

**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/33/2009**

**BETWEEN**

**ROCKVILLE DEVELOPMENTS LIMITED – APPLICANT**

**AND**

- 1. MR & MRS P LYTTLE**
- 2. MRS IRENE BURGESS**
- 3. MR & MRS D MORELAND                   - RESPONDENTS**
- 4. MR & MRS WALLACE**
- 5. MR & MRS PARK**

**Re: Lands at Station Road, Craigavad, County Down**  
**(Folios AN149315, DN150309L, DN130761L, DN130758 and DN130759L)**

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

**Background**

1. Prior to commencement of the hearing Mr Brian Fee QC, on behalf of Rockville Developments Limited (“the applicant”), advised the Tribunal that agreement had been reached with the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and the reference now only concerned the applicant and Mrs Irene Burgess (“the respondent”).
2. The applicant is the owner of 14.3 acres of development land situated on the north-eastern perimeter of the development limit for Holywood and adjoining the Royal Belfast Golf Club. Outline planning permission, W/2001/1011/0, was granted for residential development of the 14.3 acres on 12<sup>th</sup> September 2003 and a reserved matters application for the construction of 26 dwellings was approved on 29<sup>th</sup> November 2007.

3. The respondent is the owner-occupier of 37 Station Road, Cultra and she holds the property as the assignee of a Fee Farm Grant dated 1<sup>st</sup> August 1924 between Elizabeth McKee, Hannah Isabella Fleming and Jane Gelston-Morrow of the first part, Hanna Johnston of the second part and Edwin Henry Shaw of the third part.
4. The Fee Farm Grant, of which it was not disputed that the respondent was a beneficiary, contained the following covenant (“the covenant”) on behalf of the Grantors:

“AND further that the Grantors shall not build or permit to be built or erected any buildings or erections whatsoever on the field adjoining the premises hereby granted coloured blue save a shed or outhouse for cattle or on such portion of another field adjoining as is coloured green in said map which contains in breadth at the eastern end sixty feet narrowing to forty feet at the western end where the said field coloured blue adjuts into it.”
5. The 14.3 acres, on which development had already commenced, included some 3.25 acres of land (“the reference land”) which was subject to the covenant and which effectively prevented the applicant from building five of the houses for which it had planning permission, namely sites 20, 21, 22, 23 and 24.
6. The applicant now seeks extinguishment or modification of the covenant to permit development in accordance with the planning permission already granted. The respondent opposes extinguishment or modification, or in the alternative, contends that substantial compensation ought to be payable if the covenant was to be extinguished or modified. The parties had, however, agreed that consideration of compensation, if any, would be subject to discussions following the current reference to the Tribunal.

### **Procedural Matters**

7. Mr Brian Fee QC, instructed by DWF (Northern Ireland) solicitors, represented the applicant. The respondent was represented by Mr William Gowdy BL, instructed by Peden & Reid solicitors. Mr Chris Callan presented expert evidence on behalf of the applicant and Mr Kenneth Crothers gave expert evidence on behalf of the respondent. Mr Callan and Mr

Crothers are experienced chartered surveyors. The Tribunal is grateful to the parties for their helpful submissions.

### **Position of the Parties**

8. The applicant's position was that the covenant contained in the 1924 Fee Farm Grant was an unreasonable impediment to its enjoyment of the reference land, within the meaning of Article 3(1)(b)(i) of the Property (Northern Ireland) Order 1978 ("the Order").
  
9. The respondent's position was that the covenant conferred a significant ongoing practical benefit on her in that it protected the undeveloped, sylvan outlook from her property, preserved the privacy of her home, and protected her from any unwelcome concomitants of development on the lands, including the noise, dust and disturbance of building work. In the circumstances, Mr Gowdy BL submitted that it would be inappropriate to deny the respondent her ongoing practical benefit by varying or modifying the covenant. In the alternative, if the Tribunal were to grant modification of the covenant, he submitted that the applicant should pay substantial compensation to the respondent.

### **Statute**

10. The relevant sections of the Order are:

"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."

And

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

- (a) ...
- (b) any change in the character of the land or neighbourhood;
- (c) ...
- (d) ...
- (e) whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit;
- (f) ...
- (g) ...
- (h) ...”

#### **Authorities**

11. The Tribunal was referred to the following authorities:

- (i) Danesfort v Morrow & Palmer (No 2) R/45/1999
- (ii) McGrath v O’Neill R/41/2004
- (iii) Kamack Developments v Stinson R/52/2007]
- (iv) Johnston v Dawson R/43/2010

And the following text book:

Preston and Newsom Restrictive Covenants paras 15-13 and 15-14.

#### **Mr Callan’s Expert Evidence**

12. At the outset of his examination of Mr Callan’s expert evidence, Mr Gowdy BL had questioned Mr Callan’s impartiality in the reference. He asked the Tribunal to note that Mr Callan had valued the applicant’s lands, including the reference land, for the Bank of Ireland on two occasions. In his bank valuation Mr Callan had stated that the reference land was subject to impediments, but commented:

“We are confident that if the beneficiaries of the covenant do not agree to its modification then this will be imposed by the Lands Tribunal ... In conclusion, we believe that the restrictions contained within the Fee Farm Grant do not adversely impact on the ability of the land to be fully developed and therefore we believe that the Market Value has not been adversely affected.”

