



Let there be light:

a bright reminder for developers

As we approach a new development cycle, Bill Chandler reviews a recent case which serves as a timely reminder of the costly consequences of overlooking – or simply ignoring – rights to light.



In the 2010 case of HKRUK II (CHC) Ltd -v- Heaney, the High Court held that an injunction, rather than damages, was the appropriate remedy where a developer had infringed the right to light enjoyed by a neighbouring office building in Leeds city centre. Two newly-built floors were ordered to be removed, at a likely cost exceeding £2 million, despite the fact that the additional floors were fully-completed and partly-let.

The parties settled before this year's scheduled Court of Appeal hearing and it seems that the additional floors will remain. The developer is therefore spared the need to remove the upper floors - and some difficult conversations with its tenant - but the

undisclosed financial settlement still makes the developer's disregard of rights to light an expensive mistake.

The facts

In 2003, Marcus Heaney purchased a five-storey grade II listed building in Leeds, the former headquarters of the Victorian Penny Bank. Heaney spent £3 million restoring the building in order to re-let the refurbished offices and create a conference and banqueting venue on the top floor.

In 2007, the claimant, HKRUK II (CHC) Ltd, acquired a five-storey office block adjacent to the side elevation of the former bank. Planning permission was obtained to redevelop the block

and add two additional floors.

In 2008, the claimant informed Heaney of its plans. The claimant admitted that a right to light existed in favour of the former bank, and that the addition of two floors would constitute an actionable interference with the access of light to the former bank. The claimant made an offer to settle which was not accepted. Heaney threatened to seek an injunction preventing the building works, but at no stage were proceedings actually issued.

The building works were completed in July 2009. The following month, the claimant sought to remove any remaining risk of having to undo the works by applying to court, seeking

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Welcome

Welcome to the summer edition of Hill Dickinson's commercial property newsletter, which we hope you will find of interest.

If you have any queries relating to the issues raised in this newsletter, please contact the relevant author, or your usual Hill Dickinson contact.

If you have any comments on the newsletter in general, please contact our editor, Bill Chandler, at bill.chandler@hilldickinson.com.

Kind regards,

David Chinn

Head of Business Services
david.chinn@hilldickinson.com

Stop press

Hill Dickinson was named property law firm of the year at the North West Business Insider's commercial property awards 2011; one of the region's most prestigious awards events. This follows similar success in both 2009 and 2006.

The judging panel gave particular recognition to Hill Dickinson for work it had done for Peel Energy, along with a major refinancing, and a raft of work for Electricity North West.

The judges' citation read: "Hill Dickinson got the nod for an entry that showcased its skills in a variety of fields. The entry highlighted how its team goes the extra mile to cover all bases for its clients."

David Chinn, head of business services, which incorporates the firm's property and construction team, said, "It is a fantastic achievement to win this prestigious award for a third time. We have a really strong property and construction team at Hill Dickinson and this is clearly being recognised in the North West marketplace. We place great emphasis on building long-term client relationships and enabling easy access to a broad range of expertise. Our team is committed to continuing this award-winning approach."



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a declaration that Heaney was not entitled to an injunction.

The court's decision

Since there was no dispute that an actionable interference with the right to light had taken place, the court's starting point was that Heaney was entitled to an injunction unless the claimant could prove that damages would be a more appropriate remedy (in accordance with Regan -v- Paul Properties DPF No.1 Ltd).

The court confirmed that the presumption in favour of an injunction could only be rebutted if the claimant could satisfy all four criteria set out in Shelfer -v- City of London Electric Company, by establishing that:

(i) *the injury to Heaney's legal rights was small*

Whilst the total loss of adequately lit space was not substantial, the most affected areas were 'star rooms' of the former bank, such as the boardroom. The court also considered the character of Heaney's property, and his commitment to its restoration. On that basis, it was held that the injury caused to Heaney's legal rights was not small.

(ii) *the injury was capable of being estimated in money*

The court considered that Heaney's loss was capable of being estimated in money. The estimation, carried out on the basis proposed in Wrotham Park Estate Co Ltd -v- Parkside Homes Ltd, came to £225,000.

