

RIGHTS OF LIGHT – PRACTICAL POINTS ON ACQUISITION, ABANDONMENT AND BREACH

by

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Andrew Francis is a barrister in practice at Serle Court, 6 New Square, Lincoln's Inn. He has a real property practice which specialises in restrictive covenants, rights of light and party walls. He has appeared as counsel in a number of leading cases in rights of light claims, including *Regan v Paul Properties* (2007) *RHJ Ltd. v FT Patten Ltd.* (2008) and *Highcross Group v Heaney* (2010). This may have led to him being described in one of the legal directories as "Mr Rights of Light"! He has also appeared as counsel in applications to discharge or modify restrictive covenants before the Upper Tribunal (Lands Chamber) such as *Re Walker's Application* (2010) and *Re George Wimpey Bristol Ltd.'s Application* (2011). He is the author of *Restrictive Covenants and Freehold Land, A Practitioner's Guide*, 4th Edn. (2013) (Jordans) and the co-author of *Rights of Light, The Modern Law*, 3rd Edn. (Jordans) (due November 2014) and *Private Rights of Way* (Jordans) (2012). He has recently been asked to advise in a number of restrictive covenant cases where there has been an issue over validity under Chapter 1 Competition Act 1998, requiring an understanding of the application of European competition law and the effect of the change in the law in this area since April 2011. He is a Master of the Bench of Lincoln's Inn"

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Gordon Ingram is a specialist rights of light chartered surveyor and established GIA in 1993. He has been advising clients on numerous daylight, sunlight and rights of light matters for over 20 years. He regularly lectures on these topics and is frequently called to provide expert evidence in multi-million pound planning Inquiries.

Gordon is the only rights of light practitioner to be represented on the advisory panel to the Law Commission as part of their consultation on reform of rights of light. He has also advised the City of London and Westminster planning authorities on their protocols when considering adoption of S237 powers in connection with rights of light.

Gordon has led major developments and schemes in London and cities across the UK. A small example of these: One Hyde Park / 122 Leadenhall Street / 20 Fenchurch Street / The Shard / Swiss Re, St Mary Axe / Chelsea Barracks and Bishopsgate Goodsyards.

Gordon has also been involved in various Court cases one of which was Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd.

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“BRING ME SUNSHINE”¹

The scenario below is based on a development in central London, although it could be set in any other City in England and Wales.

Imagine....

You are asked to imagine that you (the instructing solicitor) are present at the first conference with counsel and the rights of light surveyor, at which the client developer Wise Ltd. (“W”) is present by its Managing Director and W’s Finance and Development Directors and chief legal officer as well as W’s planning consultant. W has just acquired the Site and is contemplating the development set out below. Planning consent is being prepared but no application has yet been made.

You will primarily be examining the case from the point of view of the developer. But because this is a conference about risk, the point of view of the dominant land owner is also of key importance.

It will be assumed that all parties and advisers have had a walk round the site and its environs. It is in a relatively high-class area.

Now down to work....

¹ With all acknowledgements to Arthur Kent, Sylvia Dee and Morecambe & Wise.

The facts and issues follow....

(1) THE SITE



Plate 01 – Ordnance Survey of Site and Neighbour

- (i) The development site (“the Site”) is shown edged red on the attached plan. The present building on the Site was erected in about 1992-1995 – the date is not yet certain. The quantity of light enjoyed by the surrounding properties may therefore be by reference to the historic structure rather than the current massing on the Site. We will assume that the massing was similar; however, this can be a critical detail as it is the change in light from what has been acquired by long enjoyment rather than that which may be experienced at the point of a new development.

The present building on the Site will be redeveloped within its existing envelope and in addition the roof line will be increased by four storeys which will be stepped back; “the height increase”.

