Questions and answers: part 4

In the fourth of his continuing series, Andrew Francis considers how rights of light can be overriden, their abandonment and remedies in case of dispute

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Question 1

How can rights of light be overridden and be made unenforceable?

Answer

Unlike restrictive covenants, which can be discharged or modified under s84(1) Law of Property Act 1925 by the Upper Tribunal (Lands Chamber), there is no comparable jurisdiction as regards easements generally, nor specifically as regards rights of light as a species of easement. This means that in the majority of cases a right of light can only be removed from a title, or made unenforceable, by an agreed release between dominant and servient landowners. There is one other occasion where a right of light may cease to exist and that is when the dominant and servient land comes into common ownership. If the properties become severed it is considered that the easement will revive. This is a common problem faced by developers who have attempted, but failed, to obtain releases and who cannot acquire the dominant land to extinguish a light of light impeding the development.

One way out of this difficulty is to engage s237 Town & Country Planning Act 1990 so as to cause the right of light (and other adverse rights) to be overridden. If that is done the owner of the right only has a claim for compensation for the value of the right overridden. The use of s237 is a technical and complex subject. In essence what is required is a valid acquisition, or appropriation of the servient land for planning purposes under s226, or s227, of the 1990 Act, or for other purposes under s122 Local Government Act 1972, by the local planning authority (LPA). If it can then be shown that there will be (for example) the construction of buildings on the land (whether by the LPA, or a person deriving title under it) and that has planning consent, that work will be authorised under s237 even though it involves interference with a right of light over the land so acquired, or appropriated. By this means the right of light will be overridden and the person entitled to that right can obtain compensation from the LPA under s237(4). This compensation is assessed on an injurious affection basis. This means that no injunction can restrain the development. This also means that the assessment of loss will be limited to the damaging effect (if any) of the new building (or possibly its user) but the compensation cannot be assessed on a release fee basis (*Stockport Metropolitan Borough Council v Alwiyah Developments* (1983)). (As to the release fee measure see 'Questions and answers: part 2', *PLJ*325, October 2014, p19-21). Because the exercise of the overriding power is similar to that of compulsory purchase, the LPA must prove that its exercise is necessary for the acquisition of the adverse right of light (the necessity test (*R v Leeds City Council ex parte Leeds Co-operative Society* (1996))). So, it must be shown, for example, that negotiations have been attempted but failed with an intransigent dominant owner.

A number of technical issues arise when s237 is being contemplated. These include whether the original acquisition or appropriation can be relied upon for 'second generation' development (see *R v City of London Corporation ex parte Barbers' Company* (1996) and *Midtown Ltd v City of London*

Real Property Company Ltd [2005]) and whether a sale by the developer who owns the site and leases it back to the LPA during the development works (or similar 'back-to-back' schemes) is a valid way of engaging s237 (see *Ford-Camber Ltd v Deanminster Ltd* [2007]). The threat that lies behind all cases where s237 is contemplated, or used, is that of judicial review under CPR Part 54. All parties (especially the LPA) must be satisfied that it is right and proper to invoke the powers to override the right of light.

Following the 'high point' of injunctions being awarded in *HKRUK II (CHC) Ltd v Heaney* [2010] there was an emphasis on seeking reliance on s237; most of it ill-conceived. *Coventry v Lawrence* [2014], with the revived emphasis on discretion, may take the heat off the risk of injunctions, but the risk does remain, so the use of s237 may need to be considered. In reality the use of s237 is rare. Some important examples of its use to override rights of light include the 'Walkie Talkie' building at 20 Fenchurch Street in the City of London, and the Millennium Spa building in Bath. But the 'threat' made by the dominant owner to call upon the LPA to exercise its powers to override rights of light (and other rights) should be treated with caution. Many LPAs do not have the resources to invoke s237 even when the land is theirs to appropriate, and the threat of judicial review is often a disincentive. Even the City of London Corporation declined to exercise its powers to use s237, in respect of the proposed development for Goldman Sachs in Farringdon Street, London EC1 in September 2014. In short s237 can be a useful tool but in reality it will not be frequently used. (Note that space does not permit consideration of similar powers to s237; eg under Localism Act 2011, s208).

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Question 2

How can rights of light be abandoned?