(iii) *the injury could be adequately compensated by a small monetary payment*

The judge did not regard a payment of £225,000 to be 'small'.

(iv) *an injunction would be oppressive*

Despite Heaney's failure to issue proceedings before the works were completed, and the fact that the additional floors were partially-let, the court found

that an injunction would not be oppressive to the claimant. The infringement of Heaney's rights was not trivial, nor was it inadvertent or driven by necessity; it had been carried out in full knowledge that it was actionable, with a view to maximising profit.

The court therefore concluded that it would be 'wholly wrong' to allow the claimant's breach and force Heaney to take compensation. An injunction was awarded. And since the parties settled before they reached the Court of Appeal, the High Court decision remains the last word on the subject.

Lessons to be learnt

At the end of the day, the Heaney case is a High Court decision which does not establish any new law. But it is a timely reminder that:

- rights to light widely exist;
- they are not limited to London;
- they do not only arise on the construction of skyscrapers;
- they can apply to relatively modest additions to existing buildings; and
- they can result in costly damages being paid to neighbours...
- ...or even an injunction requiring all or part of a building to be demolished.

Since Midtown Ltd -v- City of London Real Property Co Ltd in 2005, many developers have wrongly assumed that the courts will be reluctant to grant injunctions restraining development, leaving them facing a damages claim at most. But the Heaney case demonstrates that judges are prepared to grant injunctions, even in respect of commercial properties.

Accordingly, it is essential to investigate - at the very outset of proposed building works - what other properties may enjoy rights to light, whether the works will cause any actionable interference and likely remedies.

Legal advice will be required, and frequently a specialist rights to light surveyor. Any potential issues identified should be resolved before the developer commences work and incurs significant expenditure.

Unless express agreement can be reached with all affected parties, the risk remains of having to remove all, or at least part, of what is to be built. If agreement cannot be reached within acceptable timescales, the developer should consider applying to court for a declaration that the party with the right to light is not entitled to an injunction, or adjust the building works to avoid any infringement.

Developers may also consider obtaining insurance cover against the financial implications of a successful rights to light claim.

Final word

The Heaney case does not mean that an injunction will necessarily be awarded every time a similar case comes before the courts. Injunction is a discretionary remedy and the behaviour of the parties will be relevant.

Lord Justice Millett summed matters up in Jaggard -v- Sawyer, and was quoted with approval in the Heaney case:

“Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting the injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently.”

But, whether the next case results in damages or an injunction, developers ignore rights to light at their peril.

Bill Chandler

bill.chandler@hilldickinson.com

What is a right to light?

Basically, the right enjoyed by one property to receive light over another property. Whilst there is no automatic right to light in English law, it can exist as an easement. Easements are rights enjoyed by one property over another, such as a right of way.

Rights to light can be created expressly by deed, but frequently arise without formality by ‘prescription’, where light has been enjoyed over a neighbouring property without consent for 20 years, without interruption. Interruption includes actual interruption, or a fictional obstruction in the form of a Light Obstruction Notice registered as a local land charge. Since no intention to acquire a right is required, rights to light often arise without either property realising.

Rights to light do not attach to the land itself, or even to a building generally, but only to specific windows or openings. The beneficiary is entitled to sufficient light “according to the ordinary notions of mankind” for the comfortable use of a dwelling or for the beneficial use of business premises.

‘Sufficient light’ is not measured by brightness, but by how much of the sky is visible - 0.2% is usually sufficient. Consequently, greater interference will be permissible where the neighbouring property enjoys good sky visibility, whereas relatively minor interference with light to a property with low initial sky visibility may be actionable.



PROD in the right direction



Richard Kendall scrutinises recent proposals to put surplus public sector land to community use.

Housing Minister, Grant Shapps, announced in February 2011 that the Department for Communities and Local Government (DCLG) is taking steps to tackle the perceived problem of surplus property assets held by public sector bodies. With the efficiency and effectiveness of public bodies firmly in the spotlight, it is little wonder that the Coalition Government has turned its attention to bringing surplus publicly-owned property back into use.

