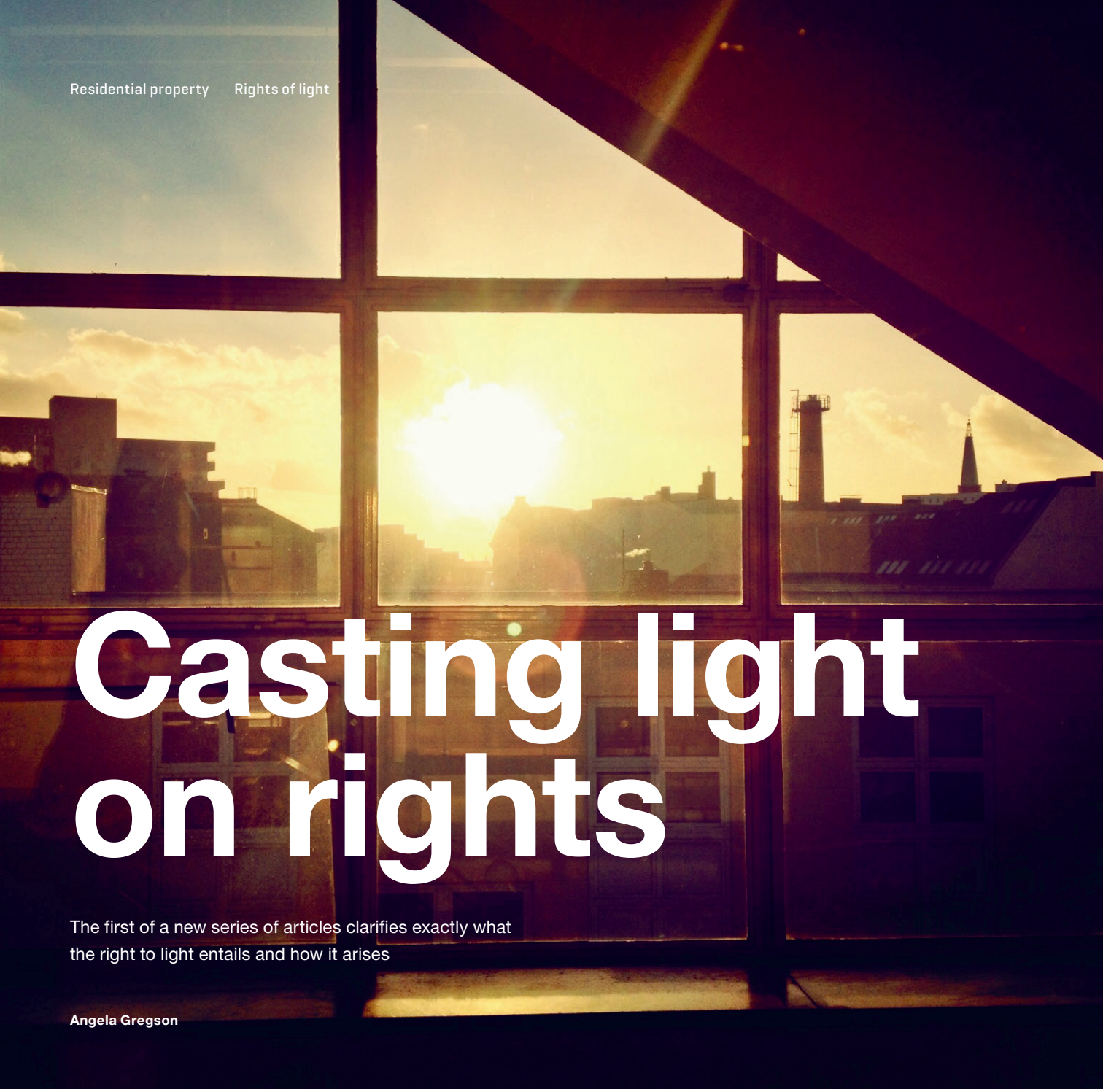

Casting light on rights

The first of a new series of articles clarifies exactly what the right to light entails and how it arises

Angela Gregson

A right to light is an easement enjoyed by one landowner over the land of someone else, and it can be asserted by anyone with an interest in land, including tenants under leases. Unusually, it can prevent a landowner from building on their own land and can be employed to restrain development even when planning permission is in place. Accordingly, rights of light are a powerful tool for those who want to resist development and are, as Lord Lindley described them in *Colls v Home & Colonial Stores* [1904] AC 179 'a peculiar kind of easement'.

