Leases and light: releasing rights of light for development where one of the properties is tenanted.

Under section 3 of the Prescription Act 1832, tenants as well as freeholders can acquire rights to light. A recent case, *Metropolitan Housing Trust Ltd v RMC FH Co Ltd* [2017] EWHC 2609, illuminates what happens when a landlord and tenant disagree over whether the tenant can release the right to a developer without the landlord’s consent.

THE BACKGROUND

RMC FH Co (“RMC”) owns the freehold of a building at 1-20, Royal Mint Street, London E1, where Metropolitan Housing Trust Ltd (“Metropolitan”) is the head tenant. The north side of the building faces a development site, the owner of which (the "Developer") has obtained planning permission to build a mixed-use development, comprising residential units, a hotel and various other units for retail, leisure and community uses.

Both RMC and Metropolitan believe that they each enjoy the benefit of a right of light (acquired by prescription) to the windows in the north elevation of their building in relation to the passage of light over the development site, and that the proposed new development would give rise to an actionable interference with the use and enjoyment of that light. Metropolitan wanted to release their rights of light to the Developer, for a fee. RMC wanted to prevent them from doing so. Metropolitan sought a declaration from the court that it was entitled to release the right to light.

THE ARGUMENTS AND THE JUDGMENT

RMC argued that if Metropolitan did so, they would be breaching their lease because:

- the right of light was part of the demised premises. This would mean that an interference with the right of light by the Developer would be an encroachment on the demised premises. If Metropolitan permitted this then it would be in breach of its obligation in the lease to prevent encroachments. The court agreed. Even though the right to light had been acquired during the course of the lease, it adhered to the freehold and was therefore part of the grant to the tenant.
RMC could require the headlessee to take action to prevent the encroachment. The judge decided that this would depend on what was reasonable and proper at the time of any request by RMC to do so.

If Metropolitan released its rights to light to the Developer, this would amount to a permission to create new windows in the new development. This could lead to the new owners and occupiers of the new building acquiring rights to light over 1-20 Royal Mint Street, which would also constitute permitting an encroachment. The judge held that this was not necessarily true, as:

- any deed of release could be drafted purely to release Metropolitan’s rights to light; and
- the grant of consent to the Developer’s new windows would work to prevent the acquisition by prescription of an easement of light by the Developer over 1-20 Royal Mint Street, and so the opening of the windows might not be or grow to the damage of the freeholder.

The judge therefore declined to make the order that Metropolitan had requested.

**WHAT DOES THIS MEAN?**

**For landlords?**

The case reminds us that tenants can acquire rights to light by prescription under section 3 of the Prescription Act 1832 in their own right. They cannot do so under lost modern grant (section 2). However, whether they will acquire prescriptive rights or not depends on the circumstances and the terms of the lease.

Landlords granting new leases should consider the following:

- to prevent the tenant acquiring rights to light against the landlord’s own retained land:
  - the landlord must reserve the right to develop its own land even if this impacts on the light and/or air to the demised premises; and
  - the lease must make it clear that the tenant did not benefit from an express or implied grant of rights to light at the date of the lease, and that any light that the Tenant enjoys is by consent for the purposes of section 3 of the Prescription Act 1832.

- To protect the property's current rights to light and to stop neighbours acquiring rights to light over the property by prescription – the landlord should obtain the following covenants from the tenant:
  - that if a third party encroaches or tries to encroach on the property or does anything which might lead to a right being acquired over the property, the tenant shall (a) immediately inform the landlord and (b) take all steps (including any proceedings) that the landlord requires to prevent or license the continuation of that encroachment or action;
  - not to stop up any windows or otherwise obstruct the flow of light or air to the property;
  - not to make any agreements with third parties in relation to the flow of light or air to the property is enjoyed with the consent of any third party; and
  - an acknowledgement that all light enjoyed by the tenant has been reserved to the landlord.
For tenants?

Tenants will want to ensure that:

- the landlord’s right to develop is limited by reference to the tenant’s beneficial use and occupation of the demised premises, particularly where the tenant’s use is light-sensitive; and

- their duties to protect the landlord’s right to light over other land and to protect their building from neighbours acquiring rights to light are limited to taking reasonable measures.

For developers?

Developers know that it is important to get a release of rights to light from every occupier of a building with the benefit of such a right. This case is interesting in that it reminds developers:

- to understand whether the tenants need the consent of their landlords to a release, in order to avoid a freeholder taking injunctive action against them where the freeholder has not also released its rights.

- of the various nuances in the terms of a deed of release. Amongst other thing, they can release all rights of light present and to be acquired in the future in relation to current buildings; release those rights only in relation to a specified development; and also deal with the rights of light to be acquired by the new buildings.

THE LAW COMMISSION’S 2014 REPORT

In 2014 the Law Commission published its report on rights to light (Law Com No 356) recommending a new regime to include:

- a statutory notice procedure which would allow a landowner to require its neighbours to tell them within a specified time if they intend to seek an injunction to protect their right to light, or to lose the potential for that remedy to be granted;

- a statutory test to clarify when courts may order damages to be paid rather than halting development or ordering demolition;

- an updated version of the procedure that allows landowners to prevent their neighbours from acquiring rights to light by prescription;

- amendment of the law governing where an unused right to light is treated as abandoned; and

- a power for the Lands Chamber of the Upper Tribunal to discharge or modify obsolete or unused rights to light.

The Government has not yet acted on these recommendations.

FOR FURTHER INFORMATION, PLEASE CONTACT

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