Neutral Citation: [2016] NICA 50 | *Ref:* **McB10063**

Judgment: approved by the Court for handing down | *Delivered:* **05/12/2016**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

_____

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

_____

Between

PHILOMENA WALSH

Plaintiff/Respondent;

-and-

HECTOR LESTER

-and-

CLAIRE LESTER

Defendant/Appellant.

_____

Before: Morgan LCJ, Weir LJ and McBride J

McBride J (delivering the Judgement of the Court)

Introduction

[1] These proceedings relate to Dunratho House and lands which were formerly part of its gardens at Craigavad, County Down. Dunratho House is a substantial residential property situated on an elevated site commanding extensive sea views across Belfast Lough.

Application

[2] This is an appeal from the decision of Colton, J in which he made a declaration that the appellants unreasonably withheld consent to the respondent's request to build a dwelling house at or about Site 1, known as 42 Glen Road, Craigavad, County Down.

[3] The appellants appeal on the grounds that the development proposed by the respondent would obstruct the view of the sea from Dunratho and is therefore in breach of the terms of the lease under which the respondent holds the land.

[4] The appellants were represented by Mr Mark Orr QC. The respondent was represented by Mr Brian Fee QC and Mr Shields. We are grateful to all counsel for their well-researched and marshalled skeleton arguments which were ably augmented by helpful oral submissions.

Background Facts

[5] By lease dated 29 July 1988 ("the lease") entered into between P McKinney of the one part and William McKinney and the said P McKinney of the other part, lands described as Site 1 at Dunratho, 42 Glen Road, Craigavad, Co Down, were demised to the lessees for a term of 9,000 years subject to a nominal rent.

[6] On the map attached to the lease, Site 1 is delineated by a red line and comprises three parts, namely:

(a) A driveway.

(b) An open area, (hereinafter referred to as the "open area") immediately in front of Dunratho House which is delineated by the letters A-B, X- D. A-B delineates the boundary between the site and Dunratho House and the line X-D is the boundary between the site and the sea shore.

(c) An area hatched blue, (hereinafter referred to as the "hatched area"). This area is separated from the open area by a line marked A-X on the map. The boundary between this area and the sea shore is delineated by the letters C-X.

[7] Site 1 was marketed as a building site with outline planning permission. The original planning permission has subsequently been renewed on a number of occasions.

[8] The original lessees' interest in the lease was assigned to the plaintiff and her husband (now deceased) on 13 September 1989.

[9] On 21 November 1996 the appellants acquired the lessors' interest in site 1 together with the freehold interest in Dunratho.

[10] On 7 August 2013 full planning permission was obtained in respect of the construction of a dwelling house (Reference: W/2013/0160F) and on 14 January 2014 full planning permission was obtained in respect of the construction of a dwelling house of a different design (Reference: W/2013/0305F).

[11] In accordance with the terms of the lease the respondent asked the appellants to consent to the proposed development. The appellants refused to consent on the basis the proposed development would obstruct the view of the sea from Dunratho and consequently was in breach of Clause 6 (c) (ii) and (iii) of the lease.

[12] The respondent sought a declaration that the appellants were unreasonably withholding their consent.

Relevant Covenants in the Lease

[13] The relevant covenant in the lease is Clause 6 which reads as follows:

> "(c)(i) Not to erect or build any dwelling house, building or other erection whatsoever on any part of the demised premises save that part hatched blue.
>
> (ii) Not to erect or build or permit on any part of the demised premises hatched blue on said map any dwelling house, building or other erection any part of which or the ridge height of which shall exceed 12 metres above the concrete footpath of the north west corner of the site shown on the map attached hereto or the height of the wall dividing the demised premises from the adjoining premises of the lessor whichever is the lesser height and not to do or permit to be done anything which shall obstruct the view of the sea from the residence known as "Dunratho".
>
> (iii) Not to erect or build or permit to be erected or built on the part of the demised premises hatched blue on the said map any building save for one dwelling house or bungalow with suitable garages and outhouses the plans, specifications and elevations of which are to be approved of previously by the lessor such approval not to be unreasonably withheld.
>
> (iv) Not to erect any walls or fences at the top of the bank between the points "A and B" marked on the map attached hereto and on the slope of the bank provided that the lessee may erect a wall or fence between the points marked "C and D" on the map attached hereto and on the level part of the bank.

(v) Not to allow any shrubs, hedging, flowers or plants to grow at the top of the said bank between the points "A and B" marked on the map attached hereto which would exceed or grow to a height more than 9 metres above the concrete footpath at the north west corner of the demised premises.

