INJUNCTIONS AND DAMAGES

Taking *Shelfer* off the Shelf

In *Lawrence v Fen Tigers Ltd* ("*Fen Tigers*") the UK Supreme Court reviewed the criteria for awarding damages in substitution for an injunction in the exercise of discretion under s 50 of the Senior Courts Act 1981 (c 54), commonly known as Lord Cairns' Act. The decision is significant because equivalent provisions have been enacted by many other common law jurisdictions. The Supreme Court held that public interest considerations were relevant to the exercise of the statutory discretion. The article argues that the public interest should have only a small role to play in determining the outcome of "damages *versus* injunction" disputes in modern private law litigation. Moreover, the public interest should rarely, if ever, be a decisive factor in private law remedy selection. The article concludes by identifying some unresolved issues in quantifying damages awards under the Act.

Michael **BRYAN***
MA, BCL (Oxford), PhD (London).
Emeritus Professor of Law, University of Melbourne.

I. Introduction

1 Upon proof of the commission of a private law wrong a court will sometimes have to decide whether to grant an injunction to prevent repetition or continuation of the wrong, or whether to award compensatory damages for the breach.[1] The starting point for analysis of the choice of remedy under English law still largely reflects the historic jurisdictional separation of common law and equity. An injunction may be awarded to prevent the occurrence or continuation of a common law wrong, such as a tort or a breach of contract, if compensatory damages are inadequate. But in equity's original jurisdiction an injunction will be awarded to prevent a breach of trust or other equitable wrong without the necessity of having to prove the inadequacy of compensation. In addition, legislation in common law jurisdictions deriving from s 2 of

* Thanks to Elise Bant, Katy Barnett and an anonymous referee for their insights and advice. The usual disclaimer applies.

1 Awards of damages to compensate for past loss are often combined with injunctions to prevent future loss, but they are not the concern of this article.

the Chancery Amendment Act 1858[2] ("Lord Cairns' Act") provides that in any case in which a court has jurisdiction to entertain an application for an injunction it may award damages (commonly known as equitable damages) in substitution for the injunction.[3] The purpose of this article is to examine how courts exercise their discretion to award damages under the Act. What will be shown is that the simplicity in the wording and objectives of s 2, and its modern counterparts, conceals the value judgments that must be made in applying the provision, as well as the difficulties involved in placing a monetary value on specific performance or injunctive relief.

2 The vehicle for re-assessing the Act is the decision of the UK Supreme Court in *Lawrence v Fen Tigers Ltd*[4] ("*Fen Tigers*"), a decision on the tort of private nuisance. One of the issues in the case concerned the availability of Lord Cairns' Act damages as an alternative to the award of an injunction. The Supreme Court proposed modifications of the criteria for the award of damages laid down in the earlier Court of Appeal decision of *Shelfer v City of London Electric Lighting Co*[5] ("*Shelfer*"), although the precise extent of these modifications is unclear. A critical question in *Fen Tigers* was whether the public interest could be taken into account in determining whether injunctive relief should be granted. This is not a new question. Nineteenth-century equity judges had occasionally to balance private rights against the benefits the community would obtain from the innovations of the Industrial Revolution, although the balancing exercise had ceased to be undertaken by the end of the century for reasons explored later in this article.[6] At the doctrinal level *Fen Tigers* raises important questions, only lightly touched upon in the decision, as to the place of Lord Cairns' Act in the post-Judicature Act scheme of remedies, and how monetary awards under the Act should be assessed.

3 The first part of this article[7] examines the circumstances in which the "injunction *versus* damages" question arises in private law litigation. It will be shown that Lord Cairns' Act should only have a limited role to play where the court exercises a post-Judicature Act

2 c 27 (UK).

3 The provision currently in force in England and Wales is s 50 of the Senior Courts Act 1981 (c 54). For the different versions that have been adopted in common law jurisdictions see Katy Barnett & Michael Bryan, "Lord Cairns' Act: A Case Study in the Unintended Consequences of Legislation" (2015) 9 J Eq 150.

4 [2014] AC 822; [2014] UKSC 13. The case made two return visits to the Supreme Court (*Coventry v Lawrence (No 2)* [2015] AC 106; [2014] UKSC 46 and *Coventry v Lawrence (No 3)* [2015] 1 WLR 3485; [2015] UKSC 50) on issues not relevant to this article.

5 [1895] 1 Ch 287.

6 See paras 28–29 below.

7 See paras 4–30 below.

jurisdiction administering both common law and equity. The second part[8] examines how the judgments of the Supreme Court in *Fen Tigers* analysed the "injunction *versus* damages" question. The final part[9] explores some of the issues, relating both to remedy selection and to quantifying damages, that were left unresolved by the *Fen Tigers* decision.

II. The scope of the Lord Cairns' Act jurisdiction: Real and illusory choice between damages and injunctions

A. History and context

4 Lord Cairns' Act was an outcome of the Third Report of the Commissioners Appointed to Inquire into the Practice of Chancery, published in 1856.[10] The proposal to confer the power to award damages on equity judges was uncontroversial, being considered the natural corollary of the power bestowed on common law courts to grant injunctions, enacted by s 79 of the Common Law Procedure Act 1854.[11] Section 2 provided:

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.

The Act provided no guidance to equity judges as to how their discretion to award damages was to be exercised. Save for a little-used provision empowering the court to summon a jury, the promoters of the Act were content to leave the principles of assessment to be elaborated by Chancery judges.[12]

8 See paras 31–62 below.
9 See paras 63–66 below.
10 Peter M McDermott, *Equitable Damages* (Sydney: Butterworths, 1994); John A Jolowicz, "Damages in Equity: A Study of Lord Cairns' Act" (1975) 34 Camb LJ 224.
11 c 125 (UK).
12 See Katy Barnett & Michael Bryan, "Lord Cairns's Act: A Case Study in the Unintended Consequences of Legislation" (2015) 9 J Eq 150 at 152–153. See also s 2 of the Chancery Regulation Act 1862 (c 42) (UK), empowering a Chancery judge to send an issue to be tried by a common law court, which could also result in a jury decision.

5 The original legislation has been re-enacted in other common law jurisdictions with variations in the wording of its material provisions but with no legislative intent to alter the substance of the jurisdiction.[13]

6 The cases with which this article is primarily concerned are those in which the court has a genuine choice between granting an injunction and awarding damages. But not all cases decided under Lord Cairns' Act are "injunction *versus* damages" cases in this sense. The Act has sometimes been applied in cases where there was no possibility, or at least no realistic possibility, of the claimant obtaining an injunction. Such cases need to be identified, if only to distinguish them from the central concern of the article, namely how courts exercise a discretion between an injunction and a damages award where a genuine choice has to be made between alternative remedies.

7 First, there are cases where an order of specific performance or an injunction has been made, but for practical reasons the order cannot be enforced, so that the court later replaces it with a damages award. For example, a vendor under a contract for the sale of land may obtain an order of specific performance against a defaulting purchaser, but before the order can be enforced the vendor's mortgagee sells the land in question because the vendor is in arrears with its mortgage repayments.[14] Secondly, the discretionary reasons for refusing the injunction (such as the exceptional hardship the making of the order would impose on the defendant) may be so strong in some cases that there is no realistic possibility of equitable relief, with the result that damages become the more-or-less automatic remedy. There are many examples of self-evidently strong grounds for refusing an injunction. One is where the injunction, if granted, would compel the defendant to initiate doubtful or socially undesirable litigation against a third party.[15]

13 The holding in *Giller v Procopets* (2008) 24 VR 1 that the revised version of the Supreme Court Act 1986 (Vic) justifies an award of statutory damages for breach of confidence is controversial. See Katy Barnett & Michael Bryan, "Lord Cairns' Act: A Case Study in the Unintended Consequences of Legislation" (2015) 9 J Eq 150 at 158–163.

14 *Johnson v Agnew* [1980] AC 367. Charles Mitchell, "*Johnson v Agnew* (1979)" in *Landmark Cases in the Law of Contract* (Charles Mitchell & Paul Mitchell eds) (Hart Publishing, 2008) at p 351.

15 *Wroth v Tyler* [1974] Ch 30, where an injunction would have compelled a husband to litigate against his wife. The actual basis on which damages were assessed by Megarry J was disapproved in *Johnson v Agnew* [1980] AC 367 at 379 and *Bracewell v Appleby* [1975] Ch 408. *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 arguably belongs to the "automatic" damages award category: see *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811, *per* Brightman J, who "never had a moment's doubt" that a mandatory injunction to compel houses to be pulled down "would … be an unpardonable waste of much needed houses".

