

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964
PROPERTY (NORTHERN IRELAND) ORDER 1978
IN THE MATTER OF A REFERENCE
R/41/2006
BETWEEN
EASTONVILLE TRADERS LIMITED – APPLICANT
AND
MARGARET L GILLESPIE & OTHERS – RESPONDENTS

Re: Lands at Holborn Avenue, Bangor

Lands Tribunal - Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAMI

Belfast – 25th April 2007

1. Some 25 years ago there was a dispute between neighbours - the Trustees of Holborn Hall ('the Trustees') and the Respondents ('the Gillespies') and their tenants. It was settled. Now there is a new dispute on related matters. The Trustees' successors in title, the Applicant ('Eastonville') has planning permission for development. The issue before the Tribunal is the preliminary question as to whether or not the terms of settlement impede current development proposals. Other issues may have to be dealt with on another day.
2. Mark T Horner QC appeared for the Applicant and Colin J W Henry BL appeared for the Respondents. Michael Whitley and Charles Ballantyne, both experienced architects, gave expert evidence.
3. The terms of settlement had been incorporated in a single document with a map, signed by the Trustees and the Gillespies and dated 18th December 1994 ('the 1994 Agreement'). Unfortunately the original document cannot be found. There are photocopies but these are not crystal clear and the map cannot be reliably scaled.
4. The dispute concerned premises on the eastern side of Holborn Avenue close to its junction with High Street, Bangor. The Tribunal refers to the land that is the subject of this application as *the Hall land* and the relevant adjoining land as *the Gillespie land*. In January 2006 the Planning Appeals Commission allowed an appeal and granted full planning permission for 14 new build apartments for the elderly, on the Hall land.

5. The Tribunal visited the premises. Both the Hall land and the Gillespie land are on the eastern side of the Avenue which runs broadly North/South. The Hall land lies to the north of the Gillespie land. Both rise gently but significantly from the Avenue. They are on the outside of a slight bend in the Avenue. Initially boundaries etc. tend to radiate away from the Avenue. A short distance back they bend to become more parallel with each other.
6. The Hall land is almost but not quite rectangular in shape. It is about twice as deep as it is wide. It is bounded by the Avenue to the west, a lane to the south and the Gillespie land to the north and east. The Holborn Hall, a mission hall, was built on the Hall land, close to the frontage to the Avenue. Its site was cut into the hillside and retaining walls built. The building took up most but not the entire frontage and about half the depth of the land. The remainder to the rear was open ground.
7. On the Hall land, to the northern side of the mission hall, there was a passage capable of providing access from the Avenue to the open ground to the rear. This is contiguous with a similar passage on the Gillespie land. At most times their use was shared. The narrowest point is at the Avenue and it widens towards the open ground. Part of one of the retaining walls ran along that passage perhaps 2 metres out from the side wall of the building, starting perhaps 4 or 5 metres back from the Avenue. Photographs from mid 1989 show that the part of the retaining wall on the passage had been replaced by tanking the building, back-filling and tarmacdaming. They also appear to show the Trustees erecting a fence along part of the boundary between the open ground and the contiguous Gillespie land. There may have been alterations to the building some time before about 1989. The Hall has been demolished.
8. The relevant parts of the Gillespie land are contiguous with the northern and eastern (rear) boundaries of the Hall land. At the eastern boundary it is a strip. Part of this strip has been used partly for car parking and in the 1994 Agreement it is termed "the eastern boundary bays". At the northern boundary it also is a strip but its shape is more irregular. It runs along the boundary of the Hall land, from the avenue to join the eastern strip at the rear. At the front there is a passage between the gable of an end terrace house and the Hall land. The narrowest point of the passage is at the Avenue. Behind the passage, what appears to have been the rear garden of that house forms part of the strip. This part has been used for car parking and in the 1994 Agreement is termed "the northern bays". The passage and strip behind also provide access to commercial premises on the outside of the North East corner. These are let by the Gillespies, currently as a funeral parlour.

9. When some 25 years ago the dispute went to Court the action began by civil bill but recommenced as a writ. The Trustees claimed a right of way over part of the Gillespies' land (probably the passage) and that the Gillespies had obstructed the right of way and trespassed on the Hall passage by the erection of a post and chain. They claimed that one of the Gillespies' commercial tenants had trespassed on to the Hall land by parking vehicles and removing fence posts and another had caused vehicles to be deposited and left there. The Trustees then claimed for relief in relation to
 - a. the boundary between their land and the Gillespies' lands;
 - b. injunctions to prevent obstruction of the right of way;
 - c. a declaration with regard to the right of way; and
 - d. damages for nuisance and trespass.

