Weighing up all the practical scenarios, how do you gain an edge for your developer clients in relation to restrictive covenants and s.84, following the spate of recent cases?

1. S.84 of the LPA 1925 will be familiar to you. I am going today to talk about both limbs of the section, the interrelation between the two and, how developers can best take advantage of its provisions, particularly in light of recent authority and tribunal cases. When I refer to both limbs, I am referring to s.84(1) and s.84(2). As far as concerns the former, I am going to concentrate on s.84(1)(aa).

2. Practitioners will be well aware of the importance of s.84(1)(aa) and the Upper Tribunal's jurisdiction, because I suspect scores of cases are issued every year by developers seeking modification or discharge of restrictive covenants to allow a particular planning permission to be built out on burdened land, relying on what is by far the most successful of the separate grounds for modification in s.84(1). Ground (aa)' - (**s.84(1)(aa)**) relevantly provides the UT with a power, in somewhat convoluted drafting, to modify or discharge restrictive covenants where:

   '*(aa) ...in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user*

   ...

   (1A) Subsection (1)(aa)...authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

   (a) does not secure to the persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; [**the limited benefit ground**] *or*

   (b) is contrary to the public interest; [**the public interest ground**]

   and that money will be an adequate compensation for the loss or disadvantage (if any).....'

3. More on s.84(1)(aa) a bit later. I am going to start by considering the benefits for developers of using s.84(2) to secure declarations from the Court as to the non-applicability of restrictive covenants, the benefits of which I feel are sometimes overlooked as is the

interrelation between going to Court for a declaration and seeking modification. (And please note I will use the term 'modification' to cover both modification and discharge. As you will all know, most developers are really only interested in modification rather than discharge in order to be allowed to develop out a particular planning permission. Discharge of a covenant, generally, sets a higher threshold (see by way of example the recent UT case of: ***Smith v Goodwin*** [2021] UKUT 0145 (LC) where discharge failed but modification succeeded).

4. Back to s.84(2), which provides:

The court shall have power on the application of <u>any person interested</u>-

(a) To declare whether or not in any particular case any freehold land is, <u>or would in any given event be</u>, affected by a restriction imposed by any instrument; or

(b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is, or <u>would in any given event be</u>, enforceable and if so by whom.

5. Three important, favourable, points for developers to note about the wording of s.84(2):

(1) S.84(5) make clear that orders (whether made by the court under 84(2), or the UT, under 84(1)), are <u>binding in rem</u> – meaning binding on the land itself and all persons now or in future: '*whether such persons are parties to the proceedings or have been served with notice or not'* . The benefits for the developer in clearing the title of covenants and not just preventing claims by present objectors to the development is obvious, particularly where, as is commonly the case, a developer is unclear as to which land actually benefits from the covenant. An in rem declaration prevents objectors from arguing that they were not parties to or aware of the court proceedings.

(2) To bring a claim for a declaration the applicant only has to be a 'person interested', therefore it is open to a developer who has (e.g.) only an option to purchase the development land or, a conditional contract for purchase. So particularly if a developer has secured or is about to secure a planning permission but has yet to exercise an option to purchase, it can establish definitively whether a restriction bites, safe in the knowledge that if it decides in future to sell the land (or transfer the benefit of the

option) the value of the court's declaration in its favour is attached to development the land for all time as well binding any benefited land.

(3) Perhaps most importantly, the normal rule is that courts will invariably refuse to make hypothetical declarations about hypothetical situations. But s.84(2) provides for it to do so in relation to restrictive covenants (note the repeated use in the section of the words '*or would in any given place be*'). So a developer can put before the court a number of potential schemes of development where a covenant potentially affects some proposed developments, but not all, and have a binding court determination as to which particular development may be legally viable (in the sense of not breaching the covenant) and which are not. This is particularly relevant where the extent or meaning of a restriction is in doubt.

6. The reason why it has become particularly important for developers to consider making early applications under s.84(2) to the Court has become particularly apparent since the Supreme Court case of ***Alexander Devine Children's Cancer Trust Ltd v Housing Solutions Ltd*** [2020] which was concerned with the public interest ground of d.84(1)(aa).

