



**Law
Commission**
Reforming the law

Rights to Light

Executive Summary

Law Com No 356 (Summary)
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RIGHTS TO LIGHT

EXECUTIVE SUMMARY

OUR PROJECT AND ITS OBJECTIVES

- 1.1 Natural light inside buildings is immensely important for comfortable living and working. We want natural light in our kitchens, and at our desks; we prefer to have a window seat and dislike a windowless room. But because available space is finite the law has to 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.
- 1.2 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. It does this in two main ways. One of these (planning law) is outside the scope of the project; the other (private rights to light) is at its core.

Planning law

- 1.3 The potential effect of a new building on the light received by neighbouring properties is one of a range of factors that is likely to be considered when planning permission is sought. Local planning authorities may consider the availability of daylight and sunlight in new buildings, and the effect of development upon existing structures, whether residential or commercial. They take into account the needs of the local community and are able to hear representations from developers and from the owners of neighbouring properties. Difficult decisions may have to be taken, balancing the needs of existing properties with the public interest in the particular development for which permission is being sought.
- 1.4 The protection of light in the context of planning permission is outside the scope of our project and this Report makes no recommendations about it.

Private rights to light

- 1.5 Some properties benefit from a form of legal protection for natural light, which they can enforce directly against neighbours and which is entirely separate from the planning system. "Rights to light" are private property rights, known as easements; they are legally similar to rights of way, for example. Not all properties have them. Many arise as a result of archaic law without the knowledge either of the landowner who benefits from them or of the neighbour whose land is affected by them. A right to light protects the passage of light into a building, usually through a window, from across a neighbour's land; it is a right to prevent the neighbour from obstructing that light.
- 1.6 The law protects private rights to light. Sometimes it does this by issuing an injunction which prevents neighbours from building in a way that would interfere with the protected light. Sometimes a right to light will not prevent building and instead a court will award damages when light is obstructed. A grant of planning permission does not authorise the infringement of private rights to light.

- 1.7 The settlement of rights to light disputes may be a major cause of delay and expense in the course of a development. Developers and the landowners whose light would be affected by the proposed development may face uncertainty, delay and significant legal expense in establishing how a right to light is likely to be protected. Negotiation between the parties may be drawn out by the threat of injunction when in fact a neighbour would be satisfied by a money payment.
- 1.8 The Law Commission's project is about the balance between competing interests that the law strikes when dealing with a private right to light and about improving the way that the law intervenes when that balance is disturbed.
- 1.9 In our Report on rights to light we make recommendations about:
- (1) the way in which rights to light are created;
 - (2) the way the courts decide whether to enforce a right to light by injunction or by damages;
 - (3) a new procedure to bring negotiations about rights to light to a conclusion; and
 - (4) the ways in which rights to light can be brought to an end.
- 1.10 The current law relating to rights to light is in many respects unclear and has developed in a haphazard manner without a fully informed debate about the relative interests of those wishing to develop land and the landowners affected by development. Much of it has arisen in the general context of easements and of the law relating to injunctions, without there being an opportunity to consider issues specific to rights to light. Our project has provided that opportunity, and our recommendations aim to improve the law for the benefit of all parties involved. Law reform cannot bring to an end the potential for disputes about rights to light but it can be designed for clarity and efficiency, and in a way that facilitates settlement.
- 1.11 In the course of the project we have been assisted by detailed discussions and written comments from developers and from those who benefit from rights to light. Inevitably the latter are more disparate and far less likely to speak as groups or as organisations; nevertheless we have heard their voice as loudly and as clearly as that of the development industry. We are in no doubt about the amenity value of light, and the essential part it plays particularly in the home. At the same time we are conscious of the value of the built environment and of the need for new homes and commercial buildings, schools, and hospitals. Our recommendations are designed to change the law so that it no longer encourages landowners to use silence and delay to drive up the price they are offered in exchange for a loss of light. Our recommendations are designed to clarify the legal relationships between the different parties, simplify the law, and make negotiation more efficient.

