Neutral Citation Number: [2017] EWHC 2609 (Ch)

Case No: HC-2017-000740

IN THE HIGH COURT OF JUSTICE

**CHANCERY DIVISION**

Royal Courts of Justice

Rolls Building, Fetter Lane,

London, EC4A 1NL

Date: 24/10/2017

**Before**:

MR JUSTICE MORGAN

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**Between:**

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|  | **METROPOLITAN HOUSING TRUST LIMITED** | Claimant |
|  | **- and -** |  |
|  | **RMC FH CO LIMITED** | Defendant |

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**Ms Rachael O’Hagan** (instructed by **Devonshires Solicitors LLP**) for the **Claimant**

**Mr John Mc Ghee QC** (instructed by **Mishcon de Reya LLP**) for the **Defendant**

Hearing dates: 5 October 2017

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Judgment Approved

**MR JUSTICE MORGAN:**

*Introduction*

1. The Defendant is the freeholder and the Claimant is the headlessee of premises which include a block of 20 flats known as 1-20, Royal Mint Street, London E1. The block is on the south side of Royal Mint Street and the north elevation of the block has a number of windows which benefit from light passing over land to the north of Royal Mint Street and across Royal Mint Street itself.
2. On the north side of Royal Mint Street and directly opposite the block of flats is a development site. The owners of that site have obtained planning permission for the construction of a mixed-use development, comprising the erection of two buildings of between 3 and 15 storeys, providing 354 residential units, a 236-room hotel with 33 serviced apartments together with various other uses including retail, leisure and community uses. The owners of the development site have commenced the development of the site.
3. Both the freeholder and the headlessee of 1-20 Royal Mint Street take the view that they each enjoy the benefit of a right of light to the windows in the north elevation of their building in relation to the passage of light over the development site. The freeholder and the headlessee of the block of flats also take the view that the works of development on the development site will in due course, and certainly by the time the development is completed, give rise to an actionable interference with the use and enjoyment of light to the north elevation of the block of flats, which light is the subject of the right of light referred to above. The owners of the development site are not a party to the present proceedings and I make no findings as to the existence of, or the extent of, the right of light to which the freeholder and the headlessee assert they are entitled. Similarly, I make no findings as to whether the proposed development would give rise to an actionable interference with any such right of light.
4. In this judgment, I will refer only to the possible interference with the right of light enjoyed by the windows in the north elevation of the block of flats at 1-20 Royal Mint Street. For the avoidance of doubt, I wish to make it clear that I make no findings as to whether there are other windows in other buildings on the premises demised by the headlease which are similarly affected.
5. The headlessee has brought the present proceedings in which it contends that:

“In exchange for monetary compensation, the [headlessee] wishes to release to the owners of [the development site] the rights to light acquired by the leasehold interest in the Property [i.e. 1-20 Royal Mint Street].”

1. The headlessee contends that there is no provision in its lease which prevents it from acting in the way it wishes. Conversely, the freeholder contends that the headlessee would commit a breach of clause 3(12) of the headlease if it were to act in that way.

*The headlease*

1. The headlease was granted on 30 June 1987 by a predecessor in title of the Defendant freeholder to a predecessor in title of the Claimant headlessee. By the headlease, an area of land with a frontage to Royal Mint Street and a long return frontage along Cartwright Street, London E1 was demised for a term of 127 ½ years from 6 March 1987 at a yearly rent of £1, if demanded. On the same day, the parties to the headlease had entered into a Development Agreement. I was not shown a copy of the Development Agreement but I was told that it provided for the headlessee to carry out a development upon the demised premises. I understand that a development was carried out in accordance with the Development Agreement and that the development comprised more than one block of flats and included the block now known as 1-20 Royal Mint Street. The headlease is registered at the Land Registry under Title No. EGL 198631. The registered title shows that all 20 flats in the building are the subject of long underleases. Seventeen of these underleases are for the term of 127 ½ years (less 5 days) from 6 March 1987 so that, in the case of those flats, the headlessee has a reversion of 5 days. In the case of Flat 19, the term of the underlease is 126 years from 6 March 1987 and in the case of Flats 3 and 4, both on the ground floor, the underleases are for the term of 99 years from 6 March 1987. I was not told whether Flats 3, 4 and 19 have windows in the north elevation of the building.
2. The headlease contains the following terms:
3. Clause 1(2) states that the headings to clauses in the headlease are not to affect the construction of the lease;
4. “the demised premises” are defined as the area of land which is demised, together with a right of support which was expressly granted to the lessee;
5. The lease was subject to certain exceptions and reservations but I need not refer to the detail of the provisions;
6. By clause 3(11), the headlessee covenanted not to permit on the demised premises any waste spoil or destruction or any act or thing which might become a nuisance annoyance or disturbance to the landlord or the owner or occupier of any neighbouring property or which in the opinion of the landlord might prejudicially affect or depreciate the landlord’s reversion to the demised premises or any neighbouring property forming part of the Crown Estate;
7. Clause 3(12) is referred to, separately, below;
8. Clause 5(2) provided that the headlessee should not by virtue or in respect of the demise be deemed to have acquired or to be entitled to nor should the headlessee during the term acquire or become entitled by length of enjoyment prescription or any other means whatsoever in respect of the demised premises to any right of light or air or other easement from or over or affecting any other land forming part of the Crown Estate;
9. Clause 5(3) was a detailed provision to the effect that there was to be no restriction on the erection of any new buildings of any height on any land forming part of the Crown Estate not included in the demise.
10. The reference in clauses 3(11), 5(2) and 5(3) to the Crown Estate is explained by the fact that the original lessor was the Crown Estate. I was told that these references to land within the Crown Estate are not relevant to the development site.
11. Clause 3(12) which is relied upon by the freeholder in this case provides:

