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*(subject to editorial corrections)**

2012 No: 91580

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

_____

Between

ARDBANA SERVICES LIMITED

Plaintiff

and

O'KANE & DEVINE CONSTRUCTION LIMITED

Defendant

_____

HORNER J

A. INTRODUCTION

[1] There are two central issues in the case. The first is not controversial. The plaintiff claims the defendant has failed to surrender up to the plaintiff its freehold interest in a development on the banks of the River Bann ("the River") following the sale of the last apartment pursuant to a lease dated 7 December 2004. The defendant has claimed that it has been precluded from doing so because of, inter alia, a mapping error in the layout and design of the estate development and in relation to car parking. This matter is no longer a contentious issue between the parties. The defendant agrees to surrender its freehold interest pursuant to the agreement and consequently this issue does not require a decision from the court.

[2] The second issue however is keenly contested. The defendant claims that it enjoys a right of way over the plaintiff's lands permitting it to enjoy access for all purposes, and in particular vehicular access, to an area of land ("the Garden") which immediately adjoins the apartment block on the River Bann on the right side looking out towards the River. This area of land was owned by Mr and Mrs Ghaie ("the Ghaies") and was transferred to the defendant by Deed of Conveyance dated 4 July 2007. This comprised the land situate at the rear of the premises formerly known as 7 Ardbana Terrace, Mountsandel Road, Coleraine. The title to the house and garden

was "split" in 1981 when the Ghaies sold the house but retained the Garden. The Garden is now comprised in Folio LY9355 Co Londonderry. The defendant wishes to develop the Garden. The defendant says that it has no intention of erecting apartments on the land as the other owners of the apartments at Ardbana Terrace fear. The defendant says it intends to build a substantial house. However, regardless of whether the defendant intends to develop the Garden as a house or as apartments, it requires a right of way for vehicles over the plaintiff's land in order for such types of development to take place.

B. BACKGROUND FACTS

[3] On 19 November 1988 Dalzell & Campbell, Architects, acting for the defendant, a builder and developer, obtained planning permission for a 10 apartment scheme in respect of Nos 19-23 Mountsandel Road, Coleraine. At that stage the defendant had not acquired all of the 8 terraced houses, namely 7-23 Mountsandel Road which presently comprise the development site. Ardbana Terrace was formerly a terrace of houses fronting the Mountsandel Road and running behind all the houses and parallel to the Mountsandel Road was a passageway used by all of the residents as a means of access to the rear of their houses. Behind this passageway lay a garden which sloped down to the bank of the River. On 14 February 2000 Dalzell & Campbell applied for planning permission for 30 apartments, comprising two blocks on the then assembled site of 13-23 Mountsandel Road. The defendant at that stage had not yet purchased Nos 7, 9 and 11 Mountsandel Road.

[4] By the end of 2001 demolition of the old terraced houses fronting the River Bann had begun. On 8 October 2003 the plaintiff was incorporated in a company, its purpose being to maintain the Ardbana apartments in good condition and acquire the freehold and collect the service income and to apply the income in the proper and convenient management of the development.

[5] By early 2004 three apartments were sold off by the defendant. In accordance with the usual practice each apartment was sold to the individual purchaser, but the defendant retained the common parts ("the Land"). On 21 May 2004 the defendant and Brian Ghaie agreed to a sale of the land comprising the Garden. However, a dispute arose about whether the Ghaies were selling in addition to the land to which they had paper title, Part A, the land to which they claimed to have acquired a possessory title, Part B. The sale did not take place. By the winter the apartments were all constructed in two blocks and 9 were sold. On 7 December 2004 the plaintiff and the defendant entered into the lease. This recites that the defendant is the owner of the lands contained in various folios situate at Ardbana Terrace, Coleraine, which comprised 45 apartments erected or to be erected and which are referred to as "the Estate". Further, that the defendant had previously granted leases and intended thereafter to grant further leases of apartments comprised in the two apartment blocks and that the defendant had in every lease imposed and in

every future lease should impose restrictions in materially the same terms set out in Clause 4. This stated:

> "It is the intention of the Lessor ("the defendant") that the Lessee ("the plaintiff") takes his lease upon the condition that the costs of and incidental to the upkeep, maintenance for the main structures, the external areas and common parts and all outgoings relating thereto should be shared between the Estate Lessees. To give effect to that intention the Lessor has procured the incorporation of the Management Company shares of which are ultimately to be held by the Estate Lessees and the objectives of which included taking of an assurance from the Lessor of the Lessor's Estate and interest in the Estate when all the units have been completed and let."

[6] On 15 April 2005 Mr Ghaie served an Equity Civil Bill on the defendant which was ultimately removed to the High Court claiming that the Ghaies were entitled to a right of way over the development land and an injunction preventing further trespass. The Ghaies had a valuation carried out on 27 April 2006 of the Garden which valued it at £300,000 on the basis that it could accommodate three 2 bedroomed apartments. By October 2006 the last unit in the development, No. 16, was sold. On 7 June 2007 the defendant settled the Ghaies' claim by agreeing to purchase the Garden for £160,000 together with £25,000 for costs, making a total payment of £185,000. On 31 August 2007 the plaintiff applied for first registration of its newly bought title. There was no claim under Rule 147 of the Land Registration Rules for any appurtenant right such as a right of way.

