serle court

New Law Journal

14 August 2015

Putting the lights out

How can developers override private rights of light under s 237 of the Town & Country Planning Act 1990, ask Andrew Francis & Dilpreet K Dhanoa

© iStockphoto/extender01

IN BRIEF

▶ The use of s 237 of TCPA 1990 to override private rights of light should be considered where the development in question is of importance to the community which will be benefited by important development leading to regeneration, or it will provide much needed significant commercial, or residential space.

The world of building development seems to have emerged from the depression caused by the 2008 financial crisis into the broad and sunlit uplands of activity. But, a major inhibition on development can be the presence of private rights asserted against the development site. These can be hard to overcome, and the price to release them and the cost of delay while terms are negotiated may be unacceptable. These rights will include private rights of way, rights of light and restrictive covenants. The first two are more problematic than the third, because the third will usually be within the jurisdiction to discharge, or modify covenants under s 84(1) of the Law of Property Act 1925 conferred on the Upper Tribunal (Lands Chamber) (UTLC). There is no jurisdiction to discharge, or modify easements. The proposals in the Law Commission's Report and Draft Bill on the reform of easements, covenants and profits-à-prendre published in June 2011 (Law Com No. 327) show no signs of life in Parliament at present. Rights of light are particularly troublesome.

The fight for a fair price

The problem for the developer is that he is prepared to buy out the adverse rights, but only at a fair price. The dominant owner usually indicates that he will seek an injunction to protect his rights, unless he is prepared to sell out at a very high price, which the developer regards as extortionate. Sometimes the developer cannot persuade the dominant owner to respond to offers of money, even in increasing amounts. Meanwhile, the developer cannot proceed with his development as he cannot, without a formal release, satisfy his funder, or those buying, or leasing units from him where Council of Mortgage Lenders conditions will have to be satisfied. An insurance indemnity policy to cover the risk often cannot be obtained, or would be too costly.

Topical issue

This issue is topical after the announcement of planning reforms by the Chancellor of the Exchequer last month aimed at increasing inner city and brownfield development, where rights of light may be present. As part of a pilot scheme, 20 areas have been designated for accelerated delivery of new homes on brownfield sites, through the use of streamlined planning powers under local development orders. Furthermore, the distinction between what is to be achieved in planning terms between London and the home counties is significantly different; yet both fall under the same government plans and objectives. Also topically, are Westminster City Council's proposals for its city plan, which in new policy S47 indicates that it regards the use of s 237 of the Town and Country Planning Act 1990 (TCPA 1990) as important in helping development to go forward.

Level playing field?

Many have noted that since *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 All ER 622 there has been a levelling of the playing field as between those with the benefit of property rights and those subject to them. Post-*Heaney* (*HKRUK II (CHC) Ltd. v Heaney* [2010] EWHC 2245 (Ch), [2010] All ER (D) 101 (Sep)) the gradient of this field lay markedly in favour of the former; sometimes grotesquely so. Release fee demands became ever higher, and coupled with the post-2008 depression, the risk of an injunction was so high that many developments were postponed. Post-*Fen Tigers* the gradient is less favourable to the party with the benefit of the rights. But the slope still lies against the developer. The party with the benefit of the rights has the *prima facie* right to an injunction. As all the relevant circumstances will be considered in deciding the proper remedy, there is often uncertainty in predicting how the court will decide that. There is the risk that if damages are awarded in lieu of an injunction they will be assessed by reference to a fair percentage of the net value of the building in breach of the rights. That can be far higher than an assessment of the diminution in value of the property with the benefit of the rights.

The alternative

The alternative is the careful use of s 237 of TCPA 1990. Section 237 allows adverse rights to be overridden and their value turned into money. The power to override under s 237 has been compared to the exercise of a compulsory purchase power. It must be shown that it is necessary and proportionate to exercise the power; negotiations to acquire, or release the adverse right privately having failed. The loss caused to owner of the right being overridden is assessed on an injurious affection basis under s 237(4). The main reason to use s 237 is to override rights of light. They pose serious constraints to development as planning rules relating to the effect of development on daylight and sunlight differ from rights of light, and planning consent is no defence to an enforcement claim. Since *Heaney* in 2010, rights of light are high profile. Awareness of the potential value of the right in terms of causing delay and additional cost to the developer is now commonplace. *Fen*

Tigers may have reduced the injunction risk, but it has not removed it, or the uncertainty referred to above. The ability to hold the developer to ransom remains a potent weapon, and the Law Commission's proposals (Law Com No. 356, published in December 2014) to reform remedies in rights of light claims are still, as with the proposals of June 2011, on the Whitehall shelf. (Other statutory provisions contain similar powers to s 237 (eg the Localism Act 2011, s 208) but space does not allow further reference to these).

