UK: Rights to light - A new dawn approaching?

Real Estate Update
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By:

Introduction

Rights to light issues can have a significant impact on any development scheme in England. Neighbours can obtain court orders, known as injunctions, to prevent interferences with their rights to light and/or be awarded significant damages to compensate them for the loss of their rights. In some cases, these claims can destroy the viability of a development scheme or require it to be altered significantly.

Over the past 200 years, various statutes and cases have sought to clarify how and when rights to light can arise or be extinguished and/or what should be the appropriate remedy for interference with the rights— injunction or damages? If damages, how should they be calculated? Despite these efforts, the issue of rights to light remains an uncertain and usually highly contentious area of risk for most development schemes.

In an effort to address the problems, England’s Law Commission undertook a detailed review of the law on rights to light. The Law Commission’s final report was published in December 2014 and proposed significant changes to rights to light law, which are expected to be adopted by Parliament. This article considers the current problems...
What is an easement?
A right benefiting a piece of land that is enjoyed over another piece of land owned by someone else.

What is a right to light?
An easement to enjoy the natural light that passes over someone else’s land, and then enters a building through apertures/openings such as windows (with or without glass), skylights and glass roofs.

How much light?
Sufficient natural light to allow the room or space behind the relevant aperture/opening to be used for its ordinary purpose. The amount of light can depend on type of property and room.

What is not covered by a right to light?
- A right to a view
- A right to sunlight
- A right not to be overlooked
- A right to privacy

However, many of the above are public law considerations for the grant of planning permission.

How can rights to light arise?

Immediately: Enjoyment over time:
- Express grant
- Implied grant
- Statute
- Prescription Act 1832—20 years enjoyment ‘as of right’
- Common law prescription
- Doctrine of lost modern grant

Uncertainty, imbalance and more uncertainty

Developers must tread very carefully as to how and when they deal with the potential impact of rights to light claims on their scheme. The injunctions that can be awarded can result in the developer having to cut back their proposed scheme and/or stop work altogether. Thus the financial implications can be huge.

A neighbour who may be entitled to an injunction is under no constraints as to when it must issue proceedings for an injunction except that the courts will generally not assist a party who seeks an injunction after the event, if it can be shown that they had the opportunity to act sooner. Notwithstanding this general principle, there are examples in case law where a party has waited until a building has been erected and has then obtained an injunction requiring it to be cut back. These were extreme cases that show quite how much trouble an injunction can cause at any stage in a development project.

Given the nature of the threat posed by an injunction, neighbours can often extract favourable settlement payments from developers who may be prepared to pay to settle a claim rather than run the risks associated with court proceedings. With claims of this nature, the risks arising from court proceedings include the usual factors such as time and expense but also an additional layer of risk arising from the courts’ discretion as to whether or not to award the claimant damages or an injunction. The case law provides some guidance for judges as to how this discretion should be exercised. Furthermore, recent Supreme Court discussion of the point suggests a flexible, proportionate approach that regards injunction as a last rather than first resort is to be favoured. However, the judge in each case retains a high degree of autonomy as to how to exercise discretion in that particular case. Therefore, until judgment is delivered, a developer may still face the risk that the court will order that its scheme be stopped.

Notwithstanding the problems for developers, neighbours seeking such injunctions should not do so lightly. Litigation relating to these injunctions can be very expensive and time consuming. Where a party seeks an interim injunction requiring the development to stop while the case is determined, the party requesting the injunction will have to give the court an undertaking to pay for any losses suffered by the developer, if the court goes on to decide that an injunction is not the appropriate remedy. In the context of a development, the losses could be
significant, so the neighbour may be required to provide security for its undertaking either by way of payment of a sum into court or a charge over its assets. Accordingly, the threat of an injunction should always be considered in the context of whether the process can be funded.

**Current options for developers**

Developers often deploy one or more of the following tactics as part of their rights to light strategy:

- Negotiations to achieve early settlement and the release of future claims
- Light obstruction notices
- Rights to light insurance, and/or
- Developer-led litigation to determine the existence of the rights to light and the appropriate remedy.

A negotiated solution will provide certainty for the developer at an early stage. It may in some cases involve paying more than the claim is “worth” but it does eliminate the risk.

Light obstruction notices are statutory notices that can be served to prevent a neighbour claiming rights to light based on 20 years’ continuous enjoyment as of right. If these remain unchallenged for 12 months, the neighbour’s claim based on 20 years’ enjoyment is eliminated. As well as eliminating claims, these notices can be a useful way to “flush out” potential claimants. However, they can have unintended consequences as they may alert parties to their potential rights.

In the past few years, rights to light insurance has become more and more popular. As with all insurance, it does not prevent the problem arising but provides comfort in the event that it does. Since negotiations and light obstruction notices can take time that is sometimes not available to a developer, many parties now regard rights to light insurance as a viable alternative to negotiated solutions and light obstruction notices.

Developer-led litigation can be appropriate in circumstances where the neighbour’s claim lacks merit but the party is still seeking to extract damages using the threat of injunction. It is an option that should be deployed very carefully.

**The Law Commission’s proposals**

There are two significant changes to the law being proposed by the Law Commission:

1. A statutory test of proportionality for the courts to use when deciding whether injunction or damages is the appropriate remedy. The recommendation is that a court must not grant an injunction to restrain the infringement of a right to light if doing so would be a disproportionate means of enforcing the dominant owner’s right to light taking into account all of the circumstances, including:

   - the claimant’s property (for example, whether it is residential or commercial)
   - the loss of amenity attributable to the infringement including the extent to which artificial light is used at the property
   - whether damages would be adequate compensation
   - the claimant’s conduct
   - whether the claimant delayed unreasonably in claiming an injunction
   - the defendant’s conduct
   - the impact of an injunction on the defendant, and
   - whether the scheme is in the public interest.

2. A Notice of Proposed Obstruction (NPO) procedure by which a developer can put its neighbours on notice as to the proposed development. Following service of the notice, the neighbour must issue injunction proceedings within eight months otherwise it will only be entitled to claim damages for any interference with its rights to light.

Since the proportionality test is very similar to the approach commended by the Supreme Court in Coventry v Lawrence, it seems highly likely that the courts may be inclined to adopt a similar test in upcoming cases even if the adoption of the test is presented as part of the courts’ general consideration as to how to exercise their remedial discretion. This may mean the courts are less likely to award injunctions in the future but developers should remain vigilant as there are a number of criteria for the courts to apply and the existence of artificial light
and planning consent are unlikely to tip the balance in favour of damages in every case.

Once adopted, the proposed changes should enable developers to manage rights to light risks with greater certainty. Some industry commentators have suggested that the NPO procedure should be regarded as a last resort in the event that negotiations fail as it can appear to be aggressive. However, it seems to this author that, if and when available, the NPO may in fact be a sensible step for developers to take at an early stage so they can establish which neighbours are in fact going to seek injunctions and which will settle for financial compensation.

**Conclusion**

While we await the introduction of the recommendations, parties must continue to deal with rights to light matters under the current regime and take care to engage a proper and effective rights to light strategy. Different schemes require different strategies. The key is to be vigilant, aware and flexible.

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