Neutral Citation Number: [2024] UKUT 370 (LC)

Case No: LC-2024-528

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF A REFERENCE UNDER SECTION 204 OF THE HOUSING AND PLANNING ACT 2016

19 November 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION – COSTS –whether the Tribunal has jurisdiction to award costs in a reference for compensation under s. 204 Housing and Planning Act – whether compensation for injurious affection – rule 10, Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

BETWEEN

GRAHAM WILLIAM KITCHEN

Claimant

and

KENT COUNTY COUNCIL

Respondent

The Homestead,
Seal Drive,
Sevenoaks,
Kent, TN15 0AH

Upper Tribunal Member Mr Mark Higgin FRICS FIRRV
Decision on written representations

Mr Kevin Leigh for the appellant
Mr Alexander Booth KC, instructed by Bevan Brittan LLP, for the respondents

The following cases are referred to in this decision:

Holliday v Breckland District Council [2012] 3 EGLR 95

Kent County Council v Union Railways (North) Ltd & Another [2009] EWCA Civ 363

Midtown Ltd v City of London Real Property Company Ltd [2005] EWHC 33 (Ch)

R v. City of London Corporation & Royal Mutual Insurance Society ex p Mystery of the Barbers [1997] 95 LGR 459

re Penny and South Eastern Rly Co 1857 7 E & B 660, 669

Wildtree Hotels Ltd v Harrow LBC [2001] 2 AC 1

Introduction

1. This decision, determined after written representations, addresses the question of whether the Tribunal has the jurisdiction to award costs in a reference made pursuant to s.204 of the Housing and Planning Act 2016 (2016 Act). This question was first raised by the respondent in correspondence with the Tribunal and was discussed at a case management hearing on 5 September 2024. It was subsequently ordered that the parties should file written submissions on this point and the Tribunal would determine the matter as a preliminary issue.

2. Section 204 provides for the payment of compensation for interference with an easement or restrictive covenant which has been overridden by section 203, 2016 Act where a local authority has been authorised to undertake development. In this case the claimant, Mr Kitchen, claims that the value of his home has been diminished as a result of the construction of flood lit sports pitches for a new school on land bound by restrictive covenants which could have been relied on to prevent that development had it not been for the effect of section 203.

3. The claimant's position is that the Tribunal does have the jurisdiction to make an award of costs, the respondent does not argue one way or the other but notes that the position is uncertain and seeks to identify the relevant matters to assist the Tribunal in coming to a decision. The Tribunal appears not to have considered the matter in any previous litigation to which its current costs rules apply.

Relevant Provisions

4. The Tribunal's powers to award costs are set out in rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ('the Rules') which were last updated on 1 May 2024. So far as relevant, rule 10 states that:

> 10.—(1) The Tribunal may make an order for costs on an application or on its own initiative.
>
> (2) Any order under paragraph (1)—
>
> (a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);
>
> (b) must, in a case to which section 4 of the 1961 Act applies, be in accordance with the provisions of that section.
>
> (3) [Punitive orders]
>
> (4) [Costs protection]
>
> (5) [Judicial review]
>
> (6) The Tribunal may make an order for costs in proceedings—
>
> (a) for compensation for compulsory purchase;
>
> (aa) under section 18 of the 1961 Act;
>
> (b) for injurious affection of land;
>
> (c) under section 84 of the Law of Property Act 1925 (discharge or modification of restrictive covenants affecting land);

(d) on an appeal from a decision of the Valuation Tribunal for England or the Valuation Tribunal for Wales;

(e) under Schedule 3A to the Communications Act 2003;

(f) under the Riot Compensation Act 2016; and,

(g) on any appeal from the First-tier Tribunal relating to—

(i) a reference by the Chief Land Registrar, or

(ii) any other application, matter or appeal under the Land Registration Act 2002.

5. Section 203, 2016 Act is headed "Power to override easements and other rights". It provides:

> 203 (1) A person may carry out building or maintenance work to which this subsection applies even if it involves—
>
> (a) interfering with a relevant right or interest, or
>
> (b) breaching
>
> (i) a restriction as to the user of land arising by virtue of a contract, or
>
> (ii) an obligation under a conservation covenant.

6. The work to which this power applies is described in section 203(2). It is work for which there is planning consent, and which is carried out by a public authority for the purposes for which the planning permission was granted, on land which the authority could acquire compulsorily. A relevant right or interest is defined in section 205(1) and means any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land (including any natural right to support). The effect of section 203 is therefore, as the heading indicates, to enable local authorities to override easements and similar rights, including restrictive covenants (as these are restrictions as to the user of land arising by virtue of a contract, and therefore fall within section 203(1)(b)(i) above).