[7] Proceedings were then issued by the plaintiff on 17 August 2012 seeking specific performance of the Lease. There was no defence put forward to this claim and as I have previously recorded the defendant has agreed that the plaintiff is entitled to the relief sought. The defendant had sought to explain the delay by various matters outside its control. The battle lines were drawn however on the issue raised by the defendant for the first time in its counterclaim that it had a right of way over the plaintiff's lands allowing vehicular access to the Garden, which it intended to develop. However, the plaintiff's case is that the defendant has access to the site on foot from the Mountsandel Road and also access from the River Bann. This was not disputed.

[8] I visited the location during the course of the hearing to view the Garden and the adjacent development. This comprises a substantial development of two blocks of apartments with the Garden adjoining the front block on the bank of the River on the right hand side as one looks across. The Garden is well maintained and I understand that this work is carried out, by agreement, by staff employed by the plaintiff. I can well understand why the plaintiff and its members, the Lessees of the Estate, might prefer not to have a house or apartment block to be located on the

Garden. There would be an obvious loss of amenity. There was also a clear pedestrian right of way from the Mountsandel Road across the plaintiff's lands to the Garden. However, there is considerable drop in height from the Mountsandel Road to the site. The road constructed for the development will not permit access to the site. The road through the development ends and further access is obstructed by a parking bay, a flower bed and a wall. Accordingly vehicular access to the Garden is impossible to achieve because of these physical obstructions.

[9] There is no hope of any accommodation between the warring factions. The plaintiff is implacably opposed to any development of the Garden. It is determined that the defendant shall not be able to obtain vehicular access to the Garden to allow any development of the Garden to take place. The defendant having spent £185,000 in purchasing the Garden is equally determined to recoup its outlay by developing it.

The case made by the defendant

[10] In the original defence and counterclaim a claim for a right of way permitting vehicular access was made on the basis that the defendant had reserved the right of way, that there was an established right of way and/or that there was an easement of necessity. It is fair to say that the pleading of these claims was somewhat opaque to use as neutral a term as possible. The defendant appears to have mended its hand following the instruction of Mr Orr QC and now claims an easement of necessity and an easement of common intention on the basis, inter alia, that the lease is subject to Clause 1(b)(ii) which states:

> "Nothing in this Lease shall operate to impose any control on development of any other lands of the Lessor."

[11] The first schedule goes on to record that:

> "Accepting and reserving onto the Lessor ("the defendant") and onto the Management Company ("the plaintiff") and subject to the rights of the other Estate Lessees:
>
> 'The roads (if any) on the Estate.'"

The case made by the plaintiff

[12] The plaintiff denies that the defendant enjoys any right of way other than by a right of way by foot to access the Garden and says that this is clearly delineated. It says that there was no grant of a right of way for vehicles, no reservation of a right of way for vehicles and no requirement of an easement of necessity for vehicles as there is already access by foot or by boat to the Garden. Further, the plaintiff says that the claim that there was a common intention that the defendant should have a right of

way for vehicular access is misguided and that there is no way that the plaintiff or the apartment owners could have divined the future intention of the defendant, especially when the defendant did not even own the Garden until it acquired it from the Ghaies in June 2007, more than 2½ years after the Lease was executed.

C. DISCUSSION

[13] It is usual to distinguish between easements which are created expressly and those which are created by implication. It is not suggested that any rights of way for vehicular access over the plaintiff's estate have been expressly reserved by the defendant. This is understandable because the lease cannot reasonably be construed to expressly reserve to the defendant a right of way for all purposes including vehicles to the Garden. At best, it reserves a right of way over the roads of the Estate but, as I have recorded, the road terminates some distance before the boundary with the Garden. It would have been open to the defendant, having expressly reserved a right of way over the roads of the Estate, to ensure that the relevant road in the Estate immediately bounded the Garden. The lease of 7 December 2004 does not reserve any such right of way over the Estate. It is not arguable, and the defendant did not make the argument, that the Lease granted an express right of way for vehicular traffic over the plaintiff's land for the purpose of accessing the Garden.

[14] The first argument advanced on behalf of the defendant is that there is an easement of necessity which will include vehicular traffic. Easements of necessity may be impliedly reserved by the law independently of the parties' known or presumed intentions: see Jackson on the Law of Easements and Profits at page 83. However, an easement of necessity traditionally arises where the owner of land grants part of it to a purchaser but the only access to the purchaser's part is over the land the owner has retained. This is patently not the position where the defendant, as here, has acquired the Garden subsequent to the Lease and now seeks access over the plaintiff's land not to use it as a Garden, but rather to allow it to be developed as a house or apartments.

