Questions and answers: part 3

Andrew Francis deals with the more complex rules that lie behind the topics covered in the first two rights of light Q&As

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'Enjoyment may be asserted by lessees even against their own landlord. This rule is unique to rights of light asserted under s3.'

Question 1

What technical rules apply to the acquisition of a right of light by long enjoyment?

Answer

As was stated in 'Questions and answers', *PLJ*324, September 2014, p6, highly technical and complex rules govern the acquisition of rights of light by long enjoyment (prescription). Also as stated there, the two alternative means of acquisition are under either s3 Prescription Act 1832 (and within the terms of s4 of that Act) or lost modern grant (LMG). It is necessary to look at each in turn.

Question 2

What technical rules apply to claims under s3?

Answer

There are six key requirements.

(i) There must be actual enjoyment of light continuously for 20 years calculated back from the date on which the right is formally brought into question. This means that the light must have been received through the aperture referred to at (ii) below, for a continuous period of 20 years. This period is calculated back from the date on which the right of light is formally challenged; eg by the issue of a claim form or a counterclaim in existing proceedings, or a reference under s73 Land Registration Act 2002. Continuous enjoyment is the key. The internal boarding up of windows for a substantial period of time will prevent the right from arising; see *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square Ltd)* [2006]. The effect of trees (evergreen or deciduous), brise soleil and opaque balcony glazing can be hard to resolve. The enjoyment must not be illegal; eg through windows in breach of planning control and at risk of enforcement action by the local planning authority.

(ii) Enjoyment must be for the benefit of a building through an aperture in it. A building does not have to be a house, as it can include buildings of other uses, such as churches, greenhouses and carports. The building does not have to be occupied. An aperture can include the glazing in a door. The glazing must admit light to a fair degree, so it can't be opaque. The opening for the window must be in place, but not the window frames or glazing. Where buildings were under construction, the key question will be when did the structure become a building and when were the apertures created? Construction records (eg daywork reports and photographs) will be crucial evidence. Where the position of the apertures has changed within the 20-year period, it is a question of evidence whether the present apertures are sufficiently coincidental in both horizontal and vertical planes to enable the right of light to

be asserted through them (see *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931]). Historic building records and survey reports will be important.

(iii) That enjoyment must be without the written consent of the servient owner or their agent. What amounts to consent within s3 can be a difficult question. The documents on the titles to the dominant land will reveal whether there are any consents potentially within s3. The key questions will be whether the terms amount to consent, and whether they benefit or bind the current owners of the dominant and servient land. Linked to this may be whether the terms amount to a restrictive covenant as to building (eg at all or as to heights) or raising objection, whether the registration rules as to covenants have been observed, and whether the terms of consent give liberty to build above certain heights. Recent authority on these issues includes *RHJ Ltd v FT Patten (Holdings) Ltd* [2008], *Salvage Wharf v G&S Brough Ltd* [2009] and *CGIS City Plaza Shares Ltd v Britel Fund Trustees* [2012]. There is no escape from a close consideration of the construction and effect of the relevant documents when determining whether the right can be asserted because of their terms. Because of point (v) below, leases will also have to be examined carefully.

(iv) That enjoyment must have been without interruption. An interruption within s3 is effectively defined by s4 as a period of one year, during which the dominant owner has submitted to, or acquiesced in, the interference with their light, and where they have 'notice' of that fact and of the person making or authorising that interference. If the servient owner builds so as to interfere with the light, and that interference is not objected to for a year (as in *Dance v Triplow* [1992]), or if the servient owner's evergreen shrub obscures the dominant owner's window without objection by them for a year, that will be an interruption. It is important to separate non-enjoyment (usually caused by the dominant owner's own acts) from an interruption caused by the servient owner. The effect of a light obstruction notice as an interruption under Rights of Light Act 1959 is dealt with in Question 4 on p17. Once there is an interruption for a year, the 20-year period of enjoyment must start again. The principle of the interruption allows a claim to be brought asserting a right of light after 20 years have run, but within a period of less than a year while an interruption has been present. This is known as 'the 19 years and a day' rule as it allows the claim, even though enjoyment without the interruption has not run for the full 20-year period.

Enjoyment must be for the benefit of a building through an aperture in it. A building does not have to be a house, as it can include buildings of other uses, such as churches, greenhouses and carports.

(v) That enjoyment may be asserted by lessees even against their own landlord. This rule is unique to rights of light asserted under s3. The principle was established in *Morgan v Fear* [1907]. It means that when advising either party where the dominant or servient land is let (even on short-term leases), the question whether tenants can assert a right of light must never be overlooked. The terms of the leases, the duration of the tenants' occupation and their predecessors', even under earlier leases within the 20-year period, must be examined. The position of the reversioners (whether as to the freehold or intermediate leases) will also have to be considered; eg where all light is reserved to the freeholder by the leases.

