Neutral Citation: [2017] NICty 1 | *Ref:* **2017NICTY1**

Judgment: approved by the Court for handing down | *Delivered:* **23/02/17**

*(subject to editorial corrections)**

IN THE COUNTY COURT FOR NORTHERN IRELAND

SITTING IN COLERAINE

BY THE DISTRICT JUDGE

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STEPHEN AND ALISON MOORE

Plaintiffs

V

CAUSEWAY COAST AND GLENS DISTRICT COUNCIL

Defendant

_____

DISTRICT JUDGE GILPIN

Introduction

[1] On or about 14 January 2014 the Plaintiffs entered into a Licence Agreement ("the Licence Agreement") with the Defendant ("the Council") to allow them to continue to pitch and use their static caravan at the Council's caravan site at Juniper Hill, Ballyreagh Road, Portstewart ("Juniper Hill") for the year 1 April 2014 to 31 March 2015 ("the Agreement Period"). They then paid the relevant licence fee of £2279.00 to the Council on or about 20 January 2014.

[2] In these proceedings the Plaintiffs seek damages of £2500 for an alleged breach of the Licence Agreement which they say occurred when the Council denied them the right to use their caravan at Juniper Hill for part of the Agreement Period, namely from 29 September 2014 to 31 March 2015.

[3] The Council accepts that it did deny the Plaintiffs the right to use their caravan for the period in question but claims it was entitled to do so in order that it could carry out certain works at Juniper Hill. In this case Mr Compton BL appeared for the Plaintiffs and Mr Gibson BL for the Council. I am grateful to both of them for their helpful and focused submissions.

The Application to Recuse

[4] At the commencement of the hearing Mr Gibson made an application that I should recuse myself from hearing this case on the basis of apparent bias. His submission was grounded on the fact that, when sitting in the Small Claims Court in 2015 I had heard a claim, Garland v Coleraine Borough Council, arising out of the same decision of the Council to deny another caravan owner the right to use her caravan at Juniper Hill for the same period and for the same reason as arises in the instant case. In Garland I had found in favour of the caravan owner and the Council had appealed my decision. Mr Gibson informed me that before the appeal was determined a settlement had been reached between the parties, one term of which was that by consent the Decree that I had made was set aside. Mr Gibson conceded that his application might enjoy greater force if the appellate court had found my decision to be wanting but accepted this was not such a case.

[5] The test for apparent bias is that set out by Lord Hope in Porter v Magill (2001) UKHL 67 namely

"…whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[6] In Howell and others v Lees Millais and others (2007) EWCA Civ 720 the Court of Appeal observed

"The mere fact that a judge has decided a case adversely to a party …. will rarely if ever be a ground for recusal."

[7] Underlying Mr Gibson's application appears to be an argument that because on the evidence given to me, the submissions made and the judgment I had formed in a previous case, a fair minded and informed observer would conclude that I have pre-determined the outcome of the instant case. I reject that line of reasoning. Each case will be looked at afresh and on its own merits in light of the evidence given in it and the submissions made. An informed observer would know of that general principle.

[8] At the hearing of this matter after I had considered Mr Gibson's application I informed him that I was rejecting it and the matter proceeded to a full hearing without further objection.

The Legal Relationship between the Parties

[9] It is common case that the limited statutory intervention which governs the seasonal use of a caravan on a caravan site in Northern Ireland, namely the Caravans Act (Northern Ireland) 2011, is not in issue in these proceedings.

[10] Rather in this case the issues in dispute are contractual arising out of a licence namely the Licence Agreement entered into in January 2014.

The Terms of the Licence Agreement

[11] It would also appear to be common case that the Licence Agreement expressly permitted the Plaintiffs to use their caravan for "holiday and recreational purposes"

1. From 17 March 2014 to 3 November 2014 during the entire week, and
2. From 4 November 2014 to 16 March 2015 only at weekends.

[12] In addition, Part 1 of the Licence Agreement, required the Council to provide the Plaintiffs certain specified services namely water, electricity (up to 15mA), gas, ground maintenance (to within 0.5m of their van), sewerage, showers/laundry, waste management and use of a recreational hall.

