes relating to development land, including matters concerning restrictive covenants and easements, overage disputes, option agreements, and collaboration and joint venture disputes. Elizabeth is regularly asked to act as a legal assessor in relation to such matters. She has a specialist practice in rights to light disputes, both at the litigation stage and the advisory stage. However, her expertise extends to all aspects of real property law and commercial landlord and tenant law, including rent review and high value commercial dilapidations claims. Her practice also includes insolvency and professional negligence disputes.

Cooper and Powell v Ludgate House Ltd [2026] EWHC 484 (Ch)

Introduction

1. There is something about Bankside. In 1894 Mr William Shelfer, the leaseholder of the Waterman's Arms, a public house located at Bankside, complained that vibrations and noise from engines and works being undertaken by the City of London Electric Lighting Company were causing a nuisance and causing structural damage to his building. This led to the seminal decision, Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287, and the well-known Shelfer principles, the test for the grant or refusal of an injunction protecting a property interest.
2. Bankside was the location for another landmark nuisance decision, Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4, when residents of Neo-Bankside complained that the Tate Modern's use of its viewing platform on the top floor of the Blavatnik Building, part of the Tate Modern art museum, was a nuisance.
3. Bankside was also the *locus in quo* for the case which is the subject of this Blundell lecture: Cooper and Powell v Ludgate House Ltd [2026] EWHC 484 (Ch).
4. In 2020 Native Land, operating through various special purpose vehicles, was granted planning permission to erect eight substantial new tower blocks, now known as "Bankside Yards", on a site which straddles the railway line on the South Bank. The first tower to be built was a 19 storey office building on the Blackfriars Road, known as "Arbor." Arbor was completed in 2022.
5. To the east of Arbor, and directly across from the railway line, is a seven storey residential apartment building known as Bankside Lofts. Stephen and Jennifer Powell owned a flat on the sixth floor of Bankside Lofts. Kevin Cooper owned a flat on the seventh floor. Both flats have windows facing towards Arbor.

6. In 2001 the Powells and Mr Cooper issued proceedings against Ludgate House Ltd, the SPV that owned Arbor, alleging interference with their rights of light and seeking an injunction requiring Arbor to be cut-back. Alternatively the claimants sought damages in lieu of an injunction.
7. After an eight day trial in March and April 2024, Fancourt J held that there had been a substantial interference with the light enjoyed by the claimants, but he refused to grant an injunction. Instead, he awarded the claimants damages of £500,000 (for the Powells) and £350,000 (Mr Cooper).
8. Unlike Shelfer and Fearn, Cooper v Ludgate House can't be said to be a 'landmark' case. The only genuinely new law created by the judgment was an unusual point which arose out of the facts. Part of the servient land (excluding Arbor) had been the subject of a resolution made under s.203 of the Housing and Planning Act 2016 (which had the effect of replacing any right to object with a claim for compensation on the compulsory purchase basis). This gave rise to the question whether, in assessing the loss of light caused by Arbor, the light to be obstructed in due course by the other towers to be erected on the servient land, and in respect of which the claimants were limited by s.203 to a claim for compensation, should be taken into account. After an in-depth review of the relevant authorities, such as Colls v Homes and Colonial Stores [1904] AC 179; Sheffield Masonic Hall Co v Sheffield Corporation [1932] 2 Ch 17; Smith v Evangelization Society (Incorporated) Trust [1933] 1 Ch 515; and Dyer's Company v King (1870) LR 9 Eq 438, Fancourt J held that the light should be assessed based on what was enjoyed before Arbor was built and ignoring any light coming from the s.203 resolution land. This was because the Claimants could not protect that light, s.203 having removed the their right to seek an injunction.
9. This finding meant that that there would potentially be an actionable nuisance.
10. The remainder of Fancourt J's judgment made no new law and was concerned with the more ordinary points which arise in rights to light cases. But there are two aspects of the judgment which are of particular interest to rights to lights

practitioners. The first is Fancourt J's analysis of the various methods of assessing light: the traditional Waldram method, compared to median daylight illuminance methods (MDI) and median daylight factor ('MDF'), assessed using the software package "Radiance." This was the first time the court had heard detailed evidence and argument about the different methods of assessing light for the purposes of assessing interference. In Beaumont Business Centres Ltd v Florala Properties Ltd [2020] EWHC 550 (Ch) the judge had had regard to Radiance, but had not found the evidence helpful.

11. The second point was the judge's approach to the assessment of damages in lieu of an injunction, following the Supreme Court's decision in One Step (Support) Ltd v Morris-Garner [2018] UKSC 20, which the Judge accepted had created a new principled basis for determining whether negotiating damages are available.
12. The first half of this lecture, delivered by Kevin Francis, will look at the modern approach to the assessment of loss of light and Fancourt J's approach to this. The second half of the lecture, delivered by Elizabeth Fitzgerald, will explore some of the issues relating to the assessment of damages on the negotiation basis in a right to light dispute and in particular, the approach to be taken after One Step.

RIGHTS OF LIGHT AFTER BANKSIDE: REAFFIRMING WALDRAM IN THE ERA OF CLIMATE-BASED DAYLIGHT MODELLING

KEVIN FRANCIS, GIA SURVEYORS

Introduction

1. The judgment in *Cooper v Ludgate House Limited and Powell v Ludgate House Limited [2025]* is now one of the most important modern authorities concerning rights of light methodology. The judgment is especially significant for surveyors because the court directly compared the traditional Waldram method against newer and more sophisticated Radiance-based daylight methodologies, in particular the Median Daylight Illuminance (MDI) test and the Median Daylight Factor (MDF) test.
2. Despite evaluating the defendant's evidence detailing the limitations in the Waldram methodology, Fancourt J affirmed that "it would be wrong to conclude that the Waldram results are unreliable or inaccurate" and that "Radiance based assessments provide useful information about the nature of the impact on light of obstructions". Whilst it is evident from the judgment that there remains a place for both assessment methods when considering an impact holistically, the judgment clearly supports the view that Radiance studies remain secondary to the Waldram approach. What is also clear is that the Waldram analysis, whilst preferred, is not without its limitations and needs to be updated and recalibrated, a task which is incumbent on the rights of light surveying industry.
3. The court therefore reaffirmed that, whilst Waldram may not be a perfect reflection of modern standards of good lighting design, it remains an established proxy for comfortable lighting and is intrinsically tied to the legal test for sufficiency. In that sense, the judgment endorsed certainty and consistency over technical precision, leaving the status quo largely unchanged with Waldram analysis retaining its position as the evidential

backbone of future rights of light litigation.

4. Whilst the technical evidence presented by the parties demonstrated that climate-based daylight modelling and Radiance-based assessments are capable of providing a more sophisticated understanding of daylight distribution within a room, the Court demonstrated a preference for methodologies that are objective, transparent and repeatable and a reluctance to place too much weight on methodologies that depend heavily upon variable assumptions and subjective interpretation. At the same time, Fancourt J clearly encouraged further research and calibration of the methodologies currently used by practitioners to provide a more evidence-based understanding of sufficiency of light.
5. This paper explores the practical and technical implications of the judgment, the continuing role of Waldram analysis, and the future relationship between traditional rights of light assessments and modern climate-based daylight modelling (“CBDM”).

The Legal Position on Sufficiency of Light

6. The modern law relating to rights of light remains rooted in the principle established in *Colls v Home and Colonial Stores Ltd* [1904], namely that a claimant is entitled to sufficient light according to the “ordinary notions of mankind”.
7. The expert light surveyor representing Mr Cooper and Stephen and Jennifer Powell relied solely upon the Waldram methodology to assess the degree of light loss and considered 0.2% sky visibility over half the area of a room to satisfy this legal threshold. The expert surveyor representing the defendants argued heavily in favour of Radiance based analysis which could be tailored to provide much more accurate light readings. The inclusion of the full suite of modern daylight analysis by the defence made the judgment significantly more complex which, with the benefit of hindsight, leads me to believe that less could be more in the context of rights of light litigation.

8. Fancourt J recognised that modern daylight methodologies may provide technically superior information regarding the behaviour of daylight within a room. However, he emphasised that these methodologies were not designed or calibrated to determine whether the remaining light was legally sufficient for ordinary use and enjoyment.
9. Whilst Radiance-based methodologies may provide valuable contextual evidence, Waldram remains the principal legal benchmark, save for in 'marginal' cases, which I go on to discuss in this paper. Outside of 'marginal' cases, Waldram can now be used with greater confidence and decisiveness.
10. This preference was evident in several aspects of the judgment, including the treatment of false colour radiance images, room configuration assumptions, reflectance values and adjusted working plane heights. Whilst the Court accepted that Radiance-based methodologies are capable of producing technically sophisticated outputs, it was clear that concerns remained regarding the consistency with which such methodologies could be applied between practitioners and their over reliance on subjective interpretation and individual preferences, which stands in direct conflict with the principle of 'ordinary notions of mankind'.

The Waldram Methodology

11. Perhaps the greatest endorsement to Waldram comes in paragraph 231 of the judgement: "The Waldram method is the industry standard and is used by everyone." (my emphasis). This is the reality, and by Mr Ingrams admission, the more detailed Radiance analysis only tends to come up in earnest when faced with litigation prospects, as opposed to everyday reporting or dispute resolution, which is done largely via Waldram.
12. The Waldram analysis used by rights of light practitioners today is essentially a computerised version of a paper-based assessment, the early development

of which pre-dates modern fluorescent lighting and even the widespread connection of homes and offices to the National Grid. Waldram represented a significant advancement at the time, replacing the need for physical demonstrations of light obstruction, including the stacking of physical objects before windows to replicate the likely impacts of a proposed obstruction. Many practitioners who hoped this case would mark the next technological leap in how light impacts are reported would have been disappointed, but the case could still prove to be the catalyst that brings change through an improved, recalibrated Waldram analysis.

13. Modern Waldram analysis assumes that the luminance of the whole sky dome is such that an illuminance of 500 foot-candles is received on an unobstructed horizontal surface. One foot-candle is equivalent to approximately 10.76 lux. The methodology further assumes that the availability of one foot-candle at working plane height provides sufficient daylight at that point. Under a uniform sky, one foot-candle would therefore be provided by visibility of 0.2% of the sky dome.
14. As a matter of convention, practitioners generally proceed on the basis that 0.2% sky visibility over half the area of a room provides sufficient daylight. This has traditionally been known as the “50:50” rule of thumb, although following this judgment, whilst perhaps not a rule of law yet, its status is arguably elevated and will be followed more prescriptively by the industry.
15. One of the most significant aspects of the judgment concerns the distinction between noticeable change and actionable interference. Fancourt J acknowledged that a reduction in the Waldram assessment from 51.1% to 49.9% may not produce a noticeable experiential difference within a room. Nevertheless, maintained that a room falling below the accepted threshold remained legally insufficient, even if the loss of light was not noticeable. Whether two surveyors agree or disagree, such a ruling provides welcomed clarity which can be reasonably applied to disputes and commercial negotiations.

16. Clarity has also been provided around what may be described by surveyors as 'de minimis' losses, where they occur to rooms already insufficiently lit. Fancourt J expressed the view that "what is accepted is that where the amount of light is already insufficient and is then further reduced, there is a rule of thumb that a further reduction of up to 2% may not be noticeable. There is no authority that suggests that there is otherwise a test of noticeability when using the Waldram method." Perhaps a minor point in the context of the judgment, but an extremely useful point of clarification that can be used in practice to defeat more frivolous claims.

Limitations of the Waldram Methodology

17. The limitations of Waldram have been well documented for many years. Increasingly, practitioners and researchers have questioned whether the traditional methodology remains the optimal means of measuring light loss and determining actionable interference. One take away from this judgment is that 'optimal' and 'sufficient' are two entirely different tests. Fancourt J referred to the Waldram method as "not a measurement of light as such, but a measurement of the degree of exposure of a room to the sky."
18. One of the principal criticisms considered during the litigation was that Waldram ignores internally and externally reflected light. By focusing solely on direct sky visibility, Waldram does not account for the *variable* contribution made by reflected light from internal finishes or surrounding buildings. This issue is particularly relevant in modern urban environments where neighbouring buildings often contain extensive glazing and highly reflective façades, which were unlikely to be present at the time of the original research.
19. This point warrants further validation by the industry, as the environment Mr Waldram conducted his earlier research would have included a degree of reflected light, which is already built into the 0.2% target and means it has not been ignored entirely.

