THE RIGHTS OF LIGHT ACT 1959 AND A FICTION TOO FAR?

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Developers in urban areas are sometimes constrained to spend substantial sums of money in securing the right to override rights of light which adhere to neighbouring properties. One wonders how often persons with rights of light acquired by prescription are unaware of their rights and of the possibility of securing a payment to them. Even if such persons are aware of their rights they may not appreciate their true bargaining power in terms of a right to an injunction or to damages assessed on the *Wrotham Park*[1] or "in lieu of voluntary release" basis. Another fertile source of failure to protect a property is the ignorance of some landowners of their ability to prevent the acquisition against them of an easement of light by prescription through the registration of a notice under the Rights of Light Act 1959 ("the 1959 Act"). Recourse to this Act is sometimes only considered when a development is pending, at which time it may be too late, or when the 20-year prescription period is nearing its end, when also it may be too late to take fully effective action under the Act. The purpose of this article is to examine the position of a landowner who wishes to prevent a prescriptive right of light being acquired against his property, with the potential impediment to future development, but who does not act until the later stages of the 20-year prescription period. In particular we will discuss the meaning and impact of s.3(4) of the 1959 Act, a little examined provision but a provision which on one view of its meaning may have a substantial practical impact on the ability of a landowner to use the provisions of the 1959 Act when the 20-year prescription period is drawing to a close. The effect of s.3(4) is to shorten the prescription period relating to the acquisition of an easement of light by one year when the

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[1] *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 W.L.R. 798; [1974] 2 All E.R. 321, Ch D.

machinery under the 1959 Act is used. The conclusion reached in this article is (a) that the provision is unnecessary, and (b) that it was inserted into the Bill which preceded the Act at a late stage in the legislative process as a result of a double misconception of the then existing state of the law.

The general law

The general principles will be well known to property lawyers. In theory a right of light can be acquired by common law prescription or under the doctrine of lost modern grant although there can be few apertures in buildings which have enjoyed the access of light since 1189 so as to permit reliance on common law prescription.[2] In practice it is prescription under the Prescription Act 1832 ("the 1832 Act") which is important. We will comment later on the possible impact of a claim to acquire an easement of light in reliance on a lost modern grant.

Section 3 of the 1832 Act states that actual enjoyment of the access of light to a building for 20 years without interruption shall create an absolute and indefeasible easement of light against the property over which the light has passed unless enjoyed by written consent or agreement. A right of light is acquired more easily than are other easements. A right of light may be acquired even where the access of light is enjoyed under an oral agreement with payment of money for it, and a tenant can acquire a right of light against his own landlord where that landlord owns neighbouring property. As with other easements the 20-year prescription period for rights of light is the 20 years before some action in which the claim to the right is in question.[3]

The key provision for present purposes is that the enjoyment of the access of light over a property must have been "without interruption". Interruption means some action which prevents the access of light, the obvious example being the erection on the servient property of a physical obstruction to the access of light. A mere statement or protest by the owner of a property that there is no right to the access of light over his property is not an interruption for these purposes. The final and critical provision is that the obstruction or other interruption must last for at least a year and must have been acquiesced in. It is worth setting out the text of s.4 of the 1832 Act which contains the critical provisions:

[2] *Bury v Pope* (1588) Cro. Eliz. 118.
[3] 1832 Act s.3.

> "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."

Thus in summary under the 1832 Act the only action by the owner of the servient property which can halt the running of the 20-year period by reason of being an interruption to the access of light to the dominant property is (a) a physical obstruction, (b) which lasts for at least a year, and (c) which is acquiesced in by the owner of the dominant property. We can illustrate the position in law by two simple examples.

- The owner of property D (the dominant land) erects a new building on his property and for 15 years there is access of light to the windows or other apertures in the building over adjoining property S (the servient land). In the 15th year the owner of property S erects an obstruction to the light. The owner of property D cannot prevent the obstruction since he has not acquired an easement by 20 years' enjoyment of the access of light. Proceedings brought to prevent the obstruction will fail and any protests by the owner of property D will be ineffective since he has no right which is infringed by the obstruction. After one year the obstruction will halt the running of the prescription period. If the obstruction is then removed the 20-year period can start again in favour of property D and a prescriptive right of light may be achieved after a further 20 years from the removal of the obstruction unless during that period there is a further obstruction.
- The circumstances may be the same as in the first example save that the obstruction on property S is not erected until 25 years after the start of the access of light to the apertures of the building on property D. The owner of property D can at once prevent the obstruction by legal proceedings since he has acquired his easement by 20 years' access of light without interruption. He can also protest at the obstruction and it seems that sufficient protests will prevent his acquiescence in the interruption constituted by the obstruction even if no legal proceedings

