Law Commission

Consultation Paper No 210

RIGHTS TO LIGHT

A Consultation Paper

THE LAW COMMISSION – HOW WE CONSULT

About the Law Commission: The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Law Commissioners are: The Rt Hon Lord Justice Lloyd Jones, *Chairman,* Professor Elizabeth Cooke, David Hertzell, Professor David Ormerod and Frances Patterson QC. The Chief Executive is Elaine Lorimer.

Topic of this consultation: This Consultation Paper examines the law as it relates to rights to light. Rights to light are a type of easement which entitle a benefited owner to receive light to his or her windows over a neighbour's land. We discuss the current law and set out a number of provisional proposals and questions on which we would appreciate consultees' views.

Geographical scope: This Consultation Paper applies to the law of England and Wales.

Impact assessment: In Chapter 1 of this Consultation Paper we ask consultees to provide evidence in respect of a number of issues relating to rights to light, such as the costs of engaging in rights to light disputes. Any evidence that we receive will assist us in the production of an impact assessment and will inform our final recommendations for reform.

Availability of materials: The consultation paper is available on our website at http://lawcommission.justice.gov.uk/consultations/rights-to-light.htm.

Duration of the consultation: We invite responses from 18 February 2013 to 16 May 2013.

Comments may be sent:

By email to propertyandtrust@lawcommission.gsi.gov.uk

OR

By post to Nicholas Macklam, Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ

Tel: 020 3334 0200 / Fax: 020 3334 0201

If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

After the consultation: In the light of the responses we receive, we will decide on our final recommendations and present them to Government.

Consultation Principles: The Law Commission follows the Consultation Principles set out by the Cabinet Office, which provide guidance on type and scale of consultation, duration, timing, accessibility and transparency.

The Principles are available on the Cabinet Office website at: https://update.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance.

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Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (such as the Freedom of Information Act 2000 and the Data Protection Act 1998 (DPA)).

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THE LAW COMMISSION

RIGHTS TO LIGHT: A CONSULTATION PAPER

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CHAPTER 1
INTRODUCTION

RIGHTS TO LIGHT

1.1 Light enables the use and enjoyment of our homes and workplaces, allowing people to live and work in safety and comfort. The importance of lighting in the workplace and at home is recognised by the law. For example, the law requires that workplaces have suitable and sufficient lighting; it provides a mechanism to resolve complaints between neighbours regarding the interference with access or light caused by high hedges; and daylight and sunlight are factors that are considered by local authorities when examining applications for planning permission.[1] People therefore enjoy various rights that relate to light.

1.2 In this Consultation Paper, however, we mean something specific by a "right to light".[2] In this project a right to light is an easement: a property right, entitling 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. Not every property benefits from an easement of light; these rights can come into existence in different ways, often inadvertently so far as property owners are concerned, and people are often unaware of their existence.[3]

1.3 Unlike most easements – such as rights of way and rights of drainage, which allow one landowner to do something on another's land – a right to light is said to be negative. A negative easement prevents a neighbour from doing something on his or her own land. So an owner of land burdened by a right to light is prevented from obstructing the light passing over his or her land in such a way that causes a nuisance to the owner of the land benefited by the right.[4]

1.4 As a result, rights to light can have a profound effect. They are valuable to landowners and can protect the amenity of properties, but in doing so they allow those who benefit from rights to light to exercise a potentially significant degree of control over what can be done on neighbouring land.

[1] See, respectively, the Workplace (Health, Safety and Welfare) Regulations 1992, r 8, the Anti-social Behaviour Act 2003, Part 8, and Chapter 2, para 2.64 and following below.

[2] Rights to light are often referred to as "rights of light", or "easements of light". We use these terms interchangeably in this Consultation Paper.

[3] See Chapter 2, para 2.2 and following below.

[4] What constitutes a nuisance is considered in Chapter 4 below.

THE ORIGINS OF THE PROJECT

The Law Commission's Easements Report

1.5 In June 2011 we completed a project on the general law of easements and other rights over land, publishing a Report and draft Bill.[5] We are currently awaiting Government's response to the recommendations made in that Report. We refer to that Report frequently in this Consultation Paper and call it the "Easements Report".

1.6 During the course of our project on the general law of easements it became clear that there was a need for further work in respect of rights to light. We commented on this in the Easements Report:

> … there is scope for a further review of the law relating to rights to light [which is] an important area with significant financial implications; the general work that we have done lays a foundation for future work in this specific area.[6]

1.7 The need for a separate review of rights to light in this project arises because some issues raised by rights to light are unique, or 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.[7]

1.8 In the Chapters that follow we make frequent references to the recommendations we made for the general reform of the law of easements in the Easements Report. Those recommendations would clarify and simplify the law. We have approached this project on the basis that our earlier recommendations on the general law of easements will be implemented in the near future; the provisional proposals that we make in this project therefore build upon and complement our previous recommendations.

The decision in *Heaney*

1.9 Following publication of the Easements Report, the Department for Communities and Local Government expressed an interest in the Law Commission undertaking a project addressing perceived problems with the way that rights to light operate. The Department's interest stems largely from a recent case, *HKRUK II (CHC) Ltd v Heaney*[8] ("*Heaney*") which related to the availability of injunctions in the context of infringements of rights to light.

[5] Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com No 327.

[6] The Easements Report, para 1.12.

[7] The reasons for this are complicated. It is a combination of factors including that rights to light are relatively easy to acquire, leading to a prevalence of them, and that they are likely to be less easy to accommodate on a redevelopment.

[8] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

1.10 We consider the *Heaney* decision in detail in Chapter 5. It has been suggested that *Heaney* has had a detrimental effect on the way in which disputes involving rights to light are approached. The Association of Light Practitioners has said that the effect of the *Heaney* decision was to inform those who engage with rights to light that:

> (1) market practice for resolving rights to light issues was not a reflection of the legal position;
>
> (2) the threshold for getting an injunction where a right to light is infringed was lower than previously thought;
>
> (3) it is questionable whether the conduct of the parties is relevant when deciding whether an injunction would be granted; and
>
> (4) delaying matters, as an adjoining owner, could increase compensation.

1.11 Accordingly, there is now 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.[9]

1.12 When we highlighted the need for a separate investigation of rights to light in the Easements Report we were aware of the fact that some landowners are not interested in protecting their entitlement to light, but rather exploiting the right that protects it. It has long been open to landowners to threaten to prevent, or to cause the demolition of, a development by pursuing an injunction unless a significant payment is made for the release of the right. In 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.

1.13 As a consequence, it has been suggested that we have reached the point where:

> Most seasoned developers would tell you that, particularly in a City Centre, the two main constraints on development are planning and rights of light.[10]

1.14 If that is correct, then it is a serious concern. The availability of modern, good quality office, residential and commercial space is important to the success of modern town and city centres. To the extent that lenders and developers have become more cautious following the decision in *Heaney*, there is the potential that this might contribute to a shortfall in the number of new buildings required to satisfy the needs of businesses and of our urban population.

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

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

1.15 It is not the case that development should be allowed to proceed no matter what the cost, and we have approached this Consultation Paper on the basis that rights to light are valuable protections that should be respected. But so must the legitimate interests of those involved in developing land, who are deeply concerned about the uncertainty of the current law and the risk of that uncertainty being exploited by those who benefit from rights to light. This project is therefore an examination of the balance between the competing interests of those groups to ensure that the correct balance is struck: one that fosters economic growth, through the beneficial and efficient use of land, whilst protecting legitimate private rights in a legal context that is more transparent, fairer and easier to use than now.

THE SCOPE OF THE PROJECT

1.16 In undertaking this project we have borne in mind that light can be vitally important to some owners, while to others it affords no more than a powerful bargaining position. The tension between the two is not new and was considered by Lord Macnaghten in *Colls v Home and Colonial Stores Ltd*:

> … the Court ought to be very careful not to allow an action for the protection of [a right to light] to be used as a means of extorting money. Often a person who is engaged in a large building scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some [rights to light], which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.[11]

1.17 The balance between those benefiting and those burdened by rights to light is influenced by numerous factors. Consequently, we examine the full life-cycle of a right to light in the course of this Consultation Paper. Specifically we examine:

(1) whether the current law as to the means by which rights are acquired and enforced provides for an equitable balance between the owners of rights of light and those wishing to develop land in the proximity;

(2) whether the law can give greater certainty as to whether an injunction will be granted prior to the commencement of works that may impact on a right to light; and

(3) how rights to light come to an end, and whether the existing ways in which this might happen are sufficient.

1.18 We also consider the interrelationship between the town and country planning regime and the private law of rights to light. However, our project does not consider whether the protection of light in the planning regime is adequate – we only examine the impact of the planning regime on the law relating to rights to light.

[11] [1904] AC 179, 193.

CONSULTATION PAPER STRUCTURE AND A BRIEF OVERVIEW OF OUR PROPOSALS

Chapter 2

1.19 Chapter 2 is an overview of the law relating to rights to light, and a brief consideration of the town and country planning regime and section 237 of the Town and Country Planning Act 1990.

Chapter 3

1.20 Chapter 3 considers the acquisition of rights to light by long use[12] and we make a provisional proposal that rights to light should, for the future, not be able to arise in this way.

Chapter 4

1.21 In Chapter 4 we examine when interference with a right to light is actionable. We examine the legal test, and explain how specialist rights to light surveyors approach this in practice.

Chapter 5

1.22 In Chapter 5 we consider the primary remedies where a right to light is interfered with: injunctions and damages. We examine the circumstances where a court might grant an injunction and propose a change to simplify the test that is used. We also consider how the courts assess damages where rights to light are infringed.

Chapter 6

1.23 Chapter 6 explores the potential for a new statutory procedure which would allow landowners who wish to develop their own land to be able to find out, within a fixed timeframe, whether neighbours who benefit from rights to light wish to protect those rights by way of an injunction.

Chapter 7

1.24 In Chapter 7 we consider how rights to light come to an end, including an examination of the role played by section 237 of the Town and Country Planning Act 1990. We examine the recommendation made in the Easements Report to extend the jurisdiction of the Lands Chamber of the Upper Tribunal to discharge and modify easements created after the implementation of that recommendation, and make a provisional proposal to extend that recommendation so that rights to light currently in existence will also come within the Lands Chamber's jurisdiction.

Chapter 8

1.25 We conclude the Consultation Paper by setting out in Chapter 8 each provisional proposal and question asked in the Chapters that precede it.

[12] This is known as prescription. See Chapter 2, para 2.27 and following below.

THE IMPACT OF REFORM OF RIGHTS TO LIGHT

1.26 Reform of the law as it relates to rights to light is likely to have implications for the economy and wider society, as well as for the parties to rights to light disputes. Our final policy recommendations will be informed by a consideration of the practical impact of the options for reform, and the Impact Assessment that we publish with our final Report will be considered by Government when deciding whether to accept or reject our recommendations. We therefore ask consultees to assist us by providing evidence relating to the following issues (and any other issues that consultees feel may be relevant). However, we appreciate that confidentiality will be an issue for many consultees. Our preference would be for appropriately anonymised figures wherever possible: it is important that we are able to make reference to the evidence in our published Report. Where consultees prefer that their responses remain confidential we ask that they be clearly marked as such.

1.27 We are keen to hear how rights to light disputes influence developments across England and Wales. Under current economic conditions many developments likely to be affected by rights to light issues are situated in central London, and we recognise that much of the available data may therefore relate to this location. We look forward to hearing from consultees who live or work in London, but would particularly value responses from those consultees with experience of rights to light issues outside the centre of London, whether it be in a different metropolitan area or elsewhere.

Funding

1.28 We understand that as a result of the High Court's decision in *Heaney* it has become more difficult to secure funding for development projects.[13]

1.29 We would be interested to hear consultees' views on this matter. Does the possibility of right to light claims make it harder to secure funding? Are particular sorts of development disproportionately affected? What additional steps, if any, must a developer now take to reassure lenders?

1.30 We would be grateful for any evidence that consultees can provide which illustrates the impact of possible rights to light claims on the funding of development projects. Are consultees aware of any developments which have failed to secure financing as a result of potential or actual rights to light disputes? If so, what are the costs associated with these types of frustrated developments?

Prevalence of disputes

1.31 Reports in the business and legal press suggest that rights to light claims will certainly delay, and therefore add to the cost of, a development. A number of high profile developments in London have been so delayed.

[13] See S Taylor, "Indemnity insurance for conveyancing" (2012) 156/48 *Solicitors Journal* 14, 14 to 15.

1.32 For example, in 2005 there was a "long-running legal dispute" over rights to light in connection with a £150 million office and retail development on New Street Square.[14] Similarly, a proposed 139,200 sq ft development at 12/14 New Fetter Lane was faced with six claims relating to rights to light. All six were eventually settled through negotiation, but only after the City of London Corporation expressed its willingness to use its powers under section 237 of the Town and Country Planning Act 1990.[15]

1.33 In addition, a £500 million development at 20 Fenchurch Street,[16] and a 270,000 sq ft development at 1 Mitre Square,[17] were each held up by rights to light disputes and were able to go ahead only after the City of London Corporation authorised the use of its powers under section 237.

1.34 Given the proliferation of rights to light and the density of buildings in our urban centres, it is reasonable to assume that similar issues impinge upon a large number of new developments. We would be grateful for any information that consultees can provide as to the frequency with which rights to light disputes arise during property developments in England and Wales.

1.35 We ask consultees to provide evidence as to the proportion of developments which involve rights to light, and evidence of any attendant delays. We would also be interested to know if consultees are aware of any plans for developments which have either been unable to go ahead or had to be altered because of rights to light disputes.

Costs of disputes

1.36 We are also keen to hear from consultees about the costs involved in a right to light dispute. Accurate financial information is not easy to come by – most such claims are settled by negotiation, and are therefore protected by confidentiality clauses.

[14] See M Jansen "LandSecs settles Midtown rights-to-light dispute" (4 November 2005) *Building.co.uk* (http://www.building.co.uk/professional/landsecs-settles-midtown-rights-to-light-dispute/3058487.article) (last visited 6 February 2013).

[15] For an explanation of section 237 of the 1990 Act see Chapter 2, para 2.49 and following below. The threatened use of section 237 reportedly led to a "multi-million pound settlement" in relation to one of the claims. See J Whitmore, "Great Portland clear for take-off after rights-of-light deal" (25 May 2012) *Property Week* (available online; subscription required); and L Mallett, "Rights-of-light claims cast pall over City schemes" (16 September 2011) *Property Week* (available online; subscription required).

[16] See P Gower, "City's Walkie-Talkie rescue: Corporation intervenes to protect tower from rights-of-light litigation" (6 May 2011) *Property Week* (available online; subscription required) and S Fraser, "City is right to protect "Walkie-Talkie" from rights-of-light claims. Over and out" (3 June 2011) *Property Week* (available online; subscription required).

[17] See P Gower, "City plan is ray of light for 1 Mitre Square scheme" (15 April 2011) *Property Week* (available online; subscription required).

1.37 The following figures can be derived from *Heaney*:

	£ (thousands)
Projected cost of development:	28,530[18]
Anticipated profit:	6,908[19]
Reduction in price paid for property to allow for right to light claims:	350[20]
Contingency fund to deal with right to light claims:	200[21]
Estimated cost to development if plans had been revised early to avoid infringement:	1,010[22]
Estimated cost to development of court ordered rebuilding work:	1,785[23]
Theoretical damages that the judge would have ordered in substitution for an injunction:	225[24]

1.38 The £200,000 set aside to deal with rights to light claim can be understood:

As a percentage of the projected total cost of development:	0.7
As a percentage of anticipated profit:	2.81

1.39 The estimated cost of the injunction can be understood:

As a percentage of anticipated profit:	25.84[25]

1.40 We must be cautious about reading too much into a single example, particularly because the figures no doubt reflect the relevant local property market. However, they give an indication of the extent to which an informed commercial developer will consider rights to light when setting the budget for a project.

[18] £18,750,000 (cost of acquisition of property) + £9,780,000 (projected budget for redevelopment): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [14] and [18]. This was the position in January 2008; the actual total cost of the project including the cost of acquisition and finance charges was £35,814,161 (October 2009): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [33].

[19] See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [87].

[20] See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [14].

[21] See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [18].

[22] This is the net additional cost agreed by both parties' surveyors (a figure derived from savings set against extra expenditure): see [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [56].

[23] See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [27]. This figure is the half way point between the radically different estimates provided by both parties to the dispute: £1,115,000 and £2,455,000.

[24] See [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [81] and following. For an explanation of how damages in substitution for an injunction are assessed, see Chapter 5, para 5.71 and following below.

[25] This is the estimated cost of the rebuilding work as against the anticipated profit expressed as a percentage.

1.41 Do the figures of the costs of disputes discussed in this Chapter conform with consultees' experiences of the cost to a development of rights to light issues? Have these experiences changed since *Heaney* was decided?

1.42 We understand that with most property developments where rights to light may be an issue a developer will need to budget for the services of a specialist rights to light surveyor and the possible costs of a negotiated settlement. Further costs incurred may include indemnity insurance, ongoing expert and legal fees, the costs of altering plans as new information comes to light and, perhaps most importantly, the inherent cost of delay (lost income, increased construction costs, internal management costs, additional debt financing costs and so on). We would be grateful if consultees could provide us with evidence as to the costs incurred in engaging with rights to light disputes.

1.43 We ask consultees to provide us with evidence of the costs to developers of engaging with rights to light disputes, particularly with regard to:

(1) the costs involved in preparing for rights to light disputes, including the costs of indemnity insurance, legal fees and the instruction of surveyors;

(2) the cost to developments of delay caused by rights to light disputes;

(3) the cost to developments of altering development plans as a result of rights to light disputes; and

(4) the amounts set aside (expressed as a percentage of anticipated profits or otherwise) to deal with potential rights to light disputes.

1.44 We would also be grateful for evidence as to the costs incurred by those with the benefit of rights to light in dealing with rights to light disputes. These costs are likely to include the services of a specialist surveyor, and further professional and legal fees as the dispute progresses. This will culminate in the costs of an action if the dispute cannot be settled by negotiation.

1.45 We ask consultees to provide us with evidence of the costs to owners of rights to light of engaging in rights to light disputes.

Other means of resolving rights to light disputes

1.46 Alternative ways in which right to light issues are resolved will also incur costs. For example, section 237 of the Town and Country Planning Act 1990 has been used, particularly by the City of London Corporation, both to encourage negotiated settlement, and to force a resolution where no such settlement could be reached.[26] However, section 237 is not a quick process,[27] and nor is it a cheap one.

[26] See paras 1.32 and 1.33 above.

[27] See Chapter 7, para 7.55 and following below.

1.47 We would be grateful for any evidence that consultees can provide about alternative ways in which rights to light disputes are commonly resolved and the costs of doing so, including evidence about the costs of a local authority using section 237 of the Town and Country Planning Act 1990 to resolve rights to light disputes.

The amenity value of light

1.48 It may in many cases be possible to understand lost light in terms of diminution of value of the affected property.[28] However, such an analysis will often fail to capture an essential quality of the loss: the amenity that it provides.[29] Specialist rights to light surveyors are often required to value the amenity of light. We would be grateful for any evidence professionals or other interested consultees can give us relating to how light is or should be assigned monetary value.

1.49 We would appreciate any evidence that consultees can provide on how the amenity provided by natural light is, or might be, valued.

1.50 We would also be interested to hear the views of those who benefit from rights to light. Natural light in the home contributes to the quality of life of those who live there, bringing psychological and physiological benefits. Maximising natural illumination also has environmental advantages. How would consultees value or evaluate natural light? Do consultees have any particular experiences involving access to natural light, rights to light or disputes over the same?

1.51 We invite consultees to make any further comments, or provide any additional evidence, which they feel may be relevant when assessing the practical and economic impact of rights to light.

ACKNOWLEDGEMENTS

1.52 We are grateful to the many people and organisations that have assisted us with this project so far.

1.53 We have benefited from meetings with numerous legal practitioners, including Stephen Bickford-Smith (Landmark Chambers), Andrew Francis (Serle Court Chambers), Patrick Robinson (Herbert Smith Freehills) and Matthew Baker (Pinsent Masons). We have also found of great assistance meetings with surveyors specialising in rights to light. We would like to record our particular thanks to Gordon Ingram (GIA) and the members of the Association of Light Practitioners, and to Craig Robinson (Savills).

1.54 We are also grateful to Estelle Dehon (Cornerstone Barristers), Professor Tom Allen (University of Durham) and Dr Emma Waring (University of York) for very kindly reading through and commenting on the human rights material in Chapter 7.

[28] For a discussion of damages for diminution in value see Chapter 5, paras 5.61 to 5.63 below.

[29] For a discussion of the difficulties of assessing damages for loss of amenity see Chapter 5, paras 5.59 to 5.60 below.

CHAPTER 2
OVERVIEW OF THE CURRENT LAW

INTRODUCTION

2.1 In this Chapter we set out briefly the current law relating to rights to light under the following headings:

(1) rights to light;

(2) the creation of a right to light;

(3) the infringement of a right to light and the remedies available;

(4) the extinguishment of a right to light; and

(5) the town and country planning regime.

This Chapter provides an overview of the law and a consideration of relevant recommendations for reform made in the Easements Report. Where relevant we go into more detail about these issues in later Chapters.

RIGHTS TO LIGHT

2.2 Rights to light – in the sense intended in this paper – are easements. Easements are property rights. Most easements are rights allowing one landowner[1] to do something on another's land; the most common example is a private right of way over a neighbour's property. A right to light is one of a small number of "negative easements".[2] Rather than giving a landowner the right to do something, negative easements give the landowner the right to prevent a neighbour from doing something. A right to light entitles a landowner to natural light through (usually) a window, and so enables him or her to prevent a neighbour from interfering with or blocking the natural light travelling over that neighbour's land.[3]

2.3 Like all easements, a right to light is valid only if it fulfils the conditions laid down in *Re Ellenborough Park*:[4]

(1) there must be a "dominant" and "servient" tenement;

(2) the right must "accommodate and serve" the dominant tenement;

(3) the dominant and servient tenements must be owned by different persons; and

[1] We use this term as a shorthand for the owner of a freehold or leasehold interest in land.

[2] The negative easements are rights of support, rights to air and water through defined channels and rights to light.

[3] See the judgment of Lord Macnaghten in *Colls v Home & Colonial Stores Ltd* [1904] 1 AC 179 at 185 to 186 and S Bickford-Smith and A Francis, *Rights of Light*: *The Modern Law* (2nd ed 2007) para 2.1. We refer to this book as "*Rights of Light: The Modern Law*" throughout this Consultation Paper.

[4] [1956] Ch 131.

(4) the easement must be capable of forming the subject matter of a grant.

We considered these in detail in the Easements Report[5] and we explore them only briefly, in the context of rights to light, below.[6]

There must be a dominant and servient tenement

2.4 A right to light cannot exist unless there is land that benefits from the right, and land that is burdened by it. These are often referred to respectively as the dominant and servient tenements or estates.

2.5 In this Consultation Paper we often refer to the owner of the benefited land as the "dominant owner", and the owner of the burdened land as the "servient owner".

The right to light must "accommodate and serve" the dominant tenement

2.6 An easement must confer a benefit on the dominant land; it is not sufficient that it benefits the owner for the time being personally:

> … the test is whether the right makes the dominant tenement a better and more convenient property.[7]

2.7 The dominant land and servient land need not directly adjoin one another:

> In the case of rights to light, frequently the dominant and servient tenements are separated by land belonging to a third party, or a public or private road.[8]

The dominant and servient tenements must be owned by different persons

2.8 The dominant and servient tenements must be in different ownership not only when the easement is created, but also subsequently – if the dominant and servient land comes into the same ownership and possession then the easement ceases to exist.[9] However, a landlord can grant to a tenant a right to light, or any other easement, over land that the landlord owns but that is not subject to the tenancy, because although the dominant and servient land are in the same freehold ownership, the tenanted land is not in the landlord's possession. Only where ownership and possession coincide can there be no easement.

2.9 We discussed this requirement in detail in the Easements Report and recommended that this rule should not apply in respect of easements affecting registered land.[10]

5 See Chapter 1, para 1.5 and following above.

6 For more detail see the Easements Report, paras 2.23 to 2.29.

7 C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th ed 2012) para 27-008. We refer to this book as "*Megarry and Wade*" throughout this Consultation Paper.

8 *Rights of Light: The Modern Law*, para 1.22.

9 For more detail see *Megarry and Wade*, para 29-014.

10 See the Easements Report, para 4.19 and following.

The right to light must be capable of forming the subject matter of a grant

2.10 The law recognises only those easements that are regarded as able to be granted by deed; the authors of *Megarry and Wade* put it this way:

> The principles underlying [the] rule are that only certain kinds of rights are capable of being rights of property which one person can convey to another, and that every easement in theory owes its existence to a grant by deed.[11]

2.11 The details of this requirement are complex, but one of its most important features is that the right must be clear and certain.[12] Thus there can be no easement giving the right to a view from a window, because this would involve imposing a wide and indefinite burden upon the servient land.[13] So far as rights to light are concerned, this requirement means that a right to light must be for the benefit of apertures in a building – typically windows.[14] This provides the requisite degree of certainty by helping to define the area of the servient land over which the light passes.

2.12 It has been held that greenhouses are capable of benefiting from rights to light,[15] and it has been suggested that modern buildings that "employ glazed curtain walling supported by steel and concrete frames" would be able to acquire rights to light despite there being no obvious aperture.[16]

2.13 However, objects that do not have apertures, such as solar panels, are almost certainly not capable of benefiting from a right to light.[17]

2.14 The protection of solar panels by easements of light would be problematic. The "channel" through which the light protected under the current law passes is defined by the aperture in the building on the dominant land. By contrast a panel benefits from light from all angles, so it would be difficult to define the extent of the easement. The fact that solar panels enable a landowner to harvest solar energy rather than to illuminate a room would also raise difficult questions about the extent of protection provided by the right.

[11] *Megarry and Wade*, para 27-014; see also J R Gaunt and P Morgan, *Gale on Easements* (19th ed 2012) para 1-36 and following. We refer to this book as "*Gale on Easements*" throughout this Consultation Paper.

[12] For more detail see *Gale on Easements*, paras 1-41 to 1-44.

[13] See *Dalton v* Angus (1881) 6 App Cas 740, 824. See also K Gray and S F Gray, *Elements of Land Law* (5th ed 2009) para 5.1.48

[14] See *Levet v Gas Light and Coke Company* [1919] 1 Ch 24. See also *Megarry and Wade*, para 30-011.

[15] See *Allen v Greenwood* [1980] Ch 119.

[16] See *Rights of Light: The Modern Law*, para 4.14; the authors suggest that "… the aperture can properly be regarded as that part of the whole area between floor and ceiling slabs intended to admit light".

[17] The point has not been tested by the courts but it is difficult to see how the law relating to rights to light can be extended to guarantee the flow of light to a solar panel, particularly bearing in mind the anomalous nature of negative easements and the reluctance of the courts to extend this class of easements any further (see *Gale on Easements*, para 1-41). See A Colby and P Williams, "Shedding light on solar panels" (2012) 1217 *Estates Gazette* 105. See also G Hobson and M Dowden, "Reversal of fortune" (2012) 162 *New Law Journal* 22.

2.15 It has been suggested that the law should be changed so as to enable easements to protect the light to a solar panel.[18] As matters stand, however, where neighbours wish to protect the passage of light to their solar panels they can do so by creating a restrictive covenant (or, after implementation of our recommendations in the Easements Report, a negative land obligation)[19] not to build so as to obstruct the passage of that light.

2.16 So it is already possible to create an interest in land for the protection of a solar panel, although we think this would be unusual. However, if it were possible to protect a solar panel with an easement the position would be different as regards non-consensual creation. Easements can arise by prescription,[20] whilst restrictive covenants and, in the future, negative land obligations must be created expressly.

2.17 We think that this is the correct position for solar panels. If prescription were to operate to create an enforceable right to the passage of light to solar panels then the difficulties that arise from a proliferation of rights to light would be exacerbated. We consider the problems that arise in respect of prescription for rights to light in Chapter 3. Allowing prescription for solar panels would be particularly problematic as it would be difficult for dominant and servient landowners to establish the channels of light that benefit the panel. As a consequence, the extent of the right would be uncertain and, potentially, very wide.

THE CREATION OF A RIGHT TO LIGHT

2.18 Rights to light can be created by express grant, by implication and by prescription.[21]

Express grant

2.19 The express creation of a right to light is most likely to occur on a sale or letting of part of a property, when the seller transfers land and either grants to the buyer or reserves[22] to him or herself one or more easements. In those circumstances the grant of positive easements – of way, or of drainage, for example – would be more usual, but occasionally a right to light might be granted or reserved. Equally, a right to light or any other easement can be granted to a neighbour at any time in the absence of any other transaction, usually for a price. An expressly

[18] A Colby and P Williams, "Shedding light on solar panels" (2012) 1217 *Estates Gazette* 105.

[19] Following the implementation of the recommendations made in the Easements Report one landowner would agree with another to the grant of a negative land obligation. See the Easements Report, Part 6.

[20] See para 2.27 below.

[21] See the Easements Report, para 2.51 and para 3.11 and following. It is also possible for easements to be created by statute.

[22] Where A sells part of his property to B, he may wish to retain a right to walk (or a right to receive light) over the land that he is selling to B. In that situation we say that A "reserves" to himself an easement over B's land.

granted right will almost always be obvious on examination of the title (whether registered or unregistered) to the benefited or burdened land.[23]

2.20 In the Easements Report we discussed the creation of easements through section 62 of the Law of Property Act 1925.[24] This provision writes into the express terms of a conveyance of a legal estate "all … liberties, privileges, … rights, and advantages whatsoever" enjoyed with the land at the time of the conveyance.

2.21 Curiously, this provision has the effect of transforming precarious benefits enjoyed with permission into full legal rights. So, where A (a tenant of Blackacre) enjoys light over his landlord's adjoining land (Whiteacre) with his landlord's permission, and A subsequently purchases the freehold of Blackacre, section 62 will operate to transform the enjoyment of the light into a legal easement benefiting A's newly acquired freehold.

2.22 We noted in the Easements Report that section 62 operates as a trap for the unwary, and recommended that it should no longer operate to transform precarious benefits into legal easements on a conveyance of land.[25] We therefore do not discuss section 62 any further in this Consultation Paper.

Implied grant

2.23 Easements can arise by implied grant where, on a sale or other disposition of part of a property, the full extent of the rights that benefit or burden the estates involved have not been set out expressly in the document that effects the disposition.[26]

2.24 There is currently no single principled basis for the implication of easements. Easements can arise by implication where:

(1) an easement is essential for the use of the land – for example where land would otherwise have no access whatsoever;

(2) an easement is necessary to allow the land disposed of or retained to be used in the manner intended by both parties at the date part of the seller's land is disposed of to the buyer;

[23] The Land Registration Act 2002 requires that where title to the burdened land is registered at Land Registry, the dominant owner of an easement burdening that land must protect the priority of the easement (so that it is enforceable against the servient owner's successors in title) by recording it as a notice on the burdened land's title. Where title to the dominant land is registered, the easement must also be registered as benefiting that land. Easements that arise by prescription do not need to be registered – they fall within the category of "overriding interests" listed in Schedule 3 to the 2002 Act. For more information see the Easements Report, paras 2.55 to 2.63.

[24] Easements Report, paras 3.52 to 3.70.

[25] Easements Report, para 3.64.

[26] See the Easements Report, para 3.11 and following.

(3) the seller has used one part of his or her land for the benefit of another before the disposition, under the rule in *Wheeldon v Burrows.*[27]

2.25 The proliferation of rules makes the law unnecessarily complex. In the Easements Report we recommended the abolition of the existing rules and their replacement with one statutory method.[28] Under that provision easements would only arise by implied grant or reservation where the easement was "necessary for the reasonable use of the land" which is being conveyed or retained. It would be possible for rights to light to be created in this way.[29]

2.26 Rights that are created by implied grant or reservation take effect at law immediately upon creation and bind successive owners of the land.[30]

Prescription

2.27 Easements arise by prescription where a landowner makes use of a neighbour's land for a long period without permission, openly and peaceably, in a way that could amount to an easement. In these circumstances the law may create an easement that is attached to the user's land.[31]

2.28 Generally, use of a neighbour's land in this way will be obvious; a right of way, for example, cannot arise by prescription unless it has been used openly for 20 years. However, rights to light are different; the "use" of the servient land is passive. The owner of the dominant land does not need to do anything; all that is required is for the windows of a building to receive light.

2.29 We consider in detail whether and how rights to light should be acquired by prescription in Chapter 3. What follows is a consideration of the three methods of prescription that now exist, and the recommendations we made in the Easements Report.

2.30 There are currently three ways in which rights to light can arise by prescription.[32]

[27] (1879) LR 12 Ch D 31. The rule in *Wheeldon v Burrows* provides that on a disposition of part of a property, quasi-easements used by the seller may be transformed into easements in favour of the buyer. A quasi-easement is said to exist where a landowner uses one part of his or her land for the convenience or other advantage of another part, and that use could have been an easement if the two parts of the land were in different ownership. See the Easements Report, para 3.19 and following.

[28] The Easements Report, para 3.45. We also recommended that section 62 of the Law of Property Act 1925 should no longer have the effect of transforming permissive rights into easements; see the Easements Report, paras 3.52 to 3.70.

