Serle Court
Prepared by Kysen PR

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The injunction question

Andrew Bruce looks at what a recent decision has to say about injunctive relief for breach of covenant, post *Coventry v Lawrence*

If my neighbour builds a structure on her land which blocks my light or breaches a covenant which restricts such construction or causes a nuisance, what is my remedy? Can I get an injunction requiring the structure to be taken down or am I only entitled to an award of damages? The recent decision of Slade J in the unreported case of *Humphrey v Rogers* (23 November 2017) has looked at this point.

What happens when a restrictive covenant is breached?

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Coventry v Lawrence

It is now three years since the seminal Supreme Court case of *Lawrence v Coventry (t/a RDC Promotions)* [2014] UKSC 13; [2014] 1 EGLR 147 (commonly referred to as *Coventry v Lawrence*), in which the issue of remedies in the context of nuisance was considered. There, Lord Sumption suggested that damages might ordinarily be regarded as an adequate remedy for nuisance and that "an injunction should, as a matter of principle, not be granted in a case where the use of land to which objection is taken requires and has received planning permission". Lord Sumption's inclination towards monetary damages in lieu of injunctive relief was not, though, shared by Lord Mance, who pointed out that "the right to enjoy one's home without disturbance is one which I would believe that many, indeed most, people value for reasons largely if not entirely independent of money". *Coventry v Lawrence* thus did not give clear guidance as to choice of remedies: the Supreme Court merely acknowledged that the trial judge ought to have an unfettered discretion as to whether to award an injunction or damages. Despite Lord Neuberger's assertion that it was "appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible", the court shied away from enunciating definitive guidance. Rather it simply made clear what should not be done: the lower courts should not slavishly follow the four tests suggested by AL Smith LJ in *Shelfer v City of London Electric Lighting Co* (1895) 1 Ch 287: (1) Is the injury to the claimant's legal rights small? (2) Is it capable of being estimated in money? (3) Can it be adequately compensated by a small money payment? (4) Would it be oppressive to the defendant to grant an injunction ? However *Shelfer* was not overruled.

Humphrey v Rogers

This was a restrictive covenant case. Mr Humphrey had been a farmer who had sold his former farmhouse to Mr & Mrs Rogers in 2010. Mr Humphrey had retained neighbouring land and he proposed to renovate and convert two buildings on that land into dwellings. Mr & Mrs Rogers were concerned about residential development on this land and therefore obtained a restrictive covenant from Mr Humphrey by which he agreed not to erect any buildings on his retained land without the Rogers' consent.

In 2012 Mr Humphrey breached the restrictive covenant by constructing a new agricultural barn on the retained land. Mr & Mrs Rogers did not become aware of this construction until the barn was virtually complete. Rather than take legal action, they elected to seek to negotiate a new covenant making clear that the new barn could not be converted into residential use. Unfortunately no new covenant was ever completed. In 2015 the laws on permitted development were relaxed and Mr Humphrey realised that he could convert the barn into three residential dwellings without formally obtaining planning permission. He commenced the conversion without notifying Mr & Mrs Rogers and when they became aware of these works they commenced proceedings.

The decision

At trial at first instance it was accepted that the conversion works constituted a breach of covenant and HHJ Moloney QC stated: "This is the second time in five years in which the defendant has deliberately engaged in conduct for his own profit in disregard of his neighbours' rights, and without even warning them of his intentions.". Having referred to *Coventry v Lawrence*, the judge said: "...the Supreme Court's approach can be summarised as follows, that *Shelfer* is not to be regarded as a prescriptive code, but remains a valuable source of guidance as to the exercise of the court's discretion." He regarded *Shelfer* as "a helpful starting point", considered the four *Shelfer* tests, determined they all pointed towards injunctive relief and concluded that: "The case for granting injunctive relief is exceptionally clear, and there are no factors of sufficient weight to persuade me to a contrary conclusion."

On appeal, Slade J found that this approach was unimpeachable. HHJ Moloney QC had not slavishly followed *Shelfer* but used it as a starting point, or (to use the words of AL Smith LJ himself) as "a good working rule".

In *Coventry v Lawrence*, Lord Neuberger approved the dicta of Lord Macnaghten in *Colls v Home and Colonial Stores Ltd* [1904] AC 179: "In some cases, of course, an injunction is necessary – if, for instance, the injury cannot fairly be compensated by money – if the defendant has acted in a high-handed manner – if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court." HHJ Moloney QC plainly regarded Mr Humphrey's conduct as high-handed and unneighbourly and considered that the Rogers could not fairly be compensated by money for the intangible loss of the rural identity of their home. Slade J agreed the facts of the case entitled the judge to grant injunctive relief. Her decision demonstrates the correctness of Lord Neuberger's observation in *Coventry v Lawrence* that: "The decision whether to award damages instead of an injunction can be dependent on a number of issues, including the behaviour and attitude of the parties. It is therefore a matter on which the trial judge is particularly well positioned to assess in a case such as this, where there was substantial oral evidence."

Andrew Bruce is a barrister at Serle Court who acted on behalf of Mr & Mrs Rogers