

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/1/2021

BY

**ALAN MILLIGAN, FREDERICK CROMIE AND JOHN LOWRY AS
TRUSTEES OF THE MOVILLA GOSPEL HALL – APPLICANTS**

AND

VIOLET HILL LIMITED - RESPONDENT

Re: Movilla Gospel Hall, Movilla Road, Newtownards

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

Background

1. Movilla Gospel Hall, Movilla Road, Newtownards (“the reference property”) is held under a lease (“the lease”) dated 14th December 1982 between William Copeland & Son Ltd (1) and The Baptist Union of Ireland (Northern) Corporation Limited (2) for a term of 9,000 years at a peppercorn rent.
2. By deed of variation dated 3rd February 1997 Alan Milligan, Frederick Cromie and John Lowry, as Trustees of the Movilla Gospel Hall (“the applicants”), became the tenants under the lease.
3. The deed of variation contained covenants on the applicants’ part to (i) construct a Gospel Hall; and (ii) not use the reference property for other than a Gospel Hall.
4. The reference property had been continually used as a Gospel Hall but the applicants advise that the congregation has depleted such that it has been determined that the ministry at the reference property should cease and the reference property be sold. The applicants consider that they require the “user” covenant to be extinguished in order to facilitate the sale.

5. They advise that on 30th June 2016 they wrote to Violet Hill Limited (“the respondent”) requesting its consent to extinguish the covenant but it declined to do so. Subsequently, on 26th January 2021, the applicants made a reference to the Lands Tribunal under the Property (Northern Ireland) Order 1978 (“the Order”) seeking extinguishment of the covenant.

6. Following several mentions before the Tribunal it was established that the applicants had not applied for outline planning permission on the reference property until 18th August 2021. The permission sought “demolition of the Gospel Hall and erection of 5 dwellings”. The application is still under consideration by the Planning Service.

7. At a mention before the Tribunal on 2nd September 2021 submissions were sought from the parties on whether the Tribunal should:
 - i. dismiss the current reference without prejudice to the applicants bringing a new reference when planning permission had been obtained.
 - ii. adjourn the reference pending the outcome of the planning application.
 - iii. modify/extinguish the covenant conditional upon planning permission being granted.

Procedural Matters

8. The Tribunal received a written submission from Mr Simon Chambers solicitor of Russell & Co, Newtownards, on behalf of the applicants and from Mr Douglas Stevenson BL on behalf of the respondent. In the current circumstances the parties had agreed that this preliminary issue should be decided by way of written representations only. The Tribunal is grateful to the legal representatives for their helpful submissions.

Position of the Parties

9. The applicants' position was that the Tribunal should adjourn the proceedings pending outline planning permission being obtained. The respondent sought dismissal of the reference.

The Legislation

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

“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.”

11. Article 3 of the Order defines the scope of “enjoyment”:

“3(3) In any provision of this Part – ‘enjoyment’ in relation to land includes its use and development.”

Authorities

12. The Tribunal was referred to the following authorities:

- i. McNicholl v Mullan R/49/1999
- ii. George Conville & Marie Conville R/64/2000

The Applicants' Submissions

13. Mr Chambers referred to what he considered to be the respondent's position that, based on the Tribunal's decision in McNicholl v Mullan R/49/1999, where the applicant was not granted modification due to the fact that he had no proposal for the user of the land and no planning permission for same, the respondent favoured dismissal of the application and a fresh application when planning permission was in place.

14. The applicants did not accept that the respondents position was correct:

- i. The respondent's interpretation of McNicholl was unduly restrictive.
- ii. In any event there was nothing to prevent the applicants from amending their referral notice if this was required.

15. Mr Chambers asked the Tribunal to note from its decision in McNicholl:

- i. The covenants prevented the applicants from using the reference property for certain purposes.
- ii. The applicant did not have any particular use in mind for his lands but simply wanted flexibility to sell [para 37 of the decision].
- iii. The Tribunal opined that "Grounds of wishing for flexibility were not sufficient" [para 38 of the decision].
- iv. The Tribunal reasoned at para 42:

in order to be able to decide whether the restriction would impede the proposed user, the Tribunal must be furnished with:

- a. particulars of the restrictions.
- b. sufficient details of the proposed user to enable the Tribunal to decide whether the restriction would bite on it.; and
- c. evidence that, apart from the restriction, the proposed user would not otherwise be prevented; to show that the restriction itself would "impede" the user. Thus, if planning permission was requested for the proposed user but had not been obtained, the Tribunal may not be satisfied that the continuance of the restriction itself would impede the user [see Land Covenants by Scannell 1996 at page 401 and 402].
- v. In exceptional circumstances the Tribunal will consider making a decision that would otherwise be premature [see para 44 of the decision].