OUR RECOMMENDATIONS

(1) The creation of rights to light

- 1.12 Most rights to light are not created deliberately. Instead, rights to light come into

being over time. Where light has passed through a window for 20 years, from across a neighbour's land, a right to light can come into being in accordance with the body of law known as the rules of prescription.

- 1.13 Many other jurisdictions took steps decades ago to ensure that rights to light could not be created by prescription, but England and Wales did not. As a result, rights to light can proliferate in the built environment without anyone involved doing anything or being aware of the creation of rights. In our consultation paper we proposed that for the future rights to light should no longer be created in this way.
- 1.14 Our proposal gave rise to some consternation. We think that that response was based, at least to some extent, on a misunderstanding of what we were suggesting. Our proposal would not have removed any existing rights. Nor would it have left any homes in darkness; nor would it have changed the planning system in any way. Generally buildings are not reliant upon private rights to light for normal and acceptable levels of daylight. Prescription is something of an anomaly within the law.
- 1.15 However, in the light of that response we do not recommend the abolition of the prescriptive acquisition of rights to light. Instead we focus on two recommendations that would make prescription operate more straightforwardly in relation to rights to light.
- 1.16 In our 2011 Report, *Making Land Work*, we made recommendations about the law relating to prescription for all easements, including a new and streamlined rule to replace the three different methods of prescription in operation today. That is accordingly our primary recommendation about prescription for rights to light, and we look forward to Government's response to *Making Land Work* and for the enactment of the draft Bill attached to that Report.
- 1.17 Following that reform, prescription will continue. But the underlying law will be simpler and therefore the process of getting advice and responding to disputes when they arise will become somewhat cheaper.
- 1.18 In this Report we take one further step to reform prescription for rights to light only. We recommend the updating of the scheme which enables prescription for a right to light to be interrupted, and brought to an end, without physically obstructing the light. This would involve the repeal of the Rights of Light Act 1959 which allows a landowner to block prescription by registering a local land charge which has the same effect as building an opaque structure on his or her land. This is a complex scheme which gives rise to some unwieldy provisions and considerable administrative burdens and costs. Instead, we recommend a simplified procedure which would take effect alongside the reformed law of prescription. We discuss this in Chapter 2 of the Report, and draft clauses to implement our recommendation are to be found at Appendix A.

(2) The choice of remedies: injunction or damages

- 1.19 A right to light is infringed when light is obstructed; but not every obstruction amounts to an infringement. The right is infringed if obstruction results in there being less light than is normally required for the ordinary purposes for which the building can be used.

- 1.20 That is the law set out in *Colls v Home and Colonial Stores Limited* [1904] AC 179. We make no recommendation to change that rule. It takes into account the differing needs of a home, a factory and a greenhouse, for example; and it can respond to the fact that a building may have more than one potential use. It is a subjective test, and we take the view that it provides a useful flexibility. We do not think that statute should prescribe an objective measure for light; nor do we think that the law should require any specific surveying methodology be used to measure it. There is no such requirement at present, and as a result it is open to the surveying profession to develop new ways of providing expert advice and evidence about light and amenity.
- 1.21 Where a right to light is infringed, then the law provides a remedy. The court may grant an injunction – an order preventing a new building, or even ordering the demolition of one just built – or it may award damages by way of compensation for the continuing infringement. In other words, the law allows those who have rights to light to protect them, but sometimes the protection it offers is given in the form of compensation, rather than an order preventing interference.
- 1.22 The primary remedy for the infringement of a right to light is an injunction. It is not the case that only serious infringements merit an injunction. Injunction is the starting point, but the court may decide to award damages instead. A nineteenth century case, *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287 has been used as the test for when damages may be awarded instead of an injunction.
- 1.23 We are recommending a new test, in order to meet two concerns. One was that the test in the *Shelfer* case was being applied in a way that had not been intended and that was too restrictive, with the result that it was very difficult for the court to avoid ordering an injunction. The other was that the case law following *Shelfer* had developed in a way that made it particularly easy for landowners with rights to light to prolong negotiations while threatening to seek an injunction, not with a view to protecting light but in order to demand a ransom price for the release of their rights.
- 1.24 Those concerns became more acute in 2010 with the decision of the High Court in *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), which sent shock waves through the development industry because of the grant of an injunction requiring the demolition of two floors of a new building that had already been let. Yet the building that infringed the right to light still stands; the litigation did not in the end protect light, and it is understood that a planned appeal was abandoned before trial following a settlement between the parties .
- 1.25 Since then the Supreme Court's decision in *Coventry v Lawrence* [2014] UKSC 13 has changed the law in this area, and is likely to have shifted the balance somewhat by ensuring that the public interest is taken into account when a judge decides whether to award an injunction or damages. Our recommendations take that change into account, but introduce a new test that is specific to rights to light, in which the key concept is proportionality.
- 1.26 We recommend that a court must not grant an injunction to restrain the infringement of a right to light if doing so would be a disproportionate means of enforcing the dominant owner's right to light taking into account all of the

