Valuers Beware!
A Case Note on Quantum *(Barrowsfield) Ltd v. Bell & ors.* [2023] UKUT 2 (LC)

The jurisdiction to discharge or modify restrictive covenants affecting freehold land under s.84 of the Law of Property Act 1925 can sometimes seem a bewildering area of law. For developers, the notion that, notwithstanding a grant of planning permission, some decades-old covenant entered into between long-departed parties could prevent their development is often perplexing. For householders, the idea that a neighbour could get the Tribunal's sanction to ignore a clear restriction apparent from their title deeds may seem unfair. For advisers (and their valuation experts) trying to guide clients through this specialist jurisdiction, it is possible the Tribunal's decision in *Quantum (Barrowsfield) Ltd v. Bell & ors.* [2023] UKUT 2 (LC) has made their job no easier.

The decision in *Quantum* was not, itself, novel. The developer's application to modify restrictive covenants so as to permit the construction of a 4/5 storey building of 33 flats was unsuccessful. The covenants prevented erection of anything other than a single dwelling-house on each of 3 of the plots which made up the development site and the Tribunal found that these covenants secured practical benefits of substantial value or advantage to the neighbouring beneficiaries. The Tribunal concluded that the jurisdiction to modify or discharge the covenants was not engaged because the overlooking from the proposed development on the garden of the nearest objector was significant and the overbearing bulk of the development would adversely affect the view from the gardens of the neighbouring properties.

It is what the Tribunal said at para.99 of its decision in relation to expert valuation evidence, though, that is interesting:

> *"We observe, however, that as so often in s.84 cases we have been presented with polarised valuation evidence which was unhelpful to the Tribunal in a number of respects. We were disappointed that neither valuer fully examined the particular and different impact of the proposed development on the different objectors' properties; they each adopted a valuation approach which simply used a sliding scale to account for distance. The applicant and its expert consider that the modification would lead to no more than a marginal loss of amenity to the neighbouring properties, creating a loss of value in the order of 1-2%. The objectors and their expert consider that modification would lead to irreversible harm to the enjoyment of their properties and a substantial loss of value in the order of 10-15%. Neither valuation expert based their selection of percentage loss on evidence from the market which could be examined at the hearing, each relying essentially on their long professional experience. We did not find this helpful and it is an approach which we strongly discourage. It will be unsurprising that we found Mr Roberts' analysis of two previous Tribunal decisions a uniquely inappropriate method of establishing loss of value to the objectors' properties in this case. We note that Mr Adams-Cairns' attribution of 15% of the value of the property to its garden makes it almost impossible to regard loss of value to the garden as being of substantial value to the property owner; but we regard that attribution as arbitrary and unevidenced."*

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Thus the guidance for valuation experts appears to be:

(1) Visit the site and assess the diminution in value to each objector's property separately. Look closely at the impact of the development on the specific amenities of each objector's property.
(2) Each case is fact-specific, so do not visit the sites of previous Tribunal decisions to analyse the assessments made in earlier cases.
(3) If the effect of the development is solely upon a garden, assess the value of that garden by reference to market data.
(4) Comparable evidence from the market ought to be provided.

The difficulty with this guidance is that appropriate market comparables in this field are likely to be rare. This is because (unless one is dealing with an estate of similar or identical houses, where it might just be possible from sales data to assess what premium is paid for a better view or a garden that is not overlooked) the market is not going to provide information as to the value of one particular aspect of a property. It will be difficult, for example, for an expert to isolate from the sales price of a nearby house what value was attributed to the absence of an overbearing block of flats on the neighbouring plot. Furthermore, whilst in a commercial rent review case, market comparables can be assessed by reference to the size of the demise, the term, the location, the modernity of the property, the covenants in the lease etc. and appropriate adjustments made to determine the best comparables, it is very difficult to undertake a similar assessment when considering the effect of a potential development on a neighbouring residential property. Residential properties are rarely capable of the "price per sq. metre" analysis frequently undertaken with offices and the sales price from one sale is likely to prove difficult to compare with the potential sale value of a property with an as yet unconstructed adjacent development.

Nonetheless it is welcome that the Tribunal has given some indication as to the expert evidence it finds **unhelpful** and expert valuers have been duly warned. Whether, though, the guidance in *Quantum* leads to the Tribunal finding itself inundated with details of supposed comparables remains to be seen.

Andrew Bruce
Barrister