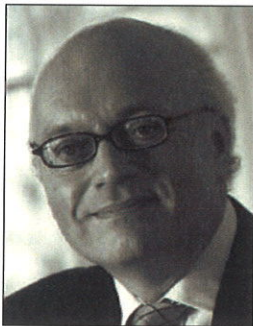


Questions and answers: part 2

How is light measured, how are damages assessed and how is an actionable interference established? Andrew Francis answers some pertinent questions relating to rights of light



Andrew Francis is a barrister at Serle Court, specialising in real property and EU law affecting real property

'The ultimate question will be whether the reasonable beneficial use and enjoyment of the room (or the building) is affected.'

Question 1

How is light measured in rights of light cases?

Answer

Light is measured in rights of light cases by applying the following standards. First, the unit of measurement is one lumen, ie the amount of light given by a candle one foot away; enough to read a newspaper by. Secondly, the maximum amount of light given by an unobstructed dome of sky is assumed to be 500 lumens, and 1 lumen is 0.2% of the whole sky. Thirdly, the amount of light received through the relevant aperture is measured at the working plane; 850mm above floor level. Fourthly, the assessment is made by ascertaining at what points in the room 0.2% daylight is received through the relevant apertures by using a 'Waldram diagram'. (This takes into account the size and location of the relevant aperture(s) admitting light into the room, the dimensions of the room(s) affected and the buildings and structures outside the aperture(s) both now and as projected in the development which may cause the interference). Finally, the information in the Waldram diagram is plotted onto a contour diagram (for example see diagram on p20). This shows the area of light received by the room to the 0.2% standard before the alleged interference and the amount of light received afterwards. The difference is expressed as the loss in square feet.

Rights of light surveyors carry out studies and produce diagrams by using up-to-date computer programs.

This method is not the same as that used for planning purposes when assessing the effect of development using BRE daylight and sunlight standards. Light meters are never used in assessing loss of light.

Question 2

How is an actionable interference with light established?

Answer

By convention, if the effect of the proposed development will reduce the amount of light to the room affected to less than 50% of its area, and assuming the room in question is at present well lit (applying the 0.2% test), an actionable interference will be shown. This '50:50' test is a guide, not a rule (*Ough v King* [1967]; *Regan v Paul Properties Ltd* [2006]). The point at which the 0.2% standard (1 lumen) is lost is known as 'the grumble point' because that is where the user of the room grumbles about lack of light. If the room is already badly lit, so that it receives light to less than 50% of its area at present, and the proposed development will reduce that by a significant amount, as every bit of light is precious, that loss will be actionable (*Deakins v Hookings* [1994]).

The effect of the loss is shown on the contour diagram below and in the table on p21.

Apart from the conventional measurements, the use of the room affected and potential future change of use (eg office to residential

use and enjoyment of the room (or the building) is affected.

To test this question, the dicta in *Colls v Home & Colonial Stores Ltd* [1904] (applied in *Regan*) as to the general effect of the loss in terms of beneficial use and

The availability and efficiency of artificial light is not taken into account (*Midtown Ltd v City of London Real Property Company Ltd* [2005]).

Question 3

When will an injunction be awarded?

Answer

If an actionable interference with light can be established, the claimant will usually want the cause of that removed, or stopped. The injunction is the key remedy. Damages at common law can be sought, but that usually limits the claimant to the loss in capital value (see question 4 below). Alternatively, the claimant may want damages to reflect the fact that (as the price of allowing the interference) they should have a fair amount of the net gain being made which is attributable to the defendant's building causing the loss ('release fee' damages). These can be awarded in lieu of an injunction under s50 Senior Courts Act 1981.

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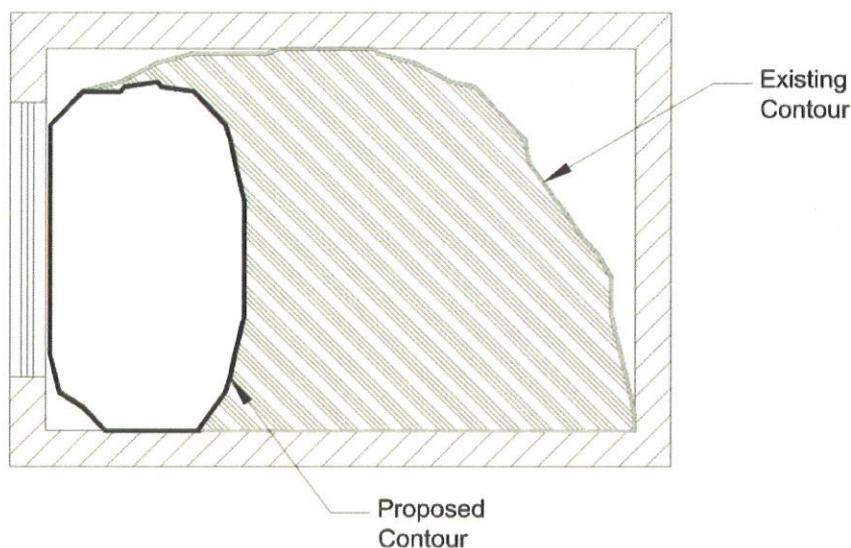
conversion) may well be material. Living rooms and kitchens need a better standard of light than bedrooms or bathrooms. Hallways and staircases usually require good light (for example see *Tamames (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006]).

