



## Rights to Light



# **The Law Commission**

(LAW COM No 356)

## **RIGHTS TO LIGHT**

Presented to Parliament pursuant to section 3(2) of the Law Commissions Act 1965

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# THE LAW COMMISSION

The Law Commission was set up by the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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The terms of this report were agreed on 8 October 2014.

**The text of this report is available on the Law Commission's website at <http://lawcommission.justice.gov.uk/areas/rights-to-light.htm>.**

# THE LAW COMMISSION

## RIGHTS TO LIGHT

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# GLOSSARY

| TERM                                                                                   | DEFINITION                                                                                                                                                                                                                                                                                                                                                                                                       |
|----------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Adverse possession</b>                                                              | The physical control and occupation of land belonging to another coupled with the intention to exclude others from the land, which over time may entitle the person in possession to claim title to an <b>estate in the land</b> .                                                                                                                                                                               |
| <b>Aperture</b>                                                                        | A defined opening in a building, such as a window or skylight.                                                                                                                                                                                                                                                                                                                                                   |
| <b>Benefit</b>                                                                         | A person has the benefit of a right if he or she is entitled to enforce it. An <b>estate in land</b> is said to have the benefit of a right if a person is entitled to enforce it by virtue of being the owner for the time being of that estate.                                                                                                                                                                |
| <b>Burden</b>                                                                          | A person has the burden of a right if he or she is required to comply with the obligations that it creates. An <b>estate in land</b> is said to have the burden of a right if a person is so required by virtue of being the owner for the time being of that estate.                                                                                                                                            |
| <b>Damages in lieu of an injunction</b><br><br><b>Damages instead of an injunction</b> | A sum of money awarded by a court when it decides, in the exercise of its discretion, not to award an <b>injunction</b> .                                                                                                                                                                                                                                                                                        |
| <b>Dominant</b>                                                                        | This word is used in a number of contexts. The dominant estate is an <b>estate in land</b> with the <b>benefit</b> of, for example, a right to light. The dominant owner is the owner for the time being of that estate. The dominant land is the parcel of land in relation to which the dominant estate exists, except where the context indicates that it is being used as shorthand for the dominant estate. |
| <b>Easement</b>                                                                        | A right to make some limited use of land belonging to someone else, or to receive something from that person's land. Examples include rights of way or rights to light or support.                                                                                                                                                                                                                               |
| <b>Estate in land</b>                                                                  | A right to land colloquially known as ownership. Ownership can be freehold or leasehold, and in this Report we refer to the <b>freehold</b> estate and the <b>leasehold estate</b> .                                                                                                                                                                                                                             |

|                                                            |                                                                                                                                                                                                                                                                                                                                                                                                    |
|------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Freehold</b>                                            | An <b>estate in land</b> of a potentially indefinite maximum duration. It can be sold or inherited. The term “freehold” is synonymous with “fee simple”.                                                                                                                                                                                                                                           |
| <b>Grant</b>                                               | The express creation of an interest in land, for example, a right to light.                                                                                                                                                                                                                                                                                                                        |
| <b>Injunction</b>                                          | An order by a court compelling a person either to do something (a mandatory injunction) or not to do something (a prohibitory injunction).                                                                                                                                                                                                                                                         |
| <b>Leasehold estate</b>                                    | An <b>estate in land</b> of a fixed duration, arising when a person with a more extensive estate in the land (the landlord) grants a right to exclusive possession of the land for a term to another person (the tenant or lessee).                                                                                                                                                                |
| <b>Planning</b>                                            | The regime, often called the planning system, that provides for the regulation of the development of land by planning authorities. It is distinct and separate from the private law of easements.                                                                                                                                                                                                  |
| <b>Prescription</b><br><br><b>Prescriptive acquisition</b> | Acquisition of rights by long use.                                                                                                                                                                                                                                                                                                                                                                 |
| <b>Restrictive covenant</b>                                | A covenant – being a type of promise, usually contained in a deed – that restricts the use that a <b>servient</b> owner can make of its land and is enforceable by a <b>dominant</b> owner.                                                                                                                                                                                                        |
| <b>Servient</b>                                            | This word is used in a number of contexts. The servient estate is the estate in land with the burden of, for example, a right to light. The servient owner is the owner for the time being of that estate. The servient land is the parcel of land in relation to which the servient estate exists, except where the context indicates that it is being used as shorthand for the servient estate. |

# THE LAW COMMISSION

## RIGHTS TO LIGHT

*To the Right Honourable Chris Grayling MP, Lord Chancellor and Secretary of State for Justice*

### CHAPTER 1 INTRODUCTION

- 1.1 Natural light inside buildings is immensely important for comfortable living and working. We like and want natural light in our kitchens, and at our desks; people like to have a window seat and most people thoroughly dislike a windowless room. The amount of natural light that a window lets in depends upon what is outside that window, and particularly upon the proximity of other buildings.
- 1.2 The legal system recognises the value of natural light inside buildings, but because available space is finite it has to strike a balance between the importance of light and the importance of the construction of homes and offices, and the provision of jobs, schools and other essentials. The Law Commission's project on rights to light is about the way that the law strikes that balance.
- 1.3 Generally, people and buildings do not have a *right* to light. Instead, the law has to balance the need for light to existing buildings, and the need for new buildings, through the planning system. Local planning authorities consider the effect of new buildings upon existing structures; the planning system gives protection but not rights. Thus when planning permission is applied for, a local planning authority will want to see evidence of the effect it will have upon the neighbouring properties, including, in many cases, the light and other amenities that those properties currently have. Where a residential property is involved the local planning authority may use *Site layout planning for daylight and sunlight: a guide to good practice*,<sup>1</sup> ("*BRE daylight and sunlight*")<sup>2</sup> in order to assess whether the property will have, or may lose, adequate natural light. Different considerations come into play for commercial buildings, where it is expected that artificial lighting will be widely used. A local planning authority looks at the amenity of existing and proposed buildings in the context of local and national planning policies<sup>3</sup> which are developed in the light of, and in order to balance, a multitude of factors including the needs of individuals, businesses, environmental concerns and the localities involved.

<sup>1</sup> P Littlefair, 2nd ed 2011; see Chapter 3, n 13.

<sup>2</sup> The BRE Trust, which publishes this work, is a charity dedicated to research and education in the built environment (see <http://www.bre.co.uk/bretrust/page.jsp?id=2052> (last visited 18 November 2014)).

<sup>3</sup> See Rights to Light – A Consultation Paper (2013) Law Commission Consultation Paper No 210, para 2.60 and following.

- 1.4 This Report is not about the treatment of light by the planning system. It is about a legal protection for natural light, which not all buildings have. Easements of light,<sup>4</sup> for which the term “rights to light” is a synonym, are private property rights. An easement of light is a right to light through a window, where that light has passed over a neighbour’s land. Put another way, it is a right to prevent a neighbour from obstructing the light to a window.
- 1.5 Not all properties benefit from easements of light. Of those that do, a few have them because of an express grant (that is, the deliberate giving, by a neighbour, of a right over that neighbour’s land); most have them because of the law of prescription, by which an easement can come into being with the passage of time. If they are infringed – for example, if the passage of light is obstructed by a new building – then the person who has the right to light is entitled to a remedy; that remedy may be an injunction to prevent (or reverse) the infringement, or it may be damages by way of compensation for the continuing infringement.
- 1.6 The protection of light in the context of planning permission is outside the scope of our project. We are here concerned only with individual rights, or easements, of light.

#### **THE ORIGINS OF THIS PROJECT IN OUR GENERAL WORK ON EASEMENTS**

- 1.7 In 2008 we published a consultation paper on easements, covenants and profits à prendre. In the course of our consultation and our discussions with stakeholders it became clear that, whilst that project was concerned with easements generally (rights of way, for example, or rights of support for buildings), there was a need for specialised work on easements of light. The concerns outlined to us at that stage related to the tendency of rights to light to impede development and raise its cost significantly; there was evidence that in some cases rights to light were defended not for the sake of preserving light but as a way of extracting large sums from developers for their release. It was felt that there was no incentive for those entitled to rights to light to come to the table and negotiate, and that the law was driving up the price at which settlements were being agreed.

<sup>4</sup> Easements allow one landowner to use the land of another. For example, an easement to pass over a neighbour’s land – often called a right of way – allows a landowner to “use” a neighbour’s property to access his or her own land. An easement of light allows the “use” of a neighbour’s land for the passage of light to his or her window.

- 1.8 Those concerns became more acute in 2010 with the decision of the High Court case in *HKRUK II (CHC) Ltd v Heaney*.<sup>5</sup> We discuss the case in more detail in Chapter 4; it sent shock waves through the development industry because, in a case where there was an expectation that damages would be awarded for the infringement of a right to light,<sup>6</sup> an injunction was given requiring the demolition of two floors of a new building that had already been let. Yet the building that infringed the right to light still stands. The result of the decision was not the protection of light itself, but an increase in risk for those infringing rights to light. The case appeared to put those who hold easements of light in an unfairly powerful position when it came to extracting money from development; it generated a perception that they have developers “over a barrel”.
- 1.9 In 2011 we concluded our project on the general law of easements by publishing a report (“the Easements Report”) and a draft Bill (“the 2011 Easements Bill”).<sup>7</sup> In the same year we published our 11<sup>th</sup> programme of law reform,<sup>8</sup> in which we stated that we were going to undertake a project on rights to light. That project commenced in March 2012 and we published a consultation paper (“the Consultation Paper”) in February 2013.<sup>9</sup>
- 1.10 In the course of the project – both before and after the publication of the Consultation Paper – we have been assisted by detailed discussions and written submissions not only from developers, but also from those who benefit from rights to light. Inevitably the latter are more disparate and far less likely to speak as groups or as organisations; nevertheless we have heard their voice as loudly and as clearly as that of the development industry. We are in no doubt about the amenity value of light, and the essential part it plays particularly in the home. At the same time we are conscious of the value of the built environment and of the need for new homes and commercial buildings, schools, and hospitals.
- 1.11 The value of light to see by is one thing; its monetary value is another. It is one thing for the law to protect an individual’s right to read the newspaper at home or to read and write at one’s desk. It is quite another for a right to natural light, benefiting an office building in which artificial light is used all day, to be used to extract excessive compensation from a neighbour. As was said in *Colls v Home and Colonial Stores Ltd*, “...the 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”.<sup>10</sup>

<sup>5</sup> [2010] EWHC 2245 (Ch), [2010] EGLR 15. We refer to this case as “*Heaney*” in this Report.

<sup>6</sup> Not least because of the failure over a long period, on the part of the holder of the right to light, to apply for an injunction. See *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [12] to [34] and the Consultation Paper, para 5.37.

<sup>7</sup> *Making Land Work: easements, covenants and profits à prendre* (2011) Law Com No 327.

<sup>8</sup> *Eleventh Programme of Law Reform* (2011) Law Com No 330.

<sup>9</sup> Rights to Light – A Consultation Paper (2013) Law Commission Consultation Paper No 210.

<sup>10</sup> [1904] AC 179, 193.

## **OUR PRIORITIES**

- 1.12 In designing our recommendations for reform of the law of rights to light we have been anxious first to secure proper protection for light itself. We are also mindful that rights to light have a monetary value and that the law allows them to be exchanged for money. Our recommendations are designed to ensure that that exchange value is also protected, but to change the law so that it no longer encourages rights holders to use silence and delay to drive up the price they are offered in exchange for a loss of light. We are mindful of the concerns of developers who need to know their legal position and, in particular, to be able to reach a point when they know whether or not a neighbour will seek to protect a right to light with an injunction or will accept compensation. Our recommendations are designed to clarify the legal relationships between different parties, simplify the law, and make negotiation more efficient.

## **OUR RECOMMENDATIONS**

- 1.13 In the Easements Report we made recommendations that would modernise the law of easements, in terms of how they are acquired – in particular by prescription – how they are treated in the title registration system, and how they can be brought to an end.
- 1.14 Government has not yet responded to the recommendations in the Easements Report. When we commenced work on rights to light we expected that we would have had that response before the end of the project and that by the time this Report, on rights to light, was published the 2011 Easements Bill might already have been introduced into Parliament or even enacted. We would then have been recommending, in this Report, some stand-alone recommendations in a Rights to Light Bill as well as some clauses for addition to the 2011 Easements Bill or for the amendment of enacted legislation.
- 1.15 Instead, our recommendations are expressed in two sets of clauses. Those in Appendix A have been drafted to be added to the 2011 Easements Bill, those in Appendix B take the form of a Rights to Light Bill. Our work on rights to light builds on the framework of the technical reforms we have already recommended, and the Rights to Light Bill should not be enacted without the prior, or simultaneous, enactment of the 2011 Easements Bill as amended by the clauses in Appendix A.
- 1.16 We turn now to the recommendations that we make in this Report for the reform of the law governing easements of light, under five different heads.

### **1. Prescription**

- 1.17 We do not recommend the abolition of the prescriptive acquisition of rights to light, for the reasons described in Chapter 2. Our primary recommendation about prescription is for the implementation of the recommendation contained in the Easements Report and the 2011 Easements Bill for the simplification of prescription. The reform we recommended in 2011 will replace the current three methods with one straightforward statutory scheme.

- 1.18 As a result, following reform, prescription will continue; the underlying law will be simpler and therefore the process will become somewhat cheaper. However, the simpler system of prescription recommended in the Easements Report was carefully designed to make sure that prescription, although simpler, did not become easier in the sense of its happening more often. The rules we recommended are simpler but more demanding. For example, there is now no provision for prescription to continue despite temporary interruption.
- 1.19 At the same time, we recommend the repeal of the Rights of Light Act 1959, which enables prescription for a right to light to be interrupted, and brought to an end, without physically obstructing the light. It does this by allowing a local land charge to be registered which has the same effect on the process of prescription as the building of an opaque structure on a neighbour's land. This is complex and gives rise to some unwieldy provisions and considerable administrative burdens and costs. Instead, we recommend a simplified procedure which would take effect alongside the reformed law of prescription. In Appendix A to this Report we provide draft clauses to be added to the 2011 Easements Bill to put this into effect; it is not possible to enact this reform while the current three systems of prescription remain in place, because the provisions of the Rights of Light Act 1959 are very closely linked to the complexity of the Prescription Act 1832. Only with the 1832 Act repealed – as the 2011 Easements Bill provides – can our simpler system be substituted for the 1959 Act.

## **2. Remedies for the infringement of a right to light**

- 1.20 As we noted above, when a right to light is infringed two remedies are potentially available: damages or an injunction. There has been some confusion and controversy recently about the way that the court exercises its discretion between the available remedies. In February 2014 the Supreme Court handed down its judgment in *Coventry v Lawrence*,<sup>11</sup> and as a result the law relating to the award of damages instead of injunction has changed. The change is a general one affecting a number of contexts as well as rights to light. Old case law is disapproved, and the public interest is to play a part in the exercise of the court's broad discretion. Following that development we take the view that reform is still needed in the context of rights to light in order to make the law more predictable and so we recommend a new statutory test to assist courts when they must decide whether to grant an injunction, or award damages instead of an injunction, where a right to light has been, or will be infringed. Draft clauses to put this recommendation into effect will be found in our Rights to Light Bill at Appendix B.

<sup>11</sup> [2014] UKSC 13, [2014] AC 822. We discuss the decision in *Coventry v Lawrence* in detail at para 4.13 and following below.

### **3. The notice of proposed obstruction procedure**

- 1.21 One message that we heard from developers in the course of our consultation is that whilst they are willing to negotiate with neighbours, to modify their plans so as to respect the rights attached to neighbouring land, and to compensate for the loss caused by the development, they have difficulty where they are left “in limbo” for a long time not knowing whether a claim to an injunction is going to be pursued. That uncertainty has a cost; development is delayed, and neighbouring landowners may have an incentive to exploit that cost. As things stand, a landowner can threaten to seek an injunction and can reject offers for settlement; time passes, higher offers are made, and eventually a settlement is reached after a protracted period of uncertainty and at a very high price.
- 1.22 Provision is made in our Rights to Light Bill to establish a regime that will enable developers to put a neighbour on notice, requiring him or her either to claim an injunction within a certain period (after the developer has paid for the neighbour to take legal and surveying advice) or to lose the right to claim an injunction. That procedure effectively brings the uncertainty to an end; the neighbour must either take action to protect the easement or accept that an injunction will not be awarded but that the claim for damages remains intact.
- 1.23 The important change that this makes in the law is one of timing. At present, where an injunction is truly wanted, the neighbour must apply to the court for one. The Notice of Proposed Obstruction procedure does not introduce any obstacles to the seeking of an injunction to protect light, nor does it make it any more expensive to do so. But it does require at least the beginnings of a commitment to do so within eight months of the Notice of Proposed Obstruction being served, in order to generate some certainty for developers. It does not make rights to light any weaker, nor does it lessen the chance of an injunction. But by introducing a deadline, we respond to calls from developers who wish to have a point in the process at which they know for certain whether or not an injunction is being or will be sought. We anticipate that the notice procedure will make negotiation more effective and will keep costs down for all concerned.

### **4. Abandonment of a right to light**

- 1.24 The law recognises that an easement can cease to exist if it is abandoned. Proof of abandonment requires proof of intention to abandon, and this is notoriously difficult to prove. Whether there is the requisite intention is a question of fact; the law will not presume the existence of an intention simply because of the length of time that has elapsed since an easement was last used. The 2011 Easements Bill deals with the general law of abandonment. It provides that non-use of an easement for a continuous period of 20 years would be evidence of an intention to abandon the easement. This would apply to all easements. In this Report we recommend a minor amendment to the 2011 Easements Bill to the effect that that period would be five years for easements of light, because the obstruction of light tends to be far less equivocal than, for example, the obstruction of a right of way. If a window has been bricked up or a building demolished, it is hard to see how the easement is intended to continue once a few years have passed.

## **5. The power of the Lands Chamber of the Upper Tribunal to discharge and modify rights to light and other easements**

- 1.25 Restrictive covenants over land (that is, obligations not to do something on land) can be discharged or modified in limited circumstances; easements, at present, cannot. The 2011 Easements Bill would change the law so that easements created after its enactment could be discharged or modified, still in limited circumstances, on application to the Lands Chamber of the Upper Tribunal.
- 1.26 Our work on rights to light has led us to the conclusion that our policy for easements generally was too cautious. We now recommend that all easements, including rights to light, whether created before or after reform, should be brought within the Lands Chamber's proposed jurisdiction to discharge or modify easements, and that the 2011 Easements Bill be amended to achieve this change before its introduction into Parliament.

## **THE IMPACT OF REFORM**

- 1.27 In Chapter 8 of this Report we set out the information that we have collected – from consultees and other sources – regarding the economic impact of disputes relating to rights to light.

## **ACKNOWLEDGEMENTS**

- 1.28 We would like to thank all of the stakeholders who have engaged with us during this project, both in meetings and in their consultation responses. A full list of consultees is annexed to this Report as Appendix E. In particular, we would like to thank the members of our advisory group: Matthew Baker, Andrew Francis, Philip Freedman CBE QC (Hon), Jonathan Gaunt QC, Warren Gordon, Gordon Ingram, Nick Lloyd, Mr Justice Morgan, Barry Morris and Patrick Robinson. We would also like to thank the British Property Federation for its sustained input into this project.

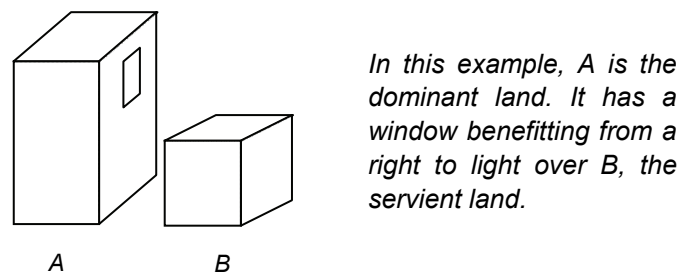
## CHAPTER 2

# PREScription AND LIGHT OBSTRUCTION NOTICES

### INTRODUCTION

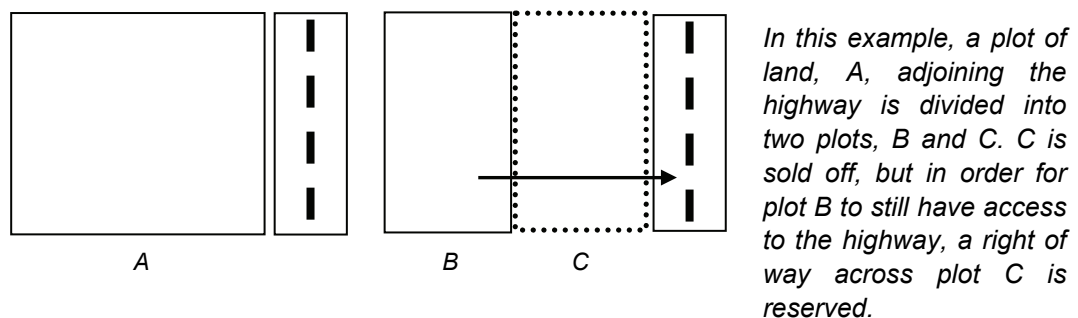
- 2.1 An easement is a right that benefits one property and burdens another. The most common example is a right of way where, for example, the owner of number 3 Acacia Avenue is entitled to walk across the back yard of number 1 in order to reach the back door of number 3. It is said that an easement benefits a property, because easements are not standalone rights. The owner of number 3, in that example, cannot sell the right of way by itself; the right goes with ownership of the house.
- 2.2 Lawyers refer to the land that benefits from an easement as the “dominant land” and the burdened land as the “servient land”; in the example just given the owner of number 3 is the “dominant owner” and the owner of number 1 is the “servient owner”. The diagram below illustrates this terminology for a right to light.

Fig 1



- 2.3 Easements can come into being by express grant, and this may happen when part of a property is sold off. Where, for example, the owner of a large area of land sells a building plot, he or she might grant a right of way or a right of drainage to the purchaser; equally, such rights might be reserved for the unsold land. The following diagram illustrates this latter case:

Fig 2



- 2.4 Alternatively, an easement can come into being by prescription. In Chapter 1 we observed that most rights to light come into being by prescription; that is, by the continuous use of light over a period of years, usually 20. This happens when light passes over one person's land and into another's property through what the case law describes as a "defined aperture", usually a window. Prescription is legally complicated because it can occur under three different sets of rules.
- 2.5 Prescription is relevant to all easements; it is regarded as a useful mechanism whereby the legal position is eventually brought into line with reality, in some cases after conveyancing mistakes. For example, where part of a property is sold and the transfer fails to grant a right of way or a right of drainage for one property across the other, after the owner of one property has made use of the other – for drainage, or by using a footpath – for 20 years, an easement of way or of drainage will usually come into being.<sup>1</sup>
- 2.6 Easements of light are negative easements; they do not involve one person doing something on another's land. Instead, they prevent someone from doing something on his or her own land. Rights to light prevent a landowner from obstructing a neighbour's light, and similarly a right of support prevents a landowner from removing a structure that supports an adjoining building. Prescription for a negative easement does not involve doing anything, but rather receiving something, such as structural support or light.
- 2.7 In the Consultation Paper we provisionally proposed the abolition of prescription for rights to light. In this Chapter we summarise briefly the current law and the arguments for and against prescription for rights to light. We consider the responses of consultees to the proposal, and explain our conclusion that prescription should be retained. We then look again at the recommendations we made in the Easements Report regarding the reform of prescription for easements generally and explain why they are appropriate and important for rights to light. Accordingly we look forward to a response from Government to our recommendations in the Easements Report, which now form a crucial part of our conclusions in respect of rights to light. We then examine whether any reform is required to accommodate solar panels.<sup>2</sup>
- 2.8 Finally, we examine the provisions of the Rights of Light Act 1959, which enables landowners to put a stop to prescription for rights to light over their property by registering a notice rather than by setting up a physical obstruction. We make recommendations for the repeal of the 1959 Act and its replacement with a modernised and simpler system.

## **THE CURRENT LAW**

- 2.9 There are currently three kinds of prescription:
- (1) prescription at common law;
  - (2) prescription by lost modern grant; and

<sup>1</sup> Easements may in these circumstances also arise by implication. See the Easements Report, para 3.11 and following. We say no more about implication here.

<sup>2</sup> See para 2.72 and following below.

- (3) prescription under the Prescription Act 1832.
- 2.10 Prescription at common law requires continuous enjoyment of the right claimed (openly, without force, and without permission) since 1189. It is therefore very rarely of any practical use, especially in the rights to light context where buildings are likely to have been built, demolished and/or altered significantly since that date.
- 2.11 Prescription by way of lost modern grant is a legal fiction: where there has been enjoyment of the right claimed for 20 years, without interruption, force, or permission, the law will presume that there must have been a grant of the right which has somehow been lost.<sup>3</sup> This presumption can be rebutted by showing there was nobody who could lawfully have made the grant throughout the entire 20-year period, in which case no easement is created.
- 2.12 The Prescription Act 1832 created two new and distinct prescription regimes: one for rights to light and another for other easements. The rights to light regime provides that where light has been enjoyed across another's land for 20 years without interruption<sup>4</sup> and without the written consent or agreement of that landowner,<sup>5</sup> a right to light will arise. Unlike lost modern grant or common law prescription claims, under the 1832 Act the 20-years' enjoyment must be, in the words of the statute, "next before some suit or action". That means that the 20 years must immediately precede an application to court by the person who claims the right.<sup>6</sup> It is not clear whether an application to Land Registry for registration of the right is equally effective as a "suit or action".<sup>7</sup>
- 2.13 We discussed the three methods of prescription in detail in the Easements Report.<sup>8</sup>

<sup>3</sup> See *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552.

<sup>4</sup> Interruption has a technical meaning in this context. The 1832 Act provides that non-use for less than one year does not count. This leads to the peculiar result that prescriptive use for 19 years and one day, which then stops because it is prevented by the servient owner, will nevertheless almost certainly result in an easement, provided that the dominant owner brings a "suit or action" to crystallise the right on the twentieth anniversary of starting to use the light.

<sup>5</sup> Prescription Act 1832, s 3.

<sup>6</sup> Prescription Act 1832, s 4. This might be, for example, a claim for nuisance by the dominant owner where the light is interrupted.

<sup>7</sup> There is little authority as to what constitutes a "suit or action", several leading texts appear to regard an application to court as being necessary (see C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (8<sup>th</sup> ed 2012) para 28-069, and K Gray and S F Gray, *Elements of Land Law* (5<sup>th</sup> ed 2009) para 5.2.77).

In *Wilkin & Sons Ltd v Agricultural Facilities Ltd* (REF/2011/0420) the Adjudicator to HM Land Registry concluded that "the making of the application [to Land Registry to register an easement] constitutes a 'suit or action'". The recommendation made in the Easements Report for the introduction of a new method of prescription (to replace the three existing methods) makes no provision for a "next before" requirement and, accordingly, any lack of clarity in the existing law will be eliminated following the enactment of that recommendation.

<sup>8</sup> Easements Report, para 3.86 and following. See also J Gaunt and P Morgan, *Gale on Easements* (19<sup>th</sup> ed 2012) ch 4, and C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8<sup>th</sup> ed 2012) para 28-059 and following.

- 2.14 In the Easements Report we recommended replacing all three methods of prescription with a single, statutory method applicable to all easements, including rights to light.<sup>9</sup> In doing so, we rejected the option of recommending the abolition of prescription for easements generally. However, in our project on rights to light we looked again at the question of abolition, this time for rights to light specifically.
- 2.15 In the Consultation Paper we explored the law in a number of other jurisdictions where prescription for rights to light has been abolished, or never developed.<sup>10</sup> We then examined the arguments for and against prescription generally, and more specifically for rights to light.<sup>11</sup> Those arguments are summarised briefly in the following paragraphs.

## **THE ARGUMENTS FOR AND AGAINST PRESCRIPTION**

### **Arguments for the abolition of prescription**

- 2.16 Prescription can be seen as giving a dominant owner something for nothing. And that “something” is a significant legal right; until the prescription period is completed, the dominant owner has no right at all and his or her use of the servient land is relatively easy to prevent; afterwards, the dominant owner has a significant degree of control over it. Once created, easements are resilient, and there are few circumstances in which they can be lost without the cooperation of the dominant owner.
- 2.17 Prescription can also be viewed as penalising generosity. A landowner may be happy to tolerate a neighbour’s use of a part of his or her land, but may be surprised and dismayed to see this use translated into an enforceable right that can no longer be prevented.
- 2.18 Furthermore, whilst prescription can be prevented, most landowners are unlikely to be aware that it is happening or know how to prevent it. Arguably, prescription penalises ignorance of the law by imposing the burden of adverse rights onto unsuspecting landowners.
- 2.19 While we were not convinced that these arguments were sufficient to justify the abolition of prescription for easements generally, we noted in the Consultation Paper that they each have greater force as regards rights to light. This is because:

<sup>9</sup> Easements Report, paras 3.115 to 3.187. The recommendation would involve the repeal of the Prescription Act 1832.

<sup>10</sup> See the Consultation Paper, para 3.15 and following.

<sup>11</sup> See the Consultation Paper, paras 3.26 to 3.45.

Where a right to light is concerned the dominant owner need take no action nor commit any trespass to acquire the right; it is for the servient owner to appreciate the importance that the law attaches to the passage of light over his or her own land through the windows of buildings on the dominant land. Even where this is understood, the servient owner will not prevent prescription unless he or she knows that, under the current law, only written permission or an interruption of the use of the light for one year or more will prevent a right to light from arising.

Sophisticated landowners may be aware that notional interruptions can be used to prevent the acquisition of a right to light by registering light obstruction notices, but these measures require time and expense.

This means that easements of light arise in a way that cannot be predicted. Landowners that understand the law may protect against prescription; others may not. A dominant owner's property may benefit from a right to light enforceable against neighbours to the North and West, but not against neighbours to the East and South.<sup>12</sup>

- 2.20 Rights to light evolved long before the state became involved in regulating the built environment through planning law. A number of common law jurisdictions either did not develop prescription for rights to light, or abolished it in the late nineteenth or early twentieth century, when cities were expanding and the built environment was becoming more complex and regulated by legislation.<sup>13</sup> In this jurisdiction prescription for rights to light continued unabated, with the result that rights to light are prevalent in built-up areas. Many of them benefit commercial buildings that are predominantly, and constantly, lit by artificial light. It is therefore not clear that all rights to light are necessarily beneficial or that their acquisition by prescription is valuable or appropriate in all cases – particularly now that the amenity of domestic premises is protected through the planning system.
- 2.21 Moreover, prescription happens by accident rather than by design. Is it appropriate that some properties happen to have an additional protection of light that the planning system does not give?<sup>14</sup>

<sup>12</sup> Consultation Paper, paras 3.30 to 3.32.

<sup>13</sup> See the Consultation Paper, para 3.15 and following.

<sup>14</sup> Because the protection afforded by the planning system differs from that commonly used in rights to light disputes (see para 3.16 below).

- 2.22 Since an infringement of a right to light can be prevented or reversed by obtaining an injunction, a right to light can be used to prevent the development of the servient land. In some cases where a development is going to interfere with a right to light, the dominant owner will agree to the release of the right for money. This is not unique to rights to light, but their proliferation, and their detrimental effect upon development and the difficulty of accommodating them within a development scheme, make instances of their release for money more common. Where rights to light are used in this manner, they are not protecting light but have instead become a way to extract money; we have to consider whether it is right that that sort of asset should continue to be acquired without effort and without payment.

### **Arguments for retaining prescription for rights to light**

- 2.23 We explained in the Consultation Paper that a benefit of prescription is that it keeps the legal entitlement to use land aligned with its actual use.<sup>15</sup> People may behave in a particular way because they think they have a legal entitlement to do so. For example, after many years of the use of a path in the belief that there is a right to do so, prescription can make that belief real. And, as noted above, prescription can come to the aid of landowners where rights have been mistakenly omitted from a conveyance of land.
- 2.24 Light may well be a special case. Obviously, even though many dominant owners are willing to trade their rights to light, many others rely on them for the amenity of their homes. We said in the Consultation Paper that whilst the state is involved in regulating the built environment through the planning system, it is arguable that this should not take away the direct control that private law rights to light afford to neighbouring owners. We explained that the planning system is a balancing exercise and cannot provide the same certainty for a particular landowner as that afforded by a right to light. Whether that is an argument for or against the abolition of prescription is a matter of opinion.
- 2.25 One issue that pervades our project on rights to light is the question whether it is right to make a special case for one type of easement. It could be argued that prescription should not be abolished only for rights to light, now that we have concluded in the Easements Report that it should be retained for all other easements.

## **THE PROVISIONAL PROPOSAL AND THE CONSULTATION RESPONSES**

### **The provisional proposal**

- 2.26 In the Consultation Paper we provisionally concluded that the arguments in favour of abolishing prescription for rights to light outweighed those in favour of its retention, and, accordingly, proposed its abolition.<sup>16</sup>

<sup>15</sup> See the Consultation Paper, para 3.38.

<sup>16</sup> Consultation Paper, paras 3.10 to 3.48.

- 2.27 The abolition we proposed would have had no impact on easements already acquired by prescription at the date of reform. But where prescriptive use was in progress at that date, our provisional proposal was that it should have no further effect.<sup>17</sup>
- 2.28 Our proposal resulted in a degree of adverse discussion in the media which, in some cases, linked the proposal with wider Government reforms to the planning system.<sup>18</sup> Although our project does not concern or affect planning law, and our proposal would have had no effect on rights to light already in existence, the coverage helped to highlight the strength of feeling that attaches to rights to light. In particular, the media attention, and the responses that it generated, made clear the concerns of residential owners and occupiers regarding the impact of stopping the most common way in which rights to light arise.

### **Consultees' responses<sup>19</sup>**

- 2.29 Approximately one-third of those responding agreed with our proposal to abolish prescription for rights to light. Those in agreement drew attention to the arbitrary timing of prescription, the lack of public knowledge about it, and the difficulty in preventing prescription from taking place. For example, the Bar Council said:

We consider that clarity and simplicity of the law is always desirable.

We agree that prescription should be abolished for rights to light.

... it is unlikely ... that the common man would know a sufficient amount of the law in this area to realise that he risked the prescription of an easement ... by failing to take steps to prevent it every 19 years. It is also arguably unreasonable that the burden of preventing a right to light being established is on the owner of the servient land when this can be costly and the owner of the dominant land need do nothing in order to obtain a potentially valuable interest over his [neighbour's] land.

- 2.30 Similarly, HDG Ltd expressed the view that:

Rights to light represent a trap for the unwary. Those who may be caught include purchasers who may have no way of knowing that they will be disentitled to alter the property they acquire without their neighbour's permission or without engaging in time consuming and expensive litigation. Rights of light also represent a windfall for the lucky few ... .

<sup>17</sup> See the Consultation Paper, paras 3.49 and 3.50. This was subject to a transitional provision for cases where light through a window had been enjoyed for 19 years and one day or longer at the date of reform. It would be possible for that use to crystallise into an easement under the Prescription Act 1832 for a limited period after that date.

<sup>18</sup> See *The Telegraph* (19 February 2013) p 1.

<sup>19</sup> Where proportions or numbers of consultees are mentioned in this Chapter we have not enumerated separately those responses, all in a broadly similar form or with a similar message, that were sent in response to a request to do so made by the "Covenant Movement". Whilst we give weight to the comments made by those consultees, we treat their responses in terms of numbers as a single response. For further details see the Analysis of Responses (available from the Law Commission's website).

It went on to conclude that the planning system was “better equipped to evaluate in a local context the balance between competing interests in the development of land and the preservation of amenity in the context of the broader public interest”.

- 2.31 Others felt that rights to light have no place in modern towns and cities. One consultee, in a confidential response, indicated that:

The people who choose to live or work in city centre areas do so because they value the convenience of living or working centrally with all the facilities they want in close proximity. It is part and parcel of city living or working that space is limited and that buildings have to be built in close proximity to one another.

... We believe that the protection which is afforded by the planning policy and legislative framework works well and it provides protection for all properties whether or not they have acquired rights to light.

- 2.32 One consultee felt that our proposal did not go far enough. Exemplar Properties said:

We think the proposal needs to go further and recommend the abolition of *all* prescriptive rights to light, including any existing rights.

- 2.33 The majority of consultees, however, did not agree with the provisional proposal. A variety of reasons were given for this, and many consultees gave several. The reasons given fall broadly into the following categories.

***Planning law gives insufficient protection of light***

- 2.34 A number of consultees expressed concern that the planning system gives too little regard to neighbouring property owners and was an insufficient substitute for the protection provided by rights to light. For example, Anstey Horne<sup>20</sup> commented that:

... in our experience the planning system’s approach to protecting amenity is just as unpredictable and inconsistent [as the protection afforded by rights to light]. This is due to a range of factors ... . If the planning system alone was to be relied upon it could lead to more neighbours objecting to applications, thereby burdening and slowing the planning system that the Government is trying to improve, or even challenging more consented schemes by judicial review.

- 2.35 BRE<sup>21</sup> suggested that:

Although loss of light can be addressed by the planning process, there are a number of situations where adjoining owners need recourse to Rights to Light:

(a) Permitted development of an extension may cause an actionable loss of light without the local authority having the chance to stop it.

<sup>20</sup> Chartered surveyors.

<sup>21</sup> BRE is the trading name of Building Research Establishment Ltd.

(b) A local authority may make a mistake. Adjoining owners cannot appeal against these decisions.

(c) Local authorities are usually not concerned about loss of light to non domestic properties, but [non domestic property owners] should still receive compensation for loss of light.

***The provisional proposal achieves little for a significant length of time***

- 2.36 Several consultees noted that the effect of the proposal would not be felt for several decades and was consequently of no immediate benefit. For example, the British Property Federation said:

Whilst abolishing rights gained through prescription might be a long-term solution to the difficulties the sector faces, from a pragmatic perspective any abolition of prescription is not going to resolve the issues that are severely constraining our industry at present.

- 2.37 Derwent London plc suggested that:

Your [provisional proposal] is in our view a “nice to have” rather than a “must have”. Our perception is that this will have very little beneficial impact in the short to medium term and the impact of this reform will only be felt – if at all – in decades to come.

***The provisional proposal may prevent other more useful reform***

- 2.38 Consultees also expressed concern that the proposal had proved so contentious thus far. Some were worried that it had the potential to impact negatively upon the prospects for the enactment of other reforms that we might recommend.

- 2.39 Berwin Leighton Paisner LLP was, on balance, in favour of the proposal, but argued that:

Over the longer term it might be helpful to limit the future acquisition of prescriptive rights. However, in our view, the proposal to abolish prescription could be the least helpful proposal to developers and the most controversial proposal from a press/public perspective. Whilst acknowledging the longer term benefit, our client soundings were strongly of the view that this proposal should only be supported if it could be implemented without adversely affecting the implementation of other more immediately helpful proposals.

- 2.40 The British Property Federation said that:

There are some strong arguments ‘for’ and ‘against’ the abolition of prescription which are well explained in the consultation document. For us, the burning ‘rights to light’ issue has never been about depriving people of rights per se, even those that are negatively acquired by prescription, but about transacting the exercise of those rights in a way that is expeditious and prevents situations where developers are held to ransom.

... It is imperative to development and growth that any legislative changes resulting from this consultation are progressed quickly and practically speaking abolition of prescription could prove more contentious and slow progress.

2.41 Herbert Smith Freehills LLP said that:

... on an honestly thought through balance, the arguments for abolition outweigh those against.

In particular, there is the issue of continuing relevance ... . If one puts the question 'Is a right to natural light acquired by prescription of continuing real relevance in the 21<sup>st</sup> Century?' in the context of the sheer complexities (even as they might be improved by reform) associated with discovery, proof, valuation, risk and solution, it is quite difficult to justify continuation.

However, it went on to indicate that, if given the "stark choice" between wider reform of rights to light, without abolition of prescription, and no reform at all or only piecemeal reform, then it would rather that prescription be allowed to continue.

***The provisional proposal is unnecessary, unprincipled, or both***

2.42 Other consultees felt that the provisional proposal was unnecessary, unprincipled, or both, and queried the propriety of treating rights to light differently from other easements. For example, Andrew Francis (Serle Court Chambers) commented that:

I do not see why the easement of light should be treated differently from any other easement. The approach in the [Easements Report] should apply to rights of light acquired by long enjoyment.

2.43 The Property Litigation Association responded that:

Two thirds of respondents do not agree with the proposal that prescriptive rights to light should be abolished. There is concern that what is proposed interferes with a fundamental English law property right that has been enjoyed as an easement for a considerable time. To remove the right would be considered arbitrary and unnecessary ... .

2.44 The Campaign to Protect Rural England told us that:

... the right to light is very important but we do not want it to be used as an unjustifiable barrier to sustainable urban redevelopment. While the [Heaney case] may have been unexpected we do not believe that there is extensive, wider evidence that justifies substantial changes to the law by which rights to lights are acquired, enforced or extinguished.

***Increased delays in the planning process and in transactions***

2.45 Other consultees raised the possibility that the proposal would lead to increased delays both in the planning process and in dispositions of land.

2.46 The National Housing Federation said:

We ... believe that if prescriptive rights could no longer be accrued there is a possibility that the planning system will be pressured far more to act as a vehicle for arguing that light should be protected. We feel that this could act as more of a brake on development than rights to light ... .

2.47 The City of London Corporation, whilst acknowledging that the arguments for and against abolition of prescription for rights to light were “finely balanced”, suggested that:

... great caution should be exercised in relying, as a justification for abolition, on the ability of planning policy to protect the light and amenity of residential owners. While loss of amenity (including sunlight/daylight) is an acknowledged planning consideration, were owners to lose alternative property law routes to pursue concerns about light, it is likely that those concerns would lead to increased focus on planning amenity and sunlight/daylight issues with implications for evaluation of planning applications and the time involved in determination (and possible appeal).

2.48 The City of London Law Society felt that:

... [abolition of prescription for rights to light] may lead parties on certain transactions to focus on whether rights to light should be expressly granted, which could present difficulties in negotiations.

It added:

... as the Law Commission noted in the [Easements Report] in relation to prescription generally, abolition may lead to unforeseen problems such as the inadvertent omission of easements from transfer documentation.

***Disputes over transferred rights would increase***

2.49 It is possible for a right to light to survive the demolition of a property so as to benefit windows that are incorporated in its replacement, such rights are known as “transferred rights”.<sup>22</sup>

2.50 We do not make any recommendation to prevent this.<sup>23</sup> The law relating to transferred rights is difficult to apply, but the problems it causes are not understood to be causing serious difficulties on a large scale at present.

<sup>22</sup> The law is complex; see paras 7.4 to 7.48 in the Consultation Paper. We discuss transferred rights in more detail in Chapter 7 below.

<sup>23</sup> See para 7.22 below.

2.51 Several consultees expressed concern that such problems would increase in number and severity if new buildings could not acquire rights to light by prescription; disputes over rights to light would centre on whether a previously established right to light had survived the demolition and rebuilding of a property (which would no longer be able to acquire a right to light by prescription).

2.52 In BRE's words, the abolition of prescription for rights to light:

... would cause a lot of difficulties with dominant owners claiming that the windows in their relatively recent property actually correspond to earlier windows in previous buildings on the site, which had had Rights to Light before prescription was abolished. This is already an issue ... but would become much worse.

***Adverse impact on property values and the creation of a two-tier property market***

2.53 Some consultees expressed a related concern, namely that our proposal would have a negative impact on property values. It was suggested that following abolition there would emerge a "two-tier" property market, with those properties benefiting from rights to light being more valuable than those that have no potential to acquire such rights (because prescription has been abolished), unless they can be acquired by agreement with a neighbouring owner.

2.54 Although it supported the provisional proposal, Nabarro LLP explained that:

The continued existence of [rights to light that exist at the time of implementation and through later transference of those rights where buildings are demolished and re-built] could however be seen as reason to criticise future abolition as it will lead to a "two tier system":

(a) It may be perceived as unfair that apertures in a building may or may not have a right of light purely because of an accident of timing (depending on whether an aperture had enjoyed light for over 19 years and 1 day by the time of the legislative change). We do not believe that this is reason enough to avoid future abolition bearing in mind any legislative change which is not (and cannot be) retrospective may have a "two tier" effect for a period of time.

(b) A more valid criticism of the "two tier" system which would be created by future abolition is that a right of light may be retained by accident [or] design, where a new building erected post legislative change happens to be constructed in such a way that there is "transference" of rights of light ... . Developers are likely to perceive it as unfair that a new building post legislative change may still have a right despite abolition.

(c) Conversely, landowners affected by a reduction in light are likely to perceive it as unfair that they do not retain a right of light simply because they chose (or were compelled, for example by planning constraints) to develop in a manner where "transference" was not possible.

***Increased litigation encouraged by the transitional period***

2.55 Under the Prescription Act 1832, use of natural light can give rise to a right to light only where the light has been enjoyed for a twenty-year period “next before some suit or action”.<sup>24</sup> Several consultees feared that our proposal would result in a large number of claims being made under the 1832 Act that seek to crystallise rights to light in the run up to expiry of the transitional period.<sup>25</sup>

2.56 Nabarro LLP (supporting the proposal to abolish prescription) suggested that:

The practical effect [of the abolition of prescription and the proposed transitional provision for rights arising under the 1832 Act] will be that if any landowner who has enjoyed light for 20 years before the end of the transitional year wants to be able to assert a right of light under the 1832 Act post legislative change, he or she will have to issue proceedings claiming a right of light against the servient owner, whether or not the servient owner intends to redevelop.

... This process would have to be repeated by a dominant owner as against every nearby property over which it has enjoyed light [for over] 20 years.

***The importance of light***

2.57 Other consultees argued that those occupying buildings expect the quality of light they enjoy to have some protection. We did not propose the abolition of existing prescriptive rights to light, but we suspect that some consultees construed the proposal as having that effect. They therefore took the opportunity to stress the importance of light generally. For example, Loughton Residents Association argued that:

... the [argument in the Consultation Paper] that some owners will agree to release the right for a sum of money does NOT mean that others would be prepared to do so, or that it is reasonable to deprive them of the right.

... In many cases, residents will have a different view to commercial enterprises, because they are much less likely to be prepared to sell their rights to light whatever the price, whereas commercial enterprises may well be prepared to do so especially when a large ransom might be obtained.

2.58 The Institute of Historic Building Conservation suggested that:

Historic buildings tend, naturally, to be old ... .

Alterations to remedy loss of light may be more difficult than for other buildings because of the requirement not to damage the appearance of the building by inserting new windows in other elevations.

<sup>24</sup> Prescription Act 1832, s 4; see para 2.12 above and also para 2.33 and following of the Consultation Paper.

<sup>25</sup> See n 17 above and the Consultation Paper, paras 3.49 and 3.50.

While in some cases right of light issues may be left to the balance of evidence in the context of the Planning Acts, we are concerned that this may mean that rights connected with heritage properties may be sacrificed to the pressing demands of new development.

2.59 The National Trust argued that:

[The right to light] which the Courts have upheld, forms part of the rich tapestry of interweaving rights playing a highly important role in helping strike a fair balance between the competing interests of neighbouring land owners. We believe that the abolition of the right would upset this balance at the expense of people who use their properties as homes and businesses.

... We believe that in our small, densely populated island where pressure for development is intense, the retention of the right fairly balances the competing needs of different landowners.

### **Discussion**

2.60 In the Easements Report we concluded that prescription should not be abolished for easements generally. This was because:

... consultees strongly favoured the retention of prescription. ... They believed that it still serves a useful purpose.

... We asked ... if prescription might be abolished for negative easements only, on the basis that such easements are in any event an anomaly in the law, and that prescription for such rights (particularly light) gives rise to disproportionate practical problems. The view of consultees varied widely on that question, but again there was no consensus in favour of abolition.<sup>26</sup>

2.61 This project gave us the opportunity to consider prescription specifically for rights to light. Whilst the provisional proposal to abolish prescription for rights to light was not without support, that support was often qualified, sometimes heavily so.

2.62 There was considerably stronger support for retaining prescription than for abolishing it. It is clear that many consultees value not just rights to light themselves, but having a strong and effective mechanism by which they can arise. Whilst the Consultation Paper sought to draw a line between the absence of any right during the period of prescription, and the right that emerges if prescription is successful, many consultees viewed the proposal differently. As Deloitte Real Estate explained:

... the proposal could be seen to be unfairly depriving adjoining owners of a right they have had for many centuries to be able to obtain a right, and then enjoy it.

<sup>26</sup> Easements Report, paras 3.79 to 3.81.

- 2.63 Notably, consultees did not wish to put at risk our other proposals by arguing strongly for something that was seen as having an uncertain benefit at some distant point in the future. We share those concerns. It is self-evident that the problems being caused by rights to light are due to rights already in existence and we cannot, as some consultees suggested, render unenforceable every right to light that has already been acquired by prescription. Consequently, the number of rights to light would diminish only slowly and in a manner as haphazard as their creation.

### **Conclusion**

- 2.64 We have concluded that prescription should not be abolished as a means of acquiring rights to light.
- 2.65 We remain convinced that the abundance of rights to light and the ease by which they come into being are material factors in their having a disproportionately adverse impact when compared with other easements. We are not convinced that all the arguments against abolition are valid. In particular, we are unconvinced by the perception that it would be unfair for older properties to have prescriptive rights whilst newer ones do not; and we are conscious that some consultees may have misunderstood the effect of our proposal. However, the lack of support for the provisional proposal, coupled with the number and diversity of risks highlighted by consultees, has persuaded us to draw back from recommending the abolition of prescription for rights to light.

### **THE RECOMMENDATIONS IN THE EASEMENTS REPORT**

- 2.66 We now turn to what we have already said in the Easements Report about prescription. The recommendation we made there was for the replacement of the existing methods of prescribing for an easement with a single, statutory method applicable to all easements (including rights to light), based on 20 years of continuous qualifying use. The new form of prescription would operate to create easements only as between freeholders.<sup>27</sup>
- 2.67 We also recommended that local customs that currently prevent easements arising by prescription should continue to do so. The Custom of London can prevent the acquisition of easements by common law prescription or by lost modern grant within the City of London. Our recommendation was that the Custom of London should prevent the new form of prescription within the City of London in the same way.
- 2.68 The recommendation made in the Easements Report for a single, statutory scheme for prescription would radically simplify the law without extending the range of circumstances in which easements can be created, and would help to minimise the need for recourse to litigation.

<sup>27</sup> In other words, rights may only arise by prescription so that they benefit and burden the freehold estates in the dominant and servient land. This means, for example, that a tenant cannot obtain a right by prescription over his or her landlord's retained land. For further details see the Easements Report, para 3.144 and following.

2.69 However, some responses to the Rights to Light Consultation Paper suggested that the law of prescription, insofar as it relates to rights to light, should be reformed in a different manner. For example, consultees suggested variously that:

- (1) rights to light should be acquired immediately upon the approval of planning permission for a building;
- (2) the period after which a right arises by prescription should be reduced from 20 years;
- (3) it should not be necessary to negotiate with the owners of certain leasehold interests for the release of rights to light acquired by prescription;<sup>28</sup>
- (4) prescription should only operate in favour of residential properties;<sup>29</sup>
- (5) rights to light should continue to be acquired pursuant to the Prescription Act 1832, but not by lost modern grant;<sup>30</sup> and
- (6) “some positive step [must] be taken” before the end of the 20-year period for a right to light to crystallise.<sup>31</sup>

2.70 We are not convinced that we should make any change to the policy advanced in the Easements Report. To do so would be to isolate rights to light<sup>32</sup> and, whilst we were able to justify this in the Rights to Light Consultation Paper where our proposal was to prevent their acquisition by prescription (and thereby make the law simpler), we can see little benefit in establishing a distinct regime for the prescriptive acquisition of rights to light, thereby making the law more complex.

2.71 Consequently, we make no recommendation to reform the law of prescription, insofar as it relates to rights to light, beyond that which was advanced in the Easements Report.

<sup>28</sup> For example, one confidential response argued that:

The ability of holders of ... short term tenancies to claim prescriptive rights through the grant of an easement benefiting the reversionary estate ... seems to us to result in rights being granted to persons that are out of proportion to the nature of the estate they possess.

The City of London Law Society suggested that:

One of the current problems with prescriptive rights to light is the potential multitude of claims from tenants in a multi-let building scenario. One suggestion, although not universally supported, would be to provide that prescriptive rights to light continue, but only for those who own a freehold interest or a leasehold interest granted for more than seven years.

<sup>29</sup> See the response of Nabarro LLP in the Analysis of Responses, ch 3 (available from the Law Commission’s website).

<sup>30</sup> The statutory scheme for prescription recommended in the Easements Report most closely resembles lost modern grant.

<sup>31</sup> An example being that the dominant owner should have to serve a notice on the servient owner “in time for a [light obstruction notice] to be issued and served” (Malcolm Hollis LLP).

<sup>32</sup> A number of consultees disapproved of anything which isolated rights to light from the general law of easements; see para 2.42 above.

## **SOLAR PANELS**

2.72 In the Consultation Paper we said that:

... objects that do not have apertures, such as solar panels, are almost certainly not capable of benefiting from a right to light.<sup>33</sup>

2.73 In the footnote to that paragraph, we explained that:

The point has not been tested by the courts but it is difficult to see how the law relating to rights to light can be extended to guarantee the flow of light to a solar panel, particularly bearing in mind the anomalous nature of negative easements and the reluctance of the courts to extend this class of easements any further ...<sup>34</sup>

2.74 We were concerned that easements benefiting solar panels could be problematic:

The “channel” through which the light protected under the current law passes is defined by the aperture in the building on the dominant land. By contrast a panel benefits from light from all angles, so it would be difficult to define the extent of the easement. The fact that solar panels enable a landowner to harvest solar energy rather than to illuminate a room would also raise difficult questions about the extent of the protection provided by the right.<sup>35</sup>

2.75 We pointed out that, if protection for a solar panel is required, then neighbours could agree to the creation of a restrictive covenant that would prevent either or both from building in a way that obstructs the passage of light to the solar panel(s).<sup>36</sup> We were concerned that, if the passage of light to solar panels could be protected by way of an easement, then such rights could arise by prescription (whereas restrictive covenants must be created expressly). This would exacerbate the difficulties currently experienced as a consequence of the proliferation of rights to light.<sup>37</sup>

### **Consultees’ responses**

2.76 A small number of consultees mentioned solar panels in their responses. All of these were in favour of greater protection. For example, David M Smith commented that:

Consideration needs to be given to properties that have invested in solar panels ... . I have invested in my home to reduce the running costs in my retirement. ... if the panels are shaded by even a wire’s shadow across them then they lose efficiency. If the light is lost there needs to be some compensation building in to the new [law] to reflect the negation of the investment made and the increased costs ... .

<sup>33</sup> Consultation Paper, para 2.13.

<sup>34</sup> Consultation Paper, ch 2, n 17.

<sup>35</sup> Consultation Paper, para 2.14.

<sup>36</sup> See the Consultation Paper, para 2.15.

<sup>37</sup> See the Consultation Paper, para 2.16.

2.77 The Ceredigion Green Party argued that:

The Law Commission has approached this problem from the wrong angle. The Commission should have started off with a consideration of national policies, in particular, national energy policies.

... Solar panels on roofs will be one of the main sources of renewable energy throughout the UK within a couple of decades ... . Therefore, far from looking to extinguish rights to light, the Law Commission should be looking to strengthen existing rights to light. ... Those people ... who have invested money in roof panels should know that this investment has some legal protection.

**Discussion**

- 2.78 Although consultees were enthusiastic about the benefits of solar panels, and emphasised the importance of uninterrupted light for realising these benefits, no consultee offered any suggestion as to what exactly should be protected.
- 2.79 It is not clear how the existing law on rights to light (which is founded on the sufficiency of light *passing through* windows and into the rooms beyond, not *upon* photovoltaic surfaces) can accommodate solar panels. Consequently, we do not think that solar panels can benefit from rights to light as presently understood. Furthermore, consultees' concerns are not entirely addressed by making it possible for rights to light to benefit solar panels. The acquisition of an easement by prescription takes 20 years, but consultees, for the most part, appear to be arguing for protection for solar panels to arise as soon as they are installed. The effect of this would be to give one owner a wholly novel right over another's land, restricting the use of a neighbour's land without first giving its owner any opportunity to avoid that happening.
- 2.80 Even if we were to overcome concerns about the nature and scope of such a right, we remain concerned that the potential for the right to be acquired by prescription will exacerbate, to an uncertain but potentially significant extent, the problems that are caused now by rights to light.
- 2.81 We note here one final point in respect of solar panels. We are aware of the suggestion that it can be problematic for those who pay to install solar panels in anticipation of the receipt of money through a "feed-in tariff"<sup>38</sup> (and lower electricity bills) only to discover that planning permission is later given for a development that renders the solar panels less effective. It has been suggested to us that it is unfair that a landowner seeking to benefit from a scheme promoted by a limb of Government should have that benefit removed or reduced by another public body through the grant of planning permission.

<sup>38</sup> For brief details see <https://www.gov.uk/feed-in-tariffs/overview> (last visited 18 November 2014).

- 2.82 A solution to the issue described above, if one is required, is outside the scope of this project. Even if a right to light could protect the passage of light to a solar panel it would give no immediate protection (unless a neighbour expressly granted the right to light), meaning that solar panels would be protected in the same haphazard way that rights to light presently benefit buildings. We think that if a solution is required, then it lies in the law that governs in what circumstances planning permission should be granted.<sup>39</sup>
- 2.83 Accordingly, we do not make any recommendation that allows the creation of easements that benefit solar panels.

