

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

R/37/1989

BETWEEN

GERRY LAING AND IAN HURLEY - APPLICANTS

NO RESPONDENT

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Belfast - 12th February 1990 and 14th February 1990

This was an application under Article 4 of the Property (Northern Ireland) Order 1978 ("the 1978 Order") for the removal of a restrictive covenant in a lease of 23rd October 1888 ("the 1888 lease") for premises then known as "Kinnegar Hotel" and Music Hall situated fronting Park Road and Milltown Road - now known as Kinnegar Road, Holywood and Kinnegar Drive, Holywood, Co Down. The Applicants at the time of their application on 10th October 1989 to the Lands Tribunal were contemplating acquisition of an estate in part of the leased lands now known as 4 Kinnegar Road, Holywood.

The Applicants formed a limited company (Silone Ltd) who purchased No 4 Kinnegar Road by assignment on 11th October 1989. There was a subsequent change of name to Meadowbrook Construction Ltd.

In the 1888 lease the particular covenant reads:-

"And also that the said premises shall during the said tenancy be used as an In(n) or licensed victualling house".

Presently No 2 Kinnegar Road is the Clipper Bar, a licensed house sub-leased to Mr James Jordan who informed the Tribunal through his solicitor that he did not intend to object to the application nor did he intend to call an expert witness. The Music Hall site is and has been occupied as dwelling accommodation for many years. Planning permission has been obtained to erect 6 apartments on the site of No 4 Kinnegar Road.

During the hearing Mr Ken Rutherford (of Messrs C & H Jefferson) solicitors for the Applicants indicated that the Applicants wished to develop No 4 Kinnegar Road, with

dwelling accommodation and consequently wished to have the covenant extinguished as far as that portion of the land contained in the 1888 Lease is concerned.

Mr Rutherford called Mr David Weir, Estate Agent of Halifax Property Services to give evidence.

The Tribunal finds the following facts proved:-

1. The 1988 Lease contained the following covenant:-

"and also that the said premises shall during the said tenancy be used as an In(n) or licensed victualling house". That covenant affected all the premises leased which constituted the licensed premises now known as No 2 Kinnegar Road, the house out-offices and yard now known as No 4 Kinnegar Road and the former music hall, now a house and out-offices at Kinnegar Drive. It is not known when the house at No 4 Kinnegar Road was erected (or converted from portion of the licensed premises). Nor is it known at what date the music hall ceased to exist.

2. On 12th February 1916 a sub-lease, of that portion of the lands known as the music hall but on which dwelling-houses had been erected, for a term of 750 years at a yearly rent of £6 was made between Jonathan Jefferson of the first part and Elizabeth Emerson and Margaret Emerson of the other part.

A sub-lease for 50 years of a piece of land adjacent to the licensed buildings was made on 17th October 1914 between Jonathan Jefferson of the first part and Mary Steen of the other part.

By indenture of Assignment dated 8th September 1919 (Jonathan Jefferson to Alexander Steen), the lands contained in the 1888 Lease were assigned but subject to the above two sub-leases.

3. When Alexander Steen died the property devolved on his son Frederick William Steen and his daughter Amy Carson Sinton, but Amy Carson Sinton demised her half share to her brother.

Frederick William Steen sub-leased the licensed premises at No 2 Kinnegar Road (the Clipper Bar) by deed dated 9th May 1973 to W A McKillen and Son Limited and he continued to reside in No 4 Kinnegar Road until his death on 29th October 1988.

His personal representative, Margaret Theresa Brennan has now sold No 4 Kinnegar Road to Silone Limited.

4. Planning permission was granted on 5th December 1989 for six apartments and carparking.
5. The ground rent of £42 per annum payable under the 1888 Lease has not been paid (nor has it been demanded) for at least 30 years.
6. No trace has been found of the original lessor Robert Seed's executors, administrators and assigns, although all reasonable enquiries have been made by the Applicants' Solicitors including advertising in the Belfast Telegraph on January 27th, 1989.