The scale of the problem

Empty buildings, derelict properties and vacant land can all have a negative impact on communities. For public bodies, surplus assets lying waste represent an unnecessary cost.

DCLG estimates that 16,600 hectares of previously developed land owned by local authorities and other public bodies might be available for redevelopment - of which 7,500 hectares is judged to be suitable for housing.

Existing powers

At present, two systems dealing with surplus property assets operate side-by-side:

1. Register of Surplus Public Sector Land

HM Treasury guidance, *Managing Public Money*, asserts that public bodies may transfer surplus property assets among themselves at open market value without the need to offer the property on the open market. To facilitate

this internal market, the Homes and Communities Agency manages the Register of Surplus Public Sector Land, accessible only to central government departments and public bodies.

Once a public body has declared property as surplus and placed it on the register, other public bodies have 40 working days to express an interest in acquiring the surplus property. If there is no interest, the property can then be offered for sale on the open market.

Problematically, use of the register is inconsistent. NHS bodies must place surplus property on the register, but there is no requirement for other departments or authorities to use it; other public bodies consider its use as either best practice or optional.

2. Public request to order disposal

Section 98(1) of the Local Government, Planning and Land Act 1980 established a process by which the Secretary of State for Communities and Local Government (or Minister for Finance, Local Government and Public Services in Wales) can order the disposal of property which 'is not being used or not being sufficiently used for the purposes of the performance of the body's functions or of carrying on their undertaking.'

Orders are not usually made at the Secretary of State's own volition, but following a written request from members of the public, known as a Public Request to Order Disposal (or PROD). Orders may not specify to whom the property is sold.

Section 98 applies to a diverse range of public bodies, including local authorities, police authorities, Environment Agency, Coal Authority, Civil Aviation Authority and the BBC. Central government departments, housing associations and some HCA assets are exempted.

The DCLG announcement characterised the PROD system as a 'little known and little used power'. A freedom of information request made through whatdotheyknow.com reveals that 57 PROD applications have been made since 1997, but only one resulted in the Secretary of State making an order. Clearly, the vast majority of applications are unsuccessful.

Proposals: business as usual?

DCLG's proposals are relatively straightforward:

- rename and replace PROD with the Community Right to Reclaim Land (CRRL);
- open up access to the Register of Surplus Public Sector Land; and
- expand the number of participating public bodies.

Although the CRRL process will be virtually indistinguishable from the existing PROD system, DCLG aim to streamline the CRRL process,

with everything other than the most sensitive decisions made below ministerial level.

The most important change will be the proposed improved transparency of the public sector estate, by making information on surplus property assets available from one online source. Practically, users may be disappointed as existing information on surplus assets relies on being able to identify property from descriptions only, rather than by reference to plans.

DCLG plan to "significantly expand" the number of participating public bodies, and whilst it is unlikely that CRRL will be extended to all public bodies, the inclusion of departments with large property portfolios such as education, health and defence will be necessary for the register to gain legitimacy.

There was an ambitious timetable for the implementation of the proposed changes, with both the updated online register of surplus property and the regulations extending the number of public bodies to which the CRRL applies due to be brought into effect by the end of May 2011. At the time of publication these are still awaited.

Implications of the changes

Public bodies

Management of information relating to surplus property will have an obvious cost implication for public bodies. Dealing with numerous CRRL requests may prove to be a costly distraction at a time when budgets are already thinly-stretched.

In reality, most public bodies already carefully manage surplus property disposals to raise much-needed funds. However, practical and cultural change may be required to prepare for greater transparency in the public estate.

Public bodies will need to assess carefully the risk of property required for strategic purposes or planned expansions being inadvertently ordered for sale. Public bodies must be able to demonstrate that the property is not surplus, and an audit trail will be essential evidence.

Communities

In addition to the ability to probe deeper into the property portfolios of public bodies, the public will welcome the extension of the PROD system to a wider range of public bodies.

