

**Neutral Citation No. [2015] NICH 17**

*Ref:* **COL9790**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **30/11/2015**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**CHANCERY DIVISION**

\_\_\_\_\_

**2014 No. 42001**

**ORIGINATING SUMMONS**

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**BETWEEN:**

**PHILOMENA WALSH**

**Plaintiff;**

**-and-**

**HECTOR LESTER AND CLAIRE LESTER**

**Defendants.**

\_\_\_\_\_

**COLTON I**

**Background facts**

[1] The plaintiff in this action is the legal and beneficial leasehold owner of lands adjacent to 42 and 48 Glen Road, Craigavad, County Down pursuant to an assignment dated 13 September 1988.

[2] The lands are comprised of one of two sites (site 1) which were formerly part of the gardens of Dunratho House (42 Glen Road) with site 2 being 48 Glen Road.

[3] On 29 July 1988 Patricia McKinney leased all of the lands to which I have referred to her husband William and herself. On 13 September 1988 William and Patricia McKinney assigned the leasehold interest in site 1 to the plaintiff and her late husband who died in 2002. Site 1 then became vested solely in the plaintiff. Christopher Walsh, her son, acts on her behalf pursuant to a Power of Attorney.

[4] Also in 1988 a Mr Peter Thallon purchased the remaining interest of Mr and Mrs McKinney in the lands at this location. Due to the premature death of his wife he moved to a smaller house which he built on site 2 i.e. 48 Glen Road. By conveyance of 21 November 1996 he sold Dunratho House together with the reversionary interest in site 1 (the plaintiff's lands) to Hector and Claire Lester the defendants. When the plaintiff and her husband purchased the lands they were sold as a building site with extant outline planning permission. Both the lease map which formed part of the assignment and the sales brochure for the lands show a conventional shaped dwelling house in the middle part of that part of site 1 (hatched in blue) on which the building of a house was permitted.

[5] In subsequent years a series of planning applications were made which resulted in continuance of outline planning permission. Full planning permission has been granted in respect of two options for the construction of a dwelling on the site namely W/2013/0160F on 7 August 2013 and also for an alternative smaller dwelling W/2013/0305F on 14 January 2014.

[6] The plaintiff's lease in relation to the lands contains a covenant protecting a view of the sea for the owners of Dunratho House.

[7] The defendants say that the proposed developments in respect of which the plaintiff has obtained planning permission are in breach of these covenants and that they are entitled to withhold their consent to the developments by reason of the covenant.

[8] The plaintiff says that each of the proposals in respect of which planning permission has been granted are not in breach of the relevant covenant and that the defendants have unreasonably withheld their consent to the proposed development.

[9] The case therefore turns on the construction of the relevant terms in the lease as they apply to the facts of this case.

### **The Covenant**

[10] The relevant covenant is set out in clause 6 of the lease in the following terms:

"6. AND the Lessee to the intent that the obligations shall continue throughout the demise hereby made covenants with the Lessor and the heirs executors administrators and assigns of the Lessor 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 the 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 at 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 marked "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 party 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 marked "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 plant or grow on the portion of the demised premises between the lines "A" and "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 right angles from the maximum height permitted on the line "A"- "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."

[11] In order to make sense of the text one must have regard to the lease map to which I will refer later in the course of this judgment.

### **Summary of the Evidence**

[12] I heard evidence from Christopher Walsh who adopted two affidavits he had sworn in this matter as his evidence. He confirmed the background to the dispute as set out in paragraphs [1] to [5] above. He explained that he was personally involved with his father at the time of the original purchase of the site which was purchased as a "building site" with the benefit of outline planning permission. He and his father were aware of the restrictive covenant and prior to purchasing the site attended there in or around August 1988 together with an architect, a solicitor, the selling agent for the site and Mr William McKinney, the defendants' predecessor in title. At that meeting a frame was constructed to demonstrate the dimensions and position of a proposed dwelling on the site to ensure that any dwelling would be in accordance with 6(c)(i) and (ii) of the Covenant. Having been satisfied that the proposed construction was in accordance with the relevant clauses he explained that his parents purchased the site and that in subsequent years the outline planning permission was renewed. He explained that in October 2012 his mother who had

reached her 80<sup>th</sup> year decided that she wanted to sell the site and he was charged with handling the matter. Before marketing the site he met with his adjoining neighbours namely Mr Peter Thallon and Mrs Claire Lester, one of the defendants in this case, explaining his mother's decision.

