

COURT OF APPEAL

89/22

11TH MAY, 1989

Before: Sir Godfray Le Quesne, Q.C., (President)
Sir Patrick Neill, Q.C., and
A.C. Hamilton, Esq., Q.C.

Between Ernest Farley and Son, Limited Appellant
And Takilla Limited Respondent

Appeal Against Judgement of the Royal Court,
of the 22nd July, 1986

Advocate P. de C. Mourant for the Appellant
Advocate J.A. Clyde-Smith for the Respondent

JUDGEMENT

(Reserved from the hearing on the 25th and 26th July, 1988)

IN THE COURT OF APPEAL OF JERSEY

ERNEST FARLEY & SON, LTD.

v.

TAKILLA, LTD.

JUDGMENT

1. This case concerns a house on Mont Cochon named Eulah. It stands on the corner of Mont Cochon and a lane called La Ruelle Vaucluse, to the east of Mont Cochon and the south of the lane. It is a substantial house, and was surrounded originally by an extensive garden. The whole property, both house and garden, belonged in 1979 to the Appellants, Messrs. Ernest Farley & Son, Ltd.. In 1979 they sold the north-western part of the property, including the house and some outbuildings, to the Respondents, a company apparently owned and controlled by a gentleman named Callaghan. The Appellants retained the greater part of the garden, lying to the east and to the south of the part sold to the Respondents. The contract of sale, dated the 8th. June, 1979, contained clauses restricting the development which might be carried out on the part thus retained. The dispute between the parties arises from the interpretation and application of those clauses.

2. The two clauses read as follows:

'3. Qu'il ne sera jamais établi dans les côtière ou pignon Ouest d'aucune maison ou autre édifice que ladite Société Bailleresse et Venderesse pourra par la suite faire ériger sur ladite propriété qu'elle se réserve aucune fenêtre donnant vers L'Ouest à une distance moins que cinquante pieds royaux à l'Est de la limite Est de ladite propriété présentement baillée et vendue.

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6. Que d'autant que ladite Société Bailleresse et Venderesse se propose et aura l'intention de bâtir, établir et construire sur ladite propriété qu'elle se réserve à l'Est de ladite propriété présentement baillée et vendue un groupe (ou groupes) de maisons de rapport (anglicisé "block(s) of flats") et appartenances tels bâtiments, établissement et constructions seront achevés et complétés conformément à et généralement en accord avec certain plan ou dessin préparé par "Messrs. Taylor, Leapingwell and Horne" et portant le numéro 326/12. Ledit plan et dessin est celui qui a été déjà soumis pour approbation du Comité des Etats de cett/e Ile dit "Island Development Committee". Etant stipulé entre lesdites parties que nuls changements ou modifications audit plan ou dessin est permis sans le consentement de ladite Société Preneuse et Acquéreuse, lequel consentement ne sera pas refusé sans raison valable.'

3. In the Order of Justice the Respondents alleged that the Appellants had broken clause 3 by constructing a building the west wall of which was within 50 feet of the boundary between the Appellants' property and the Respondents' and incorporated glass bricks, which were windows within the meaning of the clause. They also alleged that the Appellants had broken clause 6 by constructing a building which did not conform to or generally accord with plan 326/12 because it was approximately 2 metres higher than the

building shown on that plan and exceeded by approximately 2 metres 'a sight line drawn from the ridge of the [Respondents'] garage to the ridge of a building known as Villa Piemonte' to the east of the Respondents' property. The Respondents claimed an order that the Appellants demolish forthwith so much of any building constructed on their property as exceeded in height the building shown in plan 326/12 and the said sight line, and an order that the Appellants remove forthwith from the said west wall any glass bricks or windows.

4. By their Answer, the Appellants denied that they were in breach either of clause 3 or of clause 6, and averred that the building accorded generally with plan 326/12.

5. It is important to observe that the claim made by the Respondents was based simply upon the alleged breaches of clauses 3 and 6 of the contract of sale. They made no allegation that they had been induced by any misrepresentation to enter into the contract, nor that the contract was affected in any way by misrepresentation or fraud. They made no plea of mistake, nor did they rely in their pleading upon the understanding, or misunderstanding, of plan no. 326/12 entertained by Mr. Callaghan. Accordingly on the case as pleaded none of these matters has to be considered. The case does not involve any inquiry into what the Appellants may have said the plan meant or what the Respondents may have thought it meant. It turns upon the answers to be given to three questions only, viz.:

- (a) what, upon the proper interpretation of the contract of sale and, as regards clause 6, of the document specified in that clause, is the effect of the restrictions imposed by clauses 3 and 6?
- (b) do the buildings which the Appellants have erected offend against those clauses?
- (c) if so, what relief should the Respondents be given?

