

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

IN THE MATTER OF A REFERENCE

R/86/2007

BETWEEN

PATRICIA FRANCIS HUNT AND HAMPTON PROPERTIES LIMITED -APPLICANTS

AND

THE TRUSTEES OF BELVOIR GOLF CLUB – RESPONDENT

Re: Premises at 79 and 81 Church Road, Newtownbreda, Belfast

Lands Tribunal - Mr M R Curry FRICS Hon.Dip.Rating

Background

1. Belvoir Golf Club was founded in 1927. It is located two miles from Belfast City centre on the west side of Church Road, Newtownbreda. The Club has hosted championships including the Irish Open in the late 1940s and the early 1950s; the Irish PGA Championship in 1995; the Irish Amateur Close in 2009 and the British Ladies Amateur Championship in 2011. The Trustees of the Club (“the Trustees”) say that its course, in 136 acres of mature woodland has been described by some champion golfers and golf writers as one of the best parkland courses in Ireland.
2. Between the 1920s and the 1960s the Trustees sold, by way of leases, building plots along its boundary with Church Road. These included No’s 79 and 81 Church Road. No 79 was held under a lease dated 12th June 1945 and No 81 under a lease dated 14th May 1962. In common with those of other plots, the leases contained restrictive covenants for the benefit of the Trustees. These included a limitation on the intensity of development (one dwelling only on each of the two plots) a building line (not less than 60 feet from the boundary) and, in the latter lease, a covenant to pipe a section of a stream, which flowed on and became a feature of the golf course, along the boundary between No’s 79 and 81.
3. Article 5 of the Property (Northern Ireland) Order 1978 provides that 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.

4. The applicants referred the matter to the Tribunal in late 2007, seeking modification or extinguishment. But at that time there was no planning consent for further development. Without that permission the application was considered premature and was not actively pursued.
5. Towards the end of 2010, full planning consent (Reference Y/2009/0196/F) was obtained for demolition of the two dwellings and replacement with 19 apartments. These would consist of two buildings - one three storey block containing 11 units (broadly at No 79) and one four storey block containing 8 units with parking below (broadly at No 81). It was proposed that the buildings of the latter would cross the boundary into No 79; that would require relocating much of the piped stream.
6. The golf course was to the rear (west) of both existing dwellings. The view from the rear of No 81 was restricted by a group of tall, mature trees on the trustee's grounds whereas that from the rear of No 79 was largely unrestricted. The proposed development was intended to maximise the potential of that view. Part of the buildings would be within about 20 feet of the boundary of the Trustees' golf course.
7. Such development would be in breach of covenants in the leases, including those fixing the intensity of development (one dwelling only on each of the two plots) and the building line (60 feet from the boundary), and affect the piped stream.
8. This application was for extinguishment of the covenants or modification so as to permit development in accordance with the planning consent.

Procedural Matters

9. The Tribunal received:
 - Written and oral expert evidence from Kenneth Crothers and Gareth Mark Johnston, both experienced chartered surveyors;
 - Written expert evidence from Samuel Wilson, an experienced chartered engineer;
 - Written and oral expert evidence from Brian W Murray, an experienced chartered engineer;
 - Oral evidence from

- Patrick Mark Paul Hunt, the majority shareholder in Hampton Properties Limited and who occupied 79 Church Road;
 - Mark Foster, the project manager for the development; and
 - Dr Jonathan Norman Browne, a trustee of Belvoir Golf Club; and
 - Submissions from
 - Mel Power BL on behalf of the applicants; and
 - Peter Girvan BL on behalf of the respondent.
10. After the hearing, a petition signed by a number of the lady members of the club was lodged. Initially the applicants objected to the Tribunal receiving this evidence but, suggesting that it added little to the evidence already received, they did not vigorously pursue their objection.
11. The Tribunal has viewed the vicinity.

Positions

12. On behalf of the applicants it was suggested that the Tribunal could be satisfied with reference to the criteria set out in Art. 5(5) of the Property (NI) Order 1979 that the covenants, if unmodified, operated to unreasonably impede the enjoyment of the lands at 79 and 81 Church Road. Modification or extinguishment was a matter for the Tribunal. On behalf of the respondent it was suggested that the covenants clearly were of sufficient practical benefit to the respondent to justify their continuance. In particular, if modified so as to permit the development scheme, having regard to the scale and proximity of the buildings, there would be substantial adverse impact on the amenity of the first tee.
13. In regard to the stream, on behalf of the applicants it was suggested that modification of the long standing pipe of the stream could ensure that the purpose of the relevant covenant was achieved. On behalf of the respondent it was suggested that the Tribunal had no jurisdiction to make a decision which interfered with the respondent's rights but, if it had jurisdiction, the stream provided a clear practical benefit to the respondent and the Tribunal should not permit modification as that would be likely to change the flow of the water.

