Wilberforce
Property Insight

Green, brown and grey belts: modifying restrictive covenants, and the Upper Tribunal's Discretion

Article by Martin Hutchings KC, 20th May 2024

Introduction

Why s.84(1) powers of the Upper Tribunal matter.

1. The powers of the UT are important to developers because they are often key to unlocking developments of land burdened by restrictive covenants. Restrictive covenants are frequently seized on by objectors to the development who seek to use the covenants to prevent it. Invariably this represents 'round two' of a fight which began at the planning stage, when the developer has successfully faced down the 'nimbys' and has, despite their opposition, managed to secure a valuable planning permission.

2. Establishing one or other of the various grounds set out in s.84(1) of the Law of Property Act 1925 may represent the only practical way to secure the development. The chances of buying off the objectors with an acceptable cash offer are usually slim, and by the time the Upper Tribunal application is actually made, if the cash avenue has already been explored unsuccessfully, the chances of settlement are, invariably, next to nil.

3. Why is this a hot topic?

4. It is clear that, even if we do not get a change of government in the next few months, the Conservative Government is coming under increasing pressure (often from the right of their party) to liberalise planning laws to allow more house building, particularly on the green belt. And the likely next government (Labour) will almost certainly make significant changes, particularly as they will have few seats (or supporters) to lose in the affluent 'blue wall' that the green belt often consists of.

5. It is likely therefore that the need to show (in effect) 'very exceptional circumstances' in planning terms, in order to be allowed to build on the green belt, will change over the next few years, or even possibly be quietly abandoned as a matter of planning law. Furthermore, Labour are talking about the 'grey belt' (see their April 2024 press announcement). They refer to this as "*neglected areas such as poor quality wastelands and disused car parks that are in the green belt*". Labour would create a planning presumption hierarchy, consisting of brownfield sites first, grey belt second and (one supposes) green belt third, with a target of 50% affordable housing on sites.

6. Now, it is the case that in Greater London and the environs for example, which of course is a key green belt area, the land - whether brown, grey or green - is often burdened with restrictive covenants. The reason for this is that, when the outer suburbs started to be developed heavily in the late 19th and early 20th centuries, there was no national planning framework. The first national planning legislation was the Town and Country Planning Act 1947. So, certainly prior to that date and, indeed, often for a long time after, those with estates selling off land perceived that they could only protect the land they were retaining by imposing covenants on the sold land, for the benefit of their retained land. There was no national planning legislation that would provide the estate seller with general protection. When the land was thereafter sub-sold, or other parts of the estate were sold off, new restrictive covenants would also be placed on that land, for the same reasons.

7. So, this sort of very valuable land, often on the edges of, or within easy train reach of, major conurbations has, now, often, a web of fairly old restrictive covenants that bind it.

8. Once the objectors have lost the planning battle, they will often look to the 'hidden treasure' of a restrictive covenant, which binds the development land, as the way to thwart the developer's plans. Not all will usually have the benefit of the covenants, but often, some will.

9. So whether the land in future is classed as 'brown', 'grey' or 'green' – the UT's powers of modification are likely to be called on increasingly, in forthcoming years.

10. What I want to examine is the UT's **discretion** to refuse or modify restrictive covenants by reference to recent decisions. As we all now know, even when a statutory ground under s.84(1) has been established (i.e. one of the jurisdictional grounds) the UT still retains a discretion to refuse modification.

Tribunal Decisions – precedent value?

11. A key initial point to recall about UT decisions, however, is that it is often difficult to discern any particular pattern or trend in the UT's decision making process. This is not only because technically, UT decisions are not binding – UT judges are not bound to

follow their brother/sister judges' rulings - but also because each decision tends in any event, to turn on its own specific facts and is easily distinguishable, for that reason, from any earlier decisions.

12. Having said that, the UT does aim for consistent decision making, including consistency in the approach taken to questions of jurisdiction as well as to the exercise of the UT's discretion.

