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## Rights to light: Radical consequences of an orthodox decision

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To that degree, at the very least, the clarity supplied by *Barlow Clowes* is indeed to be welcomed.

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## **Rights to Light: Radical Consequences of an Orthodox Decision**

*Regan v Paul Properties DPF No.1 Ltd*  
[2006] EWHC 1941 (Ch); [2006] EWCA Civ 1319

LT Damages; Expert evidence; Infringement; Mandatory injunctions; Right to light; Sufficiency

### **Introduction**

The right to daylight exists in English Law as a type of easement which can be enjoyed in favour of a window, or other aperture in a building designed to admit light.<sup>1</sup> It has been settled law since the House of Lords' decision in *Colls v Home & Colonial Stores Ltd*<sup>2</sup> that a right to light does not protect all the light then enjoyed by an aperture. It simply provides an entitlement to receive a certain minimum quantity of light. This was described by Lord Lindley as an entitlement to "sufficient light" for the comfortable or beneficial use of the dominant tenement, "according to the ordinary notions of mankind".<sup>3</sup>

Since *Colls* the courts have struggled with two related issues. The first is how, in practice, to measure a sufficiency of light according to ordinary notions of mankind. The second, in cases where light has been found to be insufficient, concerns the principles to be applied when exercising the courts' discretion to grant a mandatory injunction, or to award damages in lieu.

*Regan v Paul Properties No.1 Ltd* addressed both issues. In considering the question of sufficiency the trial court was confronted by the second reported challenge to the established approach to expert evidence in rights to light cases in less than two years.<sup>4</sup> This is of particular interest in the context of

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<sup>1</sup> *Potts v Smith* [1868] L.R. 6 Eq. 311; *Harris v De Pinna* [1886] 33 Ch. D. 238; *Levet v Gas Light & Coke Co* [1919] 1 Ch. 24.

<sup>2</sup> [1904] A.C. 179.

<sup>3</sup> *ibid.*, 208.

<sup>4</sup> See also *Midtown Ltd v City of London Real Property Co Ltd* [2005] EWHC 33, Ch.

growing academic and professional criticism of the methodologies on which expert testimony has traditionally been based. Of more immediate importance, the case also provided the first opportunity for the Court of Appeal to consider the question of remedies for an infringement of a right to light in over 20 years. Its conclusions in this regard contained some particularly harsh, and unexpected, news for developers.

### The facts

The case concerned the impact of a development in Brighton on the daylight enjoyed by a maisonette on the opposite side of the road. The development involved raising two existing two- and three-storey buildings to five storeys. The claimant maintained that the presence of the development's penthouse flat would diminish the light in his living room to below the minimum required by *Colls*.

He raised his concerns with the defendants as soon as he became aware of their proposals. Unfortunately they were acting on professional advice that had failed to recognise the true extent of the loss. The defendants therefore proceeded with their development for a further five months and were only stopped by the issue of proceedings and their giving of undertakings in response to the claimant's application for a prohibitory injunction. By this stage the shell of the penthouse flat was already in place and the interference with the claimant's light was largely complete. The claimant therefore sought a mandatory injunction, requiring the removal of those parts of the penthouse flat, which would return the levels of daylight in his living room to an acceptable minimum.

The evidence showed that the claimant would be unable to use the central portions of the living room for reading owing to the reduction in daylight caused by the development. This would require him, either to use electric light for these activities, or to move into the bay window area at the front of the room with a consequent lack of privacy from the occupants of the development across the road. Agreed valuation evidence showed that the maisonette had been reduced in value by between £5,000 and £5,500 due to the loss of light which had been suffered.

In order to restore the level of daylight required by the claimant it would be necessary to remove the lounge, one of the bedrooms and the en-suite bathroom from the penthouse flat. The cost of

removing the already completed work would be £35,000 and the value of the flat would be reduced by a further £175,000.

### Liability for Infringement of Right to Light

The question of liability, of course, depended on the sufficiency of the claimant's remaining light according to the rule in *Colls*. The trial court received expert testimony to the effect that the light was no longer sufficient. This was based on the traditional methodology, the so-called fifty-fifty rule, first proposed by Waldram in the 1920s, and still used by surveyors today.<sup>5</sup>

In simple terms, this proposes that a room receives sufficient daylight where 0.2 per cent of the sky can be seen from at least 50 per cent of its floor area measured at working plane height. The trial court heard that 66 per cent of the claimant's living room had enjoyed the required level of sky visibility before the development, and that this had now been reduced to 43.5 per cent. According to the fifty-fifty rule, the light was therefore insufficient.