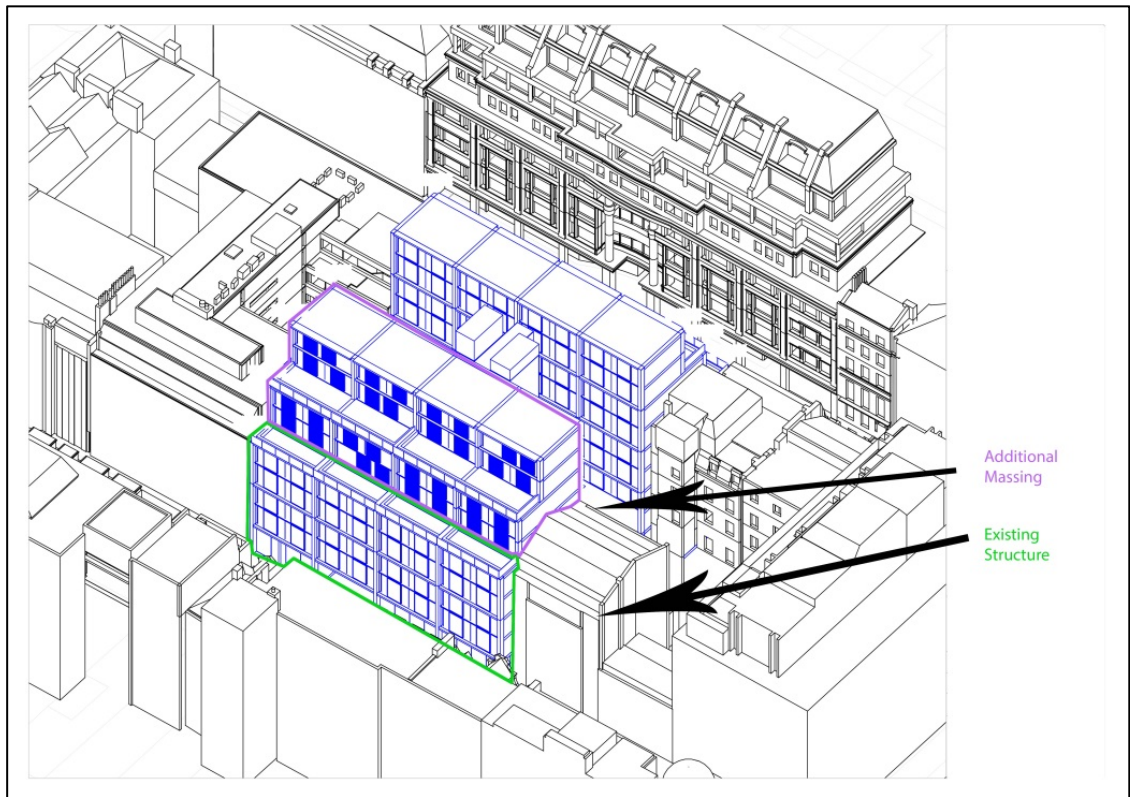


Plate 02 – The Proposed Site

- (ii) The property affected is also shown on the plan, edged green. This is owned by Morecambe Ltd; “M”. This building is partly a former Victorian building and partly a 1980s office development. The former is now let as residential flats on 99 year leases. It is believed that it was converted in about 1994, shortly after M’s acquisition, but the exact date of these works and their phasing and completion is not yet certain. Some of the apertures appear to be in different horizontal positions, both in terms of size and location from the old photographs of the Victorian part of the building before conversion as illustrated on Plate 02.

In addition it appears that in 1995/6 M refurbished the 1980s part as modern offices and in doing so inserted panels into part of the former glazed areas when reconfiguring the internal parts to provide extra lavatory and service areas.



Plate 03 – Transfer Study

- (iii) The titles to the Site and to M's property shows:-
- (a) That the Site and M's property were not in common ownership or possession so far as the titles indicate; the titles show their history back to the late C19th.
 - (b) There is a development clause on the title to the Site in a Deed dated 1st May 1983 ("the Deed") made between X Ltd. and Y Ltd. which states that W's predecessor in title (Y Ltd.) was permitted to build the building which is the office part of the site and declares that any external alteration to that building, including any increase in its height, requires the consent of X Ltd. X Ltd. was at that date the freehold owner of M's property.

M's title does not refer to the Deed. No enquiry has yet been made of the status of X Ltd.