[13] In the course of marketing the site it became apparent that potential purchasers were unwilling to purchase without the benefit of full planning permission and so he instructed Mr Alan Patterson to prepare drawings for a suitable dwelling with a view to the submission for an application for full planning permission in or around February 2013. When these drawings were ready and before submission he again contacted his neighbours showing them the plans of the proposed dwelling and providing them with a copy of the drawings. When he met with Mrs Lester in the Cultra Inn his view was that "all appeared well". Thereafter Mr Patterson lodged a planning application for full planning permission for the development of a dwelling. On 19 June 2013 Mr Walsh received an email from Des Ewing Architect, instructed on behalf of the defendants indicating that the proposed plan did not comply with the covenant contained in the lease and that he was instructed to forward an objection to Planning Service on the defendants' behalf. In response Mr Walsh met with Mr Ewing who maintained his position on behalf of the defendants that the lease prohibited the development of the site. Following this meeting he contacted Mrs Lester who allegedly replied "don't worry about Des". In fact no objection was submitted to the Planning Service by or on behalf of the defendants and planning permission was duly granted on 7 August 2013 - reference W/2013/0160/F. He explained that because of a concern that the chimney on the proposed development may not have been in compliance with clause 6(c)(ii) he instructed his architect to remove the chimney stack so as to remove any doubt about the dimensions of the proposed dwelling. These provisions were accepted by the Planning Service.

[14] Terms were then agreed for the sale of the site with Mr Patterson being the purchaser but he indicated that he proposed to build a different dwelling namely a two storey house as opposed to a three storey house and he therefore submitted a planning application for such a development in respect of which full planning permission was granted on 14 January 2014 (reference W/2013/0305/F). In the meantime the plaintiff's solicitors wrote to the defendants setting out the background and seeking their consent to the proposed developments. Other than an acknowledgment of the correspondence and an indication that the matter would be dealt with "as expeditiously as possible" no answer was forthcoming and ultimately the defendants instructed their solicitors in January 2014 to deal with the matter and they have refused to consent to either of the proposed developments on the grounds that they are contrary to the covenant in the lease. In a further affidavit he indicated that he was familiar with the site over the years and was involved in its maintenance and upkeep in the course of which he would have had reasonably regular contact with his neighbours. He indicated that there had been some changes to the site he purchased in that substantial trees had been removed and the current site was therefore significantly different from the site as originally purchased. The

significance of this is that the view of the sea when the covenant was created was different from the current view in that it was more restricted. He further indicated that it was his understanding that neither of the defendants resided in Dunratho House and indeed the defendants appeared to accept that they had not been living there since 2007. His understanding was that Dunratho House is no longer a single residence and that the property has been sub-divided into apartments. During his twice-yearly visits over the years for trimming and grass cutting he did not believe that the defendants were actually resident in Dunratho House. He indicated that in September 2013 Mrs Claire Lester showed him how they had created an entrance to the side of Dunratho House with a communal staircase to facilitate dividing the house to create an apartment comprising the entire top floor of the house which he believes is currently rented out. She also informed him that the annex to the main house, which was probably the former garage, had been converted into a further apartment which had been rented out. This is something which had been the subject matter of a dispute with another neighbour at 44 Glen Road.