13. In the circumstances Mr Gowdy BL submitted that this prior involvement with the valuation of the lands, where Mr Callan expressed an uncaveated opinion on which a third party relied, must constrain the independence with which he came to consider the respondent’s property in the context of the proceedings. Mr Gowdy BL considered the fact that Mr Callan had given advice to the bank must have acted as a factor influencing him towards upholding his earlier opinion that modification of the covenant would be “imposed by the Lands Tribunal”.
14. Mr Callan and Mr Crothers are very experienced chartered surveyors having appeared before the Tribunal on many occasions. The Tribunal also notes that there had been substantial agreement between the experts on most of the issues between them. Having considered in detail the oral and written evidence given by Mr Callan, the Tribunal is satisfied that Mr Callan’s evidence was unbiased. The Tribunal therefore considers the evidence of each expert, as submitted to the Tribunal, to be of equal weight.

#### **Discussion**

15. Article 5(1) of the Order provides that the Tribunal may make an order modifying or extinguishing an impediment on being satisfied:

“... the impediment unreasonably impedes the enjoyment of land or, if not modified or extinguished, would do so.”

Article 3(3) of the Order advises that “enjoyment” in relation to land includes its “use and development”.

16. In considering whether an impediment should be modified or extinguished the Tribunal must take into account the issues contained in Article 5(5) of the Order. There was general

agreement between the parties on most of these issues and the main areas of contention were 5(5)(b) “change in the neighbourhood” and 5(5)(e) “practical benefit”. The Tribunal attaches most weight to these issues.

#### **Article 5(5) Issues**

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

Mr Callan’s view was that the impediment provided a means of preserving the low density of development in the immediate vicinity of the respondent’s property.

Mr Crothers’ opinion was that the purpose of the covenant was a dual purpose – to preserve a view over a significant swathe of undeveloped land and to prevent any unwelcome concomitants of development on that land.

The Tribunal agrees with Mr Crothers.

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

It was common case that the character of the reference land had not changed. There was also a good deal of commonality between the experts as to the location of the neighbourhood, its character, and any changes to the neighbourhood.

Both experts were agreed –

- (i) The area was one of high quality with substantial houses situated on generous sites
- (ii) Comparison of the 1938 Ordnance Survey map with the current Ordnance Survey map showed that in the region of 80 dwellings had been constructed in the neighbourhood since that period.

Mr Callan considered that this increased density had brought about a change in the character of the neighbourhood.

Mr Crothers' opinion was that whilst there had been an increase in density that increase had not change the character of the neighbourhood.

The Tribunal agrees with Mr Crothers. Having inspected the reference land and the neighbourhood, the Tribunal is satisfied that the character of the neighbourhood had not changed, notwithstanding the increased development.

19. (5)(c) **Any public interest:**

The parties were agreed that this was not relevant to the subject reference.

20. (5)(d) **Any trend shown by planning permissions:**

This was not relevant.

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

The question of practical benefit was considered by the Tribunal in Danesfort v Morrow & Palmer (No 2) R/45/1999 at paragraph 34 –

“Both parties accepted that the proper test was not ‘what was the original intention of the restriction and is it still being achieved?’ but ‘does the restriction achieve some practical benefit and, if so, is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?’ - see Stannard v Issa [1987] 1AC 175 at 188 ...”.

Mr Callan's Evidence

Mr Callan's opinion was:

- (i) The two dwellings to be constructed closest to the respondent's property were situated between 50 to 60 metres away. Both properties would, therefore, be further away from the respondent's house than the properties belonging to her existing neighbours,

located at 35, 37a, 39 and 41 Station Road. All of these properties, including the windows, were visible from the respondent's property.

Mr Gowdy BL asked the Tribunal to note that in cross-examination Mr Callan had accepted:

- (i) The chimneys and roofs of the houses to be constructed on the reference land would be visible from the respondent's first floor.
- (ii) It would be very likely that the house on site 22 would be visible from the respondent's house, in addition to sites 21 and 23.
- (iii) The roof and top storey of sites 21 and 23 would be in sight from the respondent's house.
- (iv) The respondent would be seeing dwellings rather than greenery from her first floor.
- (v) The sea view which it was claimed the respondent enjoyed was only limited, and obscured to a large extent by increasingly mature trees. It was, however, only Mr Callan's evidence which linked the purpose of the covenant to a view of Belfast Lough.
- (vi) The applicant would be able to construct 21 and possibly up to 24 dwellings (as pointed out by Mr Fee QC there was a possibility that 3 of the dwellings could be set back from the lands affected by the covenant) on lands which were not affected by the covenant and that a number of these dwellings would be in "line of sight" of the respondent's property. The purpose of the covenant and so its practical benefit, however, was to protect the view over the reference land and not other lands.

