

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

IN THE MATTER OF A REFERENCE

R/30 & 32/2002

BETWEEN

CASTLEREAGH BOROUGH COUNCIL – APPLICANT

AND

NORTHERN IRELAND HOUSING EXECUTIVE - RESPONDENT

Re: Lands at Ballyhanwood, Dundonald

Lands Tribunal – The Hon Mr Justice Coghlin

&

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

Belfast – 6th December 2002

1. Mark T Horner QC with Robert Millar appeared for the Applicant. Nicolas Hanna QC appeared for the Respondent.
2. The applicant, Castlereagh Borough Council (“the Council”) submitted an application to the Lands Tribunal under Article 5 of the Property (Northern Ireland) Order 1978 (“the Order”) for the extinguishment of a number of restrictive covenants contained in an Indenture of Lease dated 30th July 1979 between the Council and the respondent, the Northern Ireland Housing Executive (“the Housing Executive”). The effect of the restrictive covenants was essentially to confine the use of the demised premises to recreation, open space and amenity purposes.
3. The parties have agreed that the covenants qualify for modification or extinguishment, the Housing Executive will consent to the extinguishment of the covenants

4. The only issue to be determined by the Tribunal is the amount of the sum to be paid by the applicant to the respondent in accordance with Article 5(6) of the Order. So far as is relevant Article 5 of the Order provides:

“5.(6)(b) the Tribunal may direct the applicant to pay the person entitled to the benefit of the impediment, either –

 - (i) a sum to compensate him for any loss or disadvantage which, notwithstanding any new impediment which may be added or substituted under sub-paragraph (a), he suffers in consequence of the modification or extinguishment of the impediment, or
 - (ii) a sum to make up for any effect which the impediment had at the time when it was imposed, in reducing the consideration then received for the land affected by it,”
5. The parties have agreed that any sum payable is to be based on head (ii). They also have agreed that had the land been unrestricted, the value then would have been £226,000. But the consideration under the lease was a premium of £126,000 and a nominal ground rent– a reduction of £100,000. Since then, however, part of the land has been developed in accordance with the restrictions and would not benefit from the release. Negotiations have led to an agreement that the relevant reduction in the consideration then was £81,000.
6. With the passage of time the value of both land and money changes and the Housing Executive is seeking adjustment of the reduction in consideration by an amount equivalent to the increase in the retail prices (“RPI indexation”) between the time when the restrictive covenants were imposed (1979) and the present day. If that were done, the figure at the present day would be of the order of £250,000.
7. Prior to the Order, whether a restriction was unreasonable or not, a beneficiary might have expected to extract a consideration based on the greater of:
 - a ‘share’ of either the increased development value or developer’s profit realisable by the covenantor (or his successor) on release; or
 - ‘compensation’ for actual loss or disadvantage suffered by the beneficiary.
8. The Order was in response to the mischief identified in the report *Survey of the Land Law of Northern Ireland* 1970 HMSO, 1971 (“the 1970 Survey”) (see para 392 to 395):

“One of the main criticisms of the present law relating to restrictive covenants is that there are no provisions whereby such covenants can be discharged, even if they have become obsolete, without obtaining the consent of the person entitled to enforce them. They are often used as a means of extracting money from the owner of the land burdened with the restriction, and in many cases such covenants impede the legitimate development of land.”

9. There are broadly corresponding provisions in England, Wales and Scotland. As indexation has been adopted in a number of cases in England and Wales but not in this jurisdiction or in Scotland and there are differences in the language and schemes of the broadly corresponding legislation, the Tribunal has considered their similarities and differences.

10. Section 84 of the Law of Property Act 1925 which applies in England and Wales provides:

“ ... and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either-

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.”

11. In Scotland Section 1(4) of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides:

“(4) An order varying or discharging a land obligation under this section may direct the applicant to pay, to any person who in relation to that obligation is a benefited proprietor, such sum as the Lands Tribunal may think it just to award under one, but not both, of the following heads-

(i) a sum to compensate for any substantial loss or disadvantage suffered by the proprietor as such benefited proprietor in consequence of the variation or discharge; or

(ii) a sum to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the interest in land affected by it;”