7. Those who heard my talk for White Paper last year will know that the Supreme Court implicitly emphasised in ***Devine*** the critical importance, for developers, of seeking to engage with covenant beneficiaries before beginning to build. Because as Lord Burrows pointed out in ***Devine***, whilst the Court of Appeal was *wrong* to hold that a developer who constructed a development in breach of covenant ought **as a matter of principle** to have a subsequent application for modification refused (at least under the public interest ground of s,84(1)(aa)) when the UT's discretion came to be exercised, he nevertheless said he was 'sorely tempted' to agree with the CA's (over) prescriptive approach where a cynical breach of covenant was involved. So remember that although the SC did not agree with CA in ***Devine*** when CA said that there is a principle that any applicant under ground (aa) at least in so far as it was relying on the public interest limb and breaching the covenant in a cynical manner should always he refused modification as a matter of discretion, the SC gave no encouragement at all to developers who think they might get away with such behaviour. So, conduct generally (whichever modification ground is relied on) is still very much in play at the UT hearing. But the extent to which 'bad' conduct could be decisive - even where the other factors in favour of exercise of the discretion to allow the development all

point to modification being allowed - is very arguably, put much more to the fore than it once was.

8. The presently unanswered, and bigger, question not resolved by ***Devine***, is the extent to which generally, a cynical breach of covenant by an applicant developer will lead the UT, as a matter of discretion, to refuse an application brought under the limited benefit limb of ground of s.84(1)(aa)? Remembering of course that the vast majority of cases are brought, and succeed, if at all, under this limb.

9. Certainly, the Supreme Court gave no comfort to the developer seeking to make a retrospective application after it has breached the covenant. There are several cases (which were cited to the UT and CA as well as in the Supreme Court) where the UT has said that it will not normally exercise its discretion even in a limited benefit case, where the applicant has acted in cynical breach of covenant, particularly where it is seen as attempting to present the UT with a fait accompli – see e.g. ***George Wimpey Ltd v Gloucester Housing Association Ltd*** [2011].

10. What this means therefore is that developers are well advised to secure a definitive ruling about enforceability before proceeding with their development. Pre ***Devine***, it used to be thought that developers who wanted to chance it could (i) begin developing (ii) see if objectors threatened to stop them by issuing court proceedings for a permanent injunction (iii) if they did, get a stay of the proceedings and proceed to the UT to seek modification. Developers were encouraged to take this course because s.84(9) says that if an injunction or damages is sought against the developer, the developer can stay the proceedings and proceed to seek modification – therefore buying off the risk of an injunction. This is a course of action that in light of ***Devine***, is perhaps generally, questionable. Such a developer is at risk, even if it has a very good case under the limited benefit limb and/or the public interest limb, of having its application for modification refused, simply because of its conduct in beginning to build first and asking questions later.

11. The decision in Devine, therefore brings to the fore the importance of s.84(2): that is, determining one's rights to build or not, before commencing construction and taking one's chances in the tribunal – with the danger of failing, because the breach is deemed 'cynical'.

12. Going to Court before building out and thereafter seeking modification, is precisely the course that was taken successfully by the developer in one of the most significant recent restrictive covenant case of the last at least 10 years: ***Bath Rugby v Greenwood and others*** [2021]. The background to that case is that Bath Rugby Club wishes to develop its ground, which it leases from the freeholder (a charitable trust which owns a large area of land part of which the club occupy under a long lease. The Club brought a s.84(2) application in the High Court to determine whether there were any beneficiaries of the covenant capable of enforcing it. They did so before beginning to develop indeed, even before making a planning application. They were unsuccessful at first instance, but the Court of Appeal, in December 2021 found for them. So the Club made its s.84(2) application even before securing planning permission for their development, and a point made by the Club (with some force) was that the objectors (i.e. respondents to the appeal) although not having the benefit of the covenants in a 1922 conveyance, could of course fight their 'public law' battle as and when the Club's planning application came to be considered in future by the local authority. In a sense, the case is a model use of the s.84(2) Court jurisdiction. Because the application was made well before the development plans had even been finalised the point could therefore be made with force that objections regarding noise, overlooking and construction disruption etc would all be considered as part of the planning process and should play no part in the strict question of law raised by the Claim, as to whether the covenant was annexed to any of the respondents' land.

