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/6/2016

BETWEEN

DANIEL WYLIE AND KATHLEEN WYLIE – APPLICANTS

AND

ALAN GIBSON AND ELIZABETH GIBSON – RESPONDENTS

Re: 12 Grey Point, Helen's Bay, County Down

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

Background

1. Mr Daniel Wylie and Mrs Kathleen Wylie ("the applicants") are the owners of 12 Grey Point, Helen's Bay ("the reference property"). The applicants hold the reference property under a lease dated 1st February 1973 ("the 1973 lease") between Kathleen Annie Lee Adams on the one part and Brian Terence Frew on the other part, for a term of 900 years, which they acquired 5th December 2011.

2. The reference property currently comprises a bungalow of approximately 170m^2 gross external area ("GEA"). On 29th January 2016 the applicants obtained planning permission for the demolition of the existing bungalow and its replacement with a new two storey house including a two storey rear return and a garage, all in the footprint of the existing bungalow. The GEA of the replacement property will be approximately 412m^2 and it was also generally agreed that the ridge height would increase from 5.25m to 8.6m approximately.

3. In clause 4 of the 1973 lease the tenant covenanted:

"Not to erect any building or erection upon the demised premises except in accordance with plans site plans elevations and specifications previously approved of by the Lessor or her agent in writing."

4. In 2004 Mr Alan Gibson and Mrs Elizabeth Gibson ("the respondents") purchased the landlords interest in the 1973 lease. The respondents reside at No 14 Grey Point and it was not disputed that they were the beneficiaries of the covenant contained in clause 4 of the 1973 lease.

5. The applicants are seeking modification of the covenant to permit the construction of the new house in accordance with the planning permission. The respondents have, however, refused to approve the applicants' plans for the new house and on 20th April 2016 the matter was referred to the Lands Tribunal for determination under the Property (Northern Ireland) Order 1978 ("the Order").

Procedural Matters

6. The applicants were represented by Mr Douglas Stevenson BL, instructed by Mills Selig Solicitors. Mr Richard Coghlin BL, instructed by Johns Elliot Solicitors, represented the respondents.

7. The Tribunal also received expert reports from Mr Chris Callan on behalf of the applicants and from Mr Kenneth Crothers on behalf of the respondents. Mr Callan and Mr Crothers are experienced chartered surveyors but neither was called to give oral evidence as the parties had agreed that the main bulk of the hearing would concern the issue of "practical benefit".

8. Mr Alan Jones, an experienced chartered architect provided written and oral expert evidence on the issue of "practical benefit", on behalf of the applicants. Mr Andrew Bunbury provided reciprocal evidence re the same issue, on behalf of the respondents. Mr Bunbury is an experienced landscape architect.

9. Mr David Wylie, Mrs Elizabeth Gibson and Mr Alan Gibson gave oral evidence to the Tribunal.

10. The Tribunal is grateful to all of the participants for their submissions.

Position of the Parties

11. The applicants' position was that the extent of the practical benefit secured by the covenant was clearly not of sufficient weight to justify the applicants from being prevented from constructing their new family home and they requested the Tribunal to order modification of the covenant to permit the proposed development.

12. The respondents considered that this was a reference which should turn on:

    (i) the continuity between the purpose for which the covenant was created and the purpose for which it was now being used.

    (ii) the substantial practical benefit the covenant now provided to the respondents.

    Given these factors, the respondents considered they were not acting unreasonably in relying on the covenant and given the very substantial amenities provided to the respondents by their existing dwelling, they submitted that the covenant could not be said to be unreasonably impeding the applicants' use of the reference property.

Statute

13. Articles 3 and 5 of the Order are relevant to the subject reference:

    "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, 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 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.