are commenced.[4] However, if the owner of property D neither commences proceedings nor sufficiently protests for a year there will then be an obstruction which amounts to an interruption and the prescription period will be halted. If the obstruction is later removed a further 20 years will then be needed if a right of light in favour of property D is to be established by prescription. In other words the consequence of a sufficient and effective interruption is that the clock is set back to zero. The prescription period must be started again from year one. This is the case whether the effective interruption occurs during the running of the 20-year period or after that period has been completed.

The erection of a structure on a property to prevent the passage of natural light across that property onto a neighbouring property is an awkward process which may be expensive and unsightly, and in modern times is a form of development for which it might be difficult to obtain planning permission. It was to avoid these difficulties that the 1959 Act was enacted. Despite its somewhat convoluted provisions the essence of the Act is simple. Instead of erecting a physical obstruction the owner of the servient property may register a notice with the local authority.[5] Before doing so he must obtain a certificate from the Lands Tribunal that adequate notice of the proposed application for registration has been given to persons likely to be affected by the registration of a notice. For the purposes of determining whether a person is entitled to a right of light over the servient land the access of light to any property across the servient land is treated as obstructed to the same extent as it would have been obstructed if an opaque structure of the dimensions specified and in the position specified in the notice had actually been erected. The notice has effect for one year from the date of its registration. A person who would have a right of action to prevent an actual obstruction (for example the owner of property D in the second example given above) has the same right of action in respect of the notional obstruction caused by the registration of a notice.

[4] See, e.g. *Glover v Coleman* (1874) L.R. 10 C.P. 108. The law as regards the efficacy of protests by the owner of the dominant land is different where the machinery under the Rights of Light Act 1959 is operated, a topic which we consider later and which is important to the subject matter of this article.

[5] 1959 Act s.2.

The date of the obstruction

This procedure, if operated properly, can work well. However, with interruptions to the access of light, as with interruptions to the user needed to support any prescriptive easement, there is a difficulty towards the end of the 20-year period under the 1832 Act. We will first examine the situation apart from the particular impact of s.3(4) of the 1959 Act and then come to the effect of that provision. The problem is that if an owner waits until the 20th year of the 20-year period to erect an obstruction or register a notice under the 1959 Act he may be too late. The reason is that the obstruction, actual or notional, will only operate for the purposes of preventing the running of the prescription period if it is an obstruction for at least a year. It is for this reason that under s.3(2)(b) of the 1959 Act a notice has effect for one year following the date of its registration. It follows that at the beginning of the 21st year the owner of the dominant property will be able to assert the existence of a prescriptive easement based on a completed 20 years of the access of light to his property over the servient property and the owner of the servient property will be unable to rely on an obstruction as an interruption to the access, since at the beginning of the 21st year the interruption commenced in the 20th year will not have lasted for a year.

It may again be useful to explain the process by an example. Suppose that a building is erected on property D on January 1, 1990 and thereafter there is access of natural light to its apertures across property S enjoyed without written agreement. In the ordinary way 20 years of uninterrupted actual enjoyment of the access of light will be completed on January 1, 2010 and the easement will then be absolute and indefeasible. Suppose, however, that the owner of property S erects an obstruction or registers a notice of obstruction under the 1959 Act on April 1, 2009. There are then three relevant periods to consider.

- During the remaining nine months of 2009 the owner of property D can do nothing. He cannot show the necessary enjoyment of the access of light for 20 years. If he commences proceedings to challenge the obstruction the proceedings will fail. Any protests will be ineffective and will not prevent there being acquiescence in the interruption since the owner of property D has no right to prevent the obstruction.
- The owner of property D then has a short period of opportunity in which to assert and establish his right. This

period is the three months from January 1, 2010 to March 31, 2010. During this period the owner of property D can show the necessary 20 years of enjoyment of the access of light and there has been no sufficient interruption to that access, since the interruption has not lasted for a year. The owner would be entitled to assert his right by an action for a declaration that his easement is established.[6] In the case of a notional obstruction under the Act the only effective means of showing that there is no acquiescence in the obstruction during this second period is by bringing proceedings; for the purposes of the Act protests are not enough.[7] We will have to return to the law as explained in this and in the last sub-paragraph when at the end of this article we seek to find the origin of the somewhat mysterious provision contained in s.3(4) of the Act.

