

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPLICATION
R/16/1997

THE TRUSTEES OF THE MULTIPLE SCLEROSIS SOCIETY - APPLICANTS

RE: PREMISES AT 34 ANNADALE AVENUE, BELFAST

Lands Tribunal - Mr Michael R Curry FRICS FSVA IRRV ACI.Arb

Belfast - 26th June 1997

The Property (Northern Ireland) Order 1978 ("the Order") includes a power for the Tribunal to modify or extinguish lease restrictions affecting land, which are unreasonable (for example, because they have become obsolete).

This was an application for extinguishment of covenants affecting property in the suburbs of Belfast and occupied by a charity for their own use. They wished to sell the front portion of their large site for development with some 18 private dwelling houses or private apartments and create a new, purpose-built facility for the work of the Society on the rear portion of the premises. This would require demolition of the existing buildings, which were no longer well suited to their operations. In broad terms the covenants prevented the proposed developments as they prohibited firstly, the building of more than one substantial dwelling house on the site and secondly, building close to the front of the site. Two other covenants related to the protection of the ground rent of £23, a further covenant related to maintaining an avenue which was now maintained at public expense and finally, a covenant prohibited any building on part of the land save a poultry house.

The Applicants had made efforts to contact those who may be entitled to the benefit of the covenants and had identified four parties on whom notice was served. The Registrar wrote to all the parties and to a further party who, it later appeared, could have had an interest in the outcome. Some of those who may have been entitled to the benefit of the covenants had agreed to their extinguishment. Two other notice parties, Ms Cornelia Priebe and Mr Jurgen Exter, had not. They may have been entitled to an interest which could give them the benefit of the restrictions.

Mr Roger Watts of Messrs C & J Black appeared on behalf of the Applicants, gave evidence on affidavit and also called Mr Brian Kennedy, an experienced Chartered Surveyor to give expert evidence.

Correspondence was received from Ms Cornelia Priebe and Mr Jurgen Exter and, at the hearing, they were represented by Messrs Culbert & Martin. They did not oppose the application but did not consent and the Tribunal was informed that, if the Tribunal approved modification and considered more than nominal compensation was appropriate, they would take certain conveyancing steps which would be required before their right to receipt of compensation could crystallise.

The Applicants asked the Tribunal to extinguish the restrictions but, as the Tribunal prefers a more limited modification in this type of case, at the suggestion of the Tribunal, they agreed to amend their application so that it included the substitution of new covenants which would, in effect, modify rather than extinguish the primary restrictions, thus leaving in force some residual constraints. The terms of the amended Order requested by the Applicants are set out in Appendix 1.

As there was a degree of urgency and the issues were not complex, the Tribunal gave an oral decision on the day of hearing. However, as the two non-consenting parties were outside the jurisdiction, did not have English as a first language and were unfamiliar with the legislation, the Tribunal has set out its reasons so these parties may reflect on them.

The premises were in adjoining parts held under two titles. Part of the premises were affected by covenants contained in an Indenture of Fee Farm Grant dated 28th June 1895 and part by an Indenture of Conveyance dated 1st May 1897. They were held subject to a ground rent of £23 in total.

Mr Watts had sworn out an affidavit in which he set out the objects of the charity, an abstract of the Society's title to the premises and identified the covenants which were contended by the Society to unreasonably impede the enjoyment of the land or which, if not modified or extinguished would do so.

The Tribunal may make an Order modifying, or wholly or partially extinguishing, impediments if it is satisfied that the impediments unreasonably impede the enjoyment of the land or, if not modified or extinguished, would do so. 'Enjoyment' in relation to land includes its development.

Article 5(5) of the Order sets out the matters which the Tribunal is obliged to take into account in reaching its determination.

These include

- (a) the period at, the circumstances in, and the purposes for which the impediment was created or imposed;
- (b) any change in the character of the land or neighbourhood;
- (c) any public interest in the land, particularly as exemplified by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1991 (a) for the area in which the land is situated, as that plan is for the time being in force;
- (d) any trend shown by planning permissions;
- (e) whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit;
- (f) not relevant
- (g) whether the person entitled to the benefit of the impediment has agreed either expressly or by implication, by his acts or omissions, to the impediment being modified or extinguished;
- (h) any other material circumstances.

The Tribunal has carefully considered the circumstances to be taken into account i.e. the requirements of Article 5(5) of the Order, considered the affidavit evidence and the proposed modifications.

