Continue but with compensation

Andrew Ross and Sarah Quy examine the background to rights to light and how a development can proceed where such rights exist

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A right to light is an easement and a private property right. It gives the beneficiary a right to light through an aperture, usually a window, and may burden the neighbouring land over which the light passes to reach the window. Protecting a right to light often means preventing a neighbour from obstructing the light to a window.

Rights to light can conflict with development projects. This is particularly the case in the context of the current public policy impetus in favour of high-density housing in some urban and suburban areas. Although this conflict is not new, the courts and planning authorities are increasingly recognising in their decision-making that the balance is shifting from the protection of private rights towards the promotion of development which is perceived to be in the public interest.

Remedies for breaching rights to light

When an easement is substantially infringed, this constitutes a tort of nuisance. The primary remedy is an injunction to prevent or reverse the infringement. The court has a discretion to award damages instead. In the now famous nuisance case of *Coventry v Lawrence* [2014], the court found that although an injunction remained the *prima facie* remedy to which a successful claimant in nuisance is entitled, there should be a move towards more flexibility in awarding damages instead.

This shift can also be seen in cases relating to applications by developers for the release or modification of restrictive covenants affecting development land. In 2016 in *Millgate Developments Ltd v Smith*, the Upper Chamber prioritised public interest in housing development over a private landowner's rights when it determined that some covenants prohibiting development could be discharged because they were contrary to public interest.

The tribunal decided that it was not in the public interest for affordable housing, which had been built in breach of covenant, to remain empty when the covenants were the only obstacle to them being used. The tribunal awarded the beneficiary £150,000 compensation. This was despite the developer knowing that restrictive covenants prohibited development of its site and not attempting to negotiate to release these before building. Millgate built the homes to satisfy its affordable housing obligation at another site so it could sell more valuable private residences there.

Evaluating a breach of a right to light: how is light measured?

There are several alternative ways of measuring the amount of light that a room receives, in order to assess how much would be lost if a development proceeds. These include the following:

- The Waldram method is the method commonly adopted by rights of light surveyors when providing expert evidence in a claim. It assesses the difference in light entering a room through a window before and after a proposed development. The adequate amount of light for reasonable enjoyment of a room is treated as being one lumen. A lumen is the amount of light thrown by a candle placed one

foot away at table height. It equates to approximately 10 lux. If more than half a room (usually that part closest to the window or window) receives more than one lumen of light per square foot, the light is assessed as sufficient for reasonable enjoyment. It is difficult to imagine working in a room with one candle per square foot at desk height – the test has been accepted by courts but is not considered an accurate measure of reasonable light in a room by many rights of light surveyors and planners.

- The BRE daylight and sunlight model measurement of light is the method commonly used for planning purposes. This model may well require a greater amount of light within rooms than the Waldram method. It is not normally used in rights of light disputes.

- In its review of rights to light (4 December 2014 Law Commission final report (Law Com 356)), the Law Commission referred to the modelling of Professor John Mardaljevic, professor of building daylight modelling at Loughborough University. His technique is known as climate-based daylight modelling. This uses a more sensitive basis for modelling than the Waldram method. It takes account of the usual climatic conditions in the area in which a property is located, acknowledges the effects of variability of sky conditions and also takes account of the surrounding landscape and internal arrangements of rooms. This approach is accepted by the Education and Schools Funding Agency which adopted it for its Priority School Building Programme for calculating available light in schools. It has not yet been tested in court. It is possible that this would give a more accurate measurement for purposes of a claim than the Waldram method presently provides of exactly how much light is entering a room and the effect of a development.

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How can a development proceed when the site is subject to rights to light?

There are four main approaches that a developer can take in order to ensure that development is not prevented by a right to light:

Using the light obstruction procedure

Pursuant to the Rights of Light Act 1959, light obstruction notices (LONs) can be served on the beneficiary of a right of light, certified by the Lands Chamber Upper Tribunal and registered with a local authority. This creates a notional obstruction of light to the dominant owner's land. If this remains unchallenged for a year, the right of light will be extinguished or the period of 20 years for purposes of establishing a prescriptive right will be interrupted.

LONs put owners of dominant land on notice of their right of light and can alert them to take action to protect their rights. Serving LONs may be combined with negotiation to agree release of rights.

