

A number of decisions have recently been handed down that suggest a renewed appetite to exercise the court and tribunals' discretion to modify restrictive covenants, which seemingly impose restrictions on the use of and building on areas of land, thereby allowing land to be used more effectively by landowners and developers.

## The Law

Under s.84(1) of the Law of Property Act 1925, the Upper Tribunal (Lands Chamber) has the power, on application by any person interested in the land, to discharge (partially or wholly) or modify a restriction (by covenant or otherwise) over any freehold land.

The grounds upon which the Lands Tribunal can discharge a covenant are:

- The covenant is obsolete (s.84(1)(a))
- There is an agreement to the discharge/modification between all of those with the benefit of the restriction (s.84 (1)(b))
- The restriction restricts a reasonable use of the land and confers no practical benefit of substantial value or advantage on the persons entitled to the benefit of it (or is contrary to the public interest) and the loss of the covenant can be compensated in money (s.84(1)(a)(a))
- No injury will be caused to those entitled to the benefit of the covenant by reason of its discharge or modification (s.84(1)(c))

If the required ground(s) are made out, the tribunal has the power to (1) award compensation or (2) add further provisions restricting the user of the land in view of the relaxation of the original restriction.

## *Re Ben Lynch [2016] UKUT 0488 (LC)*

In this case, a covenant was contained in a 1911 conveyance, which prevented the construction of more than one house on each plot of land. The applicant purchased the land in 2014 and, by mid-2014, had obtained planning permission to erect a two-storey detached house on the land affected by the covenant. The landowner was fully aware that the proposed development was in breach of the covenant and faced arguments from nearby property owners, who thought the proposed property would be out of character with the neighbourhood and would have an adverse effect on the amenity of the area by increasing the density.

## Upper Tribunal Decision

The Upper Tribunal held that, as there had been no significant overall changes to the character of the neighbourhood, and no other material circumstances rendered the covenant obsolete, the ground under s.84(1)(a) could not be relied upon.

However, the tribunal did find that the general principle under s.84(1)(a) was to facilitate the use of land in the public interest and this meant striking a fair balance between development needs and the protection of private contractual rights. In these circumstances, it was decided that the covenant impeded the implementation of planning permission, which was sufficiently controlled by conditions to protect the amenity of immediate neighbours and so the covenant was modified accordingly to allow the applicant's development.

## *Millgate Developments Ltd (2) Housing Solutions Limited v (1) Bartholemew Smith (2) The Alexander Devine Children's Cancer Trust [2016] UKUT 0515 (LC)*

The relevant covenant here prohibited the use of the land for building or for any purpose other than parking. A developer breached the covenant by erecting 13 affordable houses on the land. The objectors claimed that the carefully planned environment of the nearby hospice (which was being built close to the application land) would be seriously compromised by the presence of the new development. The hospice had very specific requirements due to the fact that it was intended to provide a peaceful environment and outdoor amenities for terminally ill children and their families. In this instance, the developer offered a contribution of £150,000 to the trust in return for the trustees' consent to modify the covenant. This offer was rejected.

## Upper Tribunal Decision

The Upper Tribunal held that the affordable housing did not impede the views from the hospice land, but it was acknowledged that the housing would have an adverse impact on the setting of the hospice due to the scale and proximity of the housing. It was considered that, as the cost of planting a sufficient screen to counteract overlooking and loss of privacy was estimated at between £37,440 and £70,000, this could be regarded as being a substantial value as per s.84(1)(a)(a). The tribunal then considered the public interest limb of s.84(1)(a)(a) and placed importance on the fact that planning permission had been obtained for an affordable housing development aimed at those who had been waiting for such accommodation for considerable time.

The tribunal decided that this was sufficiently important and immediate to exercise its discretion to override the objectors' private rights. Compensation of £150,000 was awarded to the trust.

### ***Stafford Flowers v Linstone Chine Management Company Ltd [2017] EWCA Civ 202***

There was a covenant over a property that restricted the use to a holiday letting for certain periods of the year. The owners had been in occupation continuously in breach of the covenant for such a significant amount of time they had obtained a Certificate of Existing Lawful Use.

#### **Court of Appeal Decision**

On appeal, it was decided that the covenant was not to be modified or discharged as the benefit to being able to enforce the covenant was to protect the character of the site. The Court of Appeal held that removing or altering would have opened the door to a multitude of claims from neighbours seeking to amend their own restrictive covenants and would have been the "thin end of the wedge". Over time, this would lead to a significant change in the character of the development, which was held to be unacceptable.

This case demonstrates that the fact that a restrictive covenant has not been complied with for a considerable time is not sufficient to succeed in an application to modify or discharge the covenant. It also shows that obtaining a certificate of lawful use for planning purposes will not alone be sufficient to modify a restrictive covenant.

