Taking a View: The protection of prospects in England and Wales

Michael W. Poulsom LLB LLM Solicitor (non-practising), Senior Lecturer, Manchester Metropolitan University

Easements of Prospect; Covenants protecting views; Planning Law and the protection of views.

Courts in England and Wales have long recognised that the view from a property can, and often will, benefit that property. In *Aldred's Case*[1], the court cited dicta of Wray C.J.in *Bland v. Moseley*[2], that 'it is a great commendation of a house that it has a long and large prospect'[3]. The breadth of the term 'commendation' reflects well the multiple forms which the benefit of a view might take, from purely aesthetic considerations to related, but more commercial considerations, of increasing property values.

Views depend upon the passage of light. Reporting on rights to light[4], The Law Commission described natural light inside buildings as 'immensely important for comfortable living and working'[5]. Consultees observed that properties with strong natural light held greater appeal for buyers, and employees preferred offices with external windows[6]. Since artificial lighting can replicate many of the properties of natural light, it is suggested that this human preference is not merely for natural light itself, but for the prospect beyond the property, which the passage of light allows to be seen.

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[1] *Aldred's Case* (1610) 9 Co Rep 57b, [1558-1774] All ER 622
[2] *Bland v Moseley* (1587) cited in 9 Co Rep 58a
[3] *Aldred's Case* (n1) 624
[4] Law Commission, *Rights to Light* (Law Com No 356, 2014)
[5] Law Commission (n4) 1
[6] Law Commission (n4) 177

The financial value of a view can be significant: Foster[7] identifies American examples of a property seller on Long Island Sound who obtained an additional $25,000 for the view, and an apartment owner in San Francisco who successfully claimed $54,000 for the diminution in value arising from obstruction of a view. Research published by Knight Frank LLP in its 'Waterfront Index 2015'[8] indicates that UK properties with views of lakes, rivers, estuaries or the sea can attract premiums of between 33% and 91% depending on location[9]. This is evidently the uplift available merely for the view; Where properties had private access to the feature, the figure rises to 118%[10].

It is perhaps therefore surprising that courts in England and Wales appear reluctant to protect views. Immediately before his dicta above Wray C.J. stated that 'for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof'[11].

There appears to have been relatively little study in England and Wales of the legal protection of views. Perhaps this is because it is widely believed that, as a general principle, protection is unavailable: Faulkner states, 'it is well understood that the law does not ordinarily provide a landowner with a right to a view'[12]. This article seeks to establish that, notwithstanding Wray CJ's assertion, some legal protection to views is available. It examines aspects of the protection afforded to, or withheld

[7] Tara J Foster, 'Securing a Right to View: Broadening the Scope of Negative Easements', 6 Pace Envtl L Rev (1988) p 269
[8] Knight Frank LLP Residential Research, 'Waterfront Index 2015'. See also 'Tree topples to give residents a view – and £1m windfall' *The Times* (London, 5 January 2018) 17.
[9] Knight Frank LLP (n8)
[10] Knight Frank LLP (n8)
[11] *Aldred's Case* (n1) 623-4
[12] Benjamin Faulkner, 'A Room with a view' NLJ 19 February 2010, Vol 160, No 7405, 245

from, views by easements, by covenants and by public law. It will be seen that both within and between each area, the law is neither clear nor consistent.

Can easements of prospect exist?

Prima facie it appears that easements of prospect cannot exist. Gale[13] states that 'the law does not recognise an easement of prospect'. Similarly, Sara states that 'an easement cannot arise giving a right of prospect'[14].

To illustrate this restrictive position, Lord Denning in *Phipps v. Pears*[15] [1965] 1 QB offered this scenario: 'Suppose you have a fine view from your house. You have enjoyed the view for many years. It adds greatly to the value of your house. But if your neighbour chooses to despoil it…you have no redress. There is no right known to the law as a right to a prospect or view'[16].

