LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

R/17/1993

BETWEEN

DAVID LAURENCE ANDREWS AND MARGARET JOY ANDREWS - APPLICANTS

AND

REV DAVIS AND MRS DAVIS - RESPONDENTS

Lands Tribunal - The President Judge Peter Gibson QC
and Mr Michael R Curry FRICS

Belfast - 28th June 1994

This is an application under Article 5 of the Property (Northern Ireland) Order 1978 ("the 1978 Order") for modification of a restrictive covenant.

The property affected by the covenant is a lock-up shop known as "The Dub Butcher - Larry Andrews", 32A Upper Malone Road, Belfast (the "Dub"). The relevant covenant is contained in a Sub-Fee Farm Grant dated 2nd October 1935, and is to the effect that the Applicants -

> "AND ALSO will not use the premises hereby granted for the sale of intoxicating liquor or carry on, or allow to be carried on, therein any noisome or offensive trade or business".

The premises "hereby granted" include the Dub.

The application is to insert the underlined additional words so as to modify the covenant to read as follows -

> "AND ALSO will not use the premises hereby granted for the sale of intoxicating liquor <u>for consumption on the premises</u> or carry on, or allow to be carried on, therein any noisome or offensive trade or business."

At the request of the Tribunal the application was later amended to modify the covenant to read:-

"AND ALSO subject to the proviso hereinafter appearing, will not use the premises hereby granted for the sale of intoxicating liquor or carry on or allow to be carried on therein any noisome or offensive trade or business ALWAYS PROVIDED THAT the premises now situate at and known as 32A Upper Malone Road, Belfast, may be used as premises in which the only or principal business carried on is the business of lawfully selling intoxicating liquor by retail for consumption off the premises as permitted by the licensing legislation in force from time to time."

Mr R G Weir QC appeared with Mr A Devlin, for the Applicants, instructed by Messrs McCann & Greyston.

The objectors were not represented.

The Tribunal had been informed before the hearing that the Dub was the subject of "The Goat and Dub Public Houses Purchase Trust". This was established in 1909 as a result of contributions from the public for the purpose of raising funds to purchase the two public houses and to extinguish the Publicans' Licences then attached thereto.

In the circumstances, the Applicants, at the direction of the Tribunal under Article 5(2) of the 1978 Order, placed advertisements in local newspapers and ninety-three letters of objection were received. All the objectors were notified of the date of hearing and a number attended the hearing. Those who appeared did so in person.

Briefly, the history of the Trust and the Dub is as follows.

By a Sub-Fee Farm Grant dated 10th June 1901 premises, which included the Dub, were granted to Andrew Lorimer in fee simple, subject to covenants which included a requirement to continue the then use as a public house.

By Conveyance dated 11th April 1906 the premises were conveyed to David Hill.

By Conveyance dated 5th February 1909 the public house premises which had already been purchased by Matilda Hill under Conveyance dated 5th February 1907 were sold to Patrick Lambe. This conveyance specifically conveyed the publican's license attached to the premises known as The Dub together with the business of a publican and all bar fittings and fixtures therein.

By a Declaration of Trust dated 8th December 1909 between "the Trustees" and "the Contributors" it was recited that the Trustees by a Deed of the same date had purchased "The Dub", that the purchase price was contributed by the Contributors and that the Declaration of Trust was executed to define the duties and interests of the various parties in the premises so that the Trustees would be bound by the stipulations therein contained. It was stated that the Trustees should not permit or allow the Dub or any part thereof to be used as a public house for the sale of intoxicating liquors or any noisome or offensive trade or business whatsoever and that in the event of a letting or sale of the said hereditaments and premises or any part thereof the said Trustees should provide against the premises so let or sold being used for all or any of these purposes.

By Conveyance dated 9th December 1909 the Dub became vested in the Trustees under the Trust set out in the Trust Deed of 8th December 1909 (which was incorrect when it mentioned the Deed of Conveyance being of the same date).