However, they may still be disappointed with the outcome of any CRRL application. Many applicants may find that, whilst they are successful in obtaining an order from the Secretary of State, the property is ultimately purchased by someone else. Uncertain funding of community groups, and the lack of assurance that they will ultimately secure the property for themselves, could deter potential applicants.

Private sector

Whilst the political rhetoric surrounding the announcement has focused on the ability of communities and local groups to bring surplus assets back into use, the biggest benefit to the private sector will be the freedom to access previously confidential information and the ability to track surplus property through the improved online register.

Conclusions

Since the proposals for CRRL appear to be identical to the PROD system, sceptics can be forgiven for wondering whether the 'new' powers are simply an expensive re-branding exercise. However, if fewer public bodies, central government departments and agencies are exempted from the application of CRRL, communities and the private sector may finally be able to force action or the disposal of surplus property more frequently.

Richard Kendall
richard.kendall@hilldickinson.com

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Efficiency drive

Bill Chandler examines the latest proposals to improve the usefulness and reputation of Energy Performance Certificates.

Energy Performance Certificates (EPCs) and Display Energy Certificates (DECs) were introduced by the Energy Performance of Buildings (Certificates and Inspections) (England and Wales) Regulations 2007, to implement the EU Energy Performance of Buildings Directive. Since the certificates first became mandatory in 2008, the property sector has become accustomed to them and the need to ensure that an EPC is supplied at the outset on every sale and letting.

Frequently criticised as a toothless device, because there is no obligation to act on a poor energy efficiency rating, Brussels and Westminster are understandably keen to improve the usefulness and reputation of EPCs and DECs - and by doing so improve on unacceptably low levels of compliance. The EU Directive has now been 'recast', with the amended directive required to be implemented into national law by July 2012 and to take effect from January 2013.

Consultation

In March 2010, the previous Labour government issued a consultation: 'Making better use of energy performance certificates and data'. That consultation was not limited to issues arising out of the revised EU Directive, but looked at the larger picture of how to make better use of EPCs and DECs generally. In addition to the formal written consultation, stakeholder workshops were held to gauge the opinion of interested parties.

By the time the consultation closed in May 2010, there had been a change of government and there was great anticipation over how the

Coalition Government would balance its commitment to improving the energy efficiency of all buildings with its promise not to 'gold-plate' EU requirements. Unsurprisingly, it took several months for the Department for Communities and Local Government to publish its summary of the 140 responses and its proposals for moving forward.

Freedom of information

Access to EPC data is currently extremely limited; it is not possible to simply order or download a copy of the EPC for any particular property. Over 80% of respondents agreed with the consultation proposal to extend access to local authorities and to allow access to anonymised data. In fact, support for wider access to EPC data was so great that the Government now proposes to make all EPC data freely available, including the energy rating and recommendations for individual properties. DCLG has now published a Privacy Impact Assessment on this proposal.

Advertisements

The recast Directive requires a property's energy rating to be included in any advertisement. Virtually all respondents supported this, and 90% agreed that this should be implemented before the revised Directive as a whole takes effect in 2013. The Coalition Government has, however, decided against early implementation, on the basis that this would constitute 'gold-plating'.

Quite what needs to be included in the advertisement will no doubt form the subject of a healthy debate at a later date.

Extending the EPC net

The consultation proposed extending the EPC requirement, so that an EPC would have to be provided on the renting-out of houses in multiple occupation (HMOs) and on certain holiday lettings.

Despite near-unanimous approval of the proposal, the Government has decided not to extend the EPC requirement to HMOs, on the basis that this is not required by the EU Directive. The Government has, however, amended its guidance with effect from 30 June 2011 to require EPCs to be provided for holiday lets where the property is rented out for a combined total of four months or more each year.

Private sector DECs

The issues surrounding the extension of DECs to commercial buildings were considered in the autumn 2010 edition and the Government's response to this particular issue was particularly eagerly awaited. Something has to be done to satisfy the requirements of the revised EU Directive for energy certificates to be displayed in commercial buildings; but simply extending the full DEC regime to the private sector would go beyond the requirements of the Directive.

