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Let there be light - fiat lux!

Introduction

1. In this darkening age of the crunch, I hope to bring a ray of light to brighten the horizon metaphorically speaking. I will avoid jokes about light at the end of the tunnel and dim views! Unlike the right to freedom from smell and noise, a Right of Light has to be acquired before it can be enforced.

2. The easement of light[1] sits outside the planning system and after rights of way, is the most common private easement for developers to grapple with. Even so, the rules and concepts are often misunderstood and commonly confused with either sunlight and daylight calculations used in the planning system, or techniques used to consider natural light in designs. The developer must accept that private rights exist, therefore, on a confined urban development, a high density scheme will need to factor from the feasibility stage common law ROL, particularly given a rise in the awareness of the public in respect of the easement of light.

3. Issues associated with ROL can be awkward particularly given the emergence of tensions in the case law, especially in the field of the remedies available to claimants in ROL cases and the increasing emphasis on re-developing brown field sites – this has made ROL a hot topic for the courts in recent years. This and the credit crunch have combined to produce several instances of prospective buyers using ROL to negotiate reductions in the purchase price for land with some development potential.

4. Most of the relevant cases in this area were decided under what is known as the "Lord Cairns Act" (Chancery Amendment Act 1858). This gives the court the power to award damages in addition to, or in substitution for, an injunction.

5. The prevailing view used to be that the power to award damages under the LCA only arose where the court had jurisdiction to grant an injunction at the time the claim was issued. However, following *Experience Hendrix v PPX Enterprises Inc* (2003), it would seem that damages could be awarded even where the claimant would not be awarded an injunction.

6. The foremost case in this area is *Wrotham Park Estate Company Limited v Parkside Homes Limited* (1974). The aim of what has become known as *Wrotham Park* damages (or "buy out" / "wayleave" damages) is to consider the sum that would have been arrived at in a haggle between the two parties as the price for the claimant to relax its rights, each making reasonable use of their respective bargaining positions, but without seeking a ransom.

7. Despite some debate as to the basis for such damages, it is accepted wisdom that they are designed to be compensatory, rather than punitive. The *Wrotham Park* decision was described by the House of Lords in *Attorney General v Blake* as "a shining beacon" (pardon the pun) showing that in contract as well as tort, damages are not necessarily confined to recoupment of financial loss, but can be measured by the advantage to the defendant from the breach.

1. A right of light is the right to receive light over another person's land to particular windows in a building. It is not a right to prevent a neighbour from reducing in any way the amount of the light reaching the windows in question. It is a right merely to preserve light to the room served by the window such that the light to the room served by the window as is sufficient for its "comfortable or beneficial use". What would be considered to be sufficient in this context may vary depending on whether the affected property is used for commercial or for domestic purposes. As a broad rule, it is generally accepted that a right of action will arise if the result of the obstruction is that it will leave less than 50% of the affected room adequately lit. For these purposes, adequate lighting is considered to be one lumen at 850mm above floor level which is equivalent to 0.2% of the light available from the whole dome of the sky.

8. The sums paid to infringed parties in ROL claims contrast enormously given ROL disputes are increasingly common as developers compete for space in the metropolitan landscape. In a recent case, the High Court awarded “buy-out” damages of £50,000 to a claimant for the loss of a right to light on a staircase.

9. This means serious downsides given cases such as *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] in which the Court declined to grant a mandatory injunction but instead ordered the developer to pay damages in lieu which equated to one third of the likely profit from his development. It proves getting it wrong can be very costly.

10. ROL touch tenanted space too between landlords and their tenants because a tenant can acquire a prescriptive right to light against his landlord by prescription by virtue of enjoyment of light for a full 20 year period without interruption unless the enjoyment is by virtue of an express consent or agreement in writing or by deed.

11. Therefore with the purpose of extracting the maximum leverage from land it is critical to consider the surrounding properties when viewing the design of a development. Timely advice in relation to rights of light issues is fundamental to resolving and mitigating problems that could otherwise severely impede development and planning prospects.

12. If a claimant can establish that a ROL has been interfered with unlawfully by an adjoining development, the remedies available are an injunction to prevent the interference complained of or, alternatively, the payment of monetary compensation. Both are a serious nuisance to any developer fortunate enough to be venturing with a scheme at this time.

Injunctions

13. Where an infringed party seeks an injunction, the burden of proof will be upon the developer to establish why the injured party should be compensated in damages rather than be awarded an injunction.

14. In the Court of Appeal case of *Regan v Paul Properties Limited* the Court for the first time in 20 years restated the law on this issue and confirmed that the judicial discretion to award damages instead of an injunction could only be exercised in exceptional circumstances. *Regan* decided that interference with a right to light could not be compensated by a monetary payment. In other words, an injunction was the appropriate remedy. This is just the type of case that demonstrates that when it comes to such hallowed rights as light and quiet enjoyment etc, one sees the courts stepping in a proactive manner and not treating damages as an adequate remedy.

