

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

**IN THE MATTER OF AN APPLICATION**

**R/45/1988**

**BETWEEN**

**JOEL LTD AND MICHAEL A MCKINSTRY - APPLICANTS**

**AND**

**HUGH S JAMISON, REGINALD B SCHOFIELD, DENIS H ALLEN,  
NEVILLE C GRAHAM AND MARY GRAHAM, JOHN MONTGOMERY, JAMES MYERS,  
STANLEY BEESLEY AND MARIAN BEESLEY, ROBERT A HILL, ROBERT J DAVIS  
WILLIAM J NIXON - RESPONDENTS**

**Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS**

**Belfast - 30<sup>th</sup> March 1990 and 5<sup>th</sup> June 1990**

This was an application under Section 5 of the Property (Northern Ireland) Order 1978 ("the 1978 Order"). The Application dated 22<sup>nd</sup> November 1988 to the Lands Tribunal did not state the determination sought but by consent at the hearing the determination sought was stated to be the extinguishment of or such modification that the Lands Tribunal deems fit of a covenant in a transfer deed dated 8<sup>th</sup> June 1978 and received in the Land Registry on 12<sup>th</sup> June 1978 of some 10.81 acres forming part of the lands comprised in Folio 24432 Country Antrim. That covenant reads:-

- "1. The Transferee for himself and his assigns hereby covenants with the Transferors as follows:-
- (1) Not to erect or build or permit to be erected or built on the premises or any part thereof any building or structure.
  - (2) Not to use the premises or permit the same or any part thereof to be used for any purpose other than as a garden or for agricultural or farming purposes.
  - (3) Not to cause permit or suffer upon the premises or any part thereof any annoyance or nuisance to the owners or occupiers.

AND the Transferee HEREBY CONSENTS to registration of the foregoing covenants as burdens affecting the lands hereby transferred and described in the Third Schedule hereto."

The Tribunal finds the following facts proved or admitted:-

1. The land which lies south east of houses at Downview Park near Upper Road, Greenisland, Co Antrim formed part of Folio 24432 County Antrim. That folio originally consisted of 12 acres 0 roods 1½ perches. On 28<sup>th</sup> July 1976 the owner-occupiers of houses numbered 111 Upper Road, Greenisland and 6, 7, 8, 9, 10, 11, 12 and 13 Downview Park purchased the land (apart from 33 square yards in a lease for 10,000 years from 1<sup>st</sup> January 1971) in fee simple as tenants in common of an undivided ninth share each. Each of the above owner-occupiers on 14<sup>th</sup> April 1978 transferred areas varying from 514 square yards to 1,022 square yards of the land adjacent to their own back garden. Each plot was subsequently incorporated into that back garden.

2. The remaining 10 acres 3 rood and 290 square yards were sold for £6,750 to Mr Armour Hill and transferred to Folio 33310 Co Antrim on 12<sup>th</sup> June 1978.

When that transfer took place the deed containing the above fore-mentioned three covenants were registered as "burdens and other encumbrances" on Folio 33310. Mr Hill covenanted for himself and assigns with the nine owner-occupiers (but their assigns were not mentioned).

3. On 16<sup>th</sup> January 1984 when the owner of the dwelling at No 9 Downview Park sold his house to Neville Crawford Graham and Mary Graham, the undivided one-ninth share in the land which then formed part of the garden of No 9 Downview Park was transferred to the purchaser for £1,000.

4. On 23<sup>rd</sup> November 1987 Mr Armour Hill sold the 10 acres 3 roods and 290 square yards contained in Folio 33310 to Joel Ltd and Michael Alexander McKinstry for £62,500 in fee simple as tenants in common of an undivided half share each. Joel Ltd and Michael Alexander McKinstry are the Applicants in this case.

5. The Applicants have conditionally sold the land to Antrim Construction Company Limited but the completion of that sale will take place on 1<sup>st</sup> January 1991 subject to

planning permission being granted and subject to this matter of the covenants being resolved by the Lands Tribunal to the satisfaction of Antrim Construction Company Limited.