13. Another important point about s.84(2) that the ***Bath Rugby*** case demonstrates is that others, with the potential, in future, to develop land which is the subject of a restrictive covenant can also muscle in. Thus in that case the freeholder trust joined the appeal on the basis that, if the 'nuisance and annoyance' covenant that was the subject of the claim, was enforceable it could also impact the trust's charitable activities on (or possible future development of) other parts of the affected land which were not leased to the rugby club. This illustrates that a person interested under s.84(2) need not, itself, have to have its own development plans (theoretical or otherwise) before successfully seeking declarations under s.84(2).

14. Now, I am conscious also that, whilst a lot of what this talk is about is practical advice, the substantive legal issues determined in the ***Bath Rugby*** case, are also worth a mention, for their practical implications for developers. I have described it above as perhaps the most

important recent restrictive covenant case with good reason, I believe. The ***Bath Rugby*** case is about whether a covenant was annexed to identified, benefited land. In ***Bath Rugby***, a 1922 covenant prevented use of the recreation ground in any way which might cause a nuisance disturbance or annoyance *'or otherwise prejudicially affect the adjoining premises or the neighbourhood'*. This is an entirely standard restriction but the difficulty for the objectors was that there were no words of annexation in the operative part of the covenant. It is a requirement of annexation of restrictive covenants to benefited land that the land must be identified in the conveyance itself or, be capable of identification. Familiar formulae of words, of which conveyancers in 1922 would have been well aware, such as X covenants 'for the benefit of the x estate' or for 'the benefit of the vendor's retained land' etc were not used. The judge below (who was successfully appealed by Bath Rugby Club and the freeholder) had interpreted the words of the particular restriction: *'adjoining premises or the neighbourhood'* as sufficient to identify the benefited land, by reference to an earlier provision in the conveyance which reserved to the vendor a drainage easement in favour of the vendor's land '*adjoining or near to*..' the land sold. The Judge wrongly, fell into the temptation of eliding the words of the drainage easement and the restriction as amounting to the same thing. What ***Bath Rugby*** tells us as regards the identification of benefited land for the purposes of annexation therefore is that 'neighbourhood' is not a conveyancing term and is insufficiently precise to identify benefited land.

15. Why is this relevant to developers more generally? It acts as a very clear reminder that close attention must be paid to the precise, operative, words used in the conveyance or transfer to determine whether the key annexation test: of showing that there is something in the conveyancing document itself to define the benefited land, is satisfied. This is sometimes overlooked – with attention often focussed only on the restriction itself rather than on the prior question of identifying from the conveyance, by clear words or necessary implication, the benefited land and operative words showing an intention to attach to it the benefit.

16. But the case is perhaps of more relevance in the obiter part of the judgments which deal with the question of whether a further test that a beneficiary seeking to enforce by annexation has to satisfy is, in showing that the benefited land is 'easily ascertainable'. This is often thought to be an additional requirement of annexation – i.e. not only does it have to be shown by objectors to the development claiming the benefit that the benefited land is

defined or capable of ascertainment from the conveyance itself but ***also***, that ascertainment of it has to be an easy process.

17. The CA in ***Bath Rugby*** were split on this issue by 2 – 1, but the majority thought that 'easy ascertainability' ***was*** an additional requirement, and did not mean the same thing as the benefited land having to be sufficiently described in the conveyance (as the Judge below had wrongly decided).

