Letter to Law Commission – Consultation Paper 210

16 May 2013

Dear sirs

Rights to Light: Response from Berwin Leighton Paisner LLP

Berwin Leighton Paisner LLP

Berwin Leighton Paisner (BLP) is a full service City practice based across ten global offices.

Our real estate team is recognised as the pre-eminent real estate practice with over 60 partners and 300 lawyers. We continue to work closely with clients on some of the most high profile deals in the market. Our broad exposure to the market, knowledge of key trends and sector specialism allows us to appreciate fully, real estate, as an asset class.

As such, this response reflects that expertise and also direct soundings from our client base in response to your consultation.

Introduction

We agree with the following findings in your report:

(a) The current position and related uncertainty are preventing projects from proceeding as swiftly as they have previously done. Rights of light issues are a significant, if not the most significant, current brake on development.

(b) Heaney has had a detrimental effect on the way in which disputes involving rights of light are approached.

(c) At times, it is in the interest of adjoining owners "to sit back and not engage" and BLP have experienced this approach regularly, on behalf of developer clients.

We support three stated objectives of the report:

(a) Greater certainty and transparency.

(b) Ensuring rights of light are not an unnecessary constraint on development.

(c) Ensuring the important amenity value of rights of light is protected.

We support all four proposals in the report, with further detailed commentary set out in paragraphs 3 to 6 below.

We set out in paragraph 7 below our views on the three additional areas where you have asked for input but where you have not, at this stage, made any provisional proposals:

(a) Test for nuisance.

(b) Calculation of damages.

(c) Abandonment.

Letter to Law Commission – Consultation Paper 210

16 May 2013

Commentary on Provisional Proposal No. 1

We propose that for the future it should no longer be possible to acquire rights to light by prescription.

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.

There are three further problems with the proposal in detail:

(a) First, there is a risk that if prescriptive rights are abolished going forward then any "existing" (by which we mean rights where twenty years' use has already accrued) prescriptive rights are likely to be jealously guarded. In the commercial sphere, there is likely to be an increase in the number of new developments deliberately designed in order to benefit from transferred rights of light, possibly just by strategically designing and positioning one or two windows to coincide with the position of old windows. This means that the battleground is likely to move to the issue of transference and when transferred rights are established. This is a very difficult area of law and one that has not been addressed in the consultation paper. See also the further comments below under "Abandonment".

(b) Secondly, the paper also does not address the issue of prescriptive rights arising under the doctrine of lost modern grant. This is a notoriously difficult area of the law, and the abolition of such rights would be welcome. We do however understand the constraints on doing so . Prescriptive rights under this doctrine are established by showing 20 years user at any point in time, rather than 20 years user immediately before any "suit or action" as required by the 1832 Act. Once rights are crystallised it is difficult to prove abandonment. In practice this causes difficulties in advising at a pre-development stage on whether a claim under the doctrine may be brought by a neighbour .

(c) Thirdly, owners would have to issue "proceedings" to protect those rights. This does not work because:

- Who would they issue proceedings against? Sometimes the servient property that may potentially impact light is located some distance from the dominant property. How are the servient properties against which proceedings are to be issued to be identified? The identification exercise would require specialist advice with its attendant cost.
- This will simply encourage, indeed, require dominant owners to issue proceedings even where their neighbours had no intention of re-developing in the near future. This will result in much unwanted litigation.

If abolition is pursued, we would suggest that a registration procedure for "existing" rights would be a simpler and cheaper course of action. We are mindful that such a procedure would have the potential to overwhelm the Land Registry during the transitional period. If registration were to be considered, careful thought would need to be given . Where are such rights to be registered and what proof should be submitted at the time of registration?

Letter to Law Commission – Consultation Paper 210

16 May 2013

Commentary on Provisional Proposal No. 2

We propose the introduction of a new statutory test to clarify the current law on when the courts may order a person to pay damages instead of ordering that person to demolish or stop constructing a building that interferes with a right to light.

We support this proposal.