- The third period is from April 1, 2010 onwards. The owner of property D has now lost his opportunity to assert a right of light. If he commences proceedings he will not be able to show 20 years of enjoyment of the light without interruption as at the date of the commencement of the proceedings. There will be an interruption constituted by the actual or notional obstruction which will have lasted a year and which, in the absence of previous effective action (i.e. legal proceedings in the case of a notional obstruction under the Act) by the owner of property D in the second period, will have been acquiesced in by him.

It therefore seems that during the first of the three above periods the owner of property S can erect his obstruction, actual or notional, but that it may do him no good because at the beginning of the second period, i.e. at the end of the 20th year, the owner of property D can establish his prescriptive easement irrespective of the nine months of interruption to light which has then elapsed. It is suggested (see, e.g. *Megarry and Wade, The Law of Real Property*)[8] that a servient owner in this position can protect himself and prevent the prospective fulfilment of the

[6] 1959 Act s.3(3).

[7] 1959 Act s.3(3) and (6)(b). If there had been an actual obstruction, as opposed to the notional obstruction created by the registration of a notice under the 1959 Act, it may be that sufficient protests during this period would show that there was no acquiescence in the obstruction so that the obstruction would not become effective in preventing the acquisition of the right to light. See s.3(3) of the 1959 Act. This difference may be significant when we come to examine the genesis of s.3(4).

[8] See *Megarry and Wade, The Law of Real Property*, 7th edn (London: Sweet & Maxwell, 2008), para.28-057.

20-year prescription period by commencing proceedings in the period before the end of the 20th year for a declaration that the dominant owner has no right to the easement. Such proceedings should succeed since at the date of the commencement of the proceedings the dominant owner will have enjoyed the access of light for less than 20 years: see *Reilly v Orange*.[9] However, it is questionable whether such a course of action will in the end sustain the servient owner in preventing a right of light being acquired. To take the dates in the above example, suppose that the owner of property S sought declaratory relief on October 1, 2009. All that the Court could declare was that as at that date the owner of property D had not acquired an easement of light and that the owner of property S was entitled to erect and maintain his obstruction. Yet when January 1, 2010 came everything would change. By that date the owner of property D would have established his 20 years since the interruption which started on April 1, 2009, albeit lawful then and on October 1, 2009, had not lasted 20 years and on January 1, 2010 became unlawful and could be prevented. The right in question in *Reilly* was a right of way where the use required to underpin the prescription involved positive action by the dominant owner. It is possible that by his proceedings the servient owner could prevent any further positive action by the dominant owner so that, irrespective of any question of an interruption, the dominant owner could not say that his user was, "as of right" during the whole of the 20-year prescription period. However, in respect of the acquisition of easements of light under s.3 of the 1832 Act, user as of right is not an essential ingredient of the claim. The problem created by *Reilly* is a separate problem to that created by s.3(4) of the 1959 Act, which is the main subject of this article, and it is sufficient at present merely to notice that reliance by a servient owner on any principle established by the Court of Appeal in *Reilly* may not be as certain as it seems.

While the making of an obstruction, actual or notional, during the first of the periods may ultimately do the owner of property S no good because the owner of property D has the three-month window of opportunity within which, as just explained, he can defeat the obstruction, it will still normally be prudent for the owner of property S to make the obstruction. The reason is that the owner of property D may not avail himself of his short period of opportunity for effective action. If this

[9] *Reilly v Orange* [1955] 1 W.L.R. 616; [1955] 2 All E.R. 369, CA.

opportunity is lost, the interruption will then have lasted long enough to prevent the acquisition of the easement. The owner of property S should therefore in the first period act but in the hope rather than the certainty that his obstruction will in the end prevent the acquisition of an easement against his property.

