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***Enforcing the right to property
properly***

*An essay on the shift from injunctive relief to
mere compensation*

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Abstract

Of all patrimonial rights, the right to property is considered by far the most powerful. The owner is entitled to the exclusive use of the object, the word 'use' is understood in a very wide meaning and the owner has a strong position as far as enforcement of his right is concerned. He can reclaim the object from anyone (revindicatio), he is usually entitled to both positive injunctions (removal of objects from his premises) and prohibitory injunctions (in case of trespass). And finally, when the owner has to put up with infringements, he is entitled to damages. There seems, however, to be quite a gap between the position of the owner who is entitled to an injunction and that of the owner who has to bear infringements and is only entitled to damages. In the first situation (injunction), the owner can vindicate his right according to a property rule which allows him to set the price for infringements. In the second case (damages), the owner is left to compensatory standards. In this paper, the consequences of the substantial shift in protection from an injunction to (different levels of) compensation will be illustrated with examples from the modern civil code of The Netherlands.

Dutch law offers examples of different regimes of protection of the owner: a rather strong position (injunctive power) in the area of neighbour law, a relatively strong position in case of expropriation (a generous level of compensation), a typical liability rule (compensation according to objective standards) when a pressing societal interest prohibits injunctive relief, and a weak level of protection in case of a limited restraint of the owners capacity in case of a public development plan (only 'fair' compensation). These examples, which show a sliding scale of levels of protection, raise the question whether the right to property is vindicated properly when injunctive power is left for some form of compensation in money. They also raise the question according to which standards of compensation the right to property can and should be adequately protected.

Keywords

Property, injunction, compensation, damages

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1. Property and injunctions

From a historical point of view the right to property seems to be in a comfortable position as far as vindication of this right by means of injunctions is concerned. The Roman *actio negatoria* and *revindicatio* are perhaps the oldest routes to prohibitory injunctions and have over the ages developed into a rather strong procedural position for the owner. It must be understood, however, that the *actio negatoria* was, under Roman law, not directly based on the right to property as such: it was an action to *deny* the existence of the servitude of someone else than the owner (*actio de servitute*). The existence of the *actio negatoria* and its later development has, however, contributed to the development of the content of the right to property as such.

While the *actio negatoria* was only an *actio de servitute* in Roman law, in German law, as well as in other jurisdictions,¹ it has developed into a general action on behalf of the owner. The action may be used against any kind of infringement other than loss of possession (for which the *revindicatio* was given). The German par. 1004 *Bürgerliches Gesetzbuch* states:

‘Wird das Eigentum in anderer Weise als durch Entziehung oder Vorenthaltung des Besitzes beeinträchtigt, so kann der Eigentümer von dem Störer die Beseitigung der Beeinträchtigung verlangen. Sind weitere Beeinträchtigungen zu besorgen, so kann der Eigentümer auf Unterlassung klagen.’²

The existence of a general prohibitory injunction in case of infringement of property rights has, in turn, been the basis for the further development of more general rules on injunctions in German procedural law.³

The development of the injunctive protection of the rights of the owner may have been (very) different in other jurisdictions, but the fact that according to English law the tort of trespass is one of the few torts that is actionable per se also seems to illustrate that the right to property is a recognised source of injunctive power.⁴

A remarkable first insight from this extremely short historical introduction may be that the acceptance of a procedural availability of an injunction on behalf of the owner has contributed substantially to the development of the right to property as such. Precisely stated, the recognition of the procedural position of the owner has not only contributed to the recognition of the right (*ubi remedium, ubi ius*), but it has also fostered the content of the right to property.

¹ See for The Netherlands P.C. van Es, *De actio negatoria* (Wolf Legal Publishers, Nijmegen 2005) p. 171 ff.

² When property is injured, by other means than withdrawal or withholding of possession, the owner is entitled to require that the intruder end the infringement. If further infringements are to be feared, then the owner can require a prohibitory injunction.

