IN BRIEF

- Headline proposals in the report and Bill.
- What is not proposed by way of reform?
- Where do we go now?

A glimmer of light?

Andrew Francis discusses right of light reform proposals

In June 2011 the Law Commission (LC) published a Report and draft Bill (*Making Land Work: easements covenants and profits à prendre*) (Law Com. No.327) which proposed radical reform of the law in that area. In that report the LC stated that it would undertake a separate project on rights of light in its 11th Programme of reform. This was done and the LC published a consultation paper in February 2013; Law Com. No. 210.

Significantly the report and draft Bill published on 4 December 2014 reflects the decision of the Supreme Court on 26 February 2014 in *Lawrence v Fen Tigers* [2014] AC 822, [2014] 2 All ER 622.

The key concerns that lie behind consultation paper and the report and Bill which sparked the need for reform may be summarised as follows:

i. The effect of the decision in *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245, [2010] All ER (D) 101 (Sep). This increased the risk of an injunction being awarded for actionable infringement of a right of light, including a mandatory injunction, even after delay in asserting rights by the dominant owner. That decision sent shock waves through the development world. After the settlement of the claim just before the Court of Appeal was due to hear the appeal in March 2011 (permission to appeal having been given by Lord Neuberger in November 2010) it is believed that the Department for Communities and Local Government passed the (DCLG) task of considering reform of this area of law to the LC in the early summer of 2011.

ii. The lack of clarity about the technical rules applicable to the acquisition of rights of light by long enjoyment (prescription) and the loss of such rights and the rules relating to abandonment were hampering an accurate assessment of the validity of rights of light when encountered.

iii. The over-technical rules and the uncertain effect of Light Obstruction Notices (LONs) under the Rights of Light Act 1959 (RLA 1959) were thought to need simplification and revision.

iv. The absence of a jurisdiction applicable under s 84(1) of the Law of Property Act 1925 (s 84) to restrictive covenants which could apply to allow easements of light (and other easements) whenever created, to be discharged, or modified was obvious.

Headline proposals in the report & Bill

Acquisition of a right of light by long enjoyment

Rights of light should be capable of being acquired as a legal easement after 20 years of continuous qualifying use as between freeholders only. This single statutory method replaces the existing three methods of acquisition of light (report, paras 2.66 and 2.71).

Bringing the acquisition of the right to an end

The ability to interrupt enjoyment and stop rights of light being acquired is to be simplified by a new Certificate of Light Interruption (CLI) procedure. This replaces the current procedure for LONs under RLA 1959. The CLI need only be registered in the Local Land Charges Register for it to take effect; paras 2.110-112.

Abandonment

Abandonment of a right of light will be presumed after five years of non-use. The presumption is rebuttable to show (for example) that the bricking up was not intended to be permanent. This will also cover cases where the dominant building has been demolished and the owner wants to assert the same right of light for the benefit of the new building, assuming coincidence of old and new apertures. But the report declined to propose a registration system for those seeking to preserve a right of light when there is to be a change in the size or position of an aperture, or when a building is being demolished and the dominant owner wants to "transfer" the existing rights of light to the new building (report paras 7.39-40).

Discharge & modification of the easement of light and other easements

The jurisdiction of the Upper Tribunal (Lands Chamber) (UTLC) to discharge or modify restrictive covenants under s 84 is to be applied to easements of light (and other easements and *profits à prendre*) whenever created (report para 7.74). The jurisdiction of the UTLC to make declarations in respect of them as proposed in the 2011 report and Bill will apply to all easements whenever created.

Putting the dominant owner on notice of the proposed development & reducing/removing risk of an injunction

Servient owners, embarking on development which may infringe rights of light can make use of the Notice of Proposed Obstruction (NPO) procedure (report para 6.31). The aim of this procedure is to give the developer an opportunity to put the dominant owner on formal notice of the development (beyond notification under the planning system) and give him an opportunity within a reasonable time to decide whether to seek an injunction or not. Once that time expires the dominant owner cannot claim an injunction (report para 6.139). That will free the dominant owner/developer from the uncertainty and risk of challenge by injunction such as arose in Heaney. The fine detail of this procedure is beyond the scope of this note. The key elements are:

i. that DCLG will prescribe the form of Notice in regulations;

ii. that the notice must identify the servient and dominant land and their owners;

iii. that the proposed obstruction must be shown in the Notice both as to its location and dimensions;

iv. service will be on freehold and leasehold owners of the dominant land and can

only be by the freehold owner or a lessee with more than five years remaining of the servient land;

v. that the NPO must be registered in the LLCR to be effective against successors in title of the original dominant owner; and

vi. that the NPO is valid for 10 years from the end of the eight month deadline, so that there is protection against an injunction for that period.

