

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

IN THE MATTER OF A REFERENCE

R/45/1999

BETWEEN

DANESFORT DEVELOPMENTS LIMITED - APPLICANT

AND

MR AND MRS M MORROW AND RICHARD PALMER – RESPONDENTS

PART II

Re: Lands at Stranmillis Road, Belfast

LANDS TRIBUNAL

The Honourable Mr Justice Coghlin

and

Mr Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 10th January 2002

1. This is the second part of an application by Danesfort Developments Limited (“the applicant”) for modification or extinguishment of certain covenants contained in a Deed, dated 27th December 1911, in accordance with the provisions of Article 5 of the Property (Northern Ireland) Order 1978 (“the 1978 Order”). A Preliminary Point herein was determined by a judgment of the Tribunal given on 14th June 2001.

2. Mr Orr QC appeared on behalf of the applicant and the respondents were represented by Mr Lockhart. The Tribunal is grateful for the assistance which it received from the attractive and well reasoned submissions and skeleton arguments presented by both counsel. A number of residents, including some who had written to the Tribunal prior to the hearing of the Preliminary Point, made written submissions in connection with the Part II application and the Tribunal was informed that the respondents were supported by a group styling itself as “the Broomhill Residents Association”. However, none of these persons applied to be included in the Part II application.

3. **The Part II Application**

The applicant has acquired the lands previously owned by the Northern Ireland Electricity Service at Danesfort on the northern side of Stranmillis Road, Belfast and now seeks to develop those lands. The proposed development consists of an extremely substantial mixed retail and residential scheme although the Part II application relates only to the residential element. The residential element comprises the construction of three apartment blocks or “City Villas”, two of five storeys and one of four storeys, comprising, in all, some 70 apartments. The relevant covenants are contained in a Deed, dated 27th December 1911 (“the 1911 Deed”) and were described in detail in the Tribunal’s judgment relating to the Preliminary Point. The land which the applicant seeks to develop (“the applicant land”) is subject to the burden of a covenant which, insofar as is relevant, provides that:

“(i) No new building shall at any time be erected on the premisesexcept detached or semi-detached dwelling houses of an annual Poor Law valuation of £35 at the least or coach houses, stables, outhouses or green houses to be used in connection with any such dwelling house or dwelling houses or boundary or other walls belonging thereto and no such dwelling house shall have its rere towards Stranmillis Road and no coach house, stables or outhouse shall be built within 50 feet or so as to front towards the said road or so as to be between the dwelling house to which they belong and the said road.”

4. The applicant land has a frontage of 125 metres onto the Stranmillis Road, a maximum depth of 120 metres and extends to about 3 acres or 1.22 hectares. This land is currently used as a private car park to service the main Danesfort office building which is presently occupied by Ulster Bank Limited for use, inter alia, as a call centre.
5. The applicant has formally conceded that Mr Palmer is entitled to the benefit of the said covenant and, at the conclusion of the hearing of the Preliminary Point, the Tribunal decided that Mr and Mrs Morrow were similarly entitled. Mr Palmer lives at 229 Stranmillis Road while Mr and Mrs Morrow reside at 24 Broomhill Park, Belfast.

6. The relevant statutory framework

Article 5(1) of the 1978 Order provides as follows:

“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 land or, if not modified or extinguished, would do so.”

7. Article 5(5) of 1978 Order:

“5(5) In determining whether an impediment affecting any land ought to be modified or extinguished, the Lands Tribunal shall take into account –

- (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) Any public interest in the land, particularly as exemplified by any development plan adopted under part III of the Planning (Northern Ireland) Order 1991 (“the Planning Order”) for the area in which the land is situated, as that plan is for the time being in force;
- (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) Where the impediment consists of an obligation to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether the obligation has become unduly onerous in comparison with the benefit to be derived from the works or the doing of that thing;
- (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;
- (h) Any other material circumstances.”

8. In Andrews v Davis [1994] R/17/1993 this Tribunal emphasised the distinction between the equivalent English legislation contained in Section 84 of the Law of Property Act 1925, as amended by Section 28 of the Law of Property Act 1969, and Article 5 of the 1978 Order by stating, at page 12 of its judgment:

“The Tribunal has concluded that the 1978 Order created a scheme which is quite different to the 1925 scheme in its greater flexibility and wider scope. In the 1978 Order the only requirement is that an applicant must persuade the Tribunal that the restriction ‘unreasonably impedes the enjoyment’, taking into account seven specified matters together with any other material circumstances. These matters reflect to a large extent the substance of the grounds and other matters of the 1925 Act but the Tribunal is given a discretion to determine the weight, if any, to be attached to each of these matters in any particular case. The Tribunal takes the view that whilst it must have regard to the matters set out in Article 5(5) it has, at the end of the day, an overall discretion, which is a wider discretion than that often referred to in the English authorities as the residual discretion ... the discretion is of course a judicial one and must be founded on correct principles and premises.”