The position on easements of prospect appears to be entrenched. It is also suggested that, even without looking further at the justifications for the rule, it appears counterintuitive. A householder who enjoys a view of, or over, another plot of land may have enforceable legal rights to walk or drive across that land, to run pipes beneath it, to park vehicles on it and to receive support from it, but apparently no enforceable right merely to enjoy the view of it or across it.

The detailed justifications for the rule are varied. This article divides the arguments for precluding easements of prospect into groups, which partly overlap.

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[13] Jonathon Gaunt QC and The Honourable Mr Justice Morgan, *Gale on Easements,* (18th edn, Sweet & Maxwell, 2008) 27

[14] Colin Sara, *Boundaries and Easements*, (Sweet & Maxwell 2002) 199

[15] *Phipps v Pears* [1965] 1 QB 76

[16] *Phipps* (n15) 83

The 'Uncertainty' Arguments

In *Harris v. De Pinna*[17] Bowen L.J. described a right of prospect as having 'a subject matter which is incapable of definition'[18]. The belief that, with regard to easements, this is an inescapable feature of a view (a belief much less evident in relation to covenants and public law) appears to be strong. In *Hunter v. Canary Wharf*[19], the analogy between a right to a view and a right to receive a television signal (which is, it is suggested, harder to define than a right to see from one point to another) was held to be 'very close'[20] and 'compelling'[21].

In similar terms, Gale suggests that the justification for prohibiting easements of prospect may be that 'that the subject-matter is too vague, and it would be inconvenient to do so'[22]. Both assertions deserve attention. A wide view across many miles of land may indeed be vague, but if it is, that is not because of the dimensions of the view in themselves, but because no attempt has been made precisely to define them. In principle, a right to see from one defined point to another without interruption is no vaguer than a right to pass and repass between those same two points. Moreover, abandoning the preconception that a view deserving protection must necessarily be large renders the justification still less tenable. A householder may greatly value the view from a window in their property to a

[17] *Harris v. De Pinna* (1886) 33 Ch D 238
[18] *Harris* (n17) 262
[19] *Hunter v. Canary Wharf Ltd* [1997] AC 655
[20] *Hunter* (n19) 699
[21] *Hunter* (n19) 669
[22] Gaunt and Morgan (n13) 27

specific landscape feature, or to a definable space between landscape features, a few metres away. A recent Scottish example involved the installation by Virgin Media of broadband boxes approximately 1.5 metres high by 2 metres wide within 5 metres of the ground floor windows of a residential property[23]. There is no obvious reason why a view of this nature, or indeed one which differs only by being longer or wider, could not be precisely defined.

The willingness of courts to accept easements which appear uncertain is not always consistent. In *Pwllbach Colliery v. Woodman*[24], Lord Sumner stated that a right to spread coal dust onto adjoining land could be 'the subject not of a mere covenant to prevent it, but of the actual grant of the right to do it'[25]. Perhaps confusingly, he declined to define the grant as 'an easement properly so called'[26] declaring it to be 'too indeterminate'[27], leaving its precise nature unaddressed. Similarly, in *Lawrence v. Fen Tigers Ltd*[28], Lord Neuberger held that a right which was 'too indeterminate to be an easement' could still be 'the subject matter of a perfectly valid grant'[29] (again leaving unaddressed what precise form that grant would take). He held that a right to emit noise could be an easement, describing it as '"the right to transmit sound waves over" the servient land'[30]. It is suggested that such judicial flexibility to what can be the subject matter of a grant (whatever form that grant might take) might allow the definition of a right of prospect as 'the right to receive a visual image' over the servient land.