## 22. Mrs Burgess' Evidence

The respondent gave evidence about the importance of the setting of the property when she chose it, the ongoing importance of the view to her and the fact that when overlooking the reference land she had no other house or windows in sight, thus ensuring her privacy. She confirmed that she was aware of the presence of the covenant when she purchased the property. She advised the Tribunal that because of the seclusion she did not close her curtains at night but if she could see the windows of houses on the reference land she would lose that



sense of seclusion and privacy. In conclusion she requested the Tribunal “to leave that little bit of greenery”.

23. Mr Crothers’ Evidence

Mr Crothers considered that as more and more of the surrounding area became developed, and as density rose, the benefit in protecting open green space became more important and more valuable. It was his opinion that such a covenant became of particular value and practical benefit to the respondent if the reference land was the only significant area of undeveloped land in the neighbourhood. He asked the Tribunal to note that the covenant was the only factor preserving the view and seclusion enjoyed by the respondent – such a benefit not being protected in the planning process.

24. Mr Fee QC submitted that Mr Crothers had made the case that the covenant enhanced the value of the respondent’s property but he had provided no evidence as to the nature and measurable level of that enhancement. Mr Gowdy BL referred to the agreement between the experts that issues of valuation and compensation would not be addressed until the outcome of the subject reference.

25. (5)(f) ... an obligation to execute any works ...

The parties were agreed that this issue was not relevant.

26. (5)(g) ... agreed expressly by his acts or omissions:

There was no issue between the parties.

27. (5)(h) Any other material circumstances:

No issues were raised.

## Conclusion

28. In conclusion Mr Fee QC submitted that, having regard to the particular circumstances of the reference lands, the special nature of the proposed development and its harmony with the existing built environment, clearly a matter that was of significance when planning permission was granted, the covenant conferred no practical benefit on the respondent. Alternatively, he submitted that, in line with the analysis provided by Mr Callan, any practical benefit of the covenant was entirely minimal so that its continued existence was not justified.
29. Drawing all of the Article 5(5) factors together and attaching most weight to Articles 5(5)(b) and 5(5)(e), Mr Gowdy BL submitted that the weight of these factors found against the release or modification of the covenant. He considered that the purpose for which the covenant was imposed remained as valid, if not more valid, now than at the date of the Fee Farm Grant. He further submitted that the covenant conferred a significant, ongoing practical benefit on the respondent in that it protected the undeveloped, sylvan outlook from her property, preserved the privacy of her home, and protected her from any unwelcome concomitants of development on the reference land. In the circumstances he submitted that it would be inappropriate for the Tribunal to deny the respondent her ongoing practical benefit.
30. The Tribunal notes the special nature of the proposed development and accepts that it is in keeping with the existing built environment in the “neighbourhood”. The Tribunal refers, however, to paragraph 22 of Danesfort Development Ltd v Morrow & Palmer which considered the issue of planning permission in relation to Property Order cases:

“The Tribunal cannot concern itself with the merits of the planning permission nor does it afford any form of appeal from the decision of the Department. Under the provisions of the 1978 Order the Tribunal is primarily concerned with the proprietary rights of private individuals constituted by the restrictive covenants.”

As in Danesfort, in this reference the Tribunal's primary concern is the proprietary rights of the respondent as protected by the Order.

31. The Tribunal notes:

- (i) Some of the existing houses in the vicinity were closer to the respondent's property than the nearest of the proposed dwellings, but accepts Mr Gowdy BL's point that these were not directly in "line of sight" of the respondent's first floor.
- (ii) What exactly would be visible from the respondent's property when the development was complete was disputed but it was generally accepted that "some" windows and "some" roof tops would be visible on the reference land.
- (iii) The applicant would be able to build 21 and possibly up to 24 (if 3 of the dwellings were set back, as noted by Mr Fee QC) of the 26 proposed dwellings without interference from the covenant.

32. Having viewed the reference land from the respondent's first floor window and considered the issues in Article 5(5) of the Order, the Tribunal is satisfied that the covenant does achieve an ongoing practical benefit for the respondent by protecting her view, privacy and peacefulness. The Tribunal also agrees with Mr Crothers, as more and more of the surrounding area becomes developed the benefit the covenant achieves in protecting the open green space of the reference land becomes more important. In Re Trollope's Application [1962] 14 P&CR 80 (quoted in Danesfort), a case which was decided under section 84 of the 1925 legislation in England and Wales, the Lands Tribunal heard evidence of planning permissions, including evidence that there was planning permission for a large number of houses adjacent to the boundary of a private country residence. The Tribunal held that "... the more the residence was beset on other sides the more precious to it was the outlook on one side secured by the covenant". In the circumstances of the subject reference the Tribunal is satisfied that the practical benefit achieved by the covenant is of sufficient weight to justify the continuance of the impediment without modification. The application for modification or extinguishment of the covenant is therefore dismissed.

**ORDERS ACCORDINGLY**

**28<sup>th</sup> April 2017**

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

**Appearances:**

**Applicant: Mr Brian Fee QC instructed by DWF (Northern Ireland), solicitors.**

**Respondent: Mr William Gowdy BL instructed by Peden & Reid, solicitors.**