

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

IN THE MATTER OF A REFERENCE

R/40 & 41/2002

BETWEEN

JOHN RAYMOND McMAHON & SAMUEL ANDREW CYRIL McMAHON – APPLICANTS
AND
KINGSMOAT DEVELOPMENTS LIMITED - RESPONDENT

PART I

Re: 89 Kings Road, Belfast

Lands Tribunal – Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 26th and 27th March 2003

1. The covenants, which are the subject of this application, are contained in a lease, dated 9th May 1973 between John Henry Britton and John Raymond McMahon and Samuel Andrew Cyril McMahon, by which the late Mr Britton gifted part of the land to the rear and south east ('the subject land') of his house at 85 Kings Road Belfast to the Applicants, for a consideration of £1 and a yearly rent of 5 pence for a term of 999 years from 1st November 1972.
2. Mr Mark Orr QC instructed by Cunningham & Dickey appeared for the applicants and Mr Mark T Horner QC instructed by Carson McDowell appeared for the respondent. Mr David Thompson and Mr Denis Templeton gave expert evidence. Both have long experience of property matters.
3. Article 4 of The Property (NI) Order 1978 gives the Tribunal a power to define the scope, etc., of impediments:
"4. -(1) The Lands Tribunal, on the application of any person interested in land, may make an order declaring-

- a) whether or not the land is, or would in any given event be affected by an impediment;
- b) the nature or extent of the impediment;
- c) whether the impediment is, or would in any given event be, enforceable and, if so, by whom.”

4. Article 5 gives the Tribunal a power 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.”

5. The applicants had a close personal relationship with Mr Britton and for many years they have continued the family business of nurserymen. Before the 1970s, the business had been conducted on their own substantially larger area of adjoining land ('the adjoining land') and since then the subject land has been used together with the adjoining land for the business. The applicants remain in business as nurserymen.

6. The respondent is now developing the site of the former dwelling house of Mr Britton as apartments. On the 12th June 2002 the applicants obtained outline planning permission for a mixed residential development of 48 dwellings on the subject land and the adjoining land. Their 'concept statement' showed 9 units on the subject land.

7. The demise of the subject land is subject to a number of covenants including:

8. In the Third Schedule, at Covenant 6:

“Not without the consent in writing of the Lessor to make any alterations or erections to the exterior of the buildings now erected on the premises and not without the like consent to erect or build on any part of the premises any dwelling house or other erection and to erect or build all additional or substituted buildings or erections in accordance with site plans, plans, elevations and specifications first approved in writing by the Lessor”.

9. And at Covenant 7:

“Not to use the premises or any part thereof or permit or suffer the same to be used so as to cause nuisance, annoyance or inconvenience to the Lessor as Tenants or the occupiers of neighbouring premises nor without the consent in writing of the Lessor to carry on or permit or suffer to be carried on thereon or on any part thereof any offensive, noisome, noxious, noisy or dangerous trade, manufacture or occupation whatsoever and not to use the premises otherwise than as a market garden *provided always that if the Lessee shall certify in writing to the Lessor at any time that it is no longer profitable for them to continue their business as nurserymen, the Lessee may at any time thereafter erect or cause to be erected on the premises a private dwelling house or bungalow or private dwelling houses or bungalows in accordance with the foregoing covenant and of not less Poor Law Valuation than those then erected on the adjacent premises.*”

(Tribunal's emphasis)

10. Mr Horner suggested and the Tribunal accepts that it is quite clear that these covenants should be read together.
11. So far as is relevant, the effect of the covenants is that consent may be withheld for the building of any dwelling house on the subject land but, *if it is no longer profitable for the applicants to continue their business as nurserymen* (whether on the subject land, the adjoining land or both) they may build private dwelling houses or bungalows in accordance with site plans, plans, elevations and specifications first approved in writing by the Lessor. The respondent accepts that it must duly consider any such plans etc. in those circumstances.
12. Under Covenant 7, the machinery, for determining whether their business as nurserymen is no longer profitable, is one of ‘self-certification’. And, on 22nd January 2003 the Applicants certified:

“We the undersigned Samuel Andrew Cyril McMahon and John Raymond McMahon being the lessees of the 9th May 1973 hereby certify in accordance with the covenant No 7 of the schedule that it is no longer profitable for us to continue our business as nurserymen.”

13. Mr Orr referred the Tribunal to the discussion on certification in *Keating on Building Contracts* at Chapter 5. There also is a discussion in *The Interpretation of Contracts 2nd Ed* by Lewison at Chapter 12.
14. The general purpose of clauses that provide that the certifier has come to some opinion is to avoid disputes. But correctly, in the view of the Tribunal, in this case neither party suggested that the certification provision should be interpreted strictly, i.e. so as to exclude any further inquiry into the basis on which the certifiers' opinion was formed.
15. Mr Orr submitted that a self-certifying party must not act unreasonably or dishonestly or capriciously. The Tribunal accepts Mr Orr's suggestion that in this case the appropriate test is "did the applicants act reasonably in certifying to the respondent that it was no longer profitable for them to carry on the business of a nursery".
16. The applicants raised an issue of whether the respondent is in breach of a restrictive covenant in respect of other lands. However the Tribunal does not consider that relevant to the instant case.
17. The matters on which the applicants relied were the poor condition of the greenhouses and boilers, the modest profitability of the business, the difficulty in obtaining suitable operatives, and the poor prospects for the business.
18. The applicants' solicitor had written to the respondent's solicitor stating that
"The accountants have also pointed out that in relation to the greenhouses there is a potential capital expenditure on these required within the next two years of over £65,000, that two boilers required to heat greenhouses need replacing and a van used in connection with the business also needs to be replaced".
19. It is important to recognise that the machinery is self-certification, the inquiry into the reasonableness of the certificate should reflect that; the level of enquiry should be proportionate. The inquiry should not be allowed to convert the process of self-certification into one of determination by an independent third party; the latter option was not the intention of the parties. Visual inspection suggested there are accumulated outstanding repairs to glazing and at least one boiler may be