circumstances, including:

- (1) the claimant's interest in the dominant land;
- (2) the loss of amenity attributable to the infringement (taking into account the extent to which artificial light is relied upon);
- (3) whether damages would be adequate compensation;
- (4) the conduct of the claimant;
- (5) whether the claimant delayed unreasonably in claiming an injunction;
- (6) the conduct of the defendant;
- (7) the impact of an injunction on the defendant; and
- (8) the public interest.

1.27 Our detailed discussion of this recommendation is to be found in Chapter 4 of our Report, and clause 2 of our draft Rights to Light (Injunctions) Bill at Appendix B would put it in into effect.

1.28 We have not made any recommendation for change in the measure of damages that can be awarded instead of an injunction – in other words, how the court should determine how much a landowner should receive if a right to light is interfered with but the court does not consider an injunction proportionate. This is a controversial area, discussed in Chapter 5 of our Report. We understand the arguments of those who believe that it is unreasonable for those who hold rights to light to be awarded a share of the profits of a development; at the same time we appreciate the point that there may be an argument for such an award in view of the fact that the development could not have taken place at all without the release of the right.

1.29 Whatever the arguments, we are not convinced that it is appropriate to change the measure of damages at this point. Any reduction in the level of damages may have knock-on effects that would be most unwelcome to those who would appear at first sight to benefit from that reduction. There are two reasons for this. First, one of the factors relevant to the court when deciding between damages and injunction is the adequacy of compensation, and so a reduction in compensation may give rise to more injunctions. Second, a reduction of the level of damages awarded instead of an injunction could make it more likely that landowners would push for an injunction instead of damages (and so have an effect upon the choices to be made by those who are served with a notice of proposed obstruction, explained below).

1.30 We recommend that Government keep under review the level of damages and consider whether further reform is required once the impact of our other recommendations has had the chance to take effect. Chapter 5 includes a discussion of the different shapes that any future reform could take.

