

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
PROPERTY (NORTHERN IRELAND) ORDER 1978

IN THE MATTER OF REFERENCE

R/5 & 6/2018

BETWEEN

ARNTZ BELTING COMPANY LIMITED – APPLICANT

AND

HERON BROTHERS LIMITED – RESPONDENT

**Re: Lands situate at Pennyburn Industrial Estate, Londonderry as comprised
in Folio Numbers LY6789L, LY89097L and LY2391L County Londonderry**

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

Background

1. The lands situated at Pennyburn Industrial Estate as comprised in folio numbers LY6789L, LY89097L and LY2391L County Londonderry (“the reference lands”) are in the ownership of Arntz Belting Company Limited (“the applicant”). The reference lands comprise two separate plots held under different leases.
2. The first plot, folio LY2391L, comprises some 11.2 acres of former industrial land held by the applicant under a 999 year lease which commenced on 15th July 1985. This plot is referred to as the “ABC lands”.
3. The second plot, folio numbers LY6789L and LY89097L, comprises some 3.6 acres held by the applicant under a 999 year lease which commenced on 19th May 1988. These lands are referred to as the “EWC lands”. Both plots, which were originally owned by the Department for Economic Development (“DED”), are now mainly vacant and derelict. Heron Brothers Limited (“the respondents”) are the current freehold owners of the reference lands.

4. The lease relating to the ABC lands contains the following covenants at paragraphs 4 and 5:

“(4) Not at any time during the term, without the previous written consent of the lessor (such consent not to be unreasonably withheld), to erect or suffer to be erected any new buildings or erections on the Premises and that in case at any time during the term there shall be occasion to rebuild the said buildings or any part thereof or any boundary wall, the same shall be rebuilt by the Lessee according to the original plan thereof or according to such other plan as shall be previously approved of in writing by the Lessor (such approval not to be unreasonably withheld) and not otherwise.

(5) Not to use or permit the Premises to be used for any purpose other than a commercial or industrial purpose and in particular, but without prejudice to the generality of the foregoing, not to use or permit the Premises to be used (a) for the carrying on of any retail trade or business, whatsoever, other than for the sale of goods manufactured by the company on the Premises, (b) for the carrying on of the business of a licensed victualler, retailer of beer, wines or spirits, restaurant keeper or caterer, (c) for the purposes of a club, place of amusement, theatre or entertainment, (d) for the purposes of a dwelling house and (e) for any noxious or offensive trade or business.”

5. The EWC lease contained the following covenants at paragraphs (5) and (6):

“(5) Not at any time during the term, without the previous written consent of the Lessor (such consent not to be unreasonably withheld) to erect or suffer to be erected any new buildings or erections on the Premises save as provided in Clause (3) above and that in case at any time during the term there shall be occasion to rebuild the said buildings or any part thereof or any boundary wall, the same shall be rebuilt by the Lessee according to the original plan thereof or according to such other plan as shall be previously approved of in writing by the Lessor (such approval not to be unreasonably withheld) and not otherwise.

(6) Not to use or permit the Premises to be used for any purposes other than a commercial or industrial purpose and in particular but without prejudice to the generality of the foregoing not to use or permit the Premises to be used (a) for the carrying on of the business of a licensed victualler, retailer of beer, wines or spirits,

restaurant keeper or caterer, (b) for the purposes of a club, place of amusement, theatre or entertainment, (c) for the purposes of a dwelling house and (d) for any noxious or offensive trade or business.”

6. On 18th December 2014, the applicant submitted a planning application, A/2014/0629/F, and subsequently, on 19th February 2019, consent was granted for:

“Medical Building (totalling 6,901 gross sq m) with car parking in a semi-basement, Superstore (totalling 5,574 gross sq m) associated car parking, Restaurant, Self-Service Filling Station, Servicing and Landscaping with access/egress via Pennyburn Pass and Pennyburn Industrial Estate Road.”

7. The granted planning permission was in breach of the covenants contained in the ABC and EWC leases and on 20th February 2018 the applicant submitted Notices of Reference to the Lands Tribunal seeking modification or extinguishment of these restrictive covenants to allow for development in accordance with the planning permission. This is the issue to be decided by the Tribunal.