### **LIGHT OBSTRUCTION NOTICES**

- 2.84 Under the Prescription Act 1832 the interruption of the use of the servient land for one year or more will prevent an easement from being acquired. Where light is obstructed for one year or more, and the obstruction is then removed, prescriptive use of the light before the interruption is stopped, and can no longer count towards the acquisition of an easement of light. If the use of the light continues after the obstruction is removed, then the 20-year period for prescription can start again.
- 2.85 The “obstruction” of light naturally means a physical barrier, such as a wall. However, the Rights of Light Act 1959 (the “1959 Act”) was enacted to enable prescription for light to be prevented by paperwork and administrative action, so as to avoid the expense of a physical barrier and, in many cases, the need for planning permission.<sup>40</sup> This is done by registering a light obstruction notice (“LON”). The notice acts as a “notional obstruction”; the light passing to the neighbour’s building, over the land of the person who registered the notice, is treated as if it had been obstructed by an opaque structure.
- 2.86 The notional obstruction works exactly like a real one. Accordingly, if anyone in the building already has an easement of light, the LON can be challenged with a view to its removal. But if the LON goes unchallenged for one year then, for the purposes of the Prescription Act 1832, the passage of light is treated as having been interrupted for that period, with the same effect as a physical obstruction would have.<sup>41</sup>

<sup>39</sup> There is reference in *BRE daylight and sunlight* to the situation where development blocks light to solar panels; see para 4.4.

<sup>40</sup> The 1959 Act was motivated in part by the needs of the owners of sites where buildings had been destroyed during the war, who might not be able to rebuild immediately but did not wish their neighbours to acquire rights to light as a result of the open spaces created by the destruction of the buildings. See *Report of the Committee on the Law Relating to Rights to Light* (1958) paras 14 and 15.

<sup>41</sup> It is also likely that a LON would prevent the acquisition of an easement of light under the principle of lost modern grant by stopping the continuous use under that principle. For more details see the Easements Report, para 3.109 and Part 3, n 123.

- 2.87 The effect of a LON is straightforward, but the procedure for registering one is not. An application for a LON to be registered as a local land charge must be accompanied by a certificate from the Lands Chamber of the Upper Tribunal stating that adequate notice of the proposed application has been given to all persons who, at the time when the certificate is issued, appear to the Upper Tribunal to be affected by the LON. This requires careful investigation to identify those with an interest in a particular building who might be affected by the registration of the LON. The Lands Chamber must be satisfied that it can issue the necessary certificate.<sup>42</sup>
- 2.88 The notice requirements are tied closely to the operation of the 1832 Act, which gives rise to an easement only where the 20-years' continuous use of neighbouring land is immediately preceding "some suit or action". The owner or owners of the building to which the LON is addressed have to be made aware of it (since it is not otherwise visible, as a physical obstruction would be) so that they can consider whether they are already in a position to commence their "suit or action" and establish their easement, and do not risk losing that ability as a consequence of something they could not see and had no notice of.

#### **Light obstruction notices and the Consultation Paper**

- 2.89 There would be no need for the 1959 Act if we were now recommending the abolition of prescription for rights to light. But we are not making that recommendation. We anticipated this in the Consultation Paper, where we said:

... in the event that we do not recommend in our final Report the abolition of prescription for rights to light, we do not think that the 1959 Act should be abolished. It serves a useful function by providing a means of interrupting the acquisition of an easement without having to erect a physical obstruction.<sup>43</sup>

- 2.90 We therefore asked consultees for their views on whether reform or simplification of the light obstruction notice regime was required.<sup>44</sup>

#### **Consultees' responses**

- 2.91 Thirty consultees responded to that question and approximately two-thirds of them wished to see some change to the LON regime. What follows is a brief summary of consultees' comments and concerns.
- 2.92 Most consultees who supported retention of the current regime said little more. Those who went into detail included the National Organisation of Residents Associations and Loughton Residents Association. Both felt that the current procedure was fair and sufficiently simple, and both wrote:

<sup>42</sup> The 1959 Act allows for a "temporary" certificate to be issued in circumstances where a LON is urgently required (see the 1959 Act, s 2(3)(b)). This does not avoid the need for a full certificate because the temporary certificate lasts for a maximum of only four months and is, therefore, unable to prevent the acquisition of a right to light under the Prescription Act 1832.

<sup>43</sup> Consultation Paper, para 3.52.

<sup>44</sup> Consultation Paper, paras 3.53 and 3.54.

The expense and effort required to register a light obstruction notice is sufficient to make the possible 'servient' party think twice whether or not to pursue it. The need to protect property from positive easements such as rights of passage being acquired by possible 'dominant' parties also requires some effort and expense, so negative easements should be no different.

2.93 Those consultees who advocated reform of the LON regime generally argued that the 1959 Act procedure was unduly cumbersome, time-consuming or expensive. Many made suggestions for how it could be improved, most focussing on reform of the service requirements, the role of the Lands Chamber, and/or the overall timing of the procedure.

2.94 Several consultees felt the most difficult aspects of the process were the identification of those who might be affected by a LON, and the service requirements. Although two-thirds of its membership saw no reason to reform the LON regime, the Property Litigation Association argued that:

It may be possible to carve out the role of the Lands Chamber and instead allow for registration of the LON [on the Local Land Charges Register] together with provision of a certificate from the developer's conveyancer that service of the LON has been effected on all those with a registered legal interest in the property.

2.95 It went on to suggest that the requirement to serve notice of the application for a LON on owners could be "limited to those parties whose interest is evident from the Land Registry". Clifford Chance LLP, the British Property Federation and Allen & Overy LLP made similar suggestions. Nabarro LLP suggested that notice might be given only to those with a proprietary interest in the relevant parts of the building.

2.96 Anstey Horne and Berwin Leighton Paisner LLP suggested reforming the law to allow for the registration of a LON to take effect only against certain flats in a building, or even only against certain apertures, so that a servient owner could target only those who are in the process of acquiring a right to light, and not those who already have or who are eligible to obtain such rights.

2.97 Hunters (solicitors), asked why "service of the light obstruction notice has to be overseen (at a fee of £1,200) by a judicial body" and suggested that oversight might be managed by Land Registry.

2.98 Other consultees felt there was no need for a certificate confirming adequate service, and that it should be dispensed with. The Bar Council argued that:

... the cost and process of obtaining the certificate is disproportionate.  
... A landowner ought not to have to fund the prevention of the acquisition by a third party of a right over his land. A direct application to the Local Authority should be sufficient.

2.99 The Bar Council also took issue with the "shelf-life" of LONs:

Such certificates should also not need to be applied for every 19 years. Once in place the registration should not be removed and the 20 year clock should not resume until the registration is removed at the request of the landowner.

- 2.100 Other suggestions included the introduction of deemed service provisions for neighbours who cannot be contacted,<sup>45</sup> a reduction in the time period for challenging LONs,<sup>46</sup> making it clear on the face of the 1959 Act that a LON has effect to prevent the acquisition of an easement under the principle of lost modern grant,<sup>47</sup> and changing where LONs are registered.<sup>48</sup>

### **Discussion**

- 2.101 The current LON regime is tied closely to the provisions of the 1832 Act. But we have recommended the repeal of the 1832 Act, and the introduction of a single, statutory method of prescribing for an easement.<sup>49</sup> Under the new regime, easements would come into being after 20 years of “continuous qualifying use” of a neighbour’s land, without a landowner having to commence an action to crystallise the right. Furthermore, the regime we recommend makes no allowance for interruption; accordingly any interruption (however short) in the use of a neighbour’s land during the 20-year period will put a stop to prescription.
- 2.102 The reform of the law of prescription gives an opportunity to address consultees’ concerns and to replace the existing LON regime with a system that allows a landowner to prevent the acquisition of rights to light by prescription, but in a way that is simpler, cheaper and faster.

### **Certificates of light interruption**

- 2.103 In the remainder of this Chapter we recommend the replacement of the LON regime with a new, simpler way for a landowner to prevent the acquisition of a right to light by prescription.
- 2.104 Our starting point is the fact that prescriptive rights derive from the uninterrupted use of a neighbour’s land openly, without force, and without permission. The neighbour can put a stop to it at any time; he or she has the option to lock a gate, for example, to prevent a right of way arising, or to build a wall to block light. The latter is of course particularly troublesome where the only reason for building is to prevent prescription, and that is why the 1959 Act was enacted.

<sup>45</sup> Suggestions along this line were made by Allen & Overy LLP, the British Property Federation and the British Council for Offices.

<sup>46</sup> Allen & Overy LLP and the Royal Institution of Chartered Surveyors.

<sup>47</sup> See the Easements Report, para 3.99 and following. The suggestion was made by Land Securities, while Andrew Francis (Serle Court Chambers) commented that the point was open to clarification.

<sup>48</sup> Dr Peter S Defoe (calfordseaden LLP) suggested a process that was integrated with the planning regime, with applications made to local planning authorities and registration on the “planning portal”. Hunters (solicitors) felt local land charges registers were inappropriate for the registration of LONs.

<sup>49</sup> See para 2.14 above.

- 2.105 There is clearly support for the retention, along with the law of prescription (in its new form following our recommendations in the Easements Report), for a way of stopping prescription for light by administrative action. But the cumbersome service procedure in the LON regime that follows both from the nature of the notional obstruction and from the detail of the 1832 Act is unnecessary. Some publicity remains essential, so that there is a record of any point where prescription stops, and we take the view that the local land charges register remains the right place for that.

***Certificates of light interruption: the detail***

- 2.106 The draft clauses in Appendix A will enable a landowner<sup>50</sup> to apply to a local authority for the registration of a certificate of light interruption as a local land charge.<sup>51</sup>
- 2.107 A certificate of light interruption will have the effect of terminating the process of prescription in favour of any buildings on the land identified in the certificate over the land owned by the person making the application.<sup>52</sup> Its effect is therefore immediate upon its registration; unlike LONs (which must exist for one year to interrupt the process of prescription under the Prescription Act 1832) it does not have to continue for a particular period in order to have effect. A certificate of light interruption will have no effect on easements that are already in existence; so those who already have the benefit of a right to light will not need, or be able, to challenge the registration.

<sup>50</sup> An owner of land, for the purposes of the light interruption certificate regime, is the owner of a freehold interest in land, a lessee with at least seven years left to run on its lease, or a mortgagee in possession. This formulation will be familiar to those who have worked with the light obstruction notice regime.

<sup>51</sup> See Appendix A, "Schedule 1A", para 3(1). It is likely that management of the local land charge regime will pass to Land Registry. At the date of this Report the Infrastructure Bill (whose provisions would make that transfer possible) has not completed its passage through Parliament. Because no change to the law has yet taken place, we have drafted this Report as though the registration of local land charges remains under the management of local authorities, and the clauses reflect that position.

<sup>52</sup> There is no limit on the area of land that an owner can identify in a certificate of light interruption. However, para 1(1) of "Schedule 1A" of the draft provisions at Appendix A provides that:

An owner of land that is or might be in use for the purpose of the access of light to any building situated on other land may make a light interruption certificate relating to those two pieces of land.

An application to register a certificate that seeks to affect land too distant to prescribe over the applicant's land will therefore be rejected.

- 2.108 Accordingly, there is no need for the application for a certificate of light interruption to be served upon those in the building affected (since there is nothing that the recipient can do about it). This mirrors reality, in that a landowner is free to interrupt the process of prescription over his or her land at any time by physically obstructing the use or even by giving consent in writing for the use. The registration of a certificate does not risk the loss of the potential to claim a right to light if it goes unchallenged; it either stops prescription in its tracks (in the same way that constructing a building would), or it does nothing. Either way, a neighbouring owner cannot be said to have lost anything and, for that reason, service upon neighbouring owners is unnecessary.<sup>53</sup>
- 2.109 Registration will serve as a useful historical record; a landowner or a neighbour will be able to establish in the future whether prescription was interrupted in circumstances where either needs to establish whether or not a property benefits from a right to light. We make no recommendation for certificates of light interruption to be capable of being removed from the Local Land Charges register. While we see the benefit of clearing “spent” local land charges from the register, we think that registration might be relevant for a substantial length of time to demonstrate that there was no period of 20 years during which the neighbouring owner could have acquired a right to light.
- 2.110 **We recommend that provision be made for landowners to stop prescription for light over their land by the registration of a certificate of light interruption on the local land charges register.**
- 2.111 **We recommend that, to be able to register a certificate of light interruption, a landowner of relevant land must be the owner of a freehold interest, a lessee with more than seven years to run on its lease, or a mortgagee in possession.**
- 2.112 **We recommend that the form of the certificate of light interruption (and any application form to register it as a local land charge) should be prescribed by rules.**
- 2.113 The recommendations we make above are given effect in the draft amendments of the 2011 Easements Bill at Appendix A.
- 2.114 Our recommendations are intimately linked to the new law of prescription set out in the 2011 Easements Bill. Accordingly, our recommendations for certificates of light interruption are expressed in provisions to be added to that Bill, in Appendix A to this Report. Light interruption certificates will be ineffective to prevent prescription under the Prescription Act 1832 and are designed to complement the new prescription regime set out in the 2011 Easements Bill. The LON regime, on the other hand, is designed to work with the 1832 Act.<sup>54</sup>

<sup>53</sup> The absence of a service requirement means that there is no need for the involvement of the Lands Chamber, as there is with LONs.

<sup>54</sup> LONs would interrupt and, if unchallenged, put a stop to prescription under the new regime recommended in the Easements Report, but in a way that would be unnecessarily cumbersome and expensive.

- 2.115 Accordingly, it will not be possible for the LON regime to be replaced by the light interruption certificate regime until the 1832 Act is repealed, which will happen when the new prescription regime set out in the 2011 Easements Bill is brought into force; and the provisions we have prepared for addition to the 2011 Easements Bill should be brought into force together with that repeal.
- 2.116 The provisions in Appendix A also make some transitional provisions to deal with cases where a LON has been registered before the repeal of the 1832 Act and remain in effect at the date of repeal.<sup>55</sup>

<sup>55</sup> LONs that are registered at the date that the 1832 Act is repealed will need to remain effective as if the 1959 Act had not been repealed. This is because we recommended in the 2011 Easements Report that the existing law of prescription should remain in force for those who have more than 19 years of use of light at the date that the existing law is otherwise repealed. The reason for that is explained in the Easements Report, para 3.179 and following. A transitional provision is also made for cases where a temporary LON has been registered.

## CHAPTER 3

# HOW MUCH LIGHT DOES A RIGHT TO LIGHT CONFER?

### BACKGROUND: THE CURRENT LEGAL TEST

- 3.1 The extent of an easement can normally be determined by its express terms, or by the use that gave rise to it. So an express grant of a vehicular right of way entitles the dominant owner to drive along that route; and a prescriptive right of way, acquired by driving across land, remains an entitlement to do so at the frequency and with the sort of vehicles used in the course of its creation.
- 3.2 An easement of light is different; despite popular belief, it does not guarantee the continuance of the level of light that the dominant owner has always enjoyed. A diminution in the light, caused by the servient owner (for example by an obstruction), will not infringe the right to light unless the test for infringement is satisfied. And so to answer the question that heads this chapter – how much light does a right to light confer? – we have to turn it round and ask what level of obstruction or diminution of light will amount to an infringement of the right.
- 3.3 The leading legal authority on this point is *Colls v Home and Colonial Stores Ltd*, in which Lord Davey said that the dominant owner is entitled to:
- ... the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind ... .<sup>1</sup>
- 3.4 The dominant owner's entitlement was summarised more recently by Lord Justice Goff (as he then was) in *Allen v Greenwood*. He said that the dominant owner was entitled to:
- ... the light required for the beneficial use of the building for any ordinary purpose for which it is adapted.<sup>2</sup>
- 3.5 This test is a subjective one; the dominant owner's entitlement depends upon a judge's own interpretation of what quantity of light is suitable for the ordinary purposes for which the benefited property is adapted.

<sup>1</sup> [1904] AC 179, 204.

<sup>2</sup> [1980] Ch 119, 130.

- 3.6 When applying this test in *Carr-Saunders v Dick McNeil Associates Ltd*, Mr Justice Millett (as he then was) held that the court is entitled to take into account potential future uses of the dominant property, including sub-division of the property which would result in different room configurations.<sup>3</sup> So the dominant owner may argue that although the light – following the obstruction – is adequate in the current open-plan office, it will be inadequate when the space is divided into smaller offices, as he or she plans to do. Such arguments must be based on credible evidence, such as a grant of planning permission or design plans for the building; the dominant owner is not entitled simply to dream up a plan and claim the light needed for it.<sup>4</sup>
- 3.7 The dominant owner's use of artificial light is not taken into account by the court when considering whether a nuisance has occurred (although it can be relevant when the court considers whether to award damages or an injunction).<sup>5</sup> As we explain below, this is not a fixed principle of law and we take the view that there will be cases where it is appropriate for the court to accept the argument that, because of the dominant owner's existing use of artificial light, there has in fact been no infringement of the right to light.<sup>6</sup>

## THE LEGAL TEST IN PRACTICE

### The Waldram method and the 50/50 rule

- 3.8 Inevitably the subjective legal test in the *Coll's* decision has to be interpreted by the courts in the light of expert evidence from rights to light surveyors. A great deal of technical learning and expertise has been developed over the years, but there is some consensus over the way that the natural light in a room is measured, and its sufficiency assessed. While it is not universally admired, the "Waldram" method of assessing the sufficiency of light is in widespread use in rights to light cases.

<sup>3</sup> [1986] 1 WLR 922, 930.

<sup>4</sup> See *Tamames (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148.

<sup>5</sup> *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] EGLR 65 at [61], [62] and [79].

<sup>6</sup> See para 3.63 and following below.

- 3.9 The Waldram method involves plotting – nowadays by the use of computers – the area of a room which receives adequate light before the proposed infringement, and the area that will be adequately lit afterwards. Light is measured in lumens, and one lumen is the light emitted by 0.2% of the sky.<sup>7</sup> It is possible to plot the points in a room from which 0.2% of the dome of the sky is visible at table-top level; one lumen per square foot is regarded as adequate. The notional line in a room beyond which there is less than one lumen per square foot has been referred to as the “grumble line”,<sup>8</sup> as Waldram himself put it, for “ordinary purposes, comparable with clerical work”, a level of light below which an “average reasonable [person] would consistently grumble”.<sup>9</sup>
- 3.10 The weaknesses in this method are obvious; for example, reasonable people grumble at different levels, and the brightness of the sky is not uniform and varies at different times of the year and in different locations. Recent research has queried both the mathematics and the empirical evidence on which Waldram’s work was based.<sup>10</sup> Nevertheless, his method remains in general use in rights to light cases.<sup>11</sup>
- 3.11 Using that method, it is possible to ascertain how much of the room was adequately lit before and after the infringement. The conventional approach, regarded by the courts as a useful practice but not a rule of law, is to say that if the remaining area of adequate light (assessed as described above) exceeds 50% of the area of the room, there is no infringement.<sup>12</sup> This is known as the “50/50 rule” or “50/50 test”. It is not applied rigidly, either as a test or a rule; nor is there any legal rule that this method of measurement must be used. But there seems to be considerable caution among rights to light practitioners which leads them to continue to use the Waldram method and the 50/50 rule. As one of the consultees – BRE<sup>13</sup> – said:

<sup>7</sup> In more detail, Percy Waldram described this as “0.2% of the light which would fall from an unobstructed hemisphere of uniform sky onto a flat roof.” (P Waldram writing for the *Illuminating Engineer* of April/May 1923 and quoted in S Bickford-Smith and A Francis, *Rights to Light* (2nd ed 2007) para 12.12). At the time the text of this Report was being finalised, a new, third, edition of S Bickford-Smith and A Francis’ book, *Rights to Light*, was not yet published.

<sup>8</sup> See the statement of facts from Crossman J’s judgment set out in *Fishenden v Higgs and Hill* [1935] All ER 435, 437.

<sup>9</sup> P Waldram writing for the *Illuminating Engineer* of April/May 1923 and quoted in S Bickford-Smith and A Francis, *Rights to Light* (2nd ed 2007) para 12.12.

<sup>10</sup> See, for example, P Defoe and I Frame, “Was Waldram wrong?” (2007) 25(2) *Structural Survey* p 98-116.

<sup>11</sup> Another method used to measure lost light is the “EFZ” (“equivalent to first zone”) method; see S Bickford-Smith and A Francis, *Rights to Light* (2nd ed 2007). This is more controversial and tends to be used to calculate compensation when it is agreed that an infringement has taken place.

<sup>12</sup> It will be seen that the deeper the room, and the smaller the window, the more likely it is that a given obstruction will be actionable.

<sup>13</sup> The response of BRE was written by Paul Littlefair, who is the author of *Site layout planning for daylight and sunlight: a guide to good practice* (2nd ed 2011) (“*BRE daylight and sunlight*”) published by BRE and widely used by local planning authorities when assessing daylight and sunlight levels within residential buildings and the open spaces between them (see para 1.3 above). *BRE daylight and sunlight* does not prescribe a single test for adequate light; see below at para 3.16.

In principle it is possible for rights to light experts to argue that different measures of daylight should be used.

Nevertheless, the Waldram method is entrenched. BRE continued:

In practice developers are not keen to embark on long and costly legal action which could easily result in their building [being] pulled down if a judge sticks to the methodology employed by his predecessors.

- 3.12 As to the 50/50 standard, sometimes a lesser interference is regarded as actionable;<sup>14</sup> sometimes a higher standard is imposed. The 50/50 rule has been described as a “pretty irreducible minimum” for a living room.<sup>15</sup> The *legal* rule remains that set out in the *Colls* case; it follows that where a property is designed or adapted for a special use, for example a greenhouse, the light to which it is entitled is greater than usual, and the usual measure of one lumen per square foot is unlikely to be adequate.<sup>16</sup>
- 3.13 Accordingly, we can say that the obviously subjective legal test is supplemented by the expertise of surveyors; there is a settled practice of use of the Waldram method as a way of determining the level of light loss, and of the 50/50 rule as a starting point for what is and is not acceptable. But that methodology is not rigidly followed; as a result the courts’ approach combines a reasonable level of predictability with some flexibility. The legal test is responsive to unusual properties and unusual uses of land, and it is also able to be receptive to new ways of measuring light as they become available. It is perhaps surprising that the Waldram method of measurement, and the 50/50 test for infringement, have remained current for so long; as will be seen, we have heard from consultees about a number of other available methods.

### Surveying practice

- 3.14 It is worth adding two observations about surveying practice at this point. One is to point out the role played by guidance published by the Royal Institution of Chartered Surveyors (“RICS”). RICS publishes for its members a guidance note on rights to light,<sup>17</sup> which provides advice and sets out best practice in this context. It states:

Members are not required to follow the advice and recommendations contained in this guidance note. They should, however, note the following points.

<sup>14</sup> *Cory v City of London Real Property Co* [1954], cited in S Bickford-Smith and A Francis, *Rights to Light* (2nd ed 2007) p 32; the adequately lit area of the room was reduced from 64.05% to 51.27%.

<sup>15</sup> *Deakins v Hookings* [1994] 1 EGLR 190, 193 by HHJ Cooke.

<sup>16</sup> *Allen v Greenwood* [1980] Ch 119, concerned a greenhouse. Buckley LJ said at 135: “If the building be a greenhouse, the measure [of adequate light] must, in my opinion, be related to its reasonably satisfactory use as a greenhouse”.

<sup>17</sup> RICS, “*Rights of light – Practical guidance for chartered surveyors in England and Wales*” (1<sup>st</sup> ed 2010) (“the RICS Guidance”).

When an allegation of professional negligence is made against a surveyor, the court is likely to take account of the contents of any relevant guidance notes published by RICS in deciding whether or not the surveyor has acted with reasonable competence.<sup>18</sup>

- 3.15 The RICS Guidance contains information on how to assess whether a room is adequately lit. In particular, it notes the following:

Modern research (Defoe, 2009) shows that [the measure of adequate light established by Percy Waldram] is less than half of what most people actually require .... Although [the higher standard] has been widely mentioned in academic papers, the courts still work on the 1/500<sup>th</sup> (or 0.2% sky factor) figure. Until a legal case sets a different standard or criterion, members should continue to assume that the 1/500<sup>th</sup> (or 0.2% sky factor) figure will be applied by the courts. Experts, however, should be aware of other methods of measurement and may wish to put them forward as an alternative.<sup>19</sup>

- 3.16 Our second observation is to point to the obviously different standards used in the planning context, where rather than the 50/50 rule, *BRE daylight and sunlight* is often used as a guide. It is a book of several chapters which enables those who design buildings, and local planning authorities, to assess light in a number of different sorts of spaces. Light inside buildings is measured in more than one way in *BRE daylight and sunlight*; for example, the author examines the “vertical sky component” which measures the daylight visible from a window (and which, helpfully, can be measured from the outside without knowledge of the internal layout),<sup>20</sup> and also discusses the “no sky line”, being the line within a room beyond which the sky cannot be seen through the window(s).<sup>21</sup> The work does not advocate either rules or strict entitlements, although it gives indications of acceptable levels of light in different rooms. There is separate discussion of sunlight, rather than daylight, in rooms, and of considerations relevant to solar energy.<sup>22</sup>
- 3.17 It is not possible to give a clear answer as to whether a room will receive more light when the 50/50 rule is satisfied or according to *BRE daylight and sunlight*; the latter is an approach rather than a rule and is sensitive to issues such as the orientation of the building and the use of a room, which the 50/50 rule ignores.

#### **Technical development and reform**

- 3.18 We were aware, prior to the publication of the Consultation Paper, that there was appetite among rights to light surveyors to build consensus on how light should be measured and what constitutes an adequate amount of light for the purposes of ascertaining whether a right to light is infringed. The Association of Light Practitioners made this point in its response:

<sup>18</sup> The RICS Guidance, p 1.

<sup>19</sup> The RICS Guidance, p 9.

<sup>20</sup> *BRE daylight and sunlight*, ch 2.

<sup>21</sup> *BRE daylight and sunlight*, 2.28 and following.

<sup>22</sup> *BRE daylight and sunlight*, chs 3 and 4.

We believe that [the principles governing when an obstruction of a right to light is actionable] do not require reform, per se, but would benefit from a code of practice to clarify the manner of their application. These principles fall into four main areas, as follows:

- i. The minimum amount of light needed at a given point to undertake activities requiring visual discrimination and its method of measurement;
- ii. The relevance of artificial lighting to the measurement of adequate light;
- iii. The proportion of the room that must be lit to at least the aforementioned minimum standard in order for it to be considered adequately lit for ordinary purposes; and
- iv. The relevance of the use, depth and layout of the affected room, both current and future, to the above.

- 3.19 Such a development would be useful; we say more later in this chapter about the need for continued debate and research about standards of lighting and ways of measuring it.

#### **OUR CONSULTATION QUESTION**

- 3.20 In the Consultation Paper we considered the legal background set out above and the practice of rights to light surveyors. We did not propose reform of the test for infringement of a right to light. We took the view that the subjectivity and flexibility afforded by the current test plays a valuable role in preventing hard cases and ensuring that a degree of common sense can be applied by judges.<sup>23</sup> It also means that the law can adapt to developing perceptions of adequate light and to changes in surveying practice. In particular, therefore, we did not propose the introduction of an objective test to replace the current subjective measure taken from the *Colls* decision and informed (generally) by the 50/50 rule. We also took the view that it would not be appropriate to introduce different standards for residential and commercial premises.<sup>24</sup>
- 3.21 We also rejected the idea that the courts might take into account the availability of artificial light when deciding whether an obstruction was sufficiently serious to be actionable.<sup>25</sup>
- 3.22 However, we asked whether consultees agreed that the current test should remain, and asked those who disagreed to make suggestions for reform.

#### **CONSULTEES' RESPONSES**

- 3.23 More than 40 consultees commented on this question and a slim majority agreed with us that the current test for when an obstruction of light should be actionable should not change. The City of London Law Society said:

<sup>23</sup> Consultation Paper, paras 4.34 to 4.43.

<sup>24</sup> Consultation Paper, paras 4.35 and 4.38.

<sup>25</sup> Consultation Paper, para 4.39 and following.

We agree ... that the current subjective legal test for when an obstruction is actionable ... is the correct test. The greater flexibility that this test provides is, generally, helpful and, while perhaps less certain than a more objective test, it should allow for fairer outcomes.

3.24 The British Property Federation said:

We support the stance in the consultation paper that there should be no change to the current test governing when an interference with a right to light is actionable. The current law strikes the appropriate balance and provides for sensible flexibility.

3.25 Andrew Francis (Serle Court Chambers) thought that the issue of the standard of light and the issue of artificial light would need to return to court for consideration in the future, but said:

Whilst the standard test for actionability is an old one (dating back to *Colls* in 1904) and whilst the scientific test is equally old, for the reasons expressed in [the Consultation Paper at paragraphs 4.38 to 4.41], I would support the view that no change is required.

3.26 John McGhee QC (Maitland Chambers) said:

Rights to light surveyors still use Mr. Waldram's method. There is now good scientific evidence that this is inadequate and sooner or later a new method will be advanced and accepted by the courts. The courts have been clear that the Waldram analysis and the 50/50 rule are guides only. A more precise scientific test could be enshrined in statute but this would not make any sense if, as the courts have rightly said, the test for interference with rights to light is of loss of amenity.<sup>26</sup>

3.27 Other consultees suggested reform, and in the rest of this Chapter we discuss those suggestions. We give particular attention in our discussion of policy to the question whether the use of artificial light in the dominant property before the alleged infringement of the right to light should be relevant to the question whether that right has been infringed.

**Introducing an objective test**

3.28 The so-called 50/50 rule is, as we have said, not a rule.<sup>27</sup> It is in general use, but there are cases where it is not appropriate (the usual example given is a greenhouse). Some consultees supported the introduction of an objective test for the level of light to be guaranteed by an easement, or for the level of loss that should amount to an infringement,<sup>28</sup> and some supported the use of a particular method of measuring light in order to administer that test.

<sup>26</sup> Others who supported the retention of the existing test included the Council of HM Circuit Judges, the National Organisation of Residents Associations, the Compulsory Purchase Association, Allen & Overy LLP, the UNITE Group plc and Travis Perkins plc.

<sup>27</sup> See para 3.12 above.

<sup>28</sup> It will be appreciated that those are two very different things.

- 3.29 Lynn Pollard, for example, generally favoured an objective test:

Nowhere is the actual calculation set down in clear terms. At present the 50% rule is used but that may be subject to case law in the future ... . The actual limit to which the dominant neighbour's easement can be infringed should be stated in irrefutable terms by way of a percentage. Then everyone knows where they stand and the figure cannot be changed at the whim of the judiciary.

- 3.30 The Bar Council, too, considered that "for the sake of consistency ... there does need to be a standard method of measuring light in place in all courts". It suggested that the 50/50 rule applied by rights to light surveyors should be used consistently by the courts, but as one of a number of factors. It continued:

[The 50/50 rule] should be one of a number of factors or stages of a test that judges should consistently proceed through in order to determine whether there has been an obstruction. ... Other considerations should involve an assessment of the relative change before and after the obstruction as well as to consider the possible uses of the room. Where office buildings for instance are continuously lit from artificial sources, this should ... be a factor that should be taken into account. ... The question would not, however, be whether artificial light could fill the void of any natural light but whether artificial light already does play a significant role in the internal lighting of a room. A definitive list of factors that should, as well as possibly a list of those that should not, be taken into account would helpfully be set out in statutory form. Complete objectivity would not be a positive step as each case should fall to be considered on its own facts.

- 3.31 There are other models for measuring natural light. For example, Professor John Mardaljevic of the Society of Light and Lighting advocates climate based daylight modelling. This technique delivers lighting predictions that take into account a number of factors, including the climate in the geographical area in which a building is situated, the position of the sun and variable sky conditions, as well as the properties of the building.<sup>29</sup>

- 3.32 The most obvious source for an alternative test to the 50/50 rule, and a possible objective standard, is the vertical sky component, as referred to in *BRE daylight and sunlight*.<sup>30</sup> BRE in its consultation response observed that the 50/50 rule was often applied in inappropriate circumstances. It criticised the rule's focus on how much light would be retained by the building after the obstruction, rather than on how much light would be lost due to the obstruction. It added that the 50/50 rule also required a detailed knowledge of the layout of the room in question, which was often unavailable to the developer's surveyor until after an objection was made by the dominant owner. It continued:

<sup>29</sup> See, for example, J Mardaljevic and G Janes, "Multi-Scale Daylight Modeling For Urban Environments" in B Beckers (ed) *Solar Energy at Urban Scale* (2012).

<sup>30</sup> See n 13 above.

It is proposed that the vertical sky component on the outside of the window be used as a measure instead. This would have several advantages:

1. It assesses the 'cone of light' visible from the window, which is what Rights to Light are supposed to safeguard.
2. It does not depend on internal layout and can usually be accurately predicted using measurements made from the proposal site.
3. It is generally used for calculations of loss of light for planning purposes (based on the BRE Report 'Site layout planning for daylight and sunlight: a guide to good practice'), so the same calculations could be used for rights to light.
4. This means that a dominant owner could look at the daylight report prepared by a developer for planning purposes and predict if their rights to light were likely to be infringed without necessarily having to hire a consultant.

... The idea would be for guideline values to be set which were lower than the good practice guidance in the BRE Report 'Site layout planning for daylight and sunlight: a guide to good practice'. If it was deemed inappropriate or difficult to include this in draft legislation, one approach could be to provide an 'Approved Document' similar to those used in Building Regulations to set out ways to meet the statutory requirement. This 'Approved Document' could be updated from time to time depending on how the system was working and as daylight prediction methods develop.

3.33 Southern Housing Group also suggested drawing upon *BRE daylight and sunlight*:

Standards for the assessment of daylight and sunlight impacts should be revised to be more sensitive to location. ... Reform of standards could most readily be achieved by using techniques provided in the current BRE guidelines in conjunction with more appropriate target values for particular urban areas. ... Consideration should be given to harmonising the techniques for the analysis of daylight impacts, both the assessment of legal Rights to Light and for assessment under the planning system. These common techniques should be accepted as the preferred format for legal evidence in Rights to Light cases and the means by which local authorities assess planning applications.

3.34 Other consultees did not agree that changes in surveying practice were needed. Deloitte Real Estate said that the test for whether a nuisance had occurred comprises two elements: (a) the calculations used to measure light, and (b) how those calculations are interpreted. With regard to (a), it commented that "the current method of assessment is considered a clear and simple method which is already understood and accepted by the courts". With regard to (b), it said:

To interpret the ... calculation, surveyors and the courts often consider what percentage of the working plane can receive enough light in the proposed scenario to determine whether an actionable nuisance has occurred. Although the working rule of 50% is often adopted by surveyors we are of the view that this should not be standardised. We are also of the view that there are too many different scenarios to be able to create a sensible sized set of criteria.

- 3.35 Anstey Horne noted that the 50/50 rule was nothing more than a working guide or a rule of thumb, and that the courts were, “quite sensibly”, operating on that basis. It saw no need for the present position to change through law reform.<sup>31</sup> It added that whilst most surveyors usually accept the threshold for “adequate” light based upon the Waldram method,<sup>32</sup> some academic papers had argued that this was a very moderate level of light and that the standard should be increased. Anstey Horne warned against this, commenting:

If the threshold were increased, for example to a point where 0.4% of the sky dome were visible, there can be no doubt that development would become yet further constrained and the position of the developing party would be all the more difficult than is currently the case. That might be particularly so in urban areas where light is already at a premium, because with a revised target of 0.4% yet more rooms would be deemed inadequately lit in the existing condition such that any further reduction is likely to be deemed material and potentially worthy of an injunction.

... In our opinion the courts should not, indeed must not, be bound by any rigid number or percentage, because every case must be considered on its individual merits and there should be room to conclude that an injury is not actionable in law even though it may technically breach certain rules of thumb or guidelines.

It went on to indicate by way of examples that an immaterial and/or imperceptible loss of light in a well-lit room, and a badly-lit room, are both arguably not actionable under the existing law.

- 3.36 The Association of Light Practitioners suggested that:

... the 50-50 rule should only be applied up to a certain depth of room, because beyond that its application could be unduly restrictive on neighbouring development.

However, this was not a recommendation for reform: the Association of Light Practitioners stated at the outset of its response that it did not believe that the principles governing when an obstruction of light is actionable were in need of reform. It thought instead that those principles would benefit from an “industry-led code of practice”.

<sup>31</sup> Although it did suggest that “a reasonable approach would be to say that in residential properties the 50-50 rule approach might not be practical beyond a depth of 5m, perhaps extending that to a maximum of 8m for commercial spaces”.

<sup>32</sup> See para 3.8 and following above.

- 3.37 Herbert Smith Freehills LLP supported that suggestion, particularly as a way of dealing with the problems of potential future uses:

As we understand it, an obstruction may be actionable after an alteration to the dominant premises even though the same obstruction would not have been actionable before the alteration. It is on that aspect where we think the principles or, quite possibly, the clarity of the principles should be considered. In that regard, we understand that members of the Association of Light Practitioners are working on a document that will pull together the various strands of current surveying practice on these matters, which document, we believe, will over time become a useful reference work for the courts, developers and land owners to turn to in the interest of enhancing clarity on whether a nuisance will or has occurred in relation to a proposed or actual obstruction.

- 3.38 Neighbourly Matters (Chartered Surveyors) said:

The Law Commission is encouraged to recommend that the Royal Institution of Chartered Surveyors (RICS) Guidance Note is given authority by the Courts as a statement of best practice to allow a benchmark standard to be adopted in all disputes.<sup>33</sup>

- 3.39 A few consultees supported retaining the current test but suggested that there was a need for greater clarity in some areas. Berwin Leighton Paisner LLP and Land Securities said that they would welcome some consideration of:

- (1) possible guidelines on the application of the “50/50 rule”, particularly for unusually shaped rooms and different use classes (residential or commercial);
- (2) the principles applying to small losses of light to poorly lit rooms; and
- (3) the assumptions to be made as to room layouts behind apertures that enjoy rights to light, and whether there should be an overall limiting depth of (say) 9m.

- 3.40 In considering these various suggestions we have to focus first on whether it is appropriate to introduce a particular standard of lighting as a rule to be followed, so that an objective level of light is guaranteed by the easement. We think that this is impracticable. One of the most valuable features of the current law on rights to light is its flexibility. The *Colls* test enables the court to be responsive to the nature of the room, the level of light it had before infringement, and the amount of light it needs. It enables an appropriate response where a room is poorly lit before infringement (which might, according to the circumstances, mean that a small loss of light could be a minor loss or a major loss). A rule is unlikely to work, and the imposition of an objective standard would only generate frustration.

<sup>33</sup> For further details on the RICS guidance see para 3.14 and following above.

- 3.41 Equally, for the law to adopt a particular method of measuring light as a rule to be followed when testing infringement would not command consensus – there was no unanimity among consultees as to what would be best, save that half of our respondents on this question supported the 50/50 rule as it is currently used.
- 3.42 The current use of the 50/50 rule does not preclude the other available methods. The vertical sky component, the no-sky line before and after infringement, or climate-based modelling, are all admissible and could all be made use of. If anything is needed it is for surveyors and other interested professionals to work towards consensus where possible, but even more importantly to work towards clarity of evidence about the adequacy of light. Whatever the scientific developments in the measurement of light, the *Colls* test is sufficiently flexible to accommodate them.
- 3.43 The request for greater clarity made by Berwin Leighton Paisner LLP and Land Securities is, we think, best delivered through developments in surveying practice, something which we discuss in the paragraphs below.<sup>34</sup>

#### **Different tests for commercial and residential premises**

- 3.44 A few consultees suggested that there should be different tests for commercial and residential premises. For example, the Property Litigation Association and Clifford Chance LLP said:

We see the merits in two separate tests for residential and commercial property on the assumption that light enjoyed by a residence should be treated with more importance than that enjoyed by a commercial property. This is essentially what happens in practice in any event when assessing the risk of a rights to light claim. However, discretion is required to account for the rooms affected by the diminution of light and the use (and potential use) of those rooms. For example, certain commercial property may rely on natural daylight and so this should not be arbitrarily discounted simply because the property is commercial ... .

- 3.45 Another consultee – who wished to remain anonymous – also thought that a distinction should be made between commercial and residential premises. It said:

... there is a case for differentiating between commercial and residential premises when assessing the adequacy of light, particularly where commercial offices utilise artificial light throughout the day. The impact of an obstruction of light on a commercial property is, in most cases, likely to be less detrimental than to that of a residential property.

<sup>34</sup> See paras 3.74 and 3.75 below. In respect of the second numbered point made by Berwin Leighton Paisner LLP and Land Securities we do not think that any change to the law is required. If, as is suggested, the loss of light would make no difference to the way in which the room or building was being used, then under the current law we would expect the court to find that no nuisance has occurred. We discuss the role of artificial light at para 3.57 and following below.

The consultee went on to suggest that making a distinction between residential and commercial premises “would reduce the ability for commercial entities to utilise their position to demand sums of money ... when the obstruction has a minimal impact on their ability to continue operations”.

3.46 One consultee took a different approach to reach a similar conclusion. The City of Westminster and Holborn Law Society suggested that the law should be “redefined by reference to what is actually enforced by the courts”. It argued that there were effectively two types of right to light under the current law: absolute rights and qualified rights. The former were comparable to any other easement, in that they may not be lawfully infringed and are capable of protection by an injunction;<sup>35</sup> in contrast, the latter may be lawfully infringed upon payment of compensation. Buildings which benefited from “qualified” rights to light were “the factory, the warehouse and perhaps the office building, for which daylight may be valuable but not essential”.

3.47 The City of Westminster and Holborn Law Society acknowledged that the qualified right to light “exists only in theory, in the sense that English law applies it in practice whilst expressly denying its existence”. It continued:

Should a reformed law give the commercial property owner such a qualified right? An example would be an office building whose light is severely diminished by a development. Under present law [the dominant owner] would, if refused an injunction, at least be entitled to damages. If reform were to create a qualified right to light that position would be preserved, but otherwise he would have no right at all.

3.48 In contrast, the British Council for Offices disagreed with distinguishing between residential and commercial premises. It argued that to do so would “introduce a new level of complexity into the situation”.

3.49 The fundamental objection to the introduction of a distinction between residential and commercial premises seems to us to be the potential for change of use. There is considerable scope for conversion of properties from commercial use to residential (or vice versa), or for them to become a mixture of residential and other uses, so that an absolute distinction would not be appropriate. In addition there are businesses – for example cafés, galleries and commercial greenhouses – where natural light might be prized as highly as it is in residential properties.

3.50 That said, the *Colls* test clearly takes into account the different uses for which a property is adapted. Moreover, there is considerable scope for the distinction between residential and commercial property to be a focus of attention when it comes to remedies, and our recommendations take this into account.<sup>36</sup>

<sup>35</sup> It suggested that an “entitlement to an absolute right should probably be defined by the use to which the dominant property is put, or should be expected to be put. Residential use is the obvious one, but (we do not know) there may be other uses (hotels for example), for which good daylight is essential and which should arguably enjoy an unqualified easement”.

<sup>36</sup> See paras 4.98 and 4.116 below.

- 3.51 The suggestion of the City of Westminster and Holborn Law Society<sup>37</sup> would represent a radical change in the law. We do not understand what benefits would be achieved by the proposal – other than certainty that an injunction would never be granted in respect of certain types of property – and we do not consider that this would represent an improvement on the current law.

**Comments on the future uses to which the dominant building might be put**

- 3.52 Several consultees alluded to the issues that arise where, in determining whether there has been an actionable infringement, the court has regard to the future uses to which the dominant building may be put. For example, Anstey Horne argued that consideration of potential future uses resulted in uncertainty, as it could result in a number of partitioning arrangements being considered. However, it continued:

... having given this careful thought we do not suggest any changes to the current approach of the courts because it is vital to assess each case on its merits and in fairness to the dominant owner they should not be forced to retain a particular layout in their building to accommodate the developer's proposals. In essence, while we acknowledge the difficulties this can cause the developer when assessing his risks, we do not believe there are any practical changes that could be made for the better.

- 3.53 Herbert Smith Freehills LLP supported the Association of Light Practitioners' suggestion<sup>38</sup> of a code of practice to deal with the problems of potential future uses:

As we understand it, an obstruction may be actionable after an alteration to the dominant premises even though the same obstruction would not have been actionable before the alteration. It is on that aspect where we think the principles or, quite possibly, the clarity of the principles should be considered. In that regard, we understand that members of the Association of Light Practitioners are working on a document that will pull together the various strands of current surveying practice on these matters, which document, we believe, will over time become a useful reference work for the courts, developers and land owners to turn to in the interest of enhancing clarity on whether a nuisance will or has occurred in relation to a proposed or actual obstruction.

- 3.54 We agree that surveying practice and expertise is likely to be the best source of answers on these issues, rather than statutory reform, and we would welcome the development of an industry-led code of practice.

<sup>37</sup> See para 3.46 and following above.

<sup>38</sup> See para 3.36 above.

- 3.55 The Association of Light Practitioners echoed some of the concerns set out above that consideration of future uses of the dominant building presented a problem in practice. It said that a dominant owner could suggest a future use of the building that the servient owner thought was unreasonable. At present the only way to test its reasonableness would be to go to court or (if both parties agreed) to engage in mediation with the other party. The Association of Light Practitioners continued:

Therefore, we wonder if there is scope here for a dispute resolution process which can be instigated by either party and which is binding on the parties, which is streamlined and avoids court proceedings. We are aware that, for example, there is a proposal to streamline Judicial Reviews through appointing "special" judges within an Environmental Lands Tribunal which is a reflection of the need to address specific areas of the law. We see such a need in determining whether a reduction in light is actionable (before even coming to the question of whether the remedy – if it is actionable – is an injunction or damages in lieu).

- 3.56 We do not think it practicable to suggest a specialised tribunal or judiciary for rights to light disputes which, although specialised, tend to be accompanied by other legal issues.

#### **The role of artificial light**

- 3.57 Finally, we turn to the role played by the use of artificial light. Where the room or space that benefits from a right to light is already artificially lit, so that an obstruction to the window actually makes little or no difference to the levels of light within, should that fact be taken into account in the court's decision as to whether a right to light has been infringed?
- 3.58 This is a difficult question. As we discuss in Chapter 4, the use of artificial light in this way is relevant to the question of what remedy is appropriate and may incline the court away from the grant of an injunction (as it did, for example, in *Midtown Ltd v City of London Real Property Co Ltd*).<sup>39</sup> But damages awarded instead of an injunction may be calculated on the basis of a share of the developer's profits; there is scope for disquiet about this. Should damages be awarded at all in a situation where the dominant land is an artificially lit office block, so that there is in fact no loss of amenity?<sup>40</sup>
- 3.59 Consultees' views were mixed on the role of artificial light. Several consultees were in favour of express provision being made to allow the courts to take artificial light into account when considering whether a right to light had been interfered with. Their responses focussed on the fact that artificial light was often used in commercial premises. For example, the Property Litigation Association (whose members were split 60/40 on whether artificial light should be taken into account by the court) and Clifford Chance LLP stated that:

<sup>39</sup> [2005] EWHC 33 (Ch), [2005] 1 EGLR 65. We recommend that this is acknowledged expressly in the new statutory test governing when damages may be awarded instead of an injunction. See paras 4.74 and following and 4.116 below.

<sup>40</sup> Save for loss of a view, which a right to light does not in any event protect.

One view is that artificial light could be taken into account in assessing whether there is a nuisance, but only where it would otherwise be marginal as to whether there is a nuisance using traditional assessment methods. This may mean that a Court might determine that no nuisance exists. This approach particularly recognises the role played by artificial light in commercial buildings.

3.60 HDG Ltd commented:

It seems to us that it would be entirely possible in non-residential buildings to take artificial light (or light from other sources) and the extent of its likely use, as well as blinds and other measures against solar gain or for privacy, into account in a realistic, up-to-date, way. In some buildings, not to be able to function without extensive natural light would be seriously detrimental to amenity; in many town and city buildings it would be the ordinary course of events. It is difficult to reconcile in a modern world why it is considered appropriate to evaluate a property in a lighting context which would only apply historically, particularly where this may lead to damages or even an injunction.

3.61 Other consultees disagreed. The City of London Law Society said:

We agree that the current position of a court being able to take account of artificial light when assessing the remedy, strikes the appropriate balance. Artificial light should not be taken into account when deciding whether an obstruction is sufficiently serious to be actionable. If it was, this could make it very difficult for the many commercial buildings that use large amounts of artificial light, to succeed in actions for light obstruction. While such buildings predominantly use artificial light, natural light remains important.

3.62 Anstey Horne noted that artificial light already plays an indirect role under the current law, because if a room or building was so gloomy that it could not be used for ordinary purposes without artificial light, any obstruction of the minimal remaining light may not constitute a nuisance.<sup>41</sup> It added that:

We believe it is still correct to focus on available natural light for the base calculations.

Furthermore, in general we do not believe artificial light should be a key consideration in terms of whether an injury is actionable. However, an exception to the rule might be where rooms or spaces are particularly poorly lit in the existing situation, such that it is apparent that the room/space cannot sensibly and safely be used without the use of artificial lighting. In such a case a small further reduction in the daylit area is unlikely to have any material impact upon use and enjoyment of the space and for that reason may not be deemed actionable.

<sup>41</sup> See the Consultation Paper, para 4.31.

- 3.63 Support for changing the law to allow the court to consider artificial light was mixed and most consultees did not argue for this approach. Nevertheless, we see considerable force in the arguments put forward, and quoted above, by the Property Litigation Association, Clifford Chance LLP, HDG Ltd and Anstey Horne. Whilst the loss of natural light is always the starting point, it may seem counter-intuitive for the court to ignore the presence of artificial light, particularly in the commercial context where offices may use artificial lighting constantly.
- 3.64 This argument was considered and rejected by Mr Justice Peter Smith in *Midtown Ltd v City of London Real Property Co Ltd*.<sup>42</sup> However, a careful reading of his judgment makes clear that that rejection was not absolute.
- 3.65 Counsel for the developer argued that all of the rooms affected by the obstruction were used for commercial purposes, and were constantly lit by artificial light in line with modern office practices, as is usual in the City of London.<sup>43</sup> The claimants' rights to light were not being used for task illumination, and "the time had come" to recognise this reality in rights to light law.<sup>44</sup> The judge saw "a number of potential difficulties about this submission", principally:<sup>45</sup>
- (1) it would mean there would never be a successful challenge to an infringement of light, because it could always be possible to fill the gap with artificial light;
  - (2) it undermines potential specific advantages that natural light may have in a given case or for certain tasks;
  - (3) it does not take into account other potential uses of the property which incorporate more use of the natural light; and
  - (4) whilst many in the City of London take a pragmatic view and are willing to bargain away their rights, no-one should be *required* to bargain away rights if he or she does not wish to do so.

For these reasons the judge rejected the submission and found that there was an infringement – but took the use of artificial light into account in deciding the appropriate remedy.

- 3.66 It is important to be clear that there is no legal barrier to the existing use of artificial light in the dominant premises being taken into account when assessing whether or not a right to light has been infringed, and indeed the judge in *Midtown* did not rule out such an outcome in a different case.

<sup>42</sup> [2005] EWHC 33 (Ch), [2005] 1 EGLR 65.

<sup>43</sup> [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [56] to [58].

<sup>44</sup> [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [59].

<sup>45</sup> [2005] EWHC 33 (Ch), [2005] 1 EGLR 65, at [61] and [62].

- 3.67 Turning to the specific reasoning in *Midtown*, we think the first ground listed above may, with respect, miss the point. The argument is not that artificial light could mitigate the loss, but that it is already being used to such an extent that there will in reality be no loss. A court might find that there is no infringement where the relevant rooms are kept constantly illuminated by artificial light, but find in another case where it is shown that natural light is genuinely used for substantial illumination that there has been an infringement.
- 3.68 As to the second and third points above, their validity will also depend upon the evidence in a particular case.
- 3.69 Thus whether natural light confers specific advantages in a given case or might be necessary for some different use of the property in the future are matters of fact and evidence. Equally, where a claimant is currently shown to rely on artificial light at all times, such that any obstruction would not be actionable, it would still be open to the claimant to prove a genuine settled intention to, say, convert the premises into a studio or residential premises in which natural light would be used instead.
- 3.70 The final objection raised is that taking use of artificial light into account in deciding whether there has been an actionable infringement of a right to light amounts to an expropriation of rights. We appreciate the concern, and indeed the discomfort, at leaving a dominant owner with nothing. Yet the reality is that in cases where artificial light is exclusively relied upon, the *substance* of the right to light (that is, natural light) is not actually being enjoyed. In this sense it is not merely that the claimant has not actually suffered any loss; the claimant is in reality not using the right to light, and accordingly there is greater discomfort in requiring another party to pay for an “infringement” that does not, in the circumstances (and taking into account alternative future uses of the property if any) do any harm.<sup>46</sup>

#### **DISCUSSION AND POLICY**

- 3.71 We are not convinced that there is sufficient support from consultees for any change in the current law as to whether a right to light has been infringed. The existing test provides necessary flexibility and is capable of keeping pace with developing views about “what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind”.<sup>47</sup>
- 3.72 Accordingly, we do not recommend any reform of the test for whether a right to light has been infringed.

<sup>46</sup> Clearly the argument is not that *any* use of artificial light will preclude an infringement. In many cases the natural light is used along with artificial light and the room will become darker as a result of the infringement, even with the lights on. Where there is a significant loss of amenity – perhaps requiring an upgrade in artificial lighting – then the legal test is likely to be satisfied.

<sup>47</sup> See para 3.3 above.

3.73 But we make two important observations. One is that, as discussed above, there is ample scope within the current law for the court to find that there is no infringement of a right to light because the dominant building is already so dependant upon artificial light that the loss of daylight makes no practical difference. This will not always be the case where artificial light is in use before the infringement; but the argument can be made, and it is open to the court to accept it in appropriate cases.

3.74 The other is to stress that there is no legal rule requiring the use of the Waldram method or the 50/50 test. The scientific measurement of light is a developing field of expertise. If change is to come in this area, we think that it has to be led by surveyors and legal practitioners working together, with a clear understanding of the legal test, which is that set out in *Colls v Home and Colonial Stores Ltd*<sup>48</sup> and in *Allen v Greenwood*, as discussed above. The dominant owner is entitled to:

... the light required for the beneficial use of the building for any ordinary purpose for which it is adapted.<sup>49</sup>

3.75 The methods used to measure light are not part of the law, although they are vital in assisting the judge to operate the legal test. New methods need to command the confidence both of surveyors and of lawyers, and to that end there is a great deal of scope for the use of professional guidance. This could be through the Association of Light Practitioners' proposed protocol or through updated RICS guidance. We think that the work being undertaken in this area has the potential to assist in addressing some of the concerns raised by consultees.

<sup>48</sup> [1904] AC 179, 204.

<sup>49</sup> [1980] Ch 119, 130.

## CHAPTER 4

# DAMAGES OR AN INJUNCTION?

### INTRODUCTION

- 4.1 When an easement is infringed – for example, by the obstruction of a right of way – the law categorises the infringement as the tort of nuisance. The primary remedy is an injunction, to prevent or reverse the infringement. Therefore where a right to light is infringed by the obstruction of light, the primary remedy is an injunction.<sup>1</sup> But whenever the court has the jurisdiction to grant an injunction, it has a discretion to award damages instead.<sup>2</sup>
- 4.2 This is a fundamental point. It is sometimes said that only the more serious infringements are “injunctable”. That is a misconception. Not all obstructions of light are actionable, and we discussed in Chapter 3 the level of light that an easement protects and the level therefore of interference that amounts to an infringement. But if there is an infringement, then the claimant’s primary remedy is an injunction, with the possibility of damages being awarded instead.
- 4.3 That said, there is no absolute entitlement to an injunction. An injunction is an equitable remedy and the traditional equitable principles apply. For example, the claimant who does not have “clean hands”,<sup>3</sup> or has delayed so long as to offend the equitable doctrine of laches,<sup>4</sup> will not be entitled to an equitable remedy. In that event, the dominant owner will be entitled only to common law damages, compensating him or her for any loss in value to the property.<sup>5</sup> But that is a very unusual situation. Generally, where a right to light has been infringed, the court does have jurisdiction to grant an equitable remedy, and that will prima facie be an injunction, to prevent the obstruction or to order the removal of an obstruction that is already in place. But where that is the case the court has discretion to award equitable damages instead, and those damages will be at a higher level than common law damages.<sup>6</sup> There is some controversy over the measure of equitable damages awarded instead of an injunction, and we address that in Chapter 5.

<sup>1</sup> See *Imperial Gas Light Co v Broadbent* (1859) 7 HLC 600, 11 ER 239 (dealing with common law rights generally); and in the rights to light context see *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 and *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1391, [2007] Ch 135 at [36]. Also see para 4.16 below.

<sup>2</sup> See the Consultation Paper, para 5.5 and the Senior Courts Act 1981, s 50.

<sup>3</sup> See J McGhee (ed), *Snell's Equity* (32<sup>nd</sup> ed 2010) paras 5-015 and 18-039. The equitable principle is complex but, in short, it “purports to insist that a claimant must show that his past record in the transaction is clean” (J McGhee (ed), *Snell's Equity* (32<sup>nd</sup> ed 2010) para 5-015).

<sup>4</sup> “Laches” is an equitable doctrine which can provide a defence to claims for equitable relief such as injunctions, where delay is coupled with circumstances that make it inequitable to grant relief. See J McGhee (ed), *Snell's Equity* (32<sup>nd</sup> ed 2010) para 5-019, and the Consultation Paper, para 5.10, n 12.