20. Waldram analysis ignores window frames and indeed the transmittance value of glazing, as well as their upkeep/ cleanliness, which means results may be overstated when considering that variable alone, albeit they could be understated with the lack of detail around reflected light where the reflective qualities are greater than what was assumed during the original research.
21. Fancourt J deals with this point in paragraph 142, where he states the “method is applied to each aperture through which the sky is visible, but any partial blockages of light caused by the window frames, glazing bars and furniture are disregarded. Waldram considered that the loss of light through the glass and frame and the benefit of reflected light coming into the room other than directly from the sky were likely approximately to cancel each other out, and so he was content to take the sky visibility factor as the sole proxy for the level of illumination in the room.”
- 22.** The net result of ignoring the contribution of reflected light, whilst allowing for additional light by virtue of ignoring glazing factors, may be close to neutral, however, the point warrants further research alongside the contribution of external reflected light, which probably was ignored.
23. Waldram analysis is based upon a uniform sky model which applies equal weighting to all parts of the sky dome regardless of altitude or orientation.
24. There is no debate that real sky conditions are not uniform. Mr Ingram’s evidence (on behalf of the defendant) highlighted that the methodology under-values light from the zenith and over-values light near the horizon. In contrast, a CIE overcast sky attempts to correct this imbalance and is considered more representative of real-world conditions. This appears to be accepted as a general point with Fancourt J accepting that the “CIE non-uniform overcast sky model is a more accurate model of illuminance from the sky; 25 lux rather than 10.75 lux (1 lumen) is a more realistic assessment of modern needs. The Waldram method is undoubtedly less sophisticated than MDI or MDF.”

25. As noted above, another significant criticism relates to the assumption that one foot-candle represents a sufficient minimum level of daylight.
26. Research undertaken by practitioners such as Dr Peter Defoe has increasingly questioned whether 10.76 lux is a realistic threshold for comfortable occupation in modern buildings, or whether it is closer to 25 lux.
27. The environmental conditions prevailing during Waldram's original research are also relevant. At the time, industrial smog significantly reduced daylight availability. It follows that 0.2% sky visibility today may provide materially greater brightness than it did during the early twentieth century, due to a cleaner sky and cleaner windows. Moreover, we cannot be sure that when Mr Waldram said that 1 foot candle or more over half the room would mean the whole room was adequately lit or whether it was simply the front half of the room. Again, further calibration and validation is needed on this point.

Climate-Based Daylight Modelling and Modern Methodologies

28. Over the past decade and more, the industry has increasingly adopted Radiance-based software and CBDM techniques to understand daylight conditions within complex environments. In some ways the use of Radiance analysis has spilled over from planning-based daylight studies, which I discuss later.
29. There is little doubt that these methodologies provide a more detailed understanding of how light behaves within a room and the precise levels of illumination achieved. However, accepting that to be the case, the court ultimately concluded that such methodologies do not presently provide the legal benchmark for sufficiency.

The Daylight Factor Method

30. The Daylight Factor methodology is detailed within BR209 and is defined as the ratio of total daylight illuminance at a point within a space to the outdoor illuminance under a standard CIE overcast sky.
31. Unlike Waldram, the methodology uses a non-uniform sky model whose intensity varies with altitude. Recommended target values within BS EN 17037 include:
- 0.7% daylight factor for bedrooms;
 - 1.1% for living rooms; and
 - 1.4% for kitchens and living/kitchen/dining spaces.

The Illuminance Method

32. The Illuminance Method utilises climate data and forms part of CBDM analysis. The methodology calculates illuminance levels throughout every daylight hour of the year. In the UK, the National Annex to the British Standard suggests the following minimum values should be exceeded across at least half the room for at least half of daylight hours:
- Bedrooms: 100 lux;
 - Living rooms: 150 lux;
 - Kitchens: 200 lux.
33. Fancourt J described the MDI assessment as “by far the most sophisticated method” but concluded that the methodologies “do not purport to establish whether interference with rights of light is actionable.” They simply were not designed for this purpose.

Marginal Cases and Hybrid Evidence

34. Although the judgment reaffirmed Waldram as the principal methodology for assessing actionable interference, Fancourt J did not reject the use of Radiance-based methodologies entirely. Instead, the judgment leaves open the possibility that such methodologies may provide assistance in more nuanced or “marginal” cases.
35. Paragraph 240 of the judgment provides a description of where a marginal case may arise. “Were it the case that the Radiance methods produced results on one side of the insufficient/substandard line and the Waldram method produced results on the other, there might have been a more difficult question about whether the Waldram results can be considered sufficiently robust, in view of the other available data. Similarly, if the Waldram results were only marginal. I accept that there are legitimate questions about the absolute accuracy and reliability of the Waldram method, which may in due course be revealed by further research.”
36. This aspect of the judgment may prove particularly important in future litigation. The practical implication appears to be that where a room clearly passes or clearly fails the Waldram assessment, the traditional methodology will likely remain decisive. However, where a case falls close to the threshold of sufficiency, climate-based daylight modelling and Radiance assessments may provide contextual support when considering whether the remaining daylight is adequate for ordinary use and enjoyment.
37. The judgment therefore potentially signals the future emergence of a hybrid evidential approach in which Waldram remains the primary legal benchmark, whilst Radiance-based methodologies are utilised as supplementary evidence in borderline disputes.

Rights of Light Versus Planning Standards

38. The daylight methodologies presented to the court (by the defence) are routinely used throughout the planning process to assess the significance of daylight impacts and the adequacy of light within proposed buildings. BR209 and BS EN 17037 establish widely recognised standards for daylight amenity. Yet the judgment reinforced that these standards are informative rather than determinative in rights of light disputes.
39. In considering the MDI and MDF methods, Fancourt J made the point that targets used by practitioners in the UK (under the BS 2018 National Annex) are essentially a watered-down version of the EU standard, which is true as a matter of fact, however, he seems to ignore that they have been diluted for good reason so as to align the EU standards with the climatic conditions of the UK.
40. He goes on to say that “there is in principle, no scope for an argument that something less than the minimum level for 50% of the room is sufficient”. By this he refers to the minimum lux levels suggested by the National annex. Fancourt J goes on to describe how the assessment grid is also reduced by 300mm on all borders when used as part of the MDF/MDI assessments, meaning that in some cases, the area of assessment is significantly under appreciated. His views are captured in paragraph 179 of the judgement where it states; *“In short, given the way that the 2018 BS is calibrated, I do not accept that there is scope for saying that a shortfall of 3-5 lux is of no significance, and that results of 97 and 95 lux are to be treated as being as good as achieving the minimum standard.”*
41. These comments imply that if one was to deploy MDF or MDI, say in a ‘marginal’ case, then the inference is that the minimum standard means minimum, and it is that level which ought to be met, or at least a shortfall of less than 3-5 lux.

42. The inability to correlate Waldram with the planning methods creates a significant practical disconnect. A scheme may satisfy planning policy and daylight guidance whilst simultaneously infringing private rights of light. The disconnect creates uncertainty for developers, architects and investors who may obtain planning permission for a scheme only to face subsequent rights of light challenges capable of frustrating delivery.
43. The Law Commission in 2014 previously recognised that alternative methodologies, including CBDM, could theoretically be utilised in rights of light disputes. However, it seems clear that more than a decade later, the profession has not reached consensus regarding their practical legal application.
44. The judgment therefore highlights a fundamental tension between legal and scientific standards. Modern planning guidance and building standards seek to optimise the quality and distribution of daylight within buildings using increasingly sophisticated methodologies, inferring a significant level of flexibility and discretion to local authorities and designers. Rights of light law, however, continues to rely upon a comparatively simple legal proxy for sufficiency.
45. In this respect, Waldram cannot be used as a modern lighting design standard, but as a legal mechanism intended to provide certainty in disputes concerning neighbouring property rights.

Practical Implications for Surveyors

46. One of the most important aspects of the judgment concerns the practical application of assessment parameters within Waldram analysis.
47. The output of the Waldram methodology provides an Equivalent First Zone (EFZ) figure. This figure refers to the area of the room that falls within the existing and proposed 0.2% sky factor contours. The area of light loss is

weighted by reference to where the loss falls within four quartiles of the room. The conventional approach is to divide the room into four equal zones known respectively as the front zone, the first zone, the second zone and the makeweight area. Weightings are given to each of these zones with factors of 1.5 (front zone); 1 (1st zone); 0.5 (2nd zone) and 0.25 (makeweight) respectively. By the application of these factors the loss is therefore given a value Equivalent to the First Zone Loss (“EFZ Loss”).

48. I set out the above methodology as a preface to understanding how the two light experts reached wholly different numerical data when presenting their Waldram analysis for each of the rooms within the flats owned by Kevin Cooper and Mr and Mrs Powell. A key dispute within the case related to whether circulation space within Flat 705 should be included within the assessment area. The defendant’s expert excluded areas behind the door swing and circulation space leading to the en-suite bathroom on the basis that these were “non-habitable” areas, but that was ultimately not accepted.

49. There were clear differences in the Waldram results presented by each of the expert advisors, particularly in respect of the main bedroom within Flat 705. The Judge referred to the results for this bedroom using the DS1 scenario as below stated that in his view they were ‘markedly’ different because of the exclusion of built-in wardrobe space and an area of space behind and in front of the door to the bedroom, which the defendants expert considered to be “non-habitable” spaces, therefore not relevant for inclusion in the assessment.

	Waldram	MDI	MDF
Mr Ingram	B:66.68 – A:52.01	B:246 – A:195	B:1.2% – A:0.9%
Mr Absolon	B:54.16 – A:43.48	-	-

50. Mr. Ingram applied guidance from BR209 to defend his reason for excluding the circulation space behind the door used to enter the bedroom and the walkway towards the en-suite bathroom and stated that in his view the space cannot be used for anything apart from entering and exiting the bedroom, particularly due to the left-hand swing of the door. Mr Absolon, on behalf of the claimants, put it another way. He said “you can’t just lob out a piece of the room and decide that it doesn’t count. It just skews the figures”
51. The court ultimately preferred the inclusion of the full room area rather than adopting subjective judgments regarding habitability. This provides important guidance for practitioners and reinforces the importance of consistency and scalability over the individual preference of occupiers.
52. The defendant’s expert also sought to make several adjustments to the Waldram analysis, which he felt warranted a departure from the standard assumptions built into the Waldram test. This included adjusting the working plane heights to reflect the presence of kitchen islands and worktops as part of the configuration of the living / kitchen / diner within Flat 605. The defendant’s expert considered that the working plane should be open to modification where task areas and heights could be measured, again to provide a more realistic assessment of the disputed area. Within his assessment, Mr Ingram raised the working plane where the fitted kitchen island (in Flat 605) and the fitted kitchen unit worktops in both Flat 605 and 705 were measured at. He argued that this was an accurate reflection of reality, and therefore it was correct to apply a working plane height that was notably higher than the binary 0.838m applied as a standard assumption.
53. This principle was also related back to the defendant’s expert claiming that where the Waldram assessment indicated there was a loss of sky contour, this occurred over an area of the room where a bed was in situ and therefore light would not necessarily be expected to be enjoyed at the working plane height. Whilst it was considered nonsensical by the Judge, and that there was other reasonable ways the room could be configured to ensure the bed was not

placed in that area, it emphasises the real world issue of what can be deemed as a 'reasonable' room use, configuration, working plane height etc and one that remains open for debate amongst practitioners regardless of the ruling.

