Let there be (some) light

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1. Richard Hanson sent us an e-mail telling us what audience to expect. He said that "a great deal of knowledge can be assumed." So I thought I would concentrate on three points of real difficulty (difficult to me anyway):

   (1) The first is a general one: are the courts too ready to recognise and enforce rights of light?

   Then two more technical questions:

   (2) Secondly, how does the law apply to rooms which are already inadequately lit?

   (3) Thirdly, are there circumstances in which can you restrain development which will interfere with your ancient lights, even where you know that you will still have sufficient light after the development has taken place?

A. Too much light?

2. Rights of light cases had a boom in the nineteenth century. Partly this was because the Prescription Act 1832 made it easier to prove that a right of light had arisen: instead of proving a lost modern grant, or user since time immemorial, it was enough to have had "the access and use of light to" a building for 20 years before action. But mainly it was because of urbanisation. From an early stage, the Courts recognised that a balance would have to be struck between competing interests: the right to build, with its attendant socio-economic benefits, and the right to preserve a certain minimum level of light amenity. In theory, the courts have three controls at their disposal: first, is the obstruction of an ancient light sufficiently serious to be actionable at all? Secondly, if an obstruction reaches that level of seriousness, should it exercise its discretion to award damages instead of issuing an injunction to prevent or remove the obstruction? Thirdly, if it decides to award damages instead of an injunction, what level of damages should be awarded? Those questions all involve an application of judgment to the facts of any particular case. That is the sense in which they are controls.

3. For some time, it was the first of those controls which received the greatest attention in the courts. Prior to the 1832 Act, the established approach was to direct the jury to see how much light would remain after the offending obstruction had been erected: if there was still enough for the comfortable use of the plaintiff's house according to the ordinary notions of mankind, then there was no actionable interference. In the aftermath of the 1832 Act and for much of the nineteenth century, the Courts sometimes departed from this approach. Sometimes the jury was told to consider how much light had been taken away by the offending development. If a lot of light was taken away, then there was said to be an actionable interference. At other times the jury was told to compare the light remaining, with the light that was necessary for the use actually made of the building at the time when the right was acquired. Both approaches, particularly the first, tended to give precedence to light amenity compared with development. But they turned out to be based on a misunderstanding about the nature of the 1832 Act. In fact, it turned out that the 1832 Act had not changed the test for whether there had been an actionable interference with ancient lights. This had been said in several cases, but it was only conclusively settled with a decision of the House of Lords in *Colls v. Homes & Colonial Stores Ltd* [1904] AC 179. The Lords held that it was still a question of judging whether the light remaining was enough for the comfortable use of the plaintiff's house according to the ordinary notions of mankind.

4. *Colls* is still the only case exclusively about rights of light to have reached the House of Lords or the Supreme Court. The overall effect of the decision was to correct a tendency towards being too generous to the plaintiff. Some of the cases, it was said, had gone "too far": eg Lord Davey at 198 and 203. How did the Lords correct that tendency? They emphasised the correct test: in other words, they operated the first of the three controls which I have mentioned.

5. In practice, over time, rights of light surveyors and the courts have developed a rule of thumb: a room will be sufficiently lit if at least 50% of the floor area receives 1 lumen (one candle in a square foot) at desktop height (850mm above the floor). That is the same as being able to see 0.2% of the whole sky at midday on an overcast day in winter from desktop height. It follows that experienced rights of light surveyors can make a reasonably good assessment by eye, just by crouching down to desktop level and seeing how much sky is visible through the windows. But they can also draw diagrams, previously called Waldram diagrams,

showing what parts of a room will fall above and below that standard, before and after the proposed development. It is only a rule of thumb, but in practice this approach seems to be applied almost universally. It has even been said that only in exceptional cases will a room be regarded as adequately lit if less light is available: eg HH Judge Cooke in *Deakins v. Hookings* (1994) 14 EG 133 and the trial judge (Stephen Smith QC) in *Regan v. Paul* [2006] EWHC 1941 at paragraph 67. I will say a bit more about this in due course.

6. In recent years, the cases attracting most attention in the courts have been about the second and third of the two available controls: namely, should the court grant an injunction or damages *in lieu*? And, if damages, how much?

