**Law Com 210: Rights to Light Consultation**

**Response of the Chancery Bar Association**

## Introduction

1. The Chancery Bar Association is one of the longest established Bar Associations and represents the interests of over 1,100 members handling the full breadth of Chancery work at all levels of seniority, both in London and throughout England and Wales. It is recognized by the Bar Council as a Specialist Bar Association. Full membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work, but there are also academic and overseas members whose teaching, research or practice consists primarily of Chancery work.

2. Chancery work is that which is traditionally dealt with by the Chancery Division of the High Court of Justice, which sits in London and in regional centres outside London. The Chancery Division attracts high profile, complex and, increasingly, international disputes. In London alone it has a workload of some 4,000 issued claims a year, in addition to the workload of the Bankruptcy Court and the Companies Court. The Companies Court itself deals with some 12,000 cases each year and the Bankruptcy Court some 17,000.

3. Our members offer specialist expertise in advocacy, mediation and advisory work across the whole spectrum of finance, property, and business law. As advocates they litigate in all courts in England and Wales, as well as abroad.

4. This response is the official response of the Association to the Law Commission's Consultation Paper No. 210 on 16th May 2013. It has been written by Timothy Morshead QC, Tom Weekes and Toby Watkin.

## The overall response of the Chancery Bar Association.

5. The Association recognizes the characteristics which the Law Commission has identified as indicating that rights to light now loom relatively large as risks associated with the development of land, compared with their historical profile. As an Association, we hold no view as to whether those characteristics amount to a problem; or, if they amount to a problem, that they require to be addressed by changes to the law. Overall, we are

therefore neutral on the question of whether the Law Commission should undertake reform in relation to rights to light.

6. However, if the Law Commission decides that reform is appropriate, the Association has a number of concerns and suggestions about the Law Commission's particular proposals, which we address in order below.

7. In addition, we have some general remarks about the scope of any reform, and a suggestion for an alternative approach if significant reform is considered appropriate, which we will offer at the end of this response.

## CHAPTER 1: INTRODUCTION

***The decision in* Heaney *(Law Com ¶¶1.9–1.15).***

8. We are neutral on the question of whether reform should be undertaken.

9. However, we do respectfully question whether the decision in *Heaney* is a proper cause for the large concerns which it seems undoubtedly to have generated.

10. As the Law Commission acknowledges in ¶1.9, one major source of the difficulties which have stimulated this consultation, is a first instance decision in *Heaney*. This is to some extent exacerbated by a single decision of the Court of Appeal in *Regan*. We are not convinced that these cases are necessarily the last word in the development of the law of rights to light. We think there is a danger of over-reacting to what may transpire to be short-term phenomena in the development of the common law. In any event, we would point out that the contentious aspects of each of those cases related to the exercise by the Court of a discretion. Experience suggests that the common law is likely to react and mould itself in response to any real as opposed to any perceived difficulties, as these are exposed presented by the facts of particular cases coming to the Courts. If Parliament has intervened in the meantime, the danger arises of a mis-match between developments in the common law and the statutory regime. These include instances where the statutory regime is so overtaken by developments in the common law that the statutory regime in effect imposes a more onerous or complicated burden than the one it was originally intended to relieve. It is difficult to ensure that any legislative solution will not disturb the coherent development of the common law, including mitigation by the common law itself of any perceived ill-effects of *Heaney* and *Regan*, if that is appropriate.

## CHAPTER 2: OVERVIEW OF THE CURRENT LAW.

***Discharge by section 84 of the Law of Property Act 1925 (Law Com ¶¶2.58–2.59 and Chapter 7).***

11. We are neutral on the question of whether reform should be undertaken and our comments should be seen in this light.

12. We have two points:

    (1) If section 84 is to be amended to deal with easements (including rights to light), we agree with the Law Commission's proposal at ¶7.132 that the amendment should extend to existing as well as future easements (including rights to light). We agree with the Law Commission (¶¶7.127–7.131) that nothing in Article 8 or Article 1 of the First Protocol to the European Convention on Human Rights prevents this course.

    (2) However, experience of section 84 in the context of restrictive covenants over the years has shown that this provision suffers from several problems viewed from the perspective of both developers and objectors, but particularly developers. Most applications depend on ground (aa), in which the Lands Chamber must consider that the benefit lost by discharge or modification would not be "substantial" from the perspective of the objector, and that money would be an adequate compensation. In this context, the main problems are:

        (a) In practice, generally the Lands Chamber tends to adopt a conservative approach towards assessing whether the expected harm resulting from modification or discharge will be "substantial".

