Neutral Citation Number: [2012] EWHC 1422 (Ch)

Case No: HC10C02288

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building, London, WC4A 1NL

Date: 25/05/2012

Before :

HHJ DAVID COOKE

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Between :

Howard John Kettel and others	**Claimants**
- and -	
Bloomfold Ltd	**Defendant**

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- -

Simon Edwards (instructed by **Fairweather Stephenson & Co**) for the **Claimant**
Martin Hutchings QC (instructed by **Prettys**) for the **Defendant**

Hearing dates: 13-15 March 2012

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke :

1. The claimants in this case are the holders of long leaseholds of eight flats in a development originally constructed in the 1990s in the East End of London, known as City Walk (also referred to as Fuller Close). The defendant is the freehold owner of the development. Each of the flats has the benefit of the use of a designated parking space, although the nature of their entitlement to those spaces is one of the issues in dispute. The claimants seek an injunction to prevent the defendant building a further block of flats on the site which would cover their parking spaces. The defendant contends that it has the right to require the claimants to use other car spaces in place of those originally allocated to them in order that it can proceed with the development as it wishes. Alternatively, it submits that in view of the offer of alternative spaces, which it maintains would be equally convenient for the defendants, any remedy to which the claimants are entitled to be limited to nominal damages and not an injunction.

2. The layout of the development can be seen on the plan at page 12 in the bundle. In general terms, it is a rectangular site bounded on the north by Bacon Street and on the south by Cheshire Street. The original development was completed in two phases; phase 1 consisting of the flats and four commercial units on the western half of the site and phase 2 comprising further flats and commercial units on the eastern half. The result was that the site was almost fully enclosed around its perimeter by flats and commercial units, but there was a gap along the northern edge. This gap and the centre of the site are taken up by roadway, car parking spaces and open space planted with trees and shrubs. The new building is proposed to be constructed in the gap, taking up 10 car parking spaces including the eight used by the claimants, and an area which is presently roadway. The other two car parking spaces are used by the defendant itself and by its director and sole shareholder Mr Hardy.

3. There is no significant dispute between the parties on the facts, so that although I have witness statements from six of the claimants it was agreed that their evidence could be taken as read. I heard evidence from two lay witnesses on behalf of the defendant, its managing director Mr Hardy and Mrs Lesley Balding, an employee of London Link Properties Ltd which is the agent managing the property for the defendant. The parties called evidence from valuation experts, Mr Shaw on behalf of the claimants and Mr Collier for the defendant. Their reports are in the bundle and they also gave oral evidence.

4. The defendant obtained planning permission for its proposed new building on 12 September 2006. It consists of a single building of three stories, containing eight flats. It is a condition of the planning permission that the occupiers of the new flats will not be provided with car parking on the site, so that although it would be necessary to find alternative spaces for the claimants, which may involve land which is presently open space or roadway, the total number of car parking spaces on the site will not increase.

5. The defendant took the view from the start that it was entitled to require the claimants to accept alternative car parking spaces. On 13 October 2008 its agent wrote to the claimants (an example is at page 148) referring to the planning permission and saying "in line with legal advice already received by our client, the car park space you have been allocated to date falls within the demised area of the new block and your right to

park will be transferred to one of the other vacant spaces within the development. Vacant parking spaces will be re-allocated on a first-come first-served basis so if you have a preference on location then please contact me and I will discuss the choices available."

6. None of the claimants had however agreed to accept a new space when on 1 September 2009, apparently without warning, contractors acting on behalf of the defendant entered on the site and fenced off the area on which the new building was to be constructed, including the claimants' car park spaces. At least one resident's car was fenced in during this process, although he was allowed to remove it when he wished. Later on that day, further letters were sent by London Link Properties to the claimants in the form of the example at page 208 addressed to Mr Kettel, which simply said "Please accept this letter as notice of reallocation of your parking space to number 28a, which is indicated in red on the attached plan."

7. Since then, the defendant has sought to agree with the claimants that they will accept alternative car parking spaces. Certain of the claimants initially indicated that they would be prepared to do so, and were sent draft documentation intended to vary their leases accordingly. Ultimately, however, they withdrew their agreement without having executed any such variation, and it is not suggested that they have entered into any binding agreement. One other leaseholder did however do so. Faced with the lack of consent from the claimants, the defendant has not proceeded further with the development, so that the area in question remains fenced off but no construction work has begun on the new block.

8. This claim was issued in October 2010. The claimants did not seek any interlocutory injunction, both parties being apparently content to await the outcome of the claim if they were not able to agree a negotiated settlement. Although the timetable of the litigation has been extended in order to enable the parties to discuss such a settlement, none has been agreed and accordingly the matter was ultimately set down for trial.

Demise or easement?

9. The first issue is whether the claimants' entitlement to use the car parking spaces amounts to a demise, as Mr Edwards submitted or is merely an easement. Mr Hutchings canvassed the possibility that it might as a matter of law be a contractual right less than an easement, but his case was put on the basis of an easement and Mr Edwards also accepted that if I was against him on his primary case the right was an easement. The claimants' position is that this issue makes no difference to the question whether the defendant is entitled to require them to accept alternative spaces, or to remedy, but that a demise would carry with it the entitlement to prevent encroachment on the air space above the parking spaces themselves. This is potentially relevant to an alternative scheme canvassed but not so far implemented by the defendants, the so- called "crash deck" scheme, which would involve a building extending over the car spaces but open at ground floor level so that they could still be used. Mr Hutchings takes the opposite position in both respects.