6. The Greenisland Local Plan, which was adopted on 2<sup>nd</sup> April 1987, puts forward a policy for the development of Greenisland up to 1995. This 10 acres 3 roods 290 square yards field is within the development limit around Greenisland and is bounded on two sides by the limit line. The Plan expresses that:- "The amount of land considered suitable for development will be in excess of the demand anticipated by 1995 in order to provide a reasonable choice of building land".
7. The Belfast Urban Area Plan 2000 covers the period up to 2001 and includes this land in its strategic land use plan. It establishes the Belfast Urban Area Green Belt. This land is bounded on two sides by that Green Belt line.
8. There has been no application for planning permission by either the Applicants or the Antrim Construction Company Limited. The Tribunal was informed that the present plans of the Company propose approximately 70 dwellings to be built on the lands.
9. The Greenisland Local Plan indicates that Upper Road, Greenisland is to be improved from the Presbyterian Church to "the edge of the settlement towards Carrickfergus". In particular sight-lines where Downview Road joins Upper Road (at a T-junction) are to be improved and the Department of the Environment has already purchased the land to provide the required sight-lines.

Also a major realignment is proposed for Shore Road from Ravenhill to Silverstone.

Certain pedestrian footpaths were proposed to be upgraded in the Local Plan. Those included that footpath from the Station through other development land of Messrs Vance and Woodside going generally north-eastwards towards the subject land viz: "Upper Station road to Upper Road via School Lane".

10. The Greenisland Local Plan also stated:-

"7.4. The present sewerage system is approaching capacity and it is intended that a detailed feasibility study into future provision within the area will be carried out within the next few years."

The Department of the Environment on 10<sup>th</sup> November 1989 made a Greenisland Sewerage Scheme to provide an extensive trunk sewer for Greenisland (including the subject land). It is proposed that those trunk sewers will not be fully installed until 1992. The Tribunal was informed that the developers contemplate using a pumping station until those trunk sewers are installed - but as yet those plans have not been submitted to the Department for approval.

Mr Barry Malcolm of Counsel (for the Applicants) called Mr Joseph Malachy McEldowney BSc Dip Arch MCD MRTPI, a lecturer in town and country planning at Queens University, and Mr Michael Alexander McKinstry, Solicitor (and one of the Applicants) to give evidence.

Mr McEldowney testified that since the original covenant was registered in Folio 33310 the Regional Physical Development Strategy 1977 and the East Antrim Area Plan 1977 emphasised the role of Greenisland as a dormitory for Carrickfergus. The Greenisland Local Plan 1987 and the Belfast Area Plan 2001 emphasised the green belt and the preferability to ensure development inside the development boundary. He considered the Greenisland Local Plan designated this 10 acres 3 roods 290 square yards site as potential housing development land in company with two other principal sites:- viz one to the south-west with limited frontage to the Shore Road (with planning permission granted for 125 dwellings and another 138 further sites under discussion with the planning authority) and one to the north-west with access off Upper Road (about one-third of the sites have an approved planning permission with the remainder pending).

An additional site to the west of the subject lands is being developed in piecemeal fashion by Messrs Vance and Woodside since 1974 as a small scale development.

Mr McEldowney further testified that from a planning point of view if the restrictive covenants were not extinguished it would be a negation of the Greenisland Local Plan. He could not see a distinction between the designation of this land in that Local Plan and a planning decision allowing development. He considered that the practical benefit of retaining agricultural or garden uses on the site has little intrinsic benefit on its own terms, and that as none of the nine Respondents had objected to the inclusion of the site in the Greenisland Local Plan as land for development they each had agreed by implication or by an act of omission to the modification or extinguishment of the impediment.

His summary was as follows:-

"6.1 THE CASE FOR THE MODIFICATION OR EXTINGUISHMENT OF THE RESTRICTION IN QUESTION RESTS ON SIGNIFICANT SOCIAL AND ENVIRONMENTAL CHANGE IN THE AREA SINCE 1978, REFLECTED IN STATUTORY PLANNING AND TRANSPORTATION PROPOSALS AT STRATEGIC AND LOCAL LEVELS WHICH ARE IN DIRECT CONFLICT WITH THE EFFECT OF THE COVENANT. THE NATURE AND EXTENT OF PRACTICAL BENEFIT OF THE RESTRICTION HAVE BEEN CONSIDERABLY REDUCED AND ITS DECLINING SIGNIFICANCE IS IMPLIED BY ACTS AND OMISSIONS OF THE PERSONS ENTITLED TO THE BENEFIT OF THE IMPEDIMENT".

Mr McKinstry testified that he and his co-purchaser bought in November 1987 the 10 acres 3 roods and 290 square yards unconditionally. The restrictive covenants registered on the Folio were well-known to the purchasers but the Greenisland Local Plan which had been adopted earlier in 1987 was considered to allow development.