54. The implications of applying different working planes within one room was reviewed in detail by the Judge but ultimately not supported due to the concept of "ordinary use" within residential accommodation. Fancourt J appeared resistant to highly tailored assumptions concerning furniture layouts, temporary occupation patterns or overly specific room uses. Instead, the Court favoured a broader assessment of how a room may reasonably be used over time.
55. This has significant implications for modern residential accommodation, particularly in the context of open-plan living arrangements and multi-functional spaces. The judgment suggests that practitioners should exercise caution before adopting highly specific assumptions concerning how particular areas of a room are used at a given point in time. Whilst this case dealt solely with residential properties, the same principle would apply to other use classes, namely offices. Therein lies a significant issue for surveyors given that there is an infinite number of ways to configure a large office floor plate, making it extremely difficult to advise on the extent and severity of any potential impacts. Once again, standardisation and repeatability trumps subjective and precise analysis.
56. One inference from the judgment is that if a room in a neighbouring property which is above the Waldram threshold for sufficiency (i.e. 50% well lit) then the law is unlikely to intervene, even when there is a noticeable reduction. Conversely, once the room falls below the threshold as a result of a development, then an actionable interference may arise, which may then lead to a court remedy, even if that change is imperceptible.
57. It follows then that legal protection is tied to 50% of the room achieving adequate light, and not the entirety of existing light which is enjoyed. Applying this to the case itself, Fancourt J commented that if one is concerned with

what reduction is noticeable and whether the impact is substantial, the relevant comparison is between the impact of the largest building that the developer could have built on the site of Arbor which does not make the light insufficient (which is taken to be a cut back version of Arbor – “cut back Arbor”) and the impact of Arbor itself – on the basis that the Claimants could have no objection to a building that left sufficient light, so it is only the incremental reduction in light that should be assessed for this purpose. Fancourt J went on to say “when considering noticeability and substantiality, it is of course the cut back Arbor percentage that is taken as the Before, so a figure of about 50 can be substituted for each of the Before figures that are above 50 in the table.”

58. In practice this suggests that within a surveyors assessment and report, the correct physical baseline, i.e. the before scenario (usually being the existing building prior to any demolition) would not necessarily represent the correct legal baseline. The correct legal baseline may well be a cutback version of the scheme, or a ‘jelly mould’, showing what is possible on the site itself whilst retaining 50% of well-lit space to rooms within neighbouring properties. It is the incremental loss beyond this point which is important.
59. The judgment leads to important commercial implications for developers, neighbouring owners and professional advisors. By reaffirming the continued primacy of Waldram, the Court has preserved a methodology that remains deeply embedded within rights of light negotiations, compensation calculations and development risk assessments.
60. This provides a degree of predictability for the industry. The continued reliance upon Waldram-derived methodologies such as Equivalent First Zone and Book Value ensures that the commercial framework underpinning the settlement of rights of light disputes remains largely intact.
61. Had the Court endorsed Radiance-based methodologies as a replacement for Waldram, significant uncertainty may have arisen regarding the quantification

of injury, compensation and development risk. The judgment therefore preserves not only the legal status quo, but also the broader commercial ecosystem that has developed around rights of light practice.

The Future of Rights of Light

62. Fancourt J expressly recognised that “there are legitimate questions about the absolute accuracy and reliability of the Waldram method, which may in due course be revealed by further research”. The judgment therefore leaves open the possibility that future empirical research and industry calibration may ultimately influence the legal benchmark for sufficiency.

63. However, the Court also demonstrated that technical criticism alone is insufficient to displace a methodology that has achieved longstanding professional and judicial acceptance. In this sense, the judgment reflects the tension between scientific realism and legal certainty that continues to underpin modern rights of light practice.

64. Research led by practitioners such as Dr Peter Defoe is increasingly focused on calibrating and modernising the methodology.

65. Key areas of future research include:

- Determining the true minimum illuminance required for ordinary use;
- Establishing how much sky visibility is required to achieve that illuminance;
- Understanding how non-uniform sky models affect the methodology; and
- Predicting illuminance under varying weather conditions and throughout different periods of the year.

66. The future challenge for the profession will be balancing technical realism with legal certainty. Whilst Radiance methodologies undoubtedly provide a more

sophisticated understanding of daylight behaviour, the courts continue to prioritise objective standards capable of consistent application, therefore it is the latter that needs to be validated through further research.

Conclusion

67. The judgment firmly re-establishes Waldram as the primary methodology for assessing actionable interference in rights of light disputes.

68. Whilst the court accepted that Radiance-based methodologies and CBDM analysis provide technically valuable information regarding the behaviour and distribution of daylight, these methodologies remain secondary to the established Waldram approach and may only be of use in cases where Waldram is not decisive.

69. The judgment demonstrates a clear judicial preference for consistency, repeatability and administrable standards over technical complexity and subjective interpretation. At present, Waldram remains the accepted legal proxy for sufficiency of light.

70. Nevertheless, the judgment also leaves open the possibility of future evolution. As research develops and the profession continues to interrogate the assumptions underpinning Waldram, there may eventually be scope for calibration or refinement of the methodology.

71. For now, however, the status quo remains intact: Waldram continues to form the evidential and practical backbone of rights of light practice.

Kevin Francis

GIA Surveyors

NEGOTIATING DAMAGES IN A RIGHT TO LIGHT DISPUTE

ELIZABETH FITZGERALD, FALCON CHAMBERS

1. In Cooper, the Defendant argued that if refused an injunction, the Claimants ought not to be awarded negotiating damages but should be limited to damages at common law and compensated by an award reflecting the diminution in the value of their flats caused by any actionable interference. The Defendant, in fact, went further and denied that negotiating damages are appropriate in *any* right of light case.¹ It said that One Step had brought about a “change in approach” and contended:²

“Whereas, until recently, the withholding of an injunction to enforce an easement or a restrictive covenant would automatically lead to damages in lieu under Lord Cairns’s Act in the form of negotiating damages, or Wrotham Park damages (from Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 WLR 798, as they were previously called), the Defendant contends that the court has to decide, on a principled basis, whether negotiating damages are appropriate, or whether a claimant who has been refused an injunction is limited to common law damages.”

2. It might not strictly be accurate to say that damages were “automatically” always given in the form of negotiating damages or *Wrotham Park* damages before One Step, but they were routinely assessed on this basis. Fancourt J accepted that One Step had created “a new principled basis for determining whether negotiating damages are available...”, but rejected Ludgate House’s argument that such damages were not the appropriate way to compensate for the refusal to grant an injunction, saying:³

“...loss of the right to enforce a property right, such as an easement, is a typical case where what has been lost by the withholding of equitable relief is the economic value of the right itself – as it is lost forever – and the effect is otherwise to require the Claimants to permit infringement of their rights. ... the law has consistently approached such matters in that way, in rights of light cases as well as other easement and restrictive covenant cases.”

¹ Cooper, para. [24].

² One Step para. [311 - 312].

³ Cooper, para. [321].

3. In Cooper, the main premise for the argument that damages should be limited to diminution in the value was that the interest that a right to light is designed to protect is use and occupation of the dominant tenement. It was said that the purpose of enforcement is to protect that use and enjoyment and not the ability of the owner to negotiate it away for money. Damage should thus be limited to injury to use and enjoyment and not to the profit that might be made from releasing the right.⁴
4. So much for the arguments in Cooper. And now to the analysis.

What Are Negotiating Damages?

5. Negotiating damages differ from traditional damages awards. They represent "... the sum that the claimant could hypothetically have received in return for releasing the defendant from the obligation which he failed to perform."⁵ They are assessed on the basis of a legal fiction which assumes a hypothetical negotiation between willing parties. They can be awarded where there is loss but where the negotiating damages are higher than the actual loss, and allow recovery even where there has been no "loss" in the conventional sense. As Lewison J said, of user damages in Devenish Nutrition Ltd v Sanofi-Aventis SA (France) [2007] EWHC 2394 ⁶

"It is precisely because he has suffered no loss that the law's response is to seek a different way to compensate him for the invasion of his rights."

6. Prior to the Supreme Court's decision in One Step, damages awarded on the basis of this legal fiction were generally described as "*Wrotham Park* damages", "user damages" or "release damages," and it was a highly controversial matter whether such 'gains-based' damages were compensatory, restitutionary, or a combination of both. These damages are now all termed "negotiating

⁴ Cooper, para. [318].

⁵ One Step, *Per* Lord Reed at [1].

⁶ At [81].

damages”⁷ and have been firmly characterised by the Supreme Court as compensatory, certainly as far as damages for breach of contract are concerned, albeit it is less clear that they are appropriately characterised as purely compensatory in tort.

7. The origins of negotiating damages lie in the nineteenth century wayleave cases⁸, for example where the defendant trespassed by carrying coals along an underground way through the plaintiff’s mine. Although the value of the plaintiff’s land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a wayleave. The wayleave basis of assessment was then extended to trespass more generally. Thus in Whitwham v Westminster Brymbo Coal & Coke Co [1896] 2 Ch 538, where a trespasser had made use of land without causing any diminution in its value, the landowner was held entitled to damages measured as what a reasonable person would have paid for the right to use the land.
8. By the end of the nineteenth century, such damages were seen as purely compensatory, as illustrated by Lord Shaw of Dunfermline’s much quoted explanation⁹ for the basis of such an award of damages in Watson, Laidlaw & Co Ltd v Pott, Cassels & Williamson [1914] SC (HL) 18; 31 RPC 104:¹⁰

“For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire.”

9. Lord Shaw gave his famous illustration of the liveryman’s horse:

“If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say:

⁷ One Step per Lord Reed at [3]: “This judgment will abjure the use of the term “*Wrotham Park damages*”.... Instead, this judgment will use the expression “negotiating damages”, introduced by Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] 2 EGLR 20, para 22.”

⁸ Such as Martin v Porter (1839) 5 W&W 351; Phillips v Homfray (1871) LR 6 Ch App 770.

⁹ Cited by Lord Reed in One Step at [27] to [28].

¹⁰ This case concerned infringement of a patent by selling 252 sugar machines, including 130 machines which were sold in Java, a location where the owner of the patent was not able to sell.

‘Against what loss do you want to be restored? I restore the horse. There is no loss. The horse is none the worse; it is the better ‘for the exercise’ ”.

10. In a case where the loss suffered is the loss of a right to negotiate a release fee because this is what would have happened as a matter of fact but for the breach, an award of negotiating damages would be an ordinary recovery of loss.¹¹ The relevant factual causation test cannot, however, be satisfied where the claimant would never have released no matter how much money was offered. In Watson, Laidlaw Lord Shaw endorsed Fletcher Moulton LJ in Meters Ltd v Metropolitan Gas Meters Ltd (1911) 28 RPC 157, 165 that even if it were not the claimant’s practice to grant licences, “it would be right for the court to consider what would have been the price at which - although no price was actually quoted – could have reasonably been charged for that permission, and estimate the damage in that way.”

11. The absence of the obvious link between causation and loss on this basis has led many to suggest damages were a form of restitutionary damages; after all, negotiating damages could be seen as looking at the gain or profit made by the wrongdoer. This has been a subject of much judicial and academic discussion. User damages can be viewed as compensatory if looked at as focusing on what the loss to the claimant was – the loss of the ability to bargain for the appropriate fee for the use of its property. They may also be said to be gains-based, if they are viewed by reference to the amount saved, or which would reasonably be anticipated as likely to be saved, by the Defendant in not having paid for the right to use the property.

12. One Step was concerned with the assessment of damages for a claim for breach of contract.¹² The Supreme Court was focusing on the compensatory nature of damages, certainly where the law of contract was concerned, but also, albeit to a lesser extent, in tort. It took a restrictive approach to gains-based

¹¹ An example of this is Ensign House Ltd v Ensign House (FEC) Ltd [2023] EWHC 1563.

¹² The claim was brought against a former director of the claimant company for breach of a three-year restrictive non-competition and confidentiality covenant. In breach of covenant, the defendant set up a rival business and sold it after the three-year period expired. Phillips J awarded negotiating damages. The award was upheld by the Court of Appeal, but the Supreme Court overturned this decision.

remedies and set out a new framework restricting the availability of such remedies in contractual cases. Lord Reed (giving the majority judgment) differed in his reasoning from the minority, Lord Sumption, but, as Fancourt J accepted in Cooper, the effect of the decision was to create three categories of cases where negotiating damages were available:

- (1) The first primarily concerned torts of invasion of property rights and breach of confidence;
- (2) The second was “cases where damages are awarded under Lord Cairns’s Act in substitution for specific performance or an injunction – here, the court has to judge what method of quantification will give a fair equivalent for what has been lost by refusing equitable relief;”
- (3) The third was “cases of breach of contract, where negotiating damages are only available if the loss suffered is appropriately measured by reference to the economic value of the right that has been breached, considered as an asset.”