approaching the end of its safe working life. But, if it is intended to rely heavily on the requirement for such significant capital expenditure, it is unreasonable to do so without a careful review by a suitably qualified person (as a result of their long experience, the applicants may be suitably qualified). That capital expenditure may well be required within the next year or two but in the context of this business £65,000 is a very substantial amount, the accountants are unlikely to be best placed to assess what is required and the only other evidence which was from the applicants' property expert did not address that issue.

20. Mr Horner suggested that the applicants could, if necessary, sell off some land to fund the expenditure. In the view of the Tribunal, any such investment would have to be considered in the context of the future prospects of the business and, although the financial evidence does not include the up-to-date trading position, the available evidence would suggest that such investment, if required, would not be prudent.
21. Trading accounts for the three years ended 30 April 2002 were produced. These showed an increasing trend in profits from the business with an increase in profit from 2000-2001 of 20.6% and 2001-2002 of 39.6%.
22. But that is not the complete picture. In each year the partners drew, as salaries between about £11,500 and £12,500. Between 2001 and 2002, turnover fell from nearly £109,000 to about £92,000. Gross profit remained at 62% but employee wages were reduced from about £23,000 in 2001 to about £8,500 in 2002. Mr McMahon explained that, in that year, 2 full time staff had left and he and his brother had been unable to attract suitable replacements so they had worked very long hours to deal with the stock that they had ordered and to keep the business going. The profitability for the year April 2002 is largely as a result of exceptional circumstances and, in particular, the partners working excessive hours without adequate paid assistance.
23. Having looked behind the certificate at the basis on which it was determined, in particular the reliance on the requirement for capital expenditure and what may have been one exceptional poor year's trading, the Tribunal is not persuaded that the applicants acted reasonably in certifying as they did. However, the business is very close to being unprofitable and their actions are only just unreasonable. Mr McMahon

gave evidence of increased competition particularly due to imports from Holland since the emergence of the peace process and further suggested that more recent trading figures were unlikely to be satisfactory. In the view of the Tribunal a broad interpretation of the expression “no longer profitable for them” is appropriate in this case; the business need not be driven to the edge of insolvency. In all the circumstances it may be that when the current trading position is clear, that will justify a certificate that it is no longer profitable for the applicants to continue their business as nurserymen. Time may shortly tell whether their actions were simply premature.

24. In passing, the Tribunal accepts that the expression “no longer profitable” does not mean less profitable in the sense that the land could be put to use that would produce a much greater profit for property development.
25. On the evidence presented at the Hearing the Tribunal therefore declares that the land is affected by an impediment and the nature or extent of that impediment is that the respondent is entitled to refuse consent for the building of any dwelling house on the subject land.
26. The Tribunal accepts that these covenants originally were created for the benefit of Mr Britton’s dwelling house and garden and not for the benefit of multi-storey apartment building going far beyond the dimension of the original dwelling house.
27. There is no doubt that there has been some change in the character of the lands over the last 20 years; a number of individual new dwelling houses have been built to the rear of what was formerly Mr Britton’s land and the Tribunal has evidence of other new developments in the neighbourhood. However so far, development has been confined to small-scale in-fill development on a much smaller scale than that which has now received planning consent on the subject and adjoining lands.
28. It is clear from the evidence of Mr Templeton that the impediment secures a real and practical benefit of some value, but only some value, to the respondent’s lands namely a degree of control over part, but only part, of the view towards the Cherryvalley River and beyond; and a degree of privacy.

29. It may be that in due course the directors of the respondent company will benefit from the covenant by reason of the view that they will enjoy and the privacy they will have in apartments they intend to occupy in their company's development. But there was no evidence before the Tribunal that the benefits were presently secured to them in their personal capacity.
30. The evidence established that the applicants are free to develop the rest of their lands and that their continuing obligations to the respondent do not prevent them from unlocking the capital value of those lands.
31. Once, as seems likely to happen, the nursery is no longer profitable the applicants then would be entitled to issue a fresh certificate and Mr Horner confirmed that the respondent will duly consider any plans for the erection of private dwelling houses or bungalows.
32. The Tribunal concludes that covenants 6 and 7 do not unreasonably impede the enjoyment of the subject land. The impediment is not an absolute prohibition and the Tribunal concludes that the bar on development only until the nursery is no longer profitable, coupled with a degree of control over future development achieves a balance which the Tribunal is not persuaded it should upset.
33. On the evidence presently before it, the Tribunal refuses the application for modification or extinguishment of covenants 6 and 7 of the Third Schedule to the lease, dated 9th May 1973. However, should circumstances change, the Tribunal reminds the parties that it sees no bar on the issue of a further certificate and, if necessary, a further application.

ORDERS ACCORDINGLY

19th June 2003

**Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAVI
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Mark Orr QC instructed by Cunningham & Dickey appeared for the Applicants.

Mark T Horner QC instructed by Carson McDowell appeared for the Respondent.