18. Why is this point of practical significance for developers?

19. The answer is that it emphasises that those advising objectors (or defendants to s.84(2) proceedings in court brought by developers) will have to focus more closely perhaps than has been the case before, on satisfying this additional requirement. And the difficulty in advising objectors/defendants is that there is no clear definition of what *'easy ascertainability'* in fact means. Indeed, in ***Bath Rugby***, even the two judges who were persuaded that this was an additional requirement of annexation did not attempt to elucidate its meaning. What is suggested in the majority judgments however, is that it is effectively a 'policy' requirement. What is meant by this is perhaps best explained in the earlier case of ***Crest Nicholson v McAllister*** [2004] where the Court justified the need for objectors to show that the benefited land was defined in the conveyance so as to be easily ascertainable, by reference to the fact that developers (or others seeking to breach restrictions) should not have to carry out detailed, forensic enquiries, at the time they seek to carry out their development - which will often be many years after the covenant was imposed.

20. Emphasising this as the CA in ***Bath*** have done, surely creates a clearer avenue for developers to use the s.84(2) procedure on the discrete ground that, even if the benefited land is sufficiently identified in the conveyance or transfer it is not, and was not at the time the conveyance was entered into, 'easily ascertainable'. The majority in the CA in ***Bath*** have made clear that they thought this is an additional hurdle for objectors to overcome. So, take the classic formula of words of annexation whereby a restrictive covenant is taken purportedly to protect the vendor's land '*adjoining or near to*' the land sold. This we know, is fine in principle as a formula, because ***Rogers v Hosegood*** [1900] tells us so. But what is perhaps overlooked is that, whereas in the ***Rogers*** case, the vendor's retained land intended to be benefited was building land laid out in plots and close to the sold land, so

that the question of easy ascertainability did not arise, that will very often not be the case in circumstances where there is no indication in the conveyance or other surrounding documents of precisely which parts of the land adjoining or near to the retained land were in fact owned, at the time of the conveyance, by the vendor and therefore intended by the vendor to be benefited.

21. So the developer, particularly since ***Bath Rugby*** may make significant mileage, in warning objectors off participating in opposing the declaration sought, by raising arguments of this kind in an early s.84(2) application.

22. Now, I want to move on and say something about the interrelationship between s.84(1) and s.84(2).

23. We have already mentioned that s.84(9) allows any party who is a defendant to covenant proceedings to stay those proceedings and go to the UT to seek modification of the covenant. Hitherto, one problem for developers (prepared to take a risk and commence their development without making their own s.84(1) or s.84(2) application first, is the time factor. A developer may (possibly as a result of the terms of its indemnity insurance policy) be unable to make its application or bring its proceedings before commencing the development. Insurance policies present a particular dilemma for developers in this regard, because it is often a term of the policy that no contact is made with potential covenant beneficiaries before the development is commenced. But as frequently happens, the objectors will wait until the developer is at maximum vulnerability (i.e. when development costs are being or have been incurred and contracts let) to raise their objections openly and serve proceedings. The Court and the UT's jurisdiction is distinct and does not overlap. The Court cannot modify covenants and the UT cannot make binding declarations as to enforceability (see the recent Upper Ttibunal case of ***Savage v 60 Kent Road Ltd*** [2021] UKUT 0102 (LC) for confirmation of this) and there is in these circumstances a danger of falling between two stools. Furthermore, objectors in the UT are known to rely on the UT rules which permit (it is sometimes thought almost as of right) any party to the UT application to stay the application and go to Court for a declaration, as a way of deliberately delaying developments.

24. In this regard, what the well-advised developer will do (whether it is applicant in the UT, or claimant or defendant in s.84(2) proceedings, or both) is to seek an order that both matters are tried/heard together by the same judge.

