

Neutral Citation Number: [2009] EWCA Civ 21

Case No: A3/2008/1244

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CHANCERY DIVISION
HH Judge Purle QC
7BM30981

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2009

Before :

LORD JUSTICE TUCKEY
LORD JUSTICE CARNWATH
and
LORD JUSTICE JACKSON

Between :

(1) Salvage Wharf Limited
(2) Birmingham Development Company Limited
- and -
G & S Brough Limited

Appellants

Respondent

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ashley Underwood QC and Stephen Bickford-Smith (instructed by **Eversheds LLP**) for the
Appellants

John Randall QC and John de Waal (instructed by **Tyndallwoods**) for the **Respondent**

Hearing dates : 1 and 2 December 2008

Judgment

Lord Justice Jackson :

1. This judgment is in six parts as follows:

Part 1. Introduction

Part 2. The facts

Part 3. The Present Proceedings

Part 4. Did the claimant lose all rights of light pursuant to s.3 of the 1832 Act?

Part 5. Was the defendant entitled to register its notice under s.2 of the 1959 Act?

Part 6. Conclusion

Part 1. Introduction

2. This is an appeal against the judgment of Judge Purle QC given on 28 April 2008 in the Birmingham Chancery Division, whereby (i) he upheld the claimant's claim to be entitled to rights of light through the windows of the northern and eastern elevations of its premises at 25-29 Commercial Street, Birmingham and (ii) he dismissed the defendants' counterclaim.
3. Strictly speaking the rear wall of the claimant's property faced north west and the right hand side of the claimant's property faced north east. However, in order to simply the references to various buildings and features throughout the appeal, the rear elevation of the claimant's property has been treated as facing north and the right hand side (viewed from Commercial Street) has been treated as facing east.
4. In this judgment I shall refer to Birmingham Mailbox Limited as "BML". I shall refer to British Waterways Board as "BWB". I shall refer to the Prescription Act 1832 as "the 1832 Act". I shall refer to the Rights of Light Act 1959 as "the 1959 Act".
5. After these brief introductory remarks I must now turn to the facts.

Part 2. The facts

6. The claimant is a family owned company, incorporated in 1935, which produces various types of washers and gaskets. The claimant now operates from Leopold Street in Birmingham. The previous premises from which the claimant operated were at 25-29 Commercial Street, Birmingham. The claimant occupied that property from 1951 to 2007. That is the property (now demolished) with which this litigation is concerned. I shall refer to it as "the Brough property".
7. Commercial Street, Birmingham runs approximately east to west. Immediately to the west of the Brough property was a property belonging to Mr Tyler ("the Tyler property"). Beyond that lay an area referred to as Washington Foundry. Beyond that lay an area referred to as Washington Wharf. A short way behind all these properties lay the Birmingham and Worcester Canal, which ran approximately parallel to Commercial Street.

8. On the east side of the Brough property was a passageway known as “Brough’s passage”. Beyond Brough’s passage lay an area known as Salvage Wharf. To the east of Salvage Wharf was a road called Holiday Passage. Beyond that lay the Royal Mail Sorting Office.
9. The Brough property had windows at a high level on the north wall and the east wall. The windows on the north wall looked out across the canal. The windows on the east wall looked out across Brough’s Passage. Light had passed through these windows for many years and no doubt this was beneficial for the people working in the factory.
10. BWB was the owner of Salvage Wharf. BWB also owned a strip of land which lay behind the Brough property, the Tyler property, Washington Foundry and Washington Wharf. That strip of land lay between those properties and the canal. I shall refer to Salvage Wharf and that strip of land collectively as “the BWB property”, even though BWB ceased to be the owner of that land during 1999.
11. For the purposes of its business the claimant leased from BWB two buildings adjacent to the Brough property. The first building was a warehouse on the east side of Brough’s Passage (“the old warehouse”). The second building was immediately behind the Brough property and stood on stilts (“the stilted building”).
12. It was a term of the claimant’s lease that when the claimant vacated the stilted building the claimant would (if required to do so) demolish the stilted building. That operation would make it necessary to rebuild the rear gable wall of the Brough property.
13. During the 1990s the Post Office made other arrangements for the sorting of mail in Birmingham and the former Royal Mail Sorting Office closed down. In September 1997 BML was incorporated for the purpose of redeveloping the former Sorting Office and the surrounding area.
14. In the spring of 1998 BML acquired a long leasehold interest in the former Sorting Office. BML also entered into negotiations with BWB for the purchase of the BWB property.
15. In June 1998 BML applied for planning permission to redevelop the former Sorting Office and the BWB land. In Appendix 1 to the planning application BML described the proposed development as follows:

“Change of use, alteration and extension of the former Royal Mail Sorting Office, Royal Mail Street and erection of new buildings on the land fronting Commercial Street to provide a mixed use scheme including residential, leisure, retail, office, hotel and car parking, including construction of a new bridge and canal basis together with alteration to Holiday Passage.”
16. A number of plans accompanied that application. Additional plans and a photo montage were lodged to supplement the application in August and October 1998.
17. It can be seen from the plans and the photo montage that BML proposed to construct a massive building (“The Mail Box”) on the site of the former Sorting Office. BML

proposed to construct a hotel on Salvage Wharf and three blocks of flats, each four storeys high, along the strip of land by the canal. Of those three blocks the first was to stand behind Washington Wharf, the second was to stand behind Washington Foundry and the third was to stand behind the Brough property and the Tyler property.