[15] Overall in terms of this dispute it was Mr Walsh's view that both the proposed dwellings were compliant with the provisions of the covenant and that the dimensions were within those specifically set out in 6(c)(ii). It was always intended by the defendants' predecessors in title that a dwelling could be constructed on the site and this is something that would have been within the knowledge of the defendants given the history of the planning permission to which he referred. He was familiar with the terms of the lease and the map to which they refer. In essence his evidence was that it was clear that the site had been divided into two separate parts with an area hatched in blue where a dwelling site was permitted and with a separate area directly in front of Dunratho House which had an enhanced and express restriction in terms of doing anything which would interfere with the view of the sea from the house. In essence his case was that the effect of dividing the site up into separate areas was to maintain and protect "a corridor of vision or view" directly in front of the main house which was designated in a separate part of the site along the lines "A" to "B".

[16] I was impressed by Mr Walsh. He gave his evidence in a straightforward and reasonable manner. I have no doubt about his truthfulness and I took the view that he acted entirely reasonably throughout the process in accordance with what one would expect of a good neighbour. Indeed his evidence was not challenged at all in cross-examination.

[17] I also received affidavit evidence on behalf of the plaintiff from Mr Peter Thallon and Anson Logue, neither of whom were called to give evidence at the hearing. Mr Thallon confirmed the background to his involvement in these lands as set out above. Of particular relevance was his assertion that when he sold the property to the defendants he met with Mr Lester and discussed what could be built at site 1 (the lands currently owned by the plaintiff). He recalls standing on the site and discussing with him what could be built in the course of which he illustrated the area where he understood a house could be built subject to height restrictions. In the

course of that meeting he advised Mr Lester of the appropriate height of the house which he believed could be built and he also referred him to the lease map, which set out the area hatched in blue and also the planning permission that existed at that time and which related to site 1. He recalled explaining to Mr Lester that the lease map and covenants were constructed in such a way as to maintain a clear straight corridor of vision from the house down to Belfast Lough over the central section of site 1. This of course accords with Mr Walsh's understanding of the lease and it is the plaintiff's case that this explains the way in which the site has been divided up with an area hatched in blue to the left where a house could be built and with an area to the right of the site directly in front of the house in respect of which a much more restrictive provision applies - see clause 6(c)(vii). He confirmed that this was his understanding of the situation with regard to site 1 and he expressed his surprise to learn that the defendants had a different understanding about what could be built on the site. He also confirmed that it was his understanding that the defendants had not used Dunratho House since in or around 2004 and that during that time it has been mainly either rented out or vacant.

[18] Mr Logue's affidavit explained that he was a businessman who had previously employed Mr Lester and was subsequently involved with him in partnership in various property investment and development opportunities. He indicated that his commercial relationship with Mr Lester had become strained but that this did not impact on the contents of his evidence. He had knowledge of the site in question as his sister was considering purchasing Dunratho House back in August 1996. He set out his sister's understanding of the restrictions in relation to site 1 which accord with that of Mr Walsh and Mr Thallon. Subsequently he was contacted by Mr Lester who explained that he and his wife were considering purchasing Dunratho and in view of the involvement of his sister he declined to act for the defendants at that time. His affidavit averred that in early 1997 he was present at Dunratho House with Mr Lester when he remarked on the wonderful view it had down to the lough. His account of the conversation was that Mr Lester then explained that the ground directly in front of the main windows of the house could not be built on but a dwelling could be constructed to the left hand side. It was his view that Mr Lester's description of what could be built and where accorded entirely with the description which his sister had been given following her discussion with Mr Thallon. There was no doubt in his mind that what Mr Lester understood could be built was a property to a certain height to the left of the straight corridor directly in front of Dunratho House. He also challenged any suggestion on behalf of the defendants that Dunratho House was their principal residence.

