

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964
PROPERTY (NORTHERN IRELAND) ORDER 1978
IN THE MATTER OF A REFERENCE
R/34/2006
BETWEEN
PADRAIG DRAYNE – APPLICANT
AND
ST PATRICK’S ARCHDIOCESAN TRUST LIMITED
TRUSTEE OF MOY PARISH OF ST JOHN’S ROMAN CATHOLIC CHURCH,
CO TYRONE – RESPONDENT

Re: 30 Jockey Lane, Moy, County Tyrone

Lands Tribunal - Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

Background

1. A graveyard belonging to the respondent ('the Trustees') is part of their holding of some 15 acres in the village of Moy and apparently held upon charitable trusts. The holding also includes St John the Baptist's Roman Catholic Church ('St John's Church'), St John's Primary School ('St John's School'), the parochial houses and other land including the reversionary interest in residential premises let on ground leases and adjacent to the graveyard. One of the latter is 30 Jockey Lane which was purchased recently by the Applicant. He has obtained full planning permission to construct two additional dwellings in its large garden. The dwellings would be two-storey and situated between it and the graveyard.
2. The physical character of the locality is a mixture of old and new. The village is on the main A9 road to Armagh, about 4 miles south of its junction with the M1 motorway and about 5 miles from Dungannon. It has seen considerable new residential development and also provides a range of local shops and services including 2 primary schools and a number of churches. St John's Church was built in 1833 and the graveyard is one of the oldest in the county. The street name 'Jockey Lane' probably reflects historic equine associations. The core of the village was laid out in the 1760s and designated a Conservation Area in 1984. This includes the Diamond, a formal rectangular market place, with lawns and trees.
3. From the Diamond, the Benburb Road runs southwest. On its northwest side, after about 100 metres one comes to the parochial houses, then St John's Church and then St John's School.

The graveyard is behind the parochial houses and the church. Just before the parochial houses, a dog leg cul-de-sac - Jockey Lane - begins and runs broadly northwest. After about 150 metres it turns broadly southwest behind the graveyard, parallel to Benburb Road. The Applicant's bungalow is at the end, with access via a lane. Its northeast boundary is contiguous with what is known as the Old Graveyard; the southeast boundary is contiguous with the car park of St John's Primary School.

4. The graveyard is in three sections divided from each other by high walls. It has buildings on all sides. The south west section is known as the Old Graveyard and it runs from the back of the Church through to Jockey Lane. The middle section is the New Graveyard (about 1971) and it runs from behind the parochial houses to the rear garden of a house on Jockey Lane. The North East section is the Orchard Graveyard (the former garden of the parochial houses) and it runs from the parochial houses to the side boundary of the rear garden of another house on Jockey Lane.
5. The applicant holds the premises from the Trustees under a lease made 17th May 1977 which reserves a discretionary power to control development in typical conveyancing terms:

“Not without the previous consent in writing of the Trustees and only according to such plans elevations and specifications as shall have been previously approved in writing by the Trustees or their architect duly appointed and authorised by the Trustees for that purpose in writing to build or erect or permit to be built or erected on the demised premises any buildings or erections in addition to the said dwelling house and its appurtenant buildings.”
6. The Applicant applied to the Trustees for consent to carry out the development. They refused ('the Trustees' decision'). As the matter progressed, the reasons for the Trustees' decision became clearer and the applicant proposed amendments to design and agreed to accept new impediments. These proposals were not sufficient to cause the Trustees to revise their decision.
7. Fr Vincent Darragh explained how the Trustees had reached their decision. As Parish Priest he had listened to comments volunteered by his parishioners, asked the Bishop for his opinion, viewed drawings and taken legal advice. He had conferred informally with the other Trustees and they decided to refuse consent. He stressed that the Applicant was a very good parishioner. The Trustees' approach was very informal and others might have done things differently. But the process is only of interest in that it may explain or clarify their decision or how it may affect the depth of the enquiry by the Tribunal.

