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/11/2022

BETWEEN

JAMES CHARLES McELWEE & MARGARET McELWEE – APPLICANTS

AND

DR RAYMOND FULTON - RESPONDENT

Re: Lands at Ballyquin Road, Limavady

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

Background

1. James Charles McElwee and Margaret McElwee ("the applicants") are the owners of lands at Ballyquin Road, Limavady ("the reference property") which are held under Folio 20645 County Londonderry .

2. On 20th October 2011 outline planning permission was granted for a substantial residential development on the reference property and on adjoining lands owned by the Boyle family.

3. Subsequently, on 1st July 2019, approval of reserved matters was granted under planning reference LA01/2016/1258 ("the planning permission") and which allowed for a substantial development comprising 201 residential units.

4. Dr Raymond Fulton ("the respondent") is the owner of 37 Ballyquin Road, held under folio 19117 County Londonderry. The respondent's property is accessed from the Ballyquin Road via a lane which passes across the reference property. The respondent has a right of way over the lane which is in the ownership of the applicants.

5. The implementation of the granted planning permission involves rerouting the respondent's right of way. The applicants have advised the Tribunal that, through their development partner, Braidwater, they have sought to obtain the respondent's agreement to rerouting. The respondent was and remains unwilling to agree to a modification of the right of way.

6. The applicants have subsequently made a reference to the Lands Tribunal seeking modification/extinguishment of the right of way to allow for the permitted development to take place. This is the issue to be decided by the Tribunal.

7. The applicants' and the respondent's properties were previously owned by a Mr Robertson. Mr Robertson agreed to sell a site to a Mr John Drennan, that site being what is now the respondent's property. The sale was affected by a deed of transfer of the site and, the grant of a right of way.

8. The granted right of way reads as follows:

> "the right of way for the Transferee his agents licensees and assigns for all purposes and at all times over the driveway coloured yellow on the said map attached hereto in connection with the use and enjoyment of the said dwelling house to be erected on the said plot of ground in common with the registered owner his lessees licensees tenants and assigns."

9. The transfer document also contains a covenant to "use the said plot of ground as the site for a private dwelling house".

10. In 1969 Charles McElwee, the first named applicant's father acquired the reference property from Mr Robertson. This included the lane. The reference property subsequently transferred to the first named applicant in 1984 and into the applicants' joint names in 1985.

11. The respondent and his late wife acquired the property at 37 Ballyquin Road from Mr Drennan in 1983. The respondent was subsequently registered as the sole owner in 2019.

12. The Tribunal notes that construction on the land which abuts the lane and the respondent's property has already commenced. These construction works, which include the construction of a school adjoining the lower part of the lane, are ongoing.

Procedural Matters

13. The applicants were represented by Mr Douglas Stevenson BL, instructed by TLT solicitors. Mr Keith Gibson BL, instructed by Macaulay Wray solicitors, represented the respondent.

14. On behalf of the applicants the Tribunal also received submissions from:

    i. Mr Joseph McGinnis, Managing Director Braidwater Group.

    ii. Mr Karl Dorman, Chartered Civil Engineer, Hoy Dorman Ltd.

    iii. Mr Kenneth Crothers, Principal Crothers Chartered Surveyors.

    iv. The applicant, Mr McElwee.

    v. Mr Joe Bradley, Development Braidwater Group.

15. On behalf of the respondent the Tribunal also received submissions from:

    i. Ms Karen McShane, Chartered Civil Engineer, Director Kevin McShane Ltd.

    ii. Ms Diane Thompson, Town Planning Consultant, MBA Planning.

    iii. The respondent, Dr Fulton.

16. The Tribunal is grateful to all participants for their helpful submissions.

The Statute

17. Article 5(1) of the Property (Northern Ireland) Order 1978 ("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."

18. Article 3(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."

19. Article 5(5) of the Order lists the matters which the Tribunal must take into account in deciding whether an impediment affecting any land ought to be modified or extinguished. The Tribunal will consider these mattes in detail.

Application of the Statute

20. In Andrews v Davis R/17/1993 the Tribunal stated at page 12:

> "… 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 …".

21. And in Danesfort v Morrow & Anr R/45/1999 (Part 2) the Tribunal stated the overall question to be decided:

> "… 'Does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?'".