13. After One Step, negotiating damages cannot be treated as restitutionary or based on a benefit-focused approach - they are compensatory¹³. Lord Reed noted¹⁴ that it is far from obvious at first blush that negotiating damages awarded in lieu of an injunction are compensatory, but he said that what is being compensated is the loss of the economic value of the right to permit the permanent infringement, which is arrived at by reference to the amount of money which the claimant might reasonably have demanded from the defendant. He said:¹⁵

“One possible method of quantifying damages under this head is on the basis of the economic value of the right which the court has declined to enforce, and which it has consequently rendered worthless. Such a valuation can be arrived at by reference to the amount which the claimant might reasonably have demanded as a quid pro quo for the relaxation of the obligation in question. The rationale is that, since the

¹³ Whether this is correct, and whether our Legal system ought to permit a gains-based approach to the assessment of loss is the subject of an entirely different lecture.

¹⁴ At [94].

¹⁵ at [95(4) and (5)].

withholding of specific relief has the same practical effect as requiring the claimant to permit the infringement of his rights, his loss can be measured by reference to the economic value of such permission.

This is not, however, the only approach to assessing damages under Lord Cairns's Act. It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction."

14. The method of assessment of damages in lieu of an injunction has always been discretionary.¹⁶ But before One Step negotiating damages were not always regarded as purely compensatory and because of this, and their restitutionary nature, doubts had been expressed as to whether they were appropriate to award as damages for claims based on torts such as nuisance.

15. An approach which treats the underlying property right which is being protected as having a pecuniary value independent of any pecuniary detriment suffered, and where the thing being compensated by the award of damages is the "loss of the economic value of the right to permit the permanent infringement" is not obviously consistent with the nature of the common law tort of nuisance. Nuisance is a property tort and the injury is to the property, not the persons in occupation, and it is for damages for the diminution in the utility of land that the claimant is entitled to compensation.¹⁷ As Etherton LJ said in Williams v Network Rail Infrastructure Ltd [2019] QB 601, 615E-F:

"The purpose of the tort of nuisance is not to protect the value of property as an investment or a financial asset. Its purpose is to protect the owner of land (or a person entitled to exclusive possession) in their use and enjoyment of the land as such as a facet of the right of ownership or right to exclusive possession."

16. Further, the legal fiction of the hypothetical negotiation which underpins the assessment of loss on this basis is not easy to apply where one is not really seeking to ascertain a market value or 'price', but rather damages for a

¹⁶ See eg Neuberger LJ in Lunn Poly v Liverpool & Lancashire Properties [2007] L&TR 6 at [22] "The court is not limited to any specific basis for assessing damages in lieu of an injunction under the Act. ...".

¹⁷ Hunter v Canary Wharf at 706, per Lord Hoffmann.

permanent infringement to the amenity of land. In Lawrence v Fen Tigers [2014] AC 822, Lord Carnwath, recognising that gain based relief, such as that awarded in Jaggard v Sawyer, had been given for trespass and breach of restrictive covenants, but, citing Forsyth- Grant v Allen [2008] Env LR 877, noted:

“In cases relating to clearly defined interference with a specific property right, it is not difficult to envisage a hypothetical negotiation to establish an appropriate “price”. The same approach cannot in my view be readily transferred to claims for nuisance such as the present relating to interference with the enjoyment of land, where the injury is less specific, and the appropriate price much less easy to assess, particularly in a case where the nuisance affects a large number of people. Further, such an approach seems to represent a radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority.”

17. This paper will consider whether:

- a. in a claim for infringement of a right to light, equitable damages can, or should, be assessed on a negotiated damages basis, and on a different basis to damages that could have been awarded at common law?
- b. One Step has now legitimised this approach?
- c. the hypothetical negotiation is undertaken on a sufficiently principled basis, or does it leave the assessment of damages arbitrary and uncertain?
- d. there is a better way to approach the assessment of damages in lieu of an injunction?

When can negotiating damages be awarded in tort?

18. As discussed above, the progenitors of negotiating damages were the nineteenth century wayleave and trespass cases, which involved the court taking a broad view of the character of loss in a case where a property right had been appropriated, and which used the hypothetical negotiation as a means to find a fair ‘price’ for the wrongful use of property.

19. In Stoke-on-Trent City Council v W&J Wass Ltd [1988] 1 WLR 1406 the claimant council operated a market on certain days of the week. The defendant set up a rival market on a different day of the week. The setting up of the rival market amounted to a nuisance (unusually, one that was actionable without proof of actual loss). At first instance, damages were awarded on the basis of the sum which the Council could have charged for the right to operate a rival market. This was reversed by the Court of Appeal.

20. Nourse LJ said, at p 1410:

“The general rule is that a successful plaintiff in an action in tort recovers damages equivalent to the loss which he has suffered, no more and no less. If he has suffered no loss, the most he can recover are nominal damages. A second general rule is that where the plaintiff has suffered loss to his property or some proprietary right, he recovers damages equivalent to the diminution in value of the property or right. The authorities establish that both these rules are subject to exceptions. These must be closely examined, in order to see whether a further exception ought to be made in this case.”

21. The first exception was trespass, where the common law gave the concept of loss a wider meaning than pure financial loss assessed by reference to the claimant’s financial position before and after. It was no answer that the claimant would not have been willing to license the use of its property, or that the property owner would probably not have used the property himself had the wrongdoer not done so: see Earl of Halsbury LC’s famous observation in *The Mediana* [1900] A.C. 113, 117, that a defendant who had deprived the plaintiff of one of the chairs in his room for 12 months could not diminish the damages by showing that the plaintiff did not usually sit upon that chair or that there were plenty of other chairs in the room.

22. The Court of Appeal said that this approach did not extend to the tort of nuisance, where loss is a substantive, and not merely a remedial aspect of the tort. Having considered the trespass, detinue and infringement of patent cases, Nourse LJ said:¹⁸

¹⁸ At pp 1413—1414.

“But it is only in [the Wrotham Park case [1974] 1 WLR 798] and in the trespass cases that damages have been awarded in accordance with either principle without proof of loss to the plaintiff. In all the other cases, the plaintiff having established his loss, the real question has not been whether substantial damages should be awarded at all, but whether they should be assessed in accordance with the user principle or by reference to the diminution in value of the property or right. In other words, those other cases are exceptions to the second, but not to the first of the general rules stated above.”

23. Alive to the logical difficulty in making a distinction between the case in nuisance before him and the wayleave cases, Nourse LJ said:

“I think that if the user principle were to be applied here there would be an equal difficulty in distinguishing other cases of more common occurrence, particularly in nuisance. Suppose a case where a right to light or a right of way had been obstructed to the profit of the servient owner but at no loss to the dominant owner. It would be difficult, in the application of the user principle, to make a logical distinction between such an obstruction and the infringement of a right to hold a market. And yet the application of that principle to such cases would not only give a right to substantial damages where no loss had been suffered but would revolutionise the tort of nuisance by making it unnecessary to prove loss.”

24. Nourse LJ thus concluded that: “As progenitors of the rule of trespass and some other areas, the wayleave cases have done good service. But just as their genus is peculiar, so ought their procreative powers to be exhausted.”

25. Nourse LJ’s concerns for insurrection in the law of nuisance if it became unnecessary to prove loss must be questioned. The law does protect property rights without proof of loss. In general terms, where nuisance causes physical damage to land, actual damage is essential to establish a cause of action, but physical damage or financial loss is not required where, for example, the damage is interference with amenity. Where the nuisance consists of an encroachment the law will presume damage¹⁹.

¹⁹ As confirmed by Sir Terence Etherton MR in Network Rail Infrastructure Ltd v Williams [2018] EWCA Civ 1514.

26. In Fry v Prentice (1845) LR 3 Eq 409 Coltman J said that “the mere fact of the defendant’s cornice overhanging the plaintiff’s land may be considered as a nuisance to him, importing a damage which the law can estimate.” A riparian owner may sue for an interference with their rights without the need to prove loss.²⁰ Similarly, nuisances which consist of interference with easements are actionable without proof of specific damage. In Nicholls v Ely Beet Sugar Factory Ltd [1936] Ch 343 at 349 Lord Wright MR said: “Disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage.” As noted in Gale,²¹ in the case of a claim founded under s.5 of the Prescription Act 1832:

“actual perceptible damage is not indispensable as the foundation of an action. It was sufficient to show the violation of a right, in which case the law would presume damage.²² Again, wherever any act injures another’s rights and would be evidence in future in favour of the wrongdoer, an action may be maintained for the invasion of the right without proof of special injury.”²³

27. But nuisance is a little different to trespass, and the other torts such as detinue or conversion, where user damages are readily awarded at common law for the invasion of rights to tangible movable or immovable property, and which formed Lord Reed’s first category above.²⁴ This was recognised by the Court of Appeal in Forsyth- Grant v Allen [2008] Env LR 877.²⁵

“An actionable nuisance does not involve the misappropriation of the claimant’s rights in the same way, even as in a case of trespass, let alone as in a case of conversion or copyright or trademark infringement. The essence of the tort is that the claimant’s rights to the reasonable enjoyment of her property have been infringed by the use which the defendant makes of his own land. On the face of it, this should not entitle the claimant,

²⁰ See eg. Pigot v Environment Agency [2021] EWCA Civ 213.

²¹ at 14-59, 22nd Ed, *Easements*, Sweet & Maxwell.

²² *Per* Parke B in Embrey v Owen (1851) 6 Ex 353 at 638; *per* Williams v Morland 91824) 2 B&C 910 at 916

²³ 1 Wms. Saund.626.

²⁴ At para. [95].

²⁵ At [32].

in my judgment, to more than compensation for the loss which she has actually suffered; but the highest that it could be put on the authorities is that the claimant can, in an appropriate cases, obtain an award calculated by reference to the price, which the defendant might reasonably be required to pay for a relaxation of the claimant's rights so as to avoid an injunction."

28. One Step said nothing as to the availability of damages at common law for the tort of nuisance. It may thus be open to doubt as to whether negotiating damages ought to be available in a nuisance claim just as they are in a trespass case.²⁶ The tort of nuisance is committed where the defendant materially and substantially interferes with the enjoyment of neighbouring land,²⁷ which may be thought of as a little different to a case where the defendant "...takes something for nothing, for which the owner was entitled to require payment."

29. However, even if not available at common law, it would seem that they are available in equity. Negotiating damages are generally available under s.50 of the Senior Courts Act 1981, the current enactment of power to award damages in substitution for an injunction originally conferred by Lord Cairns's Act, where the claimant has lost a property right, such as use of a right of way, Bracewell v Appleby [1975] Ch 408, or where there was been a trespassor or for breach of a restrictive covenant, Jaggard v Sawyer [1995] 1 WLR 269. A restrictive covenant is akin to a negative easement and breach of a restrictive covenant is generally regarded as the invasion of a property right. In Carr-Saunders v Dick McNeil Associates [1986] 1 WLR 922 Millett J adopted the same approach to an award of damages in lieu of a mandatory injunction for the interruption of a right to light.²⁸

²⁶ It may be open to doubt whether such damages ought to be available in contract, or at all, given English law's focus on enforcing the bargain and compensating for actual loss, not on penalising the wrongdoer or stripping profits. As was recently reaffirmed by the Supreme Court in King Crude Carriers SA v Ridgebury [2025] UKSC 39, the law permits "efficient breach" of contracts.

²⁷ Fearn v Board of Trustees of the Tate Gallery [2023] UKSC 4.

²⁸ At 931 E, saying "Accordingly I am entitled to take account of the servient owner's bargaining position and the amount of profit which the defendants would look to in the development of their site."

30. In Lawrence v Fen Tigers Ltd [2015] UKSC 50, Lord Carnwath said that in rights of light cases damages in lieu have not been assessed in this way, but he was clearly mistaken. Damages on this basis are regularly awarded in rights of light cases, such as Tameres (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2007] EWHC 212 (Ch); HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch); Beaumont Business Centres Ltd v Floral Properties Ltd [2020] EWHC 550 and now Cooper v Ludgate House.

31. In Lawrence v Fen Tigers Ltd [2014] AC 822 the Supreme Court, when discussing how damages in lieu of an injunction should be assessed in a nuisance case, questioned whether negotiating damages were available as the basis of an award of damages in lieu but their Lordships expressed no concluded views, having not heard argument on this issue. Lord Neuberger said:²⁹

“Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the reduction in the value of the claimant’s property as a result of the continuation of the nuisance. Subject to what I say in paras 128—131 below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.”