7. Starting with the question of "how much", the position now reached is that the court will try to identify the amount that would have been agreed by reasonable parties for a release of the rights, in friendly negotiations conducted at a time when reasonable people would have held such negotiations. The amount can be substantial although it is wrong to order an account of the developer's profits and in theory it should not be as high as a true ransom payment. That is a summary of the effect of main cases, notably *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd* [1974] 1 WLR 798, *Jaggard v. Saywer* [1995] 1 WLR 269, *Wynn-Jones v. Bickley* [2006] EWHC 1991, *Lunn Poly Ltd v. Liverpool & Lancashire Properties Ltd* [2007] L&TR 6, *Tamares Ltd v. Fairpoint Properties Ltd (No.2)* [2007] 1 WLR 2173, *HKRUK II (CHC) Limited v. Heaney* [2010] EWHC 2245 and *Pell Frishmann Ltd v. Bow Valley Iran Ltd* [2011] Bus LR Digest D1.

8. Thus the third control still has plenty of flexibility.

9. But what about the second control: ie, should the court grant award damages instead of an injunction?

10. The Court of Appeal has recently indicated that this control has less flexibility than might have been thought. The remedy for an interference with ancient lights, is an injunction, save in exceptional circumstances such as where all four *Shelfer* criteria are met, including that the injury is small and can be adequately compensated by a small money payment. This is the effect of *Regan v. Paul Properties Ltd* [2007] Ch 135, in which Mummery LJ summarised the relevant principles at paragraph 36:

> "36. *Shelfer* [(*Shelfer v. City of London Lighting Company Co* [1895] 1 Ch 287)] has, for over a century, been the leading case on the power of the court to award damages instead of an injunction. It is authority for the following

> propositions which I derive from the judgments of Lord Halsbury and Lindley and A L Smith LJJ. (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is 'a tribunal for legalising wrongful acts' by a defendant, who is able and willing to pay damages: per Lindley LJ, at pp 315 and 316. (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right 'except under very exceptional circumstances': per Lindley LJ, at pp 315 and 316. (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see A L Smith LJ, at pp 322 and 323, and Lindley LJ, at p 317."

The trial judge had granted damages instead of an injunction. The Court of Appeal, applying *Shelfer*, overturned him.

11. It is worth noting two points about *Regan*. First, the only issue in the appeal was about remedy: the appellant wanted an injunction; the respondent said that the judge had been right to award damages. But the respondent accepted the judge's finding that the interference was actionable in the first place: paragraph 20. The Court of Appeal was, as it were, stuck with the implications of this: namely, the respondent had interfered so badly with the appellant's light that not enough was left for the comfortable use of the appellant's property according to the ordinary notions of mankind. In those circumstances, the Court of Appeal did not have to ask itself whether the trial judge had taken a suitably robust approach to the question of whether enough light remained after the obstruction.

12. Secondly, at least as described in the Court of Appeal, the interference was on one view pretty slight: see paragraphs 62–63. But even so, the injury was bad enough to be actionable in the first place: that was inescapable, on the judge's unchallenged finding. In those circumstances it is perhaps unsurprising that the respondent found it difficult to argue that the injury was so small that damages would be appropriate: the

submission was inconsistent with the respondent having accepted the judge's decision on liability. Sure enough, Mummery LJ did not regard it as a "small injury": paragraph 70, because

> "In order to enjoy adequate light Mr Regan would now either have to use artificial light in the part of the living room where the natural light has become inadequate or he would have to move into the area of the living room into or close by the bay window, where he would be in full view of the occupants of the defendants' development."

That conclusion was practically inevitable given the issues available within the appeal: to have held that this was a mere inconvenience, would have been inconsistent with the concession that there had been an actionable interference.

13. Nevertheless, *Regan* illustrates one of the striking features of the current state of the law. At least in theory, interference with a right of light is not actionable at all if it is "small". But unless an injury is "small", the court cannot generally award damages instead of an injunction under the *Shelfer* principles. It would appear to follow as a matter of logic that there will seldom be any real scope for damages instead of an injunction, in any case where an actionable interference has been found to exist.

14. On this point, you may remember the case of *HKRUK II (CHC) Limited v. Heaney* [2010] EWHC 2245 in 2010, which attracted a lot of alarmed attention at the time, because the court granted an injunction to undo a substantial part of a building which had already been completed. But one of the main points to note about *Heaney* is that the defendant had conceded that its development constituted an actionable interference with Mr Heaney's right of right: paragraph 2. As in *Regan* in the Court of Appeal, the only issue was whether to award an injunction or damages. In such circumstances, *Heaney* was not a surprising decision: applying *Shelfer* and *Regan*, the outcome was pretty much a foregone conclusion.