Authorities

22. The Tribunal was referred to the following authorities:

- Parixax (SA) Pty Ltd [1956] 56 SR (NSW) 130
- Andrews v Davis R/17/1993
- Danesfort v Morrow & Anr R/45/1999 (Part 2)
- Cunningham v Fegan R/22/2010 (Part 1)
- Bradley v Dittmar R/4/2016
- Menary v Bolton & Ors R/21/2016

Position of the Parties

23. On behalf of the respondent Mr Gibson BL submitted that the starting point for the Tribunal must be the dicta of Myers J Parixax (SA) Pty Ltd (1956) 56 SR (NSW) 130:

> "An impression seems to have got abroad that when an application is made to modify a restriction one considers the benefit of the person entitled to it wholly from a material point of view; that all one has to do is to say: 'Will he be any worse off financially; will his land be less readily saleable, or will it be depreciated in value?' Well, for my part I consider that the benefit which a person gets from a restriction cannot necessarily be measured only by material consideration. There are many of us who derive enjoyment from our surroundings, even though they do not add anything to the value of our homes. Indeed, there are many people who object, because it would be unpleasant to them, to alterations in their neighbourhood, even though it might actually increase the value of their properties.

A person who has the benefit of a covenant not to erect flats is, in my view, entitled to say: 'I do not like flats near me, and that will diminish my enjoyment of my home', and if he is believed and is sincere, that is reasonable, I consider that in itself is a sufficient reason for refusing to allow a modification of the restriction, even though the erection of the flats would not result in any material loss whatever …".

24. Mr Gibson BL acknowledged that Myers J Parixax was an authority from New South Wales but the difficulty for the Tribunal in the subject reference was that there was little or no authority in the British Isles upon which to rely and this much was acknowledged in the applicants' skeleton argument where the only authority referred to was Menary v Bolton & Ors, which was an unopposed application.

25. In respect of the Tribunal's power and the discretion in respect of the exercise of that power, Mr Gibson BL noted there were no recent reported decisions. Mr Gibson BL submitted that guidance could, however, be found in going back to 1st principles and considering the Land Law Report, which preceded the Order, undertaken by Queens University in 1971 by the Faculty of Law, a working party which contained amongst others, Mr J C W Wylie. Mr Gibson BL referred the Tribunal to the relevant paragraphs of that report, being paragraphs 392 to 395, and more especially paragraph 393, which he considered contained, in effect, the predecessor to the Article 5(5) factors. He pointed to the following extracts from the report:

i. That the main criticism of the law at that time was that there were provisions whereby covenants could be discharged even if they had become obsolete (paragraph 392).

ii. That obsolete covenants were often used as a means of extracting money from the owner of the land burdened with the restriction in circumstances where the covenants impeded the legitimate development of land (paragraph 392).

iii. That the power only existed in England and Wales in the context of leasehold land (paragraph 393).

iv. That one aspect to be considered was any changes in the character of the neighbourhood or which for any other reason, the restriction and obligation had become obsolete. An example given in the report being a house which could only be used for residential purposes and which at the time was in an area which was residential. If the area was a business area then that would be an important factor supporting modification or extinguishment [paragraph 393(1)].

v. Where the obligation secured no practical benefit to the person entitled to enforce it this was also a factor in favour of change [paragraph 393(2)].

vi. Where the obligation or restriction unreasonably impeded the use or enjoyment of the development of land, but only if the restriction or obligation was of no substantial value to the covenantee or was contrary to public interest and if money would be adequate compensation for the loss of the benefit [paragraph 393(3)].

26. In conclusion Mr Gibson BL submitted, therefore, that reading down the legislation and the case law, the starting point should be whether or not the retention of the impediment conferred a substantial benefit on the impediment holder, in the subject reference the respondent and as set out above, that substantial benefit does not have to be measured in money. He further submitted it could and indeed quite obviously should be considered against a backdrop of amenity; if the right of way serviced the respondent's property and the respondent's property was a factory or some other industrial unit, it would be more difficult for the respondent objector to claim that there was an amenity value associated with the property.

27. Mr Stevenson BL referred to the respondent's approach that there was "little or no authority in the British Isles upon which to rely" and as a result it then invited the Tribunal to consider the 1971 Land Law Report which preceded the Order by some 7 years. It also stated that in considering modification "the starting point must be" the Australian case of Parixax.

28. In relation to the point about an absence of authority in the British Isles, Mr Stevenson BL considered it hardly surprising as the English legislation (s84 of the Law of Property Act 1925) did not give the Court the power to order modification of an easement, nor did the Republic

of Ireland provision (s50 of the Land and Conveyancing Law Reform Act 2009). There, therefore, could not be any English or Irish cases on modification of an easement.

