Ashurst London
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Real estate briefing

Rights to Light: Law Commission recommendations

The Law Commission issued its consultation for the reform of rights to light in Spring 2013 and on December 4th 2014 it published its report and draft bill. The Commission is seeking to put Lord Neuberger's decision in this year's Supreme Court case of ***Coventry*** –v-***Lawrence***[1] on a statutory footing. If the legislature has the time, rights to light will never be the same again.

Coventry -v- ***Lawrence*** did nothing to change the fact that an injunction is the primary remedy for an interference with a right to light and the courts will always have a wide discretion when deciding whether to award an injunction However the case did change the way the courts decide the question of whether to award damages in lieu of an injunction. The Supreme Court rejected the rigid application of the "working rule" set out in ***Shelfer*** -v- ***City of London Electric Light Company***[2] in favour of a more flexible and balanced approach.

The Law Commission has endorsed this by recommending a statutory test which has, at its heart, the concept of proportionality. By applying this new test the courts would not be permitted to grant an injunction where this would be disproportionate, taking into account such issues as the conduct of the parties, the public benefit of the development, the delay of the claimant in enforcing its rights, the loss of amenity (taking into account the extent to which artificial light is relied on) and the impact of an injunction on the developer. This concept of proportionality will involve the court in carrying out a balancing exercise, weighing up a number of factors. This will not necessarily be easy, but at least it does allow the Court to be more flexible and take into account the public benefit aspect of the grant of planning permission for the development. However, If the judgement in ***Coventry*** -v- ***Lawrence*** is anything to go by it is likely that it will be very difficult to persuade the courts that anything other than an injunction is appropriate where the actionable infringement of a right to light relates to a residential property and the claimant wishes to preserve their light.

Interestingly the Law Commission has decided not to replicate that element of the Shelfer test which requires the court to consider whether or not it would be "oppressive" in all the circumstances to award an injunction. Instead the statutory test considers the "impact" of an injunction on the developer. Of course, it will be down to the courts to rule on the interpretation of these words.

The Law Commission makes no recommendation for a change in the measure of damages awarded in lieu of an injunction. This is an extremely complex area of the law and may be a missed opportunity to change the basis on which damages are calculated and move away from profit related damages which developers argue are not a fair assessment of the sum to be paid for the release of the right to light. However, as the Law Commission points out, a reduction in the level of damages may actually have the unexpected knock-on effect of increasing the number of injunctions awarded.

This has not been completely kicked into touch, the Law Commission suggests that the Government keeps a watching brief on this particular aspect and reform may follow at a later date.

The Law Commission has also made a U-turn and is no longer recommending the abolition of prescriptive rights. This was a step too far for many respondents to the consultation and would have put rights to light on a different footing to other easements. Instead the Law Commission have suggested a simplification of the scheme which enables the acquisition of a prescriptive right to light to be interrupted, and brought to an end, without physically obstructing the light.

Other key recommendations include:

- a statutory notice procedure which would enable a landowner to require their neighbours to tell them within a specified time if they intend to seek an

- injunction to protect their right to light, or to lose that remedy;
- amendment of the law governing where an unused right to light is treated as abandoned; and
- a power for the Lands Chamber of the Upper Tribunal to discharge or modify obsolete or unused rights to light.

The Law Commission describe their recommendations for the reform of the law of rights to light 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. However if these recommendations become law we will surely see a real shift in how rights to light disputes are handled and resolved. However, these recommendations will not take effect in full unless and until the Government responds to, and gives effect to, the recommendations in the 2011 Report, Making Land Work which deals with the general reform of the law relating to easements and covenants.

The full report and recommendations can be accessed here. Please do get in touch with the contact referred to below or your usual Ashurst contact if you would like further information.

Notes:
1 *Coventry* -v- *Lawrence* [2014] UKSC 13
2 *Shelfer* -v- *City of London Electric Lighting Co* [1895] 1 Ch 287

Further information

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