Finally, in some cases the claimant would almost certainly have obtained an injunction if a timely application had been made, but it later becomes clear that the wrong will not continue or be repeated, so that the claimant is denied an injunction and remitted to her claim in damages under Lord Cairns' Act. For example, an injunction to restrain a breach of confidence will be refused if the information subsequently ceases to be confidential, of if the improper disclosure cannot be repeated.[16]

8 In yet other cases the court has a genuine choice between the injunction and a damages award, but the choice is (or ought to be) governed by general law principles, not by Lord Cairns' Act. The principle applicable in these cases will usually depend on the jurisdictional basis of the cause of action. So where a common law duty has been broken, equitable relief will only be granted in equity's auxiliary jurisdiction if common law compensatory damages are inadequate.[17] In equity compensation can be awarded in substitution for, or in addition to, an injunction where an equitable wrong, such as a breach of trust, has been committed without reference to any "inadequacy" principle. Equity here exercises its inherent jurisdiction to fashion relief according to the necessities of the case.[18]

9 This summary of the relationship between injunctions and damages at law and in equity highlights the extent to which jurisdictional criteria, as well as criteria based on the character and efficacy of the remedy, influence the choice of remedy. Lord Cairns' Act has been superimposed on the application of the jurisdictional criteria, thereby adding another layer of complexity. But the difficulties do not end there. There are pockets of common law and equity where we find compensation awards being made under Lord Cairns' Act when we might expect the "injunction *versus* damages" question to be decided in accordance with basic common law or equitable principle. On the common law side, it has become routine, upon proof of the commission of the torts of private nuisance or trespass to land, for an injunction to be granted as the primary remedy, with damages being awarded under Lord Cairns' Act only if for some reason an injunction would be inequitable. Lord Sumption noted in *Fen Tigers* that the usual reason given in the cases for granting an injunction is that the injury in private nuisance is considered to be "irreparable", in the sense that a money award cannot atone for it.[19] The primacy of the injunction in the private

16 *Giller v Procopets* [2008] 24 VR 1. For criticism of the reasoning see John Dyson Heydon, Mark James Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (Sydney: Lexis Nexis Butterworths, 5th Ed, 2015) at para 24-085.

17 *Beswick v Beswick* [1968] AC 58.

18 *Nocton v Ashburton* [1914] AC 932.

19 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 863, [159], *per* Lord Sumption.

law of nuisance might conceivably have been analogised to equity's preference for orders of specific performance, rather than damages, to enforce contracts for the sale of land, on the basis of the supposedly unique, or at least special, character of land.[20] In practice, however, as Lord Sumption also noted, the courts have not consistently applied the equitable "inadequacy of damages" principle to cases of private law nuisance. Many have simply applied Lord Cairns' Act criteria laid down in the Court of Appeal decision in *Shelfer*.[21] That decision in turn assumed, without analysis, that the injunction was the primary remedy in private nuisance cases.

10 On the equity side, compensation for breach of confidence has been awarded, not in equity's original jurisdiction to compensate for loss suffered as a result of the commission of a breach of duty, but as a result of a "beneficent interpretation" of Lord Cairns' Act.[22] Why a "beneficent interpretation" of the Act is needed to compensate for loss caused by a breach of confidence but not by a breach of fiduciary duty, where equitable compensation is the standard monetary remedy for loss, has never been explained. The difference may be attributable to nothing more than a judicial failure in some of the leading cases to appreciate that equitable compensation was the appropriate monetary remedy.[23]

11 Although Lord Cairns' Act would have been necessary in 1858 to justify a compensatory award in all these categories except arguably the breach of confidence cases,[24] reliance on the Act for this purpose has been unnecessary since 1873 when the administration of law and equity was fused. The provision which should have rendered reliance on Lord Cairns' Act superfluous was s 24(7) of the Supreme Court of Judicature Act 1873[25] ("Judicature Act 1873"), now re-enacted as s 49(2) of the Senior Courts Act 1981.[26] This subsection enabled a court empowered to apply both common law and equity:[27]

20 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 863, [160], *per* Lord Sumption.

21 Discussed at paras 16–30 below.

22 *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 286, *per* Lord Goff. Although awards have been justified by reference to the wording of modern versions of the Chancery Amendment Act 1858 (c 27) ("Lord Cairns' Act"), an examination of the legislative history of these versions does not support this justification. See Katy Barnett & Michael Bryan, "Lord Cairns' Act: A Case Study in the Unintended Consequences of Legislation" (2015) 9 J Eq 150 at 158–163.

23 *Seager v Copydex* [1967] 1WLR 923 at 932; *Seager v Copydex (No 2)* [1969] 1 WLR 809 at 813, where Lord Denning analogises "damages" for breach of confidence to damages for conversion.

24 The law of breach of confidence was relatively undeveloped in 1858 but compensation was available in equity's exclusive jurisdiction.

25 c 66 (UK).

26 c 54 (UK).

27 Like the Lord Cairns' Act equivalent provisions are found in other common law jurisdictions.

> … to grant … all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning such matters avoided.

The provision prevents the circuity of action involved in hearing the claim for an injunction in one court before remitting the matter to another court to enable damages to be assessed. A court administering a fused jurisdiction can finally determine all matters, including remedial matters, between the parties. A court exercising its powers under this provision to award damages, as an alternative to the injunction claimed, will not be committing "fusion fallacy" of confusing common law and equity provided that the substantive differences between common law and equitable doctrines are observed (for example, by not awarding common law damages for a breach of trust).

B. An unnecessary statute?

12 Does the enactment of the judicature legislation mean that Lord Cairns' Act is a dead letter? The answer to this question is "not entirely", although the gap in the judicature legislation which only Lord Cairns' Act can fill is quite small. Section 24(7) empowered courts exercising a fused jurisdiction to grant remedies that *could* have been granted at common law or in equity prior to the enactment of the judicature legislation in 1873. But it does not authorise the granting of remedies that *could not* have been granted in either jurisdiction before that date. In contrast, the Lord Cairns' Act permitted damages to be awarded where they could not have been awarded by a court of equity, provided that there was jurisdiction to award an injunction or specific performance. There is at least one situation in which damages could not have been awarded by a court of equity before 1873 but have become available solely by virtue of Lord Cairns' Act. This is where the claimant reasonably expects that loss will be caused by an infringement of her rights which has *not yet* occurred.[28] Common law damages are not available to compensate for loss caused by a prospective infringement of a legal right, but they can be awarded under the Act as an alternative to a

28 Another situation in which damages under Lord Cairns' Act can be awarded where arguably neither a common law nor a court of equity could have awarded damages before the enactment of the judicature legislation is where damages are ordered against a successor-in-title of a covenantor of a restrictive covenant of land: *Johnson v Agnew* [1980] AC 367 at 400, *per* Lord Wilberforce. But in principle equitable compensation should be available in this case for infringement of the covenantee's equitable right.

quia timet injunction which would otherwise have been granted to prevent the threatened infringement.[29]

13 A leading authority on Lord Cairns' Act prior to *Fen Tigers*, *Leeds Industrial Co-Operative Society Ltd v Slack*[30] ("*Slack*"), illustrates how the Act fills the gap. The claimant was entitled to a right of light to houses he owned in Leeds. He successfully complained that certain buildings the defendant was in the course of constructing would interfere with his right. A majority of the House of Lords held there was jurisdiction to award damages under the Act even though the cause of action in nuisance had not accrued at the date of claim. Section 24(7) of the Judicature Act 1873 could not have justified the award since there was no power vested in either common law courts or courts exercising equity jurisdiction before 1873 to award damages for a cause of action which had not yet accrued. Damages could nonetheless be awarded under Lord Cairns' Act as an alternative to the *quia timet* injunction which was the primary remedy available to prevent the infringement of the plaintiff's right.

14 *Slack* can be contrasted with cases where the cause of action has accrued but the damage is ongoing. In the latter case, for example, where a nuisance or trespass continues over a period of time, "a fresh cause of action arises with every minute"[31] and that loss can be sued for as soon as each cause of action accrues.[32] Since the cause of action has accrued, awards of damages in these cases need not be based on Lord Cairns' Act.

15 In conclusion, although the jurisdiction to award damages under Lord Cairns' Act is well established and continues to be exercised when common law and equitable wrongs have been committed, the Act is, strictly speaking, only necessary in the few cases, exemplified by *Slack*, in which the claimant's cause of action has not accrued when the application for an injunction has been made.

C. The Shelfer *working rule*

16 The leading authority on the exercise of discretion under Lord Cairns' Act for over a century was the judgment of A L Smith LJ in

29 Common law damages can be awarded for future loss caused by a cause of action which has accrued, in other words where the infringement of the right has occurred. This is commonly done, for example, where damages for loss of future earnings are assessed in negligence claims.

30 [1924] AC 851. See similarly *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245.

31 Harvey McGregor, *McGregor on Damages* (London: Sweet & Maxwell, 19th Ed, 2014) at para 11-035.

32 *Holmes v Wilson* (1839) 10 A & E 503; (1839) 113 ER 190.

Shelfer. The judgment laid down a "good working rule", necessitating four conditions to be satisfied before damages could be awarded under the Act in substitution for an injunction. The "good working rule" was not invariably applied in later decisions,[33] but it remained influential in "injunction *versus* damages" cases until the Supreme Court decision in *Fen Tigers*.

17 The claimants in *Shelfer* were the landlord and tenant of a public house. The defendant had erected an electricity-generating station adjacent to the public house. The claimants complained that the noise and vibrations caused by the defendant's activities, which had resulted in physical illness suffered by the tenant's wife and daughter as well as damage to the public house, constituted a nuisance. The defendant argued that the activities were authorised by electricity supply legislation and emphasised the social utility of the activities: "six miles and a half of the principal thoroughfares in the City of London were lighted with arc lights, the current of which was generated at the Defendants' works".[34] Kekewich J found that the noise and vibrations of the generating station constituted a nuisance to which statutory authorisation pursuant to the Electricity Lighting Acts 1882[35] and 1888[36] afforded no defence. In deference to the "great inconvenience" that would be caused by stopping the defendant's business, however, an injunction was refused and damages awarded.[37] The Court of Appeal allowed the appeal against the refusal of the injunction. A L Smith LJ summarised the conditions for making a damages award:[38]

> 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.

33 *Colls v Home & Colonial Store Ltd* [1904] AC 179 at 192–193, *per* Lord Macnaghten, and 212–213, *per* Lord Lindley, adopted a discretionary approach more favourable to a damages award. See also *Kine v Jolly* [1905] 1 Ch 480 and *Fishenden v Higgs & Hill Ltd* (1935) 153 LT 128.