16. Mr Chambers considered the applicants' reference to the Tribunal to be different from McNicholl in that the covenant they wished to have extinguished did not simply prevent them from using the reference property for specific purposes but rather it required them only to use the lands for one purpose, namely as a Gospel Hall. He asked the Tribunal note that the applicants had been unable to find a congregation to keep the Gospel Hall as a place of worship and therefore any use they wished to put the reference property to was prohibited, including its sale.
17. The applicants could not use the reference property for any practical purpose at all and on that basis Mr Chambers did not consider planning permission to be relevant.
18. He did not consider the subject reference to be similar to McNicholl and as such the rationale underlying that case was not applicable. Even if it were, the applicants contended that the matters set out at para 42 of McNicholl could be satisfied in a context where the reference property was sterile for any use, save as a Gospel Hall, for a period of 9,000 years from 1st May 1982.
19. Mr Chambers considered the respondent's interest in the reference property to be de minimis and it was hard to see what benefit it could have in retaining the covenant. At worst, he submitted that the applicants' situation fell under the "exceptional" category given the extreme nature of the covenant and the sterility of the reference property, hence planning permission should not be required in the subject application.
20. Mr Chambers asked the Tribunal to note that McNicholl went beyond the wording of Article 5(1) of the Order, which had no such requirement that planning permission be in place but instead granted a general jurisdiction to the Tribunal.
21. In summary, Mr Chambers did not consider the matter to be akin to a situation where a plaintiff issued a writ for personal injury before they had in fact suffered any injury, rather the

applicants' position was that a restrictive covenant should be extinguished and they simply wished to expand their grounds and evidence. He considered that there could be nothing objectionable in granting an adjournment to allow for this and to permit the applicants to obtain outline planning permission. He submitted that dismissing the application was unwarranted but furthermore it would be wasteful of costs and the Tribunal's time given that a fresh application would proceed anyway.

The Respondent's Submissions

22. Mr Stevenson BL referred the Tribunal to paras 32 to 49 of McNicholl from which he made the following submissions:

- i. Article 5(1) of the Order provided that the Tribunal's jurisdiction to modify/extinguish a covenant was only engaged when the Tribunal was satisfied "the impediment unreasonably impedes the enjoyment of land".
- ii. If a party required planning permission for its proposed development, then the Tribunal could not be satisfied that the impediment unreasonably impeded the enjoyment of land, as the enjoyment was already impeded by the lack of planning permission [see para 42(c)] in McNicholl.
- iii. The Tribunal and any respondent must be presented with detailed proposals of any proposed development [see paragraphs (39) and (42) of McNicholl]. The Tribunal quoted with approval the decision in Re Glevum where the President of the English Tribunal stated "any application should be assessed not only with the planning permission but also with detailed plans of a kind which could be incorporated in an order".
- iv. The Tribunal could, in theory, grant modification in line with an outline permission [see para 44 of McNicholl], but only then if "sufficient details of the proposal are laid before the Tribunal".
- v. What was clear in McNicholl was (save for in exceptional cases) the Tribunal needed in the very least, an outline permission (not application) and sufficient details of the proposal before it could countenance modification.

23. The question posed at the review in the subject reference was whether the Tribunal could, in theory, modify the covenant conditional upon planning permission being obtained. The respondent considered that this should not be done for the following reasons:

- i. The Tribunal's jurisdiction was only properly engaged if planning permission had been granted.
- ii. Making an order which stated that "the covenant is modified if planning permission is granted", was akin to saying "the covenant is modified if it unreasonably impedes development". It was to put matters back to front – the Tribunal must be satisfied the impediment unreasonably impeded development before it ordered modification.
- iii. In order for the Tribunal and the respondent to make an informed decision as to whether any impediment should be modified, the Tribunal needs details of the proposed development. It needed to know precisely what was envisaged, in order that it could consider how that development would affect a respondent, and any other party who might be affected by the modification of the impediment.
- iv. The subject reference was for the construction of five houses. There was no detail on what precisely was proposed. It was impossible to say how any scheme might affect the reference property, the respondent's interest, or how it would affect neighbouring properties.
- v. Even if the applicants were to provide some detail on the scheme, there was no certainty that this might be the final form of the scheme. The Planning Service may require variation to the proposed scheme. The case would then be run on the basis of a scheme, and permission would be granted for a different scheme. That would render the whole proceedings otiose.
- vi. If permission were refused, then the proceedings would similarly be rendered otiose. The respondent should not be put to the costs of defending proceedings which were, or could be otiose.
- vii. Permission might be granted which required the applicants to obtain rights over adjoining land (e.g. for sight lines, sewage, access etc.). The applicants may not be able to secure these rights. The covenant would again, in that case, not be impeding any development, as the applicants would not be able to develop in any event.