29. As regards Northern Ireland authority there was the Menary case and the applicants say that the lack of case law in Northern Ireland could be explained by two factors (i) it was more common for development land to be subject to a covenant impeding development than to be subject to a right of way which impeded development; and (ii) where modification of a right of way was being sought, there was not normally any need to involve the Tribunal. If a party, as in the subject reference, is being offered a materially, equally, commodious right of way he submitted that party is hardly going to run a hearing to try and argue the right of way should be entitled to stymie development, when that was not the point of a right of way.

30. Whatever the reasons for the lack of easement cases, Mr Stevenson BL submitted that this did not much matter as an easement was obviously an impediment within the meaning of the Order and there was nothing in the Order to suggest easements should be treated differently from any other sort of impediment. It was the applicants' position that the cases which have been before the Tribunal since the inception of the Order have established a solid body of jurisprudence on the approach to be adopted in applications for modification or extinguishment of an impediment and it was a matter of applying that case law to the circumstances in the subject reference.

31. As regards the respondent's reference to the Land Law Report of 1971, Mr Stevenson BL submitted: (i) the legislation proposed by that report was in different terms to the final form of the 1978 Order, which came into effect some 7 years later; (ii) the musings of the Report on legislation which came into effect 7 years later and in a different form was therefore of little or no assistance; (iii) since the 1978 Order came into effect there has, as noted above, been a wealth of case law on the approach to be adopted to cases under it; (iv) there was therefore no need to consider what was said in the 1971 Land Law Report. The proper approach was to consider the established jurisprudence on applications to modify impediments; and (v) the points set out in the Report at para 393 (on which the respondent placed reliance) were little more than recitation of the Report's proposed wording for the legislation (which was subsequently worded differently in any event). The applicants

therefore say that for the purposes of this case, and with the greatest respect to the Report's authors, it can be disregarded.

32. As regards the Parixax case, Mr Stevenson BL submitted that it was not the starting point for applications under the Order, rather the starting point was the terms of the Order itself and then the case law which had developed from that. Further, as to the passage from Parixax quoted in the respondent's submissions, Mr Stevenson BL submitted that it was hardly surprising that the Court would not modify a covenant to allow the development flats where the covenant holder lived beside the proposed development and the flats would dimmish the covenant holder's enjoyment of his home. Mr Stevenson BL considered this to be a case where a proposed development was directly in breach of the terms and the purpose of the covenant and a case where a right of way is being modified was, obviously, not remotely the same type of case.

33. In conclusion Mr Stevenson BL submitted that the approach in the subject reference should be the same as in any modification case; the Tribunal must determine whether the respondent's right of way unreasonably impeded the development of the applicants' land, and in making that determination the Tribunal must consider the factors set out in Article 5(5) of the Order.

34. The Tribunal notes the contents of Mr Gibson BL's submissions but agrees with Mr Stevenson BL, in the subject reference the starting point for the Tribunal is the Order itself and in particular the Article 5(5) issues to be considered.

35. The Tribunal refers to the previous extracts from Andrews v Davis and Danesfort v Morrow & Anr which explain how the statute should be applied and the discretion afforded to the Tribunal.

36. The Tribunal will now consider the Article 5(5) issues.

The Article 5(5) Issues

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

37. The applicants:

i. As to the "period at" and to "the circumstances in which" the right of way was granted, the details are contained in the transfer of 18th March 1963 ("the transfer") between Mr Robertson and Mr Drennan in which the respondent's property (then a site) was sold to Mr Drennan. At that time, the lane over which the right of way ran went to the respondent's property and to Mr Robertson's farm further along. The four houses which are now at the bottom of the lane were not then built.

ii. The "purposes for which" the impediment was created is an important (perhaps the important) consideration in this case:

a) The purpose of the right of way was, obviously to give Mr Drennan an ability to get to and from the Ballyquin Road to the dwelling house at 37 Ballyquin Road.

b) Relatedly, neither the transfer generally, nor the right of way in particular, gave Mr Drennan any control whatsoever over the development or use of Mr Robertson's retained land. He was not, for example, granted any type of restrictive covenant.

c) There was also no constraint whatsoever placed on the use of the lane by Mr Robertson. Mr Drennan was not granted an exclusive right to use the lane, it was a right to be enjoyed in common with Mr Robertson and his "successors, lessees, licensees, tenants and assigns".

d) Mr Drennan could not therefore exercise any control over the nature of the lane, its surface, who was using it, its boundaries, its boundary features or the properties abutting it. He simply had a right of way. As long as his right to get to and from the Ballyquin Road was not being substantially interfered with, he could have no complaint.