³ See par. 887, 888 and 890 ZPO. On this development, see the contribution of Willem van Boom in this issue.

⁴ On the relatively prominent position of injunctive protection of the right to property under English law, see John Murphy, *Rethinking Injunctions in Tort Law*, 27 *Oxford Journal of Legal Studies* 3 (2007), p. 509-535.

2. Property and tort law, a ‘continental’ approach

The relationship between property law and tort law is rather complex from a doctrinal point of view and, furthermore, is conceived differently in several jurisdictions. On the one hand it can be said that behaviour that gives rise to an *actio negatoria* can as such be seen as unlawful, because it can be viewed as an infringement of a legally protected position, and can thus – from a continental perspective – be qualified as ‘tort’.⁵ On the other hand, it must be said that the *unlawfulness* in these cases is precisely found in the existence and scope of protection of the right to property: it is unlawful *because* it is an infringement of the right to property. The added value of the fact that a right to property is at stake, is that its content and scope form the source of the concept of unlawfulness. In a similar way, a statutory rule may be the source to qualify certain behaviour as unlawful. Only in case of breach of uncodified duties – ‘negligence’ not being breach of a statutory duty – does tort law itself seem to be the source of unlawfulness.⁶ It is exactly the construction of the right to property, allowing specific procedural powers to the owner, which illustrates that its role is independent from the area of tort law. The owner may found his action directly on his right to property and need not refer to tort law to vindicate his legal position.

This does, of course, not mean that there is no role for tort law in case of infringement of property rights. The owner may suffer damage from the unlawful situation and he can claim compensation for his loss on the basis of tort law. Thus the *actio negatoria* may cumulate with an action out of tort. The *actio negatoria* serves to bring the actual situation into accordance with the law; the action out of tort serves to compensate the loss suffered. This distinction is of course most relevant in cases where a threat of unlawful behaviour is concerned (and no loss has been suffered yet) and in the case of unlawful behaviour of a continuing nature.

Furthermore, tort law may provide a criterion with regard to the limits of the powers of the owner. On the one hand, for instance, the owner is not allowed to cause nuisance when this nuisance can be considered to be of such a nature that it is unlawful. Thus, the tort law criterion of ‘unlawfulness’ is the standard to judge the nuisance.⁷ On the other hand, the owner is not entitled to an injunction in case of mere trivial nuisance.

This ‘right-based’ approach – the right to property contains powers which justify corresponding procedural rights to effect these powers – illustrates that, at least from a legal-dogmatic point of view, the right to property is more than the entitlement to compensation in money in case of infringement. It contains legal authority apart from the right to compensation; for instance the ability to stop an infringement or to prevent a threatening infringement.

⁵ van Es, *De actio negatoria*, p. 196.

⁶ On the relationship between unlawful nuisance and infringement of a property right, see A.S. Hartkamp, *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, Verbintenissenrecht, 4-III. De verbintenis uit de wet*, (Kluwer, Deventer, 2006) p. 49-52 and F.H.J. Mijnsen, A.A. van Velten & S.E. Bartels (et al eds.), *Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, Zakenrecht 5**, *Eigendom en beperkte rechten* (Kluwer, Deventer, 2008) p. 55-58.

⁷ Cf. Article 5:37 DCC.

3. Injunction or compensation?

The right to property is, however, not unlimited. The authority of the owner to exercise his property-right finds its limits in restrictions imposed by written as well as unwritten law and in the rights of others. For instance, the second section of the central article on property law in the Dutch Civil Code⁸ states:

‘To the exclusion of everybody else, the owner is free to use the thing provided that this use not be in violation of the rights of others and that it respect the limitations based upon statutory rules and rules of unwritten law.’