10. Mr Edwards' submission was that the right granted to use each space amounted to exclusive possession of it, and so a demise rather than an easement appurtenant to the demise of the flat itself. Alternatively, he said, it was a right which was so extensive that it deprived the freeholder of any reasonable use of the land for any other purpose

and so was not capable of subsisting as an easement (and by implication must be a demise) relying on the decision of the Court of Appeal in *Batchelor v Marlow* [2003] 1 WLR 764. That case involved a claim to a right by prescription to park vehicles for 9 1/2 hours per working day on land adjacent to an unmade road. Tuckey LJ, with whom the other members of the court agreed, said this:

> "[8] [The deputy judge] referred to the authorities and accepted that the question he had to answer was one of degree. This followed the approach adopted by Judge Paul Baker QC in *London and Blenheim Estates v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307 at 317, [1992] 1 WLR 1278 at 1288 who, after reviewing the earlier authorities on car parking, said:
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> > 'The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement, though it might be some larger or different grant.'
>
> [9] It was common ground before us that that was the essential question in this case and that there was no authority which provided the answer to it…
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> [18] If one asks the simple question: 'Would the appellant have any reasonable use of the land for parking?' the answer, I think, must be 'No'. He has no use at all during the whole of the time that parking space is likely to be needed. But if one asks the question whether the appellant has any reasonable use of the land for any other purpose, the answer is even clearer. His right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory."

11. It is likewise common ground before me that the question is one of fact and degree. Both counsel accept that a right to park is in principle capable of subsisting as an easement, depending on its terms. In *Moncrieff and another v Jamieson and others* [2007] UKHL 42 the House of Lords so held in relation to the law of servitudes in Scotland. Lord Scott (who expressed the view at para 45 of his judgment that there was no difference between the English and Scottish law on this point) said:

> "[59] In my respectful opinion the test formulated in the *London and Blenheim Estates* case and applied by the Court of Appeal in *Batchelor v Marlow*, a test that would reject the claim to an easement if its exercise would leave the servient owner with no 'reasonable use' to which he could put the servient land, needs some qualification. It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible

> uses can be conjured up. And by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are 'reasonable' or sufficient to save his ownership from being 'illusory'? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. The claim in *Batchelor v Marlow* for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate nine cars, the owner of the land should not grant an easement to park nine cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to nine cars there and, of course, to have access to his nine cars. How could it be said that the law would recognise an easement allowing the dominant owner to park five cars or six or seven or eight but not nine? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.
>
> [60] If, which as at present advised I regard as doubtful, *Batchelor v Marlow* was correctly decided…"

12. *Batchelor v Marlow* has not been overruled and remains binding on this court. I was referred to the decision of HHJ Purle QC in *Virdi v Chana* [2008] EWHC 2901, an appeal from an Adjudicator to HM Land Registry, in which he held himself bound by *Batchelor v Marlow*, but that the adjudicator was correct to conclude on the facts that where a parking space was adjacent to a domestic property, the residual ability of the servient owner to carry out acts such as maintaining the land and fencing round it, altering the surface or planting climbing plants adjacent to the fence could not be dismissed as insignificant or illusory.

13. Accepting that the test I am to apply is that set out in *Batchelor v Marlow*, I turn to the facts. This being a right expressly granted, it is necessary to examine the terms of the right itself in some detail to see if they, as properly construed and together with any terms which may properly be implied from the express terms in their factual context, are so extensive as to deprive the defendant of any reasonable use of the land, in the context of this particular development. It is important to look only at those terms, and not to fall into the error of assuming what is to be decided, ie that the right amounts to a demise, and concluding that it therefore restricts the owner in a particular way.

14. Some of the claimants have leases of flats in phase 1 of the development, and others in phase 2. The text of the leases for all the flats in phase 1 is materially identical. There are some differences between those and the leases of flats in phase 2, though all the phase 2 leases are in the same terms as each other. There is a complication in that some of the flats in phase 1 have car park spaces situated in phase 2, with the result that some of the drafting does not work particularly well, but in my view nether these oddities, nor any difference between the two sets of leases, affects the outcome on this point.

15. An example of a lease in Phase 1 is that of Mr & Mrs Dakyns, at p 347 in the bundle. Their flat is number 102, which is described by reference to Schedule 1 of the lease and a plan of the first floor (p368) and defined as "the Premises". The lease is for a term of 125 years from 29 September 1993 ("the Term"). The Particulars at p 349 also define the "Car Parking Space" as Number 32, which can be located by a plan of the whole site ("the Plan", p369).

    i) "The Estate" is defined as "the land and buildings edged orange on the Plan". The orange line encloses the whole development, phases one and two.

    ii) "The Building" is defined as "the part of the Estate edged blue on the Plan". The blue line encloses the whole of phase 1, but not phase 2. Despite the term used, the area within the blue line is not all built upon, and insofar as it is, it is not all one building. Thus "the Building" as defined in fact comprises at least two buildings, together with areas of roadway, parking spaces and green space.

    iii) "Open Areas" is defined as "any part of the Building not covered by buildings including without prejudice to the generality of the foregoing car parking areas access ways refuse areas and landscaped areas".

    iv) Clause 2 contains the words of demise as follows "… the Landlord as beneficial owner demises to the tenant the Premises TOGETHER with the rights specified in the Second Schedule TO HOLD the Premises to the Tenant for the Term subject to … all rights easements privileges restrictions covenants and stipulations of whatever nature affecting the Premises including matters reserved and set out in the Third Schedule…"

    v) The second schedule is headed "the Rights Granted" and consists of six paragraphs. These deal with matters such as the right to passage of services and subjacent and lateral support, and:

        a) "2. The right on foot only (in common with… all others so entitled) of access to and egress from the Premises over the entrance halls landings lifts (if any) staircases and Open Areas in the Building for access and egress to and from the Premises Refuse Area and Car Parking Space"

        b) "6. The right of vehicular access to and egress from the Car Parking Space and the sole right to use the Car Parking Space for the purpose of parking a taxed car or motorbike".

    It was observed that these defined terms have the effect that the right in paragraph 2 to pass on foot over the Open Areas is only granted formally in

respect of areas in "the Building", i.e. phase 1. Thus a person with a flat in phase 1 but a car parking space in phase 2 has the right to drive to the car parking space under paragraph 6, but apparently no right to walk back to his flat under paragraph 2. It was accepted that such a right must be implied.

