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/22/2017

BETWEEN

FRANCIS O'HARE – APPLICANT

AND

ROGER HALL AND JOSEPH HALL AS TRUSTEES OF THE HALL ESTATE – RESPONDENTS

Re: 1 Alexander Drive, Warrenpoint

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

Background

1. The property, which is the subject of this reference, is located on Alexander Drive, a mainly residential area within walking distance of Warrenpoint town centre. It comprises one of a pair of semi-detached houses built on a site of some 0.09 acres (363m^2) and known as 1 Alexander Drive ("the reference property").

2. The reference property is contained within a larger site which was held under a primary deed dated 1st August 1924 for a term of 999 years, subject to an annual ground rent of £35. This deed contained a covenant restricting building on the land. Roger Hall and Joseph Hall, as Trustees of the Hall Estate ("the respondents"), are currently entitled to the reversionary interest in the 999 years lease.

3. By deed of variation dated 7th July 1961, the covenant was modified to ratify previous breaches and authorise additional buildings on the land, subject to the lessors consent. This was granted in consideration of the ground rent being increased to £55 per annum. The variation of the 1961 covenant provided:

    "Notwithstanding anything to the contrary herein before contained should the said Raymond Alexander Dorman his executors administrators and assigns at any time

hereafter during the continuance of the said term desire to erect further dwelling houses and out offices and lock up garages on the lands comprised in the lease in pursuance of the provision of these presents the plans elevations and sections therefor shall be first submitted for approval to the said Roger Hall his heirs and assigns or his Agent or Surveyor."

4. This covenant had the practical effect of ensuring that, if the lessees intended to carry out any future development of the land, plans must first be submitted to the lessors for approval. At the time of the 1961 variation the lands contained 8 semi-detached dwellings and 1 detached. The site currently contains 14 semi-detached and 4 detached dwellings. It was accepted that plans had not been submitted to the lessors for any of these additional dwellings which had been built over a period of some 20 years.

5. Mr Francis O'Hare ("the applicant") is the current lessee of the lands containing the reference property. Planning permission, P/2013/0781/F, was granted for the construction of a pair of semi-detached houses including the reference property, on 16th April 2014. These houses have now been built and "sold on". It is a condition however, of the sale of the reference property, that an application is made to the Lands Tribunal for extinguishment or modification of the covenant contained in the 1961 deed of variation.

6. The applicant had accepted that plans had not been submitted to the respondents as required under the covenant. It was also accepted that the respondent had not been notified of the application for planning permission, as "title" on the planning application had been incorrectly entered as "freehold".

7. At the commencement of the hearing, however, the respondents raised an issue concerning the "locus standi" of the applicant to bring the subject reference to the Tribunal.

8. Article 5 of the Property (Northern Ireland) Order 1978 ("the Order") permits an application for modification or extinguished of a covenant by "any person interested in land affected by an impediment". The respondents' position was that the applicant had no "interest" in the land and he therefore did not have the "locus standi" to bring the application before the Tribunal.

9. This issue had not been raised prior to the hearing so the Tribunal invited post hearing submissions.

10. The issues for the Tribunal were therefore:

    (i) The locus standi of the applicant.

    (ii) Should the Tribunal grant extinguishment or modification of the covenant.

    (iii) If so, what is the amount of compensation, if any, to be paid to the respondent.

Procedural Matters

11. Mr Mark Orr QC, instructed by Con Lavery & Co Solicitors, represented the applicant. The respondent was represented by Mr Michael Lavery BL, instructed by Diane Coulter Solicitors.

12. Ms Kathryn Elliott MRICS of Shooter Estate Agents gave expert evidence on behalf of the applicant. Ms Ciara Aiken FRICS of Best Property Services provided expert valuation evidence on behalf of the respondent. The Tribunal is grateful to the legal representatives and the experts for their helpful submissions.

