

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964**  
**PROPERTY (NORTHERN IRELAND) ORDER 1978**

**IN THE MATTER OF A REFERENCE**

**R/4/2016**

**BETWEEN**

**VALERIE BRADLEY – APPLICANT**

**AND**

**KYLAH DITTMAR – RESPONDENT**

**Re: 26 Helen Street, Crumlin**

**Lands Tribunal – Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)**

**Background**

1. Valerie Bradley (“the applicant”) is the freehold owner of an end terrace property at 26 Helen Street, Crumlin (“the reference property”). The reference property is subject to a pedestrian right of way in favour Nos. 2-24 Helen Street. It was purchased by the applicant in 2007 and she subsequently took up occupation in 2010.
2. The pedestrian right of way originally ran along the gable wall of the reference property. An extension was added in 1982 and this extinguished the original pedestrian right of way. At the same time, however, an alternative, equivalent pathway was constructed along the same side gable allowing access to all of the residents in Helen Street and this situation had pertained since 1982 without objection.
3. In her reference to the Tribunal the applicant sought:
  - (a) confirmation as to whether the reference property was affected by an impediment and if so the nature, extent and the enforceability of such impediment.
  - (b) in the alternative an Order modifying or extinguishing the impediment.

4. The occupier of No. 24 Helen Street, Kylah Dittmar (“the respondent”), had raised objection to the applicant’s reference to the Tribunal.

### **Procedural Matters**

5. Mr Colin Henry BL, instructed by Anderson Irwin, Solicitors appeared on behalf of the applicant. The respondent gave evidence on her own behalf. Mr David A McKeown BSc CEng MICE Consulting Engineer provided an expert report on behalf of the applicant. The applicant appeared as a witness of fact. The Tribunal is grateful to the parties for their helpful submissions.

### **Position of Parties**

6. Mr Henry BL submitted that it was clear the original pedestrian right of way had not been in use for some considerable time and it had therefore been abandoned. On that basis he considered that it was no longer an impediment to the title and the applicant now sought an order declaring that the land was no longer affected by the original impediment.
7. He further submitted that it was clear from the report of Mr McKeown, from the situation on the ground, from the fact that to date, save for the current objection, there had been no objection of any kind to the alternative pedestrian right of way and from the fact it had been in use for 30 years plus, that the alternative pedestrian right of way was appropriate and more than adequate.
8. Mr Henry BL also asked the Tribunal to note that the difficulty in this case arose in relation to the title of the reference property in that any prospective purchaser would want confirmation that there was no issue with the original pedestrian right of way. He confirmed that a sale had already been lost due to this issue.
9. The respondent’s case was that part of the reference property had been illegally developed over the original pedestrian right of way and the applicant had also illegally erected a permanent gate on the private laneway to the front of Helen Street, which was subject to a vehicular right of way, thus restricting the use of the space for all local residents. Should, however, the applicant agree to remove the gate currently in situ the respondent agreed that

she would be willing to withdraw her objection to the amendment of the original pedestrian right of way.

### **Statute**

10. The sections of the Property (Northern Ireland) Order 1978 (“the Order”) which are relevant to the subject reference are:

#### “Part II

#### IDENTIFICATION, AND MODIFICATION OR EXTINGUISHMENT, OF CERTAIN IMPEDIMENTS TO THE ENJOYMENT OF LAND

##### *Application and interpretation of Part II*

3.-(1) Subject to paragraph (2), the provisions of this Part apply to any of the following impediments to the enjoyment of land (whether the impediment exists at the commencement of those respective provisions or comes into existence thereafter, and whether the land affected by the impediment is registered or unregistered):

- (a) ...
- (b) ...
- (c) an easement;
- (d) ...
- (e) ...”

And

##### *“Power of Lands Tribunal to define scope, etc., of impediments*

4.-(1) The Lands Tribunal, on the application of any person interested in land, may make an order declaring -

- (a) whether or not the land is, or would in any given event be, affected by an impediment;
- (b) the nature or extent of the impediment;
- (c) whether the impediment is, or would in any given event be, enforceable and, if so, by whom.

(2) ...

(3) ...

(4) ...”

And

*“Power of Lands Tribunal to modify or extinguish impediments*

5.-(1) The Lands Tribunal, on the application of any person interested in land affected by an impediment, may make an order modifying, or wholly or partially extinguishing, the impediment on being satisfied that the impediment unreasonably impedes the enjoyment of the land or, if not modified or extinguished, would do so.

(2) ...

(3) ...

(4) ...

(5) In determining whether an impediment affecting any land ought to be modified or extinguished, the Lands Tribunal shall take into account- ...”

