

**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/23/2022**

**BY**

**MR POLLOCK McKAY – APPLICANT**

**Re: 73 Castleroe Road, Coleraine**

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

**Background**

1. Mr Pollock McKay (“the applicant”) is the lessor of 73 Castleroe Road, Coleraine (“the reference property”), holding a leasehold estate of 999 years effective from 1<sup>st</sup> November 1946. The applicant is the successor in title of William McKay, the original lessor of the lease agreement dated 30<sup>th</sup> November 1946.
2. The applicant has obtained outline planning permission, LA01/2019/1015/O, for “the replacement of the existing vacant dwelling with 2 no. semi-detached dwellings with in-curtilage parking and alterations to existing access on to public road”.
3. The lease, however, contains covenants which restrict development: paragraphs 6, 7 and 8 of the 2<sup>nd</sup> Schedule to the lease provide:
  - “6. Not at any time during the said term to use the premises hereby demised or any part thereof for any purpose other than that of a private dwelling house without the consent in writing of the Lessor.
  7. Not to erect during the said term any building whatsoever on the said demised premises other than the dwelling house and buildings hereby covenanted to be

erected or a dwelling house and buildings in substitution thereof should the first-mentioned dwelling house and buildings be destroyed, without the consent in writing of the Lessor.

8. To keep the front of the dwelling house hereby covenanted to be erected on the line as shown on said map.”
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4. The applicant now seeks modification of the impediments to allow for development in accordance with the granted planning permission.

### **Procedural Matters**

5. The applicant was represented by Mr Glenn McCaughey of Macaulay Wray, solicitors. Mr McCaughey has provided an affidavit detailing his attempts to contact any possible beneficiaries of the covenants, but to no avail. The Tribunal is satisfied that all reasonable attempts have been made.
  
6. On behalf of the applicant the Tribunal has also received an expert report from Mr Richard McLaughlin BSc (Hons) MRICS of Northern Real Estate, dealing with the issues in Article 5(5) of the Property (Northern Ireland) Order 1978 (“the Order”), which the Tribunal is statutorily bound to take into account when considering modification or extinguishment of a covenant. Mr McLaughlin is an experienced chartered surveyor and the Tribunal is grateful to him for his helpful submissions.

### **The Statute**

7. Article 5(1) of the Order provides:  
  
“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.”

8. Article 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.”

9. Article 5(5) of the Order specifies the matters which the Tribunal must take into account, together with any other reasonable circumstances. These will now be considered in detail.

### **The Article 5(5) Issues**

#### **Mr McLaughlin**

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

10. The lease was created on 30<sup>th</sup> November 1946 some 76 years ago. Since then policies and trends have changed in urban settlements, particularly in terms of sustainability and the need to protect the countryside. Development trends have meant a higher density for development now compared to 1946.

11. Historically, in the early to mid 20<sup>th</sup> century, covenants were imposed as a tool to protect residential amenities and prevent overcrowding. In my opinion these covenants have become redundant due to changes in the demand for housing and changes in planning policies.

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

12. The Castleroe Road has seen a number of new build, higher density schemes. An example is the Salmon Leap development which is north of the reference property.

13. Adjacent to the reference property, No. 71 Castleroe Road has obtained planning permission for the replacement of a single dwelling by two new dwelling houses.

14. In addition the existing dwelling is now derelict, is an eyesore and a public health hazard.

**5(5)(c) Any public interest in the land as exemplified by any development plan adopted under Part 3 of the Planning Order (Northern Ireland) 1972**

15. The granted planning permission is a public interest in the land.

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

16. Planning trends in the locality are for higher density residential development. A list of planning permissions has been supplied.

**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**

17. Due to the changes in the character of the neighbourhood over time, an acceptance by the public to higher density, a change in planning policies and demand for residential property, it is my opinion that the impediments do not secure any practical benefit to the freeholder, who cannot be located.

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

18. Not applicable.

**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**

19. Not applicable, the freeholder cannot be located.

**5(5)(h) Any other material circumstances**

20. The impediments are out of date, not in line with planning policy nor property development trends in 2022 and serve no benefit to the freeholder.

### **Mr McLaughlin's Conclusions**

21. Mr McLaughlin concluded that it was his opinion that the impediments unreasonably impeded the applicant's enjoyment of the reference property by restricting its use and development.

### **The Tribunal**

22. The Tribunal notes the contents of Mr McLaughlin's submissions. The main issue for the Tribunal is does the impediment achieve some practical benefit, and, if so, is it a benefit of such weight to justify its continuance without modification or extinguishment?

23. Based on Mr McLaughlin's submissions and in the circumstances of the subject reference, the Tribunal is satisfied that the subject impediments, if not modified or extinguished, would unreasonably impede the applicant's use and enjoyment of the reference property. The Tribunal agrees with Mr McLaughlin, in that impediments do not confer any practical benefit on any person.

### **Decision**

24. Having considered Mr McLaughlin's expert report dealing with the statutory issues in Article 5(5) of the Order, the Tribunal orders modification of the impediments to allow for development in accordance with the granted planning permission, LA01/2019/1015/O, or any variation thereof.

### **Compensation**

25. The Tribunal may award compensation in accordance with Article 5(6)(b) of the Order but considers that no compensation should be awarded as no loss would result from the modification of the covenants.

## **Objectors**

26. As the subject reference was decided by way of written submissions and a public hearing was not held, the Tribunal will allow a further period of four weeks from the date of publication of its decision for any objectors to come forward, prior to issuing an Order of the Tribunal.

**2<sup>nd</sup> December 2022**

**Henry Spence MRICS Dip.Rating IRRV (Hons)**

**LANDS TRIBUNAL FOR NORTHERN IRELAND**