Authorities

14. The Tribunal was referred to the following authorities:

- Re Chandler's Application LP/70/1957
- Re Wards Construction (Medway) Ltd's Application LP/29/1971
- Wrotham Park Estate Co Ltd v Parkside Homes [1974] 1 WLR 798
- Re Bushell's Application LP/54/1985
- Re William's Application LP/5/1986
- David Lawrence Andrews and Margaret Joy Andrews v Rev Davis and Mrs Davis R/17/1993
- Danesfort Developments Limited v Mr and Mrs M Morrow and Richard Palmer Part II R/45/1999
- Diggers and Others Application (No 2) [2001] E EGLR 163
- Rickman v Bundell-Bruce [2005] EWHC 3552 CH
- Kamack v Stinson R/52/2007
- Russell Vince, Victoria Vince [2007] WL 257 3910
- Brian Robert Wild, Patricia Jean Wild [2012] UKUT 306 (LC)

Use and Enjoyment

15. As specified in Article 5 of the Order the Tribunal has a discretion to make an order modifying or extinguishing an impediment on being satisfied that the impediment unreasonably impedes the enjoyment of land. As defined in Article 3 of the Order, "enjoyment" in relation to land includes its "use and development".

16. The Tribunal therefore agrees with Mr Coghlin BL, the burden rested with the applicants to persuade the Tribunal that, if not modified or extinguished, the impediment would unreasonably impede their enjoyment of the reference property.

17. Mr Wylie gave evidence that he purchased the reference property in June 2009 as a family home. It comprised an early 1970's bungalow which had not been improved since construction. He advised the Tribunal that the roof was now in poor repair, there were damp issues and in some areas there was exposed piping. As the size of his family had increased he now also required more space and additional bedrooms. If development of the reference property was refused he advised the Tribunal that he would have to sell and find alternative accommodation. He therefore considered that if the covenant were not modified to allow for development in accordance with the approved planning permission it would unreasonably impede his "use and enjoyment" of the reference property.

18. When questioned by Mr Coghlin BL, Mr Wylie confirmed that he had been made aware of the existence of the covenant by the respondents' solicitors on 1st April 2015. Mr Coghlin BL pointed out that the covenant stipulated that any plans to develop the reference property required the respondents consent. Mr Wylie agreed that he had never formally sought such consent.

19. Having considered Mr Wylie's evidence the Tribunal is satisfied that the covenant, if not modified, would impede the applicants use and enjoyment of the reference property.

Practical Benefit

20. Did the covenant secure any practical benefit to the respondents, as stipulated under Article 5(5)(e) of the Order? The property at 14 Grey Point, which was purchased by the respondents in 2004, was described by Mrs Gibson as her "forever" home. It was in an ideal location close to the sea front at Helen's Bay and she outlined to the Tribunal the respondents' extensive use of the outdoor areas, such as the patio and the decking. She also explained how the property received substantial light through the patio doors, the back door and the kitchen window.

21. Mrs Gibson confirmed that her main issues with the proposed development were the "massing and loss of spaciousness" which she considered would occur if the development went ahead. It was her view that it would destroy the respondents' privacy and their enjoyment of the outdoor space which they coveted.

22. Mr Gibson gave evidence that when he first became officially aware of the applicants' development plans he had recollection of "something" in his title deeds which could prohibit building on the reference property. He then contacted his solicitor who informed him of the existence of the covenant which required any development plans to be approved by the respondents. If the development were to proceed, similar to Mrs Gibson, his main concerns were the loss of sunlight and the impact of massing.

23. Having considered their submissions the Tribunal is satisfied that the covenant achieved a real practical benefit for the respondents in that they could control the form of development on the reference property, thus limiting any adverse impact on their property.

Planning History

24. Both parties made reference to the history of the planning proposals which culminated in the grant of planning permission for the development of the reference property, W/2015/00027/F:-

25. On 29th January 2015 the respondents received official notification from the planning service of the applicants' proposed development of the reference property. They responded to these proposals by letter of 10th February 2015 confirming that their main issues with the proposals were "privacy" and "the new house will have a significant impact on all aspects of our property".

26. Also, at paragraph 5 of their letter they noted: "We have no particular objections with Mr & Mrs Wylie undertaking the changes they propose but in the specifics referred to above we do have major concerns which we believe could be mitigated by all or some of the suggestions we have made". These suggestions concerned a reduction in the number of windows on the gable wall overlooking the respondents' property, which at that stage numbered seven.

27. On 19th August 2015, following various communications, the applicants' submitted amended plans which reduced the number of windows on the gable wall to three and all of which would have obscure glazing. At hearing Mr Stevenson BL suggested that these proposals could be incorporated in any modification of the covenant, if granted.

