PROPERTY LITIGATION ASSOCIATION

THE ALAN LANGLEBEN MEMORIAL ESSAY COMPETITION 2019

Name:	**Ian Whitehead**
Firm:	Pinsent Masons LLP **(joining Winckworth Sherwood LLP as an Associate on 1 April 2019)**
Essay Question:	**What is the most unjust and/or unfair decision/statute/doctrine or principle in Property Law?**
Word Count:	**1,500** (excluding title and headings, but including footnotes)

A DIM VIEW OF DAMAGES IN RIGHTS OF LIGHT CLAIMS:

THE ARGUMENT FOR A CAP

Any organisation looking to deliver homes in constrained urban locations, of the kind needed to plug the UK's housing shortage, will likely face the major headache of rights of light. I would argue that the approach taken to the quantification of damages payable to property owners for interference with their rights of light is a major source of unfairness, which disincentives early settlements.

I am in favour of intervention in the form of a statutory cap on such damages. This would undoubtedly be met with enthusiasm from any developers who consider they are regularly paying disproportionately large sums to secure releases and are concerned that such claims could derail or delay developments. In certain circumstances, capping damages may also be fairer as between different neighbours with rights of light claims.

What approach is taken to assessing damages in rights of light claims?

The primary remedy for interference with rights of light is an injunction to prevent the obstruction of light. However, where the Court awards damages in lieu of an injunction, these are based upon the hypothetical negotiation between the respective landowners for a release. Such damages are sometimes called "negotiating damages".

In the *Wrotham Park*[1] case, a percentage of the development profit that would be derived from a failure to comply with a restrictive covenant was payable as compensation. In the *Tamares*[2] case, a neighbour was awarded almost one third of the developer's profit in the infringing part of the relevant development for loss of light. In the latter case, emphasis was placed upon the need to consider whether the *"deal feels right"*[3], although there is little guidance as to how to apply this in practice.

Why is the approach to the quantification damages in rights of lights claims unfair?

[1] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798
[2] *Tamares Ltd v Fairpoint Properties Ltd (No2)* [2007] EWHC 212 (Ch)
[3] Ibid, para 22(8)

In respect of substantial developments, the measure of damages in rights of light claims lends itself too readily to ransoms, the inherent uncertainty of which can make schemes unviable or cause them to stall.

Developers can sometimes reach settlements with a majority of neighbours, often based upon multiples of "book value" as calculated by surveyors[4]. One or two owners may then adopt entrenched positions, aiming to secure very large financial payments based upon a share of profit as the justification. Such owners will seek details of confidential development appraisals, which developers may be reluctant to share lightly.

Depending upon location, the "last man standing" is sometimes able to argue for an entitlement to millions of pounds. Their own property may be worth a fraction of such sums. The "one third of developer's profit" approach is routinely touted as the appropriate opening position by such owners during negotiations, ostensibly supported by *Tamares*. Owners with rights of light who will suffer minor losses of light, compared to their neighbours who reached early settlements, may receive substantially larger payments simply because they refused to engage with negotiations until the eleventh hour and then aggressively pursued a share of profit. Early settlement does not pay and developers must spend longer eliminating risks.

"Negotiating damages" ought to be tempered where the sums being sought are disproportionate and prejudicial to building much-needed homes.

Capping damages for interference with rights of light

Capping the level of damages for interference with rights of light is not a novel suggestion. The Law Commission consulted on capping damages in such claims[5]. The response was mixed[6].

In the five years since the Law Commission's 2013 consultation closed, rights of light issues have become increasingly publicised[7, 8] and specialist surveyors have opened new offices outside London[9]. Housing supply remains a national concern[10]. If it could provide developers with the solution to a major source of potential delay and uncertainty, then it is time to take another look at capping rights of light damages.

A cap equal to a percentage of the value of the affected property would introduce greater financial certainty for developers. Developers could estimate their maximum financial exposure to claims more accurately, based upon the massing of their scheme and local property prices. Valuing affected

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[4] With the judgment in *Carr-Saunders v Dick McNeil Associates Ltd [1986] 1 WLR 922* sometimes cited as justification for this approach.