[29] For example, a landlord may let a commercial greenhouse to a tenant. Both the landlord and the tenant know that the greenhouse will be used to grow flowers and that natural light is needed for that purpose. However, no express right to light over the landlord's neighbouring land is granted to the tenant in the lease. In these circumstances a court could reasonably form the view that a right to light is "necessary for the reasonable use" of the greenhouse, bearing in mind the knowledge of both parties as to the future use of the greenhouse at the time of the disposal. See the Easements Report, para 3.45.

[30] Following the provisions in the Land Registration Act 2002, sch 3, para 3.

[31] See the Easements Report, para 3.71 and following.

[32] See the Easements Report, para 3.98 and following.

Prescription at common law

2.31 At common law, prescription arises by virtue of continuous use without force, openly and without permission since 1189. This makes prescription at common law of limited practical use.[33]

Prescription by lost modern grant

2.32 This method of prescription is based on the legal fiction that where use of land has continued, apparently legitimately and without force, openly and without permission, for 20 years, there must have been a grant of the right which has somehow been lost.[34] The law "will adopt a legal fiction that [a grant of an easement] was made".[35] However, if it can be shown that there was nobody who could lawfully have made the grant throughout the entire 20 year period then no easement is created.

Prescription under the Prescription Act 1832

2.33 The 1832 Act contains distinct regimes for the prescriptive acquisition of rights to light and for easements generally.[36] We consider only the regime relevant to rights to light here.

2.34 The 1832 Act provides for the creation of a right to light where light has been enjoyed for the period of 20 years before a claim to the easement is made. Only the interruption of the light for a period of one year or more, or the written consent or agreement of the servient owner to the use of the light will prevent the right being acquired.[37] Unlike the two other methods of prescription, there is no need for the use to be "as of right" (in other words, as if a lawful easement existed); one effect of this is that, unlike any other easement, it is possible for a tenant to acquire a right to light by prescription against his or her own landlord.[38]

2.35 For an easement to arise under the 1832 Act the 20 years' use must be prior to some "suit or action".[39] This is in contrast to prescription arising under lost modern grant where the 20 year period of use can be at any time; on completion of the 20 year period, a right is brought into being.[40] A suit or action could be, for example, a claim in nuisance brought by the dominant owner.

[33] See the Easements Report, para 3.98.

[34] See the Easements Report, paras 3.99 to 3.101.

[35] See *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, 552.

[36] See the Easements Report, paras 3.102 to 3.108.

[37] This is the case even where local custom would have prevented a right arising under the other methods of prescription. We discuss the Custom of London in the Easements Report, para 3.154 and following, and Chapter 3, n 10 below.

[38] For more information on how the 1832 Act operates as between landlords and tenants see *Gale on Easements*, para 1-32 and *Megarry and Wade*, para 28-054 and following.

[39] Prescription Act 1832, s 4. In *Gale on Easements*, para 4-53, the position is explained as follows: "… unless or until the claim or matter is brought into question in some action, the right … remains inchoate; but the commencement of such an action fixes the period and enables the right to be established".

[40] For an example of a case where the distinction was relevant, see *Marine & General Mutual Life Assurance Society v St James' Real Estate Co Ltd* [1991] 2 EGLR 178.

2.36 Section 2 of the Prescription Act 1832 states that the use must be continuous, or "without interruption". This has a technical meaning – non-use for less than one year does not count as an "interruption". This leads to the well-known but strange result that prescriptive use for 19 years and one day will almost certainly guarantee the user an easement, on the basis that the servient owner is unable to prevent the use by interruption, provided that the "suit or action" to claim the easement is brought on the twentieth anniversary of the commencement of the use.

Our recommendations in the Easements Report

2.37 We recommended in the Easements Report the abolition of the three ways in which easements (including rights to light) can arise by prescription, and their replacement with a single statutory method. Our recommendation would involve the repeal of the Prescription Act 1832.

2.38 We recommended[41] that an easement will arise by prescription on completion of 20 years' continuous qualifying use.[42] For use to be qualifying it must:

(1) be without force, without stealth and without permission;

(2) not be use which is contrary to the criminal law, unless such use can be rendered lawful by the dispensation of the servient owner;

(3) be carried out by, and against, a freeholder;[43] and

(4) be carried out at a time when the land is in the freehold ownership of a person or body who is competent to grant an easement over it.[44]

Light obstruction notices

2.39 We noted above that under the Prescription Act 1832 the interruption of the use of the "servient" land for one year or more will prevent an easement from being acquired.[45] Where light is obstructed for one year or more, and the obstruction is then removed, the 20 year period for prescription can start again.

[41] See the Easements Report, paras 3.115 to 3.187 and the draft Bill annexed to the Report.

[42] There is no requirement for the 20 years' use to be prior to "some suit or action" (see para 2.35 above); an easement will arise whenever 20 years' use has been completed.

[43] This requirement would prevent the acquisition of rights to light by a tenant against his or her landlord.

[44] We also recommended that local customs that currently prevent easements arising by prescription should continue to do so; the Custom of London would therefore be able to prevent prescription arising under the scheme we recommended. For an explanation of the Custom of London, see the Easements Report, para 3.154 and following.

[45] See para 2.36 above.

2.40 Prior to the Rights of Light Act 1959 a servient owner could only interrupt the passage of light with a physical structure. The 1959 Act provides for a notional interruption of light. Registering a light obstruction notice[46] by following the procedure set out in the Act[47] results in the light crossing the servient owner's land being treated as having been interrupted as if an opaque structure had been erected.[48] If the light obstruction notice goes unchallenged[49] by the recipient then, for the purposes of the Prescription Act 1832, the passage of light is treated as having been interrupted, and the prescription "clock" is reset.[50] It is thought that a light obstruction notice would also prevent the acquisition of an easement of light under the principle of lost modern grant, by stopping the continuous use required under that principle.[51]

THE INFRINGEMENT OF A RIGHT TO LIGHT AND THE REMEDIES AVAILABLE

2.41 A right to light enables the dominant owner to prevent the obstruction of light by the servient owner. However, a right to light does not give a right to the maximum light ever received through the window; and therefore it is not the case that any obstruction of the light, however trivial, is an infringement of the right. The dominant owner is entitled to sufficient light for the comfortable use and enjoyment of his or her property, taking into account both the current use and potential future uses.[52] If the servient owner obstructs the light, and the amount of light received falls below this level of sufficiency, then the obstruction will constitute a nuisance. We discuss this in Chapter 4.

2.42 The primary remedies available where a right to light is infringed are injunctions and damages. We discuss these in Chapter 5.

[46] A "light obstruction notice" is nowhere defined in statute, but is a common shorthand for notices given under the provisions of the Rights of Light Act 1959, s 2.

[47] A person wishing to rely upon a light obstruction notice must register the notice as a local land charge. The application to register the notice must be accompanied by a certificate issued by the Lands Chamber of the Upper Tribunal confirming that adequate notice of the proposed application has been given to all persons who are likely to be affected (or a certificate confirming that the case is one of exceptional urgency). For more details on this procedure see *Megarry and Wade*, para 28-101 and the Rights of Light Act 1959, s 2.

[48] Rights of Light Act 1959, s 3(1).

[49] The notice can be challenged on the basis that a person already has an easement.

[50] Light obstruction notices last for a maximum of one year. The circumstances in which a light obstruction notice may last for less than a year are where the registration of the light obstruction notice is cancelled or where the light obstruction notice was only temporary. For the circumstances in which a light obstruction notice may be registered only temporarily see the Rights of Light Act 1959, s 2(3)(b) and Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010 No 2600) r 43.

[51] See M Barnes and J Bignell, "The Rights of Light Act 1959 and a fiction too far?" [2009] *Conveyancer and Property Lawyer* 474, 483.

[52] See Chapter 4, para 4.13 and following below.

THE EXTINGUISHMENT OF A RIGHT TO LIGHT

2.43 Easements are resilient, and rights to light are no exception. A right to light can only be extinguished in a limited number of ways:

(1) by agreement;

(2) by unity of ownership and possession;

(3) by abandonment; and

(4) by statute, and in particular by section 237 of the Town and Country Planning Act 1990.

Extinguishment by agreement

2.44 To be effective the extinguishment must be made by deed, although there is, at present, no need to inform Land Registry of the release of the right for it to take effect. We made a recommendation in the Easements Report that, where a registered easement[53] is released expressly, the easement should remain in existence until it ceases to be registered.[54]

Extinguishment by unity of ownership and possession

2.45 We have explained above that where the dominant and servient land come into the same ownership and possession any easement – including a right to light – is extinguished.[55] For example:

> The owner of Whiteacre (a freehold property), A, has the benefit of a right to light over Blackacre (also a freehold) which belongs to his neighbour, B. If A purchases Blackacre from B then the right to light is extinguished. If A subsequently sells Blackacre back to B then a new right to light must be created in the transfer otherwise A will not have the benefit of a right to light.

2.46 The rule does not apply where the properties involved are not both freehold estates. So if, in the above example, Blackacre is a leasehold estate, then the right to light is not extinguished; in such circumstances it is best regarded as suspended for the period during which the estates are in the same ownership.

Extinguishment by abandonment

2.47 A right to light can be lost by abandonment. This happens where an easement ceases to be used, and the dominant owner intends to abandon the benefit of the right permanently. Whether abandonment has or has not occurred is a question of fact; a court may have to decide whether there is sufficient evidence to infer that the dominant owner intended to abandon the right permanently.

[53] See n 23 above for an explanation of the registration requirements for easements.

[54] See the Easements Report, para 4.52 and following.

[55] See paras 2.8 and 2.9 above.

2.48 Applying the law of abandonment as it relates to rights to light is not always straightforward. We consider the law of abandonment in greater detail in Chapter 7.[56]

Extinguishment by section 237 of the Town and Country Planning Act 1990

2.49 Section 237 of the Town and Country Planning Act 1990 ("section 237") empowers local authorities to override rights, including rights to light,[57] in certain circumstances. We set out its provisions in Appendix A to this Consultation Paper.

2.50 The effect of section 237 is that where a local authority acquires or appropriates[58] land for planning purposes, the authority or any person to whom it sells or leases the land may use the land or build on it in accordance with a planning permission even though doing so would interfere with a neighbour's interest or right, including a right to light. Although the section only refers to "overriding" the right (suggesting that the right remains in existence, albeit unenforceable), the section has generally been interpreted as having the effect of extinguishing the right altogether.[59] The owner of the right is entitled to compensation.[60]

2.51 Section 237 has been used by local authorities to facilitate development by third parties where it would otherwise be prevented, or put at serious risk, because of the existence of rights to light burdening the land to be developed;[61] this can be achieved by the local authority taking a transfer of the land and then transferring or leasing it back to the developer. This arrangement is commonly referred to as a "section 237 scheme".[62] It has been suggested that:

[56] See Chapter 7, paras 7.4 to 7.48 below.

[57] The rights that are subject to the provisions of section 237 are set out in sub-sections (2) and (3): "… any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support", but not the rights of statutory undertakers for the purpose of carrying on their undertaking and rights conferred on a code operator by or in accordance with the electronic communications code.

[58] Appropriation describes the process whereby a local authority formally resolves to hold its own land for a new purpose. For an example of an appropriation of recreational land for the purpose of residential development see *R v Leeds City Council, ex parte Leeds Industrial Co-operative Society Ltd* (1997) 73 P & CR 70.

[59] *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [34] by Peter Smith J: "[the right is] overridden *and extinguished* subject to a right of compensation" (emphasis added). See also *R (Derwent Holdings Ltd) v Trafford Borough Council* [2009] EWHC 1337 (Admin) at [8] by CMG Ockleton (sitting as a deputy High Court judge).

[60] Town and Country Planning Act 1990, s 237(4). The compensation payable is calculated on the basis of the diminution in the value of the neighbour's land, and will not include the loss of a bargaining position or a share of the profit enabled by the interference (see *Clift v Welsh Office* [1999] 1 WLR 796).

[61] See S Fraser, "City is right to protect 'Walkie-Talkie' from rights-of-light claims. Over and out" (3 June 2011) *Property Week* (available online; subscription required).

[62] D Rosen and C Fielding, "The key to success" (2011) 1121 *Estates Gazette* 89.

> [Section 237 schemes are] not a whitewash for the convenience of developers … . However, the timely use of such schemes can unlock stalled development and regeneration projects.[63]

2.52 A local authority can only exercise its power under section 237 to override a right to light where the land burdened by the right has first been acquired or appropriated by the authority for planning purposes. The powers to acquire land compulsorily and by agreement are conferred by sections 226 and 227 of the 1990 Act respectively, and the power to appropriate land for planning purposes is conferred by section 122 of the Local Government Act 1972. We set out those provisions in Appendix A.

2.53 The section 237 power enables a local authority to acquire or appropriate land where it will have the eventual effect of improving – economically, socially or environmentally – the locality. However, the local authority may only proceed with the use of section 237 where there is a compelling case in the public interest to do so.[64] In *R v Leeds City Council, ex parte Leeds Industrial Co-operative Society Ltd*,[65] McCullough J took the view that:

> … an authority cannot properly [exercise its section 237 power] unless it has good reason to believe that interference with such rights is necessary.[66]

2.54 Similarly, it has been suggested that a local authority should use section 237:

> … only as a last resort. This might mean different things in different cases, but it will usually be necessary to demonstrate that reasonable attempts have been made to negotiate with the owners of the rights in question. It can also mean that the local authority will want to be satisfied that the proposed development cannot be cut back or remodelled to respect the adverse rights in question.[67]

2.55 In order to rely upon the power in section 237, the proposed development must relate to the planning purpose for which the land was acquired or appropriated.[68] For example, it has been held that where land has been appropriated for the purpose of regeneration following war damage, and that purpose has been fulfilled, a later development cannot rely upon the earlier appropriation for the

[63] D Rosen and C Fielding, "The key to success" (2011) 1121 *Estates Gazette* 89.

[64] Office of the Deputy Prime Minister, *Compulsory Purchase and the Crichel Down Rules* (31 October 2004) ODPM Circular 06/2004 para 17, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/7691/1918885.pdf (last visited 6 February 2013).

[65] (1997) 73 P & CR 70.

[66] (1997) 73 P & CR 70, 77.

[67] D Rosen and C Fielding, "The key to success" (2012) 1121 *Estates Gazette* 89.

[68] See *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65.

purpose of using the section 237 power; there is "no causal connection or relevance to the appropriation".[69]

2.56 It is the width of the planning purposes for which the land is acquired or appropriated that determines the extent of the section 237 power.[70] Any attempt to use section 237 to facilitate a development which is unconnected with the purpose for which the land was originally acquired or appropriated is likely to be ineffective.

2.57 Section 237 can be a very useful tool in the context of town centre redevelopment and transportation schemes where the existence and ownership of various rights that may affect the land to be redeveloped is uncertain. However, in the rights to light context involving private development schemes[71] section 237 is rarely used. We discuss the reasons for this, and section 237 more generally, in more detail in Chapter 7.[72]

Discharge by section 84 of the Law of Property Act 1925

2.58 Section 84 of the Law of Property Act 1925[73] enables the Lands Chamber of the Upper Tribunal ("the Lands Chamber") to modify or discharge restrictions on the use of land – generally restrictive covenants. It may do so only where it is satisfied that one or more of the following conditions is met:

(1) that following a change in the character of the property or neighbourhood or other circumstances the restriction ought to be deemed obsolete;

(2) that the continued existence of the restriction impedes some reasonable use of the land and either does not give those entitled to it any practical benefits of substantial value or advantage, or is contrary to the public interest, and that money will be an adequate compensation for the loss suffered;

(3) that all those entitled to the benefit of the restriction have agreed by their acts or omissions to its discharge or modification; or

[69] See *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [47] by Peter Smith J. However, contrast the case of *R v City of London Corporation and Royal London Mutual Insurance Society, ex parte Mystery of the Barbers of London* (1997) 73 P & CR 59 which involved the acquisition of a property for "the purpose of securing a development or redevelopment of the area" and a building duly built upon it in 1962. Following an application for judicial review relating to a subsequent redevelopment 33 years later it was held that the purpose for which the site was originally acquired was sufficiently broad so that the use of section 237 several decades later was permissible.

[70] Note that if the original planning purpose is too remote from the proposed development, it is open to the local authority to reacquire or re-appropriate the land for a suitable purpose, thereby renewing the availability of the power: *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [47].

[71] By which we mean developments led by a private property developer rather than a local authority.

[72] See Chapter 7, paras 7.49 to 7.67 below.

[73] We refer to this as "section 84" for the remainder of this Chapter.

(4) that the proposed discharge or modification will not injure those entitled to the benefit of the restriction.[74]

2.59 In the Easements Report we recommended that this jurisdiction be extended to enable the Lands Chamber to make orders for the modification and discharge of easements, although only to rights created after the implementation of the reforms we proposed.[75] We noted that a number of other common law countries have introduced such a jurisdiction, and that its absence in England and Wales has been the subject of adverse comment by the courts.[76] As a result, following the implementation of our recommendations in the Easements Report, it will be possible for rights to light, created after implementation, to be discharged or modified by section 84. We discuss section 84 in more detail in Chapter 7.

THE TOWN AND COUNTRY PLANNING REGIME

2.60 Rights to light evolved long before the state became involved in regulating the built environment. But now the town and country planning regime requires local planning authorities to consider applications by landowners to develop their land by reference to a framework of planning legislation and policy. The co-existence of the law relating to rights to light and the town and country planning regime is important when we consider some policy decisions – in particular, whether it should continue to be possible to acquire rights to light by prescription.[77]

Background

2.61 Most developments[78] of land require permission from the local planning authority.[79] The determination of planning applications is governed by a statutory framework. The two Acts most relevant to the types of development that often impact upon rights to light are the Town and Country Planning Act 1990 ("the 1990 Act") and the Planning and Compulsory Purchase Act 2004 ("the 2004 Act").[80]

2.62 The 1990 Act and the 2004 Act establish the framework within which planning decisions are taken. They do not set out the policies that local authorities are to apply in coming to those decisions. The Acts provide that when a local authority considers a planning application:

[74] See Law of Property Act 1925, s 84(1) and (1A).

[75] See the Easements Report, para 7.35.

[76] See the Easements Report, para 7.30.

[77] See Chapter 3 below.

[78] "Development" is defined by section 55(1) of the Town and Country Planning Act 1990 as "… the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land".

[79] Town and Country Planning Act 1990, s 57.

[80] Both have been significantly amended by the Localism Act 2011.

> … the authority shall have regard to the provisions of the development plan, so far as material to the application … and any other material considerations.[81]

2.63 The "development plan" is the plan formulated at local level.[82] Section 38(6) of the 2004 Act requires a local planning authority to attach special weight to the development plan:

> If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.

Planning policies

2.64 The formulation and application of planning policies involves a balancing exercise; policies often afford a degree of discretion to local authorities when determining a planning application. The policies seen in the development plans vary by locality and, at national level, policies differ between England and Wales. We have included at Appendix B a brief exploration of the national planning frameworks for England and Wales together with a small sample of material from development plans to give an idea of how they address issues surrounding light.

2.65 Broadly speaking, local planning policies take into account the adverse impact of developments on the daylight and sunlight enjoyed by properties – predominantly dwellings. These are often couched in subjective terms; for example the protection might be against "material" or "unacceptable" loss of daylight or sunlight. There may also be guidance on what would be acceptable and unacceptable in certain circumstances.[83]

2.66 When measuring the daylight and sunlight to a property, local authorities tend to be guided by material published by the BRE Trust.[84] The material may be used as a benchmark against which to assess what standard of light requires protection and in what circumstances; it uses a different methodology from that used to assess the sufficiency of light in the context of rights to light, which we discuss in Chapter 4 below.

2.67 Any overlap between the protection afforded by a right to light and that afforded by the town and country planning regime is inadvertent: planning policies exist to control the exercise of planning powers in the public interest, whereas rights to light serve the private interests of the owner of the dominant land. The two schemes of protection do not interact with one another; for example, the grant of planning permission allowing a development to proceed has no effect upon the

[81] The 1990 Act, s 70(2).

[82] The "development plan" is defined in section 38 of the 2004 Act (see Appendix B, para B.9 below). The development plan system is changing, with the national planning landscape shifting to national and local policies, without a regional tier. For instance, section 76(6) of the Local Democracy, Economic Development and Construction Act 2009 gave the Secretary of State a reserve power to revoke all or any part of a regional strategy.

[83] See, for example, the policy extracts for the City of Westminster in Appendix B below.

[84] P Littlefair, *Site Layout Planning for Daylight and Sunlight: a Guide to Good Practice* (2nd ed 2011).

validity of any rights to light that may be infringed by that development. Neither planning policies nor rights to light offer absolute protection from interference with sunlight and daylight; who and what they protect, and the mechanisms available to enforce each of them, vary considerably.

Challenging the grant of planning permission

2.68 A grant of planning permission may be challenged by someone who is not the applicant[85] – for example, a neighbour who is concerned about the effect of a development on his or her property.

2.69 There are two principal means by which a non-applicant may challenge a grant of planning permission. The first is through the statutory review mechanism provided by section 288 of the 1990 Act. This allows a "person aggrieved"[86] by a decision of the Secretary of State to which that section applies to challenge that decision on the basis that it is unlawful (because it was not within the powers conferred by the 1990 Act)[87] or on the basis that the relevant requirements of the 1990 Act had not been complied with.[88]

2.70 However, the statutory review procedure can only be used to challenge a grant of planning permission if there is a decision of the Secretary of State to review under the section 288 procedure.[89] This will only be the case where the applicant for planning permission has brought an appeal to the Secretary of State from the local planning authority's decision.[90]

2.71 The second means of challenging a grant of planning permission is judicial review, which is available even where the section 288 procedure cannot be used. Judicial review is available under section 31 of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules. Provided the aggrieved party has sufficient standing to bring judicial review proceedings,[91] the applicant can challenge a

[85] Where the applicant objects to the refusal of its application for planning permission, or the conditions attached to a grant of permission, he or she should first use the appeals procedure set out in section 78 of the 1990 Act before considering the statutory review or judicial review procedures discussed below.

[86] There is much case law on who is a "person aggrieved". It is clear that the appellant and the relevant local planning authority have this status, and in *Eco-Energy (GB) Ltd v First Secretary of State* [2004] EWCA Civ 1566, [2005] 2 P & CR 5 the Court of Appeal said that a person who "took a sufficiently active role in the planning process" would qualify as a "person aggrieved".

[87] The 1990 Act, s 288(1)(b)(i).

[88] The 1990 Act, s 288(1)(b)(ii). See V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) paras 19.96 to 19.117.

[89] See V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) para 19.118.

[90] The appeal is made under the 1990 Act, s 78. See n 85 above.

[91] An applicant for judicial review must have "a sufficient interest in the matter to which the application relates" (Senior Courts Act 1981, s 31(3)).

grant of planning permission on the usual grounds of administrative law.[92] These grounds include:

(1) failure to take into account a relevant planning policy or other relevant consideration;[93]

(2) failure to consider properly the impact of the proposed development on the aggrieved party's rights under Article 8 of the European Convention on Human Rights (and/or Article 1 of the First Protocol to the Convention);[94] and

(3) irrationality, that is to say, having taken into account all relevant considerations, the local planning authority nevertheless reached a decision which no reasonable planning authority could have made.[95]

2.72 Judicial review does not provide a means of asking the court to review the merits of the planning authority's decision. The focus of the review is procedural – the key issue is whether the grant of planning permission was made in a lawful manner, rather than whether it was the "correct" decision.

2.73 If the applicant's judicial review is successful and results in the quashing of the grant of planning permission (rendering it retrospectively null),[96] the local planning authority will usually be asked to reconsider the matter in the light of the court's decision.[97]

2.74 Furthermore, an applicant for judicial review of a planning decision must make an application promptly but, in any case, within three months of the grant of planning permission.[98]

[92] Including procedural irregularity, breach of natural justice, error of law, illegality, irrationality, and breach of legitimate expectations. See P Craig, *Administrative Law* (6th ed 2008) Part 2: Judicial Review.

[93] P Craig, *Administrative Law* (6th ed 2008) pp 542 to 544.

[94] See *Lough v First Secretary of State* [2004] EWCA Civ 905, [2004] 1 WLR 2557 (a case brought under the statutory review procedure but relevant to judicial review because the basis of the claim – illegality – is applicable to both): sunlight and daylight have been recognised by the courts as amenities protected by Article 8 and a planning decision sanctioning substantial interference with either may be challenged on the basis that it is incompatible with that Article.

[95] See *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

[96] P Craig, *Administrative Law* (6th ed 2008) p 837.

[97] Senior Courts Act 1981, s 31(5).

[98] See rule 54.5(1) of the Civil Procedure Rules. See also *R (on the application of Burkett and another) v Hammersmith and Fulham London Borough Council* [2002] UKHL 23, [2002] 1 WLR 1593 for a case considering when the three month time limit for making an application for judicial review commences. The time limit is reduced to six weeks where the judicial review relates to an order granting development consent made under the Planning Act 2008. The three month time limit for judicial review contrasts with the six week time limit for bringing an application for statutory review under the procedure established in section 288 of the 1990 Act.

CHAPTER 3
THE CREATION OF RIGHTS TO LIGHT BY PRESCRIPTION

INTRODUCTION

3.1 In Chapter 2 we explained that rights to light can be created expressly, by implication, or by prescription. Of these, only prescription raises issues about law reform for rights to light: should rights to light continue to be capable of being acquired by prescription?

Background: the Easements Report

3.2 We examined the policy arguments for and against prescription during our project on the general law of easements. Our Consultation Paper invited consultees to consider both the wholesale abolition of prescription, and more targeted reform encompassing the negative easements.[1] We asked:

(1) whether prescriptive acquisition of easements should be abolished without replacement; and

(2) whether certain easements (such as negative easements) should no longer be capable of prescriptive acquisition, and, if so, which.[2]

3.3 In the light of the consultation responses we received, we rejected the outright abolition of prescription; and in Chapter 2, above, we have summarised the reform that we recommended instead.[3]

3.4 There was, however, no consensus among consultees on the second question as to whether prescriptive acquisition for negative easements should be restricted and, if so, which negative easements should no longer be capable of acquisition by prescription. Some consultees noted that other jurisdictions have abolished, or never allowed, prescription for rights to light, seemingly with little trouble.[4] Others felt that all easements, positive and negative, should be treated in the same way to avoid complexity, and that prescription for all easements had a valuable role to play.

3.5 We therefore concluded that the case for the targeted abolition of prescription for rights to light had not been made at that stage. Nevertheless, we recognised that further work on this narrower question was needed. We summarised our conclusions on this point in the following way:

> We have not made any recommendations limiting the types of easements which can be acquired by prescription. There was insufficient support from consultees, and we do not think that it would

[1] See Chapter 2, para 2.2 above.

[2] Easements, Covenants and Profits à Prendre (2008) Law Commission Consultation Paper No 186, para 4.193.

[3] See Chapter 2, paras 2.37 and 2.38 above.

[4] We consider some of these jurisdictions at para 3.15 and following below.

> be appropriate to recommend reform specific to rights to light as part of this project. This is a general project. Rights to light form part of a delicate balance in the urban development context, and are a highly specialised field of practice. This is a topic that could benefit from separate review in the future.[5]

3.6 However, as we explained in Chapter 2,[6] the Easements Report did include important recommendations for the simplification and updating of the law of prescription. In formulating those recommendations we were keen to:

> … ensure that, where there is potentially a difference in scope between the current law and what we recommend, the outcome is a narrower law of prescription rather than a wider one.[7]

3.7 So although we did not recommend the abolition of prescription, our recommendations for its reform would result in a set of requirements for prescription which would be simpler than the current law but harder to satisfy. In particular, there would be no provision for prescription to continue despite interruption for less than one year (as the Prescription Act 1832 allows).[8]

3.8 Another consequence of our recommendations would be that the abolition of the Prescription Act 1832 would bring to an end the possibility of the acquisition by a tenant of a right to light enforceable against his or her own landlord.[9] A further consequence of that repeal would be that it would no longer be possible to prevent by injunction the erection of a building built upon the "ancient foundations" of its predecessor in the City of London.[10]

3.9 As a result, fewer easements, and in particular fewer rights to light, would be created by prescription following the implementation of our recommendations in the Easements Report.

SHOULD PRESCRIPTION BE ABOLISHED FOR RIGHTS TO LIGHT?

3.10 We look forward to Government's response to the recommendations in our Easements Report, and hope that our proposed reform of the law of prescription will be implemented in the near future.

3.11 But should we go further? This project affords an opportunity to consider prescription in respect solely of rights to light and so to examine in the context of a targeted review whether there is a case for abolishing prescription in respect of such rights.

[5] Easements, Covenants and Profits à Prendre: Consultation Analysis (2011) para 4.117. This document is available on the Law Commission's website at www.lawcom.gov.uk.

[6] See Chapter 2, paras 2.37 and 2.38 above.

[7] The Easements Report, para 3.143.

[8] See Chapter 2, para 2.36 above.

[9] See Chapter 2, para 2.34 above.

[10] Currently the Custom of London prevents the acquisition or enforcement of rights to light by prescription in these circumstances, save where the requirements of section 3 of the Prescription Act 1832 are met, since that section operates notwithstanding local custom. See the Easements Report, para 3.154 and following.

3.12 A number of common law jurisdictions have taken this step, some of them many decades ago – notably Australia and New Zealand. Rights to light have never been capable of acquisition by prescription in the United States of America. Those jurisdictions rely upon planning laws and the use of express agreements to protect the amenity of the built environment; and as we mentioned in Chapter 2,[11] planning policies in England and Wales confer a degree of protection for daylight and sunlight for residential premises.

3.13 The prevalence of easements of light, affording a special protection beyond that given by the planning system, can be regarded as a mixed blessing. It does protect amenity, albeit only for those properties where it happens that a prescriptive right can be claimed. But the number of rights to light – due largely to the ease by which they can be acquired – can increase considerably the costs of developing land and delay the delivery of projects. The threat of injunction or high levels of damages payments can raise the risks associated with developments considerably, creating difficulties in financing and pre-letting buildings, increasing the cost of development and causing deadlines to be missed.

3.14 With that in view, we look briefly at the position in the jurisdictions mentioned above, and then consider the arguments for and against the abolition of prescription for rights to light in this jurisdiction.

Prescription of rights to light in other jurisdictions

The United States of America

3.15 The United States of America generally recognises the prescriptive acquisition of easements but not those that are negative (including rights to light).[12] The reasoning for this, as regards rights to light, has been explained as follows:

> Nineteenth century American courts rejected the English doctrine of ancient lights, which permitted landowners to acquire the right to prevent construction blocking the flow of light and air to their windows by prescription, on the ground that it was unsuited to conditions in America. The strong need for development in 19th-century America, coupled with the sense that there was ample land, outweighed the interests of those who built first without adequate setback to protect their windows.
>
> … Although the imperative for development that led 19th-century courts to reject the English rule may have waned, American courts are not likely to resurrect prescription to protect solar collectors, views, and other non-invasive uses. Nuisance law and public regulation can provide more appropriate vehicles for protecting existing uses against new development.[13]

[11] See Chapter 2, para 2.60 and following above.

[12] See American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) §2.16 and following.

[13] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) §2.17, pp 266 and 267.

3.16 Some of the reasons underlying the courts' refusal to allow prescriptive acquisition of easements of light resonate with the position in England and Wales today:

> They involve both fairness and cost. The landowner does not have sufficient opportunity to protect against loss of rights where the use is not wrongful, and the efforts to do so would be costly. The lack of physical invasion makes it difficult for the landowner to detect adverse uses. To protect against imposition of a servitude, the landowner would have to engage in costly monitoring or invest in otherwise premature development to prevent acquisition of prescriptive limitations on potential development.[14]

Australia

3.17 The legal position across Australia varies due to its Federal structure. The doctrine of lost modern grant allows for the acquisition of easements generally in all of the states except for Tasmania.[15] In addition, the Prescription Act 1832 currently operates in South Australia and Western Australia, but never applied in New South Wales, Victoria and Queensland. A form of the 1832 Act once applied in Tasmania, but no longer does so.[16]

3.18 The history of the prescriptive acquisition of rights to light in Australia is complex. It is explained by Fiona Burns in the following terms:

> Prior to the High Court's decision in *Delohery*[17] [which held that lost modern grant applied in Australia] Australian courts were divided over whether it was possible to acquire prescriptive easements of light. In New South Wales, courts held that easements of light could not be acquired by prescription; such easements would prevent the ongoing development of towns and cities. In other states, the prospect of easements of light was met with equanimity, courts preferring to determine whether the facts fitted within the doctrine of lost modern grant rather than adopting a blanket rejection of prescriptive easements. This approach, following legal principle over pragmatism,

[14] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) §2.17, p 267

[15] It was held in *Delohery v Permanent Trustee Co of New South Wales Ltd* (1904) 4 SR (NSW) 1 that lost modern grant applied in Australia; see F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 16. Tasmania abolished lost modern grant in 2001 but replaced it with a similar statutory scheme; see para 3.21 below.

[16] Tasmania adopted the Prescription Act 1832 by enacting the Prescription Act 1934 (Tas) (subject to minor amendments), but this Act was repealed in 2001 by the Land Titles Amendment (Law Reform) Act 2001 (Tas).

[17] *Delohery v Permanent Trustee Co of New South Wales Ltd* (1904) 4 SR (NSW) 1. See F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 16.