6. Clauses 3 and 6 have already been quoted in full. The critical provision of clause 6 is that the blocks of flats are to be 'achevés et complétés conformément à et généralement en accord avec' plan no. 326/12. The draftsman did not content himself with using the words, 'conformément à', but added the expression, 'et généralement en accord avec'. The intention can only have been to soften to some extent the rigour which the clause would have displayed if the words, 'conformément à', had stood alone. A building can be said to be 'généralement en accord avec' a plan if it follows the plan in its important and principal features, even though it departs from the plan in details. In order to be able to say that the building is not 'généralement en accord avec' the plan, it would be necessary, in our judgment, to find some substantial and significant difference, not merely some trivial difference, between the two. The application of the clause thus requires an exercise of judgment rather than the simple application of a rule of thumb. It is essential to bear this in mind when considering whether the buildings erected contravene clause 6. Such an approach is moreover consistent with the

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indicative, rather than ~~the~~ definitive, character of plan 326/12. This character the plan derives from the planning purpose for which it was originally prepared, described later in this judgment.

7. The Appellants first applied to the Island Development Committee for permission to build on the garden of Eulah on the 29th. September, 1976. The evidence does not contain any particulars of the proposal then submitted, but it did not meet with the Committee's approval. In a letter of the 6th. December, 1976, the Committee agreed that the land was 'capable of development for residential purposes' but asked for a form of development different from that proposed by the Appellants. The Committee did not want the new buildings to project above the level of La Ruelle Vaucluse (to which we refer as 'the lane'). It should be explained that the site slopes steeply downward from north to south, i.e. away from the lane toward the sea, and also slopes downward from east to west.

8. After receiving this letter the Appellants engaged Messrs. Taylor Leapingwell in place of the architects who had submitted the first proposal. Mr. Taylor of that firm submitted a new proposal on the 20th. April, 1977. Long negotiations followed. The Committee were anxious to preserve the view from the lane over St. Aubin's Bay. They were also concerned about the effect of the development on the amenities of cottages standing just to the south of the garden of Eulah, and about the northward view from the coast at First Tower. For a long time they insisted

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that the new buildings should not rise at all above the level of the lane. Mr. Taylor submitted what he called a revised scheme on the 3rd. November, 1977, but the Committee remained unwilling to grant permission.

9. In 1978 Mr. Horne, who gave evidence for the Appellants, joined the firm of Taylor Leapingwell. Mr. Taylor and he had a meeting with members of the Committee on the site some time in 1978, and discussed the proposed development. As a result the Committee appear to have modified their position enough to accept buildings rising by one storey above the level of the lane. On the 27th. March, 1979, Mr. Horne submitted to the Committee 'completely revised' proposals. He wrote:

'The proposals now include for a single storey development set well apart when viewed from the frontage to La Ruelle Vaucluse, as will be appreciated we think from their elevation, and a stepped design for the flat block which will reduce the visual impact when viewed from below ...

We trust that the design which is shown, for the moment diagrammatically, is clear ...'

Accompanying this letter was plan 326/12. Mr. Horne had prepared that plan, 'to show', as he said in his evidence, 'how I thought that the development could be arranged on site to meet the points that the IDC wished to have taken account of.'

10. The Committee were satisfied at last. The planning permit was issued on the 21st. August, 1979. It will be recalled that on

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the 8th. June, 1979 the contract for the sale to the Respondents had been passed, with its reference in clause 6 to plan 326/12.

11. From this course of events two facts of some importance emerge concerning that plan. First, the plan was used to support an application for planning approval. The stage of applying for development approval had not been reached. When Mr. Horne prepared plan 326/12, therefore, he was not concerned to include the details which an application for development approval would require. The Development Control Officer of the IDC put the point thus in a letter of the 18th. July, 1980 to the Respondents' solicitors:

'The drawing to which you refer, 326/12, was a sketch proposal upon which the Island Development Committee agreed the principle of re-developing this land with a number of flat units.'

Secondly, the plan constituted a revision of the Appellants' proposals, the purpose of which was to overcome the objections of the IDC. Those objections arose largely from concern about the height of the proposed buildings. This being so, one would not expect to find the plan concealing the height proposed, but it would not be surprising to find it presenting the proposal without emphasising the height or at once attracting attention to that feature of the buildings.

12. It is now necessary to describe this plan upon which the parties have caused so much to depend. It includes five separate drawings, entitled respectively South Elevation, Cross section, Site Plan, Elevation to La Ruelle Vaucluse and Site Location Plan.

The Site Location Plan is not relevant to this dispute, but all the other four drawings are important.

13. The South Elevation shows the southern faces of the two blocks of flats which the Appellants were proposing to erect. Above the second floor of the western block there is drawn a roof, surmounted by a heavy black line which appears to represent the summit of this roof. In fact that line is not the summit. At each end of the roof there is a thin line continuing the line of the gable above the heavy black line. After a short distance each of the two thin lines turns inward and continues for a very short distance parallel to the heavy black line. In the Royal Court these two thin lines were called 'nibs'. The space within the heavy black line, the two nibs and an imaginary line joining the extremities of the two nibs is coloured a little darker than the surrounding background of sky. There are similar nibs at the ends of the roof of the eastern block, and foliage of trees extends below the level of the top of the nibs down to the line which appears to represent the summit of the roof.