12. RPI indexation has been discussed in a number of English cases. In Re Bowden's Application (1983) 47 P&CR 455 the English Tribunal held that subsequent increases in land values were irrelevant. Although Preston & Newsom on Restrictive Covenants (8th Ed) at 13-18 suggested that the payment awarded in Re New Ideal Homes Ltd's Application (1978) 36 P&CR 476 was based on changes in the value of money, that view was not repeated in the 9th Edition. In fact the parties had agreed the amount of consideration to be awarded under the head (ii) and the report does not include any details of how they had done so. In Re Harper's Application (1986) 52 P&CR 104; LP/43/1984) the Tribunal ordered modification by consent on the grounds that, among other things, the Council would suffer no loss or disadvantage from the modification. There was no indexation. In Re Groves' Application (1987) (LP/50/1986) the Tribunal made a preliminary determination without a hearing that a covenant did not secure to the persons entitled to the benefit of it any practical benefits of substantial value or advantage to them. In that determination the Tribunal required the beneficiaries to set out “the amount of their claim and any particulars in support of it including the calculation of any addition by reason of inflation”. The beneficiaries obliged and the Tribunal, again without a hearing, accepted RPI indexation. Later in Re Dove's Application (1991) (LP/28/1990) the English Tribunal, in our view mistakenly, appears to have accepted that both Re Harper and Re Groves were authorities which supported the proposition that RPI indexation should be applied. In Re Dove's Application both parties appeared to have accepted indexation and the only issue was whether the indexation should cease at 1979 when planning permission was granted, or at September 1988 when the application was made to the Council to release the covenant or the date of hearing. The applicant pointed to the maintenance of an unrealistic claim by the Council until the last moment. The ratio adopted by the Tribunal was that the Council had been “kept out of their money until now” and ordered RPI indexation up to the date of hearing. In Re Davies' and Murphy's Application (2000) (LP/32/1999) the Tribunal followed Re Groves and Re Dove's Applications and awarded RPI indexation but the decision does not disclose any argument on the point.

13. The position in Scotland is summarised in Currie v Alliance Property Co Ltd (Feb 26, 1993 LTS/LO/1992/19 & 20). The Scottish Tribunal briefly discussed Scottish and English cases and concluded:

“Despite the absence of any authority for the proposition that an award under Section 142 might be updated to take account of inflation since the date when the obligation was imposed, the Tribunal is not prepared to express a concluded view on the matter. In the Tribunal’s opinion, the terms of Section 142 are not such as clearly to exclude any update in the amount of an award, and it would be desirable therefore to reserve our position on the point until a decision is necessary and the question is more fully debated.”
14. In the sole Northern Ireland decision on the point, McCarney v Martin (1988) (R/18/1988), the Tribunal was referred to S J C Construction Co Ltd v Sutton London BC (1975) 29 P&CR 332 CA and Re Groves but decided that:

“The Tribunal would require much clearer statutory language before it could accept application of the retail prices index.”
15. Mr Horner QC pointed out that McCarney v Martin appeared to have found widespread acceptance and the approach adopted had informed parties since then but Mr Hanna was aware of some settled disputes in which RPI indexation had been applied.
16. The Order enabled the Tribunal to modify or extinguish restrictions, which are unreasonable (generally because they have become obsolete) and, broadly in accordance with the corresponding English and Scottish legislation, it gives the Tribunal a discretion to direct that a payment is made to a beneficiary. The payment may be based on compensation for actual loss or disadvantage (if any) but the Order introduced what was a new basis for a payment in this jurisdiction; head (ii) provides the alternative basis of a sum to make up for any effect which the impediment had at the time when it was imposed in reducing the consideration then received for the land affected by it. Where the Tribunal has ordered modification or extinguishment of unreasonable restrictions, the payment awarded, if any, usually has been under head (ii) and rarely head (i), probably because any significant actual loss or disadvantage suffered by a beneficiary would usually be sufficient grounds to refuse modification.

17. As a result of the lack of comprehensive argument on RPI indexation and the differences in the statutory language, the English cases provide the Tribunal with no definitive guidance either way. In Scotland, where the statutory language is similar to the NI Order, the position would appear to be that RPI indexation has never been awarded but the Tribunal there has not excluded the possibility that it might be awarded.
18. The Tribunal's first impression of the language of the Order is that it clearly suggests the measure of consideration is to be an historical assessment; it is historical both in terms of the effect at the time of imposition and in terms of the amount by which the consideration then received for the property was reduced. But Counsel drew attention to:
- The use of the unusual phrase “a sum to make up for”;
 - The use of the phrase “a sum to make up for” as opposed to “a sum to compensate”;
 - The absence of an express provision for adjustment by way of interest or indexation; and
 - The consequences of RPI indexation.
19. The Tribunal has given much thought to Mr Hanna's suggestion that if the legislature had intended that the payment was simply to be the actual amount by which the consideration paid for the property was reduced, by reason of the restrictions, at the time when those restrictions were imposed, it could have said so by the use of clear and straightforward words to that effect, without having to use the unusual phrase “a sum to make up for”. Since these words have been used it must be presumed that the legislature intended that they should have a meaning. But, there is a quite straightforward explanation; a consideration need not always be a sum of money and a reduction may not be a single amount – it may be reflected in a reduced rent (see for example Trustees of the Trustee Savings Bank of NI v Blakiston Houston Estate Co (1980) R/18/1979). The Tribunal may be required to assess a sum, which, for example, would make up for the flow of reduced amounts of future rent. In the Trustee Savings Bank case there was a bench-mark for an unrestricted rent in the