28. On 13th October 2015, notwithstanding these amendments, the respondents raised further objections to the proposals which then mainly concerned the "elevations" of the gable wall which the respondents considered would considerably reduce the amount of sunlight to their rere garden.

29. The respondents subsequently raised further objection by way of letter incorrectly dated 19th October 2015 (it was confirmed at hearing that the correct date should have been 19th January 2016).

30. In response the planning office commented on the issues raised by the respondents:

> "The proposal will be intrusive, dominant and overwhelming to No 14.
>
> I have considered that the proposed dwelling is in-keeping with the character of the area and the report above sets out the various separation distances to the boundary and rere elevation of No 14. These separation distances are in accordance with the guidance set out in Creating Places and would ensure that the proposed dwelling would not adversely impact on No 14 by way of dominance, intrusion or overwhelming impact.
>
> Loss of Sunlight and Overshadowing
>
> The separation distance ensures that the proposal does not adversely impact on the dwelling at No 14. I have undertaken the 45 degree test as set out in the Building Research Establishment site layout planning for day/sunlight and the proposal does not fail this test. In fact the proposal easily passes this test. The orientation of the rere of the dwelling at No 14, slightly away from the side elevation of the proposed dwelling, further ensures that loss of sunlight and overshadowing to the windows of No 14 will not have an adverse impact on this dwelling.

The proposed dwelling would be out of character with the Area of Village Character

I have carried out my assessment of the proposal with regards to the character of the area and the impact of the area of village character. This addendum to the main report further discusses the impact of the proposal in relation to the AVC and I am satisfied that there will not be any adverse impact on the character of the area. Policy ATC 2 states that proposals should maintain or enhance its overall character and respect the built form of the area. I am satisfied that the proposed dwelling would not adversely impact on the character of the area and as such it maintain its overall character and respect its built form."

31. The Tribunal draws no inference from the fact that at various stages the respondents appeared to change their mind about the issues which concerned them re the proposed development. They were entitled to raise additional objections if they so wished.

32. Mr Coghlin BL submitted that the applicants could have called the planning officer who made the decision in respect of the proposed development to give evidence to explain the basis of his decision and in particular what he meant by the 45 degree test. Having failed to do so he considered it difficult for the Tribunal to place any weight on the planning comments.

33. The Tribunal notes the considerations of the planning officer but refers to paragraph 22 of Danesfort v Morrow & Palmer:

"22. In accordance with these authorities the Tribunal can and should take into account the planning permission for the City Villa Development granted by the Department of the Environment. On the other hand the Tribunal also recognises that its statutory jurisdiction afforded by the 1978 Order is quite different from that afforded to the Department of the Environment by the provisions of the Planning (Northern Ireland) Order 1991. 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 is therefore primarily concerned with the propriety rights of the respondents which were protected by the Statute.

The Issue for Determination by the Tribunal

34. In Danesfort the Tribunal also gave guidance that in disputes concerning restrictive covenants 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 of sufficient weight to justify the continuance of the restrictions without modification?" [see Stannard v Issa (1987) 1AC 175 at 188]. This was therefore the issue to be determined by the Tribunal in the subject reference.

35. In determining this issue the Tribunal must consider the matters detailed in Article 5(5) of the Order. The Tribunal has, however, a discretion to determine the weight to be attached to each of the matters specified in Article 5(5) and an overall discretion which must be exercised judicially [see Andrews v Davis]. In the subject reference the parties had agreed that the main issue in dispute was contained in Article 5(5)(e):- "Whether the impediment secures any practical benefit and, if it does so, the nature and extent of that benefit". The Tribunal now considers all of the Article 5(5) issues but agrees that most weight should be given to 5(5)(e).

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

36. Mr Stevenson BL agreed that the purpose of the covenant was to afford the grantor some degree of control over the up to two houses that could be constructed on the land demised by the 1973 lease. He submitted, however, that the purpose of the covenant was not to afford

the grantor the right to prevent any house being erected on the property. The grantor could reasonably object to a particular type of house but not to a house simpliciter.

37. Mr Coghlin BL submitted that the covenant clearly implied that the grantor would retain control over the form of the dwelling house that would be built by the grantee, including the proposed elevations of the dwelling house.

