



**Law
Commission**
Reforming the law

Rights to Light Executive Summary

**Consultation Paper No 210 (Summary)
18 February 2013**

THE LAW COMMISSION'S CONSULTATION PAPER ON RIGHTS TO LIGHT

EXECUTIVE SUMMARY

- 1.1 On 18 February 2013 the Law Commission published its Consultation Paper on rights to light. The Consultation Paper, as well as this Executive Summary, can be downloaded from the rights to light project page on the Law Commission's website (www.lawcom.gov.uk).
- 1.2 The consultation period runs from 18 February 2013 to 16 May 2013. The proposals in the paper are provisional and do not represent a concluded view; responses to the Consultation Paper will influence our final recommendations to Government and consultees are strongly encouraged to respond to our provisional proposals and the topics discussed in the Consultation Paper.

Rights to light

- 1.3 The project examines the law that governs rights to light. A right to light is a property right, technically known as an easement, that entitles a landowner to receive, usually through a window, enough of the natural light passing over a neighbour's land to enable the ordinary use of the building.

Background to the Consultation Paper

- 1.4 The rights to light project builds upon work already done by the Law Commission. On 8 June 2011 we published a Report for the Easements, Covenants and Profits à Prendre project ("the Easements Report"), which contains recommendations for reform that would simplify property law, remove contradictions and anomalies, and maximise the effective and efficient use of land. We currently await Government's response to that Report, and this Consultation Paper has been written on the basis that those earlier recommendations will be implemented.
- 1.5 During the course of that project on the general law it became clear that further work was needed in respect of rights to light, which raise issues that are unique, or more pronounced, in comparison with other easements. In particular, rights to light appear to have a disproportionately negative impact upon the potential for the development of land.
- 1.6 Following publication of the Easements Report the Department for Communities and Local Government expressed an interest in the Law Commission undertaking a review of the law of rights to light. The Department's interest stems largely from the recent High Court decision in *HKRUK II (CHC) Ltd v Heaney*,¹ in which the court granted an injunction requiring partial demolition of a building which obstructed a neighbour's right to light, in circumstances in which many expected the court to decline that relief and award the payment of damages instead.

¹ [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

1.7 We consider that decision in more detail in Chapter 5 of the Consultation Paper. Briefly, it has been suggested that the case has had a detrimental effect on the ability of rights to light disputes to be resolved swiftly and amicably. There is a perception that:

A developer can act entirely properly and proactively, looking to negotiate a resolution, whilst it is actually in the interest of a neighbour to sit back and not engage, to increase the sum they can demand.²

1.8 Furthermore, the nature of rights to light and the legal remedies available to protect them means that it has always been possible for landowners to threaten to prevent a development that may infringe a right to light, or even to have it demolished, by asking the court to grant an injunction unless a significant payment is made for the release of the right. By introducing more uncertainty into the law governing the circumstances in which a court will, and will not, grant an injunction, *Heaney* makes it very difficult for advisers to establish the likelihood of any threat being successful.

1.9 The primary aim of this project is therefore to investigate whether the law by which rights to light are acquired, enforced and extinguished provides an appropriate balance between the important interests of landowners and the need to facilitate the effective and efficient use of land through its development.

1.10 In this Consultation Paper we have formulated our provisional proposals with three key objectives in mind.

1.11 First, we want to introduce greater certainty and transparency into the law as it relates to rights to light, making disputes simpler, easier and quicker to resolve.

1.12 Secondly, we want to ensure that rights to light do not act as an unnecessary constraint on development. The availability of modern, good quality residential, office and commercial space is important to the success of increasingly dense, modern town and city centres, and to the economy more generally.

1.13 Thirdly, we want to make sure that the important amenity value of rights to light remains protected under the law.

The structure of the Consultation Paper

1.14 The Consultation Paper has eight Chapters. Chapter 1 is an introduction, and Chapter 2 presents an overview of the current law.

1.15 In Chapter 3 we discuss how rights to light can be created through the doctrine of prescription, where a building or room has benefited from light passing over a neighbour's land for a long period. We make a provisional proposal that rights to light should, for the future, no longer be capable of acquisition by prescription

² Letter from the Association of Light Practitioners to the Law Commission (7 December 2012).