[13] Other obligations the Licence Agreement imposed upon the Council were set out in clause 3. In particular clause 3.1 required the Council to:

"…provide maintain and keep in a good state of repair the site services to the caravan as described in Part 1 except where these have to be interrupted for the purposes of repair or for other reasons beyond our control such as interruptions in the supply of services to us."

[14] Beyond the express terms of the Licence Agreement the Council contends that the court should imply a further term into the agreement between the parties namely that:

"Access to the site is controlled by the owners [the Council] and the owners [the Council] permit reasonable access/use of the caravan site except where access/use has to be interpreted for the purposes of repair, improvement or for other reasons beyond our control."

The Plaintiffs' Evidence

[15] Alison Moore gave evidence at the hearing of this matter on behalf of herself and her husband and was cross-examined.

[16] Her evidence was that she and her husband had kept a static caravan at Juniper Hill for a number of years making use of it not only during the period of the year when it was open every day but also on occasions when use was restricted to weekends.

[17] It was suggested to her in cross-examination that their use of the caravan may have offended the user clause in the Licence Agreement as it was put to her that her husband used the caravan in connection with his business particularly by travelling to his business premises to and from the caravan. Mr Gibson put great emphasis on the description of the use made of the caravan by the Plaintiffs in their solicitor's

letter of 19 November 2014 which described the caravan as a "pied a terre." Mr Gibson sought to suggest such a phrase implied a use ancillary to a business. My understanding however of such a phrase is that it denotes a small living space some distance from a person's primary residence.

[18] Having heard the evidence of Alison Moore I am quite satisfied that the user clause in the Licence Agreement has not been offended. I do not find the Plaintiffs to have used their caravan for anything other than the use permitted in the Licence Agreement. The suggestion by the Council that travelling to and from a caravan to a place of business elsewhere offended the user provision seems to me to be erroneous.

[19] Even if I am wrong in this and the Plaintiffs have offended the user clause I do not see how this would provide the Council with some form of defence to the proceedings as they were constituted before the court.

[20] In relation to the works that the Council intended to carry at Juniper Hill, Mrs Moore denied having personally experienced any issues of concern with the services to her site, nor was she aware of others experiencing any such concerns. However she did concede that works may well have been required to be undertaken.

[21] In short the Plaintiffs' claim was that they had paid the Council for the right to use their caravan for a certain number of days during the year but the Council had unlawfully failed to allow them to use all of the days they had paid for.

The Defendant's Evidence

[22] In 2014 Mr McCartney was the Council's Outdoor Recreational Manager and as such had responsibility for Juniper Hill. He too gave evidence and was cross examined. He said that the Council was aware of concerns particularly about the electrical infrastructure at Juniper Hill before 2014 and that in time a major overhaul would be required. However he said that it was only on receipt of a Condition Report from Cogan & Shackleton, Consulting Engineers in March 2014, that the extent and urgency of the works required became apparent to the Council.

[23] Mr Smith of Cogan & Shackleton also gave evidence which reinforced the conclusions the Council had drawn from his report namely that a significant upgrade of the electrical infrastructure was necessary to ensure statutory compliance. His report also touched obliquely on concerns about drainage at Juniper Hill and their impact on the electrical integrity of the site. It was Mr Smith's view that drainage works would best be carried out concurrently with the works to upgrade the electrical infrastructure.

[24] Following receipt of the Cogan & Shackleton report in March 2014 it would appear that on 24 July 2014 the Shadow Council, which predated the Council, agreed

in principle to progress with certain infrastructure works at Juniper Hill and, in order to do so, that they would consider a Final Business Case in due course.

[25] This Final Business Case, dated 25 September 2014, was prepared by Council Officials and thereafter presented to the Shadow Council. This document set out four options differing on the extent of the works to be undertaken. Option A provided that only essential works "to overcome the compliance issues" be undertaken. Options B-D provided for varying degrees of "non-essential works" over and above those covered by Option A. Option A provided that the electrical infrastructure be updated and that in addition some limited forms of drainage works be undertaken. Option B included more extensive electrical and drainage works. Options C and D proposed more extensive electrical and amenity works respectively.

[26] A decision was then taken to proceed not only with the essential works set out in Option A but in addition both Mr McCartney and Mr Smith accepted some of the works the Council decided to carry out came within what the Final Business Case described as "non-essential works."