13. This attempt at consistency can be seen clearly in the way that the UT has since responded to the decision of the Supreme Court ('SC') in ***Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*** [2020] 1 WLR 4783 – the first s.84(1) case to reach our highest courts since the introduction of the section in 1925.

14. That case emphasised the part of the wording of s.84(1) which provides that the Tribunal '*...shall have power...*' to modify/discharge, but therefore, is not *obliged* to exercise its power.

15. As mentioned, any applicant must thus first satisfy at least one of the grounds under s.84(1), the 'jurisdictional' stage, before the UT must then, assuming that the jurisdictional stage is passed, decide whether to exercise its discretion to modify (or discharge). On the other hand, the SC in ***Devine*** also accepted that the discretion to refuse an application should be used sparingly:

    '52. .... *I also accept that the Upper Tribunal in the Trustees of the Green Masjid case was correct to say, at paragraph 129, that once a jurisdictional ground had been established, the discretion to refuse the application should be "cautiously exercised*". (per Lord Burrows).

16. Nevertheless, in ***Devine*** the SC made clear in that case that the fact that the development had been rushed on by the developer - Millgate Developments Ltd, the predecessor in title to Housing Solutions Ltd - in order, apparently, to present the UT with a *fait accompli*, was one of three factors which was key to the exercise of the discretion against the appellant by the SC, in ***Devine***. But, as is also apparent, this does not represent a different approach being suggested by the SC, but possibly no more than a different emphasis. Prior to ***Devine***, UT decisions frequently failed to distinguish between the two distinct stages of the application process. Yet it is of note that in the last three years or so since ***Devine***, UT decisions now, always do so.

17. Yet having said that there is now a different emphasis, it is also true to say that we have moved well beyond the position where, once the UT was satisfied that one of the grounds in s.84(1) was satisfied, modification would follow almost as a matter of course, such as in ***Re Farmiloes's and Smith's Application*** [1984] 48 P&CR 317 in which the President indicated that once a ground was made out "*the Tribunal is rarely justified in refusing to exercise its discretion in favour of the applicant*".

18. Nevertheless, if the SC was not (as I believe) signalling that there should be a distinct change of direction by the UT in their approach to the discretionary stage, some recent decisions of the UT seem perhaps to suggest that ***Devine*** *is* being interpreted differently by at least some UT judges. Thus in ***Fosse Urban Projects Ltd v Whyte and O'Raw*** [2023] UKUT 286 (LC), to which I return below, the UT stated:

'81. *What is significant about…* [***Devine***] *is the strength of the Supreme Court's disapproval of the conduct of the developer, in deliberately committing a breach of the restrictive covenant with a view to making a profit from so doing, conduct which Lord Burrows* [in ***Devine***] *described as "cynical" '.*

Discretionary Considerations: Recent Decisions.

19. So, how have recent UT cases played out, given the SC's apparent emphasis in ***Devine*** on the need to consider discretion entirely separately from jurisdiction and only once the jurisdictional hurdle has been overcome?

20. It is necessary to look at some of those decisions.

21. In the first relevant decision this year: ***Rogers v Dinshaw*** [2024] UKUT 00001 (LC) where two modest domestic extensions had been built, so the application was being made retrospectively; the applicants (who were not professional developers) were found to have been unaware of the restrictions when they built, and this was key to the UT's finding that despite the breach of covenant having occurred, modification should nevertheless be ordered. The UT concluded that:

> '50. ….. *In my judgment this is not a situation where an applicant, with profit in mind, cynically breached a covenant in the expectation that no objections would arise or that those with the benefit could be ameliorated with a financial inducement.*'

22. This paragraph perhaps gives a clue as to the key factor that the UT will likely take into account in determining whether to exercise their discretion in favour of professional developers (who will of course always have profit in mind).

23. The question asked is: Was the breach of covenant 'cynical'? A test derived directly from the ***Devine*** case, in which the SC made clear that this would weigh heavily against the developer.

