LAW COMMISSION
CONSULTATION PAPER No 210

RIGHTS TO LIGHT

RESPONSE FORM

This optional response form is provided for consultees' convenience in responding to our Consultation Paper on Rights to Light.

You can download the Consultation Paper free of charge from our website at: www.lawcom.gov.uk (see A-Z of projects> Rights to Light).

The response form includes the text of the questions and provisional proposals in the Consultation Paper, with space for answers. You do not have to respond to every question or proposal. Answers are not limited in length (the box will expand, if necessary, as you type).

Each question and provisional proposal is followed by a reference to the Chapter of the Consultation Paper in which that question or proposal is discussed, and the paragraph at which it can be found. Please consider the discussion before responding.

We invite responses from **18 February 2013 to 16 May 2013.**

Please send your completed form:

by email to: propertyandtrust@lawcommission.gsi.gov.uk or

by post to: 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, wherever possible, you could also send them electronically (for example, on CD or by email to the above address, in any commonly used format).

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Are you responding on behalf of a firm, association or other organisation? If so, please give its name (and address, if not the same as above):

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If you want information that you provide to be treated as confidential, please explain to us why you regard the information as confidential:

As explained above, we will take full account of your explanation but cannot give an assurance that confidentiality can be maintained in all circumstances.

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?

Consultation Paper, Part 1, paragraph 1.30

Having surveyed the views of the PLA membership, there is no awareness of projects that have failed to secure financing as a result of potential or actual rights to light disputes. However, this does not mean that lender involvement has not altered as a result of potential or actual rights to light disputes. Respondents noted that whilst projects are being financed, lenders have been imposing strict rights to light conditions in respect of monies to be advanced. Similarly, respondents noted that there is greater lender involvement in respect of rights to light issues than has previously been the case.

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.

Consultation Paper, Part 1, paragraph 1.35

A considerable number of respondents to our survey were aware of developments not proceeding or developments having to be altered as a result of rights to light issues. Members consider that it is taking longer when acting for developers to resolve rights of light issues, to the extent that rights to light is a potential impediment to development.

The PLA as an organisation is unable to comment on the proportion of developments which involve rights to light, though it is evident that our members are seeing increased amounts of rights to light instructions in recent years. Given that the PLA represents solicitors who specialise in property litigation, increased involvement by our members suggests that rights to light have become a more significant and contentious issue in development than it may previously have been. Whether this is as a result of judicial interpretation of the law (i.e. ***Regan, Tamares*** and ***Heaney),*** or whether it is due to proposals for developments of significantly increased massing is unknown.

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?

Consultation Paper, Part 1, paragraph 1.41

It is evident that developers have to give serious consideration to development profit based damages (based on the ***Wrotham Park*** line of cases, including ***Tamares).*** Whether or not this consideration translates into forming part of a developer's budget appraisal is a matter for developers to opine on. In any event, the prudent property litigator would be advising a developer client to consider the potential damages consequences arising from development which infringes a right to light where the Court would be minded to award damages in lieu of injunction. Developers are also aware of a possible ransom situation if the infringed party was entitled to an injunction, in which case any premium paid to release rights of light may far outweigh the damages that a Court would award.

The PLA agree with the Law Commission that accurate financial information is not easy to come by. In practice, any significant development is likely to involve a rights to light surveyor reporting on the severity of the loss of light to adjoining properties. The surveyor will then 'value' this loss, albeit not necessarily on the development profit basis (e.g. x3 or x5 book value instead).

Such valuation information would be expected to be plugged into a developer's rights to light budget. After the initial report and valuation, individual negotiations would then commence. It would usually be the case that rights to light surveyors would negotiate and agree heads of terms before solicitors become involved to document the agreement reached.

Once individual adjoining owners' positions are known, a more accurate picture as to the actual costs of resolving rights to light issues can be ascertained.

Evidence of PLA members suggests that costs initially increased following *Regan* and further increased following Tamares and ***Heaney.*** The recent trend started with ***Regan*** which re-stated what the law was in respect of whether or not an injunction should be awarded. ***Regan*** was a wake-up call to the industry that an injunction right could not automatically be bought off. Tamares followed soon after and stood as a reminder that damages in lieu would not be simple diminution in value losses.
Heaney confirmed what ***Regan*** and ***Tamares*** held, albeit in the case of an injunction granted in favour of an owner of commercial property following completion of the offending building, which has caused significant and widespread concern.

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.

Consultation Paper, Part 1, paragraph 1.43

The PLA cannot comment specifically in respect of direct costs arising from rights to light issues. However, we generally comment on points (1) and (4) as follows:

(1) Members are aware of increased consideration and purchase of rights to light insurance. The premiums attached to such insurance can make it very expensive and sometimes prohibitive. Insurance is not always available. Further, insurance itself cannot prevent an injunction, although a carefully negotiated policy should provide financial protection in the event of an injunction. Insurance also poses a problem in that it can act as a fetter on negotiations with adjoining owners. A policy will generally be vitiated if the developer approaches an adjoining owner in respect of reaching an agreement for compensation in return for a release of rights, at least before the other party has asserted its rights to light. If a developer is unable to negotiate, the risk remains (as an insurer risk). However, this potentially increases the prospect of an injunction, as it may suggest that the developer has not acted reasonably in trying to address the issue. Ignoring a potential claimant could increase the risk of an injunction due to poor developer behaviour. Indeed, in that respect, the behaviour required by an insurer is the direct opposite of that required to mitigate the risk of an injunction.