He explained that the land was purchased as an investment. Previous practice of the Applicants was to purchase building land and later to transfer to the Antrim Construction Company Limited on a site fine basis ie the Company would pay £X for each house erected and sold.

He further testified that the Applicants wished for extinguishment of the impediment but if the Lands Tribunal did not approve the Applicants requested a modification:-

A cordon sanitaire at the top end of the site. No building within a 30 metre distance from the back garden boundaries of the dwellings owned and occupied by the respective Respondents. In that top half of the site, the dwellings to be built at a density and height submitted to the planning authorities to take account of the amenity of those existing dwellings. The density probably would be lower and the buildings probably would be bungalows. The density suggested would be 5 to 6 per acre and the dwellings would be substantially the same size as the Respondents' dwellings.

Mr Michael Lavery QC (for the Respondents) called Mr Michael Robert Curry FRICS FSVA IRRV, Mr Neville Crawford Graham, (one of the Respondents living in No 9 Downview Road) and Mr Robert James Davis (one of the respondents living in No 161 Upper Road) to give evidence.

Mr Curry testified that the field of 10.81 acres slopes downwards from Downview Park giving the dwellings belonging to the Respondents fine views over open countryside towards Belfast Lough. There is a difference in height of 20ft/25ft from front to rear. It is only 12 years since the impediments were created when the land was sold to Mr Armour Hill. The impediments ensured that that fine view was not lost to each of the Respondents. He further testified that there had been no change in the character of the land and apart from further residential development of land to the south west of Downview Park there has been no change in the character of the neighbourhood. He defined "the neighbourhood" narrowly to Downview Park. He further testified that there was about 50 to 60 acres of land including smaller infill sites available for development in Greenisland while the Greenisland Local Plan provided for an increase of population in Greenisland of 500 persons over that Local Plan period. Within the past fortnight a meeting between the Department of the Environment Road Service and the District Council (reported in the local press) informed that the major improvements to Shore Road will be in place by 1993 thus enabling the south-west site to utilise fully the planning permission for 125 houses and a further 200 houses for which a planning application has been made. He further testified that his experience showed that the Department of the Environment in the past had been reluctant to allow a temporary sewage pumping station when that Department had planned a new trunk sewer for a complete district.

Mr Graham testified that prior to his purchase of No 9 Downview Park he had contacted the District Planning Officer in Ballymena who informed him that there should be no development on the field of 10.81 acres. His purchase of the house relied on that fact - the view enhanced the house that much and it was so delightful to return home from his work as a managing director to the quiet rural aspect that no money could compensate him for the loss of that view and rural aspect. He further testified that when the Greenisland Local Plan was first publicised four or five of the owner-occupiers discussed the draft plans and on their behalf he spoke to the District Planning Office in Ballymena who explained to him that the lands was suitable for building but because of the restrictive covenant it could not be built on. As a result of that advice the group decided not to lodge objection to the Draft Plan.

Mr Davis testified that when he added to his garden he terraced the garden by lowering the land at the boundary. He then planted Leylandii and will be cutting these trees back in July in order to thicken the hedge. He further testified as to the extreme importance he places

on the view and the total outlook and aspect. When he purchased the house in 1974 he knew that the 10.81 acres field was zoned for building and considered planning permission would be given and when it came on the market agreed with others to buy it. When it came to be sold the Respondents took legal advice and the covenants were devised to protect the view and outlook.

Mr Michael Lavery QC (for the Respondents) submitted:-

1. The onus to satisfy the Lands Tribunal lies with the Applicants.
2. The covenant does have a benefit to the Respondents. Because they sold the 10.81 acre field at less than they could have obtained if no restrictive covenant had been entered into the Respondents paid for that benefit.
3. There is no public interest whatsoever that should over-ride this restrictive covenant.
4. The Applicants case is that the lands are zoned for housing development and there is a need for housing.

Submits that Greenisland is comparatively small and there is no significant pressure on development. Even if such pressure existed it could take place elsewhere in Greenisland

No detailed planning permission has yet been sought.

