RIGHTS OF LIGHT. SOME MAJOR WINDOW CLEANING: A BETTER VIEW AS A RESULT?

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Judgment in the *Bankside Lofts* rights of light dispute handed down by Fancourt J. On Tuesday 8th July.

The much-awaited judgment in the Bankside Lofts litigation (*Cooper & Ors. v Ludgate House Limited* [2025] EWHC1724 (Ch)) was handed down by Fancourt J. on Tuesday 8th July. It is a long judgment and deserves careful study.

The litigation raised some complex issues in the claim brought by two lessees who owned flats worth over £1m each in the building known as Bankside Lofts. The Claimants' flats (together with other lessees' flats) enjoyed rights of light over the large development site owned by the Defendant on the south side of the River Thames between Blackfriars railway bridge and Southwark Street. By coincidence, the location of this dispute is only some 100 metres to the west of Tate Modern which had featured in the private nuisance litigation and was the subject of the Supreme Court decision in *Fearn v Board of Trustees of the Tate Modern Gallery* in 2023. The same observation can be made about the location of Bankside Lofts in relation to the site of The Waterman's Arms on Bankside which was being shaken to bits by and suffered from noise and steam coming from the City of London Electric Lighting Co.'s generators, all of which led to the much-cited judgment of the Court of Appeal on injunctions and damages in lieu in *Shelfer v City of London Electric Lighting Co.* decided in 1894. The site of the Waterman's Arms is roughly on the southern abutment of the Millenium Bridge, in front of Tate Modern, facing the River Thames.

The Claimants' case was that the Defendant's new "Arbor" 19 storey office building lying to the west of their flats and on the west side of the railway actionably interfered with the light enjoyed by certain rooms in their flats. The Claimants sought an injunction to demolish substantial parts of that building or alternatively damages in lieu of an injunction. Those damages were to be assessed either as negotiating damages, or as the amount of the diminution in the capital value of their flats. On this level one would expect nothing by way of complexity or novelty in what on the surface would appear to be a fairly commonplace rights of light dispute.

However, as is revealed in the detailed, 86 page judgment, a number of complexities were present and some of them raised novel questions of law which were decided by the Judge. His judgment is welcome as it is not only a modern example of a judicial approach to a rights of light dispute, but it is of considerable assistance in clarifying some complex and much-debated issues.

This note summarises in the briefest possible term the major points in the judgment. In due course we hope to provide a longer analysis. We will also be referring to this judgment at the Serle Court Property Conference to be held on 11th September 2025 in the Ashworth Centre in Lincoln's Inn. The judgment will also be referred to and analysed in the new 4th edition of Rights of Light, The Modern Law, which is due to be published by the end of this year. Together with Tom Weekes KC, who is our co-author, we are currently preparing the final text of that book.

Overall, as practitioners in this complex area of law, we welcome the judgment. Not only does it clarify some areas of rights of light law which have not been the subject of any, or any useful Court decisions, but it also provides a model example to use when remedies are being considered. This is especially so where the Judge examines the assessment of damages. This part of the judgment should dispel many errors which regrettably we find adopted in practice, such as slavish adherence to the "one third" division of net gain or value and the advocacy of unrealistically high, or low, compensation amounts.

Major points to note from the judgment.

1. A technical and novel question was answered on how much light the Claimants could rely on coming from the servient land.

This point, which raised some complex arguments, arose because part of the servient land included land which had been the subject of a resolution in 2022 made by Southwark L.B.C. under section 203 Housing and Planning Act 2016 ("the s. 203 land") and that land would be built upon with tall buildings. Arbor was not built on the s. 203 land. Whether light enjoyed by the Claimants' flats should include light coming from the s. 203 land was a key and difficult question to answer. The Judge held that the assessment of the loss of light was to be based on the amount of light which the Claimants' flats enjoyed before the Arbor was built, *ignoring* any light coming from sources in respect of which the claimants could not assert protection; i.e. the s. 203 land. In reaching the conclusion, as a matter of new law (thereby assisting the Claimants' case) the Judge considered such authority as there was on the point, such as *Sheffield Masonic Hall Co. v Sheffield Corporation* [1932] 2 Ch 17, but on the facts he found that the case law was not directly of assistance. It was a new point. The key finding in the judgment was that the Claimants had a right of light over the s. 203 land, but that right was practically unenforceable because s. 203 removed the Claimants' rights to seek an injunction and damages in lieu as regards the interference with light coming to the Claimants' flats over that land and replaced it with a claim for statutory compensation of injurious affection; the light derived from the s. 203 land was not "protected".

