

# CHILD & CHILD

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## An Outline Guide

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### **What is a right to light?**

A right to light is an easement. It can only be enjoyed in respect of a building and cannot arise for the benefit of land which has not been built upon. It is a right to receive sufficient natural illumination through defined apertures such that the rooms served by the apertures can be used for the ordinary purposes to which the building is likely to be put. A right of light is a negative easement – it is not necessary for the dominant owner to take any steps to enjoy it – contrast a right of way which requires positive action to be exercised. It is not a right to a view. Indeed, the right to a view is unknown to the law. In **Phipps v. Pears [1965] QB 76**, Lord Denning MR, said:

*“Suppose you have a fine view from your house. You have enjoyed the view for many years. It adds greatly to the value of your house. But if your neighbour chooses to despoil it, by building up and blocking it, you have no redress. There is no such right known to the law as a right to a prospect or view.”*

### **Acquisition of rights of light**

Practitioners will be most familiar with acquisition by prescription, under section 3 of the Prescription Act 1832, i.e., by the enjoyment of the light for at least twenty years before the time that proceedings are issued without interruption and without consent. Rights under the Prescription Act cannot be asserted against the Crown. The right can arise even if the building is not occupied.

A prescriptive right of light can also arise by the doctrine of lost modern grant in cases where it can be proved that twenty years' user has been established. In such cases, the courts will assume the fictitious grant of a right of light. The significance of lost modern grant is that the twenty year period need not be immediately before the commencement of the action. It follows that a claim to a right of light arising under the doctrine of lost modern grant can succeed where a claim under section 3 of the Prescription Act 1832 would fail for having been started more than twelve months after the enjoyment of the right had ceased.

There are a number of technical differences between easements arising under the Act and those arising from the doctrine of lost modern grant, the most significant being:

- (i) rights under the Act can arise for the benefit of lessees whereas rights arising from lost modern grant can only benefit freeholders;
- (ii) the Custom of London entitles freeholders in the City of London to build to unrestricted height on ancient foundations, notwithstanding any interference with any rights of light enjoyed by neighbouring owners. The Custom of London will defeat a claim based on lost modern grant but will not defeat a claim under the Act.

Rights of light can also arise for the benefit of freehold property by prescription under the common law which requires proof of the enjoyment of the right “from time immemorial”, meaning the beginning of legal memory in 1189. This is of course virtually impossible to prove which is why the courts developed the doctrine of lost modern grant in the 17<sup>th</sup> and 18<sup>th</sup> centuries.

Rights of light can also be conferred by an express grant, just as any other right can be granted. Conveyancing documentation should therefore always be checked when considering the existence of rights of light, though such documents more commonly exclude such rights than grant them. A properly drafted lease, in particular, will reserve for the landlord the right to develop the adjoining property notwithstanding any effect that such development might have on the tenant’s rights, whether they be rights of light or air or otherwise.

Where the documentation does not expressly grant a right of light, such a right may nevertheless arise under section 62 of the Law of Property Act 1925. This provides that:

*“A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all...easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or at the time of conveyance, demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.”*

A right of light will most commonly arise under section 62 where a landowner sells a house on part of his land but retains the remainder of the land. If the house had previously enjoyed light reaching it over the adjoining land, an implied right will arise for the benefit of the

house under section 62. It is possible to exclude the operation of section 62, however, in the conveyancing documentation.

Rights of light can also arise under the rule in *Wheeldon v. Burrows (1879)*. This case applied principles which are substantially similar to those imposed in 1925 by section 62 of the Law of Property Act.

### **Infringements of rights of light**

The test for deciding whether or not an actionable interference has arisen is not how much light has been taken away but how much light remains and whether the remaining light is sufficient for the claimant's purposes. In **Colls v. Home & Colonial Stores Limited [1904] AC 179**, Lord Davey said:

*"...the owner or occupier of the dominant tenement 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 or inhabitancy or business of the tenement according to the ordinary notions of mankind."*

and Lord Lindley said:

*"...generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop or other place of business."*

The amount of light which is generally considered to be sufficient is the equivalent of 1 lumen per square foot at table top height, i.e., 850cm or 0.2% of the dome of the sky over a

minimum of 50% of the room in question. There are, however, a number of potential complications. For example, where a room benefits from windows on two sides, the owner of land on one side may only build to such a height as would leave sufficient light in the room if the building were erected on the other side - *Sheffield Masonic Hall Co. Ltd v. Sheffield Corporation* [1932] 2 Ch 17. In addition, any reasonably foreseeable future subdivisioning of the room may also be taken into account. *Carr Saunders v. McNeil Associates* [1986] 2 All ER 888.

