Property

A room with a view

Benjamin Faulkner examines whether a landowner has the right to a view

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IN BRIEF

- *Dennis v Davies*: confirms that restrictive covenants against causing a "nuisance or annoyance" can prohibit the erection of buildings spoiling a neighbour's view.

It is well known that the law does not ordinarily provide a landowner with a right to a view. In general, his neighbour is free to undertake building or extension works as he likes. In some cases the proposed works might be blocked by the planning authorities, or a management company might exercise rights to control development within a residential estate, but there is no guarantee of either eventuality. The landowner might have a right to light which could be infringed by the proposed works, but often the development will be too far away from the landowner's building to diminish the amount of light reaching it significantly, notwithstanding the obstruction of his panorama. In *Dennis v Davies* [2009] EWCA Civ 1081 the Court of Appeal confirmed that there will often be a third way: protections offered to the landowner by a restrictive covenant not to create a "nuisance or annoyance".

The facts

Dennis v Davies concerned a residential development on Heron Island on The Thames. It was constructed in 1987 by a Development Company, Heron, and the 47 three-storey residential units were sold on common terms to residents. A central selling point of the development was the riverside views it offered.

Upon completion of the development the common parts of the estate were conveyed to a management company, Peverel. The conveyances to the residents contained an array of positive and restrictive covenants between the residents themselves, and between the residents and the management company. By two such restrictive covenants, each resident agreed:

(i) "Not to erect on the Plot or any part thereof any building whether of a permanent or temporary nature except such as shall be in accordance with plans and elevations which shall have been approved in writing by the management company" (the permission covenant).

(ii) "Not…to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the estate or the neighbourhood" (the nuisance or annoyance covenant).

One of the residents, Mr Davies, proposed to erect a three-storey side extension to his building. He obtained planning permission, but a number of his neighbours (of which Mr Dennis was one) objected: the proposed extension would significantly reduce the riverside view from some of the neighbouring properties, as well as restricting the feeling of openness around the estate generally. The neighbours brought a claim for an injunction, relying upon the nuisance or annoyance covenant. There was also a factual issue as to whether the management company had in fact given consent to the proposed works under the terms of the permission covenant (which was resolved in the claimant's favour).

At first instance ([2008] EWHC 2961 (Ch)) HHJ Behrens held that:

(i) "the nuisance or annoyance covenant was capable, as a matter of law, of being infringed by the erection of a static structure. The covenant was not restricted to nuisance or annoying activities;

(ii) on the facts, the restriction of some of the neighbours' views was significant enough to amount to a 'nuisance or annoyance'; and

(iii) the permission covenant operated independently of the nuisance or annoyance covenant. Permission from the management company (had it in fact been given) would not prohibit the claimants from relying upon the nuisance or annoyance covenant in relation to the proposed extension."

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The appeal to the Court of Appeal

Mr Davies appealed on all three grounds, although he did not pursue the second with much vigour, given that it was largely a factual matter for the judge. Rimer LJ, with whom Wilson and Ward LLJ agreed without further comment, upheld the judge's decision on each ground.

"Annoying" buildings

At common law nuisance is actionable only in respect of activities or emanations from neighbouring land that disrupt a landowner's enjoyment of his land. New buildings, even if they disrupt the flow of air or disrupt television reception, or even if they destroy a scenic view, will not amount to a nuisance: *Hunter v Canary Wharf Ltd* [1997] AC 655 at 685 per Lord Goff.

However, Rimer LJ held that the covenant against nuisance or annoyance must go further than merely common law nuisance goes. For this proposition he relied upon *Tod-Heatley v Benham* 40 Ch D 81: an annoyance is anything which might trouble the reasonable peace of mind of an ordinary sensible inhabitant, so that having regard to the ordinary use of the house for pleasurable enjoyment, he would be annoyed or aggrieved by what is being done.

Despite Mr Davies's argument that "nuisance" and "annoyance" were such close relatives that "annoyance" could not be construed to protect a view any more than "nuisance" could, Rimer LJ relied upon *Wood v Cooper* [1894] 3 Ch 671 to conclude that static structures could amount to an annoyance. In that case the erection of a trellis, standing 12 foot above an eight-foot boundary wall, amounted to a "matter or thing which may be or become an annoyance, nuisance or disturbance" to the neighbour. Rimer LJ considered "unhesitatingly" that, on the ordinary and natural construction of the words, a building could amount to a "nuisance or annoyance". Further, he concluded that *Wood v Cooper* was a well-known decision, construing a long established and common form of words (substantially the same covenant is found in the *Encyclopaedia of Forms and Precedents* (2nd ed), 1925, volume XV, at p874 and (5th), 2007 reissue, at p226). The parties in 1987 therefore must have intended the nuisance and annoyance covenant to be construed in the light of *Wood v Cooper*.

Control by the management company

Mr Davies argued that, as a matter of construction, the control of development on the estate had effectively been delegated to the management company under the permission covenant. The nuisance or annoyance covenant could therefore only relate to activities, over which the management company would have no control, and not to the erection of buildings, over which the management company had exclusive control.

The Court of Appeal rejected the submission. There was no reason why the two controls could not operate side by side. Although Rimer LJ doubted that the management company was free to exercise its discretion without reference to the interests of the residents, the scope of the nuisance or annoyance covenant would have been limited expressly, had the parties had such an intention. It was not reasonable to suppose that a reasonable purchaser would believe that the permission covenant automatically foreclosed his opportunity to object to works approved by the management company.

Comment

Notwithstanding Rimer LJ's conclusion that *Wood v Cooper* was well known, his judgment has come as a surprise to many practitioners. Undoubtedly "annoyance" is a wider term than "nuisance" alone, but until now there has been a common belief that an "annoyance" is simply a lesser version of "nuisance", connoting a restriction on ongoing activities, rather than a separate concept capable of including any manner of discomfort or displeasure which might be caused—including building.

It might be said that there is a danger that the more balanced control provided by planning authorities, who take into account a range of environmental factors, including the need for further development and the provision of more accommodation, is outflanked by the ability of a range of neighbours to bar development, merely in their own interest. The nuisance or annoyance covenant dates from a time when there was no other method of planning control, and now its effects should be confined to supporting public planning control, rather than undermining it.

However, the Court of Appeal's reasoning seems perfectly logical. It is not at all unreasonable to think of some structures as "annoying", and there is no reason to assume that the juxtaposition of "annoyance" to "nuisance" in common covenants means that they are concepts in the same category or with related meanings. Whatever the historical need for the covenant, it plainly continues to be included in conveyances as a further protection to neighbouring landowners, beyond mere public planning control.

In reality the Court of Appeal's decision has still left room for argument. Not only is the question of whether a building is "annoying" a matter of fact for each individual case, but also each individual conveyance must be construed in the light of the precise words used and the surrounding circumstances at the time it was made. In *Dennis v Davies* the riverside view was central to the marketing and design of the estate from the very beginning, but in other cases the need to protect a particular view may be less apparent. Any would-be developer now has a further hurdle to overcome, but it still may be arguable in the right case that "annoyance" should be construed much more closely with "nuisance" in its common law sense, and that the structure in question still cannot be annoying. NLJ

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