(vi) That enjoyment is not asserted against the Crown. The Crown here includes not only Her Majesty in right of Her Crown and the Royal Duchies and the Crown Estate, but also government departments, the Ministry of Defence and other 'Crown type' bodies.

Question 3

What technical rules apply to claims under LMG?

Answer

The assertion of a right of light by this means requires the following principles to be observed.

- That there has been 20 years' continuous enjoyment of light for that period and that it was not impossible to presume the fictional grant during it. Thus, while the dominant and servient land was in common ownership it would be impossible to presume a grant. This can be for any period of 20 years which, unlike claims under s3, is not required to run continuously back from the date when the right is formally challenged. So any 20-year period can be chosen, assuming the current apertures and building on the dominant land are unchanged within the principles of coincidence referred to above.

- The mere fact that a grant might have been unlikely is no defence to the claim under LMG *(Tehidy Minerals v Norman* [1971]).

- A claim based on LMG will fail if it is contrary to a custom; eg the Custom of London applicable within the City of London (*Bowring Services v Scottish Widows Fund* [1995]). But LMG may be asserted against the Crown.

- A tenant cannot assert a right of light under LMG (*Simmons v Dobson* [1991]). The claim can only be made by and against the freeholders, although this rule has been criticised in Hong Kong; see *China Field v Appeal Tribunal Buildings No. 2* [2009].

Question 4

What can be done to prevent someone acquiring a right of light?

Answer

There are three routes.

(i) By agreement in writing; preferably under seal, or for valuable consideration. In such cases no right is acquired either because enjoyment is declared in the agreement to be by consent, or there is a covenant against the dominant owner objecting to the servient owner building to any height, or a defined height. As is stated previously at Question 2, such documents require close attention before their effect can be advised upon with certainty. In leases, the tenant's enjoyment can be declared to be by consent or reserved to the landlord so as to prevent tenants' claims.

(ii) By creating an interruption within s4 (see para (iv) under Question 2).

(iii) By registering a light obstruction notice (LON) under the Rights of Light Act 1959 (ROLA) in the Local Land Charges Register (LLCR). Once registered the LON will take effect as a notional obstruction to the light enjoyed. It is an 'interruption' within s4 (s3(1) and (6) ROLA), and must be formally challenged within a year of its registration. First, Form A (setting out the location and dimensions of the notional obstruction on the servient land, and the location of the dominant building on the attached plan) must be served on all those in the dominant building likely to be affected by the LON. (Note the dominant building must be identified on the plan and not the land, unless the two are coterminous. A right of light is acquired for the benefit of the building, not the land.) Following such service, the servient owner applies under r41 of the Upper Tribunal (Lands Chamber) (UTLC) Procedure Rules for a certificate. This is produced to the authority maintaining the LLCR which registers the LON, and lasts for 21 years. If it is known that the dominant owner is about to acquire a right of light, an emergency procedure is used which allows the UTLC to issue a temporary certificate leading to a temporary LON (lasting no more than six months) when registered. (Care must be taken in such cases to calculate the period of enjoyment, allowing for the 'credit' of a year in s3(4) ROLA.) The servient owner must then effect service on those affected and obtain a certificate from the UTLC, so as to allow the registration of a permanent LON before the temporary one expires. In such cases the date of registration of the temporary LON is the date from which the dominant owner must challenge it within the year (*Bowring*).

In the next Q&A on rights of light I will consider the following:

- How can rights of light be overridden and made unenforceable?

The principle of the interruption allows a claim to be brought asserting a right of light after 20 years have run, but within a period of less than a year while an interruption has been present. This is known as 'the 19 years and a day' rule.

- How can rights of light be abandoned?

- What remedies are there if there is a dispute over the existence of a right of light? ■

Bowring Services v Scottish Widows Fund
[1995] 1 EGLR 158

CGIS City Plaza Shares Ltd v Britel Fund Trustees Ltd
[2012] EWHC 1594 (Ch)

China Field v Appeal Tribunal Buildings No. 2
[2009] 12 HKFCAR 342

Dance v Triplow
[1992] 1 EGLR 190

Morgan v Fear
[1907] AC 425

News of the World Ltd v Allen Fairhead & Sons Ltd
[1931] 2 Ch 402

RHJ Ltd v FT Patten (Holdings) Ltd & anr
[2008] EWCA Civ 151

Salvage Wharf v G&S Brough Ltd
[2009] EWCA Civ 21

Simmons v Dobson
[1991] 1 WLR 720

Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square Ltd)
[2006] EWHC 3589 (Ch)

Tehidy Minerals v Norman
[1971] 2 QB 528