10. The Gillespies admitted that a chain had been placed across the passage but said that it had been removed.

11. The 1994 Agreement begins:

"In settlement of the above named proceedings and in an effort to secure amicable relations and avoid difficulties between the parties in future, the parties have agreed as follows"

12. And later:
 - "2. The access
 - 2.1 Both the Plaintiffs and the Defendants shall enjoy free unimpeded access to their respective lands over the entrance thereto from Holborn Avenue, Bangor.
 - 2.2 Neither the Plaintiffs nor the Defendants shall permit, upon their own lands, any parking of vehicles on the access at the places marked with double yellow lines as shown on the map."

13. Then
 - "3. Parking bays
 - 3.1 Within 8 weeks of the date hereof parking bays shall be marked out on the lands of the Plaintiffs and the Defendants in 3 areas as illustrated on the map namely;
 - i. On the Defendant's lands to the north of the Plaintiff's lands ("the northern bays").
 - ii. On the lands of the Plaintiffs and of the Defendants at the eastern boundary of Plaintiff's lands ("the eastern boundary bays")
 - iii. On the parking area at the rear of the Plaintiff's premises.

- 3.2 The layout of the parking bays shown on the map is for guidance and illustration only save that the eastern boundary bays shall be 6 in number, of sufficient width for car parking spaces and shall run perpendicular to the eastern wall.
- 3.3 The Plaintiffs shall have the responsibility of marking out said parking bays but the cost of so doing shall be born equally by the Plaintiffs and the Defendants and the Plaintiffs will provide to the Defendants two written estimates of the intended cost thereof for the Defendants to choose therefrom.
- 3.4 The costs of maintaining the parking bay layout for the eastern boundary bays shall be born equally by the Plaintiffs and the Defendants. Otherwise each party shall be responsible for the maintenance of the bays on their respective lands.”

14. There are specific provisions regulating the eastern boundary bays:

“4. Use of the eastern boundary bays

4.1 The Plaintiffs and all bona fide visitors to Holborn Hall shall be entitled to park on the eastern boundary bays. However, such users shall be restricted to the extent that the same shall not interfere with or impede the right of way, at all times, and for all purposes granted (or to be granted) by the Defendants to their tenants over that portion of the Defendant’s lands that forms part of the eastern boundary bays.

4.2 All necessary notification or notices or any complaint in respect of the user of the eastern boundary bays, shall be made in writing and addressed – Secretary for the time being of Holborn Hall.”

15. Then

“5. The turning facility

5.1 The Defendants and their tenants will have reasonable use for the purposes only of turning, of the unmarked area at the north east boundary of the Plaintiff’s lands.”

16. And later

“7. Successors

7.1 Terms of this settlement shall bound (sic) the Plaintiffs and the Defendants, their successors and assigns.”

17. There is provision for other matters such as arbitration in the event of dispute. There is a statement that the settlement shall form a Tomlin Order and provision that each party shall bear their own costs of the proceedings.

18. Mr Henry referred the Tribunal to the fact that when Eastonville purchased the land from the Trustees the restrictive covenant and the terms of settlement were not only drawn to their attention but made conditions of the contract. Mr Horner suggested that it was of significance

that, when the Gillespies subsequently granted a lease to their tenants after these terms had been agreed, they did not purport to grant them access across the combined passages. Mr Henry suggested reasons for that. Also, in evidence to the Planning Appeal Commission, in November 2005, the entitlement to park at the eastern boundary bays was said to be shared. But the Tribunal does not regard these later matters as being of significant assistance in interpreting the meaning of the 1994 Agreement at the time it was made.

19. Eastonville has put forward a choice of two development options, *the preferred option* and *the alternative option*, both of which are said to comply with the planning consent. On both options the buildings extend over what was the open ground to the rear but still permit parking at ground level. On the preferred option, the eastern boundary bays are used for parking. On the alternative option they are not; also, additional pillars are required to support the building over the car parking.
20. There is a partial vacuum and some ambiguities in the 1994 Agreement.
21. The main issues for this Tribunal now are:
 - a. Is Eastonville bound by the 1994 Agreement; and if so
 - b. Would the access provision at Clause 2 impede either option;
 - c. Would the parking provisions at Clauses 3 and 4 impede either option; and
 - d. Would the turning facility provision at Clause 5 impede either option?