Comparison of current and new tests:

Current Shelfer test	Proposed statutory test
An injunction will be refused: • If injury is **small** • And is capable of being estimated in money • And can be adequately compensated by a **small** money payment And it would be **oppressive** to grant an injunction	Would it be **disproportionate** to grant an injunction bearing in mind: • Size of injury (consider loss of amenity and artificial light) • Whether money would be **adequate** (not small) compensation • Conduct of both parties • Delay

We welcome the fact that the word "small" is omitted from the new statutory test. This has resulted in judicial decisions that have often been inconsistent and uncommercial, with the figure of £5,000 not regarded as "small" in a number of cases. The substitution of the word "adequate" is an improvement as this recognises that a payment may be "adequate" without being "small".

Client soundings especially welcomed the direction that artificial light may be taken into account. They did so on the basis that this now reflects the reality in the modern world, especially in relation to commercial space, where the use of artificial light is practically compulsory and where in fact the prevalence of natural light may interfere with the use of modern technology and computer screens.

Client soundings also welcomed the direction to take into account any loss of amenity, as this consideration presents a natural distinction between different uses of space e.g. residential, commercial, retail, industrial.

Client soundings also supported the rejection of a test based on whether it would be oppressive to grant an injunction. Such a test sets too high a threshold before an injunction could be refused. The new test of disproportionality sets the scene more accurately. We cautiously welcome the new test but we are concerned that this will not make it any easier to advise clients in advance on the likelihood of the grant of an injunction.

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.

Letter to Law Commission – Consultation Paper 210

16 May 2013

Commentary on Provisional Proposal No. 3

We propose the introduction of a new statutory notice procedure, which requires those with the benefit of rights to light to make clear whether they intend to apply to the court for an injunction (ordering a neighbouring landowner not to build in a way that infringes their right to light), with the aim of introducing greater certainty into rights to light disputes.

First, we should like to make the point that prior to the Heaney decision we felt able to advise our developer clients to take a view about the residual risk from dominant owners who had ignored any attempts to engage with them. Post-Heaney we have felt it much harder to do so. The proposal states that the procedure is not intended to flush out potential claimants but there are occasions where that might be its value. Non-engagement by neighbours creates unwelcome uncertainty for developers.

Secondly, it is not feasible that one may only serve one notice every five years, given the fact that:

(a) 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 or for example representations from interested bodies such as English Heritage etc. or to changing occupier or market requirements; and/or

(b) Schemes may be carried out in phases, with additional impacts arising from each phase.

Client soundings were very much of the view that to give this proposal some real practical value it would be preferable drastically to reduce the "moratorium" from five years to say 6 months. Alternatively we would suggest placing no time limit on the service of multiple notices. To avoid the perceived injustice of multiple notices "wearing down" the resolve of the dominant owner, we consider it appropriate that a developer should be required to pay any wasted costs incurred by a dominant owner in responding to notices which are superseded by further notices. It is common in rights of light matters for developers to undertake to pay their neighbours' surveying and legal costs. The risks of costs escalating because a developer's plans change are well understood. Once a neighbouring owner has appointed professionals without being concerned about incurring costs, we do not consider that their resolve would be worn down by a change of plans.

The 5 year notice rule could potentially impact adversely on property values and sales, if a market perception developed that the service of a notice by a previous owner restricted a purchaser's options for the property. For example a developer may secure a planning consent for a scheme having served an NPO and may then decide to trade the scheme to another developer. In that scenario, the other developer might be tempted to chip the price (as he would argue that an alternative scheme could not be pursued in the short term without involving the same risks as would have been incurred without an NPO). Where external finance is sought banks might be concerned that a new development would either be delayed or be subject to the current uncertainties because a new NPO could not be served for some time.

We have, on behalf of clients, direct experience of the trading of sites with complex rights of light issues to other developers who subsequently submit plans for alternative schemes. If those sites had been traded following service of an NPO potential buyers would have had to carefully consider the risk of proceeding without the benefit of being able to serve an NPO or of delaying until it could do so.

We would also be concerned that service of an NPO might adversely impact on the availability of rights of light insurance and would suggest that the views of insurers be taken into account prior to implementation.

Thirdly, the timescale envisaged by the proposal is potentially too protracted. The impacted neighbour has 4 months to serve a counter notice and another 4 months to issue proceedings, a total of 8 months. However, under the Civil Procedure Rules, it is possible to issue a claim but not serve it for a further 4 months, potentially extending the period from service of notice to receipt of claim to 12 months. This is too long. Whilst the CPR cannot be changed, we would suggest shortening the two other periods to 3 months each.