Procedural Matters

8. The applicant was represented by Mr Mark Orr QC instructed by Babingtons Solicitors. Mr Kevin Denvir BL, instructed by Doris & MacMahon Solicitors, represented the respondent.
9. Mr Chris Callan provided expert opinion evidence on behalf of the applicant and Mr John Adgey provided reciprocal expert opinion evidence on behalf of the respondent. Mr Callan and Mr Adgey are experienced Chartered Surveyors. The Tribunal is grateful to the legal representatives and the experts for their helpful submissions.

Position of the Parties

10. The applicant's position was that the extent of practical benefit secured by the covenants was not of sufficient weight to prevent the applicants from carrying out the development in accordance with the planning permission.

11. The respondents considered that the covenants provided such substantial practical benefit that modification should be declined.

The Relevant Statutory Framework

12. 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."

13. Article 3 of the Order provides:

"3(3) In any provision of this part –

‘enjoyment’ in relation to land includes its use and development."

14. Article 5(5) of the Order specifies seven matters which the Tribunal must take into account together with any other relevant circumstances.

15. In Andrews v Davis [1994] R/17/1993 the Tribunal noted:

"The Tribunal has concluded that the 1978 Order created a scheme which is quite different to the 1925 scheme [England & Wales] in its greater flexibility and wide 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 ... The discretion is of course a judicial one and must be founded on correct principles and premises.”.

16. In that context the Tribunal now considers the matters referred to in Article 5(5) of the Order and the burden rests with the applicant to persuade the Tribunal that, if not modified or extinguished the impediment would unreasonably impede its enjoyment of the reference lands.

Consideration of 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

17. The experts were generally agreed that the covenants were created in 1985 and 1988 by the DED to retain a supply of industrial lands for the Londonderry area which in turn would promote manufacturing, leading to the creation of jobs in the locality.
18. Mr Callan considered, however, that due to changing market conditions and competition from other parts of the world, the Department’s focus on jobs creation had now changed from “heavy” manufacturing toward “high-tech” industries. The Tribunal agrees. Mr Callan asked the Tribunal to note that the lands had been sold by DED in 1995 and when questioned by Mr Orr QC, Mr Adgey agreed that the only remaining public interest in the reference lands was the extant planning permission.

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

19. Mr Callan’s opinion was that the character of the reference lands had changed significantly since the covenants were created:
- (i) all commercial and industrial uses on the reference lands had ceased and the manufacturing process previously undertaken by the applicant had closed down in 2014.
 - (ii) in the case of the EWC lands the majority of buildings on the site had been demolished and the former ABC factory was now derelict.
20. He considered that there had been a move away from factory/manufacturing uses in the Pennyburn “neighbourhood” and these had been replaced by other commercial uses such as retail warehouses, leisure, trade counter and residential. He submitted a map comparing the Pennyburn Industrial Estate at the time of the covenants with the current situation. The Tribunal found this map to be helpful and notes the move away from mainly industrial use which Mr McCallan’s map demonstrated.
21. Mr Adgey considered that the character of the reference lands had remained the same by virtue of the fact that they had been an operational factory and had now been vacant and derelict for a considerable number of years.
22. In terms of the neighbourhood it was his opinion that Pennyburn Industrial Estate had remained focussed on industrial use. To confirm his findings Mr Adgey submitted a table summarising the current Land & Property Services Valuation List descriptions of the properties in Pennyburn:

<u>Asset Classes</u>	<u>% Allocation</u>
Workshop	26%
Stores	21%
Office	14%
Warehouse	13%

Factory	8%
Leisure	5%
Retail Warehouse/Showroom	5%
Garage	4%
Retail	3%

23. Mr Callan considered that the table and findings were of very limited use as:
- (i) a similar table relating to the situation in 1985 to 1988 had not been provided and it was therefore not possible to ascertain how the neighbourhood had changed.
 - (ii) the table did not take account of floor areas, so a 10,000 sq m superstore would have the same effect on the table as a small warehouse.
24. When questioned by Mr Orr QC, Mr Adgey agreed that if the development of the reference lands proceeded, it would have minimal impact on his table, as the development would only count as “one”.
25. Mr Orr QC also referred Mr Adgey to the bottom four Asset Classes; Leisure, Retail Warehouse/Showroom, Garage and Retail which amounted to 17% of the total. Mr Adgey agreed that all of these were retail in nature and conceded that these were the most recent uses to be developed in the neighbourhood.
26. The Tribunal finds Mr Adgey’s table to be of limited assistance. The Tribunal notes, however, and Mr Adgey agrees that some of the most recent uses have been retail in nature.