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[23] BBC News, 'Pensioners' view blocked by broadband boxes' www.bbc.co.uk/news/uk-scotland-glasgow-west accessed 7 September 2017
[24] *Pwllbach Colliery v Woodman* [1915] AC 634
[25] *Pwllbach* (n24) 649
[26] *Pwllbach* (n24) 648
[27] *Pwllbach* (n24) 649
[28] *Lawrence v Fen Tigers Ltd* [2014] AC 822
[29] *Lawrence* (n28) 836
[30] *Lawrence* (n28) 836

The ‘inconvenience’ argument may owe more to pragmatism than to a true reflection of how easements operate. It is not argued here that protecting views in a broad sense is without significant difficulties; A party who enjoys a protected view can necessarily restrain development that blocks it, with evident inconvenience to the developer. It is submitted, however, that using ‘inconvenience’ to prohibit the existence of rights of prospect essentially disregards the inconvenience which any easement can impose: The inconvenience experienced by a servient tenement owner, whose development is thwarted, is likely to be the same whether the easement preventing that development is one of access, drainage, support or prospect.

The ‘Subjectivity’ Arguments

Sara argues that ‘A view or prospect is essentially subjective and to provide every longstanding householder with such a right would constitute a very severe restraint on adjoining land’[31]. There is perhaps a conflation of ideas here, the subjectivity point, and the restraint on the servient land point. In respect of the first, is a prospect, or the benefit which it confers, necessarily subjective? It is argued later that the public law approach is often that it is not. Even if it is the case that the value of a prospect is to some extent in the eye of the beholder, should this necessarily preclude the availability of judicial protection?

The ‘restraint’ argument is similar to the ‘public policy’ arguments discussed below. No doubt affording every longstanding householder with such a right could severely

[31] Sara (n14) 199

restrain development on the servient land, but it will not do so in every case. There might be compelling other reasons why affording a householder a right of prospect over a piece of land imposes no significant restraint on that land, for example if the land over which the view is enjoyed cannot physically support buildings or other structures. There is also a conceptual difficulty in arguing that because applying a principle universally would create difficulties, it should not be applied at all.

The 'public policy' arguments

An argument presented in *Bland v. Moseley* and *Aldred's Case*, that an action would not lie for stopping a view because, unlike light, a view is 'a matter only of delight, and not of necessity' was itself dismissed in *Dalton v. Angus*[32], rightly it is suggested, as 'more quaint than satisfactory'[33]. The court in *Dalton* cited as 'a much better reason' that of Lord Hardwicke in *Attorney-General v. Doughty*[34], that were effect given to easements of prospect, 'there could be no great towns'[35]. It is perhaps this vivid justification that has led to the current restrictive position. Lord Hardwicke's detailed reasoning is, however, less clear. He stated:

' I know of no *general rule* [emphasis added] of common law which says that building so as to stop another's prospect is a nuisance; was that the case, there could be no great towns, and I must grant injunctions to all the new buildings in this town. It

[32] *Dalton v Angus* (1881) 6 App Cas 740
[33] *Dalton* (n32) 824
[34] *Attorney General v Doughty* (1778) 2 Ves Sen 453
[35] *Dalton* (n32) 824

depends on a particular right, and then the party must first have an opportunity to answer it'[36].

This dictum deals only with the undesirability of landholders generally having unfettered rights to preserve views, and the consequent effects on land development. This article does not contest this. Lord Hardwicke did, however, raise quite clearly the possibility of individual views being protected by 'a particular right'. He did not specify the nature of that right, but it is at least possible that he envisaged an easement. Moreover, the premise that allowing easements of prospect would unduly hinder urban development is contested. This article identifies later that public law can be rigorous and effective in protecting views in 'great towns' in England and Wales, and elsewhere.

Dalton v. Angus restates in slightly different terms two of the justifications set out earlier: That a right of prospect would 'impose a burthen on a very large and indefinite area' [37], and that such rights would be 'vague and undefined'[38]. Both justifications can be challenged: A householder may attach considerable aesthetic and financial value to a prospect across a small well-defined area, and, as will be seen later, it is possible, with thought and care, to define a prospect precisely.