9. In that context the Tribunal now turns to consider the matters referred to in Article 5(5) of the 1978 Order;

10. (a) The period at, the circumstances in, and the purposes for which the impediment was created or imposed;

The relevant covenant was contained in the Deed of 1911 and repeated in a Deed of 1920 and, as it was noted at the conclusion of the judgment in relation to the Preliminary Point, it appears to the Tribunal that a persuasive argument could be made out in favour of a scheme of development in accordance with the decision in Elliston v Reacher [1908] 2 Ch 374, Reid v Bickerstaff [1909] 2 Ch 305 at 319 and Baxter v Four Oaks Properties Limited [1965] Chancery 816.

11. Mr Christopher Callan an experienced chartered surveyor was called to give expert evidence on behalf of the applicant and Ms Beth Robinson of Templeton Robinson,

Residential Estate Agents, Auctioneers and Property Consultants, was called on behalf of the respondents. The Tribunal gratefully acknowledges the benefit that it obtained from their impressive and independent expertise. Both witnesses referred to the Ordinance Survey map of 1904. At that time the lands were undeveloped and predominantly rural with a number of residences. Belfast was beginning to emerge as a major industrial centre and, as the city expanded, a number of roads, avenues and parks were constructed in this area including Malone Park, Myrtlefield Park, Osborne Park and Deramore Drive. The access provided by these leafy suburban parks and avenues enabled wealthy industrialists and businessmen to move away from the city centre. Mr Callan referred the Tribunal to a booklet issued at the time of the designation of Malone Park/Adelaide Park as a Conservation Area in which the Malone area of south Belfast was described as "... a high quality residential environment containing one of the largest concentrations of individually designed Edwardian and Victorian villas in the province". By 1910 the trams travelled along the Malone Road to Malone Park at the end of the "line", a few metres south of the Stranmillis Road junction. In such circumstances, Mr Callan considered that it was reasonable to assume that the purpose of the restrictions imposed by the covenant was to preserve the exclusiveness of the location by controlling the nature, size and quality and location of any new buildings, in effect, "planning control of its time". Mr Callan believed that the creation of such a restrictive covenant to achieve such a purpose would not have been at all unusual at that time.

12. (b) Any change in the character of the land or neighbourhood;

As not infrequently occurs in relation to this type of application, there was some debate between the parties as to the definition of the relevant neighbourhood, with Mr Orr QC, on behalf of the applicant, contending that the neighbourhood comprised the whole Malone Conservation Area from Wellington Park to Balmoral Avenue and from Lisburn Road South to include most of the developments of the Malone Road. On the other hand, Mr Lockhart sought to focus the attention of the Tribunal on a more restricted area in the immediate vicinity of the Stranmillis Road. Mr Lockhart relied upon the evidence of Ms Robinson that, since the date of the relevant covenants, there had been much less change of significance in the vicinity of the Stranmillis Road than in the general Malone Road area.

