

LANDS TRIBUNAL FOR NORTHERN IRELAND
THE LAND COMPENSATION (NORTHERN IRELAND) ORDER 1982
PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF A REFERENCE

R/2/2013

BY

MARK DOBBIN – APPLICANT

Re: 85 Coast Road, Drains Bay, Larne

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

Background

1. This is an application under Article 5 of the Property (Northern Ireland) Order 1978 (“the Order”) for the modification or extinguishment of a covenant contained within a lease dated the 2nd August 1955 between Rose Kelly of the one part and Mabel Henderson and Nellie McKay of the other part (“the lease”).
2. The lands and premises were granted to Rose Kelly and Mabel Henderson and their heirs and assigns for a term of 999 years subject to the payment of a yearly rent of five pounds if demanded and to the covenants and conditions within the lease.
3. Those lands and premises were subsequently assigned to the Dobbins who have lived at the property for more than 40 years.
4. Planning permission to erect two blocks of four apartments on the subject land and the adjoining land at 81 and 83 Coast Road was applied for and subsequently granted on the 4th April 2014.
5. Clause 2(3) of the lease contains a provision which restricts building on the demised premises unless plans and specifications are approved by the lessor:

“Not to erect or build on the demised premises any new buildings except in accordance with plans and specifications previously approved by the lessor.”

6. The applicant wishes to develop the lands in accordance with the planning permission but the lessor has not consented. The applicants therefore seek modification or extinguishment of the covenant to permit the erection of the apartments, as approved in the planning permission.

Procedural Matters

7. Mr Chris Phillips of Carson McDowell, Solicitors represented the applicant. Mr Chris Callan of CBRE Commercial Property Consultants provided written and oral expert evidence. Mr Callan is a senior director and Head of Professional and Consultancy Services in CBRE and he currently resides in close proximity to the subject property.
8. The applicant had identified Ms Eilish Kelly as the legal beneficiary of the covenant. The representatives of Ms Kelly have provided several written objections which had raised a number of points but they did not take part in the proceedings.

Positions

9. Mr Callan submitted:
 - i. The restriction must be seen in light of the planning conditions and market trends in 1955 and the change in recent years in the market and planning conditions to allow for higher density developments in the locality, particularly apartments.
 - ii. The proposed development is pursuant to the granted planning permission, is consistent with the planning conditions and would not detrimentally affect the character of the neighbourhood.
 - iii. No material prejudice will be suffered by the lessor or the owners of the surrounding properties.

- iv There is no practical benefit to any relevant person to the withholding of consent.

Statutory Framework

- 10. The relevant statutory provisions are found in Articles 5(1) and 5(5) of the Order. Article 5(1) provides:

“The Lands Tribunal, on the application of any person interested in land affected by an impediment, may make an order modifying, or wholly or partly extinguishing, the impediment on being satisfied that the impediment unreasonably impedes the enjoyment of 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.

- 11. Article 5(5) sets out the matters which the Tribunal shall take into account in determining whether an impediment affecting any land might be modified or extinguished.

Discussion

- 12. Consideration of the Article 5(5) issues:

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

The impediment was created by a lease dated the 2nd of August 1955 and when the lease was created the subject property had already been in existence. This was confirmed by Clause 1 of the lease. “In consideration of the expense incurred by the Vendor in erecting upon the premises hereby demised the buildings now standing thereon ...”

Mr Callan's view was that the impediment was created to control the type of building which might replace the original dwelling and in particular to protect the lessor's amenity of the sea views. The Tribunal agrees.

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

Mr Callan submitted that there had been a number of changes in the vicinity of the subject property since 1955:

- At the corner of Coast Road and Branch Road two apartment blocks had been constructed within the last 10 years.
- Further to the west in Drains Bay there were two separate developments of apartments, one a three storey block and one a four storey block, both of which had been constructed in the last 15 years.
- A bungalow had been constructed at 88 Coast Road and a replacement dwelling at 92 Coast Road.

The Tribunal is satisfied that since 1955 the general location of the subject property had changed to allow for higher density development, particularly apartments.

(c) **Any public interest in 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:**

Mr Callan was not aware of any public interest in the property.