Arguments based on the powerlessness of the servient owner

Referring to Lord Denning's example from *Phipps*, Sara justifies prohibiting prescriptive easements of prospect on the basis that 'there would be very little that the adjoining owner could do to prevent such a right being acquired'[39]. He asks

[36] *Dalton* (n32) 824
[37] *Dalton* (n32) 824
[38] *Dalton* (n32) 824
[39] Sara (n14) 197

rhetorically 'When your house with the view has been there for 19 years, is he to erect a 30 foot screen to block your view just to demonstrate that no easement has been obtained'[40]. This disregards the possibility that during the prescriptive period the landholder could expressly consent to the enjoyment of the view, thereby retaining control over the acquisition of the easement. In addition, Sara himself acknowledges that his observation applies equally to easements of light and support which are often acquired by long use.

Does equating easements of prospect with those of light or support, and thereby undermining the argument against the former withstand scrutiny? It is suggested that these types of easements can be distinguished based on the burden they impose on the servient land. An easement of support is likely only to apply as between adjacent tenements. Similarly, the diffused nature of light is likely to mean that an action for interference with an easement of light will only be feasible where the interference happens close to the dominant land. Conversely, a view from a house to a landscape feature 100 or 500 metres away may be across several potential servient tenements. The further those tenements are from the potential dominant tenement, the less likely it is that their owners will appreciate, and guard against, the risk of an easement being claimed.

Of all the justifications presented for prohibiting easements of prospect, the argument that the servient owner is powerless to prevent it is perhaps the most persuasive. It can only, however, apply to prescriptive easements. Perhaps what began as a justifiable objection to allowing prescriptive easements of prospect has been allowed to become an objection to all such easements, however acquired.

[40] Sara (n14) 197

Do the courts refuse to recognise easements of prospect generally, or only easements of prospect claimed by long use?

This is unclear. Early 20th Century sources indicate that the latter approach is, or at least has been, the case. The 1908 edition of *Gale on Easements* states:

'Although ... by the civil law, a servitude of prospect could be acquired in the same manner as any other servitude, the law of England recognises no such right, except by express grant or covenant'[41].

The writer does not specify which civil law jurisdictions he envisaged, but the question arises of how, and how far, such jurisdictions accommodate easements or servitudes of prospect. Scots Law has characteristics of both common and civil law, and historically has recognised rights of prospect. In 1833, Bell[42] cited as an example of a negative servitude one by which the owner subject to it 'may be restrained from any building which may interrupt light or prospect '[43]. Describing how such rights arise, he states unambiguously, 'Positive servitudes may be constituted by prescription; negative cannot'[44], thereby simultaneously supporting the second part, but contradicting the first part, at least as far as it relates to Scots Law, of Gale's assertion.

[41] Raymond Roope Reeve, *A Treatise on the Law of Easements by Charles James Gale* (8th edn, Sweet & Maxwell, 1908) 335
[42] George Joseph Bell, *Principles of the Law of Scotland* (3rd edn, Oliver & Boyd, 1833)
[43] Bell (n 42) 267
[44] Bell (n 42) 269

Notwithstanding its evident limitations, Gale's 1908 assertion accords with contemporaneous dicta. In *Campbell v. Mayor, Aldermen, and Councillors of the Metropolitan Borough of Paddington*[45]*,* Avory J stated 'I agree that the law does not recognise a view or prospect from a house as…an easement which can belong to anybody *as of right* (emphasis added), and that no period of enjoyment will give a person a right of action against another who…erects a structure or plants trees which obstruct the view or prospect'[46]. Three decades earlier in *Dalton v. Angus*, Lord Blackburn had stated that such rights should not be allowed 'except by actual agreement'[47].

A century later it appears that the possibility of creating an easement of prospect expressly has, accidentally or by design, fallen away. In *Phipps*, as noted above, Lord Denning appeared to rule out the possibility of easements of prospect altogether[48]. *Halsbury's Laws* states that 'no easement can exist…to insist upon the preservation of the prospect from a property'[49]. Gray & Gray set out 'the historic view' that 'common law recognised, for instance, no such right as a prescriptive *(or any other)* (emphasis added) easement to preserve a good view over an adjacent landscape'[50], and state explicitly that '…such a right may be acquired only [by] a restrictive covenant which precludes the owner of neighbouring land from building [so] as to obstruct the view which it is desired to protect'[51].