> prevailed in *Delohery*. Soon after that decision, state legislatures acted to abolish prescriptive easements of light.[18]

3.19 Queensland and New South Wales have each abolished prescription for easements of light. This abolition was retrospective – the wording of the relevant legislation states that no right to the use of light to or for any building:

> … shall be deemed to exist, or to be capable of coming into existence, merely because of such access or use for any period or of any presumption of lost grant based upon such enjoyment.[19]

3.20 The effect of this wording is that no easements of light have been capable of prescriptive acquisition from 1 March 1907 (Queensland) and 1 December 1904 (New South Wales), and any easements of light which had arisen before those dates were abolished because they were deemed never to have existed.[20]

3.21 Tasmania originally abolished, with retrospective effect, rights to light by section 9 of the Prescription Act 1934 (Tas). However, a statutory scheme for prescription was subsequently introduced by the Land Title Act 1980 (Tas), which provides that:

> A person who has used or enjoyed rights which may amount to an easement at common law for a period of 15 years, or 30 years in the case of a person under disability, may apply to the Recorder in an approved form for an order … vesting an easement in respect of those rights in him or her.[21]

It is unclear whether an easement of light could be acquired under this scheme. [22]

3.22 In Western Australia, Victoria and Southern Australia the prescriptive acquisition of easements of light is also no longer possible.[23] This abolition was prospective only and took effect from 19 February 1902, 7 October 1907 and 26 October 1911 respectively.[24]

3.23 The position is similar in the Australian Capital Territory (ACT). Under section 1 of the Ancient Lights Declaratory Act 1904 (NSW), which applies to the ACT, no easement of light "shall be deemed to exist or be capable of coming into

[18] F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 17. See also A J Bradbrook and S V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed 2011) paras 8.7 to 8.9.

[19] Property Law Act 1974 (Qld), s 178; the New South Wales legislation is the Conveyancing Act 1919 (NSW), s 179.

[20] See F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 17.

[21] Land Titles Act 1980 (Tas), s 138J.

[22] See F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 18.

[23] See Property Law Act 1969 (WA), s 121; Property Law Act 1958 (Vic), s 195; and Law of Property Act 1936 (SA), s 22 respectively.

[24] A J Bradbrook and S V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (3rd ed 2011) para 8.9.

existence by reason only of [prescriptive use]". However, the position is unclear with respect to the Northern Territory; the relevant legislation is silent on whether an easement of light can be acquired by prescription.[25]

New Zealand

3.24 In New Zealand, the ability to acquire rights to light by prescription was abolished on 27 July 1894 by the Light and Air Act 1894. This abolition was prospective only – the Act did not affect rights to light that had arisen by prescription before it came into force.[26] The 1894 Act also provided that section 3 of the Prescription Act 1832 would no longer apply in New Zealand. Accordingly, rights to light must now be created expressly by deed or by registrable instrument.[27]

Arguments for and against prescription for rights to light

3.25 In the text that follows we examine the arguments for and against prescription in respect of easements generally, and more specifically for rights to light.

General arguments against prescription

"SOMETHING FOR NOTHING"

3.26 Prescription can be seen as giving the dominant owner "something for nothing". The owner of land that has not benefited from a right for 20 years acquires, or cannot be stopped from acquiring, an easement. Prior to having acquired a right by prescription, the dominant owner's use of his or her neighbour's land is precarious; immediately following the acquisition of an easement the dominant owner may acquire a significant degree of control over the servient owner's use of his or her land.

PENALISING GENEROSITY

3.27 More generally, the acquisition of easements by prescription can also be said to penalise generosity. A servient landowner may see no reason to challenge a neighbour where that person uses unobtrusively a part of the servient land. However, what starts as an act of neighbourliness by a servient owner can result in a right enforceable against that person. Such an outcome may be entirely unexpected by both the dominant and the servient landowners.

THE NEED FOR AN UNDERSTANDING OF THE LAW

3.28 In addition, the vast majority of landowners are unlikely to be aware of the law of prescription and the fact that a legal right arises if a neighbour uses (by, say, walking across it or receiving light from it) the servient land for 20 years. And even if a landowner has some background understanding of a doctrine of ancient lights, he or she may not know how to prevent prescription from taking place. Given the complexities of the law in this area, it may be seen as harsh that a

[25] Land Title Act 2000 (NT); Law of Property Act 2000 (NT). See F Burns, "The future of prescriptive easements in Australia and England" (2007) 31(1) *Melbourne University Law Review* 3, 18.

[26] Light and Air Act 1894, s 2.

[27] Property Law Act 2007 (NZ), s 299.

servient owner will need a fair amount of background understanding in order to prevent a right from arising by prescription.

3.29 We concluded that those arguments were not sufficient to justify the general abolition of prescription for easements generally. But the three arguments above are stronger for rights to light.

3.30 Where a right to light is concerned the dominant owner need take no action nor commit any trespass to acquire the right; it is for the servient owner to appreciate the importance that the law attaches to the passage of light over his or her own land through the windows of buildings on the dominant land. Even where this is understood, the servient owner will not prevent prescription unless he or she knows that, under the current law, only written permission or an interruption of the use of the light for one year or more will prevent a right to light from arising.[28]

3.31 Sophisticated landowners may be aware that notional interruptions can be used to prevent the acquisition of a right to light by registering light obstruction notices,[29] but these measures require time and expense.

3.32 This means that easements of light arise in a way that cannot be predicted. Landowners that understand the law may protect against prescription; others may not. A dominant owner's property may benefit from a right to light enforceable against neighbours to the North and West, but not against neighbours to the East and South.

Specific arguments against prescription for rights to light

3.33 Further considerations relate specifically to rights to light.

WILLINGNESS TO RELEASE

3.34 First, those with the benefit of a right to light will often agree to its release for a (potentially substantial) sum of money. This is not unique to rights to light, but the proliferation of such rights, and their detrimental effect on development, makes instances of their use in this manner common. Where this happens, it is arguable that the right – acquired for nothing – is not protecting the light (because the dominant owner does not mind if it is lost) but instead has become a tool to extract money from a neighbour who proposes to develop his or her land.[30]

IMPACT ON THE SERVIENT OWNER

3.35 Another argument is the potentially disproportionate impact that a right to light may have upon a servient owner. Easements other than rights to light are potentially easier to accommodate on a development; a right of support (which, like a right to light, can be acquired without trespass) can be accommodated by

[28] Both of these elements are linked to the operation of the Prescription Act 1832. See Chapter 2, paras 2.34 to 2.36 above.

[29] See Chapter 2, paras 2.39 and 2.40 above.

[30] It is common for dominant owners to argue in open correspondence (which could later be presented in court) that a potential loss of light is extremely damaging to their property while at the same time conducting negotiations, on a without-prejudice basis, for the release of the right.

ensuring the continued support of the neighbour's building;[31] and a right of way could be incorporated into the design of the development.

CONTINUING RELEVANCE?

3.36 Finally, rights to light evolved long before the state became involved in regulating the built environment. Before the introduction of town and country planning controls, and before the widespread use of artificial light, rights to light provided a mechanism to protect homes and businesses against over intrusive development. This function is now controlled through the planning policy and legislative framework; we noted in Chapter 2 that planning policies generally protect the light and amenity of residential owners. It is therefore arguable that rights to light are no longer a legitimate way of controlling how land is used.

General arguments in favour of prescription

3.37 We turn now to the general arguments in favour of prescription.

ALIGNING LEGAL ENTITLEMENT AND USE

3.38 First, prescription keeps the legal entitlement to use land aligned with its actual use. Where a plot of land has benefited from the use of a neighbour's land for many years then it is arguable that the use should be protected by law.

PROTECTING EXPECTATIONS

3.39 It is rare for a person to set out deliberately to obtain an easement by prescription, particularly in relation to rights of light. Nevertheless, many people behave in a certain way because they make the assumption – which may be mistaken – that they have a legal entitlement to do so. For example, a person may not worry about his or her neighbour's development plans because they are under a mistaken belief that they have a right to the light to their windows. Abolition of prescription could therefore result in some people acting in a certain way because of a mistaken belief that they have a right to light.

3.40 One response to this would be that although some people may think that they have rights to light, only those with the requisite 20 years' use will actually have one. So clearly the law does not protect everyone's expectations all of the time. It could also be argued that it is the role of the planning system to protect expectations of this nature.

FAILURE TO GRANT OR RESERVE RIGHTS EXPRESSLY

3.41 Prescription may also be of some use to landowners where there has been a failure to grant or reserve easements expressly in a conveyance, but where the parties to that conveyance have acted for a considerable length of time under the belief that the rights exist. This argument is, of course, weakened by the fact that rights to light are rarely granted expressly, and because prescription does not benefit that landowner for at least 20 years following the conveyance.

[31] See *Gale on Easements*, para 10-31: "The removal of support is not actionable if, upon removal of that support, equivalent support is provided. Further, it is established that no cause of action arises until actual injury is caused to the dominant tenement … ."

Specific arguments in favour of prescription for rights to light

AMENITY VALUE OF THE RIGHTS

3.42 Whilst it is true that many dominant landowners, especially commercial owners, are willing to bargain away their rights, many others rely on them for the amenity of their homes and businesses. Prescription affords people protection that, realistically, landowners are unlikely to obtain by consensual agreement (although some may argue that the emergence of a right that a landowner would not be able to acquire by agreement is, in itself, unfair).

PLANNING PROTECTIONS INADEQUATE

3.43 Another argument is that planning law protections cannot and should not take away the direct control that private law rights to light afford neighbouring owners. Planning law and policies are subject to change, and the protection that they afford in one location may not be the same in another. Furthermore, the control is exercised by the state – but it is a balancing exercise; there are many factors to be considered where a planning permission is granted, refused or enforced. To this extent the town and country planning framework cannot provide to a landowner the same certainty that is afforded by a right to light.

3.44 But one could also argue that it is better for amenity to be protected on a broadly consistent basis by the planning system than on an unpredictable and inconsistent basis by rights to light.

CONSISTENT TREATMENT OF RIGHTS

3.45 Finally, it is arguable that prescription should not be abolished for one type of easement only, because to do so would create an anomaly in the law. But it has been pointed out that the existence of negative easements in the law is itself an anomaly,[32] given that they restrict the servient owner's freedom (and fulfil a function usually performed by restrictive covenants). Reducing the category of anomalous rights that can be acquired by prescription could therefore be viewed as a positive step.

A PROVISIONAL PROPOSAL

3.46 Our provisional view is that the arguments against prescription are sufficiently strong in relation to rights to light to justify its abolition in this specific context. Whilst we came to a different conclusion in the Easements Report for prescription generally, we were clear at that time that further work might result in targeted reform for rights to light.[33]

3.47 Abolition of the prescriptive acquisition of rights to light would have only prospective effect; existing rights to light acquired by prescription would continue to be valid.

[32] *Hunter v Canary Wharf* [1997] AC 655, 726.

[33] See the Easements Report, para 1.12.

3.48 We provisionally propose that prescription should be abolished for rights to light.

Do consultees agree?

3.49 If we confirm this provisional proposal by making a recommendation in our final Report then some people will, on the date on which the new law comes into force, have completed 19 years and one day's prescriptive use (by receiving light over their neighbour's land for that length of time). In such circumstances those people would be unable to crystallise their rights by bringing "some suit or action",[34] because they have not enjoyed the light for the full 20 year period. But under the Prescription Act 1832 neither could they be stopped from eventually acquiring a right to the light, provided that they bring their claims on the first day of the twentieth year, as the Act provides that interruptions of less than one year in duration are not effective in bringing the continuous use to an end.[35]

3.50 As a result, we would recommend alongside the abolition of prescription for rights to light a transitional provision so that those people with 19 years and one day's use would be able to complete their full 20 years' use and claim the right under the Prescription Act 1832, provided that they brought their claims on the correct day. Of course, this transitional provision would not be needed if the recommendations in the Easements Report (which include the abolition of the Prescription Act 1832) had already been implemented.[36]

The Rights of Light Act 1959

3.51 A consequence of the abolition, for the future, of prescription for rights to light would be that the Rights of Light Act 1959 would become redundant, as there would no longer be a role for light obstruction notices.[37] The Rights of Light Act 1959 would therefore be repealed once prescription for rights to light was abolished.

3.52 However, in the event that we do not recommend in our final Report the abolition of prescription for rights to light, we do not think that the 1959 Act should be abolished. It serves a useful function by providing a means of interrupting the acquisition of an easement without having to erect a physical obstruction.

3.53 We are aware that some practitioners are dissatisfied with elements of the procedural requirements of the 1959 Act, which involve an application to the Lands Chamber of the Upper Tribunal, directions for service on neighbouring properties, and then registration of the notice as a local land charge.[38] Some stakeholders see the procedural requirements as unnecessarily cumbersome,

[34] See Chapter 2, para 2.35 above.

[35] See Chapter 2, para 2.36 above.

[36] We recommended in the Easements Report that a transitional provision should operate if the Prescription Act 1832 is repealed (see clause 18(2) of the draft Bill annexed to the Easements Report).

[37] See Chapter 2, paras 2.39 to 2.40 above.

[38] See the Rights of Light Act 1959, s 2 and the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (SI 2010 No 2600) rr 41 to 44.

whereas others believe that they are reasonable. We would be grateful for consultees' views on this issue.

3.54 Consultees, in particular those who do not wish to see the abolition of prescription for rights to light, are asked to tell us their views on the procedural requirements for the service and registration of light obstruction notices under the Rights of Light Act 1959, and whether they wish to see any reform or simplification of those requirements.

CHAPTER 4
INTERFERENCES WITH RIGHTS TO LIGHT

INTRODUCTION

4.1 In this Chapter we look at the test that governs when the interference with a right to light is actionable. The dominant owner's cause of action is not in trespass (since he or she does not have possession of the relevant land) but the obstruction may amount to a nuisance.

WHEN IS AN OBSTRUCTION OF LIGHT ACTIONABLE?

4.2 The leading authority on when an obstruction of a right to light will constitute a nuisance is *Colls v Home and Colonial Stores Ltd* ("*Colls*"), in which Lord Lindley declared that the dominant owner is:

> … entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house, if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, a shop, or other place of business.[1]

4.3 In the same case, Lord Davey added:

> According to both principle and authority, I am of the opinion that the owner or occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.[2]

4.4 Whether an obstruction is actionable therefore depends not only upon the effect of the obstruction on the dominant owner's current use of his or her property; the court must also consider potential uses to which the dominant property could be put. So the actual use to which the dominant building is being put at the date of trial does not determine whether an interference has occurred.[3] The principle established in *Colls* was summarised by Lord Justice Goff in *Allen v Greenwood*:

> The measure of the light to which right is acquired, of which it has to be seen whether there is such diminution as to cause a nuisance, is the light required for the beneficial use of the building for any ordinary purpose for which it is adapted.[4]

1 [1904] AC 179, 208.

2 [1904] AC 179, 204.

3 [1904] AC 179, 204 and 211.

4 [1980] Ch 119, 130.

4.5 *Allen v Greenwood* concerned a right of light to a greenhouse; the dominant owner was successful in his claim for a right to an extraordinary amount of light on the basis that the normal use of a greenhouse requires a high degree of light.[5]

The interaction of law and science

4.6 In modern rights to light cases both parties will usually rely on evidence from specialist surveyors as a matter of course. This is used to assist the court in assessing whether there has, or will be, an actionable interference caused by an obstruction. Surveyors have formulated methods of measuring light, and have also generated rules of thumb for when the light received by a building is sufficient for the uses to which the dominant building could be put.

Measuring light

4.7 Prior to the 1920s the usual method of measuring and testing the sufficiency of light to a building was not sophisticated. The principal method used was known as the 45 degree test; if the angle between the window sill and the top of the proposed obstruction (usually a building) was greater than 45 degrees then generally there was an actionable interference.[6]

4.8 In the 1920s Percy Waldram produced a more precise method for assessing the sufficiency of light. The "Waldram method" works on the basis of a fixed standard of light received from the sky; a standard of light of 500 foot-candles,[7] representing the average condition of sky brightness,[8] was adopted by the National Physical Laboratory in 1928. In 1923 Percy Waldram and his father suggested in *The Illuminating Engineer* that the "grumble point" – meaning "the natural illumination at which average reasonable persons would consistently grumble" for ordinary purposes comparable with clerical work was "0.2% of the light which would fall from an unobstructed hemisphere of uniform sky onto a flat roof".[9]

[5] The Court of Appeal would also have reached the same result on the basis that the dominant owner had prescribed for an extraordinary degree of light throughout the prescription period. See *Allen v Greenwood* [1980] Ch 119, 132. At first glance this appears to contradict the dicta in *Colls* that the actual use to which the dominant building is put is not determinative of the amount of light to which the dominant owner is entitled. However, it may be possible to reconcile *Allen* with *Colls* on the basis that in *Allen* it was said that a person may only prescribe for a higher degree of light if the extraordinary use was known to the servient owner during the prescription period.

[6] See, for example, *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 210, where the 45 degree test was rejected as a rule of law.

[7] A foot-candle is a unit of measurement of light; it is roughly equivalent to the illumination provided by a one candela source (approximately one candle) one foot away.

[8] See *Rights of Light: The Modern Law*, para 12.10.

[9] P J Waldram and J M Waldram, "Window design and the measurement and predetermination of daylight illumination" (1923) 16 *The Illuminating Engineer* 90, 96.

4.9 This grumble point of 0.2% is equivalent to one foot-candle or one lumen per square foot. Accordingly, one lumen per square foot became the accepted standard for measuring adequate light within a room. This was subsequently confirmed by a meeting of the Commission Internationale de L'Eclairage (the International Commission on Illumination) in 1932, at which it was resolved that "less than 0.2 per cent daylight should be regarded as inadequate for work involving visual discrimination",[10] the assessment being made at table-top height (taken to be 85cm).

4.10 The Waldram method works by taking this standard of adequate light – 0.2% of the sky – and calculating how much of the relevant building or room receives that amount of light (or more) at table-top height before and after the obstruction (or proposed obstruction) takes place. This allows the effect of the obstruction on the dominant building's light to be mapped out using a sky contour diagram; the contours of the diagram show the amount of adequate light that would be lost due to the obstruction.[11]

The surveyors' rule of thumb as to sufficient light

4.11 Surveyors often apply what is known as the "50/50 rule" when assessing the sufficiency of light received by the dominant building after an obstruction has occurred. This rule provides that a room or building is not adequately lit if it receives less than 50% of adequate light assessed using the Waldram method.

4.12 However, whilst the courts often find the 50/50 rule to be a useful guideline as to what constitutes an actionable interference with a right to light, it is clear that it is not a rule of law and therefore the courts are not bound to follow it.[12]

Applying the *Colls v Home and Colonial Stores Ltd* principle

4.13 Under the principle formulated in *Colls*, the dominant owner is entitled to sufficient light for the beneficial use of the dominant building for any ordinary purpose for which it is adapted. This means that the potential uses to which the dominant building could be put are of great significance.

4.14 But *Colls* was decided in 1904 when the potential uses to which a property could be put were far more restricted than they are in the modern day. The internal arrangements of modern commercial premises, for example, are now often built with the specific purpose of allowing for flexibility in the internal arrangements of the building.

[10] *Rights of Light: The Modern Law*, para 12.13.

[11] See also the summary of the Waldram method in *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135 at [28] to [33]. For a more comprehensive explanation of surveyors' methodologies, see *Rights of Light: The Modern Law*, ch 12.

[12] See *Regan v Paul Properties DPF No 1 Ltd* [2006] EWHC 1941 (Ch) at [76]; *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922, 927; *Ough v King* [1967] 1 WLR 1547, 1553.

4.15 *Carr-Saunders v Dick McNeil Associates Ltd*[13] involved a building purchased in 1968, the second floor of which was let to a tenant and used in open plan for the manufacturing of stage scenery; a small office was separated from the rest of the floor by a partition. In 1976 the tenant left and the claimant (the freeholder) took possession of the second floor. He made the whole of the second floor open plan and converted it into living accommodation for himself. Later the claimant added two storeys to the building for his own accommodation and converted the second floor into a suite of therapy rooms. He partitioned the second floor by constructing several solid internal walls; he also converted a partially glazed door into a fully glazed window, leaving a total of six windows.[14] It appears that there was no dispute as to whether the six windows had the benefit of rights to light. Therefore, upon completion of the works the second floor consisted of six therapy rooms, each with its own window, plus a reception area and a central corridor.

4.16 Subsequently, the defendants commenced building works to add two storeys to a building situated to the rear of the claimant's property. As a result the light to the windows of the two rooms to the rear of the second floor was obstructed.

4.17 At trial the experts for the claimant and the defendants differed in their approach. Although both produced sky contour diagrams and tested the adequacy of light using the 50/50 rule, the expert for the defendants insisted that the subdivision of the second floor should be ignored as it had occurred during the prescription period. He treated the second floor as one open plan space; he found that 66.2% of the second floor was adequately lit before the defendants' building works and that 58.4% remained adequately lit after those works had been completed.

4.18 In contrast, the expert for the claimant assessed the adequacy of the light on the basis of the subdivided rooms. Of the two rooms to the rear of the property, one received 4.5% of adequate light and the other received 6.5% of adequate light after the building works had been completed. This compared to figures of 55% and 57% respectively before the building works had commenced.

4.19 The defendants submitted that there was no actionable interference because the 50/50 rule had not been satisfied: the second floor still received 58.4% of adequate light if the subdivisions were not taken into account. The judge rejected this argument, in part because it treated the 50/50 rule as a rule of law rather than a useful guide, but also because it applied the 50/50 rule to the entirety of the second floor without regard to the shape or size of the area, the disposition of light within it, or its suitability for subdivision.[15]

[13] [1986] 1 WLR 922.

[14] He also created a new window to benefit the reception area and central corridor, but this had not acquired a right to light by the time the case went to trial, and therefore no account was taken of it. See below at para 4.25.

[15] [1986] 1 WLR 922, 928.

4.20 Millett J held that *Colls* had established that the amount of light to which the dominant owner was entitled was not to be assessed on the basis of the actual use to which the building had been put. The entitlement was to light adequate for all ordinary purposes for which the building might reasonably be expected to be used. Therefore the court had to take into account not only present use, but also potential future uses, including subdivision. On that basis the judge found that there was an actionable interference with the claimant's light because, following the obstruction, the second floor could no longer be conveniently subdivided in a way in which all subdivided areas would receive an adequate amount of light.[16]

4.21 Of course, there are limits to the potential of a building. In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*[17] the judge made clear that suggestions of alternative internal arrangements of buildings must be based on credible evidence; examples of such evidence could include, for instance, a grant of planning permission or the design of the building.[18]

The relevance of locality

4.22 The locality of the dominant building is relevant to the standard and amount of light that the dominant owner can expect to receive, in terms of the character of the neighbourhood in which the building is situated. As Lord Justice Romer in *Fishenden v Higgs and Hill Ltd* put it:

> A reasonable person would not expect precisely as much light in Mayfair as he would get in the country, and he would not expect precisely so much light in the city of London as he would get in Mayfair.[19]

4.23 However, it is unlikely that locality can make a great deal of difference as to whether an obstruction of light is actionable or not. In *Hortons' Estate Ltd v James Beattie Ltd*, Russell J said that "the human eye requires as much light for comfortable reading or sewing in Darlington Street, Wolverhampton, as in Mayfair".[20]

4.24 It is not possible to argue that no actionable interference has occurred because other properties situated in the same location receive less light than the dominant property after the obstruction.[21] Nor is it relevant that other nearby properties which receive less light than the dominant building post-obstruction are nonetheless marketable.[22]

[16] [1986] 1 WLR 922, 930.

[17] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148.

[18] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [36] and following.

[19] [1935] All ER Rep 435, 447. See also the comments of Lord Hanworth MR at [1935] All ER Rep 435, 442: "I can understand that you may have a locality which may be described as residential or manufacturing or industrial, and different considerations may apply in those areas to which you can apply these adjectives broadly."

[20] [1927] 1 Ch 75, 78.

[21] *Fishenden v Higgs and Hill Ltd* [1935] All ER Rep 435, 442.

[22] *Regan v Paul Properties DPF No 1 Ltd* [2006] EWHC 1941 (Ch) at [68] to [70].

The relevance of other apertures

4.25 When considering whether an actionable interference has occurred, the existence of other windows in the dominant property is relevant only if they benefit from rights to light. If they do not, then the court must ignore their presence.[23]

4.26 If the property does have other apertures that benefit from rights to light, the court must apply the principle laid down in *Sheffield Masonic Hall Co Ltd v Sheffield Corporation*.[24] This provides that if a building has windows on different sides which benefit from rights to light and a neighbour wishes to build in a way which would obstruct some of the light to the windows on one side, he or she is only entitled to do so to the extent that, if another neighbour built another building of the same height obstructing the windows on another side, the light would not be obstructed to the extent that it would cause a nuisance.

Existing windows providing inadequate light

4.27 We referred above to the 50/50 "rule".[25] What happens where the room receives less than 50% adequate light before the obstruction?

4.28 Some early cases seemed to suggest that no actionable injury would occur in those circumstances. For instance, in *Colls* Lord Robertson questioned whether a dominant could bring a claim where he or she had made "one window where there should be five to give proper light, and [lived] for 20 years in this cave".[26] But in *Dent v Auction Mart Co* the court said that it was not for a defendant to tell the dominant owner how to construct his or her own property by building bigger windows.[27] In *Litchfield-Speer v Queen Anne's Gate Syndicate (No 2)*,[28] P O Lawrence J found that no actionable interference would occur if there was some obstruction of light to a kitchen which was already poorly lit, although the report is not clear as to the basis of the judge's decision on this point.

4.29 The modern view is that a dominant owner should not be barred from complaining if an obstruction reduces the light to an inadequately lit room – the fact that the room is poorly lit simply makes the little light that it does receive more precious.[29]

[23] *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922, 924 by Millett J: "That window having been so recently opened, and its user being precarious, it is common ground that its existence and the availability of light thereto are to be disregarded for present purposes". See also *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 211.

[24] [1932] 2 Ch 17.

[25] See above at paras 4.11 and 4.12.

[26] [1904] AC 179, 181.

[27] (1866) LR 2 Eq 238, 251.

[28] [1919] 1 Ch 407.

[29] *Deakins v Hookings* [1994] 1 EGLR 190, 193.

4.30 Ultimately whether an obstruction is actionable will depend upon the facts of the particular case and the application of the *Colls* principle to them. Relevant factors in deciding whether an obstruction of light to a poorly lit room constitutes a nuisance will include the extent of the obstruction, the nature of the previous lighting of the premises (whether it required artificial light all the time, some of the time or not at all), and the angle at which the light enters and how it penetrates the room.[30]

4.31 For example, in a room where the amount of natural light is so poor that it is impossible (in the absence of artificial light, which cannot be taken into account by the court)[31] to use the property for any ordinary purposes for which it is adapted, the removal of some of the remaining light would arguably not constitute a nuisance; the pre-obstruction position was effectively that there was no natural light at all, so the obstruction would not affect the dominant owner's use and enjoyment of the property.[32] In contrast, where a room is poorly lit during the winter months but not during the summer months, and the effect of the obstruction is to render the room poorly lit all year round, then that obstruction will cause a nuisance.[33]

The relevance of artificial light and light from other sources

4.32 Artificial light cannot be taken into account when considering whether an obstruction of light has caused a nuisance.[34] In *Midtown Ltd v City of London Real Property Co Ltd* an argument was put to the court that an obstruction of light had not caused a nuisance because the dominant property was a commercial premises which was lit by electric light at all times. This was received by Peter Smith J with some sympathy, but ultimately rejected for the following reasons:

> First, it would mean that there would never be a successful challenge to an infringement of light, because it could always be said, no matter how much actual light is taken away, it is always possible to fill the gap with artificial light. It is well demonstrated by the fact that the rooms in the property, which have no natural light, are illuminated to the same standard by the constant electrical lighting as those, which have a natural light. No such argument so far as I am aware, has ever been put successfully or otherwise in any light case. Second, it undermines, in my view, the potential advantages that might appertain on a particular case, for natural light, which varies and might be better for specified tasks.
>
> […]

[30] See E H Bodkin, "The acquisition of rights to light for badly-lit premises" (1974) 38 *Conveyancer and Property Lawyer* 4, 7.

[31] See below at para 4.32.

[32] See E H Bodkin, "The acquisition of rights to light for badly-lit premises" (1974) 38 *Conveyancer and Property Lawyer* 4, 5.

[33] These were the facts of the Irish case of *McGrath v Munster and Leinster Bank Ltd* [1959] IR 32, in which it was held that a nuisance had occurred.

[34] Although it can be taken into account when considering the remedy to be awarded; see Chapter 5, para 5.46.

> Further, it does not take into account potentially varied uses. If the property has a right to light (as is the case), any other reasonable use to which it would be put, which might be diminished, should also be taken into account. In the instant case, in practical terms, no use is made of the natural light. It is not impossible however, for the site to be redeveloped in a way, which incorporates more use of the natural light.[35]

4.33 Similarly, a court will not take account of the benefit of light received by the dominant land indirectly – for example, from light-reflecting surfaces on the servient land.[36]

IS THERE A NEED FOR REFORM?

4.34 We noted above that the current test for when an obstruction of light constitutes a nuisance interacts with the practices of rights of light surveyors. We cannot comment on or evaluate surveying practice, but what about the legal principles governing when an obstruction of light is actionable?

4.35 One important feature of the current law is its subjectivity: an obstruction is actionable if it deprives the dominant owner of sufficient light for the beneficial use of the dominant building for any ordinary purpose for which it is adapted. Reform could involve introducing a new and objective test, for example, by providing that if light falls below a certain level then the obstruction is actionable. The level of light to which a dominant owner would be entitled could be set in legislation – perhaps in a statutory instrument so that it could change according to industry standards – and could differentiate between different types of premises; one option could be to distinguish commercial from residential premises when assessing the adequacy of light.

4.36 However, one advantage of the subjectivity in the current law is that it allows for a degree of flexibility in its application. While this has the potential to result in uncertainty, the benefit is that it does not result in hard cases, by which we mean cases where an obstruction falls just short of or just over the boundary for what constitutes an actionable interference.

4.37 The potential difficulties of using an objective test to determine when an obstruction is actionable were explored by Lord Lindley in *Colls*:

> If a more absolute standard had been adopted in all cases, certainty would, no doubt, have been gained; but the consequences would frequently have been very oppressive on the owner of the servient tenement, and far more so than under the old law. The owner of the servient tenement could have done nothing on his own land which, in fact, diminished the light acquired by his neighbour, even if all of it was not wanted for comfortable enjoyment or business purposes. It would follow that the owner of a piece of vacant land opposite to a house in an ordinary street could not build upon it at all after twenty

[35] [2005] EWHC 33 (Ch) at [61] and [62].

[36] *Dent v Auction Mart Co* (1866) LR 2 Eq 238, 251 to 252.

> years. The adherence to the old but uncertain standard of comfort and convenience avoids the danger of oppression and extortion, and renders it necessary to take a wider view of each case, especially when an injunction is asked for.[37]

4.38 We agree. Accordingly, we are minded to retain the current subjective standard for when an obstruction is actionable.

4.39 Another option for reform would be to allow artificial light to be taken into account when deciding whether an obstruction is sufficiently serious to be actionable. One criticism of the current law is that it is sometimes considered unrealistic in its application, particularly in the commercial context involving large offices where artificial lighting is used throughout the day.[38]

4.40 However, we note the comments of Peter Smith J in *Midtown Ltd v City of London Real Property Co Ltd*.[39] Bringing artificial light into the equation of whether a nuisance has occurred could result in it being difficult ever to challenge successfully an obstruction of light because artificial light could always fill the shadows.[40]

4.41 It is permissible for a court to take account of artificial light when assessing whether to grant an injunction or instead award damages in substitution for an injunction.[41] We think this strikes an appropriate balance – where artificial light would ordinarily be used, which is likely to be the case in commercial premises, a court may be more inclined to award damages instead of an injunction, particularly where it is unlikely that any future change of use will take place.

4.42 We therefore propose no changes to the current test governing when an interference with a right to light is actionable. We would, however, be grateful for consultees' views on whether reform is needed.

4.43 We ask consultees whether reform is needed to the principles governing when an obstruction of light is actionable and, if so, we would be grateful for consultees' suggestions for reform.

[37] [1904] AC 179, 208 to 209.

[38] See the comments of Gabriel Moss QC, sitting as a deputy High Court judge, in *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [32].

[39] See above at para 4.32.

[40] *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [61] and [62].

[41] *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [63]. See Chapter 5, para 5.46 below.

CHAPTER 5
REMEDIES: INJUNCTIONS AND DAMAGES

INTRODUCTION

5.1 Where the obstruction of a right to light constitutes an actionable interference, the next issue that arises is one of remedy. In this Chapter we look at the principal remedies for the infringement of a right to light: injunctions and damages.