- (c) A copy of the lease of one of the flats has been obtained, dated 2nd January 1995, granting a term of 99 years from 25th December 1994. It reserves all rights of light to the landlord and allows the landlord to build etc. on his land, and to consent to other development, whether or not that development affects the tenant's enjoyment of the flat. There is the usual covenant for quiet enjoyment by the landlord in favour of the tenant. The lease to the management company of the common parts has not yet been obtained.

(2) THE RIGHTS OF LIGHT SURVEYOR'S REPORT

- (i) This is a "desktop" study which is taken from drawings available from the Local Planning Authority records and also from some details obtained from the agent selling some flats in M's property, where the floor plans of the flats have been attached and are assumed to represent the typical layout of the flats on the elevation potentially affected.
- (ii) The Report shows that the height increase, if carried out, will cause actionable losses, applying the conventional "50:50" guideline to some of the rooms in the flats. These are mainly sitting rooms and bedrooms and also some areas of the staircases and landings in the common parts of the flats as shown in the contour. There are also actionable losses to some of the offices. The Report shows that some of the rooms in the flats which will be affected are already badly lit and will be worse lit if the development goes ahead.
- (iii) Some of the areas of loss are lit by apertures which were not in the same position or in place prior to the conversion and refurbishment.
- (iv) The areas of loss are 401.3Sq. ft. EFZ and the contours in Plate 04 illustrate the location of the losses of light.
- (v) Book value is £40,130.00. (Assuming a YP of 5%.) Enhanced book value assuming a multiplier of 3 is £120,390.00.

