UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANT – modification – covenants restricting use of site to parking of cars – houses built in breach of covenant – whether covenants secure practical benefits of substantial value or advantage – s.84(1)(aa) and (c), Law of Property Act 1925 – discretion of Tribunal - application allowed

AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

BETWEEN:

HOUSING SOLUTIONS

Applicant

-and-

MR BARTHOLOMEW SMITH

Objector

Re: Exchange House,
Woodlands Park Avenue,
Maidenhead,
SL6 3LT

Judge Elizabeth Cooke and Mr Mark Higgin FRICS
Hearing: 5-6 December
Decision Date: 27 January 2023

Mr Martin Dray, instructed by Trowers and Hamlins, for the applicant
The objector was unrepresented

The following cases are referred to in this decision:

Alexander Devine Children's Cancer Trust v Millgate Developments Limited [2018] EWCA Civ 2679
Alexander Devine Children's Cancer Trust v Housing Solutions Limited [2020] UKSC 45
Millgate Developments Limited and Housing Solutions Limited v Bartholomew Smith and the Alexander Devine Children's Cancer Trust [2016] UKUT 515 (LC)
Re Bass Ltd's Application (1973) 26 P & CR 156

Introduction

1. For the second time the Tribunal is asked to modify restrictive covenants that burden land adjoining the Alexander Devine children's hospice near Maidenhead in Berkshire. Houses were built on the land in knowing breach of covenant by Millgate Developments Limited in 2015; its application to modify the covenants succeeded before the Tribunal, in the face of objections from the hospice and from Mr Barty Smith. The hospice appealed and succeeded both in the Court of Appeal and in the Supreme Court.

2. The Alexander Devine Children's Cancer Trust ("the Hospice Trust") which owns the hospice land, has now agreed to the modification of the covenants in consideration of the payment of a capital sum.

3. The applicant, Housing Solutions, is a housing association and registered provider of social housing; it is now the owner of the application land and it has applied for the modification of the covenants so as to permit, retrospectively, the building of the houses, to which the hospice no longer objects. Mr Smith, who also has the benefit of the covenant, objects.

4. The applicant was represented by Mr Martin Dray of counsel; Mr Smith represented himself. We are grateful to them both, and also to Mr Smith and to Mr Christopher Martin, the applicant's Head of Development, for showing us round the application land and surrounding area when we visited it before the hearing.

5. In the paragraphs that follow we look first at the factual background, then at the law, and then at the decisions made in the earlier proceedings because they form an important part of the arguments in the present application. It will be helpful if we set out here the references for the decisions made on Millgate's application:

   Millgate Developments Limited and Housing Solutions Limited v Bartholomew Smith and the Alexander Devine Children's Cancer Trust [2016] UKUT 515 (LC)

   Alexander Devine Children's Cancer Trust v Millgate Developments Limited [2018] EWCA Civ 2679

   Alexander Devine Children's Cancer Trust v Housing Solutions Limited [2020] UKSC 45

6. Mr Smith's view was that the present application should not have been made, and so we then look at his application to strike it out, and at his argument that Housing Solutions is estopped from bringing it – both of which we reject – before considering the application itself and Mr Smith's objections, and explaining our decision that the covenants should now be modified as Housing Solutions asks.

The background

7. As indicated above, this application has an interesting and important background.

8. The objector's father, Mr John Smith (founder of the Landmark Trust) owned a large area of agricultural land just outside Maidenhead. Adjoining it, and adjacent to Woodlands Park Avenue, was a small industrial estate, whose proprietor, Stainless Steel Profile Cutters Limited ("SSPCL") wanted to construct a car park; the layout of the estate provided a convenient triangle, and in 1972 Mr John Smith sold to SSPCL a further triangle so as to make a rectangle, known as the "Exchange House site". In the conveyance SSPCL gave restrictive covenants for the benefit of Mr John Smith's adjoining land:

> "1. No building structure or other erection of whatsoever nature shall be built erected or placed on [the application land].
>
> 2. The [application land] shall not be used for any purposes whatsoever other than as an open space for the parking of motor vehicles."

9. The conveyance contained overage provisions which would have given Mr John Smith a profit share in the event of development; those provisions expired in 1994.