32. Lord Neuberger went on to say however, that damages should not always be limited to the value of the consequent reduction in the value of the claimant’s property and, where it was appropriate, may also include the loss of the claimant’s ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

33. Lord Carnwath citing Forsyth-Grant v Allen [2008] Env LR 877, expressed his concerns as to the appropriateness of the hypothetical negotiation as a means to assess damages for an interference with land, in contrast to being used as a method of establishing a “price”. He also noted the inconsistency between quantifying damages in lieu on this basis and the way in which damages are

²⁹ At [101].

assessed in similar circumstances for injurious affection arising from activities carried out under statutory authority, or under s.84 of the Law of Property Act 1925. Lord Clarke³⁰ was more enthusiastic and thought that it may, in some circumstances be appropriate to award “gain-based” damages in lieu of an injunction.

34. Forsyth- Grant v Allen was a right to light case, albeit an unusual one where, in view of her unreasonable conduct, the trial judge refused to grant the claimant an injunction in respect of the infringement of her rights of light, and held that an award of damages calculated on the Carr-Saunders or Wrotham Park basis was therefore inappropriate. The correctness of this finding was not challenged on appeal. The judge therefore awarded damages based on the reduction in the value to the claimant’s property. He also held that damages on the basis of a share of the defendant’s profit would be lower than the financial loss actually suffered by the claimant. As Patten J, with whom Mummery LJ agreed, explained at paragraph 28: “On the judge’s findings this is therefore a case where the claimant has suffered a real and calculable financial loss and where a profits-based award, at the levels set by the judge, would not have increased the amount of damages even if, contrary to the judge’s view, it had been an available option.” The appeal was against the judge’s refusal to order an account of profits, and the Court of Appeal rejected that appeal. The case is not, therefore, authority on the question of when negotiating damages will be awarded in a rights to light case. Patten J did, however, recognise, at paragraph 32, the possibility “in an appropriate case” of an award of damages in lieu being given by reference to the price for a relaxation of the claimant’s rights. And Toulson LJ said, at paragraph 38 that “damages may, in an appropriate case, be calculated by what the claimant could reasonably have bargained for, adopting what has been referred to in the authorities as the ‘user principle’” .

35. English property law is not always logical, as a result of its historic origins, but as a matter of consistency in the law’s approach, there would seem to be little to commend a difference in approach to the assessment of damages in lieu of

³⁰ At [173].

an injunction in a claim for trespass, or a claim based on breach of a restrictive covenant, or a claim regarding an interference with a right to light. An easement of light is, of course, 'property' in a legal sense. An interference with a right of light is, in some ways, equivalent to a trespass: it is just not a physical interference and it relates to incorporeal property rather than real property. It is also similar to a restrictive covenant - the easement of light is negative - it does not entitle the dominant owner to do anything on the servient tenement, but only enables the dominant owner to restrict the use of the servient tenement.

36. No case has yet challenged the availability of negotiating damages as an appropriate measure for infringement of a right to light when damages are awarded in lieu of an injunction as a matter of principle,³¹ and it seems likely that such damages will continue to be a standard remedy for infringement of a right to light, unless and until successfully challenged in the Court of Appeal or above. But as Lord Reed said in One Step:

"It is for the court to judge what method of quantification, in the circumstances of the case before it, will give a fair equivalent for what is lost by the refusal of the injunction."

The Discretion as to the Assessment of Damages in Lieu of an Injunction

37. In a right to light claim, it is important to remember a further limitation on common law damages. Historically, at common law, damages were only available for the effect of wrongs already committed up to the date of an award of damages by the court. The historical position was neatly explained by Sir Thomas Bingham MR in Jaggard v Sawyer [1995] 1 WLR 269, at 276 -277:

"Historically, the remedy given by courts of common law was damages. These afforded retrospective compensation for past wrongs. If the wrongs were repeated or continued, a fresh action was needed. Courts of equity, in contrast, were able to give prospective relief by way of injunction or specific performance. ... But these courts could not award damages. This anomaly was mitigated by the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125), which gave courts of common law a limited power to grant equitable

³¹ In Cooper it was common ground that the case fell within Lord Reed's second category.

relief as well as damages. It was further mitigated by the Chancery Amendment Act 1858 (21 & 22 Vict.c. 27) ("Lord Cairns's Act") which gave the Court of Chancery the power to award damages. ...

This enabled the Chancery Court on appropriate facts to award damages for unlawful conduct in the past as well as an injunction to restrain unlawful conduct in the future. It also enabled the Chancery Court to award damages instead of granting an injunction to restrain unlawful conduct in the future. Such damages can only have been intended to compensate the plaintiff for future unlawful conduct, the commission of which, in the absence of any injunction, the court must have contemplated as likely to occur. Despite the repeal of Lord Cairns's Act, it has never been doubted that the jurisdiction thereby conferred on the Court of Chancery is exercisable by the High Court and by county courts."

38. At common law, a claimant could recover damages for diminution in value in respect of a temporary infringement³² but could not recover diminution in value caused by a permanent interference³³. Thus, Battishill v Reed (1856) 18 CB 696 held that common law damages for a continuing nuisance could not be awarded for a reduction in the value of the property because this was to award damages for future and continuing nuisances, not for the nuisance which had occurred.

39. The defendant in Cooper was arguing that damages should be limited to common law damages, but what was really being said was that damages in lieu of an injunction ought to be assessed as equivalent to the diminution in the value of the property on the basis of a permanent interference. Damages assessed in this way do go further than that which could be awarded at common law, because they compensate for the future permanent effect of a continuing interference.

³² As in Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1. Cf. Snell & Prideaux v Dutton Mirrors [1995] 1 EGLR 259 where the court did not order the removal of a building which had the effect of narrowing the claimant's right of way.

³³ Thus in Hunter v Canary Wharf Ltd [1997] AC 655 at 706 Lord Hoffmann said: "It seems to me that the value of the right to occupy a house which smells of pigs must be less than the value of the occupation of an equivalent house which does not. In the case of a transitory nuisance, the capital value of the property will seldom be reduced. But the owner or occupier is entitled to compensation for the diminution in the amenity value of the property during the period for which the nuisance persisted."

40. At common law, the overall purpose of an award of damages is to put the person who has suffered injury in the same position as they would have been, in so far as money can do, as if the injury had not been committed.³⁴ Damages are compensatory in nature. At common law, damages for such factors as loss of sky, visibility and loss of sunlight may be compensated. Loss of amenity damages include the diminution in the value of the right to occupy the affected property, but not the personal distress or inconvenience of the occupiers³⁵. Nuisance is a tort where injury is to the property not the persons in occupation.³⁶ Consequential losses may also be recoverable for nuisance³⁷.

41. Equitable damages in lieu of an injunction compensate for something over and above that which is the subject of a common law claim for damages³⁸. In a rights of light case, the loss caused by the now permanent infringement as a result of the court refusing injunctive relief is still, however, really a loss of amenity of the property. It is only if one moves away and broadens the common law approach to loss and views the easement of light as a separate economic asset with value, that negotiating damages can be regarded as the appropriate money substitute for an injunction. Does this really fit with the theory that nuisance protects the amenity value of land, and that damages compensate for real loss actually suffered?

42. Lord Reed made it clear that the court has a discretion as to how to quantify damages in lieu. Also, damages need not be limited to common law rules of

³⁴ Livingstone v Rawyards Coal Co (1880) 5 App Cas 25, Lord Blackburn at p. 39: “I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.”

³⁵ See eg. Raymond v Young [2015] EWCA Civ 456.

³⁶ Hunter v Canary Wharf at 706, per Lord Hoffmann.

³⁷ Eg. Andreae v Selfridge & Co Ltd [1938] Ch 1: a drop in takings at a hotel attributable to noise and dust from building works.

³⁸ As Turner L.J. explained in Eastwood v Lever (1863) 4 De G.J. & S. 114, at 128, “They inevitably extend beyond the damages to which the plaintiff may be entitled at law,” and as Fry LJ said in Dreyfus v Peruvian Guano Co (1889) 43 Ch D 316 at 342: “I am clear that the statute often enables the Court, where a wrong has been done, to give damages upon a different scale from what was done by the Courts of Common Law, because it may give them in substitution for an injunction”.

assessment.³⁹ Lord Reed was, however, obviously not treating negotiating damages as a different type of damages award because he regarded such damages as compensatory. Lord Reed's approach puts sharply into focus the question of what it is that the court is compensating. If what falls to be compensated, in economic terms, is the loss of the underlying asset, which is to be viewed as having an economic value, can it ever really be said that anything less than an award of damages assessed on a negotiated damages approach will ever properly compensate a claimant?

43. What about the principle that 'equity follows the law' and should act by analogy with common law principles? Megarry J in Wroth v Tyler [1974] 1 Ch 30 at p 60 A-B (considering damages in lieu of specific performance), having said that the quantum of damages is not limited by the rules at law went on to say:

"No doubt in exercising the jurisdiction conferred by the Act a court with equitable jurisdiction will remember that equity follows the law, and will in general apply the common law rules for the assessment of damages; but this is subject to the overriding statutory requirement that damages shall be " in substitution for " the injunction or specific performance. In the words of Cardozo C.J., "Equity follows the law, but not slavishly nor always": *Graf v. Hope Building Corporation* (1930) 254 N.Y. 1, 9. Obedience to statute, whether in its precise words or in its spirit, is an excellent and compelling reason for not following the law."

44. In a right to light case, an award of damages based on diminution in value would obey the overriding statutory requirement that damages shall be "in substitution" for the injunction⁴⁰ and would not offend the common law rules for the assessment of damages.

45. In Cooper Fancourt J also had specific regard to the lost amenity:⁴¹

³⁹ When properly analysed, Lord Wilberforce's remark in Johnson v Agnew [1980] AC 367 that "...there is sound authority for the proposition that the Act does not provide for the assessment of damages on any new basis. The wording of section 2 "may be assessed in such manner as the court shall direct" does not so suggest, but clearly refers only to procedure." was really saying that the difference between damages for loss at common law and damages for the same wrongdoing in equity is a difference of jurisdiction not principle. See also Millett LJ in Jaggard v Sawyer and Lord Green in One Step, [47].

⁴⁰ As discussed above, if an injunction were granted an award for diminution in value would only lie for past loss.

⁴¹ Cooper at para. [322].

“Moreover, if it is correct that the purpose of a right to light is to protect use and enjoyment of property, as the Defendant submits, common law damages measured by diminution in the value of the flats would be inadequate to compensate for the loss that has been suffered. Difference in value is a measure of the exchange value of the flat, not its use value. To compensate the loss of use value, it would be necessary to find some way of measuring the additional enjoyment value of the good light that the Claimants desire to protect. Negotiating damages is a good proxy for that, as it asks for what sum the Claimants would, reasonably, be willing to give up that enjoyment. Diminution in market value is not.”

46. An award of damages based on the diminution in value of the property is not really a sufficient measure of loss of amenity value and is of little comfort to a claimant who is not wanting to sell his flat but to continue to live in it. As Fancourt J said, the flat owner is interested in his loss. But why are negotiating damages a good proxy for this loss? Negotiating damages do more than compensate for the loss of enjoyment of the right by the claimant: they are designed to take account of the gain which will be made by the defendant, even if they are to be regarded as compensatory.

47. The focus of the compensatory award of damages in lieu ought not to be the loss of an economic asset of value, but on the permanent, ongoing injury to the claimant. Fancourt J was right to say the damages should compensate for the “enjoyment value of the good light that the Claimants desire to protect.” But Lord Neuberger was right to be cautious in Fen Tigers when he said⁴² “...there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted”.

The Calculation of Negotiating Damages

48. If damages in lieu of an injunction are to be the measure of loss, then how should the Court calculate them?

⁴² At [131].

49. Hypothetical negotiations are familiar to property lawyers. They are often used in the valuation of land, or as Lord Carnwath put it, to establish a 'price'. Negotiating damages in lieu of an injunction are often analysed as compensation for the loss of a bargaining opportunity or, effectively, the price payable for the compulsory acquisition of a right. This analysis seem logical, as was said by Warren J in Field Common Ltd v Elmbridge BC [2008] EWHC 2079, at 17, to be correct. In practice, however, the assessment of damages in lieu is not undertaken in the same way as the value of land which is being compulsorily purchased, which is based on an open market valuation.