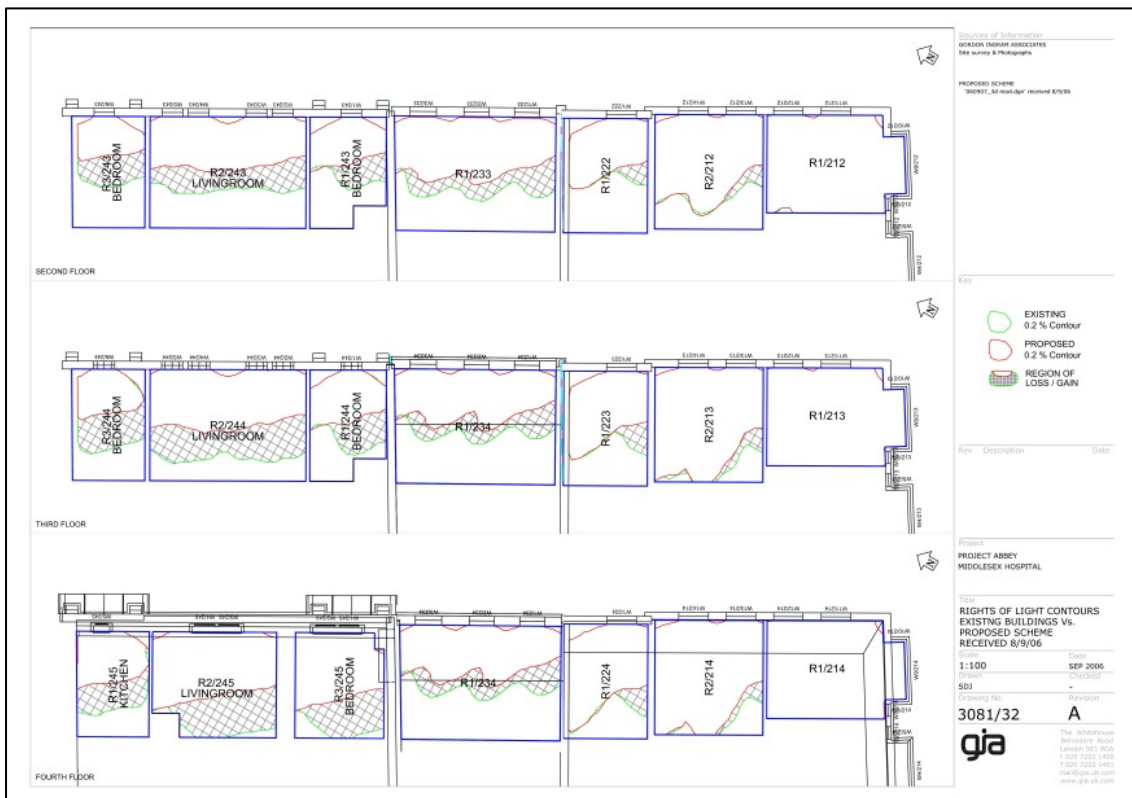


Plate 04 – Contour Plots

(3) THE ISSUES

(i) The titles raise the following issues:-

- (a) Can M assert a right of light and if so on what basis? (Options – s. 3 Prescription Act 1832 (“s.3”) or Lost Modern Grant (“LMG”) or s. 62 LPA 1925 (“s. 62”).
- (b) Can any tenant of M or can the management company assert a right of light under any of the options above?
- (c) What is the effect of the Deed?
- (d) What is the significance of the altered windows in the Victorian part of the building and the inserted panels in the “modern” part?

(ii) The Report raises the following issues:-

- (a) The question at (d) above raises the issue of how far certain losses can be claimed.
- (b) The badly lit rooms raise the issue of actionability.
- (c) The Report reserves the effect of the Deed etc. to the legal advisers.
- (d) Whereas the development of the Site may comply with daylight and sunlight planning guidelines, there is doubt about compliance with the law of light.

(4) REMEDIES FOR BREACH

- (a) W wants to know what is the prima facie remedy if the rights of light enjoyed by M's building are interfered with actionably? Is there a risk of the height increase not being built, or if built, being ordered to be pulled down?
- (b) W's MD wants an explanation of the effect of *Lawrence v Fen Tigers Ltd.* [2014] AC (about which he has been passed a memo by his legal department) in terms of the remedies of the injunction and damages in lieu.
- (c) W also wants to know more about release fee damages and how these could be assessed in this case.
- (d) W wants to know what are the overall risks in terms of claims and what can be done to protect against such risks or lessen them.

(5) ALTERNATIVE STRATEGIES

- (i) Use of Light Obstruction Notices; “LON”. No search done yet. W is uncertain of the procedure both as regards searches for LONs and their registration and the time elements.
- (ii) Use of s. 237 Town & Country Planning Act 1990; “s. 237”. W’s MD has had an email to which is attached the editorial to the Estates Gazette of 27th September 2014 as regards the Goldman Sachs development in the City of London. What is needed for s. 237 to be engaged? What are the risks in using s. 237?
- (iii) Indemnity insurance; is that an option here?

(6) FUTURE REFORM

- (i) W’s MD has had a memo from his internal legal department to the effect that the Law Commission (following its Consultation Paper in 2013, No. 210) is about to publish a Report on Remedies in Rights of Light Disputes.
 - (ii) W wants to know when that is likely to emerge, what is it going to say and when will legislation bring any changes recommended into force. Will any such Report or legislation enacting it assist here?
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Note:-

Key recent cases for further reading.

Regan v Paul Properties [2007] Ch 135. (CA) (Actionability and remedies).

RHJ Ltd. v FT Patten Ltd. [2008] Ch. 341 (CA) (Construction of “consent” clauses in leases).

Highcross Group v Heaney [2010] EWHC 2245 (Ch). (Mandatory injunctions and the approach to the assessment of damages in lieu of an injunction)

CGIS v Britel [2012] EWHC 1594. (Construction of development agreements).

Lawrence v Fen Tigers [2014] AC 822 (SC) (Injunctions and damages in lieu) (and see also [2014] 3 WLR 555 for the liability of a landlord for the tenant’s nuisance).

89 Holland Park Management v Hicks [2014] EWHC 2962 (Ch). (Interim injunctions).

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Note:-

This paper and its attachments and the talk which accompanies them (“the materials”) are part of a training exercise. The materials do not give any legal advice, nor do they form part of any legal advice as may be given. Accordingly no reliance is to be placed on the materials and the authors do not assume any responsibility to anyone for the materials or their accuracy.

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