Lost modern grant

A matter which is not often considered is the application of prescription by lost modern grant to the circumstances which are examined in this article mainly by reference to the 1832 Act. In principle, prescription by lost modern grant has not been abolished by the 1832 Act in relation to the easement of light any more than in relation to any other easement. The theory of lost modern grant is that if there has been continuous enjoyment of the access of light for at least 20 years the courts will presume, in the absence of any other explanation, that there has been a grant of a right to enjoy the light. There are two important differences between prescription under the doctrine of lost modern grant and under the 1832 Act as regards an easement of light. First, prescription by lost modern grant depends upon the user for the requisite period "as of right", that is in the latin expression "*nec clam, nec vi, nec precario*"—not secretly, not by force and not by permission. The only element of this requirement which remains as regards a claim for an easement of light under s.3 of the 1832 Act is that the access of light over the servient land must not be by written consent. Thus an oral consent by the servient owner to the access of light over his property will not prevent the acquisition of an easement of light by prescription under the 1832 Act. Secondly, and more importantly for present purposes, under the 1832 Act the period of 20 years or more of use relied upon has to be "the 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". This is a requirement in s.4 of the 1832 Act, and the text of s.4 has been set out earlier. Under the doctrine of lost modern grant this last requirement is not present.

We can see how the second of the above differences operates on the type of situation we are considering. We can take again the two factual situations or scenarios which we took as examples under the heading "The general law".

- In the first scenario, where the owner of property D has enjoyed the access of light over property S for only 15 years before there is an obstruction, the doctrine of lost modern grant will be of no avail to the owner of property D. The fact that the owner of property D has enjoyed the access of light for only 15 years is fatal to his claim both under the 1832 Act and under the doctrine of lost modern grant. We said when considering this scenario that if the obstruction is in place for at least a year and is then removed, the 20-year period needed for a claim under the 1832 Act would have to start again; the clock is set back to zero as we put it. The same would be true if there were to be reliance on the lost modern grant doctrine. The reason is that under that doctrine the necessary 20 years or more of use has to be a continuous period. The year or more of interruption would probably prevent the continuity of the period.
- When we come to the second scenario described, that is 25 years of the access of light over property S, the situation may be different if reliance can be placed on a lost modern grant. As we said under the 1832 Act the obstruction, if not properly challenged within the first year of its existence, will constitute an interruption which will be fatal to a claim under the 1832 Act. However, under the doctrine of lost modern grant the obstruction may not be fatal to proceedings commenced even after the obstruction has been in place for a year. The reason is that in proceedings commenced after the existence of the obstruction for a year the owner of property D can say that he has enjoyed the continuous access of light to his property over property S for 25 years and those 25 years did not have to be the period immediately before the commencement of his proceedings. It appears, therefore, that in these circumstances the owner of property D might be able to assert a prescriptively acquired easement under the lost modern grant doctrine where he would not be able to do so under the 1832 Act. The only answer which the owner of property S would have would be that by reason of the obstruction, if it had lasted for a substantial period of time, the owner of property D had abandoned the easement which he had acquired. This would be a difficult argument for the owner of property S to sustain since the courts are reluctant to infer an intention to abandon an easement where that inference is based on no more than a period of non-use. For example, in *Benn v*

Hardinge[10] even a period of 175 years of non-use was held not by itself to be something which led to the inference that the easement had been abandoned.

The possibility of a claim based on a lost modern grant will not affect the conclusions reached as regards the example involving three separate periods examined under the heading, "Date of the obstruction" in this article. In none of the periods will the owner of property D be able to show a continuous period of 20 years of access of light which is the minimum period needed to rest a claim on a lost modern grant. It should be noted that the effect of the registration of a notice as a notional obstruction as provided in s.3(1) of the 1959 Act operates generally and not just for the purposes of the 1832 Act, so that the notional obstruction may be significant for the purposes of the lost modern grant doctrine. As we have noted, for the purposes of that doctrine the statutory notional obstruction, which has effect only for a year, will normally prevent the enjoyment of the access of light being continuous and so may for that reason defeat a claim under the doctrine of lost modern grant.

The existence of three possible means of prescription, prescription at common law depending upon use from time immemorial, prescription under the doctrine of lost modern grant and prescription under the 1832 Act, is generally regarded as an unduly complicated system.[11] However, it is currently the law and any claimant who wishes to establish a prescriptive easement of light who finds that there is an impediment to his claim under the 1832 Act would be wise to investigate whether the difficulty can be overcome by founding his claim on the doctrine of lost modern grant.

[10] *Benn v Hardinge* (1993) 66 P. & C.R. 246.