10. Mr John Smith died in 2007 and Mr Barty Smith, his son and the objector to this application, inherited his substantial acreage of farmland. We refer to him as "Mr Smith". In 2011 he generously gave 6 acres of land to the Hospice Trust so as to provide a site for a hospice to be built for terminally ill children. The hospice is named after Alexander Devine, the son of Mrs Fiona Devine, the co-founder of the Hospice Trust; Alexander died after developing a brain tumour at the age of four, and Mrs Devine's wish was to provide a secluded location with pleasant surroundings for children and their families in similar terrible situations.

11. Mr Smith chose land for the hospice on the edge of his estate, next to the industrial estate and the Exchange House site, with wide open views of sky and countryside to the west and south. His land is now separated from the industrial buildings and the application land to the east by the hospice's land. To the north is more farmland, in different ownership. Planning permission was obtained for the hospice, and building commenced in 2014.

12. Meanwhile Millgate Developments Limited bought the Exchange House site, which is a rectangle of about an acre, half of which was burdened by the covenants (the application land) and half of which was not, and in 2013 applied for planning permission to build 23 affordable houses on it. It obtained planning permission despite the fact that the land (like the hospice land and Mr Smith's land) is in the Green Belt. Mr Smith was unaware of the planning permission but spotted the building works when they commenced in 2014; he wrote repeatedly to Millgate pointing out the breach of covenant and asking for the work to stop, and Millgate carried on building. The houses were completed in 2015. After that Millgate applied to the Upper Tribunal for the covenants to be discharged from the application land, on which it had built nine houses and four bungalows.

13. The 23 affordable houses were important to Millgate, because the planning permission that it had obtained for 47 more valuable homes nearby at Woolley Hall, Littlewick Green required it to make provision for affordable housing and it had undertaken not to dispose of 15 of the Woolley Hall units until all 23 of the Exchange House units have been constructed and transferred to an affordable housing provider. It became clear in the proceedings before

the Tribunal that Millgate could have obtained planning permission for all the 23 homes it needed to build on the unburdened part of the Exchange House Site, and so could have built the houses without being in breach of covenant.

14. The Exchange House site was transferred to Housing Solutions after the Tribunal's decision in Millgate's favour, but before the appeal to the Court of Appeal. Because it was a prospective purchaser of the land Housing Solutions was joined as a party to the application to the Tribunal. Following the Court of Appeal's decision in favour of the Hospice Trust Housing Solutions appealed to the Supreme Court.

15. The houses are now occupied, but the application land is still burdened by the covenants. Housing Solutions has adduced a short witness statement from Mr Christopher Martin, its Head of Development, which explains that as a result the houses cannot be sold (because a clean title cannot be offered to a buyer) and cannot be let on protected tenancies because the houses cannot be considered safe from the possibility of an injunction requiring their demolition. As a result although the houses are occupied, they are let only on short-term tenancies, which is not economically viable for Housing Solutions. Accordingly the housing association is keen to have the covenants modified to permit the affordable housing, and the Hospice Trust is now content that they be modified.

The law

16. Section 84 of the Law of Property Act 1984 gives the Tribunal a discretionary jurisdiction to discharge or modify restrictive covenants burdening freehold and long leasehold land. The discretion arises only when the applicant has met one or more of the requirements for the Tribunal to have jurisdiction, as follows:

> "(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case … the restriction ought to be deemed obsolete; or
>
> (aa) that 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; or
>
> (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction … have agreed … to the same being discharged or modified; or
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction …
>
> (1A) Subsection (1) (aa) above 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 persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

17. In the present case there is jurisdiction to modify the covenant so far as the Hospice Trust is concerned on ground (b), because the Trust has agreed to the modification and has not objected to this application.

18. There are two different ways to establish jurisdiction under ground (aa). Either way it has to be shown that the covenant impedes some reasonable use of the land for public or private purposes (which is not in dispute here) and then either that the covenant in impeding that use does not confer upon the objector any "practical benefits of substantial value or advantage" or that in impeding that use the restriction is contrary to the public interest; and in either case that money will be an adequate compensation for any loss or disadvantage suffered by the modification.