5. There is no question that the Respondents have expressly or by implication consented to extinguishment because no objection was made to the lands being included in development land at the inquiry into the Greenisland Local Plan. When enquiries were made with the Planning Department of the Department of the Environment as to whether an objection was necessary the verbal reassurances obtained sufficed.
6. Submits that this application falls far short of the necessary criteria.
7. Submits that a restrictive covenant need not run with the land before the Respondents have the benefit of the covenant. Refers to Gilbert v Spoor and Others [1983] 1 Ch 27 (Headnote; Eveleigh L J @ pp 30, 32, 33 and 23; Waller L J @ pp 35 and 36).

8. Refers to Northern Ireland Legal Quarterly [Vol 29, Nos 3 and 4 1978] @ pp 229, 230, 232, 234, 236 and 237.

9. Refers to Shepherd Homes Ltd v Sandham (No 2) [1971] 2 All ER 1267 (Headnote).

Submits that in Deasy's Act (landlord and Tenant Law Amendment Act (Ireland) 1861) in Sections 12 and 13 covenants are binding on successors and assigns.

10. Submits that the Applicants do not get beyond Article 5(1) of the 1978 Order for agricultural use of the 10.81 acre field is a reasonable enjoyment of the land and thus the Lands Tribunal cannot be satisfied that "the impediment unreasonably impedes the enjoyment of the land or, if not modified or extinguished, would do so".

11. On the other hand if the Tribunal disagrees with that submission, the Tribunal has a discretion which should be exercised in favour of the Respondents after account is taken of Article 5(5)(a) to (h) inclusive.

Under (a) the impediment was created only 11 to 12 years ago and the purposes for which it was created was to preserve the rural aspect and enjoyment of the view from each of the houses owned by the Respondents;

(b) there is no change in the character of the land - it was agricultural and remains so. the mere development of houses in the area does not change the character of the neighbourhood which must include the rural area adjacent and part of the Green Belt. The area north of the railway line has changed with erection of houses but the area remaining has not.

(c) the adopted development plan includes these lands in the area zoned for housing development, but that public interest expressed in that plan does not override the benefit secured by the restrictions imposed by the impediment;

(d) there is a paucity of evidence in front of the Tribunal of planning permissions or of refusals of planning applications;

- (e) the impediment is of practical benefit to the Respondents. It ensures the rural outlook and the extensive fine views over Belfast Lough are not interfered with. The evidence of those Respondents called indicate the value of those views to those giving evidence;
- (f) not applicable to this case for there is no obligation to execute works etc;
- (g) the Respondents entitled to the benefit of the impediment have not agreed expressly to modification or extinguishment. Nor did their decision not to object to the proposals in the Greenisland Local Plan imply agreement;
- (h) there are no other material circumstances.

12. Refers to three Lands Tribunal decisions, viz

In the English Lands Tribunal - Re Speakman's Application Ref LP/10/1982

In the Northern Ireland Lands Tribunal -

McClelland v Montagu R/18/1985

McMullan v Representative Body of the Church of Ireland R/5/1985

Mr Barry Malcolm of Counsel (for the Applicants) submitted:-

1. The Spoor case deals with a factual situation much different from this application. In that case there was a building scheme and the probable construction of two houses.

That decision appears to mean that as a matter of law a view can be of practical benefit. The Applicants dissent from that.

2. The Spoor case also puts forward the proposition that as a matter of law that benefit does not have to be annexed to subject lands.

The Applicants say that the benefit is not annexed to any land in the present case. There is a question as to what land, if any, this covenant is intended to benefit.

The Applicants accept that the covenant is an impediment that affects the enjoyment of the land. Of the original 9 covenantees only five remain in occupation of their individual houses. The Applicants question the extent of the benefit.

3. In the Article in the Northern Ireland Legal Quarterly (Vol 29 Nos 3 and 4, 1978) at p 236 the Respondents rely on the passage (in the third paragraph):- "In this case, one house would hardly make material contribution towards meeting the need for more housing" (in Re Brierfield Properties Limited's Application [1976] JPL 436). The Applicants say that operates in their aid.

At p 323 at top:- "However, he would also have to show that the public interest expressed in the development plan overrides all other considerations including any benefits secured by the restriction". The Applicants adopt that passage. The word "overrides" expresses the detriment (if the impediment not extinguished) to the public interest compared with the benefit to the dominant tenements.

There is a very cogent and weighty public interest because the area concerned is 10 acres plus.

4. It is accepted that there is a preliminary burden on the Applicants to show that the covenant unreasonably impedes the enjoyment of the land. "Enjoyment" is defined in Article 3(3) of the 1978 Order as "in relation to land includes its use and development".