INJUNCTIONS

5.2 The general rule is that the remedy for the infringement of a right to light is an injunction.[1] The claimant does not have a right to an injunction; as an equitable remedy it is within the discretion of the court whether or not to grant one. Exceptions to the general rule include instances where damages would be an adequate remedy; where the injunction would be ineffective because the act complained of has since ceased; and where the claimant has disentitled him or herself from equitable relief by his or her conduct.[2]

5.3 In rights to light cases where an injunction is awarded at the conclusion of trial, the injunction is likely to be mandatory (requiring the defendant to demolish whatever has caused the obstruction) and perpetual. But if by the conclusion of the trial the obstruction is not yet in place, the injunction could be prohibitory (requiring the defendant to stop building any further, or to not build at all). An injunction may also be awarded before any wrongful action has been undertaken at all; this is known as a *quia timet* injunction.[3]

5.4 Injunctions may also be sought to protect a right before a full trial can take place – these are called interim injunctions and are intended to preserve the status quo until a court can give the parties a full hearing to rule on the relevant issues, such as whether a right will be infringed by a proposed development.[4]

5.5 Where a court has jurisdiction to grant an injunction it may choose to award damages instead. This jurisdiction comes from section 50 of the Senior Courts Act 1981, which provides:

[1] See *Imperial Gas Light Co v Broadbent* (1859) 7 HLC 600, 11 ER 239 (dealing with common law rights generally); and in the rights to light context see *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287 and *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135 at [36].

[2] For more information on the court's jurisdiction to grant injunctions, see J McGhee (ed), *Snell's Equity* (32nd ed 2010) ch 18.

[3] *Quia timet* means "because he or she fears". The court's jurisdiction to grant a final *quia timet* injunction in order to prevent a threatened or apprehended act of nuisance will only be exercised where (1) there is proof of imminent danger of damage occurring; and (2) there is proof that the apprehended damage will, if it comes, be very substantial: *Fletcher v Bealey* (1885) 28 Ch D 688, 698. For a recent case involving an application for a *quia timet* injunction in the rights to light context, see *CIP Property (AIPT) Ltd v Transport for London* [2012] EWHC 259 (Ch).

[4] For the principles governing when an interim injunction may be granted, see *American Cyanamid Co v Ethicon Ltd (No 1)* [1975] AC 396.

> Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.[5]

5.6 The leading case on the award of damages in substitution for an injunction is *Shelfer v City of London Electric Light Company*[6] ("*Shelfer*"), which concerned a claim brought by a tenant and the freeholder for an injunction restraining the defendant from committing a nuisance by noise and vibrations. At first instance Mr Justice Kekewich found the nuisance to be proved but ordered damages in substitution for an injunction under section 2 of Lord Cairns' Act,[7] apparently on the basis that the injury suffered by the claimants was not sufficiently serious to justify the award of an injunction.

5.7 This decision was later reversed by a unanimous Court of Appeal; it was declared that the starting point in cases of this type was that an injunction was the primary remedy for restraining a nuisance. On the facts of the case there was nothing to justify a different approach and therefore an injunction should have been awarded.[8]

5.8 Both Lindley LJ and AL Smith LJ offered guidance on when it would be appropriate to award damages in substitution for an injunction. The former said that the jurisdiction to award damages should be exercised in only "very exceptional circumstances".[9] He suggested that such circumstances could consist of:

> … trivial and occasional nuisances: cases in which a plaintiff has shown that he only wants money; vexatious and oppressive cases; and cases where the plaintiff has conducted himself as to render it unjust to give him more than pecuniary relief. In all such cases as these, and in all others where an action for damages is really an adequate remedy – as where the acts complained of are already finished – an injunction can be properly refused.[10]

5.9 The guidance offered by AL Smith LJ was more detailed. He said:

> In my opinion, it may be stated as a good working rule that –
>
> (1) if the injury to the plaintiff's legal rights is small,
>
> (2) and is one which is capable of being estimated in money,

5 See also section 38 of the County Courts Act 1984.

6 [1895] 1 Ch 287.

7 Section 50 of the Senior Courts Act 1981 is the successor of section 2 of the Chancery Amendment Act 1858 (commonly referred to as Lord Cairns' Act).

8 See [1895] 1 Ch 287, 311 by Lord Halsbury; 316 by Lindley LJ; and 322 and following by AL Smith LJ.

9 [1895] 1 Ch 287, 316.

10 [1895] 1 Ch 287, 317.

(3) and is one which can be adequately compensated by a small money payment,

(4) and the case is one in which it would be oppressive to the defendant to grant an injunction: –

then damages in substitution for an injunction may be given.[11]

5.10 But AL Smith LJ pointed out that various caveats were to be borne in mind by future judges when considering his good working rule. In particular, he noted that even if a case for an injunction is made out, the claimant may nevertheless by his acts or by unreasonable delay[12] disentitle him or herself to an injunction. In those situations the court may award damages in substitution for the injunction.[13]

5.11 He also noted that in some instances where the four limbs of the good working rule are satisfied, the defendant may by his or her conduct be disentitled from asking the court to award damages in substitution for an injunction. Examples of such conduct include hurrying up the building of the obstruction to avoid the court awarding an injunction, or acting with a reckless disregard to the claimant's rights.[14]

Applying the *Shelfer* criteria

5.12 *Shelfer* remains the leading case to be applied by the courts when deciding whether to award damages in substitution for an injunction;[15] the individual criteria are discussed in more detail below. As will be seen, some of the cases which have applied and developed the *Shelfer* criteria are not rights to light cases – some relate to other types of easement; others involve restrictive covenants and trespasses caused by building work – but the principles to be applied are the same. The consequences to this project of *Shelfer* applying outside of the rights to light context are discussed later in this Chapter.[16]

[11] [1895] 1 Ch 287, 322 to 323.

[12] "Laches", the word used in the judgment, is an equitable doctrine based on the maxim that delay defeats equities. It can provide a defence to claims for equitable relief such as injunctions. The doctrine is described in J McGhee (ed), *Snell's Equity* (32nd ed 2010) para 5-019 as "essentially [consisting] of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim in equity". The "circumstances" usually consist of some sort of detrimental reliance by the defendant upon the claimant's delay; otherwise a clear act of acquiescence or waiver of the claimant's rights is required.

[13] [1895] 1 Ch 287, 322.

[14] [1895] 1 Ch 287, 323.

[15] *Shelfer* was applied in all of the rights to light cases reported in the last decade where the court has had to decide whether to award an injunction or damages in substitution. See *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15; *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135*; Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148; *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch), [2005] 1 EGLR 65. For a slightly older right to light case in which *Shelfer* was applied by the Court of Appeal, see *Pugh v Howells* (1984) P & CR 298.

[16] See paras 5.54 to 5.56 below.

The injury to the claimant's rights is small

5.13 There is little guidance on what constitutes a small injury and what should be measured as reflecting the injury. In most cases the "injury" has been measured through a combination of factors, including loss of light or amenity and the resulting diminution in value of the dominant property.

5.14 At first instance in *Regan v Paul Properties DPF No 1 Ltd* ("*Regan*") the judge found that the claimant's injury was small because it reduced the value of his property by £5,500, amounting to a reduction of less than 2.5% of the property's pre-development value, and one-third of the room remained well-lit, meaning that it was not rendered "uninhabitable".[17] That decision was subsequently reversed by the Court of Appeal, which held that the claimant's injury was not small because the effect of the obstruction was to reduce the claimant's light from 67% to between 42% and 45%, requiring him to use artificial light or position himself closer to the window in the room in question.[18]

5.15 In *HKRUK II (CHC) Ltd v Heaney* ("*Heaney*") the judge relied upon a number of factors when judging the size of the injury, including the amount of adequately lit space lost (27.78 sq metres); the amount of light lost in specific areas (for example, in the boardroom, which was described by the judge as one of the "star rooms" of the building, there was a reduction from 66% to 23% with an actual area lost of 4.9 sq metres); the amount of light lost in other areas which would not be actionable; and the character of the building and the commitment demonstrated by the dominant owner in restoring it.[19] He also received submissions as to the damages that would be awarded at common law[20] for the loss of light (£80,000), which was then compared with the value of the building as a whole (£4,000,000).[21] The judge noted that the former figure was only 2% of the latter, but nevertheless concluded that the claimant's injury was not small.

5.16 In some non-rights of light cases less scientific methods have been used to determine the size of the injury. In *Jacklin v Chief Constable of West Yorkshire*,[22] which involved an interference with the claimant's right of way, the first instance judge appeared to base his finding of a small injury on the fact that the claimant rarely used it and had at his disposal an alternative right of way.[23] In *Jaggard v Sawyer*,[24] which involved a house being built in breach of a restrictive covenant, the court found that the injury suffered by the claimant was small because there was no diminution in value of the benefited property; but the finding was also based on the fact that the increase in traffic caused by an additional house in a

[17] [2006] EWHC 1914 (Ch) at [95].

[18] [2006] EWCA Civ 1319, [2007] Ch 135 at [70].

[19] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [64] to [71].

[20] We discuss the differences between damages awarded at common law and equitable damages at para 5.67 and following below.

[21] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [71].

[22] [2007] EWCA Civ 181.

[23] [2007] EWCA Civ 181 at [29].

[24] [1995] 1 WLR 269.

cul-de-sac would be minimal, and the costs of the upkeep of a communal road would barely change.[25]

The injury is capable of being estimated in money

5.17 Valuers, and the courts, are used to putting a figure on a claimant's injury and usually record no difficulties in estimating the claimant's injury in monetary terms.

The injury is one which can be adequately compensated by a small money payment

5.18 There is considerable uncertainty as to which monetary payment is to be the subject of the assessment of whether or not it is small. This is troubling, as under the current law the size of the monetary payment required to compensate the injury is essential in determining whether damages should be awarded in substitution for an injunction.

5.19 If "small money payment" means the amount of damages that would be awarded in substitution for an injunction (often referred to as "equitable damages"),[26] a court will be more inclined to award an injunction; if it means the amount of damages that would be awarded at common law, a court will be more likely to incline towards damages, because the latter is assessed on the basis of diminution in value, whereas the former is assessed on a "negotiation basis" – the amount for which the dominant owner would have released the right – and is therefore usually considerably greater.[27]

5.20 In *Heaney* the amount of damages that would have been awarded in substitution for an injunction was used to assess whether the injury could be compensated by a small money payment. These were assessed at £225,000; the diminution in value to the claimant's property – or the "book value" of the light – was assessed at £80,000.[28] Unsurprisingly the judge found that £225,000 would not amount to a "small" money payment.[29] Interestingly, in *Heaney* the judge expressly rejected an argument by counsel that he should consider only common law damages when assessing compliance with the third *Shelfer* criterion.[30]

5.21 In *Regan* the Court of Appeal considered both the common law and equitable measure of damages. The court found that the common law damages of £5,000 was not a small money payment; it also considered that equitable damages would not amount to a small money payment either, although it is not clear from the judgment what this figure would have been.[31]

[25] [1995] 1 WLR 269, 282.

[26] See para 5.67 and following below.

[27] These concepts are discussed at para 5.67 and following below.

[28] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [69].

[29] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [76].

[30] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [75].

[31] [2006] EWCA Civ 1319, [2007] Ch 135 at [71] and [72].

5.22 In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*,[32] which concerned an obstruction of light to two windows used to illuminate a stairwell, it is unclear which measure of damages the judge had in mind when deciding that the injury could be compensated by a small money payment.[33] In a later hearing on the assessment of damages the judge found that the claimant's property had diminished in value by between £608.09 and £3,030[34] and subsequently awarded damages of £50,000 in substitution for an injunction.[35]

5.23 In *Daniells v Mendonca*,[36] a case involving trespass caused by building works, the court considered only the common law measure. Peter Gibson LJ found that the £5,000 needed to cover the diminution in value of the claimant's property, plus additional expenses which had not yet been assessed to remediate the damage caused by defective building work, would not amount to a small money payment.[37]

5.24 In *Jaggard v Sawyer*,[38] Sir Thomas Bingham MR approved the approach of the first instance judge in using the equitable damages figure to assess whether the injury could be compensated by a small money payment. He said:

> The judge considered the value of the injury to the plaintiff's right as capable of being estimated in money. He based himself on the Wrotham Park approach.[39] In my view he was justified. He valued the right at what a reasonable seller would sell it for. In situations of this kind a plaintiff should not be treated as eager to sell, which he very probably is not. But the court will not value the right at the ransom price which a very reluctant plaintiff might put on it. I see no error in the judge's approach to this aspect.[40]

[32] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148.

[33] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [57].

[34] The first figure was produced by the expert for the claimant; the second figure by the defendant's expert. The judge did not find it necessary to decide which was the more accurate, as both were less than the equitable damages figure. See *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [4].

[35] *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [37] and following. See para 5.75 and following below.

[36] (1999) 78 P & CR 401.

[37] (1999) 78 P & CR 401, 408.

[38] [1995] 1 WLR 269.

[39] In *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, Brightman J awarded damages on the basis of the price for which the claimants would have relaxed the restrictive covenants restricting the defendant's development from proceeding. This is the "negotiation basis" of damages mentioned above (at para 5.19) and discussed in more detail at para 5.69 below.

[40] [1995] 1 WLR 269, 282.

The case is one in which it would be oppressive to the defendant to grant an injunction

5.25 The courts take into account a multitude of factors when deciding whether granting an injunction would be oppressive to the defendant. Most of the following factors are reflected in guidance given by Lord Justice Lindley in *Shelfer*;[41] others have developed from later cases:

(1) the nature of the injury;

(2) whether the claimant has shown that he or she only wants money;

(3) the effect of the injunction on the defendant;

(4) the conduct of the defendant;

(5) the conduct of the claimant; and

(6) whether the claimant applied for interim relief in the form of an injunction.

THE NATURE OF THE INJURY

5.26 In *Shelfer*, Lindley LJ said that trivial injuries may not warrant the grant of an injunction.[42] The nature of the injury appears to have been a key factor in the decision of Gabriel Moss QC to refuse to grant an injunction in *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*:

> The injury to the right to light to the basement stairs, although sufficient to be a nuisance, is, in the whole context of the buildings and the reality of the use of artificial light in office buildings, trivial. … Accordingly, a mandatory injunction requiring demolition of a substantial part of the defendant's structure would be wholly out of proportion to the injury caused to the claimant on any possible view.[43]

WHETHER THE CLAIMANT HAS SHOWN THAT HE OR SHE ONLY WANTS MONEY

5.27 This can be an important factor. In *Gafford v Graham*[44] it was held that the fact that the claimant had shown that he wanted money meant that the first and third limbs of the *Shelfer* criteria simply did not apply. Lord Justice Nourse said:

> … [the claimant's] willingness to settle the dispute on payment of a cash sum can properly be reflected by an award of damages. Nor, once that is established, can it be an objection that the amount of damages may be large. The injury to the claimant's rights must be adequately compensated. In such a case the first and third conditions of the good working rule do not apply.[45]

[41] [1895] 1 Ch 287, 317.

[42] [1895] 1 Ch 287, 317.

[43] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [61].

[44] (1999) 77 P & CR 73.

[45] (1999) 77 P & CR 73, 85 to 86.

THE EFFECT OF THE INJUNCTION ON THE DEFENDANT

5.28 Much argument about the oppressive nature of an injunction focuses upon the effect that it will have on the defendant. Typically this effect is then compared against the loss suffered by the claimant if the injunction is not granted.

5.29 The force behind a submission that an injunction will be oppressive because of its effect on the defendant very much depends upon the conduct of the defendant; we discuss this in more detail below.[46] If a defendant has acted badly and has, for example, built with a reckless disregard for the claimant's rights, then the argument of oppression will be likely to fail: the defendant proceeded with his or her eyes open to the risk of a court granting an injunction.[47]

5.30 An important case on oppression and the effect of an injunction on the defendant is *Jaggard v Sawyer* and, in particular, the judgment of Millett LJ, in which he was wary of the consequences that a mandatory injunction could have on a defendant, particularly where the obstruction was caused by a new building which had been fully constructed. He said:

> … to grant [an injunction] would subject the defendant to a loss out of all proportion to that which would be suffered by the plaintiff if it were refused, and would indeed deliver him to the plaintiff bound hand and foot to be subjected to any extortionate demands the plaintiff might make.[48]

5.31 These words of warning were picked up by the judge in *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* and led to the refusal of an injunction:

> … I consider that it would be "oppressive" to grant a mandatory injunction which would create loss to the defendants out of all conceivable proportion to any loss that might be suffered by the claimant. The grant of a mandatory injunction would be unjust and inequitable and, in the exercise of my discretion, I am not prepared to grant it.[49]

[46] See para 5.32 and following below.

[47] See, for example, *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [80], in which the judge held that the infringement was committed in the knowledge of an actionable breach and in the view of obtaining a profit, and therefore it was not oppressive to grant the injunction despite the substantial cost to the developer in cutting back the property. A similar conclusion was reached in *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135 at [74].

[48] [1995] 1 WLR 269, 288.

[49] [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [66].

CONDUCT OF THE DEFENDANT

5.32 The conduct of the defendant is most relevant in situations where he or she has attempted to steal a march on the claimant by expediting the building works in an effort to face the court with a *fait accompli*.[50] Where this is the case the court can refuse to award damages in substitution for an injunction even where the *Shelfer* criteria are satisfied.[51]

5.33 However, it is also relevant where the defendant has acted in good faith. In *Jaggard v Sawyer* Millett LJ said:

> At the one extreme, the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights, and thereby inadvertently placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortionate demands or expose him to substantial loss.[52]

CONDUCT OF THE CLAIMANT AND WHETHER INTERIM RELIEF WAS APPLIED FOR

5.34 Closely linked are the issues of whether an application has been made for interim relief and the conduct of the claimant. The case law is not always consistent on the consequences of failure to apply for interim relief, but the following principle seems to be reflected in the cases. The courts prefer to grant prohibitory injunctions, which require the defendant to refrain from doing something, than mandatory injunctions, which impose obligations on the defendant to perform certain tasks. Faced with a completed building and a choice between ordering a mandatory injunction or awarding damages in substitution, a court is less likely to award an injunction than if the claimant had applied for an interim injunction to stop the building from being erected in the first place.[53] Nevertheless, there are many cases in which the courts have awarded mandatory injunctions to demolish completed buildings;[54] some judges have recognised that the requirement that a claimant must give an undertaking in damages to the court puts many off applying for interim relief.[55]

[50] This term appears throughout the case law and means a thing which has been done and is past arguing against or altering.

[51] See *Shelfer v City of London Electric Light Company* [1895] 1 Ch 287, 323 and *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 193.

[52] [1995] 1 WLR 269, 288, cited in *Daniells v Mendonca* (1999) 78 P & CR 401, 407; *Ketley v Gooden* (1997) 73 P & CR 305, 311; *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch) at [75]; and *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [59].

[53] See, for example, *Gafford v Graham* (1998) 77 P & CR 73.

[54] See, for example, *Regan v Paul Properties DPF No 1 Ltd* [2006] EWCA Civ 1319, [2007] Ch 135; *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

[55] *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [79]. When applying for an interim injunction the applicant is invariably required to give an undertaking to the court that he or she will pay damages to the respondent in the event that, following a full trial of the issue, it transpires that the injunction should not have been granted – see *Smith v Day* (1882) 21 Ch D 421.

5.35 A related subject is delay in bringing proceedings. Again, this is usually treated as a factor by the courts, but it is not decisive; in *Jacklin v Chief Constable of West Yorkshire* the Court of Appeal affirmed the grant of an injunction despite the failure of the claimant to seek an interim injunction, and despite his three year delay in bringing the claim.[56]

5.36 Few cases have been decided on the basis of delay. This is surprising, particularly because AL Smith LJ made clear in *Shelfer* that a dominant owner may "by his acts or laches"[57] disentitle him or herself to an injunction.[58]

5.37 In *Heaney* the dominant owner was first informed of the potential infringement of his right to light in October 2007. Extensive negotiations were then undertaken over a period of two years. On several occasions the dominant owner threatened to bring proceedings for an injunction but never carried this through. The building was completed by July 2009, at which time the developer's solicitors again wrote to the dominant owner, asking him to bring proceedings rather than keep the threat of an injunction hanging over the development. This request was ignored, and ultimately the developer applied to the court for a declaration as to its liability to the dominant owner.[59]

5.38 HHJ Langan QC noted that the case was unusual in that the party bringing proceedings was the developer rather than the dominant owner, and that the dominant owner had on several occasions been slow in correspondence and refused to bring proceedings to protect his right to light.[60] But in his judgment he indicated that the force of the delay argument was greatly reduced by the fact that the infringement was deliberate and committed with a view to making a profit.[61]

A provisional proposal for reform

5.39 The decision of the High Court in *Heaney* has generated a great deal of commentary on the current approach taken by the courts when applying *Shelfer*. From this material, and from initial discussions with stakeholders and our own analysis of the law, we consider that the following issues are causing difficulties.

(1) It is difficult to predict whether a court will award an injunction or damages in substitution for an injunction, particularly because the courts can be inconsistent in their approach to the *Shelfer* criteria.

[56] [2007] EWCA Civ 181.

[57] See para 5.10 and n 12 above.

[58] [1895] 1 Ch 287, 322.

[59] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [12] to [34].

[60] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [1], [79] and [80].

[61] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [80]. In S Bickford-Smith, M Baker and K Shaw, "Under a shadow" (2011) 1115 *Estates Gazette* 83 (co-authored by counsel for Mr Heaney) it is noted that during the hearing of *Heaney* the barrister for the developer had to abandon an argument of acquiescence after the judge indicated that he was unlikely to accept it.

(2) There is currently no cut off point, in terms of timings, when a property developer can build safe in the knowledge that no injunction will be granted because the dominant owner has delayed for too long.

5.40 The decision in *Heaney* has caused a great deal of concern for developers.[62] Previously the view was that there was a point at which a court would refuse to grant an injunction due to delay – *Heaney* demonstrates that that is not the case. This puts dominant owners in an extremely strong bargaining position. The viability of commercial developments can be heavily dependent upon the building works being completed on time. It is therefore to the dominant owner's advantage in the negotiation process to stall negotiations for as long as possible to secure an inflated payment for the release of the right, comfortable in the knowledge that, following *Heaney*, a court will almost always award an injunction. Indeed, it is likely that the longer that the dominant owner waits, the greater the payment that can be demanded. Not all dominant owners will want to take that approach in negotiations; but it is currently open to all of them to do so. We discuss this issue in more detail in Chapter 6, where we provisionally propose the introduction of a new notice procedure to help ameliorate these concerns.

5.41 A related difficulty is the approach of the courts to the *Shelfer* criteria. The inconsistencies in the case law as to when damages will be awarded in substitution for an injunction mean that it is often very difficult to predict when an injunction will be granted. Furthermore, it has been argued that the case law shows a recent trend towards treating the application of the *Shelfer* criteria as a formalistic tick-box exercise, in which the courts require that all four elements of the criteria must be satisfied before damages may be awarded in substitution for an injunction.[63] Whilst this approach may be seen as consistent with the judgment of AL Smith LJ in *Shelfer*,[64] it contrasts with other decisions, such as *Gafford v Graham*, in which the Court of Appeal held that the most important issue is whether the grant of the injunction would be oppressive.[65]

5.42 Some argue that the tick-box approach results in the courts getting caught up in questions of whether the injury is small and are therefore failing to focus on what they argue is the key issue: would the grant of an injunction be oppressive?[66] The criticism focuses on the recent decisions in *Regan*[67] and *Heaney*;[68] it has been argued that in those cases the courts:

[62] See Chapter 1, para 1.10 and following above.

[63] See S Bickford-Smith and N Taggart, "Don't be left in the dark" (2012) 1235 *Estates Gazette* 64, 66.

[64] In *Shelfer v City of London Electric Lighting Company* [1895] 1 Ch 287, 323 AL Smith LJ said: "Each case must be decided upon its own facts; but to escape the rule it must be brought within the exception."

[65] (1999) 77 P & CR 73, 86.

[66] See, in particular, S Bickford-Smith and N Taggart, "Don't be left in the dark" (2012) 1235 *Estates Gazette* 64.

[67] [2006] EWCA Civ 1319, [2007] Ch 135.

[68] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

> … failed to give proper weight to the question of oppression, thereby subjecting the developers to losses out of all proportion to those that would be suffered by the victim in each case, were the injunction refused.[69]

Reform of the Shelfer criteria

5.43 In this section we make a provisional proposal for reform of the criteria used by the courts when considering whether to award damages in substitution for an injunction by introducing a new statutory test which re-states the *Shelfer* criteria with modifications. This reform would apply only to rights of light; we discuss the reasons for this below.[70] The aim is to make clear that oppression is the key element in the decision as to whether to grant an injunction or award damages instead and ensure that a formalistic "tick-box" approach is not used by the courts. We also wish to clarify some elements of the test.

5.44 For instance, the issues with assessing whether an injury is "small" were explored above.[71] The lack of clarity as to what factors should be used to assess the size of the claimant's injury is unhelpful. Is the claimant's injury the amount of light lost overall, the severity of the light lost in a particular area of the building, the book value of the light lost, the general loss of amenity, or all of these factors combined? What measure of loss can be taken as being "small"?

5.45 Similar issues exist with the third limb of *Shelfer* – can the injury be compensated by a small money payment? There is clearly some inconsistency in how the courts are approaching this question – is the "small money payment" the diminution in value of the dominant property or the amount of damages that a court would award in substitution for an injunction?[72]

5.46 These issues can be dealt with relatively easily. We take the view that the size of the injury should be assessed on the basis of loss of amenity, given that the purpose of a right to light is to protect the amenity value of the dominant owner's light. This assessment of loss of amenity may take into account whether artificial light is ordinarily used by the dominant property. This was the basis of the remedy awarded in *Midtown Ltd v City of London Real Property Co Ltd*;[73] the court found that an injunction was not appropriate in that case because, among other reasons, the proposed obstruction of the light would not affect the use and enjoyment of the dominant property, which was used as commercial premises and relied constantly upon artificial light for illumination.[74]

[69] S Bickford-Smith and N Taggart, "Don't be left in the dark" (2012) 1235 *Estates Gazette* 64, 66.

[70] See para 5.54 and following below.

[71] See paras 5.13 to 5.16 above.

[72] See paras 5.18 to 5.24 above.

[73] [2005] EWHC 33 (Ch), [2005] 1 EGLR 65.

[74] [2005] EWHC 33 (Ch), [2005] 1 EGLR 65 at [79].

5.47 That deals with the size of the injury. We propose that the court should also consider simply whether a monetary payment will be adequate compensation. We see no reason why this monetary payment should have to be small – if the proposed obstruction is a commercial development which stands to make large profits then the damages awarded in substitution for an injunction may be large. This does not seem to provide a principled reason for inclining towards awarding an injunction – the key issue should be the size and nature of the dominant owner's injury, rather than the size of the damages that the dominant owner can expect to receive.

5.48 It was noted above that some commentators have suggested that oppression – currently the fourth limb of *Shelfer* – is the most important factor that the court has to consider. We agree. Arguably all four elements of the *Shelfer* test in its current form are geared towards assessing whether granting an injunction would be oppressive – if the injury was small and could easily be compensated by a small monetary payment then it will be likely to be oppressive for the court to grant an injunction. We take the view that this should be acknowledged explicitly in the new statutory test.

5.49 However, we consider that the concept of proportionality captures the key factor that the courts should take into account better than "oppression".[75] "Disproportionate" makes clear that the court is entitled to take into account factors other than the effect of the injunction on the defendant. Accordingly, we provisionally propose that a court may decide to award damages in substitution for an injunction if to grant an injunction would be disproportionate.

5.50 We provisionally propose that a court may award damages in substitution for an injunction in rights to light cases if the grant of the injunction would be disproportionate, bearing in mind:

(1) the size of the injury in terms of loss of amenity (which can include consideration of whether artificial light is usually used by the claimant);

(2) whether a monetary payment will be adequate compensation;

(3) the conduct of the claimant;

(4) whether the claimant delayed unreasonably in bringing proceedings; and

(5) the conduct of the defendant.

Do consultees agree?

[75] The concept of proportionality has already been relied upon by the courts when considering whether to award damages in substitution for an injunction. See *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2006] EWHC 3589 (Ch), [2007] 1 WLR 2148 at [61] and [66]; and *Jaggard v Sawyer* [1995] 1 WLR 269, 288.

5.51 The factors listed above are not hurdles to be surmounted – they are elements to be taken into account by the court in deciding whether granting an injunction would be disproportionate. No item on the list should be viewed as definitive – it will be up to the courts to determine the weight to be afforded to each factor in any given case. Nor is the list exhaustive: the nature of the injury, whether the claimant applied for an interim injunction, the impact on the defendant of granting the injunction, and the other items listed at paragraph 5.25 above are all relevant to the court's inquiry, as they have a bearing on whether the grant of the injunction would be disproportionate.

5.52 One factor that is not present in the above list is the public interest. We note that in some cases, such as *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*, the court appeared to take account of the public benefit in the development going ahead.[76] But in *Kennaway v Thompson*[77] the Court of Appeal stated expressly that the *Shelfer* criteria could not be overridden on the basis of a public interest argument.[78] It has been suggested that public interest should play a role in deciding whether to award an injunction or damages in substitution.[79]

5.53 We are not convinced that the public interest has a role to play in deciding the most appropriate remedy for private rights. If there is a true public interest in the development then that is a public law issue – as we have noted elsewhere in this Consultation Paper, section 237 of the Town and Country Planning Act 1990 provides a way of overriding easements which are blocking a development in the public interest from proceeding, provided that the other conditions for its use are met.[80] Therefore we do not propose to introduce public interest as an element for the court to consider.

LIMITING REFORM TO RIGHTS OF LIGHT

5.54 *Shelfer* is the leading case for determining when damages may be awarded in substitution for an injunction under section 50 of the Senior Courts Act 1981. This jurisdiction applies in circumstances other than the infringement of rights to light; cases involving obstruction of other easements, infringements of restrictive covenants and trespasses caused by building works are decided on essentially the same basis as rights to light cases. So should any reform extend to section 50 of the Senior Courts Act 1981 generally, rather than just to rights of light cases?

[76] [1974] 1 WLR 798, 811 by Brightman J: "It would, in my opinion, be an unpardonable waste of much needed houses to direct that they now be pulled down and I have never had a moment's doubt during the hearing of this case that such an order ought to be refused". It has been suggested (in the context of a nuisance caused by noise) that public interest can play a role in ascertaining whether a nuisance has occurred – see *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] Env LR 34 at [45].

[77] [1981] QB 88.

[78] [1981] QB 88, 92 and following.

[79] S Bickford-Smith and N Taggart, "Don't be left in the dark" (2012) 1235 Estates Gazette 64,66. See also P S Davies, "Lighting the way forward: the use and abuse of property rights" in S Bright (ed), *Modern Studies in Property Law: Volume 6* (2012) pp 48 and 49.

[80] See Chapter 2, paras 2.49 to 2.57 above and Chapter 7, paras 7.49 to 7.67 below.

5.55 We are of the view that it should not. While there is a clear conceptual benefit in extending reform so that it applies universally, we are wary of proposing unnecessary changes. In contrast to the position with rights to light, we are not aware of any criticism of how *Shelfer* is being applied in other contexts. Furthermore, the other rights in relation to which the section 50 jurisdiction may be exercised – rights of way, restrictive covenants etc – are rights that will typically have arisen by express grant or agreement and therefore will be visible on title. It will therefore be comparatively easier to determine whether those rights are going to be infringed by a proposed obstruction. This is not the case with rights to light, which usually arise informally by prescription and therefore present a greater problem.

5.56 We would be grateful for consultees' views on limiting to rights to light cases reform of the test for when damages may be awarded in substitution for an injunction.

DAMAGES

5.57 Under general principles of tort law the damages that a claimant may recover must be equivalent to the losses that he or she has actually suffered.[81] Subject to one exception, discussed below,[82] the heads of damages at common law for the infringement of a right to light are:

(1) damages for physical damage or financial loss suffered;

(2) damages for loss of amenity; and

(3) damages for diminution in value of the claimant's property.[83]

Damages for physical damage or financial loss suffered

5.58 Damages are available to compensate the claimant for physical damage to property or other financial losses resulting from the infringement. This head of damage is unlikely to be relevant in the vast majority of rights to light cases. However, one example of an instance where it may be relevant, offered by Stephen Bickford-Smith and Andrew Francis, is where the infringement of a right to light results in physical damage to an exotic plant, presumably where the dominant property is a greenhouse.[84]

[81] M Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2011) para 28-07.

[82] See para 5.64 and following below.

[83] Also available are aggravated damages, which may be awarded where the case involves: (1) exceptional conduct or motives on the part of the defendant in committing the wrong, and (2) mental distress, injury to feelings, indignity, insult, humiliation and a heightened sense of injury or grievance sustained by the claimant. For further details see *Gale on Easements*, para 14-150 and following. Exemplary damages (punitive damages intended to teach the defendant that "tort does not pay" and deter him or her and others from similar conduct) are seemingly also available under normal principles. See M Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2011) para 28-137 and following.

[84] *Rights of Light: The Modern Law*, para 11.48.

Damages for loss of amenity

5.59 A claimant is also entitled to damages to compensate for any loss of amenity caused by the infringement. Loss of amenity may include inconvenience suffered, and loss of sunlight or of sky visibility.[85] Such damages are difficult to assess – the courts have given little guidance on the principles governing the assessment of damages for loss of amenity in the context of nuisance claims. The Court of Appeal has suggested that damages awarded for loss of amenity in personal injury cases may provide some guidance,[86] although the utility of this approach has been questioned.[87]

5.60 Damages for loss of amenity are often modest. In particular, courts are wary of double recovery – loss of amenity will be likely to lead to diminution in value and the courts will usually incorporate the former into the latter.[88]

Damages for diminution in value

5.61 Where the obstruction of light leads to a reduction in the value of the claimant's property, damages can be awarded to compensate for that loss. This diminution in value can either be permanent or temporary (the latter could occur where, say, the infringement lasts for one year and the dominant property cannot be let to a tenant for that year).