14. Mr. Horne gave an explanation in his evidence of these features of the South Elevation. He said to show the full height of the roof would have been misleading from the point of view of the I.D.C. and their concerns, because the ridge would not be visible to anyone standing on the falling ground to the south of the building, even as far away as the coast at First Tower. The nibs shewed that the drawing was not a full elevation, but the roof rose higher than the heavy black line. (There was no

evidence that the nibs were a recognized convention used, by architects or by anyone else, for such a purpose.) Anyone wanting to know the full height of the building could discover it from plan 326/12 by looking at the Cross section. It was suggested on behalf of the Respondents that the 'South Elevation', because it did not show the full height of the roof, was not an elevation but a perspective. Mr. Horne said it had 'elements of both'.

15. Certain other features of the South Elevation must be mentioned. The line of the road is shown to the east of the eastern block, between the two blocks and to the west of the western block. At the eastern end of the drawing appears the western end of the neighbouring house, which is named Villa Piemonte. To the west of the western block the drawing shows a tree. On the green representing the foliage of the tree there are a number of thin broken lines. Two of these lines meet to form a ridge. A legend, 'line of greenhouse roof', is connected by an arrow to a point on one of these two lines. There is another line, higher than these two lines, a point on which is connected by an arrow to a legend, 'garage roof'.

16. There was much discussion of these lines at the trial. On the eastern edge of the Respondents' land there are a greenhouse and two garages. One of the garages is situated to the north of the other and, because of the slope of the ground, stands higher. Mr. Horne said that the lines on the green were put in to show that there were buildings on the boundary, but did not show the buildings 'with great definition'. The Respondents, on the other

hand, for reasons which will appear, attached great importance to the precise position of the lines and their identification with one or other of the buildings.

17. The Cross section is cut through the property from north to south immediately to the east of the western block of flats. It extends from the lane in the north to one of the cottages immediately to the south of the Appellants' property. An important feature of the Cross section is that it is possible, using the scale indicated, to measure on it the precise height of the ridge of the roof of the western block above various levels, including the level of the lane, and the level of the south, or front, edge of that roof.

18. The Site Plan shows the whole of the Appellants' property to the east of that of the Respondents, with the lane to the north and the Respondents' greenhouse and two garages on their eastern boundary. The Plan gives the height of the ground at a number of points and the intended height of each floor of the two blocks of flats (but not the height of the roof). These heights are expressed in metres above the Ordnance Survey datum. According to Mr. Treliving, a land surveyor who gave evidence for the Respondents, the heights were incorrectly calculated in relation to the Ordnance Survey datum, but there was no significant criticism of their accuracy in relation to each other.

19. The Elevation to La Ruelle Vaucluse shews the line of the lane, descending from east to west, and the north elevation of

the two blocks of flats. There are two inaccuracies in this drawing. First, at its western end the drawing shows the boundary wall of the Respondents' property surmounted by the lower part of a roof. The height of the wall in the drawing is greater than it should be (it might, Mr. Horne said, 'be shown about half a metre too high'), and the roof, which was probably intended to be that of the northern garage, should have been shown further to the west. Secondly, the roof of the western block as shewn in the Elevation to La Ruelle Vaucluse is lower than that roof as shewn in the Cross section. Because of this, the block was built with its roof lower by about 2' 9" than the roof as shewn in the Cross section. This, Mr. Horne said, brought the roof down very nearly to the level shewn in the Elevation.

20. Mr. Callaghan gave evidence for the Respondents. He said that when considering the purchase of Eulah he had been concerned about what was being built next door. He had explained to Mr. Gillham, who dealt with him on behalf of the Appellants, that his concerns were 'height, nearness and windows'. The Appellants had produced plan 326/12. Mr. Callaghan had noticed when on the site that the apex of the greenhouse of Eulah and the apex of the north garage were in line vertically. Seeing the line marked 'garage roof' on the foliage of the tree at the western end of the South Elevation, he had produced that line to a point vertically above the ridge formed by the two lines below it (this ridge he had thought to be the apex of the greenhouse). He had then drawn a line from the point thus reached to the roof line of the eastern block, ignoring the ribs because he had not noticed them. He had

then said to Mr. Gillham, who was present, "Well, fine, no problem there. The building is below the apex of my garage." Mr. Gillham had not disagreed nor said that was not true. In fact the roof of the western block was some ten feet higher than the apex of the northern garage. Mr. Callaghan had expected, he said, that the effect of the covenant would be that none of the buildings to be erected by the Appellants would rise above a line drawn from the top of the northern garage to the ridge of Villa Piemonte.

21. Mr. Callaghan said he had been misled by the South Elevation about the heights of the two blocks of flats. The plan shewed blue sky down to the roof line of the western block and trees down to the roof line of the eastern block. He had not seen the nibs. Furthermore, the point at which he had arrived on the plan as the apex of the north garage was seven feet higher than the true height of that garage.

22. Mr. Callaghan said he had not taken any advice on the plan or shown it to an architect. He had not been concerned with the relationship between the proposed building and the road level nor had he ever considered the road level shewn on the plan. He had never looked at the Cross section or the Elevation to La Ruelle Vaucluse, nor had he considered the plan as a whole.