7. The policy that underlies section 203, 2016 Act is the same as the policy behind section 237, Town and Country Planning Act 1990, which was identified by Dyson J in *R v. City of London Corporation & Royal Mutual Insurance Society ex p Mystery of the Barbers* [1997] 95 LGR 459 at p.464:

> "The statutory objective which underlies section 237 of the 1990 Act is that, provided the work is done in accordance with planning permission, and subject to payment of compensation, the local authority should be permitted to develop its land in the manner in which it, acting bona fide, considers will best serve the public interest. To that end, it is recognised that a local authority should be permitted to interfere with third-party rights. A balance has to be struck between giving local authorities freedom to develop land help for planning purposes, and the need to protect the interests of third parties whose rights are interfered with by local authority development. Section 237(1) is the result of the balancing exercise. Parliament has decided to give local authorities the right to develop their land and interfere with their party rights, but on the basis that work is done in accordance with planning permission (with the protection inherited in the planning process), and that third parties affected our entitled to compensation under section 237(4)."

Section 204(1), 2016 Act concerns 'compensation for overridden easements etc'. It provides for the payment of compensation for any interference with a relevant right or interest or breach of a restriction that is authorised by section 203(1). The compensation is to be calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965 (section 204(2)), and any dispute about the compensation payable is to be determined by the Upper Tribunal (section 204(5)).

The issue

8. References under s.204 are uncommon and they are not mentioned specifically in the Tribunal's Rules, including rule 10. Whether the Tribunal has a general power to award costs in such a reference (as opposed to a power to make an order for wasted costs or where a party has behaved unreasonably under rule 10(3)) therefore depends on whether the case falls within one of the categories in rule 10(6).

9. There is a degree of consensus between the parties that rule 10(6)(b) of the Rules provides a potential means by which the Tribunal could make an award of costs in the circumstances of this case. Rule 10(6)(b) provides that the Tribunal can make an award of costs in proceedings for injurious affection of land.

10. The meaning of the expression "injurious affection of land", as used in section 10 of the Compulsory Purchase Act 1965 1965 Act, was considered by the House of Lords in *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1. Lord Hoffmann, giving the leading speech, said this at paragraph 2:

> 'The term "injuriously affected" connotes "*injuria*", that is to say, damage which would have been wrongful but for the protection afforded by the statutory powers. In *re Penny and South Eastern Rly Co* 1857 7 E & B 660, 669 Lord Campbell said: "unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed." In practice this means that a claimant has to show that but for the statute he would have had an action in damages for public or private nuisance."

11. Lord Hoffmann continued, at paragraph 4:

> "Compensation is payable only for damage to the plaintiff's land or interest in land."

12. In *Kent County Council v Union Railways (North) Ltd & Another* [2009] EWCA Civ 363 Carmwath LJ said at paragraph 43 that:

> 'There is no doubt that in the modern law, as the heading to section 10 suggests, it has been treated as concerned with compensation, not for land taken, but for injury to other land which is adversely affected by the project (see e.g. *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1).

13. The root meaning of "injurious affection" is therefore injury to land which has not been compulsorily acquired but which has nevertheless been adversely affected by works carried out elsewhere. Provision is made for compensation for injurious affection by sections 7 and 10 of the Compulsory Purchase Act 1965.

14. The respondent notes that by s.204(2), 2016 Act compensation for any breach of a restriction authorised by section 203 (1)(b)(i) is to be calculated on the same basis as compensation payable under sections 7 and 10 of the Compulsory Purchase Act 1965. Section 7 relates to compensation for severance of land, where damage is caused to land which has been retained as a result of the compulsory acquisition of other land belonging to the same owner. It is not directly relevant to this case. Section 10 makes further provision for compensation for injurious affection and provides, at subsection (1), that:

> (1) If any person claims compensation in respect of any land, or any interest in land, which has been taken for or injuriously affected by the execution of the works, and for which the acquiring authority have not made satisfaction under the provisions of this Act, or of the special Act, any dispute arising in relation to the compensation shall be referred to and determined by the [Upper Tribunal]

It can be seen therefore that s.204 is concerned with compensation payable in connection with injurious affection. The claimant concludes from this analysis that the compensation payable under section 204, 2016 Act for any interference with a relevant right or interest or breach of a restriction authorised by section 203 is compensation for injurious affection and therefore that in a reference to determine such compensation the Tribunal has power to award costs under rule 10(6)(b).