With one notable exception,<sup>6</sup> the outcomes of the reported cases throughout the 20th century suggest that the courts were happy to follow the conclusions of the expert witnesses when deciding on questions of liability. More recently the experts' traditional methodology has been subject to increasing levels of criticism, both from academic writers and from within the experts' own professional institutions.<sup>7</sup>

There is also evidence that litigants and their legal representatives are now willing to question the relevance of the expert evidence on which rights to light cases have previously been decided. For example, defence counsel in the recent case of *Midtown Ltd v City of London Real Property Co Ltd* had argued that it was now time "to dispense with rigid and unhelpful rules that had been devised in the past, such as the fifty-fifty rule".<sup>8</sup>

Significantly, the continuing relevance of the fifty-fifty rule was also challenged by the defendants' counsel in the present case.<sup>9</sup> He maintained that it was not a rule of law, and that other factors were more relevant in deciding whether the claimant had

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<sup>5</sup> See S. Bickford-Smith, and A. Francis, *Rights of Light: The Modern Law* (2000), Ch.12.

<sup>6</sup> *Ough v King* [1967] 1 W.L.R. 1547.

<sup>7</sup> See [www.rightstolight.com](http://www.rightstolight.com).

<sup>8</sup> [2005] EWHC 33 at [59].

<sup>9</sup> [2006] EWHC 1941 at [52] and [67]-[69].

actually suffered any injury. Stephen Smith Q.C. (sitting as a deputy judge of the High Court) agreed that the fifty-fifty rule was not a rule of law but considered that:

“It is a very useful guide which will apply to the majority of cases concerning infringements of rights to light, especially where the dominant tenement is a dwelling house and the room in question is a living room, but it need not be followed in extraordinary circumstances.”<sup>10</sup>

The learned deputy judge duly applied the fifty-fifty rule when making his decision on liability. Describing the 66 per cent floor area with 0.2 per cent sky visibility before the development as “significantly more than the conventional minimum” and the 43.5 per cent after the development as “significantly less than the conventional minimum” he concluded that “on a statistical basis...it is plain that an actionable nuisance has been committed”.<sup>11</sup>

### Choice of remedy

#### *Shelfer principles*

Having found in the claimant's favour on liability the learned deputy judge then considered whether a mandatory injunction would be an appropriate remedy, or whether he should instead award damages in lieu. This was a matter for the discretion of the court under s.50 of the Supreme Court Act 1981. The exercise of this discretion in rights to light cases is subject to conflicting judicial pronouncements regarding the appropriateness of an award of damages.

The leading case is, of course, *Shelfer v City of London Electric Lighting Co*<sup>12</sup> where the Court of Appeal imposed an injunction to restrain a nuisance caused by noise and vibration. The judgments leave no doubt that an award of damages will rarely be an appropriate remedy in cases involving a continuing actionable nuisance and A. L. Smith L.J. proposed his “good working rule” that damages would only be an appropriate remedy:

- if the injury to the plaintiff's legal rights is small;
- *and* is one which is capable of being estimated in money;

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<sup>10</sup> *ibid.*, [67].

<sup>11</sup> *ibid.*, [71].

<sup>12</sup> [1895] 1 Ch. 287.

- *and* is one which can be adequately compensated by a small money payment;
- *and* the case is one in which it would be oppressive to the defendant to grant an injunction.<sup>13</sup>

*A different approach in rights to light cases?*

Despite the clarity of the *Shelfer* principles a number of subsequent judgments had suggested that they could be relaxed in rights to light cases where an award of damages might often be most appropriate. The most influential of these was Lord Macnaghten's judgment in *Colls* where he said *obiter* 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."<sup>14</sup>

This was immediately followed by the decision in *Jolly v Kine*,<sup>15</sup> where the Court of Appeal refused an injunction in a rights to light case and awarded damages. The Court was clearly of the view that a less restrictive approach should now be taken from that advocated in *Shelfer* and this is apparent from the judgment of Cozens-Hardy L.J.:

