

**PREVENTING THE ACQUISITION OF A RIGHT OF LIGHT BY A CONSENT
WITHIN SECTION 3 PRESCRIPTION ACT 1832? HOW CAN IT BE DONE AND
WHAT PITFALLS ARE THERE?**

By Andrew Francis, Barrister.

Serle Court, 6 New Square, Lincoln's Inn, London WC2A 3QS.

020 7242 6105

afrancis@serlecourt.co.uk

(Co-author of Rights of Light, The Modern Law, 3rd Edn. (2015) (Jordans)).

1. The Context.

Property owners and developers do not like the prospect of adjoining property owners acquiring rights against them which might inhibit future development of the formers' land. Victorian estate developers invariably included terms in plot sales that prevented the new properties from acquiring light over adjacent land, or excluded any building scheme of covenants in estates below the highest class. Nowadays the main concern of developers (in particular landlords where residential blocks of flats are being built) is to ensure that freehold owners, or tenants do not acquire rights, particularly rights of light, against the adjacent land which may, or may not be owned by the developer, or landlord. This is because of the need to ensure that on any future development of that land, no adverse rights have been acquired against it by tenants if not the freehold owner of the dominant land. Rights of light present a

particular difficulty because such rights can be acquired by tenants under s. 3 Prescription Act 1832 (“s. 3”) not only against third party owners of the servient land, but also against the tenant’s own landlord as owner of such land; *Morgan v Fear* [1907] AC 425. What is also relevant as between landlord and tenant is the need to ensure that the landlord’s future actions (or those authorised by him) do not breach the landlord’s covenant for quiet enjoyment, or the principles of non-derogation from grant as between landlord and tenant. This article does not deal with those issues, but examines the problems raised by the question – *does this provision prevent a right of light from being acquired under s. 3 and can my client rely on it, or is he affected by it?* Whilst the focus will be on preventing a right of light being acquired under s. 3, it is noted that terms of the sort referred to below (excluding acquisition of a right of light under s. 3) may also amount to evidence preventing the fictional presumption of a grant under Lost Modern Grant (“LMG”) as between freeholders; *Odey v Barber* [2008] Ch 175. Leaseholders cannot assert a right of light under LMG; *Simmons v Dobson* [1991] 1 WLR 720. But this rule has been called into question in Hong Kong by Lord Millett in *China Field Ltd. v Appeal Tribunal (Buildings) No. 2* [2009] 12 HKFAR 342. It should also be noted that this article does not deal in detail with restrictive covenants which relate to rights of light, or agreements which give permission to build within defined limits, or upon certain terms. Nor does it deal with other means by which acquisition of a right of light can be prevented; eg. by a Light Obstruction Notice under the Rights of Light Act 1959.

2. The law.

At the heart of the question whether the provision stops a right of light from being asserted under s. 3 are the terms of that section. What is a consent under s. 3 of the Prescription Act 1832 can be a tricky question to answer. The section states:-

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.

(My emphasis).

What is clear is that s. 3 specifically governs what is a consent. It therefore fits within the law of prescriptive easements. As might be expected from a statutory provision dating from 1832, when the modern law of restrictive covenants had another 16 years to emerge (*Tulk v Moxhay* in December 1848) and registration of legal and equitable interests supplanting the doctrine of notice was not fully developed until 1925, s. 3 says nothing about how consents within it are to “run with” the land affected, if they are to do so at all. The other feature of this area of law is that whereas titles are invariably silent about prescriptive rights, agreements and other documents containing consents may or may not be noted on the servient, or dominant titles. Whether consents within s. 3 require noting on any register of title is not specifically governed by the Land Registration Act 2002, or the Land Charges Act 1972.

3. The subject of this article.

This article considers the main issues that frequently arise when examining whether there is an effective consent within s. 3 and how, when drafting documents in transactions where rights of light may be an issue in the future, to avoid disputes over whether there is or is not a consent within s. 3, and whether a prescriptive right of light can be asserted.

4. The issues.

The main questions which arise when asking does this provision prevent a right of light from being acquired under s. 3 and can my client rely on it, or is he affected by it, are as follows:-

(i) *Is the provision a consent within s. 3?*

This is a question of construction of the provision in context. The modern principles of construction should be used to determine the answer; see *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900.

