

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/49/1999

BETWEEN

ANTHONY MICHAEL McNICHOLL - APPLICANT

AND

THOMAS MULLAN & ANTHONY MULLAN - RESPONDENTS

Re: 47A Chapel Street, Cookstown

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

Belfast - 14th March (Preliminary point only) & 7th June 2001

1. There were covenants contained in an agreement made 30th November 1965 ('the 1965 agreement') between William Francis Eastwood and Maurice Acheson concerning premises at 47A Chapel Street, Cookstown ('the subject premises'). Mr Eastwood held 65-67 Chapel Street ('the adjoining premises').
2. The Applicant (Mr McNicholl) was the successor in title to Mr Acheson. The Respondents ('The Mullans') were father and son and the successors in title to Mr Eastwood.
3. Mr David McBrien BL instructed by Millar Shearer and Black solicitors appeared for the Applicant. Mr Mark McEwen BL instructed by Gerard P Mooney solicitors appeared for the Respondents.

On 14th March 2001 the Tribunal heard a preliminary issue in connection with admissibility.

4. At a Mention on 4th April 2001 the Tribunal gave its decision, which was that a letter dated 17th October 1996 from the solicitors for Mr McNicholl to Mr Mullan was

inadmissible on grounds of privilege but reserved its reasons and so now sets them out in Appendix 1.

The Tribunal now turns to the substantive issues.

5. Article 4 of the Property (NI) Order 1978 ('the 1978 Order') gives the Tribunal a discretionary power to define the scope, etc, of covenants. Article 5 gives the Tribunal a discretionary power to modify or extinguish unreasonable covenants. Doing the best it can, the Tribunal has concluded that in the context of the 1978 Order, at the Hearing Mr McNicholl sought:
 - a) a determination of the nature and extent of the covenants;
 - b) a determination of whether the subject premises were currently affected by them; and if so
 - c) their modification or extinguishment.
6. Mr McNicholl's application may be considered at two levels – the general and the particular
 - a) 'to have flexibility as regards the user of the subject premises'; and
 - b) to prevent the Mullans from relying on the covenants in the agreement 'to stop him selling cigarettes and confectionary etc.'
7. The Mullans accepted that Mr McNicholl did not currently sell hot food for consumption off the subject premises but complained that he did compete by selling soft drinks.

The first question is the nature and extent of the covenants.

8. In 1965 the subject premises comprised a car showroom and yard. It may also have included petrol pumps but probably did not. The 1965 agreement records that Mr Acheson intended to redevelop the subject premises but Mr Eastwood had a right of way to and from the adjoining premises over part of the subject premises. Mr Eastwood's premises included a shop and he agreed with Mr Acheson to give up his right of way in exchange for a new right of way and a covenant restricting any use of

the redeveloped subject premises that would compete with his then current or planned future use of his shop. The terms were set out in the 1965 agreement-

- a) The new right of way would be substituted for the old.
- b) Mr Acheson agreed to “covenant that on his said premises he **will not directly or indirectly engage in or carry on or be in any way concerned with any of the trades or businesses now carried on in the said premises of the said Mr Eastwood and also the trades or businesses of a restaurant or a fish and chip shop** and such covenant shall bind the successors in title of the said premises of the said Mr Acheson”.
- c) Mr Acheson agreed to carry out accommodation works and make good any damage to the premises of Mr Eastwood, sign all deeds and documents etc. and pay all costs.

9. There was no further clarification of the “trades or businesses now carried on” nor was any contemporaneous note produced.
10. Nearly 30 years later in 1994 at a time when he was selling his interest, Desmond Eastwood, the son of the late Mr Eastwood, had made a statutory declaration (‘the 1994 Declaration’). He declared that at the date of the agreement (1965) he had been working for several years in the shop that traded on the premises. His grandmother, Mrs Rose Eastwood, was then carrying on the business and he said “the goods sold by her in the shop at that time included tobacco, confectionary, groceries, fruit and vegetables, general hardware and a limited range of pharmaceuticals”. He said that the shop continued for two years - until 1967- when he began to operate in his own right a fish and chip restaurant.
11. The Mullans both gave evidence. Mr Thomas Mullan said that the adjoining premises currently comprised two retail units - one was their fish and chip shop. For a time there had also been a sit-in restaurant but that was currently a separate retail shop. He recalled the original shop and broadly confirmed the contents of the 1994 Declaration of what ‘old lady Eastwood’ had sold.