The issue requires the Lands Tribunal to assess and weigh the benefit to the dominant tenement and the disadvantage to the servient owners and the public interest.

The Applicants stress the size of the servient lands as opposed to the size of the dominant lands (if any such dominant lands) - they are but a fraction of the servient lands.

The effect on the 10.81 acres field is to prevent any building and to prohibit any use except agriculture, garden etc. There is an absolute prohibition of building - even agricultural buildings. Submits that enjoyment of the land is impeded by the covenant - it must be so. The question is whether it is unreasonably so impeded. The Respondents say that continuation of agricultural use is reasonable but at page

230 in the NILQ article the learned author says:- "If some use or development other than that contemplated by the Applicant is possible (and practicable) without infringing the restriction, the application will fail". The footnote to that passage reads:- "The Tribunal is realistic:- see Re Wesson's Application 919630 15 P and CR 109; Murrayfield Ice Rink v Scottish Rugby Union Trustees 1973 SC 21; Re Glevum Estates Limited's Application [1974] JPL 151".

Submits 10.81 acres of land without buildings is not reasonable agricultural use. That is its only possible use within the terms of the covenant and it must unreasonably impede the enjoyment of land.

5. Submits that the Tribunal must look fairly hard at the approved Greenisland Local Plan. If the covenant unreasonably impedes the enjoyment of the land the Lands Tribunal must look at all reasonable other uses.
6. Put at its height the view enjoyed is for nine dwellings all but one of which consist of two storeys. The ninth has an attic conversion.
7. Even at the preliminary stage of considering the reasonableness or unreasonableness of the covenant under Article 5(1) of the 1978 Order the Lands Tribunal must look at the cost of the sterilisation of 10.81 acres; the loss of profit to the developer; the loss of employment engendered by the proposed development; the underutilisation of sewers and road improvements.

All must be put in the balance as to the reasonableness of the impact of the impediment. Submits this impediment should be modified or extinguished - it comes squarely under Article 5(1) of the 1978 Order.

8. As far as Article 5(5) of the 1978 order is concerned:-
  - (a) the period at which the impediment was created or imposed was some 11 to 12 years ago. Submits that is not an insignificant period - the Respondents say it is a substantial period.

The circumstances were that the Respondents purchased the lands, enlarged their gardens and sold off the remainder ie a field then inside the Green Belt with no reasonable prospect of development. That situation has materially

changed for the field is no longer inside the Green Belt but is zoned for housing development.

The purpose of the covenant was to protect the view over the fields at the rear;

- (b) physically there is no change in the character of the land. As far as the character of the neighbourhood is concerned Mr Curry was not prepared to accept that the neighbourhood extended beyond the dominant lands. Submits that is in essence reductio in absurdum. Submits Mr McKinstry's evidence is to be preferred for he was born and bred in the area and said there has been substantial housing development in the upper part of Greenisland above the railway line. That intensification of development changes the character of the neighbourhood;
- (c) the public interest is denoted by the proposed road widening and the proposed installation of a new trunk sewer for Greenisland ie a public interest facilitating the development of houses on the 10.81 acre field.

The Greenisland Local Plan discloses a public interest when the subject lands were put within the boundary of development and the Belfast Urban Area Plan 2001 the lands are within the Stop Line.

The 10.81 acre field is approximately one-third of the available building land - disclosing an overwhelming public interest;

- (d) agrees that no evidence of planning permissions granted or refusals of applications for such planning permissions have been put in evidence; but there is ample evidence to be seen of newly-built houses which must have been the subject of planning permissions;
- (e) it is accepted that the impediment secures a practical benefit to the Respondents. It is accepted that the enjoyment of a beautiful view is not a insubstantial benefit. The view is enjoyed from the rear of the houses - it is only a view and it will not be lost totally but will be impaired. Submits that it is a benefit which is clearly outweighed by the disadvantage which will be caused if this application is refused;

- (f) is not applicable;
- (g) the Applicants accept that the Respondents have not expressly agreed to the impediment being modified or extinguished. Nevertheless the evidence supports an agreement by implication. Mr Davis claimed that he contacted the Planning Authority at the time of purchase and that it was not a matter of default in making an objection to the proposed Greenisland Local Plan. Mr Graham said that he telephoned the Planning Authority after 4 or 5 of the Respondents had met. Those 4 or 5 knew the purpose of the enquiry into the Greenisland Local Plan. Yet they sat on the covenant and made no objection. Submits that they wanted the land to be zoned for building so that if a developer came along they could take the value of their covenant. The acquiesced in that - it reveals the real concern of the Respondents was not that they wished to stultify the planning;
- (h) the other material circumstances are the significant gradient downward of the thirty feet and that 5 of the original covenantees have already gone away and a sixth has his house for sale.

