A trick of the light

What is and what is not a consent under s3 of the Prescription Act 1832 can be a tricky question to answer, as Andrew Francis finds out

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Section 3 of the Prescription Act 1832 reads as follows (my emphasis):

> **Claim to the use of light enjoyed for 20 years.**
>
> When the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, *unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.*

The issues

It is invariably a matter of construction as to whether the provision under scrutiny amounts to a consent within s3. The Court of Appeal's decisions in *RHJ Ltd v FT Patten (Holdings) Ltd* [2008], and in *Salvage Wharf Ltd v G & S Brough Ltd* [2009], provide much modern assistance in resolving this question. In the former case the Court of Appeal held that the provision does not have to refer to light expressly in order to be effective as a consent within s3 preventing prescriptive enjoyment of light.

Quite apart from whether the provision is a consent within s3, another commonly encountered issue is whether the provision can bind, or benefit, successors in title. In many cases the provision may be unclear as to whether successors in title are meant to take the benefit of the consent (servient owners are relevant here) and whether the burden also passes; dominant owners being relevant here. In some cases the provision may not be noted on the relevant titles, the key being the dominant title. So if the provision is seen as a restrictive covenant (eg not to object to building or assert a prescriptive right to light) then it will not bind the dominant owner; *CGIS City Plaza Shares Ltd v Britel Fund Trustees Ltd* [2012] is an example of such a provision being held to be a restrictive covenant. But if the provision is not noted on both titles, and certainly the title 'bound' (the dominant owner), there is a serious question over validity as a matter of registration and notice. There are also the questions whether the provision is personal to the original parties, whether it is expressed or intended (eg by implication) to bind or benefit successors, and whether s78 or s79 Law of Property Act 1925 have any part to play. Ultimately this process of construction has to be carried out in order to determine the true meaning and effect of the provision. In carrying out that task the modern approach to construing terms of documents, as set out by the *Supreme Court in Rainy Sky SA v Kookmin Bank* [2011], will be adopted, however old the provision in question.

One particular problem

But there is another question: does the servient owner have to own the servient land at the time when the consent is entered into?

Take the following facts.

The first alternative

L owns the freehold of White Tower and grants leases to tenants (T) that declare (rather curiously) that the enjoyment of light *by* an adjoining building (Black Tower) over White Tower is permissive and by the consent of L. It seems clear that if L does not own Black Tower, L cannot affect the enjoyment of light by that building at the date when the leases are granted. It has no jurisdiction over Black Tower. If L acquired Black Tower at a later date it may be arguable that the benefit of the provision could be claimed by L, with effect from the date of acquisition.

The second alternative

The facts are as above, save that the leases granted to T declare that the enjoyment of light *by White Tower over Black Tower* (not owned by L) is permissive and by the consent of L. Does this amount to an effective consent within s3? If it does, and if L later acquires Black Tower and wishes to redevelop it, causing actionable interference to light enjoyed by T in White Tower, could L rely on the terms of the leases? *Paragon Finance plc v City of London Real Property Company Ltd* [2001] suggests that the answer to this question is no. L must have an interest in the servient land (Black Tower) when the leases are granted. But it is suggested that this answer depends on the construction of the provision, and the extent of L's obligation not to derogate from their grant, as was made clear by HHJ Rich QC in *Paragon*. It is also an answer that does not sit comfortably with the principle held to be established in *Paragon*, that in order to be a consent within s3, the provision does not have to be made by, or with, the servient owner. Here *Paragon* is in conflict with the old case of *Hyman v Van den Bergh* [1908], and although not referred to in the judgment of HHJ Rich QC in *Paragon*, it is not known whether the earlier case was cited in argument. It is also the case that a consent under s3 can be entered into by the lessee of the freehold owner of the dominant land with the servient owner without the tenant's landlord, the freehold owner, being a party (see *Marlborough (West End) Ltd v Wilks Head & Eve* [1996]). (Most modern leases prevent the tenant doing this. But it is suggested that a consent entered into by the tenant in breach of that term would still arguably be valid in favour of the servient owner who would not be subject, or privy, to the covenants in the tenant's lease.)

It should be pointed out that the answer to the questions raised by both examples are important given the ability of a tenant (subject to the terms of their lease) to acquire a prescriptive right of light under s3 against the servient freeholder, even if the latter is their own landlord (see *Fear v Morgan* [1907]).

Conclusion

What is clear is that the law relating to consents potentially within s3 is not clear. This may be because they fit uneasily between contract and covenant law (as equitable interests) and the law of easements where legal interests are encountered (see s1(2) and (3) Law of Property Act 1925). These provisions, as consents within s3, are a sort of 'hybrid' term. If they take effect as covenants they are clearly equitable interests and the burden requires registration. But if they take effect within the framework of easement law and amount to a condition upon which light is enjoyed, they should not fall within a registration regime and should bind or benefit the land as part of the rules which govern easements as legal interests in land, even though in most cases the prescriptive easement will be inchoate. Quite apart from the question whether a provision (eg relating to future enjoyment of light or the ability to build) amounts to a consent within s3, as opposed to a mere reservation of rights or an exclusion of any grant under s62 Law of Property Act 1925 (on which *Marlborough*, as considered by Peter Smith J in *Midtown Ltd v City of London Real Property Company Ltd* [2005], is very helpful), the other questions, such as whether the provision within s3 binds or benefits successors, and whether the servient owner had to be a party to or own land at the time the provision was entered into, are all hard to answer. The law is capable of further development here. It is hoped that this short note will at least raise an awareness of the issues, even if it does not provide comprehensive answers. ■

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Further reading

Gale, *Easements*, 19th ed (2012) Chapter 4, paras 4-23-4-41.

Bickford-Smith, Francis and Weekes, *Rights of Light: The Modern Law*, 3rd ed (2015) Chapter 6, paras 6.63-6.66 and Chapter 9, paras 9.99-9.35.

CGIS City Plaza Shares 1 Ltd & anor v Britel Fund Trustees Ltd [2012] EWHC 1594 (Ch)
Fear v Morgan [1907] AC 425
Hyman v Van den Bergh [1908] 1 Ch 167
Marlborough (West End) Ltd. v Wilks Head & Eve [1996] NLD 156
Midtown Ltd v City of London Real Property Company Ltd [2005] EWHC 33 (Ch)
Paragon Finance plc v City of London Real Property Company Ltd [2001] EWHC Ch 483
RHJ Ltd v FT Patten (Holdings) Ltd & anor [2008] EWCA Civ 151
Rainy Sky SA & ors v Kookmin Bank [2011] UKSC 50
Salvage Wharf Ltd & anor v G & S Brough Ltd [2009] EWCA Civ 21