18. On 13 July 1998 the first defendant was incorporated. The first defendant had the same directors and shareholders as BML. During the course of 1998 the first defendant set about buying up the various properties and flying freeholds, which comprised Washington Wharf and Washington Foundry. This process continued until the first defendant had purchased all those properties except for one which stood at the extreme west end (“the white building”), upon which nothing turns in these proceedings.
19. On 24 December 1998 the first defendant entered into an agreement with BWB known as “the development agreement”. Under the development agreement it was agreed that the first defendant would acquire and develop the BWB land. It should be noted that the transfer of the BWB land took some time and was not completed until 4 October 1999.
20. In order to carry out its obligations under the development agreement, BWB needed to secure vacant possession of all the BWB land. Accordingly BWB served notice under s.25 of the Landlord and Tenant Act 1954 to terminate the claimant’s tenancy of the stilted building and the old warehouse. BWB also exercised its right under the lease to require the claimant to demolish the stilted building.
21. In the meantime there were many matters to be resolved between the first defendant and the claimant, since the proposed development would take place in the immediate vicinity of the Brough property. Although much evidence was called at trial concerning the negotiations between the claimant and the defendant, I do not regard those negotiations as relevant to the issues between the parties in this litigation. Indeed I doubt that the evidence concerning those negotiations was admissible.
22. Suffice it to say that on 23 March 1999 the claimant and the first defendant entered into a written agreement, the terms of which are central to the present litigation. I shall refer to this agreement as “the 1999 agreement”.
23. The recitals to the 1999 agreement read as follows:
 - “(1) The Developer is the developer for a project of redevelopment (hereinafter called “the Project”) to be undertaken by the Developer and briefly described in Schedule 1 hereto at the property described in Schedule 3 hereto (hereinafter called “the Development Site”)
 - (2) The Owner is the Owner of the property (hereinafter called “the Property”) more particularly described in Schedule 2 hereto

- (2) The Developer at the request of the Owner is to carry out works to the Property as set out in Schedule 4 hereto
- (3) The Developer wishes to install and operate cranes from time to time for the Project (hereinafter called “the Crane”) and all or part of the Property may be subject to oversailing by the boom and counterboom of the Crane during the construction of the Project and the Owner has agreed to grant the Developer this Licence to permit such oversailing by the Crane for consideration and upon the terms hereinafter agreed”

24. Clauses 1 to 3 of the 1999 agreement dealt with oversailing. The developer was granted oversailing rights for its cranes for a period of three years and thereafter until terminated by one month’s notice.

25. By Clause 3.7 and schedule 4 the first defendant agreed to demolish the stilted building and to rebuild the claimant’s gable wall for the sum of £9,000. Clauses 5, 6 and 7 of the 1999 agreement provided as follows:

“5. For the avoidance of doubt the Owner hereby confirms that it will not object to the Project unless the Developer is in breach of its statutory requirements of any Planning Permission obtained in respect thereof

6. The parties to this Agreement hereby agree and declare that:

6.1 the Owner acknowledges that the Project may have adverse effects on subsisting rights to light air support and other easements and rights belonging to or enjoyed by the Property

6.2 the Owner undertakes and agrees with the Developer not to take any action to enforce any rights referred to in clause 6.1 above

6.3 the Owner acknowledges that the Property does not have the benefit of any right of access whether in case of emergency or otherwise over the Development Site

7.

7.1 The provisions of clauses 4, 5 and 6 above shall be binding upon the Developer and/or its successors in title and the tenants for the time being of the Development Site and shall enure for the benefit of the Owner and its respective successors and assigns and tenants for the time being of the Property

7.2 the rights and liberties herein granted by the Owner shall be binding on its successors in title”

26. The first three schedules to the 1999 agreement read as follows:

“Schedule 1

Description of Project

The project of demolition and development of the Development Site (being the land shown edged blue on the attached Plan) including (but in no way limited to) some or all of the following: as shops, restaurants, cafes, bars and residential apartments, hotel, offices and car parking ancillary to the development of the Development Site. The Project shall include but shall not be limited to all demolition works site clearance works ground preparation works remedial worksite surveys site investigation works the construction of a new canal basis bridging works all building works and any off-site works required for the construction or use of the Development Site or the obtaining or implementation of any planning permission for the carrying out of the Project.

Schedule 2

Description of the Property

The land and buildings situated in Commercial Street Birmingham and shown for the purposes of identification only edged red on the attached plan.

Schedule 3

Description of the Development Site

The land and buildings situated at Salvage Wharf Commercial Street Birmingham and shown for the purposes of identification only edged blue on the attached plan.”