Mr Brian Kennedy had prepared an expert report for the Tribunal. He had inspected maps and registers at the Planning Office in Belfast and visited the locality. He concluded that, at the time the covenants were created, this was a residential area with substantial private houses occupying large sites. It seemed that, when these covenants were granted, the grantors lived in Annadale Hall, a neighbouring substantial residence. The covenant which prohibited the erection of more than one "good and substantial dwelling house" on the site would have served to ensure that the site was developed in a manner consistent with the character of the area at that time. Such covenants effectively served as a form of private planning control in the absence of public control. But the Hall had since been demolished and replaced by a development of town houses.

Now, Annadale Avenue was an area of mixed land uses - commercial, residential, recreational and institutional uses were all established. In addition, the type and density of the residential units on Annadale Avenue had changed significantly. The site, of around 2

acres, was excessively large by today's standards and appeared to be the largest on the avenue.

The scope for further development on the site was clear and this had been confirmed by the grant of planning permission. By a decision dated 29th January 1997 (reference Z/96/0722) outline planning permission was granted for the erection of the Multiple Sclerosis Centre and 17 town houses on the Applicant's land. The trend shown by the planning history was of an intensification of residential use since around 1980 i.e. the conversion of single dwellings for multiple occupation and the construction of new higher density development. In addition to the approval on the subject site, apartments or town house developments had been approved and already developed nearby and an apartment block occupied the site on the opposite corner. The proposed scheme was entirely consistent with the character of Annadale Avenue as it existed at the date of hearing.

As none of the persons who may be entitled to the benefit of the covenant appeared to live in Belfast it seemed to him that the covenant secured no practical benefit to any of the parties. But they did prevent the proposed development of the site and therefore represented a very real restriction.

The Presbyterian Widows' Fund Association which were entitled to a one half share in the benefit of the Fee Farm Grant and Conveyance had consented to the extinguishment.

The Tribunal is persuaded that, when the impediments were created, they were intended to preserve the character of the neighbourhood, being one of large detached houses. It is clear from the expert evidence that there has been a substantial change in the character of the neighbourhood and that change is underscored by the trend of planning permissions. Any person who may be entitled to the benefit of the impediments appears to have been identified, has either consented to their modification or extinguishment, or lives far away. All reasonable steps have been taken to alert possible objectors and, although two who may be entitled to the benefit of the covenant have withheld their consent, none have come forward.

The Tribunal's conclusion is that as result of the passage of time, changes in the neighbourhood and social changes, the covenants are of little or no practical benefit and unduly onerous or restrictive. The Tribunal finds there is no practical benefit to those who have not consented. But, the Tribunal is reluctant to extinguish an impediment when modification is sufficient to deal with that element which is unreasonable. It is particularly reluctant when it cannot be said with absolute certainty that all those, who may be entitled to object, have been identified, have been put on notice and have not objected. Mr Watts submitted and the Tribunal accepts that, in all the particular circumstances of this case,

adequate continuing protection may be afforded by a general prohibition against any noisy, noxious or offensive trade or business.

The Tribunal concludes that the Applicants have proved, on the balance of probabilities, that the restrictive covenants unreasonably impede the enjoyment of the land. The Tribunal orders modification in accordance with the amended application. To give effect to the application the Applicants have requested modification in accordance with the schedule attached and identified as Appendix 1. The Tribunal so orders.

The Tribunal has a discretion to direct payment of compensation. For the following reasons the Tribunal concludes that it shall not do so.

It is most unlikely that there was any reduced consideration at the time of creation of the covenants which now would warrant the payment of any significant sum of compensation, or that any person, entitled to the benefit of any of the covenants, now would suffer any loss or disadvantage as a result of the extinguishment. The possibility of obtaining a ransom amount for release of covenants has been considered by the Tribunal on previous occasions and determined not to be a matter which attracts compensation under this Order. In all the circumstances Mr Kennedy considered, and the Tribunal agrees that the measure of compensation for their modification should be nil or a nominal value.

ORDERS ACCORDINGLY

19th September 1997

**Mr Michael R Curry FRICS FSVA IRRV ACI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Mr Roger Watts of Messrs C & J Black, Solicitors, for the Applicants.

Mr David McFarland of Messrs Culbert & Martin, Solicitors, for two of the Notice parties.