<sup>5</sup> We discuss common law damages in Chapter 5 at para 5.5 and following.

<sup>6</sup> Hence the significance, in the cases and legal writing, of the term “damages in lieu of an injunction”. We use the phrase “damages instead of an injunction” or “in substitution for an injunction” to denote damages at that higher level.

- 4.4 In this Chapter we examine the law on how the court exercises its discretion whether or not to award damages instead of an injunction.
- 4.5 The law in this area has been the subject of a recent review by the Supreme Court in the case of *Coventry v Lawrence*<sup>7</sup> (“*Coventry*”). In the text that follows we discuss the law as it was when we consulted, and where it now stands following the *Coventry* decision. We then revisit the provisional proposal for reform we made in our Consultation Paper in light of this development in the law and the feedback we received from consultees, before outlining our final recommendation.

## THE DISCRETION TO GRANT DAMAGES INSTEAD OF AN INJUNCTION

### The *Shelfer* Test

- 4.6 In the Consultation Paper we discussed the case of *Shelfer v City of London Electric Light Company*<sup>8</sup> (“*Shelfer*”), in which Lord Justice AL Smith said that it was a “good working rule” that a court may award damages in substitution for an injunction:
- (1) if the injury is small; and
  - (2) is one which is capable of being estimated in money; and
  - (3) is one which can be adequately compensated by a small money payment; and
  - (4) the case is one in which it would be oppressive to the defendant to grant an injunction.<sup>9</sup>

<sup>7</sup> [2014] UKSC 13, [2014] AC 822.

<sup>8</sup> [1895] 1 Ch 287.

<sup>9</sup> [1895] 1 Ch 287, 322-323.

- 4.7 The court in *Shelfer* also discussed other considerations, including the effect of the conduct of the parties,<sup>10</sup> but the focus in recent decisions has been on the four numbered criteria above. There appears to have been a tendency for them to be seen by the courts as “tick boxes”, all of which have to be satisfied in order for the court to award damages in substitution for an injunction.<sup>11</sup> Commentators have argued that this approach fails to give proper weight to the key issue of oppression (the fourth limb of the guidance),<sup>12</sup> so that developers have borne losses out of all proportion to those that would have been suffered by the dominant owner if the injunction had been refused.<sup>13</sup>
- 4.8 In the Consultation Paper we discussed the uncertainties in the *Shelfer* criteria and the problems with their application. A particular difficulty is the word “small”.<sup>14</sup> It has been difficult to predict whether an injury will be judged by the court to be “small”, and to assess what is meant by a “small money payment”, as there is little consistency in the case law.<sup>15</sup>
- 4.9 The case of *HKRUK II (CHC) Ltd v Heaney*<sup>16</sup> (“*Heaney*”) provided a useful illustration of the courts’ approach to the criteria in *Shelfer*, and has been the focal point of much criticism of the current law. This was an unusual case where the court proceedings arose not from an application for an injunction by the dominant landowner, but from an application by the developer for a declaration as to its liability to the dominant owner. The dominant land was a recently restored historic building in the centre of Leeds.

<sup>10</sup> “There may ... be cases in which ... the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff’s rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction”; AL Smith LJ [1895] 1 Ch 287, 323.

<sup>11</sup> See *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [61] and [72] and *Jacklin v The Chief Constable of West Yorkshire* [2007] EWCA Civ 181, (2007) 151 SJLB 261 at [48]. Also see S Bickford-Smith and N Taggart, “Don’t be left in the dark” (2012) 1235 *Estates Gazette* 64, 66.

<sup>12</sup> See S Bickford-Smith and N Taggart, “Don’t be left in the dark” (2012) 1235 *Estates Gazette* 64.

<sup>13</sup> Consultation Paper, para 5.42. The developer’s losses could include, for example, being prevented from developing the property for letting or sale or being required to demolish a part which has already been built.

<sup>14</sup> See paras 4.6(1) and (3) above.

<sup>15</sup> Some courts have approached this issue by considering whether the sum that the court would award as equitable damages was “small”, whereas in other cases the court had used the figure that would be payable as common law damages (and in some cases the court has looked at both). This can make a difference to the outcome of the case, as the equitable damages figure is likely to be significantly larger than the common law equivalent. See the Consultation Paper, paras 5.18 to 5.24 and 5.44. The better view appears to be that equitable damages is the relevant measure: *Jaggard v Sawyer* [1995] 1 WLR 269, 282 by Sir Thomas Bingham MR.

<sup>16</sup> [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

- 4.10 In examining whether the injury to the dominant owner was small, the court looked at a number of factors, including the amount of adequately lit space lost; the amount of light lost in specific areas (including a boardroom described as one of the “star rooms” of the building); the amount of light lost in other areas which would not be actionable; and the character of the building and the commitment demonstrated in restoring it. The judge received submissions that common law damages – being the loss in value of the building arising from the loss of light – would have amounted to 2% of the value of the building, and concluded that the claimant’s injury was not small.
- 4.11 The court therefore decided to award an injunction – an order requiring the demolition of the top two storeys of the new building, some of which had already been let by the developer. That decision was met with some surprise, particularly in view of the fact that the dominant owner’s inaction, and the long delay and uncertainty that that caused for the developer, were given so little weight.
- 4.12 In the Consultation Paper we noted the dissatisfaction amongst developers with this approach, and quoted commentary by practitioners that:

[The courts in *Regan v Paul Properties DPF No 1 Ltd*<sup>17</sup> and *Heaney*] failed to give proper weight to the question of oppression, thereby subjecting the developers to losses out of all proportion to those that would be suffered by the victim in each case, were the injunction to be refused.<sup>18</sup>

#### **The decision in *Coventry***

- 4.13 The Supreme Court has revisited this issue in the case of *Coventry*.<sup>19</sup>
- 4.14 The case concerned nuisance to the claimants’ home caused by noise generated at the defendants’ nearby speedway track, at which the defendants carried out racing events in accordance with planning permission. In their judgments, the Supreme Court Justices made general comments as to when it is appropriate to grant an injunction to restrain an infringement of property rights. These comments should therefore carry great weight not only in relation to nuisance claims (of noise or any other variety) but also to claims in respect of breaches of restrictive covenants, or the infringement of easements including rights to light.

<sup>17</sup> [2006] EWCA Civ 1391, [2007] Ch 135.

<sup>18</sup> Consultation Paper, para 5.42, quoting S Bickford-Smith and N Taggart, “Don’t be left in the dark” (2012) 1235 *Estates Gazette* 64, 66.

<sup>19</sup> [2014] UKSC 13, [2014] AC 822.

- 4.15 The Supreme Court's remarks on remedies are framed generally, and Lord Neuberger expressly said that he did not see rights to light cases as involving special rules.<sup>20</sup> However, Lord Carnwath's view was that the courts should be cautious of "too direct a comparison" with rights to light cases as these tend to involve the "drastic alternatives" of removing an offending building or leaving the obstruction in place, whereas injunctions in noise nuisance cases can be more flexible, allowing continuation within reasonable limits, perhaps combined with an award of damages.<sup>21</sup> Lord Mance endorsed Lord Carnwath's view and indicated that he was not persuaded that rights to light cases involve the same considerations, though he invited argument on the point in future cases.<sup>22</sup>
- 4.16 An injunction is still the primary remedy. Lord Neuberger said:
- I would accept that 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.
- ... However ... when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above).<sup>23</sup>
- 4.17 This would appear to suggest that the dominant owner whose right to light is infringed will, all other things being equal, be able to obtain an injunction to prevent the infringement, but that it is now easier for the servient owner to persuade the court not to grant one. In the absence of argument or evidence about damages, the remedy remains an injunction.

<sup>20</sup> [2014] UKSC 13, [2014] AC 822 at [122]. Lords Sumption and Clarke similarly applied the reasoning of rights to light cases in their judgments without question.

<sup>21</sup> [2014] UKSC 13, [2014] AC 822 at [167]. However, a number of cases considered by the court, in reaching its conclusion as to the appropriate remedy, concerned disputes involving rights to light (for example, *Fishenden v Higgs and Hill Ltd* [1935] All ER Rep 435, *Colls v Home and Colonial Stores Ltd* [1904] AC 179 and *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135).

<sup>22</sup> [2014] UKSC 13, [2014] AC 822 at [247].

<sup>23</sup> *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822 at [121] and [122]. Lord Clarke wished to reserve this question in the absence of submissions on the point, at [170]. The remaining justices did not comment on the matter but stated elsewhere their broad agreement with Lord Neuberger's judgment.

- 4.18 However, the Supreme Court unanimously disapproved of “slavish”<sup>24</sup> and “almost mechanical”<sup>25</sup> applications of the *Shelfer* criteria. The approach to *Shelfer* that requires all four boxes to be ticked before damages can be awarded is now at an end, as is the view that damages can only be awarded in exceptional circumstances.<sup>26</sup> Such approaches are “simply wrong in principle, and give rise to a serious risk of going wrong in practice”.<sup>27</sup>
- 4.19 Lord Neuberger explained that the power to award damages instead of an injunction “involves a classic exercise of discretion which should not, as a matter of principle, be fettered”.<sup>28</sup> But he added:

... it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible.<sup>29</sup>

<sup>24</sup> [2014] UKSC 13, [2014] AC 822 at [161] by Lord Sumption.

<sup>25</sup> [2014] UKSC 13, [2014] AC 822 at [119] by Lord Neuberger.

<sup>26</sup> [2014] UKSC 13, [2014] AC 822 at [119], [123] by Lord Neuberger. At [115], Lord Neuberger explained that:

In *Watson [v Croft Promosport]* [2009] 3 All ER 249, the Court of Appeal reversed the trial judge’s decision to award damages instead of an injunction. At para 44, Sir Andrew Morritt C described “the appropriate test” as having been “clearly established by the decision of the Court of Appeal in *Shelfer*”, namely “that damages in lieu of an injunction should only be awarded under ‘very exceptional circumstances’”. He also said that *Shelfer* “established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction”, although he accepted at para 51 that “the effect on the public” could properly be taken into account in a case “where the damage to the claimant is minimal”.

<sup>27</sup> [2014] UKSC 13, [2014] AC 822 at [118] by Lord Neuberger.

<sup>28</sup> [2014] UKSC 13, [2014] AC 822 at [120].

<sup>29</sup> [2014] UKSC 13, [2014] AC 822 at [121].

- 4.20 Little such guidance was given in *Coventry* itself, save that it is clear that the court must consider all factors that are relevant.<sup>30</sup> However, a new factor is to be afforded relevance, namely the public interest.<sup>31</sup> The majority saw this as a wide ranging idea, involving not only the public interest in the activity that was causing the nuisance (and therefore, we may speculate, in the development that might infringe the right to light) but also the public interest in employment and the interests of those whose livelihoods are bound up in the nuisance.<sup>32</sup> Planning permission is not to be regarded as raising a presumption against an injunction, in the view of the majority,<sup>33</sup> but it is given a new importance:

In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant's, or the defendant's, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction.<sup>34</sup>

- 4.21 However, the public interest can cut both ways; the Supreme Court also suggested that the fact that many others in addition to the claimant may be badly affected by a nuisance would point in favour of granting an injunction.<sup>35</sup> Other relevant factors mentioned included the possible waste of resources an injunction would bring about (particularly if on account of a single claimant), whether an injunction would stop the tortfeasor's activities altogether, and the proportionality of the financial implications of an injunction to the damage done to the claimant. Lord Neuberger said:

<sup>30</sup> Lord Neuberger said that he "cautiously (in the light of the fact that each case turns on its facts) approve[d] the observations of Lord Macnaghten in [*Colls v Home and Colonial Stores Ltd*] [1904] AC 179, 193, where he said:

'In some cases, of course, an injunction is necessary - if, for instance, the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. ...'.

<sup>31</sup> Previously the public interest was only relevant in exceptional circumstances, for example where necessary for the defence of the realm: see *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] Env LR 34 and J McGhee, *Snell's Equity* (32nd ed. 2010) para 18-042.

<sup>32</sup> [2014] UKSC 13, [2014] AC 822 at [118] and [124] and following by Lord Neuberger and at [239] by Lord Carnwath.

<sup>33</sup> [2014] UKSC 13, [2014] AC 822 at [127] by Lord Neuberger; at [246] by Lord Carnwath. Contrast the views of Lord Sumption at [161] where he argued that:

There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted ...

<sup>34</sup> [2014] UKSC 13, [2014] AC 822 at [125] by Lord Neuberger.

<sup>35</sup> [2014] UKSC 13, [2014] AC 822 at [124].

... the court may well be impressed by a defendant's argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy.<sup>36</sup>

- 4.22 Proportionality is a powerful and pervasive idea in the law. At its simplest, in this context, the idea is not that one consideration should outweigh another if it is simply greater; rather, it is that one consideration should outweigh another only if it is *so much* greater that it is right for it to outweigh the other. In this context, where for example a court is asking whether the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if he or she were left to a remedy in damages, the court might consider whether the impact on the defendant of an injunction is *so much* greater than the problem for the claimant of receiving only damages that the injunction ought not to be granted. It may be that the introduction of the public interest as a relevant factor here will weight the scales in the defendant's favour by adding a further ingredient which may, alone or in combination with other factors, incline a court towards damages.

## OUR PROPOSAL

### The proposal in the Consultation Paper

- 4.23 Owing to the difficulties arising from the way in which the *Shelfer* criteria were being applied, or were perceived to be applied following *Heaney*, we proposed in the Consultation Paper a test that would move away from the “tick box” approach to satisfaction of the *Shelfer* criteria that had developed. We proposed that a court might award damages in substitution for an injunction in rights to light cases if the grant of the injunction would be disproportionate, bearing in mind:
- (1) the size of the injury in terms of loss of amenity (which could include consideration of whether artificial light is usually used by the claimant);
  - (2) whether a monetary payment would be adequate compensation;
  - (3) the conduct of the claimant;
  - (4) whether the claimant delayed unreasonably in bringing proceedings; and
  - (5) the conduct of the defendant.<sup>37</sup>
- 4.24 The factors listed were not to be treated as being exhaustive – the court would be entitled to take into account any other relevant factors. Nor would the court need to consider whether all of the factors were present before awarding damages in substitution for an injunction.

<sup>36</sup> [2014] UKSC 13, [2014] AC 822 at [126].

<sup>37</sup> Consultation Paper, para 5.50 (see also the discussion at paras 4.8 and 4.11 above).

- 4.25 We also took the view that the fourth limb of the *Shelfer* criteria – whether an injunction would be oppressive to the defendant – should be placed at the forefront of the test, so as to express the objective to be achieved by the exercise of discretion. We thought that “proportionality” captured the key element that the courts should take into account better than the term “oppression”, which some commentators regarded as key in the law before *Coventry*.<sup>38</sup>

#### **Implications of the *Coventry* decision for our proposal**

- 4.26 We formulated our proposal and consulted on it prior to the decision in *Coventry*. The status of the *Shelfer* criteria has now changed; they are not exhaustive of the matters that the court must take into account, but equally the fact that not all are satisfied does not mean that damages cannot be awarded.
- 4.27 This means that the law on which we consulted has changed, and some of the mischief that our proposal in the Consultation Paper sought to address has apparently been resolved: most importantly, it should no longer be possible for a court to refuse an injunction solely on the basis that not all of the *Shelfer* criteria are met.
- 4.28 However, although the decision in *Coventry* is helpful, it puts the law in a state of uncertainty by opening up the courts’ discretion as to remedies. For a number of reasons we are not satisfied that the case for reform in the rights to light context has been invalidated.
- 4.29 Consultees and stakeholders have stressed the need for certainty as to when an injunction will be granted to prevent the infringement of a right to light. Some uncertainty is inevitable; this is not a matter that can be determined by rules, and the *Shelfer* criteria had hardened into rules in an unhelpful way. But the untrammelled discretion re-introduced by *Coventry* may perhaps have swung the balance too far in the opposite direction. We continue to take the view that an objective test, such as the test of proportionality that we had advocated, together with a number of factors drawn particularly (but not exclusively) to the court’s attention, will lead to better-structured and more predictable decisions, and a culture in which it is more practicable for the parties to settle without a trial.
- 4.30 Since the decision in *Coventry* we have held a number of discussions with stakeholders and have heard, from most but not all of them, a clear message that reform is still wanted. There are concerns, not only that the discretion is now too wide and unstructured, but also that the decision in *Coventry* did not wholly dispose of an over-reliance on the *Shelfer* criteria.

<sup>38</sup> Consultation Paper, para 5.49.

4.31 Evidence that these concerns might be well founded comes from comments made by the Court of Appeal in *Higson v Guenault*.<sup>39</sup> The case concerned interference by the defendant with the claimant's right of way, or alternatively trespass to the claimant's land. The defendant built a fence on the land in dispute in such a way as to make it impossible for the claimant's lorries to access its tennis club to carry out maintenance. The claimant sought an injunction ordering the defendant to remove the fence to restore access.

4.32 In considering whether to grant damages instead of an injunction, Lord Justice Aikens said:

The injury to the [claimant's] legal rights, whether by interference with the right of way or by trespass, is, in this context, not small. If the [claimant] cannot maintain its tennis courts properly, it cannot function as a tennis club. That interference cannot be compensated by a small money payment. Nor is the task of removing the 6 fence panels a Herculean one for the [defendant].<sup>40</sup>

This is, on its face, an application of the *Shelfer* criteria.<sup>41</sup>

4.33 Lord Justice Aikens went on to make the following remarks:

<sup>39</sup> [2014] EWCA Civ 703, [2014] 2 P&CR DG13. As yet there are very few reported cases that consider the approach to remedies following the decision in *Coventry*. Brief remarks made in *Prophet v Huggett* [2014] EWHC 615 (Ch), [2014] IRLR 618 at [27], [28] and [33] suggest a more flexible approach, but that decision is from a lower court and concerned employment contracts. The judgment was overturned on other grounds; consideration of the point was unnecessary in the Court of Appeal (*Prophet v Huggett* [2014] EWCA 1013, [2014] IRLR 797). A more flexible approach is also evident in the High Court case of *Comic Enterprises Limited v Twentieth Century Fox Film Corporation* [2014] EWHC 2286 (Ch), which concerned an intellectual property dispute. In that case, Mr Roger Wyand QC Sitting as a Deputy High Court Judge, after discussing the effect of *Coventry*, concluded at para [15] as follows:

From all of this I extract the conclusion that I have to apply a multifactorial exercise balancing the two competing fundamental rights with no presumption that either one automatically trumps the other. There is, however, a legal burden on the Defendant to show why an injunction should not be granted. It will depend upon the facts of the case. That is the approach I intend to adopt here.

<sup>40</sup> [2014] EWCA Civ 703, [2014] 2 P&CR DG13 at [50].

<sup>41</sup> Compare the references to "small" injury, which cannot be compensated by a "small" money payment, and the consideration of whether complying with an injunction would be oppressive to the defendant to the "working rule" set out in *Shelfer* at para 4.6 above.

There was some debate as to the correct test to apply when considering whether there should be an injunction or an award of damages in lieu. We were referred to the well-known authority of *Shelfer v City of London Electric Lighting Co* particularly the four parts of the “working rule” of AL Smith LJ at 322–3 and the comments on that case by Lord Neuberger of Abbotsbury PSC and the somewhat more radical suggestion of Lord Sumption JSC in [*Coventry*]. In my judgment, if the issue is considered on the footing that an actionable nuisance has been committed, then even if it is the four parts of AL Smith LJ’s “working rule” that are to be considered, they are not satisfied; so an injunction should be granted. If the test is whether to exercise a more general discretion (still assuming that an actionable nuisance has been committed) then it seems to me the balance falls firmly in favour of an injunction in the circumstances of this case.<sup>42</sup>

- 4.34 These comments appear to suggest that, in the Court of Appeal’s view,<sup>43</sup> the correct approach to the remedial discretion remains open to question – despite the judgment of the Supreme Court in *Coventry*.
- 4.35 This gives us further cause to believe that a statutory test is still needed. There is a real risk of the courts sliding back into a variant of the *Shelfer* test. Furthermore, the test we proposed sought to correct a number of other problematic issues, such as ensuring that unreasonable delay on the part of a claimant cannot be overlooked, and making unambiguous the requirement that the court consider the size of the injury in terms of loss of amenity rather than value.<sup>44</sup>
- 4.36 Finally, it must be borne in mind that *Coventry* concerned noise nuisance and not interference with rights to light. As noted above, Lords Mance and Carnwath expressly reserved their position on the correct approach to take on remedies in the rights to light context, leaving ample scope for argument in future cases that rights to light should be treated in a different, as yet unknown fashion. This project gives us the opportunity to recommend reform that settles the approach to be taken in rights to light cases, rather than leaving that to future case law.
- 4.37 Accordingly, we remain convinced that statutory reform is needed. Indeed, the vast majority of consultees agreed that the *Shelfer* guidance should be replaced or substantially amended; nearly 60 consultees addressed this question, and only five were opposed to any change in the law. Inevitably, in devising a recommendation for reform, we now have to look beyond our provisional proposal and beyond the consultation responses, because the law has changed since we formulated and consulted on that proposal.
- 4.38 In fact, consultation responses remain relevant and helpful. In the rest of this Chapter we consider first the insights that consultees have given us on some issues of principle and then their comments on the detail of the statutory test that we proposed and of the slightly different version that we now recommend.

<sup>42</sup> [2014] EWCA Civ 703, [2014] 2 P&CR DG13 at [51].

<sup>43</sup> Lords Justices Elias and Fulford agreed with the judgment of Lord Justice Aikens without adding any further remarks.

<sup>44</sup> See para 4.23 above.

## ISSUES OF PRINCIPLE

4.39 Under this head we look at consultees' views, and our conclusions, on the following questions:

- (1) Should an injunction remain the primary remedy?
- (2) Should the decision whether to grant an injunction be determined according to an objective level of diminution of light?
- (3) Should there be any change in the law at all on this point?
- (4) Is it right to recommend reform only for rights to light?
- (5) Should we recommend a structured discretion focussed on proportionality?

### **Should an injunction remain the primary remedy?**

4.40 We did not ask in the Consultation Paper whether injunction should remain the primary remedy for the infringement of a right to light. We took the view that this point is beyond dispute, both for rights to light and for other easements.<sup>45</sup> The law starts from the perspective of protecting light, not the monetary value of the right.

4.41 Some consultees commented on this point. The Westminster Property Association and Exemplar Properties suggested that there should be "no automatic right to an injunction except in the most exceptional of circumstances" and that in most cases the remedy for an infringement of a right to light should be damages. BRE also thought that the court's default award should be one of damages, except where there was a demonstrable need for natural light (as would be the case with habitable rooms in dwellings, schools and hospitals). It said:

The recent problems with rights to light cases have been largely caused by inappropriate remedies awarded by courts. Adjoining owners hold out for an injunction solely to maximise the damages that will be awarded ...

4.42 The Berkeley Group plc also thought that damages should be the preferred remedy, with injunctions awarded only in appropriate cases.<sup>46</sup> Similarly, one consultee (who wanted us to treat its response as confidential) expressed agreement with our proposed test, but suggested as an alternative, that an injunction should only be available as a temporary measure, "whilst the monetary compensation is established", in circumstances where the developer had failed to engage with the dominant owner in a timely manner in seeking to agree the compensation.

<sup>45</sup> See *Imperial Gas Light Co v Broadbent* (1859) 7 HL Cas 600, 11 ER 239.

<sup>46</sup> The Berkeley Group plc suggested that appropriate cases were the "most serious cases or where it is difficult to calculate the loss of value".

- 4.43 It is clear from the judgment in *Coventry* that the law remains unchanged on this point, in the sense that the burden of establishing that the remedy should not be an injunction lies with the party who is seeking that result, although it appears that the task of persuasion may now be rather easier in that the balance is not weighted either way once the question has been raised.<sup>47</sup> It is worth reiterating that we agree that the primary remedy should be an injunction, and the vast majority of consultees did not dispute that point.

**Should the decision whether to grant an injunction be determined according to an objective level of diminution of light?**

- 4.44 Chelsfield LLP welcomed the change from oppression to proportionality, but said that the proposal did not go far enough. It advocated further investigation as to:

... whether quantitative guidelines can be set down to assist a court, and therefore all parties concerned, to determine whether the injury warrants an injunction. It may be possible to identify criteria that relate to:

- a. minimum absolute light levels for different uses and one or two generic room types for residential (eg principal rooms – living, kitchen, other rooms); and
- b. loss of light % - again for different uses and different room types in residential.

- 4.45 Transport for London made a similar suggestion:

A more objective test would have to assess the loss in value of the dominant owner's interest as a percentage of total value .... If the percentage is below a threshold only damages can be awarded. If it sits above a certain percentage the Judge would have the discretion as to whether or not an injunction would be appropriate. The percentage would be high, as in our view injunctions should only be considered in the severest of cases.

- 4.46 The City of Westminster and Holborn Law Society said that it supported our proposal, and noted that if a workable statutory test were to be introduced then not all cases would need to result in litigation. However, it continued:

Notwithstanding our support for the proposal, we do not think the procedure outlined in the Consultation Paper is satisfactory. The starting point must be not the remedies but the rights themselves. Rights to light must be defined by statute and quantified by objective tests contained in regulations. Local Authorities already rely on objective industry standards when making planning decisions. Such standards are capable of being translated into statutory regulation.

<sup>47</sup> See para 4.16 and following above.

- 4.47 Land Securities suggested that it might be possible to provide that only the loss of specific percentages of light – which would vary depending on the circumstances of the case – could render an obstruction “injunctable”. It suggested, for example, that where a room, prior to the obstruction, benefited from “up to 25% [adequate light], [then] any loss of light is injunctable”, whereas “between 25% and 50%, [only] losses of more than 5% are injunctable”.
- 4.48 In Chapter 3 we discussed whether an objective measure of light could be used to determine whether a right to light was infringed. We concluded that it could not; the lack of flexibility would be unwise, and the choice of a particular measure would not put an end to controversy. For the same reasons we are not attracted to the suggestion that an objective measure be used to determine the choice of remedy; if anything, the lack of flexibility and of sensitivity to individual circumstances would be even more inappropriate in this context.

**Should there be any change in the law at all on this point?**

- 4.49 A handful of consultees rejected our provisional proposal on the basis that no change in the law was necessary, or on the basis that our provisional proposal would not represent an improvement to the law. John McGhee QC (Maitland Chambers) said that he did not favour our proposal because, in his view, it would not make it any easier to predict whether or not an injunction would be granted and might make matters less certain. The Chancery Bar Association also disagreed with our proposal; it did not consider that our proposed test would represent a simplification or improvement of the law. Laurence Target (solicitor, Trowers & Hamlin LLP) and the Campaign to Protect Rural England also did not support our proposal; the latter said that the proposal might result in it being more difficult for dominant owners to enforce their rights to light by way of injunction. They suggested that in rural areas, where there is less pressure for intensive development, the grant of an injunction would be preferable to the award of damages.
- 4.50 We take these comments seriously but, of course, since they were made the law has itself moved on as a result of the *Coventry* decision. We have explained above why we think that reform is still needed. Most consultees agreed, before *Coventry*, and our discussions with stakeholders since indicate that that is still the prevalent view.

### **Is it right to recommend reform only for rights to light?**

- 4.51 The Chancery Bar Association objected to our proposal in part because it would be undesirable to single out rights to light from other interests to which the *Shelfer* guidance applies. We addressed this issue in our Consultation Paper and asked consultees whether our proposed test should apply to rights to light cases only – our provisional view was that it should.<sup>48</sup> Over 30 consultees responded to this question. Of these, three disagreed with the introduction of a new test at all and eight gave ambiguous responses.<sup>49</sup> Of the remaining consultees, nearly 20 supported our provisional view of limiting the new test to rights to light cases. Five consultees disagreed, and wanted the test to apply generally.
- 4.52 The Council of HM Circuit Judges supported the limitation of the new test to rights to light cases in the first instance, but thought that it might be applied generally once sufficient time had passed and there was greater clarity as to how the test was being applied in practice. Similarly, the City of London Law Society said:

While there may be a little intellectual unease in having a different test for rights to light cases from cases involving an infringement of another easement or a breach of a restrictive covenant, we accept the Law Commission's recommendation. Rights to light cases appear to be the key mischief where there is a critical need for greater certainty. We would not want enactment of the proposed test to be held up by consideration of whether it has other applications. At some future time, perhaps, the Law Commission can consider whether the statutory test for rights to light has a wider application.

- 4.53 Some consultees – including Clifford Chance LLP and the Bar Council – suggested that further consideration would be needed before the test could be applied in a wider context. We agree.
- 4.54 The minority of consultees who argued that the test should apply more widely did so on the basis that the reasons for singling out rights to light were not sufficiently convincing. For example, Andrew Francis (Serle Court Chambers), commented that he “strongly disagreed” with our suggestion that the test should be limited to rights to light cases. He added:

Any set of rules should be clear and where possible of universal application in their context. The context here is property rights and interests broadly defined. The same policy reasons apply in disputes over rights of way, covenants, trespass to land and private nuisance. The origin of those rights is (with respect to the argument at para. 5.55) irrelevant in most cases. Why should it matter whether the right was the subject of an express grant as opposed to long use?

He was also concerned about the difficulties a court might have in applying different tests to the same case:

<sup>48</sup> Consultation Paper, paras 5.54 to 5.56.

<sup>49</sup> These included the Property Litigation Association, whose membership was divided on the issue; Mount Anvil Ltd and Anstey Horne said that their experience was limited to rights to light cases and so declined to give a definitive opinion.

... there are cases where interference with light may be just one of a number of breaches in issue. Many rights of light cases also raise issues over breach of covenant, if not other rights; eg rights of support and rights of way. How could the “old” Shelfer principles and any “new” rules be applied in such cases where section 50 [of the Senior Courts Act 1981] has to be considered?

- 4.55 We agree that it is not ideal to treat rights to light differently from other easements or interests in land (although those rights are to some extent already treated differently by the law).<sup>50</sup> It would not be appropriate for us to recommend, for all easements, reform of such a significant nature without appropriate consultation and a detailed consideration of the other contexts, and so we make our recommendation for reform<sup>51</sup> only for rights to light. Consideration might be given in the future – by the courts, by Government or by the Law Commission – to its extension to a wider context.
- 4.56 So far as the second point is concerned, we do not agree that a court would have difficulty in applying two different tests when dealing with the infringement of two different interests (whether or not they benefit the same land).

**Should we recommend a structured discretion focussed on proportionality?**

- 4.57 We turn then to the heart of this Chapter, which is the consideration of our proposal in the Consultation Paper for a structured discretion focussed on the proportionality of the grant of an injunction.
- 4.58 Around 20 consultees agreed with our proposal without suggesting any change to the test we proposed. Sixteen consultees also agreed with our proposal, but went on to suggest additional factors that the court could take into account should be included explicitly in the statutory test. These consultees included Herbert Smith Freehills LLP; Deloitte Real Estate; the City Property Association, which described the proposal as “fundamental to the reform needed to redress balance”; the City of London Law Society, which supported our proposed test “wholeheartedly” and said that it would “clearly provide greater certainty as to when an injunction will be granted”; and the British Property Federation (with whom Capital & Counties Properties plc agreed).
- 4.59 Later in this Chapter we look at consultees’ comments on the detail of the proposed test and in particular at the listed factors. As a matter of principle, however, we consider here whether proportionality is the right test, and how strong a discretion the test should leave with the court.

***A test of proportionality***

- 4.60 Most consultees supported the re-focus of the test on proportionality. The general feeling among consultees was captured by Anstey Horne, which said:

<sup>50</sup> For instance, the rules governing the prescriptive acquisition of rights to light under the Prescription Act 1832 are different from other easements. See the Easements Report, para 3.107 and following.

<sup>51</sup> See para 4.116 below.

Our view is that rigidly following the *Shelfer* tests makes it very difficult for proportionality to be taken account of in a proper fashion, whereas in reality it should be a material factor in the decision-making process, perhaps even an overriding one.

- 4.61 However, Allen & Overy LLP<sup>52</sup> had concerns about the intention behind re-focusing the test on the issue of proportionality. It asked:

Is this intended to reflect the current position, that the claimant is entitled to an injunction to protect his property rights, unless there are exceptional circumstances. Or is it moving towards more of a balance of convenience test?

- 4.62 The Chancery Bar Association disagreed with our proposal. It said:

The proposal to substitute a test based upon “proportionality” will give rise to litigation as the courts grapple with how the test is intended to operate in practice; and there will be a danger of unforeseen consequences.

- 4.63 Nabarro LLP was concerned that the proposed test had “the potential to be applied inconsistently by the courts such that the outcome may not be any more certain that it is currently”. But it went on to say:

Despite our uncertainty as to whether the proposed statutory test will make a difference as to how a judge decides to exercise his or her discretion, our view is that the proposed changes are nonetheless a step in the right direction and at the very least, may help remove the impression (rather than the reality) that the *Heaney* case in some way had any precedent value or in any way indicated that the courts would uniformly apply their discretion in such a rigid manner.<sup>53</sup>

- 4.64 We brought these concerns to the attention of Mr Justice Morgan, who commented that chancery judges are “well used” to resolving questions of proportionality. He continued as follows:

I do not think that a test of proportionality would make the outcome unpredictable in a particular case. Proportionality is often a matter of common sense. If an experienced adviser identifies all the factors which the judge will want to take into account, then he ought to be able to predict the likely result.

<sup>52</sup> Allen & Overy LLP submitted a response that deliberately sought to present both a developer’s and neighbouring landowner’s point of view to the questions and issues that we raised in the Consultation Paper with a view to “[setting] out the points which can fairly be made on behalf of each of the interest groups (developers and adjoining owners)”, for which we are grateful.

<sup>53</sup> The Association of Light Practitioners, which supported our proposal, said something similar: “whether or not [the new test] will make the outcome any more certain depends on how the courts apply the test and unfortunately that will depend from judge to judge”.

I think the application of the *Shelfer* guidelines themselves is not always easy to predict. There is still quite a lot of scope for argument as to exactly what they mean and how they are to be applied in individual cases. Further, judges at present often try to achieve a proportionate result by interpreting the guidelines and the Court of Appeal from time to time has to say that the judge's urge to be proportionate did not involve a correct application of the guidelines.

4.65 We are satisfied that including proportionality as the overriding factor in the test remains the correct approach.

4.66 As we explained in the Consultation Paper, we want to get away from the formalistic approach that has been taken in some cases in which the *Shelfer* guidance has been applied, and focus the court's attention on this key issue.<sup>54</sup> It is the overriding test of proportionality that most distinguishes our statutory framework from the broad discretion afforded to courts by *Coventry*. In contrast to that approach, our test would give a better sense of direction to the exercise of the discretion by focussing the court's attention on a single question, influenced by a range of factors whose significance will vary with the circumstances.

4.67 Waterslade Ltd said that:

... where the dominant tenement has particularly onerous design features which exacerbate the loss of light (for example overhanging balconies, small windows or very deep rooms) the awarding of an injunction should be regarded as disproportionate.

We agree that the design of the dominant owner's building could have a bearing on whether the grant of an injunction would be disproportionate, as this is likely to be relevant to the potential loss of amenity suffered by the dominant owner. However, we do not think that it would be sensible to prescribe that the grant of an injunction should always be regarded as disproportionate in given circumstances, as this detracts from the essence of a structured, but flexible exercise of discretion that we are recommending.

#### **The strength of the discretion**

4.68 HDG Ltd also suggested that the first sentence of the test should be amended to read that the court "should" (rather than "may") award damages in substitution for an injunction if awarding an injunction would be disproportionate. We agree; our recommendation and the draft Bill make it clear that if the grant of an injunction would be a disproportionate means of enforcing a landowner's right to light, no injunction is to be awarded.

4.69 Have we therefore unduly constrained the court's discretion? Injunctions, and damages instead of injunctions, are discretionary remedies – as the Supreme Court stressed in *Coventry* – and it is not our intention to change that fundamental principle.

<sup>54</sup> Consultation Paper, paras 5.43 to 5.49.

- 4.70 Discretion is a complex concept. At times it is wholly unrestricted, with no indication at all as to how it should be exercised or with what end in view; in other instances it is directed at the achievement of a particular goal, which is what we envisage here. We also intend that an injunction *shall not* be granted if that would be a disproportionate response to the right of the dominant owner, bearing in mind the factors we set out; and we think that that restriction upon discretion is justified. We add nothing to the law if we leave it open to the court to award an injunction where that would be disproportionate.

#### **THE DETAIL OF THE NEW STATUTORY TEST**

- 4.71 We turn now to the detail of the new test, looking at consultees' thoughts on the factors that we suggested in the Consultation Paper and reflecting on the addition of further factors.
- 4.72 As a general point, many consultees were keen to ensure that it was made plain to the courts that the factors listed in the new test were not exhaustive (and that there was no requirement to ensure that all stated factors had been satisfied). This is our recommendation and it is clear in the draft Bill.<sup>55</sup> The weight each factor carries (which may in some cases be none at all) will depend on the particular facts of the case in question.
- 4.73 We look first at the factors that we proposed, and then at potential further items to be added to the list, of which the most significant is the public interest.

#### **(1) the size of the injury in terms of loss of amenity (which can include consideration of the use of artificial light by the dominant owner)**

- 4.74 Consultees' comments on this factor focussed on the use of "amenity" as the way of measuring the size of the dominant owner's injury, and on the relevance of artificial light.
- 4.75 With regard to the former, Anstey Horne welcomed the departure from the current *Shelfer* guidance – which requires the court to consider whether an injury is "small" – to a more holistic approach which focussed upon loss of amenity. In contrast, Helical Bar plc said that the first factor in our proposed test should be:

... the size of the injury in terms of loss of value (not amenity – how can amenity be valued – [it is] rather difficult). An injunction should only be capable of being granted where the injury is severe in terms of considerable diminution in value.

- 4.76 Allen & Overy LLP queried whether there ought to be:

... a greater degree of flexibility so that the court may consider the size of the injury and loss of amenity as separate factors as well as together, giving appropriate weight to each factor as it sees fit in the circumstances.

<sup>55</sup> See the draft Bill, cl 2(2).

- 4.77 Many consultees also commented positively on the proposed test's direct reference to the relevance of artificial light. The City of London Law Society said that its inclusion as a factor would "bring the *Shelfer* criteria into the 21st century".
- 4.78 Deloitte Real Estate proposed the following re-wording of this factor:
- (1) The significance of the injury in terms of loss of amenity, taking into account the reliance on natural light during the prescriptive period.
- 4.79 Allen & Overy LLP suggested that this factor should take into account "the nature and degree of reliance on artificial light" not just on the basis of the dominant building's current use, but having regard to potential future uses of the building too.
- 4.80 However, Matthews & Goodman LLP disagreed with the inclusion of artificial light. The National Trust declined to express a firm view on the desirability of our proposal, but added that the test should take into account the fact that artificial light will inevitably be used during the autumn and winter months.
- 4.81 On balance, none of consultees' comments has given us any cause to revise our views on the inclusion of this factor.<sup>56</sup> Its purpose is, in part, to move away from the tendency to examine a dominant owner's injury in terms of its financial value and then to assess whether this is "small" enough to justify awarding damages instead of an injunction.
- 4.82 We are not persuaded by the suggestion made by Allen & Overy LLP that the test should spell out the need to examine both current and possible future use of the property when considering the reliance on natural light.
- 4.83 We do not think that the court should concentrate on the potential future use of artificial light at a property. Doing so would run the risk of the court concluding that it would always be possible to "fill the gap with artificial light".<sup>57</sup> Nevertheless, if the claimant could show that there were plans in train to convert the use of the property to one that would objectively need the use of natural light above artificial light – for example an artist's studio – then the test we propose is flexible enough for that to be taken into account as an additional factor.

<sup>56</sup> The draft Bill expresses this policy in clauses 2(3)(b) and 2(4). It indicates that the extent to which the artificial light is relied upon is always relevant when assessing loss of amenity.

<sup>57</sup> This is the language used by Peter Smith J in *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [60]. See para 3.64 and following above.

4.84 In our discussion of artificial light in Chapter 3 we explained the importance of taking it into account, not in deciding whether a right to light had been infringed but in determining the remedy.<sup>58</sup> We regard artificial light as a vital factor in the new test, and consultees agreed. We prefer to leave it in general terms rather than to refer specifically to a prescriptive period (which may have been long ago) or to any other aspect of its use.

4.85 Turning to Allen & Overy LLP's suggestion that the test should refer separately both to the size of the injury and to the loss of amenity we think that this unnecessarily splits up the concept of amenity, which is inevitably a flexible concept incorporating a consideration of the extent of the injury.

**(2) whether a monetary payment will be adequate compensation**

4.86 Under this heading the court would look at the amenity value of light to the dominant owner, and the fact that, in some instances, the natural light may be "priceless". It will of course have in mind the potential level of damages and whether such award might be adequate compensation. None of our consultees suggested that this was not a relevant factor.

**(3) and (5) the conduct of the claimant and defendant**

4.87 We remain of the view that the conduct of both parties may be crucial, and that both should feature in the revised test. However, two consultees asked about the relationship between the consideration of the parties' conduct at this stage in the courts' reasoning and the traditional bars to equitable relief.

4.88 Allen & Overy LLP agreed that the conduct of both parties should be a relevant factor, but queried the relationship with the equitable bars to relief. It raised some concerns:

First, in its reference to "conduct", the wording appears to be trying to encapsulate some of the concepts underlying the traditional equitable bars to an injunction, but without reference to these traditional concepts. We do not consider that the effect of *Heaney* was to find that the traditional equitable bars to an injunction were inapplicable. Equitable bars were simply not argued in that case. ... We consider that it would be clearer and more appropriate to refer expressly to traditional equitable bars as being preserved (to make it clear that these do survive *Heaney*, as commentators generally agree that they do). This will then allow the jurisprudence on equitable bars to be taken into account.

4.89 The Chancery Bar Association raised similar concerns.

<sup>58</sup> However, we noted at para 3.66 that we felt the court is able, under the current law, to take into account the effect of artificial light when deciding whether or not there has been an infringement of a right to light.

- 4.90 As we explained above at paragraph 4.1, a court is entitled to award damages in substitution for an injunction where it has the jurisdiction to award an equitable remedy.<sup>59</sup> Whether the court does have this jurisdiction will depend upon whether any of the equitable bars to relief, including the doctrine of laches,<sup>60</sup> apply. If there is no jurisdiction to grant the injunction, then damages in substitution for an injunction cannot be awarded. A new test in substitution for the *Shelfer* criteria is therefore only relevant where the court does have jurisdiction to award equitable relief.<sup>61</sup> However, once the court is considering the choice of equitable remedies – injunction, or damages instead – it is entitled to consider afresh the conduct of the claimant. This conduct could include behaviour (such as unreasonable delay) which is relevant to the question of whether the court should award damages in substitution, but which falls below the threshold needed to remove the court’s jurisdiction to grant equitable relief.
- 4.91 This is a conceptually difficult issue. Potentially the same factors are considered twice by the courts, first in deciding whether there is jurisdiction to grant an injunction and then again in considering whether to grant damages instead. We are not recommending a change to that traditional structure. The crucial point was made at the outset in this Chapter; it is very unusual for the equitable principles to take away the potential for an injunction. Delay must be serious and accompanied by an element of unconscionability to amount to laches. In practice we do not think this will give rise to confusion. Although there are some difficult distinctions here, in practice they are well-known to the courts.

#### **(4) whether the claimant delayed unreasonably in bringing proceedings**

- 4.92 Most consultees’ comments on this element of our proposed test focussed upon the meaning of “delay”. The British Property Federation asked for clarification. Berwin Leighton Paisner LLP and Land Securities commented:

The new statutory test directs one to consider “whether the claimant delayed unreasonably in bringing proceedings”. This phrase is likely to mean different things to different people. Against what context should “delay” be judged? For example a developer could have one timeframe and deadlines but it may not be reasonable to impose those same timeframes on neighbours, especially unsophisticated residential neighbours.

<sup>59</sup> The process undertaken by the court in determining whether there is a jurisdiction to grant an equitable remedy was considered in *Jaggard v Sawyer* [1995] 1 WLR 269, 287 by Millett LJ:

When the plaintiff claims an injunction and the defendant asks the court to award damages instead, the proper approach for the court to adopt cannot be in doubt. Clearly the plaintiff must first establish a case for equitable relief, not only by proving his legal right and an actual or threatened infringement by the defendant, but also by overcoming all equitable defences such as laches, acquiescence or estoppel. If he succeeds in doing this, he is *prima facie* entitled to an injunction. The court may nevertheless in its discretion withhold injunctive relief and award damages instead.

<sup>60</sup> See n 4 above.

<sup>61</sup> See cl 2(1)(b) of the draft Bill at Appendix B.

4.93 Allen & Overy LLP had similar concerns. It did not consider that delay, on its own, should be a relevant factor in preventing the claimant from obtaining an injunction, lest it encourage developers to ride roughshod over the claimant's rights. It asked:

(1) When is the adjoining owner's delay to be measured from? ...

(2) What do the adjoining owners have to do to put a stop to the delay? ...

(3) When is it too late for them to take action – by the time the developer enters the building contract, or when works commence, or when the development is completed?

It also suggested that:

A further issue is that the developer may string the adjoining owner along in without prejudice negotiations in which the developer implies that a deal is close to being achieved, with no open correspondence protecting the adjoining owner's position, only for the developer to then turn around and claim that the adjoining owner has unreasonably delayed.

4.94 We have considered these responses carefully, but we have reached the conclusion that no further guidance can be given on the meaning of delay – it means what it says, and nothing more. We do not envisage that the courts would treat the meaning of “unreasonable delay” in the same technical fashion as Allen & Overy LLP; it is simply one factor that the court is entitled to consider when deciding whether the grant of an injunction would be disproportionate.

4.95 Should delay be mentioned separately from other aspects of conduct? These two factors could be rolled into one. On balance we prefer to highlight the significance of delay by setting it out as a separate factor.

#### **The nature of the dominant owner's interest in the land**

4.96 A few consultees suggested that the nature of the dominant owner's interest in the land should be listed as a factor in the new test. Herbert Smith Freehills LLP said:

We wonder whether the factors to be borne in mind should also include whether the claimant has a lease and its length and nature. If the claimant's interest in the building is short lived, should that not be a material consideration for deciding whether an injunction would be a disproportionate remedy to award?

4.97 Similarly, the City Property Association commented:

We also believe that where an adjoining owner holds their interest under a lease, the length of the lease term (or period to expiry) should be a material consideration for the courts.

- 4.98 We agree that the nature of the dominant owner's interest in the land is a relevant factor – it is clear to us that a court should be less inclined to grant an injunction in favour of a short-term tenant, as compared to a 99-year leaseholder or a freeholder, and so we think that this should be acknowledged expressly in the new test.

#### **The impact of an injunction on the developer**

- 4.99 Our proposed test required the court to assess whether the grant of an injunction would be disproportionate in the light of the listed factors. However, none of those factors included reference to the effect of the injunction on the developer.
- 4.100 The effect upon the developer is crucial and whilst the point was not raised by consultees, many concentrated on that element when exploring the nature of our test.<sup>62</sup> We have concluded that it is helpful for that effect to be referred to explicitly as a factor in the new test.

#### **Public interest**

- 4.101 In the Consultation Paper we took the provisional view that the public interest should not be added to the new statutory test as a factor to be considered:

One factor that is not present in the above list is the public interest. We note that in some cases, such as *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, the court appeared to take account of the public benefit in the development going ahead. But in *Kennaway v Thompson* the Court of Appeal stated expressly that the *Shelfer* criteria could not be overridden on the basis of a public interest argument. It has been suggested that public interest should play a role in deciding whether to award an injunction or damages in substitution.

... We are not convinced that the public interest has a role to play in deciding the most appropriate remedy for private rights. If there is a true public interest in the development then that is a public law issue – as we have noted elsewhere in this Consultation Paper, section 237 of the Town and Country Planning Act 1990 provides a way of overriding easements which are blocking a development in the public interest from proceeding, provided that the other conditions for its use are met. Therefore we do not propose to introduce public interest as an element for the court to consider.<sup>63</sup>

- 4.102 We took the view that the weight of the case law was against the introduction of the public interest as an element in the decision whether to grant an injunction or award damages. That is a measure of the unexpectedness of the decision in *Coventry*.

<sup>62</sup> For example, the Property Litigation Association said that:

We agree that the 'Shelfer' method of assessing whether damages should be awarded in lieu of injunction should be replaced with a statutory test which focuses on whether [the] grant of an injunction would be disproportionate to the developer.

<sup>63</sup> The Consultation Paper, paras 5.52 and 5.53.

- 4.103 A handful of consultees commented on our stance in the Consultation Paper, and argued that consideration of the public interest should be included within our proposed test. For example, one consultee (who wished to remain anonymous) said:

We would argue that there is a case for factoring in public interest albeit the weighting of this factor can be seen to be less significant. Whilst we agree that it is primarily a public law issue, the public benefit of a development should have some weighting in the decision to grant an injunction. In particular, developments which deliver affordable housing or essential infrastructure for key services should have greater consideration as these can ultimately drive the economic growth of the area to the benefit of all including the dominant owner.

- 4.104 However, other consultees took a different view. The City of London Law Society agreed with our conclusion in the Consultation Paper that the public interest should not be included. Another consultee – who wished for its response to be confidential – was of the same view, although it did suggest that the Government should consider the issue of more helpful guidance to local authorities on the use of section 237 of the Town and Country Planning Act 1990.<sup>64</sup>
- 4.105 Inevitably the judgment of the Supreme Court in *Coventry* has caused us to rethink our position on the relevance of the public interest to the new test, and we no longer regard the conclusion reached in the Consultation Paper as tenable. The Supreme Court has ensured that the public interest is a relevant and important consideration in the choice of remedies in this context.<sup>65</sup>
- 4.106 We believe it is right to adapt our test to reflect this quite radical development in the common law. Indeed, were we not to make explicit reference to the public interest in our test, there is a risk that a court might consider that the public interest is not a “relevant circumstance” for the purpose of the test. This would make the isolation of rights to light a much greater issue.

**The effect of the dominant owner expressing a willingness to accept money**

- 4.107 We pointed out in the Consultation Paper<sup>66</sup> that in *Gafford v Graham*<sup>67</sup> the Court of Appeal held that where the dominant owner had shown that he or she only wanted money, then this could result in no injunction being granted. One consultee – the UNITE Group plc – suggested that this should be incorporated into our proposed test:

<sup>64</sup> See para 7.88 below for details of the Town and Country Planning Act 1990, s 237.

<sup>65</sup> See para 4.20 above.

<sup>66</sup> Consultation Paper, para 5.27.

<sup>67</sup> (1999) 77 P & CR 73.

... we would invite the Law Commission to codify the commonly held view (originating from *Gafford v Graham*) that if a dominant owner confirms, in open correspondence, they are prepared to accept damages in lieu of an injunction then this is an irrevocable election that the Court will uphold (in the event the dominant owner later resiles from that position and seeks an injunction).

- 4.108 However, Herbert Smith Freehills LLP disagreed. In a detailed response it noted that it had experienced litigation in which developers had sought to extract an expression of interest in a financial settlement from a dominant owner in open correspondence, with the intent of relying upon that evidence to argue that the dominant owner should not be granted an injunction. As a result, it said that dominant owners had attempted to guard against this by taking different positions in open and without-prejudice correspondence (by expressing a willingness to accept money in the latter but not in the former). It said that this often resulted in artificial and counter-productive behaviour from both parties. It continued:

Taking all this into account, we recommend that a better approach would be for the parties to be expected to have negotiated and considered ways in which the dispute could be resolved by means of payment, and that practice guidance or any codified *Shelfer* principle to make it clear that any open reference to such discussion or a level of willingness should not be evidence used as a basis of opposition to the grant of an injunction.

- 4.109 We are not persuaded by either view. We do not believe that an admission by the dominant owner that he or she might be willing to accept damages should always constitute an “irrevocable election”; nor do we think that such an admission should be incapable of being used as evidence to oppose the grant of an injunction. The dominant owner’s willingness to accept money and the manner in which this is communicated is an aspect of the dominant owner’s conduct that the court may wish to take into account when assessing whether the grant of an injunction would be disproportionate, in the light of all of the circumstances of the case.

#### **A long-stop date**

- 4.110 Allen & Overy LLP told us that its developer clients would appreciate the inclusion of a long-stop date: a defined time limit beyond which no injunction could be granted by the court. It suggested a date of two years from completion of the development on the basis that:

... the infringement ought to be obvious from the date of completion (but such time limit ought not to affect the ability to claim damages, which would be subject to normal limitation principles).

- 4.111 The British Property Federation made a similar suggestion in its response.<sup>68</sup>
- 4.112 We gave this suggestion a great deal of consideration. At first blush the idea of a long-stop date is appealing – developers would be provided with absolute certainty that, once a set period of time had passed, a dominant owner would be unable to obtain an injunction. However, we have concerns that a long-stop date could be misused, as it could lead to a situation whereby a developer strings along a dominant owner with the promise of a substantial settlement figure, only to resile from this once the long-stop date had been reached. This scenario could, of course, be avoided by allowing the court to have a residual discretion to resurrect its ability to grant an injunction to the dominant owner in extreme cases. But it would be difficult to set this discretion at an appropriate level – if the discretion were too open then the certainty provided by the long-stop date would disappear, but if it was too strict then the potential for unfairness would increase.
- 4.113 There could also be practical difficulties with setting out when time began to run for the purposes of the long-stop. Would it be from when the obstruction was in place? If so, would the dominant owner always know when time began to run? What if the development was shrouded in opaque tarpaulin and so the dominant owner could not see the stage that the building works had reached? Would the developer have to tell the dominant owner when it had put the obstruction in place? Or should time run from when the building work commenced? If so, would this give the parties enough time to attempt to reach a settlement? We took the view that setting any sort of strict rules for when time began to run would result either in unfairness or in a great deal of litigation.
- 4.114 In Chapter 6 we discuss our recommendation for a procedure for setting a long-stop date by means of a Notice of Proposed Obstruction, and we think that where a long-stop date is wanted that is the way to achieve it, and with certainty about dates that a more general provision could not give.

#### **OUR RECOMMENDATION**

- 4.115 Our recommendation is for a new statutory test to guide the court's decision whether to award damages instead of an injunction. It is based closely upon our proposal in the Consultation Paper, but is amended to take into account the feedback we have received from consultees, and the decision in *Coventry*.
- 4.116 **We recommend 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:**
- (1) the claimant's interest in the dominant land;**
  - (2) the loss of amenity attributable to the infringement (taking into account the extent to which artificial light is relied upon);**

<sup>68</sup> While agreeing with the proposal in the Consultation Paper, the Bar Council appeared to support the possibility of a long-stop date; it commented that:

We consider this would be a suitable test. More certainty is needed and there should be a definitive stage at which injunctions will not be granted because of the hardship it would cause to the Defendant.

- (3) whether damages would be adequate compensation;**
- (4) the conduct of the claimant;**
- (5) whether the claimant delayed unreasonably in claiming an injunction;**
- (6) the conduct of the defendant;**
- (7) the impact of an injunction on the defendant; and**
- (8) the public interest.**

4.117 That recommendation is put into effect by clause 2 of the draft Bill.

# CHAPTER 5

## MEASURES OF DAMAGES

### INTRODUCTION

- 5.1 Where a right to light is infringed, the principal remedies available to a claimant are an injunction or damages. There are two possible levels of damages, which may be awarded in legally distinct situations, known for historical reasons as common law damages and equitable damages.
- 5.2 Common law damages are awarded where there are reasons why the court has no jurisdiction in any event to award an injunction. In other words, the court never embarks on the inquiry we looked at in Chapter 4. The clearest such case is perhaps where the infringement of the right has ceased and is not going to recur, so that there is no reason for the court to award anything other than compensation for loss already incurred – and that is all that common law damages can achieve.<sup>1</sup> Accordingly, common law damages are inadequate as compensation for the ongoing and future losses that will arise from the permanent infringement of a right to light.
- 5.3 By contrast, where the court has jurisdiction to grant equitable relief, an injunction is the primary remedy,<sup>2</sup> and the question then becomes whether damages should be awarded instead. That decision was the subject of Chapter 4. If damages are awarded instead of an injunction then those damages (known as equitable damages) are designed to reflect future, as well as past, losses.
- 5.4 In this chapter we look briefly at how common law damages are calculated and then move on to the much more complex questions surrounding equitable damages.

### COMMON LAW DAMAGES

- 5.5 Common law damages, awarded where there is no jurisdiction to grant an injunction, compensate the dominant owner for any diminution in the value of his or her property as a result of the infringement, and for any loss of amenity, physical damage, or other financial losses.

<sup>1</sup> See *Jaggard v Sawyer* [1995] 1 WLR 269, 284 by Millett LJ.

<sup>2</sup> Although the decision in *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822 has made that primacy rather weaker than it was: see para 4.16 above.