- 1.16 In Chapter 4 we consider the test for when a person who benefits from a right to light can bring a legal claim on the basis that his or her light has been obstructed – in other words, at what point an obstruction becomes actionable in the law of nuisance.
- 1.17 In Chapter 5 we address the remedies available for the infringement of a right to light – principally injunctions (for example, an order that the construction of a building cease, or that it be demolished) and damages. In this Chapter we make provisional proposals to clarify the test used by courts to decide when damages may be awarded by the court instead of an injunction.
- 1.18 In Chapter 6 we concentrate on the availability of injunctions and the role that this can play in negotiations as a powerful bargaining tool, and provisionally propose the introduction of a notice procedure designed to introduce greater clarity into rights to light disputes.
- 1.19 Chapter 7 focuses upon how rights to light can be brought to an end. In particular, we discuss the extinguishment of rights to light by abandonment. We also make a provisional proposal to extend the jurisdiction of the Lands Chamber of the Upper Tribunal to include rights to light, whenever they were created.

Our provisional proposals

- 1.20 The four provisional proposals contained in the Consultation Paper are as follows.
- (1) We propose that for the future it should no longer be possible to acquire rights to light by prescription.
 - (2) We propose the introduction of a new statutory test to clarify the current law on when courts may order a person to pay damages instead of ordering that person to demolish or stop constructing a building that interferes with a right to light.
 - (3) We propose the introduction of a new statutory notice procedure, which requires those with the benefit of rights to light to make clear whether they intend to apply to the court for an injunction (ordering a neighbouring landowner not to build in a way that infringes their right to light), with the aim of introducing greater certainty into rights to light disputes.
 - (4) We propose that the Lands Chamber of the Upper Tribunal should be able to extinguish rights to light that are obsolete or have no practical benefit, with payment of compensation in appropriate cases, as it can do under the present law in respect of restrictive covenants.

No future acquisition of rights to light by long use

- 1.21 In the Easements Report we reviewed the law of prescription and recommended that the three methods by which easements can be acquired by prescription should be abolished and replaced by a new statutory method. But this project provides an opportunity to consider whether prescription should continue to apply to rights of light; and we have concluded that it should not, for the reasons explored in Chapter 3. Our proposal is for prospective abolition only; it would have no impact on rights to light already acquired by prescription.

A statutory test for when a court may award damages instead of an injunction

- 1.22 The primary remedy for the infringement of a right to light is an injunction – a court order directed to a person that requires him or her to do something or refrain from doing something (such as to stop building or to demolish all or part of an existing building). But the courts also have a statutory discretion to award the payment of damages instead of an injunction.
- 1.23 The current guidance for when this discretion may be exercised is found in a nineteenth-century decision by the Court of Appeal. That guidance has been applied in inconsistent ways by the courts and is in some respects ambiguous and confusing. This has an impact upon rights to light disputes and the chances of achieving a successful negotiated settlement, because the parties may struggle to predict when a court might exercise its discretion to award damages instead of an injunction. This increases costs and causes unnecessary delays, both in litigation and to the development itself
- 1.24 We therefore propose to clarify the guidance for when damages may be awarded instead of an injunction by introducing a statutory test, amounting to a clarified version of the current guidance, to simplify the law and make rights to light disputes easier and cheaper to resolve.

The introduction of a new statutory notice procedure

- 1.25 We noted above the current perception that in rights to light disputes it may be in the interests of an owner of a right to light to refuse to engage in negotiations with a neighbouring landowner, where the latter wishes to develop land in a way that may interfere with the right to light.
- 1.26 This can cause a great deal of uncertainty. In particular, the developer may not be in the position to know whether the owner of the right to light is actually concerned with protecting the amenity provided by the right to light by injunction, or simply wishes to secure a financial payment in exchange for the release of the right and is therefore using the threat of an injunction as a bargaining tool.
- 1.27 This uncertainty can have a profound impact. It can mean that developments are delayed for several months or even years, at huge cost to the developer. That cost may be subsequently passed down to others through increased rents, and if the development project is one with a significant public benefit, delays to the project mean that the public benefits provided by that project are also delayed.