A Statutory Declaration sworn on 21st February 1934 by one of the Trustees was made in connection with proceedings in the High Court of Justice Chancery Division. The deponent stated that the Trustees were of the opinion that the Trust should be wound-up as the purpose for which it had been established had been fully served, but that difficulties had arisen in ascertaining the names of the contributories to the Trust Fund and the amounts of the various contributions. It asked that the Trust be administered by the Court and the property realised and the surplus funds distributed among the persons entitled thereto. At that time the property owned by the "Goat" and "Dub" Public Houses Purchase Trust consisted of two shops with dwelling houses attached formerly the "Goat" and "Dub" public houses, fifteen cottages let to weekly tenants and some surplus funds. By Court Order dated 17th April 1934 it was so ordered and that the premises known as the Dub should be sold.

By Sub-Fee Farm Grant dated 2nd October 1935 between the Trustees and Gertrude Ruby Gray, part of the property, which includes the Dub together with other premises, was sold off.

By Conveyance dated 3rd October 1935 the Trustees conveyed to a Mrs Davis and Thomas Campbell Davis the remainder of the Dub Trust property with the benefit of three Sub-Fee Farm rents including that created by the Sub-Fee Farm Grant of 2nd October 1935 (above).

It appears that this was the end of the matter as far as the Trustees were concerned and they had now conveyed their interest in the freehold to the purchasers.

By Deed dated 14th August 1984 Gertrude Ruby Gray consented to a change of user of certain premises by one of her tenants under lease dated 14th May 1952.

The Conveyance vesting the Dub in the applicants is dated 26th November 1990. It recites the Sub-Fee Farm Grant of the 2nd October 1935, various leases granted by the said Gertrude Ruby Gray subsequently, and granted and conveyed the premises in the said Sub-Fee Farm Grant to the applicants in Fee Simple subject to the yearly rent of £15.

At the hearing several preliminary points arose -

(i) **The application was in the name of David Laurence Andrews only.**

The Tribunal granted leave to amend the Applicants to David Laurence Andrews and Margaret Joy Andrews.

(ii) **The Tribunal raised the question of the locus standi of the objectors.**
Mr Weir accepted that, from their addresses, many of the objectors lived close to the subject premises but doubted the extent to which third parties were entitled to claim the benefit of the restrictive covenant. He did not, however, raise any real objection to the presence of third parties.

The 1978 Order does not include any equivalent to the provision in Section 84 of the Law of Property Act 1925 as amended in 1969 ("the 1925 Act") in England which enables the Tribunal or Court there to determine, prior to the Hearing, the locus standi of those who appear to be entitled to the benefit of the restrictions. The Tribunal decided to follow the earlier practice on this aspect as set out in Re Sunnyfield [1932] 1 Ch 79; 101 L J Ch 55; 146 LT 406. Maugham J then stated -

> "When such an order as this is asked for, the Court ought to make every effort to see that all persons who may wish to oppose the making of the order have the opportunity of being heard, stating their objections in argument before the Court, and inviting the Court to refuse to exercise its powers."

(iii) **The Tribunal raised the question of whether, if the premises were capable of some reasonable use, it had any power to modify the covenant set out above.**

There are two competing views. The first is that which prevailed in England after the enactment of Section 84 of 1925 Act (before its amendment in 1969). This was to the effect that it was not enough for an Applicant to show that an impediment prevented him from carrying out one particular development; he had to prove that, because of the impediment, no reasonable user of any description could take place. This view was decided in re M. Howard (Mitcham) Limited's Application (1956 7 P&CR 219); re Ghey and Galton's Application [1957] 2 QB 650 (CA) and re Carshalton UDC's Application (1965) 16 P&CR 68. To cure this situation the 1925 legislation was amended in 1969 to give power to remove or qualify an impediment to the use of land if it impeded "some reasonable user".

The counter argument is that the legislation in Northern Ireland is different. In particular, Article 5 reads "... on being satisfied that the impediment unreasonably impedes the enjoyment of the land or, if not modified or extinguished, would do so". That wording can be contrasted with the original wording of the 1925 Act "impede the reasonable user of the land". Mr Weir submitted that, whereas in England the word "reasonable" qualifies "user", in this jurisdiction "unreasonably" qualifies "impedes". The scheme of the wording is quite different. The Tribunal agrees. If the Tribunal were to adopt any other view it would emasculate the 1978 Order and its underlying purposes.