8. Article 5(1) of the Property (NI) Order 1978 ('the 1978 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.”

9. It is not the function of the Tribunal to substitute what it might have done for the Trustees' decision. But the withholding of consent may amount to an unreasonable impediment under the 1978 Order and the Applicant has invited this Tribunal to use its powers to modify the Trustees' decision.

10. The modification sought is a deemed consent from the Trustees for the development of two detached dwellings in accordance with planning permission granted and subject to modifications to design and acceptance of new impediments ('the final proposal').

11. For the avoidance of doubt the Tribunal accepts the user covenant in the lease is not a restriction upon the number of dwellings.

Procedural matters

12. The Tribunal directed that the Reference be advertised. No one else came forward as a party to the proceedings.

13. Paul McLaughlin BL appeared for the Applicant, instructed by Kearney Sefton, Solicitors and John Coyle BL appeared for the Trustees, instructed by John Hoy, Son & Murphy, Solicitors.

14. Expert evidence was received from Douglas Wheeler and Conor Mallon, both experienced Chartered Surveyors in general practice. Factual evidence was received from Fr Vincent Darragh, one of the Trustees; Mrs McAleese, the owner of an adjoining dwelling; and Mr Martin O'Brien, a parishioner. Undisputed written evidence was received from Mr Jonathan Park, a Director of Park-Hood, landscape architects, about providing mature hedges. Following an oral hearing, further written legal submissions were received. The Tribunal has viewed the location.

The Proposal

15. Mr McLaughlin BL highlighted aspects of the development:

- The development consists of two detached dwellings. The houses are orientated so as not to look towards the graveyard;

- A condition of the planning permission requires the floor level of the houses to be reduced by approximately 2 metres below existing ground level at the highest point of the garden; and
- In terms of height, the ridge level of the new houses would be only marginally higher than that of the existing dwelling.

16. As the matter progressed, the applicant proposed ameliorating amendments to the design. The applicant would also accept some new impediments and ancillary and consequential modifications that would be required to permit the erection and maintenance of screening. In consequence the proposal as finalised is:

- Permission would be granted but subject to impediments:
 - requiring compliance with the conditions in the planning permission reference M/2006/0227/F, together with compliance with the associated drawings including in particular the siting, orientation, proposed ground levels and finished floor levels of the dwellings;
 - preventing the inclusion of any windows facing the graveyard above ground floor level in the nearer house (no ground floor windows would overlook the graveyard);
 - preventing the inclusion of any exterior door facing the graveyard in the nearer house;
 - requiring the erection and maintaining of mature hedging along the south-east (the school) boundary;
 - requiring the erection and maintaining of either (at the trustees' option)
 - mature hedging along the north-east (the graveyard) boundary wall; or
 - a low earth bank/bund along the full length of the boundary wall with a planting scheme of bushes and broadleaved mature trees;

Note: ancillary and consequential modifications would be required to permit the erection and maintenance of this screening;
 - preventing building work during funerals;
 - banning short term lettings for a period of less than 14 months;
 - requiring covenants in any sub-demise for
 - the performance and observation of the Lessee's covenants (other than for payment of rent) in the lease dated 17th May 1977;
 - such sub-lessees' covenants as are normally found in a tenancy agreement, and also a covenant not to cause or permit any nuisance, disturbance, annoyance, inconvenience, damage or injury to the owners or occupiers of, or any lawful visitors to, any adjoining premises, in

particular the adjoining cemetery, especially when funerals or other religious rites or services are being held therein; and

- the prohibition in the lease against any use which may be or grow to be “an annoyance to the trustees” would be amended to include express recognition of the land used as a graveyard both in terms of its use and as adjoining property.

17. The proposal was not approved by the Trustees.

The issues

18. Full planning permission reference M/2006/0227/F has been granted. That suggests that in the absence of the requirement for consent from the Trustees, the development would not be unreasonable.

19. Mr Coyle BL suggested firstly that by refusing consent, the Trustees’ decision secured the benefit of protecting an existing calm and tranquil graveyard that is greatly appreciated and treasured by the parishioners. Mr McLaughlin BL accepted that the use of the covenant to protect such existing interests could be a practical benefit. However, in the context of the present case, he suggested that the nature and extent of the benefit secured is minimal and not of sufficient weight to justify the Trustees’ decision.