iii. The respondent's expert, Ms Thompson, initially sought to contend that the right of way had what she referred to as a "dual purpose". That argument did not however survive cross examination. Ms Thompson accepted that she could not say that the right of way gave Mr Drennan any control whatsoever over what might be done to the lane or the surrounding land. Indeed, it seemed from the respondent's submissions there was no longer any debate on this point. Para 20 of the respondent's submissions states "the purpose of the impediment was to allow the Respondent residential access to his property".

iv. It was therefore now common case that the right of way was only that – a right of way – and did not give Mr Drennan any right to curtail what was done to the lane or to surrounding land.

38. The respondent:

i. From the legislation and, indeed, by the example given by the working party, it was clear that where there have been changes in the neighbourhood which render the character of the restriction or obligation obsolete, that would be a factor in justifying its removal or extinguishment.

ii. Here the purpose of the impediment was to allow the respondent residential access to his property (the grounding conveyance also contained an obligation on the respondent to use the property only as a single private dwelling house).

iii. The surrounding area at the time was farmland but what has happened now is that the character has changed to become more residential. If anything, therefore, the surrounding area has effectively "caught up" with the impediment. The area has changed from agricultural to residential. If anything, the change in character reinforces the benefit and purpose of the right of way.

iv. Furthermore, there was nothing outdated in the impediment, rights of way are as useful and relevant today as they were in the 1960s.

39. The Tribunal:

i. The Tribunal is clear, and it was generally accepted that the purpose of the right of way was to grant the respondent access from the Ballyquin Road to his dwelling house at 37 Ballyquin Road. Nothing more, nothing less.

ii. He did not have exclusive use of the lane and the Tribunal also agrees with Mr Stevenson BL he could not exercise any control over the nature of the lane, its surface, its boundaries, its boundary features or the properties abutting it.

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

40. The applicants:

Ms Thompson's report did not define the "neighbourhood". Instead, she restricted herself to criticising the neighbourhood as delineated by Mr Crothers. As Mr Crothers pointed out in his evidence, this was not a case where the Tribunal needed to concern itself with the precise extent of the neighbourhood. It was clear that since the transfer there have been substantial changes in the locale, not least in the construction of the circa 100 houses by Braidwater on the north side of the lane. The lane itself has also seen significant change – it previously served only two houses (Mr Drennan's and Mr Robertson's) but since the date of the transfer a further four houses have been built which use the lane as an access. There has therefore been a significant intensification in the use of the lane from the time of the grant of the right of way. Ms Thompson accepted, as she had to, that there had been a significant change in the locale since the date of the transfer. This too did not seem to be a matter in dispute.

41. The respondent:

Again, this appeared largely to be tied in with 5(5)(a) and the example given by the 1970s working party at paragraph 393(1).

42. The Tribunal:

i. It was a matter of fact and not disputed that the character of the neighbourhood had changed significantly from agricultural to residential, since the date of the grant of the right of way.

ii. It was also a matter of fact that four additional houses had been added at the top of the lane. The Tribunal, however, accepts Dr Fulton's evidence that these additions did not have any significant impact on his use of the lane.

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

43. The applicants:

i. This was a point on which the experts disagreed. Mr Crothers did not consider the "public interest" point to be of particular importance in the subject reference, but considered that, insofar as there was a public interest, that interest was in having houses built for people to live in. He pointed out that if the right of way was not modified and if alternative access could not be found, approximately 11% of the overall area zoned for housing in Limavady would be rendered sterile. The respondent's contention was that there was no public interest, or if there was it was small. It was now, therefore, common case that the public interest was not a weighty consideration for the Tribunal.

ii. The point did, however, take up time in evidence, and it was therefore worth briefly considering it. As noted at (i), Mr Crothers contended that if the right of way was not modified a substantial amount of the housing stock zoned in Limavady would be rendered sterile. Ms Thompson's response to this contention was that the Limavady area was "over zoned" for housing and the public interest would "not be harmed" if some of the land was rendered sterile.

