The problem in the context of statutory contribution claims is, of course, that the 1978 Act is unfortunately worded in confining the regime to compensation. There is no reason in principle why one defendant who was liable to make restitution to the claimant should not obtain contribution from someone else who is also liable to the claimant but for a compensatory remedy instead. But to fit the round peg of restitution within the square hole of compensation is unnecessary and can only serve to confuse.

Once he had concluded that the statutory contribution regime was engaged the judge went on to the final stage to consider whether a contribution claim would be likely to succeed on the facts. Statutory contribution is not available as of right but through the exercise of judicial discretion to determine the availability and extent of contribution by reference to what is just and equitable. Bearing in mind that City Index's liability was founded on knowing receipt (with the key test of liability being one of unconscionability), whereas that of the Part 20 defendants was based on negligence, it might be thought that City Index was more blameworthy and so should bear more of the ultimate liability. But the judge concluded that City Index should bear the whole liability because only it had received the benefit of the payment; only it had made a gain through the retention and use of the money for its own purposes. This is a perfectly acceptable conclusion to reach, and is in fact consistent with a wide range of authorities. However, it does mean that we are left with the supreme irony that to get within the statutory contribution regime City Index's liability was treated as compensatory, but contribution was ultimately denied precisely because the liability was restitutionary. Restitutionary liability needs to hide behind the cloak of compensation to gain entry to the statutory scheme, but, once entry has been gained, the cloak is ripped away to reveal its true identity in order to determine whether contribution will be awarded.

GRAHAM VIRGO

REMEDIES FOR INTERFERENCE WITH A PRESCRIPTIVE RIGHT TO LIGHT

THE Coase theorem famously posits that if transactions are costless then the initial allocation of a property right will not affect its ultimate use. The parties will bargain to allocate the right to whichever of them values it more highly: Coase (1960) 3 J. Law & Econ. 1.

The theorem was formulated in the context of competing uses of neighbouring land. The defendant's use of his own land might so interfere with that of his neighbour that the neighbour would have an

https://doi.org/10.1017/S0008197307000451 Published online by Cambridge University Press

action in nuisance. The issue would then be whether the court should order the defendant to pay damages for interference with the neighbour's right, or grant an injunction to protect the right from interference. As Coase explained, the award of damages effectively amounts to a judicial re-allocation of the neighbour's right to the defendant since the defendant would then be free to continue the interference without incurring further liability. In principle, he argued, the damages payable for the nuisance should correspond to the market value of the right re-allocated. The court's task was to assess the value of the notional sale between the parties when they could not actually agree on the price.

Two recent decisions on interference with prescriptive rights to light illustrate these elements of the Coase theorem in action. The Court of Appeal's decision in *Regan* v. *Paul Properties Ltd.* [2006] EWCA Civ 1391, [2006] 3 W.L.R. 1131 refines the principles by which a court determines whether to award equitable damages under Lord Cairns's Act in lieu of a mandatory injunction. *Tamares (Vincent Square) Ltd.* v. *Fairpoint Properties (Vincent Square) Ltd.* [2007] EWHC (Ch) 212, a decision of Gabriel Moss Q.C. sitting as a deputy High Court judge, adds to the evolving body of principles on the quantification of those damages. These assume a hypothetical bargain between the parties for the release to the defendant of the claimant's right.

The cases were essentially similar in their facts. In each, the defendant had embarked on constructing a new building opposite the claimant's. Once completed, it would leave the claimant's building more shaded than before. The claimant established that the defendant had committed an actionable nuisance by substantially interfering with its prescriptive easement to receive light through certain windows of its building. The difficult question was the remedy the court should award. In *Regan*, the court granted the claimant an injunction to restrain completion of the building according to the original plans. In *Tamares*, it awarded equitable damages since the defendant's new building had proceeded too far to justify granting a mandatory injunction to demolish it.

The significance of *Regan* is that the court held that the default position was that a claimant should be granted an injunction to restrain interference with his right to light, rather than be awarded equitable damages. It endorsed the "good working rule" formulated by A.L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Company* [1895] 1 Ch. 287, 322–323 which has long guided the courts in the exercise of their discretion to award equitable damages in lieu of an injunction. That is, damages may be awarded if the injury to the claimant's legal right is small; if the injury can be estimated in money

https://doi.org/10.1017/S0008197307000451 Published online by Cambridge University Press

and adequately compensated by a small money payment; and if it would be oppressive to the defendant to grant an injunction.