Further, the definition of "Open Areas" includes all the car park spaces within phase 1. Thus, Mr and Mrs Dakyns are granted the right to pass on foot over the car parking spaces allocated to other tenants, and other tenants with leases in similar form have been granted the same rights, including the right to pass on foot over the car parking space allocated to Mr and Mrs Daykyns.

vi) The Third Schedule is headed "the Rights Reserved" and includes the following:

"1. The right for the Landlord and its agents to enter the Premises… for the purposes of complying with the Landlord's obligations contained in this release and other leases…

16. Does the language of the lease, as a matter of construction, indicate an intention to demise the car parking space? In support of his argument that it does, Mr Edwards pointed to the language of clause 2, and said that the words "demises to the Tenant the Premises TOGETHER with the rights specified in the Second Schedule…" meant that there was a demise not just of the Premises as defined (ie the flat) but also of the rights listed in the second schedule. I do not accept that construction. It is true that there is no verb after "demises" that might be taken as applying to "the rights specified", but it does not make sense to speak of "demising" a right such as the right to passage of electricity, or the right of lateral support to a building. Even if it could be considered that this language was intended to provide that the landlord "demises… the sole right to use the car parking space for the purpose of parking a taxed car…", that is not the same as demising the car parking space itself. One would still have to answer the question, what is the nature of "the sole right" referred to.

17. In my judgement, clause 2 means only that the landlord demises the Premises, and grants the rights referred to in the second schedule. It is necessary to construe that schedule, in the context of the lease as a whole, to determine the nature of those rights.

18. Mr Edwards next submits that the grant of "sole use" at a rent is equivalent to exclusive occupation, that the landlord cannot do anything else with the car parking space and cannot even cross it when no car is on it unless a right to do so is reserved. The situation is on all fours with *Bachelor v Marlow.* This submission does not bear scrutiny.

i) The tenant is not granted "sole use" of a car parking space, he is granted the sole right to use it for parking a car or motorbike. This is not the language of exclusive possession, although no doubt a lease could be granted of a car parking space containing covenants restricting its use to parking a car.

ii) The submission that the landlord cannot do anything with or on the car parking space unless a right is specifically reserved to do so assumes what is required to be proved, i.e. that the grant constitutes a demise. The words of the right

themselves do not prevent the landlord from doing anything else with the car parking space, except to the extent that that would be inconsistent with the ability to park a car on it.

iii) It was plainly not the intention that the right granted excluded the ability of others to pass across the car park space because they were expressly granted the right to do so. One could only come to the conclusion that the purported grant of such rights was ineffective by starting from the assumption that the car parking space has been demised, i.e. again assuming what is required to be proved.

iv) *Bachelor v Marlow* did not decide that the right to park a car on a piece of land which is only big enough to accommodate one car amounts to exclusive possession, but only that the prescriptive right claimed in that case was so extensive, on the facts, that it could not subsist as an easement. It is a question of fact in each case whether the right granted (or exercised, in the case of a claim by prescription) is such that it makes the freeholder's ownership illusory, in which case, *Batchelor* holds, it cannot be an easement and the next question is what other form of right it may be.

19. Mr Hutchings points to a number of other provisions of the lease which he submits, rightly in my view, indicate that a demise of the car parking space was not what the parties intended. This does not, of course, mean that a demise cannot have been created if that were the clear legal effect of the right as described. But insofar as the effect of the right is ambiguous, they are strong indicators against construing it to amount to a demise. They were:

i) Clause 2 provides that what the Tenant is "to hold" is "the Premises", not the other rights described

ii) All the Tenant's covenants, including the restriction on assignment are expressed to apply to the Premises, not the car parking space

iii) The proviso for re-entry and covenant for quiet enjoyment apply only to the Premises, as does the express right of entry in Schedule 3 to carry out works. Thus if the landlord had intended to demise the car parking space he had obliged himself to maintain it (as part of the Services listed in the Fifth Schedule) but excluded himself from access to do so.

20. In my judgment, for all the reasons above, the rights granted to use the car parking space in each of the claimants' leases cannot sensibly be construed as a demise of that space. Is it then an easement? Both counsel agreed that if there was no demise, the right granted was in the nature of an easement. It was not contended that it amounted to a greater right (a fee simple) or a lesser one (a contractual licence).

21. There is no doubt that an easement for parking can exist, but it seems to me that notwithstanding the agreement between counsel I must address the question whether I am precluded by *Batchelor v Marlow* from finding that an easement exists in this case. If so, I would have to consider the further question whether I am compelled, notwithstanding my conclusion above, to hold that the rights granted amount to a demise.

22. I do not believe that an easement is excluded, essentially for the same reason as given by HHJ Purle QC in *Virdi*, that the rights exercisable by the defendant over the space cannot be said in the circumstances of this case to leave him with no reasonable use of the land and so make his ownership of it illusory.

23. I approach this from the starting point that the defendant may do anything that a freeholder could normally do, except to the extent that it is excluded by the terms of the right granted in the lease, ie except to the extent that it would be inconsistent with the express right to park a car, together with any terms to be implied as a normal matter of construction. Thus the defendant may pass on foot or by vehicle across the space freely if there is no vehicle parked on it for the time being or avoiding one that is. He may authorise others to do likewise (and has done so in the other estate leases). He may choose, change and repair the surface, keep it clean and remove obstructions (and is obliged to do so in providing the Services). He may lay pipes or other service media under it, as he may wish to do for the benefit of the estate buildings. He may in principle build above it (as is proposed under the crash deck scheme) or provide overhead projections such as wires.

24. The point was made that these matters would not necessarily be precluded by a finding of a demise, but for present purposes the question is whether the ability to undertake them can be said to be so negligible as to make ownership illusory. No doubt other examples could be given, but in my judgment these suffice- all of these rights are likely to be of importance and value to the freeholder in the context of this land, in managing the estate for his benefit and the benefit of its leaseholders. Far from being illusory, these rights may be regarded as important, even necessary.

Does the defendant have a reserved right to build on the car park spaces?