Answer

The law of abandonment of easements is complex. The question of whether abandonment can be proved (the burden of proof lying on the party asserting it) is invariably a question of fact. Because a right of light is a continuous easement (unlike a right of way which is regarded as non-continuous) it is usually relatively

easy to find *prima facie* evidence of abandonment. The classic sign is the blocking up of the relevant aperture. In such cases, the principles are in summary as follows. First, there is no minimum period for abandonment; it is not the same as the twenty-year period for acquisition by long enjoyment. Secondly, it will be a question of fact whether what was done amounts to abandonment, or was intended as such. Thirdly, the conduct of the dominant owner must be such as to make it plain that at the time of blocking up they had a firm intention that neither they, nor any successor of theirs, should make any use of the aperture to admit light to the building it served. Fourthly, the courts will not lightly infer abandonment. Mere non-user of the aperture may not be enough. There may be a reason for its blocking up, eg security considerations. (See *Williams v Usherwood* (1983) and *Marine & General Mutual Life Assurance Society v St James Real Estate Co Ltd* [1991].) In practical terms whether there has been abandonment requires a careful inspection of the relevant (former) apertures both externally and internally. How has the aperture been obscured; by temporary panelling, or by non-matching blockwork, or by fully matching materials? Are the sills and heads to the apertures still in place? Why has the work been done, and when? How long would it take to remove the obscuring materials? Ultimately whether there has been abandonment will be a question of evidence and the mere existence of blocked-up apertures is not the end of the story.

But there are other instances where abandonment can be asserted. One is where the old building (A) is demolished, so that when new building (B) is erected, the servient owner can assert that the right to light to A was abandoned when it was demolished. Much will depend on the time which passed before the apertures in B were created, whether the dominant owner maintained their right of light during the time the site was unbuilt upon (eg by notices to neighbouring properties) and the extent to which the apertures in B are coincident with those formerly in A. The same issue arises where building A is altered so that the apertures in it are now in a different position, in either the vertical or horizontal plane. Whether there is a sufficient degree of coincidence is a question of fact and degree (see *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931]). The issue can be complicated by the rule that the dominant owner is not allowed to increase the burden on the servient land. This is linked to the rules about excessive user, eg of rights of way. In rights of light cases the dominant owner is not allowed, for example, to bring their building towards the servient owner by a substantial margin (conventionally treated as in excess of 1m) or to alter their apertures so that changes to buildings on the servient land will increase the prospect of actionable interference to the dominant building. In such cases the easement is treated as extinguished by the excessive user.

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Question 3

What remedies are there if there is a dispute over rights of light?

Answer

There are three main remedies. First, a declaration as to the existence of the right of light in dispute. Secondly, an injunction preventing the breach, whether by a prohibitory injunction to stop work that will interfere actionably with the right of light, or by a mandatory injunction seeking an order that the work done which infringes the right of light is removed. Thirdly, a claim for damages, which can be either at common law for past injury to light, or in equity (effectively under s50 Senior Courts Act 1981), which reflects future injury and the right to obtain an injunction to stop the injury. Abatement as a remedy (eg personal intervention to remove an obstruction to a window) is not recommended save in cases of emergency.

The commonest remedy in rights of light disputes will be the injunction (of either variety), which may be obtained on an interim basis by application under CPR part 25. In cases where work is about to start and it is feared that the right of light will be actionably interfered with, an injunction to halt the work may be sought on a *quia timet* ('that which is feared') basis (see *CIP Property (AIPT) Ltd v TfL* [2012] and *Pavledes v Hadjisavva* [2013] for recent examples of such injunctions in rights of light disputes). Invariably damages will be claimed under s50 in lieu of an injunction and these will often be assessed on a release fee basis; ie assuming a negotiation between the parties which attempts to assess the value of the right in the dominant owner to prevent the actionable interference.

The particular factors present when deciding what the proper remedy is in rights of light claims (developing the outline in 'Questions and answers: part 2' in *PLJ*325) will be explored in detail in the next issue. ■

CIP Property (AIPT) Ltd v TfL & ors
[2012] EWHC 259 (Ch)

Coventry & ors v Lawrence & anor
[2014] UKSC 13

Ford-Camber Ltd v Deanminster Ltd & anor
[2007] EWCA Civ 458

HKRUK II (CHC) Ltd v Heaney
[2010] EWHC 2245 (Ch)

Marine & General Mutual Life Assurance Society v St James' Real Estate Co Ltd
[1991] 2 EGLR 178

Midtown Ltd v City of London Real Property Company Ltd
[2005] EWHC 33 (Ch)

News of the World Ltd v Allen Fairhead and Sons Ltd
[1931] 2 Ch 402

Pavledes & anor v Hadjisavva & anor
[2013] EWHC 124 (Ch)