25. There are judges who sit in both jurisdictions (usually county court judges, who have an additional ticket to sit as Tribunal Chair and often a High Court ticket as well). In this way, significant delay is prevented and the danger of falling between two stools or, of unhelpful and/or inconsistent procedural decisions being made by one judicial body or the other, and the claim and the application can be managed together with the Judge sitting with two separate hats on, switching from one to the other as necessary. Thus for example there may be cases where there is a very meritorious objection to modification but a much more doubtful claim to the benefit of the covenant. In this way, the developer can ask for parallel directions to be given in the court claim and tribunal application. The developer can then ask for the legal question of enforceability (the court issue) to be tried as a preliminary issue, so that the court can proceeding immediately to determine whether the covenant binds at all or prevents the proposed development, and thereafter the modification application can be heard straightaway - in the event the developer loses the preliminary issue. This is what happened in cases such as ***Birdlip v Hunter*** [2016] – the leading modern case on building schemes. London (particularly CLCC), Manchester, Leeds, Liverpool etc all have judges capable of 'double hatting'. There is a willingness of judges to adopt this course, conscious of the dangers caused by the lengthy delays which can accrue in the UT – which presently in my experience, seems clogged up with Telecommunications Code cases.

26. So, returning to the question about gaining the edge for the developer, I would strongly advocate greater consideration being given to commencing s.84(2) proceedings and seeking to have them deal with by a two-hat judge if necessary so that a 'protective' s.84(1) modification application can be run alongside the court proceedings, in the same venue and in front of the same judge. In the circumstances posed where a developer feels it has a strong claim that the covenants are not enforceable but, that if they are, a weaker (although arguable) application for modification can be made, this is often the best course – subject always to bringing any indemnity insurers that exist on board with the strategy.

S.84(1)

27. I want now to look at gaining the edge for the developer in the Tribunal in more detail. So, this assumes in effect that the developer accepts the validity of the covenant and either because it decides it is best to get clarity before beginning to develop or, because it is forced, or decides, to go to the UT when objections are raised after the commencement of development. (Of course as set out above, the latter course may now be considered more risky than previously).

28. When talking about recent UT cases on modification, it is tempting to try to find trends or developments in the jurisdiction by reference to the success or failure rate of particular applications. But it is key to bear in mind that decisions are always very fact specific and do not create precedents. One matter that has however particularly come into focus to my mind is the extent to which the public interest limb may be relied on and how that potentially at least, interacts (particularly in the South East), with the recently established and arguably, tightened, criteria for planning authorities to be able to release land from the green-belt.

29. The practical importance of the public interest limb is that, in applications under ground (aa), it is unnecessary for the developer to prove that the covenant: *'does not secure to the persons entitled to the benefit of it any practical benefits of substantial value or advantage to them;'.* So the question of the extent to which the objectors' amenities are affected is neither here nor there. The developer will show (by reference to its planning permission or strong expectation of such) that its proposed user is a reasonable one which the covenant is restricting and then need only prove that the development is in the '*public interest'*.

30. In an old Tribunal case: ***Re Collins*** [1974] the Tribunal had said that a case had to be exceptional for the Tribunal to find that the public interest limb was made out. This has always since been seen as significantly limiting the utility of the public interest limb. There are few reported Tribunal cases since 1974 where an applicant has failed the limited benefit test but succeeded on the public interest limb and its ambit has been treated as being very narrow indeed. But the UT in ***Devine***, in perhaps a somewhat throwaway remark, had said that ***Re Collins*** might in some future case, need re-consideration. The CA disagreed, but the Supreme Court (which otherwise approved the UT's legal interpretation of the meaning of s.84(1)(aa)) did not say whether this UT remark about reconsidering ***Re Collins***, was

right or wrong. Noting that the CA was found by the SC to have generally misinterpreted the section, it is certainly open to argument that the clear words of s.84(1A)(b) do not impose any limitation on the public interest limb, of the kind suggested in ***Re Collins***.

31. There are therefore a number of things to note about the state of affairs created by ***Re Collins***:

(1) Tribunal cases do not act as binding precedents, so there is nothing legally that compels a Tribunal to reach a particular decision based on one of its own earlier cases. All applications are decided on their own particular facts.

(2) There is in fact nothing in the wording of s.84(1)(aa) that suggests the case has to be 'exceptional' for the limb to apply.