34 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 290.

35 c 56 (UK).

36 c 12 (UK).

37 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 300, *per* Kekewich J.

38 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322–323, *per* A L Smith LJ.

That these four conditions were not intended to be definitive is shown by the immediately following passage in A L Smith LJ's judgment in which he stated that there might be cases where they were satisfied but the claimant would still be entitled to an injunction, for example, where the defendant had acted in reckless disregard of the claimant's rights.

18 The "good working rule" has been criticised for its generality – when exactly can an injury be compensated by a small money payment? When will it be oppressive to grant an injunction? But it would be more just to aim this criticism at the Chancery Commissioners and the Legislature for failing to prescribe criteria for the exercise of the Lord Cairns' Act jurisdiction. The courts were provided with neither a map nor a compass to guide them. In their absence it was inevitable that judicial navigation aids would be developed only very tentatively. Until *Fen Tigers* a marked judicial reluctance to substitute a damages award for an injunction was evident, except in some cases involving interference with rights to light.[39] In rights to light cases the absence of any clear physical or documented evidence of the claimant's right has sometimes evoked judicial sympathy for an innocent defendant, particularly where the defendant is a developer whose building project is well advanced before the application for an injunction is made.[40]

19 The various criticisms of the *Shelfer* "working rule" can be summarised as follows.[41] The first is that the basis of assessment is uncertain. The second is that an award of damages instead of an injunction to protect the claimant's property right amounts to a judicial expropriation, or forced sale, of that right. Finally, the "working rule" takes no account of the interests of non-parties potentially affected by the award of an injunction or of any community interest that might be prejudiced by its award.

(1) Uncertainty of quantification

20 The principles of assessment of Lord Cairns' Act damages vary according to the wrong committed and the harm suffered. In general terms, assessment is not particularly difficult when damages under the Act are awarded on the same basis as compensatory damages at

39 *Colls v Home & Colonial Store Ltd* [1904] AC 179; *Leeds Industrial Co-Operative Society Ltd v Slack* [1924] AC 851.

40 Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014) ch 4, discussing *HRUK II (CHC) v Heaney* [2010] EWHC 2245 where an injunction was granted which required demolition of the top two storeys of a new building, some of which had already been let by the developer who had infringed the right to light.

41 Donald Harris, David Campbell & Roger Halson, *Remedies in Contract and Tort* (Cambridge: Cambridge University Press, 2nd Ed, 2005) at pp 491–495.

common law. All difficulties of quantification in these cases are the difficulties already experienced at common law.[42] No additional uncertainty is caused by assessing damages under the Act. There is, however, greater uncertainty where damages are assessed as a reasonable licence fee the claimant would demand and the defendant pay for interfering with the claimant's rights. Licence fee awards under Lord Cairns' Act are commonly found in nuisance cases, including cases of interference with a right to light, but they have also been made in cases of breach of contract[43] and trespass.[44] It has been judicially conceded that the fee can only be in the nature of a "ballpark figure".[45] The figure is based on a "hypothetical bargain" the parties are taken to have made. But the "hypothetical bargain" is in fact a mythical bargain if the claimant would never have negotiated for the release of her rights.[46]

21 Moreover, if the licence fee is based on a proportion of the profits the defendant has made, or is likely to make, from interfering with the claimant's rights, the selection of the proportion and the calculation of future profits can be no more than intelligent pre-estimates of possibilities.[47] Opinions will inevitably differ as to whether the correct proportion has been chosen. In cases where a developer has interfered with, or is threatening to interfere with, the claimant's right to light, the Law Commission's recent report on rights to light[48] provides evidence of disquiet expressed that relevant factors were not always fully taken into account in assessing the proportion. There was a view, put forward in many submissions and with which the Commission expressed some sympathy, that:[49]

> … damages represent a windfall to the dominant owner which bears little resemblance to the loss that the dominant owner may have suffered, and which does not reflect the fact that the developer is bearing all of the risk associated with the development in order to make the profit.

42 For example, the assessment of damages for breach of contract where an order of specific performance or an injunction is discharged: *Johnson v Agnew* [1980] AC 367.

43 *Wrotham Park Estate Co Ltd v Parkside Homes* [1974] 1 WLR 798.

44 *Bracewell v Appleby* [1975] Ch 408; *Jaggard v Sawyer* [1995] 1 WLR 269.

45 *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922 at 932, *per* Millett J.

46 *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

47 See Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014) at para 5.53 on the range of percentages employed in nuisance and trespass cases when damages are assessed on a profit-sharing basis.

48 Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014).

49 Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014) at para 5.51.

(2) Judicial expropriation

22 The second criticism is that to award damages for breach of a duty under Lord Cairns' Act in substitution for an injunction amounts to judicial expropriation of the right infringed by the breach. The claimant is compelled by court order to accept payment in return for allowing the defendant to continue acting in breach of the duty owed to the claimant. This objection to a damages award was identified by Lindley LJ in *Shelfer*:[50]

> [T]he Court of Chancery has repudiated the notion that the Legislature intended to turn that Court into a tribunal for legalizing wrongful acts; or, in other words, the Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict.

More pungently, Lord Sumner stated in *Slack*:[51]

> I doubt whether it is complete justice to allow the big man, with his big building and his enhanced rateable value, and his improvement to the neighbourhood to have his way, and to solace the little man for his dark and stuffy little house by giving him a cheque that he does not ask for.

23 An injunction is by its very nature a coercive order, and compliance with the court order will often have adverse economic, as well as personal, consequences for the defendant. A claimant awarded an injunction is, by the same token, better placed than a recipient of a damages award. Her position is strong not just because the injunction is coercive but also because, being coercive, the claimant can fix the sum payable by the defendant for release from the obligations imposed by its terms. In *Isenberg v East India House Estate Co Ltd*[52] Lord Westbury stated that:[53]

> I hold it … to be the duty of the Court in such a case as the present not, by granting a mandatory injunction, to deliver over the Defendants to the Plaintiff bound hand and foot, in order to be made subject to any extortionate demand that he may by possibility make …

This *dictum* identifies the overwhelming bargaining advantage enjoyed by the party awarded an injunction in later negotiations with the

50 *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 315–316, *per* Lindley LJ.

51 *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 872, *per* Lord Sumner.

52 (1863) 3 DeGJ & S 263; (1863) 46 ER 637.

53 *Isenberg v East India House Estate Co Ltd* (1863) 3 DeGJ & S 263 at 273; (1863) 46 ER 637 at 641.

defendant for release from the obligations imposed by the court's order.[54] A damages award under Lord Cairns' Act to a claimant seeking an injunction to enforce a property right extinguishes an important economic function of the property right, namely the power to regulate the terms, if any, on which any interference with the right will be permitted.

24 Courts are aware that the leveraging function of a property right by the right-holder is open to abuse. This is a principal reason why it may be "oppressive to the defendant" within the fourth criterion of the *Shelfer* rule to award an injunction, thereby justifying a damages award.[55] But more often the "judicial expropriation" objection is effective (as it was in *Shelfer*) to dissuade judges from preferring damages to an injunction.

(3) The public interest

25 Prior to *Shelfer* there was no settled judicial view on whether the interests of third parties, or of community welfare, were relevant to the exercise of the court's discretion to grant an injunction. The division of opinion is exemplified by the judgments delivered in *Raphael v Thames Valley Railway Co*[56] where a railway company contracted with a landowner to execute certain works affecting the latter's land. The agreed work was difficult to complete in accordance with the terms of the contract and the company executed them, in breach of contract, so as to give the landowner a less convenient approach to his home. The landowner claimed specific performance of the contract. The order would have required the company to pull down a bridge and remove a road which had been constructed in breach of the agreement. In refusing to order specific performance Romilly MR noted that the dispute related only to "access to a gentleman's mansion" and that "it is the duty of the Court to remember that there is another class of persons

54 The power to bargain around the discharge of an injunction informs the distinction between property rules and liability rules in the classic article, Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

55 *Colls v Home & Colonial Stores Ltd* [1904] AC 179 at 193, *per* Lord Macnaghten: "[T]he Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money." See also *Jaggard v Sawyer* [1995] 1 WLR 269 at 288, *per* Millett LJ.

56 (1866) LR 2 Eq 37, reversed (1867) 2 Ch App 147. See also *Wood v Sutcliffe* (1851) 2 Sim (NS) 163; (1851) 61 ER 303 (river pollution case). Kindersley V-C noted (at 167) that, given the growth of a suburb of Bradford, no injunction would restore pure water, for "not all the Courts of law and Equity in the kingdom" could "remove the mass of human beings who are congregated on the banks of the stream".

who are not represented in this suit, and whose interests must be carefully watched; that class is the public".[57]

26 On appeal Lord Chelmsford LC disapproved of this explicit appeal to the public interest and ordered specific performance. The Chancellor considered it "questionable" whether considerations of public convenience ought to be relevant where, as in this case, the breach of contract had been deliberate.[58] However, even if the public interest could be weighed in the equitable scales, specific performance should not be refused in this case since the railway company had previously given a voluntary undertaking to modify or remove their building works as the court should direct. Denying the plaintiff specific performance on "public interest" grounds would nullify the effect of the undertaking.[59] Lord Chelmsford's judgment left open the possibility that public interest considerations might be relevant where the defendant had not deliberately committed a breach of duty. But the notion that an equity judge has a duty to protect public interests not before the court, which Romilly MR had endorsed, was effectively scotched.