Submits that if the Lands Tribunal holds against extinguishment then although the primary requirement of the Applicants is extinguishment the Applicants suggest that there are legions of alternative solutions for modification of the covenant. Mr McKinstry in his evidence suggested a modification in general terms and the Lands Tribunal should be helpful and state its sense regarding modification.

Mr Lavery QC in reply:-

1. The 10.81 acres is not one-third of the available supply of building land in Greenisland but is about one-tenth.
2. It is totally fanciful that the Applicants wished to get planning permission on the lands. The evidence shows that they were totally opposed to losing their views and always were. Therefore there was never an implied agreement to either modification or extinguishment.

## **DECISION**

The Tribunal inspected and walked the land and made internal inspections of four houses and inspected the view from some gardens of other houses.

On that inspection the weather was bad. There was constant rain that morning and the Knockagh Memorial and the top of the hills could not be seen due to low clouds. Nevertheless the view from the main ground floor living rooms and the outside patios ranged from good to excellent. Even in that weather the direct view was over a long stretch of farmland to Belfast Lough and to the Hollywood hills beyond. The oblique view to the north-east was to a degree shrouded in the mist and to the west the Belfast Shipyard could just be seen. In the hearing much was made of the hedge of Leylandii planted by Mr Davis of No 161 Upper Road but even though Mr Davis has not yet lopped those trees (as he testified he would in July) the view from the patio was good. Mr Davis had made extensions at the first floor from which he gets excellent views. The views from the adjacent house to the south-east were little impaired by those trees and, of course, the views to the south and south-west were not impaired at all.

In the general inspection of the area the Tribunal finds:-

- (a) The field of 10.81 acres has a general gradient downwards to the south-east of some 20 feet to 25 feet. There is also a gradient down from both north-east and south-west towards the centre. The dip in the centre is some 4 feet to 6 feet lower than the hedges at north-east and south-west respectively.
- (b) The field of 10.81 acres is approximately one eighth to one tenth of the available building land (ignoring small and single infill sites).
- (c) The access to the site is via a poor narrow unmade lane shared by a few houses for about half its length.
- (d) Upper Road Greenisland (at its junction with Downview Road) is a narrow metalled road with one pavement on the opposite side. Traffic is fast moving and the sight lines as one comes out of Downview Road at that T-junction leave much to be desired.

Coming now to Article 5(1) of the 1978 Order:-

- (a) The Tribunal finds that the use of the land for agricultural purposes is a reasonable enjoyment of the land. The land marches on the north-east side with extensive farm land and on the south-east side although the railway intervenes there is extensive farm land.

The corresponding English Act viz Section 84(1) of the Law of Property Act 1925 used the phrase "impedes the reasonable user of the land" and this was amended in 1969 to read "impedes some reasonable user of the land". Section 5(1) of the 1978 Order is worded differently viz:-

"(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".

The Tribunal is satisfied that the impediment does not unreasonably impede the enjoyment of the land. It has been used for many years as farm land, it marches with large areas of farm land and the impediment does not unreasonably impede that agricultural use even though no agricultural buildings may be built according to the terms of the covenant.

- (b) The second part of Article 5(1) viz "or, if not modified or extinguished, would do so" ie unreasonably impede the enjoyment of the land, led the Applicants to submit that the Tribunal should weigh and assess the benefit to the Respondents and compare that with the disadvantage to the Applicants. The definition of "enjoyment" in Article 3(3) "in relation to land includes its use and development" taken with the Article in NILQ @ p 230 line 3 viz:- "The earlier decisions (in England) establish that it is not enough for the Applicant to show that the impediment prevents him from carrying out one particular development; he must prove that, because of the impediment, no reasonable development of any description can take place" the Applicants submitted supported that view. Whether that view is correct or not it is not necessary for the Tribunal to decide for when these matters are weighed:-

- (a) The Respondents are owner/occupiers of houses which enjoy those views seen by the Tribunal on inspection. Those views are of great practical benefit and substantial value to each Respondent and these are secured by the impediment. As Everleigh LJ in Gilbert v Spoor [1983] 1 Ch @ p 32 says:-

"The expression 'any practical benefits' is so wide that I would require very compelling considerations before I felt able to limit it in the manner contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effects on a broad basis".