2. Guidance was given on how light should be measured in rights of light disputes.

The judgment contains a very useful analysis of the way in which whether an actionable interference with light has occurred, or will occur, should be assessed. The rival claims for and against the Waldram method, the Radiance method and the median daylight illuminance and median daylight factors (the latter within BRE guidelines used in planning assessments) were considered fully. It was the first time that detailed evidence and argument on the merits of these methods had been presented to a court. 130 paragraphs contain the Judge's analysis of this issue. Its complexity requires careful reading of those paragraphs. He held that the Waldram method was the better one to apply in this case. The Radiance method and to a lesser extent the BRE tests might have use in marginal cases. But it was held that they should not supplant the Waldram method. That method was universally applied in rights of light cases and usually the result of its application is agreed between the parties' surveyors, compared with the subjective opinions of rights of light surveyors. This conclusion was reached even though the Waldram method is over 100 years old.

3. The Judge found that some rooms in the Claimants' flats had suffered an actionable interference with light.

On the Waldram method, whilst there was a difference between the experts, all the relevant rooms (the principal bedroom and the living/kitchen/diner – "LKD" – in flat 605 and the principal bedroom in flat 705) had been adequately lit before Arbor was built, its effect was such as to cause the loss of light to fall below the adequate level and would be noticeable and affect the ordinary use and enjoyment of the those rooms and the flats as a whole. In particular, the LKD affected in flat 605 was to be treated as one room and that the kitchen part of it was to be treated as part of the whole.

4. *The Judge refused to grant the Claimants an injunction requiring demolition of a substantial part of Arbor.*

This part of the judgment is important as it contains observations and findings on remedies which are applicable not only in rights of light disputes, but also in other claims such as where breaches of restrictive covenants, or interference with other easements, or trespass to land arise. It is significant that the Judge affirmed the status and importance of the Supreme Court's propositions set out in *Fen Tigers* (now over 11 years old) by saying that it established a new approach to the exercise of the discretion whether to grant an injunction or damages, where the burden of persuasion to award damages rests on the defendant. It is also significant that the Judge explains the way in which oppression to the Defendant and harm to the Claimant should be measured. In this case the contrast was stark. Many factors, such as the presence of tenants in Arbor (not parties to the claim) the public interest and the fact that the interference with light to the flats did not make them unsuitable for use, just less attractive and enjoyable, were taken into account. The comparison between the cost of demolition etc. of Arbor (nearly £250m) and the level of loss to the Claimants (£4m on the maximum level assuming the Claimants would be entitled to be awarded the cost of buying an equivalent flat at a cost of £2m each) was a stark one. One strong factor was the fact that the Claimants did not wish to seek demolition of Arbor and that other lessees suffering loss of light had settled with the developer for money. In the end damages could be awarded to the Claimants as such damages would be adequate compensation.

5. *The Judge awarded the Claimants negotiating damages in lieu of an injunction.*

This part of the judgment is important, not only because it includes a careful analysis of the basis upon which negotiating damages should be awarded, but also because, as is noted above in the context of the remedy of the injunction, this analysis is significant when other types of real property dispute and remedies are under consideration. There is important commentary on the decision of the Supreme Court in *One Step (Support) Ltd. v Morris-Garner* [2018] and in particular acceptance of the Defendant's submission that this decision created a new principled basis for determining whether negotiating damages are available and that it is possible to identify 3 categories of case where such damages are available. The Judge held, contrary to the Defendant's submission, that the loss of a right to enforce an easement, was firmly within the categories of cases in which negotiating damages could be awarded. Ironically, as the judge observed, if the Defendant's counsel had been right in his submission that negotiating damages were not available to the Claimants, that would have been a strong argument in favour of the grant of an injunction.