13. Mr Callan, on behalf of the applicant, conceded that much of the original character of the Malone and Stranmillis areas as they existed in 1911 still remained but he maintained that, nevertheless, there had been a number of subtle, yet significant changes to the locality. To the north of the Stranmillis Road, Stranmillis College was constructed in 1928/1930, Danesfort, extending to 80,000 square feet, was constructed in the 1950s with a substantial extension in the 1970s and, in addition, there was the construction of the Ulster Clinic at the Malone Road end of the Stranmillis Road. Most of the large detached properties on the south side of Stranmillis Road in and around Broomhill Park were constructed during the 1920s and, in some cases, much later, while the houses further south at Hillside and Hillside Gardens were almost exclusively semi-detached and probably constructed during the 1960s and 70s. Mr Callan referred to the more recent development of units of apartments in the Malone Conservation Area, the majority of which have tended to be “in-fill development”, comprising both apartments and townhouses. While most of the apartments have been five to ten units, a few have been 12 or 16 units and Mr Callan referred specifically to the development of a three storey, plus attic, block of apartments, comprising 13 units at Broomhill Court at the corner of Stranmillis Road and Malone Road. In cross-examination by Mr Lockhart, Mr Callan accepted that apartment development had been a feature of the greater Malone area rather than Stranmillis and that in the region of Broomhill Park there were no apartments at all. He also accepted that the construction of the three City Villa blocks proposed by the applicant would represent a significant increase in terms of density and a change in character for the Stranmillis neighbourhood although, in his view, such a change should not be regarded as “fundamental”.
14. In the Tribunal’s view, in the circumstances of this particular case, it may not make a great deal of difference which concept of “neighbourhood” is accepted since, even if it is to be the Malone Conservation Area, contended for by the respondent, the facts clearly establish that, within that area, there has been a difference in the way in which the character of the land has developed between the Stranmillis Road vicinity and the larger surrounding area. On the southern side of the Stranmillis Road, apart from the Broomhill Court units, which face across the Malone Road towards Osborne, the character and appearance of development has remained generally consistent with the purpose of the covenant. Along the northern border of the Stranmillis Road, apart from four dwelling houses, including that of the respondent Palmer there has been

non-residential commercial development although his has been of a specialised nature comprising large private/public institutionalised buildings set well back from the road in landscaped surroundings. In the view of the Tribunal this can be distinguished from the more usually encountered manifestations of commercial life such as retail shops, public houses, filling stations etc – see, for example, Re Wards Construction (Medway) Ltd's Application (1973) 25 P&CR 223.

15. (c) Any public interest in the land, particularly as exemplified by any development plan;

Since the early 1990s the relevant area has been recognised as having a townscape character of a very high standard with three Conservation Areas being designated:- Malone Park (November 1993), Adelaide Park (November 1993) and Stranmillis (July 1996). Outline planning permission was granted in respect of the applicant's proposed residential development on 22nd March 2000, on 4th August 2000 the Stranmillis Road was included within the Malone Conservation Area which was designated by the Department of the Environment (Northern Ireland) in accordance with Article 50 of the Planning (Northern Ireland) Order 1991 as "... an area of special architectural or historic interest, the character or appearance of which it is desirable to preserve or enhance" and on 20th October 2000 full planning permission was granted by the Department of Environment in respect of the proposed residential development. In such circumstances, the Tribunal concludes that there is a significant public interest in the applicant lands.

16. Both the applicant and the respondents sought to rely upon public interest in support of their respective cases. Mr Lockhart submitted that the public recognition of the character and quality of the area commencing with the declaration of townscape character and culminating in the much larger Malone Conservation Area militated against a change as significant as a construction of three City Villa apartment blocks. In the Notice of Designation, dated 4 August 2000, reflecting Article 50(6) of the Planning Order, the Department of the Environment stated that:

".... the prime consideration will be the desirability of preserving and enhancing the character or appearance of the area."

17. For its part, the applicant argued that the granting of planning permission for this development by the Department of the Environment during a time when the

Department was obviously considering and ultimately declared the Malone Conservation Area raised a clear implication that the Department, as representative of the public, recognised that this development was consistent with the public interest in the area. Consequently, it becomes necessary for the Tribunal to give some consideration to the relationship between the jurisdiction conferred upon the Tribunal by Article 5 of the 1978 Order and planning control as exercised by the Department of the Environment in accordance with the planning legislation.

18. In the 1996 edition of *Land Covenants*, at page 201, Ernest Scammell made the following observations with regard to the general relationship between restrictive covenants and public law:

“Restrictions on the use of land may be found to exist under any of four separate branches of law, namely:

- (i) The law of contract;
- (ii) The law of tort, in particular the law of nuisance;
- (iii) The law of property, of which restrictive covenants form a major example; and
- (iv) Public law, including, in particular, public control of development under the [planning legislation]. It is possible that all four of these branches of the law may in any given case operate (in their different ways) to impose precisely the same restrictions on the use of land ... conversely, the fact that a given use is expressly permitted under one branch of law, for example by planning permission having been granted for development, or planning permission being determined not to be required, cannot override restrictions on use which exist under covenant or under the protection of the law of nuisance, although the existence of a planning permission is a matter which the Lands Tribunal will take into account in an application for the discharge or modification of a restrictive covenant.”