27. The “attached plan” showed the following areas edged blue: the BWB land and all of Washington Foundry and Washington Wharf except for the White Building.
28. The payment of £9,000 which was due to the defendant under Clause 3.7 of the 1999 agreement was cancelled out by the agreed compensation due to the claimant for the early termination of the claimant’s tenancy of the stilted building and the old warehouse.
29. Whilst the parties were negotiating the terms of the 1999 agreement, Birmingham City Council was dealing with the planning application. Planning permission was granted on 18 March 1999. Although this was expressed as full (rather than outline) planning permission, some substantial conditions had to be met before the

development could be carried out. Those conditions included the detailed design of all buildings to be constructed on the BWB land.

30. Over the next couple of years the development was duly carried out. A huge building known as “The Mail Box” was constructed on the site of the former Royal Mail Sorting Office. This building included shops, restaurants and some premises for the BBC. A hotel and restaurants were built on Salvage Wharf. Four storey blocks of flats were built by Crosby Homes on the BWB land behind Washington Wharf and Washington Foundry. However, the four storey block of flats originally envisaged behind the Brough property and the Tyler property was not constructed. Instead a fish restaurant and a node for the canal bridge were constructed by the first defendant in that area. A residential development was constructed on Washington Wharf by Crosby Homes. Washington Foundry was in part converted into offices by the first defendant and in part left undeveloped.
31. The second defendant, a company with the same directors and shareholders as the first defendant and BML, was incorporated on 10 May 2004. Later that year the second defendant launched an architectural competition for developing the area which it described as “the bit at the back of The Mail Box”.
32. The winners of the architectural competition proposed the construction of a massive complex which would be known as “The Cube”. The Cube would occupy the entire area of land between Commercial Street and the canal and from Brough’s Passage to Washington Foundry. In order to construct The Cube it would be necessary to demolish the recent development on Washington Foundry as well as the fish restaurant and the node constructed along the canal frontage. It would also be necessary for the second defendant to acquire the Brough property and the Tyler property and to demolish the existing buildings on those sites.
33. In August 2005 the second defendant applied for outline planning permission for the construction of The Cube. Since this project would require building works on the Brough property and the Tyler property, the second defendant entered into discussions with Birmingham City Council concerning the compulsory purchase of those two properties. On 7 February 2006 outline planning permission was granted for the construction of The Cube.
34. Another necessary step in preparation for The Cube project was the transfer of property from the first defendant to the second defendant. The first defendant transferred Washington Foundry to the second defendant in December 2004. Pursuant to a transfer dated 19 April 2006 the first defendant transferred to the second defendant those parts of the former BWB land which would fall within the curtilage of The Cube. That land was edged red on the plan attached to the transfer dated 19 April 2006. I shall therefore refer to that land as “the red land”. Delays occurred in achieving registration. The second defendant did not become the registered owner of the red land until 15 September 2006.
35. In the meantime, consideration was being given to rights of light. On 9 June 2006 the first defendant applied to Birmingham City Council for registration of a light obstruction notice pursuant to s.2 of the 1959 Act against the Brough property. In this notice the first defendant stated that it was the freehold owner of the red land. The first defendant then stated:

“Registration of this notice is intended to be equivalent to the obstruction of access of light to the said building across our land which would be caused by the erection of an opaque structure of unlimited height on such parts of the south and south westerly boundaries of our land as are shown marked red on the attached plan.”

The plan attached to the Light Obstruction Notice showed a red line along the northern and eastern boundaries of the Brough property.

36. That notice was duly registered on 12 June 2006.
37. Although the Brough property was earmarked for compulsory purchase, the question whether that property had rights of light through the windows of the north and east walls was far from academic. The answer to that question was likely to have a substantial effect upon the compensation payable for compulsory purchase.
38. The Council duly progressed the compulsory purchase of the Brough property and the Tyler property. In relation to the Brough property the Secretary of State confirmed the compulsory purchase order on 6 February 2007. On 26 May 2007 the Brough property vested in Birmingham City Council. On 30 May 2007 the Council transferred the property to the second defendant.
39. As those events were unfolding, the claimant became concerned to protect its position in respect of rights to light. Accordingly, in the final days of its ownership of the Brough property, the claimant commenced the present proceedings.

Part 3. The Present Proceedings

40. By a claim form issued on 2 May 2007 the claimant applied for (i) a declaration that it was entitled to an easement to receive light through its windows on the northern and eastern elevations of the Brough property; (ii) a declaration that the Light Obstruction Notice registered by the first defendant be cancelled.
41. Both defendants resisted the claimant’s claim. In addition the first defendant counter-claimed for damages in respect of the claimant’s alleged breaches of contract. Those breaches consisted of objecting to planning permission for The Cube development and resisting the compulsory purchase.
42. The action came to trial in the Birmingham Chancery Court in April 2008 before HH Judge Purle QC, sitting as a High Court Judge. In his judgment dated 28 April the judge held that by virtue of s.3 of the Prescription Act 1832 the Brough property enjoyed an easement of light through its windows; that Clause 6 of the 1999 agreement did not amount to an abandonment of rights to light; that the project as described in Schedule 1 to the 1999 agreement did not include The Cube development; that any interference with the claimant’s rights of light by The Cube development would go beyond what was permitted by the 1999 agreement. Accordingly the judge granted the declaratory relief sought by the claimant and dismissed the first defendant’s counterclaim. In case he was wrong on the liability issues, the judge held that the claimant’s objection to the planning application for The Cube development had not caused any loss to the defendants. However, he held that

the claimant's objection to the compulsory purchase might have caused loss (namely delay in engaging a contractor), so that if the defendants had succeeded on the counterclaim the judge would have ordered an enquiry as to damages on that aspect.