The Tribunal's conclusion is that the question to be answered is whether the restrictive covenant in the case unreasonably impedes the Applicant in his enjoyment of the land. This is further defined by the definition of "enjoyment" in Article 3(3) as including "use and development". If one gives "development" its ordinary meaning in the property context it includes change of use. The question, in the circumstances of the instant case, is therefore "does the covenant unreasonably impede the proposed change of use of the premises?"

The Applicants Evidence

Mr Weir called Mr David Laurence Andrews, Applicant, Mr Kenneth Crothers, a Fellow of the Royal Institution of Chartered Surveyors with over 20 years experience of commercial property and Mr Greyston a Solicitor and Partner in McCann & Greyston, Solicitors.

Mr Andrews gave evidence that he had been trading in the shop for some 12 years. He was an experienced butcher and this was his fourth butchers shop. He would be 56 years old this October.

He stated that his butchery trade had fallen away. He could not compete on price with larger outlets. Only by diversifying into fruit and vegetables, then coal, then gas and seasonal sales of bedding plants and flowers and by working substantially longer hours was he able to maintain the existing level of business.

Because of the decline of his core business and because of health reasons, he wished to cease trading and sell the property. He was unable to obtain any reasonable offer for the premises for their existing use, but could obtain a substantially higher price if the premises could be used as an off-licence. He had received 3 approaches from the licensed trade as a result of which he had reached agreement with one for the sale of his premises conditional upon the release of the covenant and the obtaining of an off-licence. This was Winemark.

It was suggested that with improved marketing his existing business might be viable. Mr Andrews, with long experience in retailing and of trading in the locality, would not agree.

Mr Andrews considered that the neighbourhood extended along the Upper Malone Road from its junction at the roundabout at the Malone Road to the junction with Finaghy Road South. It included all the land to the south-east as far as the edge of the the Lagan Valley Regional Park and, to the north-west of the road, it included the Taughmonagh and Greystown estates.

Mr Crothers had prepared a precis of evidence and book of particulars, a copy of which was provided to the objectors.

From the evidence of the creation of the Trust, research in the Linenhall Library and the occupation of the premises by the Irish Temperance League as the Dub Tea Gardens in 1911, Mr Crothers concluded that the impediment was created at the time when social attitudes to the sale and consumption of alcohol were considerably less tolerant than they are today and that there was a temperance aim in the creation of the covenant.

From analyses of ordnance survey maps he concluded that the character of the area at the time of the creation of the Trust was one that was largely rural. It included golf courses, a few superior houses and some more modest recent houses.

Comparing the situation today he concluded that the neighbourhood had condensed and changed to a suburban, densely populated, area with the Dub and shops adjacent to it as its commercial heart. The Upper Malone Road had become an increasingly busy main distributor road.

He gave evidence that for planning purposes an off-licence was in the same use class as a retail shop and that permission for a retail off-licence was not required.

The size of the off-licence would be limited by the physical dimensions of the property, to a small shop. The intending occupier, Winemark, was likely to run an up-market establishment in his view and unlikely to permit underage drinking.

His general experience was that off-licences did not cause problems to adjoining occupiers and in fact landlords of parades of retail shops or shopping centres were more than happy to have off-licence traders as occupiers in shopping centres.

Mr Crothers had read the judgment in the Boots case, as yet unreported. In this Carswell LJ had set out certain definitive tests to be applied in assessing a "neighbourhood". He was referred to the Applicants definition of the neighbourhood and in broad terms he agreed, but in his view the boundary to the north-west could be only roughly defined because of its position within large housing developments, the residents of which would be subject to the competing attractions of the shopping facilities at Finaghy and the Dub.

He was not aware of any licensing cases where the question of adequacy had been canvassed in the area.

Mr Greyston gave evidence that he had acted for Winemark for many years. They have 80 outlets in Northern Ireland and he gave examples of what might be regarded as comparable premises to those which would be developed here. His description was that the premises would be "small but nicely finished".

Mr Greyston made it clear that his instructions were to obtain permission for an off-sales outlet only and he was not aware of any plan to create an on-licenced public house. In any event the modification sought would not permit the granting of a full "on/off" licence.

