

RIGHTS OF LIGHT

PENALTIES AND EXTRA TIME

Usually only newsworthy to those in the Real Estate Property sector, the issues surrounding Rights of Light have now reared their head in the sports pages of national news media. Stories of football clubs being prevented from building new grounds and stadia have been circulating for a while, but the main headline of the season has most certainly been the trouble at Stamford Bridge – the £1bn redevelopment at Chelsea FC was held up by a Right of Light injunction, despite the offer of £1m to compensate the Claimant. If nothing else, the Chelsea case shows that if Rights of Light infringements are poorly managed, they can have a huge impact on the development and can have very costly consequences.

So, what is a Right of Light?

A Right of Light is an easement granted to a freeholder (or leaseholder or tenant, by assignment) which grants them the legal right to enjoy a reasonable amount of natural light to a building. The right attaches to the apertures of the building themselves, and – as long as the position of those apertures stays the same – it remains with those apertures even if the original building is demolished and another new building is developed in its place. A right of light does not include within its definition a right to sunlight, views from a property, or the right to privacy/ not being overlooked.

Nearby development of new or existing property can cause an infringement to the level of light received by neighbouring buildings, an infringement which is actionable and can be enforced through the courts (even if planning permission has already been approved by the local authority). An enforceable Right to Light can be acquired in several ways;

- **Grant by Expression** – the right is written specifically in the title deed provisions, lease or transfer
- **Grant by Implication** – the underlying rationale is to confer the right, although this is not expressly stated
- **By Prescription** – the right is accrued over a 20-year uninterrupted period of enjoyment (Prescription Act 1832)

If an infringement can be proved and there is an injury to a neighbouring property, the Courts generally have two courses of action available to remedy the situation – Damages or Injunction. In deciding which remedy is to be imposed, previous common law judgements and the circumstances of the case is question will all be considered, along with the conduct of both parties playing a particularly key part in deliberations.

How Does This Affect Developers?

Scott v Aimuwu [2015] is the first case to use *Coventry* as intended. The Judge considered several factors to reach a ruling, which included the Defendants good conduct, the Claimants delay in issuing Court. There has been much case law, often contradictory, on how the Courts should respond to infringements of Rights to Light. In *Tamames v Fairpoint Properties [2007]*, the claimant was awarded damages rather than an injunction, to the amount of 30% of the developer's profit. Conversely, the High Court decision only 3 years later in *Heaney [2010]* led to huge consternation amongst commercial property developers as it applied case law that states remedy in the first instance for an interference of rights should be an injunction. In addition, the Judge ruled that damages should only be awarded in lieu of injunction if the *Shelfer Test* criteria are satisfied – a test that was created over 100 years before the *Heaney* case. Clearly this was not deemed as an appropriate approach to a modern-day problem, and the ambiguity created from both cases caused uncertainty for the developer community.

Since then, there has been a clear and marked move toward clarifying the fair and correct remedy to be utilised in Right of Light cases. The ruling in *Coventry v Lawrence [2014]* proposed a shift away from reliance on the *Shelfer Test* and the inevitability of injunction, encouraging a more flexible approach round the award of damages proceedings, and the fact that the properties in question were both residential, amongst others. Nevertheless, the potential for Rights of Light infringement to cause delay, reduce scheme profitability, or completely halt the development altogether is still a very real issue. Care should be taken to determine how the proposed designs scaling and massing will

impact neighbouring properties, so that a robust solution can be devised to mitigate the risk of a claim as much as possible.

How to Manage the Risk

There are several options available to a developer to manage their liability and address Right to Light infringement;

- **Take no action**
- **Issuance of a Light Obstruction Notice**
- **Neighbourly Discussion**
- **Local Authority Appropriation**
- **Indemnity Insurance**

An indemnity insurance policy is seen by many developers as the most effective way to manage the risks inherent to Right to Light. By obtaining tailored terms, a greater level of accuracy of budgeting and profit assessment can be achieved, and lender risk concerns can be satisfied. The policy can be structured in two ways.

At Towergate, we have the expertise to assist in tailoring bespoke Right to Light risk solutions to suit the specific requirements of your development, whilst obtaining the best terms at the most competitive premiums.

'Wait and See' basis

- does not allow any contact with neighbouring injured properties, but provides full indemnity for any claim up to the limit of indemnity (usually the GDV)

'Agreed Conduct' basis

- this type of structure allows developers to approach injured parties and negotiate away their rights. The policy would be subject to an excess to cover those compensatory payments, but would pay out should negotiations surpass the excess figure or if matters progress beyond discussions into Court proceedings

A Right to Light indemnity policy can allow a developer to actively engage with the local community and demonstrate good conduct, but most importantly, it provides reassurance that there is a strategy to minimise financial losses, should the worst come to the worst.

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