5.62 Damages for diminution in value are assessed on the basis of the reduction in the value of the dominant property. In the rights to light context surveyors often use a particular method to calculate the damages payable for diminution in value. This is explained in *Gale on Easements* in the following terms:

> For the purpose of calculating compensation the affected rooms are divided into four equal zones known respectively as the front zone, the first zone, the second zone and the makeweight area. Loss of light in the front zone is regarded as very serious and that area of loss is given a weighting of 1.5. Loss of light in the second zone is given a weighting of 0.5 and loss of light in the makeweight area is taken at 0.25. By the application of these factors the loss is thus given a value equivalent to first zone loss, known as "EFZ". The EFZ figures are then aggregated and multiplied by a rate per square foot per annum of between £3 and £5, depending on location. That gives an annual value which is then capitalised by the application of a suitable years purchase figure. The valuation formula can thus be expressed as follows: EFZ x [£3 – £5] x YP. It can be seen that this approach is in essence a way of calculating the diminution in capital value of the areas affected by loss of light and thus of the dominant tenement.[89]

[85] *Gale on Easements*, para 14-130.

[86] *Bone v Seale* [1975] 1 WLR 797, 803. The case involved a nuisance caused by offensive smells from a nearby pig firm.

[87] *Gale on Easements*, para 14-130.

[88] This approach was taken in *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922, discussed at para 5.72 and following below.

[89] *Gale on Easements*, para 14-126.

5.63 Damages for diminution in value are not restricted to the diminution in value of the dominant property. If the owner of the dominant property owns other property which is also affected by the obstruction of light, damages can also be recovered for this loss, regardless of whether the other property benefits from rights to light.[90]

An exception to the general rule: damages for loss of bargaining position

5.64 It was noted above that the general rule of tort law is that damages should be equivalent to the loss suffered by the claimant. However, there is a notable exception to this. In trespass cases where no physical damage has been suffered the courts assess damages on the "wayleave basis" – meaning what the defendant would have paid for a wayleave to render lawful the interference.[91]

5.65 This practice arose in the nineteenth century[92] and may have developed because damages in trespass are actionable without need for proof of loss. In the absence of a jurisdiction to award damages on the wayleave basis, if a trespass did not cause any physical damage to the claimant's property or cause it to diminish in value, the courts would only be able to award nominal damages, which would allow a defendant to profit from his or her own wrong.[93]

5.66 For the reasons discussed below, common law damages for loss of bargaining position are unlikely to be of relevance in the vast majority of cases.

The problem with common law damages

5.67 Damages awarded at common law may only be awarded in respect of losses suffered up to the date of trial. But in the majority of rights to light cases the obstruction will be permanent and therefore losses are continuous. Before 1858 this meant that claimants had to bring successive actions at common law to get fresh damages to compensate for losses which occurred during the period from the last trial to the date of the new trial.[94] This problem was resolved by the

[90] See *London Tilbury & Southend Railway Company v Gowers Walk School Trustees* (1889) 24 QBD 326, 329: "… the plaintiff is entitled to recover for all the damage caused which was the direct consequence of the wrongful act and so probable a consequence that, if the Defendant had considered the matter, he must have foreseen the whole damage would result from the act". This decision was applied by the Court of Appeal in *Griffiths v Richard Clay & Sons Ltd* [1912] 2 Ch 291.

[91] See M Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2011) para 19-63 and following. For a relatively recent example of damages awarded on this basis in a trespass case in which no physical damage to the land occurred, see *Sinclair v Gavaghan* [2007] EWHC 2256 (Ch).

[92] *Gale on Easements*, para 14-131 notes that "the exception [to the general common law rules] originated in wayleave cases, where the defendant had trespassed by carrying coals along an underground way through the plaintiff's mine. Although the value of his land had not been diminished by the trespass, the plaintiff recovered damages equivalent to what he would have received if he had been paid for a wayleave", citing *Martin v Porter* (1839) 5 M & W 351, 151 ER 149 and other cases.

[93] See the concerns of Brightman J in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, 812 to 813.

[94] See *Rights of Light: The Modern Law*, para 11.38 and following.

introduction of a jurisdiction for courts of equity to award damages in substitution for an injunction.[95]

5.68 Damages awarded in substitution for an injunction – often called "equitable damages"[96] – are available only where the court has jurisdiction to award equitable relief[97] and cover future as well as past loss. As Lord Justice Millett in *Jaggard v Sawyer* put it:

> … when the court awards damages in substitution for an injunction, it seeks to compensate the plaintiff for loss arising from future wrongs, that is to say, loss for which the common law does not provide a remedy.[98]

5.69 Equitable damages are assessed in essentially the same way as the wayleave basis at common law. In the textbooks they are called something slightly different – they are said to be calculated on the "negotiation basis" – but there is no difference in principle between the two measures. Equitable damages are assessed on the basis of the price for which the claimant would have agreed to release his or her right:

> The overall principle is that the court must attempt to find what would be a "fair" result of a hypothetical negotiation between the parties.[99]

5.70 Because damages at common law only cover losses to the date of trial, they are unlikely to be relevant in most rights to light cases involving the permanent obstruction of light;[100] in this situation the claimant will usually apply for an injunction or damages in substitution for an injunction under section 50 of the Senior Courts Act 1981. The applicable principles will therefore be those which have developed under the 1981 Act and discussed below.

[95] See n 7 above.

[96] See M Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2011) para 28-132 and following.

[97] The court is able to award damages under section 50 of the Senior Courts Act 1981 where it has jurisdiction to award an injunction. Note that this test is not whether the court *would* have awarded the injunction; the question is whether it *could* have. As noted in *Jaggard v Sawyer* [1995] 1 WLR 269, 284, the question is effectively one of jurisdiction. An example of this in practice is found in *Surrey CC v Bedero Homes Ltd* [1993] 1 WLR 1361, where a developer acted in breach of a restrictive covenant by erecting more houses on a plot of land than the covenant allowed. The developer subsequently sold the houses to third parties. The claimant then brought an action for breach of the restrictive covenant, claiming equitable damages. The court held that, because the action had been brought against the developer only, after the development had taken place and the houses had been sold, the court could not award an injunction. Therefore damages awarded in substitution for an injunction were not available. See Lord Justice Millett's comments on this case in *Jaggard v Sawyer* [1995] 1 WLR 269, 289 to 290.

[98] [1995] 1 WLR 269, 290.

[99] *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)* [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [22].

[100] It has been suggested that "… the 'wayleave measure' may, it is thought, be an appropriate basis of claim for a temporary obstruction to light: the claimant and the defendant would notionally have bargained to allow the defendant to infringe the claimant's right, and reached a figure taking into account the benefit and cost to both sides". See *Rights of Light: The Modern Law*, para 11.55.

Damages awarded in substitution for an injunction (equitable damages)

5.71 Equitable damages usually incorporate losses of amenity and diminution in value into the final assessment of damages on the basis that if the claimant was going to negotiate away the right, the price that he or she would ask for would reflect any loss of amenity or diminution in the value of the dominant land.[101]

5.72 The first reported rights to light case on damages awarded in substitution for an injunction is the judgment of Millett J in *Carr-Saunders v Dick McNeil Associates Ltd* ("*Carr-Saunders*").[102] Expert evidence had valued the diminution in value of the dominant land at between £2,340 and £2,900. Millett J noted that if he was just awarding special damages, that would be an appropriate figure. But he was awarding general damages,[103] and the authorities that had been cited to him showed that he was also able to take account of:[104]

(1) loss of amenity generally, due to factors such as loss of sky visibility, the impression that other buildings were closer (through optical illusions), the loss of sunlight and the general deteriorating quality of the environment; and

(2) the hypothetical negotiation that would have taken place between claimant and defendant – the claimant would not have been satisfied with £3,000 (the diminution in value figure, rounded up); he would have a bargaining position because if he did not agree to release his right the development could not proceed. This was the approach taken in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*[105] (a restrictive covenant case) and in *Bracewell v Appleby*[106] (a right of way case).

5.73 Accordingly, Millett J concluded that he could take into account the claimant's bargaining position and the amount of profit that the defendant would look to make from the site. However, on the facts of *Carr-Saunders* there was no evidence of the amount of profit the defendant was set to make from the development. But there was evidence of the claimant's general loss of amenity, which would have been a factor in the hypothetical negotiation between the parties for the release of the claimant's right.

[101] See the comments of Millett J in *Carr-Saunders v Dick McNeil Associates Ltd* [1986] 1 WLR 922, 931: "… it seems to me obvious that any dominant owner, negotiating with a servient owner for monetary compensation for the loss of light, would take into account the general loss of amenity which his premises would suffer".

[102] [1986] 1 WLR 922.

[103] The distinction between general and special damages was explained by Bowen LJ in *Ratcliffe v Evans* [1892] 2 QB 524, 528 (cited in M Jones and A Dugdale (eds), *Clerk & Lindsell on Torts* (20th ed 2011) para 28-05): "… the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage (beyond the general damage), which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial."

[104] See [1986] 1 WLR 922, 930 to 932.

[105] [1974] 1 WLR 798.

[106] [1975] Ch 408.

5.74 After stating that he regarded £3,000 or thereabout as the absolute minimum figure, Millett J went on to award general damages of £8,000. This application of an approximate multiplier of three to the actual loss figure has become known anecdotally as the "*Carr-Saunders* multiplier" and is used in cases where no evidence of profits is available.

5.75 Equitable damages were also awarded in the rights to light case of *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd (No 2)*.[107] Gabriel Moss QC, sitting as a deputy High Court judge, began by stating that the most appropriate measure of damages in substitution for an injunction was the greater of damages for loss of amenity and "damages for loss of the ability to obtain an injunction".[108] He found that the maximum assessment of loss of amenity was £3,030 and so proceeded to consider the quantum of damages for the inability to obtain an injunction, assessed on the basis of a hypothetical negotiation between the parties for the release of the right. After reviewing *Carr-Saunders* and *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd*[109] he deduced the following applicable principles:

> (1) The overall principle is that the court must attempt to find what would be a "fair" result of a hypothetical negotiation between the parties.
>
> (2) The context, including the nature and seriousness of the breach, must be kept in mind.
>
> (3) The right to prevent a development (or part) gives the owner of the right a significant bargaining position.
>
> (4) The owner of the right with such a bargaining position will normally be expected to receive some part of the likely profit from the development (or relevant part).
>
> (5) If there is no evidence of the likely size of the profit, the court can do its best by awarding a suitable multiple of the damages for loss of amenity.
>
> (6) If there is evidence of the likely size of the profit, the court should normally award a sum which takes into account a fair percentage of the profit.
>
> (7) The size of the award should not in any event be so large that the development (or relevant part) would not have taken place had such a sum been payable.

[107] [2007] EWHC 212 (Ch), [2007] 1 WLR 2167.

[108] [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [3].

[109] [2001] 1 EGLR 81. This was a restrictive covenant case in which Anthony Mann QC, sitting as a deputy High Court judge, postulated a number of factors as relevant to the hypothetical negotiation.

(8) After arriving at a figure which takes into consideration all the above and any other relevant factors, the court needs to consider whether the "deal feels right".[110]

5.76 Unlike *Carr-Saunders*, in *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* the judge did have evidence of the estimated profits of the development. He calculated the damages payable in substitution for an injunction on the following basis.[111]

(1) The claimant's expert had estimated the likely profits from the relevant part of the development to be £163,000; the defendant's expert had estimated a figure of £186,000.

(2) The halfway point between those figures was £174,500.

(3) The parties to the hypothetical negotiation would generally agree to a one-third split of the profits – £58,166.

(4) This figure would then be reduced because of the relatively modest nature of the infringement and the need to not have a sum which would put the defendant off the relevant part of the development. This would have reduced the figure to £50,000, being a "fair result".

5.77 The judge then considered whether that figure "felt right"[112] and concluded that it did – it was substantially more than damages for loss of amenity but it seemed an appropriate figure for the claimant's hypothetical agreement to release the right. Equitable damages were therefore assessed at £50,000.

5.78 In *Heaney*[113] HHJ Langan QC adopted Gabriel Moss QC's summary of the applicable principles quoted above.[114] The judge calculated the damages that he would have awarded if he had refused to award an injunction on the following basis.[115]

(1) There were no hard and fast rules as to the date on which the hypothetical negotiation is said to take place. The court should "plant its feet in the real world and … assume that both parties would act reasonably".[116]

[110] [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [22].

[111] [2007] EWHC 212 (Ch), [2007] 1 WLR 2167 at [37].

[112] In *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* [2001] 1 EGLR 81, 87, Anthony Mann QC (sitting as a deputy High Court judge) noted that in any negotiation "science and rationality only gets one so far. At the end of the day, the deal has to feel right".

[113] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15.

[114] See the numbered list at para 5.75 above.

[115] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [81] to [89].

[116] [2010] EWHC 2245 (Ch), [2010] 3 EGLR 15 at [84].

(2) The developer would have wanted to conclude negotiations before the foundation works for the relevant development would have commenced, so that a decision could have been made as to the extent of the development that would go ahead. That was therefore the approximate time when the negotiations would have taken place.

(3) Expert evidence showed that the profit that the relevant part of the development (being part of the development that would cause the obstruction) would achieve was estimated at £1,408,000.

(4) The developer had obtained a £350,000 discount on the purchase price of the servient land to take into account potential rights to light issues, so the developer was resting on a cushion which could be regarded as expendable.

(5) The developer had budgeted £200,000 to settle all rights to light issues; in the event the defendant turned out to be the only dominant owner with a claim.[117]

(6) There should be an uplift on the figure of £200,000, but only a modest one bearing in mind the reluctance of the defendant to issue proceedings would have made it unlikely that he would have pushed unduly hard in negotiations.

(7) A final figure of £225,000 was reached – this "felt right".

Other factors relevant to the hypothetical negotiation

5.79 An important consideration in the assessment of damages is the amount of profits that may arise as a result of the proposed obstruction of light. But other factors can also be relevant.

5.80 In some cases the courts have used comparable transactions to assist them in determining what the outcome of the hypothetical negotiation would be. For instance, in the right to light case of *Marine & General Mutual Life Assurance Society v St James Real Estate Co Ltd*,[118] the judge took account of a previous agreement between the same developer and a third party in relation to the same development works that would cause the obstruction. That agreement provided that in exchange for £25,000 the third party agreed to withdraw his objections to the works. The judge found that the claimant was in a slightly weaker bargaining position as compared to the other party and so awarded a lower figure of £18,000.

[117] Where several parties benefit from rights to light, all of which would be infringed by a development, any individual dominant owner is only entitled to a share of the "pot" that the developer would reasonably have made available to deal with rights to light claims. For example, in *Bracewell v Appleby* [1975] Ch 408, a case in which the court assessed damages on the basis of the price that the defendants would have paid to the claimants in return for the grant of a right of way, the damages of £2,000 (the sum that the defendants would have paid) were divided between the five servient owners, giving them £400 each.

[118] [1991] 2 EGLR 178.

Is there a need for reform?

5.81 We are not aware of any difficulties with the way in which common law damages are assessed. But some stakeholders are unhappy with the courts' approach to assessing equitable damages. The concern focuses particularly upon the principle that the dominant owner is entitled to a share of the profits that will be generated by the proposed building that will cause the obstruction. This is why equitable damages are usually more generous than the amount of actual loss suffered by the dominant owner, and sometimes considerably more generous – it is conceivable that equitable damages could in some cases be greater than the value of the dominant property itself. We have also heard of unhappiness with the complexity in the assessment of damages.

5.82 We have therefore considered a number of possible options for reform of how equitable damages are assessed. These include the following:

(1) a greater role for comparable transactions;

(2) changing the measure of equitable damages to diminution in value (plus damages for loss of amenity and for any financial losses suffered due to the infringement); and

(3) as above, but with the addition of a statutory uplift applied to the diminution in value figure.

A greater role for comparable transactions

5.83 As noted above, the courts sometimes use comparable transactions to ascertain the appropriate figure for equitable damages. One reform option could therefore be to require the courts to disregard the expected profits that the development is set to make and simply ascertain what the market value for the release of the right would be, without having regard to "ransom" potential.[119]

5.84 This type of valuation methodology would rely heavily upon comparables – similar deals for the release of rights to light in similar contexts. It would therefore be extremely difficult to apply where no comparables are available. We would be extremely concerned about introducing this measure of damages without clear evidence that such comparables are available.

5.85 This measure of damages may also not work in practice as a way of removing an element of profit share from the assessment, as comparable deals may themselves have been based in part on an element of profit share. Therefore we do not believe that this presents a viable option for reform.

[119] By this we mean the ability of the "seller" (the dominant owner) to obtain an artificially high price because the "purchaser" (the developer) has no other option but to treat with him or her.

Change the current basis to diminution in value

5.86 Another option would be to change the basis of the calculation of equitable damages, so that they would equate to the diminution in value of the dominant land as a result of the loss of light, allowing also for damages for loss of amenity and for financial losses caused by the infringement. This would essentially replicate the position at common law – but without damages assessed on the "wayleave basis".[120] The effect of this would be to remove any element of profit share.

Change the current basis to diminution in value with an uplift

5.87 A further possibility would be to apply to the diminution figure a statutory uplift. This would allow for a multiplier of the court's choosing, but within a range set in statute, to be applied to the actual loss figure. The statutory range could be within, say, two and five. This would essentially codify the *Carr-Saunders* basis of assessing equitable damages where evidence of profit is not available.[121]

5.88 Adopting diminution in value as the basis for assessing equitable damages would remove any element of profit share. It would also result in greater predictability – despite the complexity in calculating the EFZ figure used to calculate diminution in value,[122] rights to light surveyors would be able to predict with relative accuracy the award of damages that a court might make.

5.89 The disadvantage of an approach based solely on diminution in value is that it fails to reflect the fact that the proposed obstruction – which, if a commercial property development, may generate substantial profits – would not be able to proceed without the dominant owner's consent. There is therefore a principled argument for allowing the dominant owner to receive a percentage of the profits of the development in reflection of this and the fact that the dominant owner has lost his or her ability to bargain for the release of the right.

5.90 This objection is softened, but not completely overcome, by applying a statutory uplift to the diminution in value figure. It provides the dominant owner with a form of a price and thereby acknowledges the loss of bargain for the release of the right. But there is still no reflection of the fact that the profits generated by the portion of the development that will cause the obstruction are directly related to the dominant owner's effective release of the right.

5.91 The uplift figure is also somewhat arbitrary; it has been suggested that the *Carr-Saunders* multiplier lacks a proper basis in valuation or law.[123] It may also be difficult to apply in practice where the dominant property has no readily identifiable "value", such as a church or a school (where the market value of the building may be difficult to determine).

[120] See para 5.64 and following above.

[121] See paras 5.72 to 5.74 above.

[122] See para 5.62 above.

[123] *Gale on Easements*, para 14-137.

Evaluating the options

5.92 On balance, we are not convinced that reform is necessary. While we note that some stakeholders have concerns with the current law, the various options for reform do not appear to produce a solution that offers a clear improvement on the present position. We also think it would be difficult to build consensus on any proposal for reform – there are good arguments both for and against removing profit share from the assessment; on the one hand the profits are inextricably linked to the dominant owner's release of the right, but on the other it is sometimes difficult to justify awards of damages that are far greater than the actual injury suffered by the dominant owner (and may in some cases be even greater than the value of the dominant owner's property). We do not therefore propose a change to the current law.

5.93 We would be grateful for consultees' views on this. We are particularly interested in hearing from consultees about whether the introduction of a cap on equitable damages would be appropriate and, if so, how this could be achieved in practice. For instance, one option could be to limit the amount of damages that could be awarded to the market value of the dominant property. This could avoid extremely high awards of damages being made. But a potential downside is that introducing such a cap could be seen as arbitrary, in that it would subject the value of rights to light to fluctuations in the value of the dominant land.

5.94 We would be grateful for consultees' views on the options for reform of the method of assessment of equitable damages explored in this Chapter. We would also be grateful for consultees' views on the introduction of a cap on the amount of equitable damages that may be awarded and how this could be achieved in practice.

CHAPTER 6
THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE

INTRODUCTION

6.1 In Chapter 5 we noted the concerns of developers and practitioners following the decision of the High Court in *HKRUK II (CHC) Ltd v Heaney*[1] ("*Heaney*"). Previously there was a widely held view that if a dominant owner took too long to bring proceedings then a court would refuse to grant an injunction – *Heaney* demonstrates that this is not the case.[2] There is therefore no point in time at which a developer can build safe in the knowledge that no injunction will be granted because of delay. In this Chapter we discuss the introduction of a procedure intended to address this issue.

6.2 First we address the justifications for introducing such a procedure.

6.3 Rights to light are usually acquired by prescription. No positive action is required on the part of the dominant owner to acquire the right – provided that the servient owner does not stop light from passing over his or her land to the dominant owner's windows, a prescriptive right will arise after 20 years.[3] Our provisional proposal earlier in this Consultation Paper to abolish prescription would not affect the prevalence of rights to light already acquired through that method.[4]

6.4 Rights to light are also resilient. As we noted above in Chapter 5, the principal remedy for the infringement of a right to light is an injunction.[5] This can have a dramatic impact upon the servient owner because rights to light restrict the use that the servient owner can make of his or her own land.

6.5 It is clear to us that for many people rights to light are an important and valuable way of preserving the light received by their properties. But it is also clear that for others rights to light are used as a means of extracting money from property developers, with the threat of an injunction deployed to extract payments that are out of proportion to any loss suffered, in exchange for the release of the right.

6.6 It is right that where the dominant owner wishes to preserve his or her light, the easement should be capable of being enforced by injunction. Alternatively, the dominant and servient owners can negotiate an express release for a financial sum. But we take the view that the ability of the dominant owner to refuse to commit either way can be problematic because this can result in months or years of delay. Developers require certainty – many projects are time-sensitive and it is

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

2 See Chapter 5, paras 5.39 and 5.40 above. Of course, *Heaney* could be overruled should a suitable case go to the Court of Appeal. But there is no guarantee that such a case will arise, particularly given the frequency with which rights to light cases settle to avoid the cost and delay of litigation,

3 See Chapter 2, paras 2.33 to 2.36, and Chapter 3 above.

4 See Chapter 3, paras 3.46 to 3.48 above.

5 See Chapter 5, para 5.2 and following above.

therefore in the dominant owner's interest to draw out the negotiation process for as long as possible, and thereby increase the price that the developer is willing to pay to secure the release of the right.

6.7 The cost in delay to the project may be passed on to others by the developer, which may impact upon the cost of public projects, or upon rents. Delay also means that the advantages that a development may bring (for example, regeneration to the area, new office space or increased employment opportunities) are also postponed. Uncertainties over timing can result in developers experiencing difficulties with pre-letting the new property and securing funding to allow the development to proceed. Developments also facilitate growth, both at a local and national level.

THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE

6.8 We therefore propose the introduction of a notice procedure designed to prevent the situation in *Heaney* – where extensive negotiations dragged on without conclusion for several years – from occurring by allowing the developer[6] to bring matters to a head.[7] It places the onus on the claimant to make clear if he or she wants an injunction. If the dominant owner would be content with damages then the procedure will not affect his or her position, save that negotiations will no longer proceed on the basis that an injunction could bring the development to a halt. If the dominant owner is not satisfied with damages the procedure requires the owner to take steps to assert that position; steps which, ultimately, the owner would have to take in any case to protect his or her right to light.

6.9 It is important to note that the purpose of the procedure is not to enable the developer to flush out potential claimants. We envisage that it will be used as a last resort following extensive negotiations which have failed to result in agreement.

6.10 To allow consultees to get a better understanding of how the procedure might translate into statute, we have included a set of draft clauses in Appendix C to this Consultation Paper. It should be emphasised that the aim of this exercise is to allow consultees to comment on the detail of our provisional proposals on a more informed basis; the inclusion of draft clauses does not mean that the Law Commission has reached a settled view either on recommending the introduction of the procedure in our final Report or on the detail of any such procedure. The draft clauses cover only the main substance of the procedure – they do not, for example, cover notice requirements or make provision as to costs, both of which are discussed in this Chapter.

[6] We use this term throughout this Chapter because we anticipate that the procedure will be used most frequently in the context of property development schemes – although the procedure could, in principle, be open to anyone. See paras 6.49 and 6.50 below, where we discuss whether the procedure should be effective against commercial properties only.

[7] Of course, under the current law it may be open to a developer to bring matters to a head by applying to the court for a declaration as to its liability to a dominant owner (as happened in *Heaney*). But it is questionable whether it should be the developer who has to bring an action – it is, after all, the dominant owner who wants to protect his or her right to light.

6.11 We discuss below our provisional views on the detail of the Notice of Proposed Obstruction procedure.

6.12 The procedure would provide that where an impending development will obstruct a dominant owner's light, the developer may serve on the dominant owner a Notice of Proposed Obstruction ("NPO"). The NPO would provide the dominant owner with information about the extent of the proposed obstruction and ask whether the claimant proposed to seek an injunction. The dominant owner would then have a period of time in which to seek professional advice and, if he or she wanted an injunction, the dominant owner would be obliged either to serve on the developer a counter-notice specifying whether he or she objected to the proposed obstruction, or to issue proceedings. If a counter-notice was served stating that the dominant owner objected to the proposed obstruction then the parties would then have a period of time in which to negotiate; if agreement could not be reached then the dominant owner would be required to issue proceedings.

6.13 If the dominant owner failed to object to the proposed obstruction by a counter-notice (or failed to issue proceedings) when he or she was required to do so then an injunction would no longer be available as a remedy, although he or she could still (if able to establish an actionable interference at trial) be awarded damages. It is not our intention for the procedure to have any impact upon the dominant owner's ability to ask the court for damages in substitution for an injunction (nor should it change how those damages are assessed),[8] even where the dominant owner has lost the chance for an injunction.

Form and content

6.14 The NPO would have to give the dominant owner enough information to take professional advice and make a decision about whether he or she will want an injunction; it would have to set out clearly the extent of the anticipated obstruction. It is difficult to prescribe exactly what is wanted: a general description leaves the developer open to the objection that it did not give enough information.[9] Too much information – for example a full copy of the planning application or permission, or a copy of the developer's survey report regarding rights to light – may be as unhelpful as too little.

6.15 In the draft clauses appended to this Consultation Paper the form and content of the NPO is left to be specified in regulations. We anticipate that this would remain the case in any final version of the clauses, so that the form and content of the NPO could be more easily updated to remain consistent with industry practice. We would be grateful for consultees' views on this approach, and on what sort of requirements should be contained in any such regulations.

[8] Damages awarded in substitution for an injunction are assessed on the basis of the amount for which the dominant owner would have released the right, which takes into account the fact that the right is enforceable by injunction. See Chapter 5, para 5.71 and following above.

[9] See para 6.48 below, where we ask for consultees' views on the form and content of the NPO.

Service: who, when and how

6.16 The NPO should only be capable of being served by someone (whether a corporate body or a natural person) with a freehold or leasehold interest (with more than five years remaining) in the servient land. This is not only to ensure that dominant owners are not troubled by an NPO unless there is a serious prospect of development; it is also because the dominant owner's response to the NPO is going to have an effect on current and future interests in the servient land[10] and it is not appropriate for this to be done speculatively by someone without an ownership interest.

6.17 We do not propose to specify when an NPO may be served because the requirement to provide sufficient information to the dominant owner will in effect prevent service at a stage when the plans for the proposed obstruction are at a very early stage and the extent of potential infringement is unknown.[11]

6.18 Although the present draft clauses leave to regulations the rules governing service of the NPO, we think that ultimately these should be based upon the general provisions on service contained in Part 6 of the Civil Procedure Rules and on section 6 of the Acquisition of Land Act 1981; the latter deals with the service of documents in the compulsory purchase context. Accordingly, we envisage that a notice may be served by:

(1) handing it to the person to whom it is addressed (or to a director or secretary if the addressee is a body corporate);

(2) sending it by recorded delivery to that person's (or the body's) proper address; or

(3) leaving it at that person's (or the body's) proper address.

6.19 An individual's proper address will be his or her last known address in England and Wales. A body corporate's proper address will be its registered or principal office in the UK.

6.20 If there is no last known address or registered or principal office in England and Wales, then the proper address for service will be the address of the dominant property. Similarly, if following the making of reasonable inquiries it was not practicable to ascertain the name or address of an owner or lessee of land on whom a notice is to be served, then the notice should be delivered to the dominant property.[12]

6.21 A notice may be delivered to the dominant property by addressing it to the individual (or the director or secretary of the body corporate; or, where the individual is unknown, to the "owner" or "lessee") and:

(1) handing it to a person who lives or works at the dominant property;

[10] See paras 6.23 to 6.27 below.

[11] The inability to serve more than one NPO, and the shelf-life of the NPO, will also have this effect. See paras 6.32 to 6.39 below.

[12] This is adapted from the Acquisition of Land Act 1981, s 6(4).

(2) sending it by recorded delivery to the dominant property;

(3) leaving it at the dominant property; or

(4) fixing it to or near to a conspicuous part of the dominant property.

6.22 In terms of timings, we propose that a notice that is handed to a person before 5pm on a working day will be treated as having been given or delivered that day, otherwise it will be deemed to have been given or delivered on the next working day. A notice that is left at premises or fixed to a conspicuous part of them will be deemed to have been given or delivered on the day after it was left or fixed. A notice sent by post will be deemed to have been given or delivered on the third day after posting. Weekends, bank holidays, Christmas Day and Good Friday will not be classified as working days.[13]

Third party effect and registration

6.23 The NPO will be addressed to someone with an estate in land. We think that it must take effect against an estate in land in the dominant property rather than being merely personal to the addressee, so that the addressee cannot avoid its effects by a collusive sale. But it should only have this effect once information about it is available to purchasers of the property, and we propose to address that by requiring the registration of the notice on the local land charges register.[14] The local land charges register is maintained by local authorities; it is always searched by a purchaser's conveyancer as part of his or her pre-contract investigations about title.[15]

6.24 That will mean that the NPO, once served and registered as a local land charge, will be effective against the addressee's successors in title, any subsequent mortgagee of the addressee, and the proprietors of estates subsequently derived from that of the addressee (for example, leases or sub-leases) and their mortgagees.[16]

[13] This amounts, in essence, to a simplified version of Part 6 of the Civil Procedure Rules.

[14] A person acquiring an interest in the land from a person on whom an NPO has been served, but before the NPO is registered as a local land charge, would not be bound by its effect (and the developer would be expected to serve another NPO on the person acquiring the interest before registering that notice as a local land charge).

[15] See the Access to Neighbouring Land Act 1992, s 3. The local land charges register is currently used to register light obstruction notices under section 2 of the Rights of Light Act 1959.

[16] We do not think it is practicable to bind existing mortgagees but we welcome the views of consultees on this issue.

6.25 A helpful precedent for this type of provision is provided by the provisions relating to access orders under the Access to Neighbouring Land Act 1992.[17]

6.26 Local land charges registration does not normally govern priority (unlike the land register and the land charges register). Therefore clause 5 of the draft clauses has been included to ensure that registration as a local land charge will have the effect described in paragraph 6.24 above.

6.27 In addition, the developer serving the NPO should be obliged to provide a copy of the material accompanying the NPO to any person who reasonably requests it and whose rights may be affected by the existence of the NPO.

Responding to the Notice of Proposed Obstruction

6.28 The aim of the NPO procedure is to provide certainty as to which dominant owners genuinely want an injunction to protect their light, rather than simply wanting to rely upon the availability of an injunction as a powerful bargaining tool. We therefore want dominant owners to offer some level of commitment (otherwise every dominant owner would assert his or her entitlement to an injunction as a matter of course); but not a commitment to potentially ruinous expenditure. Accordingly we take the view the dominant owner must ultimately issue proceedings.[18] Under the existing law the dominant owner will at some point have to issue proceedings if he or she wants to obtain an injunction, so this should not be regarded as a hardship.

6.29 However, we want to ensure that both parties have adequate time in which to negotiate and try to reach an agreement or compromise. We therefore propose that the dominant owner should have four months from registration of the notice as a local land charge in which to respond to the NPO by serving a counter-notice on the developer stating whether he or she objects to the proposed obstruction described in the NPO, followed by a further four months in which negotiations between the parties can take place (if the dominant owner has said that he or she does object to the proposed obstruction). If no agreement has been reached then the dominant owner must issue proceedings before the end of that period.[19]

[17] Where the court makes an order requiring someone to give his neighbour access to his or her land for the sake of carrying out works, section 4 of the Access to Neighbouring Land Act 1992 provides:

> In addition to the respondent, an access order shall, subject to the provisions of the Land Charges Act 1972 and the Land Registration Act 2002, be binding on —
>
> (a) any of his successors in title to the servient land; and
>
> (b) any person who has an estate or interest in, or right over, the whole or any part of the servient land which was created after the making of the order and who derives his title to that estate, interest or right under the respondent … .

[18] We are still considering the nature of the proceedings that the dominant owner should bring, but we are not minded to require him or her to apply for an interim injunction, given the usual requirement to give an undertaking in damages to the court (see Civil Procedure Rules Practice Direction 25A, para 5.1).