12. Mr McBrien pointed out that Mr Eastwood who made the 1994 Declaration was still alive but had not been brought to give evidence. He contended that because of that and the passage of time between the agreement and the Declaration, there remained a serious question of what were “the trades or businesses now carried on”.
13. As was rightly pointed out by Mr McBrien there has been a sea change in retailing since 1965. But in ascertaining the presumed intention of parties it is appropriate to take into account not only the language the parties have used but also the then surrounding circumstances and the commercial purpose of the document as a whole.
14. The restriction “... **not directly or indirectly engage in or carry on or be in any way concerned with ...**” is an expression of broad scope and must capture a wide range of connected activities. But a vital point is this. It refers to the relevant “**trades or businesses**” and not a list of products that those retail trades or businesses might deal in.
15. Mr McEwen suggested that the trade or business at the time of the 1965 agreement could best be described in an old fashioned way - a corner shop trade or business - but the Tribunal has concluded that the relevant expression in the Agreement is more specific than that. The Tribunal notes that the expression is in the plural – it is not a matter of prohibiting a single similar business or trade, perhaps Mr McEwen’s ‘Corner shop’.
16. It was not the main focus of the inquiry but Mr McBrien accepted that the reference to “the trade or businesses of a restaurant or a fish and chip shop” is clear and certain.
17. Although there may be some doubt on points of detail about actual goods then being sold, the issue is one of businesses or trades and that requires less precision or completeness. There was evidence from Mr Mullan consistent with the Declaration and both were consistent in turn with what might have been expected of a corner shop at that time. The Tribunal finds that at least the following categories of goods were sold, each with closely corresponding identifiable retail trade or business
 - a) Tobacco and confectionary – Confectionary and Tobacco retailing,
 - b) Confectionary – Confectionary retailing

- c) Groceries – Grocery,
- d) Food (sic) and vegetables – Greengrocery, and
- e) General hardware – Hardware retailing

18. The Tribunal concludes that the trades or businesses to which the 1965 agreement refers were the categories above. It follows that on the general level, the nature and extent of the covenants is to prevent Mr McNicholl on the subject premises from directly or indirectly engaging in or carrying on or be in any way concerned with the retail trades or businesses of

- a) A Restaurant or a Fish and Chip shop, and
- b) Confectionary, Confectionary and Tobacco, Grocery, Greengrocery, and Hardware (for convenience 'the other trades').

19. These are not indefinable restrictions even though their application may raise questions of fact and degree.

20. The prohibitions under the Agreement concern the particular trades or businesses, not the related products; the effect of a covenant that prohibits carrying on the trade or business of selling some thing may be quite different from the effect of a covenant that prohibits the sale of that thing. See for instance Labone v Litherland UDC [1956] 2 All ER 215. Neither party made that distinction, but for purposes of considering the nature and extent of the covenants, it must be made.

21. Further, a covenant that prohibits another from carrying on the trade or business of selling some thing may not prevent the selling of that thing as part of a different business even if that thing is a substantial part of the former business if it is only a subordinate, subsidiary or incidental part of the latter business: the question would appear to be one of degree – how far subsidiary. See *Hill and Redmond's law of Landlord and Tenant* at A7086 and also for instance A Lewis & Co (Westminster) Ltd v Bell Property trust Ltd [1940] 1 All ER 570.