23. Mr. Callaghan's evidence was given without any objection. At the beginning of the trial, however, when Mr. Fiott, who then appeared for the Respondents, was opening his case, the learned

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Deputy Bailiff asked him whether verbal evidence about the plan could be given. Mr. Fiott started to refer to an authority concerning ambiguity, but the Deputy Bailiff said Counsel could 'put me right in due course'. In fact there seems to have been no further consideration at the trial of the admissibility of Mr. Callaghan's evidence, nor any discussion whether plan 326/12 was indeed an ambiguous document.

24. The Respondents called two expert witnesses, an architect and a land surveyor. The architect, Mr. Mason, had had nothing to do with the design or erection of the buildings. The Respondents had called him in at the end of 1980 to report, as he said, on three things: 'the nearness of the proposed block of flats, height of the block of flats and the windows in the west elevation'. The principal point which he made concerned the height of the garages and greenhouse of Eulah and the height of the western block of flats in relation to them. He assumed that the garage indicated in the foliage at the western end of the South Elevation was the southern garage, not the northern, but, he said, the difference between the heights of the two garages was very small. According to Mr. Mason, the indication of the garage roof on plan 326/12 was 2 metres higher than the indication of the same roof on later plans on which development permission had been granted. He found a similar discrepancy between the indications on the different plans of the greenhouse roof, the indication of that roof on plan 326/12 being 1 metre higher than on the later plans. Plan 326/12 would lead one to expect, he said, that the height of the western block would be the same as the height of the garage, and that

block would not rise above a line from the ridge of the garage to the top of the roof of Villa Piemonte. In fact that block rose 2-2½ metres above that line.

25. Mr. Mason also made a criticism of the Elevation to La Ruelle Vauchuse. That drawing, he said, shewed the eaves of the garage of Eulah at the level of the top of the boundary wall, whereas in fact the eaves were down at the level of the road, 2 metres lower.

26. Mr. Mason had not at first noticed the ribs in the South Elevation. He thought the Elevation shewed a flat roof, while the Cross section shewed a pitched roof. He admitted, however, that the Cross section does show the true roof, and is accurate in relation to the lane. He also admitted that the 'line of road' shewn between the blocks in the South Elevation is effectively in a similar place to the lane as shewn in the Cross section.

27. It is important to notice that Mr. Mason's principal criticism of the height of the western block, like Mr. Callaghan's, was based on his interpretation of the broken lines in the foliage. Mr. Mason, moreover, did not explain precisely which point in the foliage he understood to be the ridge of the garage roof.

28. The remaining witness for the Respondents was Mr. Treliving, who is a Senior Lecturer in building and civil engineering studies at Highlands College. He specializes in land surveying.

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29. Mr. Mason instructed Mr. Treliving in April, 1984 to carry out a survey and check, as Mr. Treliving put it, 'the relative nature of the levels shewn on drawing 326/12'. Mr. Treliving returned in October, 1985, and compared the heights of the buildings erected with the heights shown on plan 326/12.

30. Mr. Treliving said the most significant points shewn on the plan were the ridge heights of the buildings. Ridge heights were illustrated in the Cross section, and in the South Elevation he had used the ridge lines ignoring the ribs. His evidence appears to have been (though on this point, as on other points, it is by no means easy to understand it from the transcript) that the height of the western block could be calculated from the Cross section, but what he took to be the ridge line on the South Elevation did not correspond with the ridge shewn on the Cross section, but with a lower level on the south side of the block. Similarly, the ridge line shewn in the Elevation to La Ruelle Vaucluse corresponded with a level on the north side of the block below the ridge shewn in the Cross section. However, the ridge itself of the western block as built was $\frac{3}{4}$ metre lower than that ridge as shewn in the Cross section.

31. Mr. Treliving gave evidence that the roofs of the two garages and the greenhouse of Eulah were all shewn on plan 326/12 higher than in fact they were: the north garage by 7' 3", the greenhouse by 3' 5" and the south garage by 6' 9". These were the figures which Mr. Treliving gave, but they were based on his interpretation of the broken lines on the green representing the

tree to the west of the western block. It is extremely difficult to make out from the transcript of his evidence exactly which points on the plan he took to be the ridges of the three roofs. Mr. Treliving himself said he had had to 'toss a coin and guess' where the ridge level of the south garage was. Under cross-examination he said that might have been a flippant remark; he had 'made an intelligent guess as to where that ridge is'.

32. Mr. Treliving had never seen an elevation drawing which did not show the ridge line of the building. If the ridge had been omitted from the South Elevation because a person standing to the south of the block would not see it, the drawing would be a perspective, not an elevation; nor would this explain why the ridge line was omitted from the Elevation to La Ruelle Vaucluse.

33. The preceding four paragraphs are a summary of evidence which covers 175 pages of the transcript. We believe it is a fair summary of the principal points which Mr. Treliving made. We must add, however, that he was a decidedly discursive witness; his answers were often oblique rather than direct; and he often tried to illustrate them by pointing at some feature of a drawing without attempting to describe what the feature was (e.g. 'The ridge line that I used was that line there'). For these reasons we have had great difficulty in assessing his evidence, and in some places even in understanding it.

