

## Real estate litigation

### Making a mint – can tenants release their rights to light?



**The recent case of *Metropolitan Housing Trust Limited v RMC FH CO Limited [2017] EWHC 2609 (Ch)* is a notable reminder to developers that they need to consider the different parties that may have a claim to rights of light over a development. It emphasises that while freeholders may have a distant reversionary interest they may nevertheless have a ransom position in a rights of light negotiation.**

#### Background

In 1987, Metropolitan Housing Trust (MHT) was granted a long leasehold interest of land at Royal Mint Street, London. Following the grant of the lease, MHT developed the land and built 20 flats on the demised premises which are now subject to long underleases.

A neighbouring landowner obtained planning permission for a development that would cause an actionable interference with the rights to light enjoyed by 1-20 Royal Mint Street. MHT sought to release the long leasehold rights of light over this new development in return for compensation. The freeholder became aware and claimed MHT would be in breach of its lease if it granted such a release.

#### The issues in the case

The case focused on the interpretation of a fairly standard covenant in MHT's lease which, RMC claimed, prevented MHT from releasing its rights of light.

MHT had covenanted "not to give permission for any new window... 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..."

Notwithstanding this covenant, MHT sought a declaration from the court such that it was entitled to release its rights of light over its leasehold interest in the property without the consent of its landlord.

The case turned on three issues:

1. Whether MHT's right of light was part of "the demised premises"?
2. Whether an interference with its right of light by the developer would be "an encroachment" upon or against the demised premises?
3. Whether such an encroachment by the developer might be or grow to the "damage annoyance or inconvenience" of the freeholder?

#### Demised premises

The parties agreed that the right of light had come into existence through Section 3 of the Prescription Act 1832 i.e. that the right of light claimed had been used for the previous 20 years. Since any right of light had only been acquired by 20 years of use through the windows in the building developed by MHT, no right of light was in existence (and therefore could not have been granted) at the start of its tenancy. Accordingly, MHT argued that a right of light was not a part of the demised premises at all. If this analysis was correct, MHT could allow an encroachment against its rights of light, without affecting the rights of the demised premises and so would not be in breach of the lease.



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It was however common ground between the parties that once a prescriptive right to light is acquired by the use or enjoyment of a leasehold owner (as it was here), that right to light is also annexed to the freehold.

The court further accepted that where an easement has been acquired and is annexed to the freehold it was treated as being part of the demise to the leaseholder,

even though the actual demise had been made prior to the easement being acquired. It therefore concluded that MHT's right of light was a part of "the demised premises".

### **Encroachment**

MHT argued that the correct interpretation of the word "encroachment" in the relevant covenant in the lease was in respect of an entry upon the physical land which had been demised. It was submitted that an interference with a right of light would not involve an encroachment on physical land and so this covenant did not apply to rights of light.

The court disagreed with this interpretation and found that the ordinary meaning of the word encroachment extended to rights connected to property.

### **Damage, annoyance or inconvenience to the landlord**

The court finally considered whether a release of MHT's right of light would be or grow to the annoyance of the landlord and as such would be prohibited by the covenant. It was noted that MHT releasing its rights would not result in a release of the freeholder's right and RMC would remain entitled to bring its own proceedings to restrain the development.

The court considered that the expense of proceedings would be an inconvenience to the freeholder. It also considered that the freeholder's ability to obtain an injunction requiring the removal of the obstruction to light would be significantly reduced if the interruption had continued for many years. Consequently the court concluded that a release might grow to be an annoyance to the freeholder.

### **Points to consider**

Developers need to consider carefully the various parties that may need to be involved in any discussion on the release of rights of light. This case reiterates the need for developers to ensure that they have done the requisite due diligence on neighbouring sites to decide which parties need to consent or be joined as a party to a release. That is not to say that developers must inevitably approach or join a freeholder, as a tenant who is prepared to grant a release in breach of its lease can still do so. The risk for the developer is that the freeholder later becomes aware and cries foul, which could cause a number of potential problems. However,

in the specific circumstances, this might be a risk worth taking in any particular case.

For freeholders this case is encouraging. While the court found it difficult to accept the proposition that the freeholder was genuinely (rather than tactically) concerned to prevent an interference with its rights of light it nevertheless considered that it was entitled to do so. The court however did set out that a freeholder's motivation may be taken into account when considering whether it is acting reasonably or in a proper manner. Where leases contain suitable restrictions preventing encroachments, freeholders may wish to keep a keen eye out for neighbouring developments which may provide a previously untapped source of income.

For leaseholders the case demonstrates that it is important to consider reversionary interests in a release situation. Most leases will contain prohibitions against permitting encroachments against rights of light. A leaseholder will need to decide whether consent should be sought from its freeholder to a release of rights of light. The risks to be balanced are the likelihood that, if approached, a freeholder will use its potential veto to argue for a share of the compensation (reducing the sum being paid to the tenant) as against the potential risk, if not approached, of a freeholder later discovering what the tenant has done and seeking a remedy for breach of covenant.

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