

# A lighter touch required

**Rights of light** David Stevens considers how local authorities could help developers avoid costly disputes

In *HXRUK II (CHC) Ltd v Heaney* [2010] 3 EGLR 15, the High Court granted a commercial property owner an injunction requiring a developer to cut back its completed development. The court confirmed that the primary remedy for infringement is an injunction and the court's discretion to deprive a claimant of an injunction should only be exercised in "very exceptional circumstances".

On the rare occasions when the court might be persuaded to grant damages rather than an injunction, such damages are likely to be assessed on the generous basis adopted by the High Court in *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] EWHC 212 (Ch); [2007] 1 EGLR 26, where substantial damages were awarded to the claimant (despite the very limited loss of amenity) based on one-third of the profit generated by that part of the development built in breach of the claimant's right to light.

Accordingly, developers can no longer assume that rights of light can be bought out for modest sums after a development has been completed, or that failure of potential claimants to act quickly will prevent them obtaining an injunction. Developers must therefore look to resolve potential claims before commencing their development and should explore any avenues that might assist them to deal with potentially intransigent claimants.

One such avenue is to seek the assistance of the local authority and persuade it to override such rights, or at least to indicate a willingness to do so, which might serve to even the playing field for negotiations with any potential claimants.

## Statutory powers and requirements

Section 237 of the Town and Country Planning Act 1990 (the Act) gives local planning authorities the power to override certain third-party rights, such as easements (including rights of light), to allow a development to proceed without the threat of an injunction. The third party whose rights are effectively overridden is entitled to apply for compensation for "injurious affection", but this is limited to the diminution in the value of their land and the share of profit measure established in *Tamares* does not apply.

In order for a local authority to use its powers under section 237, a number of requirements must be met:

- there must be the erection, construction or carrying out or maintenance of any building or work on land;
- the land concerned must have been acquired or appropriated by a local authority;
- the acquisition or appropriation must have been done for planning purposes; and
- the work or development must be authorised by planning permission.

If these requirements are met, then a local authority can rely on section 237 if it is satisfied that the development will enhance the economic, social or environmental wellbeing of the area, or there is a compelling case of public interest.

The protection afforded by section 237 can also be relied on by anyone "deriving title under" the local authority. Accordingly, once the site has been acquired by a local authority for planning purposes, it appears that the site could then be reconveyed (although it is not entirely clear that this would result in the developer "deriving title under" the local authority) or let on a long lease to a developer who could then carry out the development notwithstanding interference with a claimant's right to light.

However, it should be noted that while section 237 was clearly intended to enable a local authority (and its successor) to redevelop or continue to redevelop a site appropriated for planning purposes, it has been held that it does not enable a developer who is merely a successor to the local authority subsequently to develop the land for purposes other than for which it was appropriated: *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33 (Ch); [2005] 1 EGLR 65.

When deciding whether to use its statutory powers, the local authority must ensure that the requirements of the Act are satisfied and have regard to the government guidance on the exercise of such powers. The authority must also balance the public interest in the development against the potential adverse effect on the human rights of those affected. The right should only be used as a last resort, potentially following failed negotiations. If the powers are exercised inappropriately or wholly unreasonably, then the decision to exercise the statutory power might be open to challenge by judicial review.

## Compensation

Third parties whose rights have been overridden pursuant to section 237 are entitled to compensation pursuant to

section 10 of the Compulsory Purchase Act 1965. Section 10 does not itself set out the measure of compensation. That has to be derived from the principles established in case law. Those principles, sometimes referred to as the *McCarthy* rules, were summarised in the Court of Appeal in *Clift v Welsh Office* [1999] 1 WLR 796 as:

- (1) the injurious affection must arise from the lawful exercise of statutory powers;
- (2) the injurious affection must arise from a breach of the right of the third party which would otherwise be actionable;
- (3) the loss must be in respect of some loss in value of the claimant's land;
- (4) the loss must arise from the execution of the works; and
- (5) the amount of compensation must be ascertainable in accordance with the general principles that apply to damages in tort.

In summary, any claim will be limited to the diminution in the value of the claimant's land flowing from the loss of the relevant light caused by the authorised building works and will not include the loss of a bargaining position or share of the profit enabled by the infringement, as might be the case in normal rights of light claims.

In the first instance, the claim for compensation, which should be brought in the Upper Tribunal (Lands Chamber), should be made against the party relying on the overriding effect of section 237, which will often be the developer in a case where it has taken a leaseback from the local authority. However, there is the possibility of a claim being made against the authority under section 237(5), if the developer fails to discharge the liability.

## Impact on development

It is unlikely that local authorities will become involved in private development schemes unless they are of substantial public benefit and accord strongly with the authorities' own planning objectives. However, some authorities, such as the City of London Corporation, have exercised (or indicated a willingness to exercise) such powers in relation to strategically important developments in built up areas that could have otherwise been prevented by neighbouring land owners seeking to protect their rights of light by injunction.

It is hoped that, given the invidious position that many developers now find themselves in following the recent adverse case law, local authorities might prove more willing to assist worthwhile schemes, as it will be several years before any changes to the law arise from the Law Commission's review of rights of light, a consultation document on which is due in 2013.

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