DECISION

The Lands Tribunal must be satisfied that the impediment unreasonably impedes the enjoyment of the land (Article 5(1) of the 1978 Order). On the evidence the Tribunal cannot extinguish the covenant per se for No 2 Kinnegar Road has continuously been and remains a licensed premises. But the Tribunal is satisfied that the covenant unreasonably impedes the enjoyment of the house, out-offices and land at No 4 Kinnegar Road and that can be best dealt with by amending the covenant so that No 4 Kinnegar Road may be developed in accordance with the planning permission already granted.

In coming to that conclusion the Tribunal has taken into account those matters in Article 5(5) of the 1978 Order, viz:-

- (a) "the period at, the circumstances in, and the purposes for which the impediment was created or imposed";

The covenant was created by the 1888 Lease when the two premises (separated by a public road) consisted of "the Hotel and the other premises at present standing and being thereon and known as the Kinnegar Hotel" and "the buildings and premises at present standing and being thereon and used as a Music Hall".

It is not known whether the Music Hall had a spirit licence attached or, less likely, it formed part of an overall licensed premises. More probably, the covenant referred solely to the "Hotel and other premises" and had been rather poorly drafted.

- (b) "any change in the character of the land or neighbourhood";

The general area was, and remains to this day, consisting of private dwellings in the main.

- (c) "any public interest in the land, particularly as exemplified by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1972 for the area in which the land is situated, as that plan is for the time being in force";

The premises are within the area of the North Down and Ards Area Plan and the Greater Belfast Area Plan and are shown as white land ie with an established residential use - no zoning necessary.

- (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";

The only developments brought to the attention of the Tribunal are the Northern Ireland Housing Executive's modern estate not far away and a private development of maisonettes etc in Kinnegar Drive.

- (e) "whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit";

The evidence shows that no person receives any practical benefit from the effect on this portion of the land in the 1888 Lease, apart from the right to receive the ground rent of £42 per annum, and even that rent has not been paid and received for at least 30 years.

- (f) is not at all relevant in this case.

- (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";

For many years No 4 Kinnegar Road together with its outhouses and yard has not been used as licensed premises or part of licensed premises.

For more than sixteen years it has been in separate occupation from the licensed premises. By his omission to insist on compliance with the covenant the Tribunal implies that the lessor has agreed to the modification of the covenant as far as its effect on this land is concerned.

This is underlined by the fact that for a large number of years the Music Hall has not existed, although there is some doubt in the Tribunal's mind as to whether the covenant applied to those premises.

(h) "any other material circumstances".

The only other matter brought to the attention of the Tribunal was the planning permission granted on 5th December 1989 for the erection of six apartments and carparking.

The modification suggested to the Tribunal was as follows:-

The following words be added to the covenant:-

"save that portion of the said premises more particularly described in the Schedule hereto".

The following Schedule to be added to the Lease:

"SCHEDULE"

"ALL THAT AND THOSE that piece or parcel of ground situate and known as 4 Kinnegar Road, Holywood, in the Parish of Holywood, Barony of Lower Castlereagh and County of Down and more particularly hatched in green shown on the Plan annexed to the Deed of Assignment dated 11th day of October One thousand nine hundred and eighty nine and made between Margaret Theresa Brennan of the one part and Silone Ltd of the other part together with the rights members and appurtenances therewith belonging or in anywise appertaining together also with a right of way over the passage in the rere."

The Tribunal accepts the words of modification and the words of the Schedule to be added and makes an order of modification.

In accord with the evidence, the Tribunal is satisfied that no compensation is payable under Article 5(6)(b) of the 1978 Order.

ORDERS ACCORDINGLY

Mr A L Jacobson FRICS

Lands Tribunal for Northern Ireland

21st February 1990

Appearances:-

Mr Ken Rutherford (of Messrs C & H Jefferson, Solicitors) for the Applicant.