[45] *Campbell v. Mayor, Aldermen, and Councillors of the Metropolitan Borough of Paddington* [1911] 1 KB 869
[46] *Campbell* (n45) 875-6
[47] *Dalton* (n 32) 824
[48] *Phipps* (n 15) 83
[49] *Halsbury's Laws of England* (5th edn, 2012) Vol 87 para 832
[50] Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th edn OUP 2009) 109
[51] Gray (n 50) 615

It appears, therefore, that in England and Wales it may never have been possible to acquire an easement of prospect by long use, but that acquiring such an easement expressly (and presumably by implication) may once have been possible, but is no longer. The justifications for these positions are neither readily apparent nor compelling.

Protection of views using covenants

While protecting views using easements appears, albeit with little apparent justification, to be limited and uncertain, the same cannot be said of protection using covenants. In *Phipps*, having emphatically excluded the possibility of an easement of prospect, Lord Denning stated that 'the only means in which you can keep the view from your house is to get your neighbour to … covenant with you that he will not…block your view'[52].

The judicial position here appears more accommodating. However, it is suggested that while covenants *can* confer better protection to a prospect than that available from easements, in practice the protection available is neither as consistent nor as effective as landholders might want or deserve.

In *National Trust v. Midlands Electricity Board*[53], the National Trust, as owners of part of the Malvern Hills, had the benefit of a covenant created in 1936 by the Ecclesiastical Commissioners, later the Church Commissioners, who were the second defendant. The covenant, which was expressed to bind the covenantor's

[52] *Phipps* (n 15) 83

[53] *National Trust for places of Historic Interest or Natural Beauty v Midlands Electricity Board and another* [1952] 1 Ch. 380

land ‘into whatsoever hands the same may come, and to benefit and protect Midsummer Hill [the Trust’s land]...’ stated, ‘No act or thing shall be done or placed or permitted to remain upon the land which shall injure prejudice affect or destroy the natural aspect and condition of the land...’[54].

The MEB entered the covenantor’s land to erect electricity poles in 1947. The report, surprisingly, does not specify the dimensions or location of the land on which the work took place (other than to state it was ‘small’), or how many poles there were (other than there were ‘some’) but does state they were approximately 42 feet tall. Significantly, in the court’s view, however, all the poles were more than 1000 yards from the Trust’s land.

In rejecting the Trust’s application for an injunction to restrain the work, Vaisey J held the covenant to be ‘void for uncertainty’[55] and with evident distaste for the 1936 drafting, described the restriction as ‘extremely inapt and ill-considered’[56] remarking that ‘it would be difficult to find wider, vaguer and more indeterminate wording than those [used]’[57].

What rendered the restriction void was not, however, the nature of the wording itself, but ‘the omission of any criterion by which these vague and uncertain words can be brought under some control’[58]. By implication, it appears that including such a criterion might have rendered the covenant effective. It appears that in Vaisey J’s view, the wording of the covenant made it impossible to know what it was intended to achieve, and that by some leap of logic, it could not therefore have been intended to

[54] National Trust (n53) 381
[55] National Trust (n53) 385
[56] National Trust (n53) 381
[57] National Trust (n53) 381
[58] National Trust (n53) 381

prevent the work which was now envisaged. But this reasoning disregards the pressing detail that the Trust had imposed the covenant in such terms (presumably drafted by, or at least agreed by, its solicitor), to which the defendant had agreed, and it was now the Trust who sought to enforce it. The litigants were essentially the original covenanting parties (the Church Commissioners being the successor body to the Ecclesiastical Commissioners). No transfers of the benefitting and burdened land had occurred upon which the effect of the covenant might have been misunderstood. Unless between 1936 and 1947 the Trust had changed its view as to what constituted acceptable development, it seems logical to assume that the work carried out was precisely of the type which in 1936 the Trust had sought to control, and the defendant had accepted should be controlled.

