

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/19/2022

BY

(1) JOHAN LIMA DEVELOPMENTS LIMITED

(2) FLORENCE MARY HAMILTON – APPLICANTS

(3) WILLIAM HAMILTON

Re: Unregistered lands comprising a roadway or laneway leading from the adopted road, Mill Lane, Aughnacloy to a house and garden situate and known as Mill View, 5 Mill Lane, Aughnacloy and comprised in folios 6857 and 6858 County Tyrone

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

Background

1. The subject reference involves three portions of land:
 - (i) The lands and premises situate at and known as Mill View, 5 Mill Lane, Aughnacloy and comprised in folios 6857 and 6858 County Tyrone (“the first lands”). These lands are owned by Johan Lima Developments Limited (“the first landowner”).
 - (ii) Agricultural lands to the rear of the first lands and comprised in folios 6856 and TY21533 County Tyrone (“the second lands”). These lands are owned by William Hamilton (“the second landowner”).
 - (iii) Unregistered lands comprising a roadway or laneway leading from the adopted road, Mill Lane, Aughnacloy to the first lands (“the third lands”).

2. The first landowner owns and occupies the first lands subject to a right of residence in the dwelling house at 5 Mill Lane in favour of Florence Mary Hamilton (“the beneficiary”). The second landowner is the occupier and owner of the second lands.

The Determination Sought by the Applicants

3. The applicants are seeking a declaration from the Lands Tribunal:
 - (i) The first lands enjoy a right of way at all times with and without vehicles and or animals over and across the third lands for residential purposes.
 - (ii) The second lands enjoy a right of way at all times with and without vehicles and or animals over and across the third lands for agricultural purposes.
 - (iii) A proposed development of three additional houses on the first lands will enjoy the benefit of the subject right of way over and across the third lands.

Circumstances Giving Rise to this Claim for a Determination

4. The circumstances giving rise to the applicants' claim for a determination:
 - (i) The applicants' and the first landowner's immediate predecessors in title have been the owners and occupiers of the first and second lands since 6th August 1984. The first lands comprise the beneficiary's house and garden and the second lands comprise agricultural lands.
 - (ii) The first and second lands have at all material times and in any event for a period in excess of 30 years been accessed at all times both with and without vehicles and animals over and along the third lands.
 - (iii) The applicants have, on 25th November 2021, obtained planning permission for the construction of three additional detached houses on the first lands and seek a determination of their rights over and along the third lands before commencing any development.

Procedural Matters

5. The applicants were represented by Mr William Gowdy KC, instructed by C T McAlpine Solicitors. The Tribunal is grateful to Mr Gowdy KC for his helpful submissions.

6. The Tribunal also received affidavits from Mr William Hamilton and from Ms Zoe Turkington, partner in C T McAlpine Solicitors. The Tribunal is grateful to both for their affidavits.

Legislation

7. Article 4 of the Property (Northern Ireland) Order 1978 (“the Order”) provides:

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

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

- (a) whether or not the land is, or would in any event be, affected by an impediment;
 - (b) the nature or the extent of the impediment;
 - (c) whether the impediment is, or would in any given event be, enforceable and, if so, by whom
- (2) ...
- (3) ...
- (4) ...”

Affidavit of Mr William Hamilton

8. Mr Hamilton advised the Tribunal:

- (i) His mother and father purchased the first and second lands in 1984 and they have used the laneway at all times and for all purposes both with and without vehicles and animals for access, both to the house and garden and to the farmlands. They have never sought permission from anyone to use the laneway. He believes that the original house was built in the 18th century and the laneway was always the means of access to the house across the mill pond.
- (ii) In the circumstances he believes that the first and second landowners have used the laneway for more than 40 years to access the first and second lands at all times and for all purposes with and without vehicles and animals.

Affidavit of Ms Zoe Turkington, Solicitor

9. Ms Turkington detailed all of the steps which her firm of solicitors had taken to trace the ownership of the soil of the third lands. In the circumstances, however, they have been unable to identify the owner and therefore have not been able to identify a proper respondent to the subject application, on whom service of the reference could be affected.

10. Having considered Ms Turkington's affidavit in detail the Tribunal is satisfied that all reasonable attempts have been made to identify the owner of the third lands, but to no avail.

Mr Gowdy KC's Submissions

Introduction

11. The applicants seek a declaration under Article 4 of the Order that they enjoy a right of way over the third lands.

Proper Respondent

12. The Lands Tribunal is satisfied that all reasonable attempts to identify a proper respondent have been made but to no avail. The laneway comprises unregistered land. It does not form part of the same holding as the lands on either side of the laneway, the former mill ponds. It seems likely that it forms part of the holdings of the Acheson Moore family, but was overlooked when that family disposed of their interests in Aughnacloy in 1908.