19. It is important to appreciate that the two routes to ground (aa), set out in subsection 1A)(a) and (b), are alternatives. An applicant can rely on either or both, but if he relies only upon one the other is not relevant. So where only subsection (1A)(a) is relied upon, the question whether the covenant in impeding the use is contrary to the public interest does not arise.

20. So far as Mr Smith is concerned, Housing Solutions say that there is jurisdiction first on ground (c), on the basis that he will not be injured by the modification, and second on ground (aa) together with subsection (1A)(a); thus the Tribunal is not asked to consider the public interest under subsection (1A)(b).

21. Once jurisdiction is established, as Mr Smith puts it in his skeleton argument the applicant is only at first base; he must then persuade the Tribunal to exercise its discretion to modify the covenant. The Tribunal will not readily refuse to do so where jurisdiction is made out but discretion is a separate issue and in the present case it is a very serious one because of Millgate's conduct.

22. Two points arise from that last one. The first is the Housing Solutions is now the applicant, but it was not Housing Solutions that committed the "cynical breach", as the courts have described Millgate's conduct in continuing to build in the knowledge of the restrictive covenant. Nevertheless it accepted the land while the litigation was in progress, and it accepts that it stands in Millgate's shoes. That must be right; it would be unjust if a developer can build in knowing breach of covenant and the transfer to a purchaser who was then able to apply for the modification or discharge of the covenant with clean hands.

23. The second is that while the applicant's conduct (or in a case like this, that of its predecessor in title) is of central relevance to the exercise of the Tribunal's discretion, it

is not relevant at the jurisdiction stage (paragraphs 45 to 47 of the Supreme Court's decision).

The decisions in Millgate's application

24. Millgate sought the modification of the covenant in 2016 on grounds (aa) and (c). So far as jurisdiction was concerned, the Tribunal made three findings.

25. First, so far as Mr Smith was concerned the Tribunal (the Deputy President, Martin Rodger QC, and Mr Paul Francis FRICS) found that the covenants afforded no practical benefits to his land, so that there was jurisdiction under subsection (1A)(a). At paragraph 72 the Tribunal said:

> "We do not regard any of the benefits relied on by Mr Smith as practical benefits for his own land in circumstances where the hospice land provides a buffer between it and the application land. Mr Smith's arable fields are now slightly closer to the closest residential buildings than they were previously, but we do not regard the difference as of any significance."

26. That finding of fact has not been appealed, but of course it may cease to be correct if circumstances have changed since the Tribunal's decision and it is open to the Tribunal on this second occasion to reach a different conclusion.

27. Second, the Tribunal found that the covenants did confer practical benefits of substantial value or advantage upon the Hospice Trust, by preventing the overlooking of the hospice by the houses on the application land next to the boundary, and by preventing loss of privacy. So jurisdiction did not arise under subsection (1A)(a) so far as the trust was concerned.

28. Third, it found that there was jurisdiction to modify the covenants as against the Hospice Trust under subsection (1A)(b), namely that in preventing the development the covenants were contrary to the public interest, because of the waste of much-needed housing if the houses had to be demolished.

29. So there was jurisdiction to discharge the covenants, albeit for different reasons, vis-à-vis both objectors. The Tribunal then considered whether to exercise its discretion to do so. It made clear that applicants who have deliberately flouted the law and built in breach of covenant will face an uphill struggle to persuade the Tribunal to exercise its discretion in their favour; it took into account all of what counsel for the objectors described as Millgate's "egregious and unconscionable" conduct (paragraph 118 of the decision); but it decided that that conduct was outweighed by the public interest in the supply of affordable housing. It said at paragraph 120:

> " our decision will have an effect not only on the parties but also on 13 families or individuals who are waiting to be housed in these properties if, and as soon as, the restrictions are modified. We consider that the public interest outweighs all other

> factors in this case. It would indeed be an unconscionable waste of resources for those houses to continue to remain empty."

30. The Tribunal also found that money would be an adequate compensation for the damage suffered by the Hospice Trust because of the modification of the covenant. It ordered the modification on condition that £150,000 was paid to the hospice trust to fund planting that would screen the hospice gardens and the proposed wheelchair walk on the west side of the building from the new houses on its boundary.