Negotiating a deed of release

If a developer employs a rights of light surveyor to assess possible interference with rights of light caused by a development and some interference is identified, it is often the case that the developer will approach the owner of the dominant land to release their right of light. The Waldram method is usually used to assess this and calculate the value of the area over which the light is materially obstructed. When there is a real possibility of an injunction, a beneficiary may seek an amount in settlement which is a proportion of the profit the developer will gain as a result of breaching the rights of light (gain-based damages). Gain-based damages are often the owner of the dominant land's starting point in negotiation.

If a developer can persuade a beneficiary of a right of light to negotiate a release price openly, this may result in that beneficiary losing their ability to seek an injunction. This weakens their negotiating position.

Using s203 Housing and Planning Act 2006

The recent claim (*Crosthwaite v Fordstam*) by neighbours of the Stamford Bridge Football Stadium to restrain development of a new stadium led Hammersmith & Fulham Council (H&F) to exercise its powers pursuant to s203 of the Housing and Planning Act 2016. This provision allowed H&F to side-step the threat of an injunction to prevent development by resolving to acquire the land over which rights of light were claimed. The effect of this is to suspend the rights of light with which the new stadium will interfere during its existence at a relatively small cost. H&F will transfer the land it acquires to the developer or building owner to enable the development to proceed. The use of s203 both removes the ability of private persons to restrain development through an injunction and also prevents them claiming gain-based damages.

Reference

Louis Charles John Crosthwaite & anor v Fordstam Ltd & ors – Claim No: HC-2017-001462

Gain-based damages usually amount to substantially more than a compensation payment from a planning authority based on loss of amenity. Instead, under this procedure, owners are entitled to compensation akin to that payable in relation to a compulsory purchase order.

At present, planning authorities are usually cautious in making use of s203. There must be a strong need for them to do this; for instance a council may require a claim to restrain development to have been issued before it will consider using this option. Development such as that at Stamford Bridge Stadium has a very clear public interest. Smaller developments or those with a less widespread effect on the public may not meet a planning authority's criteria. In the case of Stamford Bridge Stadium, there had been lengthy discussions with the private individuals objecting to the development, mediation had occurred and funding for the development was not available until the rights of light position was resolved. There was a genuine risk that the redevelopment would not occur but for the application of s203 by H&F.

The nuisance claim: avoiding an injunction

If a claim for breach of a right to light reaches the courts, there are various arguments that are regularly considered by developers to attempt to prevent an injunction and reduce damages. Two of these are:

- The argument that the claimants are using the threat of an injunction as a means of maximising the amount a developer will pay for release of their rights. If this can be proved, the risk of an injunction may be removed. Arguments as to the availability of an injunction as a remedy are well rehearsed and are not exclusive to rights of light claims. We do not deal with these here.

- Challenges to the Waldram method of calculating loss of light. This can be difficult because few rights of light surveyors are keen to change the normal practice of their profession and there are few experts available to give evidence in civil claims on interference with light other than rights of light surveyors. Challenging the Waldram method by asserting alternative methods by which experts calculate the light necessary for reasonable enjoyment of rooms is not an unusual defence for developers in claims for breach of rights of light. Such evidence has not yet been satisfactorily tested in court. It is sometimes used as a way to defend a claim while hoping to negotiate settlement before trial.

The future: the Law Commission's proposals

The Law Commission's report recommended that:

- A court should not grant an injunction to restrain the infringement of a right of light if doing so would be a disproportionate means of enforcing the dominant owner's rights to light, taking account of various circumstances including the impact of an injunction on the defendant and the public interest.

- The government should review the level of gain-based damages once the Law Commission's other recommendations have been enacted, to see if these should be capped either at a percentage of the profit share, or as a multiplier of diminution in value.

If the Law Commission's recommendations are adopted, these will significantly reduce the ability of a private individual to restrain development and obtain substantial damages. No injunction will be available in many cases and damages may be reduced from the 25-30% of profit resulting from the damage, which is often the starting point in negotiations between developers and private landowners. Diminution in value of buildings in urban areas is often very little as a result of nearby development which obstructs light, which means that damages calculated on this basis could be nominal.

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Conclusion

For those who are unable to develop because of rights of light, there are likely to be fewer instances in the future when a court will grant an injunction restraining development. For those looking to restrain development by asserting their rights of light, it is becoming ever more important to assess public interest and other potential arguments that a developer can use to avoid an injunction and lower damages. The future may soon resemble Lord Sumption's suggestion in *Coventry*, that:

> The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right. ■

Coventry & ors v Lawrence & anor [2014] UKSC 13

Millgate Developments Ltd & anor v Smith & anor [2016] UKUT 515 (LC)