The question is does the provision “*make the enjoyment of light permissive or consensual, or capable of being terminated or interfered with by the adjoining owner, and is therefore inconsistent with the enjoyment becoming absolute and indefeasible after 20 years.*” (Per Lloyd L.J., at para. 44, in *RHJ Ltd. v FT Patten (Holdings) Ltd.* [2008] Ch 341.) A provision which amounts to a consent within s. 3 should be distinguished from a reservation of light (eg. by the tenant to his landlord) or a provision which stops a grant of existing “rights” as quasi easements on a transfer or grant of a lease under either s. 62 Law of Property Act 1925, or *Wheeldon v Burrows* (1879) 12 Ch D 31; see *Marlborough (West End) Ltd. v Wilks Head & Eve* (1996 - unrep. judgment 20th December 1996) for this distinction clearly stated by Lightman J.

Other issues that arise under this question are, for example:-

- To what apertures does the consent relate?

- What happens if the building with the apertures which are the subject of the consent in it is demolished and replaced with a new building with apertures that may, or may not be in the same position as the old ones?
- What happens if an annual, or other sum expressed as a term of the consensual enjoyment of the light is not paid? Does the consent then fall away so that after 20 years from the last payment the right of light can be asserted?

These are all fact specific and invariably raise drafting and evidential questions. They serve to show how important a close examination of the relevant document and the background evidence of enjoyment and the history of the buildings on the dominant land will be in advising on the servient and dominant owners' rights.

(ii) *Does the dominant owner have to own the servient land at the time when the consent is entered into?*

Suppose A owns Pink Land which overlooks Blue Land. A does not own the latter. A sells Pink Land to B and the transfer declares that B has the right to build on the Blue Land even though that would interfere with light to the Pink Land. Does this amount to a consent within s. 3? *Paragon Finance v CLRP Co. Ltd.* [2002] 1 EGLR 97 ("*Paragon*") (where the terms of a lease had to be construed) suggests that the answer to this question is no, as A must have an interest in the servient land (Blue Land) at the time of the transfer. The same point arises where A grants a lease to T on the Pink Land, reserving in the lease the right to develop adjoining land such as the Blue Land, which A does not own. Can T claim a right of light over the Blue Land? It is suggested that two points arise in such a case. First A, can refuse to grant rights to those taking an interest under him; i.e. he can stop T claiming a right of light

by providing in the lease that rights of light both now and arising in the future are reserved to A. This is effective; see *Paragon* (above) at p. 100. Secondly, insofar as A provides that he reserves the right to build on adjoining land, even though that might cause a loss of light to T, it is suggested that A should own that land at the time of the grant of the lease. That is the effect of *Paragon*.

(iii) *What is the position if the servient land is acquired subsequently by A and T claims a right of light?*

In his second judgment in *Paragon*, H.H.J. Rich Q.C. held that the right to develop clause in the lease could, as a matter of construction, be held to apply to land acquired by the landlord after the grant of the lease, but held that in that case it did not. As a matter of construction it ought to be clear that this is the intended result either expressly (which is rarely the case) or by implication. A further question arises when the acquisition is either before, or after the expiry of 20 years enjoyment by T. It is suggested that if the provision is a consent within s. 3 from the outset, the date of acquisition should not affect T's right of light, or lack of it. But if it is not a consent until the date of acquisition, it may take effect then only if 20 years enjoyment by T has not been completed.

(iv) *Must the provision be made with the servient owner so as to amount to a consent within s. 3?*

The last four sub-paragraphs all beg the question whether in order to be effective as a consent within s. 3 the provision (eg. the right to develop adjoining land) must be made by the dominant owner with the servient owner, or in either case, with someone having an interest in the land. It is clear that a tenant of the dominant land can agree with the servient land owner that enjoyment of light is to be by consent, even without the agreement of the tenant's landlord; see *Marlborough (West End) Ltd. v Wilks Head & Eve* (above). (Modern forms of

