

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/16/2020

BETWEEN

IAN JAMES ROSS - 1ST APPLICANT

THE GOVERNORS OF METHODIST COLLEGE BELFAST – 2ND APPLICANTS

AND

GARY ENNIS & CHRISTINE IRENE ENNIS – 1ST RESPONDENTS

HUGH GIBSON SIMPSON – 2ND RESPONDENT

Re: Lands comprised in Folio DN27491, 116 Killinchy Road, Comber

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

Background

1. Ian James Ross (“the 1st applicant”) is the registered owner of the lands comprised in folio no. DN27491, 116 Killinchy Road, Comber which were subject to a transfer dated 7th May 2020 (“the transfer”) yet to be registered and which will form a new folio in due course.
2. The subject application relates to the lands comprised in folio no DN27491 and the lands comprised in the transfer (“the reference property”).
3. Access to the reference property from Killinchy Road is via a laneway (“the access lane”). The owners of that part of the access lane are Gary Ennis and Christine Irene Ennis (“the 1st respondents”) whose title is held under folios DN 136473 and DN160906.
4. The owner of another part of the access lane is Hugh Gibson Simpson (“the 2nd respondent”) whose title is held under folio DN27322. The 1st applicant also owns a section of the access lane, whose title is held under folio 161 County Down.

5. The 1st applicant is the registered owner of the reference property and the Governors of Methodist College (“the 2nd applicant”) will be the registered owners of that part of the reference property to be comprised in the new folio once registration of the transfer is completed. The reference property is held in fee simple.
6. The 1st and 2nd applicants seek a determination from the Lands Tribunal confirming “a legal right of way for the 1st and 2nd applicants, their successors in title and all persons entitled by them and the owners for the time being of folio 161 County Down, DN27491 and the new folio at all times and for all purposes, with or without vehicles, over and along the Ennis Laneway and the Simpson laneway title”, to ensure the use and enjoyment of the reference property by the applicants.
7. The access lane is currently the only way of accessing the reference property. The applicants advise that they had previously attempted negotiations with the 1st respondents without reaching agreement and the lack of a formal right of way over the access lane has caused difficulties for the 1st and 2nd applicants.
8. The Tribunal has received a Statutory Declaration from a Robert John Baird, dated 9th February 1993 and a Statutory Declaration from a Joan Margaret Ross, dated 28th October 2019, confirming that the laneway has been used as access to the reference property since 13th January 1947. In addition the 1st and 2nd applicants submit that the laneway has been used as an access to the reference property since 1846, as evidenced by the Ordnance Survey Historic Map 1846 to 1862, a copy of which has been provided to the Tribunal.
9. The 1st applicant is the registered owner of the reference property and as such he considers that he is entitled to refer the matter for determination by the Lands Tribunal. The Tribunal agrees. The 2nd applicant became the beneficial owner of that part of the reference property comprised in the transfer and will become the registered owner of the new folio pursuant to the transfer once registration at Land Registry completes.

Procedural Matters

10. The 1st and 2nd applicants were represented by Mr Gilbert Nesbitt of Wilson Nesbitt, solicitors who provided a written submission for the benefit of the Tribunal. The Tribunal is grateful to Mr Nesbitt for his helpful submission.

11. The 1st respondent was represented by Mr Paddy McCollum of McCollum & Co, solicitors. At a mention of the reference on 2nd April 2021, Mr McCollum advised the Tribunal that the 1st respondent had no further objections to the right of way being granted.

12. The 2nd respondent was represented by Ms Sarah Louise Campbell of Peter Bowles & Co, solicitors. At a mention of the reference on 16th February 2021, Ms Campbell advised the Tribunal that the 2nd respondent had no objection to the right of way.

Discussion

13. Article 3 of the Property (Northern Ireland) Order 1978 (“the Order”) details the impediments to the enjoyment of land which are covered by the Order. The relevant sections are:

“3.-(1) Subject to paragraph (2), the provisions of this Part apply to any of the following impediments to the enjoyment of land (whether the impediment exists at the commencement of those respective provisions or comes into existence thereafter, and whether the land affected by the impediment is registered or unregistered):

- (a) a restriction, whether general or specific, arising-
 - (i) under a covenant, condition or agreement contained or implied in a deed, will or other instrument (but not in a mortgage), or
 - (ii) under a statutory provision of a local or personal character (not including a provision contained in a statutory instrument made or deemed to be made by a government department or a district council);

- (b) ...

(c) an easement;

(d) ...

(e) ...”

14. Mr Nesbitt referred the Tribunal to Article 3(1)(c) which confirmed that “an easement” fell under the scope of the Order. This was not qualified by defining it as arising by “deed”, “will or other instrument” or by “statutory provisions”. He considered that it followed therefore that “an easement” was not so limited as to how it had arisen and thus the intention of the legislation was to cover all easements, including those arising by prescription. He submitted that this was supported by Article 8 of the Order which commenced:

“8.-When an order is made under Article 8 declaring the existence of an impediment not created by an instrument ...”.

15. Mr Nesbitt submitted the applicants and their predecessors in title have used the Ennis and Simpson laneways for a period of at least 74 years, without interference, as evidenced by the Statutory Declarations and the Ordnance Survey Historical Map and as such, a prescriptive right of way had been established, in addition to an easement of necessity.

16. He referred the Tribunal to the following extracts from Wylies Irish Land Law (3rd Edition):

“Presumed Grant or Prescription

[6.073] The basis of prescription is the presumption by the courts, on being given evidence of long enjoyment of a right in the nature of an easement or profit, that the right had a lawful origin. In this respect the courts acknowledge the theory that easements lie in grant but in practice they recognise the existence of rights without requiring direct documentary evidence of their creation....”

And

“(b) Continuous User

[6.077] It is also a settled principle that the user or enjoyment must be continuous for a claim by prescription to succeed. In the case of certain easements, eg, a right of way, this has been interpreted as requiring regular use as opposed to intermittent user."

And

"(a) Easements of Necessity

[6.070] ...

[6.071] Ways of necessity are by far the most common case of easements arising by implied reservation, but there is no reason why other easements of necessity cannot be established, eg, an easement of support without which the land or buildings retained could not be enjoyed at all. In each case the grantor has to prove the necessity."

17. Article 4 of the Order provides:

"Power of Lands Tribunal to define scope, etc., of impediments

4.-(1) The Lands Tribunal, on the application of any person interested in land, may make an order declaring-

- (a) whether or not the land is, or would in any given event be, affected by an impediment;
- (b) the nature of extent of the impediment;
- (c) whether the impediment is, or would in any given event be, enforceable and, if so, by whom."

18. Having considered the submissions by Mr Nesbitt the Tribunal is satisfied that a right of way by prescription and by necessity exists over the Ennis and Simpson laneways, as prescribed by Article 4 of the Order.

19. The Tribunal is also empowered under Article 5(1) of the Order as follows:

“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.”

20. Mr Nesbitt submitted, therefore, that the Tribunal had the statutory power to make an Order modifying the existing prescriptive right of way, which impeded the applicants’ use and enjoyment of the reference property, to establish a legal right of way. The Tribunal agrees.

Conclusion

21. In accordance with its statutory authority pursuant to Article 5(1) of the Order, the Tribunal directs that “a legal right of way is established for the 1st and 2nd applicants, their successors in title and all person authorised by them and the owners for the time being of folio 161 County Down, DN27491 and the new folio at all times and for all purposes, with or without vehicles, over and along the Ennis laneway and the Simpson laneway title”.

27th May 2021

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