Is Eastonville bound by the 1994 Agreement?

22. The Tribunal has carefully examined the photocopies of the 1994 Agreement. There is a comma after “Defendants” in Clause 7.1. Grammatically it is more likely that the phrase “their successors and assigns” is not limited to the expression “the Defendants” only but is thrown back to include the whole of the earlier phrase “the Plaintiffs and the Defendants”.
23. Grammatically the expression “in future” qualifies “the parties” and when the preamble is read together with Clause 7 that perhaps also suggests more than an immediate context.
24. The Tribunal accepts that Clause 7.1 could have stated “their *respective* successors and assigns” but the intention to include both is sufficiently expressed in the language as it stands.
25. Clause 7.1 must be considered in its factual context and in the context of the entirety of the 1994 Agreement, with its reciprocity of benefits and burdens. It is highly improbable that it was intended that the successors of the Gillespies should be bound to provide shared use of their

land for access, parking and circulation space but the successors of the Trustees should be free not to reciprocate.

26. The entitlement to park at the eastern boundary bays, unlike the other areas, is subject to specific limitations including restriction to “the Trustees and all bona fide visitors to Holborn Hall”. If that is to have meaning it must refer to the mission itself rather than the Hall land as a whole. That conclusion is supported by the complaints procedure in regard to this part of the 1994 Agreement, which provides for notice to be served on the “Secretary for the time being of Holborn Hall”. Also, at the time of the 1994 Agreement the Holborn Hall was a mission hall used at week nights and on Sundays but not generally during usual business hours. That probably made the sharing solution more attractive to both the Trustees and the Gillespies with their business tenants. But the Tribunal does not accept that this is sufficient reason to conclude that the whole 1994 Agreement was intended to be binding on the Trustees only and not intended to apply if the Hall land was redeveloped for another use.
27. The Tribunal concludes that Eastonville is bound by the 1994 Agreement.

Would the access provision at Clause 2 impede either option?

28. The terms *access* and *entrance* may be used in the sense of a right or a means, in the sense of a place and also in the sense of an interface or threshold.
29. When the map and circumstances are taken into account, the purpose of Clause 2.1 would appear to be to prevent a recurrence of the obstruction of the threshold between the combined passage and the Avenue. Part of the dispute was the erection of a post and chain across the threshold. In Clause 2.1 the term *access* appears to be used in the sense of a right or a means, which is to be “free unimpeded”, and not in the context of a place that is part of either’s land. As the passage is part of their respective lands, the term *entrance* appears to be used in the sense of an interface or threshold “to their lands” and not part of either’s land i.e. the passage. Both options show a planting scheme along part of the combined threshold. That may not be a substantial obstacle but it is sufficient to conclude that the access provision at Clause 2.1 does impede both options.
30. In Clause 2.2 the term *access* plainly is used in the sense of a place.
31. When the words of Clause 2.2 are read together with the map the analysis is clear. Double yellow lines are to be painted at both sides of the passage and it is not to be obstructed by parking of vehicles on either side. The Tribunal accepts that a literal construction of Clause

2.2 has nothing to say about anything other than marking places with double yellow lines and prohibiting parking. That leaves a vacuum. Eastonville wish to erect a block of flats partly on the places to be marked with double yellow lines. Was it intended that other types of obstruction are outside the 1994 Agreement?

32. In the much cited passage from the speech of Lord Hoffman in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 HL he refers to the speech of Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB, the Antaios [1985] AC 191:
- “... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.”
33. If the analysis of the words of the 1994 Agreement is such that, although obstruction by parking is prohibited on the yellow lines, obstruction by the erection of a block of flats is not prohibited then in the interest of business common sense that analysis must be rejected. Having regard to the dispute that the 1994 Agreement was intended to resolve, the Tribunal concludes that the intention of the parties was to licence shared, reciprocal access over the length and full breadth of the passage on which the lines were to be painted. The Tribunal has the impression that the arrangement would allow one service vehicle to pass another at the passage. But after development on either option there would be just sufficient for two cars or a car and service vehicle to pass. That is a significant difference in facility.
34. The Tribunal concludes that the access provision at Clause 2 would impede both options.

Would the parking provisions at Clauses 3 and 4 impede either option?