[19] We note that rule 7.5 of the Civil Procedure Rules allows four months in which to serve the claim form after issuing proceedings.

6.30 The dominant owner would have to comply with the requirements of the Civil Procedure Rules relating to pre-action conduct before issuing the claim – including the requirement to send a letter before action[20] – in order to avoid being sanctioned by the court for unreasonable conduct.[21]

The effect of service of the Notice of Proposed Obstruction

6.31 During the eight-month period (following registration of the NPO as a local land charge) – a period in which the dominant owner has to take advice, make decisions and negotiate – the developer should not be allowed to infringe the dominant owner's right to light (whatever else it decides to do on the development site). This gives the dominant owner some space in which to decide.[22]

Multiple notices, shelf-life and changes in development plans

6.32 We need to avoid two problems.

6.33 One is the possibility of an NPO served a long time in the past being used many years in the future. A dominant owner should be able to reach a point when he or she knows that a particular development prospect has gone away and that he or she starts again with a clean slate and a right to an injunction. We therefore propose that an NPO is effective to protect the developer from an injunction only if the obstruction is put into effect within five years of service of the NPO on the dominant owner.

6.34 The other problem we need to avoid is the possibility of the developer (or other person with an interest in the development land) serving multiple notices so as to wear down the resolve of the dominant owner.

6.35 We therefore propose that only one NPO can be served upon a dominant owner.[23] Any subsequent notices served and/or registered by the developer (or its successors) upon the dominant owner (or, where the NPO has been registered as a local land charge, his or her successors) within the five year period of validity will be invalid.

6.36 One challenge for the procedure is reconciling the entitlement to serve only one NPO per dominant owner within a five year period with the practical reality that development plans can change both before commencement and during the course of building works.

[20] Further detail of the requisite pre-action conduct is found in Lord Justice Jackson (ed), *Civil Procedure: Volume 1* (2012) C1-005 and following.

[21] Sanctions include being ordered to pay the other side's costs (either on the standard or indemnity basis), being deprived of interest on any award of damages, or being ordered to pay an increased rate of interest on any damages awarded to the other side. See Lord Justice Jackson (ed), *Civil Procedure: Volume 1* (2012) C1-004, paras 4.5 and 4.6.

[22] A developer's failure to abide by this will result in the court retaining its discretion to grant an injunction.

[23] Of course, there may be more than one dominant owner who will be affected by a development, and indeed there may be more than one dominant owner with a right to light in respect of the same dominant land (for example, a freehold owner and his or her tenant).

6.37 We therefore propose that if a change in the developer's plans will result in a different obstruction which will result in a lesser infringement of the dominant owner's right to light than would have been the case with the obstruction as originally proposed, the NPO will remain valid in relation to the new obstruction.

6.38 However, if the change in plans will result in a greater infringement, that obstruction will no longer be covered by the NPO.

6.39 Importantly, this means that the developer will never serve an NPO on a whim. It gets only one chance with the procedure in respect of each dominant estate – if its plans subsequently change in a way which will result in a greater infringement it may not use the NPO procedure again and the dominant owner's entitlement to an injunction will be retained.

What happens next?

6.40 The NPO procedure provides the dominant owner with obstruction-free time to make a decision; once he or she has issued proceedings the position reverts to normal, as under the current law. Either party can apply for directions for trial. Meanwhile the developer is free to build, but if it does so it knows that it is at risk of an injunction. The proceedings can be stayed by the court if the developer has served the NPO before sufficient evidence is available to allow the court to bring the case to trial.[24]

Failure to comply with the procedure

6.41 Where the dominant owner fails to respond to the NPO within time, or informs the developer by way of a counter-notice that he or she does not object to the proposed obstruction, then the court will no longer have jurisdiction to award him or her an injunction as a remedy for the infringement of the right to light in relation to the proposed obstruction or any other obstruction which causes no greater infringement of the right to light for a five-year period from service of the NPO. As noted above,[25] the NPO procedure will not affect the ability of the dominant owner to claim for damages in substitution for an injunction. Nor will it affect how those damages are assessed.

Cost recovery

6.42 A final issue to be considered is costs. Under the NPO procedure the dominant owner is obliged to bring proceedings. As we noted above, we do not consider this to be a hardship – a dominant owner will only issue proceedings under the procedure if he or she wants an injunction, for which he or she would have eventually issued proceedings in any event.

6.43 But what about the case where, after the dominant owner has issued proceedings, the developer abandons the project or changes it in a way that means that it will no longer have any impact upon the dominant owner's light? The dominant owner will have incurred costs in bringing proceedings which are no longer needed. Should he or she have to bear the costs of doing so, or should the developer pay?

[24] See the Civil Procedure Rules, r 3.1(f).

[25] See para 6.13 above.

6.44 Another scenario could be that after the developer has served an NPO on a dominant owner its plans change in a way that means that the dominant owner's light will still be obstructed, but to a lesser extent than that specified in the NPO. If the dominant owner is informed of the change in plans then he or she may not wish to issue proceedings because he or she would be content with damages for a smaller injury. But unless he or she is made aware of the change in plans, the dominant owner will issue proceedings under the misapprehension that the development will cause a greater obstruction than the one actually intended.

6.45 We therefore think that the developer should be under a continuing obligation to inform the dominant owner of changes to its plans. If its plans change in a way that results in a greater obstruction, it will no longer be covered by the original NPO and therefore the dominant owner would not be obliged to issue proceedings to protect his or her entitlement to an injunction. And if the change in its plans results in a smaller obstruction, the dominant owner may not wish to issue proceedings at all.

6.46 In the event that the developer fails to comply with the requirement to keep the dominant owner informed of changes to its plans, we think that the court should be able to take this into account when assessing costs. There are a number of permutations for what might happen and, because of this, we are not minded to make any proposal as to costs, save that the court should be given a wide discretion to make any order as to costs that it thinks fit.

6.47 We provisionally propose that a court should not be able to grant an injunction to prevent or remedy an infringement of a right to light where the dominant owner has received a Notice of Proposed Obstruction and has not protected his or her right to an injunction in accordance with the procedure described in this Chapter and illustrated by the draft clauses at Appendix C of this Consultation Paper.

Do consultees agree?

6.48 We would be grateful for consultees' comments on the detail of the Notice of Proposed Obstruction procedure as provisionally proposed, including:

(1) the form and content of the notice;

(2) the rules governing service of the notice;

(3) the third-party effect of the notice;

(4) responding to the notice by a counter-notice and issuing proceedings;

(5) multiple-notices and shelf-life; and

(6) cost recovery.

The scope of the procedure

6.49 We have considered whether the procedure should be limited to use on rights to light benefiting commercial premises only. It may be more reasonable to expect commercial landowners to take action to protect their rights – and more realistic to expect them to be willing and able to do so. Furthermore, residential property owners are more likely than their commercial counterparts to want to keep their light rather than negotiate a release of their right, and there is anecdotal evidence that most problems of "hold outs" occur in the commercial context. The difficulties with limiting reform in this way are linked to definitional problems – how should a commercial property be defined in this context? What if commercial property has the benefit of planning permission to change its use to residential, and vice versa? We would be grateful for consultees' views on the suitability and practicability of this option.

6.50 We would be grateful for consultees' views on the suitability and practicability of limiting the Notice of Proposed Obstruction procedure to use in relation to rights to light benefiting commercial premises only.

CHAPTER 7
BRINGING RIGHTS TO LIGHT TO AN END

INTRODUCTION

7.1 In this Chapter we consider how rights to light can be brought to an end. Under the existing law this can happen in a limited number of ways:

(1) where the dominant and servient owners agree that it should happen;

(2) by unity of ownership and possession;

(3) where a right to light is abandoned; or

(4) where statutory powers are used.

7.2 Those first two methods raise no issues for reform;[1] the other methods of termination are discussed in turn below.

7.3 In the final section of this Chapter we consider our recommendation made in the Easements Report to extend the scope of section 84 of the Law of Property Act 1925 to easements created after implementation of that recommendation. In particular, we consider whether that recommendation should be extended to rights to light currently in existence.[2]

EXTINGUISHMENT BY ABANDONMENT

7.4 We discussed briefly the law of abandonment in Chapter 2, and explained that easements can be extinguished where an easement ceases to be used, provided that the non-use is coupled with an intention by the dominant owner to abandon it permanently.

7.5 We made a recommendation in the Easements Report that where an easement has not been used for a continuous period of 20 years, there should be a rebuttable presumption that it has been abandoned.[3] Our recommendation would mean that, after 20 years of non-use of a right to light, or any easement, it would be presumed that the landowner intended to abandon it. The presumption could be rebutted by the dominant owner demonstrating that he or she had no such intention.

7.6 Generally speaking, an intention to abandon an easement is not to be lightly inferred, which is why abandonment is so difficult to prove.[4]

[1] See Chapter 2, paras 2.44 to 2.46 above.

[2] See para 7.68 and following below.

[3] See the Easements Report, para 3.230.

[4] *Gotobed v Pridmore* (1971) 217 EG 759, referred to by Dillon LJ in *Benn v Hardinge* (1993) 66 P & CR 246, 257. In the latter case the non-use of a right of way for 175 years (with no other evidence as to the intention of the dominant owner) was insufficient to raise a presumption of abandonment.

7.7 But the "non-use" of a right to light is a positive action – one example could be the dominant owner blocking off the light to a window. That is very different from the failure to use, say, a right of way.[5] As a result, it is easier to infer an intention to abandon a right to light permanently than it is to infer such an intention in the context of positive easements like a right of way.

7.8 Accordingly, we can say that the reform that we recommended in the Easements Report will impact less on rights to light than on positive easements.

7.9 Where windows are bricked up there may be no difficulty in a court inferring the necessary intention to abandon the right permanently, and the longer windows are obscured the more likely it is that this will be the conclusion.[6] In *Moore v Rawson* Abbott CJ said:

> … if a person entitled to ancient lights pulls down his house and erects a blank wall in the place of a wall in which there had been windows, and suffers that blank wall to remain for a considerable period of time, it lies upon him at least to show, that at the time when he so erected the blank wall, and thus apparently abandoned the windows which gave light and air to the house, that was not a perpetual, but a temporary abandonment of the enjoyment; and that he intended to resume the enjoyment of those advantages within a reasonable period of time.[7]

7.10 However, the situation where a property is demolished but not rebuilt may be slightly more complex and may depend upon factors such as whether the site has been put to a new use, or if there are plans to do so.[8] Again, the key issue is whether there was an intention to abandon the right.

7.11 In situations where the dominant property is demolished and rebuilt with its apertures in different positions the law can be more difficult to apply.

Alteration of the dominant property's apertures

7.12 Problems arise in particular where an aperture in the dominant property is altered. It is helpful to distinguish the following methods of alteration.

(1) Increase or decrease in size of the aperture.

[5] See the discussion in *Moore v Rawson* (1824) 3 B & C 332, 107 ER 756 regarding the differences in modes of acquiring positive and negative easements and the consequences that this has on modes of abandonment.

[6] *Gale on Easements*, para 12-32 suggests that "certain acts will clearly show the intention to abandon; for example the shutting up of windows with bricks and mortar for 20 years" (citing the case of *Lawrence v Obee* (1814) 3 Camp 514). See also *Scott v Pape* (1886) 31 Ch D 554, 567.

[7] (1824) 3 B & C 332, 336; 107 ER 756, 758. See also the judgment of Littledale J at (1824) 3 B & C 332, 339 to 340; 107 ER 756, 760.

[8] In *Ecclesiastical Commissioners for England v Kino* (1880) 14 Ch D 213 the dominant property had been demolished and no building had been erected in its place, although there were plans to sell the land in the near future. The claimant's claim for an injunction to protect the access of light to windows that would occupy the same space as they used to on the (now demolished) dominant building was successful, on the basis that there was no intention to abandon the rights to light, which would pass to the purchaser.

(2) Alteration of the plane of the aperture, in any combination of the following:

(a) horizontal or vertical movement (in either direction);

(b) the wall in which the aperture is situated being brought forward or backward; and

(c) rotation on either or both of the aperture's axes.

7.13 The consequences of an alteration may be that a right to light is abandoned. But it is clear that rights to light are capable of surviving alteration. The principle is that the light to which the dominant owner has a right is the "cone" or "pencil" of light which passes over the servient land.[9] The dimensions of the aperture are used to define the boundaries of the passage of the light over the servient land, and, therefore, the right to light; but that right does not depend upon the continued existence of that specific aperture.[10]

7.14 Therefore, a right to light is not abandoned simply because a dominant property is demolished and rebuilt with new windows, provided that those new windows receive light through the same space over the servient land, or a substantial portion of it.[11] So a window that moves 30 metres away from its previous position will almost certainly result in the abandonment of a right to light.[12] But moving the window two metres may not, because it may continue to receive a substantial amount of the "same light" as that which benefited the aperture prior to demolition.

7.15 The key question is therefore whether the new apertures correspond or are coincidental[13] to the old apertures.

7.16 It is not clear how much coincidence between the old and the new windows is necessary. It cannot be so little as to leave a minor or insignificant amount of light.[14] But it does not have to be exactly the same. In *Scott v Pape*, Lord Justice Cotton suggested that the test was:

> … whether the alteration is of such a nature as to preclude the plaintiff from alleging that he is using through the new apertures in the

[9] Judges often conceptualise the space above the servient land through which light passes to reach an aperture as a "cone" or "pencil" of light (see, for example, *Scott v Pape* (1886) 31 Ch D 554, 568 and 569). We reproduce at Appendix D the diagram published in *Andrews v Waite* [1907] 2 Ch 500. The judge in that case did not specifically refer to a cone or pencil of light, but it is nevertheless useful to see how the path of light can be depicted.

[10] *Tapling v Jones* (1865) 11 HLC 290, 318; 11 ER 1344, 135; *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch D 757, 765.

[11] *Scott v Pape* (1886) 31 Ch D 554.

[12] *Scott v Pape* (1886) 31 Ch D 554, 569 by Cotton LJ: "If a building is set back, say 100 feet, it will not enjoy the same cone of light that was enjoyed before …". See para 7.27 below.

[13] The terms "correspondence" and "coincidence" are used in *Scott v Pape* (1886) 31 Ch D 554.

[14] *Ankerson v Connelly* [1907] 1 Ch 678, 683.

> new wall the same cone of light, or a substantial part of that cone of light, which went to the old building.[15]

7.17 The alteration to the apertures cannot increase the burden on the servient land.[16] This means that when considering whether an obstruction of light is actionable, the court must conduct the assessment on the basis of the apertures in their pre-altered state.[17] Furthermore, the easement will be lost where it is impossible to identify the dominant owner's pre-alteration entitlement to light and compare it with the light that is enjoyed after the alterations.[18]

7.18 It is useful to consider the position in respect of the different forms of alteration outlined above.[19]

Increase or decrease in the size of the aperture

7.19 Where the windows in the dominant property are altered so as to increase the size of the window, without any movement in the positioning of the aperture, the position is fairly straightforward. In this situation the dominant owner is entitled to the light received through the area of the new window that is coincident with the old window.[20]

7.20 It was noted above that the dominant owner may not unilaterally increase the burden on the servient land. If the dominant owner reduces the size of his or her windows, an obstruction of light will usually be more harmful – obstructing light to a small window will have more impact than obstructing the same amount of light to a larger window. Therefore the court must consider whether an actionable interference would have occurred in relation to the aperture in its pre-altered state.[21]

7.21 This can be difficult. The authors of *Gale on Easements* say that:

> The difficulty in these cases arises in defining and applying under the altered circumstances the rights of the owner of the old easement. It has been pointed out that in many cases where lights have been

[15] (1886) 31 Ch D 554, 569 to 570. Compare *National Provincial Plate Glass Insurance Co v Prudential Assurance Co* (1877) 6 Ch D 757, 766, in which Fry J suggested that any portion of light passing through the same space would be protected.

[16] *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 203 to 203 (by Lord Davey) and 211 (by Lord Lindley); *Ankerson v Connelly* [1906] 2 Ch 544, 547; *News of the World Ltd v Allen Fairhead and Sons Ltd* [1931] 2 Ch 402, 406.

[17] *Ankerson v Connelly* [1906] 2 Ch 544; affirmed by the Court of Appeal in *Ankerson v Connelly* [1907] 1 Ch 678, 685 (by Sir Gorell Barnes): "The result, therefore, is that before these alterations on the dominant tenement the erection which the plaintiffs put up would not have been a legal interference with the rights to light of the dominant tenement; and although, as matters now stand, some light would in fact be cut off by blocking up the space which is left after the alterations which have been made by the defendant, the alterations cannot in fact affect the plaintiffs' rights, because they had that right before to block up to that extent".

[18] *Ankerson v Connelly* [1906] 2 Ch 544, 548 to 549.

[19] See para 7.12 above.

[20] *Tapling v Jones* (1865) 11 HLC 290, 11 ER 1344.

[21] *Ankerson v Connelly* [1906] 2 Ch 544; affirmed by the Court of Appeal in *Ankerson v Connelly* [1907] 1 Ch 678.

> altered it may … be a matter of extreme difficulty to show that an interference with light is capable of legal remedy, having regard to the great difficulty of showing whether what is existing under the present conditions would have been a nuisance under the conditions formerly existing.[22]

7.22 Whether the dominant owner is able to show that an obstruction would have been actionable before the alteration to the apertures will often depend upon the quality of expert evidence. In *Ankerson v Connelly* Warrington J found that in that case it was:

> … beyond human ingenuity to say what may be done by the owner of the servient tenement … which would not be a nuisance to so much of the old light as still passed through the new windows under the existing altered circumstances … .[23]

7.23 But in *Andrews v Waite* the quality of the diagrams produced by the expert who gave evidence at trial were sufficient to enable the court to find that a nuisance would have been caused both before and after the alterations.[24]

Alterations to the plane of the aperture

7.24 Where the plane of an aperture moves or rotates the key issue is the extent of the coincidence with its former location: the new aperture must receive a "substantial part" of the same cone of light received by the old aperture.

7.25 In *National Provincial Plate Glass Insurance Co v Prudential Assurance Co*,[25] the dominant owner, as part of the rebuilding of his property, replaced a dormer window of three faces with a skylight. The skylight was partially coincident with the dormer window, but of a different shape. The servient owners obstructed the light to the skylight and the dominant owner brought proceedings. In finding that a nuisance had been committed, Fry J noted that there was nothing in the Prescription Act 1832 that referred expressly to a window or aperture and concluded:

> … wherever for the statutory period a given space over the servient tenement has been used by the dominant tenement for the purpose of light passing through that space, a right arises to have that space left free so long as the light passing through it is used for or by the dominant tenement.[26]

[22] *Gale on Easements*, para 12-56.

[23] [1906] 2 Ch 544, 548 to 549.

[24] [1907] 2 Ch 500.

[25] (1877) 6 Ch D 757.

[26] (1877) 6 Ch D 757, 765.

7.26 Accordingly it did not matter that the plane of the window had changed – the skylight received light from substantially the same area over the servient land.[27]

7.27 In *Scott v Pape*[28] the claimant demolished the dominant property, which contained six windows benefiting from rights to light, and replaced it with a new building, three windows of which corresponded partly with the old windows. The wall of the new building, in which the three windows were situated, had moved forward from its previous position by a maximum of three feet and five inches. In considering whether this would have an effect upon the claimant's claim for an injunction to protect the light, Lord Justice Cotton said:

> In my opinion both the moving back and the moving forward [of apertures] may destroy the right, because the new building when constructed may, either by being substantially advanced or substantially set back, be so placed that the light which formerly went into the old windows will not go into the new. If a building is set back, say 100 feet, it will not enjoy the same cone of light that was enjoyed before, but it will have an entirely different cone, and it may be moved so far forward that it will not enjoy the same light as that enjoyed by the old building.[29]

7.28 After noting that the key issue was whether the new apertures received substantially the same cone of light as the old apertures, he found that the claimant was successful on the basis that:

> … considering the small actual advance … we ought not to hold that a substantial portion of the old light does not pass through the new openings.[30]

7.29 Lord Justice Bowen agreed, and added that:

> … it would take a great deal to persuade me that a man intends to abandon any of the old light he enjoyed, if the building is rebuilt substantially so as to preserve evidently and without confusion of proof the enjoyment either of the whole of the volume of light which was enjoyed before or of some material part of it.[31]

7.30 Similarly, in *Bullers v Dickinson* a house had been rebuilt and set back from the original building by four feet at one end and seven feet at the other. The new wall contained a window which corresponded to a great extent with the original

[27] (1877) 6 Ch D 757, 765 to 767. The same conclusion was reached in *Barnes v Loach* (1879) 4 QBD 494, 498 to 499, where the wall containing the windows benefiting from rights to light had been set back (with the windows otherwise in the same position).

[28] (1886) 31 Ch D 554.

[29] (1886) 31 Ch D 554, 569.

[30] (1886) 31 Ch D 554, 570.

[31] (1886) 31 Ch D 554, 574.

window which benefited from a right to light. Mr Justice Kay found that the right had not been abandoned.[32]

Difficulties with the current law

7.31 There is some dissatisfaction with the law of abandonment, particularly as it relates to alteration of apertures. It can be extremely difficult, both for surveyors and lawyers, to advise clients as to whether a right to light will have been abandoned, or instead "transferred"[33] to a new building that has been built on the same site.

7.32 Our attention has also been drawn to peculiarities that arise if the law is applied accurately. For example, the test used by surveyors to measure light is based upon a "working plane" that is 85 cm above the level of the floor.[34] Where a building is demolished and rebuilt the heights of any floors above ground level may change, but when considering whether a nuisance has been committed the judge will consider the dominant property in its pre-altered state. The evidence of surveyors may therefore be expected to be based upon a "working plane" that no longer exists.

Options for law reform

7.33 We have considered various possibilities for reform of the law in this area.

(1) A prohibition on a right to light surviving the alteration of an aperture.

(2) A revised test for establishing when a right to light survives the alteration of an aperture.

(3) The introduction of a registration requirement.

IMMEDIATE ABANDONMENT UPON ALTERATION OF APERTURES

7.34 One option could be to prohibit the survival of a right to light where there is any alteration of the aperture to which it relates.

7.35 This would involve a dramatic change to the current law, which would be difficult to justify. While it would solve the problems with the current law (by effectively abolishing it), it could give rise to new difficulties. What would qualify as an alteration? Would replacing a window in the same location count? And what if the alteration was inadvertent – for example, where the dominant property has burned down and been rebuilt?

7.36 Aside from the practical difficulties, we do not think it is correct that rights to light should be extinguished immediately upon alteration of the aperture. There is clearly a good reason why the law should allow for alteration – the right is to the passage of light over a defined area of the servient land, not to the light through a specific aperture – and so it should not matter if one aperture is replaced by another in substantially the same position.

[32] (1885) LR 29 Ch D 155.

[33] Many practitioners speak in terms of "transference" of rights from old to new buildings.

[34] See Chapter 4, paras 4.7 to 4.10 above.

A NEW TEST FOR WHEN A RIGHT TO LIGHT SURVIVES ALTERATION

7.37 Another option would be to produce a new statutory test for when a right to light would survive an alteration. This could involve the introduction of a formula – for instance we could propose upper limits on what movement in the plane of an aperture is permissible.

7.38 The problem with this approach is that the most justifiable "acceptable movement" figure would effectively replicate the upper limits of what has proved acceptable in the current law – the aperture should only be able to move in a way that would not increase the burden on the servient land, which would be limited to keeping the aperture within the original "cone" of light. Arguably any other entitlement would be arbitrary and difficult to justify.

7.39 Furthermore, we are not convinced that this solves the practical problems experienced by lawyers and surveyors when advising upon the application of the law. In particular, it would not address the difficulties that arise from having to assess whether a nuisance would have occurred if the apertures were in their pre-altered state, after the alterations have taken place.

THE INTRODUCTION OF A REGISTRATION REQUIREMENT

7.40 Rights to light usually arise by prescription and as a result are rarely registered at Land Registry. It can therefore be difficult for neighbours to establish whether they are bound by a right to light. These problems are compounded by the law of abandonment, which allows for a dominant owner to demolish his or her property, without immediately rebuilding it, provided that it can be established that he or she never intended to abandon the right.[35] This could cause problems where, for example, a landowner has acquired property after a neighbour has demolished a building,[36] and later finds that the property is burdened by a right to light.[37]

7.41 We could mitigate these problems by requiring the registration of rights to light where title to the burdened land is registered and an aperture is altered, or is to be altered. Failure to do so would result in the easement becoming unenforceable.

[35] *Ecclesiastical Commissioners for England v Kino* (1880) 14 Ch D 213. If the building is not rebuilt for a substantial period of the time a court could, of course, infer an intention to abandon.

[36] In such circumstances, where a right to light has not been used for the twelve months preceding the disposal of the servient land and where it was unknown to the purchaser (and would not have been obvious on an inspection of the land), the provisions of the Land Registration Act 2002, sch 3, para 3 mean the right may be unenforceable against the purchaser of the servient land. For further detail see *Megarry and Wade*, para 7-100.

[37] This is in contrast to many other easements where there is likely to be some evidence of prior use; for example a pathway, pipe or gate.

7.42 But this option does not, by itself, deal with the concerns about the current law. The introduction of a registration requirement would deal only with the dominant owner's intention to keep the right – it would not address whether an altered aperture is legally capable of continuing to benefit from a right to light. For instance, the dominant owner could register the right, but then rebuild the property 100 metres away from its original location – in those circumstances the right would clearly be incapable of benefiting the new building. But what about if the property was rebuilt five metres away? Registration of the right would not obviate the need to argue about the legal effect of the alteration of the apertures.

7.43 This option would also encounter similar difficulties to those explored above in relation to the possibility of preventing rights from benefiting apertures that are altered.[38] For instance, what level of alterations would trigger the registration requirement? There may be further practical difficulties, such as the level of detail that would need to be specified, and the effect of failing to supply enough detail.

Conclusions

7.44 We take the view that none of the options discussed above represents an improvement on the current law. The legal test for when a right to light can survive the alteration of an aperture is conceptually simple, but practically complex.

7.45 Provided that the new window benefits from a substantial part of the light passing over the same area of the servient land, the right may survive, subject to the overriding principle that the dominant owner may not unilaterally impose a materially increased burden on the servient land. The problems experienced seem to be practical difficulties with establishing whether an obstruction would have been actionable on the basis of the apertures in their pre-altered state, and applying that test in the context of a new building.

7.46 The courts have adopted a pragmatic attitude to assessing whether a right to light has survived the alteration of an aperture. It has been made clear in several cases that if the altered aperture receives a substantial proportion of the light that would have been received by the old aperture, the right will survive.

7.47 We make no provisional proposals for change to the law of abandonment, beyond that which we recommended in the Easements Report.[39] However, we would welcome consultees' views on how the current law could be improved.

7.48 We would be grateful for consultees' views on whether the law of abandonment through alteration of apertures should be reformed and, if so, how the current law could be improved.

[38] See paras 7.34 to 7.36 above.

[39] See para 7.5 above.

EXTINGUISHMENT BY STATUTE: SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990

7.49 We noted in Chapter 2 the relevance to this project of section 237 of the Town and Country Planning Act 1990 ("section 237"). This is a planning power that, in certain circumstances, allows the overriding of easements and other interests that affect land. It is exercisable by local authorities where they have acquired or appropriated land for planning purposes.[40]

7.50 The effect of section 237 is that the "erection, construction or carrying out or maintenance of any building or work on land" and/or its use is authorised despite the works or use interfering with various interests, including rights to light.[41] Where section 237 takes effect, an easement is no longer exercisable over the burdened land and the benefiting owner has a right to compensation. The section is frequently categorised as a "compulsory purchase" power and it is often used in the context of schemes that involve the acquisition and subsequent redevelopment of land.

7.51 A local authority's use of section 237 is not subject to precise statutory rules on its operation; for example, there is no statutory control on the process or timing to be followed when exercising the power, or the nature and content of communications to be sent to affected neighbours. The absence of specific provision may lead to circumstances where both local authorities and landowners may be unclear about what is required of them when section 237 is being exercised.

7.52 The operation of section 237 is outside of the scope of this project. The power is utilised by local authorities in a variety of circumstances, and in respect of numerous different interests affecting land. A recommendation in respect of section 237 generally is too far-reaching for this project, and one limited to the way in which section 237 operates in respect only of rights to light is unprincipled and would be likely to lead to problems being experienced by local authorities when seeking to use section 237 in respect of land that is affected by several different classes of interest, including rights to light.

7.53 We have considered whether section 237 is an adequate tool to combat the problems associated with rights to light; if we were to conclude unconditionally that it is, then there would be no need to consider any other reform.

7.54 Section 237 is a useful mechanism by which some of the problems associated with rights to lights can be managed, but only in limited circumstances in the rights to light context involving private, developer-led schemes because:

(1) it requires a local authority's involvement;

(2) it is subject to conditions and considerations that are related to the local authority's public function; and

(3) it is likely to be of use only in respect of a small number of developments.

[40] See Chapter 2, para 2.50 above.

[41] See also Chapter 2, para 2.49 and following, and para 7.61 and following below.

The need for local authority involvement

7.55 Use of section 237 can be made only by a local authority and only where the local authority has "acquired or appropriated" the land concerned.

7.56 The City of London Corporation has publicly supported the use of section 237:

> The City of London has a long standing planning policy of promoting development in order to maintain the supply of … high quality office space in the Square Mile.
>
> […]
>
> The … decision to agree to the use of powers under s 237 ensures that developments deemed to promote economic development and other public benefits in the City … can proceed without running the risk of injunctions being applied with regards to rights to light.[42]

7.57 However, local authorities cannot be compelled to use the power. The pattern of use by local authorities (or, in some cases, the potential for its use if agreement is not reached between a developer and its neighbours) is sporadic. We are aware of several local authorities that have used, or considered the use, of section 237 but the approach is not, from publicly available information, uniform across England and Wales.

7.58 So section 237 may or may not be useful in a given situation based upon geographical and political factors. This uncertainty makes section 237 an unacceptable tool to deal with the problems caused by rights to light in the context of private development projects.

7.59 Furthermore, the need for local authority involvement makes it necessary to implement expensive and convoluted schemes. The local authority must itself "acquire or appropriate" land in order for section 237 to be used. But the development site is likely to be owned by a developer or a third party. Where this is the case the land will need to be transferred to the local authority with a mechanism to recover the land (or an interest in it) after section 237 has been exercised. Structuring such schemes can be complex:

> [Section 237] schemes can be structured in various ways, so catering for different circumstances (where, for example, a site is charged to a finance party or site assembly issues arise). Tax issues associated with the transfer of land must be dealt with, as well as public law considerations such as the requirement for the local authority to obtain best consideration … . The transaction documents should allocate responsibility for the possible transaction risks and liabilities,

[42] See City of London, "News release: City of London's Planning Committee approves recommendation to acquire interest at 20 Fenchurch Street under s 227 of the Town and Country Planning Act" (11 May 2011) (http://217.154.230.196/Corporation/media_centre/news_2011/city_20_fenchurchstreet.htm) (last visited 6 February 2013).

such as judicial review and the potential unwinding of the scheme if found to be unlawful.[43]

7.60 The complexity of the schemes, and the legal and political considerations associated with the use of section 237, make reliance upon it a last resort. Local authorities are unwilling to consider using their powers under section 237 unless other avenues have been explored; particularly the negotiated settlement route.[44] The use of section 237 by a local authority is not something a developer can be sure to be able to rely upon, nor is it a quick, cheap or easy fix to a developer's problems.

The conditions for the use of section 237

7.61 For a local authority to decide to use section 237 it must be satisfied that the use is necessary and that there is a legitimate planning purpose. Before acquiring or appropriating land for planning purposes, the local authority must be satisfied that:

(1) the acquisition or appropriation will facilitate the carrying out of a development, redevelopment or improvement on or in relation to the land that is likely to contribute to the promotion or improvement of the economic, social or environmental well-being of its area; or

(2) the land is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.[45]

7.62 In addition, because the use of the power makes unenforceable the rights of neighbouring landowners, the local authority will:

> … need to be satisfied that the public interest element of the development outweighs any adverse effect on the human rights of those affected. It should enter into a section 237 scheme only as a last resort.[46]

7.63 The limitations explained above mean that section 237 will not benefit developers in most development contexts. This is appropriate. The result of exercising section 237 can be severe; the compulsory overriding of an easement, albeit with compensation, is a significant step to take.

[43] C Fielding and D Rosen, "The key to success" (2011) 1121 *Estates Gazette* 89.

[44] See, for example, the report of the City Planning Officer and Comptroller and City Solicitor to the City of London Planning and Transportation Committee, "Rights of Light Issues affecting Development" (11 May 2011) available online at http://www.minutes.org.uk.

[45] As we noted in Chapter 2, para 2.52, the powers for a local authority to acquire land compulsorily and by agreement are conferred by sections 226 and 227 of the 1990 Act, and the power to appropriate land for planning purposes is conferred by section 122 of the Local Government Act 1972. These provisions are set out in Appendix A.

[46] C Fielding and D Rosen, "The key to success" (2011) 1121 *Estates Gazette* 89. See Chapter 2, paras 2.53 and 2.54 above.

Discussion

7.64 Section 237 fulfils a valuable role. However, its use is rightly limited and so we need to look at other measures to mitigate the difficulties that are caused by rights to light.

7.65 Some stakeholders have expressed to us the view that developers in Australia benefit from a form of "private section 237", or, in other words, a general right for a developer to override interests in land that would otherwise prevent that development.