34. The principal witness for the Appellants was Mr. Horne, the architect who drew plan 326/12. We have already referred to some

parts of his evidence: see paras. 9, 14, 16 and 19 above. As we have said, Mr. Horne's evidence about the broken lines on the green representing a tree at the western extremity of the South Elevation was that those lines were intended to indicate that there were buildings there, but did not show the buildings with any great definition. The ridge formed by two of these lines was intended, he said, to indicate the height of the roof of the south garage, but it was an estimate, because at that time he had not got the definite height of that garage. The indication was in fact about half a metre too low. The arrow marked 'line of greenhouse roof' pointed to the ridge of the greenhouse. When the level of the greenhouse was checked, this point was found to be very nearly correct. The arrow marked 'garage roof' pointed to about the right height of the top of the roof of the north garage. The line on which this point was indicated continued upward beyond the point, and Mr. Horne acknowledged that this was an error.

35. Mr. Horne said he had not known until after the contract had been passed that plan 326/12 was being used as the covenant drawing. Had he known that the plan was to be used for that purpose, he would have included only what he was 'very certain about'. The plan had been produced to accompany a planning application. It had been intended to show how the development could be arranged to meet the points which the I.D.C. wished to be taken into account. Mr. Horne had not wanted at that stage to tie himself down too closely to details.

36. The last witness for the Appellants was Mr. Tucker, who was the Assistant Development Officer of Building for the I.D.C.. He said the I.D.C. was satisfied that the buildings erected were in accord with the original planning permission, and the development permission which came later. Plan 326/12 was adequate for a planning application, but not for a development application. Mr. Tucker would have hesitated to take the height of the two blocks from the South Elevation, but would have used the Cross section as an indication of the proposed height. The I.D.C. had found the indication of the garage and greenhouse at the western end of the South Elevation to be incorrect, so had used the Villa Piemonte as a fixed point of reference.

37. The Royal Court delivered its judgment on the 22nd. July, 1986. Accepting that, for the purposes of the I.D.C., the Appellants had developed the site in accordance with plan 326/12, the Court said it remained to be decided whether the plan 'was such that the [Respondents were] misled into believing that the height of the proposed development would be some 6 feet less than that which [they claim] was in fact built'. The Court had, therefore, considered whether the plan was such that Mr. Callaghan might reasonably conclude that the building would be lower than it turned out to be. The Appellants had submitted that Mr. Callaghan had not read the plan as a whole; if he had compared the elevations with the road levels as shown in the Cross section he would not have made a mistake. The Court repeated that the main question was whether the development was carried out 'in conformity as a whole with that proposed in drawing 326/12, and as believed and interpreted by Mr. Callaghan'.

38. Considering the South Elevation, the Court said the ribs, which according to Mr. Horne indicated that the roof of the western block was going to be higher than shown on the plan, could be very misleading. There was dispute whether the legend, 'garage roof', on the green background of the tree at the western end referred to the north garage or the south garage. 'If', the Court asked, 'the drawing to the west of the South Elevation was a sketch then how was it possible for Mr. Horne to be sure which garage he depicted? ... If it was insufficiently depicted how much the more therefore could Mr. Callaghan be misled'. The Court held that the roof shown could reasonably have been taken by the Respondents to be that of the south garage; the line of the greenhouse roof was 'exactly what it says'; and Mr. Callaghan could reasonably assume that the apex of the garage roof was that of the south garage and was in correct relation to the western block.

39. The Court referred to Mr. Callaghan's evidence of his conversation with Mr. Gillham (cf. para. 20 above). They dismissed the Cross section as not being particularly helpful, because it was in effect the east elevation of the western block and that block appeared to be much higher if viewed from the west. In any case, the height of the block as shown in the Cross section had had to be reduced, as it was 'too high for the purposes of the I.D.C.'. The Court asked how the plan, if 'not sufficiently accurate for Mr. Horne, for his client's purposes', could be said to be accurate and clear enough to assist the Respondents in deciding whether to accept it for the purpose of the covenant.

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40. It was accepted, the Court said, that in the Elevation to La Ruelle Vacluse the roof ridges were not correctly shown. Furthermore, the height of the north garage and its supporting wall gave a very false impression.

41. Mr. Mason and Mr. Treliving had both said the western block was some 2 metres higher than shown on plan 326/12. The Court thought it had been reasonable for Mr. Callaghan to read the plan, 'even taking it as a whole, and particularly from the North Elevation', in this way. They held that the western block had not been built 'in accordance with plan 326/12 as interpreted by Mr. Callaghan'.

42. The Court then considered clause 3 of the contract of sale and the question of 'fenêtres', to which we shall turn later. As to the remedy for the breach of clause 6, they would, if free to do so, have held substantial damages to be the proper remedy; but they regarded themselves as bound by an earlier decision that the Court had no power to award damages in lieu of an order for removal. They therefore ordered the Appellants to remove that part of the western block 'above a sight line drawn from the ridge of the [Respondents'] south garage to the ridge of Villa Piemonte'.