lease usually prevent the tenant doing this). But where the servient owner is not a party, can he take the benefit of the consent represented by the “right to build” clause? S. 3 does not say between whom the “consent or agreement” is to be made, but there is clear law that the consent, whilst it must be in writing, does not have to be signed by the servient owner. It is suggested that the answer is that the servient owner need not be a party and the provision (eg. the right to develop clause) can be effective under s. 3 for two reasons. First, it is the dominant owner who is burdening his land with what is effectively a declaration that he will not acquire a right of light against the adjoining land. Why should he not do that unilaterally, particularly where he wants to bind his tenants? Secondly, if the provision is construed as a consent (see (i) above) the enjoyment of light is subject to the enjoyment of light being under a condition that the enjoyment could be interfered with by future building on the servient land at any time. This means that the enjoyment is “*capable of being terminated or interfered with by the adjoining owner, and is therefore inconsistent with the enjoyment becoming absolute and indefeasible after 20 years*”; see *R.H.J. Ltd. v F.T. Patten Ltd.* above. This is not a point that seems to have been considered in *Paragon*.

(v) *Does the consent within s. 3 bind, or benefit successors in title?*

It may be unclear as to whether successors in title are meant to take “the benefit” of the consent (servient owners) or whether “the burden” passes to the dominant owners. In some cases the provision may not be noted on the relevant titles, the key being the dominant title. If the provision is treated as a restrictive covenant (eg. not to assert a prescriptive right to light) then it will not bind the dominant owner as successor in title of the original party to the covenant (as covenantor) if it is not registered on his title; see *CGIS City Plaza Shares Ltd. & Anor. v Britel Fund Trustees Ltd.* [2012] EWHC 1594 (Ch). If the provision is not noted on the “benefited” title (the servient land) there may be an issue over whether the successor of the original party can take the benefit of it. Finally, whether the provision is personal to the

original parties, and whether it is intended to bind or benefit successors and whether s. 78 or s. 79 Law of Property Act 1925 have any part to play are all questions that can arise.

5. **Drafting considerations.**

In an attempt to avoid the issues referred to above advisers should consider the following points. Please note that there are two qualifications that override the points made below. First what may be commercially acceptable between the parties may well dictate different terms, or exclude any element of what is suggested below. Secondly statutory provisions (eg. on enfranchisement) may prevent certain terms being included in the transfer or grant of new or extended leases.

(i) On the disposition of freehold titles, ensure that both servient and dominant owners are parties to any consent which is clearly stated to be a consent within s. 3. (This is quite apart from excluding s. 62 Law of Property Act 1925 and any implied grant of easements under *Wheeldon v Burrows* (1879) 12 Ch D 31; see paragraph 4(i) above.) Declare any such consent to bind successors in title etc. of both parties and ensure that the consent is noted on each party's title.

(ii) On the grant of leases, reserve all rights of light to the landlord (freehold owner). That should be enough to stop a tenant's claim to light. If a belt and braces approach is preferred, declare the tenant's enjoyment of light to be subject to the landlord's right to terminate it. It is suggested that a mere consent will not work, as stated above, if the landlord does not own the servient land when the lease is granted. If he does not own that land at that date it may be possible to get round this problem by declaring that the landlord may authorise the servient owner to interfere with his

tenant's light; eg. by the landlord giving authority to the servient owner to carry out building work that may interfere with the tenant's light.

(iii) Consider covenants not to object to building on defined adjoining etc. land, or to allow building on that land within certain permitted limits; see *CGIS City Plaza Shares Ltd. & Anor. v Britel Fund Trustees Ltd.* referred to at paragraph 4(v) above.

6. Conclusion.

The law relating to consents within s. 3 is not clear. This may be because they fit uneasily between covenant and easement law. Consents within s. 3 are a sort of “hybrid” provision. If they take effect as covenants, they are clearly equitable interests and “the burden” requires registration. If they take effect within the framework of easement law and amount to a condition upon which light is enjoyed (the author's preferred view - unless the terms point towards a covenant) they should not fall within the rules of registration of equitable interests. They should benefit, or bind the relevant land by affecting a legal interest (the easement of light) even though in most cases the prescriptive easement will be inchoate. The law needs clarifying and short of legislation based on the Law Commission's draft Bill in 2011, the Courts may be required to provide clarity.

Andrew Francis.

Serle Court, Lincoln's Inn.

15th April 2015.

© Andrew Francis 2015.