19. In 1969 the equivalent legislation in England and Wales, Section 84(1) of the Law of Property Act 1925, was amended by Section 28 Schedule 3 of the Law of Property Act 1969 so as to require the Lands Tribunal to take into account “the development plan

and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas". The 1978 Order in Northern Ireland was passed with the benefit of experience of the operation of the legislation in England and Wales and, as already noted, included similar provisions at Article 5(5)(c) and (d). In Re Bass Ltd's Application (1973) 26 P&CR 156, which was one of the first cases to be decided by the Lands Tribunal for England and Wales after the 1969 amendment, the President Mr J S Daniel QC, giving judgment, observed that, while the existence of a planning permission might imply that the proposed development would not be a bad thing it did not necessarily imply that it would positively be a good thing and in the public interest and that failure of the proposal to materialise would be positively bad. The President went on to say at page 159:

"Many planning permissions have got through by the skin of their teeth. I think that the assistance derived from a planning permission at this stage of things is little more than the negative assistance of enabling it to be said that at any rate there was not a refusal."

20. In Re Martins' Application [1989] 57 PP&CR 119 the applicants were the owners of a plot of land which formed part of the garden of a house. The land was the subject of an agreement with the local authority made pursuant to Section 37 of the Town and Country Planning Act 1962 which included a restrictive covenant limiting the use of the land to use as a private open space and prohibiting the erection of a building on the land. The applicants wish to build a two storey house and applied to the local authority for planning permission. Planning permission was refused by the local authority but granted on appeal by the Secretary of State. The local authority refused to release the restrictive covenant and the applicant applied to the Lands Tribunal contending that while the grant of planning permission did not determine why the Lands Tribunal should deal with a covenant between two adjoining land owners, different considerations applied where the covenant derived its validity from Section 37 in that the purpose of such agreement was to regulate land use and, once a Minister had determined that development was acceptable from a planning perspective, the purpose of the agreement was gone and the covenant should be discharged. The Lands Tribunal dismissed the application and the applicant appealed. At page 124 of his judgment in the Court of Appeal Fox LJ said:

“When a restrictive covenant is entered into between owners of adjoining, or otherwise affected, lands the fact that the owner for the time being of the burdened land subsequently obtains planning permission to develop that land in a manner which is prohibited by the covenant does not entitle him to ignore the covenant. The benefit of the covenant is an interest in land and it is not extinguished by the acts of a planning authority.”

21. At page 125 he added:

“In my view the applicants’ contention is wrong in so far as it suggests that the granting of planning permission by the Secretary of State necessarily involves the result that the Lands Tribunal must discharge the covenant. The granting of planning permission is, it seems to me, merely a circumstance which the Lands Tribunal can and should take into account when exercising its jurisdiction under Section 84. To give the grant of planning permission a wider effect is, I think, destructive of the express statutory jurisdiction conferred by Section 84. It is for the tribunal to make up its own mind whether the requirements of Section 84 are satisfied.”

22. In accordance with these authorities the Tribunal can and should take into account the planning permission for the City Villa Development granted by the Department of the Environment. On the other hand the Tribunal also recognises that its statutory jurisdiction afforded by the 1978 Order is quite different from that afforded to the Department of the Environment by the provisions of the Planning (Northern Ireland) Order 1991. The Tribunal cannot concern itself with the merits of the planning permission nor does it afford any form of appeal from the decision of the Department. Under the provisions of the 1978 Order the Tribunal is primarily concerned with the proprietary rights of private individuals constituted by the restrictive covenants.

23. (d) Any trend shown by planning permissions

On behalf of the applicant, Mr Callen prepared a schedule of planning applications relating to the development of apartments within the Malone area, including both those granted and those refused by the Department of the Environment Planning Service. He pointed out that, in a number of cases, applications which had been refused for

particular schemes had subsequently been granted when the schemes had been re-submitted with lower densities of development. He reminded the Tribunal that the applicant had already constructed 57 apartments in 1999 on the 5.6 acre site adjoining the application land but facing Notting Hill and that planning permission had been granted in respect of the proposed City Villa development. Mr Callen explained the lower density of the former scheme, as compared to the latter, as being due to the presence of a large number of mature trees and badger sets.