38. The parties were therefore generally in agreement about the purpose of the covenant.

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

39. Mr Stevenson BL submitted that out of the land sub-demised by the owners of the respondents' property, four dwellings had been constructed. Three of those (8 to 10 The Fort) were two storey dwellings and the only bungalow was the reference property.

40. Mr Coghlin BL did not consider this issue to be relevant in the circumstances of this reference.

41. The Tribunal notes that three out of the four properties constructed on the demised lands were two storey houses.

5(5)(c) Any public interest in the land

42. Both parties did not consider this issue to be relevant.

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

43. Mr Stevenson BL submitted that the conclusions of the planning service, that the proposed development would have no adverse impact, were something to which the Tribunal should attach significant weight.

44. As set out in Re Diggens Application Mr Coghlin BL considered this to be a negative requirement as it was accepted in that authority that planning trends alone did not provide a reason to dismiss an application.

The Tribunal has noted the considerations of the planning office. In the subject reference, however, as outlined at paragraph 33, the Tribunal is primarily concerned with the propriety rights of the respondents, as protected under the Statute.

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

45. Despite working from basically the same photomontages and shadow studies, the expert architects held completely opposing views of the probable impact of the development proposals on the respondents' property at No 14.

46. Mr Jones considered the proposals to be "not a significant change" to the existing condition and in his opinion, maintaining the single storey garage between the proposed dwelling and boundary hedge, ensured minimal impact on No 14. He also considered the grant of planning permission to be an important factor, as checks and balances within that process would have ensured fairness and have involved due consideration of the impact of the proposal on its context and neighbours. In conclusion he considered that the proposals demonstrated "good neighbourliness".

47. Mr Bunbury's opinion was that, based on the two shadow studies, there would be a significant and adverse shadowing caused by the proposed development across the garden area and west facing facades of No 14 in late afternoon and evening times for over half the year and this would result in a substantial loss of amenity and enjoyment of this part of the property.

48. It was also his opinion that the photomontage clearly demonstrated there would be significant adverse effects in visual amenities and view quality on the property at No 14, deriving from the mass of the replacement dwelling at No 12. He considered that this would be exacerbated

by the increased extent of shadowing in afternoon and evening times, due to the extra storey and 3m increase in ridge height, at the very times when the garden, patio and decking areas were likely to be most used. He concluded that the development was not acceptable in landscape, visual amenities and shadow/light terms and it would have significant adverse effects on the quality, sense of space and enjoyment of the property at No 14.

49. As can be seen from their evidence the two main areas of disagreement between the experts concerned the impact of (i) shadowing and (ii) massing on the respondents' property.

Shadowing

50. Mr Stevenson BL submitted:

(i) there was no evidence before the Tribunal that the proposed development would have any effect whatsoever on the respondents' property between the months of September to March.

(ii) there was no issue between the parties in relation to the shadow study for June.

(iii) the only dates and times at which the respondents produced any evidence of any increase in shadowing were in April and August at 18:00. In these two months the increased shadowing at 18:00 was negligible.

(iv) the shadow studies demonstrated how quickly at this time of year the shadow was moving. At 16:30 there was no issue, by 18:00 there was a very minor increase in shadowing but the shadow of the existing bungalow was already in the face of the respondents' property and by 19:30 the whole area was in complete shadow. The extremely minor increase in shadowing therefore only lasted for a very short period of time and would, of course, only arise on days on which it was sunny, which were relevantly few and far between in this jurisdiction.

(v) it was clear from the shadow studies that the existing features (the existing bungalow, the respondents' hedge and No 10 The Fort) already caused extensive shadowing to the respondents' property.

51. In conclusion Mr Stevenson BL submitted that Mr Jones' view, that the proposed development was "not a significant change", was obviously the correct one. He considered that the only evidence the Tribunal should attach any weight to on the question of shadowing was the

shadow study which was accepted as correct by the parties respective experts and those studies demonstrated the effect of the proposed development of shadowing to be de minimis.

52. Mr Coghlin BL submitted:

(i) Mr Jones had prepared his opinion without having considered the effect of the increased shadowing on the windows of the respondents' property and indeed, having only "peeked over the hedge" at No 14 instead of paying the respondents the courtesy of a site visit.