25. Mr Hutchings argued that the terms of the lease, properly construed, reserve to the landlord the right to build on the car parking spaces notwithstanding the rights granted to the leaseholders. He relied particularly on clause 5.6 which reads as follows:

> " The Landlord and all persons authorised by him shall have the power without obtaining any consent from or paying any compensation to the Tenant to deal as he thinks fit with any Neighbouring Property and to erect upon such land any buildings whatsoever whether such buildings shall or shall not affect or diminish the light or air that may now or at any time during the Term be enjoyed by the Tenant [*but so that the value of the Premises shall not be substantially diminished*]"
>
> ["Neighbouring Property" is defined as ' any land or premises adjoining or neighbouring to the Building (and whether or not within the Estate)…'.]

and on paragraph 5 of the reservations in favour of the landlord in the Third Schedule, as follows:

> "5. Full right and liberty for the Landlord at any time after the date of this lease to erect any new buildings of any height on any part of the [land adjoining to or neighbouring the

> Building][*Estate*]… notwithstanding the fact that the same may obstruct affect or interfere with the amenity of or access to the Premises [*but so that the value of the Premises shall not be substantially diminished*] ."

In both cases the wording in italics is included in the leases of properties in phase 2, but not those in phase 1.

26. In my judgement, these provisions cannot be made to bear the construction Mr Hutchings requires. So far as clause 5.6 is concerned, it confers a right to build on "Neighbouring Property", i.e. land adjoining "the Building". Since (see above) "the Building" is defined as being the whole area of each phase of the construction as outlined in blue on the relevant plan, on the face of it in relation to leases of flats in phase 1 clause 5.6 entitles the landlord to erect additional buildings on land outside the area of phase 1, but not within it, and correspondingly for flats in phase 2. Mr Hutchings was forced to argue that in this instance, reference to "the Building" must be taken to mean an actual building, and not the defined term. That in my view is not tenable; the term used is capitalised so as to refer to the definition, and even if it were possible (in my view it is not) to point to factors that suggest that a contrary use may have been intended in this particular location, the definitions clause specifies that the definitions set out apply "save where the contrary is stated", rather than, as is sometimes the case "save where the context otherwise requires".

27. Clause 5.6 could therefore only assist the landlord in the case of leases of flats in one phase which provide for the use of a car parking space in the other phase, since only in that case would the car park space fall within the definition of "Neighbouring Property". Even in that case, it would not in my judgement give the right to erect a building which constituted a substantial interference with the exercise of the easement to park. It is plain from the language of the clause that the rights that it permits the landlord to override are rights to light and air, and not the express easement to park a car.

28. In relation to paragraph 5 of the third schedule, the position is in my judgement similar in leases of flats in phase 1, since those leases reserve a right to the landlord to construct additional buildings on "land adjoining to or neighbouring" phase 1 (whether or not within the Estate), but not, on the face of it, on phase 1 itself.

29. The phase 2 leases reserve the right to construct buildings anywhere on the Estate (phase 1 or phase 2) but not outside it, but only in so far as the tenant might have been entitled to object on the grounds that the building would "obstruct affect or interfere with the amenity of or access to the Premises". Mr Hutchings submits that because interference with use of a car parking space would affect the amenity of the flat, this paragraph permits the landlord to do so. He accepts however that it does not go so far as to allow the easement of parking to be permanently destroyed, and from that submits that there is an implied right to relocate the parking space elsewhere.

30. These submissions in my view approach the question of construction from the wrong starting point. Since an express right is conferred to use the car parking space, only clear language would indicate that the right may be overridden by general reservations such as that contained in paragraph 5 of the third schedule. The language used does not clearly have that effect, and in my view more naturally means only that the tenant

may not object to the erection of new buildings on the grounds of interference with amenity of, or access to, the Premises (ie his own flat). It does not take away the rights that he may have to object on the grounds that the building will interfere with a specific right that he has been expressly granted. Even if it permitted building which would interfere with the express right to park on a designated space, I accept Mr Edwards' submission that it would not be construed so as to permit the entire destruction of that right - as would occur if the space is built upon – see *Overcom v Stockleigh* [1989] 1 EGLR 75.

31. Mr Hutchings' construction would have the effect that the landlord was empowered to put up new buildings provided that the effect of doing so was to interfere with the amenity of the premises, notwithstanding that to do so would be inconsistent with any right granted elsewhere in the lease (subject to the limitation in the Phase 2 leases that it did not substantially diminish the value of the flat itself). The unlikelihood of that construction reflecting the intention of the parties at the time the lease was entered into is pointed up by the need to imply a right and obligation to provide an alternative car parking space in order to restore to the leaseholder the benefit of the right said to be overridden.

Is there a right to change the designated parking space?

32. Mr Hutchings submits that such a right must be implied. He points out that some temporary interference with the right to park on a particular space is inevitable over the life of the lease, if the landlord is to comply with its obligation to maintain and repair the surface of the designated space. The ability to specify a different space would not extinguish the right to park in a designated space, but only in the particular space identified in the lease. The actual location of the designated space was immaterial to the leaseholders (at least if the alternative were equally convenient) and the essence of the grant consisted of the right to park on a space within the estate, not the particular space originally specified. He referred me to an Australian case, *Owners of Strata Plan 42472 v Menala Pty Ltd* (1998) 9 BPR 97,717 which he submitted recognised the need for a landlord to maintain an ability to change the space designated.

33. I am not able to accept these submissions. In general, a servient landowner has no right unilaterally to extinguish an easement over one area of land on provision of an equivalent easement over another- see *Greenwich NHS Trust v London & Quadrant Housing Association* [1998] 1 WLR 1749- and I held in *Heslop v Bishton* [2009] EWHC 607 (Ch) that obstruction of the easement originally granted did not cease to be actionable in principle because of the availability of an alternative easement, even if equally convenient. An easement may of course be granted in terms which, expressly or by implication permit variation of the servient land, as recognised by Lightman J in the *Greenwich* case, and no doubt it may have been commercially sensible for the landlord if it had drafted the parking rights in such terms in this case, but there is no right of variation expressly set out and no basis, in my judgment, for such a right to be implied.