15. Therefore, following *Regan*, we are left with a situation in which the second of the two available controls — the discretion to award damages instead of an injunction — has little flexibility. It is practically frozen-up. And, as a result, the flexibility inherent in the third control — the amount of damages — is unlikely to be available, because most cases where an actionable interference is proved will be knocked out at the second stage.

16. The lesson for developers and their advisers is "if at all possible, maintain the argument that your development will not cause an actionable interference". Once interference has been conceded, or established, it will only be an exceptional case in which the court withholds an injunction.

17. What would the House of Lords in 1904 have made of this curtailment of the second control? In *Coll* the House of Lords did not overrule *Shelfer*: the question of remedies did not even arise. Nevertheless, Lord Macnaghten and Lord Lindley certainly thought that damages would have been awarded instead of an injunction in any event, if the interference had been regarded as actionable. The other Law Lords probably assumed the same thing. At 193 Lord Macnaghten memorably said that the grant of an injunction turned really on the conduct of the defendant and that:

> "if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

In *Regan*, Mummery LJ gave careful consideration to all of this (and to many other authorities), but nevertheless held that the *Shelfer* principles applied intact, without any qualification. Based on the authorities which were binding on him, I do not question his conclusion. But there is a higher court, where *Regan* did not go.

18. So much for the second and third controls. But what about the first: ie, the test which establishes whether there is an actionable interference in the first place?

19. Unfortunately, the Law Lords did not all say quite the same thing in *Colls*. But I think that the emphasis in all their speeches was similar. In particular, Lord Macnaghten, Lord Davey and Lord Lindley all thought that the law had been stated correctly in an old case called *Back v. Stacey* (1826) 2 C&P 465. In that case, Chief Justice Best had told the jury that

> "In order to give a right of action … there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done" and that the jury "must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of his premises".

Lord Macnaghten cited this passage with approval at 187 and summed up his views on the appeal by returning to the Chief Justice's formulation, stating expressly that although "some diminution of light is caused by the defendants' buildings … it is exactly what Best CJ described as partial inconvenience rather than serious injury": 194.

20. That distinction — between "partial inconvenience" and "real injury" — is of course not itself precise. But it highlights the sense in which the House of Lords wanted to correct the over-liberal approach which had previously been taken by the courts. Arguably, "partial inconvenience" not "real injury" might have been a fair way to characterise the interference with light which occurred both in *Regan* and *Heaney*. But the point was not pressed in the Court of Appeal in *Regan*, or at trial in *Heaney*.

21. There are two other reasons why the House of Lords in 1904 might have looked with surprise at the way the law now applies the first of the available controls.

22. First, whether one is considering a dwelling-house in a suburb or an office block in the middle of a great city, sometimes there is not much variation in the basic method used to test for unlawful interference. It has even been said that location makes no difference: *Horton's Estate Ltd v. James Beattie Ltd* [1927] 1 Ch 75 at 78. But it was the view of (at least) Lord Halsbury LC that the quality of light to which a plaintiff might be entitled, would depend on the circumstances: not only how much light remained, but on how much he had a right to expect bearing in mind the situation of his premises. At 185 he said:

> "A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action."

See also *Ough v. King* [1967] 1 WLR 1547, where the Court of Appeal held that locality was relevant. On this approach, perhaps there is a need for a bit of "give and take" and for neighbourly tolerance on both sides of the boundary, with the question "what is reasonable?" depending on a range of factors not controlled by any one factor, although influenced by many, including location. This is essentially a common-sense, jury approach.

23. The second and related reason why the House of Lords might have looked with some surprise at recent developments, is the role played by expert evidence. Experts have been encouraged by the courts and there is now quite a striking degree of uniformity. In fact, at first instance in *Regan*, the trial judge said that the established approach would only be departed from "in extraordinary circumstances", mainly because it achieved a high degree of "certainty": [2006] EWHC 1941, paragraph 67.