24. What recent cases like ***Rogers*** also show is the sharp(ish) divide that the UT draws between the behaviour of the non-professional 'developer' and the professional – holding the latter to a higher standard as regards its behaviour. So for example

Hodgson v Cook [2023] UKUT 41 (LC) illustrates the point. In that case, a beauty therapist was using part of her home in breach of a 'no business use' covenant and she continued to do so, right up to the point at which her application for modification was heard. Yet this fact would not have prevented the UT modifying. In ***Hodgson*** the judge, whilst declining to modify for other reasons relating to the jurisdictional test, said:

'66. ….*But this case involves no opportunism or secrecy, and the applicants are private individuals making use of their own home to make a living, not large scale property developers intent on substantial profit.'*

25. The UT here give us some clue as to what it thinks 'cynical' means. If a developer is opportunistic or carries out its development secretly it will weigh against it. But then again, what do these terms even mean? I suppose 'opportunistic' may refer to developers taking a calculated risk, in the knowledge that the covenant exists, hoping that objectors with the benefit of the covenant will not have the wherewithal to oppose the application. 'Secrecy' is perhaps more difficult to fathom. If a breach is capable of being carried out in secrecy, this might suggest that its effect has little adverse amenity impact on the objectors - which should assist the developer in jumping the jurisdictional hurdle (at least under the limited benefit limb of ground (aa)) given the limited practical injury caused by the development. Perhaps instead what the judge here meant by 'secrecy' is: obfuscating or stone walling the objectors and/or, refusing to share information regarding the development, following reasonable requests for it, made by the objectors prior to the UT application being made.

26. In another case relating to illegal user, which was decided last year after the ***Hodgson*** case: ***Kay v Cunningham*** [2023] UKUT 251 (LC), the UT allowed the application, permitting bed and breakfast use of a residential dwelling, which use had been restrained by injunction before the hearing of the application for modification. The UT stated:

'101. …*this is a situation that has more in common with Hodgson than Devine. His* [the applicant's] *conduct was, in my view neither egregious nor unconscionable and, because the application concerns the future use of the house, rather than the physical development of the site, the Tribunal is not being presented with a fait accompli.'*.

27. The ***Kay*** case therefore illustrates again the distinction between the 'non-professional' developer as compared to the professional. A finding of 'egregious' or 'unconscionable' behaviour is much more likely in the event that the development will engender substantial profit for the applicant and, where the applicant ought to have known better.

28. Clearly in circumstances where there is an entirely innocent breach, where the developer had no idea there was an enforceable covenant burdening the land; or (more

probably) where the developer had been given clear legal advice that the covenant was unenforceable which turns out to be wrong, or failed to take any legal advice before beginning its development, it will be difficult to characterise such behaviour as 'cynical'. Ignorance is bliss. At least, that must be the case if the developer, on learning of the breach and the objections, ceases to build and seeks modification at the earliest possible stage. In those circumstances, the developer is in little danger at the discretionary stage. But of course, as we all know, it is rarely that straightforward for the developer who has committed to a build programme and has contracts in place with builders/contractors who are working to a specific timetable.

29. And again to reiterate, there are at least some signs that the UT *is* taking a somewhat stricter approach to the exercise of the discretion, despite this, in my view, not being the SC's intention in ***Devine***.

30. I have already mentioned the case of ***Fosse Urban Projects Ltd v Whyte and O'Raw*** [2023] above, but it is possibly the most important of the recent Tribunal decisions.

31. This is because as far as I am aware it is one of the rare, possibly the only, reported case in which the UT has found that the jurisdictional hurdle under the 'limited benefit' limb of ground (aa) of s.84(1) was satisfied, and yet the UT still rejected the application because of the failure of the applicant to pass the discretionary part of the test. Remember of course that the limited benefit limb of s.84(1)(aa) is by far the most important ground for developers seeking modification. I would estimate that 80% of successful applications are made under the limited benefit limb of ground (aa) and they very often fail on any of the alternative grounds. In essence to clear the 'limited benefit' jurisdictional hurdle of ground (aa), it is necessary to show that the development represents a reasonable use of the burdened land, and critically, that any benefit secured by the covenant is not one of substantial value or advantage to the covenant beneficiary.