Rights of light are often confused with other matters, so it should be noted that they are not a right to receive direct sunlight, privacy or a view. As Lord Denning stated in *Phipps v Pears* [1965] QB 76: '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 the right to a prospect or view.' Yet rights of light are often deployed for these very reasons, because owners want to protect their privacy or beautiful outlooks.

To clarify: the right to light is a right to enjoy natural light that enters a building through a defined aperture. The most

obvious example of an aperture is, of course, a window, although a right to light could similarly be acquired through a skylight or a window set in a door.

Although rights of light can be expressly granted, this is rare. Most are acquired under section 3 of the Prescription Act 1832 (*bit.ly/PresAct1832*); that is, by the enjoyment of the light for at least 20 years before the time that proceedings are commenced, without interruption and without written consent.

The second and most unusual form of prescription is by common law. This is a presumption that there has been a grant of a right to light that has been enjoyed since time immemorial, in this context meaning the year 1189. Except for a handful of buildings, it is almost impossible to prove the position of apertures for a period of more than 800 years.

A right to light can also be acquired pursuant to the doctrine of lost modern grant. This doctrine presumes that at some point in the past it was expressly granted, but that the document evidencing that grant has since been lost. Again, it is necessary for the claimant to prove that there has been a 20-year period during which the light has been enjoyed without interruption and without consent.

The main difference between the doctrine of lost modern grant and the 1832 Act is that in the former case, the required 20 years need not be the period immediately before the commencement of proceedings, but can be at any point in the past. This is particularly useful in circumstances where, for example, the building enjoying the light has been demolished or a window blocked up. Crucially, only freeholders can rely on the doctrine; a lessee cannot pursue a claim pursuant to it.

A right to light can be granted expressly in the same way as any other easement, such as a right of way. As mentioned above, express grants are rare, but reservations of rights of light — which amount to the same thing — in leases and transfers are common. Before concluding that a right to light exists, you must check conveyancing documents very carefully. For example, a tenant in a block of flats may believe that they have acquired this right by prescription because they have enjoyed the light to their window for more than 20 years. However, if the lease says that the right to light is reserved to their landlord, then they have no claim.

Rights of light are often confused with other matters, and they are not a right to receive direct sunlight, privacy or a view

Once rights of light are acquired, there are still many ways in which they can be lost. One is by abandonment: to demonstrate as much, it is necessary to show that the person with the benefit of the right had a positive intention that it should be abandoned. This is virtually impossible to prove, and even the bricking up of a window or the demolition of a building is not generally enough.

Because it is impossible to acquire a right of light over your own land, it may be lost by unity of ownership. By way of explanation, assume there are two parcels of land, A and B. A has a right of light over B. If the owner of A also acquires B, they will not have a right of light over B. However, a non-related purchaser would, because both parcels are in the same ownership. There is one line of thought that the right of light could come back into existence when A sells B on, so the right is not necessarily lost, just that it does not exist while the property is in common ownership.

As previously stated, the demolition of a building will not extinguish rights of light unless the landowner had a positive intention to abandon them. If a new building is subsequently constructed on the site of the old one then, assuming the new apertures coincide with the position of the old ones, they will enjoy rights of light to the extent that there is overlap with the position of windows in the old building. Given the potential exposure to a claim, developers that are acquiring sites should carry out due diligence as to which buildings historically surrounded those sites. This is something that could be raised in pre-contract enquiries.

A claimant under section 3 of the 1832 Act must demonstrate that the light had been enjoyed for 20 years without interruption; section 4 provides that to be effective, an interruption must continue for at least a year. Therefore, if a right to light has been obstructed for more than a year, then the claimant will have lost their claim under the act but could still bring a claim under one of the other methods.

A physical obstruction such as a wall or hoarding that has been in position for a year or more will constitute an interruption pursuant to section 4 of the 1832 Act, but section 4 of the Rights of Light Act 1959 (*bit.ly/RoLact1959*) provides a far simpler way of obstructing the passage of light by the registration of a light obstruction notice; doing so has the same effect at law as if a physical obstruction had been constructed. Any rights arising under the 1832 Act will be defeated unless the light obstruction notice is challenged by court action within a year of registration. Rights of light arising under the doctrine of lost modern grant, however, are unaffected.

The next article in the series will consider how rights of light are measured and when they are infringed.