But arguably this sits uneasily with *Colls*. Lord Halsbury LC for example thought that the lack of certainty was a virtue not a vice: he said "What may be called the uncertainty of the test may also be described as its elasticity": 185. On the other hand, it is true that the House of Lords set the ball rolling in *Colls* by being among the first to encourage the use of rights of light experts. Originally, it had been left up to the jury to visit the site and form its own view. But, said Lord Macnaghten, now that there were no juries but only a judge, it was obvious that there could be no site visit. It was for this reason, not for reasons of achieving "certainty", that he encouraged the use of expert evidence: 192. That rationale for relying on expert evidence is now dissipated, because of course judges have become more than willing to hold site views. In the *Ough* case back in 1967, the Court of Appeal gave weight to the fact that the judge had seen the site for himself and formed his own view. But despite a revival in the practice of site views, and despite plenty of warnings from many judges, there is perhaps a tendency for decisions to turn more on measurements than on the judgment of a judge as jury: that is, an application of common sense. From some cases one might receive an impression that the experts and in turn the courts have adopted a "one size fits all" method for determining whether or not an actionable interference has occurred. The contour drawings and the 0.2% sky test certainly generate a comforting feel of objectivity and consistency: but would a jury really have thought that the threatened obstruction caused any serious harm to the large 1950s office block in the middle of the legal quarter of London in the *Midtown* case [2005] 1 EGLR 65, or to the Victorian bank building in the middle of Leeds in *Heaney's* case? Or did the sense of harm which struck the court in those cases arise partly as a sort of miasma arising from the numbers? Was it really just about extorting money from the developer?

24. So I think it is possible that the House of Lords in 1904 would have been surprised to see how the law has turned out — and, possibly, not wholly approving.

25. But what would the Supreme Court have to say about the three available controls, if rights of light arose in a suitable case today?

26. I think this is a more open question. I do think it is arguable that the courts have boxed themselves into a bit a corner with rights of light. Of the three available controls, the third retains its flexibility, but it is increasingly hard to get as far as third control, because the second control has frozen practically rigid and the first has perhaps come to be applied

rather mechanistically — despite occasional protestations to the contrary by the courts. As for modern expectations of more rather than less natural light: the protection of rights of light in private law was of course crucially important in an era before town and country planning legislation took root. But these days, almost every form of development needs planning permission, which will almost always involve considering the effect of the development on the amenity of surrounding land, including light. Perhaps the time is ripe, in a suitable case, for the highest court to look afresh at the way the law has developed and, possibly, issue another corrective, as in *Colls*.

27. However, there is also quite a lot to be said for leaving things as they are. It has been suggested that modern attitudes to light have changed and that more light, not less, is now to be regarded as the norm expected by the ordinary notions of mankind: see *Ough's* case. Whether or not that is right, it is tempting to give priority to productive development instead of preserving seemingly trivial individual rights of light. But from a broader perspective, the law's insistence on respect for individual rights helps to provide the overall stability which underpins much modern economic activity. Furthermore, it might be said that the standard of light recognised by the surveyors as being adequate is not very great anyway and should be respected as a sensible minimum. There are wrinkles in the law, but generally it is now reasonably well settled and understood. There are of course difficulties for developers, even for quite modest developments. But the Law Commission has looked at easements recently. At paragraph 4.117 of its "Consultation Analysis" summarising the responses to its consultation paper on easements and profits a prendre, it wrote:

> "Rights to light form part of a delicate balance in the urban development context, and are a highly specialised field of practice. This is a topic that could benefit from separate review in the future."

In June 2011 the Law Commission proposed giving the Lands Chamber power to modify or discharge easements if it is satisfied that the modified interest will not be materially less convenient to the benefited owner and will be no more burdensome to the land affected: Law Com 327 "Making Land Work" at paragraphs 7.51–7.69. Perhaps Parliament will take up the challenge.

B. Where existing windows do not provide adequate light.

28. I have said that the law is now reasonably well understood albeit with certain wrinkles. I now want to consider two of them with you.

29. First, what if the claimant complains that the defendant's building will interfere with the natural light of an already-dark room in the building? In other words, what if the existing windows do not provide adequate light? Citing some Irish cases, the leading textbook says that where premises are badly lit, a small interference may be treated by the court as more serious than where they are well lit: Bickford-Smith and Francis on *Rights of Light* (2007) at 35. To the Irish cases I would add that there is also a County Court decision called *Deakins v. Hookings* (1994) 14 EG 133 in which HH Judge Cooke said "in a room that is ill-lit every bit of light is precious". There is also the *Heaney* case, in which HH Judge Langan QC sitting as a deputy judge of the Chancery Division treated "areas which were not adequately lit prior to the works, but which have lost more than a minimal amount of light as a result" as being relevant when considering whether the injury was small: paragraph 71. See also Wood V–C in *Dent v. Auction Mart Co* (1866) 2 LR Eq 238 at 248.