(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:

Mr Callan provided a schedule of planning applications, both approved and refused, for land and property in the Drains Bay area. In his opinion these consents demonstrated that there had been an intensification of development over the last 10 to 20 years, including apartment schemes. Mr Callan referred in particular to land at 94 Coast Road which was the subject of a covenant restricting development and this covenant was removed to facilitate the development of two apartment blocks.

The Tribunal is satisfied that the subject development is in keeping with recent trends in the locality.

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

The planning permission granted to the Applicant is for the development of apartments on a site comprising 81, 83 and 85 Coast Road. Mr Callan submitted that the presence of apartments on the seaward side of the Coast Road was therefore established and if it was the ruling of the Tribunal not to modify the subject covenant to enable the scheme to proceed, there was nothing to stop the Applicant from making a fresh application for a reduced apartment scheme on the lands not affected by the covenant, at 81 and 83 Coast Road. In his opinion consent on that basis was likely for six apartments and the Respondent could not prevent such a scheme.

Mr Callan also submitted that the sea views currently enjoyed from the Respondent's dwelling would not be affected in any way by the proposed development as the Planning Service had insisted that the ridge height of the proposed development was the same as that of the existing dwellings.

The Tribunal is satisfied that any practical benefit attaching to the subject covenant would not be affected by the proposed development scheme.

- (f) The Tribunal considers this matter to be of no relevance.
- (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:**

Mr Callan referred to the Respondent's written submissions to the Tribunal and in his opinion many of the objections were not related in any way to the covenant contained within the lease. He considered that the Applicant's primary objective was to stop any further apartment schemes in the locality and he also noted that the Respondent made no mention of the visual amenity from her home being diminished by the proposed development.

Mr Callan also referred to an apartment scheme at the junction of Coast Road and Branch Road, some 100 metres from the Respondent's dwelling. He submitted that in 2004 Ms Kelly entered into a deed of release and modification of the lease which permitted an apartment development to proceed on these lands. Mr Callan supplied the Tribunal with a copy of the Deed and asked the Tribunal to note that this development was for two blocks of four apartments each. He submitted that Ms Kelly's attitude to apartments appeared to have changed between the granting of the 2004 modification and opposing the Applicant's current request for a similar modification.

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

Mr Phillips referred the Tribunal to the following extracts from "Development Control Officers Professional Planning Report":

“The height of the proposed buildings in my opinion at 7.2m is not excessive and will not dominate the landscape as feared by the third parties who sit on the opposite side of the road on elevated ground in relation to the application site.”

and

“It is my assessment that the proposed development of apartments is not out of character with this area and will have the appearance of two large dwellings located on the Coast Road. The ridge height is not considered excessive in my assessment.”

and

“Significant increase in housing density. I do not feel that the applicant has overdeveloped this site.”

Conclusion

13. The Tribunal is satisfied, having considered the relevant matters in Article 5(5) of the Order, that the impediment unreasonably impedes the enjoyment of the Applicant's land or if not modified or extinguished, would do so.
14. The tribunal therefore orders modification of the covenant to allow for the granted planning permission or any variation thereof.

Compensation

15. The Tribunal has a discretion under Article 5(6) of the Order to direct payment of compensation.
16. Mr Callan considered that the proposed development would not interfere with any practical benefit attaching to the covenant within the lease. In his opinion the conditions imposed by the Planning Office in relation to ridge height would

ensure that the Respondent would be no worse off with regard to loss of amenity and indeed the letters of objection did not raise the issue of loss of amenity as a consideration. In any case he considered that the question of compensation, if any, should be measured by reference to the modification granted by the Respondent in 2004. The payment in this case was a nominal £1 (one pound) and Mr Callan considered that a similar nominal payment of £1 or Nil compensation should be payable in the subject case.

17. The Tribunal concludes that it shall not direct payment of any compensation for the following reasons:

- (i) The modification of the covenant to allow for the planning permission will not interfere with any practical benefit secured by the covenant.
- (ii) On the balance of probabilities the effect of the covenant, operating as it did to protect the residential character of the immediate locality, was to enhance rather than take away from the value of the property at the time it was imposed.

ORDERS ACCORDINGLY

9th July 2014

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

Appearances:

**Applicant: Mr Chris Callan instructed by Chris Phillips of Carson McDowell
LLP, Solicitors**