27 An injunction's operation might be suspended with a view to giving time to a defendant to resolve problems created by his nuisance-creating activities, where those activities were undertaken with legislative authority.[60] Alternatively, undertakings could be accepted in lieu of the injunction restraining the defendant from committing the nuisance.[61] But the judicial view which ultimately prevailed sharply distinguished the functions of Parliament and the courts when it came to giving effect to public interest arguments. The view was encapsulated in a *dictum* of Page Wood V-C in *Attorney-General v Birmingham*:[62]

> If, after all possible experiments, [Birmingham council] cannot drain Birmingham without invading the plaintiff's private rights, they must apply to Parliament for power to invade his rights; and if the case be of such magnitude as it is represented to be, Parliament, no doubt, will take measures accordingly, and the plaintiff will protect himself as best he may.

---

57 *Raphael v Thames Valley Railway Co* (1866) LR 2 Eq 37 at 46–47, *per* Romilly MR.

58 *Raphael v Thames Valley Railway Co* (1867) LR 2 Ch App 147 at 151, *per* Lord Chelmsford LC.

59 *Raphael v Thames Valley Railway Co* (1867) LR 2 Ch App 147 at 151–152, *per* Lord Chelmsford LC.

60 *Attorney-General v The Metropolitan Board of Works* (1863) 1 H & M 298; (1863) 71 ER 130.

61 *Attorney-General v The Metropolitan Board of Works* (1863) 1 H & M 298; (1863) 71 ER 130.

62 *Attorney General v The Council of the Borough of Birmingham* (1858) 4 K & J 528 at 541; (1858) 70 ER 220 at 226. See Michael Lobban, "Nuisance" in William Cornish *et al*, *The Oxford History of the Laws of England* vol XII (Oxford University Press, 1820–1914) at pp 1105–1111.

28 A little-noticed consequence of the *Shelfer* decision was that it wrote the public interest out of the law of injunctions, as far as private law disputes were concerned. This was in spite of the fact that the defendant in *Shelfer* had explicitly placed the public benefits of electricity supply at the forefront of its argument. The case for a damages award was based on social utility considerations – namely that the generating station was authorised by the Electricity Lighting Acts and lit a substantial part of the City of London, so that an injunction would materially interfere with the provision of lighting. These considerations were insufficient to deny the claimants the benefit of an injunction, and A L Smith LJ's "good working rule" omitted any reference to the public interest.

29 A later example of the irrelevance of public policy considerations to the choice between damages and an injunction is *Morris v Redland Bricks Ltd*,[63] the leading English decision on the criteria for the award of a mandatory injunction. The defendant was a brick company. Excavations on its own land caused a slippage of part of the property onto the claimant's land. The claimant applied for a mandatory injunction to compel the defendant to restore support to his land. It was estimated that the restoration work would cost £35,000, and that the value of the relevant part of the claimant's land was between £1500 and £1600. Counsel for the defendant, arguing that damages should be substituted for the mandatory injunction, made the following appeal to employment policy:[64]

> [I]t is relevant that on the [defendant's] land 180 persons are employed who are drawn from a small rural community. There is at present a slump in the brick industry and clay pits are being closed down. If remedial work costing £35,000 has to be expended in relation to the activities of this site it is more likely that this pit will be placed higher on any list of the [defendant's] pits which are earmarked for closure.

The defendant succeeded in having the injunction discharged but Lord Upjohn's authoritative enumeration of the conditions for the award of a mandatory injunction contained no reference to the public interest.

30 One well-known landmark in nuisance law stands out against the established judicial practice of excluding consideration of public interest arguments in exercising discretion under Lord Cairns' Act. This is the Court of Appeal decision in *Miller v Jackson*.[65] Claims were

63 [1970] AC 652.

64 *Morris v Redland Bricks Ltd* [1970] AC 652 at 659, *per* Sir Milner Holland QC.

65 [1977] 1 QB 966. References to public policy, usually grounded in judicial intuition, can be found in other judgments. See, for example, *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 at 811, where Brightman J refused to grant an injunction which would have compelled new houses to be pulled down

(*cont'd on the next page*)

brought in negligence and nuisance for damages and for an injunction to restrain a cricket club from playing cricket without first taking adequate steps to prevent balls being hit out of the cricket ground onto the claimants' house or into their garden. A majority of the Court of Appeal refused to grant the injunction, awarding the claimants £400 damages to cover "any past or future damage".[66] Lord Denning MR and Cumming-Bruce LJ characterised the dispute as a contest between the community interest in permitting the cricket club to continue playing on the ground and the individual interest of the claimants in not being harmed by cricket balls hit into their property.[67] But Lord Denning MR did not decide that the public interest was relevant to choosing between damages and an injunction. He would have refused the claimants any remedy on the ground that the cricket club had not committed a nuisance or been negligent.[68] It was only the cricket club's willingness to pay for damage that justified the award. Cumming-Bruce LJ, on the other hand, treated third party and community interests as being relevant to the exercise of remedial discretion.[69] The precedent status of *Miller v Jackson* was weakened by the later decision of *Kennaway v Thompson*.[70] The Court of Appeal there refused an injunction to limit the noise made by the defendant's speedboat activities and expressly declined to follow *Miller v Jackson*, Lawton LJ, who evidently considered that Lord Denning had taken into account public interest considerations in acceding to a damages award, remarking that:[71]

> … Lord Denning's statement that the public interest should prevail over the private interest runs counter to the principles enunciated in *Shelfer*'s case and does not accord with Cumming-Bruce LJ's reason for refusing an injunction.

The pre-*Shelfer* cases which had taken cognisance of the public interest were to be read subject to *Shelfer*, and to the extent that they were

on the ground that it would be "an unpardonable waste of much needed houses". *Cf Kilbey v Haviland* (1871) 14 LT 353 for a "pre-*Shelfer*" application of the same policy.

66 *Miller v Jackson* [1977] 1 QB 966 at 982, *per* Lord Denning MR.

67 *Miller v Jackson* [1977] 1 QB 966 at 981, *per* Lord Denning MR, and 989, *per* Cumming-Bruce LJ.

68 *Miller v Jackson* [1977] 1 QB 966 at 988, *per* Cumming-Bruce LJ. Lord Denning rejected the nuisance claim on the ground that the plaintiffs had "come to" the nuisance. But it is well established that "coming to" a nuisance is not a defence: *Sturges v Bridgman* (1879) 11 ChD 852. See now *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 839–842, [47]–[58], *per* Lord Neuberger.

69 *Miller v Jackson* [1977] 1 QB 966 at 989, citing *Wood v Sutcliffe* (1851) 2 Sim(NS) 163; *Raphael v Thames Valley Railway Co* (1866) LR 2 Eq 3 (but not noting the reversal of Romilly MR's decision on appeal).

70 [1981] QB 88.

71 *Kennaway v Thompson* [1981] QB 88 at 93, *per* Lawton LJ.

inconsistent with that decision it was held that they were wrong.[72] The orthodoxy that no account was to be taken of the public interest in deciding whether damages should be awarded instead of an injunction for interference with a private law right was reaffirmed.

III. The *Fen Tigers* decision

31 In *Fen Tigers*[73] the UK Supreme Court took the opportunity to review the *Shelfer* working rule, with particular reference to whether the public interest was a relevant consideration in exercising discretion to refuse an injunction and make a damages award. In addition, the principles for assessing damages were discussed in *obiter dicta*.

32 The defendants[74] in *Fen Tigers* obtained planning permission to construct a speedway and stock car racing stadium. They later obtained temporary planning permission to use agricultural land to the rear of the stadium as a motocross track, and constructed a track. The permissions imposed limits on the frequency and times of activities in the stadium and on the track, but did not place any limits on the noise emitted during those activities. The claimants later bought a house close to the stadium and track. Following complaints about noise generated by the sporting activities, the local council served abatement notices under the Environmental Protection Act 1990[75] which required the defendants to undertake works to mitigate the noise. At the same time the claimants complained that the noise created by the defendant's activities constituted a private nuisance, even after the statutory works had been completed, and applied for an injunction to prevent the defendants from exceeding specified noise levels.

33 The claim raised some important issues in the law of private nuisance. The Supreme Court held that the right to carry on a noisy activity can be the subject-matter of an easement and, if continued for 20 years, can be acquired by prescription.[76] The defendants' activities had not, however, caused a nuisance to the claimants' land for long enough to establish a prescriptive right to cause the noise.[77] Furthermore, it was not a defence to the nuisance claim that the

72 *Kennaway v Thompson* [1981] QB 88 at 93, *per* Lawton LJ.

73 *Lawrence v Fen Tigers Ltd* [2014] AC 822; [2014] UKSC 13.

74 The defendants were the owners of the stadium, the previous owners and their tenants. The liability of a landlord for a tenant's nuisance was considered in *Coventry v Lawrence (No 2)* [2015] 1 AC 106; [2014] UKSC 46.

75 c 43 (UK).

76 Lord Neuberger suggested, in *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 836, [32], that the right could be acquired by prescription even if it was not an easement, provided that it was capable of being acquired by grant.

