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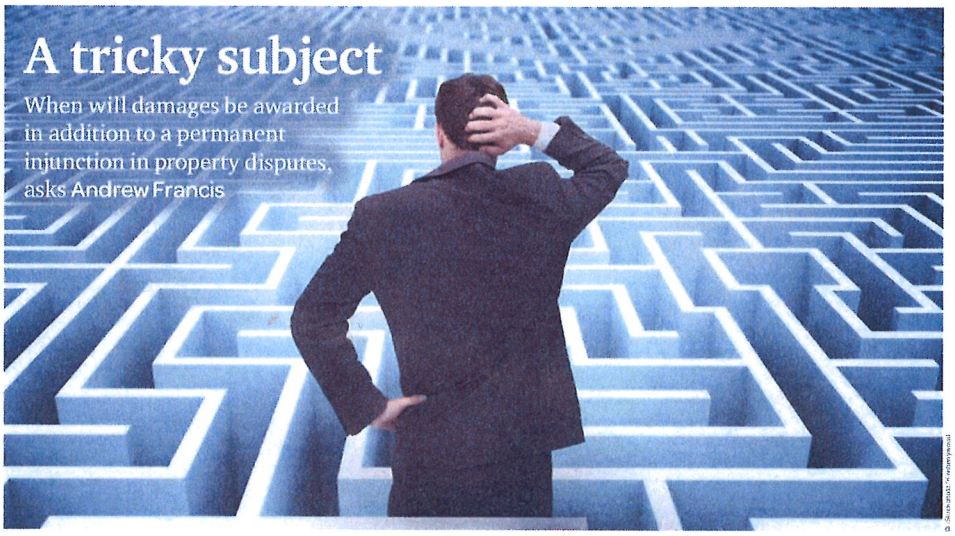
# A tricky subject

## When will damages be awarded in addition to a permanent injunction in property disputes, asks Andrew Francis



**IN BRIEF**

- Awards of damages in addition to injunctive relief should not be overlooked as a remedy.
- Pleadings should deal with this issue with care.

It is generally taken to be the case that when the court grants a permanent injunction to restrain the breach of a property right (or to restore rights where a mandatory injunction is required) and save where there has been physical damage to the claimant's land, or property, damages for economic loss, for example diminution in value of the claimant's property, will not usually arise for consideration. After all, the court's permanent order, whether in prohibitory, or mandatory terms, deals on a "once and for all" basis with the breach, whether the claim is for trespass, breach of covenant, nuisance, or actionable interference with an easement. But as has been said before in another context (*Porgy and Bess*) it ain't necessarily so that the grant of the injunction is the end of the matter. As the prayer in Particulars of Claim and Counterclaims invariably states, the claimant seeks an injunction *and* damages. This applies in claims to damages at common law and under s 50 Senior Courts Act 1981 (s 50) where the jurisdiction extends not only to awarding damages in substitution for an injunction, or specific performance, but also to such an award *in addition to* the specific remedy. In the context of specific performance in the context of the sale of land, it has been well established for many years that damages may be awarded in addition to the order for completion of the contract, such as where there are losses caused by the vendor's delay in a purchaser's claim. But in a claim where the permanent injunction will prevent the future acts of trespass, or breach of covenant, or actionable interference with a right of light, when will the court have to consider whether an award of damages may be needed in addition to the specific relief it has granted?

> *"It ain't necessarily so that the grant of the injunction is the end of the matter"*

The answer to that question is where, notwithstanding the permanent injunction granted, the long term effect of the defendant's past conduct, coupled with the risk that such conduct might re-occur (especially if the claimant, weary of battle sells his property) leads to a diminution in value of the claimant's property.

### *Raymond v Young*

An example of the latter set of facts occurred in *Raymond v Young* [2015] EWCA Civ 456, [2015] All ER (D) 160 (May), decided by the Court of Appeal on 14 May 2015. The facts are a reminder of an episode of *Neighbours from Hell*. They took place in the scenic location of Blawith in Cumbria, south of Coniston Water. The events narrated in the judgment of the Recorder as cited in the judgment of Lord Justice Patten (who gave the substantive judgment of the court with LJJ Briggs and King) reveal that Mr Young and members of his family (at Lynn Cragg Cottage) had been responsible for continuous acts of harassment, trespass and nuisance against the claimants, Mr and Mrs Raymond, at the adjacent property, Lynn Crag Farm, and their predecessors in title, for over 40 years. It seems that Mr Young had never been able to accept that he had no control over the farm after it had been sold off by his father in 1965. He did not like the fact that the farm was owned by people wealthy enough to use it as a second home. Mr Young's and his family's acts included obstruction of the use of the access way to the farm, interference with the use of a right of way to a gate into some additional land acquired by the claimants in 2010, failing to control their dog and to prevent it from defecating at the farm, causing trespass and nuisance with their guinea fowl, leaving dustbins and other rubbish near to the back door and kitchen window of the farm, burning plastic and other noxious materials causing smoke, vandalising the claimants' two CCTV cameras, a greenhouse and other property and physically intimidating Mrs Raymond.

Having granted an injunction restraining the defendants from causing the various

acts complained of, the Recorder dealt with damages. It is to be noted (see paras 13 and 14 of the judgment of Patten LJ) that the claim was pleaded and decided by the Recorder on the basis that damages would be awarded for nuisance and harassment at common law. It was not, therefore, necessary to decide the point that where the court has granted an injunction, there is nothing to compensate the claimant for by an award of damages under s 50. It is suggested that the approach of the Court of Appeal to the award of damages, albeit at common law, should also be applicable where the same issues arise under s. 50.

