Damages instead of an Injunction – the way forward – wide discretion or rigid rules?

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1. Section 17 of the High Court Ordinance(Cap 4) provides: "where the Court of Appeal or the Court of First Instance has jurisdiction to entertain an application for an injunction or specific performance,they may award damages in addition to, or in substitution for, an injunction or specific performance".

2. There are similar provisions in other common law jurisdictions such as England, Australia, New Zealand and Canada. The original provision was contained in the Chancery Amendment Act 1858, Lord Cairns' Act. Lord Cairns was the chairman of the committee on English judicial reform.

3. The object of the Act was to remove any doubt that the Chancery Court could award damages where there was jurisdiction to award an injunction or specific performance. It was designed to allow the courts to perform complete justice without requiring plaintiffs to return to common law courts to get damages.

4. In Hong Kong, when operating this jurisdiction, the courts have historically applied the well-known principles devised by AL Smith LJ in Shelfer's case [1895]1 Ch 287, namely 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.

5. As far as I am aware, there are no Hong Kong cases which have had to consider the decision of the English Supreme Court in Coventry v Lawrence [2014]UKSC 13. This sets out a new approach to be adopted by a court when deciding whether to grant damages instead of an injunction.

6. Albeit that the different Justices took subtly different approaches to the exercise of the discretion, the consensus was that the "good working rule" in Shelfer was out of date, and no longer to be slavishly followed.

7. As Lord Neuberger said: first, the application of the four tests must not be such as to be a fetter on the exercise of the court's discretion. Second, it would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied.Third, the fact that those tests are not all satisfied does not mean that an injunction should be granted.

8. As Lord Clarke put it, the exercise is one involving "a classic exercise of discretion".

9. Shelfer's case itself was curious because although it has become well-known throughout the common law world, the principles expressed by AL Smith LJ, were not expressed in that way by the other two Court of Appeal judges. To be fair, AL Smith LJ himself only expressed his principles as being "a working rule". The principles themselves have not always found favour. By the time of the Court of Appeal decision in Jaggard v Sawyer[1995]1 WLR 269 the first three tests had almost been submerged in the fourth test so that the principal question became whether the grant of an injunction would be oppressive to the defendant. However, in the decade preceding Coventry there were a line of English Court of Appeal decisions, starting with Regan v Paul Properties Limited [2007] Ch 135, which stressed that the grant of damages instead of an injunction was very much the default position, and that it was necessary carefully to apply the four tests contained in AL Smith's judgment. It is also fair to say that these four tests have not always been universally admired, and some jurisdictions such as Canada have not applied them in their full rigour, and some legal editors, such as Spry in Australia, had expressed the view, reinforced by Lord Clarke, that the four tests were an artificial restraint on what should be an unfettered exercise of discretion.

10. As Spry has said: " *there has, however, unfortunately appeared from time to time a tendency to formulate as a series of inelastic rules the general principles that are*

applied by the court in exercising its discretion whether or not to substitute damages for relief in specie… 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…"

11. Why is this issue important? It can arise in any situation where a court may have to consider whether to grant damages rather than an injunction. The issue can arise even where there is no pleading that the court should grant damages rather than an injunction. Typically the issue will arise in a property law context, such as where there has been a nuisance, as in Coventry itself, or where there has been an interference with an easement such as a right of way(or in England a right to light), or with a restrictive covenant, or where there has been a trespass, but also where, out of the property law context, there has been a breach of a restrictive covenant in an employment context: see, e.g. P v D [2016] EWCA Civ 87. In the latter context there is a tension between holding a party to a contract, and taking a more pragmatic approach in dealing with the consequences of that breach of contract. In the property law context there is also another countervailing consideration, namely that a party should not be able to buy itself out of a breach of contract situation and effectively expropriate another's rights.

12. So if Coventry is followed in Hong Kong what are the sorts of considerations which a court is likely to consider when exercising its discretion? If the court is not to be hidebound by the four tests then, in the nature of things, it is not possible to be prescriptive but I would suggest that the following are likely to be relevant considerations.

13. **1st**, an injunction, even a mandatory injunction, might still be granted if the defendant has acted in a high-handed manner, as in a decision of the English Court of Appeal post Coventry, Ottercroft v Scandia Care Ltd [2016] EWCA Civ 867. There the defendants acted in breach of undertakings not to infringe an easement and without informing the plaintiff of their plans.It was held that the Judge had been right to order

the defendants to remedy the infringement even though that required a positive act, namely the removal of a staircase. Likewise, a court is unlikely to be sympathetic to a plaintiff who has acted in such a way as to steal a march on the plaintiff. The obverse of this is that a Court is more likely to be sympathetic if the defendant acted in ignorance of the plaintiff's rights.

14. **2nd**, a court is likely to be more sympathetic to the defendant if he has tried to be reasonable in prior dealings with the plaintiff.

15. **3rd**, and this is a more controversial proposition, a court might not grant an injunction if compliance with it might be very expensive, and be contrary to some public benefit. This was the case in the well-known decision of Wrotham Park v Parkside Homes [1974] 1 WLR 798, where damages, on a way-leave basis, examined briefly below, were granted rather than an injunction to demolish houses built in breach of a restrictive covenant, and where housing was needed because of a shortage.

16. **4th**, the court may weigh up the respective advantages and disadvantages to the parties in the event that an injunction is or is not granted. This is the sort of exercise which has been conducted in Canada as long ago as 1922 in by Duff J in Canada Paper Co v Brown(1922) 63 SCR 243, cited by Lord Carnwath in his speech in Coventry: "An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others would suffer in consequence thereof may be a sufficient ground for refusing it".