77 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 860, [163], *per* Lord Neuberger.

claimants "came to" the nuisance after the stadium and motocross track had been constructed and competitive events had been held.[78] In assessing the character of the neighbourhood for the purpose of determining whether the defendants' use of their land was reasonable, the defendants were entitled to rely on their activities in so far as they could be shown to be a lawful part of the established pattern of uses of the area, but they could not rely on those activities as defining the character of the neighbourhood, to the extent that the activities caused a nuisance.[79] The defendants were also not entitled to rely on the planning permission as a defence to an action in nuisance, although the planning permission could in particular cases provide evidence of the relative importance of permitted activities, as part of the pattern of uses in the area, and could (if the permission related to the specific activity constituting the alleged nuisance) provide a starting-point for the nuisance inquiry.[80]

34 The Supreme Court restored the injunction awarded by the trial judge, but discharged by the Court of Appeal on the ground that the defendants' activities did not constitute a nuisance, which had set limits to the noise that could be emitted at the defendants' events. The operation of the injunction had been suspended, and damages had been assessed for past nuisance. However, the trial judge had also given both parties liberty to apply to vary the injunction, and the Supreme Court held that the liberty should extend to allowing the defendants to argue that a damages award should be substituted for the injunction.[81]

35 The Supreme Court's analysis of remedies under Lord Cairns' Act can be grouped under three headings: (a) the status of the *Shelfer* "good working rule"; (b) the relevance of the public interest in remedy selection; and (c) the quantification of damages in private nuisance cases.

78 Contrast *Miller v Jackson* [1977] 1 QB 966 at 981, *per* Lord Denning MR.

79 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 843, [65], *per* Lord Neuberger. Contrast the different approach, albeit reaching the same conclusion, of Lord Carnwath (at 870–871, [187]–[190]).

80 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 845–850, [77]–[99], *per* Lord Neuberger, and 877, [217]–[219], *per* Lord Carnwath. Lord Neuberger doubted (at 848–849, [91]), Lord Mance concurring (at 865, [165]), whether any special principle applied to planning permissions granted for major developments. Lord Carnwath considered (at 878, [223]) that such permissions could be relevant to an assessment of the character of a neighbourhood.

81 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 861, [151], *per* Lord Neuberger.

IV. Injunctions and damages after *Fen Tigers*

A. The status of the Shelfer *working rule*

36 All members of the Supreme Court in *Fen Tigers* objected, with varying degrees of vehemence, to what Lord Neuberger described as an "almost mechanical application of A L Smith LJ's four tests".[82] Lord Neuberger, with whom Lords Mance and Carnwath agreed, favoured a modified version which retained the essence of the tests, while emphasising that the working rule operated within a discretionary framework. So its application must not "be a fetter on the exercise of the court's discretion".[83] But in the absence of additional relevant circumstances it will normally be right to refuse an injunction if the four tests comprising the rule are satisfied. Finally, the fact that not all the tests are satisfied does not mean that an injunction will be granted.[84] These qualifications adds little, if anything, to the original working rule itself, given that A L Smith LJ and the other members of the Court of Appeal in *Shelfer* were sensitive to the discretion conferred by Lord Cairns' Act. Unlike A L Smith LJ's working rule in *Shelfer*, however, the discretionary framework proposed by Lord Neuberger is broad enough to include consideration of the public interest. This modification of *Shelfer* is examined below.[85]

37 Although the discretionary framework now encompasses public interest considerations, the objection to judicial expropriation of property, which has dogged the history of Lord Cairns' Act in nuisance cases, is likely in practice to defeat attempts to liberalise the *Shelfer* principles. According to Lord Neuberger, "the *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not".[86] The placing of the burden of proof is premised on the proposition that a damages award expropriates an important incident of the claimant's property rights by disallowing specific enforcement of the right and remitting the claimant to a money award. Disapproval of judicial expropriation was expressed even more forcefully by Lord Mance (in response to arguments put forward by Lord Sumption discussed below):[87]

82 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855, [119], *per* Lord Neuberger.
83 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855, [123], *per* Lord Neuberger.
84 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855, [123], *per* Lord Neuberger.
85 See paras 42–48 below.
86 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 855, [121], *per* Lord Neuberger. Contrast Lord Clarke (at [170]) who reserved the questions as to the placing of the burden of proof and the principles governing the exercise of discretion.
87 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 865, [168], *per* Lord Mance.

> [T]he right to enjoy one's home without disturbance is one which I would believe that many, perhaps most, people value for reasons largely if not entirely independent of money.

38 In contrast Lord Sumption, with whom Lord Clarke agreed on the point, asserted that "the decision in *Shelfer* is out of date, and it is unfortunate that it has been followed so recently and so slavishly".[88] Lord Sumption condemned the *Shelfer* objection to judicial expropriation as being "an unduly moralistic approach to disputes, and if taken at face value would justify the grant of an injunction in all cases, which is plainly not the law".[89] It followed that:[90]

> … damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests.

It presumably also follows that the burden of proof rests on the claimant to show that damages are inadequate on the facts of the case, and that there is no public or community interest likely to be prejudiced by the grant of an injunction.

39 Lord Sumption's judgment taps into a longstanding debate on the desirability of monetarising property rights.[91] To borrow the vocabulary of law and economics scholarship, the "property" rules protecting the landowner from interference by noise, which are currently enforceable by injunction, would be replaced, in Lord Sumption's world, by "liability" rules entitling the landowner only to damages.[92] The landowner would lose the power to bargain with the right-infringer for release from the injunction and would instead become the recipient of a compulsory payment. There is an extensive, if inconclusive, literature on the circumstances in which liability rules are preferable to property rules on efficiency grounds.[93] For present purposes two points can be taken

88 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 864, [161], *per* Lord Sumption, Lord Clarke concurring (at [171]).

89 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 863, [160], *per* Lord Sumption.

90 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 864, [161], *per* Lord Sumption.

91 David Howarth, "Noise and Nuisance" (2014) 73 Camb LJ 247, citing Ian Ayres, *Optional Law: The Structure of Entitlements* (University of Chicago Press, 2005).

92 Guido Calabresi & A Douglas Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972) 85 Harv L Rev 1089.

93 The literature derives from R H Coase's celebrated article Ronald H Coase, "The Problem of Social Cost" (1960) 3 J L & Econ 1. In addition to Guido Calabresi & A Douglas Melamed, "One View of the Cathedral" (1972) 85 Harv L Rev 1089, see Louis Kaplow & Stephen Shavell, "Property Rules *versus* Liability Rules: An Analysis" (1996) 109 Harv L Rev 713; Richard A Epstein, "A Clear View of the Cathedral: The Dominance of Property Rules" (1996–1997) 106 Yale LJ 2100; and Gideon Parchomovsky & Alex Stein, "Reconceptualising Trespass" (2009) 103 Nw U L Rev 1823.

from the debate. First, the costs involved in damages assessment, where the principles of assessment are unclear, can be significant.[94] Uncertainties and inconsistencies in the quantification of licence fee damages, particularly where the "shared profit" method of assessment is adopted, were identified by the Law Commission in its recent report on rights to light as a major cause of legal costs incurred by property owners and developers.[95] Secondly, an inflexible "damages but no injunction" rule might be thought to let off a deliberate wrongdoer too lightly. It is unlikely that Lord Sumption was advocating such a rigid rule, but the consequences of a "damages only" rule should be noted. If compensation for loss is considered to be an inadequate response to the deliberate commission of a private nuisance, further consideration would have to be given to making exemplary damages available for the infringement, or compelling the infringer to account for any profits made from activities causing the nuisance.[96]

40 Another objection to a "damages only" rule in private nuisance is that it overlooks the role that equitable remedies play in protecting the claimant's "consumer surplus".[97] The "consumer surplus" is the amount by which the property's subjective value to the claimant exceeds its objective value. An objectively assessed licence fee does not capture this subjective value. It is true that the assessment of the licence fee may, if awarded as compensation, take into account the particular characteristics of the claimant. As Edelman J explained in *Hampton v BHP Billiton Minerals Ltd Pty Ltd (No 2)*,[98] discussing mesne profits for trespass:[99]

> … [w]hen the claim for user damages is for compensation then the central question is the price which would be demanded by a reasonable person in the plaintiff's position. When the damages are sought on a restitutionary basis the question is upon the price which would be paid by a reasonable person in the defendant's position.

41 But a licence fee award cannot provide as complete protection for a claimant's consumer surplus as an injunction. It is perhaps for this reason that Lord Neuberger suggested in *Fen Tigers* that a possible head

94 Injunctions also have their costs, mainly relating to enforcement and supervision. Enforcement and supervision difficulties can justify a refusal to make an equitable order: *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1.

95 See text at n 47 above.

96 Exemplary damages were assumed not to be available under Lord Cairns' Act in *Giller v Procopets* (2008) 24 VR 1 at 103, [437], *per* Neave JA.

97 Alfred Marshall, *Principles of Economics* (London: Macmillan, 8th Ed, 1920) at pp 103–110; Donald Harris, David Campbell & Roger Halson, *Remedies in Contract and Tort* (Cambridge: Cambridge University Press, 2005) at pp 168–175.

98 [2012] WASC 285.

99 *Hampton v BHP Billiton Minerals Ltd Pty Ltd (No 2)* [2012] WASC 285 at [345].

of damages in nuisance should be the claimant's loss of her ability to enforce her rights.[100] The suggestion will be considered below.[101] But in the absence of such a development, the advantage that an injunction enjoys over compensatory damages in protecting the claimant's consumer surplus will often be a significant factor favouring the equitable order.

B. Remedial discretion and the public interest

42 When considering the analysis in *Fen Tigers* of the role of the public interest in determining the appropriate remedy, it is important to keep in mind the distinction between the choice of remedy and the measure of relief. Public interest considerations are, on the Supreme Court's analysis, relevant to the exercise of discretion whether to grant an injunction or to award damages (the "choice of relief" question). It is at this point that the revised *Shelfer* criteria, which take into account the public interest, bite. But once the appropriate remedy has been selected, the actual relief awarded (the "measure of relief") either specifically protects the claimant's property right, when an injunction is granted, or is a monetary substitute for an injunction.[102] The "measure of relief" stage of the inquiry is essentially rights-based, being an examination of the claimant's right, the nature of the defendant's breach of duty and an assessment of how the chosen remedy can most effectively respond to the breach of duty. This section of the article discusses the role of the public interest in determining the choice of relief.