[11] Law Commission Consultation Paper, *Easements, Covenants and Profits à Prendre* (Law Com No.186), contains a provisional proposal for a new statutory scheme where the titles to the dominant and servient estates are registered. See paras 4.194–4.220. The scheme contemplates a single period for prescriptive acquisition based on 20 years' continuous qualifying use to within 12 months of an application to the registrar for entry of a notice that the right claimed is appurtenant to the claimant's title. Given the subject-matter of this article, it is noteworthy that it is suggested that it is not necessary for a new statute to include any equivalent of s.4 of the Prescription Act 1832 because the "simple issue" would be whether there has been a continuous period of 20 years' qualifying user. Consultees were however asked whether a landowner who is concerned lest a neighbour acquires an easement (of any kind) by prescription over his land should be able to enter a notice of objection on the neighbour's title as a "surrogate for obstruction", and so notionally interrupt use. The analogy drawn was with s.2 of the 1959 Act, although, as explained above, there are very special reasons unique to easements of light that justified the introduction of such a procedure in the case of light. The Consultation Paper does not consider the operation of the 1959 Act itself.

Section 3(4)

The main question considered by this article is what effect s.3(4) of the 1959 Act has on the principles as just explained. The subsection provides:

> "Where, at any time during the period for which a notice registered under the last preceding section has effect, the circumstances are such that, if the access of light to the dominant building had been enjoyed continuously from a date one year earlier than the date on which the enjoyment thereof in fact began, a person would have had a right of action in any court by virtue of the last preceding sub-section in respect of the registration of the notice, that person shall have the like right of action in that court by virtue of this sub-section in respect of the registration of the notice."

On the face of it s.3(4) permits the owner of property D to assume that the commencement of the enjoyment of the access of light to his building began a year before it actually began for the purposes of any action he may commence to object to the notional obstruction. The right of action under the preceding subsection, s.3(3), is a right to challenge a registration of a notional obstruction as if it was a real obstruction. Thus, to come back to the example last given, the owner of property D can presumably take proceedings as if the access of light to his building had started on January 1, 1989 and not January 1, 1990. Given this assumption and departure from reality, when the notice under the 1959 Act is registered on April 1, 2009 the owner of property D will presumably be able at once to object to it by proceedings in court. The reason is that, given the assumption of the enjoyment having started on January 1, 1989, as at April 1, 2009 there will be 20 years of enjoyment of the access of light without interruption. The 20 years will be completed by January 1, 2009. Section 3(4) operates whether the claim to the easement of light is under the 1832 Act or under the doctrine of lost modern grant.

What is obscure is the thinking behind s.3(4). The underlying purpose of the 1959 Act is to provide a procedure whereby a registration with the local authority which constitutes a notional obstruction has the same effect in law as an actual obstruction erected on the date of registration. In our example an actual obstruction erected on April 1, 2009 would not defeat the acquisition of an easement of light by prescription provided that, as we have explained, the dominant owner acted swiftly in the three-month slot starting on January 1, 2010. Yet in the case of a notional obstruction under the Act by virtue of s.3(4) the

dominant owner is given a much earlier opportunity to defeat the prescriptive acquisition by starting proceedings.

It can readily be seen that the alteration of the normal rule effected by s.3(4) can be even more remarkable. Suppose that the new building on the dominant property was completed on January 1, 1990 so that, as in the example given, the enjoyment of the access of light started at that date. Suppose, however, that the facts are altered such that the registration of a notice under the 1959 Act is made on April 1, 2008 (not April 1, 2009 as in the example). The registration would halt the running of the prescription period. The notice would have effect for a year, that is until March 31, 2009, and during this period the owner of property D would have no right to object since he would not have 20 years of enjoyment of the access of light. Apart from s.3(4) the notice registered would therefore necessarily prevent the acquisition of a prescriptive easement as from March 31, 2009 because of the year of obstruction constituted by it (or would do so unless and until a subsequent 20 years of enjoyment of light without interruption ensued). However, under s.3(4) the owner of property D can apparently treat the enjoyment of light as having started on January 1, 1989. Therefore by January 1, 2009 he would on that basis have had 20 years of enjoyment and the interruption constituted by the notice would have been for less than a year. He could then presumably assert his rights by legal proceedings commenced in the period January 1, 2009 to March 31, 2009. One asks why this should be so in the case of a notional obstruction under the 1959 Act when it would not be so in the case of an actual physical obstruction to the access of light and where it would not be so where some other easement was being acquired and there was no special statutory rule akin to that in s.3(4) of the 1959 Act.