(4) We refer to our answer to the previous question - members' experience suggests increased amounts have to be set aside to deal with rights to light disputes.

Overall, the vast majority of PLA respondents to our survey were of the opinion that the costs for a developer of dealing with rights to light issues had increased, and in some cases significantly, following the decision in Heaney.

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

Consultation Paper, Part 1, paragraph 1.45

The costs (legal and surveying) incurred by owners of rights to light are, in our experience, generally borne by the developer and paid on top of the compensation amount at completion where a deal is agreed to release the right in return for compensation.

If there is a genuine dispute over the enjoyment of the right, or the owner of the right seeks to enforce its right, then costs would be dealt with by the Court following determination of the dispute (failing agreement being reached between the parties).

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.

Consultation Paper, Part 1. Paragraph 1.47

The majority of respondents stated that they had no experience of advising in respect of or implementing s237 of the Town and Country Planning Act 1990. Given that our members are specialist property litigation solicitors, this could be taken to suggest that the s237 route is not one regularly taken by developers. There are various explanations for this including the fact that the developer would have to show that the development brought a significant financial or social benefit to the locality, the often inconsistent approach of local authorities and the possibility of judicial review.

A small number had experience of advising in respect of s237 and using the threat of s237 to 'encourage' adjoining owners to reach agreement with a developer to release their rights for compensation (usually for an amount higher than that which would be payable pursuant to the statutory compensation payable in the event of a s237 appropriation). A very small number of respondents had actual experience of engaging s237 to override adjoining owner rights. Local authorities take a variable approach to their willingness to use s237. As it is rarely used, they often have little knowledge or experience of it and they may also find the prospect of use of their powers politically unattractive. Even if they are minded to use them, they often first require developers to see if they can reach agreements with the beneficiaries of rights to light. Ultimately, the developer is obliged to foot the bill for all costs and compensation. This is not of itself a problem, as the compensation should be lower than would be the case if the owners were able to exact a "ransom" payment.

Evidence also exists of a change in the use of Light Obstruction Notices. Whilst the LON is very useful as a tool to prevent rights arising pursuant to the Prescription Act 1832, it can also be used to defeat rights already in existence if it is registered for one year or more on the Local Land Charges Register without legal challenge (i.e. a claim being commenced). *Pre-Heaney,* a developer would sometimes take a view on whether or not to serve LONs on those enjoying rights to see if the right could be defeated by inaction or indifference on the part of the adjoining owner. *Post-Heaney,* the general position in respect of serving LONs on adjoining owners with rights to light is one of caution, especially if insurance is being considered as an option.

Consequently, those with rights are generally not now served with LONs. Heaney

has not affected landowners' use of LONs as part of a lone term estate

management strategy to defeat rights once they have arisen and to prevent them arising in the first place. However, this is not the case where there is a specific development in prospect.

We are also aware that major developers often collaborate with one another by entering into agreements allowing mutual rights of development notwithstanding existing rights to light (and other easements that could affect future development).

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

Consultation Paper, Part 1, paragraph 1.49

The PLA is unable to comment on the valuation approaches to be adopted, save insofar as other factors should be taken into account (e.g., artificial light, as to which, see our later comments)

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.

Consultation Paper, Part 1, paragraph 1.51

The best evidence will be provided by the development community itself, and in particular, developers responsible for urban development. The PLA notes that there has been concern in the media that the Law Commission's proposals would amount to giving free rein to developers to block enjoyment of light by adjoining owners. The Daily Telegraph ran a front page feature and claimed that the proposals "could leave almost three million households powerless to prevent large developments near their homes". An article by Jack Doyle in the Daily Mail on 19 February 2012 included a picture of a child looking out through a window onto green space and made reference to leaving 'many homeowners in a very dark mood indeed'. The adverse press coverage appears to misunderstand, or at least grossly over simplify, the issues involved.

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

Do consultees agree?

Consultation Paper, Part 3, paragraph 3.48

This question proved divisive amongst the respondents to our survey. Two thirds of respondents do not agree with the proposal that prescriptive rights to light should be abolished. There is concern that what is proposed interferes with a fundamental English law property right that has been enjoyed as an easement for a considerable time. To remove the right would be considered arbitrary and unnecessary, especially as potential purchasers of land to be developed should be able to assess what they can build on the land and assess its true value based on the ability of adjoining owners to prevent development on the land.

As regards the minority who considered prescription should be abolished in rights to light, a potential reason behind this is that it is a bar to development within urban areas, though this is purely speculative as respondents' reasons were not requested in the survey response.