In that case the Applicant's contention was that the view concerned must be a view from the Respondent's land before a practicable benefit was enjoyed. Mr Spoor had to walk out of his house and within a minute walk along the edge of the land and enjoy the magnificent view to the south.

- (b) The Applicants purchased the land on 23<sup>rd</sup> November 1987 whereas the covenant was registered on 12<sup>th</sup> June 1978. The Applicants had knowledge of the covenant when they purchased. This reference to the Tribunal was made on 22<sup>nd</sup> November 1998.

The Applicants are not developers. According to the evidence as a matter of practice the Applicants have purchased a building land and sold it to the Antrim Construction Company on a site-fine basis (ie a payment of £X for each house built and sold). In this case there is a conditional transfer to Antrim Construction Company to be completed on 1<sup>st</sup> January 1991 subject to planning permission being granted and subject to the matter of the covenant being resolved to the satisfaction of the Antrim Construction Company.

Under Article 5(1) of the 1978 Order "any person interested in land" may make an application to the Lands Tribunal. Article 3(4) defines that phrase: "(4) Any reference in this Part to a person interested in land includes a person who is contemplating acquiring an estate in the land and a person who has an interest in the proceeds of any future sale of the land".

The Applicants are persons conforming to the latter part of the definition and Antrim Construction Company conform to the earlier part. There was no application from Antrim Construction Company to be joined as Applicants nor were they so joined.

- (c) There is no evidence in front of the Lands Tribunal as to the quantum of the benefit to the Respondents nor is there any evidence as to the disadvantages to the Applicants who are interested in the proceeds of any future sale of the land.

In the Tribunal's view such detailed assessing and weighing is not necessary for the Tribunal must in a relative way consider the effects upon a broad basis. The Tribunal comes to the conclusion that if the impediment is not modified or extinguished the impediment would not unreasonably impede the enjoyment of the land.

If the Tribunal is wrong in this matter then in determining whether an impediment affecting any land ought to be modified or extinguished, before exercising the discretion given by the 1978 Order to the Lands Tribunal all the matters in Article 5(5) of the 1978 Order shall be taken into account. Taking these matters one by one:-

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

The period was about 12 years ago. The Tribunal was invited to say that was substantial and not an insignificant period. However the Tribunal considers insignificant period. However the Tribunal considers that with an impediment as recent as that the onus on the Applicants is greater. The Tribunal if the lands had been held under lease would have to give permission for an application made before the expiration of 21 years from the beginning of the term created by the lease. But that Clause 5(2) of the 1978 Order attempts to protect the landlord's reversion and, of course, does not apply in this case.

On the facts in this case there can be no question of the covenant being obsolete or even obsolescent after 12 years have elapsed. The

circumstances in which the impediment was created were when the Respondents decided to sell off the 10.81 acres they did not wish to lose the excellent views enjoyed by them from their houses. The purpose was to protect those views from interference by development with building and to prevent any nuisance or annoyance to the owner/occupiers of those houses.

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

It is accepted that the impediment has prevented any change in the physical character of the land. The Greenisland Local Plan has since its adoption on 11<sup>th</sup> March 1987 designated the land for development whereas formerly it was within the Green Belt.

There was much debate as to the extent of the neighbourhood. That is a matter of fact and the Lands Tribunal only could decide that on its inspection of the land and the area. The Tribunal is satisfied that must include all the area bounded in the south by the railway line; to the north by Upper Road; to the west by Station Road and to the east by some of the land forming part of the Green Belt (outside the Belfast Urban Area Stop-line). The only change in character of that neighbourhood in the past 12 years has been the gradual development with housing of some parts. As the Greenisland Local Plan puts it at paragraph 3.6 "Private house building has been progressing slowly within Greenisland in the past decade - mostly on individual sites with an average of 4-5 new planning permissions per year". As far as the public sector is concerned paragraph 3.1 says "Within the public sector, housing condition is considered to be good with a large number of the present housing stock having been built within the last 20 years.

The 'Waiting List' in Greenisland has been decreasing over the past few years and present housing stock is considered to be sufficient for the foreseeable future".

"(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 plan presently in force is the Greenisland Local Plan which puts "forward a policy for the development of Greenisland up to 1995". That plan includes this 10.81 acre field within the area for proposed housing development.