Issue (i) "Locus Standi" of the Applicant

13. In the absence of any authority in this jurisdiction on the interpretation of "any person interested in land", Mr Orr QC invited the Tribunal to consider the interpretation of the same term in Section 84 of the Law of Property Act 1925 in England and Wales. He asked the

Tribunal to note that the approach of the Courts and Tribunal in that jurisdiction was to adopt a wide interpretation of the words "interested in".

14. He referred the Tribunal to J Sainsbury plc v Enfield LBC [1989] 2EGLR 173 in which a purchaser under an uncompleted conditional contract had the right to make an application.

15. Mr Lavery BL advised the Tribunal that the sale of the reference property had been completed, as it had been registered in the name of Viktor Zhelev as and from 25th January 2019. This was not disputed by the applicant. He submitted therefore, that the subject reference involved a completed contract and should be distinguished from the Sainsbury case which involved an uncompleted conditional contract.

16. Mr Orr QC also referred the Tribunal to Re Robinson's and O'Connor's Application (1965) 16P&CR 106 in which an option holder had been able to rely on Section 84. Mr Lavery BL submitted that this case could also be distinguished from the subject reference as it related to a pre-completion purchase, as opposed to a completed sale.

17. Mr Orr QC then referred the Tribunal to the contents of Preston & Newsom, Restrictive Covenants Affecting Freehold Land (10th Ed) at paragraph 10-10:

> "The applicant
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> 10-10 Section 84(2) states that 'any person interested' may apply. These words are very wide, and include any person interested for any legal or equitable estate or interest in the burdened land or in the covenant. The same words are used by Section 84(1) to describe who may apply to the Upper Tribunal for the modification or discharge of a restriction. The phrase includes a buyer under an uncompleted conditional contract so he can seek declarations as to what his rights will be if he completes."

18. The Tribunal accepts Mr Lavery BL's submissions that these authorities are not on a par with the subject reference which involved a completed contract but the Tribunal notes the wide interpretation of the phrase "any person interested in land" adopted by the Courts and Tribunal in England and Wales, as submitted by Mr Orr QC.

19. Mr Orr QC referred the Tribunal to a document relating to the reference property entitled "Agreement for Transfer" and in particular to paragraphs 1 and 2 of the "Special conditions pertinent to purchase of property at 1 Alexander Drive, Warrenpoint, County Down, BT34 3NW":-

    "1. A retention of £5,000 will be held by the purchasers solicitor until such times as the Vendors Solicitors furnishes copy Order from the Lands Tribunal relaxing or removing the restrictive covenants in the title document under which the premises are held requiring the approval of the Hall Estate for the plan, specifications and elevations of the above property prior to construction.

    2. The contract herein is strictly subject to the Vendors Solicitor lodging an application in the Lands Tribunal Northern Ireland for the removal/relaxation of the restrictive covenant in the leasehold title which the above property was held and which requires the approval of the Hall Estate for the plans, specifications and elevations relating to the building in question prior to construction of some and to comply in full with the requirements and directions of the Lands Tribunal in respect of same."

    He asked the Tribunal to note, therefore, that the applicant was not entitled to payment of the full purchase price pending an Order from the Tribunal.

20. Mr Lavery BL submitted that Viktor Zhelev was now the registered owner of the reference property and title had now passed from the applicant, as evidenced by the Land Certificate, irrespective of any retention/contractual issues. Paragraph 7 of the applicant's submission stated that "he has agreed to Transfer part of the land to Viktor Zhelev ...". Mr Lavery BL submitted that this was clearly wrong as the applicant had already transferred the reference

property and moreover the full registration of that transfer had completed in the Land Registry.

21. Section 11 of the Land Registration Act (1970) states that registration is "conclusive evidence of title". The registered owner was Viktor Zhelev and Mr Lavery BL submitted that the applicant had no standing irrespective of whatever separate assignments and/or apportionments were subsequently made. He also considered that contractual issues such as retention monies did not go to title but were contractual issues only and any issues of loss and damage were between the applicant and Viktor Zhelev. In conclusion Mr Lavery BL submitted that the applicant was not an "interested" person and the reference should be dismissed.

