WHAT IS IT WORTH?

What is the law which applies when the value of the rights under restrictive covenants affecting freehold land are being calculated either in negotiations (e.g. to release the covenants) or in litigation in Court (e.g. damages in lieu of an injunction) or in the Upper Tribunal (Lands Chamber) ("UTLC") where compensation is being assessed to make up for the effect of the discharge, or modification in an application under s. 84(1) Law of Property Act 1925; "s. 84(1)"?

Two recent decisions of the UTLC answer that question. Three propositions emerge from them.

(i) When assessing damages for breach of covenant in lieu of an injunction where one measure may be based on "negotiating damages" (after *Morris-Garner v One Step (Support) Ltd.* [2019] AC 649 – *"Morris-Garner"*) and calculated by reference to the net uplift in value accruing to the party in breach, if its work is to be carried out, the Court may have regard to the compensation which the UTLC would award if the covenant was to be discharged, or modified under s. 84(1). The damages may be limited to loss caused by the breach of covenant, such as loss in capital values. This factor would not apply if the jurisdiction under s. 84(1) was inapplicable, or excluded, or if the prospects of success under s. 84(1) were remote.

(ii) The UTLC will not grant compensation under s. 84(1) based on what the negotiating damages might have been.

This is a crucially important principle which can be overlooked where covenants are the subject of release etc. negotiations and where the question of the price is key. The warning that a failure to apply this principle leads to unrealistic hopes in covenantees was given by Carnwath L.J in *Winter v Traditional and Contemporary Contracts Ltd.* [2007] EWCA Civ 1088. It is disappointing that this warning is still being ignored in some cases 17 years later. If overlooked in disputes it will lead to expert valuers being instructed on the wrong basis basis and dealing at great (and expensive) length with net development values, uplifts and "Stokes" type percentages. This principle seems to apply both to absolute as well as qualified covenants and as between the original parties to the covenants. That was shown in July in *Father's Field Developments Ltd. v Namulas Pension Trustees Ltd.* [2021] UKUT 169 (LC); "Father's Field". The writer considers that this principle is unsatisfactory, if not wrong. But unless the Supreme Court, or Parliament changes the law so as to free up the basis of assessment (see Lord Carnwath at paras. 143-152 in *Morris-Garner*) a restrictive

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covenant is potentially valueless unless there is evidence of loss in the capital value of the covenantee's land, if retained.

(iii) The third proposition is that the loss in value of the covenantee's property is the primary measure of compensation under s. 84(1)(i) if the UTLC decides to grant the application on payment of compensation under it. The alternative measure under s. 84(1)(ii) will produce its own value, if there is evidence to support it. On that latter measure *Father's Field* is a reminder that the question under it is not whether the price paid by the covenantor was a "good" or "bad" one when the covenant was imposed, but whether the covenant had a depressing effect on that price. In considering applications under grounds (aa) and (c) of s. 84(1) whether the practical benefits secured by the covenant are of substantial value, or advantage, or whether the proposed discharge, or modification will not injure the objector will be determined by that loss in capital value, if any. Evidence of uplift and "negotiating damages" is never part of that assessment because any sum which the applicant might seek to recover on that basis is not a "practical benefit" under ground (aa) and as there is no right to receive a sum so calculated, that is not part of any "injury" under ground (c). One final practical point may be made as regards assessing the loss of capital value in s. 84(1) applications. This is demonstrated on the evidence considered by the Tribunal in *Moskofian v Foster* [2021] UKUT 0214 (LC); *"Moskofian"*. That application succeeded under ground (aa) on terms as to the payment of compensation and some other conditions relating to the proposed development on the Applicant's land at Ealing. Three lessons emerge from that Decision. They are of importance to advisers and experts. First, the UTLC (and the Court) like it when the experts agree matters, such as the current capital values of the objectors' properties. There is no reason why this should not be more common. Secondly, where the application is under s. 84(1) the expert must be instructed on a proper basis, retain those instructions and supporting materials and observe the requirements of the relevant professional bodies, UTLC Procedure Rules r. 17, UTLC PD para.18, and if in Court, CPR Part 35. In the light of the evidence relating to the Objectors' expert witness in *Moskofian* and the Member's assessment of it, it is wise to have read and understood the terms of s. 84, or any other statutory provision on which the expert's evidence will be based; eg. s. 610 Housing Act 1985. Finally, the expert valuer for the objector must be careful to be aware of the "margin" when considering market value and not be tempted to "over egg" the loss in values and express that in percentages which are extreme, bearing no relation to reality. That may show a lack of objectivity. The same guidance applies to the applicant's expert, such as a refusal to acknowledge even very small effects on values caused by the proposed development. In *Moskofian* the objectors' expert witness gave evidence that the loss of value of the objectors' properties was up to 12%. The Member found that the greatest loss was 4.8% on one property, with the other 10 properties affected suffering losses of 1% or 2%; so none were substantial. The contrast between that expert's evidence and the findings of the Tribunal speaks for itself.

The explanation above should make it clear that the question "what is it worth?" is not to be answered without a full understanding of the case law, with care being taken to reach the proper and justifiable answer to it, even if that may not be the clients' preferred one. The two recent Decisions of the UTLC demonstrate all of these points and are worth studying.

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