6. *The judgment contains important analysis of the way in which negotiating damages should be assessed and how they were to be assessed on the evidence in this case.*

It is impossible to summarise the evidence which was presented by the parties and their experts to determine the amount of these damages. Some important points of general application do, however, emerge which can be summarised. First, the evidence of the prices agreed in settlements with other residents in the flats in the Claimants' block were held to be generally *informative and of some use* in seeking to identify the range of figures in assessing the damages. But that evidence was not *direct evidence* of what would have been agreed in the hypothetical negotiation between these parties. Secondly, it would be wrong to start any assessment with a traditional ransom approach when determining the amount of the extra value or profit. The right approach was held to be to treat the parties as willing buyer and willing seller, knowing of the risks in the claim on both sides in the background but not in the foreground, in order to establish the benefit of the rights of light to each side. For the Claimants that was not just the diminution in value of their flats, but also the additional value

attributable to a greater beneficial enjoyment and use of the space in the flats. For the Defendant that was the additional development value which could be released by acquiring the rights of the Claimants as well as any others with equivalent rights of light. One other important point which was made by the Judge is that when considering the appropriate share of the Defendant's added value, the conventional "Stokes" one third is *not* an assumed end point for negotiation. The appropriate share needs to be properly justified, taking into account all the circumstances and not just what the Claimants would say they want to be paid. The judge found that the appropriate percentage of the increase in value would have been agreed at a relatively modest figure, taking into account all the relevant circumstances, and the judge found that percentage to be 12.5%, thereby identifying the settlement fund to be worth £3.75 m.

7. *The "headline" award of damages to the Claimants on the negotiating damages basis - taking into account all relevant factors present in the claim, including an allowance for other flat owners who might have a share in those damages (the settlement fund of £3.75 m.) - was £725,000 to the owners a flat 605 which had been more seriously affected and £525,000 for the owner of flat 705 which was less seriously affected.*

The fact that the Judge took into account the presence of other claims from lessees in the Claimants' building is important. He found that the Defendant would be entitled to apportion part of the value of its "settlement fund" representing the whole value of the negotiating damages to the other potential claimants as flat owners in Bankside Lofts. The judgment sets out the evidence of not only the parties' experts' "book value" and "enhancement" calculations, but also the history of the negotiations with other flat owners. The apportionment of the £3.75m fund was determined at 1/3 to the Claimants (value £1.25 m) and 2/3 to the Defendant. The latter represented the balance of the "settlement fund" which the Defendant could allocate to settle other potential claims. Finally, the judge applied what is often called "the sense check" with particular reference to the bare sums produced by the division of the £1.25m as between each of the Claimants' flats and took account of the relationship between the product of that division and the capital value of each flat. It was the application of the sense check, as well as other factors, such as the prospect of the receipt of the statutory compensation attributable to the building on the s. 203 land, which led to the awards of £725,000 and £525,000 referred to above.

8. *On the assumption that negotiating damages had not been awarded, the judge assessed damages based on the loss in capital value of the Claimants' flats. The award here representing the effect of the substantial impact to flat 605 was assessed at £60,000 and in respect of the moderate impact to flat 705, this was assessed at £20,000.*

This conclusion is clearly obiter (not part of the main finding) but is useful as a "check" on the other figures relating to damages.

Conclusion.

As stated at the outset of this note, we hope to provide a further note which refers to this case in more detail. We will also include in that note discussion of the implications of this judgment for advisers.

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Chris undertakes work in all aspects of property litigation encompassing real property, and both residential and commercial landlord and tenant work.

In the field of real property Chris has developed a particular specialism in the law relating to canals and water, which work often involves consideration of difficult issues relating to riparian rights and ancient title documentation as well as the understanding and application of aged private Acts of Parliament.

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Andrew's practice has a very strong emphasis on real property law. He is recognised as a leading authority on the law of restrictive covenants affecting freehold land, and on the law of rights of light. He has been instructed in many of the major cases in these areas of law in the last three decades. He is the author of a textbook on restrictive covenants, and a co-author of textbooks on rights of light and private rights of way.

"Andrew is very strong on rights of light and is exceptionally analytical and bright."
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