- viii. In the absence of a detailed scheme, for which permission had been granted, it would be impossible for the Tribunal to make an order with the appropriate degree of certainty.
24. For all of those reasons Mr Stevenson BL submitted that the Tribunal should not allow the case to proceed on the basis that the covenant may in theory be modified if planning permission is granted.
25. On the issue of whether the reference should be dismissed, Mr Stevenson BL made the following submissions:
- i. The application which was brought was for the covenant to be extinguished. That was no longer the application that was being pursued. The applicants were therefore making a different case. If they wanted to make a different case, then they needed to bring a different application.
 - ii. If the applicants had preceded the application with the appropriate pre-action correspondence, then the respondent could have pointed out the issue with making an application without planning permission, and the costs incurred by the respondent to date would not have been incurred. The applicants should have to suffer the consequence of making a wrong-headed application.
 - iii. There was no certainty when, or if, planning permission might be granted. The respondent should not be held into proceedings in which there was no certainty if they will proceed, or when they will proceed.

Conclusions

26. In this preliminary hearing there were three options available to the Tribunal:
- i. Dismiss the current application with liberty for the applicants to make a fresh application when planning permission has been obtained.
 - ii. Stay the proceedings before the Tribunal until planning permission has been obtained.

- iii. Modify the covenant conditional upon planning permission being granted.
27. The applicants have sought option (ii) and the respondent prefers option (i). The Tribunal dismisses option (iii) as:
- a. Neither party is seeking this option.
 - b. The Tribunal agrees entirely with Mr Stevenson BL that the Tribunal's jurisdiction to modify a covenant is only engaged when the Tribunal is satisfied that the "impediment unreasonably impedes the enjoyment of land". In the subject reference the Tribunal needs, at the very least, outline planning permission before it will consider modification.
28. Mr Chambers submitted that the subject reference was an "exceptional circumstance" as outlined in paragraph 44 of McNicholl:
- "44. However here as there, provided that sufficient details of the proposal are laid before the Tribunal, the fact that outline planning permission only has been obtained will not prevent the Tribunal from dealing with the proposal on its merits. Further, in exceptional circumstances, for example where the expense of a potentially costly planning enquiry or licensing application might be negated by a decision of this Tribunal, it would consider proceeding to a decision that would otherwise be premature. This is not such a reference; the Tribunal has not been made aware of any special circumstances that would lead it to depart from its policy."
29. The Tribunal does not consider that there are "exceptional circumstances" in the subject reference. There is no evidence before the Tribunal to confirm that the applicants are facing "a potentially costly planning enquiry". Rather, this is a routine case whereby a leaseholder is seeking modification of a covenant to allow for construction in accordance with a planning permission, albeit that in the subject reference planning permission has not yet been forthcoming.

30. Mr Chambers considered that there could be nothing objectionable in granting an adjournment to permit the applicants to obtain outline planning permission. He submitted that dismissing the application was unwarranted and it would be wasteful of costs and the Tribunal's time given that a fresh application would proceed anyway.
31. Mr Stevenson submitted that there was no certainty when, or if, planning permission might be granted and on that basis the respondent should not be held into proceedings in which there was no certainty if they will proceed or when they will proceed.
32. The subject reference has been before the Tribunal since 26th January 2021 on the basis that the applicants merely wanted the covenant extinguished in order to facilitate a sale.
33. The applicants have now "changed course", having applied for planning permission on 18th August 2021 and are now seeking modification of the user covenant, if that planning permission is forthcoming.
34. The Tribunal will stay the proceedings for six months to allow for planning permission to be obtained. If planning permission is not obtained within that period the reference will be dismissed.
35. Rule 8(1) of the Lands Tribunal Rules (Northern Ireland) 1976 provides:

"Limitation of case and amendment of notice of reference

8(1) Subject to paragraph (3) a party shall not be entitled at the hearing of any matter to rely upon any ground not stated in his notice of reference except by leave of the Tribunal on such terms as to costs or otherwise as it thinks fit."
36. The Tribunal hereby grants the applicants leave to amend their notice of reference and this should be done without delay. The Tribunal will decide on the issues of costs when the reference has been finally disposed of.

27th October 2021

Henry Spence MRICS Dip.Rating IRRV (Hons)

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