Winemark has no convictions whatsoever for improper conduct of their off-licences and the issue of underage drinking is a matter to which they give very considerable attention. Their staff are instructed that if they have any doubts about the age of a purchaser they ask for identification. Later an objector, Mr McCandless, confirmed that from his own experience.

The Objectors

In response to notification of the application by the Registrar, by letter dated 25th November 1993, the agents for the persons entitled to the ground rent under the 1935 Sub Fee Farm Grant responded:-

> "At the hearing of the Reference, it is not intended to have legal representation nor to call an expert witness. It is not intended to take any action as would infringe or offend the restrictions in the Fee Farm Grant as required by the said Trustees on the sales by them of the said lands and premises which as a consequence thereof would make the said lands and premises "again" the subject of an application for wine or like licence as so desired by the Applicants".

They did not make any appearance.

The written objections may be divided into six categories.

1. The need or desire for the existing butchery and vegetable shop to continue.

2. The objection to alcohol sales (including sales to underage people).

3. The adequacy of the existing off-licence facilities.

4. The increased likelihood of undesirables being attracted to the off-licence, particularly because of the proximity to Barnett's Park.

5. The causing of litter.

6. The potential increase in alcohol related crime.

These were supplemented by oral evidence at the Hearing -

(i) Mr John R Clyde, Chairman of the Board of Governors of Fleming Fulton School was concerned that his school, which was nearby, should continue to be located in a wholesome environment.

(ii) Mr Archer Scott thought Mr Andrews should investigate other avenues. Mr Scott had been a resident of the area for some 80 years and he gave the Tribunal a most helpful history of the locality and the reasons for the creation of the Trust and the restrictive covenant in issue in the proceedings.

(iii) Miss Clara Curry was concerned that there might be rowdiness in the Dub Lane. Like Mr Scott she had been a resident for many years and was able to assist the Tribunal with the historical circumstances of trouble between the regulars of The Goat and The Dub Public Houses.

(iv) Sergeant Francis David McCandless on behalf of the RUC said the closest off-licence was Stockman's Lane. There had been some trouble in the past from children purchasing alcohol and creating a nuisance in the park nearby. His objection was on a futuristic basis. The Dub Lane was a major route to Barnett's Park where underage drinking and solvent abuse takes place but he accepted that Winemark does protect against underage drinking, and spoke highly of its reputation.

(v) Alderman Mrs Crooks gave evidence that she was concerned at the potential provision of another off-licence in the area. The two off-licences at Finaghy had resulted in considerable trouble in the local park. There had been complaints about the Dub Pavilion and patrons leaving there late had been very noisy.

(vi) The Rev William David Moore, the Minister of Taughmonagh Church, expressed strongly held views. He was concerned at the potential loss of retail shopping facilities for the community, and particularly concerned about underage drinkers and the problems created by alcohol abuse.

Mr Weir submitted that -

(i) The under-age drinking argument was based on a fallacy. It was based upon the assumption that the off-licence would not be run lawfully.

(ii) The undisputed evidence of Mr Crothers showed that the impediment is unreasonable.

(iii) Mr Scott's and Miss Curry's historical information was useful and gave a convincing explanation of the underlying purpose, but things had moved on. He emphasised that the proposal was not to reinstate The Goat and Dub Public Houses and there was no risk of any factional fighting that might ensue from that.

(iv) This was a modest proposal which was subject to the views of the Licensing Courts.

(v) Mr Andrews had been frank about his circumstances and there was no serious objection.

DECISION

The relevant statutory provisions are those found in Articles 5(1) and 5(5) of the Property (Northern Ireland) Order 1978. These read -

"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." The word "enjoyment" is defined in the Order as including "the use and development" of the land.

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) 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 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 any thing, or to pay or contribute towards the cost of executing any works or doing any thing, 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."

In England an Applicant who succeeds must establish one of the four founding grounds of the 1925 Act and the Tribunal there must take certain matters into account. If reliance is placed upon one of the grounds, he must satisfy the Tribunal as to certain other matters. In previous decisions the Tribunal here has concluded that the Scheme of the 1978 Order differs from the 1925 Act Scheme. For comparison and to underline the very distinct differences, the Tribunal sets out below the relevant portions of the 1925 Act.