(3) A new procedure: the Notice of Proposed Obstruction

- 1.31 A consistent message from developers throughout our project was that they need to know, at some point, whether an injunction is seriously sought and to have a cut-off point after which it is no longer a possibility. Many developments have specific time pressures arising from the planned use of the building, or from contractual obligations or funding structures.
- 1.32 The current law does not require landowners to assert their rights to light within any particular time period, and some landowners will delay action in an attempt to put pressure on the developer to agree a higher financial settlement for the release of the right. We have concluded in the light of consultation responses that the law should provide a mechanism for those planning to develop land to establish within a set period whether or not a landowner will apply for an injunction to prevent interference for a right to light, encouraging negotiation and removing unnecessary delay.
- 1.33 We recommend a new procedure that will put a neighbour on notice, requiring him or her either to claim an injunction within a certain period (with the developer paying the costs that the neighbour incurs in taking legal and surveying advice) or to lose the right to claim an injunction. That procedure effectively brings the uncertainty to an end; the neighbour must either take action to protect the easement or accept that an injunction will not be awarded but that the claim for damages remains intact.
- 1.34 The important change that this makes in the law is one of timing. At present, where an injunction is truly wanted, the neighbour must apply to court for one. The Notice of Proposed Obstruction procedure does not introduce any obstacles to the seeking of an injunction to protect light, nor does it make it any more expensive to do so. But by requiring that proceedings be issued and served it does require at least the beginnings of a commitment to do so within eight months of the Notice of Proposed Obstruction being served, in order to generate some certainty for those wishing to develop land. It does not make rights to light any weaker, nor does it lessen the chance of an injunction being granted, or reduce the level of damages that might be awarded by a court. But by introducing a deadline, we respond to calls to have a point in the process at which it is known for certain whether or not an injunction is or will be sought. We anticipate that the notice procedure will make negotiation more effective and will keep costs down for all concerned.
- 1.35 We discuss the new procedure in Chapter 6, and it is contained in Clause 1 and Schedule 1 to the draft Bill at Appendix B.

4. Bringing rights to light to and end

- 1.36 In Chapter 7 of our Report, we make two recommendations about the ways in which rights to light can be brought to an end. The statutory provisions that we recommend are simple amendments to the reforms recommended in our 2011 Report, *Making Land Work*, and to the draft Bill (“the Easements Bill”) attached to that Report.
- 1.37 The first concerns the abandonment of rights to light. The law recognises that an easement can cease to exist if it is abandoned. Proof of abandonment requires

proof of intention to abandon, and this is notoriously hard to prove. Whether there is the requisite intention is a question of fact; the law will not presume the existence of an intention simply because of the length of time that has elapsed since an easement was last used. In our 2011 Report we recommended that if an easement (for example a right of way) is not used for twenty years then that non-use will be evidence of an intention to abandon the easement. This would apply to all easements. In this Report we recommend a minor amendment to the 2011 Easements Bill to the effect that that period would be five years for easements of light, because the obstruction of light tends to be far less equivocal than, for example, the obstruction of a right of way. If a window has been bricked up or a building demolished, it is hard to see how the easement is intended to continue once a few years have passed.

- 1.38 Our other recommendation relates to the power of the Lands Chamber of the Upper Tribunal to discharge and modify rights to light and other easements
- 1.39 The Lands Chamber has the power to discharge or modify restrictive covenants over land in certain limited circumstances – generally where they serve little or no useful purpose. At present there is no power for the Lands Chamber to do the same in respect of easements. In our 2011 Report we recommended that easements created after the enactment of the Easements Bill would be able to be discharged or modified, still in limited circumstances, on application to the Lands Chamber of the Upper Tribunal.
- 1.40 Our work on rights to light has led us to the conclusion that our policy for easements generally was too cautious. We now recommend that all easements, including rights to light, whether created before or after reform, should be brought within the Lands Chamber’s proposed jurisdiction to discharge or modify easements, and that the 2011 Easements Bill be amended to achieve this change before its introduction into Parliament.

IMPACT ASSESSMENT

- 1.41 Chapter 8 of this Report sets out the information that we have collected – from consultees and other sources – about the economic impact of rights to light, and the disputes that flow from them. It will be for Government to produce a formal impact assessment to accompany legislation that it intends to introduce into Parliament.

CONCLUSION

- 1.42 Our recommendations for the reform of the law of rights to light can be described as an undramatic but significant change in the law designed to update it and to maintain an appropriate balance between development in the public interest and the protection of the amenity of our homes and workplaces.
- 1.43 However, our recommendations will not take effect in full unless and until Government responds to, and gives effect to, our recommendations in our 2011 Report, *Making Land Work*. The Lord Chancellor reported to Parliament in May that Government intends to respond to the report in 2014.