43 We previously noted that the Supreme Court held that a grant of a planning permission to carry out an activity does not prevent that activity from constituting an actionable nuisance. The planning permission may be evidence of the relative importance of the permitted activity, as part of the pattern of uses in the area, or (if sufficiently specific) it may provide a benchmark of acceptable noise levels caused by the activity.[103] But even if the planning permission is not relevant to determining liability in nuisance for either of these reasons, it can still influence the selection of remedy. For Lord Neuberger, it is permissible, at this stage of the judicial inquiry, to take into account any "public benefit" the planning authority identified in granting the permission, as well as any waste of resources that the grant of an injunction would

100 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 857, [128], *per* Lord Neuberger. Contrast Lord Carnwath (at [248]).

101 See paras 49–62 below.

102 *Cf* Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) ch 4, "Remedies".

103 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 877, [218], *per* Lord Carnwath.

cause the defendant to suffer.[104] More sweepingly, Lord Sumption suggested that "it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission".[105] Lord Carnwath, with reference to the facts of *Fen Tigers*, considered that the interests of third parties, including "members of the public using or enjoying the stadium" were relevant.[106]

44 Lord Neuberger enumerated other considerations that might affect remedy selection. They included the fact that the grant of an injunction might result in the shutting down of the defendant's business; loss of livelihood by the defendant's employees ("although in many cases that might well not be sufficient to justify the refusal of an injunction"); and the impact of the nuisance on the claimant's neighbours, as well as on the claimant.[107]

45 The reformulation in *Fen Tigers* of the *Shelfer* working rule so as to take into account public interest considerations was put forward as an extension of existing legal and equitable principles. Some of the suggested considerations can, however, be accommodated within the existing bars to equitable relief. The judgments made no mention of these bars, but it might well be that factors such as the defendant's loss of business would justify refusal of an injunction on the ground that the hardship that the defendant would suffer from the making of the order outweighs the benefit the plaintiff would gain from the award of the injunction.[108] Potential hardship to third parties not before the court is a relevant consideration in equity; this may allow the interests of the defendant's employees to be taken into account.[109] If equitable relief is refused on the ground of hardship, the claimant will be remitted to her claim in damages.

46 But not all the public interest considerations proposed by Lord Neuberger can be reconceptualised as instances of equitable hardship, even on the most generous interpretation of that bar. We have seen that, notwithstanding the confident mid-Victorian assertion of Romilly MR that equity judges have a duty to safeguard the interests of

104 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 856–857, [125]–[126], *per* Lord Neuberger.

105 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 864, [161], *per* Lord Sumption.

106 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 882, [239], *per* Lord Carnwath.

107 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 856, [124], *per* Lord Neuberger. See also [239], *per* Lord Carnwath.

108 John Dyson Heydon, Mark J Leeming & Peter G Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (Sydney: LexisNexis Butterworths, 5th Ed, 2015) at para 20-095.

109 *Thomas v Dering* (1837) 1 Keen 729 at 747–748; (1837) 48 ER 488 at 495, *per* Lord Langdale MR. See also *Patel v Ali* [1984] Ch 283.

the public,[110] equity jurisprudence after *Shelfer* did not recognise "public benefit" as a ground for either granting or refusing relief at any rate as an independent discretionary factor. The principal objection to making the public interest relevant to the choice between an injunction and a damages award is that most public interest arguments are not justiciable within the framework of private law litigation. This was the opinion of Lord Sumption who stated that the judge "will usually lack the information to do so [that is, consider the public interest] effectively, and is in danger of stepping outside his main function of deciding the issue between the parties".[111] Planning permissions may be exceptional in this respect, in that the planning officer's formal recommendation to grant permission may disclose whether or not community welfare was one of the reasons for making the recommendation. The recommendation, if adopted by the planning authority, is evidence of the authority's assessment of the social value of the activity to which the permission relates. Even so, the evidential value of the recommendation may be slight, given Lord Neuberger's view that planning authorities often decide to grant permission for reasons other than those advanced by the planning officer.[112]

47 Outside the specialised area of planning law, however, the suggestion that the public interest is a discrete ground for awarding or denying injunctive relief should be treated with caution. Although the concept of public interest is often used by lawyers it is not a legal term of art. The Oxford English Dictionary defines it as "the benefit or advantage of the community as a whole; the public good". But the examples of public interest put forward in *Fen Tigers* envisage a broader meaning of the term which would include local third party interests, such as the interests of the claimant's neighbours, as well as the interests of employees and customers of a defendant corporation. These are all examples of specific group interest, rather than a holistic public interest. The choice of relief where such interests are in play cannot be reliably determined unless the relevant groups are represented in the litigation. Even then, the interests at stake will be more indeterminate (though often economically and socially more significant) than, say, competing interests whose priority has to be resolved by the rules for determining priority between legal and equitable proprietary interests. Private law litigation, with its primary focus on identifying private rights and

110 *Raphael v Thames Valley Railway Co* (1866) LR 2 Eq 37 at 46–47. See text at nn 145–148 below.

111 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 862, [158], *per* Lord Sumption.

112 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 850, [98], *per* Lord Neuberger. Lord Carnwath disagreed with Lord Neuberger on this point (at [219]), considering the planning officer's report to be a reliable indicator of the planning authority's perception of the public interest of a development.

enforcing correlative duties, is a poor vehicle for solving "polycentric"[113] problems affecting the interests of third parties who have no enforceable rights in the subject-matter of the dispute.

48 Moreover, any appeal to the public interest in private law litigation raises "separation of powers" questions as to the proper spheres of legislative and judicial activity. In *Attorney-General v Birmingham*,[114] where the claimant successfully claimed that Birmingham Council's exercise of its powers under a local Act of Parliament to regulate the discharge of sewage caused a nuisance to his property located seven miles from Birmingham, counsel for the council argued that "[t]he increase of population, inseparable from the progress of a nation in industry and wealth, is attended of necessity by inconvenience to individuals against which it is in vain to struggle".[115] Page Wood V-C's rejection of this argument as being a matter for Parliament, not the courts, serves as a useful reminder that, where private rights have to be balanced against public interests, however defined, a policy of judicial abstention may still be the most prudent.[116]

C. Assessing damages

49 Following the re-analysis of the *Shelfer* principle in *Fen Tigers* the judgments of Lords Neuberger, Clarke and Carnwath discussed how damages should be assessed under Lord Cairns' Act. It is settled law that the basic measure of compensatory damages is the reduction in value of the claimant's property caused by the nuisance.[117] What is unsettled is whether non-compensatory monetary awards are available in nuisance under Lord Cairns' Act. The Supreme Court judgments reveal some differences of opinion in answering this question. Lord Neuberger considered that "most, probably, of these differences are ones of emphasis and detail rather than of principle",[118] but in fact some of the disagreements go the fundamental principles of damages awards. The

113 Jeffrey Jowell, "The Legal Control of Administrative Discretion" [1973] PL 178 at 213.

114 (1858) 4 K & J 528; (1858) 70 ER 220.

115 *Attorney-General v Birmingham* (1858) 4 K & J 528 at 536; (1858) 70 ER 220 at 224.

116 See text at n 62 above.

117 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 857, [128], *per* Lord Neuberger. Lord Clarke considered (at [172]) that:

> … there was scope for an award of general damages: see, *eg*, in the context of noise, *Farley v Skinner* [2002] 2 AC 732 (a contract case but Lord Steyn at [30] would have reached the same result in the claim had been brought in nuisance).

Damages for loss of amenity, in the case of nuisance by smell, were awarded in *Bone v Seale* [1975] 1 WLR 797. See also *Hunter v Canary Wharf* [1997] 1 AC 655 at 706, *per* Lord Hoffmann.

118 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 858, [132], *per* Lord Neuberger.

judgments consider, albeit somewhat briefly, two critical issues. The first is whether damages under Lord Cairns' Act are assessed on the same basis as common law damages or, if applicable, equitable compensation. The second is whether monetary awards other than compensatory damages are available under Lord Cairns' Act.

(1) Do Lord Cairns' Act damages replicate common law damages and equitable compensation?

50 In *Johnson v Agnew*[119] Lord Wilberforce stated that damages under Lord Cairns' Act should be awarded on the same basis as common law damages.[120] *Johnson v Agnew* concerned an order of specific performance of a contract for the sale of land which could not be enforced. Damages were awarded for breach of contract as a substitute for the specific performance order, assessed not at the date of breach but at the date on which specific enforcement became impossible. This exception to the "date of breach" rule was already recognised at common law and therefore could be applied to damages assessment under the Act. In reaching this conclusion Lord Wilberforce disapproved of *dicta* of Megarry J in *Wroth v Tyler*[121] who had considered that damages under the Act were assessed on a different basis from common law damages.

51 The principle of assessing damages in accordance with recognised common law and equitable criteria runs into obvious difficulties, as Lord Wilberforce acknowledged, in cases where there are no common law or equitable principles to apply, for example, where damages are being assessed in substitution for a *quia timet* injunction sought on the basis of a reasonable apprehension that a tort will be committed.[122] The common law principles of assessment are directed to compensating for loss where a cause of action has accrued, not to assessing loss where the cause of action has not accrued, so in this case some other basis of assessment must be found.[123]

52 But even where common law analogies are available, some courts have found them unhelpful in assessing damages under the Act. In *Giller v Procopets*[124] the Victorian Court of Appeal awarded damages

119 [1980] AC 367. See text at n 14 above.