"(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise

as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied -

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed absolete; or

(aa) that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

...."and

"(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Lands Tribunal is satisfied that the restriction, in impeding that user, either -

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be

discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

The Tribunal has concluded that the 1978 Order created a scheme which is quite different to the 1925 Act scheme in its greater flexibility and wider scope. In the 1978 Order the only requirement is that an applicant must persuade the Tribunal that the restriction "unreasonably impedes the enjoyment", taking into account seven specified matters together with any other material circumstances. These matters reflect to a large extent the substance of the grounds and other matters of the 1925 Act but the Tribunal is given a discretion to determine the weight, if any, to be attached to each of these matters in any particular case. The Tribunal takes the view that whilst it must have regard to the matters set out in Article 5(5) it has, at the end of the day, an overall discretion, which is a wider discretion than that often referred to in the English authorities as the residual discretion as decided in Driscoll v Church Commissioners [1957] 1QB 330; [1956] 3 WLR 996; 100 SJ 872; [1956] 3 All ER 802; 7 P&CR 371 (CA) and re Ghey and Galton's application [1957] 2 QB 650; [1957] 3 WLR 562; 101 SJ 679; [1957] 3 All ER 164; 9 P&CR 1 (CA); reversing 168 eg 167 [1956] JPL 534; [1956] CLY 7345.

The Tribunal is supported in its views by the Report of the Office of Law Reform "Final Report of the Land Law Working Group" 1990. In reviewing the 1978 Order it reported -

"Power of the Lands Tribunal to modify or discharge restrictions

2.9.1 The [Survey of the Land Law of NI 1970] proposed that the Lands Tribunal for Northern Ireland should be empowered to make orders discharging or modifying land obligations (within the Survey's definition) or other obligations or restrictions affecting land. It was envisaged that a provision would be enacted corresponding to section 84 of the [1925 Act] which, like that section, would permit an order to be made only on specified grounds such as obsoleteness, absence of practical benefit or agreement. One of those grounds was that the restriction unreasonably impeded the use or enjoyment or development of the land, but only if the restriction was of no substantial value to the covenantee, or

was contrary to the public interest, and if money would be adequate compensation for the loss of the benefit.

The Property (Northern Ireland) Order 1978

2.9.2 The Survey's proposal was substantially implemented by the 1978 Order, although with a number of variations. The most important of these was that the Lands Tribunal was given power to modify or extinguish an impediment to the enjoyment of land when it is satisfied that the impediment unreasonably impedes the enjoyment of the land, instead of having the scope of its jurisdiction restricted - as the Survey had proposed - to a number of specified cases (although a list of circumstances to be taken into account was provided) ....".

The discretion is of course a judicial one and must be founded on correct principles and premises. To this extent the Tribunal considers that many of the cases decided in England, and textbooks such as Preston & 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.

The Tribunal begins with the circumstances to be taken into account ie the requirements of Article 5(5) and deals with each individually.

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

The impediment was created or imposed in a Sub-Fee Farm Grant dated 2nd October 1935. There are no express words in either the Trust deed or the conveyance to explain the purpose of the restriction. It is difficult to establish with certainty the circumstances at that time but doing the best it can with documentary evidence, the expert evidence and the oral testimony, the Tribunal finds that the circumstances were as follows. Around the time the covenant was created there was a special provision in the licensing laws which made particular provision for licensed premises to serve "bona fide travellers". The location of The Dub, just outside the County Borough and Union, made it attractive to those wishing to go outside the boundary for a drink. The occupiers of large houses in the Malone and Upper Malone areas of Belfast were troubled by the rowdy behaviour of those who had taken advantage of

the "bona fide traveller" provision, and who had caused trouble and nuisance returning from The Dub Public House, as it then was, to Belfast. There was also damage to crops and disturbance and nuisance to those who lived between The Goat Public House at Milltown and the Dub as a result of rivalry between the regulars of the two establishments. There was a general belief in the area at the time that the wealthy merchants and linen barons who lived in the area had clubbed together to buy out the licences to prevent nuisance to themselves and their residential properties on the Malone Road. At that time there was also an active temperance movement.

