

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/27/2016

BETWEEN

G McGREEVY CONSTRUCTION LIMITED – APPLICANT

AND

SAMUEL ERNEST COOPER,

GERARD MARTIN & CATHERINE PATRICIA HOLLYWOOD - RESPONDENTS

Re: Land adjacent to 50 Crieve Road, Newry

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

Background

1. G McGreevy Construction Limited had been granted planning permission, 2005/A483, to erect two dwelling houses on land adjacent to 50 Crieve Road, Newry (“the reference land”) contained within folio 10402 County Down.

2. The reference land was, however, subject to a restrictive covenant (“the covenant”) contained within a Deed of Transfer dated 13th November 1990 made between Samuel Ernest Cooper (“the registered owner”) of the one part and Gerard Martin Hollywood and Catherine Patricia Hollywood (“the respondents”) of the other part. The covenant provided that the registered owner would not convey the site immediately adjoining the premises coloured yellow on the map attached to the Deed of Transfer (i.e. the reference land) to a purchaser for any purpose other than to erect a single dwelling house, having a floor area of at least 2,000 square feet.

3. The applicant had the benefit of a licence agreement dated 11th September 2008 entered into with the registered owner and which authorised the applicant to build a housing development on lands including the reference land, in accordance with the planning permission and which

was known as Carneyhough Housing Development. The applicant now seeks permission to erect two dwelling houses on the reference land.

4. The applicant accepted that the respondents were the beneficiaries of the covenant. The solicitors for the respondents had advised the Tribunal that their clients were not in a position to take part in the proceedings. They had, however, provided a written submission on behalf of the respondents.
5. The Lands Tribunal had notified the registered owner of the proceedings but he failed to respond. The applicants had also advised the Tribunal that they had a Power of Attorney to act in the name of and on behalf of the registered owner, under the terms of the licence agreement.
6. The applicant asked the Tribunal to note that some 50 houses had already been completed in the Carneyhough Housing Development and as a condition of the planning permission an extensive planting belt had been put in place around the lands belonging to the respondents.

Procedural Matters

7. Ms Sheena Grattan BL instructed by Donnelly Neary & Donnelly, solicitors represented the applicant. The Tribunal received a written submission from Luke Curran & Co, solicitors on behalf of the respondents. Mr G P McGarrigle, an experienced chartered surveyor, provided an expert report on behalf of the applicant.

Position of the Parties

8. The applicant sought modification or extinguishment of the covenant to permit the erection of two dwellings, in accordance with the planning permission. The applicant also considered that no compensation should be payable to any person.
9. The respondents refused to consent to the application for modification or extinguishment of the covenant.

Statute

10. The following sections of the Property (Northern Ireland) Order 1978 (“the Order”) are relevant:

“3.-(3) In any provision of this Part -

‘enjoyment’ in relation to land includes its use and development”

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—

- (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, particular 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 anything, or to pay or contribute towards the cost of executing any works or doing anything, 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.
- (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 ... 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 affected by it,”

The Respondents' Objections

11. Through their solicitors the respondents invited the Tribunal to take into account the following objections:

- “1. The Applicant did not put our client on notice of the application before issuing proceedings.
2. The Applicant is not the registered owner of the lands to which the restrictive covenant burdens.
3. The Applicant does not have standing to bring the application under Article 5 of Part 2 of the Property (NI) Order 1978.
4. The Licence Agreement dated 11th September 2008 does not create an estate or interest in the land in fact clause 23 therein specifically precludes the creation of any estate or interest.
5. The Registered Owner Samuel Cooper has not been put on notice of the application.

6. The Registered Owner has not consented to the application.
7. The Registered Owner has not received independent legal advice.
8. The Power of Attorney within the Licence Agreement is limited to executing documents to give effect to the transfer of land. It does not extend to issuing court proceedings on behalf of the Registered Owner.”
9. The restrictive covenant was designed to prohibit development in the Restricted Area. It was accepted and foreseen by Our Client when acquiring their Property from the Registered Owner that the remaining field to the North would become a larger residential development. The grant of Planning Permission for same does not impact on the benefit or purpose of the restrictive covenant.
10. The Planning Permission granted requires approval of a landscaping scheme for planting along the sites common boundaries with their Property. The Planning Officers foresaw the invasion of privacy to their Property and family home if an additional dwelling in the Restricted Area was permitted.
11. The breach of Restrictive Covenant affects the amenity and character of Our Client’s Property.
12. Despite the time that has passed since the commencement of construction the planting belt as required by the grant of Planning Permission has not been put in place by the Applicant.
13. It will take a considerable number of years for the planting belt to grow sufficiently to provide adequate screening to the living space at the rear of the dwelling and garden at Our Clients family home.
14. There is a window from the additional dwelling within the restricted area overlooking into the living space at Our Clients Property.
15. We note that the Applicant proposes to market the dwelling within the Restricted Area for £230,000 or thereabouts. The construction of an additional dwelling within the Restricted area will have an adverse impact on the market value of Our Client’s Property as its privacy is impeded and the visual appearance from the Crieve Road is tarnished. Our Clients use and enjoyment of their Property has been materially affected.
16. The extinguishment of the restrictive covenant would permit the Applicant to apply for Planning Permission for further house in the Restricted Area.
17. The Applicant has not established that the restrictive covenant retains no practical benefit nor that it impedes the reasonable enjoyment of the Restricted Area.”

The Applicant’s Response

12. Ms Grattan BL grouped the respondents’ objections into three categories:
 - (i) procedural (lack of notice etc);

- (ii) jurisdictional (the applicant has no standing etc); and
- (iii) substantive (the merits of the respective Article 5 factors).