[19] Neither of the defendants gave evidence in this matter although both swore affidavits. Mr Lester confirmed that he and his wife had purchased Dunratho, 42 Glen Road, Craigavad on 21 November 1996. They had enjoyed living in the house from time to time but the house was currently rented. He averred that when they bought Dunratho they appreciated its prominent position and uninterrupted sea view and that they sought specific advice from their solicitor on the strength of the covenants which protected that view. It was his belief that they could enforce the

relevant covenants and in particular clause 6(c)(ii) and that even if the stated height restrictions in the clause were observed the plaintiffs were still under an obligation not to “do or permit to be done anything which shall obstruct the view of the sea from the premises known as Dunratho.”

[20] Having received advice from Mr Ewing it was clear that both the proposed dwellings in respect of which the plaintiff had planning permission would in fact restrict the view of the sea from the house. He also relied upon Mr Ewing’s opinion that it was possible to construct a new dwelling on the site which would not breach the prohibition in clause 6(c)(ii). He concluded his affidavit in the following terms:

“The plaintiff’s summons asks for a declaration that my wife and I have unreasonably withheld our consent to the plaintiff’s proposal. Pursuant to clause 6(c)(iii) any proposed dwelling is to be approved by us, however the clause in issue here is not clause 6(c)(iii), it is 6(c)(ii), which contains a prohibition on building the proposed new dwelling described in the plaintiff’s drawings.”

[21] In her affidavit Claire Lester asserted that she and her husband regarded Dunratho as “our principal residence”. She indicated that they had purchased a house in Scarva, County Down in 2007 to accommodate educational needs of their son and due to other family circumstances. She indicated that she does stay overnight at the house regularly and it is occupied under an informal arrangement by a friend of hers.

[22] Neither of the defendants took issue with the contents of the affidavits of either Mr Thallon or Mr Logue save for the extent to which they resided at the house. Whilst the first defendant disagreed with the plaintiff’s interpretation of the covenant neither of the defendants challenge the factual assertions set out in Mr Walsh’s affidavit and elaborated and confirmed in his oral evidence save for the extent to which either of the defendants resided at the house.

### **Expert Evidence**

[23] I received two written expert reports from Mr Michael Johnson, Chartered Surveyor, Mr John Hutcheson, Chartered Architect on behalf of the plaintiff, two expert reports from Mr Des Ewing, Chartered Architect on behalf of the defendants together with a Minute of Experts meeting dated 20 November 2014. Both Mr Hutcheson and Mr Ewing gave evidence at the hearing.

[24] I am grateful to the experts for their helpful drawings, plans and projections which were extremely useful in helping me understand the layout of the lands and the issues that arise from the covenants in dispute.

[25] Two important matters emerged as undisputed.

[26] Firstly both of the proposed plans complied with the height restrictions set out in 6(c)(ii) of the covenant.

[27] Secondly parts of both of the dwellings would be visible from Dunratho House as one looks down towards Belfast Lough.

[28] In his report and evidence Mr Hutcheson provided his analysis of the covenant and the related lease map. Ultimately the construction of the covenant is a matter for the court. From an evidential point of view Mr Hutcheson highlighted a number of matters which were of assistance in determining the proper construction of the lease.

[29] Paragraph (i) is straightforward. Building on the site is restricted to that part of the land hatched in blue.

[30] In relation to paragraph (ii) as I have indicated above both experts agree that the proposed dwellings are within the detailed height restrictions set out therein. Furthermore as set out above the experts agree that both the proposed dwellings restrict the view of Belfast Lough from Dunratho House. It was Mr Hutcheson's opinion that the second part of the clause namely "and not to do or permit to be done anything which shall obstruct the view of the sea from the premises known as 'Dunratho', properly construed refers to the view set out in paragraph (vii) which was referred to as the "corridor" in front of Dunratho House by the witnesses to whom I have already referred.

[31] Paragraph (iii) requires the lessors permission for anything built within the area hatched in blue with the proviso that such permission is not to be unreasonably withheld.