The Tribunal concludes that the impediment was created or imposed for a combination of purposes -

(i) to protect the amenity of the large houses in the Upper Malone area by reducing unsociable behaviour by patrons of The Dub public house.

(ii) to prevent annoyance as a result of disturbances as a result of trouble between the regulars of The Dub and The Goat Public Houses.

Whilst there may have been an element of the purpose attributable to the temperance movement it must be recognised that the actions of the Trustees were focused on The Dub public house premises only (and the Goat) and were not such as to create any restriction extending to the whole of the neighbourhood or even beyond the immediate surroundings of the public house premises.

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

On the evidence the Tribunal concludes that the neighbourhood is an area extending from the roundabout at the House of Sport along the Upper Malone Road to the junction with Finaghy Road South and comprising to the south and east the residential development so far as its boundary with the Lagan Valley Regional Park. So far as the extent of the neighbourhood to the north-east of the Upper Malone Road is concerned, the boundary is not clear but it includes a substantial portion of the Taughmonagh estate and the Greystown estate. There is a undefined area as a result of the competing attractions of the shopping at Finaghy. The objectors did not disagree with Mr Crothers evidence as to the extent of the neighbourhood although there is a grey area at the point were the attraction of the facilities at Finaghy

balances those at the Dub. The maps produced by Mr Crothers clearly show a marked change in character of the land and neighbourhood. The neighbourhood has condensed and changed from a combination of rural golf courses, open fields, park lands and gentlemen's residences to a more dense urban population with the Dub and shops adjacent thereto as its commercial heart.

From the evidence and from its viewing of the neighbourhood, the Tribunal finds that there now are a number of other retail premises both adjoining the Dub, forming a small parade of retail shops, and elsewhere within the vicinity. Some of these been converted to other uses and some are vacant. Some continue to be occupied by shops. There are also now licensed club premises within the neighbourhood but no off-licence.

(c) **Any public interest in the land, particularly as exemplified 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.**

There is no evidence before the Tribunal of any public interest in the land.

(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.**

There is no evidence of any trend shown by planning permissions granted or refused for land in the vicinity of the land. The Tribunal has concluded that planning permission was either sought and obtained or is not now required for the existing retail shop development.

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

The Tribunal has already set out its views as to the locus standi of the objectors. In a genuine case every effort should be made to ensure that they are heard, but that begs the question of whether they can claim that the practical benefit, if any, of the impediment is secured to them. Whilst the Tribunal is grateful to the objectors for their contributions to the hearing it concludes that they are not entitled to say that it is secured to them for the following reasons -

(i) Whilst many appeared in a representative capacity they cannot claim to be custodians of the public interest in the sense of a public authority or trustee covenantees.

(ii) Even if they could claim to have a public or representative capacity, the local community is quite different in character and location to that sector of the public which subscribed to the original Trust and is not either directly or indirectly its successor.

(iii) The objectors are third parties and the benefit, if any, of the impediment is not such as is secured in a manner which would entitle the objectors to enforce the covenant as of right. If the Respondents had chosen to agree to the modification it appears to the Tribunal that would have been the end of the matter so far as the objectors are concerned.

The question remains as to whether the **Respondents** (as opposed to the other objectors) are entitled to say that the impediment secures any practical benefit to them. The Tribunal finds they are not, for the following reasons -

(i) The Respondents purchased their interest from the Trustees and do not claim to be, nor could they be, representatives of the original Trustees and bound by their aims.

(ii) The Respondents do not live in the neighbourhood and so the benefit, if any, is not a practical benefit to them.

Having reached these conclusions for the reasons outlined above, it is not necessary for the Tribunal to consider the nature and extent of that benefit, if any. If, however, contrary to the view of the Tribunal the objectors (or the Respondents) contentions are relevant, the Tribunal is of the opinion that on the evidence any practical disadvantage which might be suffered by them in consequence of the proposed modification is only slight, and far outweighed by the strength of the Applicants case. For example -

(i) There have been marked changes in the neighbourhood and the benefit, if any, must be considered in the light of current circumstances. These

changes and the current circumstances that prevail in the neighbourhood have already been set out by the Tribunal.

