# In the spotlight – the future of rights to light

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**Property analysis: Could we see significant reforms to rights to light in 2015? The Law Commission's report and draft bill to reform the law of rights to light is examined by barrister Andrew Francis of Serle Court.**

## Original news

Rights to light of property owners--striking a balance, LNB News 04/12/2014 41

*The legal system in England and Wales does not give people or homes a general right to natural light. The law does, however, recognise the value of natural light inside buildings, via planning law and private rights to light. The Law Commission, in its final report on the matter, looks at how the law can strike a balance between the importance of light and the importance of the construction of homes and offices, and the provision of jobs, schools and other essentials. The report's recommendations include a statutory test to clarify when courts can award damages for loss of light instead of stopping a development or ordering demolition.*

## Why did the Law Commission produce this report and draft bill?

In June 2011 the Law Commission published its report and draft bill proposing reform of the law of easements and covenants. In it, the Law Commission stated that it would undertake a separate project on rights of light. This was done and the Law Commission published a consultation paper in February 2013.

The report and draft bill just published reflect the decision of the Supreme Court in *Lawrence v Fen Tigers* [2014] UKSC 13, [2014] 2 All ER 622.

The key concerns that lie behind consultation paper, report and bill which sparked the need for reform were:

- the effect of the decision in *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245, [2010] All ER (D) 101 ( Sep), which increased the risk of an injunction being awarded for actionable infringement of a right of light--that decision sent shock waves through the development world
- the lack of clarity about the technical rules applicable to the acquisition of rights of light by prescription and the loss of such rights and the rules relating to abandonment are hampering an accurate assessment of the validity of rights of light
- the overly technical rules and, in some cases, the uncertain effect of light obstruction notices under the Rights of Light Act 1959 (RLA 1989) need simplification and revision
- the absence of a jurisdiction applicable under the Law of Property Act 1925, s 84(1) (LPA 1925) to restrictive covenants which could apply to allow easements of light (and other easements) whenever created, to be discharged or modified

## What are the headline proposals from the Law Commission?

### 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.

### 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 procedure. This replaces the current procedure for light obstruction notices under RLA 1959. The new certificate need only be registered in the local land charges register for it to take effect.

**Abandonment**

Abandonment of a right of light will be presumed after five years of non-use. The presumption is rebuttable.

**Discharge and modification of the easement of light and other easements**

The jurisdiction of the Upper Tribunal (Lands Chamber) to discharge or modify restrictive covenants under LPA 1925, s 84 is to be applied to easements of light (and other easements) whenever created.

**Putting the dominant owner on notice of the proposed development and reducing or removing the risk of an injunction**

Servient owners embarking on development which may infringe rights of light can make use of the notice of proposed obstruction procedure. This will give the developer an opportunity to put the dominant owner on notice of the development (beyond notification under the planning system) and give the latter an opportunity to decide within a reasonable time whether to seek an injunction or not. Once that time expires, the dominant owner cannot claim an injunction. The fine detail of this procedure is beyond the scope of this article. The dominant owner has eight months from service to issue a claim for a final injunction. It is possible to agree an extension of that period. The fact that a notice of proposed obstruction 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 notice and multiple notices, as well as for the recovery of the reasonable legal and surveyor's costs of the dominant owner from the servient owner.

**Injunction or damages?**

The draft bill proposes:

> '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.'

The factors relevant to whether it would be disproportionate to grant an injunction are set out in cl 2(3). The new statutory formula is in effect an updated version of the 'good working rule' set out by AL Smith LJ in *Shelfer v City of London Electric Lighting Co* [1895] 2 Ch 388, 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*. But the proposals do set out guidance to judges which is an important step forward in reducing uncertainty.

## What is not proposed by way of reform?

The report considers, but does not propose, reform on the following topics:

- the method of assessing whether there has been an actionable interference with light
- the assessment of damages in rights of light cases
- protection of the access of light to photovoltaic panels
- changes to the grounds for discharge or modification under LPA 1925, s 84
- clarification of the relationship between the proposed jurisdiction to discharge or modify easements and the overriding power under the Town and Country Planning Act 1990, s 237

These may be lost opportunities, but at least the report and bill propose reform on the major issues. As regards damages in rights of light cases, reform of that topic may be a bridge too far.

## Where do we go now?

The report and bill, coupled with the Law Commission's Law of Property Bill 2011, ought to be the subject of urgent scrutiny by the Department for Communities and Local Government and moved before Parliament without delay. But it seems unlikely that this will happen before the general election in May 2015.

*Interviewed by Robert Matthews.*

*The views expressed by our legal analysis interviewees are not necessarily those of the proprietor.*