More recent cases demonstrate a more accommodating approach. In *Gilbert v. Spoor*[59] the Court of Appeal unanimously rejected an appeal from Mr Gilbert who wished, and had received planning permission, to build three houses in breach of a covenant limiting the number of houses on the land to one. To facilitate this, he sought to discharge or modify the covenant under s.84 *Law of Property Act 1925*. Several neighbours objected on the basis that the new houses would obscure the view (described as 'resplendent'[60]) over the Tyne Valley. Mr Gilbert argued that the covenant conferred no 'practical benefit of substantial value or advantage'[61], an argument with which the Court emphatically disagreed.

[59] *Gilbert v Spoor* [1983] 1 Ch 27
[60] *Gilbert* (n59) 31
[61] *Gilbert* (n59) 30

Two aspects of the decision are perhaps surprising: Firstly, in contrast with the covenant in *National Trust*, the covenant which Mr Gilbert sought to discharge or modify did not refer specifically to the view; it simply required him 'not to erect on the [land]...any building… other than one private dwellinghouse...'[62]. It might be argued that the imposition of this covenant was intended primarily to control the density of housing and to prevent commercial use, rather than to protect the view, and to use it to this end was beyond its original intended purpose. Secondly, the view which the householders sought to protect could not in fact be enjoyed from their houses, but only from the road adjoining them, and from some public seats nearby. The court also acknowledged that there would be no interference with the view enjoyed from the land of the lead respondent, Mrs Spoor, which was already blocked by the house on Mr Gilbert's land, built according to the covenant.

The court seems to have attached considerable significance to the fact that the covenant was imposed as part of a building scheme: Both Eveleigh and Waller LJJ referred to the existence of a 'local law'[63]. Eveleigh LJ noted that 'the covenant is intended to preserve the amenity or standard of the neighbourhood generally'[64], and that 'the loss of the view just round the corner from the land may have an adverse effect upon the land itself'[65]. Nonetheless, given the limited opportunities which the respondents had to enjoy the view, the decision is perhaps noteworthy for the court's enthusiasm to protect it.

[62] *Gilbert* (n59) 30
[63] *Gilbert* (n59) 30, 36
[64] *Gilbert* (n59) 33
[65] *Gilbert* (n59) 33

A similarly accommodating approach is evident in *Davies v. Dennis*[66]. This concerned a river development of 47 houses, built to give each house a river view through gaps between them. Mr Davies obtained planning permission to build a three-storey side extension which would reduce the claimants' river views. His title (like those of his neighbours) contained a covenant requiring him 'not to do or suffer to be done...anything of whatsoever nature which may be or become a nuisance or annoyance...'. As in *Gilbert*, the covenant did not refer expressly to the river views.

The High Court (with which the Court of Appeal agreed) held that Mr Davies' proposal would breach the covenant. It referred to *Tod-Heatley v. Benham*[67], in which Cotton, Lindley and Bowen LJJ respectively defined 'annoyance' as '… an interference with the pleasurable enjoyment of a house'[68], 'anything which raises an objection in the minds of reasonable men...'[69] and 'a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person, but of the ordinary sensible...inhabitants of a house'[70]. These definitions had previously influenced the finding of Romer J. in *Wood v. Cooper* [71] that a trellis on top of a wall, which blocked both light to the plaintiff's garden, and the view from his house, breached a leasehold covenant against nuisance.

A connection may be drawn here with Sara's reference to 'subjectivity' as an objection to permitting easements of prospect. What constitutes 'annoyance' is perhaps no less subjective than what constitutes 'a good view', or the obstruction

[66] *Davies v Dennis* [2010]1 P. &C.R. DG13 D33
[67] *Tod-Heatley v Benham* (1888) 40 Ch D 81
[68] *Tod-Heatley* (n67) 94
[69] *Tod-Heatley* (n67) 96
[70] *Tod-Heatley* (n67) 98
[71] *Wood v Cooper* [1894] 3 Ch 671,677

thereof, but the courts appear to have had little difficulty applying an objective standard to the former, but not to the latter.