Fourthly, 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.

Fifthly, we think that 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.

Lastly, we are concerned that the requirement to issue proceedings within a defined timescale is likely to lead to the proliferation of a new breed of specialist solicitors and rights of light surveyors who will likely advise impacted neighbours on an aggressive basis, quite possibly on CFA or other similar arrangements. This may lead to the entrenching of positions and further complexity, rather than the simplification that we all seek. The introduction of damages based agreements under the Jackson reforms whereby solicitors can be paid through a share of the final damages award is also likely to further exaggerate the positions adopted by impacted neighbours. At the very least therefore perhaps rights of light surveyors, should be made subject to an approved Code of Conduct whether under the aegis of the RICS or a specific specialist association of Rights of Light surveyors.

Commentary on Provisional Proposal No. 4

We propose that the Lands Chamber of the Upper Tribunal should be able to extinguish rights to light that are obsolete or have no practical benefit, with payment of compensation in appropriate cases, as it can do under the present law in respect of restrictive covenants.

We support this proposal in principle.

Under the existing legislation rights can be modified or discharged if the relevant restriction or right is:

(a) Obsolete;

(b) Impedes some reasonable user **and** either doesn't confer practical benefits of substantial value or advantage or is contrary to the public interest;

(c) Released by express or implied agreement;

(d) Will not injure the neighbour.

However, there is some doubt as to whether the existing four grounds for discharge or modification are adequate in the rights of light context. The report itself gives very limited examples that are seen to fall under each ground e.g.:

(a) The first ground – A "bricked up window" or a "previously residential property used exclusively for storage" [1].

(b) The second ground – A "residential development in an area with a housing shortage" or "a new hospital development" [2].

(c) The third ground – This is seen as adding no more to the existing common law argument that a right has been "abandoned" (a notoriously high threshold to meet)[3] .

(d) The fourth ground – The report itself states that "it is difficult to think of a situation in which this ground may be relevant to rights of light" [4].

Accordingly we are concerned that the "amenity" value of light would always be protected under the current provisions 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.

Although these additional grounds overlap to some extent with the rationale behind the use of s237 powers, these new grounds would provide additional support to developments where the local authority simply do not have the resources or political appetite for an appropriation or acquisition under their s237 powers.

Additional Areas of Input

Test for nuisance

Clients soundings confirmed that there is a perception that the Waldram method of assessment is somewhat outdated, but there does not appear to be a better alternative currently . We support its retention.

We are concerned that certain "rules" which were originally intended as guidelines for practitioners have now hardened through long use. We would welcome a restatement of the principle that the test for interference with rights of light is whether the dominant owner has suffered a loss of amenity.

---

1 Para 7.71

2 Para 7.73

3 Para 7.78

4 Para 7.79

We would welcome some consideration of:

(a) Clarification of the "50/50" "rule" particularly for unusually shaped rooms.

(b) What if there is a loss of 2% but to an already badly lit room? In practice that would make no difference to the way in which the room is used. A badly lit room remains badly lit, and the loss should not be injunctable.

(c) What assumptions ought to be made as to room layouts behind the apertures? Should there be an overall limiting depth of say 9m?

(d) How should the 50/50 "rule" be applied to different use classes? At the moment some surveyors apply a rule of 55% remaining to residential and 50% remaining to commercial. Can any guidelines be formulated?

Calculation of damages

Our developer client base would welcome a proposal to peg the measure of damages to the impact on the neighbour (via an assessment based on diminution in value and CPO type valuations or multiples of EFZ) rather than the perceived "benefit" to the developer (via a Wrotham Park/Tamares profit share). They would additionally welcome a maximum overall cap based on the value of the dominant land. This would be particularly beneficial in the case of residential flats or houses or commercial dominant leasehold owners, who are currently able to command a large release payment based in some cases on very short remaining lease terms, but where due to their ability to renew their lease, there is a disproportionate injunction risk.

We note that if the proposal to extend section 84 is adopted this will give some comfort to developers . If they succeed in extinguishing or modifying rights under section 84 the dominant owner's claim for compensation will be based on injurious affection which compensates for diminution in value.

There is one particular anomaly thrown up by a profit share method of assessment. This is that sometimes a small loss of light can dictate a large cutback, and vice versa. It is wrong that a neighbour that suffers a modest injury may nevertheless seek a large profit share.