        (b) Beyond that, it is in many cases difficult to predict what view the Lands Chamber will take as to whether any modification or discharge will be "substantial".

        (c) It is difficult for applications to succeed against public bodies holding covenants as a "custodian of the public interest" given that it is unlikely "that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification": eg, *Re Zenios* [2011] EWCA Civ 1645.

        (d) Additionally, it is difficult to assess confidently what level of

compensation the Lands Chamber will award in those cases where it judges that the modification or discharge will not be "substantial."

(e) Further, the procedure itself is not especially fast. One complicating factor is that applicants often desire to obtain planning permission prior to the Lands Chamber hearing, because this is considered very strong evidence that the proposed user in breach of covenant is "reasonable". In practice, this makes it difficult or risky for developers to twin-track the Lands Chamber process with the planning application: the two must sometimes be taken sequentially rather than in parallel which, of course, adds to the time required.

13. In our experience advisers regularly conceive of section 84 as a mechanism by which developers can buy out rights of substance. This, section 84 emphatically is not.

14. Therefore, if the Law Commission considers that there is a need for urgent intervention to facilitate development despite the existence of rights of light, we question whether its proposed amendments to section 84 are likely by themselves to deliver the desired changes.

## CHAPTER 3: THE CREATION OF RIGHTS TO LIGHT BY PRESCRIPTION.

***A PROVISIONAL PROPOSAL (Law Com ¶¶3.46–3.48).***

15. We are neutral on the question of whether reform should be undertaken and our comments should be seen in this light.

16. However, a reform which abolished the acquisition of prescriptive rights to light for the future only strikes us as of doubtful utility. To the extent that there is substance in the concerns reported to the Law Commission, they arise out of the innumerable rights to light which already exist. If the problems reported to the Law Commission are sufficient to justify intervention along the lines of abolishing rights to light at all, we encourage the Law Commission to bite the bullet and enable them to be side-stepped outright in appropriate cases without recourse to the common law, as we explain further below.

## CHAPTER 4: INTERFERENCES WITH RIGHTS TO LIGHT.

***IS THERE A NEED FOR REFORM? (Law Com ¶¶4.34–4.42)***

17. We are neutral on this question and our comments should be seen in this light.

## CHAPTER 5: REMEDIES: INJUNCTIONS AND DAMAGES.

***Reform of the* Shelfer *criteria (Law Com ¶¶5.43–5.50).***

18. We are neutral on the question of whether reform is required overall and our comments should be seen in this light.

19. However, rights to light are not by any means the only thing which can upset development: other easements including commonly-encountered easements such as rights of way and wayleave rights, as well as restrictive covenants, often impede development. For so long as rights to light are regarded as equal members of the class of easements, despite their unusual characteristics, it would be arbitrary and in our view unprincipled to single them out for special treatment by the Courts. Unlawful interference with a right to light is a tort and ordinary tort principles, including as to remedies, ought to apply in our view. We do not favour the proposal in Law Com ¶5.50.

20. Put simply, if rights to light should continue to be recognized as a type of easement they should be enforceable in the same way as other easements. Amongst other things, that should mean that, prima facie, a dominant owner should be able to prevent an infringement. We support the principle of a presumption that the courts will prevent the unlawful infringement of a property right. Rather than introduce an exception to that principle, we think that the right in question ought to be taken more distinctly outside the generality of property rights, as we suggest below.

21. The proposal to introduce a quite different test for determining whether to grant an injunction in a rights of light case would, by departing from the law relating to all other property rights, complicate rights of light law. This is undesirable. Partly due to the respects in which it already diverges from the law relating to other easements, rights of light law is complicated enough.

22. The proposal to substitute a test based upon "proportionality" will give rise to litigation as the courts grapple with how the test is intended to operate in practice; and there will be a danger of unforeseen consequences. As we understand it, the test (broadly) would require the

court to make a comparison of the benefit to a claimant of an injunction (when compared with an award of damages) with the disadvantage to a defendant of an injunction (when compared with an award of damages). We do not consider that the substitution of this test for the present test will represent a simplification or improvement of the law.

23. It is not clear to what extent it is intended that this test should supplant the manner in which equity determines whether to grant injunctive relief. For example, is a liberalisation intended (ie, making the courts more likely to grant an injunction) in respect of matters that have nothing to do with proportionality? Is it intended that a court should be more likely to grant an injunction in cases in which it would be proportionate to grant an injunction, but where a claimant, by his conduct, has disqualified himself from seeking an injunction (given that the reference to "conduct" in the test appears confined to conduct pertaining to an overall test of proportionality)?