And

“(6) Where the Lands Tribunal makes an order modifying or extinguishing an impediment, -

- (a) the Tribunal may add or substitute such new impediment as appears to it to be reasonable in view of the modification or extinguishment of the existing impediment;
- (b) the Tribunal may direct the applicant to pay the person entitled to the benefit of the impediment, either-
  - (i) a sum to compensate him for any loss or disadvantage which, notwithstanding any new impediment which may be added or substituted under sub-paragraph (a), he suffers in consequence of the modification or extinguishment of the impediment, or
  - (ii) a sum to make up for any effect which the impediment had at the time when it was imposed, in reducing the consideration then received for the land affect by it, ...”

## **Discussion**

11. Having heard the submitted evidence the Tribunal finds that the following issues require further consideration:
  - i. The gate.
  - ii. The status of the original pedestrian right of way.
  - iii. Modification.
  - iv. Compensation.

## **The Gate**

12. The respondent submitted that the gate had been illegally developed over the vehicular right of way thus restricting the use of the space for all of the residents of Helen Street. When Mr Henry BL pointed out that it was solely the original, pedestrian right of way which was the subject of the reference, the respondent considered that the vehicular and pedestrian rights of way were interlinked and could not be considered separately.
13. Mr Henry BL submitted that the issues raised by the respondent concerning the gate at the end of the cul-de-sac were beyond the control of the applicant. He confirmed:
  - i. the gate did not block the pedestrian right of way which was the subject of the reference before the Tribunal.
  - ii. the land on which the gate was located was not within the ownership of the applicant. The land was owned by Buckland and Bradley Properties Limited. He conceded that Mr Bradley of that company was a brother of the applicant but the applicant confirmed in her evidence to the Tribunal that she had no legal connection whatsoever to the company.
  - iii. the applicant had a key to the gate which allowed her to park her car adjacent to the reference property. She had no control, however, of the land beyond the gate apart from her permitted parking space.

- iv. the Land Registry maps clearly showed that the location of the gate was beyond the limit of the vehicular right of way, as confirmed by the engineering expert Mr McKeown.
14. The Tribunal agrees with Mr Henry BL, it was clear the gate was located outside the limit of the vehicular right of way, it did not block the pedestrian right of way and it was located on land beyond the legal control of the applicant. The Tribunal is satisfied that the Land Registry maps submitted by the applicant confirmed that the vehicular and pedestrian rights of way at Helen Street were not interlinked. The issue concerning the erection of the gate is therefore considered to be irrelevant to this reference which solely concerned the status of the original pedestrian right of way.

#### **The Status of the Original Right of Way**

15. Mr Henry BL referred the Tribunal to the title deed of the respondent's property at 24 Helen Street. This was a deed of 25<sup>th</sup> September 1968 which described the nature of the easement:
- “A right of way over and along that portion of the land coloured green of the map attached hereto ... subject to a right of way in favour of the owners of numbers 2–22 (even numbers only) and 26 Helen Street aforesaid over and along that portion of the land coloured blue on the said map.”
16. Mr Henry BL considered this to be a standard situation where there were terraced houses with an alleyway or laneway at the rere. Each owner had a right of way along the entire length and a reciprocal burden over their own portion of the length.
17. The side extension to the reference property was erected in 1982, as confirmed by a copy of the passing of the building regulations and planning permission dated 1982. At that time the alternative pathway was created to facilitate maintenance of the pedestrian right of way for the benefit of the other owners in Helen Street. Mr Henry BL asked the Tribunal to note that since that time there had been no difficulty encountered, or any objection raised with regard to the alternative pedestrian right of way and it was clear that it had been working perfectly well throughout that period.

18. With regard to the current reference, Mr Henry BL confirmed that all of the parties likely to have been affected were notified and the only objection received had been from the respondent. He then referred the Tribunal to the respondent's letter of 30<sup>th</sup> July 2016 in which she set out her objection and which seemed to solely concern the gate at the end of Helen Street.

19. Mr Henry BL's primary submission was that the impediment, namely the original pedestrian right of way as described, had been released by modification and by operation of the law in that it had been extinguished by abandonment.

20. He referred the Tribunal to Wylies' Irish Land Law 3<sup>rd</sup> Edition paragraph 6.105:

"An implied release may arise where it is established that there was an intention on the part of the owner of the easement or profit to abandon it. Such an intention may be presumed from non-user by the dominant owner for a long period, eg, 20 years, but the courts are generally reluctant to presume abandonment from mere non-user and look for circumstances to explain the non-user and to justify raising the presumption. The abandonment may also be presumed where an alternative right is granted, eg, another right of way is substituted for the existing one, or where a substantial alteration is made to either the dominant or servient tenement, so as to make the use or enjoyment of the right impossible or no longer necessary."

21. Mr Henry BL considered this to be on point with the situation in the subject reference:

- i. the route of the original pedestrian right of way was altered some 35 years ago.
- ii. until the current objection, there had been no objection from any person with regard to the use of the alternative pedestrian right of way and it was clearly accepted by the residents of Helen Street.