- 5.6 In the rights to light context diminution in value is often assessed by rights to light surveyors by using the “EFZ” measure,<sup>3</sup> quantifying the light lost in different parts of the room, aggregating the resulting figures and multiplying the result by “a rate per square foot per annum of between £3 and £5, depending on location. That gives an annual value which is then capitalised by the application of a suitable years purchase figure”.<sup>4</sup> The figure produced by this assessment is known as the “book value” of the loss attributable to the reduction in light.<sup>5</sup>

## EQUITABLE DAMAGES

- 5.7 Equitable damages are assessed on the basis of a hypothetical negotiation for the release of the right between the dominant and servient owners – the court must attempt to find what would have been a “fair” outcome of that negotiation.<sup>6</sup>
- 5.8 Equitable damages will usually include any losses that would have been compensated by way of common law damages, on the basis that if a dominant owner was going to negotiate to release the right, the price that he or she would settle for would cover, as a minimum, any diminution in value in his or her property (and any other losses).<sup>7</sup> Further, in the case of *Carr-Saunders v Dick McNeill Associates Ltd* (“*Carr-Saunders*”),<sup>8</sup> Mr Justice Millett found that the previous authorities<sup>9</sup> permitted him to take into account the dominant owner’s bargaining position. Following that approach, the courts have in at least two reported rights to light cases looked to the amount of profit that the developer expected to make from the part of the development that would cause the infringement when assessing equitable damages.<sup>10</sup>
- 5.9 In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)*<sup>11</sup> (“*Tamares*”) the court awarded £50,000 damages in substitution for an injunction; in *HKRUK II (CHC) Ltd v Heaney*<sup>12</sup> (“*Heaney*”) the judge awarded an injunction but assessed the damages that he would have awarded in substitution for an injunction at £225,000. These figures amount to approximately 28% and 16% of the profits that the developers were respectively estimated to make from the relevant parts of their developments.

<sup>3</sup> See Chapter 3, n 11.

<sup>4</sup> J Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) para 14-126.

<sup>5</sup> RICS, “*Rights of light – Practical guidance for chartered surveyors in England and Wales*” (1<sup>st</sup> ed 2010) p 11.

<sup>6</sup> See *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [22].

<sup>7</sup> See *Carr-Saunders v Dick McNeill Associates Ltd* [1986] 1 WLR 922, 931 by Millett J.

<sup>8</sup> [1986] 1 WLR 922.

<sup>9</sup> In particular, *Wrotham Park Estate Co Ltd v Parkside Homes* [1974] 1 WLR 798.

<sup>10</sup> This practice appears to have developed from the case of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 in which Brightman J awarded damages of 5% of the anticipated profits from a development which had proceeded in breach of a restrictive covenant, which were to be shared equally between the fourteen landowners who had the benefit of the covenant. We call this the “profit-share” measure of damages.

<sup>11</sup> [2007] EWHC 212 (Ch), [2007] 1 WLR 2167.

<sup>12</sup> [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

- 5.10 We said in the Consultation Paper that this element of profit-sharing was causing concern for some stakeholders, particularly developers.<sup>13</sup> They felt that awards made on this basis were too high; that the limited number of reported awards was artificially inflating negotiated settlements; that and taking profit into account is unfair in principle, because the developer bears all the risks of developing a site and yet the law can require it to share its anticipated profit – which might never materialise – with neighbouring owners who have rights to light.
- 5.11 The counter-argument is that it is only fair to award a share of the profit – none of which could be realised without infringing the right to light – to the dominant owner. The dominant owner’s “losses”, for which the court is awarding damages, include the loss of the ability to bargain with the developer for the release of the right. It is for this reason that equitable damages assessed in this manner can be regarded as being compensatory in nature, despite the fact that they may exceed the amount by which the value of the dominant property has diminished.<sup>14</sup>
- 5.12 A share of profits is not an inevitable part of the court’s award. As *Gale on Easements* puts it, “the imaginary negotiation is a useful tool but it is not a straitjacket”,<sup>15</sup> and there is evidence that where profits cannot be forecast, different measures of damages are used. The Association of Light Practitioners has informed us that rights to light cases are often settled on the basis of diminution in value (often with an uplift) where there is no evidence of the developer’s estimated profits or where:

... the parties do not have the appetite for the more complex, time-consuming and costly analysis of share of profit (which necessitates the calculation of rights of light cutbacks and a development appraisal).

<sup>13</sup> Consultation Paper, para 5.81.

<sup>14</sup> See J Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) para 14-138, citing the House of Lords’ decision in *Attorney General v Blake* [2001] 1 AC 268 and other cases.

<sup>15</sup> J Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) para 14-142: “The law would appear to be that it will often be appropriate to take evidence of actual costs and/or profit (where that is known) into account for the purpose of arriving at a fair figure to compensate the claimant for the wrong which has been done to him ...”. See generally J Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) paras 14-139 to 14-142 and the cases cited in those paragraphs, and also *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 EGLR 29.

- 5.13 Fresh uncertainty has been brought to this area of the law by comments of the Supreme Court in *Coventry v Lawrence* (“*Coventry*”).<sup>16</sup> Lord Neuberger stated, with reference to *Jaggard v Sawyer*,<sup>17</sup> that it seems “at least arguable” that damages awarded instead of an injunction should not always be limited to the diminution in value of a claimant’s property, but that the damages “might well, at least where it was appropriate, also include the loss of the claimant’s ability to enforce her rights, which may often be assessed by reference to the benefit to the defendant of not suffering an injunction”<sup>18</sup> (that is, the defendant’s profit).<sup>19</sup> But he went on to say that:

... there are factors which support the contention that damages in a nuisance case should never, or only rarely, be assessed by reference to the benefit to the defendant in no injunction being granted, as pointed out by Lord Carnwath ... below. For that reason, as well as because we have not heard argument on the issue, it would be inappropriate for us to seek to decide on this appeal whether, and if so in what circumstances, damages could be recoverable on this basis in a nuisance claim.<sup>20</sup>

- 5.14 Lord Carnwath was “reluctant to open up the possibility of assessment of damages on the basis of a share of the benefit to the defendants”.<sup>21</sup> He noted that the Court of Appeal had already done so for trespass or breach of a restrictive covenant in *Jaggard v Sawyer*,<sup>22</sup> but stated that “the same approach has not hitherto been extended to interference with rights of light ...”.<sup>23</sup>

<sup>16</sup> [2014] UKSC 13, [2014] AC 822.

<sup>17</sup> [1995] 1 WLR 269.

<sup>18</sup> [2014] UKSC 13, [2014] AC 822 at [128].

<sup>19</sup> This comment has been greeted with some surprise by property lawyers, who regarded it as axiomatic that equitable damages were not limited to diminution in value.

<sup>20</sup> [2014] UKSC 13, [2014] AC 822 at [131].

<sup>21</sup> [2014] UKSC 13, [2014] AC 822 at [248].

<sup>22</sup> [1995] 1 WLR 269.

<sup>23</sup> [2014] UKSC 13, [2014] AC 822 at [248]. Lord Carnwath cited *Forsyth-Grant v Allen* [2008] Env LR 41 but did not mention *Tamara (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 or *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15. In *Forsyth-Grant v Allen* [2008] EWCA Civ 505, [2008] Env LR 41 equitable damages were not available; the judge at first instance had held that, in view of the claimant’s unreasonable conduct, an injunction would have been refused and that it would therefore be inappropriate to grant equitable damages. Instead, the Court of Appeal was addressing whether to award an account of profits where a right to light was infringed. An account of profits is a remedy that awards all of the profits made by the defendant as a result of his or her wrong to the claimant. In the Court of Appeal’s own words, “this is a distinct and different remedy” from the damages calculated on the negotiated release fee basis ([2008] EWCA Civ 505, [2008] Env LR 41 at [20]).

- 5.15 The comments made in *Coventry* throw some doubt on the correct measure of damages to be awarded in lieu of an injunction where a right to light is infringed. But it remains the case that there is the potential for an award of damages calculated with reference to the profit made in infringing a right to light. Although only a small handful of reported cases have done so<sup>24</sup> there is concern that those few cases may be colouring negotiations and inflating settlement figures.
- 5.16 Reports of dissatisfaction with damages based on a share of the developer's profits, which is regarded as the reality in many cases, led us to consider in the Consultation Paper – which was, of course, written before the decision in *Coventry* – whether reform was feasible. We concluded that it was not.
- 5.17 In reaching that conclusion we examined and rejected three possibilities. First we asked whether it would be feasible “to require the courts to disregard the expected profits that the development is set to make and simply ascertain what the market value for the release of the right would be, without having regard to any “ransom potential” (meaning the dominant owner's ability to obtain an artificially high price from the developer for release of the right, because of his or her unique bargaining position).<sup>25</sup>
- 5.18 We concluded that that was impracticable. It was not clear that professionals would have ready access to figures from comparable transactions in order to assess market value in that way; and even if they were accessible, prices from comparable transactions are likely to include an element of profit share.
- 5.19 Second we considered the possibility of changing the basis of the calculation of equitable damages to diminution in value (and damages for loss of amenity and other financial losses), so as to remove profit share explicitly from the reckoning;<sup>26</sup> further, we discussed the possibility of damages based on diminution in value but with a statutory uplift applied to that figure, perhaps by multiplying it by a factor of between two and five.<sup>27</sup>
- 5.20 However, because we were not convinced that reform was necessary or justified, or that any of our considered options would offer a clear improvement on the current law, we did not make a provisional proposal for reform.<sup>28</sup> We instead asked for consultees' views on the above options. We also asked for consultees' views on introducing a cap on the amount of equitable damages that could be awarded; one option was to cap those damages at the value of the dominant owner's interest in the land.

## **CONSULTEES' RESPONSES**

- 5.21 Around 50 consultees addressed this topic. Ten did not support any change in the law and four gave ambiguous responses; the remainder supported reform of the law in one way or another.

<sup>24</sup> See para 5.9 above.

<sup>25</sup> Consultation Paper, para 5.83.

<sup>26</sup> This is in essence the measure of damages at common law.

<sup>27</sup> Consultation Paper, paras 5.81 to 5.91.

<sup>28</sup> Consultation Paper, paras 5.92 to 5.94.

### **Comments from consultees who did not support any reform**

5.22 Dr Peter S Defoe (calfordseaden LLP) did not support any reform of the law because he felt that “the status quo is best for negotiation”.

5.23 Hunters (solicitors) and the City of Westminster and Holborn Law Society did not agree with rights to light being singled out from other rights in this respect. The latter reasoned that:

Equitable damages are awarded on broad principles of fairness and justice. If the general view is that there is a problem with the way equitable damages are assessed, this is best resolved by a separate consultation on equitable damages.

5.24 The National Organisation of Residents Associations also opposed reform, on the basis that the various methods of assessing damages were “unlikely to be improved without hazarding the fairness of the awarding of damages”.

5.25 The Bar Council took the view that no reform was needed as it felt that the current law was “relatively straightforward”. It added that “it is equitable that the profit from the development is taken into account because it is likely that it would be relevant to the negotiation of any hypothetical buy-out”.

5.26 John McGhee QC (Maitland Chambers) considered that the law should either remain unchanged or that equitable damages should be limited to loss of financial and amenity value. On balance he concluded that there was no reason to amend the law. He continued:

Indeed it would be wrong to do so. In circumstances in which a developer overrides important amenity rights of an adjoining owner ... it is right that he should be put into the position he would have been in had the developer first sought his agreement to give up his rights.

5.27 Allen & Overy LLP’s response offered both a developer’s and a dominant owner’s perspective; from the latter’s perspective it said:

The current position on damages in lieu reflects established principles of property law and it is hard to see how any rationale for a different approach could be justified as a matter of principle. ... The alternative to the “significant” payments which developers complain about is presumably an “insignificant” payment. However, why should developers be allowed to make profits at the expense of infringing other people’s rights?

### **Consultees’ comments on the options for reform**

5.28 Turning to the substance of possible reform, only a handful of consultees addressed the possibility of relying on comparable transactions to determine a “market value” for the release of a right to light, and it did not receive any support.

- 5.29 The other two options for reform were both based on the common law measure of damages. Option (2) was in effect to equate equitable damages with common law damages by restricting them to diminution in value (and other financial losses); option (3) would allow the courts to award a multiple of that figure, and we said that the multiplier might be within the range of two and five. There is evidence that this is the approach already used in some cases, for example where the anticipated profit from the development cannot be quantified.<sup>29</sup>
- 5.30 Twenty-three consultees favoured either option (2) or (3). Of these, 21 consultees appeared to favour option (2), but several of these responses also indicated a degree of acceptance of option (3). Two consultees clearly preferred option (3).

### **Support for option (2)**

- 5.31 A number of consultees who supported option (2) saw the current law as giving the dominant owner a windfall, in the form of a share of profit from a development for which he or she has taken no risk and which may have, in fact, made his or her property more valuable.<sup>30</sup> For example, Clifford Chance LLP explained its support for this option in the following terms:

The potential amount of damages payable is sufficient to act as a deterrent to development in the first place, but also amounts to a potential vast windfall for an adjoining owner where the damages payable bear no relation to the actual loss, if any, that they have suffered. The amount to be awarded is the subject of uncertainty with case law suggesting a range of between 5% and 50% of development profit. It should of course be remembered that if the development has not yet been built, no profit has been realised by that development, making any development profit based damages calculation a further increased risk for a developer.<sup>31</sup>

- 5.32 Transport for London argued for this option on the grounds that “the prospect of a profit share in a new development inevitably increases the motivation for landowners to threaten injunctions”.

<sup>29</sup> See *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922. Furthermore, Anstey Horne made the following comment:

Our view, which we think is generally supported by other consultants, is that it is highly unlikely that a rights of light dispute will be settled at [a diminution in value level] because at best the affected party is in an neutral position having traded its light for a certain amount of money. Therefore, it is common practice to apply some form of enhancement or uplift on the baseline sum in order to arrive at a figure that the affected party might reasonably be prepared to accept or, if it went that far, a court might reasonably award.

<sup>30</sup> It was not clear whether consultees who stated that damages should be limited to diminution in value without mentioning damages for loss of amenity or other financial losses felt that no award should be made in respect of these heads, or whether “diminution in value” was simply being used as a label for all elements of option (2). We have assumed the latter.

<sup>31</sup> This latter point was echoed by Allen & Overy LLP, giving views on behalf of its developer clients.

- 5.33 BRE noted that due to the recent recession the number of unprofitable developments had increased and suggested that equitable damages should be “based on valuation of the daylight lost” (at least where the dominant property is a commercial premises).
- 5.34 Berwin Leighton Paisner LLP made similar points.<sup>32</sup> It had concerns that the current law incentivises dominant owners “to seek large settlements based on high percentages of estimated developer’s profit”, without sufficient acknowledgement of the risk to the developer of undertaking the project.
- 5.35 The Berkeley Group plc said that one problem with the current method of assessment was that it could lead to “rights to light shopping”, whereby buildings which adjoined development sites were acquired in order to provide an income through rights to light compensation. It also noted that the effect of some developments can be to increase the value of neighbouring land, and so in some cases no loss to the value of the dominant property would be suffered at all.
- 5.36 HDG Ltd argued that it was illogical to approach damages on the footing that the dominant owner can stop the development, since a court will only come to consider equitable damages if it has concluded that no injunction should be granted. It echoed the complaints above about awarding a share of profit to a party who has taken no risk and put in no work, and it criticised the current measure for making it very difficult to predict likely awards yet maintaining the potential for damages to be so high as to disincentivise otherwise economically viable schemes. It added:

Given the random and haphazard way in which the consultation paper acknowledges that rights of light may be acquired or known about, a share of profit is likely to prove a windfall benefit to the adjoining owner unrelated to the loss in value of his property and the inconvenience to its occupiers of the building owner’s development of the part of it that affects his light. (In some cases, of course, value may be increased by the development where this drives an [increase] in the value of the location).

***Support for option (3)***

- 5.37 Only two consultees made clear that their preference was for option (3). Julian Barwick (Director, Development Securities plc) suggested an uplift of “two times loss in value”, whilst Chelsfield LLP felt there should be an uplift of “50 – 200% depending on circumstances”.
- 5.38 However, some consultees who argued primarily that damages should be limited to diminution in value saw some scope for an increase in that measure of damages in extreme cases. For example, Derwent London plc and the British Property Federation supported departure from the “diminution of value” measure in cases of “severe” impact to amenity. The latter also suggested as an alternative a “more formulaic” approach of “diminution in value, plus or times x”, but did not indicate how great “x” might be.

<sup>32</sup> As did Exemplar Properties and the Westminster Property Association.

- 5.39 In a confidential response, a further consultee supported an uplifted diminution in value measure in “exceptional circumstances”, defined as “where the developer has acted unscrupulously and made no attempt to follow the process to agree compensation”. It proposed an uplift of up to two times the diminution in value figure.

#### **Suggestions for restricting the level of equitable damages**

- 5.40 A number of consultees commented on the possibility of capping the amount of damages that may be awarded by a court, either by setting a ceiling on the amount that could be awarded (with no change to the existing measures of damages) or by introducing a different measure (such as diminution in value) in addition to a cap on the amount that could be awarded. Four consultees explicitly opposed the introduction of a cap.
- 5.41 Those in favour of restricting the amount of damages that a court could award generally favoured limiting the maximum award to the value of the dominant tenement or a percentage thereof.<sup>33</sup> A few suggested limiting damages to a percentage of the profit made by the party in infringing the right to light instead. One consultee<sup>34</sup> favoured a hybrid solution, with the former approach applying to residential property and the latter to commercial property.
- 5.42 Others saw the appeal of a cap on damages, but had reservations. One consultee (who wished to remain anonymous) said the following:

We are of the view that whilst a cap would be advantageous for providing certainty of maximum damages in development, there is not a clear solution at present as to how this can be achieved. There are too many variables to ensure the cap would be adequate in different circumstances eg location, type of site etc which could in turn lead to the cap being set too high and therefore effectively becoming redundant.

- 5.43 The Council of HM Circuit Judges could see “some attraction to the notion of ‘capping’ the amount of any award by reference to the present open market value of the dominant property”, but was not satisfied that the case for such reform had been made out. The Property Litigation Association also had reservations as to whether a cap should apply, but said that it was ultimately a question of “policy” and did not express a final view.
- 5.44 Other consultees explicitly opposed the introduction of any cap in principle. For example, the Bar Council said that:

A cap would ... be entirely inappropriate as it would prevent the scale of any project and the extent of any obstruction from being taken into account to determine the appropriate level of damages.

<sup>33</sup> The Berkeley Group plc, for example, suggested a cap based on the pre-development value of the dominant property whereas the UNITE Group plc suggested a cap of 30% of the market value where the dominant property is in residential use and 10% where it is in commercial use.

<sup>34</sup> Nabarro LLP.

5.45 The Chancery Bar Association also doubted whether a cap would be appropriate. It argued that section 18 of the Landlord and Tenant Act 1927, which had imposed a cap on the measure of damages for breach by a tenant of its repairing obligations under a lease, had resulted in numerous unintended consequences and had caused complications in the law. It was concerned that similarly undesirable effects could result from a cap in the rights to light context.

5.46 Allen & Overy LLP, after noting that developers would be likely to welcome any change which saw the amount of damages being reduced, said that while there is a “superficial attraction” in a cap based on the value of the dominant land, such a measure would “disproportionately penalise the poorest landowners”. It gave the following example:

If two properties are next to one another, one worth £100,000 and one worth £1 million, and each suffer an equivalent injury (which on ordinary principles would be valued at say £500,000 each), the property with the lower value will have its damages capped at £100,000 whilst the property with the greater value will receive the full amount. Further, in a situation where a cut-back is shared equally between two properties, this will enable the property with the higher value to receive an even bigger share of the profits (in the above example, if the cutback were equally attributable to both properties’ rights, the property with the higher value would be entitled to £900,000 in damages and the property with the lower value only £100,000). We do not consider that this is fair.

5.47 Herbert Smith Freehills LLP also opposed capping damages at the value of the dominant land, claiming that the idea “does not stand analysis”:

For a start (and this is not our main point), following *Stokes v. Cambridge Corporation* (1961) 13 P & CR 77, the value of a right in (“dominant”) land that if released would allow a neighbour to build profitably on his own land is part of the value of the dominant land. Therefore the point is circular. ... the fact is that there are many very high value premises that would not be affected by such a cap at all, not because the level of damage is low, but just because the land that is suffering the damage is (say) a large unit. Whether a cap would be applied in one case or another would therefore, ultimately, be somewhat arbitrary.

It also highlighted the practical downsides to applying such a cap, namely increasing the complexity and expense of litigation, as it would become necessary to establish the value of the dominant land. Furthermore it pointed out that determining the value of the dominant land could be difficult where, for example, the affected property is one wing of a building on a large single registered title consisting of many inter-connected buildings.

### **Industry-led reform**

- 5.48 Anstey Horne said that there was “scope for useful reform” in this area of the law. It proposed that a court should “look at the different methodologies available [for measuring damages] and consider them ‘in the round’ before forming a judgement as to what might be reasonable in all the circumstances and ‘feel right’”. It continued:

Our recommendation is that a working party be set up ... to review the question of development gain and provide some further guidance for the courts on the subject. That might mean technical guidance from rights of light surveyors combined with valuation advice from a combination of rights of light surveyors and specialist general practice valuers experienced in development costs.

- 5.49 The Association of Light Practitioners favoured a similar holistic approach:

Despite the continuing usefulness of the uplifted diminution in value method, we are not sure if it would be completely equitable to move away from share of profit altogether. Instead, we think that a court should look at the range of figures that result from application of the different methodologies available and consider them 'in the round' before forming a judgment as to what might be reasonable in all the circumstances and "feel right".

If one adopts an even-handed approach to the question of share of profit we think it is hard to argue against the principle. It is a question of striking a fair and reasonable balance.

It summarised its conclusions as follows:

... we believe that the measure of equitable damages should include an assessment of both uplifted diminution in value and share of profit, but that the sum awarded should not be disproportionate to the level of injury. In reality, this is a complex matter and one that is difficult to explore fully and do justice to the range of views among [the Association of Light Practitioners'] members ... in this short response. We believe an industry-led code of practice needs to be produced, which would help the courts and all parties involved in rights of light disputes, and our members are keen to help produce such a document.

## DISCUSSION AND POLICY

### Support for reform

- 5.50 In the Consultation Paper we said that we were not convinced that any of the options considered in it would offer a clear improvement on the current law. We also said that we thought it would be difficult to build consensus for reform. We said that there were good arguments both for and against removing the element of “profit share” from the assessment of equitable damages.<sup>35</sup> This is reflected to some extent in consultees’ responses.<sup>36</sup> This is also reflected in the comments made by the Supreme Court in *Coventry*,<sup>37</sup> where Lord Carnwath stated that “the issues are complex on any view”, and highlighted arguments for and against.<sup>38</sup>
- 5.51 It is clear that there is considerable support for removing the profit-share element from damage awards. Consultees’ principal objection to the current law seems to be that equitable 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 realise the profit.
- 5.52 Furthermore, there is a sense that developers are having to settle rights to light disputes for sums greater than a court might award by way of equitable damages. Developers indicate that reported profit share awards loom large in negotiations for the release of rights to light.<sup>39</sup> We understand that the starting point for the hypothetical negotiation is often based on a figure of one-third of the profits generated by the relevant part of the development, by analogy with the *Stokes v Cambridge Corporation*<sup>40</sup> principle in the compulsory purchase context.<sup>41</sup> This was explained by Gabriel Moss QC (sitting as a Deputy High Court Judge) in *Tamares* in the following way:

<sup>35</sup> Consultation Paper, para 5.92.

<sup>36</sup> Compare the responses of the Association of Light Practitioners (see para 5.49 above), Anstey Horne (see para 5.48 above) and the consultee referred to in para 5.42 above.

<sup>37</sup> [2014] UKSC 13, [2014] AC 822.

<sup>38</sup> [2014] UKSC 13, [2014] AC 822 at [248].

<sup>39</sup> See para 5.34 above.

<sup>40</sup> (1962) 13 P & CR 77.

<sup>41</sup> G Roots and others, *The Law of Compulsory Purchase* (2nd ed 2011) pp 376-7 explains that *Stokes v Cambridge Corporation* (1962) 13 P & CR 77 is often cited as shorthand for the principle that where one piece of land holds the key to the development of another, this “ransom value” may be reflected in the compensation awarded. In *Stokes* the court held that in the absence of compulsory purchase powers the developer would have agreed to pay to the owner of the land one-third of the development value in order to acquire access to the development.

The use of a third share perhaps illustrates expectations in a negotiation of this kind, and seems to accord with common sense, which requires the proposed share of profit not to be so high as to put the developer off the relevant part of the development. It must be remembered that if a developer agrees to pay a third of an expected development profit regardless of whether it is actually made or not, he is taking a risk and the other party is not. This helps to explain the reasonableness of the one-third/two-thirds split rather than say a 50/50 or 40/60 split in a commercial context.<sup>42</sup>

- 5.53 However, we are aware of only two reported rights to light cases since *Carr-Saunders* in which the court has taken into account the developer's estimated profits when assessing equitable damages.<sup>43</sup> These are *Tamames*,<sup>44</sup> and *Heaney*,<sup>45</sup> discussed above.<sup>46</sup> In *Tamames*, the court awarded 28% of the relevant profit, whilst in *Heaney* (despite the court awarding an injunction) it felt that 16% of the relevant profit would have been appropriate (if it had decided to award that remedy). Cases relating to the infringement of other rights have produced a variety of percentages; in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*<sup>47</sup> (a restrictive covenant case) the equitable damages amounted to 5% of the anticipated profits; whereas in *Wynn-Jones v Bickley*<sup>48</sup> (a trespass case) the court awarded 50% of the estimated profit facilitated by the trespass.<sup>49</sup>
- 5.54 The result of this wide range of potential awards, despite the supposed "one-third of profits" starting point, is that developers are unable to predict the sort of sums that courts might decide should be paid by way of damages where an injunction is inappropriate.
- 5.55 Although, as John McGhee QC (Maitland Chambers) argued, the law requires developers to pay "only what a reasonable person in their position would pay" to secure release of a right to light, it seems that the few reported cases involving profit share may be having a disproportionate effect on the market in rights to light settlement figures, pushing settlements to a level that is generating what developers regard as significant and disproportionate costs to developments.

<sup>42</sup> [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [34].

<sup>43</sup> In other cases decided since *Carr-Saunders*, such as *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 and *Regan v Paul Properties DPF No 1 Ltd* [2006] EWHC 1941 (Ch), the courts have also awarded damages in substitution for an injunction, but the assessment of those damages was reserved to a later, unreported hearing (and in *Regan*, the Court of Appeal reversed the first instance decision and granted an injunction: [2006] EWCA Civ 1391, [2007] Ch 135).

<sup>44</sup> [2007] EWHC 212 (Ch), [2007] 1 WLR 2167.

<sup>45</sup> [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

<sup>46</sup> See para 5.9 above.

<sup>47</sup> [1974] 1 WLR 798.

<sup>48</sup> [2006] EWHC 1991 (Ch).

<sup>49</sup> A useful summary of the various awards made in recent cases is found in J Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) para 14-143.

- 5.56 We are swayed, not so much by a feeling that the law is incorrect, but by the argument that the cases are having an exaggerated effect on negotiation and generating what might be seen as disproportionate settlements.

### **The impact of reform**

- 5.57 We have explained that damages could be restricted by changing the basis on which they are awarded, by capping the amount that can be paid, or by some combination of the two.
- 5.58 The consequences of any of these potential reforms are uncertain. We consider them under three heads: the risk to the chances of settlement; the potential effect on the frequency of injunctions; and the interaction with the Notice of Proposed Obstruction (“NPO”) procedure.

### ***The risk to the chances of settlement***

- 5.59 A restriction of the available equitable damages may mean that neighbours are more likely to hold out for an injunction.<sup>50</sup> They might do so for one of two reasons: either because they prefer to keep the light rather than to settle for very low levels of damages, or as a way of preserving a bargaining position and applying pressure to the developer.
- 5.60 This happens under the current law, to some extent. We understand that, once the dominant owner in the *Heaney* case was granted an injunction, the parties reached a settlement,<sup>51</sup> and the two storeys of the building remain in place. The fear is that if equitable damages were to be limited, that pattern of injunction followed by negotiation (with the developer having little to bargain with) would become far more widespread.

### ***The potential effect on the frequency of injunctions***

- 5.61 We have recommended that in deciding whether to award damages instead of an injunction the court should take into account (among all the circumstances) whether monetary compensation would be adequate.<sup>52</sup> Accordingly, the introduction of a less favourable measure of damages could result in the court being more inclined to grant an injunction rather than to award damages instead.
- 5.62 The effect of limiting damages could be to prejudice the interests of developers by increasing the likelihood of dominant owners insisting on an injunction, or seeking artificially high settlements as the price of their not seeking one. This outcome would be contrary to the interests of those who supported reform.

<sup>50</sup> Transport for London argued that the existence of profit-share damages resulted in a greater “motivation for landowners to threaten injunctions” (see para 5.32 above). We think that it is arguable either way. However, we think that if the level of damages is reduced there is a greater danger that threats will be followed up by applications to court.

<sup>51</sup> See S Bickford-Smith, M Baker and K Shaw, “Under a shadow” (2011) *Estates Gazette* 1115 83, 83.

<sup>52</sup> See para 4.116 above; under the *Shelfer* criteria the test is whether the damage can be estimated in money and could be adequately compensated by a small payment.

### ***The interaction with the Notice of Proposed Obstruction procedure***

- 5.63 A reduction in equitable damages could undermine the NPO procedure, which we provisionally proposed in our Consultation Paper and which we recommend in Chapter 6 below.
- 5.64 The NPO procedure would have the effect of preventing a dominant owner from obtaining an injunction if he or she did not apply to court for that remedy within a specified period. Nevertheless, the dominant owner would remain entitled to equitable damages (provided that he or she would otherwise have been entitled to an injunction or damages instead of an injunction). Retaining the possibility of equitable damages works as an incentive to those dominant owners that would be inclined to settle for compensation not to incur the cost and inconvenience of seeking an injunction in order to preserve their bargaining positions. But this would only be the case if those damages are substantial. If we recommend restricting equitable damages, it may be more likely that the dominant owner would prefer to seek an injunction in order to preserve his or her bargaining position and ability to secure a more substantial settlement, in the same manner discussed at paragraphs 5.59 and 5.60 above.

### ***Towards policy***

- 5.65 On the one hand, as we said above, we see force in the arguments in favour of reform to ensure that the courts do not award – and that the parties in negotiation do not expect – a high share of a developer's profit as the price of the release of a right to light.
- 5.66 On the other hand, there are risks in reducing the level of equitable damages. A reduction may have unintended consequences that would prejudice those who are most troubled by the levels of settlements currently being negotiated.
- 5.67 How great those risks are we cannot know. But we think that the risks provide a very strong reason not to replace the current measure of damages with one based only on the diminution in value of the dominant property (together with costs and loss of amenity) – our option (2). This option would in most cases represent the most drastic reduction in damages, and so is most clearly open to the objections we outline above on the consequences of making equitable damages less attractive.
- 5.68 But there are other options. The plausible options are to assess damages by reference to diminution in value, but increased by a statutorily imposed multiplier; to cap damages at the value of the dominant land; and to cap damages at a percentage of the profits of the relevant part of the development. We look at these options in turn.

### ***A multiplier of diminution in value***

- 5.69 It would be possible to provide for equitable damages to be calculated by assessing the diminution in value (plus costs and a figure for loss of amenity) in the value of the dominant land, multiplied either by a single figure or by one of a range of possible multipliers, perhaps from two to five. This was option (3), explored above.

- 5.70 The multiplier (or the valid range for the multiplier) would be set at an inevitably arbitrary level, and although some consultees supported (or indicated a level of contentment) with the idea of an uplift, other consultees were opposed to it.<sup>53</sup> We do not therefore think this approach presents a viable option for reform either.

***A cap based on the value of the dominant land***

- 5.71 A cap based on the value of the dominant land was seen as attractive by many consultees. Those that gave reasons tended to emphasise that it would lead to greater proportionality between the value of the dominant owner's interest in the land and the damages awarded.
- 5.72 However, of all of the responses that addressed this option, we found particularly convincing those of Allen & Overy LLP and Herbert Smith Freehills LLP.<sup>54</sup> These focussed on the potential unfairness that a cap linked to the value of the dominant property may cause, particularly where two adjoining dominant properties suffer the same loss of light, but where property A is valued at less than property B (or where property A is not capable of being valued easily); in this situation the owner of property A may receive less compensation than the owner of property B, despite the fact that both suffered an equivalent injury – and even greater unfairness would occur where property A suffered a greater loss of light than property B.
- 5.73 For this reason we do not think that capping equitable damages at the value of the dominant property (or a percentage thereof) offers a fair option for reform.

***Limiting the percentage of profits that can be awarded***

- 5.74 That leaves the question of whether we should recommend reform on the basis that it would still be open to the court to award damages based on a percentage of the developer's estimated profits arising from the part of the development that infringes the dominant owner's right to light, but specifying a lower percentage than the maximum found in the case law.
- 5.75 This might prove to be the most viable option. The main objection that could be raised against it is that any percentage figure would be arbitrary. It might be set somewhere between the 28% found in the *Tameres* case and the 5% in the *Wrotham Park* case.<sup>55</sup> It would also need to leave open the possibility of basing any award on alternative methods of valuation (for example, an award based on a multiple of the diminution in value of the dominant property) where the profit is expected to be very low or a profit-share method is inappropriate, for example, where the profit is difficult or impossible to determine.<sup>56</sup>

<sup>53</sup> Herbert Smith Freehills LLP said that an uplift may be "arbitrary and lacking a proper valuation or legal basis"; Anstey Horne did not think it would be appropriate to provide for a statutory uplift because "... once again and as with most things related to rights of light, it really must be a question of judgement related to the specific circumstances of the case at hand".

<sup>54</sup> See paras 5.46 and 5.47 above.

<sup>55</sup> *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798.

<sup>56</sup> This might be the case where, for example, the building that infringes a right to light is a public building.

### **Our recommendation**

- 5.76 We take the view that there is to some extent a problem with equitable damages. We think that the reputed starting point for negotiations of one-third of the estimated profits arising from the part of the development that infringes a right to light is probably high, and certainly many of our consultees were concerned about this. But there is an element of subjectivity in our judgement, and of self-interest in theirs.
- 5.77 What stands in the way of a recommendation for reform is the lack of clear economic evidence as to the cumulative effect of a change in the outcome of negotiations and the settlement of disputes that we think will arise as a result of the decision in *Coventry* and the effect of our proposed reforms (especially the new test for the granting of damages instead of an injunction, and the NPO procedure) on the incidence, or risk of, injunctions being granted.
- 5.78 The essence of the existing law is that equitable damages are based upon a hypothetical negotiation for the relaxation of a right. The figure awarded is influenced by, and feeds into what parties negotiate in the market. We think it is necessary to see the effect of the decision in *Coventry*, the introduction of the new test for the granting of damages instead of an injunction, and the NPO procedure on the market and the industry. Accordingly, we cannot safely make a recommendation for reform at this point.
- 5.79 **We recommend that Government review the question of reform of the level of equitable damages once our other recommendations have been enacted and have taken effect, and to consider at that stage and as a matter of economic policy the desirability of capping equitable damages either at a percentage of profit share, or as a multiplier of diminution in value.**

### **OTHER ISSUES RAISED BY CONSULTEES**

- 5.80 Finally, some consultees raised issues, or made suggestions that went beyond the questions posed in the Consultation Paper.

#### **Expanding the role of the Lands Chamber**

- 5.81 The Property Litigation Association suggested that the Lands Chamber should have the ability to determine the quantum of any damages payable. It suggested that if the Lands Chamber was able to do this, consideration should also be given to allowing the Lands Chamber to determine liability as well.
- 5.82 Our view is that it would not be practicable or cost-effective to require a separate hearing purely to determine quantum; this proposal would therefore necessitate allowing the Lands Chamber to conduct full trials of rights to light cases. We do not think this would be desirable. We have previously noted that the legal expertise of the Lands Chamber has increased in recent years: owing to reforms to the tribunals system, all High Court judges are now also judges of the Upper Tribunal. However, it does not, we think, have more expertise than the courts – particularly as regards the grant of injunctions. Furthermore, we do not think that it is sensible to give such a jurisdiction only in cases involving rights to light. Accordingly we do not propose to take this suggestion any further.

### **Recommending further guidance**

- 5.83 Berwin Leighton Paisner LLP and Land Securities requested guidance on various areas of surveying practice. The Law Commission does not have the requisite expertise for it to comment on these areas. However, we are aware that organisations including the Association of Light Practitioners and Anstey Horne have suggested the possibility of producing codes of practice to assist the courts in technical matters relating to rights to light disputes.<sup>57</sup>

### **A residential-commercial distinction**

- 5.84 A small number of consultees suggested that the assessment of damages or the imposition of a cap should take into account the use to which the dominant property is put (whether residential or commercial) and the reliance by the dominant owner on artificial light. We do not consider that such clarification is necessary – the current approach to assessing equitable damages is sufficiently flexible to allow those considerations to be taken into account.<sup>58</sup>

### **“Parasitic” damages**

- 5.85 Finally, the Association of Light Practitioners and Anstey Horne asked that we look at “parasitic” damages. These were mentioned only briefly in our Consultation Paper.<sup>59</sup> The law provides that when assessing diminution in value for the purposes of awarding common law damages where a right to light is infringed, the court is entitled to take into account loss of value caused by the simultaneous loss of light to other parts of the property which do not benefit from rights to light.
- 5.86 The rationale underpinning an award of parasitic damages is summarised by Lord Justice Buckley in *Horton v Colwyn Bay*:

... if an actionable wrong has been done to the claimant he is entitled to recover all the damage resulting from that wrong, and none the less because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable.<sup>60</sup>

- 5.87 In the event of an obstruction of light to the dominant property, the dominant owner is therefore entitled to damages to compensate for the entire diminution in value of the dominant property attributable to the infringement; not only in respect of light lost to those parts of the property that enjoy light *as of right*, but also in respect of light lost to those that parts that enjoy light *as a matter of fact*.

<sup>57</sup> See the comments of both organisations at paras 5.48 and 5.49 above.

<sup>58</sup> A court can take into account the nature of the owner’s use of the building when deciding what settlement that owner (or that type of owner) would have accepted for the release of his or her right.

<sup>59</sup> Consultation Paper, para 5.63.

<sup>60</sup> [1908] 1 KB 327, 341. This part of the judgment has been criticised as an over-simplification insofar as it appears to apply to damage to a secondary interest by any tort: “[T]here is no necessity in principle to adopt such a sweeping statement. Each tort is different and, since the matter is one of policy, each can be decided in a different way from the next one.” H McGregor, *McGregor on Damages* (19th ed 2014) 8-121.

- 5.88 The concept was elaborated upon by Lord Esher, Master of the Rolls, in *Re London Tilbury & Southend Railway Company and the Trustees of the Gower's Walk Schools*:

... the Plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the defendant had considered the matter, he must have foreseen that the whole damage would result from that act. If that be so, and a person puts up buildings, the inevitable consequence of their erection being to obstruct ancient and modern lights, should he not be taken to have foreseen that in obstructing the one he would obstruct the other? If that were proved in a common law action the plaintiff would be entitled to damages for the whole of the consequences of the wrongful act of obstructing ancient lights, which would include damage to the new as much as to the old lights.<sup>61</sup>

- 5.89 Similarly, in *Griffith v Richard Clay & Sons Ltd*<sup>62</sup> the claimant owned two houses looking on to a street (the windows to the front of which benefited from rights to light) as well as some land to the rear. There were no windows at the back of the houses. The claimant intended to redevelop the land by demolishing the houses (which were dilapidated) and to erect on the land (including the land to the rear) a factory or warehouse. The defendant obstructed the claimant's light and was ordered to pay damages to compensate for diminution in value of all of the land – not just the land on which the two houses were situated. In the Court of Appeal Lord Cozens-Hardy, Master of the Rolls, reiterated the comments of Lord Esher in the *London Tilbury* case and affirmed the first instance judge's decision.
- 5.90 Anstey Horne said that it “would welcome clarity” on the continuing availability of such damages, but accepted that “it may be best left for the courts to consider on the individual merits of the case...”.
- 5.91 The Association of Light Practitioners also invited a review of the way in which parasitic losses are taken into account, and made the following suggestions:
- i. Demote all parasitic losses to the makeweight zone in the equivalent first zone (EFZ) calculation and thereby value them at one-quarter of their full amount.
  - ii. Calculate a cutback to the scheme to avoid an actionable injury to the windows with rights and work out the EFZ loss in the usual way. Then add on the additional losses that result from reinstating the cutback portion of the scheme after demoting them to the makeweight zone.
- 5.92 Having considered the issue in greater detail, we do not feel that it would be appropriate for us to recommend reform in this area.

<sup>61</sup> (1889) 24 QBD 326, 329.

<sup>62</sup> [1912] 2 Ch 291.

- 5.93 There is limited support for reform in this area and an apparent lack of evidence of the approach causing significant legal problems in practice – indeed, the issue does not appear to have arisen in reported litigation in England and Wales for almost a century,<sup>63</sup> and it appears the modern approach to equitable damages is causing far greater consternation amongst stakeholders than common law damages.
- 5.94 Determining the extent to which the value of a property benefitting from a right to light has been diminished by virtue of an infringement of the right is a matter for valuers using specific knowledge and industry practices. Just as we have concluded in relation to the test for when an infringement is actionable, at paragraphs 3.74 and 3.75 above, so we are convinced that this is a matter on which the Law Commission is not best placed to recommend change: absent the requisite expertise it would be inappropriate for us to interfere with valuation practices.

<sup>63</sup> The issue of parasitic damages in a right to light case reached the Supreme Court of Ireland in *Scott v Goulding Properties* [1973] IR 200. The court held, by a two to one majority, that the claimant's entitlement to damages for infringement of her rights to light was limited to "damages measured not merely on the basis of the loss of light to [the] particular windows but also general damages to be assessed on the basis of loss of amenity and enjoyment of the property and loss of value of the property" (FitzGerald J, at 219).

## CHAPTER 6

# THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE

- 6.1 One problem that we have already highlighted in this Report is the uncertainty and delay caused when it is not clear whether the owner of a property, whose right to light will be infringed by a development, will actually claim an injunction. A constant refrain during the project has been concern that landowners who would be satisfied by a payment in respect of the infringement draw out negotiations with the servient owner, forcing up the price of settlement by the threat of an injunction. In this Chapter we recommend the introduction of a new statutory notice procedure to mitigate this problem. It would allow a landowner who expects to obstruct a neighbour's light to require that neighbour, if a right to light is going to be infringed and if an injunction is wanted, to make a commitment to claiming an injunction within a specific timeframe, but without prejudicing the neighbour's right to damages instead.
- 6.2 In the text that follows we set out how we have reached our conclusion and a brief overview of the procedure, and then consider in detail the new notice procedure by reference to the draft Bill at Appendix B.

### INTRODUCTION

- 6.3 In Chapter 6 of the Consultation Paper we proposed the creation of the "Notice of Proposed Obstruction" ("NPO") procedure. The NPO procedure would allow a landowner to serve a notice on a neighbour indicating that light to the neighbour's property might be obstructed by a proposed development. The neighbour would have to decide, within a specified period, whether or not to apply to court for an injunction to protect that light. If the neighbour did not do so, then he or she would be unable to obtain an injunction in respect of the obstruction anticipated in the NPO, but would still be entitled to equitable damages.<sup>1</sup>
- 6.4 The proposed procedure was designed to assist a landowner who needs to ascertain whether the neighbour will want to prevent a proposed development. This was part of the problem in *HKRUK II (CHC) Ltd v Heaney*<sup>2</sup> ("Heaney").

<sup>1</sup> See para 5.7 and following above.

<sup>2</sup> [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

- 6.5 In *Heaney* the dominant owner was first informed of a potential infringement to his right to light in October 2007. Extensive negotiations then took place over a two-year period. On several occasions the dominant owner threatened to bring proceedings for an injunction but never did so. The building was completed by July 2009, when the developer's solicitor again wrote to the dominant owner, asking him to bring proceedings rather than keep the threat of an injunction hanging over the development. Eventually the developer applied to the court for declarations "as to its freedom from liability to [the neighbouring landowner]".<sup>3</sup> The dominant owner then counter-claimed for an injunction, and succeeded notwithstanding his delay; the court granted an injunction requiring the demolition of the top two storeys of the new building, some of which had already been let by the developer. That demolition did not happen and we understand that a settlement was reached.
- 6.6 The current law therefore appears to enable landowners who have a right to light that is going to be infringed to play for time in asserting their right; the longer they prevaricate, the greater the inconvenience and cost to the developer, and the more the developer will pay to settle, given the possibility that the court will still grant an injunction. There is a perception in the development industry and among those who advise landowners on right to light disputes that *Heaney* has taken away the risk that the neighbour's delay in negotiating may reduce the chances of an injunction.<sup>4</sup> There is currently no cut-off point after which a property developer can build with certainty that no injunction will be granted.
- 6.7 We argued in the Consultation Paper that the law, while rightly offering protection to rights to light, had in practice created an unjustifiable imbalance. Our provisional proposal for the introduction of NPOs would address this by enabling a developer to require its neighbour to seek an injunction within a specified time, or lose the chance of being awarded that remedy. It would force neighbours to put their cards on the table: will they accept compensation, or will nothing less than an injunction to prevent an infringement suffice?
- 6.8 The NPO procedure we proposed would not take away the neighbour's right or force court action which the neighbour would not otherwise have to take; a neighbour who wanted an injunction would eventually have to apply to the court anyway. Nor would it prejudice the neighbour's entitlement to damages. If an injunction was not sought, the developer could proceed in the knowledge that the development could not be halted or undone, but would remain liable in damages to the neighbour whose right was infringed as though the potential for an injunction had not been lost.

<sup>3</sup> See *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [1] and [12] to [34].

<sup>4</sup> Consultation Paper, paras 1.10 to 1.11.

## THE BACKGROUND TO THE NPO PROCEDURE

### Development practice

- 6.9 Current development practice is to investigate neighbouring properties, at an early stage, to determine whose light will be obstructed. Typically developers think in terms of “envelopes”, by which they mean the overall size, or “massing” of the development; they may have in mind a particular envelope that will not obstruct anyone’s light, and a larger envelope that can be achieved if neighbouring rights to light can be managed in some way.
- 6.10 Where the developer thinks that neighbours may have the benefit of rights to light that are likely to be infringed, it will generally seek to engage with those neighbours. The developer will aim both to get information about its neighbours’ rights and also a feel for their views about any potential obstruction.<sup>5</sup>
- 6.11 Where the developer opens negotiations for the release of rights to light, it will generally offer the neighbours a solicitor’s undertaking to pay their legal and surveying costs incurred in the negotiation of a settlement. A neighbour may, however, refuse to engage, preferring to sit back in the knowledge that the closer the commencement of the development, the stronger his or her bargaining position. Delay may cause serious problems for the developer, with consequent difficulties (in terms of delay and inflated prices) for potential purchasers and tenants, whether domestic or commercial.
- 6.12 Following enactment of our recommended NPO procedure, the developer would have a further option: the service of an NPO.

### The content and effect of an NPO

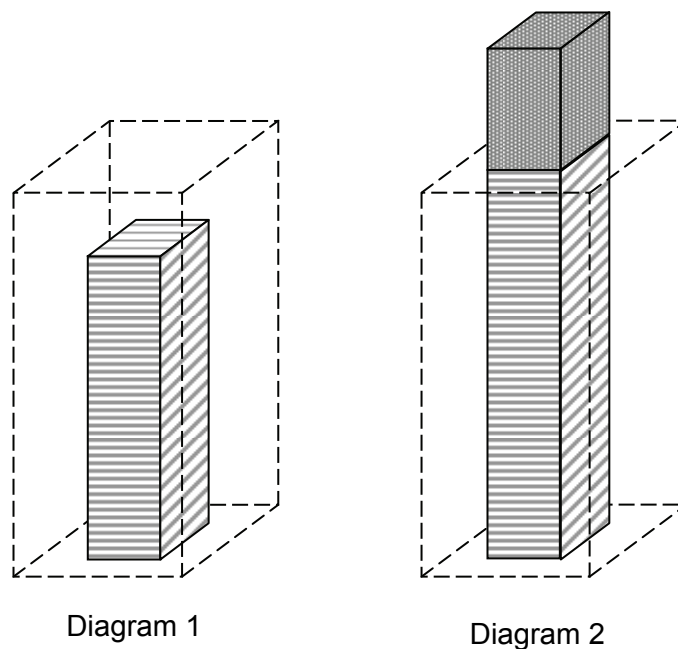
- 6.13 An NPO would provide details of an obstruction; either a specific building, or an “envelope” that expresses a maximum space within which a developer plans to build. The NPO would have to be sufficiently specific for the neighbour to be able to take professional advice (legal and surveying), at the expense of the person serving the notice, to determine whether he or she has a right to light that would, or would be likely to be, infringed if the obstruction were built. If the answer is ‘yes’, the lawyer and surveyor together would be able to form a view on how likely it is that the neighbour could obtain an injunction.
- 6.14 Once the NPO had been served on the neighbour, the neighbour would have three options.
- (1) The neighbour could choose to apply to court for an injunction to defend the right to light, and serve proceedings, by a date specified in the NPO.<sup>6</sup>
  - (2) The neighbour could do nothing and lose the potential to be awarded an injunction. This would not affect the neighbour’s entitlement to damages for infringement of the right to light.

<sup>5</sup> Insurance against the enforcement of rights to light is also a possibility; most insurers will require that there be no contact with the neighbours – or contact only as agreed with the insurer.

<sup>6</sup> The relevant timings are considered at para 6.101 and following below.

- (3) The neighbour could enter into negotiations with the developer for the release of the right to light. In this case, the parties might agree to extend the deadline for applying to court for an injunction.
- 6.15 In forcing the neighbour to assert his or her right within a specified timeframe, the NPO procedure would give the developer clarity regarding the risk of a development suffering delay, or catastrophic failure in the event that an injunction was later granted. Where a dominant owner chooses to apply to court for an injunction the developer would know that the neighbour seriously intends to prevent the development. The developer would negotiate on that basis, contest the application, or change the plans for the development. If no infringement actually occurs, the proceedings would be discontinued (and the wasted costs of the litigation would be likely to be borne by the developer).
- 6.16 Where the neighbour does nothing the developer would know that the neighbour, and (if the NPO was registered as a local land charge)<sup>7</sup> his or her successors in title could not seek an injunction in respect of any development on the servient land that fits within the obstruction described in the NPO. This protection would last for 10 years; if the light is not infringed during that period then the NPO would lapse, but if the proposed obstruction does take place the protection from injunction would be permanent.

*Fig 3*



- 6.17 In Diagrams 1 and 2, the cube defined by dashed lines represents the obstruction described in the NPO against which a neighbour has chosen not to seek an injunction. In Diagram 1, the building ultimately constructed – the cube with lines upon its surfaces – fits entirely within it and, accordingly, would benefit from the protection against injunction afforded by the NPO procedure.

<sup>7</sup> See para 6.98 below.

- 6.18 In Diagram 2, the building ultimately constructed is partly within and partly outside of the envelope described in the NPO. Part of the building (being the cube with lines upon its surfaces) would benefit from the protection against injunction afforded by the NPO procedure, but part of the building (the “unprotected part”) – shown in Diagram 2 as a darker cube – is outside of the envelope. If the unprotected part (whether on its own or in addition to the remainder of the building) caused an actionable infringement of a neighbour’s right to light, then a court would have the full range of remedies available to it in respect of the unprotected part.

#### **Consultees’ comments**

- 6.19 The vast majority of consultees welcomed in principle the NPO procedure proposed in the Consultation Paper. Many confirmed the concern that, following *Heaney*, landowners with a right to light could apparently ignore efforts to discuss the impact of a proposed development and to negotiate yet still obtain an injunction. They therefore welcomed the NPO procedure as a way of encouraging negotiations and balancing the respective interests of the dominant and servient landowners.

- 6.20 Land Securities said:

This is possibly the single most important proposal ... as it tries to address our biggest area of uncertainty and risk – imposing fixed time constraints when dealing with adjoining owners who will not respond to our efforts to reach agreement with them.

- 6.21 The City of London Law Society commented that:

In general terms, we agree with the principle of the process. It is important to bring matters to a head, injunction-wise and to address those who manipulate their rights to extract ransoms, with the consequential adverse impact on potential developments and the economic benefits that they may bring.

- 6.22 The British Property Federation said that:

We believe that this aspect of the consultation paper goes to the nub of property industry concerns over rights to light post-*Heaney*. The ability of a dominant owner to use the combination of delay and threat of injunction to extract greater compensation is having a serious adverse impact on the development industry and in turn its important contribution towards growth.

A procedure that therefore does not deprive the dominant owner of rights, but through procedural rules, seeks to elicit the dominant owner’s intentions in a timely fashion – a so called “put up or shut up rule” - would be very helpful and is something we support.

- 6.23 Allen & Overy LLP offered more qualified support. It said that, after speaking with its developer clients, it thought that the procedure would have value. However, it also said that the advantages had to be carefully weighed against the risks of unfairly prejudicing and burdening adjoining owners, and suggested that:

Strictly the procedure is not necessary, in that developers already have the ability to take matters into their own hands by applying for a declaration ... .

- 6.24 A minority of consultees were opposed to the NPO procedure. Some argued that the procedure would complicate matters and disadvantage those landowners who do not have ready access to professional advice. Others objected because they did not consider the outcome in *Heaney* to be unsatisfactory.

### **Discussion**

- 6.25 We agree with Allen & Overy LLP that the NPO procedure must be carefully balanced. However, we do not think that the ability of a dominant owner to seek a declaration (as the developer did in *Heaney*) renders the NPO procedure unnecessary. An action for a declaration is redundant where all parties are well aware that the proposed development would infringe a right to light. And it only puts matters beyond doubt if the court declares that there is no infringement because the question of whether to award damages or an injunction will not be before the court. So it is at best an indirect route to the result wanted. There is also something of a psychological aspect. The NPO procedure would require the neighbour to make a proactive commitment, going beyond threats, by issuing proceedings in order to preserve his or her right to an injunction; and we think that there is considerable value in this.
- 6.26 We are not persuaded that the NPO procedure would ask too much of dominant owners. In the Consultation Paper we proposed mechanisms to ensure that those receiving an NPO would be able to obtain advice at the expense of the developer, and we recommend further refinement to those proposals below.<sup>8</sup> An NPO would need to set out clearly the consequences of failing to engage with the procedure. The dominant owner would, with the benefit of professional advice, be in a position to understand the potential adverse impact of a neighbouring development upon his or her right to light, to assess how best to limit the prospect of that happening, or to receive adequate payment for its release if that is preferred.

### **Commercial and residential properties**

- 6.27 We asked consultees for their views on the suitability and practicability of limiting the use of the NPO procedure to circumstances where rights to light benefit only commercial premises. Consultees were overwhelmingly against restricting the procedure in this way. Of the 32 consultees who responded directly to this point, only two<sup>9</sup> supported a limitation along those lines. For example, the City of London Law Society expressed concerns about mixed-use buildings:

<sup>8</sup> See para 6.143 and following below, which deal with the payment of the dominant owner's costs.

<sup>9</sup> Hunters (solicitors) and Allen & Overy LLP.

The obvious problem with such a limitation is how the procedure should be applied to a mixed commercial and residential use building. Many developments are mixed use and, if the notice procedure is intended to provide greater comfort to developers in relation to injunctions, the procedure will ultimately fail if it cannot be used for half the tenants in a building who are residential.

- 6.28 Others noted difficulties in defining residential and commercial property. For example, the British Property Federation was concerned with how the limitation would be applied in practice. It said:

... there are some good reasons for arguing that rights to light in a housing situation and rights to light for commercial property should have different policy treatments. We agree, however, that there are difficult issues of delineation. How to define a commercial property? What happens if the property flips from commercial to residential use?

- 6.29 We agree with consultees. Limiting NPOs to those circumstances where the property is commercial would significantly devalue the NPO procedure; it would in any event present difficulties in definition.<sup>10</sup>
- 6.30 We anticipate that our proposals to assist the recipients of NPOs through the provision of information in the NPO<sup>11</sup> and the covering of their professional costs<sup>12</sup> would afford particular protection to residential owners. On the other hand, the effort that the servient owner or its advisers must put into preparing an NPO, and complying with the obligations that follow – particularly to cover the reasonable professional costs of the dominant owner – should make their use by residential owners against their neighbours (for example, to enable them to build an extension) extremely rare.

### Conclusion

- 6.31 **We recommend the introduction of a Notice of Proposed Obstruction, whereby a landowner who expects to obstruct the light to a neighbour's property could require that neighbour to seek an injunction in respect of the obstruction within a specified time, or be prevented from obtaining an injunction in respect of that obstruction.**
- 6.32 In the remainder of this chapter we make a series of recommendations setting out the details of the NPO procedure, which have developed from those proposed in the Consultation Paper and have benefited from the input of consultees. We do so under the following headings (the number in brackets after each heading indicates the paragraph number at which the discussion of that topic starts), and with reference to the Schedule to the draft Bill at Appendix B (which would establish the procedure).

<sup>10</sup> For example, whether the common parts of a flat complex are “residential”, or a family home where one room is used as an artist’s studio.

<sup>11</sup> See para 6.33 and following below.

<sup>12</sup> See para 6.143 and following below.