24. The Tribunal accepts that the applicant has demonstrated a trend of planning permissions being granted for town houses and small blocks of apartments, to date, mostly on relatively small “in-fill” sites, accompanied by some increase in density in the general Malone area. The permission granted in respect of the applicants City Villa proposal would not appear to be inconsistent with this trend. However, as noted earlier in this judgment, the Tribunal considers that it is important to bear in mind the distinctive character of the Stranmillis Road, within the area as a whole, and the respondent’s ability to rely upon the “thin end of the wedge argument” – see, for example, Re Snaith and Dolding (1996) 71 PP&CR 104, Re Hunt’s Application (1996) 73 PP&CR 126 and McMorris v Brown [1991] 1 AC 142 at 151. In Re Trollope’s Application (1962) 14 P&CR 80, a case which was decided before Section 84 of the 1925 legislation in England and Wales was amended in 1969, the Lands Tribunal heard evidence of planning permissions, including evidence that there was a planning permission for a large number of houses adjacent to the boundary of a private country residence. The Tribunal held that “... the more the residence was beset on other sides the more precious to it was the outlook on one side secured by the covenant.”

25. (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 viewed the area and, in particular, inspected Mr Palmer’s house and garden and viewed the Morrow’s house and garden.

26. **Mr Palmer’s house and garden**

Mr Palmer resides at No. 229 Stranmillis Road and his garden shares a boundary with the application land. The house itself faces south with Velux windows in the pitched roof opposite the application land. The house is situated in a secluded generous site comprising more than a quarter of an acre and, in the words of Ms Robinson the

privacy of this site is at present “virtually unrivalled in the immediate area”. The five story City Villa II would be positioned 24 metres away from Mr Palmer’s house and would literally “tower” over Mr Palmer’s house and garden. There would be approximately 32 windows on the left side of City Villa II and Mr Callan accepted that both the balconies and windows of City Villa II would afford residents of the apartment block an “eagle eye” view over Mr Palmer’s garden. It appears that approximately 16 balconies would overlook Mr Palmer’s premises. Mr Callan accepted that the erection of City Villa II would have a significant impact upon Mr Palmer’s privacy. In Ms Robinson’s view, even after taking into account the existence of the current Danesfort buildings and the floodlit car park servicing the 24 hour call centre, the construction of the City Villas and, particularly, City Villa II would have a massive impact upon the degree of privacy enjoyed by Mr Palmer. Ms Robinson also expressed the view that such a loss of seclusion would significantly detract from the value of Mr Palmer’s house and garden. Both experts agreed that, if the development proceeded, Mr Palmer would be unable to sell his property during any period of construction.

27. The Morrow’s house and garden

Mr and Mrs Morrow reside at 24 Broomhill Park on the south side of the Stranmillis Road almost opposite to the main entrance into the Danesfort complex. Thus, the Morrrows live further away from the proposed apartment development and, in Broomhill Park, the houses tend to face each other rather than front on to the Stranmillis Road. Mr Callan accepted that the introduction of the three City Villas with a total of 70 apartments upon the application lands would lead to a change in the appearance, amenity and character of the area so far as the Morrrows were concerned. Mr Callan also conceded that the fourth floor of the City Villa I apartment block would overlook the Morrrows’ house. Ms Robinson confirmed that there was a very strong demand for the type of property in which the Morrrows live and that one of the factors fuelling such demand was the fact that the area had remained unchanged over many years, enjoying a quiet, peaceful character and a high degree of amenity. Ms Robinson did not consider that the development of the Ulster Clinic, Danesfort or Stranmillis College reduced the desirability of these properties to any material degree.

28. In the circumstances, the Tribunal has no doubt that the covenants secure substantial practical benefits both to Mr Palmer and to the Morrrows. In Mr Palmer’s case there is likely to be a direct and dramatic reduction in the degree of privacy which he enjoys

and, in both cases, the proposed development would significantly detract from the visual amenity and pleasant character of the area. Despite the assertion at paragraph 7.7.5 of his statement of expert evidence, Mr Callan accepted that it would be of significant benefit to Mr Palmer to be able to prevent the construction of City Villa II and he also agreed that, if the original purpose was to ensure that the character of Stranmillis Road remained in accordance with the wishes of the original parties, the covenants had largely succeeded.

29. (f) Any obligation to execute any works or to do any thing or make any contribution.

No such positive obligation arises in the circumstances of this case.

30. (g) Whether the beneficiaries have agreed either expressly or by implication, to the impediment being modified or extinguished.

The Tribunal was informed that, apart from the respondents, other local residents unanimously opposed the proposed development consisting of the three City Villa apartment blocks. No evidence was led on behalf of the respondent of any express or implied agreement on the part of the beneficiaries to indicate their agreement to the proposed development.