“(12) Encroachment

Not to give permission for any new window light opening doorway path passage drain or other encroachment to be made nor to permit any easement to be acquired upon or against the demised premises which might be or grow to the damage annoyance or inconvenience of the landlord and in case any such encroachment or easement shall be made or attempted to be made or acquired or attempted to be acquired to give immediate notice in writing to the Landlord and at the request and cost of the Landlord to adopt such means as may be reasonably required or deemed proper for preventing the making of such encroachment or the acquisition of such easement”.

*The rival contentions*

1. The submissions of the parties addressed two different subjects. The first subject concerned the right of light said to be enjoyed by the freeholder and the headlessee in relation to the windows in the north elevation of 1-20 Royal Mint Street. The second subject concerned the windows which are to be opened in the new building on the development site and which, it was said, would enjoy the use of light passing over the land which is the subject of the headlease.
2. In relation to the right of light said to be enjoyed by the freeholder and the headlessee in relation to the windows in the north elevation of 1-20 Royal Mint Street, the freeholder contended:
3. the right of light was part of “the demised premises”;
4. an interference with the right of light by the developer of the development site would be “an encroachment” upon or against the demised premises;
5. such an encroachment by the developer “might be or grow to the damage annoyance or inconvenience” of the freeholder;
6. the headlessee had covenanted by clause 3(12) not to permit such an encroachment;
7. the headlessee’s intended release of its right of light would amount to a permission of such an encroachment contrary to clause 3(12); and
8. further, the headlessee was obliged by clause 3(12), at the request and cost of the freeholder, to adopt such means as may be reasonably required or deemed proper for preventing the making of such encroachment; the relevant means could include the headlessee bringing proceedings to restrain the actionable interference with its right of light.
9. In response to these submissions, the headlessee submitted:
10. the right of light was not part of “the demised premises”;
11. an interference with the right of light by the developer of the development site would not be “an encroachment” upon or against the demised premises;
12. in any event, any such encroachment by the developer would not “be or grow to the damage annoyance or inconvenience” of the freeholder;
13. accordingly, the intended release of the headlessee’s right of light was not contrary to clause 3(12); and
14. the headlessee was not obliged by clause 3(12) to take any action.
15. In relation to the passage of light to the proposed new windows in the development, the freeholder says:
16. the new windows would come within clause 3(12);
17. the enjoyment of light through the new windows and across the demised premises could lead to an easement of light being acquired for the benefit of the development site and as a burden on the freehold and on the headlease of 1-20 Royal Mint Street;
18. the acquisition of such an easement of light might be or grow to the damage annoyance or inconvenience of the freeholder;
19. in those circumstances, the headlessee must not give permission to the opening of the new windows;
20. a release by the headlessee of the rights of light appurtenant to the demised premises would amount to a permission by the headlessee to the new windows; and
21. further, the freeholder could require the headlessee to bring proceedings to restrain the interference with its right of light and thereby to prevent the development and thereby to prevent the opening of the new windows.
22. In relation to the passage of light to the future windows in the development, the headlessee says:
    1. a release of the rights of light appurtenant to the headlease would not amount to a permission to the opening of the new windows; and
    2. the freeholder could not require the headlessee to bring proceedings to prevent the development and thereby to prevent the opening of the new windows.
23. In addition to these contentions which were identified at the hearing, in the course of considering my judgment further potential points have come to light which were not the subject of specific submissions at the hearing.