7.66 We understand this to be a reference to section 28 of The Environmental Planning and Assessment Act 1979 (NSW) which provides that:

> For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument … shall not apply to any such development or shall apply subject to modifications specified in that environmental planning instrument.[47]

7.67 The 1979 Act does not give to the developer a power to override interests affecting land.[48] Instead it allows "environmental planning instruments"[49] to provide for this effect. The provision is grounded firmly in public planning legislation. It is not a power for developers to override property rights; such powers rightly reside only with public authorities.

SECTION 84 OF THE LAW OF PROPERTY ACT 1925

7.68 In Chapter 2 we discussed the recommendation we made in the Easements Report about section 84 of the Law of Property Act 1925.[50] Once that recommendation is implemented, all easements, including rights to light, created after implementation of that reform will be able to be modified or discharged by the Lands Chamber of the Upper Tribunal (the "Lands Chamber") pursuant to section 84. In the context of the present consultation it is worth considering how the section 84 grounds for modification and discharge[51] might apply to a right to light. The discussion below explores that point, before considering whether we should now go further and propose that existing rights to light should be made subject to the section 84 jurisdiction.

[47] Environmental Planning and Assessment Act 1979 (NSW), s 28(2).

[48] There is some debate about whether easements are included within the scope of section 28 of the Environmental Planning and Assessment Act 1979 (NSW). See S Rendell, "Recent Developments in the Law of Easements in NSW, Following the High Court of Australia Decision in *Westfield v Perpetual Trustee* and also including conflicts with planning consents" p 14 (available online at: http://www.fig.net/pub/fig2010/papers/ts08e%5Cts08e_rendel_4371.pdf (last visited 6 February 2013)).

[49] Defined in the Environmental Planning and Assessment Act 1979 (NSW), s 4, and Part 3 of that Act.

[50] We refer to this provision as "section 84" for the remainder of this Chapter.

[51] These grounds were listed in Chapter 2, para 2.58 above.

The grounds for discharge and modification

7.69 In the Easements Report we recommended that the grounds contained in section 84 be applied, without substantive amendment, to the modification or discharge of easements.[52] In the following text we present an overview of the section 84 grounds for discharge and modification, and discuss how they might be applied in the rights to light context.[53]

The first ground

7.70 The first ground is that following a change in the character of the property or neighbourhood or other circumstances the restriction ought to be deemed obsolete.[54]

7.71 A right to light which has no practical use – a bricked up window, say – may presumably be obsolete.[55] The ground may also apply if, for example, a previously residential property is used exclusively for storage.

The second ground

7.72 The second ground is that the continued existence of the restriction impedes some reasonable use of the land and either does not give those entitled to it any practical benefits of substantial value or advantage, or is contrary to the public interest, and that money will be an adequate compensation for the loss suffered.[56]

7.73 A residential development in an area with a housing shortage, or a new hospital development might be within this ground, particularly if the threatened rights to light benefited a commercial building enjoying little or no amenity from natural light.

7.74 The policy considerations underlying this ground were recently explored by the Court of Appeal in *Shephard v Turner*:

> The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights.[57]

[52] The Easements Report, para 7.55. In addition to a reorganisation of section 84 for clarity, we recommended that the Lands Chamber should only modify an easement if it is satisfied that the modified interest will not be materially less convenient to the benefited owner and will be no more burdensome to the land affected*:* see the Easements Report, para 7.60.

[53] For a more detailed analysis of the Lands Chamber's decisions on section 84 applications, see A Francis, *Restrictive Covenants and Freehold Land* (2nd ed 2005) ch 16.

[54] Law of Property Act 1925, s 84(1)(a).

[55] The easement may also be abandoned; see para 7.4 and following above.

[56] Law of Property Act 1925, s 84(1)(aa) and (1A).

[57] [2006] EWCA Civ 8, [2006] 2 P & CR 28 at [58] by Carnwath LJ.

7.75 Cases which fall to be decided under this ground are generally dealt with by reference to the following questions:[58]

(1) Is the proposed use reasonable?

(2) Does the right which is subject to the application impede that use?

(3) Does impeding the use secure practical benefits to the objector which are of substantial value or advantage?

(4) Is impeding the use contrary to the public interest?

(5) If the answer to point (3) is no, or if the answer to point (4) is yes, would money be an adequate compensation?

7.76 The Lands Chamber has accepted that light can be a "practical benefit of substantial value".[59] When it considers whether a particular right to light is of "substantial value" it may be that the tribunal will take a broad view, considering, for example, the use to which the building is put, and the extent to which that use is served by artificial light. The tribunal does not consider bargaining power or "ransom value" to be a practical benefit for the purposes of section 84(1A).[60]

7.77 It seems likely that an application to discharge or modify any right to light which provides valuable amenity will not succeed unless a strong case can be made that it is contrary to the public interest. Lands Chamber decisions suggest that the public interest condition of section 84(1A) is of narrow application and is not easy to fulfil. The grant of planning permission, for example, is rarely sufficient to prove that a restriction preventing a proposed use is contrary to the public interest, even where the applicant is a local authority.[61] Accordingly we would not expect many applicants to succeed on this basis without something more.[62]

The third ground

7.78 The third ground is that all persons entitled to the benefit of the restriction agree, either expressly or by implication, by their acts or omissions, to the discharge or modification.[63] We think that so far as easements, including rights to light, are concerned, an application to the Lands Chamber on this ground may be made in circumstances where a servient owner might also argue that an easement has been abandoned.

[58] Adapted from the questions set out in *Re Bass's Application* (1973) 26 P & CR 156, and noted and discussed in A Francis, *Restrictive Covenants and Freehold Land: A Practitioner's Guide* (3rd ed 2009) para 16.115 and following.

[59] *Re North's Application* (1997) 75 P & CR 117

[60] *Stockport Metropolitan Borough Council v Alwiyah* (1986) 52 P & CR 278.

[61] *Re Mansfield District Council* (1976) 33 P & CR 141.

[62] For examples of applications which succeeded on the basis of public interest, see *Re Lloyd and Lloyd* (1993) 66 P & CR 112 (government policy required homes to provide care in the community combined with a local need for care homes); *Re SJC Construction Company Limited's Application* (1974) 28 P & CR 200 (scarcity of housing land available locally and the value of the work already done).

[63] Law of Property Act 1925, s 84(b).

The fourth ground

7.79 The fourth ground is that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.[64] This ground is currently used to stop vexatious or frivolous objections to applications to discharge or modify restrictive covenants.[65] It is difficult to think of a situation in which this ground may be relevant to rights of light – if the servient owner is going to the trouble of making an application to discharge a right to light, it is unlikely that that discharge will not cause an injury to the dominant owner, unless (for example) it could be proven that the dominant owner never uses his or her right to light. The tribunal has held that loss of bargaining power (to extract ransom payments) is not an "injury" within the meaning of this ground.[66]

7.80 We asked in the Consultation Paper that preceded the Easements Report whether additional grounds were needed for easements generally. None were suggested.[67] We concluded that no amendment to the existing grounds of section 84 was needed, following the extension of the tribunal's jurisdiction to discharge or modify easements generally.[68]

7.81 We take the view that this conclusion applies equally to rights to light. Section 84 now strikes a balance between developers and those who have the benefit of restrictive covenants, and we expect this to be the case after the section 84 jurisdiction is extended to easements. We do not think that it is appropriate to upset that balance by providing grounds that are unique to certain easements. We therefore make no proposals regarding the grounds of section 84.

The compensation that may be awarded under section 84

7.82 Section 84(1) provides for the payment to any person entitled to the benefit of a restriction of either (but not both) of the following:

(1) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(2) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

7.83 In the Easements Report we made no recommendation to change the basis of compensation awarded under section 84(1).[69] We see no special arguments in the rights to light context to depart from this decision, and we therefore make no proposals on this issue in this Consultation Paper.

[64] Law of Property Act 1925, s 84(c).

[65] *Ridley v Taylor* [1965] 1 WLR 611.

[66] *Re Bennett and Tamarlin Ltd's Application* (1987) 54 P & CR 378.

[67] See the Easements Report, para 7.57.

[68] See the Easements Report, para 7.52 and following.

[69] See the Easements Report, paras 7.15 to 7.21.

Human rights

7.84 If an application made under section 84 of the Law of Property Act 1925 is successful, the dominant owner's easement will either be modified or discharged. As a result, two articles of the European Convention on Human Rights may be engaged in section 84 proceedings. We concluded when making the recommendation in the Easements Report that no incompatibility with the European Convention would arise where an easement was modified or discharged under section 84; in the text that follows we explain how we reached this view.

Article 1 of the First Protocol to the Convention: protection of possessions

7.85 Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms ("A1P1") provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

7.86 The nature of the "possessions" protected by A1P1 has been considered in the case law of the European Court of Human Rights ("ECtHR"). "Possessions" broadly encompasses not only established property rights as defined by domestic law, but also any interests in and claims to property belonging to others. Examples include judgment debts,[70] contractual rights,[71] claims (such as a claim for damages for negligence)[72] and even legitimate expectations of obtaining effective enjoyment of a property right, provided that such a claim has a sufficient basis in national law.[73]

7.87 The text of A1P1 is regarded by the ECtHR as encompassing three rules:[74]

(1) a general principle of peaceful enjoyment of possessions (the first sentence);

(2) a rule about deprivation of possessions (the second sentence); and

[70] *Timofeyev v Russia* (2005) 40 EHRR 38.

[71] *A, B and Company AS v Germany* (1978) 14 DR 146.

[72] *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301.

[73] See *Stretch v United Kingdom* (2004) 38 EHRR 12, which involved the *ultra vires* (meaning "beyond the powers") grant by a local authority of an option to renew a lease. The ECtHR held that the revocation of the option – notwithstanding the fact that the grant was *ultra vires* – constituted a breach of A1P1; the claimant had a legitimate expectation to the property right. The claim had a "sufficient basis in national law" despite the fact that *ultra vires* representations cannot generally found the basis for a legitimate expectation in English administrative law.

[74] *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 at [61]. See also T Allen, *Property and the Human Rights Act 1998* (2005) p 102; *Megarry and Wade*, para 1-024.

(3) a rule about the control of use (the second paragraph).

7.88 The first rule is regarded by the ECtHR as an "overarching principle of 'peaceful enjoyment' of possessions [that] qualifies, and permeates the interpretation of, the second and third rules of the article".[75] But a situation that does not fall clearly within the second or third rules can be regarded as falling within the first rule, because the ECtHR has said that the second and third rules are only instances of the general protection in the first rule.[76]

7.89 The precise dividing line between the second and third rules is unclear. The paradigm case of a deprivation of possessions is the expropriation by the state – often through powers of compulsory purchase – of land belonging to a private individual. Clayton & Tomlinson offers "the extinction of all of the legal rights of the owner" as the primary criterion for a deprivation.[77]

7.90 A typical example of "control of use" involves the state exercising control of the owner's use of his or her property, either by requiring positive action to be taken[78] or (more commonly) by imposing restrictions. Standard instances of the latter include planning controls[79] and prohibitions on construction.[80]

7.91 Some cases are more challenging to classify. For example, in *JA Pye (Oxford) Ltd v United Kingdom*[81] the Grand Chamber of the ECtHR held that the operation of the English law of adverse possession – the effect of which was to transfer ownership from one private party to another by the extinguishment of the former's title – was an instance of control of use, notwithstanding the loss of title suffered by the original owner.

7.92 It is therefore often difficult to say with certainty in any given situation whether A1P1 is applicable and under which rule a case will fall. Whilst the same principle of proportionality is applied across all A1P1 cases, a key difference between rules (2) (deprivation of possessions) and (3) (control of use) is that a deprivation of possessions will not usually be considered compatible with the Convention in the absence of compensation, whereas the absence of compensation does not always make a control of use incompatible with the Convention.[82]

[75] K Gray and S F Gray, *Elements of Land Law* (5th ed 2009) para 1.6.10, footnoting *James v UK* (1986) 8 EHRR 123 at [37] and several other cases.

[76] See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.99 and the footnotes cited in that paragraph. In *Thomas v Bridgend County Borough Council* [2011] EWCA Civ 862, [2012] 2 WLR 624 a lacuna in the provisions of the Land Compensation Act 1973 left the appellants without compensation for depreciation in the value of their properties. The Court of Appeal found that this engaged (and breached) the first rule of A1P1.

[77] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.104.

[78] See *Denev v Sweden* (1989) 59 DR 127, which involved a positive obligation on the owner to plant trees for environmental purposes.

[79] See *Pine Valley Developments v Ireland* (1991) 14 EHRR 319.

[80] See *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35.

[81] (2008) 46 EHRR 48.

[82] See para 7.95 and following below.

WHEN MAY A DEPRIVATION OF POSSESSIONS OR A CONTROL OF THEIR USE BE PERMISSIBLE?

7.93 The text of A1P1 states that an interference with possessions – an expression we use to encompass both deprivation and control of use – must be subject to the conditions provided for by law;[83] the interference must also be in the public interest.[84]

7.94 But to any interference a test of proportionality must also be applied: does the interference strike a "fair balance"[85] between the public interest and the individual's rights? In answering this question, the court will have regard to whether there is a reasonable relationship of proportionality between the legitimate aim pursued in the general interest and the means adopted to pursue that aim; are the means used proportionate to the aim?

7.95 It is in the context of the proportionality inquiry that the issue of compensation can be decisive – the ECtHR has consistently held that, in a case involving the deprivation of an individual's possessions, the fair balance test will not be satisfied unless that individual has been compensated for his or her loss, unless the circumstances are truly exceptional.[86]

7.96 In contrast, compensation is generally not required in control of use cases, although it can be a factor relevant to the fair balance inquiry. Cases falling within the third rule have frequently been successfully defended, where states have shown that a fair balance has been struck between the general interest and the individual notwithstanding a lack of compensation.[87]

7.97 In assessing whether a fair balance has been struck, the court will take into account a number of factors in addition to the compensation issue, including: the conduct of the state, the conduct of the applicant, the effect of the interference on the individual, the strength of the benefit to the wider community and whether the measure effecting the interference has retrospective effect.[88]

[83] This requirement is not particularly onerous; it provides that domestic laws which interfere with property rights must be "adequately accessible and sufficiently precise" – *Lithgow v United Kingdom* (1986) 8 EHRR 329 at [110]. Cases are rarely brought or argued successfully on this basis.

[84] The case law does not distinguish between the terms "public interest" in the second sentence and "general interest" in the second paragraph of A1P1. See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.116, n 375.

[85] The concept of the "fair balance" inquiry was introduced by the case of *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35

[86] *James v United Kingdom* (1986) 8 EHRR 123; see R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.124. See also *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [57].

[87] For example, no obligation to pay compensation arose where the Leasehold Reform Act 1967 reduced the value of property owned by the trustees of the Duke of Westminster – *James v United Kingdom* (1986) 8 EHRR 123. See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.130.

[88] Measures which have retrospective effect are more likely to disturb the fair balance, although tax legislation with retrospective effect has been found to be permissible – *A, B, C, D v United Kingdom* (1981) 23 DR 203.

APPLICATION TO SECTION 84 PROCEEDINGS

7.98 It is fair to assume that A1P1 is engaged in section 84 proceedings. Clearly a restrictive covenant or an easement falls within the scope of "possessions" protected by the provision; it is debatable, however, whether the interference would be classified as falling within the second or third rules of A1P1 – as we noted above, the case law on this point is unclear.

7.99 We take the view that section 84, as amended to allow for the modification and discharge of easements, would be compliant with the requirements of A1P1, regardless of whether the interference fell within the second or third rules.

7.100 Where the proposed modification or discharge is contentious – for instance where the second ground of section 84 is relied upon[89] – there will need to be a clear public benefit in discharging or modifying the restriction, and compensation will be awarded to cover the loss suffered by the dominant owner.

7.101 In other words, the Lands Chamber will not make an order discharging or modifying a right to light unless either there is no loss of amenity, or that loss has been subjected to the careful balancing against the public interest that the Convention requires. Furthermore, if the Lands Chamber makes an order, having been satisfied that the removal of amenity, if any, is appropriate, it will order compensation. [90]

7.102 The ECtHR has stated that the measure of compensation for property expropriated by the state must be "an amount reasonably related to its value".[91] The ECtHR has not specified how the "value" of property should be determined, but in general a standard of "market value" has been used, without giving the applicant any entitlement to profit-share or to a sum representing the value of the property to its former owner.[92]

7.103 In addition, as the issue of quantification of compensation falls within the state's margin of appreciation, the ECtHR will only substitute its judgement for that of the national legislature where the latter's assessment is "manifestly without reasonable foundation".[93] It is therefore beyond doubt that the amount of compensation that may be awarded by the Lands Chamber following the modification or discharge of a right to light will be acceptable, because the Lands Chamber will never make an award that is less than the loss in value suffered by the dominant owner.

7.104 In our view the modification or discharge of an easement under section 84 would therefore be compatible with A1P1.

[89] See para 7.72 and following above.

[90] This is usually on a loss in value basis, not a negotiated share of profits basis. However, the Lands Chamber retains a degree of flexibility (see para 7.82 above). See also *Winter v Traditional and Contemporary Contracts Ltd* [2007] EWCA Civ 1088 at [33].

[91] *Lithgow v United Kingdom* (1986) 8 EHRR 329 at [121] and following; *James v United Kingdom* (1986) 8 EHRR 123 at [54].

[92] See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.123.

[93] *Lithgow v United Kingdom* (1986) 8 EHRR 329 at [122].

Article 8 of the Convention: the right to respect for the home

7.105 Article 8 of the European Convention on Human Rights provides:

> Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

7.106 Article 8 protects an occupier's "home" rights, meaning:

> The place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area but also to the quiet enjoyment of that area. Breaches of the right to respect for the home are not confined to concrete or physical breaches … but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference.[94]

7.107 "Home" has been given a broad interpretation. As well as including residential premises, the concept of "home" has been held to extend to holiday homes[95] and also to business premises.[96]

7.108 It is clear from the case law that the amenity value of land is protected by Article 8. In *Lough v First Secretary of State* the Court of Appeal noted that loss of amenity alone can result in a violation of Article 8, provided the loss is substantial and serious.[97] So Article 8 may be engaged in section 84 proceedings if, as a result of the proceedings, a development on the servient land would be permitted to go ahead (subject, of course, to any relevant planning restrictions), the effect of which would be so significant as to interfere with a dominant owner's right to respect for his or her home.

[94] R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 12.305, citing *Borysiewicz v Poland* (App No 71146/01) (1 July 2008) at [48] and *Giaconnelli v Italy* (unreported) (2 November 2006) at [76].

[95] *Kanthak v Germany* (1988) 58 DR 94.

[96] See *Niemietz v Germany* (1993) 16 EHRR 97 at [30] to [33].

[97] [2004] EWCA Civ 905, [2004] 1 WLR 2557 at [43].

7.109 As with A1P1, interferences with Article 8 rights are permitted, provided that they are justified. Whether an interference is justified depends upon whether the criteria in Article 8(2) are satisfied: any interference must be in accordance with the law and be "necessary in a democratic society" in pursuance of one of the legitimate aims listed in the text of Article 8(2). It falls to the state to make the initial assessment of whether the measure is necessary; the state is afforded a margin of appreciation in this assessment.[98] The question of whether an interference is necessary is answered by a proportionality exercise of a similar nature to that seen in the context of A1P1 – the state must show that the interference corresponds to a "pressing social need"[99] and is a proportionate response to the legitimate aim identified. The requirement that the state must identify a pressing social need provides a key distinction between Article 8 and A1P1: the fact that any interference with Article 8 must be "necessary in a democratic society" means that the standard or intensity of the proportionality review is generally seen as higher in the Article 8 context.[100]

7.110 In assessing whether extending the jurisdiction of the Lands Chamber would be a proportionate way of achieving that aim, it is important to note the grounds on which an order for the modification or discharge of a right to light could be made under section 84, which we discussed above.[101]

7.111 In our view the assessment performed by the Lands Chamber when considering whether one or more of the grounds of section 84 have been met ensures compliance with the requirements of Article 8. A right to light would only be discharged or modified under section 84 if it was obsolete or the proposed order of the Lands Chamber would cause no injury;[102] or where the right is said to impede the reasonable use of land. In the latter case the Lands Chamber will conduct a careful balancing exercise to weigh the public interest against the individual interest. This ensures that any interference with Article 8 rights is prescribed by law, pursues a legitimate aim[103] and is proportionate. There is therefore no incompatibility with the Convention.

The extension of the section 84 jurisdiction to existing rights to light

7.112 Our recommendation in the Easements Report related to easements created post-reform only. In the discussion that follows we revisit that recommendation and consider whether the Lands Chamber should be given the power to modify or discharge rights to light that are currently in existence.

98 See *Dudgeon v United Kingdom* (1982) 4 EHRR 149 at [52].

99 *Dudgeon v United Kingdom* (1982) 4 EHRR 149 at [51].

100 See R Clayton and H Tomlinson, *The Law of Human Rights* (2nd ed 2009) para 18.118.

101 These grounds were explored more fully, and with their statutory references, at paras 7.69 to 7.81 above.

102 Either because the dominant owner consented to the discharge or modification or because the Lands Chamber found that no injury would be caused.

103 The text of Article 8(2) acknowledges the state's legitimate aim in securing the economic well-being of the country and protecting the rights and freedoms of others.

7.113 In this Consultation Paper we have already provisionally proposed that prescription should no longer operate to create rights to light.[104] That would mean that very few easements of light would be created in the future, since few are granted expressly or by implication. If that provisional proposal were implemented the extension of the section 84 jurisdiction, as recommended in the Easements Report, would therefore have scarcely any effect in the context of the multitude of existing rights to light.

7.114 We therefore have to consider whether we should go further than we did in the Easements Report and extend the section 84 jurisdiction to existing rights to light.

7.115 One argument for the extension of the jurisdiction is that rights to light can be acquired by prescription without any positive action by the benefiting owner, and often without the knowledge of any of the interested parties. Inevitably, then, rights to light have proliferated across the country. They frequently only become apparent when they are infringed or threatened with infringement.

7.116 Furthermore, rights to light are extremely resilient and are vigorously protected by the courts: the primary remedy for the infringement of a right to light is an injunction.[105] This provides a powerful bargaining tool for a dominant owner, who may seek to exploit the profit-making potential of a right to light, rather than using it to protect the amenity value of light to his or her property. Taken together, these factors mean that rights to light often appear to present a disproportionate impediment to property development.

7.117 Accordingly, we take the view that there is a strong case for the extension of the section 84 jurisdiction to cover existing rights of light. We think that it is important to provide for a jurisdiction that can assess whether a right to light continues to provide the dominant owner with a substantial practical benefit and, if necessary, balance that against the public interest in the modification or discharge of the right.

7.118 We did not make such a recommendation in the Easements Report because of concern about a human rights issue. We said:

> … to extend the jurisdiction to interests already in existence would risk contravening Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. That is because the benefit of an easement … currently includes the freedom to bargain for its release (even if it is obsolete) and, either to refuse a release or to demand a price for its release which could exceed the amount likely to be recovered as compensation by order of the tribunal. So to bring existing easements … within the scope of reform would be, in effect, to strip value out of existing property rights.[106]

[104] See Chapter 3, para 3.48 above.

[105] See Chapter 5, para 5.2 and following above.

[106] The Easements Report, para 7.32.

7.119 We explained above that the modification or discharge of a right to light as a result of section 84 proceedings would be compatible with the European Convention on Human Rights.[107] But the concern that we expressed in the Easements Report relates to a different issue. The owner of an existing easement can currently bargain for its release and demand a price which could exceed the amount likely to be recovered as compensation by an order of the Lands Chamber. The easement currently therefore has a value in two senses. One is that it protects the access of light to property, and the amenity value of the property and comfort of the owner. The other is that it is a valuable asset that can command a ransom price. The easement, or the property itself, may even have been acquired with the latter in view rather than the former.

7.120 Following the extension of section 84 all easements of light would become less valuable, because they would be subject to potential discharge in exchange for a level of compensation that would be far less than the ransom value they now command. The concern expressed in the Easements Report was whether the amendment of section 84 to encompass existing rights to light would be incompatible with A1P1 of the European Convention on Human Rights in itself, because it would effectively remove the ransom value of all existing rights to light.[108]

7.121 Of course, this is precisely what happened to restrictive covenants when the section 84 jurisdiction was first introduced in 1925. But that was 28 years before the European Convention on Human Rights was brought into force; clearly the United Kingdom was not under the same international obligations then as it is now.

7.122 A similar effect would also have occurred on several occasions in the past, when the power now contained in section 237 of the Town and Country Planning Act 1990 was first introduced in section 22 of the Town and Country Planning Act 1944, and re-enacted in later consolidation statutes.[109] As we discussed above,[110] section 237 of the 1990 Act empowers a local authority to override easements and other rights where servient land is acquired or appropriated by the local authority for planning purposes. Compensation is payable to the dominant owner where section 237 is used to override a right; but that compensation is calculated on the basis of the diminution in the value of the neighbour's land, and will not

[107] See paras 7.84 to 7.111 above.

[108] It is not clear which of the rules of A1P1 may be engaged simply by virtue of the extension of the section 84 jurisdiction. Reducing the value of property rights may be seen as a control of use; but it is more likely to be classified as falling within the first rule, which enunciates a general principle of peaceful enjoyment of possessions. See paras 7.84 to 7.92 above.

[109] See the Town and Country Planning Act 1944, s 22; the Town and Country Planning Act 1962, s 81; the Town and Country Planning Act 1971, s 127; and the Town and Country Planning Act 1990, s 237. Each Act was repealed by its successor.

[110] See para 7.49 and following above.

include the loss of a bargaining position or a share of the profit enabled by the interference.[111]

7.123 The existence of section 237 means that, in situations where the power could be exercised, the "ransom value" of the rights to which it applies has been extinguished. A dominant owner is no longer able to extract a ransom payment from a local authority in return for allowing a development to proceed; if the dominant owner attempted to "hold out" and secure a heavily inflated payment, the local authority could exercise its powers under section 237 to override the right.

7.124 In fact section 237 has not had this general effect upon all rights to light – particularly because it is available only in limited circumstances. We have heard of no suggestion that section 237 of the Town and Country Planning Act 1990 (or any of its predecessors) is itself incompatible with the European Convention on Human Rights on the basis that the existence of the power to override easements and other rights devalues appurtenant rights generally.

7.125 Indeed, many pieces of legislation which have the effect of regulating the use of property rights have an impact upon the value of those rights. One example of this is found in the case of *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs*,[112] which concerned a canal which had been designated as a site of special scientific interest under (the then) section 28 of the Wildlife and Countryside Act 1981. In return for annual consideration of £19,000 the claimant company, which owned the canal, had entered into a management agreement with English Nature in 1997. This agreement introduced certain restrictions on the use of the canal; prior to the agreement being entered into the claimant had aspirations of opening up the canal to commercial activities. In 2000 the management agreement expired, and in 2001 the 1981 Act was amended[113] to introduce a new statutory regime relating to sites of special scientific interest. The effect of the amendments was to entitle English Nature to refuse consent to "any works or leisure activities" on the canal without the need for a new management agreement or for financial consideration to be awarded.

7.126 In response to this the claimant issued proceedings, in which it sought a declaration that the amendments to the 1981 Act were incompatible with A1P1 on the basis that:

> … the consequence of the amendments effected by the 2000 Act to the 1981 Act curtailed, often very severely, the use which owners could make of their land and consequently reduced, often substantially, indeed sometimes to the point of extinction, the profit

[111] *Clift v Welsh Office* [1999] 1 WLR 796. For a discussion of the measure of compensation under section 237(4) see D Stevens, "A lighter touch required" (2012) 1228 *Estates Gazette* 75.

[112] [2004] EWCA Civ 1580, [2005] 1 WLR 1267.

[113] By sections 75(1) and 76 of (and Schedules 9 and 11 to) the Countryside and Rights of Way Act 2000.

> earning capacity and hence the market value of their land, without according any compensation for such reduction.[114]

7.127 The claim was rejected, both at first instance[115] and in the Court of Appeal. Lord Justice Neuberger delivered a judgment to which all members of the Court of Appeal had contributed. After reviewing the authorities and noting that there was no doctrine in the case law of the ECtHR which required the payment of compensation for the control of use of property,[116] he stated:

> If article 1 of the First Protocol required the provision of compensation in legislation which restricted the use of property, the results would be very far-reaching indeed. The financial consequences of introducing laws concerned with town and country planning, listed and historic buildings, health and safety at work, and hygiene, to take some obvious examples, would be such as severely to cripple the legislature's freedom to introduce such socially beneficial legislation.[117]

7.128 This echoes the point we make at paragraph 7.125 above; legislation which regulates property rights can often impact upon the value of those rights.

7.129 Lord Justice Neuberger then went on to consider whether the amendments to the 1981 Act pursued a legitimate aim in the public interest and found that they did.[118] He then noted that a fair balance inquiry must be undertaken by the court when considering compatibility with A1P1; and the cases showed that that fair balance inquiry must afford the legislature a certain margin of appreciation.[119] He concluded that the legislation was compatible with A1P1; it was not sufficient to point merely to the fact that the public benefit obtained by the amendments to the legislation would come at the expense of reducing the value of the claimant's interest in the canal (and reducing the value of other land designated as a site of special scientific interest).[120]

[114] [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [15].

[115] [2004] EWHC 153 (Admin), [2004] Env L R 40.

[116] [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [57].

[117] [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [46].

[118] [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [60].

[119] [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [52].

[120] See [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [65] and following. Lord Justice Neuberger also considered whether the case could be described as one which amounted to a "*de facto* expropriation" – in other words, a control of use which amounts in substance to a deprivation of possessions – and concluded that it could not. See [2004] EWCA Civ 1580, [2005] 1 WLR 1267 at [47] to [50].

7.130 We are not aware of any case which has been decided by the ECtHR since this decision which could cast doubt upon the accuracy of these conclusions. As Lord Justice Neuberger makes clear in the judgment, there is no general principle that compensation is required where the effect of legislation is to regulate or control the use of property rights, even where the effect of that legislation is to substantially reduce the value of their rights. Accordingly, no incompatibility with the European Convention arises where legislation has the effect of reducing the value of property rights, provided that it pursues a legitimate aim in the general interest and strikes a fair balance between the public interest and the interests of the dominant owners.

7.131 We are confident that extending the section 84 jurisdiction does pursue a legitimate aim and strikes a fair balance between the public interest and the interests of individual owners of rights to light. We have given very careful consideration to extending the jurisdiction and explored the reasons for doing so at paragraphs 7.112 to 7.117 above. A fair balance is struck on the basis that no dominant owner is singled out to bear an individualised and excessive burden, and the case law shows that no compensation is required where legislation has the effect of reducing the value of property rights. Accordingly, we conclude that the position taken in the Easements Report was over-cautious and that extending the jurisdiction of the Lands Chamber to cover existing rights to light would be compatible with the European Convention on Human Rights.[121]

7.132 We provisionally propose that the jurisdiction of the Lands Chamber of the Upper Tribunal should be extended so as to enable it to make orders for the modification or discharge of existing rights to light.

Do consultees agree?

[121] A similar conclusion has been reached by others – see, for example *Gale on Easements,* para 1-155.

CHAPTER 8
LIST OF PROVISIONAL PROPOSALS AND CONSULTATION QUESTIONS

8.1 In this Chapter we set out our provisional proposals and consultation questions on which we invite the views of consultees. We would also be grateful for consultees' comments on any aspects of the Consultation Paper not covered below.

8.2 It would assist us if, when responding, consultees could indicate the paragraph of this list to which their response relates, or the paragraph(s) of the Consultation Paper most relevant to the point.

THE IMPACT OF REFORM OF RIGHTS TO LIGHT

8.3 We would be grateful for any evidence that consultees can provide which illustrates the impact of possible rights to light claims on the funding of development projects. Are consultees aware of any developments which have failed to secure financing as a result of potential or actual rights to light disputes? If so, what are the costs associated with these types of frustrated developments?

[paragraph 1.30]

8.4 We ask consultees to provide evidence as to the proportion of developments which involve rights to light, and evidence of any attendant delays. We would also be interested to know if consultees are aware of any plans for developments which have either been unable to go ahead or had to be altered because of rights to light disputes.

[paragraph 1.35]

8.5 Do the figures of the costs of disputes discussed in Chapter 1 conform with consultees' experiences of the cost to a development of rights to light issues? Have these experiences changed since *Heaney* was decided?

[paragraph 1.41]

8.6 We ask consultees to provide us with evidence of the costs to developers of engaging with rights to light disputes, particularly with regard to:

(1) the costs involved in preparing for rights to light disputes, including the costs of indemnity insurance, legal fees and the instruction of surveyors;

(2) the cost to developments of delay caused by rights to light disputes;

(3) the cost to developments of altering development plans as a result of rights to light disputes; and

(4) the amounts set aside (expressed as a percentage of anticipated profits or otherwise) to deal with potential rights to light disputes.

[paragraph 1.43]

8.7 We ask consultees to provide us with evidence of the costs to owners of rights to light of engaging in rights to light disputes.

[paragraph 1.45]

8.8 We would be grateful for any evidence that consultees can provide about alternative ways in which rights to light disputes are commonly resolved and the costs of doing so, including evidence about the costs of a local authority using section 237 of the Town and Country Planning Act 1990 to resolve rights to light disputes.

