Your guide to...

Rights of Light

The history of a 'Right to Light' in the UK arises from general property law relating to easements dating as far back as the 17th century. The Ancient Lights Law was replaced by the 1832 Prescription Act but why has this become so significant in the past ten years?

A Right to Light is an easement, which is generally defined as a right a person has over land owned by someone else. It can be created by express grant, such as set out in a conveyance or deed, or by prescription over a period of time. The latter is the most common way rights are acquired, by an easement of light under Section III of the Prescription Act 1832. For an aperture to acquire a right of light, it must have enjoyed that light uninterrupted for 20 years or more. The injury is not based on the amount of light which is lost, it is the amount of light that a room is *left with,* which is relevant.

Rights of light generally become an issue when a new development affects the access to light of an adjoining property and as our ever-expanding population has led to more development in our cities, and increasingly buildings going skywards, this has in turn intensified the problem.

Case Law

During the past ten years there has been a great deal of publicity regarding Rights of Light which has led to considerable change to this risk as a result of recent case law. In 2007, the case of Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd, involved a relatively small loss of light to a staircase, which resulted in an award of damages in lieu of an injunction, by reference to one third of the developer's profits. This considerable amount led to a significant increase in concern for developers and thus a greater requirement for insurance.

A few years later, in the 2010 case of HKRUK II (CHC) Ltd v Heaney, the judge granted an injunction, obliging the developer to demolish the upper floors of an almost-complete development. The loss of light was relatively small and the injunction a rather draconian order, but this was mainly due to the developer's conduct before proceedings commenced. A later case, Ottercroft Ltd v Scandia Care Ltd, was another where the court decided to grant a mandatory injunction, a decision which also took into account the poor conduct of the developer with neighbours.

These very serious penalties led to an increased concern for developers and the risk of an injunction meant insurance may be required to cover the full property value rather than a smaller amount to simply cover damages or a percentage of profit. The Heaney case also started to change the approach and structure of insurance policies.

Generally, policies prior to this time were based on a traditional 'wait and see' approach. This means insuring against a claim from *all* affected properties which sometimes would include higher risk properties, and this led to considerable premiums - as there was naturally a higher probability of a claim. The policy conditions would not allow any communication with owners or occupiers of any of the affected properties.

mason owen...

financial services

The problem with this approach is the lack of communication and neighbourly contact by the developer could, in a court's eyes, increase the risk of an injunction, especially in consideration of the aforementioned cases highlighting the conduct of the developer. Policies over the past few years have become far more sophisticated allowing a much more structured approach to the management of risk. Insurers understand the need for developers to enter negotiations with certain neighbours to agree a resolution, possible settlement and release of rights. There are also matters such as party wall awards, which may involve a surveyor from both sides and previously insurers would be reluctant to allow such contact with an affected party. Nowadays policies will allow contact with owners or occupiers of an affected property under an 'agreed conduct' clause within the policy. Usually this involves a deductible often to the value of the estimated level of damages calculated within a Rights of Light (RoL) surveyor's report. Agreed conduct can be on both a pro active or reactive basis.

This type of policy has been very helpful insuring considerably problematic, high risk sites allowing them to proceed quickly whilst negotiations are ongoing in the background. Negotiations with third parties can take a very long time and in the past we have experienced developments which have stalled for years whilst discussions have taken place and deeds of release of rights agreed. Policies can include a mix of properties on an agreed conduct basis, and others insured on a traditional 'wait and see' basis. Deductibles can be applied per affected property, and insuring at an early stage, sometimes prior to planning, allows the development to proceed providing the comfort of a fixed budget at outset for the developer prior to entering negotiations. This approach can also of course aid funding.

Light Obstruction Notices (LONs)

As mentioned above, the apertures in a building can acquire a prescriptive right of light after 20 years' continuous enjoyment. In order to stop such a right arising, a developer can put up an actual obstruction, such as a building. However, the Rights of Light Act 1959 provides a quicker and more cost-effective method of interrupting the enjoyment of light by allowing for the erection of Light Obstruction Notices. These notional obstructions act in effect like a screen of infinite height and must commence within 19 years and 1 day of the start of the prescriptive period in order to prevent rights from being acquired, as once the notice has been registered, the affected neighbouring owners have one year to assert their right to light by the issue of legal proceedings. If the notice remains unchallenged after one year, the right to light is deemed to have been interrupted and the 20-year prescriptive period will start again.

A developer should seek specialist advice from a RoL surveyor and legal opinion in order to place LONs. This should also include research into the history of the neighbouring site as rights of light can transfer automatically from a demolished building to a new replacement building if the position of the windows in the new building is essentially the same as the windows in the demolished building. Even if the neighbouring building is less than 20 years old, should a claimant successfully prove transference of rights from the previous property of the land, they could theoretically challenge the LONs. Some insurers will provide indemnity against a successful challenge to the notices which can be helpful in providing additional comfort to the developer, especially as part of a strategy if other neighbouring properties are affected. This can then allow development to progress without having to wait 364 days until the end of the period in which the neighbouring property can issue legal proceedings to challenge the LON.

Section 203 of the Housing & Planning Act 2016

As a last resort, in the case of major developments with significant public benefit, it may be possible to request the local planning authority to exercise their statutory powers under section 203 of the Housing and Planning Act 2016 to override third party rights, including rights of light. Such powers are rarely used as they require a transfer of ownership to the local planning authority and are usually only considered after negotiations with the relevant parties have failed. If this strategy is undertaken it will remove the risk of an injunction and the neighbouring affected properties cannot claim damages for the impact of rights to light but can claim limited compensation for loss in value of their property. Typically, the local authority will ask the developer to indemnify them against claims for compensation from neighbouring property owners. Insurance can sometimes help in this situation too, and a policy can be provided for the developer rather than having to put funds in escrow to deal with potential future compensation claims.