*The procedure which has been adopted*

1. Before discussing the points raised by the parties’ submissions, I wish to explain that these proceedings were brought pursuant to CPR Part 8. The Claim Form was supported by Particulars of Claim and the parties have filed evidence which is mostly of a formal character. In its Particulars of Claim, the headlessee stated that the issue in dispute turned on a narrow legal issue concerning the proper interpretation of the lease. The narrow legal issue appears to have been the correctness of the headlessee’s contention that, as matter of interpretation of clause 3(12), it was not prevented from releasing the right of light. The Particulars of Claim also stated that the freeholder had not advanced a case that the release by the headlessee of the right of light would cause damage annoyance or inconvenience to it.
2. On 3 May 2017, the solicitors for the headlessee wrote to the solicitors for the freeholder stating that the freeholder’s evidence failed to address the issue concerning the interpretation of the headlease. On 8 May 2017, the solicitors for the freeholder replied stating that the evidence did not deal with matters of legal argument which would be instead be dealt with in its skeleton argument for the hearing. On 26 September 2017, the parties agreed a list of issues which was essentially one issue which was said to turn on the proper construction of the headlease.
3. When the freeholder did provide its skeleton argument, the matters raised went beyond questions of interpretation of the headlease and pure points of law. I have set out above my summary of the rival contentions. There are two matters which are now in contention where it seems to me that the dispute involves matters of fact or of mixed law and fact. I refer to the contention that a release by the headlessee of the right of light appurtenant to the headlease would be or grow to the damage annoyance or inconvenience of the freeholder and to the further contention that the freeholder can require the headlessee to take action on the ground that such action is reasonably required or deemed to be proper.
4. In the absence of evidence, there are many matters where I have not been told the relevant facts. I do not know which windows exist in the northern elevation of 1-20 Royal Mint Street. I do not know which windows exist in the flats which are the subject of the underleases and whether there are windows in the northern elevation which are in the common parts of the building, for example, providing light to a communal staircase. Further, I do not have any evidence as to the impact of the proposed development upon the windows in that elevation. I do not know whether the underlessees of the flats enjoy rights of light appurtenant to their underleases although it appeared to be assumed in the course of the argument that they did. I was not shown a copy of a standard form of underlease and I therefore do not know the terms of the underleases, although the correspondence exhibited to the witness statements did refer to clause 4.21 of an underlease.
5. As regards the proposed development, I do not know what windows will be installed. I do not know whether, and if so to what extent, they will enjoy light which passes around the side of, or over the roof of, the existing buildings on the demised premises. Further, I do not know whether, in recent times, there were buildings on the development site which have now been demolished and, if so, whether such buildings contained windows which enjoyed light which passed around the side of, or over the roof of, the existing buildings on the demised premises. If the demolished buildings did contain windows which enjoyed light in that way, I do not know if those windows had the benefit of a right of light, whether that right survived the demolition of the buildings and whether the new windows in the proposed development would continue to benefit from the cones of light which passed around or over the demised premises and which cones of light were the subject of a right of light.
6. Further, it appears from the correspondence that both the freeholder and the headlessee have been in discussion with the developer of the development site but I do not know the nature or content of those discussions. I have not been shown any draft of a possible release by the headlessee of the rights of light appurtenant to the headlease, if such a draft exists.
7. In the course of the submissions, questions were raised as to what the freeholder’s current wishes were, and what its possible future wishes might be, as regards the effect of the proposed development on the enjoyment of light by the windows in the north elevation of 1-20 Royal Mint Street. The freeholder sought to persuade me that the freeholder’s present wishes were genuinely, rather than tactically, to object to the threatened interference with the right of light enjoyed by those windows with a view to preventing that interference. I was referred to a witness statement which, it was suggested, would allow me to find as a fact that these were indeed the freeholder’s present wishes. I do not think that the way in which matters were expressed in that witness statement would allow me to make that finding as distinct from making a different finding that the freeholder did not wish the new windows in the proposed development to acquire a right of light over 1-20 Royal Mint Street which might inhibit the freeholder’s own use or development of the premises at some future time. Further, the evidence relied upon would not allow me to make findings about the wishes which the freeholder might have in the future.
8. In view of the emergence of issues which are not purely questions of construction or matters of law, the court is handicapped by the lack of factual evidence from either party in relation to those issues. In the remainder of this judgment, I will give my rulings on matters of construction or matters of law and I will indicate the extent to which I can usefully comment on issues which involve matters of fact.