32. In ***Fosse*** '*well resourced*' developers as they were described, had built an additional house on a plot where the covenant restricted density to one house per plot. They had begun the development before bringing the application and continued it thereafter, so that by the time of the hearing the house was completed and occupied. Jurisdiction under the limited benefit limb of ground (aa) as well as ground (a) (obsoleteness) was established. What was clearly very significant was that at the Tribunal hearing, the applicant developer had not sought to explain its actions in breaching the covenant before making its application for modification. The fact of there being no witness statement from the developer was said to have: '*hindered an examination of [its] motives*' in breaching the covenant. Furthermore the UT noted that no evidence was produced to show that the applicant had any doubts as to the covenant's enforceability at any relevant stage. This led the UT to conclude as follows:

'80. *I draw the inference that it [the developer/applicant] was aware of the restriction and that it was enforceable, and decided to take its chance that its neighbours would not seek an injunction or resist an application to discharge made after development had commenced. The first part of that gamble was successful…Whether the second part succeeds depends on the willingness of this Tribunal to overlook what I can only conclude was a deliberate breach of covenant.'*

33. So the lack of evidence from the applicant led to an adverse inference being drawn – a principle that will be familiar to all litigators. The UT added:

'83. *The applicant has failed to adhere to an obvious process to discharge or modify a restrictive covenant. It could have adduced evidence about why it failed to take the proper course but chose not to'.*

34. But one surely has to question whether the UT's approach in ***Fosse*** goes too far - particularly because ground (a) as well as (aa) was found to be satisfied: the covenant was therefore found to be obsolete. The decision smacks of punishing a developer even though the covenant served no purpose.

35. Remember too, that ***Devine*** was a 'public interest' limb case under s.84(1)(aa). In ***Devine***, the children's hospice trust proved that the covenant <u>did</u> secure practical benefits of substantial value or advantage to the objectors. So, the applicant (Millgate Developments Ltd) at first instance had only succeeded on the alternative, public interest limb having failed to satisfy the limited benefit limb. The permanent interference that would be caused to the residents of the children's hospice and their families as a result of the existence and occupation of the social housing was found to be substantial.

36. One would surely think that discretionary factors should play a somewhat different role in cases where the developer only satisfies the Tribunal that it is in the public interest to modify – particularly in circumstances where it is proved that the development <u>*will*</u> interfere, in a substantial way, with the objectors' amenities that are protected by the covenant, such that the limited benefit hurdle in (aa) is not cleared. It is easy to see why in public interest cases, the behaviour of the applicant in breaching the covenant is taken more seriously.

37. One must further question whether it is right (as perhaps implied in ***Fosse***) that all that is necessary to prove a cynical breach of covenant is the fact that it is 'deliberate'. There do not seem to have been any other 'exceptional' factors referred to in ***Fosse***, such as would suggest that the developer had behaved 'unconscionably' or 'cynically' – whatever these terms might mean - although no doubt continuing to build, as Fosse

did, even after the application had been made, was undoubtedly very unhelpful to Fosse's case.

38. Perhaps a more balanced approach was exhibited by the Tribunal in what may be described as ***Devine*** round two, although the facts were admittedly very different from those in ***Fosse***.

    So, what happened in ***Devine*** was that there were in fact two objectors: the children's hospice owners (a charitable trust) and a farmer, Mr Barty Smith who owned land which was further away from the development and therefore less affected by it. Furthermore, Mr Smith's land was agricultural with no apparent immediate prospect of a change of use. Mr Smith's objections were not upheld by the Tribunal at first instance – the covenant did not secure, as regards the development, any benefits of substantial value or advantage, so far as concerned Mr Smith's land. There was no appeal against this part of the decision and Mr Smith took no formal part in the appeal process, in which of course the cancer trust were successful.