Statutory rules that may affect the right of the owner are laws regarding neighbours, environmental planning regulations, laws on monuments, et cetera. The term unwritten law refers to abuse of power⁹ as well as to tort law.¹⁰ The owner’s right finds its limits where the use would be unlawful towards another. In practice this means that the powerful right of the owner is, for example in the area of neighbour law, often balanced against the interests of someone else. The owner’s request for an injunction may thus be denied after a balancing of the interests of the petitioning owner and the respondent. Here the right to property may ‘end’ in a mere balancing of interests.

A clear example of this is the case in which an owner has built slightly over the border of his premises on his neighbour’s property. To require an injunction with the effect that the building be removed, can under specific circumstances be seen as abuse of power of the owner. Article 5:54, section 1, DCC then regulates the consequences:

‘Where a part of a building or work has been constructed on, over or under the land of another person and where removal of the protruding part would be disproportionately more prejudicial to the owner of the building or work than its preservation would be to the owner of the land, the owner of the building or work may at all times demand that, against compensation, a servitude be granted to him in order to preserve the existing situation or that, at the option of the owner of the land, the required part of the land be transferred to him.’¹¹

The position of the owner of the premises receives special protection in so far as the criterion for abuse of his power is whether the removal would place a *disproportionally* heavy burden on the owner of the building. The fact that violation of a property right is at issue, justifies awarding a special weight to the interest of the owner by setting a certain threshold.¹²

⁸ Article 5:1 Dutch Civil Code, hereinafter DCC.

⁹ Article 3:13 DCC.

¹⁰ Article 6:162 DCC.

¹¹ The provision is not applied (Section 3) when the owner of the building can be held to have been in bad faith or grossly negligent with respect to the construction. The owner of the protruding part may also be additionally protected against abuse of power by Article 3:13 DCC, Hoge Raad 15 November 2002, Nederlandse Jurisprudentie 2003, 48 (*AVO/Petr*).

¹² On the different standards for balancing in case of abuse of power (Article 3:13 DCC) and in case of the decision of the court to end a servitude (Article 5:79 DCC) see Valk, ‘De rechter, het Nieuw BW en de voortdurende verplichtingen op registergoederen’, in: *Rechterlijke macht en Nieuw BW, BW-krant Jaarboek 1990* (Gouda Quint, Arnhem, 1990) p. 119-129. See also Hof Arnhem 15 February 2005,

Yet, once the request for removal is considered abuse, the infringing party is merely' obliged to compensate the loss according to the regime of damages in case of tort. Thus the protection of the owner under Dutch law shifts from a 'property right-approach' (affecting the actual right) to a 'liability-approach' (entitlement to compensation of loss).¹³ Furthermore, within the liability-approach, the level of compensation of the loss is merely based on the market value of the land which is transferred, resulting (at best) in the owner being placed in the same *financial* situation as before the transgression. This means that the original owner is in general worse off than the 'intruding' party. Misuse of this provision is barred by the provision that the rule of transfer is not applied when the intruding party can be held to have acted in bad faith or grossly negligent, but the proof of this rests upon the owner's shoulders.¹⁴

Furthermore, the Dutch Civil Code provides a specific rule for the occasion in which the right of the owner is confronted with a societal interest. Article 6:168, section 1 DCC states:

'The judge may reject an action to obtain an order prohibiting unlawful conduct on the ground that such conduct should be tolerated for reasons of important societal interests. The victim retains his right to reparation of damage according to this title.'

This article provides an explicit option to let important societal interests prevail over – in theory – any civil right, including the right to property. The phrase 'important societal interests' is not intended to restrict the application of the article to strictly public interests; other important interests may qualify as well. It is, therefore, a potentially powerful defence against actions of the owner. The provision has been designed for cases of nuisance in particular, but its working is not limited to such cases. So far the Dutch Supreme Court has only limited the scope of the article by declaring that restrictions of the right to personal freedom, which do not rest upon a statutory basis, do not have to be tolerated.¹⁵

As far as the application of Article 6:168 DCC is concerned, the parliamentary documents suggest that when the violator is a public authority, its behaviour could be judged only in a restrained way, because the public authority should be allowed a margin of appreciation for public policy reasons.¹⁶ On the other hand, incidentally, in literature a more serious test has been advocated: since the starting point should be the prohibition of unlawful actions, the article should only be applied if the public interest at stake 'evidently' outweighs the owner's interest.¹⁷

Nederlandse Jurisprudentie Feitenrechtspraak 2005, 403, applying a special qualified standard for the balancing of rights in case of Article 5:79 DCC.