13. It would be very difficult, costly and disproportionate now to attempt to trace descent of Frederick Acheson Montgomery-Moore to the present date to identify who now would be entitled to the soil of the laneway. The Tribunal agrees.

14. The reference has been advertised and no responses have been received. It is therefore submitted that it is in order to deal with the reference in the absence of a respondent. The Tribunal agrees.

Right of Way

15. It is plain from the historic documents that since at least the middle of the 19th Century, the first and second lands have enjoyed the benefit of access over the third lands. Indeed, the only purpose served by the third lands, as a bridge or causeway across the Mill Pond is an access to the first and second lands. The Tribunal agrees.
16. The affidavits of the solicitors and Mr Hamilton confirm that the owners of the first and second lands have exercised a right of way across the third lands since at least the late 1960s, without permission from any other person. The Tribunal agrees.
17. In the circumstances, where such user for a period in excess of 40 years is evidenced without permission or interruption, the applicants plainly establish the benefit of prescriptive easements under statute or under the doctrine of lost modern grant.
18. The requirements for the establishment of a prescriptive easement under the doctrine of lost modern grant are summarised in Power “Intangible Property Rights in Ireland” (“Power”) at 4.10. The essential proof is user as of right of the easement for a period in excess of 20 years. There are additional factors to be proved where the servient tenement is not held in possession, but there is no evidence in the present case of an interest in reversion.
19. The requirement of section 2 of the Prescription (Ireland) Act are discussed in Power at 4.43. Where there is user as of right for a period in excess of 20 years, a prescriptive easement can be established under statute. Where there is user for a period in excess of 40 years, an easement will be established on an “absolute and indefeasible” basis, unless the right was enjoyed under a written consent. There is no evidence of a written consent in the subject case.

20. Statutory prescription does not apply where the servient tenement is held under a tenancy. See Power at 4.22. The evidence in the subject case – i.e. that the third lands appear to be unregistered land, and were not the subject of a rent which could be sold by the Acheson Moore family, tends to suggest that no leasehold interest was ever created over the third lands.

The Tribunal's Conclusions

21. Mr Gowdy KC invited the Tribunal to declare that:
- (i) the first lands at all times enjoy a right of way with and without vehicles and or animals over and across the third lands for residential purposes; and
 - (ii) the second lands enjoy a right of way at all times with and without vehicles and or animals over and across the third lands for agricultural purposes.
22. In the circumstances of the subject reference and exercising its statutory power under Article 4 of the Order, the Tribunal is content to make the declaration as proposed by Mr Gowdy KC.

Development of the First Lands

Mr Gowdy KC:

23. The applicants have obtained planning permission for the construction of an additional three detached dwellings on the first lands. The effect of a change or intensification of user on an easement was considered by the English Court of Appeal in McAdams Homes Limited v Robinson [2004] EWCA CIV 214, [2004] 3 EGLR 93. There are two issues to be considered. The first is whether there is a radical change in character or change in identity of the land. The second is whether there is a substantial increase in the burden. It is well recognised that where land is used for a particular purpose, a right of way will not support the user of that land for a radically different purpose.
24. No question of radical change of user occurs here. The proposed three new houses are located on the first lands, in the garden occupied for residential purposes with the existing

house at Mill View. They are not located on land occupied for agriculture or any other purpose.

25. Thus, the proposed new houses will continue to have the benefit of the right of way, provided that there is no substantial increase in the burden on the servient tenement i.e. the third lands. The question as to whether there is a substantial increase is a matter of fact and degree, to be determined on the particular facts of a given case. Here, the fact that the third lands are not occupied for, and cannot be used for, any purpose other than as an access to the first and second lands is of magnetic importance. Any increase in the user of the laneway across the third lands has no adverse impact on the enjoyment of the third lands. Furthermore, the increase in user is not significant. The number of additional houses is comparatively small, as is the increase in vehicle movements. Note that in Stanning v Baldwin [2019] EWHC 1350 (Ch), Deputy Judge Mark Anderson QC considered that the replacement of one house with four did not involve a substantial increase in the burden on the servient tenement.
26. The applicants therefore seek an additional declaration that the proposed development of three additional houses on the first lands will enjoy the benefit of the subject right of way over and across the third lands. Based on the facts the subject reference the Tribunal is content to make such a declaration.

Summary

27. In summary, exercising its statutory power under Article 4 of the Order, the Tribunal makes the following declarations:
- (i) the first lands enjoy a right of way at all times with and without vehicles and or animals over and across the third lands for residential purposes;
 - (ii) the second lands enjoy a right of way at all times with and without vehicles and or animals over and across the third lands for agricultural purposes; and
 - (iii) the development of the three additional houses on the first lands will enjoy the subject right of way over and across the third lands.

18th July 2023

Henry Spence MRICS Dip.Rating IRRV (Hons)

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