120 *Johnson v Agnew* [1980] AC 367 at 400, *per* Lord Wilberforce.

121 [1974] Ch 30.

122 *Johnson v Agnew* [1980] AC 367 at 400, *per* Lord Wilberforce. See text at n 30 above.

123 See text at n 29 above. In the right to light cases, the "profit share" measure is often applied. See text at nn 159–162 below.

124 [2008] 24 VR 1. Neave JA, with whom Maxwell P agreed, left open (at [431]) the question whether the award was one of equitable compensation or damages under Lord Cairns' Act. Ashley JA concluded (at [142]) that "equitable damages" were

(*cont'd on the next page*)

under Lord Cairns' Act for mental distress caused by breach of confidence in circumstances in which common law damages for this head of damage would not have been available. The claimant would have been entitled to an immediate injunction to prevent the breach once it had occurred, but by the time of hearing there was no possibility of continuation of the breach and therefore no grounds for granting an injunction. The Court of Appeal's damages award for mental distress was based, at least in part,[125] on the principle that the claimant should be compensated for the loss which would have been prevented by the award of a timely injunction. The claimant would not have suffered mental distress (or, at any rate, as much distress as she actually suffered) if an injunction had been promptly obtained. The aim of the damages award was therefore to place her in the position she would have been in had she obtained a timely injunction to prevent the breach of confidence.

53 Decisions such as *Wroth v Tyler* and *Giller v Procopets* support the proposition that rights protected by primary enforcement, whether by way of specific performance or an injunction, should be valued more highly than rights protected by the secondary remedy of a damages award. In cases where bargaining between the parties is possible, as in many cases of breach of contract, nuisance and trespass, damages as an alternative to equitable relief under Lord Cairns' Act will usually be higher than an equivalent award of common law damages since, as has been judicially noted, the price that the defendant must pay the claimant for release from the injunction or grant of specific performance will usually be higher than an objectively assessed damages award.[126] The higher value reflects the claimant's subjective interest, enforceable by equitable order, in having the defendant perform his obligations.

54 Placing a "performance value" (in other words, a value reflecting the subjective value to the claimant of the defendant's performance)

available, the emphasis of his judgment (at [135]–[141]) being on Lord Cairns' Act damages. For criticism of the decision on this point see n 16 above.

125 Such an award does not exclude the possibility of damages covering the whole of the period during which the claimant suffered mental distress in consequence of the defendant's breach of confidence, including any period prior to the time when an injunction could have been obtained: *Giller v Procopets* [2008] 24 VR 1, [428], *per* Neave JA.

126 *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 15, *per* Lord Hoffmann. See also Daniel Friedmann, "Economic Aspects of Damages and Specific Performance Compared" in *Contract Damages: Domestic and International Perspectives* (Djakhongir Saidov & Ralph Cunnington eds) (Oxford: Hart Publishing, 2008) at p 65, which notes (at pp 73–74) the exceptions to this assumption, for example, where the subjective value of performance to the claimant is less than the objective loss arising on breach which can be compensated in damages.

compensable by a monetary award on obligations that are specifically enforceable in equity is controversial. There is a substantial literature on the recognition of the "performance interest" in assessing damages.[127] The extent to which English law explicitly or implicitly enforces the interest is, however, unsettled. Moreover, even if the performance interest is recognised, it is not obvious that the valuation of rights ought to reflect the current, historically derived distinction between rights enforceable by primary relief (which are mostly property rights but also include fiduciary obligations and equitable obligations of confidence) and rights enforceable by secondary relief (which cover most personal rights). But it is just such a distinction that Lord Neuberger seems to have in mind in *Fen Tigers* when he suggested that:[128]

> … [w]hile double counting must be avoided, the damages might well, at least where it was appropriate, also include the claimant's loss of her ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction.

Several points can be made about this tantalising sentence. First, there will be, as Lord Neuberger surmised in the opening words, a real risk of double counting unless compensatory damages for *past* loss of enjoyment of property by reason of the nuisance are clearly separated out from damages for loss of the right to prevent by injunction *future* occurrences of the nuisance. Damages for diminution of the value of the property, which is the usual measure of damages in nuisance cases, compensate for both kinds of loss. Combining this head of damages with damages for the loss of the right to an injunction creates a serious risk of double counting. Secondly, this so-called compensatory award is in fact a disguised method of awarding restitutionary damages, since it is based on the benefit to the defendant of not suffering an injunction. It would be more transparent to recognise that restitutionary damages, considered in the next section of this article,[129] ought to be available in nuisance.[130] Finally, the policy of awarding damages for loss of the claimant's ability to enforce a right needs careful scrutiny, given the fact that the category of rights enforceable by injunction or specific performance as the primary remedy in English private law is a legacy of

127 Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) ch 4, "Remedies"; Daniel Friedmann, "The Performance Interest in Contract Damages" (1995) 111 LQR 628; Charlie Webb, "Performance and Compensation: An Analysis of Contract Damages and Contractual Obligation" (2006) 26 OxJLS 41.

128 *Lawernce v Fen Tigers Ltd* [2014] AC 822 at 857, [128], *per* Lord Neuberger.

129 See paras 57–62 below.

130 *Cf* the analysis of hypothetical bargain damages as compensatory in *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286; [2008] 1 WLR 445 at [59], *per* Chadwick LJ, which are arguably restitutionary. See Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at p 429.

the institutional separation of common law and equity, and is not based on a considered analysis of the comparative value of legal rights. It is not self-evident that the valuation of rights ought to depend on historical jurisdictional differences.

(2) Non-compensatory awards under Lord Cairns' Act

55 Several judgments in *Fen Tigers* suggested in *obiter dicta* that gain-based awards should be available where the defendant has obtained a measurable benefit from committing the nuisance. We saw in the previous section that Lord Neuberger suggested that, in an appropriate case, damages for loss of the ability to enforce a right could be based on the benefit to the defendant of not suffering an injunction. The suggestion enjoyed the support of Lord Clarke who considered that a licence fee award, representing a reasonable price for a licence to commit the nuisance, should be available.[131] Lord Carnwath, on the other hand, was more cautious. While endorsing a flexible approach to the award of remedies, he doubted whether a licence fee award was appropriate in nuisance cases, primarily because the injury is less specific than in cases where licence fee awards have been made in trespass cases, and the price harder to assess, particularly where the nuisance affects a large number of people.[132]

56 Two remedies based on the benefit the defendant has gained from committing a nuisance are relevant in this context. The first is the account of profits, which compels the wrongdoer to account for the profit made from the commission of the wrong. In *Forsyth-Grant v Allen*,[133] a case involving an infringement of a right to light, a majority of the Court of Appeal (Patten J and Mummery LJ) held that an account of profits cannot be awarded for the tort of nuisance. Toulson LJ, in contrast, did not rule out the possibility of an account of profits but held that the claimant's conduct in this case disqualified him from this measure of equitable relief. It is probable that only a decision of the Supreme Court could authorise the award of an account of profits for nuisance. Even if the remedy were held to be available in nuisance, the evidential obstacles to the award of an account in *Fen Tigers* would be almost insuperable. Such an order would require the court to determine

131 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 866–867, [173], *per* Lord Clarke, citing *Jaggard v Sawyer* [1995] 1 WLR 269, a trespass case.

132 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 884, [248], *per* Lord Carnwath. An additional reason that Lord Carnwath gave was that the licence fee approach was a "radical departure from the normal basis regarded by Parliament as fair and appropriate in relation to injurious affection arising from activities carried out under statutory authority".

133 [2008] EWCA Civ 505; Craig Rotherham, "Gain-based Relief in Tort after *Attorney-General v Blake*" (2010) 136 LQR 102.

the share of the defendant's profits attributable to the excessive noise levels that constituted the nuisance. Moreover, even if such a calculation could be made, the defendant might well be allowed an equitable allowance for his skill and effort in developing and promoting the profitable stock car racing activities.[134] The practical obstacles to taking an account on facts such as *Fen Tigers* are likely to be decisive even if the principled objections could be overcome.

57 The other gain-based remedy relevant to the present discussion is restitutionary damages, assessed as the licence fee that a reasonable person in the position of the claimant would demand, and that a reasonable person in the position of the defendant would pay, as the price for continuing the activity constituting the nuisance. This remedy was the principal focus of the *obiter dicta* on non-compensatory remedies in the judgments of Lords Neuberger, Clarke and Carnwath in *Fen Tigers*. There is authority for the award of licence fee, or hypothetical bargain, damages in nuisance.[135] On the other hand, in *Stoke-on-Trent City Council v W & J Wass Ltd*[136] the Court of Appeal refused to assess damages on this basis for infringement of an exclusive right to hold a market, the cause of action being in nuisance. Here also, as a matter of authority, a decision of the Supreme Court is probably needed to resolve the conflict of precedents.

58 There is greater scope for licence fee awards in nuisance than for account of profits orders. Three points may be noted about such awards. First, there is some disagreement as to whether such awards are indeed gain-based. Some writers and judges have characterised such awards as compensatory, the compensation being for the claimant's lost opportunity to bargain with the defendant for a licence to pursue the activities constituting the nuisance.[137] Another view is that the damages are neither restitutionary nor compensatory, but constitute a valuation

134 *Cf Boardman v Phipps* [1967] 2 AC 46.