The Tribunal rejects Mr McEldowney's evidence which was solely based on his opinion that "The designation of the subject lands as a potential housing site in the statutory plans .... had direct implications for the restrictive covenant in that it gave official sanction to development in direct contradiction of the restriction". The Greenisland Local Plan does not have the opined effect for at paragraph 3.9 it says "The amount of land considered suitable for development will be in excess of the demand anticipated by 1995 in order to provide a reasonable choice of building land. This is also because several of the potential development areas have access difficulties which may mean that they are not immediately available for development".

The Applicants put forward the proposed road widening and the proposed installation of a trunk sewer as matters of public interest in the land.

The Tribunal in its inspection saw that the sight-lines at the T-junction between Downview Road and Upper Road required improvement - that would be essential whether or not the lands were to be developed. As far as the trunk sewer proposed is concerned, the Greenisland Local Plan dealt with this in paragraph 7.4 as follows:- "The present sewerage system is approaching capacity and it is intended that a detailed feasibility study into future provision within the area will be carried out within the next few years". The programme dates for that sewerage scheme have not yet been fixed but the

evidence shows that completion will not be before November 1992. Such a trunk sewer will facilitate the drainage of development on the 10.81 acre field.

"(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;"

No such permissions nor refusals of applications were put in evidence. Counsel suggested that all new development must have had planning permissions and that suggestion is accepted by 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;"

The Tribunal has already stated that on its inspection that the view enjoyed by all occupiers of the nine houses are the practical benefit of an excellent view over agricultural land, the Belfast Lough and the Holywood Hills beyond. The impediment secures that view whether or not each occupier was one of the original covenantees.

"(f) It is agreed by all parties that this is not applicable 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;"

All parties agree that there has been no express agreement by the Respondents.

The Applicants argue that, because the Respondents raised no formal objection in the enquiry into the Greenisland Local Plan, by implication they are agreed to modification or extinguishment.

The Tribunal dismisses that submission - the unshaken evidence of both Mr Davis and Mr Graham was that the view was always of

extreme importance and that all steps were taken to protect that view. No objection was made because they were advised by the Planning Authority that the covenant was protection.

"(h) any other material circumstances."

The Applicants took the view that the significant downward gradient and the fact that some of the original covenantees had sold their houses were other material circumstances to be taken into account. The Tribunal considers that those circumstances overlap with other matters already dealt with.

The Tribunal, after taking all these matters into account must exercise its discretion in favour of the Respondents.

Consequently the Tribunal dismisses the application for extinguishment and modification of the impediment, for no matter which way the Tribunal weighs the foregoing matters they come heavily down on the side of the Respondents.

The Tribunal was asked to give an indication as to what modification would be acceptable. Although the previous paragraph dismisses the general application for extinguishment and modification in the view of Counsel's request the Tribunal adds this for elucidation:- Article 5(6) says "Where the Lands Tribunal makes an order modifying or extinguishing of an impediment:-

(a) the Tribunal may add or substitute such new impediment as appears to it to be reasonable in view of the modification or extinguishment of the existing impediment;".

The Tribunal expects an application for modification of an impediment to state explicitly what modification is requested. A general modification such as was put forward by Mr McKinstry viz a cordon sanitaire at the top of the site (being back gardens of houses to be erected) and the density would probably be lower is far too general to be capable of an order of modification by the Lands Tribunal. Nor does Article 5(6) of the 1978 Order place any duty on the Lands Tribunal to spell out such a modification - it gives the Tribunal a

power to add or substitute a new impediment "in view of the modification or extinguishment of the existing impediment". In the instant case the Tribunal has dismissed the application for extinguishment or modification so Article 5(6) of the 1978 Order does not apply.

The Applicants will pay to the Respondents their costs of this Reference; such costs if not agreed to be taxed by the Registrar of the Lands Tribunal on the High Court Scale.

#### **ORDERS ACCORDINGLY**

**25<sup>th</sup> June 1990**

**Mr A L Jacobson FRICS  
LANDS TRIBUNAL FOR NORTHERN IRELAND**

#### **Appearances:-**

**Mr Michael Lavery QC (instructed by Messrs Elliott, Duffy and Garrett, Solicitors) for the Respondents.**

**Mr Barry Malcolm of Counsel (instructed by Joseph Lockhart and Son, Solicitors) for the Applicants.**