31. (h) Any other material circumstances.

Facts canvassed by the parties under this heading included:

- i. In relation to the issue as to whether the covenant “unreasonably” impeded the applicant’s enjoyment of the land, Mr Lockhart recognised that the covenant did permit the construction of suitable detached or semi-detached dwelling houses and he was prepared to accept on behalf of the respondents that this could include suitably constructed and designed “town houses”. Mr Lockhart submitted that such development was radically different from the proposed three City Villa blocks comprising 70 apartments with a density of 23 units per acre particularly when contrasted with the density of 3-4 unit per acre at Broomhill Park. Mr Lockhart argued that not only would the former type of development be within the parameters of the existing covenant but that it would be also much more consistent with the aims and objectives of the public Conservation Area strategy.
- ii. Mr Lockhart sought to provide support for this submission by calling evidence as to the state of the market in apartments in Belfast generally and, more

specifically, in the Malone Conservation Area. Ms Robinson gave evidence that during the 12 months or so prior to the hearing the increase in apartment construction in Northern Ireland had been the lowest in the UK and that, as a result, the market had been causing considerable concern. There was a very limited demand by owner/occupiers with interest being restricted almost entirely to “young professionals”. She stated that, at the time of hearing, some 582 apartments were currently for sale in the Belfast area with 300-350 of those being located in south Belfast. In cross-examination Mr Callen, on behalf of the applicant, accepted that of the 57 apartments constructed by the applicant in Phase 1 overlooking Notting Hill 7 were currently for sale, 26 were currently for re-sale and 18 were currently available for re-letting. Mr Callen conceded that sales of apartments had been fuelled by a substantial number of “speculative” investors and that the market in south Belfast was now “saturated”.

32. While the Tribunal had little difficulty in accepting Mr Lockhart’s submission that the development of detached, semi-detached or town houses, at a suitable density, would be much more in keeping with the character of the Stranmillis Road, it considered that caution was required when determining the weight to be given to these factors in the context of the fairly limited evidence available as to the respective commercial merits of different types of development.

33. **Conclusion**

The Tribunal has carefully considered the relevant provisions of Section 5 of the 1978 Order as set out above. Having done so the Tribunal is quite satisfied that the relevant covenant does achieve real practical benefits for both of the respondents. The benefit to Mr Palmer of preventing the development of the City Villa apartment blocks is both substantial and unarguable in terms of protecting the significant degree of privacy and seclusion which he presently enjoys. On a more general level the covenant benefits both Mr Palmer and the Morrows by preserving the amenity and character of the Stranmillis Road within the great Malone Conservation Area. As the Tribunal recognised when determining the Preliminary Issue, and as Mr Callen accepted in evidence during the course of this hearing, the original covenant appears to have been part of a scheme by which the vendor sought to effect “planning control of its time” and this scheme currently benefits the respondents by enabling them to prevent apartment block development with the currently associated problems of

speculative buying, fluctuating and low rates of actual occupancy, and constant sale and re-sale. The importance to be attached to such a scheme was recognised by the Lands Tribunal in Re Bromor Properties Ltd's Application (1995) 70 PP&CR 569 and Re Lee's Application (1996) 72 PP&CR 439. To paraphrase the Tribunal in Re Hornsby's Application (1969) 20 P&CR 495 at 503 "... vigilant insistence on the covenant will preserve the character and amenity of the Stranmillis Road to a standard which designation as part of a Conservation Area would lamentably fail to achieve." In such circumstances the benefits to the respondents of the continuing existence and enforceability of the covenant are clearly valuable and of sufficient weight.

34. Both parties accepted that the proper test was not "what was the original intention of the restriction and is it still being achieved?" but "Does the restriction achieve some practical benefit and if so is it a benefit of sufficient weight to justify the continuance of the restrictions without modification?" – see Stannard v Issa [1987] 1 AC 175 at 188. The Tribunal has no hesitation in concluding that this test should be answered in the affirmative in this case and, accordingly, the application will be dismissed.

ORDERS ACCORDINGLY

18th April 2002

**The Honourable Mr Justice Coghlin and
Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAVI**

Appearances:-

Mark Orr QC instructed by L'Estrange & Brett, Solicitors, appeared on behalf of the Applicant.

Brett Lockhart BL instructed by Peden and Reid, Solicitors and Murphy & O'Rawe, Solicitors, appeared on behalf of the Respondents.