NCN: [2022] EWHC 903 (Ch)

Case No: CH-2021-000154

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

On appeal from His Honour Judge Dight CBE
County Court at Central London

Rolls Building
7 Rolls Buildings
London, EC4A 1NL

11th March 2022

Before:

THE HONOURABLE MRS JUSTICE BACON DBE

- -

Between:

(1) EMILIO DI SILVIO
(2) ANNA DI SILVIO
(3) STUART WILSON
(4) JANE BARCLAY WILSON

Appellants

- and -

(1) GIDEON SHARP
(2) NICKY SHARP

Respondents

- -

- -

MR J. MCCREATH (instructed by **IBB Law LLP**) for the **Appellants**
MR P. CLARKE (instructed by **Howard Kennedy**) for the **Respondents**

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APPROVED JUDGMENT

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MRS JUSTICE BACON:

Introduction

1. This is an application by Mr and Mrs Di Silvio and Mr and Mrs Wilson for permission to appeal against the order of HHJ Dight CBE, sitting in the Central London County Court, dated 24 June 2021, made after a judgment handed down on 10 June 2021.

2. On 29 October 2021, after considering the application on the papers, I ordered a rolled-up hearing of the application for permission to appeal, with the hearing of the appeal to follow immediately if permission is granted.

3. I have been greatly assisted by the clear and cogent written and oral submissions of Mr McCreath for the Appellants and Mr Clarke for the Respondents. Both counsel sensibly advanced their submissions fully, rather than attempting to divide their submissions into permission submissions and full appeal submissions. On that basis, I will deal with their submissions fully now, before considering the implications of my conclusions for the disposal of the appeal.

Background

4. The background to this matter is a dispute between a group of neighbours who all live in a close of houses in Wimbledon. The close is subject to a building scheme, and the scheme contains a restrictive covenant which provides (among other things that are not relevant to this appeal) that the covenantor is "[n]ot to do or permit or suffer to be done anything on or about the property or buildings now or hereafter constructed thereon which shall or may be or grow to be an annoyance nuisance or disturbance to the Vendor the owners or occupiers of any other property on the estate."

5. Mr and Mrs Sharp, who live at number 6, wished to build an extension to their house. They obtained planning permission over their neighbours' objections, but were aware that those neighbours would oppose the extension on the grounds that it breached the covenant. They therefore issued a Part 8 claim against the four objecting neighbours (Mr and Mrs Di Silvio at number 2 and Mr and Mrs Wilson at number 5) seeking a negative declaration that the proposed extension would not breach the covenant.

6. The neighbours counterclaimed for a declaration that the extension *would* breach the covenant and sought relief aimed at preventing the extension from going ahead. They also counterclaimed for a declaration that the building works that would be required to complete the extension would also breach the covenant.

7. The judge heard evidence from the neighbours who were the defendants to the claim, as well as from a number of other neighbours in the close. His conclusion was that the extension would not breach the covenant, and he therefore made the declaration sought by the Sharps and declined to grant the

corresponding relief sought in the counterclaim. The counterclaim for a declaration that the works would breach the covenant has been stayed.

8. Of particular relevance to the appeal, the judge held that the correct test to decide whether the extension would breach the covenant was as set out by HHJ Behrens (sitting as a judge of the High Court) in *Dennis v Davies* [2008] EWHC 2961 (Ch). His Honour Judge Behrens himself took that test from his reading of *Tod-Heatly v Benham* (1888) 40 ChD 80, the seminal authority on the issue. HHJ Behrens stated the test at §98 of his judgment as follows:

> “Would reasonable people, having regard to the ordinary use of the Claimants’ houses for pleasurable enjoyment, be annoyed and aggrieved by the extension? To adopt the words of Lord Justice Lindley, would the extension raise an objection in the minds of reasonable men, and be an annoyance within the meaning of the covenant? Lastly, would the extension reasonably trouble the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of the Claimants’ houses?”

9. It is common ground that this test is a hypothetical reasonable person test. It requires the Court to decide, on a binary basis, whether a reasonable person living in the neighbours’ houses would be annoyed by the proposed extension. The judge answered that question, on all the evidence, in the negative.

The ground of appeal

Preliminary comments

10. The sole ground on which the Appellants appeal is that the judge fell into error by adopting that test. Mr McCreath says that the proper test which emerges from a correct reading of *Tod-Heatly* is “whether the reaction of a person who was annoyed by that activity would fall within the range of reactions which a reasonable person might have”, or in other words, whether an objection by a person who was annoyed by that activity would be not unreasonable?