34. I accept that a right of temporary obstruction in order to carry out works may be implied as necessary in order that the landlord may fulfil his maintenance obligations, but that is a far cry from the right sought to be established, which would permanently extinguish the easement over the land originally subject to it. The alleged lack of

inconvenience to the dominant landowner is not a reason to imply a right to change what has been granted to him. Nor is it relevant to say that he would have had no reason to require the use of any particular space and that the 'essence' of the right granted is merely to park somewhere; the right granted is to park in a particular space and it simply cannot be construed as being only to park in any place from time to time designated by the landlord.

35. Nor is the *Strata Plan* case any assistance to the defendant. In that case the owners of various lots of land were entitled to 'the right to leave one motor vehicle in a marked car parking space on the land…burdened'. It was held that it was likely that spaces had originally been marked out and the grant to each lot holder was intended to refer to one of them, but it was not specified in the instrument and it was now impossible to establish where that space had been. It was held that the servient landowner was under an implied obligation to make this right effective by marking out parking spaces and allocating them to the lot owners, but (p16,346) 'not necessarily once and finally, as some occasion could arise for changing the location of the space'. In implying a term obliging the landowner to mark out a space in place of one that could no longer be identified the court was doing no more than imposing the minimum obligation necessary to give business effect to the grant, by permitting the landowner to reserve the right to change the allocation if he wished. That is no basis for reading an express grant over a space which is clearly identified as being subject to a right to alter which has not been expressly stated.

Is a pleaded cause of action made out?

36. This I can take shortly; although Mr Hutchings in his skeleton submitted that the claimants could not make out any of the pleaded causes of action, the pleading of 'breaches… of the defendant's obligations under the leases' is in my view plainly apt to encompass a substantial interference with the express easement that I have held was granted by those leases. It is equally plain that a substantial interference has occurred through the fencing off of all or part of the car parking spaces such that vehicles cannot be parked on them, and further such interference will occur if the defendant carries out its intention to build on those spaces. Mr Hutchings did not seek to persuade me to depart from the decision that I made in *Heslop,* that there did not cease to be a substantial interference with the right granted because some other equally convenient right was available to the dominant owner, in this case because of the offer of an alternative space.

Remedy: Injunction or damages?

37. Mr Edwards' primary submission is that the claimants should be granted an injunction to restrain the actual and threatened interference with their parking rights. In the alternative, they seek damages based on what was described as a 'release fee'; that is the amount which would be agreed to be paid in a hypothetical negotiation between reasonable parties for the right to do that which would otherwise be unlawful. Mr Hutchings' submission was that I should in the exercise of discretion refuse an injunction and that damages should either be nominal, or if I adopt the 'release fee' basis, the amount awarded should be much less than the claimants seek.

38. The grant of an injunction is a discretionary remedy, but it is one to which a successful claimant is prima facie entitled in the case of interference with property

rights such as the easements in this case. Mr Hutchings started from the 'good working rule' expressed by AL Smith LJ in *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287, in which the Court of Appeal considered the circumstances in which courts might exercise the power given by Lord Cairns' Act to award damages in lieu of an injunction:

> "In any instance in which a case for an injunction has been made out, if the plaintiff by his acts or laches has disentitled himself to an injunction the Court may award damages in its place. So again, whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.
>
> In my opinion, it may be stated as a good working rule that -
>
> (1.) If the injury to the plaintiff's legal rights is small,
>
> (2.) And is one which is capable of being estimated in money,
>
> (3.) And is one which can be adequately compensated by a small money payment,
>
> (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction:-
>
> then damages in substitution for an injunction may be given."

39. It is important in my view not to lose sight of the fact that in this passage AL Smith LJ was dealing with exceptional circumstances in which an injunction might be withheld, and nothing more general. In the passage immediately preceding the 'general rule' he said this:

> "Many Judges have stated, and I emphatically agree with them, that a person by committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be.
>
> In such cases the well-known rule is not to accede to the application, but to grant the injunction sought, for the plaintiff's legal right has been invaded, and he is prima facie entitled to an injunction.
>
> There are, however, cases in which this rule may be relaxed, and in which damages may be awarded in substitution for an injunction as authorized by [Lord Cairns' Act]."

Lindley LJ clearly agreed that an injunction was the normal remedy. He said:

> "Without denying the jurisdiction to award damages instead of an injunction, even in cases of continuing actionable nuisances, such jurisdiction ought not to be exercised in such cases except under very exceptional circumstances. I will not attempt to specify them, or to lay down rules for the exercise of judicial discretion. It is sufficient to refer, by way of example, to trivial and occasional nuisances: cases in which a plaintiff has shewn that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has so conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy - as where the acts complained of are already finished - an injunction can be properly refused."

40. It is not the law that if a defendant can show that the circumstances fall within the four (cumulative) matters identified by AL Smith LJ the prima facie remedy switches to damages. Mr Hutchings referred me to a passage in Spry on Equity (6th ed p 640) as follows:

> "There is no satisfactory reason why general equitable principles that depend essentially on the balance of justice between the parties, and especially on the weight that must be given to considerations of hardship, should be restricted by a rigid set of rules. It is hence not surprising that the views of AL Smith LJ (in *Shelfer*) have been criticised from time to time, and they should be treated with considerable caution. It appears to be preferable to say simply that such matters as are mentioned in this 'working rule' as the extent of injury complained of or the fact that it is capable of being estimated in money, should be regarded as a relevance, without necessarily being decisive, when the court is called on to exercise its discretion and to decide whether it would be unjust to grant the specific relief to which the plaintiff is prima facie entitled. "

in support of a submission that there are no rigid rules to be applied when considering whether an injunction is appropriate, but it seems to me that what is in fact emphasised by this passage is the exceptional nature of a case in which the court departs from the normal remedy of an injunction.