*The demised premises*

1. Clause 3(12) includes the phrase “upon or against the demised premises”. There was initially some difference between the parties as to whether this phrase governed the first prohibition in clause 3(12) i.e. that the lessee should not permit an encroachment to be made. Ms O’Hagan, counsel for the headlessee, initially submitted that this phrase did not govern this first prohibition but only the second prohibition i.e. that the lessee should not permit any easement to be acquired upon or against the demised premises. Later, Ms O’Hagan came to agree that the phrase governed both prohibitions. I consider that this is indeed the position. It cannot have been intended that the first prohibition would govern any encroachment anywhere.
2. The headlessee’s skeleton argument provided in advance of the hearing did not identify any submissions as to the meaning of “the demised premises” in clause 3(12) of the headlease. However, in the course of the hearing, counsel for both parties were invited to state whether the right of light enjoyed by the lessee in relation to 1-20 Royal Mint Street was a right which came within the phrase “the demised premises”. It appeared to be common ground that the right of light which both the freeholder and the headlessee assert now exists was a right of light which did not exist at the date of the lease but which came into existence some 20 years after the opening of the windows in the north elevation of 1-20 Royal Mint Street. It was also agreed that the right of light could be claimed by reliance on section 3 of the Prescription Act 1832. It was also common ground that the right of light could be asserted by the freeholder and also by the headlessee.
3. Against that background, a hypothetical question was raised as to what the position would be if the headlessee had at the time of, or after, the erection of 1-20 Royal Mint Street negotiated with the owner of what is now the development site for a deed of grant to the lessee of a right of light to the windows in 1-20 Royal Mint Street, such right of light being expressed to be granted for the term of the headlease only. Would a subsequent agreement by the headlessee with the owner of the development site to release that right of light be an encroachment upon or against “the demised premises” or would one say that the deed of grant was not part of the relationship between the freeholder and the headlessee and the right of light granted by the deed was not a part of the demised premises? If the second of these answers were given, what then of the present case where the right of light now enjoyed by the headlessee was not originally demised by the headlease?
4. The questions raised as to the meaning of “the demised premises” led to a consideration of how the right of light asserted by the freeholder and the headlessee came into existence in this case. Both parties asserted that the right of light came into existence by reason of section 3 of the Prescription Act 1832. Mr McGhee QC, counsel for the freeholder, suggested that it might not have been possible to claim a right of light over the development site by reliance on the doctrine of lost modern grant if the development site had been subject to a lease during any relevant period of 20 years. This distinction led to a wider consideration of the correct analysis where an easement is acquired by prescription where the dominant tenement is the subject of a lease and whether the analysis is different depending upon whether the easement is acquired by prescription, by reason of the doctrine of lost modern grant, or under section 2 of the 1832 Act (for easements other than a right of light) or under section 3 of that Act (for a right of light).
5. Mr McGhee made the general submission that where a dominant tenement is subject to a lease, then the acts of user by the lessee which are relied upon to support a claim to an easement acquired by prescription are treated as acts of user by the freehold reversioner and will lead to the acquisition of an easement appurtenant to the freehold. I accept that submission which is supported by clear authority: see, for example, Gayford v Moffatt (1868) LR 4 Ch App 133 at 135 and Pugh v Savage [1970] 2 QB 373 at 380 G-H.
6. Mr McGhee then submitted that the easement which was thereby acquired as appurtenant to the freehold was treated as being the subject of the demise to the lessee, even though the actual demise had been made prior to the easement being acquired. Mr McGhee did not cite any specific authority for this proposition but instead he invoked the principles which apply when a lessee, after the date of the lease, takes adverse possession of land belonging to a third party which adjoins the demised premises. In such a case, it is well established that the lessee is normally treated as having taken possession of the land of the third party for the benefit of the lessor so that the possession of the lessee is treated as the possession of the lessor and when the lessor acquires title to the land by adverse possession, then the land is treated as being the subject of the demise to the lessee. The legal position in that respect is discussed in a number of cases, for example, Smirk v Lyndale Developments Ltd [1975] Ch 317 and Tower Hamlets LBC v Barrett [2006] 1 P&CR 9. There has been considerable discussion in the decided cases as to the basis for this rule. Different justifications for the rule have been put forward and it has even suggested that “the basis of the doctrine is somewhat obscure and confused” and that logic might be “a dangerous concept to invoke in this “tangled” area”: see Tower Hamlets LBC v Barrett at pages 82 and 86.
7. Ms O’Hagan did not really challenge this analysis as to how an easement, when acquired, is treated as being demised to the headlessee. I accept that this analysis does provide a possible explanation as to how it is that a lessee can assert the benefit of an easement which has been acquired as appurtenant to the freehold after the date of the grant of the lease.
8. Neither counsel put forward a possible alternative analysis. I am aware that this point was addressed in the judgment of Lord Millett NPJ in the Hong Kong Court of Final Appeal in China Field Ltd v Appeal Tribunal (Buildings) [2009] 5 HKC 231. At [68], Lord Millett said, in relation to the acquisition of an easement on the basis of a lost modern grant after the date of the grant of the lease:

“But [the tenant] does not derive the rights over the servient tenement from his landlord under his lease as part of the demised premises, nor does he acquire it with the landlord’s consent, but by a separate (albeit fictitious) grant presumed from long user against land not comprised in this lease and without his landlord’s consent.”

This analysis by Lord Millett was part of a wider analysis which criticised the hitherto established rules of English law to the effect that: (1) for lost modern grant, the relevant user must be by or on behalf of an owner in fee simple against an owner in fee simple; and (2) the doctrine of lost modern grant cannot apply as between lessees holding under a common lessor. Although Lord Millett said at [86] that he doubted whether either rule would be upheld in England if they were to be examined by the House of Lords (or now the Supreme Court), I am not able to disregard these rules. If I apply these rules, I do not think that I can adopt Lord Millett’s analysis in paragraph [68], which I have quoted above.