35. The 1994 Agreement does not expressly say so but the common business sense view is that it was a reciprocal arrangement whereby the Trustees and the Gillespies licence each other to share use of each other's land for access, parking and circulation space. See, for example, the shared nature of the arrangements at Clause 3 for marking out, sharing costs and maintenance. The relevant land included the open ground of the Hall land, the strips of Gillespie land and both their passages from the Avenue. There is an express licence for use of part for turning only but the Tribunal concludes that is regulatory rather than defining the entirety of the entitlement of the Gillespies. The Tribunal concludes that the 1994 Agreement includes a reciprocal arrangement whereby the Trustees and the Gillespies licence each other to share use of each other's land for parking. The Planning Appeals Commission required parking spaces to be “permanently retained to serve [the Eastonville] development”.

36. The Tribunal is reluctant to stray into the interpretation of planning conditions but it appears that *permanently retained* does not mean *exclusively* – so the sharing of such spaces is acceptable. In passing, it might therefore follow that Eastonville may include, for planning purposes, shared use of the northern bays.
37. In the 1994 Agreement the tension between the use of the eastern boundary bays both for parking and as a right of way that the Gillespies granted, or intended to grant to their tenants (see Clause 4) is resolved by giving precedence to the right of way.
38. The eastern boundary bays cannot be *permanently retained* because Eastonville's use is only permitted subject to the Gillespies' entitlement to grant a right of way over them. Thus that aspect of Clauses 3 and 4 of the 1994 Agreement would impede the preferred option (which uses the bays as car spaces).
39. The right of way in Clause 4 would not impede the alternative option because the parking bays are moved away from the eastern boundary.
40. The Tribunal accepts that, apart from the specific requirements of the eastern boundary bays, the layout of the parking bays shown on the 1994 Agreement map is for guidance and illustration only. Although there would be fewer bays in total and they would be laid out differently, the 1994 Agreement has the character of flexibility and the Tribunal concludes that this aspect of Clause 3 of the 1994 Agreement would not impede the alternative option in regard to the open ground and eastern boundary bays.
41. For guidance and illustration only the northern bays are drawn perpendicular to the northern wall on the map. The impression of the Tribunal is that, with perpendicular parking, access to these bays and circulation would be unsatisfactory on both options. Parallel rather than perpendicular parking would be so different that it is impeded by the guidance in the 1994 Agreement. But, if single side 'herringbone' parking was coupled with an adequate turning facility elsewhere, that would not be impeded by Clause 3. However the consequent traffic circulation would require a suitable turning facility provision e.g. in accordance with Clause 5. If that is provided then neither option would be impeded by Clause 3.

Would the turning facility provision at Clause 5 impede either option?

42. The 1994 Agreement provides that the Gillespies and their tenants will have reasonable use for the purposes only of turning, of an unmarked area at the north east boundary of the Eastonville's land. On the adjacent area of the Gillespies' land their current tenants, who are

funeral undertakers, have built a substantial covered area or canopy, supported by two corner pillars which almost touch the Eastonville's land. In deciding what such "reasonable use" is, the Tribunal considers it may have regard to the extent to which use for turning is affected by the obstructions on the Gillespies' land. It concludes that some consequential awkwardness on the Eastonville side is acceptable in the context of reasonableness.

43. On the preferred option the relevant area is partly obstructed by a pillar supporting the building over the open area and also by part of one of the eastern boundary parking bays (the row has expanded northwards to accommodate other supporting pillars). But on balance the Tribunal concludes that the preferred option would provide reasonable use.
44. On the alternative option the pillar is beside the eastern boundary parking bays and the obstruction affects less. The impact of the pillars supporting the canopy is likely to be more of an inconvenience than a difficulty. Again on balance the Tribunal concludes that the alternative option would provide reasonable use.
45. The Tribunal therefore concludes that the turning facility provision at Clause 5 would not impede either option. It also concludes that both options would provide an adequate turning facility in the context of circulation space ancillary to the parking requirements of Clause 3.
46. The Tribunal therefore concludes:
 - a. Eastonville is bound by the 1994 Agreement;
 - b. The access provision at Clause 2 would impede both options;
 - c. The parking provisions at Clauses 3 and 4 would impede the preferred option but not the alternative option; and
 - d. The turning facility provision at Clause 5 would not impede either option.

ORDERS ACCORDINGLY

26th September 2007

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

Appearances

Mr Mark T Horner QC instructed by Elliott Duffy Garrett, solicitors appeared for the Applicant.

Mr Colin J W Henry BL instructed by Wilson Nesbitt, solicitors appeared for the Respondents.