[32] Paragraph (iv) prohibits the erection of any wall or fence between the points marked "A" and "B" which is the area directly in front of Dunratho House and to the right of the part of the site hatched in blue. The clause does permit the erection of a wall or fence between the points "C" and "D" which is the line that runs along and across the entirety of the site at the bottom of the site adjacent to the concrete path which adjoins Belfast Lough.

[33] Paragraph (v) restricts the height of any shrubs or hedge planted along the line "A" to "B" to a specific height. Both experts agree that this would have the effect of obstructing the view of the sea that currently exists in Dunratho House.

[34] Paragraph (vi) restricts the height of any wall or fence that can be erected along the lines of "C" to "D" and also the height of any plant or shrubs. Again both experts agree that the view of the sea would be obstructed by the permitted fence/hedge along the line "C" to "D".

[35] Mr Hutcheson places particular emphasis on paragraph (vii) which defines an imaginary plane running from the maximum permitted height along "A" to "B" to the maximum permitted along "X" to "D" as annotated on the lease map. The introduction of "X" he says is particularly significant. "X" divides a line between C and D along the front of the site so that "X" is in line with "A" thereby creating the "corridor" effect to which I have already referred. Paragraph (vii) expressly refers to "the view of the sea from the residence known as 'Dunratho' and significantly the clause anticipates that taller plants will be permitted on the northwest side of the demised premises (i.e. the area hatched in blue) and smaller plants on the southeast side thus not interfering with the view of the sea. Analysing this paragraph in the context of the rest of the paragraphs it was Mr Hutcheson's opinion that if the restrictions prohibiting interference with the view of the sea had been intended to apply over the area hatched blue then the point "X" would not have been introduced and the plane would have been defined using the point C in the northwest corner. In answer to the question why paragraph (ii) included a restriction on doing anything in this area that would obstruct the view of the sea he puts forward the opinion that this may have been intended to prevent such circumstances as the planting of a large tree on the edge of the blue hatched area whose mature crown could spread into the area intended to be kept clear and since it was not planted within the area "A-B", "X-D" it could not contravene paragraph (vii) and thus it was necessary to include this reference in (ii).

[36] Paragraph (viii) prohibits the planting of any trees in the area not hatched blue and thus implies that there is no restriction on the planting of trees in the portion hatched blue. This is of course relevant to Mr Hutcheson's analysis of the reasons why the second part of the clause was therefore inserted in paragraph (ii).

[37] Mr Ewing did not provide an analysis or construction of the clauses. His evidence as indicated above clearly indicated the restriction that would result from either of the dwellings proposed. The defendants in particular relied upon Mr Ewing's evidence to the effect that a building could be constructed in the area hatched in blue which would not interfere in any way with a view of the sea from Dunratho House. He provided plans, drawings and projections of two potential dwellings which would comply with the covenant and would not restrict the view from Dunratho House in any way. Thus the defendants argue that it was open to the plaintiff to come up with an alternative design. Mr Hutcheson had an opportunity to consider these plans and he suggested that the type of houses proposed by Mr Ewing are not going to be envisaged by most people when they consider building a house for themselves. He was of the view that they would be contrary to the marketing literature at the time the plaintiffs purchased the lands which disclosed a site plan identifying a rectangular building located in the centre of what is the area hatched in blue on the lease map, something which is not dissimilar to the proposals that have received planning permission. He suggested that the design was unique and involved locating the house in the corner of the site underneath a wall which would require significant earthworks. This theme was taken up in cross-examination by Mr Fee QC on behalf of the plaintiff. Mr Ewing

gave evidence to the effect, which I accept, that there was nothing unusual in height restrictions in leases where smaller houses were constructed in front of larger houses, particularly in the Cultra area. When he referred to specific examples it was clear however that the houses subject to the restrictive covenant were nonetheless of the conventional style envisaged by the plaintiff in this case. Indeed when pressed the only actual example of the style of house envisaged by Mr Ewing on this site was at Grass Road in Portstewart which had been designed to protect the view at Portstewart Golf Club. He did not resile from the proposition put to him that the Portstewart example was an iconic building recognised as being a unique and unusual design.