1. I have some hesitation in accepting Mr McGhee’s analysis based on the principles which apply in a case of adverse possession by a tenant. Adverse possession and prescription operate in different ways. Adverse possession depends upon limitation which is extinctive whereas prescription is acquisitive. Further, the principles which apply in the case of adverse possession have been described as obscure and lacking in logic. That is not necessarily a good basis for extrapolation to the different area of prescription. Nonetheless, however imperfectly, the analysis does explain how a lessee acquires an easement by prescription based on user after the grant of a lease and no alternative analysis has been put forward. Accordingly, I hold that in relation to prescription based on the principles of lost modern grant or based on section 2 of the 1832 Act (for easements other than rights of light), this is indeed the correct analysis of the situation.
2. The question then is whether the above analysis applies in the case of a right of light which has been acquired by reason of section 3 of the 1832 Act. It is clear that some of the general rules as to prescription apply for the purposes of section 3 but that others do not. A clear example of a case where the rules are different under section 3 is where the dominant and the servient tenement are in common ownership. In such a case, a lessee of the putative dominant tenement cannot acquire other easements such as rights of way over the putative servient tenement. The reason for that is that the use by the lessee which is relied upon is treated as being use by the lessor and the lessor cannot rely upon the user to acquire an easement binding the freehold of the putative servient tenement and benefitting the putative dominant tenement because that would result in the impossible position of the freeholder having an easement over his own land: see Kilgour v Gaddes [1904] 1 KB 457. However, it is established that a lessee of the putative dominant tenement can rely on section 3 of the 1832 Act to acquire a right of light appurtenant to the lease over the putative servient tenement even where the tenements are in common ownership: see Fear v Morgan [1906] 2 Ch 406, affirmed in Morgan v Fear [1907] AC 425, following earlier authorities.
3. This leads to the question in the present case, where the right of light which is asserted is claimed pursuant to section 3: does section 3 bring into existence two rights of light, one appurtenant to the freehold and one appurtenant to the lease and for the term of that lease? The present case is not one where the dominant and the servient tenements were in common ownership. There is therefore no reason in this case to hold that the right of light which has been acquired was confined to a right appurtenant to the lease. There is no reason not to hold that prescription under section 3 has operated in this case in the same way as prescription operates generally. I therefore hold that the right of light acquired in this case under section 3 is a right appurtenant to the freehold and is a right which is treated as demised to the lessee under the lease.
4. I am now in a position to determine whether the right of light in this case is part of “the demised premises”. That phrase is not confined to corporeal hereditaments as it was defined to include the right of support expressly granted by the lease. As the right of light in this case is treated as having been demised by the freeholder to the headlessee, I hold that the right of light is part of “the demised premises”. The position is not the same as in the hypothetical question raised in paragraph 27 above which, therefore, I do not have to decide.

*Encroachment*

1. In her skeleton argument, Ms O’Hagan submitted that clause 3(12) of the headlease prevented the headlessee from permitting a third party to acquire an easement over the demised premises. Accordingly, she said, it did not prevent the headlessee releasing an easement which was appurtenant to the demised premises. In her skeleton argument, she did not address the wording in clause 3(12) which referred to an encroachment upon or against the demised premises.
2. In his skeleton argument, Mr McGhee submitted that a release by the headlessee of the right of light would be to permit an encroachment upon or against the demised premises. He referred to the definition of “encroach” in the Shorter Oxford English Dictionary, 6th ed., as meaning to “intrude usurpingly on another’s territory, rights, etc” and he submitted that an encroachment was not confined to unauthorised entry upon physical land but could extend to unauthorised interference with rights over land.
3. In her oral submissions, Ms O’Hagan submitted that a release of the right of light did not involve an encroachment upon or against the demised premises. She submitted that “encroachment” had a specific meaning in clause 3(12) and required there to be an entry upon the physical land which had been demised. She drew attention to the way in which the word “encroachment” is used in relation to the law of nuisance. As described in Clerk & Lindsell on Torts, 21st ed., at 20-06, a private nuisance can take three forms. The first of these forms involves an encroachment on land, the second involves damage to land and the third involves interference with the enjoyment of land. She referred to the examples of encroachment in the context of private nuisance given in Clerk & Lindsell at para. 20-07. She submitted that an interference with a right of light would not involve an encroachment on physical land within this first category.
4. I consider that the erection of a building on the development site resulting in an actionable interference with the right of light enjoyed by 1-20 Royal Mint Street would be an encroachment on the right of light. As “the demised premises” in clause 3(12) include the right of light, such interference would be an encroachment upon or against the demised premises. A permission for such interference would be to be permit such an encroachment. A release of the right of light would involve such a permission. Accordingly, a release by the headlessee of the right of light would be contrary to clause 3(12) if the further requirement of clause 3(12), that the encroachment “might be or grow to the damage annoyance or inconvenience of the landlord” is satisfied.
5. I reach this conclusion as to the meaning of “encroachment” for the purposes of clause 3(12) for the following reasons:
6. The ordinary meaning of “encroachment” extends to an interference with a right;
7. Applying the ordinary meaning of “encroachment”, an actionable interference with the right of light is an encroachment on the right of light;
8. The right of light is part of the demised premises;
9. Applying the ordinary meaning of “encroachment”, the interference with the right of light is an encroachment upon or against the demised premises;
10. As to the submission that clause 3(12) is dealing with the acquisition of easements over the demised premises, this ignores the fact clause 3(12) is also dealing with encroachments upon or against the demised premises;
11. The wording of clause 3(12) does not provide a context which operates to cut down the ordinary meaning of the word “encroachment”; there is no reason to cut down the meaning of “encroachment” so that there has to be an entry on the physical land demised;
12. The fact that the word “encroachment” is conventionally used in a narrower way in the law of private nuisance is of no real relevance; in any case, if the law of nuisance is any kind of guide to the subject matter of clause 3(12), an actionable interference with a right of light is itself a private nuisance;
13. The wording of clause 3(12) plainly extends to acts which do not involve entry upon the physical land demised: the reference to windows and lights extends to acts on adjoining land; further, the clause refers to encroachments upon “or against” the demised premises; and
14. At the date of the lease, the definition of “the demised premises” included both a corporeal hereditament (the physical land) and an incorporeal hereditament (the express right of support) so that it is not appropriate to construe “the demised premises” in clause 3(12) as limited to physical land.