(3) As I have said the ***Re Collins*** approach, could be said to involve an impermissible 'statutory gloss' on the plain words of s.84(1A)(b): '*in impeding that user .... is contrary to the public interest*'. The CA had gone wrong, said the SC, by doing just that, because it had failed to follow the words of the section properly, in that the question was whether the impediment to the proposed user (represented by the covenant) was contrary to the public interest, not whether the use of the land was, in some general sense, reasonable.

(4) The upshot of this is therefore that ***Re Collins*** still 'stands', for whatever it is worth, BUT it is of note that the SC in ***Devine*** did not comment, because it did not need to, on the reasoning of the UT in the ***Devine*** case, to the effect that ***Re Collins*** may need re-consideration.

32. It is true to say that no recent UT cases give comfort to the developer as to the UT being willing to consider again the question of whether 'exceptional circumstances' are in fact needed to jump through the 'public interest' hoop, as suggested in ***Re Collins***. Only one very recent case has featured a claim under the public interest limb and it was hopeless on its facts. But developers are surely well advised, depending on the particular circumstances, to consider relying on it at least in circumstances where there is likely to be good evidence

of a pressing local need for the development (say, to help fulfil local authority housing targets) and willingness on the part of the local authority to give evidence to the UT to this effect (this is probably fairly critical to the success of an application under the public interest limb).

33. So what about the change of planning regime and for example the increasing willingness of some local authorities to release green belt land for housing purposes? Often this land is protected by covenants and the important point for consideration is how the fact of its release impinges on the chances of successful modification of covenants, relying on the public interest ground of s.84(1)(aa)?

34. In the ***Devine*** case the SC implicitly disagreed with the CA's decision that the fact that the development land was in the green belt was an unusually strong factor against it being in the public interest to modify the covenant (see per Lord Burrows at para 68.). This fact certainly creates the potential to turn the CA's argument on its head and to argue, in future Tribunal cases, that the fact of release of the particular burdened development land from the green belt (which itself requires exceptional circumstances) is an important factor supporting the notion that it is appropriate to 'override' the private rights of the covenant beneficiaries in the public interest under the public interest limb where the land has been released by the LPA.

35. The National Planning Policy Framework (NPPF) 2018, which arguably tightens the criteria for release from green belt, states at [para. 136]: '*Once established, Green Belt boundaries should only be altered where exceptional circumstances are fully evidenced and justified, through the preparation or updating of plans. Strategic policies should establish the need for any changes to Green Belt boundaries, having regard to their intended permanence in the long term, so they can endure beyond the plan period*.'

36. Thus the fact that the local planning authority (or on appeal, the inspector or Govt. Minister) will have sanctioned the development on land released from green belt status, might be said to implicitly support there being an immediate, and significant, public interest in the development being allowed, such as in any event meets even the apparent threshold criteria in ***Re Collins*** of 'exceptional circumstances' (whether because of a desperate local housing shortage, or otherwise). The ***Re Collins*** test of the public interest needing to be '*so*

immediate and important as to justify the serious interference with private rights and the sanctity of contract' might be said to equate closely to the refined (and arguably stricter) NPPF test identified above.

37. This latter point however, remains a very open one. One can see that the public interest limb will have added importance where green belt land has been released for development of purely social housing, but the extent to which it will prove useful in future regarding developments which are primarily for private housing, remains to be seen.

Conclusions

38. To gain an edge for the developer, I suggest that recent cases and Tribunal applications suggest the following:

(1) Where annexation of a particular restrictive covenant is in issue, examine carefully the covenant to see whether there are arguments the developer can use to show that, even if the operative words of the covenant are sufficient to identify (in theory at least) the benefited land, the extent of that land was not 'easily ascertainable' at the time of the conveyance or transfer

(2) Play close attention to the danger that 'bad' behaviour will adversely affect the chances of securing modification – however strong the case might otherwise be;

(3) Accordingly, consider the merits of seeking a declaration under s.84(2) before or alongside a modification application

(4) In light of the decision in ***Devine***, consider the extent to which a case may be put forward to the Tribunal under the public interest limb, and whether and what evidence would be sufficient to justify the argument.

39. Thank you.

Martin Hutchings QC