(vi) Not to erect any wall or fence or to allow any shrubs, hedging, flowers or plants to grow between the points "C and D" on the said map which shall exceed a height of 3 metres above the concrete footpath at the north west corner of the demised premises.

(vii) Not to erect any walls or fences or plants grow on the portion of the demised premises between the lines "A to B" and "X to D" on the map attached hereto any shrubs, hedging, flowers or plants which would exceed in height at any point an imaginary line drawn at rights angles with a maximum height permitted on the line "A to B" joining the maximum height permitted on the line "X to D" (thus taller plants will be permitted on the north west side of the demised premises and smaller plants on the south east side thus not interfering with the view of the sea from the residence known as "Dunratho".

(viii) No trees are to be planted on the area of the demised premises not hatched blue provided that this restriction does not apply to trees already growing on the demised premises at the date hereof or to shrubs, hedging, flowers or other plants."

Judgment of Trial Judge

[14] The learned trial judge heard oral evidence from the respondent's son Chris Walsh, Mr John Hutcheson, Chartered Architect, engaged on behalf of the respondent and Mr Des Ewing, Chartered Architect, engaged on behalf of the appellants. He had affidavit evidence from both respondents, Peter Thallon (predecessor in title to the appellants) and Mr Logue, a former business colleague of Mr Lester.

[15] The experts agreed that both of the proposed developments would comply with the height restrictions set out in Clause 6(c)(ii) of the lease. It was further

agreed that part of each proposed development would be visible as one looks down from Dunratho House towards Belfast Lough.

[16] The learned trial judge found that Site 1 had been marked out when the appellants' predecessor in title, Mr Thallon, was present. His evidence, which was independent of the parties, supported the interpretation put forward by the respondent. The learned trial judge also found that the proposed dwelling which could be constructed as suggested by Mr Ewing, and which would not obstruct the sea view, would not have been within the contemplation of the parties when the lease was originally drafted.

[17] The learned trial judge accepted, without counter argument being made, the appellants' contention that a sea view was something which could properly be protected by a negative convenant in a lease.

[18] In construing the lease the learned trial judge held that the court was to give effect to what the contracting parties intended by reading the terms of the contract as a whole and giving the words their ordinary and natural meaning having regard to the background facts which existed at the time the lease was executed.

[19] Applying these principles, the learned trial judge held that having regard to the covenant as a whole, the evidence of Mr Hutcheson, the nature of the inter-locking and inter-related restrictions set out in Clause 6 (ii) through to (vii) and his findings of fact, the reference to "obstruct the view of the sea" should be interpreted as meaning the sea view was absolutely protected in the open area and was not protected in the hatched area as clause (ii) specifically allowed building work to a certain height which had the effect of obstructing the sea view.

[20] The learned trial judge held that reasonableness in Clause 6 (iii) must be given a broad common sense meaning with the court having regard to the context and with an understanding that consent could not be withheld for reasons which had nothing to do with the purpose of the covenant.

[21] He held that the appellants were unreasonable in withholding their consent to the proposed development. In line with the evidence of Mr Lester he held that the key issue was the meaning of Clause 6 (ii). Once the Court held that this clause did not prevent the construction of a dwelling even though it obstructed the sea view then there was no reasonable basis for the appellants to refuse to consent.

Submissions of the Appellants

[22] Mr Orr QC challenged the learned trial judge's decision on two grounds. He submitted that the learned trial judge incorrectly construed Clause 6(c)(ii) (the construction point) and secondly he failed to apply the correct test in deciding whether the appellants unreasonably withheld consent to the proposed dwelling pursuant to Clause 6(c)(iii) (the consent point).

[23] He submitted that, as part of the court's task is to ascertain the meaning of the relevant words at the time of the contract, little or no weight could be attached to the evidence of Mr Thallon or Mr Logue whose knowledge of the lease arose after it was executed. He further submitted that little or no weight should be given to the expert evidence of Mr Hutcheson in respect of the construction point as he was an architect and not an expert in conveyancing.

[24] The appellants submitted that the lease was clear in its terms. Clause 6(c)(ii) contained two separate restrictions. The first related to a restriction on building height and the second constituted an absolute prohibition on doing anything which obstructed the sea view. Mr Orr QC submitted the learned trial judge erred in his construction of the lease as the agreed evidence was that both of the proposed developments would obstruct the sea view from Dunratho. Therefore such development would be in breach of the lease.

[25] In relation to the consent point Mr Orr QC submitted that this was a freestanding entitlement. The court would therefore only be justified in overturning a decision by the covenantee to refuse consent, if satisfied "no reasonable neighbour could object to the proposal". He submitted the appellants' refusal to consent was reasonable as preservation of the sea view improved the amenity of Dunratho.