41. Mr Hutchings also referred me to paragraph 14- 58 in Gale on Easements, in support of the proposition that an injunction is the appropriate remedy only where there is substantial, irreparable injury to the claimant's rights. That however would not in my view be a fair summary of that paragraph; it is correct to say that it contains a citation from *Attorney General v Cambridge Consumers Gas Co* (1868) 4 Ch App 71 at 80 where it is said that the court interferes to prevent an injury on two grounds, and that "one is that the injury is irreparable", and that the paragraph concludes by saying that the court "will [not] interfere by injunction to restrain actionable wrongs for which damages are the proper remedy", but the prima facie position is set out at the beginning of the paragraph:

> " Before a perpetual injunction can be granted to restrain a private nuisance or the disturbance of an easement, the court as a general rule requires the party to establish his legal right and the fact of its violation. But when these things have been established, then, unless there be something special in the case, the party is entitled as of course to an injunction to prevent the recurrence of that violation. An easement is a legal right. The remedy by injunction is in aid of that legal right. The owner of the right is entitled to a prohibitory (or negative), as opposed to a mandatory, injunction, not in the discretion of the court, but of course; unless there is something special in the case, for instance laches, or the fact that the disturbance is only trivial or occasional. "

It is against this prima facie position that the court must address whether the circumstances are such that "damages are the proper remedy".

42. That there can be such cases is not in doubt. Some of the cases Mr Hutchings referred me to do not assist, as the question decided was not one of the discretion as to remedy; *Nynehead v RH Fibreboard Containers Limited* (1999) 1 EGLR 7 involved parking rights but the question in that case was whether the landlord's failure to control misuse of a yard by other tenants (which was found to amount to a derogation from grant) amounted to a repudiatory breach of the defendant's lease, thus entitling them to avoid payment of rent. It was held that it did not. *Colls v Home and Colonial Stores Ltd* [1904] AC 179 concerned rights to light, but was determined on the basis that the disturbance found was not sufficient to be actionable (although Lord MacNaughten did express the view, obiter, that if a defendant had acted fairly and not in an unneighbourly manner an injunction might be refused, and that courts should not allow claims to protect ancient lights to be used to extort money). *Crane Road Properties LLP v Hindulani* [2006] EWHC 2066 (Ch) was cited as an example of the judge refusing to grant an injunction or damages in lieu in respect of minor alterations to the line of a roadway. In fact the judge held that these alterations did not amount to an actionable interference with the right of way at all (see paragraph 101), so that no question of discretionary refusal of an injunction by way of remedy arose.

43. In other cases a breach of a property right was found, but damages were held sufficient remedy. I do not need to refer to them all, since in my view they did not cast doubt on the prima facie position as I have expressed it, and in all cases where an injunction was refused there was some special factor which made it unjust to grant a remedy of injunction. *Wrotham Park Estates Ltd v Parkside Homes Ltd* (1974) 1WLR 798 is a well known case in which a number of houses had been built in breach of covenant requiring a layout plan to be agreed in advance by the successors in title to the original vendor of the land. Brightman J refused an injunction which would have required the demolition of the houses, pointing out that the holder of the covenant had suffered no financial loss, and the destruction of the houses would have been "an unpardonable waste".

44. In *Jaggard v Sawyer* [1995] 1 WLR 269 the Court of Appeal upheld the refusal of an injunction to prevent the occupiers of a newly built house using a private roadway on a small residential development over which they had no right of way, on the ground that the increase in usage of the road would be minimal and the claimant had held

back from taking action to prohibit the building of the new house until it was almost complete.

45. In *Midtown Ltd v City of London Real Property Company Limited* [2005] EWHC 33 (Ch) Peter Smith J refused an injunction in the case of interference with rights of light by construction of a new office building. He held that one of the claimants had only a financial interest in the property, and the other, the occupier, would not be affected by the loss of light.

46. In *Tamares Ltd v Fairpoint Properties Ltd* [2007] 1 WLR 2148 and injunction was refused on the grounds that it would be oppressive, where the right infringed was in respect of the light to two windows illuminating the stairs to a basement.

47. The prima facie right to an injunction to prevent the continuing infringement of a legal right was reasserted by the Court of Appeal in *Regan v Paul Properties DPF Ltd* [2006] EWCA Civ 1319, overturning the decision of the first instance judge and granting an injunction to prevent the completion of a development of a five-story block of flats that would infringe the rights to light of a cottage opposite. Mummery LJ, with whom the others agreed, reviewed the authorities and said this:

> "36 *Shelfer* has, for over a century, been the leading case on the power of the court to award damages instead of an injunction. It is authority for the following propositions which I derive from the judgments of Lord Halsbury and Lindley and A L Smith LJJ. (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is "a tribunal for legalising wrongful acts" by a defendant, who is able and willing to pay damages: per Lindley LJ, at pp 315 and 316. (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right "except under very exceptional circumstances": per Lindley LJ, at pp 315 and 316. (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see A L Smith LJ, at pp 322 and 323, and Lindley LJ, at p 317.

> 37 In my judgment, none of the above propositions has been overruled by later decisions of any higher court or of this court…"

He went on to hold that the obiter remarks of Lord MacNaughten in *Colls* did not impose any different test, and that the judge at first instance had been wrong to hold that the burden was on the claimant to show why damages would not be an adequate remedy.

48. I turn then to the facts, starting from the position that the claimants are prima facie entitled to an injunction to prevent interference with their property rights, and that if it is to be refused in the exercise of discretion there must be good reason, amounting to an exceptional circumstance, to do so. In assessing whether this is made out, all the circumstances, including the specific matters referred to by AL Smith LJ in *Shelfer*, are relevant.

49. Mr Hutchings submitted that the injury to the claimants' rights was trivial only, in that they were being required to park in a different space a few yards away from the original one. There would be no loss of convenience to them. Nor was there any irreparable injury. To the extent there was any disadvantage, it could be compensated by a small monetary payment. All of this relies on the court taking into account the availability to the claimants of an alternative car parking space of equal convenience. However, the claimants of course have no existing right to any such space, and although the defendant has offered to provide such spaces, the terms of those offers were never finalised, nor were they put in a form which would have allowed the claimants to accept them and create an immediately binding right. In the first instance, they were offered the option to choose an alternative space, and then to enter into documentation which would have varied their leases. When the fencing was put up around the car parking space they were entitled to use, they were simply told that a different space had been allocated to them. In some cases that space did not then exist. The evidence of the claimants themselves does not object to these spaces on the grounds they are less convenient, though the evidence of the experts shows that in some cases at least there might be reasonable objections on that ground.