- (1) The form and content of an NPO. (6.33)
- (2) Who should be able to serve an NPO? (6.41)
- (3) When should an NPO be capable of being served and the issue of multiple notices. (6.47)
- (4) How should an NPO be served? (6.64)
- (5) On whom should an NPO be able to be served? (6.76)
- (6) Development after service of an NPO. (6.83)
- (7) Withdrawing an NPO. (6.86)
- (8) Third-party effect and registration. (6.92)
- (9) Details about responding to an NPO. (6.99)
- (10) Failure to respond to an NPO. (6.134)
- (11) The provision of information relating to an NPO. (6.141)
- (12) Costs. (6.143)
- (13) Damages. (6.159)
- (14) The “shelf-life” of an NPO. (6.170)

### **THE FORM AND CONTENT OF AN NPO**

6.33 In the Consultation Paper we suggested that the form and content of an NPO should be set out in regulations. We asked consultees for their views about that approach, and what the regulations should contain.<sup>13</sup> The draft clauses annexed to the Consultation Paper required the Secretary of State to make regulations with a view to ensuring that the person served with an NPO was given sufficient information about the proposed obstruction to enable him or her (with professional advice) to assess accurately –

- (1) whether the proposed obstruction would infringe a right to light benefiting that person’s estate in the dominant land; and
- (2) the extent of any infringement of such a right to light that would be caused by the proposed obstruction; and
- (3) clear information about the effect of [the part of the Bill dealing with NPOs] (including in particular the steps which that person may take in response to the notice and the consequences of failing to take any step within the [time allowed]).<sup>14</sup>

<sup>13</sup> See the Consultation Paper, para 6.15.

<sup>14</sup> See the Consultation Paper, para 6.14 and clause 6 of the draft clauses annexed as Appendix C to the Consultation Paper.

### Consultees' comments

- 6.34 Consultees' comments focussed on the information that should be provided alongside the notice. There was a consensus that the required information should focus on the location and size of the proposed obstruction, so as to enable dominant owners, with professional advice, to determine the impact upon their properties. For example, Mount Anvil Ltd said:

We believe that showing some detail as part of the notice would be worthwhile to ensure that the affected party can make a reasoned decision on how to proceed. This could be in the form of a massing model outlining the nature of the proposed scheme and proximity to the affected aperture and perhaps comparison with the existing building.

- 6.35 Anstey Horne suggested that the information provided should be limited to a location plan indicating the position of the development site, and the proposed structure compared to any existing building in the form of elevation and cross-section drawings. It warned against providing the dominant owner with too much information at an early stage.
- 6.36 Whilst most consultees did not comment on our view that the content of the NPO should be left to regulations, some expressed concern with that approach on the basis that the detail should be developed alongside other policy by the Law Commission and not be left to Government.<sup>15</sup>

### Discussion

- 6.37 We did not intend (as some consultees inferred) to defer consideration of the content of NPOs until the drafting of a statutory instrument and enactment of our recommendations. Our recommendation sets out a framework for the Secretary of State to follow when regulations governing the form and content of the NPO are drafted. We have had in mind both the addressee's need for information and the comments of consultees that too much material accompanying an NPO could be counter-productive. Importantly, the NPO would not be expected to contain any admission the recipient has a right to light, nor that the proposed development would interfere with any right that exists.
- 6.38 **We recommend that the Secretary of State be given a power to prescribe by regulations the form and content of an NPO. The Secretary of State must exercise the power so that the dominant owner, with professional advice, has sufficient information to assess accurately whether the proposed obstruction would infringe a right to light and the extent of any infringement of such a right.**
- 6.39 **We recommend that the regulations must require that the NPO:**
- (1) identify the person serving the NPO;**
  - (2) identify, or give a sufficient description of, the intended recipient of the NPO;**

<sup>15</sup> See the Analysis of Responses, ch 6 (available from the Law Commission's website).

- (3) describe the servient and dominant land;
- (4) describe the proposed obstruction (including a plan showing its location and diagrams showing its dimensions);
- (5) specify the last day on which the addressee can claim an injunction;
- (6) explain the effect of the NPO, including the consequences of not claiming an injunction within the relevant timeframe; and
- (7) state that the recipient should seek professional advice (and that the person serving the NPO is obliged to pay the reasonable costs of taking that advice).

6.40 Those recommendations are put into effect by paragraph 3 of the Schedule to the draft Bill.

#### **WHO SHOULD BE ABLE TO SERVE AN NPO?**

6.41 In the Consultation Paper we said that:

The NPO should only be capable of being served by someone (whether a corporate body or a natural person) with a freehold or leasehold interest (with more than five years remaining) in the servient land.<sup>16</sup>

6.42 That limitation was proposed because we envisaged NPOs would be effective against current and future owners of the dominant land and because we had proposed that only one notice could be served in respect of the servient land every five years. In those circumstances, we thought that it was necessary to ensure that the person entitled to serve an NPO had a significant ownership interest.

#### **Consultees' comments**

6.43 Few consultees addressed this issue directly. However, some of those that did were concerned that the class entitled to serve an NPO had been drawn too tightly. Several consultees, including the Property Litigation Association and Clifford Chance LLP, pointed out that not all developers enjoy an ownership interest in any or all of the land being developed and that developers should be competent to serve notices with the owner's authority. However, Malcolm Hollis LLP suggested that:

This could ... be overcome by making the service of a NPO a condition of any contract between an owner and a proposed developer.

<sup>16</sup> Consultation Paper, para 6.16.

## **Discussion**

- 6.44 We are not now recommending that only one notice could be served by a landowner in any five-year period. Nevertheless, the recipient of an NPO would be required to take actions and decisions within a defined time frame and may wish to discuss the NPO with the party serving it, not least the payment of his or her costs.<sup>17</sup> To ensure that there is an element of stability to discussions, we think that the person serving the NPO should have a substantial interest in the servient land. Where the developer does not own the land or have a long enough lease, it will need to require the current landowner (as part of an agreement to acquire or develop the site) to serve any NPOs.
- 6.45 **We recommend that an NPO should only be capable of being served by someone (whether a corporate body or a natural person) with a freehold or leasehold interest (with more than five years remaining) in the servient land.**
- 6.46 That recommendation is put into effect by paragraph 1 of the Schedule to the draft Bill.

## **WHEN SHOULD AN NPO BE CAPABLE OF BEING SERVED AND THE ISSUE OF MULTIPLE NOTICES**

- 6.47 The scheme described in the Consultation Paper was intended as one of last resort, to be used at a relatively late stage where negotiations had stalled or broken down. We did not require this directly; but we felt that the requirement for the developer to provide the dominant owner with the specified level of information relating to the development would prevent service of an NPO at a very early stage when the detail of development plans and therefore the extent of the potential infringement of the dominant owner's light was unknown.<sup>18</sup> We also proposed that it should not be possible to serve more than one NPO in a five-year period; an NPO would therefore be a last resort because there was no chance of a further attempt within five years. We felt that therefore developers would be unlikely to serve an NPO where development plans were not in an advanced form.

## **Consultees' comments**

- 6.48 Many consultees liked the idea of a last resort procedure. The City Property Association said:

The members' view is the proposed notice procedure should exist as a backstop and not a first port of call. It would be available in a situation where an adjoining owner is delaying or adopting negotiation 'tactics', rather than being straightforward in either responding to or setting out what they consider would be an acceptable settlement.

- 6.49 However, some consultees thought that the procedure would be better used at an early stage – even as a first point of contact. For example, the Berkeley Group plc said:

<sup>17</sup> See para 6.143 and following below.

<sup>18</sup> See the Consultation Paper, para 6.17.

We believe that it would be a lost opportunity if the use of notices is limited to cases where negotiations are breaking down and notices cannot be used to flush out potential claimants.

- 6.50 We were initially concerned that using the NPO procedure in this way could result in developers, at a very early stage, serving NPOs on all potential dominant owners specifying an artificially large development envelope in order to protect itself from possible changes of plans or to flush out potential claimants. The potential for developers doing this was discussed by several consultees. For example, the Property Litigation Association and Clifford Chance LLP said:

The developer will be keen to submit a flexible outline of development in the NPO (ie a profile within which a development could be carried out) so as to avoid having to serve multiple NPOs as the scheme evolves, especially as it goes through planning ... .

- 6.51 Herbert Smith Freehills LLP examined the consequences of developers adopting this approach, noting that:

Limited to one notice every five years, a developer might hedge its bets by serving an NPO that "cannot be wrong", by which we mean a notice drafted by reference to an overly-cautious (ie obstructive) property design. The risk of an over-sized "jelly mould" being proposed in the NPO may not only be unhelpful to the recipient of the notice but it may also act then to create a dispute that never would have existed: the complaining dominant owner and the developer litigating in a phoney war in respect of a building that would never in fact be built.

- 6.52 Some consultees suggested that an NPO should only be served once planning permission for the proposed development had been granted.<sup>19</sup> Others advocated a less prescriptive approach to avoid limiting significantly the benefits of the procedure. The British Property Federation said that a developer:

... should not need to indicate his detailed designs for how the development will look nor have applied for, or obtained, planning permission – this will give developers' flexibility as to when in their planning stage they choose to serve the notice, subject to the constraints regarding what happens if they later choose to increase or decrease the size of the obstruction.

- 6.53 Nabarro LLP also said that it would not support limiting the use of NPOs to buildings in respect of which planning permission had been granted, on the basis that "there may be good reason why a developer needs to serve an NPO before planning has been achieved". It added that:

<sup>19</sup> For example, Deloitte Real Estate said:

It is proposed that a developer may issue one statutory notice per planning permission. The notice would still be valid for any "minor alternations" under that current planning permission. If the scheme changes such that a new planning permission is required the developer would need to serve a new notice and the neighbour would have the right to accept or refuse again.

If an NPO has to specify the intended building envelope (whether by reference to planning or not), developers may be reticent to serve the NPO until the development has reached a final design stage.

By then, a developer may perceive it is just too late to follow the NPO procedure which will take (on the current proposal) 8 months to get to the issue of proceedings and if proceedings are issued, the matter could take a year to get to trial (ignoring any appeal).

- 6.54 Turning to the issue of how many notices could be served, we proposed in the Consultation Paper that only one NPO should be capable of being served in respect of the servient land in a five-year period. This was introduced to prevent the risk of developers seeking to wear down the resolve of dominant owners by flooding them with notices. The majority of consultees disagreed with this, and suggested that we had been overcautious in thinking that developers would seek to use the procedure in this way. For example, Herbert Smith Freehills LLP said:

We do not consider that there need be a fear of a plethora of notices being served (say, "in the alternative"), and that a weary dominant owner may then give up responding. There are many situations in law where multiple notices are a risk, including in respect of planning applications ... . If there is evidence of bad faith or sharp practice by virtue of the service of multiple sequential notices, then this should be treated as relevant evidence when the court considers the conduct of the parties and determines what remedy to grant and what costs order to make.

- 6.55 Several consultees noted that the costs involved in the NPO procedure would be a sufficient control on the number of notices served.

- 6.56 Furthermore, a number of consultees were concerned about the lack of flexibility caused by our proposed limitation on serving more than one NPO on each dominant owner every five years. Clifford Chance LLP described this aspect of the procedure as "unworkable" and Berwin Leighton Paisner LLP said:

... it is not feasible that one may only serve one notice every five years, given that ... schemes are often changed a number of times; this is most often not at the whim of the developer, but a reasonable and proportionate response to planning considerations ... .

- 6.57 Some consultees suggested that, rather than restricting developers to serving only one NPO in a five-year period, provision should be made for allowing developers to withdraw an earlier notice and pay the dominant owner's wasted costs. For example, the British Property Federation said:

A suggestion is that a dominant [owner's costs] could become payable upon either the deemed withdrawal of an NPO (by reason of the service of a fresh notice) or the express withdrawal of such a notice. Those costs could be paid on the standard basis, to be assessed by the Lands Chamber if not agreed by the parties.

## Discussion

- 6.58 We are persuaded that, for the objectives of introducing the NPO procedure to be met, the procedure must be more flexible than that envisaged in the Consultation Paper. We are keen to ensure that the NPO procedure would be a useful tool that helps to resolve disputes and provide certainty that a development could be built, whilst ensuring that dominant owners could protect the amenity afforded by light where they wish to do so. In particular, we have taken on board the point that the scheme envisaged in the Consultation Paper might prompt the developer to specify an over-large development envelope. In reaching our final conclusion, we considered two options:
- (1) restricting the time at which the notice can be served (to ensure an NPO is used as a last resort); or
  - (2) relaxing the restriction on the number of notices that can be served (to ensure that the obstructions described in notices will not be artificially “inflated”).
- 6.59 We took seriously consultees’ suggestion that the potential obstruction described in an NPO be linked to a planning permission. However, we cannot see how this would work in practice. Buildings are not necessarily built exactly to the dimensions and in the location specified on the plans submitted to obtain planning permission. Developments may also be the product of a number of permissions, and of later local authority approvals pursuant to earlier permissions. Linking an NPO to a particular permission, and the plans associated with that permission, may render them useless if minor variations or later approvals result in a greater infringement to light. Alternatively, NPOs would be unfair to dominant landowners if such later permissions and approvals were deemed to form part of the NPO from the outset, but result in a greater infringement than that expected from the information supplied with the NPO.
- 6.60 We think that the benefits of the NPO procedure would be limited if it could be used only at a late stage. Developers can expend significant sums and time in obtaining planning permission; they may choose not to use the NPO procedure until later, but equally should have the option to do so before planning permission is finalised and so clear off (or face) the possibility of an injunction at that relatively early stage.
- 6.61 Turning to multiple notices, we agree with those consultees who suggested that we were overcautious in provisionally proposing to limit the number of NPOs capable of being served to one in any five-year period. We think that there is little likelihood that developers would use the NPO procedure to wear down a neighbour’s resolve in the way that we feared. We anticipate that, by the time a servient owner decided to serve an NPO, it would almost certainly have spoken with neighbours, have a reasonable idea of what it would like to see built and have conducted detailed assessments of the potential impact of the development on neighbouring landowners.

- 6.62 We make a recommendation below that the party serving the NPO should be responsible for the pre-action costs of those served. In addition, the developer would have to establish on whom NPOs should be served, assess the risk of their applying for an injunction, and be financially prepared to negotiate the release of rights or defend injunction proceedings. Where a dominant owner commences proceedings and the servient landowner consequently abandons its plans it would probably be ordered to pay the wasted costs of the dominant landowner in any active proceedings. So NPOs would not be cheap and that in itself would deter excessive use.
- 6.63 Accordingly we have concluded that there is no need either to restrict the time at which the NPO can be served or to limit the number of NPOs that can be served by a servient landowner.<sup>20</sup>

### **HOW SHOULD AN NPO BE SERVED?**

- 6.64 The procedure described in the Consultation Paper would have given the Secretary of State a power to make provision about how NPOs were to be served.<sup>21</sup> We envisaged that the rules on service should be built upon Part 6 of the Civil Procedure Rules and on section 6 of the Acquisition of Land Act 1981 (which deals with the service of documents in the compulsory purchase context), and explained broadly how they might look. Accordingly, we envisaged that notice might be served by:
- (1) handing it to the person to whom it is addressed (or to a director or secretary if the addressee is a body corporate);
  - (2) sending it by recorded delivery<sup>22</sup> to that person's (or the body's) proper address;<sup>23</sup> or
  - (3) leaving it at that person's (or the body's) proper address.
- 6.65 We also explained that where after making reasonable inquiries it was not possible to ascertain the name or address of a person to be served with an NPO, the notice should be delivered to the dominant property. Where the name of an individual was not known, it could be addressed to the "owner", or "lessee" or "occupier". It might then be served by being handed to a person who lived or worked at the dominant property, sent by recorded delivery to the dominant property, left at the dominant property, or fixed to or near to a conspicuous part of the dominant property.<sup>24</sup>

<sup>20</sup> We recommend at para 6.90 below a restriction on serving a second NPO where the period to respond to the first NPO has not yet elapsed.

<sup>21</sup> See cl 6(1)(c) of the draft Clauses annexed to the Consultation Paper as Appendix C.

<sup>22</sup> The Acquisition of Land Act 1981, s 6 states that a document is not served unless "sent by registered letter, or by the recorded delivery service", although the Royal Mail no longer refers to its services by these terms.

<sup>23</sup> An individual's proper address is his or her last known address in England and Wales. A body corporate's proper address will be its registered or principal office in the UK. If there is no known address, or registered or principal office, then the address for service would be that of the dominant property.

<sup>24</sup> This is adapted from the Acquisition of Land Act 1981, s 6(4).

- 6.66 We proposed that a notice handed to a person before 5pm on a working day would be deemed to be delivered on that day, otherwise it would be deemed to have been delivered on the next working day and that any notice that was left or affixed at the premises would be deemed to have been given the day after it was left or affixed. Any notice sent by post would be deemed to have been delivered on the third day after posting.<sup>25</sup>

#### **Consultees' comments**

- 6.67 Consultees generally agreed with that approach. For example, Anstey Horne said:

The proposal that the service of the NPO should be based upon the general provisions contained in Part 6 of the Civil Procedure Rules and on Section 6 of the Acquisition of Land Act 1981 would appear to be entirely sensible.

#### **Discussion**

- 6.68 We think that the approach suggested in the Consultation Paper is broadly correct. It is important to provide for the potential to serve upon landowners that cannot be located or identified.

- 6.69 **We recommend that the Secretary of State be given power to make regulations setting out how NPOs are to be served, including power to make provision for deemed service.**

- 6.70 That recommendation is put into effect by paragraph 3 of the Schedule to the draft Bill.<sup>26</sup>

- 6.71 While agreeing in principle with the inclusion of provisions permitting deemed service, Allen & Overy LLP urged some caution:

We agree that it is important that there are rules regarding deemed service. Our main concern is regarding the proposal that the notice can be handed to a person who lives or works at the premises. This might lead to notices being handed (sometimes deliberately) to inappropriate persons eg a temporary building contractor. We believe the rules on service at the premises should be the same as under the [Civil Procedure Rules].

- 6.72 We understand Allen & Overy LLP's concern. A provision allowing for the service of a notice on unidentified owners looks, at first glance, particularly problematic. The Acquisition of Land Act 1981 addresses this concern; section 6(4) provides that:

<sup>25</sup> See the Consultation Paper, para 6.16 and following.

<sup>26</sup> See, in particular, sub-paragraphs 3(1)(c) and 3(5).

If the authority or Minister having jurisdiction to make the order in connection with which the document is to be served is satisfied that reasonable inquiry has been made and that it is not practicable to ascertain the name or address of an owner, lessee or occupier of land on whom any such document as aforesaid is to be served, the document may be served by addressing it to him by the description of “owner”, “lessee” or “occupier” of the land (describing it) to which it relates, and by delivering it to some person on the land or, if there is no person on the land to whom it may be delivered, by leaving it or a copy of it on or near the land.

6.73 This type of provision would give adequate protection for landowners. We envisage that service of a notice on an “owner”, “lessee” or “occupier” and its delivery to a person (other than a known owner, lessee or occupier) on the dominant land, or leaving the notice on or near the dominant land, should be permitted only in limited circumstances where the dominant owner has made all reasonable investigations and it is not practicable to ascertain the name or address for service of the owner, lessee and/or occupier.

6.74 **We recommend that the rules for service of an NPO should be based upon the rules set out in Part 6 of the Civil Procedure Rules and section 6 of the Acquisition of Land Act 1981.**

6.75 In addition, paragraph 3(5) of the Schedule to the draft Bill ensures that the regulations that govern service will not permit an NPO to be addressed to a landowner by description rather than by name unless all reasonable investigations to identify the landowner have been made.

#### **ON WHOM SHOULD AN NPO BE ABLE TO BE SERVED?**

6.76 In the Consultation Paper we envisaged that an NPO might be served on a neighbour with a freehold or leasehold estate.

#### **Consultees’ comments**

6.77 Only a few consultees addressed this point in their consultation responses. Laurence Target (solicitor, Trowers & Hamlin LLP) said:

We do not think that it is helpful to restrict the application of the notices to land in which there is a legal estate. The procedure should apply equally to demesne land.

6.78 Furthermore, Mr Justice Morgan has highlighted the following to us in correspondence:

Gale on Easements 19th ed para 14-16 states that someone with a proprietary or possessory right to the dominant tenement has title to sue for the infringement of an easement (including a right of light) appurtenant to the dominant tenement. So if that is right, there will be persons who can sue for an injunction in relation to an infringement of a right to light but who yet cannot be made subject to the NPO procedures.

## Discussion

- 6.79 The NPO would have to be targeted at a person with an estate in land who is able to have the benefit of an easement of light, and our recommendation remains as we proposed in the Consultation Paper. The position of occupiers is ambiguous; an adverse possessor has a fee simple by virtue of that possession and may have with it the benefit of a right to light; but the adverse possessor is therefore within the scope of our policy. We are not convinced that there is any virtue in including licensees within the class of persons who can be affected by an NPO as we do not regard them as having a sufficient “interest” in the land to be capable of benefiting from a right to light.
- 6.80 **We recommend that an NPO should be capable of being served on a freehold or leasehold owner of land.**
- 6.81 That recommendation is put into effect by paragraphs 1 and 29 of the Schedule to the draft Bill.
- 6.82 We have not made provision for service on demesne land.

## DEVELOPMENT AFTER SERVICE OF AN NPO

- 6.83 In the Consultation Paper we proposed that, following service of the NPO but before a final decision had been taken by the recipient as to the response to make to it, the developer should not be allowed to infringe the dominant owner’s right to light (whatever else it decided to do on the development site). None of our consultees addressed this issue in any detail. We continue to take the view that it is important to give the dominant owner time to take advice and to make decisions without feeling pressured by a neighbour’s construction process.
- 6.84 **We recommend that, during the period after service of an NPO and before the end of the period during which the recipient must have issued proceedings for an injunction, the dominant owner must not interfere with the dominant owner’s right to light. If the servient owner does not adhere to this requirement, then the NPO will not prevent the grant of an injunction to restrain that interference.**
- 6.85 That recommendation is put into effect by paragraph 10 of the Schedule to the draft Bill.

## WITHDRAWING AN NPO

- 6.86 We agree with those consultees who suggested that a developer should be entitled to withdraw an NPO to avoid incurring unnecessary costs where development plans have changed or been abandoned. To be effective, we think that the servient landowner must notify the dominant owner in writing of the withdrawal of the NPO. The withdrawal of an NPO should be without prejudice to any obligation of the developer to pay the dominant owner’s costs.<sup>27</sup>

<sup>27</sup> See para 6.155 and following below. We note that where an NPO is withdrawn then any further pre-action costs incurred by the recipient will not be “reasonable” for the purpose of determining whether or not the developer is liable for them.

6.87 **We recommend that a servient landowner should be entitled to withdraw an NPO by notifying the dominant owner in writing of the NPO's withdrawal. Withdrawal of an NPO should be without prejudice to any obligation of the developer to pay the dominant owner's costs.**

6.88 That recommendation is put into effect by paragraph 5 of the Schedule to the draft Bill.

6.89 We have also concluded that no more than one NPO should be "live" at any one time. So, in a situation where a servient owner serves an NPO ("NPO 1"), then serves another NPO ("NPO 2") – without having withdrawn NPO 1 – in respect of the same dominant land and proposed obstruction and during the time period for the dominant owner to respond to NPO 1,<sup>28</sup> then service of NPO 2 on the same addressee (or a successor that addressee) should have the effect of withdrawing both NPO1 and NPO 2. It is essential that dominant owners must be able to determine with certainty the impact of an NPO and the time limit in which to respond, and there is obvious potential for confusion if more than one NPO must be responded to at any one time.

6.90 **We recommend that:**

- (1) where an NPO has been served; and**
- (2) the period of time by which the dominant owner must have responded by issuing proceedings for an injunction has not yet expired; and**
- (3) the servient owner serves a further NPO on the same dominant owner in respect of the same dominant land and obstruction;**

**then, so far as that dominant owner is concerned, both NPOs should be deemed to be withdrawn. The deemed withdrawal should be without prejudice to any obligation of the developer to pay the dominant owner's costs.**

6.91 That recommendation is put into effect by paragraphs 17 and 18 of the Schedule to the draft Bill.

<sup>28</sup> Where an NPO already has effect to prevent an injunction what we say here is not relevant. In these cases, whilst the servient owner can withdraw the first NPO, its effect should not be overridden by the service of another NPO. Doing so could leave the servient owner without valuable protection, or leave the parties confused about the status of court proceedings.

### **THIRD-PARTY EFFECT AND REGISTRATION**

6.92 In the Consultation Paper we suggested that the NPO must take effect against an estate in land rather than being personal to the addressee, so that it is not wasted if the land is sold – and indeed so as to prevent the opportunity for the recipient of a notice to avoid its effects by a collusive sale. We also said that the NPO should only have this effect once information about it is available to purchasers; we proposed to address this by requiring the registration of the NPO as a local land charge and providing that it would not affect successors in title until registered.<sup>29</sup>

6.93 A majority of consultees agreed with the proposal, although many did not address it. Those who did agree, without making detailed comments, included the Property Litigation Association, Clifford Chance LLP, the British Property Federation, the City of London Corporation and Anstey Horne. The City of London Corporation said:

The Law Commission's broad proposal regarding the requirement to register an NPO as a local land charge is an important feature of ensuring the successors in title of both dominant and servient tenements are easily able to determine the nature of the land and the rights appertaining to it.

6.94 However, some consultees who agreed with the principle of requiring registration suggested that registration at Land Registry would be more appropriate. For example, the City of Westminster and Holborn Law Society said:

It seems that the Land Registry (or Land Charges Registry), rather than a Local Land Charges registry, is the proper place for notices.

6.95 Others did not feel that registration was necessary at all. For instance, Hunters (solicitors) said:

We do not favour registration of notices concerning private rights as local land charges. If need be, they can be registered at the Land Registry, but we wonder how the Law Commission proposals can be relevant to future owners with different needs and wishes to those of a former owner who received the initial notice quite some time previously.

### **Discussion**

6.96 We disagree with the concern raised by Hunters (solicitors). The NPO would have to be effective against successors in title to the person served for the procedure to be useful, for the reasons mentioned above. Provided that purchasers could assess accurately whether an NPO has been served in respect of a property then they could ask the seller for further information regarding it. When deciding whether to proceed with the purchase, a purchaser could then factor in the loss (or otherwise) of the potential for an injunction.

<sup>29</sup> See the Consultation Paper, para 6.23.

6.97 Registration at Land Registry, rather than on a local land charges register, would not be viable because the NPO would not be an interest in land; in any event the neighbour's title may be unregistered. In contrast, local land charge registers are already used for the registration of light obstruction notices,<sup>30</sup> and would be used for certificates of light interruption.<sup>31</sup> It is logical to recommend the registration of NPOs in the same way.

6.98 **We recommend that an NPO should be effective against successors in title to its addressee once it is registered on a local land charges register.**

#### **DETAILS ABOUT RESPONDING TO AN NPO**

6.99 We now look in detail at issues relating to the response to an NPO.

6.100 In the Consultation Paper we proposed that a dominant owner would have four months from registration of the NPO as a local land charge in which to respond, and could do so either by issuing proceedings for an injunction or by serving a counter-notice on the developer. If the dominant owner served a counter-notice, the parties would have a further four months in which to negotiate, by the end of which, if no agreement had been reached, the dominant owner would be required to issue proceedings or lose the potential for an injunction.

6.101 Consultees' comments on this topic raised the following questions.

- (1) Should the time for response run from the registration of the NPO as a local land charge?
- (2) Is a counter-notice worthwhile?
- (3) Should the dominant owner have to issue proceedings and, if so, for what?
- (4) What should the time period(s) be?

#### **(1) Should the time for response run from the registration of the NPO as a local land charge?**

6.102 Philip Freedman CBE QC (Hon) (Mishcon de Reya and a member of our advisory group) had concerns about how the developer and dominant owner would know from when time began to run if registration were the trigger. He suggested that:

Any time limit for issuing injunction proceedings should run from an easily ascertainable date such as the service of the notice of proposed obstruction rather than from the date of its registration as a local land charge.

<sup>30</sup> See para 2.87 above.

<sup>31</sup> See para 2.110 above.

- 6.103 Land Data queried how the procedure would work in practice and whether the legislation would impose an obligation on local authorities to inform the developer and the addressee of the registration date. We agree that this is a significant concern; it would introduce a further administrative task into the NPO procedure which, in the event of mistake or the loss of correspondence, could result in the dominant or servient owner suffering significant prejudice.<sup>32</sup>
- 6.104 We now see two problems with linking the time period for commencing proceedings with the date of registration of the NPO as a local land charge. One is that the actual registration of a local land charge, by the registering authority, is not within the control of either the dominant or servient landowner. The other is that, if we make that link, then if the dominant owner does not register the NPO as a local land charge the NPO will have no substantive effect – which is not our intention. The effect of the NPO on the recipient does not depend on registration.
- 6.105 We do not consider either of these consequences to be acceptable. In particular, registration is not intended to be an obligation, although the notice would only bind successors in title to the addressee if it is registered. In addition, the time limit within which proceedings for an injunction should be commenced must be easily ascertainable for all concerned. We now recommend a simpler approach, namely that the NPO must state a date by which the dominant owner must respond. The date must not be less than eight months after service of the notice,<sup>33</sup> and therefore the developer would be sensible to choose one that leaves some leeway so that there is time for service to be effected.<sup>34</sup>
- 6.106 This approach would ensure that both parties are aware of the time limit for responding to the NPO, as well as making that date obvious to prospective purchasers of either the dominant or the servient land. It would also give the developer the opportunity to synchronise an “end date” by which it should have responses to a number of NPOs.
- 6.107 **We recommend that an NPO must state the date by which the recipient must take action in order to preserve its right to an injunction, and that the date must be not less than eight months after the date of service of the NPO.**
- 6.108 That recommendation is put into effect by sub-paragraphs 3(4)(e) and 3(7) of the Schedule to the draft Bill.

<sup>32</sup> For example, where correspondence goes missing or is mistakenly never sent, the time limit for responding to an NPO could commence without either the dominant or servient owner being aware, or the authority charged with keeping a local land charges register could have rejected an application to register the NPO and the time limit may never have commenced.

<sup>33</sup> We explain at para 6.120 and following below our recommendation that the statutory minimum period should be eight months. We provisionally anticipated that the response to an NPO should be made within four months of receipt, but with the potential for that to be extended by the service of a counter-notice (see para 6.100 above). We explain below that we no longer see the need for a counter-notice and recommend a single period of eight months to respond, which can be extended by the parties.

<sup>34</sup> For example, an NPO served on 1 January might specify 10 September as the date by which the recipient must respond to it. This gives the servient owner a comfortable window during which it can be certain to have served the NPO.

## **(2) Is a counter-notice worthwhile?**

- 6.109 Many consultees appeared to be content with the dominant owner being able to serve a counter-notice to extend the period of time in which he or she had to issue proceedings by a further four months. No consultee commented specifically on the desirability of including a counter-notice within the procedure. However, members of our advisory group have expressed concerns. Philip Freedman CBE QC (Hon) (Mishcon de Reya) said:

The counter-notice procedure may be misused by [the dominant owner] giving it simply to protect his position and to give himself more time, and so be arguably superfluous, as was the counter-notice under s.25 [of the Landlord and Tenant Act 1954] which was abolished in 2003 pursuant to the Law Commission's recommendation.

- 6.110 However, Warren Gordon (Olswang) disagreed:

While it is acknowledged that legislation in other areas is moving away from counter notices and they can constitute a procedural trap, they are helpful to the developer. If no counter-notice is served (nor injunction claimed) in the four month period, the developer [can] rest assured that [the dominant owner] cannot claim an injunction.

- 6.111 We see the force in both arguments, but are persuaded by the former. We think that there is a very high probability that those served with NPOs would, as a matter of course, serve a counter-notice to extend the period for negotiations. If that were to happen, then the counter-notice would serve only as an administrative burden, with an associated risk where its service was overlooked, or was ineffective.

- 6.112 Accordingly, we do not wish to make any recommendation about the service by the dominant owner of a counter-notice.

## **(3) Should the dominant owner have to issue proceedings and, if so, for what?**

- 6.113 The majority of consultees agreed with our proposal that the dominant owner should ultimately have to bring proceedings in order to retain the right to ask the court for an injunction, although few discussed this in detail in their responses. However, a minority of consultees disagreed. For example, the City of Westminster and Holborn Law Society said:

It should be for the developer, not the dominant owner, to issue the proceedings and have the conduct of them as claimant. The proceedings should normally be for a declaration ...

It would be for the dominant owner in his defence to oppose the declaration, and to counterclaim in the alternative for damages.

- 6.114 Deloitte Real Estate also suggested a different approach:

There should not be an obligation on the defendant to take the matter to court, as this could be inequitable for those that do not have the funds to bring a claim forward. There should however perhaps be an intermediary step whereby the developer can pay for, and instigate, some form of mediation or arbitration. This ruling does not need to be binding but would better inform both parties on a likely court judgment. After mediation/arbitration and if the neighbours still wanted to protect their rights of light they should be made to take out proceedings.

- 6.115 We think that the dominant owner should have to issue proceedings for an injunction in respect of the obstruction described in the NPO. This is what would happen if the developer infringed a right to light (or was going to do so) where there had been no NPO served. The NPO is in a sense a test of the dominant owner's commitment; the step to be taken should be a real indicator of the neighbour's seriousness in wanting to prevent the development and protect his or her light.
- 6.116 The dominant owner should apply for a final injunction, and will not be required to apply for an interim injunction.<sup>35</sup>
- 6.117 So far as Deloitte Real Estate's suggestion is concerned, we think that the use of alternative dispute resolution to settle rights to light disputes is to be encouraged. However, were we to recommend that it be compulsory then the NPO procedure would be complicated, with attendant delay and costs. The NPO procedure is sufficiently flexible to enable the parties to submit to alternative dispute resolution should they so wish, and we think that doing so would, in many cases, be valuable.
- 6.118 **We recommend that the dominant owner should have to issue and serve proceedings for an injunction in respect of the obstruction described in the NPO, within the required timeframe, to preserve the availability of that remedy.**
- 6.119 That recommendation is put into effect by paragraphs 7 and 9 of the Schedule to the draft Bill.

#### **(4) What should the time period(s) be?**

- 6.120 Many consultees were content with the initial time period of four months, coupled with an additional four months if the dominant owner served a counter-notice. For example, the City of London Law Society said:

The respective four month periods to respond and negotiate seem about right – a sufficient time to respond and negotiate, but not so long as to unreasonably halt the development process.

<sup>35</sup> Where an application is made for an interim injunction it is usual for the dominant owner to give an undertaking in damages to the court (see Civil Procedure Rules, Practice Direction 25A, para 5.1). We think this goes too far.

- 6.121 None of our consultees thought that the overall time period needed to be longer. Indeed, many consultees thought that there was scope for making the process quicker. As we noted in the Consultation Paper, the Civil Procedure Rules allow a claimant four months in which to serve proceedings after issue. This meant that the entire process – from service of the NPO to service of proceedings – could take up to 12 months. Some consultees thought that this was too long, particularly if the procedure was expected to be used as a last resort following negotiations between the parties. This point was expressed by a number of consultees, including Capital & Counties Properties plc, who said:

If the intention is that a Notice of Proposed Obstruction ... is served by a developer as a last resort, then the time periods of four months for the claimant to consider its position following service of an NPO and a further four months for negotiations to take place need to be considerably shorter. In practice negotiations will already have been taking place, and so these time periods need to be reduced to prevent further delay to a development.

- 6.122 Anstey Horne suggested that the most appropriate length of the time limits would depend upon what information was provided to the dominant owner along with the NPO. It said:

If the recipient is only going to be provided with relatively simplistic information in plan, section and elevational form ... it may not be necessary to have an initial four-month period for response. This period should be used for solicitors to investigate whether the recipients enjoy a right to light, but nevertheless there may be scope for reducing this to two or three months in order to speed up the process.

- 6.123 It then went on to consider the second four-month period, following service of the counter-notice by the dominant owner:

In practice we think this four-month period may be too short, particularly if it is to be the period in which detailed studies are undertaken, because organising access to measure up the dominant owner's property and calculate full rights of light impacts, etc, could take a couple of months at least, leaving limited time to negotiate.

- 6.124 Finally, some consultees suggested that whatever the length of the time periods, it should be possible for the parties to extend them by mutual agreement.

- 6.125 Our provisional proposal in the Consultation Paper would have established a final immoveable deadline for the landowner to commence proceedings of eight months following registration of the NPO as a local land charge. We anticipated in the Consultation Paper that the second four-month period (after service of a counter-notice by the dominant owner) would be for negotiations.

- 6.126 While we hear consultees' concerns about the length of time that the NPO procedure might take to reach a conclusion we are conscious that it should not leave a neighbouring owner with too little time adequately to consider, with professional advice, the impact of an NPO. Accordingly, we think it is right that the minimum length of time in which a recipient of an NPO should have to take action is eight months from the date specified on the face of the NPO (not being earlier than the date of service of the NPO); as we said above, we are no longer making provision for counter-notices so a single period is appropriate.
- 6.127 During that eight month period, the addressee of the NPO would have to both issue and serve upon the developer the claim form for an injunction, because we agree that the eight-month period should not be extended by allowing further time for service.
- 6.128 **We recommend that the minimum period between the date specified on the face of an NPO (not being earlier than the date the NPO is served) and the deadline for the recipient to serve upon the developer the claim form for an injunction should be eight months.**
- 6.129 That recommendation is put into effect by paragraphs 3(7) of the Schedule to the draft Bill.
- 6.130 We do not expect developers, in most cases, to insist on the minimum period. Doing so is likely to result in proceedings being issued because the parties have not been able to negotiate a settlement. Instead, we expect developers to set an initial deadline, and agree extensions to that deadline that maximise the potential of reaching an agreement and avoiding litigation.
- 6.131 Accordingly, we agree with the suggestion that the parties should be free to agree in writing to an extension of the deadline for the dominant owner to commence proceedings and serve a claim form for an injunction. Such a provision provides flexibility and, where negotiations are ongoing and there is hope of a settlement, an opportunity for the dominant owner to avoid having to approach the court. We do not see any need to register this extension as a local land charge.
- 6.132 **We recommend that the parties should be free to agree in writing to the extension of the deadline for the dominant owner to commence proceedings and serve a claim form for an injunction to protect his or her right to light.**
- 6.133 That recommendation is put into effect by paragraph 4 of the Schedule to the draft Bill.

#### **FAILURE TO RESPOND TO AN NPO**

- 6.134 In the Consultation Paper we proposed that if the dominant owner failed to respond to the NPO within the initial four months, or failed to issue proceedings within four months of serving a counter-notice, he or she would lose the possibility of being granted an injunction. Consultees generally agreed. The Property Litigation Association and Clifford Chance LLP noted that this was:

... consistent with the owner of a property right, who is aware of a nuisance and who wishes to enforce any right enjoyed, having to act quickly in order to obtain the equitable relief of an injunction ... .

- 6.135 However, plans do change; what if the eventual development is different from, rather than simply smaller than, the obstruction described in the NPO? In the Consultation Paper we proposed to deal with this by allowing for altered plans to be covered by the original NPO, so long as the new plans would result in “no greater infringement” of a right to light than would the development described in the NPO. None of our consultees offered any detailed comments on this test.
- 6.136 However, on further discussion with consultees we query how the test could be applied in practice – for example, is an obstruction of light to a living room greater than an obstruction to a bedroom? It may be that the test would not provide a sufficient degree of certainty and would require the court to undertake an extremely difficult exercise.
- 6.137 We have concluded that what is wanted is a simple test based upon a comparison between the development as built and the development described in the NPO; if the former physically fits within the latter, then any protection against injunction afforded by the NPO should apply to the development as built. This means that the developer would have to take care to get the obstruction described in the NPO right – it needs to be big enough to allow for variations in plans at a later stage. This may or may not be a difficult exercise – it is another aspect of the procedure that may incline the developer towards using it later in the development process when negotiations have failed rather than early on.
- 6.138 Provided that which is built fitted within the space that would have been occupied by the obstruction described in the NPO then its impact on the dominant owner’s light must be less pronounced and he or she would not be disadvantaged.<sup>36</sup>
- 6.139 **We recommend that, if a person fails to respond to an NPO by issuing and serving proceedings by the date specified in the notice (which must not be earlier than eight months following the date the NPO is served), then he or she will no longer be able to be granted an injunction in respect of any development that fits within the obstruction specified in the NPO.**
- 6.140 That recommendation is put into effect by paragraphs 7 and 9 of the Schedule to the draft Bill.

#### **THE PROVISION OF INFORMATION RELATING TO AN NPO**

- 6.141 We suggested in the Consultation Paper that a developer should be obliged to provide a copy of the material accompanying the NPO to any person who reasonably requests it and whose rights may be affected by the existence of the NPO.<sup>37</sup>

<sup>36</sup> It may of course be that the dominant owner does not like the smaller building. But that is not something against which the dominant owner is entitled to be protected, beyond the generic protection in the planning system.

<sup>37</sup> Consultation Paper, para 6.27.

- 6.142 Very few consultees addressed this point directly. The British Property Federation said that our provisional proposal would be “fair and unlikely to be unduly burdensome”. However, we have concluded that an obligation to provide information is unnecessary and unworkable. The recipient of an NPO will be able to provide copies of it to potential purchasers. It is not obvious how to frame a sanction where a developer fails to comply with the obligation; in particular, it would be disproportionate for failure to provide information to affect the validity of the NPO.

## **COSTS**

- 6.143 We made no proposals in the Consultation Paper regarding costs. Instead we asked for consultees’ views, particularly in respect of the situation where a developer abandons its project after serving an NPO (and after the dominant owner has obtained professional advice, and/or issued proceedings); or where the developer changes its plans in a way which alters the effect of the proposed building on the dominant owner’s light.

### **Consultees’ comments**

- 6.144 Consultees’ comments focussed on whether the developer should be responsible for the dominant owner’s pre-action costs generally, and the majority of the consultees were of the view that the developer should pay. It is already standard practice in negotiations surrounding rights to light for a dominant owner to receive an undertaking from the developer or its solicitor as to pre-action costs, such as surveyors’ or solicitors’ fees. The City of Westminster and Holborn Law Society said:

The procedure should contain an offer by the developer to meet all the dominant owner’s reasonable costs and expenses (ie, of experienced surveyors, solicitors and counsel) in any event up to the point where the dominant owner has all the facts and advice to enable him to reach a properly advised settlement. Perhaps security for those costs and expenses should be provided also by the developer, for example by paying an appropriate sum to his solicitors to be held as stakeholders. The underlying sanction against the unreasonable objector should be that the court in the ensuing proceedings may order that the objector should not have his costs of the proceedings where he would otherwise be entitled to them in any event.

- 6.145 The British Property Federation said:

To further protect the dominant owner, the costs of serving the notice and the reasonable costs of the adjoining owner taking advice should normally be covered by the developer. A suggestion is that a dominant owner’s costs could become payable upon either the deemed withdrawal of an NPO (by reason of the service of a fresh notice) or the express withdrawal of such a notice. Those costs could be paid on the standard basis, to be assessed by the Lands Chamber if not agreed by the parties.

- 6.146 Nabarro LLP cited current practice, and argued that the court's general discretion on costs was sufficient to result in a fair outcome, and that no special provision was needed for costs. Anstey Horne said:

Although there is no statutory obligation upon the developing party to pay the reasonable legal and surveying fees of the dominant owner, it is now common practice for fee undertakings to be put in place to that effect. If no such undertakings are given there is less likelihood of negotiations progressing promptly and in truth that would place an unreasonable and unfair burden on the dominant owner.

- 6.147 It added that any undertakings required to be given by the developer should be on the basis of "reasonable fees", leaving it open to the parties to argue about what is reasonable at a later stage.

- 6.148 Allen & Overy LLP took the view that:

Rather than have a complex series of rules stating what the position should be regarding the costs liability and adjoining owner's right to an injunction in each of these circumstances, a straightforward solution would be to require the developer to offer to pay a sum of money (say up to £5,000 plus VAT) for the adjoining owner to take his own independent advice in relation to the notice.

- 6.149 The Association of Light Practitioners also supported making the developer responsible for the dominant owner's "reasonable costs of considering and responding to any notice", on the basis that this would militate against any sense of injustice caused by having to deal with more than one NPO from the developer. However, it added that:

... there is a risk that the NPO procedure will be attractive to a neighbour if they are guaranteed their costs and can preserve their claim to damages in lieu such that neighbours refuse to engage until an NPO has been served... .

- 6.150 Mount Anvil Ltd explained that:

It is essential that there is some form of cap in place regarding a developer's liability to potentially cover the costs of any investigation by rights of light surveyors and solicitors in relation to the NPO.

### **Discussion**

- 6.151 In order to respond intelligently to an NPO, a neighbour would need specialist surveying and, in all likelihood, legal advice to ascertain whether a right to light exists, its scope and whether the development described in the NPO would infringe the right.

- 6.152 Obtaining the necessary advice can be costly. However, the same is true if a landowner chooses to defend its right by applying for an injunction. What we wish to ensure is that there is a clear responsibility on the person serving an NPO to cover the reasonable costs of the recipient incurred in taking advice on the existence and scope of rights to light from which he or she may benefit, and matters arising from the NPO.
- 6.153 We have considered in detail whether there was any possibility of providing the recipient of a notice, in advance of taking advice, either money or an enforceable solicitor's undertaking to cover the costs of taking the advice, but have concluded neither would be feasible. What costs are "reasonable" will differ from case to case.<sup>38</sup> For example, the advice needed to explore the impact of a multi-phase skyscraper on a large, commercial property with numerous rooms would cost significantly more than an extension on the rear of a public house that blocks light to a neighbour's bathroom.
- 6.154 Post-consultation discussions with solicitors highlighted that they would be unwilling to give open-ended undertakings for "reasonable costs". So any obligation on a developer to ensure that an NPO was accompanied by a solicitor's undertaking to cover such costs would be doomed to failure. Likewise, an obligation to pay upfront the "reasonable costs" (or a portion thereof) would risk debate and disagreement. And if the validity of an NPO were to be based on a subsequent assessment of whether an advance payment (or an undertaking for a specific amount) did, in fact, cover the recipient's reasonable costs (or a portion thereof) then we doubt whether NPOs would be relied upon to give the necessary certainty that a development would be free from injunction.

### **Conclusion**

- 6.155 We have concluded that a developer should have a statutory obligation to cover the reasonable costs of the recipient. While payment of those costs would not be linked to the validity of an NPO, their recovery would be enforceable as a debt.
- 6.156 In practice, we would anticipate that developers will want their solicitors to provide undertakings to cover costs as they fall due (drafted to cover specific sums) in order to encourage recipients to take advice as early as possible in the process, and to encourage negotiation.
- 6.157 **We recommend that a person serving an NPO should be subject to a statutory obligation to cover the recipient's reasonable legal and surveyor costs that are incurred in taking advice on the existence and scope of rights to light from which he or she may benefit and matters arising from the NPO.**
- 6.158 That recommendation is put into effect by paragraphs 13 and 14 of the Schedule to the draft Bill.

<sup>38</sup> For this reason we cannot recommend a cap on the fees payable, as contemplated by Mount Anvil Ltd.

## DAMAGES

- 6.159 Very few consultees commented specifically on our proposal regarding the damages that the dominant owner could receive notwithstanding the loss of the right to ask the court for an injunction on the expiry of an NPO. The only detailed comments came from consultees who had concerns about how the proposal would work in practice. For instance, the Chancery Bar Association said:

The idea that a dominant owner can become (as a result of the operation of the statute) disentitled to an injunction but nevertheless entitled to claim damages in lieu of an injunction is not easy to understand and would require litigation to clarify. Currently, damages in lieu of an injunction are available only where there is jurisdiction to grant an injunction (which may be lost by such things as laches and acquiescence). Following the statutory loss of the right to an injunction, would the right to damages in lieu be invulnerable; thereby, for some purposes, putting the dominant owner in a stronger position than he would otherwise have been? Or might it be necessary (in some sense) to assume the continuance of a right to an injunction merely for the purposes of asking whether an equitable defence to an “injunction” has arisen that would deprive the dominant owner of a right to damages in lieu?

- 6.160 Land Securities commented:

The provision preserving the right to claim damages in lieu of an injunction after a notice is served (whether or not it is objected to) may have unintended consequences. ... This is materially worse than the current position where if a neighbour remains silent and fails to act for a period of one year after the obstruction has occurred, any rights under the 1832 Act (whether to an injunction or to damages) are lost. A similar failure to act in response to an NPO on the other hand means that although the right to an injunction is lost, the right to damages remains.

- 6.161 The Association of Light Practitioners had concerns about the effect that the dominant owner’s entitlement to damages in substitution for an injunction would have upon negotiations. They felt that lawyers might advise dominant owners not to negotiate and to wait for an NPO to be served because it would preserve any claim to damages in lieu of an injunction. The Association of Light Practitioners further noted that:

Generally there is a risk that neighbours will come to believe that they can delay negotiations until a NPO is served, on the basis that there is no duty on them to do anything until the expiry of the periods proposed under the NPO. We believe that would be an incorrect assumption as the court could still take into account the neighbour’s behaviour prior to the service of the NPO when looking at the conduct of the parties under the proposed new statutory test.

- 6.162 Nabarro LLP suggested that, in order not to lose the entitlement to damages in substitution for an injunction, the dominant owner should have to make the claim for those equitable damages (as distinct from common law damages) during the period to respond to an NPO. It argued that a recipient of an NPO – who only wanted money – might allow an NPO to lapse; suggesting that, in doing so, it could not be later suggested that the recipient should have applied for an interim injunction to prevent the interference with light (with attendant costs and the potential of having to provide a significant undertaking to cover the developer's costs and losses if the injunction is refused).<sup>39</sup> It felt that the NPO procedure could leave the risk of large equitable damages having to be paid to an uncertain point in the future.

### **Discussion**

- 6.163 We think that the provisional policy set out in the Consultation Paper regarding the continued availability of damages may have been misconstrued by some consultees.
- 6.164 Our intention was that, where the court was incapable of granting an injunction as a result of an NPO, the court should still consider whether, absent the NPO, it would have granted an injunction. Where it would have granted an injunction (but could not as a result of the NPO procedure) the court should consider the award and measure of equitable damages.<sup>40</sup>
- 6.165 On the other hand, where the court concluded that it would not have granted an injunction (for example, when it had no jurisdiction to grant an equitable remedy), the NPO would have no effect. There was no intention of guaranteeing the dominant owner damages based on a profit-share method. Common law damages might still, of course, be awarded.

### **Conclusion**

- 6.166 We have concluded that we should proceed with the policy proposed in the Consultation Paper. The fact that a party has failed to respond to an NPO by issuing proceedings should not affect the availability or quantum of damages awarded in subsequent proceedings (and the effect of the NPO should be ignored in addressing those issues).
- 6.167 In answer to Nabarro LLP's concern, we think our recommendation leaves a developer in a better position than it would otherwise have been. If landowners did not respond to an NPO (so that they could obtain damages instead) then we regard that as a successful use of the NPO procedure – the developer has been able to proceed with the development, without the risk of the development's catastrophic failure. If, for example, the landowner leaves a claim for damages too long (so that a court would not have considered the grant an injunction) then that landowner would not receive damages in lieu of that injunction.

<sup>39</sup> See n 35 above.

<sup>40</sup> See para 5.7 and following above.

6.168 **We recommend that if a party fails to respond to an NPO by issuing and serving proceedings, that should not affect the availability or quantum of damages awarded in subsequent proceedings for the infringement of the dominant owner's right to light (and the effect of the NPO should be ignored in addressing those issues).**

6.169 That recommendation is put into effect by paragraph 12 of the Schedule to the draft Bill.

#### **THE "SHELF-LIFE" OF THE NPO**

6.170 We suggested in the Consultation Paper that an NPO should be valid for five years following its service on the dominant owner. The NPO would therefore be effective in protecting a developer from an injunction only if the obstruction was put in place within that five-year period.

#### **Consultees' comments**

6.171 Only a few consultees addressed this issue directly; for example, Herbert Smith Freehills LLP agreed that a "shelf-life" would be required and said:

We believe five years is probably the right period. Large developments can take many years to bring to completion and the NPO process is likely to be used relatively early in the development programme. For the very largest developments five years may not be long enough and we wonder whether there needs to be some form of saving provision protecting a developer who has legitimately followed the NPO process but hasn't fully completed the "obstruction" and therefore faces the risk of an injunction being resurrected.

6.172 Another consultee, in a confidential response, said:

We consider that the five year time limit for putting into effect the obstruction ... is correct, subject to a proviso that we wonder whether further provisions are needed to protect a servient owner that has substantially implemented the scheme to which the NPO relates but has not yet put in place the actual physical 'obstruction' at the expiry of the five years period? We suggest this as we can foresee potentially difficult consequences resulting on large schemes with long lead in and construction periods.

6.173 But some consultees disagreed with the principle of a "shelf-life". Berwin Leighton Paisner LLP said:

We do not understand the rationale for a "shelf life" of 5 years for the injunction immunity afforded by a failure to serve a counternotice. In relation to a complex site there may be a mixture of counterparties, some of whom have objected and some have not. There may also be a complex planning situation to work through. In these circumstances, it is important that as much certainty as possible is achieved. To have a situation where the right to an injunction is lost but may then revive is not helpful to making progress on a development. Once the right to an injunction is lost, it should be lost forever.

## Discussion

- 6.174 We are not convinced that it is right for the NPO to result in the permanent loss of the potential for an injunction by the owner.
- 6.175 Our main concern relates to changes in circumstances. A dominant owner may choose not to respond to an NPO because he or she is content with the proposed development. The ideal course would then be to negotiate with the developer to withdraw the notice, and to enter into a deed releasing the right to light to the extent required for that particular development. However, there may be occasions when this route is not taken. If the development then does not take place, another developer may take advantage of it later. In changed circumstances, with a different developer, possibly different planning policies and generally in an unknown future, the dominant owner may no longer be content to have given up the potential for an injunction.
- 6.176 We also think it likely that dominant owners would be more aggressive in protecting rights where the loss of the potential for an injunction is permanent.
- 6.177 If there is to be a shelf life, how long should it be? In the Consultation Paper, we suggested five years; but we are alive to the concerns of those consultees who are concerned that some large developments may not be completed (to the point where the dominant owner's right is infringed) within this timeframe.
- 6.178 Whatever period is chosen could result in hard cases. Developments may stall or suffer unexpected delay. But if we were to provide for the protection from an injunction to be extended where developments are commenced, but left unfinished, then we introduce uncertainty for both parties.
- 6.179 Certainly we now think that the five-years' protection proposed in the Consultation Paper is too short. The consequences of the potential for an injunction re-emerging mid-development would be catastrophic for the developer. It is important that the protection afforded by an NPO is sufficient to give confidence to those who would use them that their developments will be built.
- 6.180 We have concluded that we should recommend a 10-year period of protection against injunction. We think that this strikes a good balance between developers and dominant landowners. This is, if not arbitrary, to some extent subjective; but we feel that 10 years is a realistic timeframe in which developments should be concluded, and it would encourage servient landowners to use the NPO procedure in connection with a "real" development. In the interests of certainty for all parties<sup>41</sup> the period should run, not from the date of service as we originally suggested, but from the date specified in the NPO as being the date by which the dominant owner must commence and serve proceedings or agree with the servient owner an extension of time to decide.

<sup>41</sup> Including those managing local land charges registers, who will wish to remove entries for NPOs that can no longer have any effect.

- 6.181 The 10-year shelf-life would mean that the time for the dominant owner's response cannot be extended beyond 10 years starting from the date specified on the face of the NPO as being the date by which the dominant owner must commence and serve proceedings:<sup>42</sup> we think that is rather unlikely in any event. It is more important to have certainty concerning the period for which the NPO is active.
- 6.182 **We recommend that an NPO provide protection against an injunction being granted for a period of 10 years from the deadline for response in the NPO.**
- 6.183 That recommendation is put into effect by paragraphs 7 and 11 of the Schedule to the draft Bill.
- 6.184 Complications arise if the servient or dominant owner sells or lets whole or part of their land. Clearly successors to the dominant owner are bound by the NPO after it is registered as a local land charge, but provision has to be made for consequential matters, such as the payment of costs or the withdrawal of an NPO where a dominant owner has disposed of its land in whole or in part. Similar issues arise for the servient owner. Part 5 of the Schedule to the draft Bill makes provision for these circumstances and a detailed explanation can be found in the explanatory notes for the draft Bill (see Appendix B).

<sup>42</sup> See para 6.99 and following above.

# CHAPTER 7

## BRINGING RIGHTS TO LIGHT TO AN END

### INTRODUCTION

- 7.1 Rights to light, like all easements, are resilient and they can be brought to an end in only a limited number of ways. This Chapter concerns the termination of rights to light by abandonment or by statutory powers.<sup>1</sup>

### ABANDONMENT OF AN EASEMENT

- 7.2 Abandonment of an easement occurs when a dominant owner ceases to use it and intends to abandon the right permanently. Whether abandonment occurs is a question of fact.
- 7.3 Various factors can lead a court to infer that abandonment has occurred.<sup>2</sup> However, the intention to abandon always has to be proved by anyone who claims that an easement has been abandoned, and proving someone else's intention is difficult. This led us to make the following recommendation in the Easements Report:

We recommend that where an easement ... has not been used for a continuous period of 20 years, there should be a rebuttable presumption that it has been abandoned.<sup>3</sup>

- 7.4 We considered in the Consultation Paper how the law of abandonment operates in relation to rights to light specifically. Problems arise when a window (that benefits from a right to light) has been blocked up, or the building has been demolished and a new building constructed with windows in the same place, or similar places, or different places. Has the right to light been abandoned or does it survive to benefit the new window? A right to light can survive the alteration or movement of an aperture, and so it can survive demolition and re-building, in some circumstances.<sup>4</sup>
- 7.5 In deciding whether the dominant owner's right to light survives the movement or expansion of apertures it is necessary to ask whether the new aperture receives substantially the same light – described by Lord Justice Cotton as the same “cone of light”<sup>5</sup> – as previously was the case.<sup>6</sup>

<sup>1</sup> Rights to light will also come to an end if the dominant and servient owners agree that this should happen, or if both the dominant and servient land come into the ownership of a single owner. We do not propose any change to these methods of ending rights to light, and do not consider them here.