Respondent's Submissions

[26] Mr Brian Fee QC on behalf of the respondent submitted that the court applied the correct legal test in respect of both the construction and consent points. In these circumstances there was no misdirection or no misapplication of the law. The learned trial judge had heard all the evidence and therefore the Appeal Court should not interfere unless satisfied the learned trial judge was "wrong".

Issues to be considered on appeal

[27] We consider that three issues fall for consideration namely:

(i) Can a 'right to a view' be protected by a covenant in a lease?

(ii) If so, what is the correct construction of Clause 6(c)(ii)?

(iii) Are the appellants unreasonably withholding consent?

Issue 1: Right to a View

[28] This court raised with the parties whether a right to a view could, in law, be protected by a covenant in a lease. This issue was not argued in the court below and the parties were therefore given an opportunity to file supplemental skeleton arguments. We are grateful to all counsel for their well-researched submissions.

[29] It has been established since Aldred's Case [1610] 9 CK 57(b) 77 ER 816 that our law does not recognise any easement of prospect. This has been confirmed in a number of subsequent cases including Butt v Imperial Gas Company [1866-67] LR 2 Ch App 158 and, Browne v Flower [1911] 1 Ch 219, Campbell v Mayor, Aldermen and Councillors of the Metropolitan Borough of Paddington [1911] 1 KB 869. The stated rationale for this approach is that a right to a view fails to comply with one of the four essential ingredients of an easement set out in Re Ellenborough Park [1956] 1 Ch 131, namely such a right is not "capable of forming the subject matter of a grant" because a right to a view is not capable of precise definition. It is on this basis that certain rights to light and certain rights to air also fail to be recognised as easements. In Harris v De Pinna [1886] 33 Ch 238, the court held that a claim to the passage of air, not coming through a defined channel would not amount to an easement as it was " vague and undefined and extensive", as per Cotton LJ. Bowen LJ further held at page 262,

> "It would be just like amenity of prospect, a subject matter which is incapable of definition."

[30] Notwithstanding the case law in respect of easemants of prospect both the appellants and the respondent submitted that a right to a view could be protected by way of a covenant in a lease and the law would recognise and enforce such a covenant provided it was certain.

[31] In support of this proposition, the appellants relied on a quote by Professor Scamell in Land Covenants; Restrictive and positive, relating to freehold land, including covenants for title [1996] where he stated at page 208:

> "Although there cannot be an easement consisting of a right to a view a covenant not to obstruct a view will be enforced."

[32] Professor Scamell cites a number of authorities in support of his opinion, including Piggott v Stratton [1859] 1 De Gex Fisher and Jones 33,45 ER 271 J, Western v Macdermott [1866 -67] LR 2 Ch App 72 and Crawley v Woolf [1888] 4 TLR 434 CA. In each of these cases the court was enforcing covenants which prohibited or restricted the erection of buildings or other structures or the carrying out of other activities, the effect of which was to protect a view. In none of the cases cited did the court consider or rule that a covenant, which expressly sought to protect a view, was enforceable. Hence, we do not find that these cases are authority for the wide statement of principle made by the learned author.

[33] The respondent and appellants also referred the court to Preston and Newsom, Restrictive Covenants affecting Freehold Land, 10th Edition at page 463 where the authors write:

> "There is no common law right to privacy or a view and the only private means of protecting either is by a restrictive covenant."

[34] The authors in paragraph 15.13 and in footnote 123 refer to a number of cases in which a right to a view was protected by covenants. Again, it is notable that in all the cases cited, none of the covenants under consideration sought to directly protect a view. Rather the court in each case considered covenants which contained certain restrictions and prohibitions which had as their object or consequence the protection of a view. We therefore do not find that any of the cases cited afford authority for the proposition made by the learned authors.

[35] In Wakeham v Wood [1982] 43 P & CR 40 for example, the covenant provided:

> "… that no building to be erected on the land should be of sufficient height to obstruct the present view of the sea and beach from the house."

[36] The Court accepted, without argument that a right to a view was a legally enforceable right. It found that there was a serious interference with the plaintiff's right to a view of the sea and then went on to consider the appropriate remedy in such circumstances. The question whether such a covenant could, in law, be enforceable, was not argued and was therefore not considered by the Court of Appeal.

[37] Given the dearth of authority on the question it is necessary to revert to first principles. In determining whether a covenant in a lease protecting a view is enforceable at law, the question is whether such a right is capable of forming the subject matter of a grant. To answer this question it is necessary to consider cases where the question, was directly addressed.