We additionally asked our membership (assuming that prescription for rights to light is to be abolished) if the abolition of prescription for rights to light should be prospective only or a complete abolition. The vast majority of respondents agreed with the Law Commission that abolition should be prospective only.

Prospective abolition brings with it its own challenges, namely how to ascertain if a building enjoys a right to light. This should still be ascertainable, as rights to light surveyors are able to assess this at the present time when considering whether or not to serve LONs. Whilst complete abolition would remove the problem of prescription for developers, prospective abolition is theoretically workable and operates to alleviate at least some of the fears of those who are concerned about any draconian abolition of an established English property easement.

In some respects prospective abolition operates akin to an 'automatic statutory Light Obstruction Notice'. As proposed, there will be no impact on those enjoying rights to light (or who will acquire 20 years enjoyment within 1 year from any reforming enactment coming into force). The effect of prospective abolition will prevent those properties in the process of acquiring rights from acquiring those rights. What the Law Commission is proposing is not necessarily a revolutionary idea, and therefore not one that is unreasonable in what it seeks to achieve. Light Obstruction Notices can currently be served on adjoining owners to prevent rights coming into existence

where they are in the process of being acquired. It is up to the developer to 'protect' its position by serving and registering the LONs before the rights are accrued and thus resetting the prescriptive clock. A well-advised property owner would serve and register LONs to 'protect' its ability to redevelop in any event. The effect of prospective abolition would amount to the same protection, without the developer having to engage the Rights of Light Act 1959 and incur the cost of serving and registering multiple LONs in what can be an administratively complex procedure. Therefore, it may be said that prospective abolition is not by itself draconian as the same outcome can presently be achieved via the LON process (assuming that no challenge is raised within the period of 1 year). There are real concerns, however, about the adequacy of the planning system to prevent unsuitable development.

In respect of prospective abolition being akin to a statutory LON, the Law Commission will have to establish whether as a matter of policy it is preferable for the law to automatically remove prospective rights, or whether it is best for developers and property managers to take active steps themselves to protect themselves against adjoining owners acquiring rights to light.

On balance, and reflecting the views of our membership, we do not agree that prescriptive rights of light should be abolished prospectively or otherwise. Fundamentally the key concern would appear to be not so much the existence of the right itself, but the uncertainty surrounding whether an injunction is to be awarded and the potential for significant damages to be awarded.

We also asked our membership if (regardless of the Law Commission's recommendations in the Easements Report of June 2011) common law prescription and lost modern grant should also be abolished. A clear majority were of the view that common law prescription and lost modern grant rights should be abolished.

There is logic in this approach. By retaining three methods of prescription, there is uncertainty. Further, it is arguable the Prescription Act 1832 and the Rights of Light Act 1959 have no impact on common law prescription or lost modern grant. Therefore a party could go to the trouble and cost of attempting to prevent a PA 1832 claim arising by serving and registering a LON only to find that the adjoining owner later claims a right based on lost modern grant. Enjoying a prescriptive right via one form of prescription (namely a statutory based form) should be sufficient and create greater certainty.

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.

Consultation Paper, Part 3, paragraph 3.54

Around two-thirds of our members who responded to our survey consider the LON process reasonable as opposed to one third who found it unnecessarily cumbersome.

The process itself is not straightforward and is time-consuming and increasingly more expensive (for example, Lands Chamber fees have increased significantly in recent years). It is however difficult to see how the process could be simplified. The most administratively involved aspect of this process is identifying and then serving LONs on the various layers of adjoining interests. However, this is necessary, as evidence of the notional obstruction must be given to those with a current interest as much as to those that may acquire an interest in the future. Whilst registration of the LON at the Local Land Charges Registry would be the simplest way of achieving a registration, this would ignore those currently in occupation or ownership who may enjoy rights. Therefore, the service process is a necessary part of the LON process.

It may be possible to carve out the role of the Lands Chamber and instead allow for registration of the LON at the LLCR together with provision of a certificate from the developer's conveyancer that service of the LON has been effected on all those with a registered legal interest in the property. The temporary/definitive distinction could still be maintained. Alternatively, time would stop upon registration, but the registration would lapse if a valid certificate concerning service was not filed within (for example) 4 months of registration. The proposed NPO procedure does not appear to envisage a role for the Lands Chamber. The LON process is not dissimilar, so we consider that it could be possible to remove the role of the Lands Chamber in respect of LONs.

Further, service itself could be limited to those parties whose interest is evident from the Land Registry - i.e. registered freeholders and leaseholders and those whose lease is for less than 7 years and whose interest is noted on the landlord's title. This does away with the need for a physical inspection of the property and the uncertainty that arises where access is not possible or where the identification of the owner is difficult. This would also remove the need to serve on 'the occupier'. This could lead to unregistered leases being unprotected. However, should the proprietor be obliged to register, but choose not to do so, then perhaps that should be their issue for failure

to register. In respect of a non-noted leasehold interest, some members query the impact of a development on a lease interest that is limited in time (albeit the tenant may enjoy rights to light which would be included in any renewal lease). As for unregistered land, there is unlikely to be much land impacted by a LON that is completely unregistered due to the essentially urban nature of rights to light. If this is of concern, then a provision could be made for where the freehold is unregistered for service to be effected by serving notice at the unregistered property.