<sup>2</sup> For example, where a dominant owner has made alterations to the dominant land which make the enjoyment of a right impossible or unnecessary. See the Easements Report, para 3.213.

<sup>3</sup> Easements Report, para 3.230.

<sup>4</sup> See the Consultation Paper, para 7.12 and following.

<sup>5</sup> *Scott v Pape* (1886) 31 Ch D 554, 569.

<sup>6</sup> See the Consultation Paper, para 7.27 and following.

- 7.6 We concluded that there were peculiarities and problems with the current law, and that lawyers and surveyors could find it:

... extremely difficult ... to advise clients as to whether a right to light will have been abandoned, or instead “transferred” to a new building that has been built on the same site.<sup>7</sup>

- 7.7 We went on to consider the following possibilities for reform.

- (1) A prohibition on a right to light surviving the alteration of an aperture.
- (2) A revised test for establishing when a right to light survives the alteration of an aperture.
- (3) The introduction of a registration requirement.<sup>8</sup>

- 7.8 However, with some regret, we concluded that none of the options considered would result in an improvement of the current law. In the absence of a provisional proposal, we asked for consultees’ views on whether reform was needed and how the current law could be improved.<sup>9</sup>

#### **Consultees’ responses**

- 7.9 Nearly forty consultees considered abandonment of a right to light. Whilst most agreed that the existing law was problematic, around one-third concluded, as we did, that legal reform – whether along the lines we considered or otherwise – would not improve the position. The Royal Institution of Chartered Surveyors, for example, indicated that:

... it is difficult to imagine how such a technical matter can be better governed in a revised but acceptable form.

- 7.10 The Association of Light Practitioners took the view that the issues may best be resolved by a change of practice amongst light surveyors:

This area needs clarity but we recognize that this is likely to arise through [an] agreed protocol instead of through a change in the law. It hinges around when are rights likely to be transferred?

- 7.11 However, around 20 consultees were keen to see some reform and many raised strong arguments in support. Suggestions fell roughly into three categories:

- (1) reform to address the position where use of a right to light has ceased;
- (2) reform to clarify when a right to light should survive alteration or rebuilding; and
- (3) introduction of a registration regime.

<sup>7</sup> Consultation Paper, para 7.31.

<sup>8</sup> Consultation Paper, paras 7.33 to 7.43.

<sup>9</sup> Consultation Paper, para 7.48.

- 7.12 There was almost no support for an outright prohibition on rights to light surviving alterations of apertures. As the Property Litigation Association (one of only a few consultees to consider prohibition) explained:

In terms of improvement of the current law, a prohibition on a right to light surviving the alteration of an aperture would be the most certain way of addressing this issue. However, this is draconian, would deny the owner of the right the ability to continue to enjoy the right following demolition of the dominant property and is not generally supported by our respondent members.

***Reform to clarify when a right to light should survive alteration or rebuilding***

- 7.13 Around one quarter of consultees wanted to see the law clarified. Several suggested the introduction of statutory maxima for the amount of movement, or change in size of an aperture, that would allow a right to light to survive. It was argued that this would give greater certainty to landowners and their advisors by furnishing a cut-off point beyond which it would be unquestionable that an aperture could still enjoy a right to light.

- 7.14 Favoursing such an approach, the Bar Council said:

Although it would be potentially arbitrary to set out an upper limit for movement of apertures, people rebuilding their properties would at least know their limitations and less litigation would be conducted over the percentages of overlap between previous and altered apertures.

***Introducing a registration regime to avoid a right to light being lost***

- 7.15 Other consultees argued for the creation of an obligation to register a right to light where an aperture was altered or demolished. Failure to do so by a fixed point in time would result in the right being lost. Reform along such lines was seen as a means of making the law less cumbersome and difficult to apply.

- 7.16 Herbert Smith Freehills LLP, for example, expressed its support for such an approach in the following terms:

If an owner intending to block up windows, with some degree of permanence, or intending to demolish a building which contains benefited windows, were required to register their location, dimension and plane in advance in order to prevent the easement becoming unenforceable in the future, that would appear both a proportionate requirement and conducive to providing the evidence required for survivorship of the easement to transferred windows, ie, clarity.

***Reform to address the position where use of a right to light has ceased***

- 7.17 Several consultees argued for a fixed time frame following an alteration in which a right to light must be “re-used” or lost. For example, Dr Peter S Defoe (calfordseaden LLP) felt that:

If ... an opening is blocked with masonry for more than 1 year then the right ought to be abandoned.

7.18 Anstey Horne suggested an approach that would mirror the recommendation made in the Easements Report, namely that there should be a rebuttable presumption of abandonment where an easement is not used for a continuous period of 20 years.<sup>10</sup>

7.19 Other consultees, including the British Council for Offices and the British Property Federation, supported a rebuttable presumption of abandonment but felt that 20 years was too long, and that five years would be more appropriate.

7.20 However, Nabarro LLP specifically rejected the approach taken in the Easements Report:

... our view is that certainty is required and a rebuttable presumption of abandonment after a fixed period of time is no better than no presumption at all, because the developer will still face the uncertainty that the dominant owner may be able to prove that it had no intention to abandon.

### **Discussion**

7.21 Despite the absence of any provisional proposal regarding the reform of abandonment in the Consultation Paper, most consultees wanted to see some change made to the law. However, there was no consensus as to what form it should take.

7.22 What is clear from consultees' responses is that there is negligible appetite for any reform that wholly prevents rights to light being capable of transfer from one building to its replacement following demolition. We agree, and we say no more about it here.

7.23 We have, however, reached the view that we are able to recommend some reform, albeit in a very limited fashion. We consider here each of the three areas highlighted by consultees above, and conclude with a recommendation for reform.

### ***Clarifying the law on rights to light surviving alteration or rebuilding of the dominant property***

7.24 We are aware of the difficulties experienced by landowners and their advisors in working out whether a right to light survives the alteration of a property – whether this takes the form of apertures benefiting from rights to light being enlarged, reduced or moved, floor levels being altered or the dominant building being completely reconstructed.

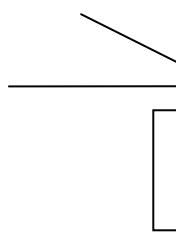
<sup>10</sup> See the Easements Report, paras 3.212 to 3.231.

7.25 We can understand why a number of consultees argued for certainty by requesting statutory limits on transference of rights to light. However, we cannot easily determine how this could be framed in statute. Reconstruction of a building can take an infinite number of forms. We are doubtful that a test could be framed that does not lead to greater complications, uncertainty and hard cases than the current law.

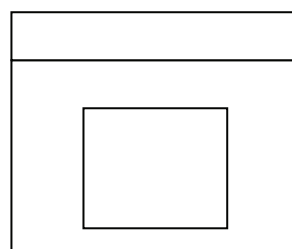
7.26 To illustrate this, we use an example:

*Fig 4*

Before development

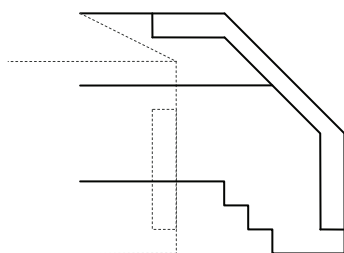


*Side view*

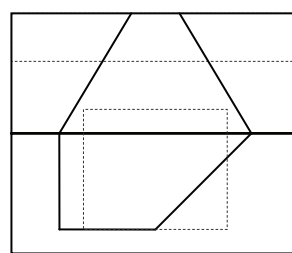


*Front view*

Following development



*Side view*



*Front view*

Prior to development, a property has a rectangular window set into a vertical wall. The property benefits from a right to light; the light passes through the window.

The front wall and roof of the property are demolished. A new wall is built three metres further forward than the original and an irregular shaped window is installed as shown. The first floor is lowered and the ground floor has steps added before reaching a height above that which existed before the redevelopment was undertaken.

- 7.27 The law is clear that no alteration of the buildings on the dominant land can change the right to light so as to place a greater burden on the servient land.<sup>11</sup> It is also clear that for a right to light to survive, the new property must receive substantially the same light as the old.<sup>12</sup> In the example above, the new window, if it is comparable to the original at all, has undergone rotation and expansion on multiple axes, and movement on at least one, and possibly several planes (depending upon how the movement is viewed). The first floor has moved directly down, but the ground floor now has stairs and part of it is raised.
- 7.28 We have been unable to frame a statutory test that could determine whether there is a transference of any right to light in these circumstances that would be fair and easy to apply, and which would allow for the scope of the right to be understood in its new context.
- 7.29 In reaching this conclusion, we note Andrew Francis' response in which he felt there was little that could be done to improve the law and the "well established principles, which lie at the heart of all easements" and that, where transferred rights were an issue, the "good sense" of surveyors meant that solutions were found. We also highlight the response of the Association of Light Practitioners who commented that:

... the difficulty with the "cone of light" concept is that it has been expressed historically as a section drawing through the affected room and development site ie a 2-dimensional section, but this doesn't accurately capture the 3-dimensional passage of light flowing over and around obstructions to a source point. There may be a need to try to devise a new method of measurement which fits within the Waldram framework ... for these particular circumstances.

- 7.30 We agree. We think the answer lies not with the imposition of a new statutory test, but through the work of surveyors and the development of surveying practices to help the courts to determine when it can be said that substantially the same light continues to be enjoyed by a property through new apertures.

### ***Introduction of a registration regime***

- 7.31 We explored in the Consultation Paper the possibility of imposing a registration requirement on dominant owners. It could operate by way of a pre-condition to a right being transferred where buildings or windows are altered. The idea is simple: if you are not using a right to light then register it, or lose it. The benefit of a registration requirement would be to make publicly available the existence of a right. However, we dismissed the possibility of introducing a registration requirement, noting that:

<sup>11</sup> *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 203 by Lord Davey and 211 by Lord Lindley; *Ankerson v Connelly* [1906] 2 Ch 544, 547; *News of the World Ltd v Allen Fairhead and Sons Ltd* [1931] 2 Ch 402, 406.

<sup>12</sup> *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch D 757, 765-768.

... this option does not ... deal with the concerns about the current law. The introduction of a registration requirement would deal only with the dominant owner's intention to keep the right – it would not address whether an altered aperture is legally capable of continuing to benefit from a right to light.

... There may be further practical difficulties, such as the level of detail that would need to be specified [in the application for registration of the right], and the effect of failing to supply enough detail.<sup>13</sup>

We also noted the difficulty in defining the trigger that would cause a dominant owner to have to apply to register the right to light.

- 7.32 Furthermore, whilst registration might make clear that a right to light was claimed, its scope and enforceability may not be obvious. These concerns arise because of the way in which an owner's register of title works, and the way in which Land Registry records interests benefiting an estate.
- 7.33 Where the owner of land seeks to register the benefit of an easement acquired by prescription then Land Registry will, if it considers it "more likely than not that the claimant is entitled to apply" for the registration to be made, serve various notices on those who appear to be interested in the burdened land.<sup>14</sup> If no objection is received to the notices, then Land Registry will make the entry.
- 7.34 This may give rise to a number of difficulties. First, it may be difficult to satisfy the registrar of the existence of the prescriptive right, particularly if the right claimed relies upon the position of windows and buildings that no longer exist. In some cases the registrar will make a qualified entry on the dominant owner's title,<sup>15</sup> which will not guarantee the scope and enforceability of a right and so will not meet the objectives of registration in these circumstances.

<sup>13</sup> Consultation Paper, paras 7.42 and 7.43.

<sup>14</sup> See Land Registry, *Practice Guide 52 – Easements claimed by prescription* (June 2014) paras 3.1 and 3.2. The guide is available from <https://www.gov.uk/government/publications/easements-claimed-by-prescription> (last visited 18 November 2014).

<sup>15</sup> Where the burdened land is unregistered, Land Registry notes that it is likely to make the following entry:

The registered proprietor claims that the land has the benefit of a right [terms of right as claimed by claimant]. The right claimed is not included in this registration. The claim is supported by [dates and details of statement(s) of truth or statutory declaration(s) and who has made them] (See Land Registry, *Practice Guide 52 – Easements claimed by prescription* (June 2014) para 3.2).

Regardless of the registration status of the servient land, Land Registry has a general power to enter a qualified entry. The Land Registration Rules 2003, SI 2003 No 1417, r 73A(5) provide that:

Where the registrar is not satisfied that the right claimed is a legal estate which subsists for the benefit of the applicant's registered estate, the registrar may enter details of the right claimed in the property register with such qualification as he considers appropriate.

- 7.35 Accordingly it is not simply a matter of registering the fact that the dominant land benefits from an easement by “[filing] plans indicating the position and dimensions of the demolished windows” as Allen & Overy LLP suggested.<sup>16</sup>
- 7.36 Second, there is the need to serve potential servient owners. These may not just be immediate neighbours; in order to protect a right to light a large number of landowners interested in nearby land, not only immediate neighbours but potentially landowners one or more streets away, may have to be identified and served. This follows from the fact that a right to light, unlike a right of way, is not identified simply by a line on a plan.
- 7.37 Third, there is the possibility of opposition from potential servient owners. Where an application to register the benefit of a right to light is opposed, then one of three things can happen:
- (1) the application can be withdrawn by the dominant owner;
  - (2) the dominant and servient owner can seek to settle any dispute directly; or
  - (3) the dispute can be referred to the Land Registration division of the Property Chamber of the First-tier Tribunal.<sup>17</sup>
- 7.38 Finally, while registration is likely to be good evidence of a person’s intention not to abandon a right to light, it does not guarantee that the right transfers as a matter of law. It may encourage the entry onto the register of misleading or inaccurate references to easements that do not, following the rebuilding of a property, benefit it.
- 7.39 So an obligation to protect a right to light by registration on demolition and rebuilding or other alteration will potentially cause considerable expense and may trigger disputes where previously there were none.
- 7.40 Accordingly, we do not want to recommend the introduction of a registration requirement as a condition of the survival of the right to light in cases where the window through which the light passes is changed in size or position.

***Where use of a right to light has ceased***

- 7.41 Several consultees supported reform to terminate rights to light that have ceased to be used after a period of time.
- 7.42 We did not consider this possibility directly in the Consultation Paper. Instead we pointed out the proposal made in the Easements Report to raise a presumption of abandonment after 20 years of non-use.

<sup>16</sup> See para 7.31 and following above.

<sup>17</sup> See Land Registry, *Practice Guide 52 – Easements claimed by prescription* (June 2014) para 5.

- 7.43 Determining whether abandonment has occurred is unusually difficult for rights to light in comparison to other easements. There is no physical evidence that light passing across the servient land was being enjoyed by the dominant land. Furthermore, even if the servient landowner is aware that the light was being enjoyed by the dominant land, there may be no evidence available to him or her to help determine the scope of the right to light.<sup>18</sup>
- 7.44 We do not think we can go so far as to recommend that a right to light that has not been used for a particular length of time should be deemed to be abandoned and effectively terminated automatically. To do so would be unfair to those who have ceased to use a right to light, whether by accident or design, but who are prevented from re-using it through no fault of their own. This may happen where, for example, a property is destroyed by fire but a dispute over insurance or planning means that the property is not rebuilt, and the right to light is not re-used for a number of years.
- 7.45 Instead, we are inclined to recommend a modification to the reform proposed in the Easements Report such that a presumption of abandonment of a right to light will arise after a period of non-use by the dominant owner, however that occurs. Because this is a minor modification of the policy expressed in the 2011 Easements Bill, our recommendation is for an appropriate amendment to be made to that bill prior to its introduction into Parliament.
- 7.46 The period after which the presumption will arise is necessarily arbitrary. We suggest that the period should be five years. This is sufficiently long for a typical dominant owner to be able to re-use the right to light (should he or she so wish), or to undertake, or begin undertaking, actions that make clear his or her intention to do so in the future.<sup>19</sup>
- 7.47 **We recommend that the 2011 Easements Bill be amended prior to its introduction to provide that where a right to light has not been used for a continuous period of five years, there should be a rebuttable presumption that it has been abandoned.**
- 7.48 This recommendation is not intended to supplant the general law relating to abandonment. The five-year period of non-use after which the presumption of abandonment would arise will not prevent a court from establishing a dominant owner's intention to abandon a right to light before that period has elapsed. So, by way of examples, where a dominant owner:
- (1) consciously and apparently permanently blocks the aperture through which light passed (for example, by bricking up a window); or
  - (2) demolishes a building and commences the construction of another building that is incapable of benefiting from the pre-existing right to light;

<sup>18</sup> For example, where a property has been demolished.

<sup>19</sup> For example, the dominant landowner may have applied for fresh planning permission or be in the process of constructing the building that will ultimately benefit from the right to light.

then a court may conclude that the evidence is such that it can infer the necessary intention on behalf of the dominant owner to abandon the right to light even though only a relatively short period of non-use has elapsed.

## **SECTION 84 OF THE LAW OF PROPERTY ACT 1925**

- 7.49 Section 84 of the Law of Property Act 1925 (“section 84”) enables the Lands Chamber to modify or discharge restrictions on the use of land – generally restrictive covenants – but only where certain statutory grounds are met.<sup>20</sup>
- 7.50 Those grounds are set out at paragraph 7.75 below. They are quite limited; essentially they enable the Lands Chamber to modify or discharge a restriction only where it has the consent of all interested persons, or where it concludes the restriction fails to or can no longer secure any real benefit to anyone. It is never the case that rights can be discharged simply because it is in the public interest to do so.<sup>21</sup> Where a restriction is modified or discharged, section 84 provides that the Lands Chamber may direct a payment to be made to the person with the benefit of the restriction.<sup>22</sup>
- 7.51 We made a recommendation in the Easements Report that the jurisdiction of the Lands Chamber should be extended to enable it to make orders discharging or modifying easements.<sup>23</sup> Our recommendation only applied to those easements created after its enactment. We explained this limitation as follows:

... to extend the jurisdiction to interests already in existence would risk contravening Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. That is because the benefit of an easement or profit currently includes the freedom to bargain for its release ... . So to bring existing easements ... within the scope of reform would be, in effect, to strip value out of existing property rights.<sup>24</sup>

<sup>20</sup> For a consideration of the relevant grounds, and how they might operate in the context of rights to light, see the Consultation Paper, para 7.68 and following.

<sup>21</sup> Section 84 permits the Lands Chamber to order modification or discharge of a restrictive covenant where the continued existence of the restriction impedes some reasonable use of the land where its continuation is contrary to the public interest, but only where money is an adequate compensation for the loss suffered. See the Law of Property Act 1925, s 84(1)(aa) and (1A) and the Consultation Paper, para 7.72 and following.

<sup>22</sup> Section 84 refers to such payments as “consideration” (see the Law of Property Act 1925, s 84(1)). “Consideration” has a tendency to suggest a price above and beyond the damage caused. However, we understand that the Lands Chamber’s approach to the assessment of “consideration” has tended towards diminution in value. The area is complex and was examined in the context of the Easements Report, where we concluded that no change to the wording used in the 1925 Act should be made. We use “compensation” in the text that follows.

<sup>23</sup> Easements Report, para 7.35.

<sup>24</sup> Easements Report, para 7.32.

7.52 We discussed this limitation in detail in the Consultation Paper on Rights to Light. Our conclusion was that the recommendation in the Easements Report to limit reform to easements created post-reform was “over-cautious”.<sup>25</sup>

7.53 Accordingly, we provisionally proposed the expansion of the jurisdiction of the Lands Chamber to modify or discharge restrictions affecting land under section 84 to include rights to light currently in existence.<sup>26</sup>

7.54 We see the extension of the jurisdiction of the Lands Chamber to discharge or modify rights to light as being of particular importance. Rights to light have proliferated; unlike most easements, they arise without the dominant owner taking any action and often without the knowledge of the servient owner. The easements that arise are resilient. We highlighted in the Consultation Paper that:

... [a dominant owner] may seek to exploit the profit-making potential of a right to light, rather than using it to protect the amenity value of light to his or her property.<sup>27</sup>

An expanded jurisdiction for the Lands Chamber would go some way to mitigating this concern. It would mean that where a dominant owner was holding out for substantial compensation on the basis of a right that was essentially obsolete (say, a right benefiting a small window in a building used as a warehouse that has been boarded up for some time) the servient owner could apply for the right to be discharged. Were that to happen, then compensation would be likely to be awarded on a loss in value basis.<sup>28</sup>

### **Consultees’ responses**

7.55 The vast majority of consultees welcomed our provisional proposal. Many did so for the reasons outlined in the Consultation Paper, and/or highlighted the potential for the proposal to facilitate socially and economically beneficial development.

7.56 The Bar Council agreed, commenting that:

The Lands Tribunal is already well versed in modifications to covenants and we consider that a specialist tribunal to deal with such technical matters is preferable for cost and for process. It also accords with the increasing use of specialist tribunals.

7.57 Andrew Francis (Serle Court Chambers) explained that, in his experience:

... rights of light are unduly troublesome in many cases and in reality their benefit to the dominant owner may be negligible or non-existent. To counter the numerous extortionate ransom demands and to lessen the huge economic cost ... the proposal creates an effective remedy.

<sup>25</sup> Consultation Paper, para 7.84 and following.

<sup>26</sup> Consultation Paper, para 7.132. The reasoning is complex. For more detail, see the Consultation Paper, para 7.112 and following.

<sup>27</sup> Consultation Paper, para 7.116.

<sup>28</sup> See n 22 above.

7.58 Hunters (solicitors) suggested that the mere potential for an application to the Lands Chamber would encourage settlements and facilitate the availability of insurance cover against right to light claims. Andrew Francis (Serle Court Chambers) expressed similar views, noting that the possibility of such an application “tempers many demands” for releases of restrictive covenants which fall within the present section 84(1) jurisdiction.

7.59 Other consultees, although in favour of our provisional proposal, qualified their support. John McGhee QC (Maitland Chambers) gave his support subject to two reservations: that the Lands Chamber has sufficient resources to deal with applications quickly and efficiently, and that the Lands Chamber could also judge whether an injunction ought to be awarded in the same proceedings, to avoid the costs and delays associated with having to raise the issue at a separate hearing. The City of London Corporation also asked that we consider this latter possibility.

7.60 A number of consultees disagreed with our provisional proposal altogether. For example, the UNITE Group plc said:

... this is potentially a Trojan Horse for developers for little (realistic) upside. The opportunities to apply to the Lands Chamber for an order to modify or discharge existing RTL would (it seems to us) be very limited and, of those applications that do run, we think there is a danger of an inconsistent approach of the Courts and the Lands Chambers which may create uncertainty.

7.61 The Chancery Bar Association said that it was neutral on whether reform should be undertaken. However, it went on to note that the Lands Chamber generally took a “conservative approach” towards assessing whether the expected harm resulting from modification or discharge of a restriction would be “substantial” and that it was often difficult to predict the Lands Chamber’s decision or the level of compensation that it may award. It added that the procedure was also “not especially fast” and concluded that:

In our experience advisers regularly conceive of section 84 as a mechanism by which developers can buy out rights of substance. This, section 84 emphatically is not.

## **Discussion**

7.62 Despite some reservations, consultees generally agreed with our proposal for the extension of the Lands Chamber’s jurisdiction to cover rights to light already in existence, and we are content to proceed with a final recommendation.

- 7.63 To address the reservations: we cannot make predictions about the Lands Chamber's resources. Prior to the publication of the Easements Report, we discussed with the then President of the Lands Chamber the recommendation we were minded to make, and he was keen to extend the jurisdiction of the Lands Chamber to cover all easements created after reform. Equally, the current President saw no cause for concern in our proposal to extend the jurisdiction to all rights to light whenever created. Furthermore, the current jurisdiction to modify and discharge restrictive covenants accounts for a small proportion of the Lands Chamber's total workload.<sup>29</sup>
- 7.64 The possibility and impact of parallel proceedings was another issue that we considered in the easements project. It is not new: it already arises where the owner of land benefiting from a restrictive covenant applies for an injunction. In these circumstances the servient owner can apply to court for an order giving leave to apply to the Lands Chamber for the discharge or modification of the covenant and staying the court proceedings in the meantime.<sup>30</sup>
- 7.65 We are not aware of significant difficulties arising from parallel proceedings relating to restrictive covenants, and accordingly we make no recommendation to change the current position (particularly as we have made no such recommendation for easements generally).
- 7.66 We acknowledge that developers could seek to abuse the section 84 mechanism in the hope of forcing dominant owners to compromise rather than incur costs in defending proceedings. However, applications to the Lands Chamber will be realistic only for a limited range of rights to light because of the limited grounds available for modification and discharge.<sup>31</sup> We would therefore expect abuse of the jurisdiction of the Lands Chamber to be a costly and futile exercise. The Lands Chamber has the power to strike out applications where it considers that there is no reasonable prospect of success,<sup>32</sup> and, in making an order for costs, the Lands Chamber can take into account a number of circumstances, including whether it "considers that a party ... has acted unreasonably in bringing, defending or conducting the proceedings".<sup>33</sup>
- 7.67 Indeed, several consultees felt that applications would rarely be made due to the limited nature of the grounds on which the Lands Chamber could order the discharge or modification of rights to light. Certainly we do not envisage more than a minority of rights to light being able to be addressed in this way, and the proposal is not intended to be a way to deal with a significant proportion of them.

<sup>29</sup> One article records that there were 93 section 84 hearings between January 2000 and November 2011: T Sutton, "On the brink of land obligations again" [2013] 1 *Conveyancer and Property Lawyer* 17.

<sup>30</sup> See the Law of Property Act 1925, s 84(9) and, for an example of its use, see *George Wimpey Bristol Limited v Gloucestershire Housing Association Limited* [2011] UKUT 91 (LC) at [5].

<sup>31</sup> See the response of the Chancery Bar Association at para 7.61 above that discusses and dismisses the conception that section 84 is a mechanism that can be used to "buy out rights of substance".

<sup>32</sup> See the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, SI 2010 No 2600, r 8(3)(c).

<sup>33</sup> See the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, SI 2010 No 2600, r 10(3)(b).

- 7.68 Finally, the City of London Corporation queried whether a reference to the Lands Chamber would allow a development to proceed or whether the reference would stay the development. An application to the Lands Chamber, on its own, will not allow a development to proceed while that application is considered. Until the Lands Chamber orders the discharge or modification of the dominant owner's interest, it remains extant. If the dominant owner chooses to ignore its existence (with the expectation that the Lands Chamber will later modify or discharge it) then it will do so at its own risk, including the risk of the dominant owner seeking an injunction.

### **One further step**

- 7.69 It will be clear from what is said above that we have concluded that the Lands Chamber's jurisdiction should be extended to allow it to discharge or modify rights to light, whenever they have been created. This conclusion would, however, leave rights to light at odds with all other easements which, under the recommendation made in our Easements Report, would only fall within the Lands Chamber's jurisdiction if they were created after the enactment of the 2011 Easements Bill.<sup>34</sup>
- 7.70 That distinction is unprincipled. We explained in detail in the Consultation Paper the reasons for having concluded that we were too cautious when we recommended limiting the Lands Chamber's jurisdiction to interests created after the enactment of the 2011 Easements Bill.<sup>35</sup> As a matter of policy, we think that the arguments that we made in support of our recommendation for rights to light are applicable to other easements and profits.
- 7.71 Accordingly, we have concluded that what is required is not an amendment to the 2011 Easements Bill to make rights to light a special case (as we have done above for the presumption of abandonment for rights to light),<sup>36</sup> but a recommendation that the 2011 Easements Bill be amended prior to its enactment so as to include within the expanded jurisdiction of the Lands Chamber all easements and profits, including rights to light, whenever created.<sup>37</sup>

<sup>34</sup> See para 7.51 above.

<sup>35</sup> See the Consultation Paper, para 7.112 and following, and in particular para 7.119 and following and our comments about the protection of possessions under the European Convention on Human Rights. Essentially we have concluded that we were too cautious on this point in the Easements Report.

<sup>36</sup> See para 7.47 above.

<sup>37</sup> See clause 30 of the 2011 Easements Bill; amendment would involve simply deleting the words "created on or after the date on which this Part comes into force" and "created on or after that date" from clause 30(2)(c) and (d) respectively.

- 7.72 Section 84(2) of the Law of Property Act 1925 enables the court to make declarations about the existence and scope of interests.<sup>38</sup> We recommended in the Easements Report that the power for the court to make declarations must be extended to easements and profits à prendre created post-reform, and widened so that the Lands Chamber can exercise the power in certain circumstances.<sup>39</sup>
- 7.73 The conclusion we have reached about modification and discharge of easements and profits à prendre applies equally to that recommendation. Accordingly we have concluded that the 2011 Easements Bill should be amended so that the court and Lands Chamber have power to make declarations concerning easements and profits à prendre whenever they were created.<sup>40</sup>
- 7.74 **We recommend that the 2011 Easements Bill be amended prior to its enactment to provide that the jurisdiction of the Lands Chamber of the Upper Tribunal be extended so as to enable it to make orders for the modification and discharge of easements and profits à prendre, and to make declarations in respect of them, whether created before or after enactment.**

**Additional grounds or amendments to section 84**

- 7.75 The Lands Chamber may order the discharge or modification of a restrictive covenant only where it is satisfied that one or more of the following grounds is met:
- (1) that following a change in the character of the neighbourhood or other circumstances the restriction ought to be deemed obsolete;
  - (2) that the continued existence of the restriction impedes some reasonable user of the land and either does not give those entitled to it any practical benefits of substantial value or advantage or is contrary to the public interest, where money will be an adequate compensation for any loss or disadvantage suffered;
  - (3) that all those entitled to the benefit of the restriction have agreed by their acts or omissions to its discharge or modification; or
  - (4) that the proposed discharge or modification will not injure those entitled to the benefit of the restriction.<sup>41</sup>

<sup>38</sup> Easements Report, para 7.39 and following and the 2011 Easements Bill, cl 29.

<sup>39</sup> See the Easements Report, para 7.49. Our recommendation also extended to land obligations (being a new interest in land that we recommended be created in that Report – see the Easements Report, para 5.63 and following).

<sup>40</sup> Again, the amendment would be straightforward.

<sup>41</sup> See the Law of Property Act 1925, s 84(1) and (1A).

7.76 We recommended in the Easements Report that no change should be made to these grounds.<sup>42</sup> Consultee responses caused us to highlight in the Easements Report that any change to the grounds for discharge and modification was an “emotive and controversial issue”. We noted that:

A number of consultees felt strongly that these should not be changed, so as to ensure that no adjustment is made to the delicate balance that section 84 embodies, between the interests of developers, and those who hold the benefit of restrictive covenants.<sup>43</sup>

7.77 We therefore recommended that easements should be capable of modification or discharge under section 84 on the same grounds as covenants, and that no further grounds were necessary.<sup>44</sup> We explained the decision as follows:

We asked consultees if they thought that additional grounds are required for easements and profits. None were suggested, and we do not recommend any ...<sup>45</sup>

7.78 In the Consultation Paper for this project, we took the view that it would be inappropriate to upset the balance of section 84 by providing grounds that were unique to rights to light. Accordingly, we made no proposals regarding discrete grounds on which the Lands Chamber could modify or discharge a right to light.<sup>46</sup>

### ***Consultees’ responses***

7.79 A number of consultees, however, made suggestions for additional grounds to be added to section 84, applicable solely to rights to light. The British Property Federation suggested that the current grounds were too narrow, and said:

The principal area where a power to discharge or modify would be most useful would be in the context of an impacted neighbour where the premises are commercial, the impact to amenity is extremely limited, and the real purpose is to extract money.<sup>47</sup>

7.80 Berwin Leighton Paisner LLP and Land Securities stated that:

<sup>42</sup> See the Easements Report, para 7.14 and following. We did, however, recommend the creation of new grounds to deal with the novel circumstances presented by the creation of positive land obligations and reciprocal payment obligations (for which see the Easements Report, para 7.61 and following).

<sup>43</sup> Easements Report, para 7.14.

<sup>44</sup> We made a recommendation in the Easements Report, para 7.60 such that, where the Lands Chamber ordered the modification of an easement or profit it must be satisfied that the modified interest will not be materially less convenient to the benefited owner and will be no more burdensome to the land affected.

<sup>45</sup> See the Easements Report, para 7.57.

<sup>46</sup> Consultation Paper, para 7.81.

<sup>47</sup> Derwent London plc favoured a similar extension.

... we are concerned that the “amenity” value of light would always be protected under the current [grounds of section 84] without consideration being given to how substantial that amenity really is – for example, in the modern commercial context where use of artificial light is prevalent.

Additional grounds ought to be added, based perhaps on considerations such as:

- (a) The size and value of the development.
- (b) The benefits accruing to the local economy and community.

7.81 Nabarro LLP appeared to support an extension of the current public benefit ground such that the Lands Chamber could take into account benefits of a development such as “regeneration and job creation”.

7.82 In contrast, the Property Litigation Association and Clifford Chance LLP were opposed to introducing additional grounds for modification or discharge and argued that the current grounds might even be too wide for rights to light. They felt that modification of an existing right to light might be too difficult to deal with, and that in any case the only cases likely to go before the tribunal would concern obsolescence:

Modification of an existing easement may simply be too difficult to deal with and perhaps unnecessary if the sorts of cases to go before the tribunal are essentially about obsolescence arising from abandonment. The only possible reason for modification that we can see would be where a dominant party is claiming light from part of an old window where there is no coincidence between that part and the new window (and where there is coincidence between a different part of the old window and the new window) – the Lands Chamber could in this situation ‘modify’ the right by reducing it to the extent of where there is coincidence between the old and new windows.

They concluded that it might be necessary to restrict the jurisdiction of the Lands Chamber to discharge or modify rights to light to the ground of obsolescence.

### ***Discussion***

7.83 There was no consensus as to how to extend or amend the section 84 grounds insofar as they would apply to rights to light. The suggestions above can be loosely grouped into the following potential grounds for discharge or modification:

- (1) where the dominant property is used for commercial purposes, the impact to amenity is limited, and the real purpose behind the enforcement, or threatened enforcement of the right is to extract money; and
- (2) where the size and value of the development and/or benefits accruing to the local economy and community warrant it.

- 7.84 As regards the first of these suggestions, we struggle to see how the Lands Chamber would be in a position to assess accurately whether the real intention of the dominant owner was to extract money. Moreover, this is not the purpose of the section 84 power, which looks at the quality of the right and not at states of mind.
- 7.85 Nor are we persuaded to recommend the second proposed ground. We take the view that there is already ample scope for the benefits of a given development and the public interest to be taken into account in an application made under the existing public interest ground<sup>48</sup> – which is conditional upon money being an adequate compensation for the discharge or modification of the right concerned. We do not feel it would be appropriate to introduce a similar ground that would allow a servient owner to circumvent this requirement. In reaching this conclusion we are mindful of recent developments in the law that indicate regard should be had to public interest when considering the question of whether or not to grant an injunction.<sup>49</sup>
- 7.86 As for the suggestion to restrict the grounds on which a right to light could be discharged or modified, we see little justification for doing so. We can envisage circumstances where each ground might be relevant and there is little evidence that dominant landowners are demanding change.
- 7.87 Accordingly, we do not recommend any modification or extension of the grounds for modification or discharge of interests under section 84.

#### **SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990**

- 7.88 Section 237 of the Town and Country Planning Act 1990 (“section 237”) is a planning power that, in certain circumstances, allows for a dominant owner’s easements and other interests that affect land to be overridden, allowing developments to proceed where otherwise they could be subject to an injunction.
- 7.89 The section 237 power is exercisable only by local authorities,<sup>50</sup> and only where they have acquired or appropriated land for planning purposes.<sup>51</sup> In the context of section 237, land can be so acquired or appropriated only where:
- (1) the authority thinks that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land; or
  - (2) it is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.<sup>52</sup>

<sup>48</sup> Section 84(1)(aa) read in conjunction with section 84(1A)(b) of the Law of Property Act 1925.

<sup>49</sup> See para 4.20 above, and *Coventry v Lawrence* [2014] UKSC 13, [2014] AC 822.

<sup>50</sup> “Local authority” is defined in the Town and Country Planning Act 1990, s 336.

<sup>51</sup> See the Consultation Paper, paras 2.49 and following and 7.49 and following.

<sup>52</sup> See the Town and Country Planning Act 1990, ss 226, 227 and 246.

- 7.90 A local authority is not permitted to acquire or appropriate land under (1) above unless it is likely to contribute to achieving the promotion or improvement of the economic, social or environmental well-being of their area.<sup>53</sup>
- 7.91 Once the section 237 power has been exercised and the interests affecting the land are overridden, the local authority is free to transfer or lease the land to a developer.
- 7.92 The primary use for section 237 is where a local authority is keen to undertake or promote a development on land that it owns or is able to acquire. A wide range of rights might be involved, including restrictive covenants and easements. The idea behind the provision is that the overriding of private rights is justified by the public interest in the development. Compensation is payable to the holders of the rights overridden, but only on a diminution in value basis.<sup>54</sup>
- 7.93 Section 237 can therefore play an important role in the context of private development<sup>55</sup> and the management of problems relating to rights to light. A number of local authorities are prepared to assist developers by acquiring, or threatening to acquire, servient land so that they can use their section 237 powers in effect to clear the burden of rights of light from the land. Where the land is acquired and the section 237 power exercised, the ownership of the land is then transferred back to the developer. This is legitimate because the subsequent use of the servient land must relate to the planning purpose for which it was appropriated, but the development and subsequent use do not have to be carried out by the local authority itself.<sup>56</sup>
- 7.94 A well-known recent example of section 237 being used in the context of a private development is Land Securities' project at 20 Fenchurch Street, London (known as the "Walkie-Talkie building").<sup>57</sup> The developer was having difficulties in negotiating with neighbouring holders of rights to light, but was able to proceed after the City of London Corporation resolved to use its power under section 237. The threat of the use of the powers was enough, we understand, to bring neighbouring owners to the table to agree compensation with the developer.

<sup>53</sup> See the Town and Country Planning Act 1990, s 226(1A).

<sup>54</sup> See C Fielding and D Rosen "The key to success: section 237" (2011) 1121 *Estates Gazette* 89.

<sup>55</sup> It is often difficult to draw the line between a local authority's development scheme and that of a private developer. It is common for the local authority to work in partnership with private developers. In these circumstances the local authority may promote a broad development scheme and seek a development partner to design, construct and later manage the development as a going concern. For the purposes of this Report "private development" means a development scheme that has emerged from the private sector to be constructed on land that the developer controls.

<sup>56</sup> See the Consultation Paper, paras 2.50 and 2.55.

<sup>57</sup> See P Gower, "City of London to acquire an interest in the walkie-talkie" (11 May 2011) *Property Week* (online). Also see City of London, Report on exercise of authority delegated by court of common council – 20 Fenchurch Street – s.237 – approval of acquisition (9 June 2011) available from [http://democracy.cityoflondon.gov.uk/Data/Planning%20and%20Transportation%20Committee/20110906/Agenda/\\$DA%202%20-%20%2020%20Fenchurch%20Street%20Report.DOC.pdf](http://democracy.cityoflondon.gov.uk/Data/Planning%20and%20Transportation%20Committee/20110906/Agenda/$DA%202%20-%20%2020%20Fenchurch%20Street%20Report.DOC.pdf) (last visited 18 November 2014).

7.95 The decision of a local authority to facilitate private development in this way is of course judicially reviewable, and it has been suggested that the power should be invoked only as a last resort.<sup>58</sup> It therefore involves an element of risk for the local authority; and clearly some local authorities are more willing to contemplate its use than others.

7.96 We examined section 237 briefly in the Consultation Paper. We noted that, as a planning power that can affect a multitude of rights, it was outside the scope of our project:

The [section 237] power is utilised by local authorities in a variety of circumstances, and in respect of numerous different interests affecting land. A recommendation in respect of section 237 generally is too far-reaching for this project, and one limited to the way in which section 237 operates in respect only of rights to light is unprincipled and would be likely to lead to problems being experienced by local authorities ... .<sup>59</sup>

7.97 Our consideration was therefore limited to examining whether the provision was sufficient to counter the problems being caused by rights to light. We concluded that it was not.<sup>60</sup> We did not ask a consultation question about this, but nearly 30 consultees commented on section 237. They did so in a variety of contexts, and many gave examples of their experience or explained how they understood the section to work. We consider their comments below, and then look at two issues raised by the City of London Corporation about the interaction of the NPO procedure<sup>61</sup> and the extension of section 84 with a local authority's powers under section 237.

#### **Consultees' comments on the section 237 power**

7.98 Many consultees concentrated on the perceived faults of section 237 and their experiences of it rather than explaining whether or not they felt section 237 was sufficient to deal with the problems of rights to light. Of those that did address the issue the overwhelming majority indicated, or appeared to indicate, that section 237 was not sufficient.

7.99 Consultees' concerns covered a number of points. Several said that local authorities were reluctant to use the section 237 power and that its use can be slow. The Berkeley Group plc summarised the position as follows:

From time to time we have considered asking a local authority to exercise its s237 ... powers but have never pursued this for the following reasons:

<sup>58</sup> See the Consultation Paper, para 7.60 and, for example, C Fielding and D Rosen, "The key to success: section 237" (2011) 1121 *Estates Gazette* 89.

<sup>59</sup> Consultation Paper, para 7.52.

<sup>60</sup> See the Consultation Paper, para 7.64 and following.

<sup>61</sup> See Chapter 6 above.

a) Local authorities are loathe to do this unless they are deriving a direct benefit themselves as they do not see it as part of their remit to assist a private developer to resolve development risk;

b) If a local authority were minded to exercise s237 powers, the developer loses control of the process which is both time consuming and at risk of judicial review proceedings ... ;

c) The loss of control by the developer may cause more delays than those caused by negotiations;

d) The process may be more expensive than a negotiated settlement as local authorities always seek a full indemnity as to costs so there is no incentive on the authority to manage costs ... .

- 7.100 Other consultees noted that, even if local authorities saw use of section 237 as appropriate in a particular circumstance, they required that the developer first attempt to solve any right to light issues by agreement.
- 7.101 The UNITE Group plc stated that it had never been able to persuade a local authority to use its power under section 237 to resolve rights to light disputes; and that consequently it did not see section 237 as a solution to the problems caused to developers by rights to light. The British Property Federation made similar points, noting that although potentially extremely useful, section 237 could not create the desired “climate of certainty that is conducive [to] development and growth”.
- 7.102 HDG Ltd argued that relying on a local authority’s powers to resolve problems that have emerged from private law is to “load greater cost and administrative burden on local authorities inappropriately”.
- 7.103 A number of consultees who did favour the use of section 237 in this context complained that divergent approaches were being adopted by different local authorities, and argued for guidance to be issued on how local authorities should use their section 237 powers, in order to promote consistency.
- 7.104 Other consultees considered the link between two of our other proposals for reform and section 237. The City of London Corporation queried whether, if use of section 237 is a last resort, it would be necessary first to serve all affected neighbouring owners with Notices of Proposed Obstruction and await the outcome of that process. It was also concerned that since the Lands Chamber under an expanded section 84 would be able to consider discharging or modifying a right to light on the public interest ground, it might never be seen as “necessary” for a local authority to use its section 237 powers. It saw these changes as potentially undermining a valuable tool.
- 7.105 Similarly, the British Council for Offices indicated that its members “want to continue to work with local authorities to use section 237 where necessary to get economically important office developments moving”, and that it “would not want to see the ability of the local authorities to use it negatively affected by the proposals in this Consultation Paper”.

## Discussion

- 7.106 Consultees generally agreed that section 237 is only part of the solution to the problems presented by rights to light. Whilst many noted the drawbacks and limitations of section 237, they did not advocate reform.
- 7.107 The purpose of section 237 is to enable development and we think it is essential that it should operate against all interests in land equally. A reform of section 237 for all interests is outside the scope of this project and, in any case, there is no consensus that any reform is necessary, nor as to what reform would be appropriate for rights to light.
- 7.108 We note the comments of consultees regarding the issuing of guidelines to local authorities regarding the use of section 237 in order to ensure consistency. We will draw those comments to the attention of the Department for Communities and Local Government so that it can consider whether guidelines should be issued. But guidance will not change the law or make any particular use of section 237 lawful.
- 7.109 We acknowledge the points raised on the interaction of our other reforms and section 237 and consider them further here.

### ***Is the use of a Notice of Potential Obstruction a pre-requisite for a local authority's use of section 237?***

- 7.110 There is no requirement in the Town and Country Planning Act 1990 that other mechanisms should be exhausted before the power in section 237 is exercised. However, there is commentary to suggest that a local authority should consider Government guidance on the use of compulsory purchase powers when using section 237.<sup>62</sup> That guidance explains that:

<sup>62</sup> See C Fielding and D Rosen "The key to success: section 237" (2011) 1121 *Estates Gazette* 89. The Government guidance referred to in the article is Office of the Deputy Prime Minister, Circular 06/2004: Compulsory Purchase and The Crichel Down Rules (2004) (available from [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/7691/1918885.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/1918885.pdf) - last visited 18 November 2014) (the "Guidance"). The authors note at p 89 that: The guidance [Circular 06/04] does not expressly cover section 237 but that power is generally thought to be sufficiently analogous that the guidance should be followed.

The compulsory purchase of land is intended as a last resort in the event that attempts to acquire by agreement fail. Acquiring authorities should nevertheless consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan a compulsory purchase timetable at the same time as conducting negotiations. Given the amount of time which needs to be allowed to complete the compulsory purchase process, it may often be sensible for the acquiring authority to initiate the formal procedures in parallel with such negotiations. This will also help to make the seriousness of the authority's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations.<sup>63</sup>

It further indicates that section 226(1)(a)<sup>64</sup> of the Town and Country Planning Act 1990:

... enables acquiring authorities ... to exercise their compulsory acquisition powers if they think that acquiring the land ... will facilitate the carrying out of development, redevelopment or improvement on, or in relation to, the land being acquired and it is not certain that they will be able to acquire it by agreement.<sup>65</sup>

- 7.111 The City of London Corporation's concern is that in the event that a use of section 237 powers is judicially reviewed, the court may take the view that the use of section 237 should only be engaged once NPOs have been served and this avenue exhausted.<sup>66</sup>
- 7.112 We do not think this concern is valid, although the NPO process is an additional tool which may make the use of section 237 unnecessary in some cases.
- 7.113 Where an NPO is served and dominant owners do not respond to the NPO by commencing proceedings for an injunction then the burden imposed on local authorities when using section 237 will be avoided – there will be no injunction and the development can proceed. The matter will be settled one way or the other without recourse to the local authority and so there will be no risk of judicial review. Where a landowner does commence proceedings then the local authority will be clear which dominant owners are taking issue and may choose to use section 237 rather than awaiting the result of each case.

<sup>63</sup> The Guidance, p 8.

<sup>64</sup> Relevant parts of s 226(1)(a) are summarised in paras 7.89 and 7.90 above.

<sup>65</sup> The Guidance, p 22.

<sup>66</sup> In addition to the importance of a proposed development to a local authority's strategic plans a local authority is likely to consider a number of factors when coming to its decision to use section 237. These include the number of potential dominant owners, whether there are already threatened or active proceedings to prevent the development, the timescale for development (and the impact of delay), its purpose (for example whether the development proposed is "public" or commercial), the financial viability of the scheme if "profit share" damages are payable and the extent and nature of negotiations to release the rights by agreement.

- 7.114 Ultimately it will remain a matter of judgement for local authorities, who have to take decisions about the use of section 237 in the public interest. There may be cases where only one neighbour is holding out, in which the use of a single NPO may be a better option. In cases where a large number of neighbours will not negotiate, the use of NPOs would be inconvenient and time-consuming, and the local authority may take the view that it is in the public interest to address the problem using section 237. The courts will be sensitive to these considerations. But we cannot lay down a clear, rigid rule in answer to the City of London Corporation's concern, nor do we think it would be desirable to do so.

***Is an application under the extended section 84 a pre-requisite for the use of section 237?***

- 7.115 The recommendation made at paragraph 7.74 above would make it possible for the Lands Chamber to discharge or modify rights to light, as it can already discharge or modify restrictive covenants.
- 7.116 The City of London Corporation also queried whether it will be legitimate for a local authority to use its section 237 powers if an application is not first made for the right(s) to light to be discharged under section 84, once that facility exists.
- 7.117 This is a rather different concern from that raised about the NPO procedure. We explained above that section 84 will be used, broadly speaking, where the right to light is obsolete or unimportant to the dominant land, or where it is legitimate for the public interest to take priority.<sup>67</sup> It is therefore going to be available in circumstances where section 237 might otherwise have been used. But we do not think that it will be seen as a pre-requisite for the use of section 237. It would be legitimate for a local authority to take the view that a section 84 application would not succeed and that instead section 237 should be used. Furthermore, it is unlikely that a local authority is going to be expected to use (or to ask a developer to use) section 84, regardless of the merits of the case, where the outcome is very likely to be the same; the loss of a right to light and compensation based on the diminution in value to the dominant owner. We envisage that the power will, rather, lift a burden from local authorities.
- 7.118 Moreover, the effect of section 237 already applies to restrictive covenants (as well as certain other interests). We have found no indication that, in circumstances where section 237 has been used to override restrictive covenants, it has been successfully argued that the local authority has acted unlawfully for not first having sought to have the covenant discharged or modified through the mechanism of section 84.
- 7.119 Accordingly, we are content that our proposals regarding section 84 should not negatively impact on the operation of section 237, which will continue to be an appropriate tool for facilitating development in circumstances where it is in the public interest to do so.

<sup>67</sup> See para 7.50 above.

# CHAPTER 8

## THE ECONOMIC IMPACT OF RIGHTS TO LIGHT DISPUTES

### INTRODUCTION

- 8.1 In this chapter we report on the data that consultees have provided about the financial impact of disputes about rights to light under the current law. It is not a formal impact assessment; rather, it is an account of the evidence we have about one aspect of the impact of the current law, namely its financial cost.
- 8.2 Of course, consultees' responses pre-dated the decision of the Supreme Court in *Coventry v Lawrence* ("*Coventry*").<sup>1</sup> It is possible that *Coventry* might affect how consultees would have responded to our questions if we were to ask the questions again or in the future. We cannot, however, predict here its impact.
- 8.3 The summary of responses set out below does not include the results of a survey undertaken by the British Property Federation. The results of that survey speak for themselves and are included at Appendix D to this report.<sup>2</sup>
- 8.4 The responses painted a picture of rights to light issues and disputes causing delays, under-utilised land and increased costs to developers including land holding costs, additional professional fees, interest payments, lost opportunity costs, and the costs incurred in redesigning projects.
- 8.5 However, we do not suggest that reform will eliminate the costs associated with rights to light. Our recommendations will not mean that developers can ignore the interests of neighbours. A right to light remains a property right; disputes will arise, and it is not possible to eliminate the risk of litigation. Indeed, it is not desirable to eliminate all of the costs associated with rights to light; they exist to protect amenity, and it is appropriate for property owners to protect their property or, alternatively, to seek compensation for loss or damage. However, we believe that the recommendations that we have made will improve the law making it more balanced and predictable and reducing costs for all parties.

### THE CONSULTATION

- 8.6 In Chapter 1 of the Consultation Paper, we asked consultees for evidence of the practical and economic impact of rights to light and, in particular:
- (1) the funding of development projects;
  - (2) delays in delivering development schemes and attendant costs;
  - (3) evidence about developments that have been abandoned or altered as a result of rights to light disputes;

<sup>1</sup> [2014] UKSC 13, [2014] AC 822.

<sup>2</sup> The first document in the Appendix is the British Property Federation's own summary of its survey. The rest of the documents in the Chapter are responses to the survey completed by Land Securities and sent directly to the Law Commission.

- (4) the costs to developers of engaging in rights to light litigation;
- (5) the costs of litigation for those with the benefit of rights to light;
- (6) the costs of alternative dispute resolution for rights to light disputes; and
- (7) evidence about how the amenity provided by natural light is, or might be, valued.

8.7 Before considering in order the points set out above we set out some of the evidence we have received of the extent and frequency of the problems associated with rights to light under the current law.

### **The extent and frequency of current problems**

8.8 There is a scarcity of publicly available information relating to rights to light. Most rights to light are not apparent on an investigation of registered titles held by Land Registry, because most come into being by prescription. There is also the issue of confidentiality; the Law Society explained that:

Confidentiality rules are likely to prohibit solicitors from disclosing this type of information and, even if such evidence could be provided, the fact that many developments are commercially sensitive means that most clients would be reluctant to allow such information to be disclosed. Many landowners and developers would not want to draw attention to rights of light issues that may affect their developments in case doing so would prejudice those projects.

8.9 Nevertheless, we have received from development professionals a great deal of evidence of the costs of the problems caused by rights to light. We are well aware that this is a group with a strong interest of its own, and we are conscious of the need for a balanced overview.<sup>3</sup> We are also aware that a great deal of the evidence we have is focused on London. We are very conscious of the value of light and of the need for landowners to defend their rights; we are also aware of the public interest in development and in the provision of homes, schools and places of work. This is not an area where the interested groups can be identified as two sides in a war over rights to light. Rather, light is just one factor in a complex matrix of issues related to the sharing of space and facilities on a crowded island.

8.10 With those notes of caution in mind, we can look at some of the evidence about the nature and frequency of disputes.

8.11 Whilst the nature of rights to light and the ways in which they come into existence make it impossible to estimate with certainty how many of them exist, we did receive feedback on the extent of disputes. Anstey Horne considered that the potential for rights to light disputes is inevitable in the urban environment:

<sup>3</sup> Allen & Overy LLP highlighted the potentially self-selecting nature of responses to our Consultation Paper, pointing out that many would come from developers, who have an interest in making rights to light easier to defeat.

... in urban environments such as London, the overwhelming majority of projects that involve an increase in height and massing will give rise to the potential for some level of rights of light injury and dispute.

- 8.12 In a confidential response, one consultee stated that it had “developed ... 17 schemes, all of which involve [rights to light] issues”. The City of London Corporation expressed the view that rights to light issues have a “significant and material impact on the delivery of schemes in the City market”. They told us that:

There are 37 schemes that are either currently being delivered or are awaiting a pre-let to commence construction, totalling circa 10.3 million [square feet]. Of these schemes, 20 have been subject to intervention by the City (both formal and informal) in terms of promoting resolution of rights to light issues. The ability to deliver these schemes has been frustrated, prior to City engagement, because of rights to light issues. The vast majority of the floorspace being created in the square mile was within the scope of these 20 schemes, amounting to 6.2 million [square feet] of office floorspace.

- 8.13 The City Property Association stressed the importance of the extension and development of real estate in maintaining the City of London’s position as a world leading centre for financial services and the insurance industry. They explained that in the last 20 years, new build development activity in the City has averaged around two million square feet per year, which translates into around £750 million of construction related activity per year, plus associated employment opportunities. They told us that it is only over the past ten years that rights to lights constraints have moved from being manageable risks to posing risks of materially greater uncertainty.

- 8.14 HDG Ltd told us that:

The two main constraints for a developer at an early stage of development in town and cities aside from funding (and assuming ordinary viability) are planning and rights of light.

- 8.15 Chelsfield LLP said that:

Our cities could be developed to greater levels of density if managed properly. .... Many of our cities could provide more development and, in particular, more housing if there were a sensible regime in place in respect to rights of light. This would reduce the pressure on green belts and is a more sustainable form of development with public transport systems and infrastructure already established, to a large extent.

... Although rights of light may not appear to be a headline matter for our politicians it does, along with the current funding predicament and the town planning dysfunction, play a significant role in suppressing development starts, and in the underutilisation of development sites. Growth, housing, jobs and taxes are the ultimate casualty.

It added:

... the magnitude of the problem and its impact on the economy is to a large extent hidden because developers do not usually expose themselves to the risk in the first instance ... .

- 8.16 The Property Litigation Association surveyed its membership in order to respond to our Consultation Paper. It noted that:

... it is evident that our members are seeing increased amounts of rights to light instructions in recent years. Given that the [Property Litigation Association] represents solicitors who specialise in property litigation, increased involvement by our members suggests that rights to light has become a more significant and contentious issue in development than it may previously have been. Whether this is as a result of judicial interpretation of the law (ie *Regan*, *Tameres* and *Heaney*), or whether it is due to proposals for developments of significantly increased massing is unknown.

- 8.17 The City Property Association was more forthright as to the effects of the recent case law in this area, commenting that:

Prior to the court cases set out in the [Consultation Paper] known as *Reagan vs Paul Properties*; *Tameres (Vincent Square)*; and *Heaney*, Rights to Light matters were resolved in a timely manner and rarely held up implementation of development and extension projects. What should be clear from the City of London's evidence and is supported by the experience of the [City Property Association] membership is that this position has changed.

- 8.18 The British Property Federation agreed, telling us that:

Rights to Light have become a significant brake on the development and extension of commercial property in the UK, and therefore a significant obstacle to growth. What was a manageable risk in project planning and delivery has become far less manageable as a result of a succession of court cases... that have introduced greater cost and uncertainty into the development process.

...The current level of uncertainty as regards outcome, and costs of compensation and delay are having a significant impact on development viability and delivery.