### **The Legal Principles to be Applied**

[38] I am grateful to counsel for the parties Mr Fee QC and Mr Shields on behalf of the plaintiff and Mr Orr QC for the defendants for their diligent and helpful exposition of the relevant case law. In this regard I can do no better than quote the judgment of Deeny J in the case of H Limited v D C & Anor [2014] NI Ch 3 in which he reviewed the relevant cases and observed:

“[20] This is a commercial contract made between a business firm and a business man, albeit in the context of litigation. The first defendant relies on the decision of the Supreme Court in Rainy Sky v Kookmin Bank [2011] 1 WLR 2900; Rainy Sky v Kookmin Bank [2011] UKSC 50, [2002] 1 All ER 1137. The judgment of the court was delivered by Lord Clarke of Stone-cum-Ebony. His discussion of the relevant authorities is valuable and I have borne it carefully in mind. However, the essence of his judgment and that of the court is to be found at paragraph 21:

“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If

there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.’

[21] It is important to remember that in expressing that view the Court was proceeding on an incremental basis. Earlier judgments, for example that of Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913, remain good law. What is clear from a reading of the authorities is that it continues to be the duty of the court to look at the contract, agreement or document as a whole in seeking to interpret any parts thereof which give rise to difficulty. Re Sigma Finance Corporation [2010] 1 All ER 571 is an illustration of that. Indeed it is evident from the jurisprudence going back to Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381 and beyond. See also Chitty on Contracts, 31<sup>st</sup> Ed. That approach is consistent with the phrase used by the Supreme Court in another field of law that context is all.”

[39] In another judgment of this court namely Holloway & Holloway v Sarcon (No 177) Ltd [2010] NI Ch 15 Deeny J referred to the “admirable summary” of Lord Bingham of Cornhill in BCCA v Ali [2001] 1 AC 251 as follows:

“In construing this provision, as any other contractual provision, 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 known to the parties. To ascertain the parties’ intentions the court does not of course inquire into the parties’ subjective states of mind but makes an objective judgment based on the matters already identified.”

[40] Thus it is clear from the authorities that unless the context otherwise requires, the starting point for the construction of covenants is the natural and ordinary meaning of the words used. Whilst the principle is easily stated its application to particular covenants can prove problematic. As the authorities demonstrate the courts are frequently confronted with covenants which are capable of a number of interpretations, which are unclear and which contain inherent contradictions. The authorities suggest a discernible shift to ensure that expressions are not interpreted

too literally at the expense of business common sense. The process of construction is “a composite exercise, neither uncompromisingly literal nor unswervingly purposive” as per Sir Thomas Bingham MR – Arbuthnot v Fagan [1995] CLC 1396 at 1400. Lloyd LJ vividly described the problem of construction as being:

“Designed to separate the purposive sheep from the literalists goats.” See [1987] 1 Lloyd’s Report 230.

[41] I also bear in mind the reference in Chitty on contracts 31<sup>st</sup> Edition Volume 1 Chapter 12 paragraph G044 which states:

“Further it has long been accepted that the courts will not approach the task of construction with too nice a concentration upon individual words.

The common and universal principle ought to be applied; namely that an agreement ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intention of the parties, than to any particular words which they may have used in the expression of their intent.”

Finally to quote Preston on Restrictive Covenants:

“The essential question of construction is the meaning that the deed would convey to a reasonable person having all the background knowledge that would have been reasonably available to the parties in the situation in which they were at the time of the contract.”

### **Interpretation of the Covenant**

[42] Applying these principles of construction how do I interpret the covenant in the context of this dispute?