50. In Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] EWA Civ 430 Neuberger LJ, at [19] and [21], distinguished between what is required when a contract or a statute directs damages to be assessed by reference to what hypothetical willing parties might agree as at a certain date, which is really a way of defining market value, and damages under Lord Cairns's Act.

"...one is not here concerned with a strict contractually-based or statutorily-based market value assessment (as, for instance, under most rent review clauses or when assessing compensation for compulsory purchase). Damages under the Act are, of course, quasi-equitable in nature: they are awarded in lieu of equitable relief albeit that their direct origin is statutory. Nonetheless, that does not mean that damages can be assessed in any old way. The approach to assessing damages under the Act must not be arbitrary; nor should it be indefensibly consistent with the approach to assessment of damages and valuations in other fields; nor should it be unpredictable and therefore likely to lead to litigation."

51. Damages in lieu are equitable, and one may expect some variance in the approach to their assessment to that taken in a market valuation exercise – hence Lord Neuberger's direction that the approach need not be "indefensibly consistent." They ought not, however, to be so inconsistent with this approach as to be unpredictable and sometimes arbitrary ways to assess loss.

52. Cooper is one of many examples of the unpredictability of an award of damages on this basis. Fancourt J decided that the hypothetical negotiation would have settled somewhere between 10% and 15% of the increased value of the right to build out Arbor fully, and the parties would have compromised at 12.5%,

which translated to about £3.75million as the amount the developer would pay to remove the risk.

53. The judge quite properly took into account the fact that there were other parties affected by Arbor and the 12.5% would be shared with other potential owners. The £3.75 million was treated as a fund for the developer to settle with other owners, allocated as two-thirds to Ludgate House for this purpose and one third to the Claimants. This gave £725,000 to the Powells and £525,000 to Mr Cooper (reflecting the different level of interference to the two flats). Fancourt J then stood back and considered in the round whether these were the kind of sums which could reasonably have been expected to have been negotiated and agreed. In doing this he had regard to the amount by which the flats had been diminished, which was significantly less, albeit he said that that did not mean that the sums are necessarily wrong,

54. After this cross check he settled on £500,000 for the Powells and £350,000 for Mr Cooper. By way of reference, the diminution in value found by the judge was £60,000 for the Powells and £20,000 for Mr Cooper.

55. Notwithstanding Fancourt J's very clear and detailed judgment, it is difficult to analyse this award and understand why he decided 10 -15% was the appropriate range and 12.5% the ultimate figure for the share of 'profit' that would have been released. This is not a criticism of the judge. As Anthony Mann QC said⁴³ "...the sort of damages questions involved in cases like the present are matters of judgment which are incapable of strict rational and logical exposition from beginning to end." This is another way of saying that damages awarded on this basis are arbitrary and unpredictable.

56. Any approach which is based on a fiction is bound to require some degree of judgment on the part of the tribunal, and thus some degree of uncertainty. However, the conventional approach taken by the courts to hypothetical negotiations when assessing damages in lieu is more uncertain and illogical than it need be. The court's approach may not need to be "indefensibly consistent" with the approach taken in a market valuation, but it ought still to be

⁴³ Amec Developments Ltd v Jury's Hotel Management (UK) Ltd [2001] EGLR 81, at [36].

consistent, certainly insofar as possible. There are two aspects in particular which are inconsistent and produce uncertainty. These are the approach taken to what is regarded as “profit”, and, thereafter, the apportionment of this amount.

57. It is generally accepted that the benefit gained to the infringer will be relevant in the negotiation, and despite their apparent compensatory nature, the gain to be made by the defendant is to be considered when assessing loss⁴⁴. What is this gain and how should it be factored into the negotiation?

The “Profit”

58. The hypothetical negotiation is generally assumed to take place before the relevant obstruction has been erected,⁴⁵ and thus the bargain is being struck at a time when the parties do not know what the actual profits will be. This ought not to matter because, as discussed above, the assessment is not concerned with actual profit. One Step has, however, opened the door to the possibility of looking to the actual profit made in the hypothetical negotiation.

59. In Wrotham Park Brightman J’s starting point was the profit which the developer “with the benefit of foresight” would have assumed would be made. As Lord Carnwath noted in One Step,⁴⁶ Brightman J seems to have imagined a negotiation before the infringement, but using actual profits as evidence of what the parties would have contemplated before they actually accrued. He took this as showing that the negotiation analysis need not be pursued “rigorously to its logical end”, and that he was not required to “guess at something which events have in fact made certain.”

⁴⁴ Jaggard v Sawyer at 281-282. Sir Thomas Bingham MR at 281 discussing Wrotham Park said Brightman J “...paid attention to the profits earned by the defendants, as it seems to me, not in order to strip the defendants of their unjust gains, but because of the obvious relationship between the profits earned by the defendants and the sum which the defendants would reasonably have been willing to pay to secure release from the covenant.”

⁴⁵ Amec Developments Ltd v Jury’s Hotel Management (UK) Ltd [2001] ECLR 81, at [35]: “the negotiations are deemed to take place before any transgression occurs.”

⁴⁶ At [156].

60. There is now a greater willingness to use hindsight in the assessment of loss. In Amec Developments Mr Anthony Mann QC also said⁴⁷ that the negotiation need not be pursued to its logical end and:

“I do not have to imagine a negotiation in which the parties have to guess at something that events have in fact made certain. In carrying out my exercise, I can take into account the actual events that have happened, and the actual benefits accrued, as at the date of trial.”

61. Neuberger LJ in Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd [2006] 2 EGLR 28, preferred an approach which started with the assumption that once a particular valuation date has been settled on, “consistency, fairness and principle” mean that factors which arise after this date are not to be taken account of, save that the quasi-equitable nature of the damages means that where there are “good reasons” to depart from the norm this may be done. At [29] he said:

“Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant. However, 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.”

62. Neuberger LJ’s approach was approved by Lord Walker in Pell Frishmann Engineering Ltd v Bow Valley Iran Ltd [2009] UKPC 45, a case which is a reminder that uncertainty as to profits can go both ways. The Privy Council in Pell Frishmann looked to the anticipated profits at the date the deal was being stuck, and not the actual profits, which were much lower.

63. In One Step Lord Carnwath sought to give “more precise and principled guidance.” At [159] he said:

“...account must be taken of the nature of the claim. Under the user principle, whether as applied to the taking of a horse or infringement of a patent, the inquiry is as to the price or fee that the defendant would have been expected to pay at the time of the

⁴⁷ [2001] 1 EGLR 81 at 84A-C.

taking or the infringement. Logically the assumed knowledge should be limited to that which was available to the parties at the time. The position is different where the award is by way of compensation for the refusal of an injunction. This is a reflection not simply of the more flexible “quasi-equitable” nature of the jurisdiction, but (as Lord Reed JSC explains at para 47) the different bases of the awards: “past, on the one hand, and future or continuing, on the other”. Where the causes of the claimant’s loss are not limited to past breaches, but include the judge’s refusal of an injunction to restrain future breaches, there is no reason in principle to exclude information available to the parties up to the time of the judge’s decision.”

64. Lord Reed was a little less definite, and expressed no final view, but he was also inclined to say that:

“...since the damages are awarded in the exercise of an equitable jurisdiction, and the court’s objective is, in Viscount Finlay’s words, to give an equivalent for what is lost by the refusal of an injunction, it follows that the approach adopted should reflect those characteristics.

65. The ability to look to the actual profits made is a further reason to question the rationale of these damages being regarded as purely compensatory in nature. For the purposes of the assessment of loss, however, what matters is that the correct notion of ‘profit’ released by the permitting infringement is identified.

66. It is commonplace to look to a residual land valuation as a way to ascertain the likely profit. This formed the basis of the approach undertaken in Cooper. The valuers did not agree many of the input figures in their valuations, such as construction costs, but did agree the land values for Arbor as built and on the basis of the building cut back, using the different construction costs. Fancourt J said⁴⁸ this “somewhat hampers the ability to evaluate the residual valuations” but that, in any event it was more realistic to consider a range of values, and in the hypothetical negotiation the different values based on different construction costs were variables that would not be resolved in the parties’ negotiations (the

⁴⁸ Cooper para. [349].

same being true of the slightly different Waldram analysis produced by the light surveyors)⁴⁹.

67. A residual valuation gives a gross development value (GDV) figure, which is the estimated value of the development site once completed. Working backwards from this, various costs are deducted, such as construction costs, acquisition costs, interest on acquisition costs, the amount required to buy the site and interest on this amount, stamp duty and conveyancing costs. Importantly a developer's profit is also deducted. The developer's profit is generally a percentage of the total costs or the GDV and it represents the profit the developer will want to make to reflect the risk of investing its money into the development. In the residual valuation it represents the minimum return on the capital invested.

68. It follows that the appropriate figure to look to in such a valuation is not the developer's profit, but the increase in the site value released as a result of being able to infringe the right of light.

69. It is often quite difficult in rights of light cases to tell from the judgment what has been used to assess the profit, as this is generally not discussed in detail. It was, however, in Beaumont Business Centres Limited v Florala Properties Limited [2020] EWHC 550. The Deputy Judge, Peter Knox QC, at [312], compared the value of the hotel as completed with the value without the offending infringing structure having been built in the lightwell. He said:

"...the likely uplift which Florala was going to be able to make by building the hotel as it did, rather than by having to carry out a scheme along the lines of the most profitable Florala Alternative (ie. with the dual entry lift scheme) was in the region of at least £1 million. This is to say, it would land up with a hotel worth £14.8 million rather than the value of £15.9 million of the hotel as built."

⁴⁹ The same point was made in Tamares v Fairpoint by Gabriel Moss QC, at [5], who said that the role of the court is not to assess the conflicting evidence in order to determine what is the correct valuation but rather to decide the sum the parties would have agreed in the hypothetical negotiation for the release of the right in view of the conflicting evidence presented by each side.

70. The judge considered site value but did not consider this right approach:

“I reject the suggestion ... that I should take as the relevant indicator the “developer’s profit” of 17.5% on the total construction costs (which would be about 17.5% of £1 million or so...), because it is plain from Mr Kirkpatrick’s evidence above that this “developer’s profit” is just a notional amount – and I emphasis notional – to compensate the developer for the risks (past and future) he undertakes in carrying out the development: it is not the same as the net total benefit he expects to obtain from the development.”

71. In Cooper, Fancourt J quite rightly rejected developer’s profit as the appropriate starting point and compared site value with and without the cut back needed to prevent the interference. The Claimants had sought to argue for an extremely complicated approach which measured extra value released by the infringing development by adding the increase in the land value to the increased allowance for profit. Fancourt J said this was clearly double counting, as it obviously was, and was based on a misunderstanding of the way that residual valuation calculations work. He explained⁵⁰:

“Profit is an allowance put into the programme among many other inputs, to enable it to produce the value of the land, or vice versa- but it is wrong to say that the increase in the profit allowance and the increase in the land value are the extra value that were released by the ability to build out Arbor. In reality, the developer has paid for the land and is only obtaining a profit if the gross development value exceeds all the costs of the development, including the costs of the land. However, it is increase in land value that is being taken to represent the added value.”

72. Fancourt J’s judgment is important in this regard as it is the first time the court has explained this important aspect of residual valuations. However, having taken the correct bit of the residual valuation as representing the uplift in value to the developer by being allowed to breach the rights, Fancourt J then, at the point at which he was deciding how much of the percentage to apportion, further adjusted for risk, saying:⁵¹

⁵⁰ Cooper at para. [362].

⁵¹ Cooper at [374].

“in view of the size and complexity of the development, the high risk to the Defendant (which is not fully compensated by the profit allowance in the residual valuations, at only 15%), ...”

73. With respect to the judge, I question whether he was right to do this. The 15% was precisely what the experts appear to have agreed reflected the element of risk which the developer was facing in order to undertake the development and realise a profit. The residual value produced represented the excess return that was predicted to be made after accounting for the minimum return the developer would be prepared to accept, taking into account the risk. If the experts had agreed this figure, it would be wrong to say that the risk to the Developer had not been sufficiently accounted for.

74. To argue that at the point at which the hypothetical negotiation takes place it is not known whether the predicted profit will or will not be made introduces a further risk which must be accounted for is not the answer. There is no additional risk which is not reflected in the residual valuation.