(ii) it was common sense that where a commodity was in short supply, the loss of any part of that commodity was a substantial loss. Sunlight was in short supply in Northern Ireland and so the loss of the evening sun to windows and outside areas was, a substantial loss.

(iii) the English decision in Re Vinces Application provided useful guidance as to when even a loss of sunlight to a limited area should be considered significant for the purposes of assessing substantial benefit. In that case the court was satisfied that a loss of sunlight and daylight to a ground floor utility room and cloakroom was significant (para 50).

(iv) following that guidance, the Tribunal should find as a matter of fact that the loss of sunlight to the kitchen, hall and open plan dining room represented a significant loss of sunlight for the purposes of applying Article 5.

(v) it was noteworthy that in Re Vinces Application the judge considered that it was significant that the rooms deprived of light had glazed doors to "ensure the maximum distribution of available light". The Tribunal would know from its site visit that the open plan nature of the dining room functions in the same way and this will be deprived of sunlight by the proposed development.

Massing

53. In relation to massing Mr Stevenson BL submitted:

(i) the reference concerned the replacement of an existing bungalow with a house and it was the increase which was relevant, not the size of the house itself.

(ii) the ridge height of the proposed house (8.6m) was smaller than that of No 10 The Fort which was also constructed on land demised by the 1973 lease and which also neighboured the respondents' property.

(iii) in terms of photomontages the minor difference between the experts was the extent of "sky" that should be shown. Mr Bunbury had taken a "letter box" view of the proposed development i.e. he had extended the field of vision horizontally but not vertically, making the loss of sky seem more significant.

(iv) Mr Jones' evidence demonstrated why his montage more accurately reflected what the eye would see. That contention was not substantially challenged and on that basis, of the two montages Mr Jones' was to be preferred.

54. Mr Coglin BL submitted:

(i) in relation to massing, Mr Bunbury had recited his relevant experience and that his office had a set of criteria for judging the magnitude of visual effects which ranged from "negligible" to "substantial" which he defined: "the proposal forms an immediately apparent component in the view and will redefine its baseline characteristics". He offered the opinion that, in the subject reference, the proposed development would fall into the category of "substantial".

(ii) Mr Bunbury accepted that the photomontage he had prepared and the traces over his photomontage prepared by Mr Jones, were both interpretations of the effect of the proposed development and the Tribunal equipped with both would be in a good position to make up its own mind.

(iii) the respondents' response to the proposed development was that it would represent a significant increase in visible mass that would leave them with a sense of loss of spaciousness in an area of their property that was very important to them.

(iv) the English guidance was again apposite. In Re Wilds' Application it was argued by the applicants that "the existing bungalow roof is currently visible over the hedge between the two properties – and the new gable [while] admittedly higher would be only marginally more visible, especially when the specimen trees that he had … strategically planted to create a natural screen, matured" [para 22]. The increase in height was at 2.67m, considerably less than the difference in ridge height in the present reference. The judge found, "I am satisfied that the issue of the potential for the proposed new gable wall to have a severely detrimental impact on the outlook from the objectors' property by introducing a stark and overbearing structure virtually right onto the boundary is enough on its own to enable me to conclude that the benefits [of the covenant] are of substantial value and advantage" [paras 75 and 76]. The Tribunal must in its discretion take this guidance into account and should follow it to find as a matter of fact that the benefit of the covenant in the present case was of substantial value and advantage.

55. With regard to the photomontages Mr Bunbury had taken a "letter box" view of the proposed development while Mr Jones had incorporated "sky" into his interpretation. Having visited the respondent's property the Tribunal prefers Mr Bunbury's photomontage, as the Tribunal considers it to be more reflective of the view through the respondents' rear windows and patio doors.

56. The Tribunal also notes the competing views of the experts re the "massing" impact of the proposed development. It was a matter of fact, however, that the proposed development would be significantly larger and higher than the existing.

57. In Andrews v Davis the Tribunal underlined the "very distinct differences" between the English scheme under the 1925 Act and the Northern Ireland scheme under the 1978 Order but commented: "To this extent the Tribunal considers that many of the cases decided in England, and text books such as Preston and Newsom's 'Restrictive Covenants affecting freehold land' 8th Edition 1991, will often provide helpful guidance as to the application of the principles and how that discretion should be exercised".