22. The Tribunal concludes that the nature and extent of the covenants is to prevent Mr McNicholl on the subject premises from directly or indirectly engaging in or carrying on or be in any way concerned with the retail trades or businesses of
- a) A Restaurant or a Fish and Chip shop; and
 - b) Confectionary, Confectionary and Tobacco, Grocery, Greengrocery, and Hardware (for convenience 'the other trades').
23. But these covenants prohibiting Mr McNicholl from being concerned with these trades or businesses of selling some thing may not prevent the selling of that thing as part of a different business even if that thing is a substantial part of the former business if it is only a subordinate, subsidiary or incidental part of the latter business.
24. Clearly, as the covenants stand, future disputes over whether sales of particular items are only a subordinate, subsidiary or incidental part of another business could arise. On application, the Tribunal would be minded to approve a modification to the agreement to establish a proportionate mechanism for dispute resolution.

The second question is whether the covenants currently affect the subject premises.

25. Prior to the hearing, the parties had agreed questions that might be decisive issues. These included a question as to whether the covenants were personal to the original parties. At the hearing Mr McBrien did not pursue but reserved his position in regard to that question. The Tribunal therefore proceeds on the assumption that the benefits and burdens of the covenants run with the respective adjoining lands.
26. Mr McBrien relied on public policy against restraint of trade to contend that the covenants restraining the other trades were void.
27. The Tribunal comments in passing that the introduction of such arguments at a late stage at the Hearing and the absence of any reference to them in the skeleton arguments or lists of authorities does not facilitate the proper conduct of its business.

28. Mr McBrien relied on parts of Article 5.5 of the 1978 Order to bring the question of restraint of trade within the ambit of this reference-

“ ... the Tribunal shall take into account –

- a) the period at, the circumstances in, and the purposes for which the impediment was created or imposed;
- f) **where** the impediment consists of an obligation to execute any works or do anything or pay or contribute towards the costs of executing any works or doing anything, whether the obligation has become unduly onerous in comparison with the benefit to be derived from works or the doing of that thing;
- h) **any** other material circumstances.

29. Article 5.5(f) of the 1978 Order applies to positive obligations and although the Tribunal accepts that often there can be differing views on whether particular covenants are positive or negative, these covenants restraining the other trades are clearly negative in character and so the Tribunal concludes that Article 5.5(f) is not relevant.

30. Although Mr McEwen did not object to restraint of trades issues being considered, on reflection the Tribunal does not accept that it has any jurisdiction under the 1978 Order (or any other legislation) to make a declaration that the covenants restraining the other trades were void on grounds of restraint of trade. The Tribunal accepts that under the 1978 Order it must consider the period at, the circumstances in, and the purposes for which the impediment was created or imposed and any other material circumstances. However for purposes of the sanction of treating covenants in restraint of trade as void from the start, the time for determining reasonableness is the time when the covenants were made. The context in which the 1978 Order allows the Tribunal to modify or extinguish covenants is quite different; the test is whether an impediment is presently unreasonable not void (and provides proportionate remedies including modification to an appropriate extent).

31. Having heard the parties however in case it is wrong in its conclusion as to jurisdiction, in the alternative the Tribunal declares that it does not find the covenants void on grounds of public policy against restraint of trade and concludes that this is not a

bargain that the law should destroy. The Tribunal has set out its reasons on the issues raised in Appendix 2.

The final question is modification or extinguishment

32. As outlined earlier, Mr McNicholl's application may be considered at two levels – general and particular
 - a) 'to have flexibility as regards the user of the subject premises' and
 - b) to prevent the Mullans from relying on the covenants in the agreement 'to stop him selling cigarettes and confectionary etc.'
33. The Tribunal first considers the particular level.
34. As the Tribunal has declared, the nature and extent of the covenants is to prevent Mr McNicholl on the subject premises from directly or indirectly engaging in or carrying on or be in any way concerned with the retail trades or businesses of
 - a) A Restaurant or a Fish and Chip shop; and
 - b) the other trades.
35. And these covenants prohibiting Mr McNicholl from being concerned with these trades or businesses of selling some thing may not prevent the selling of that thing as part of a different business even if that thing is a substantial part of the former business if it is only a subordinate, subsidiary or incidental part of the latter business.
36. The Tribunal therefore concludes that provided Mr McNicholl sells cigarettes and confectionary etc. or even hot food only as a subordinate, subsidiary or incidental part of his petrol filling station business, and there was no evidence that he wished to do more than that, the covenants do not prevent him from doing so. There is no need for any modification to deal with that particular matter.
37. The Tribunal now turns to the general level and Mr McNicholl's wish to have flexibility as regards the user of the subject premises. Despite the efforts of the Tribunal to accommodate him, he was not present at the Hearing but it appears he had no

particular use in mind; he just wanted the covenants extinguished to facilitate marketing the premises.

