Light at the end of the tunnel

Gateley

Winter 2015

Or just an oncoming train?

Rights to light can be a serious problem for a developer. If its development obstructs a neighbour's right to light, the legal penalties can be severe. At worst, the developer may be ordered (via a court injunction) to halt the development, or even take it down. At best, it may be ordered to pay damages to the landowner and these damages can be extortionate. What's more, it is often difficult for a developer to know for sure whether a neighbour has a right to light that it might obstruct. Although some rights to light may have been granted expressly (and therefore recorded in deeds and at the Land Registry), most rights to light are acquired by a landowner if it can show that its building has enjoyed a right to light for 20 years or more (this is known as acquiring the right through prescription). These rights will not, of course, be recorded in any documents.

Worse still, recent case law suggests that a neighbour can succeed in a claim for an injunction for an offending building to be taken down, even if it sits back and lets it happen *(HKRUK II (CHC) Ltd -v- Heaney* [2010] EWHC 2245 (Ch)).

So in a worst case scenario, a developer could find itself with a completed building, only to have to take it down again, once the neighbour has decided to take action.

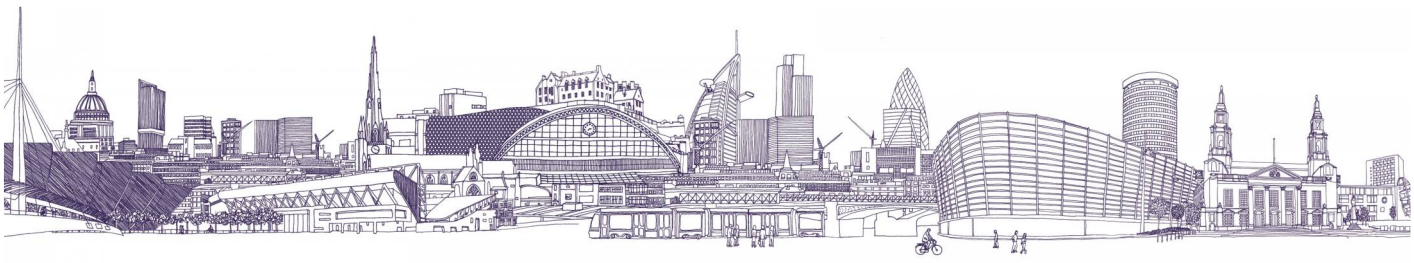
In short, there is a great deal of uncertainty surrounding rights to light as far as developers are concerned and so it is welcome news that the Law Commission has issued a report into rights to light, which makes some recommendations which, if taken up, will bring far more certainty to this area of law.

In brief, the Law Commission's recommendations will mean:

1. The law of prescription will be simplified: 20 years' continuous user will still be required, but there will only be one statutory test.
2. It will be easier to prevent rights to light being acquired by prescription. Prescription requires 20 years' uninterrupted use. Under the old law the use had to be interrupted for a year or more. Under these recommendations all a party will have to do to interrupt the 20 years' use will be to serve a certificate of light interruption, which can be registered as a local land charge (this will replace the old light obstruction notice procedure under the Rights of Light Act 1959).
3. If a party thinks it will obstruct a right to light, it will be able to issue a Notice of Proposed Obstruction (NPO). This will require the neighbour to seek an injunction within a specified time. If it fails to do so, it will lose the right to apply for an injunction.
4. The legal test for deciding whether an injunction is granted, rather than damages, will be simplified, with a particular emphasis on whether an injunction would be a disproportionate means of enforcing the neighbour's rights.

Unfortunately, the Law Commission ducked the thorny question of how damages for an obstruction should be assessed, which is a pity, given the extortionate ransoms being claimed by some neighbours in exchange for releasing their rights to light.

These recommendations are undoubtedly developer-friendly but they are only half the battle. Although they have been incorporated into a bill, that bill has not yet been put before parliament, and it is impossible to say when it will. Suffice to say that the recommendations of the closely-linked Easements Report, published in 2011, have still not been laid before parliament.



Light at the end of the tunnel or just an oncoming train

If you would like to discuss any of the issues raised in this update, please contact:

William Cursham
Associate
Construction
dt: +44 (0) 121 234 0066
m: +44 (0) 7739 325 929
WCursham@gateleyuk.com