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.

Consultation Paper, Part 4, paragraph 4.43

There is probably a need for an element of judicial discretion in respect of this, though this must be tempered with achieving certainty for the parties in order to avoid the issue needing to be determined in the first place.

We see the merits in two separate tests for residential and commercial property on the assumption that light enjoyed by a residence should be treated with more importance than that enjoyed by a commercial property. This is essentially what happens in practice in any event when assessing the risk of rights to light claim. However, discretion is required to account for the rooms affected by the diminution of light and the use (and potential use) of those rooms. For example, certain commercial property may rely on natural daylight and so this should not be arbitrarily discounted simply because the property is commercial (see Langan J's comments in ***Heaney*** concerning the special nature of the respondent's boardroom).

The issue of artificial light is important. Our respondent members were split 60/40 on the issue of whether artificial light should be taken into account when considering if a nuisance has occurred. We note the concerns of the Law Commission as succinctly explained by Peter Smith J in ***Midtown*** that artificial light will always fill the shadows' and those against the suggestion recognise the difficulty in measuring the impact/value of artificial light.

Further, the use of artificial light predominantly concerns commercial property as opposed to residential. Generally, infringement of one commercial party's light by another commercial party is resolved by payment of compensation - the issue is one of money as opposed to a principled requirement for the enjoyment of light. One view is that artificial light could be taken into account in assessing whether there is a nuisance, but only where it would otherwise be marginal as to whether there is a nuisance using traditional assessment methods. This may mean that a Court might determine that no nuisance exists. This approach particularly recognises the role played by artificial light in commercial buildings. In the scenario where a nuisance does exist but is not significant, the presence of artificial light could feature in the calculation of damages.

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?

Consultation Paper, Part 5, paragraph 5.50

We agree that the ***'Sheffer*** method of assessing whether damages should be awarded in lieu of injunction should be replaced with a statutory test which focuses on whether grant of an injunction would be disproportionate to a developer. ***Sheffer*** per se is not flawed, but its interpretation can be inconsistent. A new statutory test would retain much of the objective nature of ***Sheffer,*** but would ensure that the primary focus in ascertaining if damages should be awarded in lieu is whether the award of an injunction would be disproportionate.

We would agree that public interest should not be included in the test.

The 'disproportionate' element should be the over-riding element of the test, which appears to be the Law Commission's intention, with the other factors being elements to be taken into account when assessing whether or not an injunction would be disproportionate rather than a "box ticking" exercise. We would wish to ensure that this is enshrined in any new statutory test; otherwise we are not sure what difference a new test would make compared to the existing test.

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.

Consultation Paper, Part 5, paragraph 5.56

Our membership is divided on this issue. Universal application would be consistent and would put on a statutory footing a key common law test. There would be merit in this and in itself, universal application is not a bad thing. However, one view from those against an immediate universal application is that greater consideration should be given to non-rights to light situations and the impact of any statutory test in respect of those situations before any reform be extended beyond the rights to light sphere.

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.

Consultation Paper, Part 5, paragraph 5.94

The overwhelming view of our respondent membership is that reform is necessary. The potential amount of damages payable is sufficient to act as a deterrent to development in the first place, but also amounts to a potential vast windfall for an adjoining owner where the damages payable bear no relation to the loss, if any, that they have suffered. The amount to be awarded is the subject of uncertainty with case law suggesting a range of between 5% and 50% of development profit. It should of course be remembered that if the development has not yet been built, no profit has been realised by that development, making any development profit-based damages calculation a further increased risk for a developer.

Under the current law, development profit damages, whilst nominally accounting for artificial light, fail to fully grasp the significance of artificial light - the focus instead is ascertaining the due portion of development profit arising from that part of the development scheme that infringes the right to light enjoyed. However, see our response to the question concerning the principles governing when an obstruction of light is actionable, where we suggest that artificial light may be taken into account in assessing damages awarded to the dominant owner.

Further, the calculation of development profit in theory should be what is payable to all the adjoining owners affected. However, the reality will likely be that not all adjoining owners will be party to a claim and that they each might be affected by the scheme in differing ways. Ascertaining what should be allocated as a damages award to actual claimants is therefore very difficult.

The results of the survey of our membership did not suggest a consensus on how the Court should approach the calculation of damages. The preferred option for reform would be for damages to be calculated by reference to diminution in value plus damages for loss of amenity and for any financial losses suffered due to the infringement, plus a statutory uplift. The second option for reform favoured by our membership would be the same as the above, but without a statutory uplift. A further small proportion of our respondent members consider that there is a role for comparable transactions in ascertaining damages payable, but these are in a minority.