43. It is necessary at this stage to recall what exactly the issues between the parties were. We have set them out earlier in this judgment (cf. paras. 4 and 5). We repeat that the action does not raise any question of mistake, misrepresentation or

fraud. The Respondents' claim under clause 6 is simply that the Appellants have not erected the two blocks 'conformément à et généralement en accord avec' plan 326/12. In order to consider this claim it is necessary to examine and inspect the plan. The enquiry at this point is what the plan means, not what Mr. Callaghan may have thought it meant. The two blocks have to be compared with the proposal contained in the plan. If Mr. Callaghan misunderstood the plan, it is still the proposal contained in the plan which is critical, not Mr. Callaghan's understanding of what the proposal was.

44. Unfortunately, the Royal Court appear not to have kept this point consistently in mind. At an early stage in their judgment, they said the question to which they had applied their mind was

'whether plan 326/12, which was shown to Mr. Callaghan by Mr. Gillham, on behalf of the [Appellants], was such that he might reasonably conclude that the building would be lower than it turned out to be'.

Taken by itself, this sentence might well mean that the Court had concentrated simply on the document in order to discover its meaning. However, they went on immediately to say:

'Since the only evidence as to what was said to Mr. Callaghan by any of the [Appellants'] employees is that given by Mr. Callaghan himself, and it has not been contradicted, we accept it, so far as it is relevant. It is unfortunate that Mr. Gillham was not called by the [Appellants] because he was the person most concerned with the plan on behalf of the [Appellants]'.

It is clear that what the Court was seeking to discover was what Mr. Callaghan's understanding of the plan had been, and for this purpose they thought that extrinsic evidence - to wit, evidence of what Mr. Callaghan was told by Mr. Gillham - was admissible.

45. A little later in the judgment, the Court set out the law. When parties had reduced their agreement into writing, their intention had to be sought within the four corners of the document, and plan 326/12 was a document to which these principles of interpretation applied. If, however, there was a latent ambiguity in the plan, evidence of the parties' intention might be given in order to resolve the ambiguity. They then said the defence, 'in brief', was:

- '1. drawing 326/12 is reasonably accurate;
2. the [Appellants] followed it and built in general accord with that drawing;
3. [Mr. Callaghan] misread the drawing;
4. it was unreasonable for him to do so;
5. there was, therefore, unilateral mistake, and [the Respondents are] not entitled to relief'.

46. The first two of these propositions were alone sufficient to establish a complete defence to the Respondents' claim. If the Appellants had built the flats 'in general accord with' drawing 326/12 as properly interpreted, the action was bound to fail.

That Mr. Callaghan might have misread the plan was an irrelevant circumstance. The Court, however, concentrating on the third and fourth propositions, went on to say:

'the main question is whether the eventual development was carried out in conformity as a whole with that proposed in drawing 326/12, and as believed and interpreted by Mr. Callaghan'.

(The underlining is ours.)

47. The Court then examined the plan. They said they had looked at the whole of it and not at one isolated part. They did indeed describe the whole of the plan. They discussed the South Elevation at some length, in particular the lines on the tree at the western end, describing Mr. Callaghan's drawing of the sight line from what he took to be the apex of the south garage and his conversation with Mr. Gillham. They also discussed, more briefly, the Elevation to La Ruelle Vaocluse. The Cross section, on the other hand, they dismissed as not particularly helpful.

48. The Court's conclusion on this part of the case was that it had been reasonable for Mr. Callaghan to read plan 326/12 as indicating a building some 6 feet lower than the building erected, and the western block had not been built 'in accordance with plan 326/12 as interpreted by Mr. Callaghan'. (The underlining is again ours.)

49. In our judgment the Royal Court fell into error in concentrating upon Mr. Callaghan's interpretation of plan 326/12 rather than the intention of the parties revealed by the intrinsic terms

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of the document. It was a consequence of this that they entertained extrinsic evidence of the parties' intention without proper consideration of its admissibility.

50. The complaint of the Respondents under clause 6 of the contract is that the western block is higher than the block shewn in plan 326/12. The first question to be considered, therefore, is, What representation does the plan make about the height of the block? There is no doubt that the plan contains two drawings on which the height of the western block can be measured exactly. The first is the Cross section. This section passes through the lane (La Ruelle Vaocluse) at a point precisely identified on the Site Plan. The vertical distance between this point and the highest point of the western block can be measured on the Cross section. The second drawing is the Elevation to La Ruelle Vauchuse. On that drawing the vertical distance between the surface of the lane and the top of the roof of the western block can be measured at any point on the length of the block. (The height of the block as shewn in the Cross section is in fact different from its height as shewn in the Elevation. We return to this point below.)

51. Mr. Callaghan admitted that he never even looked at the Cross section. All his attention was concentrated on the South Elevation. Mr. Mason and Mr. Treliving also placed their emphasis on the South Elevation. It was on their interpretation of the South Elevation that they based their conclusion that plan 326/12 portrayed the western block lower than the block as actually

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built. In our judgment this was a misinterpretation of the plan.