43. The defendants were aggrieved by the judge's decision. Accordingly, by a Notice of Appeal dated 28 May 2008 the defendants appealed against the declarations granted in favour of the claimant and against the dismissal of the counterclaim.
44. The arguments which have been advanced in relation to this appeal have a kaleidoscopic quality. Originally seven grounds of appeal were pleaded. Those grounds mutated to some extent in the written skeleton arguments. The oral arguments deployed at the hearing departed substantially from the skeletons.
45. On day two of the hearing a drastically amended Notice of Appeal was served by the appellants. Doing the best that I can with this document (a sea of red amendments and crossings out), there are essentially two issues in this appeal. The first main issue is whether pursuant to s.3 of the 1832 Act as a consequence of entering into the 1999 agreement, the claimant lost all rights of light. The second main issue is whether the first defendant was entitled to register its Light Obstruction Notice. The second issue will also involve construing the 1999 agreement. In relation to the second issue I must consider (a) the first defendant's entitlement to erect a notional wall (as described in the Light Obstruction Notice) and (b) whether The Cube was part of the "Project" referred to in the 1999 agreement.
46. In addressing the two main issues in this case I shall not attempt to follow the labyrinthine course of the pleadings, the amendments, the contingent arguments and the revised fallback positions of each party. Instead I shall concentrate upon the substance of the matter.

Part 4. Did the claimant lose all rights of light pursuant to s.3 of the 1832 Act?

47. Sections 3 and 4 of the 1832 Act provide as follows:

**“3 Right to the use of light enjoyed for twenty years
indefeasible, unless shown to have been by consent**

... 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.

**4 Before mentioned periods to be deemed those next
before suits for claiming to which such periods relate –
What shall constitute an interruption**

... Each of the respective periods of years herein-before mentioned shall be deemed and taken to be the period next

before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and ... no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.”

48. The effect of these two provisions is that it is necessary to examine the state of affairs in the 20 year period preceding the commencement of this action. That is the 20 year period between 3 May 1987 and 2 May 2007. There is no dispute that during this period the claimant enjoyed, without interruption, light entering the Brough properties on the north and east elevations. The Light Obstruction Notice does not alter the position because less than a year elapsed between the registration of the Notice and the commencement of this action.
49. The crucial question which arises, therefore, is whether the proviso to s.3 of the 1832 Act has been triggered. The defendants contend that the proviso has been triggered by the parties entering into the 1999 agreement, in particular clause 6. The defendants contend that after the date of that agreement the claimant only enjoyed light through the relevant windows by “some consent or agreement” within the meaning of s.3. The claimant disputes that clause 6 of the 1999 agreement has any such effect.
50. There have been a number of decisions over the last two centuries in which the courts have grappled with the meaning of s.3. In *Mitchell v Cantrill* (1887) 37 ChD 56 a landowner granted to the plaintiff’s predecessor a long lease of a house with “all rights and appurtenances legal used or reputed to the said plot”. A house was built on the adjoining land and this was leased to a Mr Cantrill. Mr Cantrill’s executrix sought to build an extension on the Cantrill land which interfered with light to the plaintiff’s windows. The plaintiff applied for an injunction to restrain the building works. The Court of Appeal, reversing the decision of the District Registrar in the Palatine Court, held that the plaintiff was entitled to an injunction. The clause quoted above did not trigger the proviso to s.3. At pages 59-60 Cotton LJ said this:

“The enactment is this, that the right to light is granted where there has been an enjoyment of the access and use of light for twenty years, “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.” Now does this clause which I have read bring it within that? In my opinion it does not. It is an agreement given for the purpose of the enjoyment of the light, but it is simply an exception out of the grant made of appurtenances and rights, so as to prevent the lessee from urging as against the landlord or anybody claiming through him, before a right had been obtained under the statute, that the landlord could not derogate from his own grant either by his building or granting to anybody else a right to build so as to interfere with the Plaintiff’s lights.If you had an express proviso in the contract between the parties that, notwithstanding the grant to the Plaintiff, the landlord should

be at liberty to build so as to interfere with his right, that would be another point, but that is not the express form of it, and in my opinion the fair and clear meaning of this clause, construing it without reference to the consequences to one party or the other, is not anything of that sort.”

Both Lopes and Lindley LJJ agreed with that judgment.

51. In *Willoughby v Eckstein* [1937] 1 Ch 167 the plaintiff and defendant were the lessees of adjoining premises at Balfour Mews in Westminster. The lease to the plaintiff excluded from the demise any rights to light and then continued:

“Subject to the adjacent buildings or any of them being at any time or times rebuilt or altered according to plans as to height, elevation, extent and otherwise approved of by the ground landlord.”