Discussion

14. The Tribunal was referred to:
- The Property (Northern Ireland) Order 1978;
 - Mason v Hill and Others [1824] All ER Rep 73;
 - Edleston v Crossley and Sons (Limited) [1868] TLR Mar 7th;
 - Borough of Portsmouth Waterworks Company v London, Brighton and South Coast Company [1909] TLR Dec 15th Vol. Xxvi;

- Re Truman, Hanbury, Buxton & Co Ltd's Application [1955] 3 All ER 559;
- Bass Ltd's Application (1973) 26 P&CR 156;
- Martin's Application (1989) 57 P&CR 119;
- Andrews v Davis [1993] R/17/1993;
- Danesfort v Morrow and Palmer (No 2) [2002] R/45/1999;
- Spruce Enterprises Limited v Richard Palmer [2004] R/63/2003;
- Kamack Developments Limited v Doreen Katherine Stinson and Eleanor Roberta Stinson [2009] R/43/2010;
- Edward Albert Pryor [2009] UKUT 131 (LC) 2009 WL 3171877;
- Johnston v Dawson and Price (No 1) [2011] R/43/2010;
- Howarth & Jackson *Wisdom's Law of Watercourses* 6th Ed;
- Mason v Hill and Others [1824] All ER Rep 73;
- Embry v Owen 1852 6 EX 353;
- Chasemore v Richards (1859) VII House of Lords Cases (Clark's) D49 11 ER 140;
- Edelston v Crossley (1868) 18 LT 15;
- Isaie Frechette v LA Compagnie Manufacturers De St Hyacinthe (1883) 9 App Cas 170;
- Borough of Portsmouth Waterworks Company v London Brighton and South Coast Railway Company [1909] Times Law Reports Vol xxvi 173;
- Attwood v Llay Main Collieries Limited [1926] Ch 444;
- Arthur Kevin O'Brien and The Department of Agriculture for Northern Ireland [1991] R/46/1990; and
- Sandale Developments Limited's Application for Judicial Review [2010] NIQB43.

The Covenants

15. The relevant covenants were as follows:

The 1945 Lease (79 Church Road)

3. To erect on the demised premises within two years from the first day of May 1945 a detached villa residence of brick or stone and slated or tiled and in accordance in every respect with the plans, elevations, sections and specifications to be approved of and assigned by the Lessors or their agent architect or surveyor for the time being and will not build said house or outhouses thereof or any building in connection therewith nearer to the western boundary than sixty feet.
4. The Lessee shall within six months from the date hereof properly fence off the said premises on the west and south sides by a suitable type of wall fencing or railing according to plans and specifications to be first approved of in writing by the Lessors or

their architect, agent or surveyor such wall, fence or railing to be not less than four feet six inches nor more than six feet in height and if stepped shall as regard height be measured from the lowest point thereof.

5. To keep the wall on the east side of the said premises in good repair during the said term but with the right to make one large and one small wooden or iron gate ten feet wide and three feet wide respectively therein with proper piers and in accordance with plans to be previously submitted to and approved of by the Lessors or their agent or surveyor for the time being.
7. Not on pain of forfeiture of these presents to make any doors or other openings of any kind whatsoever into the other premises of the Lessors on the southern and western sides or boundaries of the said demised premises.
8. Not to use the said premises or any building thereon or permit the same to be used for the manufacture or sale of any intoxicating liquors nor use the same for any other purpose than that of a dwelling house and not to do or suffer to be done thereon any act or thing which may be or become a nuisance, annoyance or damage to the Lessors or their tenants, lessees or occupiers of other property in the neighbourhood.

The 1962 Lease (81 Church Road)

3. To erect on the demised premises within four years from the date hereof a detached villa residence or bungalow of brick or stone and slated or tiled and in accordance in every respect with the plans, elevations, sections and specifications to be previously submitted to and approved of and signed by the Lessors or their agent, architect or surveyor for the time being and will not build the said house or the outhouses thereof or any building in connection therewith nearer to the western boundary than sixty feet.
4. The Lessee shall within the said period of four years from the date hereof properly fence off the said premises on the west, north and south sides by a suitable type of wall, fencing or railing according to the plans and specification to be first approved of in writing by the Lessors or their architect, agent or surveyor, such wall, fence or railing shall not be less than four feet six inches and more than six feet in height and if stepped shall as regard height be measured from the lowest point thereof.
5. To keep the wall on the east side of the premises in good repair during the said term but with a right to make such openings as will comply with any regulations or requirements of the Down County Council and in accordance with plans to be

previously submitted to and approved of by the Lessors or their agent or surveyor for the time being.

6. To keep the premises and all improvements at any time erected and made thereon in continuous good and sufficient order, repair and condition and on any determination of this demise will so leave and yield up the same.
7. Not on pain of forfeiture of these presents to make any doors or other openings of any kind whatsoever into the other premises of the Lessors on the northern and western sides or boundaries of the said demised premises.
8. Not to use the said premises or any building thereon or permit the same to be used for the manufacture or sale of any intoxicating liquors nor use the same for any purpose other than that of a private dwelling house and not to do or suffer to be done thereon any act or thing which may be or become a nuisance or damage to the Lessors or the tenant, lessees or occupiers of other property in the neighbourhood.
13. To pipe the stream shown on the map hereto annexed adjoining the northern boundary of the demised premises so far as it runs through the said premises and to keep the said pipe free from obstruction so as to prevent any flooding of the adjoining property belonging to the Lessors and also will not divert the course of the said stream but will permit the same to flow into the existing water course on the western boundary of the said premises.