The two favoured options remove the development profit element. Adjoining owners

would however still be compensated on a basis that reflects their actual loss as opposed to compensation being based on a right to share the profits of the developer. This would essentially disapply the ***Wrotham Park*** line of cases from an assessment of damages in lieu in respect of rights to light cases.

However, a sizeable number of members consider that the adjoining owner's right to prevent an infringement of their rights is more valuable than the actual loss that would be suffered if the adjoining owner's rights are infringed. However, if this is the case, arguably we would expect such adjoining owners to be adequately protected by an award of an injunction - such award being proportionate on the basis of the proposed statutory test.

Development profit damages could still be reserved for. extreme cases where the developer's behaviour merits such an award. Again there is a division of opinion on these issues.

In respect of a cap on damages, a further issue of policy arises. How and on what basis a cap should apply should be given careful consideration. It may not in any event be appropriate for a cap to attach to the value of the dominant land as the result could be quite arbitrary and unfair to the dominant owner.

Whilst we have not examined the issue in detail with our members, the Law Reform Committee of the PLA has reservations in respect of whether a cap should apply. The essential issue is whether the easement is of value to the person owning the right or to the person seeking to over-ride the right. It is a question of policy as to whether damages should be capped or not. If they are, this would amount to depriving a dominant owner of a valuable right. For example, the servient developer needs to acquire the dominant owner's right of light to enable it to realise a £500m profit on the development scheme (the scheme otherwise generating only £1 OOm profit). The dominant owner's property is worth £500,000. Arguably the dominant owner's right is worth more than its property. Should the dominant owner be prevented from achieving a greater value? If damages are not capped, then the developer would potentially have to pay out a significant amount to the dominant owner or owners making its scheme less commercially viable and adding in further risk to the development project (NB the usual scenario is that no profit will actually be realised at the point that any negotiation to buy out the right takes place).

Therefore, the issue of value and any cap upon it is one of policy.

The Law Reform Committee have also discussed whether or not the Lands Chamber

should have the ability to determine the quantum of any damages payable. We do see some merit in this due to the specialist nature of the Lands Chamber. If the Lands Chamber were to be given this authority, the logical next step would be to consider if the Lands Chamber should have the ability to determine liability as well as quantum. We would ask that the Law Commission give consideration to this.

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?

Consultation Paper, Part 6, paragraph 6.47

An overwhelming majority of our members who responded to our survey were of the opinion that a statutory notice procedure as proposed by the Law Commission should be introduced. There is therefore a strong feeling that ascertaining if a dominant owner is seeking an injunction early on in the development process is important. This is also consistent with the owner of a property right, who is aware of a nuisance and who wishes to enforce any right enjoyed, having to act quickly in order to obtain the equitable relief of an injunction (which was not the case in ***Heaney,*** and which situation the proposals of the Law Commission are attempting to avoid).

A dominant owner with notice has ample opportunity to apply for an injunction to protect its position. The developer will be keen to submit a flexible outline of development in the NPO (i.e. a profile within which a development could be carried out) so as to avoid having to serve multiple NPOs as the scheme evolves, especially as it goes through planning, and multiple possible injunction claims (we envisage that the NPO will be significantly more sophisticated than the LON notional obstruction).

In the event that the NPO is not responded to, the dominant owner is not prejudiced. The dominant owner will then have had time to apply for an injunction. It is for the dominant owner to protect its property rights. The dominant owner would still need to ascertain that its rights to light have been infringed. Mere service of a NPO would not necessarily mean that the development will infringe their rights or, indeed, guarantee that the development will take place. It is likely that many developers will, without prejudice to whether or not the adjoining owner enjoys a right, serve notices "just in case".

The NPO would resolve a lot of uncertainty as to adjoining owner intention and provide the developer with knowledge that it can build out its scheme without the risk of it being demolished/cut back.

Query whether it is intended that a developer should be able to serve a NPO on a neighbouring owner or occupier who has enjoyed light for, say, between 15-18 years and so had not yet acquired a right of light by prescription (assuming it has not been abolished). In those circumstances, the neighbour will not be entitled to apply for an

injunction and will not then be able to do so within the proposed five year period from service of the NPO, during which time he may acquire rights to light. If the purpose of the NPO is to put the adjoining owner to an election whether to seek an injunction or damages then it does not work in this scenario: the adjoining owner is unable to make any election but still loses the right to an injunction in the future.

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.

Consultation Paper, Part 6, paragraph 6.48

Our initial comment is that it is often the case that developers and adjoining owners spend a reasonable amount of time negotiating the terms of a settlement deal whereby the adjoining owner releases its rights in return for a compensatory payment. These negotiations can become protracted. Therefore, we would propose that provisions be included in the proposed legislation that allow for the developer and the adjoining owner to mutually agree in writing to extend the deadline for the adjoining owner being obliged to apply for its injunction. The mutuality provisions means that both parties would have to see it as being in their interests to extend time and so there remains an incentive to complete a deal without the adjoining owner having to worry about its Court application if there is a reasonable prospect of a deal being completed. We see this process working in a similar way to the process that exists under the Landlord and Tenant Act 1954 whereby a landlord and tenant can agree in writing to defer the date by which a tenant must apply to the Court for a renewal lease.