22. The issue, therefore, for the Tribunal was did the applicant have sufficient "interest" in the reference property to allow him to bring a reference to the Tribunal, as required under Article 5 of the Order.

23. Article 3(4) of the interpretation section of the Order states:

> "Any reference in this Part to a person interested in land includes a person who is contemplating acquiring an estate in land and a person who has an interest in the future sale of the land."

24. The Order and the wide interpretation by the Courts and Tribunal in England and Wales do not require an applicant to have a legal interest in the land. The Order includes any "person contemplating acquiring an estate in land" and the authorities provide for a person with an uncompleted conditional contract [Sainsbury plc].

25. There is no doubt that the applicant, at the time of making his reference to the Tribunal, had "an interest in the future sale of the land" as per Article 3(4) of the Order. Special Condition 2 of the "Agreement for Sale" of the reference property now required the applicant to make a reference to the Tribunal for the "removal or relaxation" of the restrictive covenant in order

to receive the full purchase price. In those circumstances the Tribunal considers that the applicant has a sufficient "interest" in the sale of the reference property to bring the subject reference.

Issues (ii) and (iii) Extinguishment/Modification and Compensation

Position of the Parties

26. The applicant sought extinguishment or modification of the covenant without any liability for compensation.

27. The respondents' position was that under, the Property (Northern Ireland) Order 1978 ("the Order"), the applicant had failed to demonstrate any grounds whereupon the impediment could be extinguished for no compensation. They considered the only issue for the Tribunal was the level of compensation.

Statute

28. Article 5(1) of the Order provides:

> "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."

29. Article 3(3) of the Order clarifies the extent of "enjoyment":

> "3-(3) In any provision of this Part –
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> 'enjoyment' in relation to land includes its use and development;"

30. Article 5(5) lists the matters which the Tribunal must take into account in deciding whether an impediment affecting any land ought to be modified or extinguished.

Authorities

31. The Tribunal was referred to the following authorities:

(i) Stockport MBC v Awiyah Developments [1986] 52 P&CR 278

(ii) Danesfort Developments Limited v Mr & Mrs M Morrow and Richard Palmer R/45/1999

(iii) Castlereagh Borough Council v Northern Ireland Housing Executive R/30 & 32/2002

(iv) John McGrath and Margaret Mary McGrath v Kerry O'Neill, Kim O'Neill, Peter O'Neill & Gary O'Neill R/41/2004

(v) Winter v Traditional & Contemporary Contracts Ltd [No 2] [2007] EWCA Civ 1088

(vi) Re Dobbin R/2/2013

32. In McGrath v O'Neill R/41/2004 the Tribunal cautioned at paragraph 13:

> "13. In any event, covenantors should not assume that by deliberately breaching covenants, such a pre-emptive strike would deter the Tribunal from exercising its discretion fully in accordance with the provisions of the Order. If, as it may, the Tribunal refuses modification or grants a modification that is insufficient to encompass a development that has already been commenced or completed, a remedy may have to be found elsewhere. If that becomes a matter of damages, the basis may be different from that in the 1978 Order."

33. The Tribunal also derives assistance from Andrews v Davis R/17/1993. In that case the Tribunal outlined the requirement under the 1978 Order at page 13:

> "… In the 1978 Order the only requirement is that an applicant must persuade the Tribunal that the restriction 'unreasonably impedes the enjoyment', taking into account seven specified matters together with any other material circumstances. These matters reflect to a large extent the substance of the grounds and other matters of the 1925 Act but the Tribunal is given a discretion to determine the weight, if any, to be attached to

each of these matters in any particular case. The tribunal takes the view that whilst it must have regard to the matters set out in Article 5(5) it has, at the end of the day, an overall discretion, which is a wider discretion than that often referred to in the English authorities as the residual discretion …".