The way in which s 237 can be used

Section 237 can only be engaged where there is the erection, construction, or carrying out of maintenance of any building or work on land whether by the local authority, or by a person deriving title under that authority; "the authority". It is assumed that the exception in s 237(3) which includes rights of way etc for the benefit of statutory undertakers' apparatus does not apply. If the first requirement is met, the land in question must either have been acquired, or appropriated by the authority for "planning purposes". This is where detailed evidence is required to ensure that the acquisition or appropriation is for planning purposes, as defined by s 246 of TCPA 1990; for example, that the acquisition, or appropriation can be shown to be for the promotion, or improvement of the economic well-being of the area, and in accordance with the wider public interest; see s 226 of TCPA 1990 and *R v City of London Corporation and Royal Mutual Insurance ex parte the Mystery of the Barbers* (1997) 73 P & CR 59, per Dyson J. An appropriation to allow a sale off simply for development is not a valid appropriation; *Sutton LBC v Bolton* [1993] 2 EGLR 181, [1993] 2 EGLR 181. An acquisition, or an appropriation will be evidenced by the authority's minutes (recording decisions taken by the leader of the authority in committee or cabinet—the power is non-delegable) with an officer's report behind the resolution. An acquisition will also be evidenced by the transfer of the land. The developer can transfer the land to the authority (with a building lease granted back to the developer) so that it can appropriate that land for planning purposes. When the development is completed the land is conveyed back to the developer.

The final and crucial requirement is that the acquisition, or appropriation is *necessary*. This requires proof that there is no other way in which the adverse right can be acquired. A balance must be struck between local authorities having the freedom to develop land for planning purposes, and the need to protect third party rights, and so s 237(1) requires a balancing exercise to be performed; see *the Barbers* (above). In the case of covenants there may be the "escape route" of an application to the UTLC under s 84(1). But in the case of rights of light there is no such recourse. If the dominant owner is holding out for an injunction, or for outrageous sums, s 237 may be shown to be necessary; see *R v Leeds City Council ex parte Leeds Industrial Co-operative Society* (1996) 73 P & CR 77.

> *"While the use of s 237 is not a universal "cure" for the problems created by rights of light (& other adverse rights) it should not be overlooked"*

What are the advantages in using s 237?

Overriding the adverse right removes the risk of an injunction. Furthermore, compensation for the effect of the breach of the right of light caused by the new building is payable under s 237(4) on an injurious affection basis. That will be the diminution in value (if any) of the dominant land, and that avoids the potential obligation to pay damages on a "release fee" or "Wrotham Park" basis; see *Holliday v Breckland DC* [2012] UKUT 193 (LC), [2012] 3 EGLR 95. The developer is responsible for paying the compensation under s 237(4) and will invariably be required to give an indemnity to the authority against its residual liability under s 237(5). It is clear that if s 237 has operated effectively to override the adverse right of light there is no litigation risk (injunction or damages) to the developer.

What are the disadvantages & risks in the use of s 237?

The first risk is that of judicial review under CPR Pt 54. The risk of such a claim demonstrates the importance of the steps which need to be taken to ensure the validity of the acquisition, or appropriation. Such a claim must be brought promptly and in any event not later than three months after the grounds to make it first arose; CPR Pt 54 r 4(1). It should be noted that promptitude is the principal requirement, and the three months should not be treated as the key deadline. This means that the date of acquisition, or appropriation will be critical. One problem for dominant owners is that unless the land being acquired, or appropriated is within a category of "protected" land, eg open spaces, there is no duty on the Authority to advertise the proposed acquisition, or appropriation. In practice, because of the need to satisfy the "necessity" test, the dominant owner will be aware of the proposal to develop and the possible use of s 237, so he will be on notice of that power. The developer can insure against the risk of judicial review, but claims on the grounds of illegality, irrationality and impropriety are almost limitless in this arena; see *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, [1984] 3 All ER 935, per Diplock LJ, which is often cited as the case of the grounds for bringing a judicial review claim. It is believed such a policy was taken out where s 237 was used to override rights of light claimed against the "Walkie Talkie" building in Fenchurch Street, City of London.

The second risk is where the present development may not fall within the planning purposes for which the land was originally acquired, or appropriated. If it does not, the present development cannot rely on the earlier overriding of rights under s 237. This issue has arisen in the City of London where immediate post-war acquisition and development after bomb damage has been followed by "second generation" development; see *the Barbers* (above) and *Midtown v CLRP Co. Ltd* [2005] EWHC 33 (Ch), [2005] All ER (D) 164 (Jan). In such cases it may be necessary for the authority to acquire the land with the lease-back referred to above, or to re-appropriate it for the present planning purposes.

Conclusion

While the use of s 237 is not a universal "cure" for the problems created by rights of light (and other adverse rights) it should not be overlooked. This is particularly so where the development is of importance to the community which will be benefited by important development leading to regeneration, or the provision of much needed significant commercial, or residential space. NLJ

Andrew Francis, Serle Court & **Dilpreet K Dhanoa,** 4-5 Gray's Inn Square (*www.serlecourt.co.uk; www.4-5graysinnsquare.co.uk*)