(ii) The Tribunal agrees with the views set out in Re O'Reilly's application (1993) 66 P&CR 485 and followed in Re Hydeshire LTD's application (1993) 67 P&CR 93 that in deciding any question as to whether there is any practical benefit secured, the Tribunal must consider whether the restriction in itself, in consequence of its wording and effect, is capable of providing that benefit.

(iii) The "bona fide traveller" provision in the Licensing laws has long disappeared, as has "The Goat" and the proposed modification is not such as to permit a public house.

(iv) The effect of the modification if granted would be to permit one of a small parade of shops on a busy road to be changed to off-licence use.

(v) The covenant affects only a limited geographical part of the neighbourhood.

(vi) The Tribunal accepts Mr Weir's submission with regard to the question of whether the premises will be run lawfully. The Tribunal, in deciding whether to grant a modification must assume that the statutory conditions will be properly observed. See for instance re Edward's application (1906) 11 P&CR 403.

(f) **Where the impediment consists of an obligation to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether the obligation has become unduly onerous in comparison with the benefit to be derived from the works or the doing of that thing.**

There is no relevant obligation to be considered by the Tribunal.

(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.**

Although the persons now entitled to the benefit of the impediment have not appeared at the hearing, they have made it clear that they have not expressly or by implication agreed to the impediment being modified or extinguished. The Tribunal has, however, already concluded that the impediment does not secure them any practical benefit.

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

A number of points were put forward during the hearing as being material. The first was the state of health of Mr Andrews, who runs the Dub. The Tribunal has given sympathetic consideration to his state of health and business circumstances, but cannot be influenced by any considerations of that kind in its decision. As was stated by Russell LJ in Ridley & Another v Taylor [1965] 1 WLR 611; [1965] 2 All ER 51; 16 P&CR 113 -

> "Finally I come to the question of exercise of discretion, assuming there was jurisdiction. I do not for myself think that the particular situation of the tenant, as having not very long since struck a bargain inconsistent with this particular outcome, is a factor in the exercise of discretion. I do not think that the personality of the tenant or his past behaviour is relevant to the exercise of the discretion. I refer again to the fact that tomorrow an assign may make the same application. I think that the decision (including the exercise of discretion) must be related to the property and its history as such."

The second matter was the wish of the objectors that the Dub should continue its present business. On this issue the Tribunal states its conclusion briefly. The existence of the covenant does not of itself in any way guarantee the continuance of the butchery and vegetable trade of the Applicants.

The third matter that arose was the Applicants' motive for making this application, namely to make a profit. Again the Tribunal's conclusion may be stated briefly. The fact that the Applicants are seeking to make a profit is not a ground for refusing to make an Order. In Gee v The National Trust [1966] 1 WLR 170 Salmon LJ stated -

> "I ought to add this. There was a suggestion that the Applicant wanted the modification purely for financial reasons so as to make a profit. It seems to me that this is not supported by the evidence. It is plain in the evidence that he

wanted to build another house a little higher up the hill because the house which he is now occupying is too close to the road and he is being troubled by trespassers, and so on - a trouble against which he thought he could very much more readily protect a house a little further away. But even if one of his objects had been to make a profit, that would afford no ground for exercising the discretion against him. There is nothing wrong or improper in making a profit per se".

The fourth matter was the objections based on what may be termed "licensing objections". By way of analogy this arose in Re Ghey and Galton's application [1957] 2 QB 650. Lord Evershed MR referred to the opinion expressed by the Tribunal that the Applicant's proposed use of the premises "would be more advantageous from the point of view of the owners of the surrounding houses" and continued

"With the utmost respect to the Lands Tribunal, I venture to think that he has somewhat misapprehended his function. He is not asked to say what he thinks would be advantageous from one point of view or another to the neighbours. He is not asked to act as a kind of planning authority".

The Tribunal similarly considers that it is not asked to act as a kind of licensing authority. The question whether an off-licence should be granted is entirely a matter for the licensing courts.