[paragraph 1.47]

8.9 We would appreciate any evidence that consultees can provide on how the amenity provided by natural light is, or might be, valued.

[paragraph 1.49]

8.10 We invite consultees to make any further comments, or provide any additional evidence, which they feel may be relevant when assessing the practical and economic impact of rights to light.

[paragraph 1.51]

THE CREATION OF RIGHTS TO LIGHT BY PRESCRIPTION

8.11 We provisionally propose that prescription should be abolished for rights to light.

Do consultees agree?

[paragraph 3.48]

8.12 Consultees, in particular those who do not wish to see the abolition of prescription for rights to light, are asked to tell us their views on the procedural requirements for the service and registration of light obstruction notices under the Rights of Light Act 1959, and whether they wish to see any reform or simplification of those requirements.

[paragraph 3.54]

INTERFERENCES WITH RIGHTS TO LIGHT

8.13 We ask consultees whether reform is needed to the principles governing when an obstruction of light is actionable and, if so, we would be grateful for consultees' suggestions for reform.

[paragraph 4.43]

REMEDIES: INJUNCTIONS AND DAMAGES

8.14 We provisionally propose that a court may award damages in substitution for an injunction in rights to light cases if the grant of the injunction would be disproportionate, bearing in mind:

(1) the size of the injury in terms of loss of amenity (which can include consideration of whether artificial light is usually used by the claimant);

(2) whether a monetary payment will be adequate compensation;

(3) the conduct of the claimant;

(4) whether the claimant delayed unreasonably in bringing proceedings; and

(5) the conduct of the defendant.

Do consultees agree?

[paragraph 5.50]

8.15 We would be grateful for consultees' views on limiting to rights to light cases reform of the test for when damages may be awarded in substitution for an injunction.

[paragraph 5.56]

8.16 We would be grateful for consultees' views on the options for reform of the method of assessment of equitable damages explored in Chapter 5. We would also be grateful for consultees' views on the introduction of a cap on the amount of equitable damages that may be awarded and how this could be achieved in practice.

[paragraph 5.94]

THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE

8.17 We provisionally propose that a court should not be able to grant an injunction to prevent or remedy an infringement of a right to light where the dominant owner has received a Notice of Proposed Obstruction and has not protected his or her right to an injunction in accordance with the procedure described in Chapter 6 and illustrated by the draft clauses at Appendix C of this Consultation Paper.

Do consultees agree?

[paragraph 6.47]

8.18 We would be grateful for consultees' comments on the detail of the Notice of Proposed Obstruction procedure as provisionally proposed, including:

(1) the form and content of the notice;

(2) the rules governing service of the notice;

(3) the third-party effect of the notice;

(4) responding to the notice by a counter-notice and issuing proceedings;

(5) multiple-notices and shelf-life; and

(6) cost recovery.

[paragraph 6.48]

8.19 We would be grateful for consultees' views on the suitability and practicability of limiting the Notice of Proposed Obstruction procedure to use in relation to rights to light benefiting commercial premises only.

[paragraph 6.50]

BRINGING RIGHTS TO LIGHT TO AN END

8.20 We would be grateful for consultees' views on whether the law of abandonment through alteration of apertures should be reformed and, if so, how the current law could be improved.

[paragraph 7.48]

8.21 We provisionally propose that the jurisdiction of the Lands Chamber of the Upper Tribunal should be extended so as to enable it to make orders for the modification or discharge of existing rights to light.

Do consultees agree?

[paragraph 7.132]

APPENDIX A
RELEVANT STATUTORY PROVISIONS

SECTION 122 OF THE LOCAL GOVERNMENT ACT 1972 – APPROPRIATION OF LAND BY PRINCIPAL COUNCILS

(1) Subject to the following provisions of this section, a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held immediately before the appropriation; but the appropriation of land by a council by virtue of this subsection shall be subject to the rights of other persons in, over or in respect of the land concerned.

(2) A principal council may not appropriate under subsection (1) above any land which they may be authorised to appropriate under section 229 of the Town and Country Planning Act 1990 (land forming part of a common, etc) unless—

> (a) the total of the land appropriated in any particular common, or fuel or field garden allotment (giving those expressions the same meanings as in the said section 229) does not in the aggregate exceed 250 square yards, and
>
> (b) before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them,

(2A) A principal council may not appropriate under subsection (1) above any land consisting or forming part of an open space unless before appropriating the land they cause notice of their intention to do so, specifying the land in question, to be advertised in two consecutive weeks in a newspaper circulating in the area in which the land is situated, and consider any objections to the proposed appropriation which may be made to them.

(2B) Where land appropriated by virtue of subsection (2A) above is held—

> (a) for the purposes of section 164 of the Public Health Act 1875 (pleasure grounds); or
>
> (b) in accordance with section 10 of the Open Spaces Act 1906 (duty of local authority to maintain open spaces and burial grounds),

the land shall by virtue of the appropriation be freed from any trust arising solely by virtue of its being land held in trust for enjoyment by the public in accordance with the said section 164 or, as the case may be, the said section 10.

(4) Where land has been acquired under this Act or any other enactment or any statutory order incorporating the Lands Clauses Acts and is subsequently appropriated under this section, any work executed on the land after the appropriation has been effected shall be treated for the purposes of section 68 of the Lands Clauses Consolidation Act 1845 and section 10 of the Compulsory Purchase Act 1965 as having been authorised by the enactment or statutory order under which the land was acquired.

SECTION 226 OF THE TOWN AND COUNTRY PLANNING ACT 1990 – COMPULSORY ACQUISITION OF LAND FOR DEVELOPMENT AND OTHER PLANNING PURPOSES

(1) A local authority to whom this section applies shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily any land in their area —

> (a) if the authority think that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land, or
>
> (b) which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated.

(1A) But a local authority must not exercise the power under paragraph (a) of subsection (1) unless they think that the development, re-development or improvement is likely to contribute to the achievement of any one or more of the following objects —

> (a) the promotion or improvement of the economic well-being of their area;
>
> (b) the promotion or improvement of the social well-being of their area;
>
> (c) the promotion or improvement of the environmental well-being of their area.

(2A) The Secretary of State must not authorise the acquisition of any interest in Crown land unless —

> (a) it is an interest which is for the time being held otherwise than by or on behalf of the Crown, and
>
> (b) the appropriate authority consents to the acquisition.

(3) Where a local authority exercise their power under subsection (1) in relation to any land, they shall, on being authorised to do so by the Secretary of State, have power to acquire compulsorily —

> (a) any land adjoining that land which is required for the purpose of executing works for facilitating its development or use; or

(b) where that land forms part of a common or open space or fuel or field garden allotment, any land which is required for the purpose of being given in exchange for the land which is being acquired.

(4) It is immaterial by whom the local authority propose that any activity or purpose mentioned in subsection (1) or (3)(a) should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).

(5) Where under subsection (1) the Secretary of State has power to authorise a local authority to whom this section applies to acquire any land compulsorily he may, after the requisite consultation, authorise the land to be so acquired by another authority, being a local authority within the meaning of this Act.

(6) Before giving an authorisation under subsection (5), the Secretary of State shall —

(a) if the land is in a non-metropolitan county in England, consult with the councils of the county and the district;

(b) if the land is in a metropolitan district, consult with the council of the district;

(bb) if the land is in Wales, consult with the council of the county or county borough; and

(c) if the land is in a London borough, consult with the council of the borough.

(7) The Acquisition of Land Act 1981 shall apply to the compulsory acquisition of land under this section.

(8) The local authorities to whom this section applies are the councils of counties, county boroughs, districts and London boroughs.

(9) Crown land must be construed in accordance with Part 13.

SECTION 227 OF THE TOWN AND COUNTRY PLANNING ACT 1990 – ACQUISITION OF LAND BY AGREEMENT

(1) The council of any county, county borough, district or London borough may acquire by agreement any land which they require for any purpose for which a local authority may be authorised to acquire land under section 226.

(2) The provisions of Part 1 of the Compulsory Purchase Act 1965 (so far as applicable), other than sections 4 to 8, section 10 and section 31, shall apply in relation to the acquisition of land under this section.

SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990 – POWER TO OVERRIDE EASEMENTS AND OTHER RIGHTS

(1) Subject to subsection (3), the erection, construction or carrying out or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves —

(a) interference with an interest or right to which this section applies, or

(b) a breach of a restriction as to the user of land arising by virtue of a contract.

(1A) Subject to subsection (3), the use of any land in England which has been acquired or appropriated by a local authority for planning purposes (whether the use is by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is in accordance with planning permission even if the use involves —

(a) interference with an interest or right to which this section applies, or

(b) a breach of a restriction as to the user of land arising by virtue of a contract.

(2) Subject to subsection (3), the interests and rights to which this section applies are any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right to support.

(3) Nothing in this section shall authorise interference with any right of way or right of laying down, erecting, continuing or maintaining apparatus on, under or over land which is —

(a) a right vested in or belonging to statutory undertakers for the purpose of the carrying on of their undertaking, or

(b) a right conferred by or in accordance with the electronic communications code on the operator of an electronic communications code network.

(4) In respect of any interference or breach in pursuance of subsection (1) or (1A), compensation —

(a) shall be payable under section 63 or 68 of the Lands Clauses Consolidation Act 1845 or under section 7 or 10 of the Compulsory Purchase Act 1965, and

(b) shall be assessed in the same manner and subject to the same rules as in the case of other compensation under those sections in respect of injurious affection where—

(i) the compensation is to be estimated in connection with a purchase under those Acts, or

(ii) the injury arises from the execution of works on, or use of, land acquired under those Acts.

(5) Where a person deriving title under the local authority by whom the land in question was acquired or appropriated—

(a) is liable to pay compensation by virtue of subsection (4), and

(b) fails to discharge that liability,

the liability shall be enforceable against the local authority.

(6) Nothing in subsection (5) shall be construed as affecting any agreement between the local authority and any other person for indemnifying the local authority against any liability under that subsection.

(7) Nothing in this section shall be construed as authorising any act or omission on the part of any person which is actionable at the suit of any person on any grounds other than such an interference or breach as is mentioned in subsection (1) or (1A).

APPENDIX B
OVERVIEW OF THE PLANNING FRAMEWORKS FOR ENGLAND AND WALES

NATIONAL PLANNING POLICIES

B.1 The national planning policies for England and Wales can be found in the National Planning Policy Framework and Planning Policy Wales respectively.

The National Planning Policy Framework

B.2 The National Planning Policy Framework ("the Framework") is published by the Department for Communities and Local Government.[1] It is a concise document which sets out 12 core land-use planning principles that should underpin decision-taking by local planning authorities.[2] The Framework generally does not regard itself as the source of detailed planning policy; instead it:

> … provides a framework within which local people and their accountable councils can produce their own distinctive local and neighbourhood plans, which reflect the needs and priorities of their communities.[3]

B.3 The Framework makes no explicit reference to daylight and sunlight. The fourth core land-use planning principle seeks only to protect amenities generally.[4] It states that:

> Planning should … always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings.[5]

B.4 The fourth core land-use planning principle gives no indication of what amounts to a "good" standard of amenity.

B.5 There is other material in the Framework that helps establish the foundations for more detailed local policy generation. For example, it states that:

[1] A copy of the Framework (March 2012) is available online at: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6077/2116950.pdf (last visited 6 February 2013).

[2] The Framework, para 17.

[3] The Framework, para 1. The Framework does not form part of a development plan (see Chapter 2, para 2.63 above and para B.9 below).

[4] The Framework does not define "amenity". A useful definition appears in the glossary of The London Plan: Spatial Development Strategy for Greater London (see http://www.london.gov.uk/sites/default/files/London%20Plan%2022%20July%202011%20RTF.rtf (last visited 6 February 2013)), which provides that an amenity is an "element of a location or neighbourhood that help to make it attractive or enjoyable for residents and visitors", a definition that encompasses daylight and sunlight.

[5] The Framework, para 17.

> Local planning authorities should consider using design codes where they could help deliver high quality outcomes. However, design policies should avoid unnecessary prescription or detail and should concentrate on guiding the overall scale, density, massing, height, landscape, layout, materials and access of new development in relation to neighbouring buildings and the local area more generally.[6]

Planning Policy Wales

B.6 The fifth edition of Planning Policy Wales[7] was published by the Welsh Assembly Government in November 2012. Along with supplementary Technical Advice Notes, circulars and policy clarification letters, it sets out the land-use planning policies of the Assembly Government. It has the same status as the National Planning Policy Framework: it is a document which should be taken into account when formulating local policies and which may be material to decisions on individual planning applications.[8]

B.7 Like its English equivalent, Planning Policy Wales contains a broad, aspirational statement on the protection of amenity:

> The planning system is intended to help protect the amenity and environment of towns, cities and the countryside in the public interest while encouraging and promoting high quality, sustainable development.[9]

B.8 This is followed by a number of more specific policies that highlight the need to consider amenity. For example, in relation to housing development, paragraph 9.3.3 provides that:

> Insensitive infilling, or the cumulative effects of development or redevelopment, including conversion or adaptation, should not be allowed to damage an area's character or amenity. This includes any such impact on neighbouring dwellings, such as serious loss of privacy or overshadowing.

DEVELOPMENT PLANS

B.9 Where an application for planning permission is considered by a local planning authority it will have regard to a "development plan". Section 38 of the Planning and Compulsory Purchase Act 2004 defines "development plan" as follows:

> (2) For the purposes of any area in Greater London the development plan is —

6 The Framework, para 59.

7 A copy of Planning Policy Wales is available online at: http://wales.gov.uk/docs/desh/publications/121107ppwedition5en.pdf (last visited 6 February 2013).

8 Planning Policy Wales, para 1.1.4. As is the case with the Framework, Planning Policy Wales does not form part of a development plan (see Chapter 2, para 2.63 above and para B.9 below).

9 Planning Policy Wales, para 3.1.1.

(a) the spatial development strategy, and

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and

(c) the neighbourhood development plans which have been made in relation to that area.

(3) For the purposes of any other area in England the development plan is —

(a) the regional strategy for the region in which the area is situated (if there is a regional strategy for that region), and

(b) the development plan documents (taken as a whole) which have been adopted or approved in relation to that area, and

(c) the neighbourhood development plans which have been made in relation to that area.

(4) For the purposes of any area in Wales the development plan is the local development plan adopted or approved in relation to that area.

Regional planning policies

B.10 One element of development plans in England is a spatial or regional strategy.[10] We consider below, by way of an example, the spatial development strategy for Greater London, known as the London Plan.[11]

The London Plan

B.11 The current London Plan was published in 2011 and forms part of the development plan of the local planning authorities of each of the 33 boroughs of London.

B.12 The London Plan makes provision for the prevention of overshadowing (and, by implication, the protection of sunlight and daylight) as well as the safeguarding of the amenity of surrounding land and buildings generally. The relevant policy is Policy 7.6(B)(d), which states that:

> Buildings and structures should … not cause unacceptable harm to the amenity of surrounding land and buildings, particularly residential buildings, in relation to privacy, overshadowing, wind and microclimate. This is particularly important for tall buildings.[12]

[10] Although see n 82 in Chapter 2 above.

[11] Further details, and a copy of the London Plan (2011), are available online at: http://www.london.gov.uk/priorities/planning/londonplan (last visited 6 February 2013).

[12] The London Plan 2011, p 216, col 2. See further Policy 7.7(D)(a) in respect of tall buildings at p 218, col 1.

Local planning policies

B.13 Another ingredient of development plans is a set of local documents which have been approved or adopted by an individual authority. Historically, local planning policies were implemented by using one of three instruments: a structure plan, a local plan, or a unitary development plan. These are in the process of being phased out and replaced by suites of policies known as local development frameworks.[13] Some local planning authorities have fully adopted a local development framework, whereas others continue to use other instruments that are in the process of being phased out.[14]

B.14 Local development frameworks (and predecessor policy documents) are substantial documents which can come to several hundred pages in length. We consider below a small sample of policies that indicate how light and overshadowing are approached by several different local planning authorities: Westminster City Council, the Royal Borough of Greenwich, Newcastle City Council and Manchester City Council.

Westminster City Council

B.15 Westminster City Council has adopted a local development framework. The Core Strategy[15] provides that:

> … new development should take measures to minimise noise, light, and air pollution, to acceptable levels and maintain or improve the amenity for neighbouring residents by addressing issues of privacy, overlooking, natural light, enclosure, and disturbance. These detailed matters will be dealt with in detail in the City Management Plan.[16]

B.16 The City Management Plan is not being taken forward as a separate document; more detailed polices are being taken forward as revisions to the Core Strategy.[17] For the present, certain elements of its Unitary Development Plan[18] remain in force as "saved policies". Among them is Policy ENV13(E), which provides that:

> The City Council will normally resist proposals which result in a material loss of daylight/sunlight, particularly to existing dwellings and

[13] See V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) para 5.18.

[14] See V Moore and M Purdue, *A Practical Approach to Planning Law* (12th ed 2012) paras 4.32 and 4.33.

[15] Westminster City Council, Core Strategy (2011) is available online at: http://www.westminster.gov.uk/services/environment/planning/ldf/corestrategy/ (last visited 6 February 2013). The Core Strategy is a development plan document forming part of the local development framework.

[16] Westminster City Council, Core Strategy (2011) para 5.22.

[17] See http://www.westminster.gov.uk/services/environment/planning/ldf/cityplan/ (last visited 6 February 2013).

[18] Westminster City Council, The Unitary Development Plan (2007) is available online at: http://www.westminster.gov.uk/services/environment/planning/unitarydevelopmentplan/ (last visited 6 February 2013).

> educational buildings. In cases where the resulting level is unacceptable, permission will be refused.[19]

B.17 Paragraphs 9.228 to 9.229 of the accompanying notes give further guidance on what amounts to a "material loss" or an "unacceptable level" of daylight or sunlight:

> The City Council wishes to protect and improve amenities for residents, workers and visitors. That will include maintaining and improving the amount of daylight and sunlight reaching buildings, particularly housing. Individual applications will therefore be assessed to ensure that they do not result in a material loss of daylight and sunlight.
>
> Although the policies are primarily designed with regard to residential accommodation, the City Council may apply them to other uses, such as schools and other activities where loss of daylight/sunlight in particular may prejudice the present use of the premises. Recommended standards for daylight and sunlight for residential accommodation are set out in the Building Research Establishment (BRE) publication, 'Site layout planning for daylight and sunlight', issued in 1991, which also gives guidance on privacy, gardens and open space. The City Council will normally aim to ensure that there is a predominantly daylit appearance for habitable rooms to residential buildings. Therefore minimum daylight values are normally unacceptable. There are many residential properties in Westminster which fall well below the recommendations made in the BRE document. In these situations, where principle habitable rooms such as bedsits, living rooms, studies or kitchens are affected, the City Council may find any loss of light unacceptable.[20]

The Royal Borough of Greenwich

B.18 The local planning policies for the Royal Borough of Greenwich can be found in the "saved policies" of the Unitary Development Plan adopted in 2006.[21]

B.19 The Unitary Development Plan contains two policies which are directly relevant to daylight and sunlight. The first is Policy D1(vii), a general policy which provides that:

> Development proposals should be of a high quality of design and will be expected to … maintain adequate daylight and sunlight to adjoining buildings and land.[22]

[19] Westminster City Council, The Unitary Development Plan (2007) p 472.

[20] Westminster City Council, The Unitary Development Plan (2007) p 473.

[21] Royal Borough of Greenwich, The Unitary Development Plan (2006) is available online at: http://www.royalgreenwich.gov.uk/downloads/file/752/unitary_development_plan_2006 (last visited 6 February 2013). The Local Development Framework documents are in the process of being formulated. Until these documents are adopted many of the Unitary Development Plan policies remain relevant.

[22] Royal Borough of Greenwich, The Unitary Development Plan (2006) p 109.

B.20 The second is Policy D10(ii), which pertains only to residential building extensions:

> Proposals for rear, side and other additions should be limited to a scale and design appropriate to the building and locality …. Rear extensions will not be permitted where these could cause an unacceptable loss of amenity to adjoining occupiers by reducing the amount of daylight, sunlight or privacy they enjoy, interfere with a pleasant outlook or result in an increased sense of enclosure.[23]

Newcastle City Council

B.21 As is the case in the Royal Borough of Greenwich, Newcastle City Council has a number of policies from its Unitary Development Plan[24] have been saved while work continues on its local development framework documents. This includes Policy H2(C), which provides that:

> Development which would harm the amenity of any dwelling, or group of dwellings will not be allowed. Impact on residential amenity will be assessed with particular regard to … ensuring satisfactory daylight, sunlight, outlook and privacy for all dwellings, existing and proposed, particularly in relation to good existing standards in the locality.[25]

Manchester City Council

B.22 Policy DM1 of Manchester City Council's Core Strategy[26] provides that:

> All development should have regard to the following specific issues for which more detailed guidance may be given within a supplementary planning document: … effects on amenity, including privacy, light….[27]

[23] Royal Borough of Greenwich, The Unitary Development Plan (2006) p 114.

[24] Newcastle City Council, The Unitary Development Plan (1998) is available online at: http://www.newcastle.gov.uk/wwwfileroot/legacy/regen/plantrans/UDP.PDF (last visited 6 February 2013).

[25] Newcastle City Council, The Unitary Development Plan (1998) p 31.

[26] Manchester City Council, The Core Strategy (2012) is available online at: http://www.manchester.gov.uk/downloads/download/4964/core_strategy_development_plan (last visited 6 February 2013). The Core Strategy is a development plan document.

[27] Manchester City Council, The Core Strategy (2012) p 216.

B.23 Manchester City Council has adopted and issued a supplementary planning document.[28] In it there is little reference to natural light.[29] However, it is interesting to note the text of paragraph 12.8:

> It will always be important for the City to be able to accommodate new interest and activity in its different forms, including tall buildings. There is now much more interest in these types of developments than there has been for many years, and this is a great indication of the strength of the City Centre economy. Schemes will be considered on an individual basis, by reference to their appearance, their impact on the immediate area and the effect on the City's skyline. Key questions will be the quality and interest of the roofline; the design of the lower floors; the relationship to the surrounding streets; the impact of servicing and parking requirements; the microclimate, including overshadowing and air turbulence effects, created by the relationship of the building to those adjacent; and the quality and usability of the spaces surrounding the building.

[28] Manchester City Council, Guide to Development in Manchester – Supplementary Planning Document and Planning Guidance (April 2007) is available online at: http://www.manchester.gov.uk/site/scripts/download_info.php?fileID=1424 (last visited 6 February 2013). The Supplementary Planning Document is not a development plan document, but it would be a material consideration for the local authority to consider when deciding whether to grant planning permission (see Chapter 2, para 2.62 above and para B.9 above).

[29] There is a reference to daylight in the Supplementary Planning Document, p 20, in the context of solar energy.

APPENDIX C
DRAFT CLAUSES

C.1 The draft clauses discussed in Chapter 6 begin on the following page.

Draft clauses on rights to light

CONTENTS

NOTICES OF PROPOSED OBSTRUCTION

NOTICES OF PROPOSED OBSTRUCTION

1 Notices of proposed obstruction: general

(1) An owner of land in England and Wales on which any person proposes to create an obstruction may serve a notice of proposed obstruction on an owner of other land if it appears that the obstruction would interfere with the access of light to that other land.

(2) In this Part "notice of proposed obstruction" means a notice which—

(a) describes the obstruction which is to be created; and

(b) complies with any requirements prescribed by regulations under section 6(1)(a).

(3) The holder of a leasehold estate may only serve a notice of proposed obstruction if the lease was granted for a term of 5 years or more and has at least 5 years left to run when the notice is served.

(4) In this Part, in relation to any notice of proposed obstruction—

(a) "the proposed obstruction" is the obstruction described in the notice;

(b) "S" is the person who serves the notice and "the servient land" is the land owned by S on which the proposed obstruction would be created; and

(c) "D" is the person served with the notice and "the dominant land" is the land owned by D to which the notice relates.

(5) A notice of proposed obstruction is registrable as a local land charge affecting the dominant land.

(6) In this Part—

"obstruction" means anything created on land which obstructs the access of light to other land;

"owner", in relation to any land, means the holder of a freehold or leasehold estate in that land; and

"right to light" means an easement of light.

2 Effect of notice of proposed obstruction on the availability of an injunction to restrain infringement of a right to light

(1) This section applies where a notice of proposed obstruction has been served.

(2) In this Part "injunction" means an injunction that would prevent the infringement of a right to light benefiting D's estate in the dominant land by the creation on the servient land of—

(a) the whole of the proposed obstruction;

(b) any part of the proposed obstruction; or

(c) any other obstruction that would cause no greater an infringement of the right to light than would have been caused by the proposed obstruction.

(3) D may serve a counter-notice on S stating—

(a) that D objects to the proposed obstruction and intends to claim an injunction; or

(b) that D does not wish to claim an injunction.

(4) D cannot be granted an injunction after a counter-notice under subsection (3)(b) has been served on S.

(5) D cannot be granted an injunction if D fails—

(a) to serve a counter-notice under subsection (3)(a) on S, or

(b) to claim an injunction,

before the end of the period of 4 months beginning with the day after the day on which the notice of proposed obstruction is registered as a local land charge affecting the dominant land.

(6) D cannot be granted an injunction if D—

(a) has served on S a counter-notice under subsection (3)(a) before the end of the period mentioned in subsection (5), but

(b) fails to claim an injunction before the end of the period of 4 months beginning with the day after the last day of the period mentioned in subsection (5).

(7) Where subsection (4), (5) or (6) provides that D cannot be granted an injunction, no court has power to grant an injunction to D.

(8) Subsections (4) to (7) have effect subject to section 3.

(9) References in this Part to D claiming an injunction (however worded) are to D issuing proceedings in which an injunction is sought or taking any step in the course of legal proceedings which has the effect of applying for an injunction.

3 Exceptions etc from section 2

(1) The power of a court to grant an injunction to D is not ousted by section 2 if anything done on the servient land—

(a) between the service of the notice of proposed obstruction and the end of the period allowed by section 2(5), or

(b) in a case where section 2(6) applies, during the 4 month period mentioned in that provision,

infringes a right to light benefiting D's estate in the dominant land.

(2) Nothing in section 2 prevents—

(a) an injunction being granted to D in respect of a claim for an injunction which is made by D before the time at which any provision of that section provides that D cannot be granted an injunction; or

(b) an injunction being granted to D to prevent an obstruction on the servient land which is to be or, as the case may be, has been created after the end of the period of 5 years beginning with the day after the day on which the notice of proposed obstruction was served on D.

(3) Subsections (4) and (5) apply in any case where, by virtue of section 2, D cannot be granted an injunction in respect of an infringement of a right to light benefiting D's estate in the dominant land.

(4) The non-availability of an injunction does not affect the damages which may be awarded to D (or which may be claimed by D) as the owner of a benefited estate in the dominant land.

(5) In particular, the non-availability of an injunction is to be disregarded in relation to the exercise by any court of the power to award damages to D in substitution for an injunction (whether under section 50 of the Senior Courts Act 1981 or otherwise).

4 Restriction on multiple notices of proposed obstruction relating to the same land

Where a notice of proposed obstruction has been served on D, no further notice of proposed obstruction describing an obstruction on the servient land may be served on D (as an owner of the dominant land) for the period of 5 years beginning with the day after the day on which the original notice was served on D.

5 Effect of notice of proposed obstruction on certain persons acquiring an interest in the dominant land

Where a notice of proposed obstruction served on D is registered as a local land charge affecting the dominant land, references in this Part to D are to be read as or (if the case so requires) as including a reference to—

(a) any of D's successors in title to the dominant land whose estate is acquired after the registration of the notice, and

(b) any person who has an estate or interest in, or right over, the whole or any part of the dominant land which was created after the registration of the notice and who derives title to that estate, interest or right under D.

6 Regulations

(1) The Secretary of State may by regulations make provision as to—

(a) the content or form of notices of proposed obstruction or of any additional information that is to be served with notices of proposed obstruction;

(b) the content or form of counter-notices under section 2(3); and

(c) the service of notices of proposed obstruction or of counter-notices under section 2(3).

(2) The power to make regulations under subsection (1)(a) must be exercised with a view to ensuring that a person served with a notice of proposed obstruction is given—

(a) sufficient information about the proposed obstruction to enable that person (with professional advice) to assess accurately—

(i) whether the proposed obstruction would infringe a right to light benefiting that person's estate in the dominant land; and

(ii) the extent of any infringement of such a right to light that would be caused by the proposed obstruction; and

(b) clear information about the effect of this Part (including in particular the steps which that person may take in response to the notice and the consequences of failing to take any step within the time allowed by any provision of section 2).

(3) Regulations under subsection (1)(a) may, in particular, make provision for or in connection with the inclusion in a notice of proposed obstruction (or in information required to be served with the notice) of any of the following —

(a) the identity of the person giving the notice;

(b) the identity of the person to be served with the notice or, if that cannot be ascertained by reasonable investigation, a description of that person;

(c) a description of the servient land and the dominant land to which the notice relates;

(d) a description of the obstruction to which the notice relates;

(e) a description of any building or structure, or of the apertures on a building or structure, the access of light to which would be affected by the obstruction to which the notice relates.

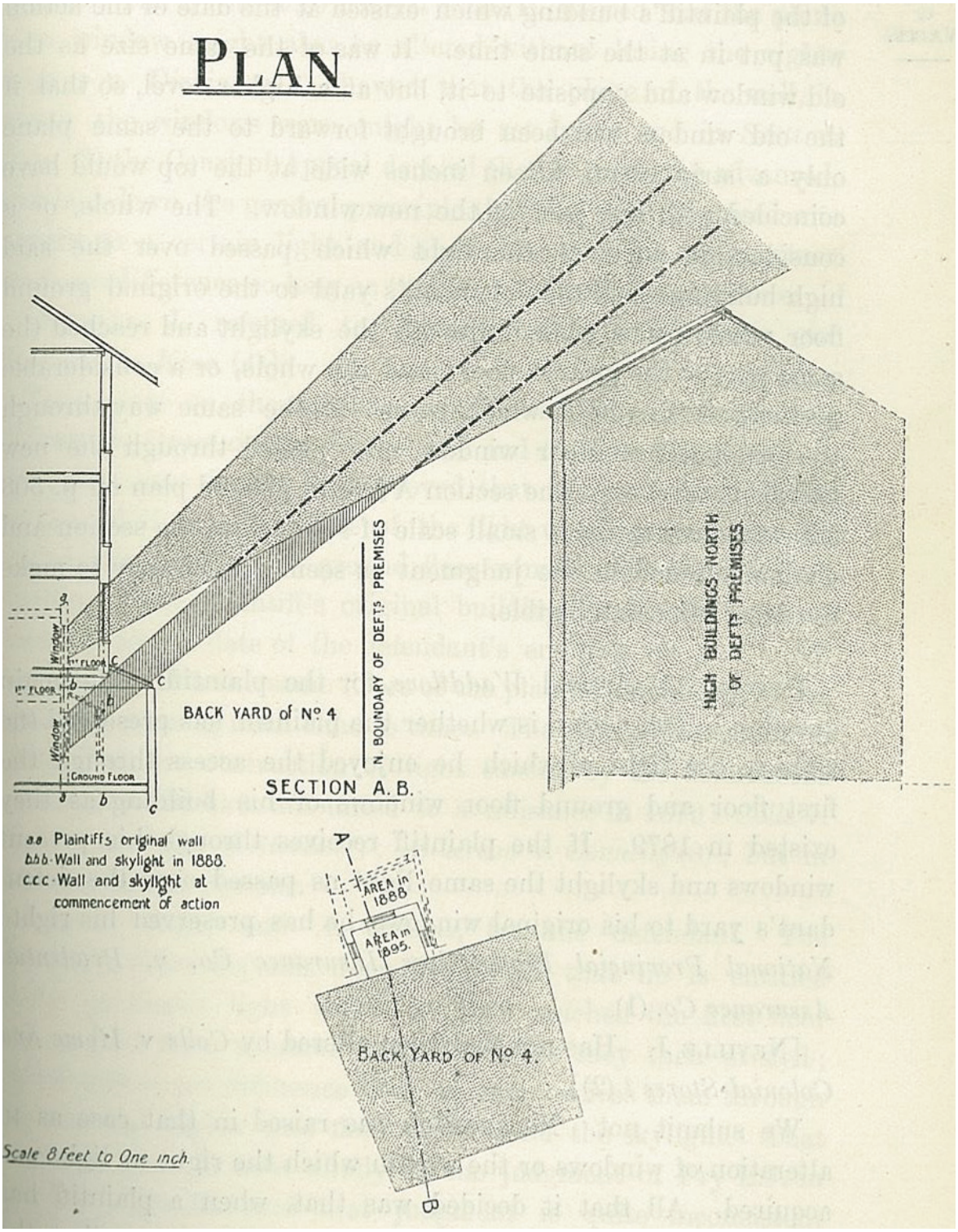
(4) Regulations under subsection (1)(c) may include provision as to the time at which a notice is to be taken as having been served.

(5) Regulations under this section may make different provision for different purposes.

(6) The power to make regulations under this section is exercisable by statutory instrument subject to annulment by resolution of either House of Parliament.

APPENDIX D
ABANDONMENT DIAGRAM

D.1 The following diagram depicting the path of light is taken from *Andrews v Waite*.[1]



[1] [1907] 2 Ch 500, 503.