50. By service of a plan a few days before trial, it emerged that the defendant was now proposing that the spaces previously offered would be only temporary, and different spaces would be created when the new building was constructed and offered to use by the claimants. No such proposal had ever been formally put to them.

51. There is it seems to me a fundamental objection, which is that to allow such offers to exclude the remedy of injunction amounts to permitting the defendants to expropriate the rights presently held by the claimants, and then choose for themselves the remedy to which the claimant would be entitled, by offering to make amends in a particular way. I do not say that the availability of the alternative easement offered is entirely irrelevant; it was plainly part of the consideration that led Lightman J to conclude that an injunction was inappropriate in the *Greenwich* case, but it seems to me the circumstances here are very different from that case.

52. The correct starting point seems to me to be that what the defendant has done by fencing off the car parking spaces, and what it proposes to do by building on them, amounts to the entire abrogation of the claimants' express easements to park on those

spaces. It is not a trivial injury in terms of its effect on the claimants' rights but a total one. It is not one which would cause the claimant only a small financial loss; the right to use of a parking space is valuable (according to the defendant's own expert such a space could be sold on a long leasehold for about £20,000). It is being undertaken not for any wider public benefit, but for the private profit of the servient owner.

53. It cannot be said to be oppressive to the defendant in any respect to prevent it from carrying out its proposals by injunction. Certainly an injunction would prevent them from carrying out what they no doubt anticipate will be a profitable development. But they have no right to abrogate the property rights of the claimants in order to be able to carry out that development.

54. The claimants have not stood back and allowed the defendant to incur expenditure or proceed with its development on the tacit assumption that they would not enforce their rights; on the contrary they have made clear at all points that they intend to do so. It is true that they did not seek an interim injunction, but they cannot in my view be criticised for being unwilling to take on the risk of giving a cross undertaking in damages and the defendant was never under any illusion that by not seeking such an injunction they were acquiescing in the infringement of their rights.

55. On the other hand, the conduct of the defendants in this matter has in my view been somewhat high-handed. Rather than seek the claimants' agreement to amend their leases they simply asserted that they had the right to designate an alternative car parking space, referring airily to legal advice which was never disclosed. When the claimants did not agree to accept alternative spaces, the defendants went ahead with their proposals without any prior warning and bluntly told the claimants that their designated spaces had been changed.

56. In the *Greenwich* case, Lightman J said this in relation to the availability of an injunction (at p 1755):

> "(c) **Injunction**
>
> The plaintiff contends that the defendants in the very special circumstances of this case, even if they do have a cause of action, can have no right to an injunction to restrain the plaintiff from proceeding with the realignment: the defendants should be satisfied by, and be restricted to, an award of damages in respect of the easement... I am satisfied that this is so for a number of reasons, which include the following: (1) no reasonable objection can be made to the realignment: on any basis it is an improvement, most particularly in the matter of safety; (2) the defendants and all the occupants of premises on the potentially dominant land have long had full notice of this proposal, have been invited to object if they wished, and have refrained from doing so; (3) the realignment is necessary to achieve an object of substantial public and local importance and value."

57. There are in my view no comparable special circumstances in this case. It might be said to be an ordinary case of a servient landowner seeking to escape from rights held

by others which he now finds inconvenient to himself. It may be the case that a similarly convenient alternative can be offered, but the very essence of a property right is that it is a matter for the owner to decide whether to exercise it and not for the court or the holder of a subordinate interest to compel him to not do so. The same may no doubt be said of the right of way that was effectively extinguished in the Greenwich case, but there is in my view a qualitative difference between an express right to use an identified piece of land for a particular purpose, such as we have here, and a right of way which serves only as access to other land, a minor change to which may be expected to be of no appreciable concern to the users.

58. In contrast to the Greenwich case, the dominant owners have made clear their objections. In some cases these are on the basis of the general amenity of the estate which they see as being reduced if further building takes the place of open space. This cannot be dismissed as unreasonable in a residential context, and for the reasons given is not a matter they are debarred from raising by the terms of their leases. Some or all may be prepared to waive their objections if a sufficient payment is offered, but the case has not in the end been put (although it was hinted at) that the claim is motivated only by money. This is not a case of clearing up uncertainty for a project of public benefit such as the Greenwich hospital.

59. In these circumstances, in my view it is for the claimants whose rights have been infringed to decide whether they are prepared to accept the offer of amends by way of provision of a different space, and they cannot be said to be acting unreasonably in seeking to enforce the rights that they have. I would grant the injunction sought.

Basis and quantum of damages

60. Having reached my conclusion in favour of an injunction, I do not need to decide the alternative issue of the basis and quantum of damages, but it is right that I should briefly set down my views since it was fully argued and may be relevant if the case goes further. I do so on the basis that it is assumed that an alternative car parking space is made available to each claimant, with equivalent security of his entitlement to use it, and that it is reasonably equivalent in convenience of use in all respects, both as to its intrinsic qualities as a parking space (such as its size and ease of access) and its convenience for occupiers of the relevant flats, so that there can be no appreciable financial loss to the leaseholder in terms of the value of his lease. I do not believe there is any reasonable likelihood of an injunction being found inappropriate if this were not the case, but if I am wrong on that then any damages for inconvenience and financial loss would have to be assessed in addition and taking account of the individual circumstances of each claimant.

61. Firstly, it seems to me clear that damages are to be assessed on what was referred to in the trial as the 'release fee' basis, that is to say the sum which would be negotiated between willing parties for the right to do what cannot be done without the defendant's consent. Nominal damages, as contended for by the defendant, would be insufficient as the assumed provision of an alternative space does not compensate the claimant for the full value of the right lost. It makes good the loss of use to him, but not the value of his permitting it to be used by someone else.

