

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

IN THE MATTER OF A REFERENCE

R/64/2000

BY

GEORGE CONVILLE & MARIE CONVILLE – APPLICANTS

Re: 14 Carney Hill, Craigavad, County Down

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

FURTHER HEARING

Belfast – 22nd November 2001

1. The Convilles' lease contains a lessee's covenant ('the Covenant'):
 "AND will ... expend the sum of one thousand seven hundred and fifty pounds at least in the erection of a good and substantial single storey dwelling house or bungalow in accordance with plans and specifications to be first approved of by the Lessor in writing ..."

2. The connection with the Mowbrays was that their lease included a lessor's covenant.
 "... that she the Lessor will not erect or build or permit to be erected or built on that portion of her adjoining ground fronting to the main County Road leading from Belfast to Bangor and numbered 5, 6, 7, 8 and 9 on the map or ground plan endorsed hereon [which included the Conville's bungalow] any houses or buildings whatsoever save those of the Bungalow type with suitable outoffices"

3. On 26th September 2001 the Tribunal set out its determination on preliminary points:
 - The covenant is restrictive in character;
 - Although there was a negative or restrictive covenant in the Convilles' lease that reflected a lessor's covenant in the Mowbrays' lease, there was nothing in the Convilles' lease to allow the Mowbrays to take the benefit of it;
 - Neither the immediate neighbours nor the Mowbrays are entitled to the benefit of the covenant but the lessors are entitled to the benefit of the covenant;

- Not surprisingly in the circumstances, the persons entitled to the benefit (the successors to the Lessor) have not consented to the application for modification; and
 - In deciding whether to modify the restriction the question of whether, or to what extent, the Tribunal should consider the effect on the Mowbrays' property is a matter for another day.
4. Mr Mel Power BL instructed by Wilson Nesbitt, Solicitors, appeared on behalf of the Convilles.
 5. Mr Ivan McClean a planning adviser and surveyor gave expert evidence. He based his written report on a conversion of the Conville's bungalow to a two-storey house that would have raised the height of the ridgeline by 1.35 metres. However, at the hearing, he produced a revised design which would result in the ridge height being increased by not more than 1 metre.
 6. Mr McClean also produced photographs illustrating the view from the Mowbrays' house and the Tribunal has inspected the view from there.
 7. Article 5 of the Property Order (NI) 1978 (the '1978 Order') provides:
 - “(6) Where the Lands Tribunal makes an order modifying or extinguishing 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;
 - b) ...
 - (7) A new impediment shall not be added or substituted under paragraph 6(a) without the agreement of the applicant; but this provision does not affect the discretion of the Lands Tribunal to refuse an application where such agreement is not forthcoming.”
 8. The Convilles agreed that, if the Tribunal granted modification, they would accept a substituted impediment that would permit alterations/additions to the house in accordance with the revised drawings submitted to the Tribunal at the Hearing (first

drawn in June 2000 but very recently amended so as to incorporate the reduced ridge height).

9. The Tribunal now turns to those matters it is required to take into account under the relevant provisions of Article 5 of the 1978 Order

“(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) ...
- 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) ...
- 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.

10. The Tribunal in its earlier decision considered the circumstances in and the purpose for which the impediment was created or imposed. Among other things the Tribunal found that the impediment was concerned with the Mowbrays' site which was on the upper side of the estate road and had sea views that might be affected by inappropriate development on the lower side of the road.

11. There have been changes in the character of the neighbourhood, but not great changes; the estate generally has been completed and matured, wooded areas have also matured and some dwellings have been altered. Some trees have grown to obscure, not unattractively, part of the view of the Lough from the Mowbrays' house.

12. The proposed alteration of the Conville's dwelling to a 2-storey house has been granted planning consent.
13. Mr Brian Speers of Carnson Morrow Graham Solicitors confirmed on behalf of the lessors that they did not consent to modification or extinguishment but had not recorded any objection and did not take any part in the proceedings. So no person directly entitled to the benefit of the covenant has taken part in the proceedings.
14. In its decision of the 26th September 2001 the Tribunal left the question of whether or to what extent the Tribunal should consider the effect on the Mowbrays' property for this further hearing.
15. At an earlier stage in the proceedings the Tribunal had informed objectors that anyone who wished to pursue an objection must notify the Registrar not later than 27th July 2001. By letter dated 1st August 2001 the Mowbrays wrote to the Registrar "having assessed our position re the above case and taken on board the Court's position as regards "throwing our hats in the ring" we have reluctantly come to the conclusion that exposure to further costs on top of the potential loss of value to our property is more than we can afford." The Tribunal understands and accepts the reasons for their decision.
16. It follows that the position of the Mowbrays is this. Although
 - the lessor had covenanted with the Mowbrays' predecessors that she will not erect or build or permit to be erected or built on [the Conville's land] any houses or buildings whatsoever save those of the bungalow type with suitable out-offices";
 - the lessors have not consented to modification or extinguishment;
 - the Tribunal is on one view stepping into the shoes of the lessor (in the absence of any permission from the lessor) and exercising its discretion in accordance with the provisions of the 1978 Order;
 - the Mowbrays may be entitled to have the effect on their property considered by the Tribunal (in the unusual circumstances of this case); and
 - they have not consented to modification or extinguishment,
 - they have not an objection before the Tribunal.

17. Correspondence from the Mowbrays went on to make further points which in the circumstances the Tribunal cannot consider.
18. The view from the Mowbrays' house towards the sea is partly over the roof of the Conville's bungalow. The original promise by the lessor to protect the view from the Mowbrays' house did not fix any ridge height for any permitted bungalow; the Conville's bungalow might have been taller but still a bungalow. If permitted the Conville's new roof will intrude into the view the Mowbrays enjoy and they will notice that, but the revised proposal will limit the impact and the Mowbrays will continue to have fine views.
19. The weight that the Tribunal attaches to the effect on the Mowbrays' property must be proportionate
 - they have no direct entitlement to the benefit of the covenant;
 - they do not have any formal objection before the Tribunal; and
 - the increase in ridge height will be modest and the impact on the view from their house will be quite limited.
20. That being so the Tribunal orders modification to permit development in accordance with the revised plans, subject to the restriction that the ridge height of the new dwelling must not extend more than 1 metre above the ridge height of the existing dwelling. The Applicants are invited to draft a suitable form of words to be approved by the Tribunal and incorporated in an Order.
21. The Tribunal also determines that in the circumstances no person is entitled to any compensation.
22. The Tribunal makes no order as to costs.

ORDERS ACCORDINGLY

4th December 2001

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

Appearances:-

Applicant: Mr Mel Power BL instructed by Wilson Nesbitt, Solicitors.