30. But all of this depends on the idea that a person can acquire by prescription a right to inadequate light. Arguably, this makes little sense. The fiction in prescription cases is of a lost grant: see, eg, Lord Halsbury LC at 183 in *Colls*. Whoever heard of a grant of a right of inadequate light?

C. *Sheffield Masonic Hall Co Ltd v. Sheffield Corporation* [1932] 2 Ch 17.

31. The second wrinkle I want to mention is potentially quite an important point which I suspect is often missed. It arises from a first instance decision called *Sheffield Masonic Hall Co Ltd v. Sheffield Corporation* [1932] 2 Ch 17. It has led a quiet life in the law reports, hardly remarked-upon. But if it is correct, it is a rather significant decision. Imagine you want to build on your land. But you know that your neighbour to the east has a right of light over your land. Your neighbour also has a right of light over the land to the north. You want to build upwards on your land. How high can you go? Can you go as far as you like, provided your works will not cause a nuisance? No. You have to assume that the person who owns the other land in the north might also want to build up. You must assume that he may wish to interfere with your neighbour's lights to the same extent as you wish to interfere with them. You must take care to ensure that if the owner of the land in the north were later to build upwards to the same height as your works, there would still be no interference with the right of light.

32. What does this mean in practice? From the perspective of the servient

owner — ie, all of you in our example — then although you could build to say 60 feet in height without causing an actionable nuisance, you might in fact be prevented from building to more than 30 feet, because of the risk that the owner of the land to the north will also want to build to 30 feet in height at some point in the future.

33. But equally startling: from the perspective of the dominant owner — ie, the neighbour with the right of light — presumably he must go to court for an injunction if the servient owner builds higher than 30 feet, even though he will not be able to say that the development will itself leave him with less than adequate light if it goes as high as 60 feet. If he fails to do so, then he runs the risk that the owner of the land in the north will later be able to build to at least 30 feet, even if this leaves him with less than adequate light.

34. I want to make four points about this decision.

35. First, personally I have never known anyone test this point by applying for a pre-emptive injunction. But it is a point to keep in mind, certainly for a big enough case with a lot at stake.

36. Secondly, I have seen this principle used by the neighbour himself — the dominant owner, your neighbour in our example — to say that he might want to put up a new structure 30 feet high, with the result that the servient owner, all of you in our example, must restrict his height to 30 feet. This is unlikely to be good law. If the *Sheffield Masonic* case is good for anything, it is for ensuring that various servient owners must between them ensure that they do not cause an actionable interference with the dominant owner's rights. It says nothing about whether the dominant owner can interfere with his own lights; and it does not say that the servient owner can be subjected, in effect, to a larger burden than he has assumed, merely because the dominant owner chooses to obstruct his own lights.

37. Thirdly, in *Ramares v. Fairpoint* [2007] 1 WLR 2148 at paras 48–51, the judge asked himself whether what the dominant owner proposed was likely to happen. He was considering a different question: namely, the principle in *Carr-Saunders v. Dick McNeil Associates Ltd* [1986] 1 WLR 922 (was the remaining light adequate for any likely future use of the room, as well as the existing or past use?). But I suspect that a similar constraint applies here. If so, then you only need to worry about whether you can build all the way up to 60 feet, if it is actually likely that the other adjoining owner — the owner of the land in the north in our example —

might want to build upwards in the future.

38. But fourthly, I wonder whether the *Sheffield Masonic* case can really be correct. Take the example of a different easement: a right of way. Suppose I have a right of way to the highway over your land. I also have a right of way to the highway over someone else's land. Both rights of way are equally effective and I make equal use of them. One day you decide to narrow the width of my right of way over your land. This is not actionable, because it does not substantially interfere with my rights. But I decide that I will start making more use of the other right of way. In fact, I stop using your right of way altogether. I become dependent on use of the other right of way. But so what? Surely the owner of the servient land over which the other right of way crosses — analogous to the north land in our example — has nothing to complain about. Perhaps the true principle is that the measure of the permissible burden of an easement does not really depend on what other easements exist over other tenements? If so, perhaps the *Sheffield Masonic* doctrine is wrong.

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2nd February, 2012