62. Such damages are in principle compensatory and not a matter of restitution as an account of profits would be. The principles to be applied were summarised by Vos J,

after a review of the relevant law in *Stadium Capital Holdings (No 2) Ltd v Marylebone Property Co PLC* [2011] EWHC 2856 (Ch), cited with approval by the Court of Appeal recently in *Enfield LBC v Outdoor Plus Ltd* [2012] EWCA Civ 608:

> " 69 In the light of these authorities, it seems to me that, in a trespass case of this kind, "hypothetical negotiation damages" of the kind described in these cases are obviously appropriate. That negotiation is taken to be one between a willing buyer and a willing seller at an appropriate time (in this case accepted to be when the trespass began). Events after the valuation date are generally ignored. The fact that one party might have refused to agree is irrelevant. But the fact that one party held a trump card and could have stopped the defendant obtaining any benefit is a relevant matter. The value of the benefit of the trespass to a reasonable person in the position of the particular defendant is what is being sought. In other words, the price which a reasonable person would pay for the right of user, or the sum of money which might reasonably have been demanded as a quid pro quo for permitting the trespass."

63. Vos J also made clear that the personal characteristics of the parties were to be ignored:

> "[71] It is clear from the authorities that I have mentioned that personal characteristics of the parties are to be disregarded in the postulated hypothetical negotiation... Whilst I should assume that all reasonable points will be taken in the negotiation, I cannot assume that a reasonable hypothetical site owner has either the easygoing characteristics of BRB any more than the exceptionally aggressive approach of Stadium. The personal characteristics of the parties, as opposed to the objective facts with which they were faced, are to be ignored."

64. Those were cases of trespass, but a similar basis has been adopted for infringement of other rights; such damages are sometimes referred to as "Wrotham Park" damages after the case of that name (above), which concerned a restrictive covenant, and *Tamares* (also above) concerned an easement.

65. I heard evidence from two experts as to the likely outcome of the hypothetical negotiation, Mr Shaw for the claimants and Mr Collier for the defendants. Their evidence of the basis on which such negotiations are conducted is admissible, but the question of the outcome is for the court. Their fundamental methodology was very similar, being to estimate a value of the land to be developed (a "development appraisal") and then apportion that value between the holders of the interests who would have to come to agreement in order that the development could proceed.

66. They were also largely agreed as to the process involved in the development appraisal, which I summarise as:

    i) estimate the value of the finished development, ie the sale value of the flats to be built

    ii) estimate and deduct the costs of development, ie the cost of obtaining all necessary planning permissions and the like and the cost of construction and sale of the flats, including all professional fees

    iii) deduct a "developers profit" to reward the developer for the risks and effort of undertaking the development, which they agreed in oral evidence is currently normally agreed at 25% of the gross development value, to reflect the present market risks,

    iv) deduct the actual cost to the developer of acquiring his interest in the site (both assumed 5.75% of the land value) and the costs of financing the development.

    The result was the net value of the land. Mr Shaw's appraisal appears at p 862 of the bundle and results in a land value, on his central assumption but allowing for the 25% developers profit he conceded, of £1,125,000. Mr Collier's calculation is at p 919 and his equivalent value is £945,000.

67. All the figures that go into this appraisal are of course matters for negotiation, each side no doubt putting forward the factors that would push the result in a direction favourable to it. The court's task, it seems to me, is not to determine what each of those figures should be as if it were an issue of fact separately in dispute, but to make an overall assessment of the likely negotiated outcome between reasonable parties. Both counsel agreed with this approach. On that basis, and given that it was not suggested that either party had started from a position that was so wholly unreasonable it should be discounted I would not seek to evaluate the strengths and weaknesses of the individual figures contended for, but assume that the negotiation would be likely to result in a figure somewhere in the middle, in this case £1,035,000.

68. There is then the question of apportioning that between the interests that have to be joined to achieve the result that all are assumed to want, ie that the development may proceed. Mr Shaw's evidence was that this was likely to lead to a 50/50 division, because neither party could proceed without the other. That in his experience was commonly the result of such negotiations. It was the outcome in *Stadium*, in which Vos J conducted a detailed review of the competing arguments of the parties assumed to be in negotiation, taking into account evidence before him that a 50/50 split was a commonly negotiated result in hoarding/airspace cases.

69. Mr Collier referred to *Stokes v Cambridge Corporation* (1961) 180 EG 839, in which the Lands Tribunal assessed compensation for compulsory acquisition of land behind a ransom strip on the basis that it would be necessary to pay a price to obtain access of one-third of the value released by that access. "Stokes" payments, he said, varied according to the circumstances between 15 and 50% of the unlocked land value. His report suggested that in view of the offer of alternative spaces the claimants would have been likely to have sought only 15% of that value and settled for less in negotiation, a total of £70,000 between them.

70. Mr Hutchings referred also to *Tamares,* in which the judge, Gabriel Moss QC, started from a figure of one third of the expected profit, rounding it down to take account of the modest nature of the infringement and the need to arrive at a figure which would not put the developer off the whole project:

> "34. 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*…"

71. But in that case, it does not appear that the calculation of "profit" to be made was made allocating a first slice to the developer, whereas here it is common ground between the experts that a first share should be allowed to the developer for just the sort of risks as Gabriel Moss QC referred to. It would be double counting to award the other party only one- third of the reduced figure on account of the same risks. In *Stokes*, the calculation also allowed for a first slice of profit to the developer, in that case 15% of the developed value. It is relevant to note that the owner of the ransom strip was not a party, so that the assessment of the amount likely to be paid to him was made as between others.

72. The percentages applied in these cases are not matters of precedent, but illustrations of the result of the assessment of the hypothetical negotiation carried out in particular cases. In this case, assuming as I must that both parties wish to reach agreement on a fair outcome so that the development can proceed, ultimately each is in a similar position in that neither can proceed with the development under discussion without the other. The fair result likely to be reached in my judgment is that the value generated would be split equally (after the 25% allowance for developer's profit). I would therefore have assessed damages in lieu of an injunction at £517,500, to be divided between the claimants.