In respect of the numbered paragraphs above:

(1) As to form and content, we agree that the NPO should provide sufficient detail to enable the adjoining owner to know if it needs to seek an injunction. We would expect developers to submit either planning approved plans, or else more flexible envelope drawings in case the proposed scheme is varied. Such drawing(s) should be sufficient to enable an adjoining owner to know if its rights are to be infringed (though the adjoining owner may need rights to light surveying assistance in this regard). From a certainty perspective, the key issue for any legislation to ensure is that the adjoining owner is aware of the extent of the proposed scheme. So long as the submitted drawings clearly show each elevation and setback, we do not consider that rights to light surveyor would find it unclear or unhelpful, though the Law Commission should carefully consider the submissions from rights to light surveyors in respect of this.

The Law Commission should consider whether or not it is desirable to allow for tolerances in respect of any building outlined in the NPO. For example, should any

reform provide that a 500mm building tolerance should not be treated as offending the NPO, or the erection of building features (e.g.: balustrading, brise soleils, railings etc.) that have no material impact on the adjoining owners' light but which might infringe the NPO envelope?

One concern that we have is where a developer does not provide sufficient information upon which a dominant owner can take a decision as to whether or not its rights are infringed (e.g. lack of a scale on a plan). In such circumstances, there needs to be a means of determining whether or not a notice is valid and what the impact of an invalid notice is. The Lands Chamber could be given jurisdiction to extend time limits in respect of service of a valid NPO and a counter notice in such circumstances.

(2) In respect of service, we agree that service should be on those with a legal interest in land. From an ease of service perspective, we consider that limiting service to registered interests would ensure that the process is not unnecessarily complicated by having to account for non-registered or non-noted interests. The Law Commission will have to consider whether ignoring unregistered interests is appropriate, though from members' experience, it is the unregistered interests, or the potential for them to exist, that cause delay and cost in respect of dealing with LONs.

We would note that not all developers actually enjoy an ownership interest in any or all of the land being developed. In other words, they carry out the development under licence or a short-term interest in the land. Therefore, the requirement for the developer to have an interest in land of at least 5 years will not address this situation. Accordingly, provision should be made for a developer to be able to serve on behalf of an owner of development land, and with the owner's authority, regardless of the interest (if any) enjoyed by the actual developer.

Timing of service will be a matter for the developer.

We agree with the method of service proposed (i.e. Part 6 CPR and s6 Acquisition of Land Act 1981)

(3) We agree with the proposed service and Local Land Charges Registration procedure.

(4) Our suggestion about mutual agreement to extend time to issue proceedings should address our concern about proceedings being commenced unnecessarily. This would also ameliorate the risk of unnecessary costs being incurred. We agree with the counter-notice concept and effect on the ability to obtain an injunction if the

notice is not responded to or if a counter-notice is served.

We are concerned that the NPO process may advance matters to a contentious footing rather quickly - i.e. an adjoining owner will simply seek an injunction in order to protect its position. This could give rise to an increase of rights to light injunction claims and put a burden on developers to progress contentious disputes. Also, we are concerned that by pushing an adjoining owner towards an injunction early on, it may set the tone of any settlement negotiations, or may prevent such negotiations taking place. This would appear to be counter-productive. Developers will be keen to avoid having to defend multiple proceedings. Our proposed extension process may alleviate some of this pressure. However, from a policy perspective, we are concerned that an injunction may be a 'first resort' as opposed to a 'last resort' in the case where negotiations ultimately break down.

(5) Multiple Notices - A system needs to be in place that recognises that a developer may amend or alter its plans. As a result of the proposals, it is likely that developers will take a cautious approach to drawing the proposed obstruction's height, setback and massing. The proposed notional obstruction is likely to be larger than the actual final building, though the developer will be under pressure to ensure that any 'excess' development is minimised. As we understand the proposals, any scheme that is smaller in size than that contained in the NPO is permissible without the need for a further notice. Anything larger than what is contained in the NPO requires a further NPO. As proposed, this would not be possible as only smaller schemes will be covered by the protection of the NPO and any larger schemes require a fresh NPO. As a second NPO cannot be served for a further 5 years.

We are fundamentally concerned about issues of sterilisation that arise with the 5 year period and consider this aspect of the proposal to be unworkable. What if developer A becomes insolvent and the site is sold to developer B who wishes to build a different and higher scheme? Effectively, developer B could not serve an NPO until 5 years had passed from service of the original NPO. Presumably the price that B pays for the site will reflect the effect of the NPO. However, it does seem to unnecessarily and unwisely restrict what a subsequent developer may want to do with the property. We presume in those circumstances that the old rules will apply i.e. that the developer could build a larger scheme but not seek the protection of the NPO procedure.