39. After the Supreme Court decision in the hospice trust's favour, inevitably a deal was struck between the developer and the hospice – which involved no doubt a substantial payment to prevent the prospect of the hospice trust securing a permanent injunction requiring the offending social housing to be pulled down or, restricting its use. But naturally the developer did not do a deal with Mr Smith. So, post the Supreme Court decision, Mr Smith seemingly threatened his own, separate claim for injunctive relief, which led the developer (through Housing Solutions Ltd, the social housing provider that had acquired the development from Millgate) to bring a new modification claim, against Mr Smith alone.

40. In ***Housing Solutions v Smith*** [2023] UKUT 25 (LC) the Tribunal, perhaps unsurprisingly, granted the application for modification. No doubt realising the weakness of his case, given the result of his objections in the earlier application, Mr Smith sought to argue that Millgate's cynical behaviour as developer, as described by the SC in its decision in ***Devine*** (in respect of which, Housing Solutions admitted it stood in the shoes of Millgate) should disbar Housing Solutions from securing modification, irrespective of the strength of its case at the jurisdictional stage and the weakness of Mr Smith's corresponding position.

41. The Tribunal was having none of this, however. Here is what the judge said:

    '71. *The Supreme Court was very careful to make it clear..... that there is no rule that discharge, or modification, will not be available where there has been a cynical breach;...*
    75. *The only reason not to modify the covenants would therefore be to continue to punish the cynical breach, in circumstances where Millgate and Housing Solutions have*

already been through years of litigation and where Millgate has paid a substantial sum to the Hospice Trust by way of compensation….

78. *It is not for the Tribunal to pursue a mission of punishment where the modification of the covenants will not injure [the objector], where [the developer] has already paid a heavy price for its misconduct, and where the cynical breach of covenant has made no difference to the fact of the Tribunal's jurisdiction'*.

42. So there are clearly limits to the extent to which behavioural factors will influence the UT. It will be astute to detect circumstances where an objector could itself be said to be indulging in its own cynical behaviour, motivated by a desire to ransom a developer (as would implicitly appear to have been the view taken of Mr Smith's challenge).

43. Limits are also suggested by what I think is the most recent UT case to consider the discretion issue in any detail, the decision having been handed down in mid-March of this year.

44. ***Patel v Spender*** [2024] UKUT 62 (LC) was one where several owners of docklands dwellings including a Mr Patel, sought to modify a qualified covenant restricting the right to make external alterations. The covenants were part of a building scheme, established in the late 1990s. The application was made to allow development of the roof spaces of 11 houses. It failed at the jurisdictional stage under s.84(1)(aa) on 'thin end of wedge' and aesthetic grounds, so its decision on the discretionary stage was strictly 'obiter'.

45. But the UT said of its discretion:

> '*We do not therefore need to consider the evidence adduced… to paint Mr Patel in a bad light and thereby persuade us not to exercise our discretion in favour…… Had we had a discretion, that evidence would not have attained its objective. In Ridley v Taylor [1965] 1 WLR 611…Russell LJ said: "I do not think the personality of the applicant, or his past behaviour is relevant to the exercise of discretion. I refer again to the fact that tomorrow an assign may make the same application" '*.

46. The reference to ***Ridley v Taylor*** should not however be seen as contradicting the approach taken by the UT in the post-***Devine*** cases referred to above. What the Court of Appeal was there saying was that general 'bad behaviour' by the applicant should not affect the exercise of the discretion, the Court was not there addressing the situation where a deliberate or cynical breach of covenant occurs in relation to the very development in respect of which the UT's sanction is sought.

Lessons for the Developer

47. So what are the lessons to draw from this somewhat confusing, possibly even contradictory, picture that emerges from the post ***Devine*** decisions?