iii. There were three responses to Ms Thompson's contention. Firstly, the figures for housing demand on which her analysis was based dated from 2016. The 2016 figures represented a significant downgrade from the 2008 figures. There was every possibility that the new figures (which should have been released by now) could show a significant upgrade. Secondly, the fact land was zoned for housing did not mean it could be delivered. There were other considerations, including

title issues and issues with sewerage provision which could prevent development. Thirdly, and more importantly, the argument that there was an oversupply of housing in Limavady was not borne out by the facts on the ground. Mr McGinnis and Mr Bradley gave evidence that the houses on the Boyle lands were selling very well indeed and all of the newly constructed houses were nearly sold. In response to questions from the Tribunal, Ms Thompson conceded that she was not aware of any large tracts of housing lying unsold in the Limavady area. Thus, the oversupply argument made by Ms Thompson was based on outdated figures and did not reflect the position on the ground.

iv. The applicants therefore say that given there was a public interest in people getting houses, particularly quality "starter" houses like those in the proposed development, and given the houses in the development were selling very well, that insofar as there was a public interest for the purposes of Article 5(5), that interest was in seeing the development proceeding.

44. The respondent:

The respondent's position was that there was no public interest in the subject land. The land was not to be used for a school or a hospital or anything which would benefit the public in the general sense. At the end of the day, this was a private housing development by a private developer for the benefit of private individuals.

45. The Tribunal:

The Tribunal agrees with both parties that this issue was of little or no significance in the circumstances of the subject reference. The Planning Department, however, represents the public interest in any lands and it recognised that the subject development was consistent with the public interest in the Limavady area. The Tribunal, therefore, considers implementation of the granted planning permission to be of public interest.

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

46. It was not disputed that there was clearly a trend for the grant of planning permission for residential development at or around the reference property.

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

47. The applicants:

i. The Tribunal must consider what rights an impediment in question gave (or secured) to a respondent and how modification might affect those rights. A respondent cannot, it is submitted, complain about an infringement of something which was not secured by the impediment in question. That is, it cannot ask the Tribunal to consider the effect of modification on rights it does not actually enjoy.

ii. The central argument being made by the respondent was that he objected to the change in the character of the right of way from a right of way over a rural type lane to a right of way over a road in a development. However, the right of way did not give the respondent any right whatsoever to control what was done to the lane or to the development of the surrounding land. He could not prevent the applicants from changing the lane to a development road. Indeed, if planning permission had been granted for a development road along the lane, then the case would not have troubled the Tribunal at all, as no modification of the right of way would have been needed. For the reasons previously explained, the respondent cannot base his objection to modification on the infringement of "rights" which he did not actually have (the right to control development of the land or lands) and that was precisely what he was seeking to do.

iii. Again, as previously explained, all that the right of way granted (or secured) to the respondent was a right to get to and from the Ballyquin Road. He is to be granted a new right of way over the road in the development which will enable him to get to and from the Ballyquin Road. That new right of way was clearly (given it has obtained Roads Service approval and planning permission) a perfectly safe, and, on any objective view, acceptable way to get to and from the Ballyquin Road. There was no substantive criticism that could be made of the new right of way as a right of way.

iv. At paragraph 6 of the respondent's closing submissions, the respondent sets out his objections to the proposed right of way. The applicants set out those objections below, and its response to them:

a) <u>The proposed route involved a longer journey time.</u>

This was not accepted. As explained in Mr Dorman's report, it was a shorter journey when one is heading to or coming from the Limavady/Derry/Coleraine direction. It was only longer if one was going to or from Belfast, but for both the respondent and any future occupier of his property that could only be for a small minority of journeys. Thus, the argument about time and distance differences between the existing right of way, insofar as they were of any consequence, favoured the applicants. In his evidence, the respondent, quite correctly, did not put any store by the distance differences between the existing right of way and proposed new right of way. He was not making any complaint about journey time or distance. His complaint was about the change in nature of the right of way. For the reasons explained previously, the right does not give him the right to control the nature of it. Thus, his complaint was about the effect of the new right of way on something which the existing right of way did not actually grant to him.

b) <u>That the proposed route involved a longer distance.</u>

The points made above are repeated.

c) <u>That the proposed route contained and will contain more traffic.</u>

This was true, but (i) the respondent has no control over the amount of traffic which can be put on the lane. He was seeking to assert a benefit which the right of way does not grant; (ii) the route has been deemed safe and acceptable by Roads Service. The traffic was thus not going to materially impede access to the respondent's property; and (iii) the existing lane was narrow, meaning if traffic was encountered on it a reversing manoeuvre had to be performed. That would not be the case on the new road.

d) <u>That the proposed route was public rather than private (save for a small section as the respondent would leave his house).</u>

This was again true, but the point made at (c) is repeated. The respondent had no ability to constrain the number of users of the lane.