Is it problematic if views can be protected by covenants, but not by easements?

It is suggested that it is. The apparent willingness of the courts in *Gilbert* and *Davies* to allow covenants to operate to prevent or restrict development which interferes with a view needs to be balanced with the inherent limitations of covenants. In both cases, the parties who risked losing their view succeeded because they could show that the party proposing to block it was burdened by an appropriate covenant, of which they, by reference to reasonably recent building schemes (1954 in *Gilbert*, and the mid 1980's in *Davies*) had the benefit. Had the covenants not been imposed, the party proposing to block the view not been subject to the burden, and there been no effective mechanism for making the benefit run to each claimant (the building schemes), the actions would have failed.

Further limitations on the effectiveness of covenants in protecting views arise from the requirements that the burden of a freehold covenant can only run in Equity[72], that a covenant requiring steps to be taken to preserve a view, if construed as positive, will not run at all[73], and the burden will only run if it would not be inequitable to enforce the covenant against the covenantor's successors in title[74]. Unlike easements, covenants in England and Wales are not legal interests in land under the

[72] *Austerberry v Oldham Corpn* (1885) 29 Ch D 750
[73] *Tulk v Moxhay* (1848) 2 Ph 774
[74] *Tulk* (n73)

Law of Property Act 1925, or interests which override under the *Land Registration Act 2002*[75].

Protection of Views by Public Law

In both *Gilbert* and *Davies* the work which would entail impeding the views enjoyed had received planning permission. Not all development which might obstruct a view requires such permission. It might reasonably be argued, therefore, that the protection afforded by planning law will be inferior to the protection, itself inadequate, available from covenants.

But there is evidence of a more protective approach towards views, at least in some localities. Since 1938, The City of London Corporation has used the 'St Paul's Heights' to protect views of St Paul's Cathedral from the South Bank and the Thames Bridges[76]. Although originally applied voluntarily between the Corporation and developers, the arrangement was given policy status in the 1980s, and significantly extended. The London View Management Framework 2012 ('the LVMF') sets out 27 'Designated Views'[77] comprising 'London Panoramas', 'Linear Views', 'River Prospects' and 'Townscape Views'[78]. It states clearly that 'Planning applications for a proposal that could affect a Designated View should be

[75] For a detailed discussion of the limitations of covenants and of the Law Commission's proposals for the reform of covenants, readers are referred to Andrew Cash, 'Freehold Covenants and the Potential Flaws in the Law Commission's 2011 Reform Proposals' (2017) 81 Conv, Issue 3, 212

[76] Department of the Built Environment, City of London Corporation, *Protected Views Supplementary Planning Document* (2012) 8

[77] Greater London Authority, *London View Management Framework Supplementary Planning Guidance* (2012) 1

[78] Greater London Authority (n77) 7

accompanied by an analysis 'that explains, evaluates and justifies *any* (emphasis added) visual impact on the view'[79], and that 'A proposal that is not consistent with … the principles and guidance set out in [the LVMF] should be refused'[80]. Each Designated View has one or more 'Assessment Points' (Designated View 18, the River Prospect from Westminster Bridge, has five), defined precisely by reference to grid references[81] and is assessed from a precise height above the ground (1.6 metres in most cases). Similar protection exists elsewhere, notably in Edinburgh, where more than a hundred 'key views' defined by reference to 'view cones' and 'sky space' exist across the city[82], and in San Francisco and Vancouver.

It is not argued here that Planning policies of this nature address fully the protection of views. They are location specific, and unlike real property rights, can be changed unilaterally[83]. Nor do such policies compensate a party whose view is obstructed. What they provide is, it is suggested, significantly better – A recognition that views have importance and value, an objective means of defining them, and perhaps a means of preventing obstruction occurring without resorting to the expense and uncertainty of proceedings.