15. The relevant factors for the Court to consider in deciding to award damages instead of an injunction are:

    (i) Whether the injury to the claimant’s legal rights is modest;

    (ii) Whether loss can be quantified in money;

    (iii) Whether the claimant’s interest was only in monetary compensation;

    (iv) Whether the loss can be adequately compensated by the payment of money;

(v) Whether it would be oppressive to the defendant to grant an injunction;

(vi) Whether the conduct of the claimant rendered it unjust to give it more than pecuniary relief;

(vii) Whether there are any other circumstances which justify the refusal of an injunction.

16. In deciding upon the pertinent remedy the Courts will generally differentiate between a claimant who is interested in protecting its property (and promptly issues legal proceedings before its rights have been interfered with) from the claimant who is on the make by obtaining an injunction.

Damages

17. In the latest Court of Appeal case of *Forsyth-Grant v Allen* the Court considered the issue of the assessment of damages for infringements of ROL.

18. The case concerned the ROL prescriptively acquired by an adjoining hotel and the construction of 2 new semi-detached houses (aptly named Sunrise and Sunset). The contractor engaged a “rights of light” surveyor who contacted the proprietor of the hotel several times to seek access to assess the likely impact of the building works. The hotelier refused to co-operate with the builder.

19. The contractor modified the plans for the houses to try to minimise any loss of light to the hotel and then proceeded with the project. The hotelier issued proceedings and ambitiously sought an account of all the profits made by the defendant from the infringement of her ROL and, in the alternative, damages, including exemplary damages for the nuisance, again calculated by reference to the profit made by the defendant.

20. The Court noted that the hotelier had resolutely refused to negotiate with the builder. They hotel also claimed to have suffered loss of light in a room that was let to paying guests although it was in fact a storeroom. This led the Judge to conclude that it would not have been equitable for a Court to have granted an injunction in respect of the infringement.

21. Consequently, the Judge refused to award profit based (or “buy out”) damages but did award the hotelier compensatory damages for the loss of light that they had actually suffered in the sum of £1,850.

22. The Court of Appeal upheld the County Court decision ruling that the standard remedy for the loss of rights of light in such circumstances was an award of damages. Damages would ordinarily compensate a claimant for the loss actually suffered but might in appropriate cases include a share of the profits derived from the breach, calculated by reference to what the claimant would have secured in the negotiations for the relaxation of the right infringed.

23. The Court of Appeal held that an account of profits would only be available in exceptional cases where a defendant has misappropriated proprietary rights belonging to the claimant.

24. In the appeal the claimant concentrated on seeking an account of all the profits derived from the infringement of their rights of light. The Court of Appeal upheld the County Court’s decision because the

claimant had behaved unreasonably and it would not be equitable to grant an injunction - it would therefore also be inappropriate to award "buy-out" damages.

25. This decision leads to the conclusion that "buy-out" damages will only be awarded on the merits of each individual case to do justice between the parties to the claim. Therefore, the conduct of the parties in seeking to negotiate a settlement of a ROL claim will be a relevant consideration when the court decides whether to grant "buy-out damages" or compensatory damages, should an injunction not be appropriate.

Conclusion

26. The principles underlying the award of damages for breach of a right to light are now reasonably well established, but their application and the resulting outcome is considerably more uncertain. There has been a propensity for some developers to assume that the existence of ROL can always be bought off by negotiation and the payment of money. Given the risks of being faced with an injunction this is a reckless assumption.

27. It is equally unwise to assume the Courts will always look benevolently upon a developer who wishes to proceed with a development notwithstanding an interference with the ROL even though the developer has committed a substantial amount of money to the development.

28. As we get to grips with the fallout from *Regan* and *Tamares*, case law in relation to rights of light continues to develop. *Regan* was the first case dealing with rights of light in the Court of Appeal for many years, whilst *Tamares* did not go beyond a decision at first instance *RHJ Ltd v FT Patten (Holdings) Ltd* got to the appellate courts in 2008. This case deals with landlords attempting to prevent tenants acquiring rights of light through terms in the lease and has repercussions in respect of who can prevent developments and who is entitled to the potentially substantial payouts that may follow.

29. In *RHJ* the lease reserved to the landlord a 'full and free right' to build on the land retained 'as they may think fit'. The tenant argued that it had acquired a right to light through prescription because it had enjoyed continuous light for 20 years. Section 3 of the Prescription Act 1832 states that the right to light will not arise if it 'was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing'. This means that rights to light cannot be claimed where consent or agreement has been expressly made. The tenant argued that the agreement made in the lease did not refer to 'light' expressly and so it could still claim a right to light. The Court of Appeal held that the clause in the lease constituted written agreement and said that the agreement did not have to refer expressly to 'light' for it to exclude a claim to a right to light by prescription. Note that the wording in the lease was important in this decision. The result will apply in not only the landlord/tenant situation but also where a developer sells off part only of his land and retains the rest for future development.

30. So, developers selling off plots of land should take care with the wording in any conveyance to ensure that it comes within section 3, thereby ensuring that a purchaser cannot claim a right to light if the developer starts to build on the adjoining land. Prospective

> **purchasers need to make certain that their enjoyment of light on the land will not be lost if the adjoining property is developed. They will need to verify this before they even think about exchanging contracts.**

Fiat Lux!

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