24. Therefore, if the problems drawn to the Law Commission's attention justify intervention, we would respectfully urge the Law Commission to focus directly on the cause of the problem, namely the right to light itself, rather than on its symptoms. We think that the obvious and most suitable solutions to any problem of sufficient substance to justify intervention are (i) the Law Commission's proposals for amendment to section 84, including ensuring that any amendments to apply to existing as well as future easements including rights to light; and (ii) amendment to the planning regime, which we consider further below.

***Limited reform to rights of light (Law Com ¶5.54–5.55).***

25. As we understand this part of the consultation paper, the Law Commission is inviting views as to whether the *Shelfer* principles ought to be amended for the generality of cases: in other words, a statutory codification of the *Shelfer* principles, updated by the introduction of concepts having to do with "proportionality".

26. This is a very interesting possibility and, obviously, it raises a topic of potentially profound importance. However, it goes far beyond the narrow and specialist field of rights to light. We greatly doubt whether the present consultation exercise will attract a wide enough audience to provide the Law Commission with the full range of potentially valuable responses to such an interesting and important question as the one raised by ¶5.55 of the consultation paper.

27. We sincerely hope that the Law Commission will not decide to recommend reform outside rights to light without first widening its consultation.

28. Subject to that important caveat, we offer two provisional views at this stage:

    (1) First, fundamentally, we think it would be wrong in principle to introduce legislation directed at influencing the exercise of this most discretionary of jurisdictions, even using the light-handed method proposed in Law Com ¶¶5.50 and 5.56. The jurisdiction both to grant and to withhold injunctive relief has evolved largely through the nuances which emerge in individual cases which have tended to make it more, or less, unjust to enforce the full rigour of the law. An assessment of those nuances lies at the heart of the jurisdiction. We question whether cases like *Heaney* and even *Regan* (which we acknowledge to be a decision of the Court of Appeal) represent more than examples of the exercise of the jurisdiction and we suggest that it would be wrong to exaggerate their legal significance. If *dicta* in those cases prove to be sufficiently troublesome, we would expect the common law to evolve to surmount them.

    (2) Secondly, we do not immediately see how the proposed formula would materially add to the confidence with which the outcome of any particular case could be predicted. In all except clear cases (ie, in our experience, in most cases) there would remain a significant penumbra of doubt about how the Court would resolve the question of proportionality. Further, scope for new fields of litigation would open-up about the extent to which a judge has had regard, or sufficient regard, to particular statutory factors. If and to the extent that it succeeds in meeting the immediate perceived problems, we suspect that it will create fresh ones in their place.

***DAMAGES (Law Com ¶¶5.58–5.94).***

29. We are neutral on the question of whether reform is required overall and our comments should be seen in this light.

30. However, as to Law Com ¶5.94 and the suggestion of a cap: we question whether this is appropriate. We have in mind the example of section 18 of the Landlord and Tenant Act 1927, which imposed a cap on the

measure of damages for breach by a tenant of his repairing obligation. To paraphrase: the cap, where it applies, is set at the amount by which the landlord's reversion is diminished in value by reason of the disrepair. That enactment was brought about on the back of a single decision of the Court of Appeal, which was apparently thought to have established as a rule of law that the landlord might recover his actual cost of repairs, whether or not this was a fair reflection of his loss. In fact it is questionable whether that is what the Court of Appeal was really doing. But legislation nevertheless followed. In subsequent years, the common law developed a new, or more clearly articulated the earlier, set of rules: in particular, even under the common law and without the 1927 Act, it is now clear that a landlord could not automatically recover his cost of repairs where this did not represent his real loss. Moreover, the fact that there is now a statutory cap on the damages which may be awarded to landlords can in some cases complicate the process inadvertently: what if there is a genuine reason for the landlord to desire that his property should be in repair (as for example a stately home of great personal or architectural importance), but where the cost of repairs far exceeds any possible diminution in value? The enactment has introduced (at least) a layer of unintended complexity and brought about the potential for hard cases. We think it would be better to leave questions of damages to the common law.

## CHAPTER 6: THE NOTICE OF PROPOSED OBSTRUCTION PROCEDURE.

31. While we are neutral on whether reform is required, we would not support reform of the kind proposed under the notice procedure (Law Com ¶¶6.47–6.50).

32. Our concerns are these:

    (1) Any time limit for serving counter-notices or objecting or starting proceedings, will be arbitrary. It will produce litigation about whether time limits have been met. And, even where there is no doubt that a time limit has been missed, it will produce new categories of hard case. For example, what if for some perfectly innocent reason the intended recipient of the critical notice happens to be abroad at the time when it is delivered, possibly on long leave or on foreign service? What about dominant owners who are under a disability?