One might have thought that an answer to this question might be found in the report of the Committee on the Law relating to Rights of Light, under the chairmanship of Harman J., which reported in May 1958, with the report leading to the 1959 Act.[12] In fact the report does not throw light on the problem. What the report does do is to state the principle, which we have explained, namely that an easement of light can be acquired by actual enjoyment for 19 years and one day.[13] Nor is an explanation provided by leading textbooks such as *Megarry and Wade, The*

[12] Cmnd 473.

[13] See paras 10 and 36.

Law of Real Property or *Gale on Easements*.[14] Nor does the only High Court decision on the Act, *Bowring Services Ltd v Scottish Widows Fund & Life Assurance Society*,[15] further elucidate the matter.

A little detective work has revealed the source of s.3(4), namely an amendment to the Bill which preceded the Act proposed by Lord Granville-West when the Bill was before a committee of the House of Lords on February 12, 1959 and the response of the Government to that proposal. However, with respect to both Lord Granville-West, and to the Lord Chancellor, Viscount Kilmuir, who responded on behalf of the Government, the proceedings do appear to have been based on two erroneous propositions of law.

The first point is as follows. Lord Granville-West pointed out, correctly, that under the terms of the Bill a dominant owner is deemed to acquiesce in the notional obstruction constituted by a notice registered with the local authority until he brings an action to challenge the notional obstruction. This provision is now in s.3(6)(b) of the Act.[16] Lord Granville-West suggested that this was in contrast to the position under the 1832 Act where, in the case of an actual obstruction, protests by the dominant owner might prevent his acquiescence in the obstruction. So far this is correct. However, what it misses, as we have pointed out earlier, is that a protest by the dominant owner is only effective so as to prevent acquiescence in an obstruction if at the time of his protests the dominant owner had a right to object and to prevent the obstruction. Certainly this is the view of the editors of *Megarry and Wade*.[17] It follows that if the dominant owner has enjoyed 19.5 years of the access of light over the servient land, and at that point the servient owner erected an actual obstruction or registered a notice under the 1959 Act, in neither case could the dominant owner prevent the period of obstruction accruing by mere protest. If there was an actual obstruction protests would not be sufficient because the dominant owner had no right to protest. If there was a notional obstruction under the Act protests

[14] See *Megarry and Wade, The Law of Real Property*, 7th edn (London: Sweet & Maxwell, 2008), para.28-080; *Gale*, 17th edn (London: Sweet & Maxwell, 2008), para.4.32.

[15] *Bowring Services Ltd v Scottish Widows Fund & Life Assurance Society* [1995] 1 E.G.L.R. 158; [1995] 16 E.G. 206, Ch D at 161.

[16] 1959 Act s.3(3) and (6)(b). If there had been an actual obstruction, as opposed to the notional obstruction created by the registration of a notice under the 1959 Act, it may be that sufficient protests during this period would show that there was no acquiescence in the obstruction so that the obstruction would not become effective in preventing the acquisition of the right to light. See s.3(3) of the 1959 Act. This difference may be significant when we come to examine the genesis of s.3(4).

[17] See *Megarry and Wade, The Law of Real Property*, 7th edn (London: Sweet & Maxwell, 2008), para.28-057, n.327.

by the dominant owner would not be sufficient: (a) because he had no right to object; and (b) because by reason of s.3(6)(b) a protest cannot prevent acquiescence in the case of a notional obstruction. Lord Granville-West's point was therefore based on the erroneous proposition that during the final six months of the 20-year period there was some difference as regards the efficacy of protests between an actual and a notional or statutory obstruction. What is correct is that once the 20 years have ended there is a possible difference between an actual and a notional obstruction. In the case of an actual obstruction protests, by then of course protests against an unlawful obstruction, may be effective to prevent there being acquiescence in the obstruction. In the case of a notional obstruction under the Act protests are not sufficient for this purpose and legal proceedings will be necessary. This is a genuine difference but it is difficult to see how it can justify reducing the prescription period by one year in the case of notional obstructions under the Act.