135 *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922; *Tamares (Vincent Square) Ltd v Fairpoint* [2007] EWHC 212.

136 [1988] 1 WLR 1406. *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 was applied in *Devenish Nutrition Ltd Ltd v Sanofi-Aventis SA (France)* [2009] Ch 390 to deny a reasonable fee award for breach of statutory duty.

137 Robert Sharpe & Stephen Waddams, "Damages for Lost Opportunity to Bargain" (1982) 2 OxJLS 290. There is a growing trend, particularly in breach of contract cases, to characterise such damages as compensatory: see *Lane v O'Brien Homes Ltd* [2004] EWHC 303; *WWF-World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2007] EWCA Civ 286; [2008] 1 WLR 445; and *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2009] UKPC 45. See also *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430 and *One Step (Support) Ltd v Morris-Garner* [2014] EWHC 2213 at [104], *per* Phillips J.

of the right that has been infringed by the tort of nuisance.[138] It is unnecessary in this article to enter into the arguments for these alternative analyses of the licence fee award.[139] For present purposes it suffices to note that the members of the Supreme Court who discussed the question characterised the damages as being gain-based.[140]

59 Secondly, Lord Carnwath stated that licence fee damages might not be appropriate in the case of a nuisance caused by excessive noise or a noxious smell where the nuisance affected a large number of people.[141] In such a case there will be differences in the impact of the nuisance on those affected, depending on the proximity of their property to the activity causing the nuisance and on the nature of their property, for example, whether it is a private residence or business premises. These factors might well be taken into account in actual negotiations between landowners and the owner of (say) a factory that emits excessive noise or discharges noxious fumes for permission by the factory owner to continue the offending activity. They should therefore also be relevant to assessing damages based on a hypothetical bargain between these parties. This in turn should mean that to award the same licence fee damages to all those affected, regardless of the special factors affecting their properties, may be to adopt an undesirable "one size fits all" approach to restitutionary damages assessment.

60 In *Devenish Nutrition Ltd Ltd v Sanofi-Aventis SA (France)*,[142] Lewison J gave as a reason for not awarding restitution for breach of statutory duty by operating an unlawful cartel the fact that there were multiple claimants. In the Court of Appeal Arden LJ suggested that problems caused by multiple claimants could be solved by case management directions.[143] This is a sensible solution to the problem identified by Lord Carnwath. There may well be practical difficulties in fixing the amount, or amounts, of a licence fee in a nuisance case where

138 Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) ch 4. See also *Bunnings Group Ltd v CHEP Australia Ltd* (2011) 82 NSWLR 420 at [177], *per* Allsop P, for what is arguably a "valuation of rights" analysis of a licence-fee damages award in conversion.

139 See Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) ch 23 and Graham Virgo, *The Principles of the Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2015) at pp 430–432.

140 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 857–858, [128]–[131], *per* Lord Neuberger (although [128] is ambiguous as between restitutionary and substitutive damages), 886–867, [173], *per* Lord Clarke ("gain-based damages"), and 884, [248], *per* Lord Carnwath (discussion of awards based on "a share of the benefit to the defendants").

141 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 884, [248], *per* Lord Carnwath.

142 [2009] Ch 390 at 427, [107], *per* Lewison J.

143 *Devenish Nutrition Ltd Ltd v Sanofi-Aventis SA (France)* [2009] Ch 390 at 466, [98]–[100], *per* Arden LJ. See Andrew Burrows, *The Law of Restitution* (Oxford: Oxford University Press, 3rd Ed, 2011) at pp 630–632.

the nuisance affects multiple claimants. But the difficulties should not be relied upon as a ground for a principled refusal ever to award licence fee damages for nuisance.

61 Finally, Lord Carnwath was unwilling to approve the award of so-called "share of profits" damages, based on a sharing between claimant and defendant of the profits derived from the defendant's activities, given the complexity and conflicting authorities on this question.[144] Lord Carnwath stated that "share of profits" awards were not made in cases of interference with a right to light, relying on the Court of Appeal decision in *Forsyth-Grant v Allen*. But, as the Law Commission for England and Wales has pointed out in its recent report on rights to light,[145] that case concerned the discretionary grounds for refusing an account and not the criteria for awarding licence fee damages. Contrary to Lord Carnwath's assertion, the amount of the licence fee has been assessed in some right to light cases by reference to a percentage of the defendant's expected profit from the property development causing the infringement of the claimant's rights. In *Tamares (Vincent Square) Ltd v Fairpoint Properties*[146] the licence fee award amounted to 29% of the profits the developer expected to make from the part of the project affected by the claimant's right to light. In *HKRUK II (CHC) Ltd v Heaney*[147] the relevant share of the expected profits awarded was 16%. Both percentages are clearly much more generous than the 5% of expected profits awarded for breach of a restrictive covenant in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*.[148] The Law Commission drew attention to the disparity in the share of profits awarded in cases of infringement of a right of light, and was receptive to the argument that the share awarded to settle "right to light" disputes was a significant and disproportionate cost to property developers.[149]

62 Lord Carnwath doubted the relevance of the right to light cases to the more general question of assessing licence fee damages in

144 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 884, [248], *per* Lord Carnwath. They are not account of profits awards since the sum assessed is based on the expected, as well as any actual, profits made by the defendant.

145 Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014) at para 5.14.

146 [2007] 1 WLR 2167.

147 [2010] EWHC 2245.

148 [1974] 1 WLR 798.

149 Law Commission (Law Com No 356), *Rights to Light* (HC 796, 3 December 2014) at para 5.56. The Commission recommended (at para 5.79) that, after its proposed reform of the law of rights to light will have been implemented, the Government should consider as a matter of economic policy the desirability of capping Lord Cairns' Act damages in these cases, either as a percentage of profit share or as a multiplier of diminution in value.

nuisance.[150] But the right to light cases usefully draw attention to some of the uncertainties involved in assessing licence fee damages where assessment is based on a share of the defendant's expected profit. Most of the debate on this measure of Lord Cairns' Act damages has concerned the question of principle: Should licence fee damages be awarded in nuisance? Rather less attention has been paid to the issue of how such damages should be quantified. It is regrettable that the Supreme Court did not take the opportunity to provide guidance to lower court judges (including, possibly, the judge hearing the application to vary the injunction awarded in *Fen Tigers*) on both the appropriateness of such awards and the methodology to be applied in making them.

V. Conclusion

63 The Supreme Court decision in *Fen Tigers* has clarified the law of private nuisance in important respects. Unfortunately, it has done little to clarify the principles for awarding damages under Lord Cairns' Act. The court should not be criticised too harshly on that account. It did not hear argument on some of the issues raised, so that the *obiter dicta* on these issues were necessarily speculative. Moreover, the structural peculiarities of the English law of private law remedies, noted at the beginning of this article, are so deep-rooted that it is doubtful that any single decision could provide more than palliative relief. Nevertheless, the deficiencies in the present law of remedies which were relevant to the *Fen Tigers* decision merit a brief summary.

64 Questions about the choice of an appropriate remedy require consideration at three levels. First, and most fundamentally, there may be a question as to whether the court has jurisdiction to award the remedy sought. The potential of s 49 (2) of the Senior Courts Act 1981 to create a flexible system of private law remedies, capable of fulfilling the legislative mandate to make a "complete and final determination" of all matters in dispute, has yet to be realised. An opportunity was missed in *Fen Tigers* to develop a more coherent structure of private law remedies which does not have to be explained in terms of the institutional arrangements governing the common law and equity prior to the enactment of the judicature legislation. Fulfilling the potential of the judicature legislation, more than 140 years after it was enacted, will remove the necessity for relying on principles of uncertain and disputed scope, such as the "inadequacy of damages" principle, and will relegate Lord Cairns' Act, if it is needed at all, to a marginal role, applicable only

150 *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 884, [247], *per* Lord Carnwath. See also 865, [167], *per* Lord Mance.

to cases where the award of damages cannot be justified by the powers conferred on courts exercising a fused common law and equitable jurisdiction.[151]

65 Secondly, there may be questions as to the principles to be applied in choosing between two available remedies. The relevant principle considered in *Fen Tigers* was A L Smith LJ's "working rule" enunciated in *Shelfer*. The Supreme Court relaxed the *Shelfer* criteria to the extent of enabling public interest considerations to be brought into account. It remains unclear, however, what constitutes a relevant public interest for this purpose, particularly in a case not involving planning permissions. The blame for this uncertainty cannot be laid wholly at the door of the Supreme Court. The failure of the promoters of Lord Cairns' Act to prescribe criteria for the award of damages under the Act has resulted in more than a century of judicial formulations of *ad hoc* principles regulating the exercise of discretion. The Supreme Court decision in *Fen Tigers* is merely the latest instalment of this story of judicial *ad hoc*ery.

66 Finally, there may be questions relating to the measure of relief. If a monetary award is made, principles for quantifying the award must be applied. Alternatively, if specific equitable relief is awarded, the order must be fashioned to meet the circumstances of the case and the court's objective in making the order. As far as monetary orders are concerned, the *obiter dicta* on assessing Lord Cairns' Act damages in *Fen Tigers* regrettably add to, rather than remove, the existing uncertainty on the availability of non-compensatory monetary awards. But here also blame should not be attached solely to the Supreme Court decision since the law applicable to non-compensatory monetary awards remains relatively undeveloped. On this issue, also, *Fen Tigers* may come to be regarded as no more than one uncertain step taken along the road to establishing a coherent structure for the law of non-compensatory damages.

---

151 As in *Leeds Industrial Co-Operative Society Ltd v Slack* [1924] AC 851. See text at n 30 above.