Angela Gregson is a partner with Child & Child angelagregson@childandchild.co.uk

Related competencies include:
Development appraisals, Inspection

In the light of day

The second article in the series on rights of light explains how infringements are determined and measured

Angela Gregson

A claim for infringement of a right to light can only be made if the interference is an actionable one. Whether or not the interference is enough to be actionable is determined by how much light remains after the defendant's actions, and whether it is adequate for the claimant's purposes.

This test was set by the House of Lords in *Colls v Home & Colonial Stores Limited* [1904] AC 179 (*isurv.com/CollsvHCS1904*). In that case, Lord Davey stated that 'the owner or occupier of the dominant tenement is entitled to the uninterrupted access through [their] 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 [human]kind'.

Lord Lindley put it a slightly different way: 'generally speaking, an owner of ancient light is entitled to sufficient light according to the ordinary notions of [human]kind for the comfort or use and enjoyment of [their] 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.'

A development can take away some of the light to the neighbouring property so long as there is enough left. The use to which a room is put and the claimant's ability to continue using it for that purpose is thus of critical importance to any claim. If the property in question is residential and the light is lost to work surfaces in a kitchen, this would be considered far more serious than the loss of light to a corridor or store room. But how is the loss measured?

It is important to understand what is irrelevant when pursuing the measurement of light for the purposes of a claim. The BRE guidance on the level of reduction in daylight and sunlight that is acceptable in planning terms is of no relevance: it is entirely possible — in fact commonplace — for a development to sail through the planning process on the basis that the BRE requirements are met but still then actionably interfere with a right to light and therefore leave open the possibility of a claim for an infringement.

Artificial light is not taken into account when considering whether a room is well lit — the suggestion that artificial light should be considered was roundly rejected by Justice Peter Smith in *Midtown v City of London Real Property Co Ltd* [2005] EWHC 83 (Ch) (*isurv.com/MidvCLRP2005*). This is particularly relevant to office blocks, which are routinely lit by artificial means.

A rights of light claim continues to be determined by the amount of light that would be emitted from a candle

Perhaps surprisingly, deciding what is satisfactory for the purposes of a rights of light claim continues to be determined by the amount of light that would be emitted from a candle. Although there is more than one way of measuring loss of light, the only sure method that has received judicial approval is the Waldram method developed following the work of Percy Waldram in the 1920s and 1930s (*isurv.com/Waldmeth*).

According to the Waldram method, the amount of light considered to be sufficient is the equivalent of one lumen per square foot at tabletop height. So, if a point in a room can receive 0.2 per cent of the total illumination received from the sky, it is considered adequately lit.

The well-known 50/50 rule emerged from the Waldram method. This is used by surveyors and provides that, if half the light in a room is adequate in accordance with the method, then there is no actionable interference and therefore no claim. However, surveyors must be very careful not to apply this rule rigidly. In *Ough v King* [1967] 1WLR 1537 (*isurv.com/OvK1967*), the Master of the Rolls Lord Denning stated: 'I would not myself be prepared to regard the 50/50 rule of Mr Waldram as a universal rule. In some cases, a higher standard may be reasonably required.'

In *Ough*, the amount of the room that was well lit after the obstruction was only reduced from 64.05 per cent to 51.27 per cent, but the court nonetheless found that there was an actionable interference; there was still a claim, although this was above the 50 per cent threshold. In *Deakins v Hookings* (1994) 1EGLR 190, the court held that the 50/50 rule was not a rigid test and a higher standard may be needed in some cases (*isurv.com/DvH1994*). Accordingly, it must be regarded as a rule of thumb and not a rule of law.

The Waldram method does not take into account modern standards and expectations. Levels of light that he deemed adequate in the 1920s and 1930s may not be considered sufficient today. This is particularly true in the residential sphere. It must also be noted that the method does not allow for externally or internally reflected light or seasonal variations.

There are other methods by which loss of light can be measured, such as the radiance test and climate-based daylight modelling. The former is a method of software analysis that uses ray tracing to demonstrate levels of light, while the latter looks at meteorological data based on the precise position of a building and can consider reflected light. Such modern methods of scientific analysis will be able to produce more accurate methods of assessing whether a proposed development will really cause a nuisance. However, to date, they are completely untested in the courts.

One day, no doubt, the question of whether the Waldram method should continue to be used to measure losses of light will come to litigation. If and when it does, it could lead to significant changes in the way losses of light are measured, and what exactly constitutes an actionable interference with a right to light.