[43] I fully accept Mr Orr QC’s contention that the protection of a sea view is something which can properly be the matter of a covenant in a lease such as in this case. The issue is what is the extent of the restriction provided in the lease? When one looks specifically at the question of the extent of any building that can occur in the area hatched in blue on the site the defendants say that the matter is entirely straightforward. Clause 6(c)(ii) expressly states that the lessee must “not do or permit to be done anything which shall obstruct the view of the sea from the residence known as ‘Dunratho’.” In accordance with the principles to which I have referred they say that the meaning of the words is plain. The experts agree that both

the proposed dwellings which form the subject matter of the plaintiff's claim will obstruct the view and that plainly they are contrary to this provision in the covenant.

[44] This first impression is tempered by the question I posed to Mr Fee QC in the course of his opening. What then is the point of the rest of Clause 6(c)(ii) and indeed the entirety of Clause 6? If the lessor's intention and the intention of the covenant was to protect the view from Dunratho House and to ensure that a lessee would not do anything which shall obstruct the view of the sea then what was the necessity for the remainder of the clauses? One simple paragraph would have sufficed. It seems to me that any proper construction of the covenant must require looking at the covenant "as a whole" and in light of all the factual background. As per Deeny J in H Ltd v D C & Anor "context is all." It is obvious that the covenant goes to considerable length to provide an interlocking and inter-related series of restrictions. Firstly the site is divided into sections. Secondly in respect of each section and the boundaries of each section considerable detail is provided in relation to the extent to which each section and each boundary may be developed. Focussing specifically on 6(c)(ii) which deals with the erection of the building in the area hatched blue specific details as to the permitted height of any building are set out. If the intention was simply to prevent any development which restricted the view in any way what was the point of the inclusion of this detail? Thus there is an apparent contradiction in (ii) in my opinion. This contradiction is continued in a sense that the clauses at (v) and (vi) also will obstruct the view of the sea from Dunratho notwithstanding the provision at (vii) which purports to prevent any interference with the view of the sea from Dunratho in respect of the area "A"- "B"; -"X"- "D".

[45] Can these contradictions be reconciled within the terms of the covenant? In my view the answer to this question is yes and one does not have to have regard to, for example, the maxim "verba cartarum fortas accipuntur contra proferentem" which is very much a principle of last resort. Having considered the matter carefully and having looked at all the plans, photographs and projections it seems to me that there is merit and sense in the proposition from Mr Hutcheson that the reference to obstructing the view of the sea from the residence known as Dunratho in (ii) is interrelated with the reference to the view of the sea in (vii) and that what is being protected here is the view that remains from the front of Dunratho House through the area or "corridor" represented by the lines "A"- "B" and "X"- "D". Thus the clauses leading up to (vii) go into great detail about the heights of the various obstructions that are permitted throughout this site thereby setting the limits of any restrictions on the views with (vii) protecting the view from the front of the house through to the sea beyond.

[46] Indeed it seems to me this is the only sensible explanation for the introduction of "X" as an additional reference point in the lease map. This provides the key to a proper understanding of what is meant by "the view of the sea from Dunratho."

[47] Not only is this consistent with an overall reading of the interlinking clauses and the covenant as a whole it is also consistent with all the background material

that has been introduced at the hearing. I recognise of course that I must be extremely careful about any weight paid to evidence of surrounding circumstances and that the exercise the court is engaged in is a construction of the words themselves. Nonetheless in coming to the view that I have it seems to me that the background evidence entirely supports this construction.

[48] In this regard I refer to the steps that were taken in relation to the marking out of the site at the time of purchase at which the defendants' predecessors in title were present and the discussions described by Mr Thallon and Mr Logue in their affidavit evidence. I appreciate that these witnesses did not give evidence but they were not contradicted by way of affidavit evidence or otherwise. It is clear that Mr Thallon who seems to be independent of the parties supports the interpretation put forward by the plaintiffs in this matter and one bears in mind that he of course was the predecessor in title to the defendants. Furthermore he alleges that when he sold the lands to the defendants in 1996 he made that interpretation clear to them. Of course I accept that the defendants are entitled to stand on the covenant if it supports their contention and indeed this has been their approach in this litigation and their approach to the request from the plaintiff. However this background information in so far as it is relevant does support the interpretation I put on the covenant.