52. Our first reason for saying this is that the South Elevation in fact contains no indication of the top line of the roof of the western block. We have examined the original plan which was submitted to the I.D.C., and is incorporated by reference in the contract. At either end of the roof line of the western block appear the nibs. It is true that these nibs are not conventional signs, but seem to have been devised by Mr. Horne for the purpose of indicating that the South Elevation did not portray the full height of the block. They appear, however, quite clearly on the plan. Anyone looking at it with any care should have seen them, and recognized at least a possibility that the block was to rise above the roof line shown in the South Elevation. If he had considered the plan as a whole, he would then have looked to see whether any other part of it contained a clearer indication of the height of the block. He would have found such indications in the Cross section and the Elevation to La Ruelle Vaocluse.

53. Not only did Mr. Callaghan, Mr. Mason and Mr. Treliving fail to give proper weight to the Cross section. They also, in our view, made unwarranted use of the lines drawn on the foliage of the tree in the South Elevation. Mr. Horne said those lines were intended merely to indicate the presence of buildings, not to portray any details of those buildings. Both the lines and the legends are in our judgment too vague and too rudimentary to form a reasonable basis for the calculation of any precise heights.

54. Even such as they were, however, the lines drawn by Mr. Horne on the foliage did not by themselves support the imaginary line, from the supposed top of the roof of the north garage to the roof of the Villa Piemonte, upon which the Respondents' conclusion depended. Their witnesses purported to fix the point of the top of the north garage by producing Mr. Horne's line marked 'garage roof' to a point vertically above the apex drawn by Mr. Horne. This apex, Mr. Horne said, was the apex of the south garage. The result of putting the top of the north garage at the spot reached by producing Mr. Horne's line was to put between the roofs of the two garages a difference of height of 9' 6", whereas the actual difference is about 1'. It is true that Mr. Mason and Mr. Treliving thought the apex drawn by Mr. Horne was the apex of the roof of the greenhouse, not the south garage. Even on this view, however, the difference in height between the top of the roof of the north garage as fixed by the Respondents and that of the greenhouse would be much greater than in fact it is. Any comparison of the plan with the buildings on the ground would therefore have shown that there was something wrong with the Respondents' calculations.

55. Reading the plan as a whole involves putting these indefinite indications of the South Elevation beside the clear and measurable outlines of the Cross section and the Elevation to La Ruelle Vaucluse. When this is done, there can in our view be no doubt that the plan's representation about the height of the western block is contained in the two latter drawings, not in the South Elevation.

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56. The point then arises that the height of this block in the Cross section is not the same as its height in the Elevation to La Ruelle Vacluse. The reason for this is that the latter elevation does not, for some reason, show the full height of the block. What appears to be the top line of the roof is in fact the line of the break in the northern slope of the roof, about 2' 9" below the apex. In our judgment, however, this does not raise any difficulty in deciding what is the effect of the plan read as a whole. The Cross section shows the complete outline of the block. The Elevation to La Ruelle Vacluse does not. Whatever the reason for the defect of the latter drawing, it is clear that it is to the complete drawing that one must refer in order to see what representation the plan makes about the proposed height of the block.

57. We therefore conclude that when plan 326/12 is read as a whole its representation is that the height of the western block is to be the height portrayed in the Cross section. It is to be observed that the plan was read in this way by Mr. Tucker, who among the witnesses was the only expert independent of both parties. He said he would have used the Cross section, not the South Elevation, as an indication of the height of the western block. The Site Plan also has some importance in this context. It gives various levels both within the proposed buildings and on the ground, including a level just within the Respondents' property. These shew, for instance, a difference of 5.17 metres (34.55 - 29.38), or about 17', between ground level immediately south of the Respondents' greenhouse and the ~~and~~ floor level of the top storey of the western block. This should have shewn an

attentive reader of the plan that the lines and legends on the foliage of the tree on the South Elevation could not be used as definitive or precise indications of the height of the garages or the greenhouse.

58. Mr. Clyde-Smith submitted that the Cross section might be accurate, or the relative heights of the western block and the garages and greenhouse of Eulah as shewn by the South Elevation might be accurate. Both could not be right, so the plan 326/12 contained an ambiguity on its face. Extrinsic evidence was therefore admissible to establish the parties' intention, and their intention was revealed by the conversation between Mr. Callaghan and Mr. Gillham. Since Mr. Gillham was not called, Mr. Callaghan's evidence of the conversation was uncontradicted. It had therefore to be accepted that Mr. Gillham accepted Mr. Callaghan's interpretation of the plan, and that was the intention of the parties.

59. The fallacy of this argument, in our view, is its characterisation of plan 326/12 as ambiguous. The typical ambiguity discussed in the authorities on the admissibility of extrinsic evidence consists of a description which might apply to either of two or more persons or things but does not fit any of them entirely. Plan 326/12 does not contain any such ambiguity. It contains a number of indications or representations of the height of the western block. They are not to the same effect as each other, but they are not truly repugnant because, as we have shown, they are of different degrees of significance and precision.

Reading them all with this consideration in mind, one arrives at the representation of the height of the block which, taken as a whole, the plan is making, i.e. the height portrayed in the Cross section. The meaning of the document is thus established by intrinsic interpretation, and extrinsic evidence of the parties' intention is neither necessary nor admissible.

60. It is common ground that the western block as built does not exceed in height its portrayal in the Cross section. In fact it is about 2' 9" lower. The Respondents' complaint under clause 6 of the contract therefore fails.