We note that the Law Commission is concerned that multiple notices should be limited. An adjoining owner should not have to make continual applications to Court

to seek an injunction to protect its position. However, a NPO process us likely to involve relatively substantial expense and therefore is highly unlikely to be repeated on multiple occasions and for this reason we have doubts as to whether the five year sterilisation period should apply.

We are also concerned that adjoining owners are adequately aware of the impact of an NPO. For example, an adjoining owner receiving such a notice which contains a drawing of a redevelopment that is so high it would never achieve a planning consent may take the view that the scheme would not achieve planning and therefore may not wish to take the time and effort to serve a counter-notice or else issue proceedings. As proposed, the developer would not need to serve a fresh notice if it then wished to proceed to build a smaller scheme that would achieve a planning consent. We would suggest that any NPO contain a health warning on it that warns the recipient of what happens if it does not take action upon the NPO.

(6) It would be sensible for a developer to inform an adjoining owner of any change of plan in respect of development. This would be consistent with limiting the developer's exposure if it were to develop a smaller scheme than that proposed by the NPO. It does not seem unreasonable for the Court to consider developer behaviour in this regard when assessing costs.

In the event that the parties were to reach a settlement agreement, costs would be dealt with as part of that agreement.

If a developer significantly changes its scheme or abandons it, the adjoining owner would still be at liberty to pursue its claim based on the NPO. If the developer informed the adjoining owner of the change or abandonment and so the adjoining owner discontinued its application, then it ought to follow that the costs of the application would be borne by the developer. As we understand them, the proposed rules do not cater for what is to happen in this situation. If an NPO cannot be withdrawn then the developer, or perhaps a successor in title, could still proceed with the development but it may be too late for the adjoining owner to apply for an injunction. The parties would have to ensure that an appropriate arrangement is put in place to prevent this happening, e.g. a restrictive covenant, when proceedings are disposed of.

The adjoining owner may decide to proceed with an NPO application that is no longer strictly necessary because the developer has abandoned the scheme. The outcome may well be an award against the developer, though we consider that the Court

should exercise its discretion in this regard. The adjoining owner may want to obtain an order of the Court because the developer refuses to put an arrangement in place to prevent the development going ahead, including by any subsequent owner, and in those circumstances it may be appropriate for a Court to make a final determination with costs awarded against the developer.

It is also possible that the developer could abandon or significantly change its scheme before the adjoining owner commences injunction proceedings but the adjoining owner could still incur significant legal and other professional costs obtaining advice on the NPO. Perhaps consideration should be given to a statutory duty for those serving an NPO not to misrepresent their intentions to the adjoining owner and to update them if their intentions change.

Clarification is required in respect of the proposed NPO procedure. If a section 3(a) counter-notice is served, it is evident that a dominant owner is seeking an injunction. The draft legislation does not address the situation where the servient owner could apply for a declaration immediately upon receipt of the counter notice, thus accelerating litigation when this may not have been the dominant owner's intention by the service of the notice (possibly to buy more time within which to consider its position/negotiate). It is our view that a servient owner should be able to issue proceedings for a declaration upon receipt of a counter notice. This would assist in obtaining certainty. The question therefore becomes whether or not four months is a sufficient period within which a dominant owner is to assess its position and be in a position to either issue proceedings or else be ready to be served with proceedings.

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.

Consultation Paper, Part 6, paragraph 6.50

A sizeable majority of respondent members consider that the NPO procedure should apply to all properties and not just commercial properties. The reason for this is certainty. Recent case law suggests that it is not always clear when a house is a residence. Further, what happens in a block where the ground floor is commercial, but the remaining floors are residential? Essentially two regimes would have to apply to one building. What if the use of the property changes after the NPO is served and registered - would an adjoining owner be able to benefit from the residential scheme if it was formerly commercial? How would a developer know about a change of use and what would it be expected to do?

Further, rights to light is generally a more sensitive area for residential owners (especially those who are resident in the residential property affected) and consequently this can act as a bar to an early settlement. This will potentially protract and escalate a dispute, with the inherent uncertainty that attaches to such dispute and the consequent increase of risk to a developer as it commences development and incurs costs without the comfort of knowing if the residential adjoining owner will seek an injunction. The NPO process gives the residential owner a clear choice to make and sufficient time to make it. The uncertainty created by an injunction from a residential owner remaining a threat to development is disproportionate to requiring the residential owner to enforce its rights by applying for an injunction within a time frame that is not unreasonable and which accords with the equitable principles governing when injunctive relief should be awarded.

Accordingly, we are of the view that, in respect of NPOs, the regime should apply to all relevant adjoining owners and not be limited to those adjoining owners who own commercial premises. At the same time, we recognise that residential owners and occupiers may not be able to undertake the financial risk of giving a cross• undertaking in damages and so there may be very little appetite for them to seek a pre-emptive injunction in response to a NPO, unless the need to provide a cross-undertaking is disapplied in the enabling legislation.