The Tribunal's conclusion is that the Applicant has proved on the balance of probabilities that the restrictive covenant unreasonably impedes the use and development of the land for the following reasons -

1. The application is not for restoration of permission for a public house. It is confined to an off-licence only. To make the matter absolutely clear the Tribunal has required, and the Applicants have agreed, that the wording of the proposed modification be changed so as to refer specifically to the definition of an off-licence within the Licensing Acts. By so doing the Tribunal emphasises that the application is limited to no more than that and if successful will permit a user only in accordance with the requirements and regulations imposed by the Licensing Acts.

2. The neighbourhood has changed markedly and the character and circumstances of the neighbourhood have changed fundamentally, so that the original aims of the covenant are of little, if any, relevance. In so far as the covenant may have encouraged temperance, by preventing the sale of alcohol at that time, that aim is no longer achievable because the subject is no longer the only retail premises in the neighbourhood. The application is for an off-licence only and the problems of rivalry between the regulars of the original two pubs does not arise. In so far as a ban on the sale of alcohol might have prevented rowdyism in the neighbourhood that ban has already been breached.

3. Although the Respondents have not expressly nor by agreement agreed to the modification, neither they nor the objectors have convinced the Tribunal that the impediment secures any practical benefit to them. The Tribunal attaches little or no weight to objections made by objectors with no proprietorial interest. As already indicated, however, the Tribunal finds that any practical benefit of the covenant to them is slight.

4. So far as the question of the adequacy of off-licence facilities is concerned, whilst this may be relevant to a licensing Court, the Tribunal is not convinced that this is a material issue in the context of the 1978 Order. In any event there are no off-licence premises in the neighbourhood.

5. The proposal is subject to the views of the Licensing Courts and as such is not a settled proposal. The physical boundaries of the property are well defined and at the request of the Tribunal the application has been amended so as to make it plain that it relates only to the subject premises and to an off-licence use only to the extent permitted by the Licensing Act. To hold back this application until after the decision of the Licensing Courts would create an unacceptable vacuum. It is proper that this matter be determined first. The Tribunal emphasises, however, that where an impediment apparently secures to any person a practical benefit, it is only in exceptional circumstances and where the proposal is carefully framed by evidence, such as that given by Mr Crothers and Mr Greyston, that it will consider an application for which all other relevant permissions have not already been obtained.

6. The Tribunal adopts the approach adopted in Re Bass Limited's application (1973) 26 P&CR 156 in which, so far as the principles are applicable in the instant case, they

may be distilled into two parts. The first is 'is the proposed change of use of the premises reasonable?' The second is 'does the covenant unreasonably impede that change of use?'.

To answer the first question it is important to consider the question on the assumption that the covenants do not exist. Any other approach begs the question. Having considered the matters required to be considered and set out the Tribunal's conclusions on each of the matters above, the Tribunal accepts that the application is for a modest proposal which is subject to the views of the Licensing Court. In all the circumstances the Tribunal concludes that the proposed change of use of the premises is reasonable, and that the covenant unreasonably impedes that change of use.

The Tribunal orders that the covenant be modified to read as follows -

> "AND ALSO subject to the proviso hereinafter appearing, will not use the premises hereby granted for the sale of intoxicating liquor or carry on or allow to be carried on therein any noisome or offensive trade or business ALWAYS PROVIDED THAT the premises now situate at and known as 32A Upper Malone Road, Belfast, may be used as premises in which the only or principal business carried on is the business of lawfully selling intoxicating liquor by retail for consumption off the premises as permitted by the licensing legislation in force from time to time."

The Tribunal having ordered that the covenant be modified the question remains as to whether the Tribunal should exercise its discretion so as to award compensation. The undisputed evidence of Mr Crothers was that "at the time it was imposed, the impediment may have had some effect in reducing the consideration received for the land affected by it. It is difficult to say what this effect may have been but I believe it would have been nominal only. If payment is due under this heading, I suggest it should be a nominal £100."

The Tribunal accepts this suggestion as fair and reasonable in all the circumstances and so orders.

ORDERS ACCORDINGLY

The President, Judge Peter Gibson QC
Mr M R Curry FRICS
25th November 1994 **LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

R G Weir QC and A Devlin instructed by Messrs McCann & Greyston, Solicitors for the Applicants.