58. The Tribunal notes the "helpful guidance" outlined in Re Vinces Application and Re Wilds' Application, as put forward by Mr Coghlin BL.

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

59. Both parties agreed that this issue was not relevant.

5(5)(g) Whether the person entitled to the benefit of the impediment had agreed either expressly or by implication, by his acts or omissions, to the impediment being modified or extinguished

60. It was accepted by both parties that the respondents had not agreed to the covenant being modified. Mr Stevenson BL asked the Tribunal to note, however, that the original covenantee had no issue with the erection of a two storey dwelling on No 10 The Fort, being part of the premises demised by the 1973 lease and which had a higher ridge height than the proposed development and which, as the shadow studies showed, cast shadows over the respondents property.

5(5)(h) Any other material circumstances

61. Mr Stevenson BL did not consider this issue to be relevant. Mr Coghlin BL asked the Tribunal to note that the applicants did not reply to any of the respondents' letters concerning their

unwillingness to consent to the development proposals and which had forced the respondents to threaten an injunction.

Conclusions

62. Mr Stevenson BL submitted that the Tribunal was involved in a balancing exercise in that it must consider the extent of the practical benefit of the covenant and weigh that against the development it prevented on the applicants' property. He considered the practical benefit secured by the covenant to be minimal, for the reasons set out by Mr Jones. Set against that was the catastrophic outcome for the applicants if the covenant was not modified – they would, as Mr Wylie explained, have to sell their bungalow and move elsewhere to get a suitable family home. In conclusion Mr Stevenson BL submitted that the extent of the practical benefit of the covenant was not of sufficient weight to justify the applicants from being prevented from constructing their new family home.

63. Mr Coghlin BL submitted that the matters identified in Article 5(5) indicated that the covenant was not unreasonably impeding the applicants' enjoyment of the reference property. Even if, which was denied, the applicants' personal circumstances had any weight in the balance, he considered that weight should be strictly limited and should not be allowed to outweigh the respondents' interest in upholding the covenant.

64. Mr & Mrs Gibson gave evidence that their two main areas of concern were (i) shadowing and (ii) massing, with the most concerning of these being massing. With regard to shadowing it was generally agreed that there would be "some" additional shadowing on "some" occasions April, May, July and August. Mr Bunbury considered the impact of this additional shadowing to be significant while Mr Jones considered it to be minimal. Although the expert evidence was inconclusive the Tribunal notes the general agreement that "some" additional shadowing would occur on "some" occasions but finds that this issue alone would not be of sufficient weight to warrant the continuance of the covenant without modification.

65. The impact which mainly concerned the respondents was massing. The Tribunal had the benefit of photomontages from both experts but on inspection it considered Mr Bunbury's

"letter box" approach to be more realistic in the circumstances. The respondents considered the profile of the existing bungalow at No 14 to be relatively unobtrusive. The ridge height of the existing garage was about 3.5m while the ridge height of the proposed garage would be 4.6m. The existing bungalow had a ridge height of 5.25m at its highest point and in comparison the ridge height of the proposed house would be about 8.6m. The gable wall of the proposed house would be a solid plane while part of the existing gable wall of the bungalow was set back. The GEA of the house would increase from 170m^2 to 412m^2.

66. Having carefully considered the facts and evidence, as applied to the relevant provisions of Article 5(5) of the Order, with most weight being attached to Article 5(5)(e) the Tribunal is satisfied that the covenant does achieve real practical benefit for the respondents in that they can control the form of any development on the reference property, thus maintaining the sense of privacy and spaciousness which they currently enjoyed. The Tribunal is also satisfied that the massing of the proposed development would have an adverse impact on that sense of spaciousness and that impact was of sufficient weight to justify the continuance of the covenant without modification. The application for modification is therefore dismissed.

ORDERS ACCORDINGLY

26th April 2017

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

Appearances

Applicants – Mr Douglas Stevenson BL instructed by Mills Selig, Solicitors.

Respondents – Mr Richard Coghlin BL instructed by Johns Elliot, Solicitors.