5(5)(c) Any public interest in the land, particularly as exemplified by any development plan

27. Neither expert considered this issue to be relevant to the subject reference. The Tribunal disagrees, there is a public interest in the reference lands which is the granted planning permission. Following detailed consideration of the plans and other material issues, the

planners had granted planning permission for the proposed development, in the public interest. The planning considerations, however, are different to those under the Property Order. In Re Martins Application [1989] 57 PP&CR 119. At pages 124 of his judgment in the Court of Appeal Fox LJ said:

“124. When a restrictive covenant is entered into between owners of adjoining, or otherwise affected, lands the fact that the owner for the time being of the burdened land subsequently obtains planning permission to develop that land in a manner which is prohibited by the covenant does not entitle him to ignore the covenant. The benefit of the covenant is an interest in land and it is not extinguished by the acts of a planning authority.”

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

28. Mr Callan submitted a schedule of planning applications in respect of the Pennyburn neighbourhood over recent years and he asked the Tribunal to note:

- (i) the approved application in respect of the reference lands for retail warehousing, medical building, superstore, education research development building and restaurant.
- (ii) in May 2012 the then owner of the EWC lands was granted planning permission for retail warehouse and associated car parking.
- (iii) other changes in use in recent years in the wider Pennyburn/Springtown area included office parks (developed by the respondent), a cinema complex and a number of educational/academic institutions including North West Regional College and St Marys College.
- (iv) residential development had also take place to the south of the reference lands.

29. Mr Callan accepted that there were still a number of continuing industrial uses in the Pennyburn locality but he considered that the recently granted planning permission on the reference lands was in line with a general trend away from manufacturing/factory uses at Pennyburn.

30. Mr Adgey provided a schedule setting out a planning history of the Pennyburn Industrial Estate. He asked the Tribunal to note that of a total of 54 approvals in the period 5th August 1988 to date, only 4 of those related to retail use, two of which were the reference lands.
31. Of the remaining approvals 29 had been for intensification of existing industrial use and in his opinion this demonstrated that there had been no change in the use of the neighbourhood. He considered that this confirmed the covenants were still relevant.
32. Mr Callan disagreed with Mr Adgey's findings in that they included planning permissions going back to 1988. It was his opinion that recent trends had been away from manufacturing use and he referred to the first two applications on Mr Adgey's list, for car sales (March 2019) and cinema complex (June 2018). These applications were pending.
33. The Tribunal agrees with Mr Callan, including the approval on the reference lands and the car sales and cinema complex applications which were pending, a trend was now emerging which was for non-industrial uses. The Tribunal also notes, however, that there was still significant manufacturing/industrial uses in the locality.

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

34. Having considered all of the submitted documentation and taking into account which he considered to be the fundamental change in Pennyburn as regards land use, Mr Callan's opinion was that there would be no loss of practical benefit to the respondent if the Tribunal was to grant modification of the impediments, to facilitate development in accordance with the planning permission.

35. When asked by the Tribunal Mr Adgey confirmed that his main concern with the proposed development was the considerably greater amount of traffic which would be generated on the Pennyburn Estate Road and subsequently in to the estate. He accepted that the planners had not identified any significant traffic issues in granting the permission but it was his opinion, from the respondent's point of view, that the increase in traffic volumes on to the only access road in to the estate would have a direct impact on the quiet enjoyment by the current users in the estate. From an estate management point of view he considered that any increased congestion would have an impact on the marketability and demand for the industrial use of the estate, which would have a knock on effect on both rental and capital value of assets in the estate.
36. Mr Callan asked the Tribunal to note that Mr Adgey had not provided any evidence to confirm that the proposed development would lead to a reduction in rental and capital values. He referred the Tribunal to the planning permission which did not foresee any onerous conditions relating to the roads. He also referred the Tribunal to the example of the "Boucher" business parks where intensification of use had increased rental values. He accepted that the current widening of the Bunrana Road had created traffic problems in Pennyburn but this was outwith the Pennyburn neighbourhood. Mr Callan also asked the Tribunal to note that the respondents were not always driven to maintain the industrial heritage of the estate when they allowed other uses such as cinema and offices elsewhere.
37. The Tribunal agrees with Mr Callan, there was no market evidence to suggest that the proposed development would have an adverse impact on rental and capital values within the estate. In addition neither party had provided a traffic impact assessment to support their conclusions but the Tribunal notes that the planners did not have any concerns in relation to increased traffic volumes.
38. The Tribunal refers to the following extracts from the planning permission -

Clause 2 of the planning conditions was stipulated by the planning authorities to:

"Control the use of the site so as not to prejudice the continued vitality and viability of existing retail centres or the adequacy of the roads infrastructure."