61. We now turn to the complaint of breach of clause 3 of the contract. The question here is simply whether there are 'fenêtres' in the west wall of the western block.

62. Photographs which were put in show that in this wall there are five openings closed with glass. During the hearing the parties also put in the following agreed statement:

'The glass blocks, submitted by the Respondent to be windows, which are in contention, are constructed of 2 pieces of obscured glass which are joined together. They have a vacuum centre and a total thickness of approximately 3½ inches and are mortared together. They will only admit or emit light, and it is not possible to see through them in either direction other than shadows or outline shapes nearby'.

63. The Royal Court said there was no reason why they should not use the English word 'window' as well as 'fenêtre', because the legal meaning was the same in both languages. They quoted the following definitions:

Larousse Illustré, 1974 :

'FENETRE - Baie pratiquée dans un mur pour donner de jour et de l'air à l'intérieur d'un édifice. Boiserie et châssis vitre qui garnissent cette ouverture ...'

Shorter O.E.D. :

'WINDOW - 1. An opening in a wall or side of a building, ship or carriage, to admit light or air, or both and to afford a view of what is outside or inside; now usu. fitted with sheets of glass, horn, mica, etc.; a frame containing a pane or panes of glass, or glazed sashes.'

The Court concluded that to fall within either definition

'the glass bricks in the building would have to (1) admit air or (2) light and (3) allow a person to see in or out of the building'.

Since the bricks did not satisfy the third requirement they were not 'fenêtres'.

64. There is also a door in the west wall. The Royal Court said it 'undoubtedly offends against the clause', and ordered the Appellants to remove it or block it up with masonry or glass bricks.

65. The Court's conclusion about 'fenêtres' appears surprising. There is no doubt that in English parlance the word 'window' is

commonly used of an opening fitted with glass which is translucent but not transparent. The same is true of the word 'fenêtre' in French. Indeed, the Royal Court quote a passage from Le Gros in which (at p.262) he refers to

'fenêtres ... à verre dormant (verre mort et non ouvrant)'.

What Le Gros meant appears from a later passage (at p.509) also quoted by the Court. Under the title 'Verre Dormant', Le Gros there remarks:

'D'après Pothier, c'est un verre assez épais pour empêcher les regards de percer dans la maison du voisin, et assez transparent pour laisser passer autant de jour qu'il en faut.'

66. The two definitions quoted by the Royal Court are not inconsistent with this usage. That in the O.E.D. expressly states that the 'opening' is 'now usu[ally] fitted with sheets of glass, horn, mica, etc.'. This obviously qualifies the earlier words, 'to afford a view of what is outside or inside', for it is hardly possible to get a view through horn or mica. The definition in Larousse says nothing about the transparency of a 'fenêtre'. Here again, the words, 'Baie pratiquée dans un mur pour donner de jour et de l'air à l'intérieur', must be read with the following words, 'Boiserie et chassis vitre qui garnissent cette ouverture'. So read, we do not think the definition is excluding from the scope of 'fenêtre' an opening closed with ^{fixed} and non-transparent ~~fixed~~ glass.

67. In our judgment the five openings closed with glass in the west wall are 'fenêtres' within the meaning of clause 3 of the contract. Their presence in the wall therefore constitutes a breach of that clause.

68. We add a word about the references which, like the Royal Court, we have made to the English word 'window' and its definition. Since the contract is written in French, the task for the Court is to interpret the French word 'fenêtre'. We have felt free to refer to the English word only because both parties seemed to agree that its meaning was the same as that of 'fenêtre', and we accepted this view. Had we felt any doubt about this, the interpretation of 'fenêtre', not that of 'window', would have had to prevail.

69. Clause 3 of the contract contains no reference to doors, nor did the Respondents make any complaint in the Order of Justice about the door in the west wall. Mr. Clyde-Smith conceded that they were not entitled to the order, made by the Royal Court, that it be removed or blocked up.

70. When granting relief for the breach which they found of clause 6 of the contract, the Royal Court said they would, if free to do so, have considered substantial damages a proper remedy, but under the decision in Felard Investments, Ltd. v. Trustees of the Church of Our Lady Queen of the Universe (1979), J.J. 19 they had no power to award damages in lieu of an order for removal. Mr. Mourant expressly disclaimed any challenge to the Royal

Court's decision on this point. We too should have considered damages, if such an order were legally available, an adequate remedy for the breach of clause 3, but in view of Mr. Mourant's attitude we have not pursued the point. We therefore express no view upon it, beyond stating that both the decision in the Felard Investments case and the extent of its operation remain open for consideration in this Court.

71. The result is that the Respondents have established a breach of clause 3 of the contract, but have not established a breach of clause 6. The orders made by the Royal Court must be set aside; the Appellants will be ordered to block up within a reasonable time the windows in the west wall of the western block; and the Respondents must pay $\frac{4}{5}$ of the Appellants' costs in this Court and in the Royal Court. If the parties cannot agree upon a reasonable time for the blocking up of the windows, there will be liberty to apply to the Royal Court.

34.

Authorities.

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