Luxmoore J held that these words reserved to the lessor a right to build on the adjoining land in a manner which interrupted light to the plaintiff’s property. Accordingly the proviso to s.3 was triggered and the plaintiff did not acquire a right to light by prescription.

52. In *Marlborough (West End) Limited v Wilks, Head and Eve* (transcript 20 December 1996) a deed settling a dispute between adjoining landowners included the following provision:

“IT IS HEREBY AGREED AND DECLARED that notwithstanding that the Building Owners have placed windows in that part of their new buildings which overlook the premises occupied by the adjoining owner no right or easement of light or air exists in respect thereof or has been or shall at any future time be acquired by the Building Owners or any one deriving title through or under them and the adjoining owner and the Freeholders and all persons deriving title through or under them or either of them shall have the right to intercept light and air coming to the said windows.”

Lightman J held that the second and third limbs of this clause entitled the adjoining owner to redevelop in a way that would interrupt light. Accordingly the proviso to s.3 was triggered and the building owner did not acquire by prescription rights to light across the land of the adjoining owner.

53. At page 8 of the transcript Lightman J formulated the relevant principle in these terms:

“Whether or not a document constitutes such a consent or agreement is a matter of construction. In this context, care must be taken to distinguish between provision designed to protect the servient owner by negating the implication of a grant of an easement or the grant of analogous rights under the doctrine of non-derogation from grant or to establish by

agreement the existing legal rights of the parties; and provisions designed to authorise the servient owner at a future date to carry out works or build as he pleased unrestricted by any easement of light in favour of the dominant land and notwithstanding any resultant injury to the light enjoyed. Provisions of the former character do not constitute either consents or agreements by the servient owner licensing or consenting to the future enjoyment of the access of light and accordingly do not prevent acquisition of light by prescription (see *Mitchell v Cantrill* (1887) 37 Ch D 56); but provision of the latter character may be construed as consents or agreement permitting the enjoyment of the access of light during the interim period and accordingly (as provided in Section 3) preclude any easement arising by prescription under the Act (see *Willoughby v Eckstein* [1937] Ch 167).”

54. In *RHJ Limited v FT Patten (Holdings) Ltd* [2007] EWHC 1665 (Ch); [2007] 4 All ER 744 the lease of an office block contained a provision excepting or reserving:

“All rights to the access of light or air from the said adjoining property known as Victoria House and Graham House to any of the windows of the demised property.”

55. The lease also reserved to the landlord:

“The full and free right to erect, build, re-build and or alter as they think fit at any time and from time to time any buildings or bays or projections to buildings on any land adjoining the demised property and/or on the opposite sides of the adjoining streets and access ways.”

56. Both Lewison J and the Court of Appeal held that the provisions of this lease had the effect of triggering the proviso to s.3 of the 1832 Act. Lewison J reviewed a long line of authorities concerning the effect of s.3 of the 1832 Act. At paragraph 34 he said this:

“The real distinction that the cases draw is, as it seems to me, between clauses that deal with the position as it exists at the date of the lease, and clauses that deal with what might happen in the future. Clauses of the first kind are effective only to prevent the creation of easements by express or implied grant; and do not prevent the subsequent acquisition of a right of light by prescription. Clauses of the second kind may prevent the acquisition of a right of light by prescription of what they authorise would interfere with light. If, on a fair reading of the clause they do, then it is not necessary, in my judgment, for the clause to use the word ‘light’. Nor, in my judgement, is it necessary for the clause to provide that the enjoyment of light is ‘permissive’. What is needed is that the clause makes it clear that the enjoyment of light is not absolute and indefeasible. The court must ‘find out the substance of the contract’: in other

words it is a question of interpretation of the clause in question. Once the clause has been interpreted, that interpretation will have been 'expressly' agreed. A clause in a lease which authorises the landlord to build as he pleases is likely to satisfy the test."

57. In the Court of Appeal Lloyd LJ gave the principal judgment with which Lawrence Collins and Mummery LJ agreed. Lloyd LJ reviewed the authorities on s.3. In particular he cited with approval the passage from Lightman J's judgment in *Marlborough (West End)*, which I have quoted above.

58. At paragraph 44 Lloyd LJ stated, with reference to the last part of s.3:

"I consider that the phrase "expressly made or given for that purpose" can be satisfied by an express provision in the relevant document which, on its true construction according to normal principles, has the effect of rendering 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."

See *RHJ Ltd v FT Patten (Holdings) Limited* [2008] EWCA Civ 151; [2008] Ch 341 at paragraph 44.

59. Lloyd LJ then went on to emphasise that the document which is said to trigger the proviso to s.3 must be construed in context and having regard to the surrounding circumstances.

60. With the benefit of that guidance from the authorities, I turn to the 1999 agreement in the present case. I must construe clause 6 of that agreement in its context and having regard to the surrounding circumstances.