Clauses 3 and 4 to:

“Control the nature, range and scale of retailing activity so as not to prejudice the continued vitality and viability of the existing retail centres or the adequacy of the roads infrastructure.”

Clause 5 to:

“Enable the Council to retain control over the nature, range and scale of retailing activity so as not to prejudice the vitality and viability of existing retail centres.”

Clause 6, 7, 8 to:

“Ensure that the road works considered necessary to provide a proper, safe and convenient means of access to the site are carried out at the appropriate time.”

Clause 11 to:

“Facilitate the convenient movement of all road users and the orderly progress of work in the interests of road safety.”

Clause 12 to:

“Ensure that the roadworks necessary to provide a proper, safe and convenient means of access to the site are carried out prior to the commencement of retailing and other operations.”

Clause 13 to:

“Ensure that adequate provision has been made for parking, servicing and traffic circulation within the site.”

Clause 14 to:

“Ensure that adequate provision has been made for servicing to the site that minimises conflict with customer/visitor traffic from the network and to ensure that the servicing and traffic management necessary to provide a proper, safe and convenient of access to the site are designed safely and appropriately.”

Clause 15 to:

“Ensure there is a satisfactory means of access in the interest of road safety and the convenience of road users.”

39. The Planning Authorities had therefore been very detailed in their requirements which they considered necessary to protect the “vitality and viability” of other businesses in the locality and also to ensure that the development had minimal impact on the existing roads infrastructure.

5(5)(f) Where the impediment consists of an obligation ...

40. Neither expert considered this to be relevant.

5(5)(g) Acts or omissions

41. Neither expert considered this to be relevant.

5(5)(h) Any other material circumstances

42. Mr Callan did not detail any other relevant circumstances.

43. Mr Adgey referred the Tribunal to correspondence from the respondents to Derry City Council alleging that the applicant neither owned, or controlled lands which appeared to be central to delivering access to and from the reference lands. He was “advised”, therefore, that the applicant could not perfect the planning consent granted as it did not hold title to the required lands and he therefore considered that the applicant could not seek to have the covenant removed when the purpose of the reference may never come to fruition.
44. Mr Orr QC submitted that these related to title issues which were not before the Tribunal and which neither expert was qualified to deal with. The Tribunal agrees. Mr Denvir, however, asked the Tribunal to note that the applicant could not satisfy the Tribunal in regard to its ownership of the relevant visibility splays.

Conclusion

45. The question for the Tribunal was not “what was the original intention of the restriction and is it still being achieved?” but “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 (see Stannard v Issa [1987] AC 175 at 188). The Tribunal must therefore consider the extent of the practical benefit of the covenant and weigh that against the development it prevented on the applicant’s property.
46. Having carefully considered the Article 5(5) issues the Tribunal is satisfied that the impediment, if not modified, would unreasonably impede the applicant’s enjoyment of the reference lands and this outweighs the practical benefit to the respondent:
- (i) job creation in the locality had now changed from “heavy” manufacturing to “high-tech” industries and the original purpose of the covenant was now obsolete.
 - (ii) the most recent developments in the locality had been retail in nature.
 - (iii) planning permission had been granted for the development.
 - (iv) a trend of planning permissions/applications for retail development was now emerging.

- (v) there was no evidence of any loss of practical benefit to the respondents. Their main concern was that the proposed development would significantly impact on the traffic flow within the estate but no evidence had been submitted to substantiate their assertion. Nor was there any evidence to suggest that the proposed development would have an adverse impact on rental and capital values within the estate.
- (vi) the respondents had permitted other developments such as offices and a cinema complex elsewhere in the general locality.

47. The Tribunal therefore grants modification of the covenants to allow for development in accordance with the planning permission A/2014/0629/F which was granted on 19th February 2019.

4th July 2019

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

Appearances

Applicant: Mr Mark Orr QC instructed by Babingtons, solicitors.

Respondent: Mr Kevin Denvir BL instructed by Doris & MacMahon, solicitors.