38. Grounds of wishing for flexibility are not sufficient. The policy of this Tribunal has been not to give applicants a 'blank cheque'. That has been the policy since the coming into operation of the 1978 Order.
39. There are practical as well as policy reasons to limit intervention in covenants made by parties. Unless there is a specific proposal for their consideration neither those who may be entitled to the benefit of the impediment nor the Tribunal can reach an informed conclusion as to whether
 - a) the proposal is something which the former is entitled to oppose and
 - b) at that point in the passage of time and a changing world, the proposal is impeded unreasonably.
40. The policy is in accordance with that of the Lands Tribunal for England and Wales (under the corresponding but somewhat different legislation there). It probably was first expressed in an unreported decision: Re Glevum Estates (Western Counties) Application LP/53/1972. The relevant passage was quoted and cited with approval in Re Lloyds Bank Ltd's Application (1976) 35 P&CR 128. In Re Glevum, the President of the Tribunal said:

'Perhaps I should add that as a general proposition any applicant seeking to rely upon [grounds of unreasonably impeding the user or development] should be armed not only with the planning permission but also with detailed plans of a kind which could be incorporated in an order. What the applicants are in effect asking for is a blank cheque, which I should not have been disposed to grant in any event.'
41. That policy has continued to be applied in both jurisdictions and including unopposed applications. (See Re University of Westminster's Application [1997] 1 EGLR 191).
42. In order to be able to decide whether the restriction would impede the proposed user, the Tribunal must be furnished with
 - a) particulars of the restriction(s),
 - b) sufficient details of the proposed user to enable the Tribunal to determine whether the restriction would bite on it, and

- c) evidence that, apart from the restriction, the proposed user would not *otherwise* be prevented; to show that the *restriction* itself 'would impede' the user. Thus, if planning permission is required for the proposed user but has not been obtained, the Tribunal may not be satisfied that the continuance of the restriction itself would impede the user. See *Land Covenants* by Scamell 1996 at pps 401,402

43. Having regard to the different wording of the legislation in the two jurisdictions, the grounds for refusing to grant an application in a case where there is no specific proposed user or development are certainly no less strong here than there.

44. However here as there, provided that sufficient details of the proposal are laid before the Tribunal, the fact that outline planning permission only has been obtained will not prevent the Tribunal from dealing with the proposal on its merits. Further, in exceptional circumstances, for example where the expense of a potentially costly planning enquiry or licensing application might be negated by a decision of this Tribunal, it will consider proceeding to a decision that would otherwise be premature. This is not such a reference: the Tribunal has not been made aware of any special circumstances that would lead it to depart from its policy.

45. Mr McBrien relied on Article 4(1) of the 1978 Order –

“The Lands Tribunal, on the application of any person interested in land, may make an order declaring –

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

46. Unless there were an issue in connection with the running of the benefits and burdens, a sale is an event of no relevance to whether or not the land is or would be affected by an impediment. The Tribunal does not accept that a possible sale in the circumstances of this reference is 'an event' within the meaning of that article. Nor for

the reasons given above is it prepared to deal with an undefined hypothesis as 'a **given** event'.

47. The 1978 Order makes special provision for intending purchasers to bring a reference and the Tribunal encourages that but only in circumstances where there is a proposed user or scheme.
48. Having reached these conclusions, it follows that the Tribunal does not consider it appropriate to review in a vacuum, the matters that it is required to take into account in deciding whether or not the covenants may be unreasonable.
49. The Tribunal refuses extinguishment.

ORDERS ACCORDINGLY

20th November 2001

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

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Mr David McBrien BL instructed by Millar Shearer and Black solicitors appeared for the Applicant.