The dominant owner has eight months from service (service being governed by the Civil Procedure Rules) to issue a claim for a final injunction. There is no need to seek an interim injunction. The date of expiry of that eight month period must be stated in the Notice. It is possible to agree an extension of that period. During that period the servient owner must not interfere with the rights of light of the party served. If that occurs the NPO does not prevent an injunction being sought to restrain that interference, even if the claim is issued after the eight month period has expired (report para 6.84). It is proposed that the fact that a NPO has been served and not responded to should not affect the availability, or quantum of damages. There are proposals which govern the withdrawal of a NPO and multiple NPOs and for the recovery of the reasonable legal and surveyor's costs of the dominant owner from the servient owner (report paras 6.87, 6.90 and 6.157).

Injunction or damages?

Significantly the draft Bill proposes that "the court must not grant an injunction if, in all the circumstances of the case, an injunction would be a disproportionate means of enforcing the claimant's right to light" (draft Bill cl 2(2)). The factors relevant to whether it would be disproportionate to grant an injunction are set out in cl 2(3) of the draft Bill. Such factors will include the loss of amenity attributable to the infringement of light and whether or not damages would be adequate compensation for the injury to the claimant caused by the loss of light as well as the conduct of the parties and any unreasonable delay in claiming an injunction (report para 4.116). The new statutory "formula" is in effect an updated version of the "good working rule" set out by Lord Justice AL Smith in *Shelfer v City of London Electric Lighting Co Ltd* [1895] 1 Ch 287, as "refreshed" by the Supreme Court in *Fen Tigers*. It does not remove the starting point that the prima facie remedy for a breach of property rights is an injunction. That was made clear in *Fen Tigers*; see report paras 4.15-4.17. But the proposals do set out guidance to judges which is an important step forward in reducing uncertainty.

> *"After the General Election the new government will want to set its house in order"*

What is not proposed by way of reform?

The report and Bill consider, but do not propose reform on the following topics:

- The method of assessing whether there has been an actionable interference with light (report para 3.72). In the context of considering the test for interference, the relevance of artificial light is discussed at paras 3.57-3.70 of the report.
- The assessment of damages in rights of light cases (report para 5.79). The report leaves it to the government to review whether there should be reform of this issue once the proposed reforms in the report and Bill have been enacted and have taken effect.
- Protection of the access of light to photovoltaic panels (report para 2.83).
- Changes to the grounds for discharge or modification under s 84 (report para 7.87).
- Clarification of the relationship between the proposed jurisdiction to discharge, or modify easements and the overriding power under s 237 Town & Country Planning Act 1990 (report para 7.119).
- These are all important current topics and it is a pity that reform did not include at least some of them and in particular damages in rights of light cases. The quality of electric lighting in the dominant building could also have been brought forward as a specific factor when assessing whether or not to grant an injunction under cl 2(3) of the draft Bill.

Where do we go now?

The draft Bill, coupled with the 2011 Bill ought to be the subject of urgent scrutiny by DCLG and brought before Parliament without delay. But it seems unlikely that this will happen before the General Election in May 2015. Law reform on this subject is not a vote winner. After the General Election the new government will want to set its house in order so the reform of technical property law is unlikely to be a priority. All this sounds depressing, and it may turn out that this prediction that nothing will be done soon is wrong. It is known that the Law Commission has hopes of legislation being introduced in respect of the 2011 Bill given the indication made in Parliament in May 2014 of a response to that Bill in 2014. It would be sensible if the response was not only to the 2011 Bill but also to the Report and Bill published on 4 December. **NLJ**

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