11. Before turning to Mr McCreath’s arguments on that point, it is important to make two preliminary observations on the difference between the parties.

12. First, although the foundation of Mr McCreath’s argument on the substance is that there will always be a range of views on the question of annoyance, and that the Court should not base its decision on a single point picked from that range, ultimately Mr McCreath is not saying that the boundary between what is permitted and not permitted under the covenant is a spectrum. He is saying that there is a distinct line, but that it is not drawn at the point at which the activity is or may be an annoyance to the hypothetical reasonable person. Rather, it is drawn at the point at which the view that the activity is or may be an annoyance crosses the line from one that is not unreasonable to one that is unreasonable or fanciful.

13. Secondly, it is necessarily the case that Mr McCreath's formulation puts the point at which the covenant bites lower than that of the hypothetical reasonable person. If it were not so, this appeal would be pointless. In other words, his position is that there may be situations, and indeed that the present case is exactly one of those, where the judge will say that the hypothetical reasonable person would not be annoyed, but nevertheless Mr McCreath would say that the activity should still be prohibited by the restrictive covenant because there is someone who would be annoyed whose views cannot be described as unreasonable.

14. Those points, in my view, must be borne in mind when considering the case law to which I now turn.

The Tod-Heatly case

15. Mr McCreath rightly says that this case is about interpretation of the particular covenant in issue and the words of that covenant. But, as he also says, those words (or very similar words) have been interpreted in the case law considering other covenants, and the case law is therefore relevant and important in considering the interpretation of the covenant in this case.

16. In that regard, Mr McCreath's central point is that in the seminal case of *Tod-Heatly* (1888) 40 Ch D 81 the Court of Appeal adopted his "range of reactions" test, not the "binary reasonable person" test.

17. *Tod-Heatly* was a case about a hospital that had been set up in an area subject to a covenant in materially similar terms to the one in this case. The neighbours of the hospital said that its activities were an annoyance within the meaning of the covenant, in part because it presented a risk to their health.

18. At pp 93–94, Cotton LJ said that in deciding whether something was an annoyance or grievance within the scope of the covenant, judges "must not take that to be an annoyance or grievance which would only be so to some sensitive persons. They must decide not upon what their own individual thoughts are, but on what, in their opinion and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people". He continued that the Court must be satisfied that "reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done" and that "a reasonable apprehension of nuisance from acts done by the Defendant" would fall within the terms of the covenant.

19. At p. 95, however, he put the test in a slightly different way, saying that "having regard to the evidence of doctors on both sides, it cannot be said that the apprehension of risk from this hospital being carried on is unreasonable". Mr McCreath places particular emphasis on that sentence.

20. At pp. 96–97 Lindley LJ said that "Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant". He continued, "It appears to me to be unnecessary to decide whether the doctors on the Defendant's side are right in saying there is nothing

to be afraid of, or whether the evidence on the other side is right that something is to be feared. It is quite enough, as it appears to me, to establish that reasonable men are satisfied that serious risk is incurred, and that they reasonably believe there is serious risk".

21. At p. 98 Bowen LJ first defined annoyance as something that reasonably troubles the mind and pleasure "of the ordinary sensible English inhabitant of a house", thereby applying a classic hypothetical reasonable person test.

22. He continued, however, "if it is not an unreasonable thing for an ordinary person who lives in the neighbourhood to be troubled in his mind by apprehension of such risk, it seems to me that there is danger of annoyance". On p. 99 he also said that, "it appears to me not unreasonable that the neighbourhood should be apprehensive as to consequences; and if the neighbourhood is reasonably apprehensive as to the consequences, the matter, I think, comes within the covenant". Again, Mr McCreath placed particular reliance on those latter passages.

23. Mr McCreath submits that the passages where the judges said that it was "not unreasonable" for a person to apprehend a risk from the hospital were the passages where the judges were deciding the case, and thereby represent the ratio of the case. He says that those passages reflect his test, rather than the hypothetical reasonable person test.

24. However, on a plain reading of the three judgments of LLJ Cotton, Lindley and Bowen, I do not consider that they lay down any test that is different to the one adopted by the judge in this case. What each judge quite plainly asks is whether a reasonable, sensible person in the position of the relevant objectors or neighbours would find the activity in question to be an annoyance. The fact that in some places the test is expressed in negative terms, by asking whether the reaction is unreasonable, does not detract from that conclusion. I agree with Mr Clarke that in this judgment "not unreasonable" is simply being used interchangeably with "reasonable".