61. The first matter to note about clause 6 is that it refers to and acknowledges the claimant's subsisting rights to light. The second matter to note is that if the project has "adverse effects" upon the claimant's subsisting rights of light, the claimant agrees not to take enforcement action. The claimant does not abandon or agree to abandon its rights to light.

62. It is also relevant to examine the project which was contemplated at the time of the March 1999 agreement. The plans lodged by the first defendant with its planning application in June 1998 were in the public domain. Indeed those plans had been inspected by Mr Brough of the claimant.

63. The hotel which was proposed to be constructed on Salvage Wharf would not materially affect the amount of light entering the claimant's windows on the eastern elevation. Turning to the north elevation, the planning application proposed the construction of three four-storey blocks of flats along the canal side. The block of flats at the east end (which was not in the event constructed) would have caused some slight diminution of the light entering the claimant's premises. But that diminution would not have been so substantial as to give rise to any legitimate complaint by the

claimant. This is demonstrated by the diagram and calculations appended to the respondent's skeleton argument.

64. I am quite satisfied that, on the proper construction of clause 6, the 1999 agreement does not constitute a "consent or agreement" of the kind referred to in the proviso to s.3 of the 1832 Act. Clause 6 in the present case is radically different from the clauses in *Willoughby, Marlborough (West End) Limited* and *RHJ*, which did have that effect.
65. I am fortified in this construction of clause 6 by reference to the other terms of the commercial deal. I quite accept that, as Mr Underwood QC rightly submits on behalf of the defendants, in law consideration does not have to be adequate. Nevertheless it would be most remarkable if the claimant had given up obviously valuable rights of light and had received virtually nothing in return.
66. Let me now draw the threads together. For the reasons set out above I agree with the conclusion of Judge Purlé that the claimant did not abandon his rights to light by entering into the 1999 agreement. Nor did the claimant lose those rights to light by operation of the proviso to s.3 of the 1832 Act.
67. My answer to the question posed in this part of the judgment is no.

Part 5. Was the first defendant entitled to register its notice under s.2 of the 1959 Act?

68. Section 2 of the 1959 Act provides:

“Registration of notice in lieu of obstruction of access of light

(1) For the purpose of preventing the access and use of light from being taken to be enjoyed without interruption, any person who is an owner of land (in this and the next following section referred to as “the servient land”) over which light passes to a dwelling-house, workshop or other building (in this and the next following section referred to as “the dominant building”) may apply to the local authority in whose area the dominant building is situated for the registration of a notice under this section.

(2) An application for the registration of a notice under this section shall be in the prescribed form and shall—

- (a) identify the servient land and the dominant building in the prescribed manner, and
- (b) state that the registration of a notice in pursuance of the application is intended to be equivalent to the obstruction of the access of light to the dominant building across the servient land which would be caused by the erection, in such position on the servient land as may be specified in the application, of an opaque structure of such dimensions

(including, if the application so states, unlimited height) as may be so specified.

.....

(4) Where application is duly made to a local authority for the registration of a notice under this section, it shall be the duty of [that authority to register the notice in the appropriate local land charges register, and—

(a) any notice so registered under this section shall be a local land charge; but

(b) section 5(1) and (2) and section 10 of the Local Land Charges Act 1975 shall not apply in relation thereto.]”

69. Section 3 of the 1959 Act provides:

“Effect of registered notice and proceedings relating thereto

(1) Where, in pursuance of an application made in accordance with the last preceding section, a notice is registered thereunder, then, for the purpose of determining whether any person is entitled (by virtue of the Prescription Act, 1832, or otherwise) to a right to the access of light to the dominant building across the servient land, the access of light to that building across that land shall be treated as obstructed to the same extent, and with the like consequences, as if an opaque structure, of the dimensions specified in the application,—

(a) had, on the date of registration of the notice, been erected in the position on the servient land specified in the application, and had been so erected by the person who made the application, and

(b) had remained in that position during the period for which the notice has effect and had been removed at the end of that period.

.....

(3) Subject to the following provisions of this section, any person who, if such a structure as is mentioned in subsection (1) of this section had been erected as therein mentioned, would have had a right of action in any court in respect of that structure, on the grounds that he was entitled to a right to the access of light to the dominant building across the servient land, and that the said right was infringed by that structure, shall have the like right of action in that court in respect of the registration of a notice under the last preceding section:

Provided that an action shall not be begun by virtue of this subsection after the notice in question has ceased to have effect.”