Paul will be explaining how the rights of light surveyors go about the task of measuring the adequacy of light in a given area. If, by reference to those calculations, it is shown that the reduction brings the light below acceptable levels, then an infringement will have occurred and the claimant will be entitled to a remedy. What will that remedy be?

## **Remedies**

The starting point is that, in every case where it is shown that the reduction in light is actionable, then an injunction may be granted and it is for the defendant to show that there is a reason why the primary rule should not apply. A number of tests need to be satisfied to defeat a claim for an injunction. In *Shelfer v. City of London Electric Light Company* [1895] 1 Ch287, A.L. Smith, LJ said:

*“In my opinion, it may be stated as a good working rule that –*

- (1) if the injury to the plaintiff’s legal rights is small,*
- (2) and is one which is capable of being estimated in money,*
- (3) and is one which can be adequately compensated by a small money payment,*
- (4) and the case is one in which it would be oppressive to the defendant to*

*grant an injunction*

*then damages in substitution for an injunction may be given.*

These principles were applied in ***Regan v. Paul Properties DPF Limited No. 1 [2006] EWCA Civ 1391*** where the Court of Appeal held that the rule in *Shelfer* was authority for the following propositions:-

1. A claimant is prime facie entitled to an injunction
2. The defendant has no right to ask the court to sanction his wrong by buying out the claimant's rights as damages, even though the court has jurisdiction to award damages in lieu of an injunction.
3. The court should only exercise its discretion to award damages in lieu of an injunction by reference to established principles.
4. Some of the factors which are relevant to the question whether the court should exercise its discretion to grant an award of damages in lieu of an injunction are:
  - The *Shelfer* principles set out above.
  - Whether, on the evidence it appears that the claimant is in reality only interested in money.
  - Whether the claimant's behaviour is such that it would be unjust to grant an injunction.
  - Whether there are any other circumstances which would justify the refusal of an injunction.

Child & Child represented the home owner in that case and obtained a mandatory injunction requiring the development to remove the upper parts of its new building.

These principles were again applied in *HKRUK II (CHC) Limited v. Heaney [2010] EWHC 2245* where the court granted a mandatory injunction requiring the removal of the offending parts the developers' new building. This case does not change the law in any way but does illustrate the willingness of the courts to take robust action to protect a dominant owner's rights. It is easy, however, to overestimate its significance. As the judge said:

*Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting the injunction and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.*

The judge in *Heaney* acknowledged that the case was a difficult one. Most commentators agree that a different judge may well have reached a different conclusion.

It should be remembered that any injury which is actionable is injunctible. The question whether an injury is actionable is a matter of law for the judge to decide. It is not a matter of expert opinion.

Paul will discuss the various formulae that rights of light surveyors use in arriving at figures for compensation where an actionable loss of light has arisen and where an injunction is not

being sought. Those formulae operate as an effective practical means of arriving at compensation figures but are not founded on any legal principles. Where the level of damages is assessed by the court, the court will either award:

- (i) common law damages; or
- (ii) damages in lieu of an injunction.

At common law, the level of damages will be assessed by reference to the value of the loss suffered by the claimant, the most obvious measure of damages being the diminution in value of the property resulting from the loss of light. Difficulties arise in calculating that diminution, however, because there must be excluded from the calculation any reduction in light which is lawful – the damages should be calculated only by reference to the additional diminution in value resulting from the unlawful element of the reduction.

Damages calculated on that basis are frequently inadequate to represent proper recompense for the claimant's loss. In such a case, the court may grant damages in lieu of an injunction, rather than common law damages and would be likely to calculate the amount of damages by reference to what would have been the result of a hypothetical negotiation between the parties for the release of the right, without either party holding the other to ransom. These are known as *Wrotham Park* damages following *Wrotham Park Estates Co. Limited v. Parkside Homes Limited* [1974] 1 WLR 798. The starting point for the calculation of the notional premium is the additional net profits which the developer will earn as a result of infringing the claimant's rights. There is little guidance in the cases as to what the appropriate percentage of that profit should be, though it is established that the size of the award should not be so large that the development would not in practice have taken place if it had been paid and that the court must in any event consider whether the deal "feels right". Predicting the

outcome of a claim for damages for breaches of rights of light is accordingly a highly uncertain affair. The use of the valuation methods employed by rights of light surveyors confers a valuable degree of certainty and predictability.

Before *Heaney*, it was generally considered that a claimant who wishes to apply for an injunction to restrain a developer from continuing with offending works will generally need to apply to the court, on issuing the proceedings, for an interim injunction to preserve the position pending trial. When applying for an interim injunction, he will be expected to undertake to the court to pay compensation to the defendant if it should subsequently transpire that the injunction should not have been granted. This is a very real risk for the claimant and is a matter which developers frequently stress when attempting to dissuade neighbouring owners from applying for an injunction. Following *Heaney*, it would seem that this general rule no longer applies. It remains to be seen, however, whether the courts will in future reapply that general rule.