¹³ Cf. Calabresi and Melamed, 'Property rules, liability rules and inalienability: one view of the cathedral', *85 Harvard Law Review* 6, (1971-1972) pp. 1089-1128. On a similar development in Germany, see Ott and Schafer, 'The dichotomy between property rules and liability rules: experiences from German law', *1 Erasmus Law Review* 4, pp. 41-58.

¹⁴ Article 5:54, section 3, DCC.

¹⁵ Hoge Raad 8 July 1992, NJ 1993, 488.

¹⁶ ¹⁶ C.J. van Zeben et al (eds.), *Parlementaire geschiedenis NBW, boek 5 Zakelijke Rechten*, (Kluwer, Deventer 1981), p. 59.

¹⁷ J.M.C.M. Smarius, 'Artikel 6.3.1.5b Nieuw Burgerlijk Wetboek dient niet vervangen te worden door een mogelijkheid van schadevergoeding bij gerechtvaardigde daad', *WPNR* 1984/5698, p. 305-312.

This is puzzling. On the one hand it seems evident that a different weight should be attached to a public interest (for instance public health) than to the private commercial

interest (the opportunity to make profit) of an owner, because the latter can be expressed financially and be met accordingly with monetary compensation. For instance, the company that temporarily suffers a loss in turnover as a result of limited access to its premises due to necessary construction work on a public sewage system can be indemnified properly by an amount of money. On the other hand it does not seem possible to determine a specific standard by which to decide whether one interest outweighs the other sufficiently significantly to deny an injunction in favour of compensation. For example, how much noise should a person living in a quiet residential area have to tolerate for the benefit of the exploitation of a highway of national importance?

Once Article 6:168 DCC is applied, the owner's right is converted into a right to compensation for loss. The regime that regulates this under Dutch law appears to be of a strictly compensatory nature: the loss suffered is to be compensated according to its objective value.

4. From injunction to compensation: a sliding scale with a rather steep interval

As mentioned above, the right to property, at least in The Netherlands and in Germany, primarily provides the owner with a *right* to injunctive relief of any infringement. Under certain circumstances, however, the owner cannot exercise this right and has to settle for monetary compensation. These are entirely different things, not only from a doctrinal point of view, but from a factual and economic point of view as well. Once it is concluded that the owner is entitled to compensation, he has not only 'lost' his primary right to an injunction, but he has in a substantially different material and procedural position: he will have to prove the cause, existence and size of his loss, the remedy is purely compensatory and it is evaluated according to more or less objective standards, as Dutch law does not allow for a different set of rules for assessing damage(s) in the case of property infringement. And it might turn out even worse: he may not even be entitled to full compensation. The level of compensation depends on the type of case.

The most generous regime of compensation is probably applied in case of expropriation by the state. The fact that the owner loses a special right is here thought to be adequately compensated by a high standard of compensation. The owner is, according to Dutch expropriation law, not only entitled to compensation determined by the market value of his property, he is also compensated for the devaluation of the remaining property, for the loss of income over a maximum period of 13 years and for costs of transfer to a new location. Although this seems a rather generous level of compensation, it is not a full compensation, because the compensation for loss of income is limited to a certain number of years, whereas for instance in case of personal injury such a limitation is unknown.

A – presumably, because no cases have been reported – less favourable regime is applied after the balancing of interests according to Article 6:168 DCC.