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.

Consultation Paper, Part 7, paragraph 7.48

A sizeable majority of respondent members consider that reform is necessary.

Where abandonment causes most issues is where it concerns transference or coincidence of light. This is a complex issue for the non-specialist to grasp and there is little by way of judicial or other guidance on the matter. For example, many new buildings that share a footprint with what they are replacing contain curtain glazing on the facades of the building such that the property now enjoys more light than previously. It seems difficult to ascertain if there is any actual nuisance caused by diminution of light to the coincidence area if the actual light now enjoyed is greater than was the case previously (due to bigger current apertures).

In terms of improvement of the current law, a prohibition on a right to light surviving the alteration of an aperture would be the most certain way of addressing this issue. However, this is draconian, would deny the owner of the right the ability to continue to enjoy the right following demolition of the dominant property and is not generally supported by our respondent members. Further, how would the issue of an injunction or damages be addressed in the event that the dominant owner was forming plans to demolish and rebuild its property?

We agree with the Law Commission's comments in respect of a new test for when a right to light survives alteration. A statutory test may improve matters beyond what exists presently, and this is something that is supported by a majority of our respondent members. Accordingly, there may be a role for a statutory definition of when rights to light survive the alteration or demolition of an aperture.

As a first principle, redevelopment where there is no coincidence of light should amount to abandonment of the easement that the demolished building enjoyed. We further consider that there should be a statutory time limit whereby an easement will be deemed abandoned where light is no longer enjoyed (for example where a building has been demolished and no new building has been built in its place for a certain period of time).

A majority of our members also favour a registration scheme as a means of reform. However, this is not an absolute answer: we agree that a registration scheme ignores the issue of whether the dominant property is legally capable of continuing to benefit from a right to light. Therefore, whilst in theory, registration of a right to light provides

certainty, it would still be necessary to ascertain if in effect there is abandonment of the easement by the erection of a development that does not coincide with the original development. We can see how registration could cause confusion in this respect. There should be a strong case for abandonment if a new building is erected on the dominant land but not in such a position so that there is coincidence on currently assessed methodology. It would seem odd to preserve such light when a natural intention to abandon the light could be inferred from the erection of a new building on the site. If registration is to work, it would require precise guidelines as to what could be preserved and how. This could involve a role for secondary legislation governing when an application to register should be made (e.g. within 4 months of practical completion of a new development). It could also cover what can be registered (e.g. just those original apertures that coincide with the new apertures) based on current surveying principles.

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?

Consultation Paper, Part 7, paragraph 7.132

The PLA agrees with this proposal. The Lands Chamber is skilled in property issues and provides an appropriate forum for the determination of whether a right to light should be modified or discharged.

In practice, we query the extent to which the Lands Chamber will be called upon to determine whether a right to light should be modified or discharged. It would seem reasonably clear as to when a right to light is enjoyed or not. However, the expertise of the Lands Chamber may be helpful in case a complex issue concerning abandonment/coincidence arises.

We also are of the opinion that the Lands Chamber's jurisdiction should extend to all easements of light created after any reform is enacted, and not just new easements created after reform is enacted. This is certain and universal in respect of this issue. Also, the role for the Lands Chamber is likely to be greater in respect of 'old' easements of light.

We are assuming that the jurisdiction will be limited in the same way as s84 authority is limited to modification or discharge of restrictive covenants in certain situations - in other words, the circumstances for a similar s84-type regime will be limited to easements of light that appear to be obsolete due to abandonment or non-coincidence. We favour extension on this basis, but would be reluctant to see extension beyond this (for example as a means of ascertaining if a right being enjoyed should be modified or discharged).

We query if any Lands Chamber authority should extend only to discharge of the easement - either it is in use or it is not. Modification of an existing easement may simply be too difficult to deal with and perhaps unnecessary if the sorts of cases to go before the tribunal is essentially about obsolescence arising from abandonment. The only possible reason for modification that we can see would be where a dominant party is claiming light from part of an old window where there is no coincidence between that part and the new window (and where there is coincidence between a different part of the old window and the new window) - the Lands Chamber could in this situation 'modify' the right by reducing it to the extent of where there is coincidence between the old and new windows.

An interesting question also arises as to whether a right of light can ever be obsolete.

It may also be necessary to restrict the authority of the Lands Chamber solely to the extent that the easement is obsolete, as opposed to any of the s84 grounds for discharge/modification.

A further issue that arises if s84 is to be extended to rights to light is whether from a conformity perspective, any extension should apply to all easements and not just rights of light.

If the proposed reform is to be enacted, care should be given in the application of s84, which concerns restrictive covenants, to easements of light. An easement is a right enjoyed by a party whereas a restrictive covenant is a restriction preventing the use of land in a particular way. Discharging or modifying someone's right over another person's land is quite different to removing a restriction on the use by a person of its land. Perhaps the protection here is the limited scope of s84 to obsolete rights to light. However, this is an issue that we are of the view should be noted when considering this proposed reform.