Mr Mark McEwen BL instructed by Gerard P Mooney solicitors appeared for the Respondents.

Appendix 1

Reasons for decision on preliminary issue in connection with admissibility.

50. The letter was marked “without prejudice”. It was an opening shot and it suggested that agreement could be reached to mutual benefit: it proposed regularising ‘the Mullans right of way position’ by means of a formal agreement, and ad hoc assistance with car parking. It continued:

“In return you could release Mr McNicholl from a covenant that was entered into in 1965 between a Mr Eastwood and Mr Acheson. It is not conceded that Mr McNicholl is legally bound by this but nevertheless it would be to his advantage if it were formally released.”

51. Mr McEwen submitted that although the letter was marked “without prejudice” the segment above was an indicator that the Applicant realised his true position and this contradicted the contents of his affidavit of October 1998. Although dressed up in an attempt to make it without prejudice, the entire letter was not without prejudice because it was not purely an attempt to settle. He submitted that the letter was not was not privileged for three reasons:

- a) It contained assertions.
- b) It was not a genuine attempt to compromise.
- c) It was an opening shot letter, although marked without prejudice.

52. He submitted that the entire letter should be put in because the segment concerned would otherwise be out of context.

53. The Tribunal was referred to The White Book - *The Supreme Court Practice* 1999, *Phipson on Evidence* 15th Edition, Buckinghamshire County Council v Moran [1989] 2 All ER 225, South Shropshire D C v Amos [1987] 1 All ER 340, Cutts v Head [1984] 1 All ER 597. The Tribunal has also considered Volume 1 of *Civil Procedure* Autumn 2000 and Unilever plc v The Proctor & Campbell Co [1999] 2 All ER 691 affirmed on appeal [2001] 1 All ER 783 CA.

54. There was agreement on the appropriate principle to be applied but there was disagreement on how it should be applied. For the following reason the Tribunal finds that the letter was privileged.

- a) Taken as a whole, this 'opening shot' letter clearly was a genuine attempt to negotiate: it was more than an assertion of a party's rights and could fairly and properly be read as the opening of negotiations. The whole tone of the letter was a genuine attempt to negotiate and there would be a danger in unpicking the document.
- b) A without prejudice opening shot may be privileged.
- c) The purpose of the without prejudice rule is 'to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement'. If there was a significant admission here, and the Tribunal does not consider there was, it was clearly linked to an attempt to reach a settlement.
- d) The without prejudice head of privilege is not confined to admissions but applies to all bona fide without prejudice statements which touched upon the strength or weaknesses of the parties cases or which placed a valuation on a parties rights forming part of the attempt to compromise the litigation.
- e) Particularly in the case of an opening shot, a pragmatic rather than a purist approach is appropriate. An opening shot, by its nature, is likely to include some scene setting. The letter and the segment propose an accommodation to mutual advantage and it would be pedantic and impractical to insist that such an opening shot letter should be drafted entirely without any material other than a proposed compromise.
- f) The Tribunal does not agree that the letter represented a position contrary to the contents of the affidavit. There was no dispute about the existence of the covenant; the question is whether Mr McNicholl was affected. As a branch of property law the establishment of the benefits and the burdens of restrictive covenants has taken many twists and turns over more than a century and still gives rise to doubts and difficulties. It was not unreasonable to expect that opinions might differ about where the benefits and burdens of restrictive

covenants might fall. A party may understandably accept that certainty would be valuable without conceding where the benefit and burden lay. Even considered in isolation, the segment concerned did no more than say that. The Tribunal sees many cases compromised and settled rather than argued on the merits and has no difficulty in accepting the advantage of certainty over doubt.

Appendix 2

Reasons in connection with restraint of trade

55. Mr McBrien relied primarily on two points: he accepted that the prohibition against a restaurant and fish and chip shop was certain but contended-

- a) the restraints on the other trades were too vague, and/or
- b) the duration of the restraint was unreasonable.

and so the covenants were void on grounds of public policy against restraint of trade. He referred the Tribunal to *Chitty on Contracts* Volume 1 and *Halsbury's* Volume 47 (1994 Reissue).