"I think it is impossible to doubt that the tendency of the speeches in the House of Lords in *Colls v Home & Colonial Stores Ltd* is to go a little further than was done in *Shelfer v City of London Electric Lighting Co*, and to indicate that as a general rule the Court ought to be less free in granting mandatory injunctions than it was in years gone by."<sup>16</sup>

The Court of Appeal again awarded damages in the rights to light case of *Fishenden v Higgs*<sup>17</sup> and once again sought to distinguish the approach taken from that proposed in *Shelfer*. Maughan L.J. considered that A.L. Smith L.J.'s good working rule was "not a universal or even a sound rule in all cases of injury to light" and felt that an interference with a right to light "differed enormously" from injury by noise and vibration.<sup>18</sup> Lord Hanworth summarised the Court's position when he said:

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<sup>13</sup> *ibid.*, 322–323.

<sup>14</sup> Above fn.2, 193.

<sup>15</sup> [1905] 1 Ch. 480.

<sup>16</sup> *ibid.*, 504.

<sup>17</sup> (1935) 153 L.T. 128.

<sup>18</sup> *ibid.*, 144–145.

“It seems to me, therefore, that these rules in the *Shelfer* case must now be taken with the concomitant passages to which I have referred in the later cases, in *Colls* and in *Jolly v Kine*, and that we ought to incline against an injunction if possible.”<sup>19</sup>

Although two subsequently reported rights to light cases<sup>20</sup> have applied the *Shelfer* principles in their pure form (and granted injunctions) the recent decision in *Midtown*<sup>21</sup> once again appeared to confirm the courts’ general reluctance to grant injunctions for infringements of a right to light.

In that case Peter Smith J. did not accept that a victim of an infringement of light had an entitlement to an injunction, virtually as of right, and considered that the court instead had to strike a fair balance after considering all the circumstances of the case. On this basis, despite a substantial injury to the claimants, he declined to grant an injunction and instead made an award of damages.<sup>22</sup>

#### *Award of damages and appeal*

After reviewing these decisions the learned deputy judge in *Regan* concluded that it was no longer an exceptional course to refuse an injunction for the infringement of a right to light and that the onus was now on the claimant to demonstrate why damages would not be an appropriate remedy.<sup>23</sup>

He did not consider that there was anything in the defendants’ conduct that would disentitle them from asking for an award of damages in lieu of an injunction as they had acted throughout on the advice of their surveyor.<sup>24</sup>

In the absence of oppressive or high-handed conduct by the defendants he therefore awarded damages in lieu of an injunction. Somewhat ironically, in view of his earlier comments, he also justified the decision by reference to the four *Shelfer* criteria which, he concluded, had all been satisfied.<sup>25</sup>

His conclusions in this regard emphasised the smallness of the claimant’s injury compared to the cost to the defendants of complying with an injunction. One third of the claimant’s

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<sup>19</sup> *ibid.*, 139.

<sup>20</sup> *Pugh v Howells* [1984] 48 P. & C.R. 298; and *Deakins v Hookings* [1994] 1 E.G.L.R. 190.

<sup>21</sup> Above fn.4.

<sup>22</sup> Above fn.4, [77] and [80].

<sup>23</sup> [85].

<sup>24</sup> [90]–[94].

<sup>25</sup> [95].

living room remained well lit and the room had not, therefore, been rendered uninhabitable. The loss of value to the claimant's maisonette (a maximum of £5,500) was also small when compared to the loss of floor area, and its effect on the likely selling price of the defendant's penthouse flat. This would be disproportionate to the amount of harm caused to the claimant.

The claimant duly appealed to the Court of Appeal against the refusal to grant an injunction. His grounds of appeal were that the learned deputy judge had misdirected himself in law in ruling that an award of damages was not an exceptional course, and in placing the burden of proof on a claimant to persuade the court that damages were not an appropriate remedy. Furthermore, he maintained that the learned deputy judge had also incorrectly applied the *Shelfer* principles to the facts of the case.<sup>26</sup>

### Decision in the court of appeal

#### *Relevant principles*

The Court of Appeal's judgment was delivered by Mummery L.J. He noted that *Shelfer* was a Court of Appeal case that was binding on the Court in the present case.<sup>27</sup> He did not accept Cozens-Hardy L.J.'s conclusions in *Jolly v Kine* about the tendency of the speeches in the House of Lords in *Colls* to go further than was done in *Shelfer*. Any such "tendency" was only evident in the *obiter* remarks in Lord Macnaghten's speech. Lord Macnaghten had described his comments as "practical suggestions" and had expressly stated in his judgment that he did not intend them to be authoritative.<sup>28</sup>

On this basis his lordship concluded that some of the later cases had treated Lord Macnaghten's observations "as having an effect which they did not, and were never intended, to have."<sup>29</sup> He considered that *Fishenden v Higgs and Hill* also came into this category and concluded that the learned deputy judge had "gone too far" in treating it as authority for placing the onus on a claimant to persuade a court that he should not be left with a remedy in damages.<sup>30</sup>

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<sup>26</sup> [2006] EWCA Civ 1319 at [26] and [33].