70. If an action is brought under s.3 of the 1959 Act, this enables the court to determine whether the party who registered a Light Obstruction Notice under s.2 was entitled to interrupt the entry of light into the claimant’s property.
71. This useful procedure avoids the need for structures to be erected and then demolished pursuant to an order of the court.
72. The argument at first instance centred largely upon whether The Cube development formed part of the project referred to in the 1999 agreement. The judge held that it did not.
73. Insofar as this is still a live issue, after the parties various manoeuvrings, I am quite satisfied that the judge was correct in this regard. I reach this conclusion for five reasons:
 - (i) The Cube project was not part of the original development. It was a subsequent redevelopment.
 - (ii) The Cube project involved demolishing a number of buildings which formed part of the original development, in particular the fish restaurant, the node by the canal and the refurbished offices on Washington Foundry.
 - (iii) The Cube project extended onto land which was not part of the development site, as shown on the plan annexed to the 1999 agreement.
 - (iv) The Cube project involved the compulsory purchase and demolition of the Brough property. This went well beyond the development described in the 1999 agreement.
 - (v) The 1999 agreement contemplated a development which would be completed within three years: see clause 2. The Cube project started much later, as set out in Part 2 above.
74. I turn next to the question whether in June 2006 the first defendant or second defendant was entitled to build the notional wall which is described in the Light Obstruction Notice. It will be recalled that this wall would be of unlimited height. It would run along the northern boundary of the Brough property and the eastern boundary. Its location is shown on the plan annexed to the Light Obstruction Notice. I shall refer to this plan as “Drawing 115”, since that is its page number in the core bundle.
75. In my view neither the first defendant nor the second defendant was entitled to build the notional wall in June 2006. I reach this conclusion for four reasons:
 - (i) The wall shown on Drawing 115 bears no relationship to the development described in the 1999 agreement.

- (ii) By June 2006 the development to the land to the north and east of the Brough property was substantially completed. That development did not involve or include the notional wall or anything like it.
- (iii) On a fair reading of the 1999 agreement, the claimant was consenting to a development which may cause some diminution of light entering the claimant's premises. The claimant was not consenting to a completely different development (viz. the notional wall) which would completely block all light from passing through the claimant's windows.
- (iv) The 1999 agreement contemplated a development that would be completed within three years: see clause 2. The Light Obstruction Notice was not registered until more than seven years after the parties entered into the 1999 agreement.

76. I am fortified in this conclusion by the matters mentioned in Part 4 above. The claimant's rights to light were of considerable value. It would be remarkable if the claimant were to give up those rights for very little in return. I am quite satisfied that, on the true construction of the 1999 agreement, the claimant was not permitting the developer to build the notional wall shown on Drawing 115.
77. In the course of the hearing there was much debate about which defendant was entitled to register a notice under s.2 of the 1959 Act on 9 June 2006. It will be recalled that before that date the first defendant had executed a transfer of the red land in favour of the second defendant, but the second defendant's title to the red land was not registered until 15th September 2006.
78. In relation to this issue we were referred to ss. 27 and 74 of the Land Registration Act 2002. Counsel debated whether these provisions involved a departure from the position under s.19 of the Land Registration Act 1925 and Rule 83 of the Land Registration Rules 1925. On the view which I take of this case, that issue does not arise for decision. In my view, in June 2006 neither defendant was entitled to construct the notional wall as shown on Drawing 115.
79. A separate issue argued before us was whether clause 7.1 of the development agreement meant what it said or whether the phrase, "be binding upon" and "shall enure for the benefit of" should be reversed. Mr Randall QC for the respondent submitted that clause meant what it said. Mr Underwood QC for the appellants submitted that the phrases should be reversed. On this issue I prefer and accept the submissions of Mr Underwood. The clause in its present form makes no sense. It was clearly the intention of the parties that clauses 4, 5 and 6 should enure for the benefit of the developer and its successors.
80. Where a written agreement as drafted is a nonsense and it is clear what the parties were trying to say the court will, as a matter of construction, give effect to the obvious intention of the parties. See *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 at 113 D-E per Lord Hoffmann;

KPMG LLP v Network Rail Infrastructure Limited [2007] EWCA Civ 363 at paragraphs 44-50 per Carnwath LJ.

81. Let me now draw the threads together. For the reasons set out above, although the appellants succeed on the interpretation of clause 7.1, they fail on the core issue. The 1999 agreement did not entitle either defendant, as at June 1999, to construct the notional wall. Accordingly, my answer to the question posed in this part of the judgment is no.

Part 6. Conclusion

82. For the reasons set out in Parts 4 and 5 above, I consider that the judge was correct to allow the claimant's claim and to direct cancellation of the Light Obstruction Notice.
83. I also consider that the claimant was entitled to object (unsuccessfully) to the planning application for The Cube project and to the compulsory purchase of the claimant's property. Whatever else the claimant may have been consenting to by the 1999 agreement, the claimant was certainly not consenting to being dispossessed of its own property. The proposition pleaded in the counterclaim that the claimant should not even have exercised its statutory right to raise any objection to these matters is most surprising. I therefore consider that the judge was correct to dismiss the counterclaim.
84. In the result, this appeal is dismissed.