- 1.28 Accordingly, we provisionally propose the introduction of a new statutory notice procedure designed to introduce greater clarity into rights to light disputes. This will allow a developer to trigger a process whereby the owner of the right to light must take action within a certain period [~time in order to claim an injunction. This will redress the balance between landowners and developers by restricting the ability of landowners to threaten developers with injunctions where there is no real intention to seek one, thereby reducing the scope for unnecessary constraints on developments and encouraging the swift resolution of disputes.

Extending the jurisdiction of the Lands Chamber of the Upper Tribunal

- 1.29 Currently the Lands Chamber of the Upper Tribunal has jurisdiction under section 84 of the Law of Property Act 1925 to discharge and modify restrictive covenants. This jurisdiction is important both in facilitating development of land and in preserving amenity that is still regarded as important. In the Easements Report we recommended the extension of this jurisdiction to easements, but only to those created after implementation of reform.
- 1.30 The reasons for limiting reform in that way were based on concerns about how wider reform could affect the value of existing rights.
- 1.31 In this Consultation Paper we revisit those concerns and conclude that we were over-cautious in the Easements Report. We therefore provisionally propose the extension of the jurisdiction of the Lands Chamber of the Upper Tribunal to discharge or modify rights to light that already exist.

Other areas on which we invite consultees' views

- 1.32 We would also be grateful for consultees' views on other areas of the law discussed in the Consultation Paper, but in relation to which we have not made any provisional proposals. There are three main areas of the law on which consultees may particularly wish to offer comment.
- 1.33 The first is the test for when an obstruction of light constitutes a nuisance and is therefore actionable, which we discuss in Chapter 4. The current test is based on an early twentieth-century case and depends upon the use to which the property benefiting from the right to light is put, and the effect of the obstruction of light upon that use and on potential future uses.
- 1.34 We have not made a provisional proposal in respect of this test because we are not aware that it is causing substantial difficulties in practice. There is some uncertainty with the subjectivity inherent in a test which requires the court to consider the effect of an obstruction upon how a person uses his or her property. However, our provisional view is that the alternatives – such as an objective test – have the potential to result in difficult and unjust outcomes.

- 1.35 The second area of the law in relation to which we make no provisional proposals is damages, discussed in the second part of Chapter 5. Under the current law the damages that may be awarded instead of an injunction are calculated on the basis of the amount for which the owner of the right to light would have released the right, thereby allowing a development that would otherwise constitute an actionable interference to proceed. This "negotiation basis" of assessing damages can take into account the profits that the proposed development will make.
- 1.36 We understand that some consultees may be unhappy with this method of assessing the amount of damages payable. In the Consultation Paper we consider the arguments both for and against retaining the "negotiation basis" of calculating damages. We also consider various alternative options that could be used instead.
- 1.37 We have decided against making a provisional proposal in respect of damages. It is not clear to us that the current law is causing practical problems; in the light of this, and the fact that the various options for reform would not appear to represent a clear improvement, we are not minded to propose reform. However, we would welcome consultees' views on this, and on the various options discussed in the Consultation Paper.
- 1.38 Finally, in Chapter 7 we consider the law of abandonment. A right to light is abandoned where there is an intention on the part of the owner of the right to give it up permanently. In some instances this intention may be clear – shutting up a window with bricks and mortar may be one example . but in other scenarios the law may be more difficult to apply.
- 1.39 In the Consultation Paper we consider various possible options for reform. However, it is not clear that any of those options offers a better alternative to the current law. We therefore ask for consultees' views on whether the law of abandonment needs reform and, if so, how the current law can be improved.

How to respond to the consultation

- 1.40 If you wish to respond to the consultation, please send your responses:
- (1) By email to: propertyandtrust@lawcommission.gsi.gov.uk
 - (2) By post to: Nicholas Macklam, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ
- 1.41 If you send your comments by post, it would be helpful if, where possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).
- 1.42 For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality of consultees' responses, please see the Consultation Paper at pages iii and iv.