<sup>27</sup> [35].

<sup>28</sup> [39] and [46].

<sup>29</sup> [39].

<sup>30</sup> [57].

His lordship also made reference to the judgments in the Court of Appeal in *Slack v Leeds Industrial Cooperative Society Ltd.*<sup>31</sup> Although the learned deputy judge had not discussed these, they also provided a reaffirmation of the *Shelfer* principles.

### *Findings*

Based on these authorities the Court of Appeal held that the learned deputy judge had acted on a wrong principle of law in placing the onus on the claimant to show why damages should not be awarded. It therefore exercised the trial court's discretion afresh and granted the mandatory injunction sought by the claimant.<sup>32</sup>

In doing so his lordship made reference to the *Shelfer* principles. He did not regard the claimant's loss, which involved a substantial interference with the use of his living room, as "a small injury". The learned deputy judge's remarks about the room not being rendered uninhabitable indicated that he had not taken the correct approach in relation to the size of the injury.<sup>33</sup>

Although he accepted that the injury was capable of being estimated in money he did not think that it could be compensated by a small monetary payment. There were different ways of calculating the loss. A money payment calculated according to the principles of equitable compensation, and therefore based on a proportion of the developer's net profit, would not be small. The learned deputy judge had also been wrong to link his consideration of this issue with the comparative cost to the defendants of complying with an injunction.<sup>34</sup>

Finally, in view of the conduct of each of the parties, his lordship did not consider that it would be oppressive to the defendants to grant an injunction. The claimant had objected to the development as soon as he became aware of it. In the face of this objection the defendants had chosen to take "a calculated risk" and to continue with the construction operations "with their eyes open". Although they had acted on the advice of their surveyor, this advice turned out to be wrong. The defendants must take the consequences of this rather than throwing them onto the claimant in order to deny him his prima facie entitlement to an injunction.<sup>35</sup>

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<sup>31</sup> [1924] 2 Ch. 475.

<sup>32</sup> [69].

<sup>33</sup> [70].

<sup>34</sup> [71] and [72].

<sup>35</sup> [73]-[75].

### Conclusions

The decisions, both at first instance on liability, and in the Court of Appeal on the grant of an injunction, represent an adherence to textbook orthodoxy. The continued reliance on the fifty-fifty rule is probably unsurprising. Despite growing criticisms of the technique it has provided a useful rule of thumb for the courts in rights to light cases for over 80 years. Although other techniques have been proposed, they remain undeveloped and any alternative will take time to gain widespread acceptance. In the meantime, whatever its undoubted flaws, the fifty-fifty rule continues to provide the courts with a welcome element of certainty in the highly uncertain process of determining sufficiency of daylight according to the rule in *Colls*.

The Court of Appeal's decision on the granting of the mandatory injunction has more immediate consequences. Although it is difficult to fault the reasoning behind it on doctrinal grounds it is equally difficult to question the learned deputy's judge's observations during the trial that, in practice, mandatory injunctions have been a rare event in rights to light cases. Indeed, the courts' preference for awarding damages, even in the most extreme circumstances, seemed to have reached its apogee in the *Midtown* decision.

Nevertheless, despite the practical realities of the situation, Lord Macnaghten's observations had been allowed to sit uneasily alongside A. L. Smith L.J.'s good working rule for over a century without apparently challenging its essential tenets. To a large extent, the learned deputy judge's decision simply reflected established practice in rights to light cases. However, by expressing it as a decision based on a reversal of the established burden of proof, he forced the Court of Appeal to make a choice between the statement of law in *Shelfer* and that in *Colls*. In doing so it chose to reaffirm the traditional *Shelfer* principles and, theoretically at least, to reverse the courts' longstanding developer-friendly approach to remedies in rights to light cases.

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