25. One quite clear example of that is the judgment of Bowen LJ at p. 99, the passage I have cited already, where the two phrases are used in terms that make clear that they intend precisely the same thing. He says in one breath that it appears "not unreasonable" that the neighbourhood should be apprehensive, and in the next that if the neighbourhood is "reasonably apprehensive", then the covenant is engaged. That is not, in my judgment, a reference to a range of views. Rather, it is asking whether in that neighbourhood a reasonable person would be apprehensive, a question that he answers in the affirmative.

26. I also do not accept that the references to reasonable views plural, or reasonable people plural, show that the judges were considering a range of views. At no point in the judgment is there any reference to a range of views or opinions. Throughout the judgment it is quite clear that the judges are seeking to ascertain what would be the opinion of the hypothetical reasonable person.

27. The test set out in *Tod-Heatly* is therefore, in substance, in my judgment, a binary reasonable person test.

Consequences of the point of principle

28. On that basis, the test set out by HHJ Behrens (sitting as a judge of the High Court) in *Dennis v Davies* [2008] EWHC 2961 (Ch), §98, cited by HHJ Dight in this case, correctly sets out the point of principle. The restrictive covenant is and should be applied using the standard hypothetical reasonable person test. In other words, the judge should ask whether a reasonable person, or an ordinary sensible person, having regard to the ordinary use of the relevant properties, would be annoyed by the activity in question. It is a commonplace test, which courts are well equipped to apply.

29. If the answer is that a reasonable person would not be annoyed, or in other words that applying the covenant from the perspective of the reasonable person, it would not be engaged, then the activity is not restricted by the covenant. That is an entirely logical and sensible interpretation of the covenant.

30. Mr McCreath's formulation would have the contrary result, that even if a reasonable person would not be annoyed in any way by the activity, it might still be prohibited by the covenant because there might be someone who objected, whose views were not within what Mr Clarke termed the "core of reasonable opinion" but which nevertheless could not be described as unreasonable or irrational. That in my view sets the bar far too low, and it would I think be somewhat surprising to anyone bound by such a covenant to learn that their activities could be restricted by the covenant on this basis, even if a reasonable person would not consider their activities to be in any way an annoyance.

31. As Mr Clarke has pointed out – and as is abundantly clear from the case law – this is a very common sort of covenant. There is, however, no indication in any of the cases that have considered this sort of formulation, that the test is anything other than a binary hypothetical reasonable person test. Examples are the cases of *Wood v Cooper* [1894] 3 Ch 671 and *Trustees of the Coventry School v Whitehouse* [2012] EWHC 2351 (Ch), but these are not exhaustive.

32. That of course does not mean that Mr McCreath is wrong. The fact that the point has not been alighted on in subsequent cases does not mean that the point may not be a good one. The body of jurisprudence does however reinforce my conclusion that the formulation set out in *Dennis v Davies* correctly interprets the ratio of *Tod-Heatly.*

Wording of the covenant

33. Mr McCreath's other central point is that his "range of reactions" or "not unreasonable" test deals better with the nature of the covenant, because its language prohibits activities that "*may be*" an annoyance, as well as those that "*shall*" be annoyance. He submits that the test that he proposes can cope better

with the elasticity of that language, as well as the inherent elasticity of the concept of annoyance, which contains an irreducible element of subjectivity.

34. I disagree. The language of "may be" simply makes the point that the annoyance may not have crystallised. It is therefore enough for a reasonable person to apprehend that there may be an annoyance – a point made by Cotton LJ in *Tod-Heatly*. That does not, however, suggest that the test should be inverted to ask whether the annoyance perceived by a particular neighbour is positively unreasonable, as opposed to the test applied whether a reasonable person would indeed consider there to be an actual or potential annoyance.

35. Indeed, if Mr McCreath's test sets the boundary at a definitive point, just at a lower point which is common ground, there is no reason why that should fit any better with the "may" wording than the test of the reasonable person.

36. My conclusions thus far are sufficient to dispose of the appeal, but I will deal for completeness with Mr McCreath's submissions on what he said were the specific errors made by the judge below.

Errors said to have been made by the judge

37. First, Mr McCreath said that the judge did not seek to discern the true principle in *Tod-Heatly*. That is true if one looks only at the passage where the judge directly sets out the relevant extracts from *Tod-Heatly*. But the judge did later on at §75 focus specifically on what he thought the principle was, and he then repeated the principle by reference to *Dennis v Davies* at §77.