75. If the correct ‘profit’ is used when looking at the gain to the defendant, the hypothetical negotiation is automatically more predictable. But once ascertained, how should the profit factor into the negotiation and be apportioned?

Apportioning the Profit: The Stokes Approach

76. It is not uncommon to find that a development site is only capable of being developed if some other parcel of land, or some right over adjacent land, is available to facilitate that development. The valuation of the development land therefor requires the amount payable to the owner of the other land to obtain the land or right to be deducted. This is often referred to as the ‘ransom payment’. In One Step Lord Carnwath referred to Stokes v Cambridge Corporation (1962) 13 P&CR 77, as being:

“commonly relied on by valuers in assessing the market value of land subject to compulsory acquisition (under the Land Compensation Act 1961, section 5) where adjoining land holds the key to its development. The value is treated typically as

reduced by between one third and one half, to reflect the likely cost of securing the necessary interest from the additional landowner.”

77. *Stokes* was a compulsory purchase case, where the land had development value which could only be unlocked if a right of way were acquired over the adjoining land. The starting point for the tribunal was that the would-be developer would be willing to pay the owner of the adjoining land 50% of the development gain that would be released by unlocking the ability to develop the land. However, in this case the owner of the adjoining land also owned other land which would, in due course, be accessed over the proposed road. A consequence of the proposed development would be that the adjoining owner would also be able to develop its land (the likelihood of rezoning was increased if the developed land had already been developed for industry first). The adjoining owner’s position would therefore be enhanced and this led to the conclusion that the 50% should be reduced to one third. Thus, it was this special feature that reduced the 50% to one third; but the starting point was an equal split of the development gain⁵².

78. The *Stokes* principle is a valuation principle, rather than a legal principle⁵³. As such, the appropriate percentage is a matter of valuation evidence in each case, and it is for the relevant tribunal to decide what share of the profit is appropriate. The *Stokes* principle applies in a situation where there is a ‘ransom value’, in the sense that one party has the “golden key” which is crucial to unlocking the development potential of the other’s land.

79. The use of the word ‘ransom’ leads to much confusion in the process of assessment of damages in lieu, as discussed below. The term ‘ransom value’ is used when two properties are needed to carry out a development and property B is worth a small fraction of property A. Where the values of the two properties are closer together the term “marriage value” or “synergistic value” is used, but the concept is the same and means the additional element of value

⁵² The approach in *Stokes* was endorsed by the House of Lords in *Waters v Welsh Development Agency* [2004] UKHL 19.

⁵³ See Nourse LJ in *Wards Construction (Medway) v Barclays Bank plc* [1994] 2 EGLR 32.

created by combining two or more assets or interests where the combined value exceeds the sum of the separate values.

80. Where a development can only proceed if some additional right to use land or breach a restriction is secured there is a 'ransom value'. In this situation a 50% split of the increase in land value to be unlocked is the logical starting point, and has often been used as such.⁵⁴ The economic logic for this is straightforward. The increase in the land value which will be unlocked will have already factored in capital costs and risk so that what is being negotiated over is the amount that the developer expects to make over and above that which it expects to make as a minimum return on the capital being invested in the development. The local starting point is thus to start with an equal split of this sum, as without the cooperation of both parties the value cannot be unlocked. The negotiation doesn't necessarily end with a 50:50 split, however. Where there are other factors in play, as in *Stokes*, 50% may not be the right percentage.

81. In assessing damages in lieu, *Stokes* is often used to establish the proposition that a normal payment for a ransom is one third of the development profit (meaning here the increase in the value of the land attributable to the it being capable of development).⁵⁵ This is not, however, correct.

82. In *Earl Cadogan v Sportelli* [2006] EW Lands LRA_50_2005, the Lands Tribunal said, at [117]:

"For many years the Tribunals decision in *Stokes v Cambridge* [1961] 13 P & CR-77, a case on compensation for compulsory purchase, was treated by valuers as establishing that the appropriate share of the development value of a piece of land to attribute to the land over which the only access to such land could be obtained was one-third. This was in fact based on a misreading of the tribunal's decision, ... However, had the decision been treated as a establishing that the ransom value for access should be one-half of the development value but that this should be varied as necessary to reflect the particular circumstances of the case, that would have been

⁵⁴ For example: *Ozanne v Hertfordshire CC* [1988] 2 EGLR 213; *Wards Construction (Medway) v Barclays Bank plc* [1994] 2 EGLR 32; *JA Pye (Oxford) Ltd v Kingswood Borough Council* [1998] 2 EGLR 159.

⁵⁵ This seems to have been the approach taken in *Tamares*.

appropriate, and the decision could have been applied as determining such quantification as a matter of general application.”

83. The *Stokes* principle is often applied, or at least referred to, but rarely taken at its logical start point, and rarely followed through to its logical end point, and one of the most unpredictable aspects of the hypothetical valuation is the appropriate percentage to be applied to the division of profit.

84. A more usual starting point for the court in a hypothetical negotiation is one third.⁵⁶ In Tamares the deputy judge, Gabriel Moss QC, explained why he thought one third was logical, seemingly (mistakenly) finding support for this from *Stokes*. He said, at 2173 F-G:

“The use of a third share perhaps illustrates expectations in a negotiation of this kind, and seems to accord with common sense, which requires the proposed share of profit not to be so high as to put the developer off the relevant part of the development. It must be remembered that if a developer agrees to pay a third of an expected development profit regardless of whether it is actually made or not, he is taking a risk and the other party is not. This helps to explain the reasonableness of the one third/two thirds split rather than say a 50/50 or 40/60 split in a commercial context. The one-third approach can also be derived by analogy from the approach of the Lands Tribunal in the compulsory purchase decision of Stokes v Cambridge Corporation (1961) 13 P R 77.”

85. In Beaumont Business Centres Ltd v Florala Properties Ltd the deputy judge rejected the suggestion that the profit (which in this case was the Developers Profit) should be split 50:50 – for the reasons explained by Gabriel Moss QC in Tamares:

“That is to say, the proposed share of the profit must not be so high as to put the developer off the relevant part of the development, and so a figure of 50% is likely to be too high, because if the development costs are higher than expected, the

⁵⁶ This approach may gain some support from the research on ‘the Ultimatum Game’ introduced by economists Werner Güth, Rolf Schmittberger, and Bernd Schwarze in 1982. The Ultimatum Game is an experiment in economic and psychological research designed to study the negotiation and decision making process. It challenges traditional assumptions underpinning the ‘Rational Choice Theory’ and shows that humans prioritize fairness over pure self-interest. I thank my colleague Stephen Jourdan KC for drawing my attention to this interesting research.

developer's share will be *pro tanto* reduced, whereas the non-developer still gets his 50%. A more realistic starting figure, as held in *Tamares*, is one third, or 33.3%, which will give the developer enough slack to absorb any costs over those which he expects, but the other party a sufficient and reasonable pay-off."

86. These explanations, based on a risk analysis (and an incorrect reading of *Stokes*) expose a misunderstanding of what it is that is being split. As discussed above, it is, or ought to be, the increase in the land value to be unlocked which is the subject of the negotiation. This is what is meant by 'profit,' and this figure will already reflect the element of risk to a developer.

87. In Cooper Fancourt J also said,⁵⁷ that the one-third share, which was the Deputy's Judges's starting point in Tamares is "a conventional share of value in ransom strip-type valuation cases: see Stokes v Cambridge Corpn (1961) 13 P&CR 77". He went on to explain why he was not dealing with a ransom position:⁵⁸

"I consider that the Claimants go too far in positing (as they appeared to do) that the developer would be held to ransom in the negotiations. The negotiations are not a ransom exercise because the Claimants are deemed to be willing to sell at a reasonable price and the developer is deemed to be willing to buy at a reasonable price. It is also notable that this is not a case in which agreement has to be reached before any development is possible: it is about releasing the extra development value in a profitable development. It is therefore wrong to start the assessment with a traditional ransom proportion of the extra value of profit."

88. This passage might suggest a degree of misunderstanding as to the *Stokes* approach, but Fancourt J said: "It is also notable that this is not a case in which agreement has to be reached before any development is possible: it is about releasing the extra development value in a profitable development." The figure which is being split between the parties is this extra development value which may be released if a deal is done. To start with a 50:50 split is not inconsistent with the parties not being willing, nor does it say the developer is being held to

⁵⁷ Para [328].

⁵⁸ Paras. [339]–[340].

ransom. The starting point, as a matter of logic, ought always to be a 50:50 split to be adjusted down as is appropriate. There is no logic to a division which gives one third as the starting point. Nor is it clear why Fancourt J decided 10 -15% was the range and ultimately 12.5% was the appropriate share of 'profit' that would have been released.

89. The starting point of a 50:50 split is only rational, however, if one is splitting the right thing in the hypothetical negotiation.

No Ransom

90. It follows from the fact that the hypothetical negotiation is assumed to take place before the relevant breach allows the judge to ignore the fact that a development has been completed and that the claimant has the defendant over a barrel if it could require the offending structure to be demolished (a situation which may properly be said to be one where the developer is 'held to ransom').

91. The negotiation also proceeds on the basis that the parties are willing to agree a proper but not a "ransom price".⁵⁹ As the authors of *Gale on Easements* note,⁶⁰ "Sir Thomas Bingham's dictum in Jaggard v Sawyer that the price is not a "ransom price" is at first sight puzzling, because, of course, it is the power to hold the other party to ransom by the threat of an injunction which creates the claimant's bargaining position. Gale thus suggests that this means no more than that the price is to be moderated by the artificial assumption that both parties are willing and without personal agenda, the assumption that the negotiations is before either is irrevocably committed and the availability of possible alternatives, such as a cut back.

92. It seems likely that this is exactly what was meant by 'no ransom' - one assumes willing parties and eliminates any risk that the seller (who, as discussed below is the actual party and not purely hypothetical party) will say that I would not be willing to release my rights ever or that I would only release

⁵⁹ Jaggard v Sawyer [1995] 1 WLR 269, per Sir Thomas Bingham MR at 282H.

⁶⁰ at 14-151.

my rights for a full disgorgement of the profit to be made. It need not go further than this, but it does seem to have been taken further, and used to explain why a 50:50 split of profits is not the starting point, as illustrated by Cooper.

93. In Cooper Fancourt J specifically addressed what might be seen to also be a logical consequence of the negotiating taking place before the breach, but which had not previously been spelt out in earlier authority, namely, that it is not known for certain whether or not there will be an injunction. He said:

“Nor, in my judgment, is it appropriate to deem the parties to assume that if a deal is not done an injunction will be granted, as that is to leave the negotiating parties in effectively a ransom negotiation. Grant or refusal of an injunction sought prior to any construction above ground, and initially on an interim basis, would have required a very different evaluation from the decision whether to grant a mandatory injunction to pull down a completed and occupied building. It would have turned, initially, on whether damages would be an adequate remedy for the Claimants. What it is appropriate to assume is that the parties know that the Claimants could apply for an injunction, based on their rights, and that they might well obtain one, if willing to do a deal at a reasonable price, that threat is better seen as part of the context rather than as a principal driver of the negotiations.”

94. If the court is compensating for its refusal to grant equitable relief by giving the claimant the monetary equivalent of the injunction, it seems, on the one hand, illogical to proceed on any other basis than to assume that this relief would be available. If the parties do not know whether an injunction would or would not be granted, this would seem to undermine the concept of a hypothetical negotiation, and involve the parties more in a process of an assessment of a loss of a chance of an injunction being granted. However, Fancourt J’s approach in Cooper would still leave the Claimant with a bargaining position, and is, perhaps, best seen as another facet of the direction that the price is not a “ransom price.” This approach may also mitigate against the potential for the damages award to overvalue the right to the lost injunction.

95. In Isenberg v East India House Estate Co Ltd (1863) 3 De GJ & S 263, 273, Lord Westbury LC refused a mandatory injunction to compel the defendant to pull down part of a new building which interfered with the plaintiff’s light, instead

exercising the recently acquired jurisdiction under Lord Carins's Act to award damages in lieu. He said:

" . . . I hold it . . . to be the duty of the court in such a case as the present not, by granting a mandatory injunction, to deliver over the defendants to the plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make, but to substitute for such mandatory injunction an inquiry before itself, in order to ascertain the measure of damage that has been actually sustained."