Regan affirms, importantly, that the burden is on the defendant to show that the *Shelfer* rule is satisfied rather than on the claimant to show that it is not. The Court of Appeal overruled the contrary approach of the trial judge on this point. It would not sanction the expropriation of the claimant's property right unless the defendant showed good reasons to justify it. It follows that the defendant bears the litigation risks which result from the inevitable imponderability of the court's discretion and from the evidential difficulty of quantifying the damage that would be caused to either party if the injunction were refused or awarded. *Regan* therefore strengthens a claimant's hand in settlement negotiations over the remedy for breach of his right to light. He would now be better placed to extract a higher price from the defendant.

That improved bargaining position is also relevant in the situation considered in *Tamares* where the deputy judge had to quantify the equitable damages awarded in lieu of the injunction. He held that the value of the claimant's right was the sum he would have obtained in a hypothetical negotiation for the release of the right to the defendant. The negotiation would be presumed to take place at the date of breach. Each party would have access to information that was, or could have been, known to him then: [2007] EWHC (Ch) 212, at [22], applying *Amec Developments Ltd.* v. *Jury's Hotel Management (UK) Ltd.* [2001] 1 E.G.L.R. 81 and *Lunn Poly Ltd.* v. *Liverpool and Lancashire Properties Ltd.* [2006] EWCA Civ 430, [2006] 2 E.G.L.R. 29. The court would presume that the claimant's right to prevent the defendant's development project would give it a significant bargaining position. It would presume that the claimant would normally expect to be paid a proportion of the defendant's expected profit from the development in breach of his right as the price for waiving his chance of obtaining an injunction to restrain the development. But, on a realistic view, that price could not be so high that the defendant's development would become unprofitable: the defendant would then have no incentive to proceed with the project and the claimant could have no action against him. It was relevant that, at the date of the hypothetical negotiation, it could not be known with certainty whether the defendant would make any profit at all, or how much it might be. Since the defendant would bear the risk of that uncertainty, he could justifiably bargain for the claimant to receive a smaller, rather than larger, proportion of his expected profit from breaching the right. Applying this test to the facts, the deputy judge set the claimant's share at no more than one third of the defendant's expected profit from

https://doi.org/10.1017/S0008197307000451 Published online by Cambridge University Press

breaching the right to light. A 50:50 division would have been excessive.

Regan and *Tamares* will be relevant far beyond rights to light. They will influence the award and valuation of damages for infringement of other kinds of easement (*e.g.*, *Bracewell* v. *Appleby* [1975] Ch. 408), restrictive covenants (*e.g.*, *Wrotham Park Estate Co. Ltd.* v. *Parkside Homes Ltd.* [1974] 1 W.L.R. 798), and possibly even non-proprietary commercial contracts (*e.g.*, *Experience Hendrix LLC* v. *PPX Enterprises Inc.* [2003] EWCA 323, [2003] 1 All E.R. (Comm.) 830). Significantly, nothing in the negotiation approach to valuation could require the defendant to account for the entire profit made by him in breach of the claimant's right (*cf. A.-G.* v. *Blake* [2001] 1 A.C. 268, a decision which on an economic analysis might best be explained as involving the breach of an "inalienable" contractual entitlement: see Calabresi & Melamed (1972) 85 Harv. L. Rev. 280). The reasoning in *Tamares* endorses the view that compensation for a lost opportunity to bargain for the release of a right is a real concept rather than a fictitious attempt to award damages in a restitutionary measure, a point affirmed very recently in *WWF - World Wide Fund for Nature* v. *World Wrestling Federation Entertainment Inc.* [2007] EWCA Civ 286. Economic theory and the dynamics of settlement negotiation support its existence.

D.M. Fox

THE PRINCIPLE OF STATE LIABILITY IN EC LAW AND THE SUPREME COURTS OF THE MEMBER STATES

In *Traghetti del Mediterraneo* v. *Republica Italiana* (Case C-173/03, judgment of 13 June 2006, not yet reported), the European Court of Justice has seized another opportunity to flesh out the meaning of the principle of State liability for breaches of EC law. In *Francovich* (Joined Cases C-6 and 9/90 [1991] E.C.R. I-5357), where the Italian State had failed to implement an EC directive, the Court held that Member States had an obligation to make good loss and damage caused to individuals by breaches of EC law attributable to the State. Despite the silence of the EC Treaty, this obligation incumbent on the State was construed as a natural corollary of the individual rights granted to private parties by Community Law. Later decisions extended the principle to cases where the national legislature enacted legislation incompatible with Community Law (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] E.C.R. I-1029), where Member States incorrectly implemented EC directives

https://doi.org/10.1017/S0008197307000451 Published online by Cambridge University Press