56. In regard to the first point, the Tribunal accepts that the restraint on the other trades may be considered separately but does not agree that those covenants were so vague as to be declared void-

- a) The Tribunal should be slow to hold a covenant void for uncertainty
 - a. generally, and
 - b. in this case the agreement is no longer executory but has been partly performed (the right of way exchanged, other works done).

See for instance Brown v Gould & Ors [1972] ChD 53 at 56; Sudbrook Trading Estate Ltd v Eggleton [1983] CA 1 AC 444 at 460, approved on appeal HL (E) at 484; and Trustees of National Deposit Friendly Society v Beatties of London Ltd [1985] II EGLR 59 at 61

- b) For purposes of the sanction of treating covenants in restraint of trade as void from the start, the time for ascertaining the intentions of the parties is the time when the covenants were made. Although not recorded in the agreement, the businesses or trades were readily ascertainable from the then surrounding circumstances - by visiting the shop.

c) In this application the Tribunal has been able to make a determination of the nature and extent of the covenants. In a changing world, vagueness some 35 years after the start is not a safe indicator of vagueness at the start.

57. Mr Norman Devlin, an experienced Chartered Surveyor based in Cookstown and Mr Connor Mallon, an experienced Chartered Surveyor based at Armagh and Newry, both gave expert evidence.

58. Neither appears to have been correctly instructed as to the construction of the covenants and it is not necessary to review much of their evidence, helpful though it might otherwise have been.

59. There was no dispute between the surveyors that there were other premises not far away selling the products of the other trades and it was not suggested that the restraint imposed by the covenants was directly detrimental to the public: there was no restriction on consumer choice in the vicinity. The relevant consideration was the reasonableness of the restraints between the parties.

60. The Tribunal does not agree that on balance, the duration of the restraint was unreasonable in the circumstances-

a) Not all open-ended covenants are automatically unreasonable and Mr McNicholl continues to enjoy the benefits of the bargain. (See *Halsbury's para 38*)

b) This was not the sale of a business. The tribunal accepts that the original parties were no longer present and circumstances have changed. But if the covenants were reasonable when made, subsequent events which were envisaged (in this case the proposed change of the covenantee's business to a fish and chip shop and restaurant) do not generally affect their validity (see *Halsbury's para 27 & 31* but bearing in mind Shell UK Ltd v Lostock Garage Ltd [1977] 1 All ER 481).

c) Time and space should not be isolated considerations. The control was limited to the small geographical area of the neighbouring premises: there were other

premises not far away selling the products of the other trades – it was only a case of ‘not in my back yard’.

d) When considering whether the restraint was otherwise reasonable, it is important to consider the circumstances and the relationship between the parties so far as may be ascertained, at the time the agreement was made. Prior to making the covenant-

a. The covenantor and covenantee owned neighbouring land; they were not employer and employee, supplier and user, business partners nor vendor and intending purchaser of a business. There was no apparent inequality of arms.

b. Development of the covenantor’s land was impeded by the covenantee’s permanent right of way. In exchange for a reduction in the effect of that impediment, the covenantor accepted a restraint on extent of the user to which his development land could be put. That does not have the ring of an unreasonable bargain.

c. The Tribunal accepts that these were not landlord and tenant covenants that might be expected in a shopping centre (if not the High Street of Cookstown): this was not a case where a landlord was subdividing his holding and imposing restrictive covenants on user by potential tenants in the interests of good estate management. But, here although the covenantor enjoyed an ‘impeded’ interest in the land and on one view did not technically acquire a new interest in land – i.e. an interest he did not already have, at the very least he acquired a different interest and valuably enhanced his ability to deal with his land in the way he wanted to at any time in the future. (See *Chitty* at 17-126 &127)

61. It follows that if contrary to the views of the Tribunal, it does have a jurisdiction to make the declaration sought, the Tribunal does not agree that-

a) the restraints on the other trades were too vague, or

b) the duration of the restraint was unreasonable.

62. The Tribunal does not find the covenants void on grounds of public policy against restraint of trade and concludes that this is not a bargain that the law should destroy.