17. **5th**, certainly in a property law context, the grant of planning permission may be relevant, although in Coventry, frustratingly, differing views were expressed. Lord Neuberger said that: "in some cases, the grant of planning permission for a particular activity… may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction". Lord Sumption went further: "it may well be that an injunction should as

a matter of principle not be granted in a case were a use of land to which objection is taken requires and has received planning permission". Lord Clarke, in similar vein, although perhaps not as trenchantly said that: "the existence of planning permission for the activity complained of may well be of particular relevance to the remedy to be granted". Perhaps by way of contrast, and certainly with different emphasis, Lord Mance said this: "I do not think that a grant of planning permission can give rise to any presumption that there should be no injunction…", and Lord Carnwath said: "I would not regard the grant of planning permission for a particular use as in itself giving rise to a presumption against the grant of an injunction… the nature of, and background to, a relevant planning permission may be an important factor in the Court's assessment". Perhaps the most that can be said is that the grant of planning permission may be a relevant factor as part of the overall discretionary exercise but not a conclusive factor.

18. **6th**, in the particular case of trespass, it may still be the case that if the plaintiff is wholly excluded from his property, as opposed to there being a minor encroachment, he may still usually be granted an injunction. The plaintiff cannot be wholly deprived of his property rights simply by giving him compensation: see Harrow London Borough Council v Donohue [1993]NPC 49 where Waite LJ observed that: "there was no authority which provided a precedent for allowing total dispossession to be achieved by means of an award of damages in lieu of an injunction", and see post-Coventry, Charlie Properties v Risetall Ltd, unreported, 11 November 2014.

19. **7th**, even though they are now, at least in England, not prescriptive principles, there may still be scope for some consideration of AL Smith's tests, and for the court to ask itself whether the damage to the plaintiff is small and quantifiable and whether damages are adequate compensation.

20. Incidentally, there are famous dicta of Lord Cairns himself in Dohery v Allman (1978) 3 App Cas 709 at 719-20 which, although frequently cited, appear to be contrary to the jurisprudence on the relevant provisions of his Act. He said "*[I]f there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity*

would have no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves". But, whether the matter is approached by applying conventional Shelfer principles or wide discretionary Coventry principles, Lord Cairns' statement is too wide. At most his view can only be a starting point for a discretionary exercise, and not prevent an exercise of the discretion in the first place. There is an excellent analysis in Meagher, Gummow & Lehane's Equity: Doctrines and Remedies at paragraph 21-195 where a reasoned critique of Lord Cairns' statement is carried out.

21. The final point (and this merits a full-scale treatment of its own) is how damages, if they are to be awarded rather than an injunction, are to be assessed. In this context, their assessment may be an exception to the general principle that a plaintiff is only entitled to those damages which reflect the loss to his interest. So in Wrotham Park where there was no diminution to the value of the landowner's retained interest, the court granted damages referable to what could have been bargained for by the innocent party in order to give up his right to the relevant restrictive covenant (and the Wrotham Park principle has been applied from time to time without criticism in Hong Kong).Brightman J said this: "*Had the offending development been the erection of an advertisement hoarding in defiance of protest, I apprehend… that the court would not have hesitated to grant a mandatory injunction for its removal. If, for social and economic reasons, the court does not see fit, in the exercise of its discretion, to order demolition of the 14 houses, is it just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing? Common sense would seem to demand a negative answer to this question.*"

22. However, what remains undetermined is whether the "way leave" principle of assessment will always be applied, at least in the property law context. The editors of "Equity: Doctrines and Remedies" consider it unfortunate that there has been a tendency uniformly to award damages on a "way leave" basis instead of considering the possibility of awarding damages on the more conventional basis of damage to the plaintiff's property interests. The editors of these work see the attraction of awarding damages on a "way leave" basis where there is not any damage to the plaintiff's property interests but criticise the award of such damages when always granted on this basis.

23. Coventry is also important in this context, if only to illustrate the point that at least in the context of nuisance it is not clear whether damages should be awarded on a "way leave" hypothetical negotiation basis. So Lord Neuberger said that this issue will need to be worked out on a case by case basis, and Lord Clarke said that "I would leave open the question how damages should be assessed"; and Lord Carnwath said that: "without much fuller argument… I would be reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants". Lord Carnwath's concern was that the "hypothetical negotiation" approach could not be readily transferred to claims for nuisance 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.

24. My concluding thoughts or questions are these: if it is appropriate conventionally (and notwithstanding the concerns of the editors of "Equity: Doctrines and Remedies") to award damages on a "way leave" basis where there has been a trespass or an infringement of an easement or a restrictive covenant, is the qualitative difference with a nuisance such that damages for the latter should be treated in a different way? If there is damage to the value the property, why should damages be awarded on this basis, or would this be, in effect, sanctioning the wrong? What is the status of Lord Cairns' statement in Doherty v Allman? Are the Hong Kong courts now likely to apply wider discretionary principles rather than the narrower rules in Shelfer's case?

Sources and references

1. Butler, Equity and Trusts in New Zealand, pages 862-870.

2. Meagher, Gummow and Lehane, Equity: Doctrines and Remedies, 5th Ed, paras [21-195] and [24-115] to [24-140].

3. Spry, The Principles of Equitable Remedies, pages 646-679.

4. McDermott, Equitable Damages, pages 88-99 and 130-143.

5. Bradbrook, Bradbrook and Neave's Easements and Restrictive Covenants, 3rd Ed, pages 504-531.

6. Sharpe, Injunctions and Specific Performance (Release No.24, November 2015), paras 4.59-4.685.

7. Amec Developments Ltd v Jury's Hotels Ltd [2000] EWHC 454 (Ch).