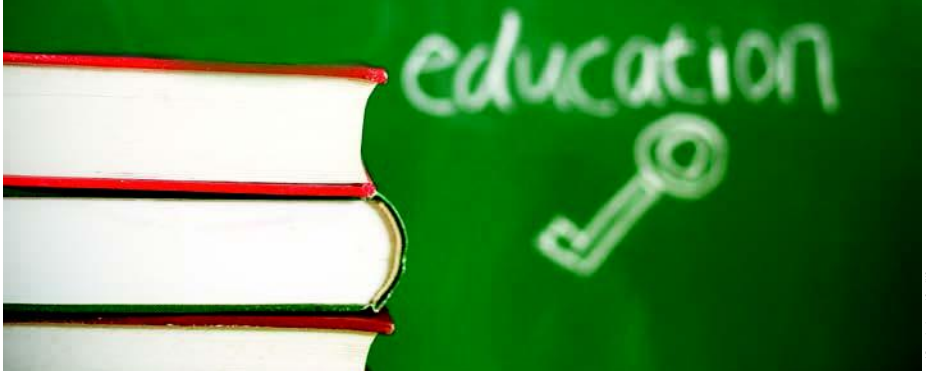
# Lessons to be learnt

How has *Lawrence v Fen Tigers Ltd* been treated at first instance, asks Andrew Francis

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**IN BRIEF**

- Trial judges are clearly applying the principles set out in Lawrence v *Fen Tigers* and the balanced approach to the proper remedy is being adopted.

A key question arising from the judgment of the Supreme Court in *Lawrence v Fen Tigers Ltd* [2014] 1 AC 822, [2014] 2 All ER 622 was how trial judges would decide whether the proper remedy for breach of property rights was an injunction, or damages in lieu.

*Fen Tigers* stated two key principles. First, where there is a breach of property rights the prima facie position is that an injunction should be granted. Second, as to the choice between an injunction and damages, the outcome should depend on all relevant facts, circumstances and arguments. Overlying both principles is the point made by the Supreme Court in *Fen Tigers* that there should no longer be slavish adherence to the "good working rule" in *Shelfer v City of London Electric Lighting Co Ltd* [1895] 1 Ch 287, [1891-4] All ER Rep 838. While there were differences between the justices of the Supreme Court as to what might be relevant in terms of the exercise of the discretion (eg, the existence of planning consent) that decision shows how the question of what is the proper remedy should be approached so that the manner of the exercise of the discretion is as predictable as possible; see paras. 121 and 123, per Lord Neuberger. There is now a balanced approach. There should be "no inclination either way" as to the remedy; per Lord Neuberger at para. 122. The approach to *Shelfer* taken in cases such as *Regan v Paul Properties* [2007] Ch 135, [2007] 4 All ER 48 and *HKRUK II (CHC) Ltd. v Heaney* [2010] EWHC 2245 (Ch), [2010] All ER (D) 101 (Sep), revealed "a serious risk of going wrong in practice"; per Lord Neuberger at para. 119. The question is, how have those principles been treated and applied by trial judges, who are effectively "at the coal face" of delivering a just outcome?

## Facts matter

Facts lie at the heart of the question as to the proper remedy. Many clients, understandably, want a guarantee as to what the court will do. Clients feel frustrated that there is no "one size fits all" answer to the question "will the court grant an injunction or damages in my case?" But as Lord Neuberger stated in *Fen Tigers* at para. 122: "The outcome should depend on all the evidence and arguments." The cases referred to below are examples of this.

## Consideration of Fen Tigers by the Court of Appeal

In *Higson v Guenault* [2014] EWCA Civ 703, the Court of Appeal had to consider whether a mandatory injunction ordered at first instance should be upheld. The dispute concerned the width of a right of way to a Tennis Club. This was crucial in order that lorries could deliver hot tar macadam, when required, to resurface the tennis courts. Having found that a fence erected by the Higsons caused a substantial interference to the right of way, the Court of Appeal held that the proper remedy was the injunction. At para. 51, Aikens LJ (with whom Eias and Fulford LJJ agreed) held as follows: "There was some debate as to the correct test to apply when considering whether there should be an injunction or an award of damages in lieu. We were referred to the well-known authority of *Shelfer v City of London Electric Lighting Co* particularly the four parts of the 'working rule' of AL Smith LJ at 322–3 and the comments on that case by Lord Neuberger of Abbotsbury PSC and the somewhat more radical suggestion of Lord Sumption JSC in *Lawrence v Fen Tigers Ltd*. In my judgment, if the issue is considered on the footing that an actionable nuisance has been committed, then even if it is the four parts of AL Smith LJ's "working rule" that are to be considered, they are not satisfied; so an injunction should be granted. If the test is whether to exercise a more general discretion (still assuming that an actionable nuisance has been committed) then it seems to me the balance falls firmly in favour of an injunction in the circumstances of this case. On the other hand, if the matter now has to be considered on the basis that the 2004 fence constitutes a trespass, then, plainly, an injunction is merited and it would not be oppressive to make the order the judge did."