It must be assumed that in these cases loss will be calculated as is usual in case of damaging an object.¹⁸ This means that the objective (market) value is to be reimbursed. This value is determined by either the objective costs of reparation, if economically sensible, or the cost of replacement (in case of complete loss). It is, however, recognised that if reparation is more costly than the objective value of the loss, the owner may under certain circumstances claim the cost of reparation. Relevant circumstances are the function of the building for the owner (private use, commercial use or investment), the possibility of obtaining a similar property elsewhere, and the extent to which the cost of repair exceeds the loss of value of the object.¹⁹ This shows that there may be some, however modest, space for a more subjective approach even if this might not be the economically most efficient one.

Interestingly, the road of Article 6:168 DCC (no injunction because of societal interests, but compensation) has hardly ever been followed as of yet. This may be explained by the fact that compensation of public interference with private interest is often regulated by law separately. For instance in a case of limited restraint of the owners capacity by a public development plan regulating the allowed use of an area for the future, a different standard of compensation is applied. In these cases, according to the standard of *égalité devant les charges publiques*, only a 'fair' amount of the loss is compensated, while a certain amount of the loss is explicitly left with the owner under the denominator of 'normal societal risk'. This implies that *in fact* the owner may be much worse off than in case of full compensation.

The shift from injunction to compensation and the different levels of compensation in different types of cases reveal a sliding scale of protection towards rather modest levels of compensation. On this scale, the shift from injunctive protection to compensation of loss appears to be a rather steep interval, as the owner is confronted, not only with a loss of his effective power to protect his actual right: a shift 'from right to money', but also with a substantially different procedural position when he wants to effectuate his right to compensation.

5. Evaluation: proper compensation for the loss of injunctive power?

The above mentioned examples of the shift from protection by way of an injunction (actual vindication of the right) to monetary compensation for (sometimes less than) the value of the object of the property right, may perhaps in part be explained by the nature of the infringement. In cases where public interests are at issue, one could say that from the beginning the property right did not contain more than the right of the owner *taking into consideration* possible future restrictions for the benefit of public interests. Under Dutch law this line of thinking is reflected in the sentence in Article 5 section 1 DCC that the owner has the most extensive right 'provided that this use not be in violation of the rights of others and that it respect the limitations based upon statutory rules and rules of unwritten law.' This illustrates that the owner's right is not comprehensive but, in view of public interests, restricted from the outset.

¹⁸ C.J.J.C. van Nispen, *Sancties in het vermogensrecht*, (Kluwer, Deventer 2003) p. 24-25, criticizes the application of the strictly compensatory measures of the law of damages in case of the application of Article 6:168 DCC.

¹⁹ Hoge Raad 1 juli 1993, NJ 1995, 43 (*Den Haag/Van Schravendijk*).

The category of cases in which the owner has to tolerate infringements for the benefit of public interests may, therefore, not be entirely representative for the illustration of shifts from injunction to (under)compensation.

However, in all cases in which the nature of vindication of the right of the owner shifts from injunction to compensation, the question can be raised whether the standards of compensation are adequate. In the search for an adequate standard of compensation, the value of the fact that the owner is deprived of his injunctive power should be taken into account. The question could be raised what could be seen as the 'loss' that results from the shift from being entitled to an injunction to being entitled to monetary compensation.

A first relevant point of view should be the shift in procedural position of the owner. In case of an injunction the owner can 'simply' state that his entitlement allows him to defend his right against any type of infringement. It is this aspect that provides him with a strong bargaining power in negotiations for a settlement. In case of compensation, however, the (former) owner appears to have to deliver an 'uphill fight': he has to prove infringement, loss, causation and quantum and he usually has to some extent to bear the costs of the procedure. In order to make the shift from injunction to compensation more gradual, this aspect should be taken into account in the assessment of the loss suffered. This provides an argument for a generous standard of compensation of costs of the 'forced transaction'.