He submitted that this was a clear case where there had been a release of the original right of way in favour of an alternative right of way.

22. In her submission the respondent did not raise any legal issues with regard to the original or the alternative pedestrian rights of way.
23. Article 4 of the Order gives the Tribunal the statutory authority to make an order declaring whether or not land is affected by an impediment, the nature or extent of the impediment, whether the impediment would be enforceable and if so, by whom. Having considered the evidence Tribunal is satisfied that the original pedestrian right of way had been abandoned in favour of the alternative pedestrian right of way and the reference property was no longer affected by it. For the sake of completeness and if the Tribunal was wrong in its conclusion that the reference property was no longer affected by the original impediment, the Tribunal will now also consider the issue of modification.

#### **Modification**

24. In the alternative the applicant had sought modification of the original pedestrian right of way in accordance with the Order. Article 5 gives the Tribunal the statutory authority to make an order modifying or extinguishing an impediment on being satisfied that the impediment unreasonably impedes the enjoyment of land, or if not modified or extinguished would do so.
25. Article 5(5) sets out the criteria which the Tribunal must take into account in making any decision. In relation to these criteria Mr Henry BL submitted:

**5(a) The period at, the circumstances in, and the purposes for which the impediment was created or imposed.**

The purposes for which the impediments were created or imposed were to provide pedestrian access to the rere of the properties in Helen Street. The alteration of the original pedestrian right of way had not affected this.

**(b) Any change in the character of the land or neighbourhood.**

There had been a change in the character of the land or neighbourhood to the extent that some of the properties had actually extended to the rere, thus altering in themselves the pedestrian right of way.



(c) Not applicable.

(d) Not applicable.

(e) **Whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit.**

The practical benefit secured was the same as the purpose stated at paragraph (a) above, and this benefit was not affected as stated.

(f) Not applicable.

(g) **Whether the person entitled to the benefit of the impediment has agreed either expressly or by implication, by his acts or omissions, to the impediment being modified or extinguished.**

As stated, up to the current objection raised, only when the subject application was made, there had been no objection to the alteration of the pedestrian right of way. If it had made a material difference, then in 1982 when the extension was erected, there would have been objections from the owners of the properties in Helen Street, and there was none. No court applications or proceedings were taken to prevent the erection of the extension, and under normal principles, it was clear that the residents in Helen Street, who had the benefit of the pedestrian right of way, clearly acquiesced in the change of route.

(h) **Any other material circumstances.**

The matters stated at (g) are repeated. It was further noted that the objector was not objecting to the actual alteration of the pedestrian right of way. Her complaint related to the right of way at the front of the property and the vehicular access at that point, which had nothing to do with the pedestrian right of way, and in any event, as submitted, it was not within the legal power of the applicant.

26. Based on his conclusions on the Article 5(5) issues Mr Henry BL submitted that, in the alternative, the original impediment should be modified and he suggested the following modification order:

“That the easements of right of way appurtenant to the properties 2-24 Helen Street, Crumlin, referred to in Land Registry instrument 7771/1969 and which are a burden and impediment on the lands at 26 Helen Street, Crumlin, being Folio AN184199 and which burdens are registered in Folio AN184199 shall be modified to the extent shown coloured blue on the map attached hereto.”

27. The Tribunal agrees with Mr Henry BL, the impediment unreasonably impeded the applicant’s enjoyment of the reference property or, if not modified, would do so, as it was not possible to sell the property with the original pedestrian right of way in place. In the alternative the Tribunal is therefore content to modify the impediment in accordance with Mr Henry BL’s suggested modification clause.

### **Compensation**

28. Where the Tribunal makes an order modifying or extinguishing an impediment Article 6 of the order gives the Tribunal the discretion to pay compensation to any person adversely affected by the modification or extinguishment.
29. Mr Henry BL referred the Tribunal to Mr McKeown’s expert report which submitted that the alternative pedestrian right of way was more than suitable and he considered that no harm or loss would arise with regard to any properties entitled to the enjoyment of the original impediment. The Tribunal agrees with Mr McKeown, none of the beneficiaries would suffer any loss if modification of the original impediment was acceded to.

### **Conclusion**

30. Applying its statutory authority conferred in Article 4 of the Order the Tribunal orders that the reference property is no longer affected by the original impediment. If the Tribunal is wrong in that conclusion, in accordance with the statutory powers given to the Tribunal, modification of the original impediment is ordered, as per Mr Henry BL’s suggested modification order. The Tribunal also directs that no compensation is payable to any person under Article 6 of the Order.

**ORDERS ACCORDINGLY**

**2<sup>nd</sup> February 2017**

**Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)  
Lands Tribunal for Northern Ireland**

**Appearances**

**Applicant: Mr Colin Henry BL instructed by Anderson Irwin, Solicitors.**

**Respondent: Ms Kylah Dittmar.**