48. The following points are relevant in my view.

49. First, sight should not be lost of the fact that there needs to be a compelling reason NOT to exercise the discretion to modify, if jurisdiction to do so is established. Furthermore, s.84(9) of the LPA 1925 specifically contemplates that an application might be made after High Court injunction proceedings have been issued, because the sub-section expressly provides for the Court to stay proceedings whilst a Tribunal application is made.

50. Secondly, the more 'professional' the developer is, the more it can be expected to be judged by a higher standard, as regards its conduct.

51. Thirdly, and critically, if, once objection is raised and particularly after the application for modification has been made, the developer continues to carry out works, there would have usually to be a good reason offered in evidence as to why the developer has behaved in this way (possibly substantial penalties payable to the builder under the building contract would provide *some* reason for continuing with the development works, and certainly carrying out works to make the development itself physically safe – even after protests - would surely also provide a good reason).

52. Fourthly, it follows therefore that if the development ceases once the application is made or, better still, once objection is raised, this will improve the developer's position. So, if the developer is able to write into its contract with the builders, clauses which provide for work cessation without reimbursement of loss being payable to the builder, all the better. (Of course ideally the development will not have started at all before the application is made).

53. Fifthly, it is dangerous not to address in evidence the question of why development work has occurred before modification has been sought. Some, perhaps even partial, justification for the position that the developer finds itself in, can usually be found and should be offered up.

54. Sixthly, where the application is brought under s.84(1)(aa), the developer ought to make sure that it has comprehensive evidence to address the other 'discretionary' matters that the Tribunal must take account of, in particular (under s.84(1B)): '*the development* [i.e. local] *plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas…*'.

55. Seventhly, it obviously pays to be open with objectors or potential objectors before any development work is commenced. So for example, if you need to implement a planning permission to preserve it, you should tell the objectors what you are doing.

56. But of course, as regards this latter point the developer is often presented with a dilemma if it holds a title insurance policy that may cover it for losses in the event of successful claims by covenant beneficiaries. This is because the policy will often not permit the policy holder to make any contact with, still less negotiate with, objectors, without the insurers express consent – which in often difficult to obtain.

57. So subject to the above insurance point, making open offers to objectors in relation to paying damages for the breach up to the point of modification, might ameliorate the position (provided it is not itself seen as a cynical ploy).

58. That final thought (and eighth point) arises from the decision in the final recent case that I would highlight: ***Howard v Surana*** [2023] UKUT 00248 (LC). This concerned two domestic properties which were being built by non-professional developers, and where the objectors had not sought injunctive relief. By the time of the application the houses had been built. Nevertheless, in response to the suggestion that the UT should disallow the application as a matter of discretion, the UT stated:

> *'73. But the Tribunal's jurisdiction under s.84 is about the future, and not the past. Modification will not rewrite history and it will not absolve the applicants from responsibility for their previous breaches of the covenants. Nor will it deprive beneficiaries of the covenants of their rights to seek damages for the breaches. The Tribunal would not be approving or rewarding cynical conduct by modifying the restrictions to regularise the position for the future because the right to seek a financial remedy for the past breach would remain. In those circumstances the appropriate exercise of the tribunal's discretion is to allow modification'.*

59. This is somewhat odd, but it perhaps provides a chink of light for developers who bring applications after having started or completed their development.

60. Of course it is true that a damages claim could in that case, still be brought for the prior breach (prior to modification being ordered) but:

> (i) will objectors be likely to do so, bearing in mind the cost of proceedings?
> and, more to the point
> (ii) what is the loss to the objector in this situation?

Very arguably loss would be limited, not least because negotiating damages would not be available – because no injunction could be granted after modification; and, as

regards the usual alternative measure: diminution in value, the objectors would generally already have been compensated in full anyway, by means of the Tribunal's compensation award. All that has been 'suffered' therefore is that the development has taken place a year or so before it could have been carried out legally. In most circumstances this will not give rise to any, or any significant loss.

61. Nevertheless, ***Howard*** perhaps provides some food for thought, being a decision of a very experienced Tribunal judge.

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