96. The Court will not deliver over the defendant "bound hand at foot" by the grant of an injunction, nor should it do so by an award of damages in lieu by assuming an injunction will be granted, "no matter how unwise" it would be to do so.

97. The Court of Appeal in Feakins v Department for Environment Food and Rural Affairs [2005] EWCA Civ 1513 went further than Fancourt J in Cooper. Waller LJ said:

"What however is clear is that the bargaining position of claimants and in particular the strength of their argument that the court would ever have ordered the removal of trespassing material is important in assessing the appropriate compensation. Also relevant may be the fact that by not acting quickly to obtain an order or injunction, the claimant no longer has a strong bargaining position.

It seems to me that the working rule [as set out in Shelfer] certainly does not contemplate that in all circumstances where the court could have awarded an injunction, damages will be assessed on the basis that the claimant would otherwise be entitled to an injunction or have been entitled to an injunction i.e. on the basis that the claimant is or was in a position to hold the defendant to ransom."

The nature and seriousness of the breach

98. Looking to the nature and seriousness of the breach may, to some extent, go hand in hand with the parties' reasonable assessment of the risk of an injunction being granted. The impact of the infringement on the claimant may not be something which is a feature of a market valuation, but is a factor which may directly affect the sum the willing claimant would be prepared to settle for. Similarly, the extent to which the defendant had alternative options to using the

claimant's land may be an important factor directly affecting the amount the defendant will be willing to pay.

99. In Cooper Fancourt J said that any dominant owner, negotiating with a servient owner for monetary compensation for the loss of light, would take into account the general loss of amenity which his premises would suffer.

“To that extent, it seems to me that the court is entitled to approach the question on the basis that damages are awarded in lieu of an injunction, and not merely in compensation for the loss of the actual legal right. If a mandatory injunction had been granted, the building would have been pulled down and the plaintiff would have been restored not only to his direct light, but also to sky visibility, a pleasant view of brickwork and a sloping roof, sunlight, and so on.”

100. In Tameres Gabriel Moss QC said⁶¹, when rejecting a submission to the effect that damages ought to be assessed at the same level as the damages for loss of amenity given the limited nature of the infringement or that they ought to be assessed not by taking a percentage of the profit made but an uplift from damages for loss of amenity:

“The claimant in such a situation, who is being compensated, not for the loss of amenity, but for the loss of the right to stop the infringement, is bound to focus mainly on achieving a percentage of the profits being made from the infringement of his rights.”

101. However, he did also refuse to ignore the limited nature of the loss of amenity - this was not completely irrelevant to the hypothetical negotiation.

“Although I fully accept that commercial parties will look mainly to a share of the profit, I do not accept that they would ignore the context in which the negotiation takes place. In a case such as the present they would take into account the limited nature of the infringement.”

102. The fact that the Defendant had other alternatives available may obviously affect the negotiation. Thus, where a defendant has the ability to

⁶¹ at 2172-2173.

acquire statutory rights to obtain the grant of the right in question, the measure of compensation payable under statute will be a relevant factor.⁶² This does not, however, allow a defendant to say that it could have achieved the same result by not committing the relevant wrong such that there should be no damages. In LB Enfield v Outdoor Plus [2012] EWCA Civ 608 an advertising hoarding was accidentally constructed in such a way as to trespass slightly onto the Claimant's land. At first instance the judge awarded nominal damages, but the Court of Appeal overturned this, framing the question as what was the value of the trespass to the defendant and noting that the alternative option to the defendant could not be one which would eliminate the trespass itself, as this would negate the very basis of the hypothetical negotiation exercise. The Court of Appeal awarded the claimant half of the notional licence fees which were received from the hoarding.

103. The award of 50% of the defendant's gain in this case does seem surprising.

104. What ought not to be relevant in a hypothetical negotiation is the amount of the release payment compared to the value of the land. As part of the process of assessing the appropriate percentage in Cooper, Fancourt J had regard to the whether the figure felt right, having regard to the value of each flat.⁶³At para. [367] he said:

"the sums identified by the Claimants as the damages figures ... are so obviously disproportionate to the value of the Claimants' properties, the extent of the Claimant's loss and the possible value of the light that they will lose, that the Claimants should have realised that the method they used to quantify the damages was wrong or wrongly applied."

105. One can see why the gain to the developer to be released is a relevant factor, but why does it matter what is the overall value of the flats? In a compulsory purchase context it is of no matter that the claimant had no use for

⁶² See eg. Bocardo SA v Start Energy UK Onshore Ltd [2011] UKSC 35.

⁶³ See eg. paras. [354] and [367] and [381].

its land, or that a ransom strip has no intrinsic value other than its significance to the proposed development.

106. The desire, or need, to undertake this “cross check” perhaps illustrates the concerns identified by Lord Carnwath as to the difficulty in transferring the hypothetical negotiation to establish an appropriate “price” to the assessment of loss for interference with the enjoyment of land. It also, perhaps, brings to the fore the bigger question of what is it that the Court is compensating and whether gains-based negotiating damages are the appropriate way to assess loss. If it feels wrong that damages to compensate for the loss of enjoyment of property produce a figure which is greater than the overall value of the property, this suggested that what is being compensated is, perhaps, not the right thing. But if the right to seek an injunction has attributed to it a separate economic value, the loss of which must be compensated and a “price put on it”, it may well give the claimant a strong negotiating position and a reason to share the profits from the development, which logically has no direct relevance to the value of the land.

The hypothetical parties

107. One difference between the hypothetical negotiation as used in market valuations and that used to ascertain the price for the release of a right of light is that the willing seller and willing purchaser are hypothetical in the former⁶⁴, but now seem to be the actual owners of the dominant and servient tenement in the latter, albeit that they are assumed to be willing and acting fairly and reasonably.⁶⁵ The courts have moved away from the notion of pure hypothetical

⁶⁴ Hoffmann LJ in *Executors of Lady Fox v IRC* [1994] 2 EGLR 185: “The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable.”

⁶⁵ *Pell Frishman Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [49]: “It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-

parties, as in Lunn Poly,⁶⁶ to the actual parties. As Warren J said in Field Common Ltd v Elmbridge BC:⁶⁷ the negotiation:

“...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 licence: after all, even if damages are to be seen as compensation for loss of an opportunity to negotiate, 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.”

108. A move away from purely hypothetical parties gives further importance to the direction that there be ‘no ransom’ and the need to eliminate any personal agenda on the part of either party, and may give more flexibility to the judge in deciding the outcome of the hypothetical negotiation. In Cooper Fancourt J had regard to the size and complexity of the development “and the sophistication of the developer” when deciding that the appropriate approach was to assess a global settlement sum for the developer to buy out all adverse rights and apportion a part to the Claimants, rather than leaving out other potential objectors and dealing only with the Claimants.⁶⁸ This approach may be consistent with an approach that assumes hypothetical parties in the position of the actual parties, but in general terms a move away from pure hypothetical parties to the actual parties “ignoring their personal characteristics” but acting reasonably,⁶⁹ would seem to introduce more uncertainty, and the possibility of subjective characteristics of the parties creeping in. There is no easy clear blue line as to what might or might not be a ‘personal characteristic.’ The hypothetical negotiation ought to proceed on the basis of hypothetical parties in the position of the actual parties, as with a market valuation.

matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably.”

⁶⁶ At [35].

⁶⁷ At 21-22.

⁶⁸ Cooper para. [372].

⁶⁹ Eaton Mansions v Stinger [2012] EWHC 3354 (Ch), [2013] EWCA Civ 1308, [59-60]; Stadium Capital [2011] EWHC 2856, [71].

Conclusions

109. Easements of light are seen by many as a little different from other property rights, such as a right of way or a restrictive covenant, and the impact of infringement is more difficult to assess.
110. The origins of rights to ancient light go back to the medieval period, where sunlight was essential for ordinary living. As cities grew denser, properties were built closer together and higher, thereby threatening the access of light to their neighbours, such that the common law afforded remedies. There has always been a tension, however, between wanting to protect an individual's enjoyment of their property and facilitating development. In Attorney-General v Doughty (1752) 2 Ves.Sen. 453 Lord Hardwicke LC stated (in connection with the enjoyment of a view): "I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town..."⁷⁰
111. It often feels wrong that a claimant can potentially extract a windfall sum from a developer because of a loss which often has comparatively little, if any, impact on the value of the claimant's property, and often little real impact on the claimant's actual enjoyment of light. Lord Macnaghten said, in Colls v Home & Colonial Stores Ltd [1904] AC 179, "the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."
112. Damages assessed on the negotiation basis in this context are arbitrary and for some, Lord Carnwath included, it is troubling that there is such a disparity in the method of compensating for loss of amenity in a compulsory purchase context and in assessing compensation for the modification or discharge of a covenant under s.84.

⁷⁰ See also Fearn v Tate, [196].

113. The above concerns put into focus whether a hypothetical negotiation is, or is always, the right tool for the job when assessing damages in lieu. One Step, and now Cooper, remind us, however, that negotiating damages are not the only way of assessing such damages.
114. If the purpose of the negotiation is to produce the figure which the actual parties would agree, one might think the use of comparables to be relevant. There are, however, very few cases which discuss this approach.
115. In Cooper Fancourt J rejected the Claimants argument that evidence of settlements which had been made with other tenants at Bankside yards, with similar rights to the Claimants, was the best evidence of what sums would have been agreed in a hypothetical negotiation. Fancourt J accepted⁷¹ that:
“the prices agreed are generally informative and of some use in seeking to identify the likely range of figures, but I do not agree that this is direct evidence of what would have been agreed in the hypothetical reasonable negotiation to release rights rather than restrain the construction of Arbor.”
116. Leaving aside the fact that the evidence of the negotiations post-dated the date of the hypothetical negotiation, the judge’s main reason for disregarding such evidence was that in all but possibly one case, the negotiations were not carried out with a view to compensating for the absence of an injunction preserving the right of light. There was no indication that the value of the rights to the developer had been considered or assessed. The negotiations had proceeded on the basis of the usual negotiations between rights to light surveyors and were the product of conventional negotiations based on the industry-standard ‘book value’ method, a negotiation which the Judge rather amusingly described as “akin to a ritual dance between professionals.”⁷²

⁷¹ At para. 334.

⁷² At para [335].

117. The book value method is a form of diminution in value damages, unique to right to light claims. This method of assessment is inexplicable.⁷³ As illogical as this method may seem, however, it is, nevertheless, the basis upon which very many rights of light disputes are resolved. It may not, in and of itself, be a logical or defensible way to assess loss, but is it really any less arbitrary than an award of damages on a hypothetical negotiation basis? It may be evidence of what others, a great many others, have agreed in relation to the same development. It is thus hard to dismiss such evidence as likely to be anything other than good evidence of what parties think to be a reasonable price for the release of their rights, whether or not this has any regard to the estimate or account of the profit to be made.
118. There may, of course, be no comparable evidence. And there is not always evidence of the defendant's profit.
119. In Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922 there was no evidence of the amount of profit and, as Gabriel Moss QC explained in Tamara at 2171 C, Millett J's method "was to start with the loss of amenity and then build upwards, in effect guessing at the boost given to the claimant by his bargaining position in the absence of evidence relating to the profit being made from the development."
120. At the end of the day there are advantages, disadvantages and shortcomings to all of the established methodologies to assess damages in lieu of an injunction. Different methods may, however, be best suited for different situations.
121. Notwithstanding the doubts expressed by some as to the availability of negotiating damages in the tort of nuisance, such damages have been awarded and are likely to continue to be awarded in a right to light claim. As the Supreme Court recognised in Fen Tigers, and the Court of Appeal in Forsyth-

⁷³ For a detailed explanation of how it works see Barnes, *The law of Rights of Light*, Bloomsbury, 2016 at 7.78-7.107 & Karas *The Law of Rights of Light, 2nd Ed* Wildy, Simmonds & Hill, at 218-227.

Grant v Allen, negotiating damages may, in an appropriate case, be the right method of assessment.

122. If a claimant is to be compensated for the loss of the right to bargain, with the gain to the defendant being brought into account, the assessment of loss should be principled and consistent, and perhaps brought back in line with the assessment of loss in the valuation context.

Elizabeth Fitzgerald
Falcon Chambers