e) <u>There will be a change in character of the right of way.</u>

Again, this was true, but the respondent had no right to constrain any change in the character of the right of way.

f) <u>That the roadway had not yet been adopted.</u>

This was true, but it was subject to a road bond and will be adopted in due course. The respondent can hardly complain about travelling over an unadopted surface given that is what he does permanently.

g) <u>That the respondent's route was now a mixture of private and public.</u>

This is the same point as "(d)".

h) <u>That the respondent will now have to deal with the Management Company and Roads Service.</u>

This was not understood. The new right of way will be adopted, save for the area in front of the respondent's property which will be private and will be maintained by the Management Company. The respondent will not have to "deal with" Roads Service in any way. As to "dealing with" the Management Company, as things currently stand there is no one obliged to maintain the lane. The respondent has a right at common law to maintain the lane. Under the new right of way, the Management Company will be obliged to maintain the private element of the road. The respondent will still have his rights at common law. Thus, his position, as far as maintenance was concerned, was improved from the present position – he will still have his <u>right</u> to maintain and there will be another entity <u>obliged</u> to maintain.

v. The respondent's submissions also do not acknowledge the benefit to the respondent of the new road – a road with a good surface, properly drained, well lit, with footpaths to allow safe access on foot. The respondent will also have the benefit (if he wishes to avail of them) of new services and will have a much shorter walk when taking his bins and his recycling boxes to and from his property.

vi. When the issue was approached in the correct way – namely by considering the purpose of the right of way and the benefit it actually secured (access to the Ballyquin Road) and contrasting that with the proposed right of way (again providing access to the Ballyquin Road) it was clear that the proposed modification would not result in the loss of any practical benefit which the existing right of way secured for the respondent.

48. The respondent:

i. This was a matter where the applicants' case must fall. The practical benefit to the respondent was that he continued to use a right of way which was shorter and less bothersome than the right of way which was proposed:

a. The current lane was secluded in character.

b. The respondent faced little or no traffic interruption (in the sense of vehicular traffic) on his route out to the county road.

c. That the route to the county road was shorter.

d. That the right of way had been in existence since 1963 and enjoyed by the respondent and his family for the past 40 years.

ii. Against that:

a. The proposed route involved a longer journey time.

b. The proposed route involved a longer distance.

c. The proposed route contained and will contain more traffic.

d. The proposed route was public rather than private (save for a small section as the respondent would leave his house).

e. There would be a change in the character of the right of way.

f. That the roadway has not yet been adopted (Mr Crothers, in his evidence on behalf of the applicant, agreed that there can be problems with adoption but Mr Bradley, on behalf of the applicant, attempted to assure the Tribunal

that adoption was 100% guaranteed – the usefulness of Mr Bradely's evidence is commented on below).

g. The respondent's route was now a mixture of private and public.

h. The respondent will now have to deal with the Management Company and Roads Service.

iii. As matters currently stand, the proposal, by the applicant was that the respondent be left with a mixture of Management Company and Government Department in respect of his access. At present he faces none of these difficulties with the sole point of contact in respect of his right of way being the applicants personally.

iv. The respondent's evidence, which was unchallenged, was that the spread and surface of the right of way had existed during all his time at the property without change. There was little or no maintenance required to the lane, a fact with empirically appears to be supported by the notion that since at least 2001 the only person utilising the laneway for the majority of its length was Mr Fulton alone (save for the very occasional piece of farm machinery).

v. What was now proposed on behalf of the applicants was that part of the lane would now be taken over by a Management Company and that the burden on that lane will be increased by the construction of two houses. Mr Fulton will now have to deal with the Management Company whose interests will be focussed largely on maintaining the development of 200 to 300 houses. It was impossible to know, at this stage, how many properties would be taken under the Management Company, how the Management Company was or will be established and, indeed, Mr McGinnis, who gave evidence on behalf of the developer, was, rather embarrassingly, unable even to recall the name of the Management Company.

vi. All of the above puts the respondent in an entirely unsatisfactory position. The respondent was, in effect, being asked to adopt not only a complete change in the nature and character of the lane but a complete change in the nature and character of the owner.

vii. The respondent also faced the problem that, at present, the proposed right of way was not adopted and what was offered in its place was a promise by the owners of the bed of the alternative route, namely the Boyle family, that they will grant him a

right of way. No right of way has yet been granted and, whilst the promise made by the Boyle family was interesting, it was not enforceable in law and the Tribunal had no power to order the Boyle family to grant to the respondent a right of way. This, in the respondent's respectful submission, was a fatal flaw in the application itself. Put quite simply, in the absence of an executed right of way, the Tribunal had no power, even if it were wholly convinced on the other factors, to order that the right of way be modified as the applicants so claim. To do so would, put quite simply, be unlawful.