A key factor in that case was that unless the right of way could be used by, in particular, lorries delivering material for maintenance to the tennis club, it could not function as such. This was the fact that mattered. The order for the removal of fence panels, whether a trespass, or a nuisance to the easement, was hardly an oppressive, or disproportionate remedy. Money could not compensate for the interference.

## The first instance cases

These are:

- *Charlie Properties Ltd. v Risetail Ltd* (Mr N. Strauss QC, sitting as deputy judge of the High Court, Chancery Division, 11 November 2014). That was an application for summary judgment for trespass to land, which was granted. It was held that having regard to *Fen Tigers* and the nature of the cause of action, and the plain and unlawful appropriation of the claimant's land for development, there was no realistic prospect of defending the claim for an injunction at trial. A flagrant trespass to land almost invites an injunction.
- *Scott v Aimiuwu* (Mr Recorder Cole, Central London County Court, 18 February 2015). In *Aimiuwu* the defendants had, despite protests from the claimants, extended the rear of their house; "the extension". The extension actionably interfered with light though four windows in the claimant's house, two of them serving a garage/workshop. The other two served a utility room and a bathroom. The case raised issues over the pre-claim conduct of the parties, which included issues over an alleged

agreement by the claimants not to object to the extension, and estoppel. As these defences were rejected by the judge the key question was what was the proper remedy? No interim relief had been sought (the judge did not criticise the claimants for that) but formal warnings were given by the claimants' solicitors and undertakings were given by the defendants. The claimants sought a mandatory injunction to remove the offending part of the extension (92 sq m). It was held that the defendants misguidedly believed that planning consent gave them the right to continue the work. The defendants relied on the small areas of loss (78.02 sq ft EFZ with a net book value loss of £11,569—the claimant's property being valued at £1.1m in November 2014) and the fact that the rooms affected was "secondary" space. The judge considered *Fen Tigers* and in particular the principles set out above. The judge declined to grant a mandatory injunction for the following reason. First, the injury was small compared with the overall value of the claimants' property; see figures above. Second, the injury was to secondary space. Third, it would be oppressive to make an order requiring the extension to be cut back, having regard to the effect on the defendants' family and the cost of doing so. "The adverse effect of a mandatory injunction upon the defendants would be much greater than its beneficial effect on the claimants" (judgment para. 121). Having considered the proper approach to awarding damages, the Judge assessed them on a hypothetical negotiating position, just before the loss occurred, applying *Wrotham Park v Parkside Homes Ltd* [1974] 2 All ER 321, [1974] 1 WLR 798, in the sum of £30,000. A profit related calculation based on one third of £190,000 (£65,000) was rejected. The judge also rejected awarding damages on a book value basis (£11,569). He also held that considering the assessment of damages in *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 2 All ER 888, [1986] 1 WLR 922, "there is no figure by which the book value is or ought conventionally to be increased to represent appropriate general damages" (judgment para 140) (this is an important warning to rights of light surveyors).

- *Scott v Winter* (Mr Recorder Kramer, The County Court at Newcastle Upon Tyne, Chancery Business, 16th March 2015). In *Winter,* part of the garden to Mrs Winter's property was subject to a vendor's restrictive covenant imposed in 1962 that she (as successor in title of the original covenantor) would not "build or allow to be built any erections of any kind whatever on the land to the west [of the land conveyed] it being the object of the parties hereto to prevent any obstruction to the view westwards from [the land conveyed]" (the covenant). Despite solicitors' warnings of enforcement of the covenant, Mrs Winter started building a house on the burdened land in May 2014. In June the claimants issued the claim seeking injunctive relief, Mrs Winter having broken an undertaking given on her behalf. Interim injunctions stopping work were granted in late June and July, which Mrs Winter broke. At the trial in December 2014 (the house being incomplete) the judge found that (a) the attractive view westward from the claimants' property would be obstructed by the new house; (b) this would be a substantial injury to the claimants; and (c) it would not be oppressive to remove the partly built house given in particular Mrs Winter's conduct (it was held that she had realised her wrongdoing) and that it was "one of the clearest cases" for the grant of the injunction sought. In considering *Fen Tigers* the judge summed up the issue as one where "ultimately, it is a question as to where the justice of the case lies" (judgment para 61). Significantly, the judge held that in a covenant case the existence of planning permission (being irrelevant on that application) was not to be taken into account (judgment para 62). Finding against the defendant on technical issues as to the enforceability of the covenant an injunction was granted ordering the removal of the partly built house, the clearing of the site and restraining further breach.

## Conclusion

Trial judges are clearly applying the principles set out in *Fen Tigers* and the balanced approach to the proper remedy is being adopted. That is not surprising given the high authority of that decision.

The nature of the cause of action must not be ignored. Nuisance, trespass and breach of covenant all present different thresholds as to the risk of an injunction.

The relevant facts are crucial and when applied to the principles, those facts will determine the result. The task of any litigator will be to establish the relevant facts, and that often takes time and effort. That is something clients must bear in mind when costs are being considered.

The uncertainty in terms of predicting the remedy which will be granted must be part of any advice in litigation. But preparing an objective "balance sheet" of all relevant facts and circumstances is part of giving that advice. That brings us back to the words "facts matter". **NLJ**

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