15. The claimant submits that compensation under s.204 was previously available under s.237(4) of the Town and Country Planning Act 1990. Its origins can be traced back through s.127 of the Town and Country Planning Act 1971, s.81 of the Town and Country Planning Act 1962, and s.22 of the Town and Country Planning Act 1944. The claimant concludes that although s.204 replaced the previous statutory provision but did not alter its substance and previous case law remains relevant.

16. The claimant refers to *Holliday v Breckland District Council* [2012] 3 EGLR 95 which is a decision of the Tribunal in relation to s.237(4) of the Town and Country Planning Act 1990, the predecessor of section 203, 2016 Act.

17. The claimant notes that in *Holliday*, costs were awarded in favour of the compensating authority and the claimant asserts that it is therefore implicit that the parties and the Tribunal (Mr George Bartlett QC, President, and Mr Paul R Francis FRICS) accepted that there was a power to award costs. That is no doubt true, but it does not assist in this case. The Tribunal's current Rules were substantially amended in 2013 and when *Holliday* was decided the power to award costs was expressed in much more general terms (providing simply that the costs of and incidental to any proceedings shall be in the discretion of the Tribunal).

18. The claimant describes the Council's submissions as attempting to draw a difference between proceedings for injurious affection and a claim where compensation is to be based upon the same principles as injurious affection, as "a distinction without a difference". They say that the provisions under s.204 engage the fundamental right of protection under Art. 8 of the European Convention and this is why compensation is payable because the right is qualified where interference is in accordance with the law and necessary under one of the stated heads. Otherwise, they say, the protection is illusory. The claimant submits that the 2016 Act therefore did not change the underlying purpose of compensation enacted previously under the earlier planning acts.

19. The claimant also cites the later case of *Midtown Ltd v City of London Real Property Company Ltd* [2005] EWHC 33 (Ch), it was held by Peter Smith J at paragraph 34 that:

> The purpose of the section is to facilitate the proper development of land by providing that easements and any other rights, which might prevent such development, are overridden and extinguished subject to a right of compensation. Under s 237(4) the compensation is assessed as if the rights were compulsorily acquired. Thus, the measure of compensation payable is the diminution in value of the interest affected and not (for example) by reference to a reasonable price that could be extracted for the giving up of the right;

20. The claimant says that the judgement is clear that compensation is assessed "as if" the rights were compulsorily acquired and concludes that this means that costs are to be awarded in the same way as if the claim was a compulsory acquisition claim. They state that to deny costs as part of such claim would represent a major change in the courts' approach to compensation where private rights are overridden. This can only be done by Parliament and there is nothing to support the suggestion that the basis of compensation should have altered, including a successful party's right to its costs. The claimant says that it follows that the Tribunal has the power to award costs in a claim under s.204 and has exercised this power under previous legislation which provided the same remedy.

21. I find the decision in *Midtown* more compelling, the reference to:

> 'the compensation is assessed as if the rights were compulsorily acquired'

clearly equated the overriding of rights with the loss of value caused by injurious affection resulting from the compulsory acquisition of land. No land of the claimant's has been taken in this case, so the case is not analogous to a claim for compensation for compulsory purchase to which section 7 of the 1965 Act would apply. The claimant's case is that his land has been damaged, and its value has been reduced, or to use the antique language of the compensation code and the Tribunal's Rules, it has been injuriously affected by the creation of the floodlit sports pitches on neighbouring land. To deny a claimant costs in circumstances where compensation is assessed on the same basis as injurious affection, where costs can be awarded, seems to me to be obtuse. That appears to me to equate to the situation that has arisen in this case.

Conclusion

22. It seems to me that proceedings under s.204 are proceedings for compensation for injurious affection and I therefore I agree with the claimant that the Tribunal has the jurisdiction to award costs in this particular case. In those circumstances it does not seem to me to be necessary to consider some of the more elaborate arguments presented by the claimant.

23. I observe that the effect of s.204 is to create a situation which could occur where a covenant is modified under s.84 of the Law of Property Act 1925, namely that a party's property rights are altered in favour of another party. In those circumstances the Tribunal can also determine compensation for the loss or modification of the rights. The basis of that compensation is often calculated by reference to the diminution in value of the property affected, in other words, by the same means by which injurious affection is assessed. The Rules mandate that the Tribunal has jurisdiction to award costs in cases conducted under

s.84 and it would be irrational for a costs jurisdiction to be available in those circumstances and not in another where the effect could be identical.

Mark Higgin FRICS FIRRV

19 November 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.