49. The Tribunal:

There is no doubt that the existing right of way secures a considerable practical benefit for the respondent. As to the nature and extent of that benefit the Tribunal agrees with Mr Stevenson BL, all that the existing right of way secured to the respondent was a right to get to and from the Ballyquin Road. There were no other rights attached to the existing right of way.

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

50. Not relevant in the circumstances of this reference.

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

51. Not relevant in the circumstances of this reference.

5(5)(h) Any other material circumstances

52. The respondent:

Under this heading the Tribunal had an enormously wide discretion. No guidance was given in the Working Party Faculty as to what might constitute material circumstances but, in the respondent's, respectful submission the following ought to be considered:

a) Whether or not any of the parties have been guilty of unreasonable or unconscionable behaviour.

b) The material extent to which the applicant or applicants would be benefited by the modification.

53. The applicants:

i. The respondent's submissions contended that under this head the Tribunal should consider (a) whether any of the parties had been guilty of unreasonable behaviour; and (b) the extent to which an applicant would be benefited by a modification.

ii. As to point (a) the applicants did not accept that "behaviour" was a material circumstance. In any event, the applicants entirely refute the suggestion that they have done anything other than behaved entirely properly throughout. There was evidence at hearing about the conversation between the applicants, Braidwater and the respondent. These were nothing other than the normal conversations between parties seeking to reach an agreement in cases such as this. An agreement could not be reached, which was regrettable, but the conversations were evidently perfectly cordial. The applicants were of the view they were entitled to have the right of way modified and the respondent was of the view they were not. That was all that could really be said of those conversations. There was certainly nothing said or done by the applicants or Braidwater in their dealings with the respondent that was relevant to the question of whether or not the right of way ought to be modified.

iii. As to point (b), the applicants say that this was not something that the Tribunal should take into consideration. At no point does the 1978 Order direct the Tribunal to consider the benefits to an applicant of modification, and the Tribunal has never done that in any other case. There was thus no legislative nor case law basis for the point being advanced by the respondent. The respondent's argument was (presumably) that an applicant who was getting less of a benefit should be more likely to get modification. Where was the line to be drawn on that? How was the benefit to an applicant to be measured? Would evidence needed to be called on that? What if an applicant might be able to obtain an alternative access at some point – was the value of modification to him then less? What if an

applicant could do an alternative development which might not impinge a covenant – again was the value then less? Was the benefit more to an applicant who had less money, as it would be more of a benefit to him than to someone who was well off? If this argument was accepted, it would open up a whole can of worms, and affect every future application before the Tribunal. There was therefore good reason why it was not a point which the Tribunal was enjoined to consider by the 1978 Order nor one which the Tribunal had entertained before. The Tribunal should not, it was submitted, consider it in this case.

54. The Tribunal:

i. With regard to "(a)" the Tribunal was not concerned with nor does it want to be involved in the without prejudice discussions between parties prior to hearing. The Tribunal agrees with Mr Stevenson BL this was not a material circumstance in the context of the Order.

ii. With regard to "(b)" the Tribunal again agrees with Mr Stevenson BL, the financial benefit to the applicant was not a material circumstance to be considered under the Order.

Tribunal's Authority to Order a New Right of Way

55. The respondent had questioned the authority of the Tribunal to order a new right of way over the Boyle lands.

56. Mr Stevenson BL referred the Tribunal to Article 5(6)(a) of the Order:

"Where the Lands Tribunal makes an order modifying or extinguishing an impediment:

(a) the Tribunal may add or substitute such new impediment as appears to it to be reasonable in view of the modification or extinguishment of the existing impediment."