Insurance arrangement by Mason Owen

There is still a very wide-ranging difference in the approaches, policy parameters and availability between various insurers in the market. At Mason Owen we have over fifteen years' experience helping arrange Rights of Light Indemnity for our clients. We work with all the major insurers in the market, with several different surveying firms and a large percentage of the top UK law firms specialising in this area. We assist the developer helping to manage the approach for the rights of light risk and structuring the insurance to their specific requirements.

Policies can cover the legal costs of defence, settlements or damages awarded to third parties, demolition, rebuilding costs, abortive expenditure, loss in land value and can be extended to protect against delays during construction including contractual obligations and financial penalties.

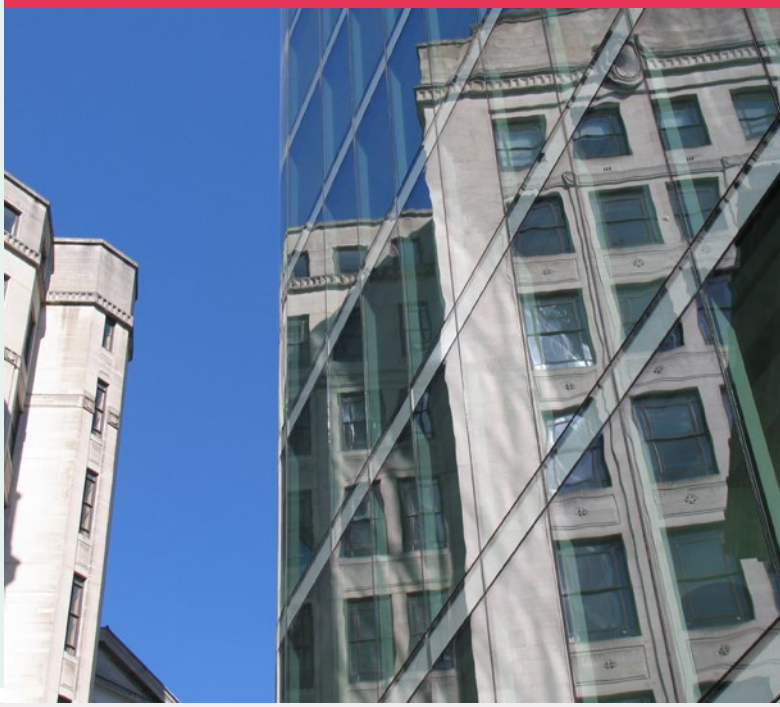
To obtain the best terms from insurers we need to provide as much information as possible as part of a detailed presentation, in order to build a comprehensive understanding of the development. A list of the full information which is helpful is detailed below, however we appreciate sometimes little is available at an early stage, and we can often obtain an initial indication from insurers with just a basic analysis from a RoL surveyor, title documentation and an idea of the indemnity limit required. **Minimum information required in bold below.**

- **Address of the property, full address and postcode or detailed description of the land.**
- **Title Documentation, Official Copy Entries and filed Plan(s) for the target property.**
- **Specialist Rights of Light survey from a recognised firm.** Ideally this should include EFZ figures and a calculation of the potential damages for affected properties.
- **Official copy entries & plans for each of the affected properties** with an actionable loss detailed in the RoL report. A copy of any leases (at least a sample) for each to the affected properties.
- Current (or previous) use of the property and future use once developed.
- Full details of the proposed development including a layout / development plan and elevations along with the proposed timeframe for the development.
- An indication of the fully developed value of the site.
- **Level of cover required,** if there is a moderate to high injunction risk then the full value of the development should always be considered. Alternatively, you may insure for a lower indemnity level to protect against possible damages awarded against you but should always include a reasonable extra amount to consider additional professional fees in the event of a claim and any diminution in value if a cut back scheme had to be implemented.
- Please confirm if the project has external funding and the value of the loan.
- Please provide details of any 'cut-back' loss assessed if the development had to be reduced to preserve Rights of Light to adjacent properties.
- Planning Information. Some insurers will consider providing terms prior to planning but developments which pose a higher risk are likely to require the comfort that the planning process has drawn out any potential claimants.
- If planning has been granted insurers will need to be provided with details of any objections and, if possible, copies of the letters. Please provide a link to the local authorities planning portal. A copy of the planning officers report to the planning committee and the decision notice is also useful to provide insurers.
- A legal assessment of the RoL position is very useful and preferable before we approach insurers but appreciate this is not often undertaken until after the RoL survey so initially any legal assessment for the land acquisition, report on title can be helpful instead. This may identify whether there are any express rights granted (or released) in previous conveyances and any other title issues which may be relevant such as covenants with height restrictions for example.
- Please provide photographs of the property and the affected adjoining properties. Wherever possible, area permitting, we would be happy to conduct a site visit to help gain a better understanding of the development and surrounding area and therefore can assist with photographs of the site to provide insurers.
- Details of any pre-application or public consultation prior to planning.
- Full disclosure of any communication with affected parties and any proposed communication which may be required in future especially party wall awards, crane oversail or scaffolding licences. Please confirm the names of the surveyors acting for the adjoining property owners.
- Please let us know if you are aware of details of any similar developments in the immediate area that could also have an impact of the right to light of neighbours.

Should you require advice on any of the above points please contact us on

0151 255 2600

and ask to speak with a member of the legal indemnity team.



mason owen financial services

Providing protection for our clients for **over 30 years**

E: mail@mofs.co.uk
T: 01512 552 600
mofs.co.uk

7th Floor, 20 Chapel Street, Liverpool, L3 9AG