- 8.19 The British Property Federation went on to explain that the current uncertainties are leading to cautious behaviour on the part of both developers and their advisors because of concern that injunctions may be granted where they would not have been previously. It expressed concern that the risk of injunctions and delay are being used as bargaining chips; suggesting that dominant owners regard it as financially advantageous to hold up development through the threat of injunction or by failing to engage.

- 8.20 Berwin Leighton Paisner LLP stated plainly that "rights of light issues are a significant, if not the most significant, current brake on development".

- 8.21 The extent of difficulties associated with rights to light was disputed by one consultee. Dr Peter S Defoe (calfordseaden LLP) told us:

There are few people that could provide an accurate response to [the question of what proportion of developments involve rights to light]. Most rights of light practitioners will deal only with that and not see the total volume of development. My practice is one of the few multi disciplinary practices that could provide the relevant statistics. Less than 1% have actual disputes. Roughly 10% have potential issues.

- 8.22 Chelsfield LLP expressed concern about the effect that rights to light are having on the property and construction industries, which it identified as key areas for economic growth. In particular, it expressed concern about the effects that the current law is having on the development of urban housing, and the potential detrimental effects of this on green belts.

- 8.23 Michael Burrows saw the environmental argument from a different perspective, telling us that rights to light are an important safeguard against further deterioration of our environment and as such should not be discarded.

- 8.24 Loughton Residents Association expressed concern about the nature of the problem being addressed. It told us:

The proposals in this document involve the removal – or the avoidance of the creation of – useful rights enjoyed by residents, because of difficulties in a different sphere, between commercial organisations. The Commission appears to have no evidence of similar problems in cases involving residents. The proposals therefore seem disproportionate in their effect on residents.

- 8.25 Overall, however, the picture painted by the majority of consultees was one of prevalent and serious problems, particularly in London and urban areas.

### **The funding of development projects**

- 8.26 A few consultees, including Clifford Chance LLP, indicated that they were aware of developments that failed to secure financing as a result of potential or actual rights to light disputes.

- 8.27 Others explained that, while they were not aware of projects that had failed to progress because of lenders' concerns regarding rights to light, they were aware that lenders had been imposing strict conditions on monies advanced – particularly since the decision in *HKRUK II (CHC) Ltd v Heaney*<sup>4</sup> ("*Heaney*") – and that funding was generally harder to obtain in a more risk-averse climate.<sup>5</sup> In Anstey Horne's words:

<sup>4</sup> [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

<sup>5</sup> Although Allen & Overy LLP suggested it was hard to state how far this effect was down to *Heaney*, and not just symptomatic of a more cautious lending environment generally.

We are not aware of any scheme that has not proceeded due to lack of finance because of rights of light difficulties, but we are aware that the funding world is very nervous about rights of light disputes and the potential implications from a financial perspective.

8.28 Andrew Francis (Serle Court Chambers) made the following remarks:

I cannot give specific examples for reasons of confidentiality of [clients'] affairs, but from my own practice I have no doubt that particularly, since *Heaney* in the autumn of 2010 (if not *Regan* in 2006/7) the fate of many development proposals where rights of light have been in issue has been affected by the impossibility [or] greater difficulty in obtaining funding.

... in many cases where my advice for developers and lenders and funders (eg, private equity) has been required, any risk of a rights of light claim will in all likelihood "kill" the chance of funding, or at least make it available only on strict terms; eg as to drawdown stages and reports on release.

8.29 Helical Bar plc explained that the uncertainty over whether there will be an injunction discourages future tenants from agreeing to pre-lets, making it harder to obtain funding. The City of Westminster and Holborn Law Society cited an example of a development which took the developer "over seven years from acquiring the development site to get into a position where the development was fundable - ie to such a position where a funder could be convinced that any infringement of light would not be actionable". Whilst insurance is in theory available to offset rights to light risks and put funders at ease, Mount Anvil Ltd indicated that such policies "have proved prohibitively expensive in the past". The Property Litigation Association agreed with this.

8.30 Julian Barwick (Director, Development Securities plc) offered the following perspective on funding:

It is very difficult to estimate the costs of ... frustrated developments – one cannot say that a particular project cost £x more to secure funding because of [rights to light]. Either you secure funding because there is clarity on [rights to light] or you don't because there is insufficient clarity on [rights to light]. So what generally happens is that where the dominant owner has set his heart on extracting maximum possible riches from the developer, schemes get abandoned, or smaller schemes get built leading to an inefficient use of land.

8.31 Others disagreed, however. Dr Peter S Defoe (calfordseaden LLP) said that:

In the past year for example I have advised on approximately 100 projects where rights of light have been a potential issue and in none of them was there an issue regarding inability to secure funding.

- 8.32 Neighbourly Matters (Chartered Surveyors), Matthews & Goodman LLP and the Royal Institution of Chartered Surveyors all suggested that many of the difficulties described by other consultees could be avoided by careful planning and due diligence in the pre-purchase stage, and ensuring land is properly valued to take account of rights to light.

**Evidence about developments that have been abandoned or altered as a result of rights to light disputes**

- 8.33 The British Property Federation told us that, from start to finish, the negotiation and settlement of rights to light issues on a major project “can take in exceptional situations up to three years”, during which period developers and their funders are left in uncertainty. Andrew Francis (Serle Court Chambers) stated that he was aware of at least one example where a central London development site stood empty for two years while rights to light issues and funding were being resolved. A consultee who wished to remain anonymous stated that:

Whilst not involved specifically, we are aware of ... central London projects where projects have been delayed for over 2-4 years whilst a number of rights to light situations were resolved. Other sites where there are unresolved rights to light claims over many years means the site remains derelict and unsaleable.

- 8.34 4 Housing Architects provided a case study in which a development of 141 flats and commercial space was delayed for over four years, in part due to a rights to light dispute. Allen & Overy LLP told us that prior to the judgment in *Heaney* the time required to settle claims was an estimated six months, whereas following the judgment that had increased to 18 months.

- 8.35 Mount Anvil Ltd said that:

Although we are yet to experience an instance where we have been unable to build out a scheme due to such issues there have certainly been cases elsewhere in the industry where a start on site has been delayed which has resulted in significant costs being incurred by developers.

- 8.36 In a confidential response, another developer estimated that rights to light “difficulties” delay its schemes on average by six months. It continued:

... without exception every one of our schemes has been altered to take account of rights to light.

**The costs of abandoning or altering developments**

- 8.37 Mount Anvil Ltd explained that:

We have ... come across scenarios where we have considered materially amending schemes due to potential rights of light impact which has adversely affected the architectural quality of projects and the level of anticipated return. This has led to us deciding against progressing certain deals.

8.38 The UNITE Group plc had similar experiences, and had in the past declined to acquire certain sites due to potential rights to light issues.

8.39 Most consultees who commented on this issue felt that it was rare for a scheme to be wholly abandoned purely because of rights to light concerns. Anstey Horne, for example, was aware of only one example where a scheme had not proceeded at all because of issues arising from rights to light. However, as Nabarro LLP pointed out, the existence of rights to light issues can reduce the potential for regeneration and result in lost opportunities:

The existence of rights of light issues is stifling proposals for regeneration in the first instance. We have acted for numerous clients who have decided not to acquire land for development because the rights of light issues jeopardise the potential for development. Ultimately a different party may be willing to take that risk, but undoubtedly rights of light are in some instances at best delaying regeneration where needed and at worst, preventing such regeneration at all.

8.40 The Berkeley Group plc made the same point:

... we have never had to cancel a development because of rights to light – there is always a price that the adjoining land owner will take. However, we do reject sites for purchase where we believe the rights to light risk would make the site unviable.

8.41 Chelsfield LLP commented that it had decided to avoid litigating rights to light disputes following the *Heaney* decision:

We have not been involved in a rights of light dispute in recent years because we believe that post *Heaney* the outcome is too uncertain. If there is a potential rights of light issue we normally either do not develop or adopt a scheme which avoids the rights of light issue (provided it is viable) and accepts the site's full potential has not been realised.

The underutilisation of sites is not good for such a densely populated country. It's a waste of scarce resource.

8.42 It later added:

[Developers] know that if they do get into a dispute which leads to an injunction it will severely delay the development, increase planning risk (new permissions may be required) and be very costly.

The corollary to this is that many sites are simply not coming forward for development because [rights to light render] schemes not viable. Alternatively schemes are drastically cut back to avoid rights of light matters and therefore the full potential of the sites are not being realised.

On so many occasions we have looked at our properties or potential purchases and concluded it is simply not worthwhile running the rights of light risk and hence we have either done nothing and allowed the property to “tick over” or not proceeded with an acquisition. In many instances if it were not for rights of light issues the site would have been developed, generating growth, better quality offices, housing, output for construction industry, jobs, taxes, etc.

8.43 The Property Litigation Association informed us that a considerable number of its members who responded to its survey on the Consultation Paper were aware of developments not proceeding or having to be altered as a result of rights to light issues.

8.44 Anstey Horne stated that although it may not occur very often, they had seen clients elect to amend a scheme to avoid unpredictable rights to light disputes altogether, meaning that the potential of development sites is not always maximised. 4 Housing Architects provided a case study of one of its developments, in which a scheme for 121 flats in central London had to be cut back to 65 flats, in part due to rights to light issues, despite an 18-month consultative design process conducted in collaboration with English Heritage, local stakeholders and council officers.

8.45 Exemplar Properties referred to an example where a particular scheme had planning permission, and over 30 settlements in respect of rights to light were reached with neighbouring owners. However, after the downturn in the property market in 2007, it sought a planning permission “which sought to adjust the proposals to take account of the different market conditions”. It explained that, by doing so, it found itself “in the unfortunate position of having an additional 25 potential injuries to light” the negotiation and settlement of which “arguably delayed our progress by some 6 months”. It also gave an example of a tenant, with seven years of its lease remaining, who had the benefit of a right to light. It explained that:

The leaseholder’s light was estimated to be reduced by only 2-4%, and both their and our own rights of light experts calculated that a compensation payment might be due of circa £20,000. However following consultation with what might in parlance be called an “ambulance chasing” solicitor, the leaseholder sought a payment of in excess of £1 [million], effectively holding the development to ransom.

8.46 Chelsfield LLP also gave an example of a development which it had altered in order to try to avoid rights to light issues. It cut back a planned 20 storey housing development to ten storeys. This resulted in less than half the number of housing units being realised, as a result of the risks, costs and potential funding implications of encountering a rights to light issue.

8.47 Other consultees explained that cut-backs were not always a possibility, for example where the developer had planning permission for the complete development, or where the nature or location of a scheme meant there was no room for altering the design to avoid the risk (in constrained urban locations, for example).

8.48 Julian Barwick (Director, Development Securities plc) highlighted the costs by way of a case study. It is reproduced in full below:

We exchanged contracts to buy this site following a competitive tender with London Underground Limited, in 2007. The purchase contract was conditional on receipt of satisfactory planning permission and on agreeing a satisfactory [rights to light] agreement with a neighbour. Our first proposal of 350,000 [square feet] did not proceed because our neighbour challenged it and so the [rights to light] condition was not satisfied. We then sought planning permission for a smaller project of 285,000 [square feet] in two buildings. The first building of 110,000 [square feet] has been designed expressly to avoid causing actionable nuisance and is due for completion shortly. Our neighbour however contends otherwise and has expressed his intention to demand demolition of the offending parts of our building on completion. Despite years of discussion, our neighbour has consistently refused to tell us which elements of the first building he believes will cause an infringement. The second building of 175,000 [square feet] may have to be scaled back by a further 40,000 [square feet] to avoid risk of injunction due to a very odd partition arrangement in one room in our neighbour's office building.

The damage to the UK economy arises as follows:

- The development is smaller than originally envisaged leading to an inefficient use of scarce land resource. Each square foot of development adds site value of circa £150 [per square foot].
- The building designs incorporate splays and setbacks, and is more expensive to build than would otherwise be the case. A five per cent reduction of construction cost would deliver a saving of £1.5 [million].
- [Rights to light] legal and surveyor costs will amount to circa £1 [million].
- Designing buildings that are free from the threat of injunction adds further complication to the development process, and all this needs to be communicated to sources of finance, occupiers, future investors and so on. The amount of time spent on this exercise is very significant indeed.
- And no value is added as a result of these various costs.

- 8.49 It was common for consultees to describe substantial cut-backs being made to development proposals in order to avoid affecting an adjoining owner's right to light. Such cases can be seen as examples of where a right to light is doing exactly what it should by protecting the amenity of the light passing to the neighbour's land. Our reforms would not eliminate the need for cut-backs – if the court would order an injunction, or the damages payable for interference would be prohibitive, then a developer will need to consider how to manage the right to light (for example, by serving a Notice of Proposed Obstruction in the hope that no action for an injunction is forthcoming), or consider restructuring the development in a way that does not interfere with the right to light.

### **The costs to developers of engaging in rights to light litigation**

- 8.50 At paragraph 1.37 and following in the Consultation Paper, we analysed the costs of the litigation in the *Heaney* decision as follows:

|                                                                                          | £ (thousands)       |
|------------------------------------------------------------------------------------------|---------------------|
| Projected cost of development:                                                           | 28,530 <sup>6</sup> |
| Anticipated profit:                                                                      | 6,908 <sup>7</sup>  |
| Reduction in price paid for property to allow for right to light claims:                 | 350 <sup>8</sup>    |
| Contingency fund to deal with right to light claims:                                     | 200 <sup>9</sup>    |
| Estimated cost to development if plans had been revised early to avoid infringement:     | 1,010 <sup>10</sup> |
| Estimated cost to development of court ordered rebuilding work:                          | 1,785 <sup>11</sup> |
| Theoretical damages that the judge would have ordered in substitution for an injunction: | 225 <sup>12</sup>   |

The £200,000 set aside to deal with rights to light claim can be understood:

|                                                             |      |
|-------------------------------------------------------------|------|
| As a percentage of the projected total cost of development: | 0.7  |
| As a percentage of anticipated profit:                      | 2.81 |

<sup>6</sup> £18,750,000 (cost of acquisition of property) + £9,780,000 (projected budget for redevelopment): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [14] and [18]. This was the position in January 2008; the actual total cost of the project including the cost of acquisition and finance charges was £35,814,161 (October 2009): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [33].

<sup>7</sup> See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [87].

<sup>8</sup> See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [14].

<sup>9</sup> See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [18].

<sup>10</sup> This is the net additional cost agreed by both parties' surveyors (a figure derived from savings set against extra expenditure): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [56].

<sup>11</sup> See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [27]. This figure is the half way point between the radically different estimates provided by both parties to the dispute: £1,115,000 and £2,455,000.

<sup>12</sup> See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [81] and following. For an explanation of how damages in substitution for an injunction are assessed, see the Consultation Paper, para 5.71 and following.

The estimated cost of the injunction can be understood:

|                                        |                     |
|----------------------------------------|---------------------|
| As a percentage of anticipated profit: | 25.84 <sup>13</sup> |
|----------------------------------------|---------------------|

- 8.51 We asked at paragraph 1.41 of the Consultation Paper whether these figures conformed with consultees' experiences of the cost to a development of rights to light issues, and whether things had changed since *Heaney*.
- 8.52 Andrew Francis (Serle Court Chambers) and Laurence Target (solicitor, Trowers & Hamlins LLP) reported that these figures did conform with their experiences. Andrew Francis added that:

Since *Heaney* the release fee expectation of the dominant owner has gone up hugely and it is usual to have a release fee negotiation start with a request for the developer's net profit or uplift in value to which the "fair" percentage can be applied. In addition and in practice "book values" are (post *Heaney*) often being multiplied by far more than the "*Carr-Saunders*" multiplier of 3 or 4, as now multipliers of 10, or even 20 are being taken as a guide or even offered so as to make the offer "tempting" [and] capable of early and swift settlement, thereby avoiding the need to disclose development appraisals and spend money on extracting the net profit etc.

- 8.53 The Property Litigation Association's membership suggested that costs initially increased following *Regan v Paul Properties DPF No 1 Ltd*<sup>14</sup> and further increased following *Tamames (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*<sup>15</sup> and *Heaney*.
- 8.54 The City of London Law Society stated that "in general terms, following *Heaney*, [we are] aware of a big increase in the number of claims for damages and the size of the claims". The Berkeley Group plc reported that following *Heaney*, it had been obliged to pay sums to affected neighbours "ostensibly to better their sites as well as to buy out their rights to light". Allen & Overy LLP told us:

One developer client whom we were acting for in 2010, both before and after the *Heaney* judgment, experienced a substantial jump in the compensation payments it had to make as a direct result of the judgment ... .

- 8.55 Helical Bar plc stated that the figures in the table above "seem modest", and that rights to light claims running into several millions of pounds are faced in the City and Central London. It added that fees of specialist rights to light surveyors alone can surpass £500,000. The Berkeley Group plc had similar concerns, stating that:

<sup>13</sup> This is the estimated cost of the rebuilding work as against the anticipated profit expressed as a percentage.

<sup>14</sup> [2006] EWCA Civ 1391, [2007] Ch 135.

<sup>15</sup> [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148.

... since *Tamares* and *Heaney* we have also seen the introduction of contingent fee arrangements agreed with land owner's surveyors. [In one case] one of the surveyors acting for a single land owner charged £350 [thousand]! ... This is a disturbing development ... .

- 8.56 However, Dr Peter S Defoe (calfordseaden LLP) said that the figures above “bear a resemblance to actuality”, but suggested the effect may have been short-lived:

Undoubtedly *Heaney* had at least a short term impact on settlement figures ... [When] commercial clients realised they did not have to settle then they took a harder stance and we saw several that might previously have been settled for tens of thousands being actually settled for hundreds of thousands. This appears to have settled back down for the time being.

- 8.57 Neighbourly Matters (Chartered Surveyors) argued that the costs set out “are limited to major commercial schemes in city centres and do not reflect regional negotiation levels”.

- 8.58 More generally, we asked in the Consultation Paper for:

... consultees to provide us with evidence of the costs to developers of engaging with rights to light disputes, particularly with regard to:

(1) the costs involved in preparing for rights to light disputes, including the costs of indemnity insurance, legal fees and the instruction of surveyors;

(2) the cost to developments of delay caused by rights to light disputes;

(3) the cost to developments of altering development plans as a result of rights to light disputes; and

(4) the amounts set aside (expressed as a percentage of anticipated profits or otherwise) to deal with potential rights to light disputes.<sup>16</sup>

- 8.59 The UNITE Group plc provided the following assessment of average figures per development:

(1) £75 [thousand] - £150 [thousand] (exclusive) and significantly more if litigation ensues with one or more dominant owners;

(2) in monetary terms, a combination of (1), (3) and (4) in addition to our lost management time in dealing with [rights to light] issues, additional funding / holding costs and lost profit;

(3) significant (perhaps in some cases, in excess of £1 [million]) when considered in the round and, on occasions, it may not be economically or practically viable to re-design the scheme; and

<sup>16</sup> Consultation Paper, para 1.43.

(4) traditional “book value” damages.

8.60 Travis Perkins plc also gave an assessment of average costs:<sup>17</sup>

(1) £250 [thousand] (exclusive) - assuming formal litigation is avoided;

(2) in monetary terms, a combination of (1), (3) and (4) in addition to lost management time, lending and holding costs. There is also the uncertainty and loss of profit caused to the operating business intending to occupy the developed site;

(3) significant and, in some cases, it may not be economically or practically viable to re-design the scheme; and

(4) traditional “book value” damages.

8.61 In a confidential response, another consultee estimated typical legal fees and rights to light surveyor costs at around £1 million. It estimated costs to a development of a delay as two- to three- years’ interest on the site price plus loss of profit at around £10 million. Transport for London stated that it incurred legal fees of around £100,000 defending an attempt by a neighbour to obtain an early injunction to prevent alleged infringement of its right to light by one of the operator’s developments. Another consultee, also responding in confidence, gave the following figures representing its costs over the last ten years across its portfolio (in response to the questions numbered (1) to (4) at paragraph 8.58 above):

(1) £10 [million].

(2) £80 [million].

(3) We are unable to provide this due to the complexity of calculating what would have been developed in each case, but a substantial loss of value where schemes would have been larger. It should be noted that every one of our development schemes has been adjusted to a greater or lesser extent to accommodate rights to light.

(4) £20 [million].

8.62 Julian Barwick (Director, Development Securities plc) provided the following evidence:

Re (1): We are currently spending between 1% to 2% of the total project cost on legal and surveyors fees. Prior to *Heaney* it was circa 0.2%.

Re (2): Significant (see our other responses).

Re (3): There is a major addition to cost here.

<sup>17</sup> The responses of the UNITE Group plc (see para 8.59 above) and Travis Perkins plc are similar.

Re (4): As a general rule, we design our buildings to avoid [rights to light] issues so do not set out with specific allowances to vary other's rights. The risk of an injunction is not worth taking. The costs arise from the fog of uncertainty as to whether any rights are being infringed, and from dealing with spurious claims, which are significant (see our other responses).

- 8.63 Andrew Francis (Serle Court Chambers) provided an approximate calculation of costs based on the claims he has seen in his practice. They are based only on large scale developments:

... the overall cost to such developers over the past 5 years or so is over £50 [million] - £100 [million]. ("Cost" includes not just the release fee paid, or other compromise payments, but also the items set out in the question). This is based on 100 claims (or potential claims) which I have seen in practice over the past 5 years or so and by applying a conservative average cost of £500,000 - £1 [million] per claim; the "cost" is all the items set out in the question and as amplified above.

- 8.64 Mount Anvil Ltd gave a general statement on the impact of rights to light claims on developers. It explained that costs can be "substantial" and that:

The costs of holding onto an asset for an increased period has obvious impacts in terms of costs of finance and accrual of more significant peak borrowings due to elongated completion dates and realisation of value at a later stage. This can adversely affect the [project's] rate of return. Costs associated with missing longstop dates etc. can also be substantial and potentially lead to breaching of contractual arrangements and subsequent penalty payments.

It added that:

On the back of the *Heaney* ruling and the subsequent uncertainty there has been a substantial increase in the amount of cost incurred in relation to surveyors' fees due to the need to consider even relatively minor injuries as potentially injunctable.

- 8.65 HDG Ltd explained that every time a right to light assessment needs to be done, it costs at least £3,500 for a simple model considering only a few apertures.

- 8.66 Neighbourly Matters (Chartered Surveyors), after reiterating that a "correctly designed scheme suffers no loss or delay" and that "redesign is only required of a poorly [designed] scheme in the first instance" suggested a lower estimate of the costs involved; it suggested that disputes on a "domestic scale" can be resolved for as little as "£500 if parties listen and simple non-computer methods are used". In city centre disputes, depending on the complexity of the site, it added that the costs payable by a developer could range between £5,000 and £8,000. It added that an initial report dealing with rights of light and planning daylight/sunlight could cost £1,500 and a computer model £2,000 to £4,000 subject to the number of surrounding properties.

- 8.67 Anstey Horne gave a more cautious assessment of the impact of the current legal landscape:

It was always the case that the developer needed advice, both from a rights of light surveyor and a solicitor, when considering his options for redeveloping a site. However, as indicated above, on the back of the *Tameres* case and the close scrutiny on most projects of compensation related to development gain, we see increased surveying fees being met by the developer. It is probably also true to say that solicitors' fees have increased, because rights of light disputes increasingly have the potential to lead to litigation, such that it is almost always the case that a solicitor needs to be on board and at least sitting alongside the rights of light consultant.

8.68 Allen & Overy LLP was unable to provide specific information regarding costs, but warned that costs "cannot be considered in isolation as they will vary widely according to the circumstances of that case" and will be "affected by the attitude taken by both sides with regard to settlement negotiations".

8.69 The Berkeley Group plc provided an example of a residential development, which a single adjoining owner alleged would infringe its right to light. Performing the cut-back to the scheme necessary to avoid infringement whilst reaching the necessary affordable housing target would have cost "tens of millions of pounds, making the scheme unviable"; to avoid this, the Group had to settle the rights to light claim for £3 million, despite advice that the claim was only worth £250,000. It also highlighted a marked increase in the costs of settlement post-*Heaney*; it gave an example of a site purchased prior to that decision, in relation to which right to light negotiations with adjoining owners were advanced and were expected to settle for £2.3 million. Following *Heaney*, the stakeholder explained that it ended up paying £6 million to these owners, in addition to professional fees of approximately £500,000 and land holding costs.

8.70 In a confidential response, one developer reported that:

... across ... 17 major development schemes we have had to deal with over 50 rights to light negotiations over the last 10 years at a significant cost in terms of time and money. We estimate this has cost us a total of over £100 [million], in compensation, fees and lost opportunity cost. Whilst these developments ... have proceeded, there are many more that have not been taken forward or acquired due to [rights to light].

This cost might have been more significant but for the fact that in many circumstances we design around the issues to limit the risk of injunction or do not proceed to acquire the project where we perceive the risk is too great. This means that the development pipeline is restricted beyond the controls implied by the planning process and general market conditions.

### **The costs of litigation for those with the benefit of rights to light**

8.71 We also asked for evidence of the costs of rights to light to owners of land with the benefit of those rights.<sup>18</sup>

8.72 The Property Litigation Association noted that, in general, these costs are borne by developers and paid on top of compensation. Alternatively, they may be determined by the court following litigation. Anstey Horne similarly told us that dominant owners tend not to incur costs, since under the current state of the law developers actively engage with issues presented by rights to light early in the development process. Developers are therefore willing to pay dominant owners' legal and surveying fees. It concluded that:

... there is less risk now than ever before that the dominant owner is forced to spend money to obtain surveying and legal advice without any guarantee of it being recoverable.

8.73 Julian Barwick (Director, Development Securities plc) noted that surveyors acting for those with the benefit of rights to light are often willing to enter into a "no win no fee" type arrangement in respect of disputes.

8.74 Andrew Francis (Serle Court Chambers) explained that costs of £250,000 per side could be expected, and may be as high as £400,000 if the dispute is lengthy. He pointed out that under the Civil Procedure Rules,<sup>19</sup> the losing side will pay the other's costs, leading to a total bill likely to exceed half a million pounds before damages.

8.75 Dr Peter S Defoe (calfordseaden LLP) indicated that it is usually the servient owner who covers the costs incurred, but that the question of the quantum of these costs was "too difficult to answer". He said:

Typical costs for surveyors each side is in the region of £5,000 each.  
Legal can be as much again.

He also explained that:

The average cost paid by the servient owner appears ... to be in the region of £10,000 where a financial settlement is agreed.

These figures are in line with the responses of Neville Pentecost and Lynn Pollard, who estimated the costs of their disputes at several thousand pounds and £10,000 respectively.

8.76 A confidential response pointed out that there are costs other than monetary ones involved in rights to light disputes and highlighted detrimental effects on the lives and health of dominant owners who lose the natural light to their homes. Allen & Overy LLP also pointed this out, stressing the importance of considering the financially unquantifiable impact on rights owners if light is not protected.

<sup>18</sup> Consultation Paper, para 1.45.

<sup>19</sup> Civil Procedure Rules, rule 44.2.

### **The costs of alternative dispute resolution for rights to light disputes**

- 8.77 At paragraph 1.47 of the Consultation Paper we asked consultees for evidence of alternative ways that rights to light disputes are commonly resolved and the costs of such means. In particular, we asked for evidence of the costs involved in a local authority using section 237 of the Town and Country Planning Act 1990 ("section 237") to resolve disputes. In fact the evidence given to us under this head related largely to section 237 and did not assist us on the costs of alternative dispute resolution.
- 8.78 The Compulsory Purchase Association told us that the costs involved in the appropriation of land for the purposes of section 237 are minimal, simply requiring a resolution by the local authority. Where land is transferred to a local authority and then "re-transferred to a developer with the benefit of section 237" it indicated that the "costs involved are largely the transaction costs", adding that:
- If [a] third party interest is interfered with, the owner of the interest is entitled to compensation for any diminution in value of the land that benefits from the interest, and is not entitled to a consideration that might be negotiated in the absence of the statutory powers ... .
- 8.79 Neighbourly Matters (Chartered Surveyors) acted as a consultant for the section 237 release for a major redevelopment of a city centre railway station. It indicated that its fee for the report and investigation was £1,500.
- 8.80 The Property Litigation Association noted that where section 237 is used, all costs will be borne by the developer, in addition to the compensation payable. Nevertheless, the costs involved will be less than any "ransom" that developers might otherwise have to pay.
- 8.81 The British Council for Offices noted that the use of section 237 might involve the payment of additional stamp duty land tax (because of the need for a local authority to hold the land in order for the section 237 power to be used).
- 8.82 Anstey Horne told us that, notwithstanding section 237, there were few ways of resolving rights to light disputes other than negotiation of financial settlements, the negotiation of mutual development terms, or simply the avoidance of actionable infringements. It told us that none of the cases in which it had been involved had been resolved by arbitration, adjudication or mediation. It pointed out that, while some developers may obtain insurance against the risk of a right to light being infringed, insurance does not resolve the problem, but shifts the financial burden to the insurer.
- 8.83 Dr Peter S Defoe (calfordseaden LLP) indicated that many local authorities had "proven extremely reluctant to invoke section 237". He went on to indicate that the following options to manage rights to light were highlighted to clients, where appropriate.
- (1) "Prove that no right exists".
  - (2) "Prevent a right of light [from] coming into being".
  - (3) "Amend the design".

- (4) “Obtain insurance”.
- (5) “Negotiate”.

### **The importance of light and difficulties in quantifying its value**

- 8.84 Several consultees highlighted the difficulties that exist in valuing, in monetary terms, a right to light. The British Property Federation told us:

The amenity of light will differ between property owners. Homeowners may not have access to the state of the art electrical [lighting] or design features that a new commercial property can offer... . Different business occupiers may also have different “light” demands. The impact of poor light on a cafe and its trade may be significantly different than that of a warehouse. Light also brings health and psychological benefits on which it is difficult to place a monetary value. Some studies even suggest that natural light may even improve staff productivity through its effect on morale – an intangible effect which it is hard to quantify.

There is therefore no “one size fits all” approach.

- 8.85 The National Organisation of Residents Associations agreed that there could be no universal formula for calculating the amenity value of light. It observed that a small window in a lavatory might have very little amenity value, in contrast to a large window in an artist’s studio. It went on to stress that a major issue related to the well-being of residents, and that the importance of light will vary from room to room and from resident to resident depending on their needs. For example, some individuals may be more susceptible to Seasonal Affective Disorder than others; for those individuals the amenity value of light would be substantially greater because of the adverse health effects that a diminution in light exposure would have. Due to the fact that there are so many variables involved, it did not see how the financial value of light could be assessed in general terms.
- 8.86 Allen & Overy LLP noted that extensive research has confirmed the benefits of natural light, including its effects on regulating the human biological clock which in turn positively affects mood and alertness. It pointed out that in the property market, properties which benefit from strong natural light are likely to be more attractive to buyers and tenants and therefore worth more. It cited employees’ preference for offices with external windows as opposed to internal windowless offices as evidence for a human preference for natural over artificial light. It also suggested that natural light may improve worker productivity and reduce absenteeism. Finally, it highlighted the potential environmental impact that natural light can have by reducing electricity usage and costs.

8.87 The Chartered Institute of Architectural Technologists highlighted the environmental and human health benefits of a building's use of natural light. It suggested that what we proposed in the Consultation Paper went against climate change targets and the reduction of carbon dioxide (CO<sub>2</sub>). The Institute stressed that any changes to the law need to be considered in accordance with Government's wider aim of improving the sustainability of UK homes.

## **CHAPTER 9**

### **LIST OF RECOMMENDATIONS**

#### **CHAPTER 2: PRESCRIPTION AND LIGHT INTERRUPTION CERTIFICATES**

- 9.1 We recommend that provision be made for landowners to stop prescription for light over their land by the registration of a certificate of light interruption on the local land charges register.

**[paragraph 2.110]**

- 9.2 We recommend that, to be able to register a certificate of light interruption, a landowner of relevant land must be the owner of a freehold interest, a lessee with more than seven years to run on its lease, or a mortgagee in possession.

**[paragraph 2.111]**

- 9.3 We recommend that the form of the certificate of light interruption (and any application form to register it as a local land charge) should be prescribed by rules.

**[paragraph 2.112]**

#### **CHAPTER 4: DAMAGES OR AN INJUNCTION?**

- 9.4 We recommend 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:

- (1) the claimant's interest in the dominant land;
- (2) the loss of amenity attributable to the infringement (taking into account the extent to which artificial light is relied upon);
- (3) whether damages would be adequate compensation;
- (4) the conduct of the claimant;
- (5) whether the claimant delayed unreasonably in claiming an injunction;
- (6) the conduct of the defendant;
- (7) the impact of an injunction on the defendant; and
- (8) the public interest.

**[paragraph 4.116]**

## **CHAPTER 5: MEASURES OF DAMAGES**

- 9.5 We recommend that Government review the question of reform of the level of equitable damages once our other recommendations have been enacted and have taken effect, and to consider at that stage and as a matter of economic policy the desirability of capping equitable damages either at a percentage of profit share, or as a multiplier of diminution in value.

**[paragraph 5.79]**

## **CHAPTER 6: THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE**

- 9.6 We recommend the introduction of a Notice of Proposed Obstruction, whereby a landowner who expects to obstruct the light to a neighbour's property could require that neighbour to seek an injunction in respect of the obstruction within a specified time, or be prevented from obtaining an injunction in respect of that obstruction.

**[paragraph 6.31]**

- 9.7 We recommend that the Secretary of State be given a power to prescribe by regulations the form and content of an NPO. The Secretary of State must exercise the power so that the dominant owner, with professional advice, has sufficient information to assess accurately whether the proposed obstruction would infringe a right to light and the extent of any infringement of such a right.

**[paragraph 6.38]**

- 9.8 We recommend that the regulations must require that the NPO:

- (1) identify the person serving the NPO;
- (2) identify, or give a sufficient description of, the intended recipient of the NPO;
- (3) describe the servient and dominant land;
- (4) describe the proposed obstruction (including a plan showing its location and diagrams showing its dimensions);
- (5) specify the last day on which the addressee can claim an injunction;
- (6) explain the effect of the NPO, including the consequences of not claiming an injunction within the relevant timeframe; and
- (7) state that the recipient should seek professional advice (and that the person serving the NPO is obliged to pay the reasonable costs of taking that advice).

**[paragraph 6.40]**

- 9.9 We recommend that an NPO should only be capable of being served by someone (whether a corporate body or a natural person) with a freehold or leasehold interest (with more than five years remaining) in the servient land.

**[paragraph 6.45]**

- 9.10 We recommend that the Secretary of State be given power to make regulations setting out how NPOs are to be served, including power to make provision for deemed service.

**[paragraph 6.69]**

- 9.11 We recommend that the rules for service of an NPO should be based upon the rules set out in Part 6 of the Civil Procedure Rules and section 6 of the Acquisition of Land Act 1981.

**[paragraph 6.74]**

- 9.12 We recommend that an NPO should be capable of being served on a freehold or leasehold owner of land.

**[paragraph 6.80]**

- 9.13 We recommend that, during the period after service of an NPO and before the end of the period during which the recipient must have issued proceedings for an injunction, the dominant owner must not interfere with the dominant owner's right to light. If the servient owner does not adhere to this requirement, then the NPO will not prevent the grant of an injunction to restrain that interference.

**[paragraph 6.84]**

- 9.14 We recommend that a servient landowner should be entitled to withdraw an NPO by notifying the dominant owner in writing of the NPO's withdrawal. Withdrawal of an NPO should be without prejudice to any obligation of the developer to pay the dominant owner's costs.

**[paragraph 6.87]**

- 9.15 We recommend that:

- (1) where an NPO has been served; and
- (2) the period of time by which the dominant owner must have responded by issuing proceedings for an injunction has not yet expired; and
- (3) the servient owner serves a further NPO on the same dominant owner in respect of the same dominant land and obstruction;

then, so far as that dominant owner is concerned, both NPOs should be deemed to be withdrawn. The deemed withdrawal should be without prejudice to any obligation of the developer to pay the dominant owner's costs.

**[paragraph 6.90]**

- 9.16 We recommend that an NPO should be effective against successors in title to its addressee once it is registered on a local land charges register.

**[paragraph 6.98]**

- 9.17 We recommend that an NPO must state the date by which the recipient must take action in order to preserve its right to an injunction, and that the date must be not less than eight months after the date of service of the NPO.

**[paragraph 6.107]**

- 9.18 We recommend that the dominant owner should have to issue and serve proceedings for an injunction in respect of the obstruction described in the NPO, within the required timeframe, to preserve the availability of that remedy.

**[paragraph 6.118]**

- 9.19 We recommend that the minimum period between the date specified on the face of an NPO (not being earlier than the date the NPO is served) and the deadline for the recipient to serve upon the developer the claim form for an injunction should be eight months.

**[paragraph 6.128]**

- 9.20 We recommend that the parties should be free to agree in writing to the extension of the deadline for the dominant owner to commence proceedings and serve a claim form for an injunction to protect his or her right to light.

**[paragraph 6.132]**

- 9.21 We recommend that, if a person fails to respond to an NPO by issuing and serving proceedings by the date specified in the notice (which must not be earlier than eight months following the date the NPO is served), then he or she will no longer be able to be granted an injunction in respect of any development that fits within the obstruction specified in the NPO.

**[paragraph 6.139]**

- 9.22 We recommend that a person serving an NPO should be subject to a statutory obligation to cover the recipient's reasonable legal and surveyor costs that are incurred in taking advice on the existence and scope of rights to light from which he or she may benefit and matters arising from the NPO.

**[paragraph 6.157]**

- 9.23 We recommend that if a party fails to respond to an NPO by issuing and serving proceedings, that should not affect the availability or quantum of damages awarded in subsequent proceedings for the infringement of the dominant owner's right to light (and the effect of the NPO should be ignored in addressing those issues).

**[paragraph 6.168]**

- 9.24 We recommend that an NPO provide protection against an injunction being granted for a period of 10 years from the deadline for response in the NPO.

**[paragraph 6.182]**

#### **CHAPTER 7: BRINGING RIGHTS TO LIGHT TO AN END**

- 9.25 We recommend that the 2011 Easements Bill be amended prior to its introduction to provide that where a right to light has not been used for a continuous period of five years, there should be a rebuttable presumption that it has been abandoned.

**[paragraph 7.47]**

- 9.26 We recommend that the 2011 Easements Bill be amended prior to its enactment to provide that the jurisdiction of the Lands Chamber of the Upper Tribunal be extended so as to enable it to make orders for the modification and discharge of easements and profits à prendre, and to make declarations in respect of them, whether created before or after enactment.

**[paragraph 7.74]**

(Signed) DAVID LLOYD JONES, *Chairman*

ELIZABETH COOKE

DAVID HERTZELL

DAVID ORMEROD

NICHOLAS PAINES

ELAINE LORIMER, *Chief Executive*

8 October 2014

## **APPENDIX A**

### **LIGHT INTERRUPTION CERTIFICATES: PROVISIONS FOR INSERTION IN THE 2011 EASEMENTS BILL**

**(A) The following subsections are to be added to clause 16 (acquisition of easements by long use):**

“(3A) In the case of qualifying use of land for the purpose of the access of light, subsection (1) has effect subject to paragraph 4 of Schedule 1A (interruption of a period of qualifying use by the registration as a local land charge of a light interruption certificate).

(3B) Schedule 1A (which makes provision in relation to light interruption certificates and their registration under the Local Land Charges Act 1975) has effect.”

**(B) The following clause is to be added after clause 18 (easements and profits: repeal of existing law):**

“18A Consequential repeal of the Rights of Light Act 1959

- (1) In consequence of the provision made by Schedule 1A, the Rights of Light Act 1959 is repealed.
- (2) That repeal does not affect the operation of that Act (or of any rules made by virtue of it) in relation to –
  - (a) a notice registered under section 2(4) of that Act before the day on which this section comes into force; and
  - (b) where such a notice was registered in pursuance of an application accompanied by a certificate issued under section 2(3)(b) of that Act, anything necessary to be done to enable –
    - (i) the issue by the Upper Tribunal of a further certificate (under the rules mentioned in section 2(5)(c) of that Act) before the end of the period specified in the certificate issued under section 2(3)(b), and
    - (ii) the amendment of the registration of the notice once the further certificate is lodged with the registering authority.”

**(C) The following Schedule is to be added after Schedule 1:**

**“SCHEDULE 1A**

**Section 16(3B)**

**LIGHT INTERRUPTION CERTIFICATES**

*Light interruption certificates*

- 1 (1) An owner of land that is or might be in use for the purpose of the access of light to any building situated on other land may make a light interruption certificate relating to those two pieces of land.
  - (2) In sub-paragraph (1) “owner” means –
    - (a) the holder of the freehold estate in the land; or
    - (b) the holder of a leasehold estate in the land which was granted for a term of years of which not less than 7 years remain unexpired when the certificate is made; or
    - (c) a mortgagee in possession (within the meaning of the Law of Property Act 1925) where the interest mortgaged is either the freehold estate or a leasehold estate of the kind mentioned in paragraph (b).
  - (3) In this Schedule “building” means the whole or any part of a building, or of any other structure, that is capable of benefiting from a right to light created under section 16.
- 2 (1) A light interruption certificate must –
    - (a) give the name of the person making it (“the maker”);
    - (b) specify the land owned by the maker to which the certificate relates (“the maker’s land”);
    - (c) specify the other land to which the certificate relates; and
    - (d) state the intention of the maker to interrupt any period of less than 20 years’ qualifying use of the maker’s land for the purpose of the access of light to any building on the other land by registering the certificate as a local land charge affecting that other land.
  - (2) Rules may require a light interruption certificate to be in such form as the rules may prescribe.

- (3) A light interruption certificate is made when the maker applies for its registration as a local land charge in accordance with paragraph 3.

*Registration of a light interruption certificate as a local land charge*

- 3 (1) A person proposing to make a light interruption certificate may apply to the registering authority for the registration of the certificate as a local land charge affecting the land specified in it under paragraph 2(1)(c).
- (2) Where such an application is duly made to the registering authority it is the duty of the authority to register the certificate in the manner prescribed by rules.
- (3) Once registered, the certificate is a local land charge.
- (4) Rules may require an application for registration to be in such form, accompanied (if the rules so require) by such additional information, as the rules may prescribe.
- (5) Sections 5(1) and (2) and 10(1)(a) of the Local Land Charges Act 1975 do not apply in relation to a light interruption certificate.
- (6) In this paragraph “registering authority” means the registering authority (within the meaning of the Local Land Charges Act 1975) in whose area the land specified in the certificate under paragraph 2(1)(c) is situated.

*Effect of registration of a light interruption certificate*

- 4 (1) A light interruption certificate registered as a local land charge has the effect of interrupting any period of less than 20 years’ continuing qualifying use of the maker’s land for the purpose of the access of light to any building situated on the other land specified in the certificate.
- (2) The interruption of any such period of qualifying use takes place at the end of the day on which the certificate is registered and terminates the qualifying use for the purposes of section 16 (and, accordingly, if the qualifying use continues it is to be treated for those purposes as starting again on the next day).
- (3) For the purposes of this paragraph –
  - (a) “qualifying use” means use which, in the case of use for the purpose of the access of light, is qualifying use for the purposes of section 16; and

- (b) a period of continuing qualifying use is to be regarded as a period of less than 20 years if the period of such use ending with the day on which the certificate is registered is less than 20 years.

*Meaning of “rules”*

- 5 In this Schedule “rules” means rules under section 14 of the Local Land Charges Act 1975.”

# LIGHT INTERRUPTION CERTIFICATES

## EXPLANATORY NOTES

### COMMENTARY ON THE CLAUSES AND SCHEDULE

- A.1 Rights to light can arise by prescription where light passes through the windows of a building from across neighbouring land for 20 years. Prescription can be stopped in a number of ways, including by obstructing the passage of light by a building.
- A.2 The provisions set out in Appendix A establish a new regime to prevent the acquisition of rights to light by prescription. They allow a landowner to create a “light interruption certificate” (a “LIC”) which, when registered as a local land charge, prevents the acquisition of right(s) to light across a landowner’s property. They also provide for the repeal of the Rights of Light Act 1959, which enables the interruption of prescription under the current law.
- A.3 The provisions in Appendix A are for insertion in the draft Law of Property Bill attached (at Appendix A) to the Law Commission’s Report on easements, covenants and profits à prendre.<sup>1</sup> References to the “2011 draft Bill” in these explanatory notes are to that draft Bill.
- A.4 The 2011 draft Bill repeals the current law of prescription, subject to one transitional provision, and creates a new scheme for prescription. The draft provisions for LICs will operate in conjunction with the new prescription regime; LICs would not work effectively with the current law of prescription.

#### **Paragraph (A): New subsections to be added to clause 16 of the 2011 draft Bill (acquisition of easements by long use)**

- A.5 Paragraph (A) inserts two new substantive provisions in clause 16 of the 2011 draft Bill. The first, (subsection (3A)) has the effect of making prescription for rights to light under the new prescription regime subject to the effect of LICs (the substance of which is set out in the Schedule). The second, (subsection (3B)) introduces the new Schedule 1A, which makes provision for LICs. The Schedule is explained below.

#### **Paragraph(B): New clause to be added after clause 18 of the 2011 draft Bill (easements and profits: repeal of existing law)**

- A.6 Paragraph (B) inserts a new clause 18A in the 2011 draft Bill. This clause repeals the Rights of Light Act 1959. The Rights of Light Act 1959 allows a landowner to prevent the prescriptive acquisition of rights to light over its land through the use of what are commonly called light obstruction notices. Light obstruction notices are designed to prevent prescription under the provisions of the Prescription Act 1832.
- A.7 LICs are designed to prevent prescription under the new prescription regime created by the 2011 draft Bill.

<sup>1</sup> *Making Land Work: easements, covenants and profits à prendre* (2011) Law Com No 327.

- A.8 The new clause 18A(2)(a) sets out a transitional provision to ensure that light obstruction notices that are already registered as local land charges when clause 18A comes into force will continue to have effect. This is needed because the 2011 draft Bill contains a transitional provision enabling the Prescription Act 1832 to continue in effect for a brief period (and only in certain circumstances) following the coming into force of the new prescription regime.<sup>2</sup> The new clause 18A(2)(b) allows a temporary LON (issued under section 2(3)(b) of the Rights of Light Act 1959) to be replaced by a full LON (in the same way as under the current law).

**Paragraph (C): New Schedule to be added after Schedule 1 to the 2011 draft Bill**

- A.9 Paragraph (C) inserts a new Schedule 1A into the 2011 draft Bill. The provisions of the Schedule are considered below.

***Paragraph 1: light interruption certificates***

- A.10 Paragraph 1 gives a power to those who own the freehold or a lease with more than 7 years to run (or who are a mortgagee in possession) of a piece of land to create a LIC. A LIC can only be created where the landowner's property "is or might be in use for the purpose of the access of light to any building" on other land.
- A.11 Paragraph 2(1) sets out that, to be valid, a LIC must:
- (1) give the name of the landowner making it;
  - (2) specify the land over which the landowner wishes to prevent prescription;
  - (3) specify neighbouring land (on which the prescriptive acquisition of rights to light will be prevented by the LIC); and
  - (4) state it is the intention of the landowner to interrupt any acquisition of rights to light by prescription that is occurring.
- A.12 Paragraph 2(2) enables rules to be made under the provisions of the Local Land Charges Act 1975 to prescribe the form of LICs.

***Paragraph 3: registration of a light interruption certificate as a local land charge***

- A.13 Paragraph 3 enables a landowner to apply for the registration of a LIC as a local land charge. The LIC only becomes a local land charge upon its registration. The LIC is registrable against the land over which the person registering the LIC wishes to prevent prescription.

<sup>2</sup> See the 2011 draft Bill, cl 18(2).

- A.14 Paragraph 3(5) disapplies sections 5(1), 5(2) and 10(1)(a) of the Local Land Charges Act 1975. Those provisions impose duties which are relevant to local land charges whose registration is not optional and for compensation to be payable where a local land charge is not disclosed on a search of the register because it has not been registered. They are not relevant to LICs which do not have to be registered and are not local land charges until registered.

***Paragraph 4: effect of registration of a light interruption certificate***

- A.15 Paragraph 4(1) causes a registered LIC immediately to interrupt the process of prescription, where it is taking place under the new prescription regime. The LIC is only effective to prevent the acquisition by prescription of rights to light, and has no effect on rights to light that have already come into being (whether by express grant or by prescription) before the LIC is registered.

**APPENDIX B**  
**DRAFT RIGHTS TO LIGHT (INJUNCTIONS) BILL**

# **Rights to Light (Injunctions) Bill**

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## **CONTENTS**

- 1 Notices of proposed obstruction affecting landowners' ability to obtain injunctions to enforce rights to light
- 2 Exercise of court's power to grant an injunction to enforce a right to light
- 3 Interpretation, Crown application, extent, commencement and short title

- 
- Schedule – Notices of proposed obstruction
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  - Part 2 – Effect of notices of proposed obstruction
  - Part 3 – Registration of notices of proposed obstruction as local land charges
  - Part 4 – Multiple notices of proposed obstruction relating to the same land
  - Part 5 – Modification of Parts 1 to 4 in cases where the ownership of the dominant or servient land changes
  - Part 6 – Interpretation: general

A  
**B I L L**

TO

Make provision about the enforcement by injunction of rights to light.

**B**E IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

**1 Notices of proposed obstruction affecting landowners' ability to obtain injunctions to enforce rights to light**

The Schedule makes provision for and in connection with the service of notices of proposed obstruction and the effect of service of a notice of proposed obstruction on a landowner's ability to obtain an injunction to restrain the infringement of a right to light.

**2 Exercise of court's power to grant an injunction to enforce a right to light**

- (1) This section applies where—
  - (a) a claim is made for an injunction to restrain the infringement of a right to light; and
  - (b) the claimant is not prevented by any principle of equity from obtaining an equitable remedy in respect of any infringement of the right to light.
- (2) The court must not grant an injunction if, in all the circumstances of the case, an injunction would be a disproportionate means of enforcing the claimant's right to light.
- (3) The circumstances to be considered in assessing whether that is the case include—
  - (a) the claimant's interest in the dominant land;
  - (b) the loss of amenity attributable to the infringement;
  - (c) whether or not damages would be adequate compensation for the injury to the claimant;
  - (d) the claimant's conduct;
  - (e) any unreasonable delay in claiming an injunction;
  - (f) the defendant's conduct;
  - (g) the impact of an injunction on the defendant;

- (h) the public interest, so far as relevant.
- (4) The extent to which artificial light is relied on instead of or in addition to natural light is always relevant in assessing the loss of amenity attributable to an infringement of a right to light.
- (5) Nothing in this section affects the court's power to award damages in substitution for an injunction in a case where an injunction is not granted by virtue of subsection (2).
- (6) In this section "claim" includes a counterclaim and "the claimant" includes the person making a counterclaim.

### **3 Interpretation, Crown application, extent, commencement and short title**

- (1) In this Act "right to light" means an easement of light.
- (2) This Act binds the Crown.
- (3) This Act extends to England and Wales only.
- (4) This Act comes into force as follows —
  - (a) section 1 and the Schedule come into force on a day appointed by regulations made by the Secretary of State by statutory instrument;
  - (b) section 2 comes into force on a day so appointed; and
  - (c) this section comes into force on the passing of this Act.
- (5) This Act may be cited as the Rights to Light (Injunctions) Act 2014.

## SCHEDULE

Section 1

### NOTICES OF PROPOSED OBSTRUCTION

#### PART 1

##### PRELIMINARY: SERVICE OF NOTICES OF PROPOSED OBSTRUCTION ETC

##### *Power to serve a notice of proposed obstruction*

- 1 (1) An owner of land may serve a notice of proposed obstruction on an owner of other land the access of light to which could be impeded by an obstruction created on the first-mentioned land.
- (2) But the holder of a leasehold estate may not serve a notice of proposed obstruction unless the lease –
  - (a) was granted for a term of 5 years or more, and
  - (b) has at least 5 years left to run when the notice is served.

##### *Meaning of “notice of proposed obstruction” and related expressions*

- 2 (1) This paragraph defines terms used in this Schedule.
- (2) “Notice of proposed obstruction” means a notice which –
  - (a) describes an obstruction that, if created on land owned by the person serving it, would interfere with the access of light across that land to land owned by the person on whom it is served; and
  - (b) complies with any requirements as to its content or form imposed by regulations made under paragraph 3.
- (3) In relation to a notice of proposed obstruction which has been served –
  - (a) “the proposed obstruction” is the obstruction described in the notice;
  - (b) references to space that would be occupied by the proposed obstruction are to space that it would occupy if it were created on the servient land;
  - (c) “S” is the person who serves the notice;
  - (d) “the servient land” is the land owned by S to which the notice relates (being the land on which the proposed obstruction would be situated if it were created);
  - (e) “D” is the person served with the notice;
  - (f) “the dominant land” is the land owned by D to which the notice relates;
  - (g) “relevant injunction” means an injunction that would prevent the infringement of a right to light benefiting the dominant land by the creation on the servient land of –
    - (i) the proposed obstruction or any other obstruction the whole of which occupies space that would be occupied by the proposed obstruction; or

- (ii) any part of an obstruction not mentioned in sub-paragraph (i), being a part which occupies space that would be occupied by the proposed obstruction.

*Regulations as to the content, form and service of a notice of proposed obstruction*

- 3 (1) The Secretary of State may by regulations make provision about—
  - (a) the content of notices of proposed obstruction;
  - (b) additional information to be provided with notices of proposed obstruction;
  - (c) the service of notices of proposed obstruction and any additional information.
- (2) The power under sub-paragraph (1)(a) includes power to prescribe a form for notices of proposed obstruction.
- (3) The powers under sub-paragraph (1)(a) and (b) are exercisable with a view to ensuring (among other things) that D—
  - (a) is able to understand the notice and its effect; and
  - (b) has sufficient information about the proposed obstruction to be able (with professional advice) to assess accurately whether, and if so to what extent, the creation of that obstruction (or any part of it) would infringe a right to light benefiting D's estate in the dominant land.
- (4) Any regulations made under this paragraph must secure that a notice of proposed obstruction (or in the case of a matter mentioned in paragraph (c) or (d) either a notice of proposed obstruction or additional information)—
  - (a) identifies S by name and gives an address for service for S;
  - (b) identifies D by name or gives a description sufficient to identify D (but see sub-paragraph (5));
  - (c) identifies the servient land and the dominant land in the manner required by the regulations;
  - (d) describes the proposed obstruction in the manner required by the regulations (and see sub-paragraph (6));
  - (e) specifies the last day on which D may claim a relevant injunction (but see sub-paragraph (7));
  - (f) explains the effect of the notice (including the consequence if no relevant injunction is claimed within the permitted period and S's obligation under paragraph 13 to meet pre-action costs reasonably incurred by D in response to the notice); and
  - (g) includes a statement that D should seek professional advice.
- (5) The regulations must not permit a notice of proposed obstruction to give a description of D (instead of D's name) unless all reasonable investigations have been made and S is unable to identify that person by name.
- (6) The description of the proposed obstruction that the regulations are to secure is included in a notice of proposed obstruction must include or be accompanied by—
  - (a) a plan showing its location; and
  - (b) diagrams showing its dimensions.
- (7) The regulations must require the specified day mentioned in sub-paragraph (4)(e) to fall after the end of the period of 8 months beginning with the day after the day on which the notice is served on D.

- (8) The regulations may provide that in circumstances prescribed by the regulations a notice of proposed obstruction is to be deemed –
  - (a) to have been served on a person; or
  - (b) to have been served on a person at a time prescribed by the regulations.
- (9) Regulations under this paragraph may –
  - (a) make supplementary, incidental, consequential or transitional provision or savings; or
  - (b) make different provision for different purposes.
- (10) The power to make regulations under this paragraph is exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

*The permitted period for claiming a relevant injunction in response to a notice of proposed obstruction*

- 4 (1) In this Schedule “the permitted period for claiming a relevant injunction” (or “the permitted period”), means, in relation to a notice of proposed obstruction, the period beginning with the service of the notice on D and ending with the day specified in the notice by virtue of paragraph 3(4)(e), unless that period is extended under sub-paragraph (2).
- (2) If S agrees to an extension of the permitted period to a particular day, the permitted period is extended for all purposes of this Schedule until the end of that day.
- (3) Any extension must be agreed by S in writing before the end of the permitted period as it stood before the extension.
- (4) There is no limit to the number of extensions that may be agreed; but the permitted period cannot be extended beyond the end of the ten year period mentioned in paragraph 11(2).

*Withdrawal of a notice of proposed obstruction*

- 5 (1) This paragraph applies where a notice of proposed obstruction has been served, whether or not it has been registered as a local land charge by virtue of paragraph 15.
- (2) S may withdraw the notice of proposed obstruction by giving D a notice of withdrawal.
- (3) The notice of proposed obstruction ceases to have effect for all purposes when the notice of withdrawal is given to D.
- (4) But withdrawal of the notice of proposed obstruction does not –
  - (a) alter the effect of the notice in relation to things done on the servient land before the notice of withdrawal is given (see paragraph 7(2)); or
  - (b) affect the obligation of S to reimburse pre-action costs reasonably incurred in response to the notice of proposed obstruction (see paragraph 13).
- (5) In this Schedule “notice of withdrawal” means a notice in writing that identifies the notice of proposed obstruction to which it relates and states that it is being withdrawn by S.

## PART 2

### EFFECT OF NOTICES OF PROPOSED OBSTRUCTION

#### *Purpose of Part 2*

- 6 This Part provides for the effect of a notice of proposed obstruction that has been served.