*Damage annoyance or inconvenience to the landlord*

1. So far, I have held that a release of the right of light appurtenant to the headlease, so as to allow the developer of the development site to erect a building which would otherwise give rise to an actionable interference with such a right of light, would be permitting an encroachment upon or against the demised premises. However, the headlessee is only prevented by clause 3(12) from permitting such an encroachment if the encroachment “might be or grow to the damage annoyance or inconvenience of the landlord”.
2. Some of the submissions in relation to this question considered whether the headlessee’s release of the right of light appurtenant to the headlease would result in damage to the freeholder when such a release would not result in a release of the right appurtenant to the freehold so that the freeholder would remain entitled to bring its own proceedings against the developer to enforce its right of light. However, the issue raised by clause 3(12) is whether the infringement of the right of light appurtenant to the headlease might be or grow to the damage etc of the freeholder. The issue is not whether the release by the headlessee of the right of light appurtenant to the headlease might be or grow to the damage etc of the freeholder. Accordingly, it is not necessarily an answer that the freeholder could seek to restrain the interference with the enjoyment of light by bringing its own proceedings based on the right of light appurtenant to the freehold.
3. If there is an interference with the right of light which is appurtenant to the headlease then the use of light after the interference will be less extensive than the use of light before the interference. Because section 3 of the 1832 Act requires it to be shown that the right of light claimed was used for 20 years next before the action is brought (see section 4 of the 1832 Act), after one year of the interference with the use of light, a claim to a right of light based on section 3 of the 1832 Act may not be possible in respect of the extent of the right enjoyed before the interference but only in respect of the lesser extent of light enjoyed after the interference. This will be the result if, but only if, the interruption is submitted to or acquiesced in. However, once there is an interruption of the light, the position is that the interference might be submitted to or acquiesced in by the headlessee and so the interference “might be or grow to” the damage etc of the freeholder. Indeed, if the headlessee permits the interference with the right of light, then the interference will clearly be submitted to. Ms O’Hagan submitted that this could be avoided by the freeholder taking action within one year of the interruption to assert its right of light and obtaining a declaration from the court that it has by the present time acquired a right of light by prescription pursuant to section 3. However, that submission involves the freeholder in incurring the expense of proceedings which would seem to be an “inconvenience” to the freeholder (although such proceedings might be necessary even if the headlessee did not release its right of light). It might be the case that the freeholder could assert a right of light based on the principles of lost modern grant and that it could continue to assert such a right many years into the future even after the interruption resulting from the development. However, both counsel approached the case on the basis that the present right of light had been acquired under section 3 and I was not encouraged to think that it might have been acquired pursuant to a lost modern grant.
4. In any event, I consider that there is another reason why an interruption in the enjoyment of light at the present time might be or grow to the damage etc of the freeholder. If there is no interruption at the present time and the light continues to be enjoyed until the headlease ends, and the freeholder becomes entitled to the premises free of the headlease and the underleases, then at that point the block of flats will continue to enjoy a right of light and the light will not have been interrupted. If, on the other hand, there is an interruption of the light in the near future then, even if the freeholder continues to have a right of light at the end of the headlease, the fact that the interruption has continued for many years will significantly reduce (and may entirely remove) the freeholder’s ability to obtain an injunction requiring the removal of the obstruction to the light.
5. I am not able to decide on the evidence before me that the developer will encroach on the rights of light appurtenant to the headlease and therefore I cannot decide that a release by the headlessee of its rights of light will amount to the permission of such an encroachment. However, if as the freeholder and the headlessee appear to assume, the development will amount to a substantial interference with the right of light appurtenant to the headlease so that a release of rights by the headlessee is necessary to avoid an infringement of those rights, then it will follow that the development will involve an encroachment within clause 3(12) and a release by the headlessee will amount to a permission for such encroachment and a breach of clause 3(12).
6. The above conclusion is subject to the following qualification. I asked Mr McGhee whether the freeholder could contend that the interference with the right of light appurtenant to the headlease might be or grow to the damage etc of the freeholder if the freeholder had released its own right of light appurtenant to the freehold before the headlessee released its right of light. Mr McGhee accepted that if the freeholder had chosen to release the right of light appurtenant to the freehold, it would not be able so to contend. That means that if the freeholder released its right of light, the headlessee would not commit a breach of this part of clause 3(12) by then releasing the right of light appurtenant to the headlease.