Furthermore, there seem to be 'intrinsic' differences between being entitled to ownership of something and being entitled to compensation in money. Firstly, the owner may be emotionally attached to the object of his property, for instance because it has been in his family for decades or even centuries. This aspect is usually not accounted for in the assessment of the compensation, although it can be considered to be a real loss in fact.²⁰ Secondly, there seems to be an economic difference between entitlement to property and entitlement to monetary compensation, because goods and money may show a different return. This could be accounted for in the assessment of the compensation by considering the price of a similar object with a similar 'economic power'. This, however, may be difficult, because on the one hand it may not be possible to acquire such an object in fact (in which case the owner has to put up with the return on money instead of the return on his property). It may also be difficult, because the standard for a 'similar' object may be hard to find, precisely because the original object had certain specific economic opportunities.

An example may illustrate this: a piece of land by a lakeside is expropriated for the benefit of a public housing plan. The owner was not able to bargain a price for his land on a free market and may be compensated with the price of another piece of land nearby a lake. Although this may, from some perspective, put him in a similar position (granted that costs of moving, et cetera, are compensated), as he is still living near a lake. However, he has not been able to generate the specific economic power of his property in the form of the potential benefits from the commercial future of that original property: these have been transferred to the new owner. A manner of compensation for this loss would perhaps be to provide the original owner with shares in the new project. A similar manner would be to take into account in the assessment of the compensation the probable benefits the new owner will generate.

²⁰ Under Dutch law, compensation of emotional loss in case of damage to goods is only allowed when the injurer had the intention to hurt the owner emotionally (Article 6:106, Section 1 under a, DCC).

This resembles a form of disgorgement of profits. Although this (disgorgement) is usually only considered reasonable in case of some form of intentional infringement, it may be questioned why it is not applied more regularly in cases of infringement upon a property right, because if the right as such contains a certain economic power, that should be taken into account in the compensation.

6. Conclusions

The right to property can be considered one of the most powerful rights a person can have. This, among other reasons, is because of the 'injunctive power' of the right to property, providing the owner with a strong factual and economic position in case of a (threatening) infringement of his right. When an injunction is not granted, the owner may be entitled to damages for having to put up with an infringement, or even for losing his property right (in case of expropriation). For several reasons, however, the entitlement to damages may be considered to be only a very second best. The owner is in fact deprived of the authority that was incorporated in his property right. He will, at least according to Dutch law, be compensated for the value of the object of the property, but often even for less than that. And the owner will find himself in a different procedural position: he will have to prove the existence and quantum of his loss and he may be confronted with the risks of insolvency of the infringing party. These factual and economic consequences of the shift from injunctive power to entitlement to compensation appear, at least under Dutch law, to be rather large and unfortunate for the owner. This raises the question how the implications of a shift from an injunction to compensation of loss should be addressed adequately. The very fact that the owner was in principle entitled to an injunction in order to protect his position, should therefore, at the end of the day, be reflected in an adequate compensation.²¹

In order to protect the specific legal power of the right to property, there appear to be good reasons to smooth the shift from injunctive power to monetary compensation. In this respect several options (or combinations thereof) can be considered. Firstly, a specific standard is to be applied in deciding to refuse an injunction. In balancing the interests of the owner against other interests a high threshold should be applied. For instance, in case of overbuilding onto a neighbour's property, the decision to deny an order to remove the building must be given with great reluctance. Secondly, once an injunction is denied, the owner should be met with a generous standard of compensation. This can be achieved by compensation, not only of the market value, but also of the economic potential surpassing the current market value of the object. Disgorgement of (future) profits may be an adequate tool to achieve this. Thus, a different law of damages should be applied in these types of cases, allowing a different yardstick for measuring the quantum. The very fact that a legal position is initially protected with injunctive power should be reflected in the level of compensation once an injunction is denied.

²¹ This can be seen as a modification of a liability rule, thus becoming a more perfect substitute to the property rule. See Ott & Schafer, 1 *Erasmus Law Review* 4 (2008), p. 54.