[49] In relation to the proposed dwellings that could be constructed as suggested by Mr Ewing in my opinion these would not have been within the contemplation of the parties when the lease was originally drafted. This would mean that a building could only be erected on a small portion in a corner of the area hatched in blue, on the basis of a unique and restricted design which would require substantial work before it could be constructed.

[50] The matter does not end there. Mr Orr QC on behalf of the defendants contends that they have a freestanding entitlement to withhold consent or approval of a proposed building within the site on the basis of 6(c)(iii). In this regard Mr Orr referred me to the first instance High Court case in Manchester namely Margerison v Bates & Bates [2008] EWHC 1211 (Ch). In that case the defendants withheld consent to the erection of a pitched roof on a bungalow close to the defendants' residence which would have an adverse impact on their visual amenity. The defendants in that case were extremely house-proud and had been living in the premises since 1978. They emphasised that it was their family home and they had no intention whatsoever to leave or sell. They had objected to the proposed development from the outset. Mr Orr QC pointed out that in that case too there was also a sub-clause restricting the overall height of the bungalow, very similar to the current case. In the Margerison case the court came to the view that just because the bungalow was within the height restriction did not mean that the defendants could not separately rely on the separate clause which permitted them to withhold consent provided it was reasonable and he says that this is therefore a case of considerable assistance to the defendants. In that case the judge reviewed the authorities and the principles to which I have referred and which I do not propose to repeat. Turning to the question of withholding of consent or approval it seems to me that the principles are fairly

clear. Reasonableness is given a broad common sense meaning. The court must have regard to the context of the power and thus there is no entitlement to withhold consent for reasons that have nothing to do with the purpose of the covenant to which the power applies. Finally the question is one of fact depending on the particular circumstances of the case. In determining what is reasonable the court does not simply substitute its own views and the court must recognise that the covenantee will look at the issue through the prism of their own property rights under the restrictive covenant.

[51] However it is clear that every case is fact specific. In this case it seems to me that the provision at (iii) must be seen through the prism of the detailed restrictions and measurements set out in the remainder of the clauses. The key issue remains the interpretation of (ii) in the overall context of the lease. Indeed this is the view of the defendant Mr Lester himself where he states in his affidavit:

“The plaintiff’s summons asks for a declaration that my wife and I have unreasonably withheld our consent to the plaintiff’s proposal. Pursuant to clause 6(c)(iii) on the lease any proposed planning has to be approved by us, however the clause in issue here is not clause 6(c)(iii), it is 6(c)(ii) which contains a prohibition on building the proposed new dwellings described in the plaintiff’s drawing.”

[52] In the context of this case I agree with the assertion that the issue here is in fact clause 6(c)(ii) and the construction that the court places on that clause in the context of the covenant as a whole. Whilst there might be circumstances in which it would be reasonable to withhold approval of a development for reasons other than the height and dimensions of a proposed building, that does not arise here. The issue in this case is the effect of the proposed building on the “view of the sea” from Dunratho and whether it is in breach of the covenant.

[53] Insofar as the conduct of the parties is relevant it seems to me that the plaintiff has behaved in an exemplary fashion throughout informing the defendants of her intentions, providing them with all appropriate and relevant information and at all times attempting to deal with the matter as a good neighbour. The defendants seek to rely on the covenant. For the reasons I have set out above I have come to the conclusion that the proper construction of the covenant means that the proposed buildings in dispute in this action are not in contravention of the covenant and that the defendants have unreasonably withheld consent and/or approval in respect of the proposed dwelling houses.

[54] Accordingly I declare that the plaintiff is entitled to the relief sought in the originating summons herein.