The second possible error is a statement of the Lord Chancellor in response to Lord Granville-West. The Lord Chancellor said that the dominant owner could challenge the registration of a notice at any time by seeking a *quia timet* injunction and cited in support *Litchfield-Speer v Queen Anne's Gate Syndicate (No.2)*.[18] If this statement was meant to indicate that in the case of an obstruction created after 19.5 years of access of light the dominant owner could obtain an injunction to prevent the obstruction at that time it is at least questionable. At that time the servient owner was entitled to create the obstruction and it seems difficult to see how a *quia timet* injunction could be obtained to require him to remove that which was lawful. Of course, after the end of 20 years the position would change, but that is a different matter. The nature of a *quia timet* injunction is that it prevents the commission of an act which, if carried out, would be wrong. It does not prevent or reverse the commission of that which is lawful when carried out but which, if persisted in later, might become unlawful. As Lord Cozens-Hardy pithily put it in *Attorney General v Long Eaton Urban DC*[19]:

> "It is as old as the hills that if a man threatens that he intends to do something which is unlawful, and asserts a right to do it, the Court will grant an injunction to restrain him. It is wholly irrelevant to say whether he has done it or has not."

[18] *Litchfield-Speer v Queen Anne's Gate Syndicate (No.2) Ltd* [1919] 1 Ch. 407, Ch D.
[19] *Attorney General v Long Eaton Urban DC* [1915] 1 Ch. 124, CA at 127.

The decision of Lawrence J. in the *Litchfield-Speer* case referred to by Viscount Kilmuir was of this nature in that he granted a declaration that the continued construction of a new building above a certain height would, if carried out, constitute an infringement of the plaintiff's right of light.

It seems that when the Bill came back before the House of Lords on May 5, 1959 Viscount Kilmuir had relented and introduced an amendment which has become s.3(4) of the Act. It was said to meet a shortcoming pointed out by Lord Granville-West during the committee stage of the Bill. The explanation then given of the new provision does not take the matter much further.

It is therefore difficult to conclude other than that both the alleged shortcoming and the alleged remedy of it, which together engendered s.3(4), were based on an erroneous, or at least highly questionable, understanding of an aspect of the law in this admittedly complex area, and that the amendment has itself created an unnecessary and confusing alteration in the law in order to meet a defect or shortcoming in the original Bill which did not in fact exist.

We have tried to draw attention to the need for owners of what may become a servient tenement to act promptly under the 1959 Act in order to prevent their land becoming encumbered by an easement of light, a need which is emphasised by the truncating of the prescription period effected by s.3(4). The need for landowners to act early in operating the 1959 Act in order to prevent the acquisition of prescriptive rights of light is also emphasised by the fact that an application to a local authority to register a notice under the Act can normally only be made after a certificate has been obtained from the Lands Tribunal to the effect that notice of the proposed application has been given to all persons who are likely to be affected by the registration of the notice (see s.1(3)(a)). There is a procedure under s.2(3)(b) for the registration of a temporary notice where the Tribunal certifies that the case is one of exceptional urgency. Presumably there will be exceptional urgency where a notice registered after a full process of notifying all persons likely to be affected would or might be too late to prevent the acquisition of prescriptive rights. For reasons explained in this article it may be not at all easy to know exactly when such circumstances have arisen and so when the case is one of exceptional urgency which brings into play the procedure under s.2(3)(b). The recent decision of the President of the Tribunal in *In the Matter of an Appeal against a Decision of*

the Registrar by Anglo Suisse Holdings Ltd[20] that the Tribunal has no power to extend the time specified in a certificate under s.2(3)(b) is a further inducement to timely action.

Conclusion

As the late Professor H.W.R. Wade put it in the *Cambridge Law Journal* in 1959,[21] for a dominant owner who plays his cards correctly, the effective period is not 20 years but 19. In practice owners of servient land who wait until the 20th year of the 20 years to start the operation of the procedure under the 1959 Act may well be too late, and if our understanding of s.3(4) of that Act is correct they may still be too late even if they start to operate the procedure under the Act during the 19th year. There is a trap in the concept of a 20-year prescription period in that prompt action in this context may in some instances only be certain to be effective if taken prior to the commencement of the 19th year of the 20-year period, i.e. as much as two years before the prescription period ends. There is therefore every inducement to owners of land across which there is access of light enjoyed by neighbouring land, and where there is any prospect of the future development of this servient land, to act promptly in utilising the procedures under the 1959 Act.

[20] *In the Matter of an Appeal against a Decision of the Registrar by Anglo Suisse Holdings Ltd* Unreported March 9, 2009.
[21] [1959] C.L.J. 184.