The Article 5(5) Issues

34. Regrettably Ms Elliott did not provide any direct evidence in relation to the Article 5(5) issues. She considered them to be "relevant but not of concern". The Tribunal does not agree. Ms Aiken, however, did submit evidence in relation to each of the Article 5(5) issues.

35. 5(5)(a) The period at, the circumstances in, and the purposes for which the impediment was created or imposed

It was generally accepted that the impediment was created to control development on the lands. It was a form of planning permission of its day, although it clearly envisaged future development of the lands.

36. 5(5)(b) Any change in the character of the land or neighbourhood

Ms Elliott had not carried out any research into the character of the neighbourhood in 1961 and was, therefore, unable to detail any changes. Ms Aiken submitted that there were no changes since 1961 as the neighbourhood had remained residential. When questioned by Mr Orr QC she accepted that a "lot more" houses had been erected in the locality since 1961.

37. 5(5)(c) Any public interest in the land, particularly as amplified by any development plan

Neither expert considered this to be relevant. The Tribunal, however, considers the Development Control Officers Professional Planning Report to be relevant and of public interest. Within the report he noted the following:

(i) This is an urban site within the development limit of Warrenpoint as defined on the Banbridge/Newry and Mourne Area Plan 2015. It is white land with no specific

zoning. This area of the town, just to the east of the town centre is mainly residential in nature and has a mix of single and two storey house types.

(ii) As the site is in an urban area there is a presumption in favour of development, subject to meeting other planning policies.

(iii) The proposal would be in line with the regional housing policy of the RDS.

(iv) I am satisfied that the design for a pair of semi-detached dwellings is in keeping with its surrounding context. The design and layout will not create conflict with adjacent land uses and there will be no unacceptable amenity impact on surrounding dwellings as a result of overlooking loss of light. The development relates satisfactorily to its townscape setting.

(v) Brief summary of reasons for reconsideration. Suitable urban site for two dwellings which are in keeping with the area in terms of scale, plot size and building line; access and parking arrangements acceptable; no adverse amenity impacts; objections fully considered but cannot be given determining weight.

38. 5(5)(d) Any trend shown by planning permissions

Ms Elliott did not submit any evidence in this regard. Ms Aiken referred the Tribunal to planning application L/07/2018/0180/F which was for a detached dwelling which was refused on the grounds of "over development of the site" and concerns over road safety and access to the site.

39. Ms Aiken also referred the Tribunal to an extract from the Rathfriland Outlook entitled "Councillors refuse house in 'overdeveloped' estate". When questioned by Mr Orr QC she accepted that the development had been refused on parking and access issues rather than density.

40. Regrettably neither expert submitted any relevant information re the trend of planning permissions in the locality, of which there must have been many.

41. 5(5)(e) Whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit

Ms Aiken asked the Tribunal to note that the respondents' owned considerable other freehold and leasehold reversions in Warrenpoint town and townlands, including lands adjacent to the reference property. When questioned by Mr Orr QC, however, Ms Aiken was unable to confirm that the Hall Estate owned adjoining lands.

42. Mr Lavery BL submitted that the subject covenants, in these circumstances were worth a considerable amount of money, as the Hall Estate had hundreds of ground rental properties in Warrenpoint, the rents for which were still being collected and covenants were still being enforced.

43. Mr Orr QC asked the Tribunal to note that the respondents were only entitled to the reversionary interest in the 999 year lease and were only entitled to collect the ground rent of £55. He asked the question "what had the respondents lost" other than a possible small increase in ground rent. There was no loss of amenity or any other such benefit.

44. 5(5)(f) Any obligation to execute any works or to do anything or make any contribution

There was no such positive obligation in the circumstances of the subject reference.

45. 5(5)(g) Whether the beneficiaries had agreed either expressly or by implication, to the impediment being modified or extinguished

The experts did not consider this to be of relevance nor does the Tribunal.

46. 5(5)(h) Any other material circumstances

Mr Lavery BL submitted that at all times the applicant had acted in bad faith in an attempt to avoid paying ground rent and had made a false declaration to the planning authorities re the title to the lands.