20. In both the Scottish and Northern Ireland legislation the draftsmen have used the phrase “a sum to compensate” under head (i) only, as opposed to the phrase “a sum to make up for” under both head (i) and head (ii) in the English provision. The Tribunal has concluded that the difference is a linguistic improvement in that the use of the word “compensate”, in what is later legislation, reflects the directly compensatory nature of head (i). This underlines the clear distinction between the two heads in the Order; the former requires a current assessment of compensation, the latter is not intended to be in the nature of compensation for some current loss.
21. The Tribunal is not persuaded that a power generally to enhance the reduction in consideration by an award of interest or indexation is a necessary implication of its jurisdiction under the Order. If the legislature had intended to give the Tribunal such a power, it would have made that clear in express terms. Further, interest is the common way of compensating for a party being ‘kept out of its money’ (see Re Dove’s Application (1991) LP/28/1990). The Order could have, but does not provide for interest to be awarded, and so the Tribunal would be reluctant to allow indexation to be used as a substitute for interest and thereby compensate a party for being ‘kept out of its money’.
22. Although RPI indexation is stated by the Housing Executive to be intended to reflect the change in the value of money only, not the change in the value of land, the former is a factor, but not the only factor, in the latter. RPI indexation must generally in practice represent an assessment by a back door of a share (although perhaps a somewhat arbitrary share) of the current development value, not the historic reduction. But the object of head (ii) is that the beneficiary of what has become an unreasonable restriction should no longer be in a position to extract a ransom based on a share of the current development value from the owner of the burdened land. So, adopting a wide interpretation, which allowed the Tribunal to depart from the actual reduction in

23. Mr Hanna QC suggested that indexation is attractive because it is not arbitrary and it is fair. From the standpoint of the covenantee receiving the payment, he will receive the same monetary value in real terms no matter at what point in time it falls to be assessed. Whereas, if the payment in real terms is effectively determined by the entirely arbitrary decision of an applicant to apply for extinguishment at a particular point in time (which the beneficiary is powerless to influence) such an approach would be inherently unfair and arbitrary. Mr Horner suggested that RPI indexation produces an absurd result from the standpoint of the covenantor making the payment in that the longer that land is held, the greater the indexation that has to be applied to the reduction in consideration. He suggested that any consideration that is to be awarded must take into account the restriction on use of the land that a covenantor has had as a consequence of the impediment.
24. The scheme of head (ii) of the Order may produce what is a relatively modest sum and perhaps a rather rough and ready solution to the need to balance the interests of the parties but it should be remembered that head (ii) only applies in cases where restrictions are unreasonable (generally more than 21 years old and obsolete) and the beneficiary has not suffered any loss or disadvantage.
25. Although the Tribunal is not persuaded that RPI indexation should generally be applied, there may be circumstances that would lead the Tribunal to adopt an exceptional approach in assessing the appropriate sum in accordance within Article 5 (6) (b) (ii) of the Order and it now turns to the facts of the instant case. The lease is dated 1979 (made after the coming into operation of the Order). The area of land is part of a holding of about 100 acres on the outskirts of the city. The restrictions maintained the premises for recreation; open space and amenity purposes only. In 1979, the agreed consideration for the whole was £126,000 but, if unrestricted, the premises would have been worth a great deal more than that - £100,000 more. There is nothing in the lease that explains why the restrictions were imposed but the premises did adjoin very large Housing Executive housing estates and it may be that the Housing Executive saw some, but not exclusive, benefit for themselves and their tenants in the provision of recreational facilities in the vicinity. There is no evidence

26. The Tribunal invited the parties to comment on whether Article 1 of the First Protocol of the European Convention on Human Rights might be relevant. Neither pursued any issue in relation to the Convention and the Tribunal, as a public authority, does not consider that any convention issue arises.
27. The Tribunal concludes that the reduction in consideration should not be adjusted by an amount equivalent to the increase in the retail prices between the time when the restrictive covenants were imposed (1979) and the present day.

ORDERS ACCORDINGLY

17th December 2003

**THE HON MR JUSTICE COGHLIN &
M R Curry FRICS IRRV MCI.Arb Hon.FIAMI
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Applicant: Mark T Horner QC with Robert Millar instructed by Tughan & Co.

Respondent: Nicolas Hanna QC instructed by the Legal Department of the Northern Ireland Housing Executive.