    (2) Notices of this sort are likely to generate litigation about the form

and content of the notice. There is already more than enough litigation of this sort.

(3) There will also be difficulties when notices (as will inevitably happen) are not properly noted as a local land charge; in some cases, where the Registrar has made a mistake, there will be claims against the public purse; in others, there will be claims against negligent solicitors; and so on.

(4) Service of such notices will, rightly, be regarded as a hostile act by the recipient. Service of a notice is likely to trigger "protective" claims being brought to assert rights of light. Claims, once commenced, can quickly acquire their own momentum. Costs are likely to escalate. It is entirely possible that cases will arise in which parties find themselves trapped into a cycle leading inexorably to costly litigation, where apart from the notice procedure no proceedings at all would have taken place.

(5) The idea that a dominant owner can become (as a result of the operation of the statute) disentitled to an injunction but nevertheless entitled to claim damages in lieu of an injunction is not easy to understand and would require litigation to clarify. Currently, damages in lieu of an injunction are available only where there is jurisdiction to grant an injunction (which may be lost by such things as laches and acquiescence). Following the statutory loss of the right to an injunction, would the right to damages in lieu be invulnerable; thereby, for some purposes, putting the dominant owner in a stronger position than he would otherwise have been? Or might it be necessary (in some sense) to assume the continuance of a right to an injunction merely for the purposes of asking whether a equitable defence to an "injunction" has arisen that would deprive the dominant owner of a right to damages in lieu?

(6) Generally, a scheme like this will add complexity to an already difficult field; and we would expect that it will further disadvantage those who do not have ready access to expert advice, compared with those who do have such access. In particular, we suspect that those for whom rights to light are most important — occupiers of private dwellings — may often be least able to judge how best to respond; and, where they respond, may find themselves facing a costs risk even before any threat of actual

development has arisen.

33. Overall, in those cases where it was invoked, we fear that the proposed notice procedure would prove to be a recipe for yet further complication, expense and litigation. We think there would be a real risk that it would create as many problems as it resolved.

34. Additionally, we question whether it would be much used. We suspect that some of the considerations which we have mentioned may deter developers from making much use of the new procedure. Therefore, if and to the extent that there is a problem serious enough to be addressed, we question whether the notice procedure would achieve much towards addressing it.

## CHAPTER 7: BRINGING RIGHTS TO LIGHT TO AN END.

### *SECTION 84 OF THE LAW OF PROPERTY ACT 1925 (Law Com 7.68–7.132)*

35. We have already expressed our view in ¶¶11–14 that if section 84 is to be reformed, the reform should enable the Lands Chamber to modify or discharge existing as well as future easements, including rights to light. We have also expressed our reservations as to whether this proposal would actually alleviate the problem, if and to the extent that there is a problem serious enough to be addressed.

## GENERAL: IF REFORM IS REQUIRED, HAS THE LAW COMMISSION GONE FAR ENOUGH?

36. As we have repeatedly stated, we are neutral on the question of whether reform is required. Our following comments, like our earlier ones, must be seen in this light.

37. Experience suggests that legislation aimed at addressing particular perceived problems can generate unforeseen, unintended or arbitrary consequences, as well as creating its own levels of fresh complexity which in some respects may approach in terms of onerousness and uncertainty the effects which it is intended to mitigate. We suspect that some at least of the current proposals, if adopted, would add significant complexity without delivering a proportionate alleviation of the perceived problems.

38. Additionally, the problems identified by the Law Commission appear to us to be largely intrinsic to the channels through which the common law operates. As we have indicated, we suspect that the common law will evolve to deal with any lasting difficulties. But we recognize that this is uncertain; and additionally that the process may take time. Moreover, we

recognize that the timescales cannot be predicted: nobody can say which will be the important case to go to the Supreme Court, or when it will happen.

39. Those considerations suggest to us that even if (as we think) the problem is not intrinsic to the common law as a matter of substance, nevertheless it is manifested through the machinery and processes of the common law. For this reason, we question whether any solution which in effect tinkers with the common law will really effect a breakthrough.

40. Therefore, if the Law Commission considers that reform is appropriate, we would suggest that paramount considerations should include simplicity, clarity and robustness, as well as bypassing as completely as possible the channels which at present have become (apparently) bogged down — rather than adopting methods which attempt to mitigate the existing processes but which risk introducing further complexity and possible anomaly into the law. If there is really a sufficient justification for reform of the law, as to which we are neutral, then we would encourage wholesale, not piecemeal, reform.

