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The Law Commission issues final report on Rights of Light overhaul

Following the initial Consultation Paper in 2013, the Law Commission issued their final report on the 3rd December 2014. The report represents a comprehensive assessment of the easement to light and its effect on development in the 21st century. As experts in rights of light and neighbourly matters, we have read this report with interest and have produced the summary below outlining the key considerations and proposed changes.

One of the key recommendations is the replacement of what has become known as the "Shelfer Test", following *Shelfer-v-City of London Electric Lighting Company* (1895), and in particular the test's recent impact on whether compensation or an injunction should be granted. The new statutory test, designed to guide the court's decision, is based on consultees responses and the decision in a recent case (*Coventry-v-Lawrence* 2014), which came before the Supreme Court between the Consultation Paper and the publication of the final recommendations.

The new statutory test states that the "court must not grant an injunction if, in all the circumstances of the case, an injunction would be a disproportionate means of enforcing a claimant's right to light". The Commission outlines a number of considerations that the court is to consider when making a decision, which include the claimant's interest, loss of amenity attributable to the proposals (taking into account the use of electric lighting), whether damages would be adequate, the conduct of both parties, whether it would be oppressive to the defendant and the public interest in the development. The last of the considerations was not one considered in the Consultation Paper, which concluded that the weight of case law was against considering the public interest. The inclusion of this measure in the new test goes some way to demonstrate the impact of the *Coventry-v-Lawrence* case, although the Commission report states that following *Coventry* the balance may have swung too far in favour of developers.

The inclusion of an electric lighting consideration is also a new and welcome consideration, which brings rights of light into the 21st century, where it is clear that many commercial buildings rely exclusively on electric lighting.

It would be a mistake for developers carte blanche to assume that the recommendations and recent case law mean that compensation is now the preferred solution to dealing with rights of light nuisance claims. In the *Coventry* case, Lord Neuberger stated that the preferred solution is still an injunction. The report makes it clear that this is particularly the case with regard to residential properties, but also other buildings that have a reasonable expectation and reliance on natural light. The Commission also make it clear that if a neighbouring property may reasonably make some other use of a commercial building – one which is more reliant on natural light – this should be considered relevant.

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The second significant recommendation made by the Commission is for the repeal of the 1959 Rights of Light Act, to allow the employment of "Notices of Proposed Obstruction" (NPO). The intention of the NPO, which is served on neighbouring properties, is to encourage negotiation, or to call a neighbour's bluff. Following a case in 2010 (*HKRUK-v-Heaney*), it was felt that some neighbours were consciously avoiding engaging with developers in order to extract more compensation to release their rights of light. This is anecdotally borne out by increases in compensation that we have observed.

The NPO gives a neighbour, who has been served with such a notice, 8 months to apply for an injunction. If they do not elect to apply for an injunction within 8 months, the neighbour loses his or her right to apply for an injunction, but may still apply for damages. Whilst this provides developers with a greater degree of certainty, it should be noted that the basis for valuation is still likely to leave "profit share" as a remedy which is still open to the courts. Indeed, the Commission makes it clear that they are not the best positioned to deal with compensation, which they feel is best determined by the market and specialists in valuation, such as Chartered Surveyors like MES.

The Commission has elected to drop one of the more controversial proposals in the Consultation Paper, which was the abolition of rights of light by prescription. Although the proposal was for properties that have already gained a right of light to retain them, the idea of removing the potential to obtain a right of light in the future became controversial, and was commented on in a number of national newspapers such as *The Telegraph*. However, the Commission has recommended that the existing methods of prescription are modified by their proposed Easement Bill. Broadly speaking, any defined aperture that has enjoyed uninterrupted light for 20 years will still gain a prescriptive right, which is the case under the current 1832 Act.

Finally, the report also examined the prospect of solar panels obtaining a right of light, but dismisses the idea on the basis that it is not possible to define apertures and openings, such as windows and doors, which have been traditionally used when defining a right of light; concluding that a solution to the issue of solar panels is outside the scope of the project and report. Our view is that the issue of new developments reducing the amount of sunlight onto solar panels will become a hot topic in the future and we await the first cases that consider this issue.

If you have any questions or queries regarding common law rights of light or daylight and sunlight for planning, please do not hesitate to contact us.