[27] After having obtained all the necessary approvals and appointed contractors to carry out the works the Council closed the site from in or around 29 September 2014. Mr McCartney and Mr Smith's evidence was that the Council had considered whether it might have been possible to close portions of the site while the works were being carried out but that this was in the end not considered possible. Thus when the site was closed on 29 September 2014 the Plaintiffs were prevented from using their caravan from that date until the commencement of the new site year in or around 1 April 2015.

The submissions of the Plaintiffs

[28] The Plaintiffs case is that the Licence Agreement expressly provided in Part 1 that they could use their caravan on a daily basis from 16 March 2014 up to 3 November 2014 and from 4 November 2014 to 16 March 2015 only at weekends.

[29] They submit that this is reinforced by Clause 2.1 of Part 3 of the Licence Agreement which provided

"We [the Council] permit you …. to use … [the caravan] … during the period each year described in Part 1."

[30] They do not however agree with the interpretation the Council place on Clause 3.1 of the Licence Agreement namely that it allowed the Council to prevent use in certain circumstances. Clause 3.1 provided

"We [the Council] will provide maintain and keep in a good state of repair the Site Services to the caravan …. except where these have to be interrupted for the purposes of repair or for any other reasons beyond our control…"

[31] The Plaintiffs contend that Site Services are defined with precision in the Licence Agreement as water, electricity (up to 15mA), gas, ground maintenance (to within 0.5m of the van), sewerage, showers/laundry, waste management and use of a recreational hall but there is no mention within this list of services of 'use' of the caravan as being a site service. In short they contend that in certain circumstances the Council could rely on Clause 3.1 to interrupt the provision of the specified services e.g. electric to their caravan but they could not rely on this clause to restrict them using their caravan.

[32] The Plaintiffs also urge the court to reject the submission of the Council that aside from the express terms of the Licence Agreement the Court should imply into it the clause contended for set out at paragraph 14 above. In this regard they urge the court to be cognisant of its role of interpreting an agreement and not adding to it; the presumption that where an written agreement is silent on an issue the court will not imply that it does in fact speak about it; that it is not the court's role to attempt to improve an agreement and finally that some additional wording should only be implied by the court where without it the agreement would be devoid of practical coherence.

[33] The Plaintiffs note that the Licence Agreement drawn up by the Council could have had but did not have an express clause such as the Council now contends for. They point to the fact that at Clause 9 of Part 3 of the Licence Agreement the Council did include express provisions to allow them to move a caravan to a different location within Juniper Hill in certain circumstances and that the Council agreed in those circumstances to "be responsible for all reasonable costs incurred in moving the Caravan." However the Plaintiffs point out that nowhere in the Licence Agreement does the Council reserve unto itself the right to prevent the use of a caravan simpliciter.

The submissions of the Council

[34] The Council reminds the court that the Plaintiffs in this case do not enjoy any statutory protection either under the Caravans Act (NI) 2011 or such statutory protections as might be afforded to tenants whether commercial or residential of premises. The Council argue the relationship between the parties is contractual and is grounded upon a combination of express and implied terms.

[35] The Council argues that the wording set out at paragraph 14 should be implied into the Licence Agreement made by the parties in this case.

[36] It suggests that the court should import such wording into the Licence Agreement because either if the issue had been brought to the attention of the parties

at the time they entered into the Licence Agreement the parties would have provided for it or alternatively the court considers it now fair to do so.

[37] The Council argues that nowhere in the agreement does it expressly provide that the Plaintiffs be given access to their caravan all that is provided for is that they can use it. They therefore suggest that for the Licence Agreement to make any practical sense the parties must have already agreed an implied clause as to access. They then argue if access forms part of the agreement between the parties then so must a right to interrupt that access and thus the clause they contend for should be implied into the Licence Agreement.

Discussion

[38] I have no difficulty in agreeing with the Plaintiffs that the express agreement they concluded with the Council allowed them to use their caravan every day from 17 March 2014 to 3 November 2014 and at weekends from 4 November 2014 to 16 March 2015. This is explicit in Part 1 of the Licence Agreement and is supported by Clause 2.1 of Part 2 of it.