**APPLICATION TO THE LANDS TRIBUNAL
BY THE TRUSTEES FOR THE MULTIPLE SCLEROSIS SOCIETY**

Terms of the Order requested by the Applicant:

1. That the following covenant in the Fee Farm Grant of 28 June 1895 between David Clarke Patterson, William John Jackson, William Robert Patterson and William John Jackson of the first part, John Hartley, James Crawford, Ledlie Hartley, William Tudor Hartley and Alexander Holmes Hartley of the second part and Thomas Edward McConnell of the third part and registered in the Registry of Deeds on 2 July 1895 Book 38 No. 182, namely:

"The grantee, his heirs or assigns will on or before First day of November One Thousand, Eight Hundred and ninety-six build or erect or cause to be built or erected and completely finished on the ground hereby granted one good and substantial dwelling house (but not more than one) at a cost of not less than £1,100 such house to be of the clear annual value of £40 at the least such annual value to be ascertained by reference to the General Government Valuation of Ireland and nothing herein contained shall prevent the grantee, his heirs and assigns from having liberty to erect stables or other suitable outhouses as an adjunct to the said dwelling house provided that such stables or outhouses as aforesaid are erected on the southern portion of the said grant of premises and extending not more than 60 feet north from the extreme southern boundary so as not to interfere with the prospect from Annadale Hall."

shall be modified by substituting the following covenant for it:-

"Not to permit or suffer the use of the ground hereby granted or any part thereof for any noisy noxious or offensive trade or business"

2. That the following covenants in the Fee Farm Grant of 28 June 1895 between David Clarke Patterson, William John Jackson, William Robert Patterson and William John Jackson of the first part, John Hartley, James Crawford, Ledlie Hartley, William Tudor Hartley and Alexander Holmes Hartley of the second part and Thomas Edward

McConnell of the third part and registered in the Registry of Deeds on 2 July 1895 Book 38 No. 182 are discharged:

- (a) "No building shall be erected on the said granted premises at a less distance of 69 feet 6 inches from the centre of said avenue (now Annadale Avenue and Mornington)."
- (b) "The grantee, his heirs or assigns, will ensure and at all times hereafter keep insured against loss or damage by fire all buildings that may be erected on said premises in the London and Lancashire Fire Insurance Company or some other well established fire insurance office in England or Ireland to the extent of the full value thereof and duly pay the premiums which may become payable in respect of every such insurance and will on demand produce to the mortgagees their executors, administrators or assigns or the grantors, their heirs or assigns the policy or policies of insurance and the last receipt for the premium payment in respect thereof."
- (c) "The grantee, his heirs and assigns shall so often as the same shall be destroyed or damaged by fire or other accident re-build or reinstate the same or erect other buildings of equal rent or value."
- (d) "The grantee, his heirs or assigns, shall keep in good and sufficient condition and repair the said avenue to the centre thereof so far as it bounds the hereby granted premises."
- (e) "and will also perform and observe the covenants and conditions contained in the original Fee Farm Grant of the premises dated 7th February 1874 on the grantee's part to be observed and performed so far as same are applicable to the premises hereby granted."

3. That the following covenant in the Conveyance dated 1 May 1897 between David Clarke Patterson, William John Jackson, William Robert Patterson and William John Jackson of the first part, John Hartley, James Crawford, Ledlie Hartley, William Tudor Hartley and Alexander Holmes Hartley of the second part and Thomas Edward McConnell of the third part registered on the 25th day of May 1897 Book 35 No. 33:

"The said Thomas Edward McConnell, his heirs or assigns, will not erect or place or permit to be erected or placed on the land hereby conveyed or any part thereof any building or erection of any kind, saving and excepting liberty to the said Thomas Edward McConnell,

his heirs and assigns, to erect and make a poultry house and run for fowl on the portions of land coloured yellow and green on the said map and also that the said Thomas Edward McConnell, his heirs and assigns, shall keep in good and sufficient condition and repair the said avenue to the centre thereof so far as it bounds the hereditaments hereby conveyed."

shall be modified by substituting the following covenant for it:-

"not to permit or suffer the use of the land hereby conveyed or any part thereof for any noisy noxious or offensive trade in business."

AND FURTHER THAT all persons shall hereafter only be obliged to perform the said covenants as modified by this Order and the remaining covenants, not hereby discharged, contained in the said Fee Farm Grant of 28 June 1895 and the Conveyance of 1 May 1897 above mentioned and no person shall be entitled to enforce the restrictions referred to in the covenants hereby discharged or modified.