20. Mr Coyle BL further suggested that, as acts of expression of religious belief and practice in the graveyard were a manifestation of religious belief within the meaning of Article 9 of the European Convention on Human Rights, the Tribunal had an obligation to protect established religious practice and to positively guard established manifestations of religious practice and belief. Mr McLaughlin BL accepted that the actions of mourners attending a burial ceremony within the graveyard or parishioners attending the grave of a deceased constituted such a manifestation.

21. Mr Coyle BL suggested that the Tribunal should not order modification of the Trustees’ decision because it secured the benefit of reducing the level of risk of interference with religious practices and the manifestation of religious beliefs in the graveyard. Mr McLaughlin BL suggested that such an order by this Tribunal could not and would not constitute an interference with or a limitation upon such manifestation or practice. Alternatively, if ordering the modification might comprise a degree of limitation upon religious practice, it was not such as to give rise to an infringement of Article 9.

22. Article 5(5) of the 1978 Order sets out the non-exhaustive range of matters to be taken into account in determining whether an impediment affecting any land ought to be modified or extinguished—

- “(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) ...;
- (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;
- (e) whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit;
- (f) ...;
- (g) ...;
- (h) any other material circumstances”.

23. Article 9 of the Convention provides for freedom of thought, conscience and religion:

1. Everyone has the right of freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

24. The issues therefore are

- In regard to Article 5 of the 1978 Order:
 - Whether the nature and extent of the benefit was of sufficient weight to justify the continuance of the restrictions without modification of the decision;
- in regard to Article 9 of the Convention:
 - whether an Order by the Tribunal for the proposed modification of the decision would constitute an interference with or limitation upon the manifestation or practice of religious belief;
 - if so, whether such an Order would:
 - effect a degree of limitation sufficient to infringe Article 9(2); or

- constitute an improper attack on the Roman Catholic faith or its practice by the parishioners.

Discussion

Period and purpose

25. The impediment was created relatively recently – about 30 years ago. The original lessee was the former head teacher of the school and the consideration reflected gratitude for his contribution to education in the parish.
26. Mr Coyle BL suggested that the purpose of the covenant is
“a part of a recognition of Roman Catholic ritual and sensibility, to grant a limited permission to that end and restrict further development giving the Church, or reserving to it, a break on intrusive and un-welcome development”.
27. The Tribunal does not accept the suggestion that the purpose of the covenant is one of recognition of Roman Catholic ritual and sensibility. No such recognition is expressed in the lease; the wording of the covenant was in common use in leases generally, and in the view of the Tribunal the covenant simply does not give that impression. But the Tribunal does accept that the continuance of the discretionary power is justified and it may properly be used to avoid disrupting acts of expression of Roman Catholic belief and practice in the graveyard.

Character of the neighbourhood

28. The focus of the case was on the privacy and quietness issues relating to the graveyard.
29. Broadly speaking, of the properties contiguous with the graveyard, about half the perimeter is under the occupation and control of the Trustees or associated bodies. But the other half is not and that is so partly because, before and after the period when the impediment was created, the Trustees sold off parcels. The balance not under their control currently comprises private dwellings and a section of Jockey Lane.
30. The graveyard is already overlooked by a number of the immediately surrounding houses. The Old Graveyard is overlooked by reception rooms and a sun terrace of No. 20, to a lesser extent by upper floor windows on the gable wall of No. 18 and by what is presently an attic/roofspace window in No. 22. The Orchard Graveyard is overlooked by upper floor windows of No. 6 and to a lesser extent by upper floor windows of No. 8. The Trustees appear to have created or accepted some screening by means of high trees along the North West boundary of the Orchard Graveyard and also by the addition of blockwork to an old wall to provide a high wall on the North West boundary of the New Graveyard.