[5] Law Commission, *Rights to Light* (Law Com No 356, 2014) and Law Commission, *Rights to Light: A Consultation Paper* (Consultation Paper No 210, 2013)

[6] Law Commission, *Rights to Light* (Law Com No 356, 2014), [para 5.40]

[7] Tim Clark, "City takes stake in £300m Lendlease tower over right-to-light" (Construction News, 6 November 2018) <https://www.constructionnews.co.uk/companies/contractors/lendlease/city-takes-stake-in-300m-lendlease-tower-over-right-to-light/10036914.article>

[8] Steve Bird, "Chelsea forced into extra time as family's fight for daylight blocks new £1bn stadium" (The Telegraph, 12 January 2018) <https://www.telegraph.co.uk/news/2018/01/12/no-light-end-tunnel-chelseas-new-1-billion-stadium/>

[9] In 2016 GIA and Anstey Horne launched offices in Manchester and Birmingham respectively.

[10] Homes England, *Strategic Plan 2018/19 – 2022/23* (2018), [p11-14]

properties would not be without scope for disagreements, but this could be adequately legislated for[11].

The arbitrary nature of capped damages would arguably be unfair to certain affected neighbours. The Law Commission's 2014 Report did not conclude that *"capping equitable damages at the value of the dominant property (or a percentage thereof) offers a fair option for reform"*[12], particularly as owners with more valuable properties might, as the consequence of caps linked to property value, be able to secure greater compensation than neighbours with less valuable properties, even if the interference is the same. I would suggest that the owner of a £1 million property is much more likely to have the resources to play hardball with developers over rights of light than the owner of a £100,000 property; therefore in most cases there is already an inherent disparity between the ability of owners of more and less valuable properties to secure "fair" sums for actionable interference with their rights of light.

In my view the benefits of financially limiting right of light risks for many housebuilders, and the levelling of the playing field as between neighbours (so that those who settle earlier do not lose out), would outweigh the concern that a cap would be arbitrary.

Incentivising rights of light settlements: Notice the difference

A crucial benefit of capping damages is that, once parties can more readily judge the maximum figures at stake, in most claims the cat-and-mouse game between affected neighbours and developers over the appropriateness of injunctions can be more swiftly dispensed with. Capping damages would make threatening injunctions, in cases where the real objective is maximising financial compensation, a less appealing strategy. There would be less to gain from such threats.

Even with capping, where a neighbour truly values their light and wishes to preserve it, there should be nothing to stop them from pursuing an injunction. Such owners would, however, know from an early stage what the maximum compensation would be if they seek injunctive relief and the Court awards damages instead.

With some imagination, capping could be combined with a statutory notice procedure (not dissimilar to the Law Commission's proposal for "Notices of Proposed Obstruction"[13]) with variable levels of cap designed to incentivise settlement. This would involve a radical change in the way rights of light negotiations are approached.

If a developer could serve affected neighbours with notice of its scheme, combined with an open offer to pay compensation that triggers a statutory cap at, say, 25% of the value of the affected property if a release of rights is completed within a certain period, after which time compensation would be capped at a lower value, the impact on the speed of settlement negotiations could be very significant. Rather than rights of light strategies taking years to implement, sites could be de-risked swiftly, unless there are parties genuinely seeking injunctions to maintain their light. I would suggest that this is quite rare, bearing in mind that very few rights of light claims ever reach trial.

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[11] For example, by providing that each party may appoint an independent property and, in the absence of agreement between valuers, taking the median figure.

[12] Law Commission, *Rights to Light* (Law Com No 356, 2014), [paras 5.72-5.73]

[13] Ibid [paras 6.13-6.18]

The intricacies of any regime of caps and notices would require much careful consideration. It would be possible to limit its scope to align with housing policy, for example to benefit only sizable residential developments. Section 203 of the Housing and Planning Act 2016 already provides a potential avenue for developers to overcome difficult rights of light problems where developments are in the public interest, however such arrangements require the Local Authority to adopt a hands-on approach and will always be overshadowed by the risk of judicial review, particularly if there are any doubts concerning whether there has been proper consultation before rights are overridden.

Rights of light compensation will be fairer once the "last man standing" approach no longer pays dividends. If capping damages could allow both developers and affected neighbours more certainty over the sums at stake when faced with rights of light issues, and there was a clear incentive for parties to reach settlement early, this could help remove rights of light as a potentially significant hurdle to the construction of new homes that our towns and cities sorely need.