Having awarded what seems to be a modest sum of damages for the various heads of trespass set out above (£3,500) and £5,000 for aggravated damages (not in issue in the Court of Appeal) the Recorder made two further substantial awards, the first for diminution in the value of the farm, at £155,000 (having heard expert evidence on the point) and second, a sum of £20,000 which was a "rounded up" sum taken from the award of damages for the acts of nuisance with the addition of an amount representing general damages for inconvenience and distress.

The appeal by the defendants concentrated on arguing that both the award for diminution in value of the farm and the award for inconvenience and distress should be set aside as wrong.

The Court of Appeal held that the Recorder was right in making his award of £155,000 for diminution in the value of the farm and applied *Hunter v Canary Wharf Ltd* [1997] AC 655, [1997] 2 All ER 426. That award was upheld as it reflected the fact that:

i. there was a risk that the defendants' conduct might continue (despite the injunction); that
ii. a potential purchaser on being made aware of the dispute (as the Law Society's Property Information Form requires) would pay less for the property; and
iii. the injunction granted would not protect a future owner of the farm (as it would operate *in personam* for the benefit of the claimants only) so that fresh proceedings against the defendants might be required.

However, the Court of Appeal disagreed with the Recorder's award of £20,000 for inconvenience and distress. The court held that the award for diminution in value of the farm took account of the defendants' conduct by way of nuisance up to trial and because damages for distress are not recoverable in the tort of nuisance; cf. the "disappointing holiday" claims for breach of contract; see in particular para 40, per Patten LJ.

## What lessons can be learned from this decision?

First, as stated above, the grant of a permanent injunction may not be the end of the matter. There are cases, such as *Raymond v Young*, where the defendant's past conduct and his general proclivities serve as a guide to the future, and leave a "stain" on the claimant's property, so that its future value is impaired. Second, while it is tempting to see *Raymond v Young* and its extreme facts as confined to the department of warring neighbours from hell, there may be cases which arise in less extreme circumstances where damages in addition to a permanent injunction might be claimed with justification.

> ***"Raymond v Young reminds us that damages are a tricky subject in property claims & the technicalities in this area of law should not be overlooked"***

Suppose, for example, that the conduct of a developer is such that its conduct during and after a development, in which it will continue to have an interest; eg as landlord, or estate manager, causes the adjoining owner fear and anxiety, eg dumping of building waste as a trespass to the claimant's land, lack of respect for boundaries, obstruction to rights of way. The adjoining owner is granted an injunction to restrain future trespass, nuisance and actionable interference with easements. But it is clear that the defendant's attitude to its responsibilities as a landowner, or manager is such that future trespass and nuisance etc will be likely to re-occur under that party's watch.

Why should the claimant not receive an award of damages (in addition to the injunction) which reflects the future diminution in his property caused by the factors relied upon in *Raymond v Young*? To take another example, in a right of light dispute, it has not been unknown for servient owners to nail boards to the dominant owner's windows, or to refuse to cut back trees and shrubs against those windows. An injunction may only go so far, If the neighbouring defendant has a predisposition either to making trouble, or being awkward, an injunction may not prove a long term remedy, eg where it requires (in effect) the regular cutting back by him of the shrubs. Here an award of damages to reflect long term capital loss may be appropriate, if supported by valuation evidence.

While, as stated above, *Raymond v Young* is not a decision on s 50, there seems no reason why, where that section has been pleaded in the claim for damages either in lieu of, or on addition to an injunction, the principles of the decision in *Raymond v Young* should not apply. The aim of s 50 is to award damages, where appropriate, for both past *and future* losses. The latter will invariably be in issue in rights of light claims where the capitalised value of the injury reflects the treatment of the award as compensation for future loss; see the principle of past and future losses stated by the court shortly after the enactment of s 2 of the Chancery Amendment Act 1858 (the precursor of s 50) in *Isenberg v East India Estate Co* (1863) 3 De GJ & Sm 263. There may well be cases where the risk of future infringement and the effect of past conduct causes a "blight" on the value of the dominant property (even in rights of light claims where a permanent injunction is granted to restrain the breach) is high enough to warrant an award of damages. This may go beyond the standard method of assessment based on Waldram diagrams and the assumed maximum value of light at £5 p.s.f as is coventionally adopted.

Finally, it is suggested that *Raymond v Young* should lead to a more careful approach to pleading remedies and also damages. Full consideration of what is to be sought as the monetary outcome for the claimant is vital. To plead many claims for damages at common law alone, where property rights are the subject of interference and where an injunction is sought prevents the assessment of damages under s 50 and may have a limiting effect on the award, despite the suggestion of Lord Justice Chadwick in *World Wide Fund for Nature v World Wrestling Federation* [2007] EWCA Civ 286, [2008] 1 All ER 74 where he indicated that a similar measure of damages to that applicable under s 50 should be awarded where common law damages only are sought. As has been stated above, *Raymond v Young* is a decision on common law damages. There are cases where the difference between common law damages and those under s 50 may be a large one, eg where "negotiation" damages are sought to represent future loss and the ability to restrain, or remove the infringement. *Raymond v Young* reminds us that damages are a tricky subject in property claims and the technicalities in this area of law should not be overlooked. NLJ

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