A special need for good light may be required; eg greenhouses – *Allen v Greenwood* [1980].

The ultimate question will be whether the reasonable beneficial

enjoyment of the room will be applied. The scientific standards set out above will be applied by the court as part of the decision whether there has been an unlawful interference with the right of light. The key question is not what light has been taken away but what is left, and does that remaining light satisfy the sufficiency required, whether at the 0.2% standard, or on a more general basis when the use of the room is taken into account?

Example of a contour diagram



Produced by Andrew Cartmell at Point 2 Surveyors

Examples of light loss considered to be actionable interference

	Room 1	Room 2
Total area	100 sq ft	100 sq ft
Existing area well lit (to 0.2% standard)	80 sq ft	30 sq ft
Future area well lit (to 0.2% standard)	20 sq ft	20 sq ft
Actionable interference?	Area of room well lit at 0.2% standard is down from 80% to 20%, thus loss is <i>prima facie</i> actionable. Area of loss: 60 sq ft.	Area of room well lit at 0.2% standard is down from 30% to 20%, thus loss is <i>prima facie</i> actionable (10% loss) as significant and not <i>de minimis</i> . Area of loss: 10 sq ft.

The recent decision in *Coventry v Lawrence* [2014] establishes that where a property right is interfered with (eg a right to protection from nuisance), the injunction is the *prima facie* remedy. Where residential use is interfered with, some Justices of the Supreme Court (JSC) in *Coventry* said that an injunction might be more readily granted to protect it. In *Coventry*, the JSC emphasised the need to have regard to all the circumstances when deciding whether or not to grant an injunction, or damages in lieu under s50, and to apply the 'good working rule' in *Shelfer v City of London Electric Lighting Co* [1895], with care. What is clear from *Coventry* is that while the 'over favourable' approach to granting injunctions in cases such as *Regan* was disapproved, the risk is still there.

Question 4

If damages are awarded, how are they measured?

Answer

In rights of light claims there are three alternative measures: book value, enhanced book value and release fee.

Book value

This takes the area of loss (see examples above) which is 'zoned' to produce a 'weighted average' of all areas of loss, known as Equivalent First Zone (EFZ). Assume in example 1 above that the EFZ is 50 sq ft. By convention light cannot have a value greater than £5 per sq ft, so the starting

figure is $50 \times £5 = £250$. Because the compensation is on a one-off basis, that sum must be capitalised by a factor representing the value in terms of the yield of the affected building; the YP. Assuming the yield is 5%, the YP will be 20, so the book value of loss as capitalised will be $£250 \times 20 = £5,000$.

Enhanced book value

In *Carr-Saunders v Dick McNeil Associates* [1986], Millett J recognised that book value damages would not satisfy a claimant who could seek an injunction, or obtain a greater amount in negotiations. Therefore, he took the book value of £3,000 and, in the absence of any evidence of net gain to the defendant, increased that to £8,000 to reflect the claimant's position. From that case the practice has developed (see *HKRUK II (CHC) v Heaney* [2010]) of applying a multiplier to book value, which leads to a figure that fairly reflects not only capital loss, but also the loss of the right to an injunction. The factor is not fixed and generally ranges between 2.5-5 depending on the nature and strength of the claim.

Release fee

This measure is awarded where damages are assessed under s50. The measure is assessed by taking the net gain, or profit to the defendant attributable to the building which causes the actionable loss. A 'notional cutback' is worked out by rights of light surveyors which is then given a net value. A 'fair' percentage is then

applied to that net value and this amount should reflect what the parties would have agreed as a release fee in negotiations to release the right of light and give up an injunction. There is no fixed 'Stokes' one third. The test is whether 'the deal feels right'. Examples of this are found in *Tamare (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] and in *HKRUK*.

It is invariably the case that in negotiations to settle rights of light claims the release fee measure is the one taken and forms the basis of agreement. ■

Allen v Greenwood

[1980] Ch 119

Carr-Saunders v Dick McNeil Associates [1986] 1 WLR 922

Colls v Home & Colonial Stores Ltd [1904] UKHL 1

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

Deakins v Hookings [1994] 1 EGLR 190

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

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

Ough v King [1967] 1 WLR 1547

Regan v Paul Properties Ltd & ors [2006] EWCA Civ 1391

Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287

Tamare (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2006] EWHC 3589 (Ch); [2007] EWHC 212 (Ch)