#### *Restriction on the availability of a relevant injunction after expiry of permitted period*

- 7 (1) The notice of proposed obstruction has the effect provided by this paragraph on the availability to D of a relevant injunction (unless by virtue of any provision of this Schedule the notice either ceases to have effect or has no effect).
- (2) After the end of the permitted period for claiming a relevant injunction, D cannot be granted a relevant injunction except in a case falling within –
- (a) paragraph 9 (relevant injunction claimed before the end of the permitted period);
  - (b) paragraph 10 (relevant injunction relating to infringement by things done on the servient land before the end of the permitted period); or
  - (c) paragraph 11 (relevant injunction relating to infringement by things done on the servient land more than ten years after the end of the original permitted period).
- (3) Where by virtue of sub-paragraph (2) D cannot be granted a relevant injunction, no court has power to grant a relevant injunction to D.
- (4) Nothing in this paragraph affects the power of a court to grant D an injunction preventing the infringement of a right to light by the creation of any part of an obstruction, in a case where some of the obstruction does, but the part to which the injunction relates does not, occupy space that would be occupied by the proposed obstruction.
- (5) Nothing in this paragraph affects the power of the court, in proceedings for an injunction mentioned in sub-paragraph (4) relating to part of an obstruction, to have regard to the rest of the obstruction (including so much of it as occupies space that would be occupied by the proposed obstruction) in determining the existence or extent of any infringement of the right to light concerned.

#### *Cases where a relevant injunction may be granted despite paragraph 7(2)*

- 8 Paragraphs 9 to 11 set out the cases where a relevant injunction may be granted to D after the end of the permitted period for claiming a relevant injunction.
- 9 (1) A relevant injunction may be granted in respect of a claim made before or after the end of the permitted period if, before the end of the permitted period, any claim for a relevant injunction has been made by D.
- (2) For the purposes of this Schedule a claim for a relevant injunction is made when –
- (a) a claim form in which such an injunction is sought is issued and served (in accordance with any applicable rules of court); or

- (b) any other step is taken in the course of legal proceedings which has the effect of applying to the court for such an injunction.
- 10 A relevant injunction may be granted if it relates to anything done, before the end of the permitted period, to create an obstruction on the servient land.
- 11 (1) A relevant injunction may be granted if it relates to anything done, after the end of the period specified in sub-paragraph (2), to create an obstruction on the servient land.
- (2) That period is the period of 10 years beginning with the day after the day specified in the notice of proposed obstruction by virtue of regulations made under paragraph 3(4)(e).

*Non-availability of relevant injunction to have no effect on damages*

- 12 (1) This paragraph applies where, by virtue of paragraph 7(2), D cannot be granted a relevant injunction in proceedings relating to the infringement of a right to light benefiting the dominant land.
- (2) The fact a relevant injunction cannot be granted does not affect the damages for any such infringement that may be awarded to D.
- (3) In particular, that fact is to be disregarded in relation to the exercise by a court of the power to award damages to D in substitution for an injunction.

*Duty of S to reimburse pre-action costs incurred by D in response to the notice of proposed obstruction*

- 13 (1) S must reimburse any pre-action costs reasonably incurred by D.
- (2) Pre-action costs are costs incurred by D in seeking professional services in connection with the notice of proposed obstruction, other than professional services provided –
  - (a) after the end of the permitted period for claiming an injunction, or
  - (b) in respect of the taking of a step in proceedings to enforce a relevant right to light (including the issue of a claim form).
- (3) The professional services referred to in sub-paragraph (2) include the provision of advice or information as to –
  - (a) the existence and nature of any relevant right to light;
  - (b) whether, and if so to what extent, the proposed obstruction (or any part of it) would infringe any relevant right to light;
  - (c) the effect of the notice of proposed obstruction and the provisions of this Schedule so far as relating to it; and
  - (d) the steps open to D in response to the notice and the remedies available to D in relation to any infringement of a relevant right to light that would be caused by the proposed obstruction.
- (4) In this paragraph “relevant right to light” means a right to light benefiting D’s estate in the dominant land that would or might be infringed by the proposed obstruction.
- 14 (1) The Secretary of State may make regulations which supplement paragraph 13 by specifying what costs are, or are not, to be regarded as pre-action costs reasonably incurred for the purposes of that paragraph.

- (2) Regulations under this paragraph may –
  - (a) specify services that are, or are not, to be regarded as professional services for the purposes of paragraph 13; and
  - (b) make different provision for different purposes.
- (3) The power to make regulations under this paragraph is exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

### PART 3

#### REGISTRATION OF NOTICES OF PROPOSED OBSTRUCTION AS LOCAL LAND CHARGES

##### *Registration of notices of proposed obstruction as local land charges*

- 15 (1) Once a notice of proposed obstruction has been served, S may apply to the registering authority in whose area the dominant land is situated for registration of the notice as a local land charge affecting the dominant land.
- (2) Where such an application is duly made to the registering authority, it is the duty of that authority to register the notice in such manner as rules may prescribe.
- (3) Once registered, the notice is a local land charge and is binding on –
  - (a) any person who, after the registration of the notice, acquires D's estate in the whole or any part of the dominant land –
    - (i) from D, or
    - (ii) from a person other than D who is by virtue of this subparagraph bound by the notice;
  - (b) any person who has an estate in the whole or any part of the dominant land that was created after the registration of the notice, and who derives title under D, other than a person mentioned in subparagraph (4); and
  - (c) any person in adverse possession of the whole or any part of the dominant land, where the person's adverse possession begins after the registration of the notice.
- (4) A person whose estate in the whole or any part of the dominant land –
  - (a) is created after the registration of the notice, but
  - (b) derives from an estate created out of D's estate in the dominant land before the registration of the notice,
 is not bound by the notice.
- (5) Sections 5(1) and (2) and 10(1)(a) of the Local Land Charges Act 1975 do not apply in relation to a notice of proposed obstruction.
- (6) In this Schedule, in relation to a notice of proposed obstruction –
 

“registered” means registered by virtue of this paragraph (and “unregistered” has a corresponding meaning); and

“the registering authority” means the registering authority (within the meaning of the Local Land Charges Act 1975) in whose area the dominant land is situated.

*Cancellation of registration following withdrawal of a registered notice of proposed obstruction*

- 16 (1) Where a registered notice of proposed obstruction has ceased to have effect on the giving of a notice of withdrawal (by virtue of paragraph 5(3)), S or D may apply to the registering authority for the registration of the notice to be cancelled.
- (2) An application under this paragraph must be in the form prescribed by rules and accompanied by a copy of the notice of withdrawal.
- (3) Where such an application is duly made to the registering authority, the authority must cancel the registration of the notice of proposed obstruction in such manner as may be prescribed by rules.
- (4) The effect of withdrawing the notice of proposed obstruction is not conditional on cancellation of the registration (or on making an application under this paragraph).

PART 4

MULTIPLE NOTICES OF PROPOSED OBSTRUCTION RELATING TO THE SAME LAND

*No general restriction on multiple notices of proposed obstruction relating to the same land*

- 17 (1) This paragraph and paragraph 18 apply where a notice of proposed obstruction (“notice A”) has been served.
- (2) Except as provided by paragraph 18, there is no restriction on the number of other notices of proposed obstruction which may be in effect at the same time as notice A in relation to –
- (a) the whole or any part of the dominant land specified in notice A, and
  - (b) the whole or any part of the servient land specified in notice A.

*Effect of serving a notice of proposed obstruction relating to the same land as an earlier notice during the permitted period for that notice.*

- 18 (1) Sub-paragraphs (2) to (4) apply if, during the permitted period for claiming a relevant injunction in response to notice A, S serves on D another notice of proposed obstruction (“notice B”) which –
- (a) identifies as the dominant land for notice B land which (or any part of which) is the whole or part of the dominant land specified in notice A, and
  - (b) describes a proposed obstruction which (or any part of which) would occupy space that would be occupied by the proposed obstruction described in notice A.
- (2) In that event –
- (a) notice B has no effect except as mentioned in sub-paragraph (3) (and accordingly may not be registered);
  - (b) notice A ceases to have effect (and accordingly may not be registered if it was unregistered when notice B was served);
  - (c) if notice A is registered when notice B is served, the registering authority must, when it becomes aware that notice A has ceased to have effect, cancel the registration of notice A in such manner as may be prescribed by rules.

- (3) Despite sub-paragraph (2)(a), the service of notice B does give rise to the obligation of S under paragraph 13 to reimburse pre-action costs reasonably incurred by D (in relation to notice B) at any time before D becomes aware that notice B has no effect.
- (4) Despite sub-paragraph (2)(b), the service of notice B does not affect the obligation of S under paragraph 13 to reimburse pre-action costs reasonably incurred by D (in relation to notice A) at any time before D becomes aware that notice A has ceased to have effect.

## PART 5

### MODIFICATION OF PARTS 1 TO 4 IN CASES WHERE THE OWNERSHIP OF THE DOMINANT OR SERVIENT LAND CHANGES

#### *Purpose of Part 5*

- 19 This Part modifies or explains the effect of particular provisions of Parts 1 to 4 of this Schedule in cases where, following service of a notice of proposed obstruction, there has been a change in the ownership of the dominant land or the servient land (or both).

#### *Meaning of “successor to D”, “successor to S” etc*

- 20 (1) This paragraph defines terms used in this Part.
- (2) “Successor to D” means a person who is bound by the notice of proposed obstruction by virtue of falling within paragraph 15(3)(a) or (b).
- (3) “Successor to S” means –
  - (a) a person who has acquired S’s estate in the whole or any part of the servient land after the service of the notice of proposed obstruction; or
  - (b) a person who has an estate in the whole or any part of the servient land that was created after the service of the notice of proposed obstruction, and who derives title under S.
- (4) “Derivative estate” –
  - (a) when used in relation to the dominant land, means any estate the holder of which is bound by the notice of proposed obstruction by virtue of paragraph 15(3)(b); and
  - (b) when used in relation to the servient land, means any estate of the kind referred to in sub-paragraph (3)(b).

#### *References to S: general*

- 21 References to S in paragraphs 2, 4(2) and (3), 5(2), 13(1) and 18(3) and (4) continue to refer to S even after a change in the ownership of the whole or any part of the servient land.

#### *Application of paragraph 5*

- 22 (1) The reference in paragraph 5(2) to S is to have effect as if it included a reference to a successor to S whose estate is not a derivative estate.

- (2) But where a notice of withdrawal is given by a successor to S whose estate is in part only of the servient land, sub-paragraphs (3) to (5) of paragraph 5 are to have effect as if –
- (a) the reference in paragraph 5(3) to the notice of proposed obstruction were a reference to that notice so far as relating to the part of the servient land owned by the successor;
  - (b) the reference in paragraph 5(4)(a) to the servient land were a reference to the part of the servient land owned by the successor; and
  - (c) in paragraph 5(5), after “relates”, there were inserted the words “, describes the part of the servient land owned by the successor”.
- 23 (1) A notice of withdrawal under paragraph 5(2) may be given to D (and has the effect provided for by paragraph 5(3)) after a change in the ownership of the dominant land, whether or not at the time it is given D is the owner of the whole or any part of the dominant land.
- (2) Paragraphs 5(2) and (3) are to have effect in relation to a successor to D as if the references to D were references to the successor, subject to sub-paragraphs (3) and (4) below.
- (3) A notice of withdrawal given to a successor to D whose estate –
- (a) is not a derivative estate, and
  - (b) is an estate in part only of the dominant land,
- has effect to withdraw the notice of proposed obstruction only in so far as it relates to the part of the dominant land owned by the successor (and paragraph 5(3) is to be read accordingly in its application to that notice of withdrawal).
- (4) A notice of withdrawal given to a successor to D whose estate is a derivative estate (“the notified successor”) does not affect the operation of the notice of proposed obstruction in relation to D or to any successor to D other than –
- (a) the notified successor, or
  - (b) a successor to D whose estate derives from the notified successor’s estate,
- (and accordingly paragraph 7(2) continues to apply to D and any successor to D who does not fall within paragraph (a) or (b)).
- (5) In sub-paragraph (4) “the notified successor’s estate” means the estate in the whole or any part of the dominant land held by the notified successor when the notice of withdrawal is given.

### *Application of Part 2*

- 24 Any reference to D in paragraphs 7(2) to (4), 8, 9(1) and 12 is to have effect as if it included a reference to –
- (a) a successor to D; and
  - (b) a person in adverse possession of the whole or any part of the dominant land who is bound by the notice of proposed obstruction by virtue of paragraph 15(3)(c).
- 25 Any reference to D in paragraph 13 is to have effect as if it included a reference to a successor to D whose estate is not a derivative estate.

*Application of Part 3*

- 26 The reference to S in paragraph 15(1) is to have effect as if it included a reference to a successor to S.
- 27 In paragraph 16(1) –
- (a) the reference to S is to have effect as if it included a reference to a successor to S; and
  - (b) the reference to D is to have effect as if it included a reference to a successor to D.

*Application of Part 4*

- 28 (1) In paragraph 18(1) –
- (a) the reference to S is to have effect as if it included a successor to S, and
  - (b) the reference to D is to have effect as if it included a successor to D.
- (2) Paragraph 18(3) has effect in relation to pre-action costs incurred by a successor to D whose estate is not a derivative estate as if the references to D were references to that successor.
- (3) Paragraph 18(4) has effect in relation to pre-action costs incurred by a successor to D whose estate is not a derivative estate as if the references to D were references to that successor.

## PART 6

## INTERPRETATION: GENERAL

*Minor definitions and index of defined terms*

- 29 In this Schedule –
- “obstruction” means anything created on land that obstructs (or, as the case may be, anything that if created on land would obstruct) the access of light across that land to any other land;
  - “owner”, in relation to land, means a person who holds a freehold or leasehold estate in that land;
  - “rules” means rules under section 14 of the Local Land Charges Act 1975.
- 30 The following Table lists the provisions which define terms used in more than one paragraph of this Schedule:

| <i>Term</i>                                            | <i>Provision of Schedule</i>                                       |
|--------------------------------------------------------|--------------------------------------------------------------------|
| D                                                      | paragraph 2(3)(e) (but subject to any modification made by Part 5) |
| derivative estate (in relation to the dominant land)   | paragraph 20(4)(a)                                                 |
| derivative estate   (in relation to the servient land) | paragraph 20(4)(b)                                                 |

| <i>Term</i>                                                                 | <i>Provision of Schedule</i>                                                   |
|-----------------------------------------------------------------------------|--------------------------------------------------------------------------------|
| the dominant land                                                           | paragraph 2(3)(f)                                                              |
| notice of proposed obstruction                                              | paragraph 2(2)                                                                 |
| notice of withdrawal                                                        | paragraph 5(5)                                                                 |
| obstruction                                                                 | paragraph 29                                                                   |
| owner                                                                       | paragraph 29                                                                   |
| the permitted period for claiming an injunction (or “the permitted period”) | paragraph 4(1) and (2)                                                         |
| pre-action costs                                                            | paragraph 13(2) and (3)<br>(read with any regulations made under paragraph 14) |
| the proposed obstruction                                                    | paragraph 2(3)(a)                                                              |
| registered (or unregistered)                                                | paragraph 15(6)                                                                |
| the registering authority                                                   | paragraph 15(6)                                                                |
| relevant injunction                                                         | paragraph 2(3)(g)                                                              |
| rules                                                                       | paragraph 29                                                                   |
| S                                                                           | paragraph 2(3)(c) (but subject to any modification made by Part 5)             |
| successor to D                                                              | paragraph 20(2)                                                                |
| successor to S                                                              | paragraph 20(3)                                                                |
| the servient land                                                           | paragraph 2(3)(d).                                                             |

# RIGHTS TO LIGHT (INJUNCTIONS) BILL

## EXPLANATORY NOTES

### COMMENTARY ON THE CLAUSES

#### **Clause 1: notices of proposed obstruction affecting landowners' ability to obtain injunctions to enforce rights to light**

- B.1 Clause 1 introduces the Schedule to the draft Bill which contains the provisions that establish the Notice of Proposed Obstruction procedure.

#### **Clause 2: exercise of court's power to grant an injunction to enforce a right to light**

- B.2 Where a right to light is infringed, or is about to be infringed, a court is, in most cases, able to award an injunction to prevent that infringement. However, where that is the case, the court has discretion to award damages instead.
- B.3 Clause 2 sets out a new test that a court must apply where it has jurisdiction to award an injunction to protect a right to light and is considering whether or not to award damages instead.
- B.4 Subsection (1) sets out the circumstances in which the new test applies. In particular, it indicates that the statutory test is not relevant where the circumstances of a particular case (for example, serious delay on the part of the claimant combined with unconscionable conduct) mean that a court cannot grant an injunction because equitable principles mean that the court can give no equitable relief.
- B.5 Subsection (2) provides that the court must not grant an injunction if, having taken into account all relevant circumstances, to do so would be a disproportionate means of enforcing the right to light. However, where the court for that reason does not grant an injunction, then subsection (5) confirms that nothing in clause 2 affects the court's power to award damages instead.
- B.6 The factors that a court might take into account when assessing the proportionality of granting an injunction are not limited by the draft Bill; if something is relevant to the question of whether the grant of an injunction is a disproportionate means of enforcing a particular right to light, then the court can, and should, consider it. However, the draft Bill sets out at subsection (3) a number of factors that might be relevant; those factors are considered below.

#### ***Clause 2(3)(a): the claimant's interest in the dominant land***

- B.7 This refers to the interest held by the person claiming an injunction – the claimant might, for example, hold a freehold or long leasehold interest, or alternatively a relatively short lease. The more substantial the interest, the more likely it is that an injunction will be a proportionate remedy.

***Clause 2(3)(b): the loss of amenity attributable to the infringement***

- B.8 Where the light protected by a right to light is improving the amenity of a building then that fact will weigh in favour of a court concluding that the grant of an injunction is a proportionate means of enforcing the right. However, where that is not the case – for example, where the natural light is being used to illuminate part of a building that is used for storage – then the reverse is likely. It will be possible for the court to consider the extent of the loss of amenity under this head; a large loss of amenity is more likely to result in an injunction than a smaller one.
- B.9 Subsection (4) makes clear that it is always relevant for a court to have regard to the “extent to which artificial light is relied on instead of or in addition to natural light” when considering the loss of amenity; where a property is already reliant on artificial light, as is the case with many commercial buildings, then it is anticipated that a court will be less likely to regard an injunction as a proportionate response to an infringement.

***Clause 2(3)(c): whether or not damages would be adequate compensation for the injury to the claimant***

- B.10 Where damages are an adequate means of compensating a claimant then it is to be expected that a court will readily conclude that an injunction is a disproportionate means of enforcing a right to light. It is anticipated that a court will have regard not only to whether damages (of any level) would be adequate compensation, but also whether the measure of damages in the particular case would be adequate.

***Clause 2(3)(d) and (f): the claimant’s and defendant’s conduct***

- B.11 It is possible that a claimant’s conduct will bar the potential for the grant of an injunction under ordinary equitable principles. Where that happens, the statutory test in clause 2 has no effect (see paragraph B.4 above), and no equitable relief will be granted.
- B.12 However, a claimant’s conduct may fall short of the level that would bar it from receiving equitable relief altogether. In that case, the test in clause 2 requires the court to consider the conduct of the claimant when considering the proportionality of an injunction; the conduct of the defendant will also be considered.
- B.13 For example, where a claimant has unreasonably refused to engage with a neighbour regarding a possible or actual interference with a right to light, or has made unambiguous its intention not to seek to enforce the right by way of injunction then, all other things being equal, it is expected that a court will lean towards not granting an injunction. On the other hand, where a defendant has knowingly or recklessly infringed a right to light without first making reasonable attempts to negotiate with the claimant then it is to be expected that a court will lean towards the grant of an injunction.
- B.14 Where a claimant admits that it might be willing to accept damages then a court will be entitled to consider under this head that admission, and the manner in which it is communicated. This does not prevent or change the status of without prejudice negotiations.

***Clause 2(3)(e): any unreasonable delay in claiming an injunction***

- B.15 A claimant's unreasonable delay in claiming an injunction could legitimately be considered as an aspect of the claimant's conduct. However, it is of particular importance and has been included separately to ensure that it is given due regard.

***Clause 2(3)(g): the impact of an injunction on the defendant***

- B.16 The court will be expected to consider the effect of an injunction on the defendant. For example, it might be that an injunction would cause substantial loss out of all proportion to the benefit to the claimant; conversely it may be that an injunction would cause little practical difficulty or expense for the defendant.

***Clause 2(3)(h): the public interest, so far as relevant***

- B.17 The inclusion of the public interest in clause 2 follows the judgment of the Supreme Court in *Coventry v Lawrence*<sup>1</sup> and is expected to be interpreted widely by the courts.

**Clause 3: Interpretation, Crown application, extent, commencement and short title**

- B.18 Clause 3 states that the Act binds the Crown and that it applies only to England and Wales. It gives to the Secretary of State a power to bring the substantive provisions in the Act into effect by statutory instrument.

**Schedule: Notices of proposed obstruction**

- B.19 References to paragraph numbers in the text that follows are to paragraphs in the Schedule to the draft Bill.
- B.20 The Schedule to the draft Bill contains the substantive provisions regarding the Notice of Proposed Obstruction ("NPO") procedure.
- B.21 An NPO may be served by a landowner ("S") on a neighbour ("D") in circumstances where an obstruction described in the NPO (the proposed obstruction) could (if it were to be constructed on S's land) obstruct light passing over D's land. If D has a right to light that would be infringed by that obstruction, then following service of an NPO D must choose whether to protect the right to light by applying to court for an injunction. If D does not do so within the time permitted by the NPO then anything built within the space defined by the obstruction set out in the NPO cannot result in the grant of an injunction.
- B.22 The Schedule is split into five parts.

***Part 1: Preliminary: service of notices of proposed obstruction etc***

**PARAGRAPH 1: POWER TO SERVE A NOTICE OF PROPOSED OBSTRUCTION**

- B.23 Paragraph 1 enables a landowner to serve on a neighbour an NPO. The power is limited to freehold owners, or leasehold owners who have at least 5 years left of a lease to run at the date the NPO is served.

<sup>1</sup> [2014] UKSC 13.

PARAGRAPH 2: MEANING OF “NOTICE OF PROPOSED OBSTRUCTION” AND RELATED EXPRESSIONS

- B.24 Paragraph 2 defines a number of terms used in the Schedule (paragraph 30 contains a table listing the defined terms in the Schedule and the provisions in which they are defined).

PARAGRAPH 3: REGULATIONS AS TO THE CONTENT, FORM AND SERVICE OF A NOTICE OF PROPOSED OBSTRUCTION

- B.25 Paragraph 3 enables the Secretary of State to make regulations about the content and form of NPOs, any additional information to be provided with NPOs and the way in which NPOs (and any additional information) must be served.
- B.26 The Secretary of State is required to exercise the power with a view to ensuring that D is able to understand the NPO, and its effect, and, with professional advice, has sufficient information to assess whether the creation of the obstruction described in the NPO would infringe a right to light if D has one.
- B.27 Sub-paragraph (4) sets out a list of requirements regarding the content of NPOs (or the material that accompanies them) that must be met when the Secretary of State exercises the power to make regulations.
- B.28 Sub-paragraph 4(b) anticipates that the regulations will allow for service of an NPO on a recipient who is described rather than named (for example, an NPO might be addressed to “The freehold owner”). In most circumstances, addressing an NPO to a landowner by description will be inappropriate; sub-paragraph (5) requires that the regulations will only permit the use of a description of D where “all reasonable investigations have been made” and the person serving the NPO has been unable to identify the proposed recipient by name. The Secretary of State may also make provision for the deemed service of NPOs (see sub-paragraph (8)).
- B.29 Sub-paragraphs 4(e) and (7) require that a date be set out in the NPO indicating the end of the period within which D must claim an injunction.

PARAGRAPH 4: THE PERMITTED PERIOD FOR CLAIMING A RELEVANT INJUNCTION IN RESPONSE TO A NOTICE OF PROPOSED OBSTRUCTION

- B.30 When an NPO is received, D has a period of time in which to determine whether or not it has a right to light that would be infringed by the obstruction described in the NPO and, if so, whether or not it wishes to protect the right to light by applying to court for the grant of an injunction and serving the relevant papers on S. The period is referred to in the draft Bill and in these Notes as “the permitted period”.
- B.31 The permitted period ends on a date decided by S and set out in the NPO. It cannot be less than 8 months from the date of service of the NPO (see paragraphs 3(4)(e) and 3(7)).
- B.32 Sub-paragraph 4(2) allows S to extend the permitted period on any number of occasions. Sub-paragraph 4(3) states that any extension must be agreed in writing and occur before the expiration of the period for D to respond. However, sub-paragraph 4(4) provides that the period may not be extended beyond 10 years after the initial deadline in the NPO.

PARAGRAPH 5: WITHDRAWAL OF A NOTICE OF PROPOSED OBSTRUCTION

- B.33 Paragraph 5 allows S to withdraw an NPO. Withdrawal must be by way of a written notice that identifies the NPO (see sub-paragraph (5)).
- B.34 Sub-paragraph 5(4)(a) ensures that, where an NPO has already resulted in a development being protected from the grant of an injunction, its withdrawal has no effect on the protection from injunction afforded to that building.
- B.35 Furthermore, the withdrawal of an NPO has no effect on S's duty to reimburse D's pre-action costs (sub-paragraph 5(4)(b) and paragraph 13).

***Part 2: Effect of notices of proposed obstruction***

PARAGRAPH 7: RESTRICTION ON THE AVAILABILITY OF A RELEVANT INJUNCTION AFTER EXPIRY OF PERMITTED PERIOD

- B.36 Paragraph 7 provides that, from the end of the permitted period, an injunction cannot be granted to prevent the infringement of a right to light by the proposed obstruction (or anything built within the space that would have been occupied by the proposed obstruction).<sup>2</sup>
- B.37 There are, however, three exceptions to that rule; an injunction may be granted where:
- (5) D has claimed<sup>3</sup> the necessary injunction and served it on S within the permitted period (see paragraphs 7(2)(a) and 9);
  - (6) the building works that infringe the right to light were constructed before the end of the permitted period (see paragraphs 7(2)(b) and 10); or
  - (7) the building works that infringe the right to light were constructed more than 10 years from the end of the permitted period (disregarding any extension).
- B.38 Sub-paragraph (4) and (5) deal with the case where part of an obstruction overlaps with the space that is protected from the grant of an injunction. Sub-paragraph (4) makes clear that the court is not prevented by paragraph 7 from granting an injunction in relation to so much of a development as exists outside that space. Sub-paragraph (5) makes clear that the court can take into account the impact of the whole obstruction when deciding whether to award an injunction in respect of the part that is not protected.

PARAGRAPH 12: NON-AVAILABILITY OF RELEVANT INJUNCTION TO HAVE NO EFFECT ON DAMAGES

- B.39 Where the effect of an NPO is to prevent the grant of an injunction, paragraph 12 provides that the fact that the NPO has prevented the injunction should be ignored when considering what damages, if any, the court should award for the infringement. Accordingly any entitlement of the claimant to equitable damages is unaffected by the fact that an NPO prevents the grant of an injunction.

<sup>2</sup> See also the definition of "relevant injunction" at paragraph 2(3)(g).

<sup>3</sup> Or counterclaimed in existing proceedings; see paragraph 9(2)(b).

PARAGRAPH 13: DUTY OF S TO REIMBURSE PRE-ACTION COSTS INCURRED BY D IN RESPONSE TO THE NOTICE OF PROPOSED OBSTRUCTION

- B.40 S must reimburse D's reasonable pre-action costs incurred in seeking professional advice regarding the existence and nature of any relevant right to light, whether the obstruction described in the NPO would infringe any right to light, the effect of the NPO and the options and potential remedies available to the recipient following its receipt (see paragraph 13(1) and 13(3)). The costs would be recoverable as a debt.
- B.41 Costs incurred after the deadline for the recipient to claim an injunction are never to be regarded as pre-action costs (see paragraph 13(2)(a)).
- B.42 Paragraph 14 gives to the Secretary of State a power to make regulations that specify what are, or are not, to be regarded as "pre-action costs reasonably incurred" for the purposes of paragraph 13.

***Part 3: Registration of notices of proposed obstruction as local land charges***

PARAGRAPH 15: REGISTRATION OF NOTICES OF PROPOSED OBSTRUCTION AS A LOCAL LAND CHARGES

- B.43 Following service of an NPO S may apply for its registration as a local land charge.
- B.44 Registration of an NPO as a local land charge is not compulsory. However, doing so means that the NPO's effect of preventing the grant of an injunction will bind:
- (1) successors in title to the whole or any part of D's estate who acquire their interest after the NPO is registered as a local land charge (see paragraph 15(3)(a));
  - (2) those deriving title from D (for example, a tenant or a sub-tenant) from a person who is bound by the NPO after it is registered as a local land charge (see sub-paragraphs 15(3)(b) and 15(4)); and
  - (3) any person who takes adverse possession of the whole or any part of the recipient's land after it is registered as a local land charge (see paragraph 15(3)(c)).
- B.45 Registration of an NPO as a land charge will therefore ensure that a purchaser, for example, of D's land will equally be unable to claim an injunction outside the permitted period.
- B.46 Sub-paragraph 15(5) disapplies sections 5(1), 5(2) and 10(1)(a) of the Local Land Charges Act 1975. Those provisions impose duties which are relevant to local land charges whose registration is not optional and for compensation to be payable where a local land charge is not disclosed on a search of the register because it has not been registered. They are not relevant to NPOs which do not have to be registered, are not local land charges until registered, and have no effect on D's successors until they are registered.

PARAGRAPH 16: CANCELLATION OF REGISTRATION FOLLOWING WITHDRAWAL OF A REGISTERED NOTICE OF PROPOSED OBSTRUCTION

- B.47 If an NPO is registered as a local land charge and then withdrawn (see paragraph 5), either party can apply for the cancellation of the registration. Application must be made in the form prescribed by rules made under section 14 of the Local Land Charges Act 1975 (see paragraph 29) and be accompanied by the notice of withdrawal. However, the effect of the notice of withdrawal is not conditional on either party having cancelled, or applied to cancel, any registration (see paragraph 16(4)).

***Part 4: Multiple notices of proposed obstruction relating to the same land***

PARAGRAPH 17: NO GENERAL RESTRICTION ON MULTIPLE NOTICES OF PROPOSED OBSTRUCTION RELATING TO THE SAME LAND

- B.48 There is generally no restriction on the number of NPOs that can be in effect emanating from one piece of land and served on an owner of another piece of land. There is one exception to that rule, where a second NPO is served on D during the period while it is still open to him or her to respond to an earlier NPO in respect of the same obstruction.
- B.49 If S serves another NPO during the permitted period which:

- (1) identifies as the dominant land a piece of land that overlaps, in whole or in part, the dominant land identified in the first NPO; and
- (2) describes an obstruction that overlaps, in whole or in part, the obstruction described in the first NPO;

then both the first and second NPO have no effect, save that S remains liable for pre-action costs until the recipient becomes aware that the NPOs have ceased to have effect (see sub-paragraphs 18(3) and (4)).

***Part 5: Modification of Parts 1 to 4 in cases where the ownership of the dominant or servient land changes***

- B.50 Either or both of S and D might sell their interest, in whole or part, after the NPO has been served; they might also let their land. Part 5 deals with what happens in those circumstances.

PARAGRAPH 20: MEANING OF "SUCCESSOR TO D", "SUCCESSOR TO S" ETC

- B.51 Paragraph 20 sets out a number of definitions that are used in Part 5 of the draft Bill.

REFERENCES TO S IN THE DRAFT BILL

- B.52 Paragraph 21 confirms that, in several situations, a sale by S does not affect his or her powers and obligations under the Schedule, or affect D. So, even if S sells his or her interest to another then:
- (1) S remains the person who can agree to extensions of the time period to respond to the NPO; and
  - (2) S remains liable to D for the reimbursing of pre-action costs.

B.53 However, in some cases, references to S in the draft Bill include references to those who acquire their interest from S. The following sub-paragraphs summarise the position:

- (1) Paragraph 22 indicates that either S, or a successor to S (but not a tenant of S) is entitled to serve a notice of withdrawal. Sub-paragraph 22(2) provides that, where a successor to S owns only part of the land originally owned by S, then any notice of withdrawal given by the successor has effect only in respect of that part.
- (2) Paragraphs 26 and 27 make it clear that both S and his or her successor(s) (including tenants) are able to apply to register the NPO as a local land charge, and apply for the cancellation of that entry where the NPO is withdrawn.
- (3) Paragraph 28(1) means that the invalidation of NPOs provided for by paragraph 18 (multiple notices) will occur whether the second NPO is served by S, or by a successor to or tenant of S.

#### REFERENCES TO D IN THE DRAFT BILL

B.54 Paragraph 23 deals with the situation where a notice of withdrawal is sent to D. In that case the notice is valid whether or not, at the time it is given, D is the owner of any part of the dominant land.

B.55 A notice of withdrawal is also effective if it is given to a successor in title to, or tenant of, D save that:

- (1) where the successor receiving the notice is a successor to only part of D's land then the notice of withdrawal is only effective in respect of that part (see paragraph 23(3)); or
- (2) where the recipient of the notice has an estate derived from D's estate (in other words, a lease or sub-lease etc) then the notice of withdrawal is only effective in respect of that recipient and of those who derive title from that recipient.

B.56 Paragraph 24 extends the application of paragraphs 7(2) to (4), 8, 9(1) and 12 of the Schedule so as to provide that where a successor to D, or an adverse possessor, is bound by the NPO<sup>4</sup> then

- (1) the provisions of the Schedule relating to the effect of the NPO upon the court's ability to grant an injunction to D also apply to D's successors in title, D's tenants and those in adverse possession; and
- (2) the provisions relating to the measure of damages apply equally to claims by successors to D or those in adverse possession.

B.57 Paragraphs 25 and 28(2) and (3) provide that the person serving an NPO is responsible for the pre-action costs of D and his or her successors in title (but not those of D's tenants or sub-tenants).

<sup>4</sup> See the definition of "successors to D" at paragraph 20(2).

- B.58 Paragraph 27(1)(b) provides that a successor in title to D is able to apply to have an NPO that has been registered as a local land charge removed from the register following the receipt of a notice of withdrawal.
- B.59 Paragraph 28(1)(b) provides that NPOs will be invalidated as provided for by paragraph 18 (multiple notices) whether the second NPO is served on D, or on a successor to, or tenant of D.

***Part 6: Interpretation: General***

- B.60 Part 6 contains some further definitions and an index setting out the terms that are defined in the Schedule and the provisions containing the definitions.

## APPENDIX C

### THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE – PRACTICAL EXAMPLES

- C.1 In Chapter 6 we made a recommendation to allow developers to serve Notices of Proposed Obstruction (“NPOs”). In this Appendix we consider three examples of how NPOs might be used. In each case a servient owner (“SO”) owns and wishes to develop land burdened by rights to light held respectively by the owners of two plots of land, “DO1” and “DO2”.

|                              |                           |                              |
|------------------------------|---------------------------|------------------------------|
| Dominant<br>Owner 1<br>“DO1” | Servient<br>Owner<br>“SO” | Dominant<br>Owner 2<br>“DO2” |
|------------------------------|---------------------------|------------------------------|

#### ***Example 1***

- C.2 SO wishes to develop its land. It is aware that, in doing so, it might interfere with rights to light benefiting DO1 and DO2.
- C.3 SO makes efforts to engage with DO1 and DO2 to negotiate for the release of their rights to light. DO2 is agreeable and enters into a deed of release in return for payment. Nothing is heard from DO1. SO needs certainty that the development can proceed and serves DO1 with an NPO on 1 January. The notice alerts DO1 to the need to respond, and gives DO1 the deadline of 15 September to do so.<sup>1</sup> SO registers the notice as a local land charge.
- C.4 DO1 takes advice and is advised that it has the benefit of a right to light and that the right to light will be infringed by the obstruction set out in the NPO. DO1 does not wish to lose the light and is advised to issue proceedings for an injunction within the prescribed period. DO1 notifies SO of its intent.
- C.5 SO takes the view that DO1 will indeed seek an injunction and is likely to get one. SO decides to withdraw the notice (and cancel the local land charge registration) and changes the design of the development so as to avoid interfering with DO1’s right to light.

#### ***Example 2***

- C.6 The situation is the same as in example 1, save that following receipt of the NPO, DO1 wishes to negotiate with SO for the release of the right to light.

<sup>1</sup> The deadline must be a minimum of eight months from the date of service of the NPO. See para 6.107 above.

- C.7 DO1 has been avoiding engaging with SO but takes advice upon receipt of the NPO – the advice is received on 1 August. The advice is that DO1 has the benefit of a right to light and that the obstruction set out in the NPO would amount to an actionable interference, but that what remains of the period during which DO1 must apply to court or lose the potential for an injunction will not give adequate time to negotiate its release and that an extension of time should be sought.
- C.8 DO1 requests a further two months to negotiate. SO agrees (rather than risk DO1 claiming, and potentially obtaining, an injunction) and the position is formalised by correspondence. The parties negotiate and reach agreement: DO1, by deed releases its right to light in return for a payment. SO makes an application to cancel the entry on the local land charges register and withdraws the NPO.

### ***Example 3***

- C.9 The situation is the same as in example 1, save that DO1 does not respond to the NPO.
- C.10 SO must wait until the deadline specified in the NPO to pass before construction proceeds so far as to infringe DO1's right to light. If it does not and DO1's right to light is infringed, then the NPO procedure provides SO with no protection in respect of that infringement; DO1 will be able to seek to prevent it by injunction. But if proceedings have not been served on SO by the deadline and SO then interferes with DO1's right to light by constructing a building that is within the envelope of the obstruction described in the NPO, then DO1 will not be able to obtain an injunction to prevent the interference.
- C.11 DO1 may still, of course, commence proceedings if negotiations do not result in settlement. If the court concludes that, but for the NPO, it would have granted an injunction, then it will be able to award damages instead on the basis explained in Chapter 5.

### ***Example 4***

- C.12 As in example 1, SO has negotiated a release of DO2's right to light and has served an NPO, on 1 January, upon DO1.
- C.13 On 15 January SO registered the NPO as a local land charge.
- C.14 On 1 February DO1 sold his land to DO3. DO3 is bound by the NPO because of its registration, and steps into DO1's shoes so far as negotiations with SO are concerned; SO is obliged to pay DO3's pre-action costs.
- C.15 If on 1 February DO1 had let his land, in whole or in part, to T, then T would also have been bound by the NPO. If T's lease gave him the benefit of DO1's right to light, then T would need to respond by claiming an injunction during the permitted period in the NPO, or lose the right to do so. SO remains liable for DO1's pre-action costs but does not take on responsibility for T's. In practice T's position will depend upon his contractual arrangements with DO1 and the terms of the lease. If SO withdraws the NPO by sending a notice of withdrawal to DO1, the NPO will be withdrawn so far as T is concerned too.

# APPENDIX D

## BRITISH PROPERTY FEDERATION SURVEY

### DATA

| Financial Impact of Rights to Light Claims                                                                                                                                             |                                           |                                                 |   |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|-------------------------------------------------|---|
| Given commercial sensitivity over such information we have sought to present it in aggregate form using a proforma circulated by BPF. The following results are based on 13 responses. |                                           |                                                 |   |
| Basic information about the development/investments in question                                                                                                                        |                                           |                                                 |   |
| 1.                                                                                                                                                                                     | Rough size of development (Sqm)           | Up to 4,999 sqm.....                            | 0 |
|                                                                                                                                                                                        |                                           | 5,000-9,999 sqm.....                            | 1 |
|                                                                                                                                                                                        |                                           | 10,000-19,999 sqm.....                          | 3 |
|                                                                                                                                                                                        |                                           | 20,000-29,999 sqm.....                          | 1 |
|                                                                                                                                                                                        |                                           | 30,000-39,999 sqm.....                          | 2 |
|                                                                                                                                                                                        |                                           | 40,000-49,999 sqm.....                          | 0 |
|                                                                                                                                                                                        |                                           | 50,000 plus sqm.....                            | 2 |
|                                                                                                                                                                                        |                                           | Plus 4 schemes aggregating to 400,000sqm        |   |
| 2.                                                                                                                                                                                     | Rough cost of development/investment (£m) | Up to £24m.....                                 | 0 |
|                                                                                                                                                                                        |                                           | £25m to £49m.....                               | 2 |
|                                                                                                                                                                                        |                                           | £50m to £99m.....                               | 0 |
|                                                                                                                                                                                        |                                           | £100m to £149m.....                             | 2 |
|                                                                                                                                                                                        |                                           | £150m to £200m.....                             | 1 |
|                                                                                                                                                                                        |                                           | £250m plus.....                                 | 2 |
|                                                                                                                                                                                        |                                           | Plus 4 schemes aggregating to in excess of £1bn |   |
| 3.                                                                                                                                                                                     | Rough location                            | Central London                                  | 7 |
|                                                                                                                                                                                        |                                           | Outer London                                    | 1 |

|                                  |                                                                           |                                                                                                                                                             |
|----------------------------------|---------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                  | Outside London                                                            | 1                                                                                                                                                           |
|                                  | Not possible to disaggregate                                              | 4                                                                                                                                                           |
| <b>Impact of Rights to Light</b> |                                                                           |                                                                                                                                                             |
| 4.                               | Time delay to the project because of Rights to Light (estimate in months) | Average delay 27 months, range 12 months to 36 months.                                                                                                      |
| 5.                               | Costs of delay (incl. finance costs) (estimate in £)                      | Average £6.86 million. Range £2m to £20m.                                                                                                                   |
| 6.                               | Adviser costs – legal fees, surveyors fees, etc. (estimate in £)          | Average £363,000. Range £80,000 to £1m.                                                                                                                     |
| 7.                               | Compensation paid or payable (estimate in £)                              | Average £ 5,486,000. Range £1m to £20m.                                                                                                                     |
| 8.                               | Did the development proceed or is it proceeding?                          | <p>Yes in five cases.</p> <p>On hold in three cases.</p> <p>Revised scheme in one case, to make much smaller.</p> <p>Not possible to disaggregate four.</p> |

# Rights to Light – Impact Proforma



The British Property Federation is collecting evidence to support the Law Commission's consultation on possible legislative change to the law on Rights to Light. As part of that process, it is important that the case the Law Commission makes to the Government is well-evidenced on the potential benefits that would flow from legislation. Without that 'case-making' Government is less likely to act.

We are conscious, however, that the industry has legitimate concerns about disclosing confidential information, which is why BPF is collecting it. We have tried to keep the information broad so that individual cases are not identifiable. Our preference would be to have completed proformas on individual development schemes. However, for larger developers with several developments being progressed it may be easier to give an 'aggregate figure' of the impact on them over say a year.

Though perhaps harder to estimate, this proforma can also be used to indicate projects that did not proceed because the Rights to Light issues made the project unattractive.

## Some basic information about the development/investment in question

|    |                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|----|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. | Rough size of development (Sqm)           | <p>Up to 4,999 sqm..... <input type="checkbox"/></p> <p>5,000-9,999 sqm..... <input type="checkbox"/></p> <p>10,000-19,999 sqm..... <input type="checkbox"/></p> <p>20,000-29,999 sqm..... <input type="checkbox"/></p> <p>30,000-39,999 sqm..... <input type="checkbox"/></p> <p>40,000-49,999 sqm..... <input type="checkbox"/></p> <p>50,000 plus sqm..... <input type="checkbox"/></p> <p><i>Tick one box above or</i> <input type="checkbox"/></p> <p>Aggregate for several developments (please state total in sqm)</p> |
| 2. | Rough cost of development/investment (£m) | <p>Up to £24m..... <input type="checkbox"/></p> <p>£25m to £49m..... <input type="checkbox"/></p> <p>£50m to £99m..... <input type="checkbox"/></p> <p>£100m to £149m..... <input type="checkbox"/></p> <p>£150m to £200m..... <input type="checkbox"/></p> <p>£250m plus..... <input type="checkbox"/></p> <p><i>Tick one box above or</i> <input type="checkbox"/></p> <p>Aggregate for several developments (please state total in £m)</p>                                                                                 |
| 3. | Rough location                            | <p>Central London <input type="checkbox"/></p> <p>Outer London <input type="checkbox"/></p> <p>Outside London <input type="checkbox"/></p> <p><i>Tick one box above or tick below if an aggregate</i></p> <p>Aggregate of several locations <input type="checkbox"/></p>                                                                                                                                                                                                                                                      |

| Impact of Rights to Light |                                                                           |                                                                                                                                                   |
|---------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| 4.                        | Time period covered                                                       |                                                                                                                                                   |
| 5.                        | Time delay to the project because of Rights to Light (estimate in months) | None. Our experience of large projects and the delays rights of light can cause meant that we started negotiations well before vacant possession. |
| 6.                        | Costs of delay (incl. finance costs) (estimate in £)                      | £                                                                                                                                                 |
| 7.                        | Adviser costs – legal fees, surveyors fees, etc. (estimate in £)          | £800K                                                                                                                                             |
| 8.                        | Insurance costs (where applicable) (estimate in £)                        | £                                                                                                                                                 |
| 9.                        | Compensation paid or payable (estimate in £)                              | 4.1% of profit.                                                                                                                                   |
| 10.                       | Did the development proceed or is it proceeding?                          | Project completed.                                                                                                                                |

**Any other information you want to submit:**

- Did the adjoining owner delay the process to extract maximum gain? – yes.
- Were duplicate surveys carried out? – yes.

**Your details:**

Your name: Stephen Chatfield

Company: Land Securities

Email address: [REDACTED]

**Please return to:**

Ian Fletcher  
Director of Policy (Real Estate)  
British Property Federation  
St Albans House  
57-59 Haymarket  
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SW1Y 4QX

Tel: [REDACTED]  
Fax: [REDACTED]  
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# Rights to Light – Impact Proforma



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We are conscious, however, that the industry has legitimate concerns about disclosing confidential information, which is why BPF is collecting it. We have tried to keep the information broad so that individual cases are not identifiable. Our preference would be to have completed proformas on individual development schemes. However, for larger developers with several developments being progressed it may be easier to give an 'aggregate figure' of the impact on them over say a year.

Though perhaps harder to estimate, this proforma can also be used to indicate projects that did not proceed because the Rights to Light issues made the project unattractive.

## Some basic information about the development/investment in question

|                                                                |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
|----------------------------------------------------------------|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1.                                                             | Rough size of development (Sqm)           | Up to 4,999 sqm..... <input type="checkbox"/><br>5,000-9,999 sqm..... <input type="checkbox"/><br>10,000-19,999 sqm..... <input type="checkbox"/><br>20,000-29,999 sqm..... <input type="checkbox"/><br>30,000-39,999 sqm..... <input type="checkbox"/><br>40,000-49,999 sqm..... <input type="checkbox"/><br>50,000 plus sqm..... <input type="checkbox"/> |  |
| <i>Tick one box above or</i>                                   |                                           | <input type="text"/>                                                                                                                                                                                                                                                                                                                                        |  |
| Aggregate for several developments (please state total in sqm) |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| 2.                                                             | Rough cost of development/investment (£m) | Up to £24m..... <input type="checkbox"/><br>£25m to £49m..... <input type="checkbox"/><br>£50m to £99m..... <input type="checkbox"/><br>£100m to £149m..... <input type="checkbox"/><br>£150m to £200m..... <input type="checkbox"/><br>£250m plus..... <input type="checkbox"/>                                                                            |  |
| <i>Tick one box above or</i>                                   |                                           | <input type="text"/>                                                                                                                                                                                                                                                                                                                                        |  |
| Aggregate for several developments (please state total in £m)  |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| 3.                                                             | Rough location                            | Central London <input type="checkbox"/><br>Outer London <input type="checkbox"/><br>Outside London <input type="checkbox"/>                                                                                                                                                                                                                                 |  |
| <i>Tick one box above or tick below if an aggregate</i>        |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| Aggregate of several locations <input type="checkbox"/>        |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |

| Impact of Rights to Light |                                                                           |                                                                                                                                                  |
|---------------------------|---------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|
| 4.                        | Time period covered                                                       |                                                                                                                                                  |
| 5.                        | Time delay to the project because of Rights to Light (estimate in months) | None. Our experience of large projects and the delays rights of light can cause meant that we started negotiations well before vacant posession. |
| 6.                        | Costs of delay (incl. finance costs) (estimate in £)                      | £                                                                                                                                                |
| 7.                        | Adviser costs – legal fees, surveyors fees, etc. (estimate in £)          | £2M                                                                                                                                              |
| 8.                        | Insurance costs (where applicable) (estimate in £)                        | £                                                                                                                                                |
| 9.                        | Compensation paid or payable (estimate in £)                              | 4.7% of profit.                                                                                                                                  |
| 10.                       | Did the development proceed or is it proceeding?                          | The project is being built.                                                                                                                      |

**Any other information you want to submit:**

**Your details:**

Your name: Stephen Chatfield

Company: Land Securities

Email address:

**Please return to:**

Ian Fletcher  
Director of Policy (Real Estate)  
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Tel:   
Fax:   
Email:

# Rights to Light – Impact Proforma



The British Property Federation is collecting evidence to support the Law Commission's consultation on possible legislative change to the law on Rights to Light. As part of that process, it is important that the case the Law Commission makes to the Government is well-evidenced on the potential benefits that would flow from legislation. Without that 'case-making' Government is less likely to act.

We are conscious, however, that the industry has legitimate concerns about disclosing confidential information, which is why BPF is collecting it. We have tried to keep the information broad so that individual cases are not identifiable. Our preference would be to have completed proformas on individual development schemes. However, for larger developers with several developments being progressed it may be easier to give an 'aggregate figure' of the impact on them over say a year.

Though perhaps harder to estimate, this proforma can also be used to indicate projects that did not proceed because the Rights to Light issues made the project unattractive.

## Some basic information about the development/investment in question

|                                                                |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
|----------------------------------------------------------------|-------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| 1.                                                             | Rough size of development (Sqm)           | Up to 4,999 sqm..... <input type="checkbox"/><br>5,000-9,999 sqm..... <input type="checkbox"/><br>10,000-19,999 sqm..... <input type="checkbox"/><br>20,000-29,999 sqm..... <input type="checkbox"/><br>30,000-39,999 sqm..... <input type="checkbox"/><br>40,000-49,999 sqm..... <input type="checkbox"/><br>50,000 plus sqm..... <input type="checkbox"/> |  |
| <i>Tick one box above or</i>                                   |                                           | <input type="text"/>                                                                                                                                                                                                                                                                                                                                        |  |
| Aggregate for several developments (please state total in sqm) |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| 2.                                                             | Rough cost of development/investment (£m) | Up to £24m..... <input type="checkbox"/><br>£25m to £49m..... <input type="checkbox"/><br>£50m to £99m..... <input type="checkbox"/><br>£100m to £149m..... <input type="checkbox"/><br>£150m to £200m..... <input type="checkbox"/><br>£250m plus..... <input type="checkbox"/>                                                                            |  |
| <i>Tick one box above or</i>                                   |                                           | <input type="text"/>                                                                                                                                                                                                                                                                                                                                        |  |
| Aggregate for several developments (please state total in £m)  |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| 3.                                                             | Rough location                            | Central London <input type="checkbox"/><br>Outer London <input type="checkbox"/><br>Outside London <input type="checkbox"/>                                                                                                                                                                                                                                 |  |
| <i>Tick one box above or tick below if an aggregate</i>        |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |
| Aggregate of several locations <input type="checkbox"/>        |                                           |                                                                                                                                                                                                                                                                                                                                                             |  |

| Impact of Rights to Light |                                                                           |                                                                                                                                                   |
|---------------------------|---------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------|
| 4.                        | Time period covered                                                       |                                                                                                                                                   |
| 5.                        | Time delay to the project because of Rights to Light (estimate in months) | None. Our experience of large projects and the delays rights of light can cause meant that we started negotiations well before vacant possession. |
| 6.                        | Costs of delay (incl. finance costs) (estimate in £)                      | £                                                                                                                                                 |
| 7.                        | Adviser costs – legal fees, surveyors fees, etc. (estimate in £)          | £1.2M                                                                                                                                             |
| 8.                        | Insurance costs (where applicable) (estimate in £)                        | £15K                                                                                                                                              |
| 9.                        | Compensation paid or payable (estimate in £)                              | 2.5% of profit.                                                                                                                                   |
| 10.                       | Did the development proceed or is it proceeding?                          | The project is being built.                                                                                                                       |

**Any other information you want to submit:**

- Did the Board refuse funding?: No – but would have, had we not been able to agree compensation and terms with potentially injunctable neighbours in the timescale required. The need to agree these terms in a shorter timescale meant a premium was paid on top of the compensation.
- Did the Board delay the approval of funding at any stage?: Yes – full funding and approval to proceed with full scheme to completion was only granted after Right of Light compensation and terms had been agreed with all potentially injunctable neighbours.
- Was the programme for the project delayed?: No but the programme and procurement became more complex and we arguably incurred additional construction costs as we had to buy the job in stages rather than the whole project.

**Your details:**

Your name: Stephen Chatfield

Company: Land Securities

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## **APPENDIX E**

### **LIST OF CONSULTEES**

- E.1 Below, we list those who responded to the Consultation Paper and who did not request that we keep their details confidential.

#### **RESPONSES TO THE CONSULTATION**

##### **4 Housing Architects**

Ms Ann Allan

Allen & Overy LLP

Anstey Horne

Mr J R K Armstrong

Ashley Road Residents Association

The Association of Light Practitioners

Mr Chester Ball

The Bar Council

Mr Julian Barwick (Director, Development Securities plc)

Mr David Bennion

Ms Rachel Benson

The Berkeley Group plc

Berwin Leighton Paisner LLP

Mr Nicholas Black BSc, formerly (now retired) FRICS

The Bloomsbury Association

Mr Bill and Ms Sue Blyth

BRE (the Building Research Establishment Ltd)

The British Council for Offices

The British Land Company plc

The British Property Federation

Mr Michael Burrows

Campaign to Protect Rural England

Capital & Counties Properties plc

Mr Stephen Carver FAPM FIRM BSc MSc CEng Eurlng

The Ceredigion Green Party

The Chancery Bar Association

The Chartered Institute of Architectural Technologists

Chelsfield LLP

The City of London Corporation

The City of London Law Society

The City of Westminster and Holborn Law Society

The City Property Association

Ms Karie and Mr James Clifford

Clifford Chance LLP

The Compulsory Purchase Association

Mr William Cooper

Ms Helen Coughlan

The Council of HM Circuit Judges

The Covenant Movement

Creffield Area Residents' Association

Dr Peter S Defoe PrD(BE) DipArb FRICS FCI Arb MCQI CQP (calfordseaden LLP)

Deloitte Real Estate

Derwent London plc

Ms Collette and Mr Philip Dunkley, Mr Charles Carroll, Mr Thomas Carroll and Ms Claudia Carroll

Exemplar Properties

Mr David Feather

Mr Andrew Francis (Serle Court Chambers)

Mr David Freud

Mr Tony Furniss

Mrs Jane Galbraith

Gatehill (Northwood) Residents Association

Ms Susan Gennoe

Professor Alan Gillett OBE DSc MA FRICS FCEM

Mr Lucien Gover

Mr Anthony Gray

Mr Riccardo Grillo BA

Mr Nigel Hamilton

Mr Paul Hargreaves MRICS MCIOB

Mr Alex Hawran

HDG Ltd

Helical Bar plc

Herbert Smith Freehills LLP

Ms Erika Higginson

The Home Builders Federation

Hunters (solicitors)

The Institute of Historic Building Conservation

Ms Judith Jaafar MA, DHyp, MBSCH

Mr Dave Jackson

Dr Anthony Kaye

Ms Jenny King

Lady Kingston

Ms Jean Knight MSc

Land Data

Land Securities

The Law Society

The Local Land Charges Institute

Loughton Residents Association

Ms Velma Lyrae

Mr Hugh Macmillan

Ms Friederike Maeda

Malcolm Hollis LLP

Mr Mark Mallon (Lawrence Graham LLP)

Professor John Mardaljevic PhD FSLL (University of Loughborough)

Matthews & Goodman LLP

Mr John McGhee QC (Maitland Chambers)

Mr Iain Meek DipArch RIBA (Meek Associates)

Mount Anvil Ltd

The National Organisation of Residents Associations

The National Trust

Neighbourly Matters (Chartered Surveyors)

Mr Iain Nisbet

Mr Peter Odds

Ms Diane O'Neill

The Open Spaces Society

Mr Matthew Owen-Hughes

Mr David G Parratt JP, LLB, FRICS, FCI Arb, DiplC Arb, FBEng, PEng, MAE

Mr Neville Pentecost

Mr Gordon Philip

Ms Lynn Pollard

Mr Harry Pritchard

The Property Litigation Association

Nabarro LLP

The National Housing Federation

Mr Rohit Radia BSc (Comp Sci) FRSA

Mr Morris A Richards (Architect, Morris Richards Associates)

The Royal Institution of Chartered Surveyors

Professor Troy A Rule (University of Missouri)

Ms Marilyn Rust

St Stephen in Brannel Parish Council Planning Committee

Mr David M Smith

Southern Housing Group

Mr Donald Stickland

Ms Hazel Dealtrey Talbot

Mr Laurence Target (solicitor, Trowers & Hamlins LLP)

Mr Martin Tighe

Mr Brian Timmins

Transport for London

Travis Perkins plc

The UNITE Group plc

Urban Building Surveyors Ltd

Mr Patrick Vaughan

Ms Kathleen Walsh

Waterslade Ltd

The Westminster Property Association

Mr Rosco White

Mr Alan Wickens

Mr John M Wyles

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