We acknowledge that damages calculated on a "negotiation" basis are well established in law. Our concern is that counterparties are encouraged to seek large settlements based on high percentages of estimated developer's profit . The risk to developers at that stage is not sufficiently taken into account. One may of course hope for a judicial sense-check of "does it feel right" but this does not achieve certainty for either party.

There are further areas of uncertainty around the following aspects, and guidance on these would be welcome:

(a) How cutbacks are to be "shared" between different impacted neighbours. What formula ought to be used? Some surveyor's share the cutback by reference to proportions of affected EFZ's but this is not universally accepted.

(b) When assessing the profit, what assumptions should be made as to yield, void periods, hurdle rates etc.?

(c) Should the maximum share of profit should be expressly capped at a figure significantly less than one third, given the element of risk etc. for the developer ?

Abandonment

This area needs clarity . When are rights likely to be transferred as opposed to abandoned? The case law in this area is very old, mostly pre-dates Waldram and is therefore inconsistent with modern methods of evaluating light impact. The reference in case law to a "cone of light" is unhelpful and impossible to apply in practice. Particular difficulties arise where floor levels vary and where the point of measurement (being table top height) varies significantly from the old to the new development. Some clear parameters as to when rights will and will not be transferred, coupled with clear principles and methodology based on the Waldram method of analysis need to be formulated.

As mentioned above if prescriptive rights are abolished in future, there will be more emphasis on transferred rights and therefore a greater need for clarity in this area.

Other Comments

Interaction with other proposals for reform

We are conscious of the proposals in your previous report "Making Land Work: Easements, Covenants and Profits a Prendre" (2011) Law Com No 327 (the "Easements Report"). This consultation has a different sponsoring Government Department. We do not know whether the recommendations in the Easements Report are to be implemented and when.

We consider any recommendations made as a result of this consultation must be independent of the Easements Report. That may require some amendment to the proposals if the recommendations in the Easements Report are not implemented.

We set out below some particular concerns.

If the Easement Report recommendations are adopted and implemented prior to these recommendations:

(a) future acquisition of prescriptive rights of light will be abolished;

(b) a person who can establish 20 years' use of light under the Prescription Act 1832 or who has 19 years and one day's enjoyment will still be able to make a "claim" in respect of that right to light under the transitional provisions:

(c) a new scheme for statutory prescription will be put in place;

(d) the new statutory scheme will apply to use that commenced before implementation

For the future if the Easements Report is implemented we have a concern that the statutory prescription scheme will be very similar to Lost Modern Grant in that once light is enjoyed for any period of 20 years without interruption, the right will crystallise.

We are concerned that the issues we have about identifying claims for Lost Modern Grant will simply transfer to the new statutory prescription scheme. Any new scheme should make it simpler to undertake proper due diligence and give advice on whether a development will infringe rights.

The new statutory prescription scheme will permit acquisition of rights by a freeholder and against a freeholder. This would appear to preclude a tenant under for example a long investment lease from acquiring rights under the new scheme. We consider that this issue should be re-visited prior to implementation of the Easements Report.

If you ultimately recommend that there should be no future abolition or that an "existing" prescriptive right to light should be preserved by way of registration rather than by making a "claim", we suggest that the Rights of Light Act 1959 should be preserved rather than repealed. The 1959 Act is a useful mechanism and would still have a role to play in dealing with existing prescriptive rights. Ideally it would be extended so as to be capable of extinguishing lost modern grant claims as well although we understand the difficulty in so doing.

The Light Obstruction Notice procedure

The current process requires some clarification:

The Act should be amended to make it clear that a "dwelling house" can include a flat or a number of flats in a building . This would mean that only the flat or flats in a building which are actually impacted on by the reduction in light need receive notices.

The Act should make it clear that the notional obstruction described in the notice may be such that it only impacts on certain windows in the dominant building, without having to actually to draw a plan showing the notional obstruction. It should also make it clear that the notional obstruction need not be one which is capable of being built in reality.

Conclusion

The current measures are welcome in advancing the debate to achieve greater certainty and transparency in this area, although for the reasons outlined, do not yet achieve all of the desired outcomes.

Yours faithfully

Berwin Leighton Paisner LLP