[15] The Garden can be accessed on foot. It is not without a means of access. Gale on Easements (19th Edition) at 3-122 states as follows:

> "… generally speaking it does appear to be essential that the land is absolutely inaccessible or useless in order for there to be an easement of necessity."

The authority for this proposition is Nickerson v Barraclough [1981] Ch 325 at 332 per Sir Robert Megarry VC. The Garden constitutes a well-maintained lawn situate on the banks of the Bann. It is neither inaccessible nor useless. It can be accessed by foot and can be enjoyed as a pleasant garden.

[16] Further, the Garden can also be accessed by boat. In Manjang v Drameh [1990] 61 PNCR 194 the Privy Council concluded that access by boat, whilst perhaps

not as convenient as vehicular access, was sufficient to preclude any implication of a right of way by necessity.

[17] Finally, easements of necessity require "to be assessed by the use at the time of the deed at which the grant to reserve the right created the necessity": see Power on Intangible Property Rights in Ireland. At the time of the lease the defendant did not own the Garden and it was being maintained as a lawn.

[18] The claim by the defendant that it enjoys an easement of necessity permitting vehicular traffic to access the Garden through the Estate is fundamentally misconceived for the reasons set out above.

[19] The next claim that is made, is that it was a common intention of the parties to grant a vehicular right of way over the plaintiff's land. This argument faces a number of difficulties. In Pwllbach Colliery v Woodman [1915] AC 634 Lord Parker said at Page 646:

> "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used."

[20] That case involved a butcher complaining about a nuisance created by coal dust. This was being deposited on his slaughter house and sausage factory from the adjoining and neighbouring colliery. This colliery was a sub-lessee of the original tenant, a tin company, to whom the land had originally been leased. The butcher held the adjacent land under a subsequent lease from the same land owner "subject to all rights and easements belonging to any adjoining and neighbouring property." Lord Parker went on to say at page 647:

> "But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use."

[21] The House of Lords held that although the tin company was entitled to make a sub-lease, and indeed itself could carry on a business of coal mining, there was no evidence that it had ever intended to engage in such work. Hence, there could be no

room for any implication based on a common intention and thus any attempt to prove an implied grant of easement arising from the parties' common intention failed.

[22] In the instant case the defendant relies on the clause at paragraph 1(b)(ii) that nothing in the Lease "shall operate to impose any control and development of any other lands of the Lessor". This refers to the Lease operating as a control. But the plaintiff is not arguing that there is anything in the Lease that acts as a control on the development of any other land of the defendant, even if other land of the defendant can be defined not as land presently owned, but as land which the defendant may acquire, which is doubtful. It is important to recognise that although the law will imply the reservation of an easement where this is necessary to give effect to the common intention of the parties, this cannot be regarded as a mere application of the principles which govern implied terms under the law of contract because an easement arising from an implied common intention will not be restricted to the parties to whom the intention is imputed, but will comprise an interest in land: see Albert Power on Intangible Property Rights in Ireland at 2.20.

[22] The defendant is in effect arguing that paragraph 1(b)(ii) constitutes either an implied grant of a right of way to the defendant for vehicular access, or more logically a reservation of a right of way for vehicular access. Firstly, it is simply not possible on even the most generous construction to construe this provision as impliedly reserving (or granting) a right of way for vehicular access to the defendant. Secondly, a reservation of a right of way, which is deemed to be a re-grant from the grantee to the grantor, is construed against the grantor; see Power on Intangible Property Rights in Ireland at 9.02.

[23] One might, for example, see a possible argument that the plaintiff (and its members) could not complain about a development of any other lands of the defendant on the basis that, for example, such a development might affect the covenant of quiet enjoyment. However, there is no way that this clause can be reasonably read, to reserve (or grant) to the defendant a right of way for all purposes including vehicular access over the plaintiff's property.

[24] Further it was not within the contemplation of the parties at the time the Lease was entered into that the defendant was going to acquire, never mind develop the Garden, which was then retained by the Ghaies given that the acquisition of the Garden by the defendant came more than 2½ years after the Lease was executed.

[25] To make the claim that there was a common intention that the defendant should have a vehicular right of way to enable it to access the Garden, when the defendant did not even own the Garden at the time of the Lease is a hopeless one, no matter how attractively Mr Orr QC has packaged it.

D. CONCLUSION

[28] The plaintiff's claim succeeds on the first issue, no defence having been offered and the defendant conceding the plaintiff is entitled to the relief it seeks. The defendant's claim for an easement to permit vehicular access over the Estate to the Garden fails. The construction of the apartment development has created what is in effect a barrier to the estate road comprising as it does a parking space, a flower bed and a wall. These prevent further vehicular access and any vehicle enjoying the right of way permitted over the roads of the Estate must stop before it reaches the boundary of the land owned by the defendant. However, there remains a clear right of access to the Garden by foot over the Estate or by boat over the River. The construction of the barrier was deliberate. In the circumstances I can find no means by which the defendant can be said to have acquired a right of way to access the Garden by motor vehicle. I will hear the parties on the issue of costs.