Summative assessment exercise - outline answer

The so-called “general rule” in *Gafford v Graham* is not really a rule at all, but a well-established exception to the more basic rule which states that developers should not be able to ignore restrictive covenants and, by paying damages in lieu of an injunction, effectively purchase the right to do so:

> "a person by committing a wrongful act ... is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf".
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> (*Shelfer v City of London Electric Lighting Co (No.1)* [1895] 1 Ch. 287, Court of Appeal).

If the exception is now the rule, there is no true exception to it. That is to say, there is no case in which a person with the power to enforce the restrictive covenant has done *nothing* to stop the building work and then been permitted to enforce a mandatory injunction to have the completed building torn down. However, the decision of the Court of Appeal in *Mortimer v Bailey* [2004] EWCA Civ 1514 makes it clear that a person with the power to enforce the restrictive covenant may be permitted to enforce a mandatory injunction to have the completed building torn down even though he has done *everything* he could have done to stop the building work while it was threatened or in progress.

The defendants, Colin Bailey and Pamela Waterton-Bailey, were developers on a small scale. Their plan was to erect a single storey extension to the rear of their house ("The Old Barn"), thereby adding a "garden room". They presented this plan to the claimants, Martin and Jocelyn Mortimer, who were next door neighbours to the Baileys and at that time on friendly terms with them. Having studied the plan, the Mortimers noted that the extension would seriously reduce the enjoyment of their main downstairs room--the kitchen at the rear of their house ("The Heugh"). They objected to the proposed extension in a "conciliatory" and "constructive" letter. There was then a meeting between the neighbours to discuss the possibility of an extension, at the conclusion of which the defendants concluded (wrongly, according to Bowers J. at first instance) that the claimants would in no circumstances approve any extension to the rear of the defendant's house. The

defendants then proceeded "on legal advice" to obtain planning permission and commenced building. In so doing the defendants were in breach of a restrictive covenant entered into by their predecessor (who happened to be Mr Mortimer's brother) for the benefit of the "The Heugh". That covenant prohibited the erection of any building or structure of any kind and additions or alterations thereto without the prior written approval of the claimants, such approval not to be unreasonably withheld. The claimants had not appreciated that the covenant had been breached until after the building work had commenced, but thereafter they sought legal advice and threatened proceedings to have the extension pulled down and removed. Proceedings for an interim injunction were eventually commenced, but not until the final week of development. Armstrong J. refused the interim injunction on the ground that damages would be an adequate remedy or (if that was wrong) on the ground of the claimants' delay. At the final hearing of the matter, Bowers J. found that the defendants had been aware of the covenant at all times and had built in reliance on their lawyer's opinion that the claimants could have no reasonable ground (in light of the planning permission) to withhold consent to the development. His Lordship did not agree with that opinion. He held that the claimants' loss of direct sunlight and a "sense of openness" justified their refusal to approve the defendant's plan despite the presence of planning permission and he ordered the building to be returned to its former state.

The mandatory injunction for the removal of the building was affirmed on appeal. Peter Gibson L.J. held that failure to seek an interim injunction is merely one "factor" to be taken into account "in weighing in the balance whether a final injunction should be granted". There was therefore no ground to disturb the judge's decision to grant a mandatory injunction. Indeed Jacob L.J. described the appeal as "hopeless". The decision is nevertheless significant in at least three respects. First, it confirms that even when a building has been completed, the award of damages in lieu of a mandatory injunction should always be a matter for the judge to decide in his or her discretion; were it otherwise, developers who build quickly would in effect be permitted to purchase the right to breach restrictive covenants. Secondly, since failure to seek an interim injunction is merely one "factor" influencing the discretion to award an injunction, such failure cannot be equated with acquiescence in the breach. Thirdly, it suggests that the judicial discretion to grant or refuse a final mandatory injunction should be informed by the extent to which the parties' conduct was reckless to the risk that the decision might go against them.

In the instant case the claimant did not issue proceedings for an interim injunction until it was too late, but the claimant had earlier given written notice of his objection to the development and threatened proceedings. That suffices to exclude the defence of acquiescence. Failure to issue interim proceedings does not of itself amount to acquiescence or "standing by". Peter Gibson L.J. held in the instant case that:

> "[i]t may be entirely reasonable for the claimant, having put the defendant on notice, to proceed to trial, rather than take the risk of expending money wastefully by seeking interim relief".