41. We do not presume to offer fully worked-up proposals. However, one possibility which we would encourage the Law Commission to consider, if it decides that there is a serious problem calling for reform, is to reform the planning legislation. We consider this to be a natural vehicle for the protection of amenity rights generally, including light. By way of example, the Town and Country Planning Act 1990 might be amended to provide that:

    (1) in determining whether or not to grant planning permission, regard shall be had to the effect of the proposed development on the light reaching any property affected by the proposals, especially any residential property or other property sensitive to light levels. Although this is already implicit in the requirement to have regard to "material considerations", it could usefully receive statutory recognition in this way; and

    (2) development pursuant to planning permission granted by a local planning authority or on appeal after such regard has been had will not be unlawful (and will not be liable to be restrained by injunction or otherwise) by reason only of the fact that it interferes with any right of light; but

    (3) other development, including any development which is lawful

pursuant to "default" provisions such as for example General Permitted Development Orders, or development which has no planning permission but against which no enforcement proceedings are expedient, will not attract such immunity from the assertion of rights to light.

42. Taking the treatment of rights to light substantially outside the common law would enable the immediate problem (assuming it to be large enough to justify intervention) to be addressed, without disturbing the coherence of the common law.

43. Singling-out rights to light in this way is supportable because of their anomalous status and, in particular, the implausibility of pretending that anyone has ever really assented or would ever really assent to the grant of a right of light restricting his use of his own land: the fictions on which lost modern grant and prescription depend, involve a particularly bold leap of imagination in the case of rights to light.

44. On the other hand, we would favour making provision for the payment of compensation in the case of any disturbance with a right of light pursuant to our suggested framework. We appreciate that it would be necessary to impose a time limit for the making of claims, but the risk of creating unfairness because of a timing "cliff" (see ¶9 above) would be reduced because (a) the default position for all dominant owners (whether or not they respond in time) is that their rights to light will be crystallised into a limited money interest by the grant of planning permission; (b) the planning process should flush out objections from anyone with a legitimate interest in ancient lights: the law might require that guidance about rights of light should accompany publicity about planning applications, to minimise the danger of people missing claims through ignorance; additionally, (c) developers should be able to predict both the maximum likely number of claims being made and (for the first time) the associated likely compensation levels; and therefore (d) there is no need to require the dominant owner to act before works commence: we would suggest that the right of compensation should apply to those claims which ultimately succeed and which are notified within three months of the development as built causing what would otherwise be an actionable interference with the right to light.

45. If compensation were to be payable, then the sanction for non-payment after agreement or determination of the amount would be that the Court's jurisdiction to award an injunction (including a mandatory

injunction requiring removal) would revive, with a presumption that the injunction would be awarded, regardless of the identity of the current owner or occupier of the servient land. Alternatively, and perhaps more logically, the law could provide for a statutory charge in favour of the dominant owner, to take precedence over other interests including derivative interests such as leases or other charges (in a beefed-up version of the technique already used to enable the Environment Agency to recover remediation costs under the Environment Protection Act 1990). This way, works could commence without delay caused by litigation over the existence of rights of light and the amount of compensation payable, but at the same time there would be a high level of assurance that any compensation due would eventually be paid.

46. We would suggest that the basis of compensation should be as for injurious affection under established compulsory purchase principles: namely, diminution in the value of the property affected, as conventionally understood (ie, without reference to "negotiated share damages" or the like). Possibly a *solatium* of a 10% uplift could be awarded in the case of residential premises, for which there is also precedent in compulsory purchase law. We think that compensation under those principles would exclude the payment of "ransom" sums (as acknowledged implicitly by the Law Commission in ¶7.123, as compensation under section 237 is assessed on the same basis as injurious affection). But, to ensure that awards for diminution in value remain based on the conventional assessment, we would suggest that the position be entrenched in any legislation. This precaution is, we suggest, required partly because of a tendency which may be emerging of attempts to treat *Wrotham Park* damages as if in some sense they reflect diminution in value: eg *Winter v. Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80 at ¶33 — although of course any drafting would have to be careful to avoid the implication that, apart from the special provisions, *Wrotham Park* damages do indeed reflect diminution in value.

47. In respect of interferences with rights to light which are not authorised by planning permission under our suggested framework, if our approach were to be favoured, then we would suggest that no other changes to the existing law would be required, although our suggestion would be compatible with the proposed amendments to section 84. We suspect that our approach would obviate the difficulties (assuming there are any real as opposed to fanciful difficulties) actually faced by the overwhelming majority of developments in which such difficulties are said to arise.