[38] In Harris v De Pinna, Cotton LJ accepted that certain limited rights to light and certain limited rights to air for example, through a defined channel, were capable of existing as easements, as they were capable of precise definition and therefore capable of forming the subject matter of a grant.

[39] Further in Dalton v Angus [1881] 6 AC 740 at 824 when Lord Blackburn stated:

> "The right of prospect which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement… A right to have a prospect can only be acquired by actual agreement."

He was clearly accepting a right to a view is capable of forming the subject matter of a grant.

[40] From these cases, it appears, in principle, that a right of prospect granted by a covenant in a lease is a legally enforceable right provided it is clearly defined and is not too vague or extensive. It will be a question of fact in each case whether the covenant admits of sufficient certainty to be enforceable.

Issue 2: Construction

[41] When construing the meaning of a covenant, Lord Hoffman formulated the approach the court should take at paragraph 14 of Charter Brook Limited v Persimmon Homes Limited [2009] 1 AC 1101 as follows:

> "There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896, 912-913. They are well-known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be, using the language in the contract to mean."

[42] Similarly, in BCCI v Ali [2002] 1 AC 251 Lord Bingham said at paragraph 8:

> "The object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties."

Submissions of the Parties

[43] The appellants submitted that the words used in Clause 6(c)(ii) were clear and unambiguous. They acted to prevent any obstruction, however de minimis of the sea view from Dunratho.

[44] In contrast, the respondent submitted that Clause 6(c)(ii) had to be interpreted in light of the lease read as a whole having regard to the circumstances which existed at the time the lease was executed. The respondent submitted the intention

of the parties, as elicited from the various interlinking clauses set out in Clause 6, was to reserve an unobstructed sea view over the open area. By permitting building development on the hatched blue area the parties intended the sea view would be interfered with otherwise the references in the earlier parts of Clause 6 (ii) setting out height restrictions would be rendered redundant. The respondent further contended this construction was in line with all the background circumstances. In particular at the time the lease was entered into the modern designs put forward by Mr Ewing would not have been within the contemplation of the parties. Further the lease map, by having drawn on it a conventional shaped dwelling located in the central area, showed that the parties understood and contemplated that the sea view would be obstructed by building to the permitted height restrictions. This clause therefore was never intended to protect the sea view. This interpretation was supported by the evidence of Mr Thallon and Mr Logue.

[45] In the supplemental skeleton the respondent also submitted that clause 6 (ii) was void on the grounds of uncertainty as the right to a view was set out in a vague unspecified way and therefore it was impossible to ascertain precisely what view was being protected.

Consideration of the Construction Issue

[46] In construing the covenant, the court must have regard to the lease as a whole and to the relevant background circumstances which existed at the time it was executed.

[47] In light of this, the evidence of Mr Thallon and Mr Logue is not relevant as they were not parties to the lease at the time it was executed.

[48] In the lower court, some discussion took place about whether the appellants lived in the property. As the benefit of the covenant attaches to the land and is not personal to the appellants it is not relevant whether the appellant lived in the property or not.

[49] Preston and Newsom at page 174 note, "A particular word is thus considered in the context of the clause within which it is found and as used elsewhere in the same document." The phrase "the view of the sea from the residence known as Dunratho" is used in both Clause 6(c)(ii) and 6(c)(vii). Clause (ii) refers to "obstruct" the sea view and Clause (vii) refers to "interfering" with the sea view.

[50] Clause (vii) restricts the erection of walls, fences and growing of plants in the open area. Such structures or plants are not permitted to exceed a maximum height permitted along the lines A-B and the line X-D. The purpose of these restrictions is then set out at the end of the clause, by use of the following words in brackets, "thus … not interfering with the view of the sea from the residence known as Dunratho".

[51] Clause (v) sets out height restrictions placed on the structures and plants permitted along line A-B and Clause (vi) deals with height restrictions permitted along the line C-D.

[52] All the experts agree that the construction of walls, fences or the growing of plants to the maximum height permitted by Clauses (v) and (vi) would have the effect of obstructing the view of the sea over the open area, which currently exists from Dunratho House.

[53] If, as Clause (vii) states, the purpose of these various height restrictions is to ensure that there is no interference with the view of the sea from Dunratho House, the sea view being protected must be that which remains after structures are erected or plants grown to the maximum permitted height under the various clauses. It cannot mean that the sea view is totally protected from all obstruction, otherwise the detailed provisions of Clauses (v),(vi) and (vii), which permit some obstruction of the sea view, would be rendered meaningless and the word "thus" in clause (vii) would be rendered nugatory.