47. Mr Orr QC pointed out that seven properties previously erected on the lands had been in breach of the covenant for a considerably long period of time and the respondent had failed to take action for these breaches.

Conclusion

48. The Tribunal has carefully considered the relevant provisions of Article 5(5). For the following reasons the Tribunal is satisfied that the impediment, if not modified, would unreasonably impede the applicant's enjoyment of the land, which includes its use and development:

(i) The covenant was created in 1961 to control development but it clearly envisaged and allowed for future development of the lands

(ii) The neighbourhood had changed significantly since 1961, with a large number of residential properties being erected.

(iii) Planning permission has been granted and it was in line with regional planning policy.

(iv) Although no specific details were provided by the experts, the general trend had clearly been to approve residential planning applications in the locality.

(v) The Tribunal agrees that the houses should not have been built without the consent of the respondents. However, in McGrath v O'Neill, at paragraph 14, the Tribunal stated that "the withholding of consent" in itself by the respondent lessor "would be an unreasonable impediment" in the circumstances of that case. The Tribunal considers the circumstances to be similar in the subject reference.

(vi) In relation to the construction of the pair of semi-detached houses, the Tribunal considers the impediment to be of no practical benefit to the respondents. They had not lost any amenity such as a view etc and any modification of the covenant would not interfere with the respondents right or ability to collect its "hundreds" of ground rents and enforce covenants on other land which they owned.

49. The Tribunal considers the impediment to be unreasonable and grants modification of the covenant to give consent, with effect from the date of the hearing, for development in accordance with the planning permission P/2013/0781/F, which was granted on 16th April 2014.

Compensation

50. The Tribunal may award compensation under Article 5(6)(b) of the Order, either:-

> "(i) a sum to compensation 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
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> (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 affected by it."

51. The Tribunal derives assistance from:

(i) McCarney v Martin R/18/1988 at page 10:

> "… The Northern Ireland Lands Tribunal in R/1/1981 @ p6 in the penultimate paragraph said:- 'Article 5(6)(b)(i) understandably allows compensation for 'any loss or disadvantage' suffered in consequence of the modification or extinguishment of an impediment, but where the impediment secures 'no practical benefit', there is no basis for any assessment, and clearly nothing can be allowed simply for the bargaining power which a covenantee enjoyed before the 1978 Order'
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> Again in R/30/1981 the Northern Ireland Lands Tribunal @ p6 final paragraph said:- 'Under Article 5(6)(b)(i) of the 1978 Order there can be no loss to the landlord because the evidence shows that the interest is not that of an owner occupier but rather that of a collector of neighbouring grounds rents."

(ii) McGrath v O'Neill:

> "17. Reflecting these conclusions, the 1978 Order subsequently made provision for the measure of compensation. Where a covenant is an unreasonable impediment and the lessor does not suffer any loss or disadvantage (other than the loss of a means to extract money) it is:
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> > '(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 affected by it.'"

(iii) Castlereagh Borough Council v Northern Ireland Housing Executive:

> "16. … Where the Tribunal has ordered modification or extinguishment of unreasonable restrictions, the payment awarded, if any, usually has been under head (ii) and rarely head (i), probably because any significant actual loss or disadvantage suffered by a beneficiary would usually be sufficient grounds to refuse modification."

52. In the subject reference, therefore, method (ii) is clearly the method to be used for calculating compensation, if any. Based on the stated authorities Ms Elliott considered that no compensation was payable. None of Ms Aiken's assessments of compensation were based on method (ii).

53. The Tribunal considers that, in 1961, the covenant was a positive impediment in that in controlled development on the lands. On that basis any difference in the value of the land with or without the covenant would have been minimal and the Tribunal makes no award of compensation.

18th April 2019 **Mr Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances:

Applicant: **Mr Mark Orr QC instructed by Con Lavery & Co, solicitors.**

Respondent: **Mr Michael Lavery BL instructed by Diane Coulter, solicitors.**