Procedural

13. Ms Grattan BL asked the Tribunal to note that the respondent had been notified of the reference and having raised concerns in correspondence chose not to appear; the registered owner had been notified by the Tribunal and it had always been a matter for him whether he sought independent legal advice; in addition she submitted that there was nothing in the statute which required the registered owner to consent to the application.
14. The Tribunal agrees with Ms Grattan BL and finds that there were no procedural matters which would prohibit the reference from proceeding.

Jurisdictional

15. Ms Grattan submitted:

- (i) An applicant does not have to be the registered owner to bring an application under Article 5 of the Order. Article 5(1) of the Order provides that the lands Tribunal may “on the application of any person interested in land affected by an impediment” ... “make an order modifying, or wholly or partially extinguishing, the impediment ...”.

Standing is conferred on “any person interested in land”. The applicant does not therefore require a legal estate in land or even a legal equitable “interest”. Article 3(4) of the Order provides: “Any reference in this part to a person interested in land includes a person who is contemplating acquiring an estate in the land and person who has an interest in the proceeds of any future sale of the land.”.

The applicant was most definitely a person who had an interest in any future sale of the land. The agreement made between the registered owner and the applicant also provided for the future conveyance of an estate in the land to the applicant.

Accordingly the applicant had standing to bring the application.

(ii) A precise legal analysis of the nature of the rights conferred by the Licence Agreement was unnecessary. Similarly, the applicant was not bringing the reference on behalf of or as the agent of the registered owner so it was unnecessary to consider the Power of Attorney. The applicant was bringing the reference on its own behalf as both a person who had an interest in the proceeds of any future sale of the land and as someone who was contemplating acquiring an estate in the lands in the future.

16. The Tribunal agrees with Ms Grattan BL and is satisfied that the applicant had standing, conferred by the statute, to bring the reference to the Tribunal.

Substantive – The Article 5(5) Issues

17. Ms Grattan BL submitted, and the Tribunal agrees, that in exercising its discretion the Tribunal should take into account the matters listed in Article 5(5) of the Order:

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

Mr McGarrigle advised the Tribunal that the impediment was created in 1990, some 27 years previous, when the land was undeveloped and the general area was semi-rural. It was his opinion that the impediment was created to ensure the privacy of the respondents' houses and that any development of the reference land would be in keeping, in size and quality, with the respondents' property at 50 Crieve Road.

The Tribunal agrees.

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

Mr McGarrigle detailed the changes in the locality since 1990:

(i) There had been a development of dwelling houses erected to the side and rear of 50 Crieve Road. This was a private sector development comprising a mixture of detached and semi-detached dwellings.

- (ii) Adjacent to 50 Crieve Road three detached dwellings of greater than 2,000 ft sq each had been erected. Two of these dwellings were on the reference land.
- (iii) To the rear of 50 Crieve Road there were three pairs of semi-detached dwellings each of around 1,000 to 1,300 ft sq.

The Tribunal notes the significant changes in the land and the neighbourhood since the inception of the covenant in 1990.

5(5)(c) **Any public interest in the land, including any development plan etc.**

Mr McGarrigle did not consider this matter to be relevant to the subject reference.

5(5)(d) **Any trend shown by planning permissions granted for land in the vicinity ...**

Mr McGarrigle referred to the fact that planning permission had been granted for the proposed development of the reference land.

The Tribunal notes the trend of planning permissions granted in the locality, as detailed in 5(5)(b). The trend had clearly been to grant planning permission for semi-detached and detached dwellings in the vicinity of the reference land.

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 Grattan BL submitted that no evidence had been provided to the Tribunal in support of the specific issues raised by the respondents re the impact on the value of their dwelling house. The expert opinion of Mr McGarrigle was that the privacy of the respondents' property at 50 Crieve Road was preserved by fencing and mature hedgerow which surrounded it. He also had concluded that any benefit originally conferred by the covenant in respect of privacy and value was lost when a large number of higher density houses were erected to the side and rear of 50 Crieve Road.

The Tribunal agrees with Ms Grattan BL, the respondents had failed to submit any evidence in support of their assertion that the removal or modification of the covenant would reduce the value of their property. The Tribunal also agrees with Mr McGarrigle, the benefit originally conveyed by the covenant had been significantly reduced by high density development adjacent to the respondents' property.

5(5)(f) **Where the impediment consists of an obligation to execute any works ...**

Mr McGarrigle did consider this issue to be relevant.

5(5)(g) **Whether the person entitled to the benefit has agreed ...**

It was accepted by the applicant that the respondents were not consenting.

5(5)(h) **Any other material circumstances**

There were no additional circumstances which the applicant wished to draw to the attention of the Tribunal.

Compensation

18. On the basis that any practical benefit of the covenant had been significantly reduced by high density development adjacent to the respondents' property, Mr McGarrigle's expert opinion was that no compensation should be payable. In the absence of any evidence to the contrary the Tribunal accepts Mr McGarrigle's opinion.

Conclusion

19. In conclusion Ms Grattan BL submitted that the applicant had discharged the burden upon it in that it had established that being restricted to building one dwelling unreasonably impeded its enjoyment of the reference land. She also submitted that the impediment no longer

conferred a practical benefit on the respondents, there having been no sustainable evidence – based objections. Accordingly Ms Grattan BL submitted that the impediment should be extinguished.

20. Having considered in detail the issues outlined in Article 5(5) of the Order, the Tribunal agrees with Ms Grattan BL, the impediment unreasonably impeded the applicant’s enjoyment of the reference land or, if not modified would do so.
21. The Tribunal orders modification of the covenant to allow for the planning permission 2005/A483 or any variation thereof. The Tribunal also orders that no compensation is payable to any person.

ORDERS ACCORDINGLY

28th April 2017

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

Appearances:

Applicant: Mr Sheena Grattan BL instructed by Donnelly Neary & Donnelly, solicitors.