

Where the Tribunal makes an order to discharge or modify a restrictive covenant under s 84 Law of the Property Act 1925 (LPA 1925), it may direct that compensation be payable under one of two heads. The second head, as set out at s 84(1)(ii) LPA 1925, is compensation to make up for any effect that the restrictive covenant had at the time when it was imposed in reducing the consideration received for the burdened land. How to calculate compensation under s 84(1)(ii) and who is entitled to such compensation was considered in *Neil Sheppard v (1) Martin Grant Holdings Limited and (2) Roger Turner [2020] UKUT 171 (LC)*.

### Facts

Mr Shepherd owned 5 Bluebell Road, Lindford (the "Property"), which was a linked-detached house in the centre of a 1980s housing estate. Mr Shepherd had obtained planning permission to demolish the garage of the Property and erect an attached two-storey dwelling, positioned perpendicularly to the Property ("Proposed Development"). The Property was, however, subject to various restrictive covenants that prevented the implementation of the Proposed Development.

Mr Shepherd commenced negotiations with Martin Grant Holdings Ltd (MGH), the person with the benefit of the restrictive covenants, to release the restrictions. The price of release could not be agreed.

Accordingly, Mr Shepherd made an application to the Upper Tribunal (Lands Chamber) under s 84 LPA 1925 for the modification of the restrictive covenants attached to the Property. MGH objected to the application together with a neighbour, Mr Roger Turner, who owned 1 Bluebell Road.

### Decision

The Tribunal dismissed the objections of Mr Turner that the Proposed Development, by making the Property semi-detached, would affect Mr Turner's own property and the issues raised regarding encroachment on the parking bay. For the first objection, no expert evidence was submitted, and the latter objection ignored that the parking arrangements were secured by planning conditions.

The Tribunal then considered MGH's objection. MGH accepted that the value of the retained land would not be affected by the modification and did not suggest any other injury to its retained land. As such, the Tribunal held the application based on ground (c) of s 84(1) LPA 1925, that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction, was made out. In turn, there was no basis for compensation under s 84(1)(i) and the single issue in the case was the amount of compensation payable under s 84(1)(ii).

The Tribunal discussed the identities of the parties. It found that it was of no relevance if the applicant was a successor in title to the original covenantor given that what must be considered is the effect of the restrictive covenant on the price that the covenantee originally received.

The Tribunal did discuss whether it should exercise its discretion and award compensation where the owner of the benefitting land is no longer the original covenantee. This was not an issue, however, on the facts of this case given that MGH was the holding company for the assets of the original covenantee, so they were "sufficiently closely related to the original covenantee" to be entitled to compensation.

The Tribunal held that the question to determine the compensation payable under s 84(1)(ii) was "the amount by which the original purchase price might have increased had the restrictions – or at least those restrictions which would prevent the proposed development in this application – not been entered into the transfer."

In order to calculate this, the Tribunal considered the following factors:

1. Identify the relevant restrictions preventing the Proposed Development – it is not a blanket discharge and any other restrictions remain and should be factored into the calculation
2. No presumption that the planning permission would have been in place when the original purchase occurred – it is the hope of gaining planning permission, and not being prevented from implementing that permission by restrictions, that is the subject of the valuation exercise
3. Effect of the Proposed Development on the existing Property of the original purchaser – in this instance, the negative implications were that the existing Property would lose its garage, it would become semi-detached, its garden would become long and narrow, and its smaller drive would still accommodate two cars but only in tandem

4. Adjustments for the impact of inflation – judgment on the principle of an inflationary adjustment was left for a future application, but the Tribunal did state that the amount of compensation that would represent a “just” award (as per the wording of s 84(1)) is a matter of judgment and it is for the objector to provide evidence to support the suggested impact

The Tribunal held that, taking these factors into account, the appropriate amount of compensation that Mr Shepherd should pay to MGH was Mr Shepherd’s longstanding offer of £4,000 and an order should be made to modify the relevant restrictive covenant to allow for the Proposed Development.

## Practical Significance

This case provides useful guidance on the less frequently relied upon basis for compensation under s 84(1)(ii) and the factors that will be considered by the Tribunal when calculating such compensation.

In the present case, as MGH was the holding company of the original covenantee, the Tribunal found it was “sufficiently closely related” to be entitled to compensation. It will be interesting to see whether this phrase is used and developed in future cases and the extent to which this principle will be stretched beyond the original covenantee. The Tribunal appears to suggest there will be instances when s 84(1)(ii) will not be available due to a lack of connection between the current owner of the benefitting land and the original covenantee.

Finally, the case restates that compensation under s 84(1) is at the discretion of the Tribunal and it is for it to decide what is “just” to award. Objectors relying on s 84(1)(ii) should, therefore, ensure they have sufficient evidence to support any suggested impact of the restrictive covenant on the original purchase price.

Should you require any assistance in respect of restrictive covenants over land, including the process of modifying or discharging a restrictive covenant, please do not hesitate to contact our Real Estate Litigation team.

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