Angela Gregson is a partner with Child and Child angelagregson@childandchild.co.uk

Relevant competencies include:
Legal/regulatory compliance

When action must be taken

The third article in our series focuses on remedies for interfering with rights of light

Angela Gregson

There are two possible remedies for unlawfully interfering with a right to light: an injunction or damages. Once there is an actionable interference with a right to light, an injunction is the primary remedy. This could be granted by the court, either to prevent a development from being started or to cut back one that had already been constructed.

Prior to *Coventry & Ors v Lawrence & Anor* [2014] UKSC 13, as discussed below, the crucial case was *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287, CA (*isurv.com/ShelvLELC1895*). This laid down what has became known as the *Shelfer* test, which determined that damages could be awarded in substitution for an injunction if:

- the injury to the claimant's rights is small
- the injury can be estimated in financial terms
- the injury can be adequately compensated by a small payment
- it would be oppressive to the defendant to grant an injunction.

The *Shelfer* principles were applied in both *Regan v Paul Properties Ltd & Ors* [2006] EWCA Civ 1391 and *HKRUK II (CHC) Limited v Heaney* [2010] EWHC 2245 (Ch), which marked the high point for claimants in rights of light cases. In each one, injunctions were granted by the court to cut back buildings to prevent interference with rights of light.

Today, the leading case on the question of whether an injunction will be granted is *Coventry* (*bit.ly/CovvLawr2014*). It was not, in fact, a case about rights of light but one that concerned noise nuisance; however, the principle that it laid down applies equally to the nuisance caused by interfering with a right to light. The Supreme Court held that 'the court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered … Each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good.'

So, the court will determine whether or not an injunction will be granted on a case-by-case basis. It is a question of fact and therefore impossible to predict with certainty whether an injunction will be granted in any particular case. Commentators generally agree that the impact of *Coventry* is that injunctions are now less likely than they were following *Regan* and *Heaney*; it is far more likely that an injunction will be granted where the property affected is residential rather than commercial. As the Supreme Court stated: 'The right to enjoy one's home without disturbance is one [that] I believe that many, indeed most, people value for reasons largely if not entirely independent of money.'

I am a solicitor specialising in the field and can look at all the facts of a case and advise on the likely chances of an injunction being granted in a particular case. However, following *Coventry*, every case is unique, and while it is possible for an injunction to be granted in any case where there is an actionable interference with a right to light, this is ultimately at the court's discretion.

The second remedy for unlawfully interfering with a right to light is damages. Most cases are resolved with a payment of damages without proceedings ever being issued, or even contemplated. There are, essentially, two methods by which damages are assessed:

An injunction is the primary remedy for an actionable interference with a right to light

1. **Book value:** using the Waldram method for calculating a loss of light (see *Property Journal* January/February, pp.8–9), rights of light surveyors generally agree a book value for the loss. This is achieved by looking at the extent of the loss of light, the likely rent, and the yield that would be applicable. They then agree a multiplier for that figure, which could be three, four or five times the book value depending on the severity of the loss. The multiplier is something that is agreed between the surveyors, and the enhanced book value is often greater than five times, especially when dealing with residential properties.
2. **Damages in lieu of an injunction:** the court can award damages in lieu of an injunction pursuant to section 50 of the Senior Courts Act 1981. Such damages are generally known as negotiating damages following the Supreme Court case of *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20.

The starting point for the calculation of damages in lieu of an injunction is the net profit that the developer will earn as a consequence of infringing the claimant's rights. In practice, this means that the claimant will be entitled to a percentage of the profit that the defendant will make from that part of its development that infringes their rights of light.

In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] EWCA Civ 1309, the court held that a share amounting to one-third of the developer's profit might be appropriate. However, the one-third share can clearly be increased or decreased by other factors. In *Tamares*, damages were reduced to substantially below 33 per cent of profit due to the relatively minor nature of the interference; in *Wrotham Park Estate Co Limited v Parkside Homes Ltd* [1974] Ch 798, only five per cent of the developer's profit was awarded, while in *Wynn-Jones v Bickley* [2006] EWHC 1991 (Ch), the figure was 50 per cent.

It is fair to say that, as with predicting whether an injunction will be granted, the level of damages that might be awarded by a court in lieu of an injunction is also uncertain. The principle remains, as the court emphasised in *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* [2001] 07 EG 163, that it needs to consider whether the deal arrived at 'feels right'.