Lord Justice Carnwath

85. I agree that the appeal should be dismissed for the reasons given by Jackson LJ. I will add some comments of my own on the issue under the Prescription Act 1832.
86. The question raised by section 3 is whether, following the 1999 agreement, the light enjoyed by the windows of the Brough property was "enjoyed by some consent or agreement expressly made or given for that purpose". This turns on the interpretation of clauses 6.1 and 2, by which the owners of the Brough property acknowledged that "the Project" might have an adverse effect on "subsisting rights to light...belonging to or enjoyed by the Property", but agreed with the Developer not to take action to enforce those rights.
87. It is to be noted that on its face clause 6.2 appears to be an agreement not to enforce the rights, expressed in unrestricted terms. However, in context, it must in my view be read as implicitly limited by clause 6.1. The Owner was agreeing not to enforce his rights, solely to the extent that they might be adversely affected by the Project itself, and not to any greater extent. The other main points to note are, first, that the agreement was not in terms expressed as conferring any rights on either party, but acknowledged "subsisting rights"; and, secondly, that there was no giving up of such rights, but simply an agreement not to enforce them for a particular purpose.
88. The cases to which we have been referred are concerned for the most part with clauses in conveyances or leases, where the issue is what if any rights are enjoyed over retained property. They fall into two main categories, the significance of which is summarised in *Gale on Easements* 18th Ed para 4-26:

“If a lease or conveyance excepts the right to light in such a way as to negative the implication of a grant, the exception does not constitute an agreement within the section but the case is otherwise, and “agreement” is constituted, if the instrument contains words which positively authorise the grantor to build as he pleases”.

89. I confess that I do not find the rationale for the distinction entirely easy to understand. In both cases the grantor is reserving the right to deal with his adjoining property as he wishes. It is not obvious why it should matter whether this is expressed in negative or positive form. However, the distinction is clearly established and has recently been confirmed by this court in *RHJ Ltd v FT Patten (Holdings) Ltd* [2008] Ch 341.
90. The leading example cited in *Gale* of the first category is *Mitchell v Cantrill* (1887) 37 ChD 56, in which the lease demised land and its appurtenances “except rights, if any restricting the free use of any adjoining land... for building or other purposes...” This was held not to be a consent within section 3, so that the lessee was able to rely on 20 years enjoyment of light to establish a prescriptive right. In *RHJ* Lloyd LJ commented:
- “The basis of the decision was that the express provision negated any immediate acquisition of a right to light, whether by implied grant or by the effect of the covenant for quiet enjoyment or the principle of non-derogation of grant, and did not on its true reading constitute an agreement or consent relating to the future enjoyment of light.” (para 31)
91. In *Gale*, the *Mitchell* decision is contrasted with *Haynes v King* [1893] 3 Ch 439, in which the lease contained a declaration giving the lessors power to “deal as they may think fit” with the adjoining premises, and to erect “any buildings whatsoever, whether such buildings shall or shall not affect or diminish the light... enjoyed by the lessee...” This was held to be an agreement within section 3.
92. *Willoughby v Eckstein (No 2)* [1937] Ch 167 is another example of the second category. The clause in the lease excluded “any rights of light... over other ground” and was “subject... to the adjacent buildings... being at any time rebuilt or altered...” The latter words were held to constitute -
- “a grant by the lessee to the lessor to build during the full term on the adjacent land... and an agreement by the lessee... that any enjoyment of light in respect of the premises demised to him was to be permissive throughout the whole of the term.” (p 263)
93. Jackson LJ has quoted (as did Lloyd LJ in *RHJ*) part of Lightman J’s unreported judgment in *Marlborough (West End) Limited v Wilks, Head and Eve*, in which he sought to summarise the relevant principles. He highlighted a distinction in the cases between -

- (i) “provisions designed to protect the servient owner by negating the implication of a grant of an easement... under the doctrine or non-derogation from grant...”; and
 - (ii) “provisions designed to authorise the servient owner at a future date to carry out works or build as he pleased unrestricted by any easement of light in favour of the dominant land...”
94. Although the passage is characteristically illuminating, I respectfully question the use of the word “designed”, if it suggests that the issue is one of intention, as opposed to legal form. Both types of clause are in a sense “designed” to leave the lessor free to deal with the retained property free of any easements in favour of the demised property. However, for these purposes, a distinction is drawn between clauses which in terms only deal with the position as it exists at the date of the lease, and those which deal positively with what might happen in the future. The logic appears to be that reservation by the lessor of a positive right to build in the future is taken to carry with it an implied “consent or agreement” to the lessee enjoying the use of light in the meantime, and therefore precluding the acquisition of prescriptive rights under the 1832 Act.
95. Turning to the present case, it is important to emphasise, as do the recent authorities, that the issue is one of construction of the particular clause in its context. The mere fact that a clause is expressed in terms relating to the future does not bring it within the section. The structure of the present clauses is quite different from any of those considered in *Gale*. They are part of an independent agreement, not directly related to a specific conveyance or lease. Accordingly there was no need to negative any implied rights which might otherwise arise on the transfer. Taken together the clauses do not in terms confer any rights. On the contrary they confirm the existing rights of the Owner, while imposing a restriction on their enforcement for a particular purpose. Although the effect is to enable the Developer to carry forward a particular project without risk of infringement proceedings, the Owner’s continued enjoyment of his light does not thereby become a matter of “consent or agreement”, but is confirmed as a matter of “subsisting right”.
96. Accordingly, I agree with Jackson LJ that there was nothing in the agreement to prevent the acquisition of prescriptive rights under the 1832 Act.

Lord Justice Tuckey

97. I agree with both judgments.