31. There have been changes since the impediment was created - a bungalow was erected by another school teacher and his wife (Mrs McAleese) at No. 22 Jockey Lane, and extensions were built to Nos. 18 and 20. Many pedestrians (a large number of whom are schoolchildren) now use Jockey Lane regularly as it now provides access on foot between new developments at Clover Hill/ The Hollows and the village centre.
32. Mr Coyle BL suggested that the character of the immediate surroundings of No. 30 Jockey Lane had not changed significantly since the period when the impediment was created. But there have been changes and when one takes a wider view it becomes apparent that then No. 30 Jockey Lane was at the edge of the village, on its boundary with the surrounding fields of the countryside, whereas now it is well within the village mainly because those fields have been replaced by the crescent shaped Clover Hill/The Hollows housing development which loops from Benburb Road to the other side of Jockey Lane.

Planning permissions

33. The development is clearly consistent with modern planning policies.

Practical Benefit

34. Those who are grieving may find some solace in private contemplation and prayer and also in the support of others through congregation, quiet conversation and prayer in a graveyard. It is the local practice for members of the congregation to visit the graveyard after ceremonies in the Church. Every year the Church organises a 'Cemetery Sunday', an outdoor rite that is an occasion on which relatives and friends of those buried in the graveyard congregate to honour, pray for and remember them. These could be attended by some 2,000 people.
35. Mr Martin O'Brien, a clearly devout parishioner, said that he could not countenance any private development close to sacred ground and would regard any noise interference as utterly inappropriate. If those who were grieving or wished to practise their religious belief and pay respect to the dead were within ear-shot and/or view of the inhabitants of the proposed development, that would be particularly offensive to him.
36. As the former garden or orchard of the parochial houses had recently been converted into a graveyard, the parish priest Fr Darragh also made regular use of the graveyard as a place for private prayer, contemplation and perhaps some respite.

Article 5

37. The covenant allows the Trustees to retain some level of development control over the lands demised. The Tribunal accepts that usually is a practical benefit to a beneficiary who occupies neighbouring land and is so in this case. As Mr Coyle BL pointed out, the effects of the reserved control have included prompted and unprompted offers in a “rolling programme of ameliorating adjustments by the applicant”.
38. Changes in the immediate proximity already have gradually increased the risk of loss of privacy - being overheard and overlooked - and the risk of noise.
39. Bearing in mind the reduced ground level of the proposal, the ameliorating design amendments to remove any windows overlooking the graveyard and the degree to which the graveyard already is overlooked by other dwellings, any risk of additional overlooking at all would be very slight.
40. In regard to being overheard, although the proposal includes a dwelling that would be closer to the graveyard, there already was a dwelling and garden there, there already are five houses with gardens contiguous with the perimeter and Jockey Lane is a pedestrian route. The additional risk of being overheard would be slight.
41. In regard to noise from No. 30 as a result of the proposal, there could be three families where there was only one, and a dwelling will be much closer to the graveyard. Mr Coyle suggested that ordinary social activities such as parties and barbeques, acceptable elsewhere, are at odds with this environment and its maintenance. But, including the existing dwelling at No. 30, there already are nine or so houses around the perimeter – with occupants all free to engage in such ordinary social activities. Jockey Lane is busier with pedestrian traffic and, although children at the school may be kept within the buildings during funerals, they do play outside at other times. The proposal includes a range of sound attenuating arrangements. The Tribunal concludes that the additional risk of significant intrusive noise would be slight.
42. Mr Coyle BL also suggested that the proposed development was unreasonable because of disruption during construction. The Tribunal does not accept that the construction noise and disturbance, which would be inevitable temporary consequences of any development usually would be or in this particular case are, grounds for determining that the development is unreasonable. In any event the applicant has undertaken to cease construction work during funerals.