### **Extinguishment**

Rights of light can of course be extinguished by agreement. The other methods by which a right of light may be extinguished are:

(i) Abandonment

This is very rare. Once a right of light has arisen, it would be surprising for the owner of that right simply to abandon it and the clearest evidence is required by the courts to demonstrate an intention to abandon. The mere bricking up of the window and even the demolition of the building (see below) is not generally sufficient. To prove abandonment, evidence must be produced to demonstrate a fixed intention never again to assert the right.

(ii) Demolition Or Alteration Of The Dominant Property

Most people unfamiliar with the field would assume that, where a building enjoying rights of light is demolished, then those rights of light will naturally be extinguished. Generally speaking, however, this is not the case. The demolition of a building will not result in the extinguishment of its rights of light if it can be demonstrated on the evidence that the dominant owner had no intention to abandon the rights. The fact of demolition is insufficient, by itself, to prove such an intention. It follows that, where a new building is erected in the place of an earlier one which enjoyed rights of light, then the new building will enjoy rights corresponding to the old – but only in respect of windows whose positions correspond to the positions of the windows in the old building. This principle even applies where the alterations involve changes in the plane or the shape of the window. If, by contrast, the windows in the new building do not coincide with the position of the windows in the previous one, then the rights of light benefitting the earlier windows will be deemed to have been abandoned.

(iii) Delay

Where a claimant relies on section 3 of the Prescription Act 1832, he must show, amongst other things, that the right had been enjoyed “without interruption” for twenty years prior to the commencement of the action. For these purposes, an interruption will only be effective if it lasts for at least a year. It follows that if a right of light has been obstructed for more than a year before proceedings are instituted, the claimant’s right of light under the Act will have been lost.

(iv) Statute

It is not necessary to erect a physical obstruction in order to create an interruption of the right of light. A notional interruption can be registered as a local land charge

under the Rights of Light Act 1959. The effect of this is that, subject to service of notice on the servient owner, the registration acts as a notional obstruction. Any rights of light arising under the Prescription Act 1832 will be lost unless the dominant owner brings proceedings for infringement within twelve months of the date of registration. Rights of light may also be overridden on compulsory purchase of a property by the local authority, for example, under section 237 of the Town & Country Planning Act 1990. This applies where a local authority acquires property for the purpose of development and entitles the local authority to extinguish the dominant owner's rights of light in return for compensation. The level of such compensation is assessed by reference to the diminution in value of the dominant owner's land and not by reference to *Wrotham Park* principles discussed above. This can result in a significantly lower figure than would otherwise be the case. The granting of an award under the Party Wall etc. Act 1996 authorising works which will infringe rights of light does not prevent the dominant owner from bringing proceedings in respect of those works. Section 9 of the Act states that :

Nothing in this Act shall :

- (a) authorise any interference with an easement of light or other easements in or relating to a party wall; or
- (b) prejudicially affect any right of any person to preserve or restore any right or other thing in or connected with a party wall in case of the party wall being pulled down or rebuilt.

### **Practical matters**

Developers should always give early consideration to the impact of their schemes on the rights of light of any adjoining owners and begin negotiations with those owners at the

earliest possible stage. Despite the example of *Regan*, most adjoining owners would be very reluctant to take on the risks and costs involved in applying for an injunction and can frequently be persuaded to release their rights in return for a suitable premium. It is generally best to instruct rights of light surveyors to negotiate the level of such premium. It is important to remember that the affected properties are frequently mortgaged and that the mortgagees will need to agree the arrangements and to execute the deed of release. In the present financial climate, mortgagees frequently require that part of the premium be paid to them in reduction of the mortgage, as a condition of granting their consent. This can sometimes cause lengthy delays.

A dominant owner must also be careful to ensure that any discussions concerning the level of possible compensation do not have the effect of undermining his ability to apply successfully for an injunction in the event that agreement is not reached. An acknowledgment in correspondence that the dominant owner is prepared to accept money would seriously undermine his position in any application for an injunction. It is accordingly important to ensure that all correspondence dealing with compensation is marked “without prejudice and subject to contract” and to make it clear that the dominant owner will not be bound to proceed with any agreement prior to the completion of a formal deed of release.

In addition, tax considerations must be borne in mind. The disposal of a right of light in a deed of release would probably be treated as a taxable disposal for the purposes of capital gains tax giving rise to a significant charge, though the principal private dwelling-house exception may frequently apply. A developer who pays a premium in return for a deed of release may also be subject to stamp duty land tax on that premium.

Rights of light give rise to a series of practical and legal issues, many of which are arcane and obscure. Developers will require multi-disciplinary input to deal with these issues and should obtain advice at the earliest possible stage.

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