[39] It seems to me trite law that in appropriate cases the courts can imply certain terms into an agreement. Lord Neuberger in Caryle v Royal Bank of Scotland 2015 UKSC 13 expressly approved of the approach of the majority in the New Zealand Court of Appeal decision in Fletcher Challenge Energy ltd v Electricity Corporation New Zealand Limited where that court held that

"The Court has an entirely neutral approach when determining whether the parties intended to enter into a contract. Having decided that they had that intention, however the Court's attitude will change. It will then do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities."

[40] I have also no difficulty in accepting the submission of the Council that in providing that the Plaintiffs could use their caravan the parties had by implication agreed there would be an ancillary right of access across Juniper Hill to allow them to get to it.

[41] However I reject the attempt on behalf of the Council to curb this basic right of the Plaintiffs to access their caravan by allowing the Council the right to restrict both access and consequently use where such a restriction is sought in order to effect repairs, improvements or for other reasons beyond the Council's control.

[42] In relation to use as I have set out at paragraph 38 above that the parties had reached a clear and coherent express agreement as to when this was permitted. The Council could have sought to insert a proviso such as they now contend for but they did not do so. The Council had clearly turned its mind to what it might do if certain works had to be undertaken and thus in these circumstances had reserved the right to move a caravan to a different location at Juniper Hill. However it would appear

they did not address the scenario of closing the entirety of Juniper Hill thus preventing caravan owners using their caravans while the works were being carried out.

[43] In relation to access I have found this to be implicit within the agreement between the parties being ancillary to the express right to use the caravan. Given my finding that the Council did not enjoy the right to restrict the use of the caravan outside the express provisions of the Licence Agreement it follows that they do not have the right to restrict the ancillary right of access.

[44] In relation to assessing what damages should be paid to the Plaintiffs I am cognisant of the fact that the starting point must be the basic principle that the purpose of an award of damages, so far as possible by an award of money, is to place the innocent party in the position they would have been in if they had not suffered the wrong of which complaint has been made.

[45] While the Plaintiffs claim was expressed in the Ordinary Civil Bill to be "for £2500 for damages for loss and damage" in her evidence Mrs Moore suggested they should be compensated for the loss of use of the caravan, finance payments made during the period in dispute, a refund of a portion of the Licence Fee paid and the costs of taking some winter breaks elsewhere. As such the Plaintiffs' claim is both for pecuniary and non-pecuniary losses.

[46] Having heard Mrs Moore give her evidence I am satisfied that she and her family would have made use of their caravan at Juniper Hill on average 2 weekends per month during the off season which I take it given their family circumstances to include October save for perhaps a few additional days in that month. I do note that no vouching documentation was placed before the court to support her claim for breaks taken elsewhere.

[47] In general terms the approach to be adopted when assessing general damages for loss of amenity is to provide compensation which is modest rather than excessive. I take note that in the instant case the Plaintiff's enjoyed only a limited interest in respect of the Council's land namely that of a licensee.

[48] It seems to me that an assessment of the amount of money necessary to compensate the Plaintiffs is a matter of general assessment to determine the appropriate compensation rather than an arithmetical calculation based on the number of days use of the caravan was denied to them.

[49] In the particular circumstances of these Plaintiffs in this case I determine that figure to be one of £750.00

[50] In relation to costs Order 55 Rule 19 (2) of the County Court Rules (NI) 1981 ("the Rules") provides

(2) In any proceedings before the district judge, if the award by the district judge does not exceed £3,000 no costs, save those which would be awarded under Order 26, Rules 43 to 46 shall be allowed if the district judge is satisfied that the proceedings should have been brought under Article 30(3) of the Order [i.e. in the Small Claims Court]

Valentine at paragraph 18.13 of 'Civil Proceedings, The County Court' notes this Rule gives rise to a two stage exercise. Firstly whether the action could have been commenced in the SCC and then whether it should have been so commenced. This second limb imports a judicial discretion. Having considered the provisions of Order 26 of the Rules which governs proceedings in the Small Claims Court I am satisfied this matter could have been commenced as a small claim. However on considering the second limb of the test I have come to the conclusion it should not have been commenced there. It seems to me that due to the questions of fact and law involved and the subject matter of the dispute it benefitted from the more extensive body of procedural rules which govern cases in the County Court but which are not found in Order 26 which provides for a more summary approach. I am therefore satisfied that the Plaintiffs should have their costs in the usual way for cases brought in the County Court and not suffer what Valentine terms "the costs penalty" for not having brought them by way of a small claim.