57. He submitted:

i. The Tribunal had a wide power to order the grant of new impediments, with the precise form of and conditions of that impediment being a matter for the Tribunal. The Tribunal had received affidavits from the Boyle family confirming that they would grant the respondent a right of way and/or would abide by any order which the Tribunal might make in relation to rights granted over their land. The Tribunal could therefore be confident that the respondent would enjoy a right of way to his property if modification was ordered. The respondent's contention would make sense if the Boyle's were unwilling to grant those rights or were not willing to abide by an order from the Tribunal. That was not however the case – they would abide by any order made under Article 5(6). There was therefore no issue.

ii. If the Tribunal thought there was an issue, then it could be addressed in three ways: (i) the Boyles could grant a right of way prior to any final order being made; (ii) the new impediment ordered by the Tribunal (it being remembered the Tribunal had a wide discretion over the form of any new impediment) could provide that on the respondent being granted a right of way by the Boyles over their land, the respondent's right of way over the land was extinguished and replaced by a right of way over the new road to the point where it met the Boyle land; or (iii) the Boyles could be added as co-applicants to make clear (beyond peradventure) that an order under Article 5(6) binded them.

iii. The applicants say that the respondent's argument on this point was of a piece with its initial skeleton argument when it sought to raise the Human Rights Act 1988 as a bar to any application for modification, and which resulted in a lost day and a delayed hearing. It was an attempt to raise a technical argument because its argument on the substantive point was weak. For the reasons set out above, the latest technical argument was bad in law, and even if it had any merit, it could easily be addressed.

Conclusions

58. Mr Stevenson BL concluded:

i. The evidence, whilst lasting for three days, did not change the complexion or the fundamental point in this case. That was the respondent considered that the right of way entitled him to stymie development of the land and/or surrounding land, and it did not do that.

ii. This case was relatively straightforward. The impediment which the respondent has was a simple right of way to the Ballyquin Road. He was being offered, in its place, a right of way which on any reasonable view was equally commodious as the existing right of way. The respondent's opposition to modification of the right of way was based on the assumption that the right of way included a right to stymie development of the lane and the applicants' property. That assumption was wrong in law. When one considered the respondent was being offered not just a more commodious right but also new services and gate posts, and when the impediment was preventing the construction of 88 houses, the applicants respectfully submit that the case for modification was unanswerable.

iii. If the Tribunal was with the applicants, they would welcome the opportunity to have some input into the final form of the Tribunal's order.

59. Mr Gibson BL concluded:

i. In the respondent's respectful submission, it was clear that the reason the legislation was enacted was to ensure that obsolete covenants did not impede the development of land or that covenants which were no longer used or enjoyed should be allowed to prevent development merely for the purposes of extracting material gain.

ii. Here, it would be a matter for the Tribunal to assess the respondent's credibility but the Tribunal could have little or not doubt that what was proposed, even on an entirely objective view, was materially different from what currently existed. The question which the Tribunal therefore had to answer was whether or not the retention of the existing right of way conferred a substantial benefit on the respondent. In the respondent's respectful submission, that was not a difficult question to answer.

The Tribunal

60. As previously noted in Danesfort v Morrow the overall question was:

> "Does the restriction achieve some practical benefit and if so is the benefit of sufficient weight to justify the continuance of the restriction without modification."

61. It was not disputed that the subject right of way provided a significant benefit to the respondent as it was his only means of getting to and from the Ballyquin Road.

62. There was also no doubt that the subject right of way significantly impeded the applicants' use and enjoyment, which included development, of their lands. The applicants gave evidence that, if the right of way was not modified, some 88 houses within the permitted development could not be built.

63. The Tribunal, however, agrees with Mr Stevenson BL, the existing right of way only provided the respondent with a right to get to and from the Ballyquin Road. Under this right, however, the applicant had no control over (i) the surface of the lane; (ii) the hedgerows/trees along the edge of the lane; and (iii) any development which could take place adjoining the lane.

64. In addition, the applicants had offered an alternative right of way which the Tribunal considers was a viable alternative, providing the respondent with access to and from the Ballyquin Road. This replicated the right under the exiting right of way. The Tribunal accepts that the right of way being proposed was completely different to the existing right of way and there were pros and cons for both, but it does grant the respondent a safe means of access to the Ballyquin Road, which was all that he was granted under the existing right of way.

Decision

65. The Tribunal, therefore, orders modification of the right of way to permit development of the applicants' lands in accordance with the granted planning permission. This modification will, however, be dependant on the respondent being granted a satisfactory right of way over the

Boyle lands, as proposed by the application. Modification will not be granted until the alternative right of way is in place. As suggested by Mr Stevenson BL, the Tribunal will hold discussions with the parties as to an agreeable form of words for the Order of the Tribunal.

Compensation

66. The Tribunal has not received any submissions from the parties about the amount of compensation, if any, to be paid for the modification. Any submissions concerning compensation should be with the Tribunal within four weeks of the date of this decision.

22nd May 2024

Henry Spence MRICS Dip.Rating IRRV (Hons)

LANDS TRIBUNAL FOR NORTHERN IRELAND