*Can the freeholder require the headlessee to take some action?*

1. The second part of clause 3(12) obliges the headlessee:

“ … at the request and cost of the Landlord to adopt such means as may be reasonably required or deemed proper for preventing the making of such encroachment … ”

1. The freeholder submits that in the case of “such encroachment” i.e. an interference with the light to the demised premises which might be or grow to the damage etc of the freeholder, it can require the headlessee to bring proceedings against the developer to restrain the interference with the right of light appurtenant to the headlease. The freeholder then submits that if the headlessee had previously released its rights as against the developer then the headlessee would have put it out of its power to comply with such a requirement and thereby would have committed a breach of clause 3(12).
2. The freeholder’s ability to require the headlessee to take action only arises if the requirement is reasonable or deemed proper. What is “reasonable” and what is “deemed proper” will usually give rise to the same, or at any rate similar, considerations. Such a question would have to be answered at the time when such a requirement were made. In the present case, I was not told that such a requirement had been made by the freeholder. The only action, which was identified in the course of argument, which the freeholder might require in the future was the bringing of proceedings by the headlessee to restrain the infringement of the right to light. If the freeholder were to impose such a requirement, would it be a reasonable requirement?
3. The answer to this question may depend upon what the freeholder really wants to achieve. If the freeholder genuinely wanted to prevent the infringement of the right to light, that would give rise to one set of considerations. Conversely, if the freeholder wished to have tactical proceedings against the developer to improve the freeholder’s ability to negotiate a payment to it by the developer in return for the freeholder releasing the right of light appurtenant to the freehold, that might give rise to different considerations.
4. A consideration of the reasonableness of a requirement by the freeholder in a particular set of circumstances might also give rise to a consideration as to what benefit such a requirement would confer on the freeholder and what detriment there might be to the headlessee.
5. One question which was addressed was the possible difference between proceedings, for an injunction to restrain infringement, brought by a reversioner and proceedings brought by a lessee who is in occupation of the dominant tenement. Mr McGhee submitted that proceedings by the headlessee to restrain the developer from infringing the right of light appurtenant to the headlease “obviously” had a much better chance of success than similar proceedings by the freeholder. Mr McGhee described the headlessee as being “in possession” as compared with the freeholder who was a reversioner. In fact, it may be that the headlessee is not “in possession” in relation to any of the windows which enjoy light over the development site. Because I was not given any evidence on this point I am not able to say whether there is a window in the block of flats which would be adversely affected and which is not in a flat demised by an underlease.
6. Mr McGhee seemed to accept that a reversioner would normally have a cause of action in nuisance in relation to the erection of a permanent building on the servient land which would infringe the reversioner’s right of light. Although I was not taken to the relevant authorities, the law is clear. A reversioner can sue in relation to a nuisance where the nuisance will, or even might, continue to a time when the reversion falls into possession. The rights of a reversioner are considered in Mayfair Property Company v Johnston [1894] 1 Ch 508 at 516-519, Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 at 312, 317-318 and 324 and Jones v Llanrwst UDC [1911] 1 Ch 393 at 404. I assume for present purposes that the building to be erected on the development site may well exist until the end of the headlease.
7. Mr McGhee submitted that it was “obvious” that the headlessee had a better prospect of success in restraining an infringement than did the freeholder. This was on the basis that the headlessee was in possession and the freeholder was a reversioner. However, if both the freeholder and the headlessee are reversioners and the headlessee has only a nominal reversion of 5 days on the expiry of the underleases, then the difference in the prospects of success is not obvious to me. Indeed, the headlessee may have a weaker case on the ground that its interest in possession will only last for 5 days. I note that the headlessee’s reversion in relation to Flats 3, 4 and 19 I somewhat longer than 5 days but I do not know if those flats have windows which will be adversely affected by the development.
8. As to whether the headlessee could show that a requirement that it bring proceedings against the developer, even where the freeholder is liable for the headlessee’s costs (as is provided in clause 3(12)), would be detrimental to it would again depend on all the circumstances at the time of the requirement.
9. Accordingly, beyond making the above comments, I am not in a position to rule whether a release by the headlessee of its right of light would inevitably lead to a breach by it of the second part of clause 3(12).
10. Counsel did not submit that the freeholder could require the headlessee to require the underlessees to bring proceedings to restrain an infringement of their rights of light. As I indicated earlier, the parties appeared to assume that the underlessees of the flats did enjoy rights of light appurtenant to their underleases. I was not shown a copy of any of the underleases but the correspondence between the parties which was in evidence purported to quote an underlessee’s covenant in clause 4.21 of an underlease, in these terms:

“To do such acts and things as may reasonably be required by the Landlord or the Superior Landlord to prevent any easement or right belonging to or used with the Premises from being obstructed or lost And not knowingly to allow any encroachment to be made or easement acquired over the Premises and in particular not to allow the right of access of light from or over the Premises to any neighbouring property to be acquired.”