38. Secondly, Mr McCreath said that *Dennis v Davies* did not consider the specific issue of the binary test versus the range of opinions test because it was not argued before the Court there. It is true that *Dennis v Davies* did not specifically consider the arguments that have been raised before me today. But the point remains that at §98 of *Dennis v Davies* the judge set out the principle that he was applying clearly and unambiguously in a way that is completely inconsistent with the test proposed by Mr McCreath in this appeal.

39. Thirdly, Mr McCreath says that the judge wrongly considered that the Court of Appeal in *Dennis v Davies* had approved the formulation of the test set out by HHJ Behrens at first instance in that case.

40. I agree that the Court of Appeal did not expressly approve the test as set out by HHJ Behrens. Rimer LJ set out the relevant passages of the judgment below, including the passage at §98 cited in this case, and did not disapprove of those passages, before going on to say at §12 that the Court of Appeal was not required to decide the factual question of whether the proposed building in that case breached the covenant. He then added in an *obiter* aside, that "I would have required much persuading that this Court could properly arrive at a view on that matter differing from his", but that comment was clearly aimed at the judge's factual conclusions, not his formulation of the test. That does not, however, undermine the judge's primary conclusion in this case which was that the principle was correctly set out by HHJ Behrens at first instance at §98, a conclusion with which (as discussed above) I agree.

41. Fourthly, Mr McCreath says that the judge wrongly considered that he was bound by *Dennis v Davies*. I do not agree. HHJ Behrens adopted a "binary reasonable person" test, and that formulation of the test was binding on HHJ Dight CBE in this case. Of course, I am not strictly bound by that decision in this appeal. But as I have said, I regard the test set out there as the correct one, so I would follow it in any event.

42. Fifthly and sixthly, the judge is said to have erred in taking into account the "elasticity" of the range of reactions test as proposed by Mr McCreath. It follows from what I have said that I do not entirely agree with the judge's reasoning on this point. As I noted in my preliminary comments, Mr McCreath's test still sets the line at a single point. What is certainly true, however, is that his test is not the reasonable person test, but something else – as I have said, the boundary is drawn where "not unreasonable" crosses over to unreasonable or fanciful. In the present context, I agree that this may be somewhat more difficult to apply than a standard hypothetical "reasonable person" test.

43. Of course, as the judge noted, there are cases such as public law cases or cases involving the exercise of discretion, where the question is whether the decision that has been taken falls within a reasonable range of views. Those are, however, in a quite different context to the present, where the intention is to give a wide tolerance to the view reached by the public authority or the person entrusted with the discretion. I agree with the judge that those sorts of cases are not analogous to the present case, nor would the approach adopted in those cases be an appropriate approach to adopt in this case.

44. Seventhly, Mr McCreath says that the judge erred by holding that the test in *Tod-Heatly* was set out before the concept of the "reasonable person" (i.e. "the man on the Clapham omnibus") had become generally established in English law. Mr McCreath points out that the roots of the "reasonable person" test in fact go much deeper than the 1880s, and that it was Bowen LJ himself who coined the famous "Clapham omnibus" phrase.

45. That point does not, however, undermine the judge's conclusions in this case. If anything, the fact that there is a tradition of defining a legal standard by reference to the hypothetical reasonable person reinforces the test that the judge applied.

46. Finally, Mr McCreath submits that the judge was wrong to take into account the fact that the subsequent authorities and textbooks did not adopt the "range of reactions" approach, given that those authorities and commentaries simply did not discuss the difference between the two tests. Again, however, that does not undermine the judge's conclusions. As Mr McCreath fairly accepts in his skeleton argument, even if there had been such a discussion, the central question on the case law remains that of identifying the ratio of *Tod-Heatly* and, as I have found, that turned on a reasonable person test.

Conclusion

47. Mr McCreath's submissions were attractively and eloquently presented. They were, however, in my judgment wrong both on the authorities and as a matter of principle.

48. I have carefully considered whether I should refuse permission, or give permission but refuse the appeal on the substance. Those outcomes, of course, have very different consequences in terms of the right of further appeal. In light of the very clear conclusions I have reached on both authority and principle, I consider that the right course is to say that I do not consider the appeal to have a real prospect of success and nor is there any other compelling reason to hear the appeal. I therefore refuse permission to appeal.