43. Mr Coyle BL suggested that money would not be an adequate compensation and the Tribunal accepts there may be a difficulty in formulating a claim but does not accept that this is a factor to be taken into account at this stage.
44. Bearing in mind the proposal and, very importantly, the design changes and new impediments which would be included in the proposal, the Tribunal is quite satisfied that while the Trustees' continuing refusal achieves something, there is little in the way of real practical benefits. The graveyard is still a relatively quiet and private place, but no longer a 'country churchyard' as a result of developments both in the immediate vicinity and further afield. The Tribunal concludes that the Trustees' decision does provide a slight practical benefit to them but, in regard to Article 5 of the 1978 Order, the nature and extent of the benefit is not of sufficient weight to justify the continuance of the restrictions without this modification of the decision.

Protection of religious practice

45. Article 9(2) of the Convention provides that freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society ..., or for the protection of the rights and freedoms of others.
46. The Tribunal was referred to Clayton and Tomlinson: *The Law of Human Rights* and a number of authorities discussed therein.
47. Mr Coyle BL suggested that interference by the Tribunal in modifying the Trustees' decision so as to permit the proposal would be neither a necessary nor proportionate interference with the freedom to manifest religion or belief. Parishioners would not be as 'free' to attend the graves of the deceased. Freedom in this regard, was not just the ability to be physically present, but to engage in the religious observance or manifestation without distraction or interruption or noise which would detract from the essence of the observance. He suggested that there would be a significant impact which is likely not to be de-minimis.
48. The Applicant's right and freedom to develop the lands is subject to the exercise of a discretion reserved to the Trustees. Interference by the Tribunal to order modification is prescribed by law. It is based on the statutory framework of the 1978 Order. That formulates in some detail (see above) the basis on which the Tribunal may intervene and the matters to be taken into account in assessing the merits of the individual case. Further, the decisions of the Tribunal setting out how it has exercised its discretion are given in writing and published. They are available on the internet and abstracts, commentary and analysis appear in journals. The 1978 Order was a response to an identified social need to prevent the obstruction of development by covenants that had outlived their usefulness or were otherwise unreasonable impediments.

49. The interest of the Applicant lies in a substantial development of his land and in a form that has been approved by the domestic planning authority in a valid and subsisting planning permission. The intervention the applicant seeks from the Tribunal is more limited than that approval; it incorporates further constraints and obligations, to be incorporated in any Order of the Tribunal. These have been arrived at in the course of a detailed and careful assessment, in expert reports and at the Hearing, of the extent and consequences of the interference. On the other hand, for the reasons set out above in the consideration of the 1978 Order, the interest of the Trustees is in preventing a slight risk of a modest degree of limitation upon religious practice. On balance, in the view of the Tribunal its intervention is proportionate and reflects a fair balance between the rights of religious practice and the Applicant's right, as owner, to develop his lands.
50. The Tribunal notes that over the years the Trustees have disposed of land contiguous with the graveyard and thereby voluntarily accepted development with dwellings likely to give rise to the same risks of which it complains in this case.
51. Mr Coyle BL referred to the concessionary consideration by which the original lessee acquired the lands, but that was not reflected in other terms or constraints and the Tribunal does not accept that to be relevant in current circumstances.
52. The modification would fall squarely within the type of limitations which are permitted under Article 9(2), since it would be in accordance with law, for the protection of the rights of others and satisfy the requirements of proportionality.

Conclusions

53. In regard to Article 5 of the 1978 Order, the Tribunal therefore concludes that the nature and extent of the benefit of the covenant was not of sufficient weight to justify the continuance of the restrictions without modification of the Trustees' decision.
54. In regard to Article 9 of the Convention, the Tribunal therefore concludes that an Order for the proposed modification of the decision would constitute some indirect interference with or limitation upon the manifestation or practice of religious belief. But it would not affect a degree of limitation sufficient to infringe Article 9(2) or constitute an improper attack on the Roman Catholic faith or its practice by the parishioners.
55. The Tribunal orders modification in accordance with the proposal as finalised.

56. Otherwise, the requirement for lessor's consent continues in full force so far as any further development might be contemplated.

ORDERS ACCORDINGLY

Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

6th August 2009

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Applicant: Paul McLaughlin BL instructed by Kearney Sefton, Solicitors

Respondents: John Coyle BL instructed by John Hoy, Son & Murphy, Solicitors.