Angela Gregson is a partner with Child and Child
angelagregson@childandchild.co.uk

Related competencies include: Legal/regulatory compliance

Staying in the light

The fourth article in the series on rights of light explains about light obstruction notices

Angela Gregson

A right to light is an unusual concept; most commonly, it is acquired by long-term use pursuant to the terms of the Prescription Act 1832 (*bit.ly/PresAct1832*). If the right is acquired in this way, then it will not be recorded on any title documents. Set against this background is the light obstruction notice (*bit.ly/LON-RoL59*).

This is often referred to as a notional obstruction: in other words, it is a completely artificial concept, a fictional screen or wall as opposed to a physical obstruction. It was introduced by the Rights of Light Act 1959 (*bit.ly/RoLAct59*) as a statutory method of interrupting the passage of light without the need for putting up a physical obstruction.

If daylight passes across one piece of land to another that has constituted an aperture in a building on another piece of land for a period of 20 years, the owner of the land with the building on it will acquire a right to light. This is pursuant to section 3 of the 1832 Act, if the passage of that light is not interrupted. Once the owner obtains that right, they can potentially stop a development by obtaining an injunction or demand substantial damages from the developer. The 1832 Act provides that if the flow of light is interrupted for a year, then no rights pursuant to the legislation will be obtained. A developer who seeks to construct a building that might interfere with a right to light has recourse to the light obstruction notice.

A developer should not miss an opportunity to prevent a right to light being acquired. If a neighbouring building and its apertures have been in situ for up to 19 years and one day, an application for a notice will prevent rights of light being acquired and thereby avoid a potential claim. In addition to preventing later claims, it is worth noting that some developers often use the light obstruction notices tactically as a way of identifying possible future claimants.

The process

To obtain a light obstruction notice, a formal request must first be made to the Upper Tribunal (Lands Chamber). Evidence must be given to demonstrate that the applicant has informed those with an interest in the building that is the subject of the proposed registration of the notice. Once the tribunal is satisfied that adequate publicity has been given, it will issue a certificate. Thereafter, this certificate must be registered as a local land charge with the relevant local authority.

Currently, the fee for making an application for a light obstruction notice is £1,320, plus an additional £330 if a temporary — emergency — certificate is required. There is also a fee for registering the certificate as a local land charge, which depends on the local authority but is in the region of £100.

If a right to light is very close to being gained — the apertures in question have been in situ for almost 19 years and a day — and exceptional urgency can therefore be demonstrated, then the Upper Tribunal can issue a temporary certificate that can be acquired very quickly. This can be registered as a local land charge, albeit only for a temporary period of up to six months, while a full or definitive certificate is acquired.

The effect of the notice is to put up a hypothetical light obstruction of specified dimensions in a specific location. This obstruction is usually described as a screen of infinite height and prescribed width. The location of the proposed light obstruction notice must be marked on a plan that is filed with the tribunal. In theory, a developer could always build a physical obstruction instead of applying for a light obstruction notice. However, such structures are often impractical, not least for planning reasons.

The light obstruction notice is a completely artificial concept or notional obstruction as opposed to a physical one

The notional interference is deemed to be established on the day that the notice is registered as a local land charge. If the notice remains on the register of local land charges for at least a year before the end of the 20-year period when that building would otherwise have secured a right to light, then it constitutes a sufficient interruption. This would cancel any years procured by the owner of neighbouring land towards acquiring a prescriptive right to light.

It should be noted that the notice is only effective for a year. After that has elapsed, the 20-year period for obtaining a right to light for the owner of neighbouring land can begin again. However, in practice the one-year interruption will be sufficient for the developer's purpose. By the time the 20-year period under the 1832 Act had begun again and been reached, the new development will long since have been constructed.

Challenging a notice

Any challenge to a light obstruction notice must be made within 12 months of its registration as a local land charge. Until legal proceedings are issued, anyone who has received a notification is deemed to acquiesce in the obstruction for the purposes of section 4 of the 1832 Act.

Once 12 months have passed, rights of light gained under the act will be lost and there will be no way of challenging the notice. The only way to challenge its registration is to issue a claim. In practice, if a landowner can prove the acquisition of a right to light over a 20-year period, they would first show evidence to the developer's solicitor and invite them to remove the notice from the register.

Angela Gregson is a partner with Child and Child
angelagregson@childandchild.co.uk

Related competencies include: Conflict avoidance, management and dispute resolution procedures, Development appraisal