The Legislation

16. Article 5(5) of the Property (NI) Order 1978 provides:

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

- (a) the period at, the circumstances in, and the purposes for which the impediment was created or imposed;
- (b) any change in the character of the land or neighbourhood;
- (c) any public interest in the land, particularly as exemplified by the regional development strategy formulated under Article 3 of the Strategic Planning (Northern Ireland) Order 1999 or by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1991 for the area in which the land is situated, as that plan is for the time being in force;

(d) any trend shown by planning permissions (within the meaning of that Planning Order) granted for land in the vicinity of the land, or by refusals of applications for such planning permissions, which are brought to the notice of the Tribunal;

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

(f) where the impediment consists of an obligation to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether the obligation has become unduly onerous in comparison with the benefit to be derived from the works or the doing of that thing;

(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;

(h) any other material circumstances.”

The Buildings

17. Leaving aside for the moment the stream issues, the Tribunal first considers the proposed buildings in the context of the matters required to be taken into account by article 5 (5) of the 1978 Order.

18. Clearly, in general terms, the purpose of the relevant covenants was to protect the amenity of the golf course at its boundary. They did not however prevent the course from being overlooked, generally from upper floor windows. As a consequence of the replacement, on four other plots along the boundary of the golf course, of large single dwelling houses with apartments, there had been a change in the character of the land or neighbourhood. Neither the *Regional Development Strategy for Northern Ireland 2025* nor the *Belfast Urban Area Plan 2001* showed any public interest in the land. In light of the planning consents for the above apartment developments and for the subject lands there was sufficient consistency about planning permissions, for apartments in the vicinity, for that to be regarded as a trend. The Trustees did not object to the ‘arts and crafts’ design concept for the buildings. The Trustees had permitted modifications on other plots to allow apartments to be built. Many of these enjoyed unrestricted views over the course. They also had acquiesced in or permitted breaches of the building line: a conservatory at No 69 breached the line by about 7 or 8 feet and the apartments elsewhere had been permitted within about 40 to 50 feet of the boundary.
19. The Tribunal also accepts that the proposed development was reasonable (planning consent having been granted) not out of keeping with the character of the neighbourhood and reflected a trend in planning consents.

20. The main issue was whether preventing the proposed encroachment of the buildings, coupled with their scale (and the design for the apartments at No 79 in particular), to within about twenty one feet of the boundary at this location was a benefit of sufficient weight to justify its continuance without modification. That was a matter of degree; was the proposal too much, too close?
21. The retention of the amenity around the boundaries of this parkland course was a primary purpose of the covenants. But the Tribunal accepts that there were locations where some modification to permit apartments and breaching of the 60 feet building line could take place without materially affecting that aim. The Trustees had modified covenants to permit such development elsewhere on the boundary. Where they had done so, they had required considerations in cash or kind but these did not appear to have been based on any assessment of loss of amenity.
22. The proposed scheme would sit considerably closer to the boundary than any other development and, fairly, Mr Johnston accepted that would cause concern. But there were additional considerations. Other modifications permitting development related to locations not close to a fairway or tee whereas the proposed development, in particular the apartments at No 79, would be in close proximity to the first tee; the edge of the ladies tee box was only about 25 feet or so from the boundary. The Tribunal accepts Dr Brown's evidence that the first tee on a course is of particular importance as that is where persons meet as a group and also form their first impressions. It agrees with Dr Brown and Mr Crothers that, in contrast with two detached dwellings set well back from the boundary, the proximity, scale and height of the apartment blocks would have a very significant adverse effect on the character of the setting of that first tee. Further, the designs of the apartments at No 79 included two patios on the lower floors and nine French doors and balconies on the upper floors. These were intended to take advantage of the prospect over golf course and beyond but golfers on the first tee would be overlooked (especially the ladies first tee box) and there would be a risk of interference to play, accidental or otherwise. In the view of the Tribunal these changes would be so detrimental to the amenity secured by the covenants that it must conclude that the proposed scheme was too much, too close.
23. The Tribunal accepts that the stream was an important feature of the golf course. The available evidence was insufficient to identify the source of the water that issued from the piped section between No's 79 and 81; it could have included ground water seeping through brick walls of an old pipe/culvert and/or water from the roadside of those plots. There likely is

a satisfactory engineering solution that would allow development without increased risk of flooding or reduced flow but the Tribunal agrees with Mr Murray that further investigation, probably including CCTV examination of the pipe, would be required before it contemplated modification in accordance with the application.

24. The Tribunal concludes that the covenants achieve substantial practical benefits and these are of sufficient weight to justify refusing this application. In all the circumstances it elects not to put forward any new impediment in substitution but, although the Tribunal cannot prejudge a future application, that is not to say that a less intrusive scheme also would be refused.

ORDERS ACCORDINGLY

24th January 2013

**Michael R Curry FRICS Hon.Dip.Rating
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances

Applicant: Mel Power BL instructed by Mills Selig, solicitors.

Respondent: Peter Girvan BL instructed by King & Gowdy, solicitors.