The considerable detail of the LVMF and its equivalents elsewhere is beyond the scope of this discussion, but it is perhaps remarkable not just for its precision and technicality, but also for its evident certainty of purpose, which distinguishes it so conspicuously from the judicial indifference to the protection of views evident in the

[79] Greater London Authority (n77) 7
[80] Greater London Authority (n77) 7
[81] Greater London Authority (n77) 240-1
[82] Edinburgh City Council, *Edinburgh Design Guidance*, (2013) 23
[83] Foster (n7) 287

easement cases. Merely deciding the Designated Views and Assessment Points must have been no small task. That a commitment to preserving views and the constant development of London appear to have co-existed for almost 80 years says much about the importance which can be attached to the former, if there is a will to do so, without simultaneously disregarding the latter. Perhaps the precise technical detail evident here is that which Vaisey J was seeking when he ruled against the National Trust in 1952, and perhaps the St Paul's Heights policy might have proved a suitable template for the Trust had it existed in 1936.

One might reasonably argue that if a view can be defined precisely using principles of surveying and geometry, and if the development of cities can be achieved while still affording protection to views, much of the argument for refusing to allow easements of prospect falls away. Although his type of protection is locality specific, the means by which views are identified, assessed and protected could be applied anywhere, and not necessarily only by public law. If a prospect can be defined precisely in Planning Guidance, it can be defined equally precisely in either a covenant or in the grant of an easement.

If, as is argued here, there is no reason in principle why an easement of prospect could not be granted expressly, can it also be argued that such an easement should be capable of prescriptive acquisition? The technical difficulties of defining a view, a right to which has been acquired by long use, are undeniably significant, but not, it is suggested, insurmountable. Perhaps as a starting point, no easement of prospect could arise for a view exceeding a particular distance, calculated by reference to the size, nature and locality of the dominant property. An alternative is statutory restrictions on building above a certain height within a certain distance of another's land, defined by geometric principles, just as the *Party Wall etc. Act 1996* defines

works on or close to boundaries. Rights capable of prescriptive acquisition might be restricted to those which (to borrow wording from section 84 (1A)(a) *Law of Property Act 1925*) confer 'practical benefits of substantial value or advantage', or which increases significantly (for example more than *x*%) the value of the property. The Law Commission identified the difficulty of calculating the amenity value of light[84] and in particular the absence of a 'one size fits all' approach. The difficulties in calculating the amenity value of a view are likewise considerable, but the Knight Frank research referred to earlier indicates that such calculations are possible. It might also be that, as was recommended with reference to rights to light[85], different tests would need to be developed for commercial and residential premises to afford adequate protection to views.

Conclusion

This article does not advocate the universal protection of views, nor does it seek to elevate the importance of views above that of other competing demands upon land. It argues that views should have something approaching parity with existing property rights. Currently in England and Wales, whether a view is protected is determined not by its nature or the value, monetary or otherwise, to the party claiming it, or indeed by the burden which protecting the view would impose on the land over which it is enjoyed, but by whether a covenant, or a planning restriction exists. Whether it does exist depends more on good fortune than of a careful and consistent approach to recognising and protecting the benefit which views can confer.

[84] Law Commission (n4) 177
[85] Law Commission (n4) 44

How might that parity between the right to enjoy a view and existing property rights arise? Practitioners and courts might together facilitate this. Practitioners could draft easements of prospect in transfers of part. If drafting easements of doubtful efficacy is unattractive, practitioners might draw comfort from drafting easements to park vehicles, which remain difficult to draft and advise upon, but which can be effective when drafted carefully, and operate in other common law jurisdictions. Practitioners might strengthen their position by supporting express easements of prospect with covenants.

If, for their part, courts more readily accepted that the justifications for refusing to recognise easements of prospect are not wholly convincing, and that the co-existence of historically prohibitive approach towards easements protecting views, with a permissive approach towards covenants protecting views creates inconsistency and unpredictability, the future for easements of prospect may be more favourable.