[54] Although Clause (ii) refers to "obstruction" of the sea view and Clause (vii) refers to "interfering" with the sea view we do not think, in this case, anything turns on the different wording used in the clauses. What is important is that both clauses refer to "the sea view" and we consider the same meaning should attach to this phrase wherever it appears in the lease. Therefore, the sea view being protected in Clause (ii) is that which remains after a dwelling is built in accordance with the height restrictions set out in the earlier part of Clause (ii).

[55] This interpretation gives utility and meaning to the earlier part of Clause (ii) and makes the lease internally consistent

[56] This interpretation is also in line with the background circumstances. The land was sold as a building site and the lease map shows a conventional dwelling situated in the middle of the hatched area. At the time the lease was executed, the parties could not have contemplated that a dwelling could be built which would not obstruct the view and therefore the parties must have intended that the sea view which was being protected was that which remained after a dwelling was built in accordance with the height restrictions.

[57] As appears from the foregoing, this court does not agree with the respondent's submission and the finding of the lower court that the lease totally protected the sea view in the open area and did not protect the sea view at all in the hatched area.

[58] Given that the sea view can be so defined in the way we have done, we do not find that the covenant is void on the grounds of uncertainty.

[59] We pause to note that drafters seeking to protect a view must draft with great care and precision to avoid such covenants failing on the grounds of uncertainty. Such a right must not be too extensive, uncertain or vague. It should be anchored in terms of time as a view can evolve over time due to changes in the surroundings, for example tree growth or removal. In Wakeham and Wood the covenant was enforceable not least because it was clearly anchored in time and referred to "the present sea view".

[60] This court therefore finds that Clause 6 (ii) means a dwelling can be erected in the hatched area, even though it obstructs the sea view, provided it complies with the height restrictions set out in the earlier part of the clause. Otherwise Clause (ii) prevents the respondent doing anything, such as storing scrap or erecting a mast for example, which would have the effect of obstructing the remaining view from Dunratho, after the dwelling is erected.

[61] Thus, we find that either of the respondent's alternative proposed developments would not be in breach of Clause 6(c)(ii).

Third Issue: Unreasonably withholding consent

Relevant Legal Principles

[62] The majority of the reported cases on the test to be applied in determining whether consent is unreasonably withheld relate to proposed assignments of a lease or alterations to the demised premises. A number of principles emerge from this case law which are relevant to freehold covenants. They are:

(a) Reasonableness is given a broad meaning.

(b) In determining whether a convenantee is unreasonably withholding consent the test the court should apply is set out succinctly in Margerison v Bates [2008] EWCA 1211 Ch by Jones QC at paragraph 60 when he quoted Hart J at paragraph 29 in Mahon v Sims [2005] 3 EGLR 67,

> "Refusal of approval will be unreasonable if the court is satisfied that no reasonable covenantee would have refused approval in the circumstances. It is clear that the protection of the sensibilities of the covenantee is one of the purposes of the covenant in this case … it will be only if satisfied that no reasonable neighbour can object to the proposal that the court will be justified in overriding a decision by the covenantee to refuse approval. If the refusal was on a

> subjective ground, upon which the opinions of reasonable neighbours might differ, that will, in a context such as the present, be reasonable ground enough … it will however prevent (the covenantee) from acting arbitrarily or capriciously or from improper motives."

(c) As noted in Holder Brothers v Gibbs [1925] Ch 575 CA at 587 consent cannot be withheld for reasons that have nothing to do with the purposes of the covenant to which the power to withhold consent applies. The reasoning should therefore

(d) Have some proprietorial connection with the objectives of the covenant. It should relate to what is being protected and not be for the purpose of increasing or enhancing the rights of the person, - Mount Eden Land Securities v Staudley investments Ltd [1997] 74 P&CR 306.

(e) The question is one of fact and depends on all the particular circumstances of the case.

Submission of the Appellants

[63] The appellants submitted this was a freestanding power and they were reasonable in refusing consent as they wished to preserve a completely unobstructed sea view from Dunratho as this enhanced its amenity and value.

Consideration

[64] The purpose of the covenant in Clause 6(ii) is to protect the sea view which remains after a dwelling is built in accordance with the permitted height restrictions. The appellants are withholding consent on the basis they wish to preserve a completely unobstructed view of the sea from Dunratho. By doing so the appellants are attempting to increase their rights beyond what we have found to be the purpose of the covenant. This is impermissible and in all the circumstances, especially where the land was marketed as a building site, unreasonable.

[65] As the respondent is requesting consent to a proposed dwelling which does not offend the covenants in the lease we find that no reasonable neighbour could refuse consent. We therefore find the appellants are unreasonably withholding their consent.

Conclusion

[66] We affirm the decision of the learned trial judge, granting the respondent a declaration that the appellants are unreasonably withholding consent.