1. For the sake of completeness, I point out that there may be scope for argument as to whether the freeholder could require the headlessee to attempt to rely on this covenant against the underlessees requiring them to bring proceedings for infringement. As I understand it, the underlessees (or some of them) are in possession of their flats. However, the freeholder would have to show that it was reasonable under clause 3(12) of the headlease to require the headlessee to take that action and, further, that it was reasonable under clause 4.21 of the underleases to require that action. It may be that a release by the headlessee of the right of light appurtenant to the headlease would not affect the arguments in this respect. However, as the point was not argued, I will say no more about it.

*The windows in the proposed development*

1. There is a separate question as to the windows which, I am told, the developer is intending to create in its development. This question again involves the application of clause 3(12) but it raises distinct issues from those already considered.
2. If the developer creates new windows in its development then that will involve a “new window … [being] made … upon or against the demised premises”. Further, if a new window is opened which uses different cones of light from the cones of light previously enjoyed by windows on the development (if there were any) which had already acquired a right of light, then the new windows could result in an easement of light being in due course acquired over 1-20 Royal Mint Street. Further, if the developer were to acquire new rights of light over 1-20 Royal Mint Street, then the acquisition of those new rights could be or grow to the damage etc of the freeholder.
3. In those circumstances, if the headlessee were to give permission to the developer to open new windows in that way, then that would be a permission within the opening words of clause 3(12). However, perhaps perversely in view of the terms of the prohibition in clause 3(12), if the permission which was given to the developer took the form of a “consent or agreement … by deed or writing” then that would prevent an easement of light being acquired under section 3 of the 1832 Act and the light would be enjoyed “with permission” so as to prevent the owner of the development site relying on the doctrine of lost modern grant, certainly so long as the agreement or the permission was effective as between successive owners of the dominant and the servient tenements. If the giving of permission did prevent the acquisition of a right of light by prescription, then the result might be that the enjoyment of light by the building on the development site would not be or grow to the damage etc of the landlord. I have expressed that somewhat tentatively in case the agreement or permission would not be effective as between successors in title to the original parties to the agreement or permission.
4. The question which was argued before me was whether a release by the headlessee of the rights of light appurtenant to 1-20 Royal Mint Street would amount to a permission to the developer to open new windows in the building erected on the development site. My answer to that question is: “not necessarily”. It may be that the developer would wish to have both a release of the headlessee’s rights and a permission for the developer’s new windows, particularly if the developer is asked to pay a substantial sum for the arrangement with the headlessee, but it certainly ought to be possible to draft a release which deals only with the release of the rights appurtenant to the head lease. Further, the giving of such a permission may prevent the acquisition of an easement of light and so the opening of the windows might not be or grow to the damage etc of the freeholder.
5. Mr McGhee also submitted that the freeholder could rely upon the second part of clause 3(12) to require the headlessee to take action in a case where windows were opened and there was an attempt to acquire an easement of light over 1-20 Royal Mint Street. Mr McGhee referred to various actions such as erecting a barrier to the passage of light and/or registering a light obstruction notice under the Rights of Light Act 1959 and he suggested each of these actions would not be appropriate or could not be guaranteed to be effective. He therefore suggested that the freeholder could reasonably require the headlessee to bring proceedings to prevent the developer infringing the light to 1-20 Royal Mint Street and if the court granted an injunction restraining the developer in that way, then the developer could not erect its proposed building and as a result he would not open windows which could potentially acquire rights of light.
6. As to the freeholder’s suggestion that it would be entitled to require the headlease to bring proceedings to prevent the developer erecting its proposed building and thereby prevent the opening of windows in that building, the freeholder has not yet required the headlessee to act in that way. If the freeholder were to require those proceedings to be brought, then the question would be whether that requirement was reasonable in all the circumstances. I have already stated that I am not able on the material before me to say that proceedings to prevent an infringement of the right of light appurtenant to the headlease would be reasonable. If such proceedings were to be brought, not for the genuine purpose of preventing an infringement with a right of light enjoyed by 1-20 Royal Mint Street but for the collateral purpose of preventing the developer opening windows in its new development which might acquire rights of light which were more extensive than any pre-existing rights of light, that might be an additional factor which would have to be assessed when considering the reasonableness of the freeholder’s request that the headlessee bring proceedings against the developer.

*The outcome*

1. In these proceedings, the headlessee has sought a declaration that it is entitled to release the right of light appurtenant to the headlease. For the reasons given earlier, I will not make that declaration.
2. I can see advantages in the court making a declaration which gives effect to those matters which I have been able to decide on the material before me. The form of any such declaration can be discussed with counsel on the hand down of this judgment.