We shall have to wait a while longer to discover precisely



how display certificates will apply to the private sector. The Government says it is exploring how to take this matter forward when implementing the revised Directive, but in the meantime a voluntary approach will be promoted.

Air conditioning reports

As well as introducing EPCs and DEC, the same legislation also required the regular inspection of air conditioning systems and recommended the regular inspection of boilers. The consultation proposed that it should become mandatory for air conditioning reports (ACRs) to be lodged on the central EPC register. That proposition having received considerable support among respondents, the Government intended to introduce this requirement from 1 July 2011, although this has now been delayed.

The consultation did not propose making regular boiler inspections compulsory but, since this is mentioned in the revised Directive, it can only be a matter of time.

Energy Bill

The Energy Bill currently progressing through Parliament seeks to put EPCs to work. The Bill establishes the 'Green Deal', a scheme expected to commence in 2012 and designed to promote energy efficiency measures paid for through savings in energy bills.

The Bill will allow the Secretary of State to make regulations permitting the disclosure of EPC, DEC and ACR data. The brief published by the Department of Energy and Climate Change suggests that this power will be exercised to permit accredited 'Green Deal' providers to access that data for energy efficiency purposes.

The Bill will also create rule-making powers, allowing the Secretary of State to make regulations affecting privately-rented domestic and commercial properties if a review in 2014 concludes that insufficient voluntary action has been taken under the Green Deal.

For domestic properties, those regulations could prohibit landlords from unreasonably refusing consent to energy efficiency improvements required by their tenants (subject to Green Deal or other funding being available) and allow local authorities to require the worst performing properties to be brought up to an acceptable standard.

Landlords of commercial properties could be required to bring their properties up to an acceptable standard before they can be rented out.

Conclusion

Although further detail is required in due course as to how EPC ratings will be included in advertisements and how the display certificate regime will be extended to the private sector, it is apparent from its response to the consultation that the Coalition Government continues to view EPCs as an important vehicle to drive energy efficiency in both domestic and commercial buildings.

And, encouragingly, the Energy Bill proposals to use EPC ratings to determine which poorly-performing properties must be improved will, for the first time, give much-needed teeth to the EPC regime.

Bill Chandler

bill.chandler@hilldickinson.com

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Update

Competition time (winter 2010/11)

In the winter edition, we considered the OFT's draft guidance on the application of competition law to land agreements. Since 6 April 2011, restrictive covenants, exclusivity agreements and other restrictions on the use of land have been subject to the full force of competition law for the first time.

The OFT has subsequently published its final guidance, which can be found on the OFT website:

http://www.of.gov.uk/shared_of/consultations/land-agreements/land-agreements-guideline.pdf

The final guidance includes additional worked examples and clarifies some (although not all) of the issues identified with the draft guidance. As expected, however, the fundamental principles have remained unchanged and the key question will usually be whether the particular restriction has an appreciable effect on competition in the relevant market.

The final guidance also indicates that the OFT is 'unlikely' to pursue offenders with a market share below 30%, but this should not be relied upon for several reasons:

- the OFT does not guarantee that this will always be the case;
- even a small operator may actually have a 30% share in the relevant local market; and
- even if the OFT does not pursue, there is still the risk of third party claims and the restriction being held to be void.

Ask Hill Dickinson!

Is there a topic you have always wanted to see discussed in this newsletter?

Is there an issue that is affecting you or your business on a regular basis?

Have you got a burning legal question that you have always wanted to know the answer to?

Email the editor at bill.chandler@hilldickinson.com and we will deal with as many of your suggestions and questions as possible in forthcoming editions.

If you have any queries about matters raised, please contact:

Bill Chandler

Editorial contact

bill.chandler@hilldickinson.com

David Chinn

Head of Business Services

david.chinn@hilldickinson.com

Martyn Smith

Business Development Manager

martyn.smith@hilldickinson.com

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