### ***Facts of James Hall and Company (Property) Ltd v Maughan and others, Re the Aclet (Restrictive Covenants) [2017] UKUT 240***

This case involved a covenant over the property which permitted the use as a hotel and pub. The Upper Tribunal was asked to consider an application pursuant to Section 84(1)(a) to discharge this covenant in order to change the use to a shop. The objections were principally based on the fact that the existing pub in question was the heart of the community and closing it would have an adverse impact on the residents.

#### **Upper Tribunal Decision**

The tribunal stated there was a distinction between the circumstances where planning permission had been granted for a change of use and where the user is able to change the use under general permitted development rights. In this case, planning permission from the planning authority was not required to change the use from a hotel and pub to a shop. As a result, the tribunal granted the application to modify the covenant to allow use as a shop rather than discharge the covenant completely, as the use was held to be reasonable, in light of the general permitted development rights. The tribunal also held that it is not possible to rely on a negative covenant to achieve a positive result. If the pub ceased to trade, it would not breach the restrictive covenant and, therefore, the benefit claimed by the objectors was not a consequence of the covenant.

### ***Pauline Anne Hennessey v Gary Mark Kent [2017] UKUT 243 (LC)***

The applicant here obtained planning permission in 2015 for a replacement dwelling and two further detached houses, as her previous house had been largely damaged by a fire. The land had a restrictive covenant which prohibited the erection of more than a single dwelling house on the land and a requirement to obtain the prior approval of the vendors to the plans of any new house. The applicant sought to rely on s.84(1)(a), asserting that the restrictive covenant would impede reasonable use of the land for private purposes. The owner of a nearby property that had the benefit of the nearby restrictive covenant opposed the application on the basis that the covenant provided benefits of substantial value such as the view and privacy.

#### **Upper Tribunal Decision**

The tribunal held that the proposed use of the applicant's land was reasonable and the restriction impeded that use. The tribunal also held that the benefits secured by the restriction, such as the prevention of overlooking and noise, were not of substantial value or advantage to the nearby landowners and that money would provide adequate compensation in this respect. Accordingly, the planning permission was implemented, subject to the nearby landowner receiving compensation for 5% of the value of his property.

### ***Barter Re Ivy House [2017] UKUT 451 (LC)***

In this case, the applicants purchased a property known as Ivy House with half an acre of grounds from Somerset County Council. When marketed, Ivy House was described as likely to "be of interest to residential and commercial developers". However, the transfer of the property included a covenant "not to build any additional building for use as residential accommodation" on the land comprised in the transfer. Following completion the applicants applied for and obtained planning permission to divide Ivy House into flats and to erect a new building for 13 two bedroom flats. Once the applicants obtained planning permission, the Council approached the applicants offering the release of the covenant in return for a share of the development value, however, the parties failed to reach an agreement. The applicants applied to the Tribunal for the covenant to be discharged under section 84(1) relying on grounds (a) and (c).

#### **Upper Tribunal Decision**

In reviewing the applicants' case, the Upper Tribunal agreed that the proposed use of the land was reasonable, as planning permission would not have been granted otherwise. The tribunal did agree that the covenant did not secure any "practical benefit" by protecting any view, amenity, privacy or other proprietary interest of the council, but was purely imposed for financial reasons as a "money making exercise". Accordingly, the tribunal accepted that the components of ground s.84(1)(a) were satisfied. The tribunal also held that loss of a bargaining position was not injury capable of being taken into consideration and therefore the tribunal had discretion under both s.84(1)(a) and s.84(1)(c).

In exercising this discretion, the tribunal reviewed the shortness of time since the imposition of the covenant and the closeness of the applicant's connection to the covenantor. It also examined the negotiation of the price of the property and considered the council would have required a greater sum if the covenant was not included in the transfer. As the covenant only restricted the ability to build on the land, the tribunal was satisfied the price paid reflected the open market value of Ivy House and its grounds. As no relevant evidence was provided in relation to a sum to be negotiated, the tribunal was unable to modify the covenant on terms to make a payment and accordingly dismissed the application.

## Comments

These decisions provide a useful starting point for a landowner who may otherwise be restricted in using its land by a covenant. Whilst the recent cases offer an opportunity for landowners and developers to realise value which would have otherwise been precluded, it must be remembered that a restrictive covenant will not be modified or discharged in every case solely for the purpose of allowing a development. It is also important to note the importance of obtaining planning permission, with appropriate conditions to protect neighbouring landowners and occupiers, to support any such application to the Tribunal (though this is not conclusive).

If you would like to discuss any of these issues further, please do not hesitate to contact our Real Estate Litigation team.

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