31. The Hospice Trust appealed to the Court of Appeal. Mr Smith has explained to the Tribunal that he both encouraged and funded the appeal, and was an energetic participant with the trust all the way to the Supreme Court's decision. The Hospice Trust was successful before the Court of Appeal on four grounds, just one of which was successful in the Supreme Court when Housing Solutions brought a further appeal. Accordingly the covenants remained intact, and the Supreme Court anticipated that there might be an application to the High Court for an injunction or for damages, although neither the Hospice Trust nor Mr Smith has made such an application in the two years that have elapsed since the Supreme Court's decision.

32. The ground that succeeded for Housing Solutions in the Supreme Court was that the Tribunal make an error of law by failing properly to take account of Millgate's cynical conduct in the exercise of its discretion.

33. The Supreme Court was of course alive to the fact that an appeal from the Tribunal's discretionary decision could not succeed purely because the appellate court would have taken a different view, but only if the Tribunal had made an error of law. The Supreme Court found that the Tribunal had indeed done so because in reaching its discretionary decision it failed to take into account two factors.

34. The first focused on the fact that Millgate could have built all the houses it needed on the unencumbered half of the car-park, and therefore the "land-use conflict" – that is, the conflict between housing need and the hospice's need for privacy – could have been avoided.

> "58. The first omitted factor is that, had the developer respected the rights of the Trust by applying for planning permission on the unencumbered land, there would then have been no need to apply to discharge the covenant under section 84 and the hospice would have been left unaffected. Millgate was not just a cynical wrongdoer which had gone ahead with the development in deliberate breach of the covenants and in the face of objections raised. Rather, in addition, and crucially, Millgate, by its cynical breach, put paid to what, on the face of it, would have been a satisfactory outcome for Millgate and, at the same time, would have respected the rights of the Trust (because building on the unencumbered land would not have involved any breach of the restrictive covenant). It is important to deter a cynical breach under section 84 but it is especially important to do so where that cynical conduct has produced a land-use conflict that would reasonably have been avoided altogether by submitting an alternative plan.

35. The second was closely-related:

> "The second omitted factor is that, had Millgate respected the rights of the Trust by applying under section 84 before starting to build on the application site, it is likely that the developer would not have been able to satisfy the "contrary to public interest" jurisdictional ground under section 84 . This is because Millgate would have been met with the objection that planning permission would be granted for affordable housing on the unencumbered land so that the upholding of the restriction would not be contrary to the public interest."

36. In other words, Millgate by its wrongful action created the factual situation that gave the Tribunal jurisdiction under the public interest ground.

37. The Supreme Court held that the Tribunal had made an error of law in ignoring these factors. Housing Solutions succeeded and the application for modification failed.

38. As we said above, the Hospice Trust has now accepted compensation and is content for the covenants to be modified so as to permit the development that has taken place.

39. There have been some settlement negotiations between Housing Solutions and Mr Smith but they have not been fruitful, and Housing Solutions has applied again to the Tribunal for modification of the covenant on grounds (aa) and (c). So far as ground (aa) is concerned, only subsection (1A)(a) is relied upon, namely that the covenant in impeding the development does not secure to the objector any practical benefits of substantial value or advantage. The public interest limb of the subsection is not relied upon.

The strike-out application

40. Mr Smith asked the Tribunal, early in the proceedings, to strike out the application as an abuse of process because the matter has already been settled by the Supreme Court and it was not open to Housing Solutions to have another bite of the cherry and try again. The Tribunal determined that it would hear that application together with the hearing of the substantive application.

41. Mr Smith suggested that there was a *res judiciata* which prevented a further round of litigation. Mr Dray argued that because Mr Smith was not a party to the Supreme Court decision, there was no *res judicata* in his favour. Moreover, the Supreme Court did not make any decision about an application based on subsection (1A)(aa); it was concerned only with the public interest ground, which is not now relied upon, and accordingly the Tribunal now is asked to hear a very different application. We accept Mr Dray's arguments; there is no abuse of process in the bringing of this application

42. Is Housing Solutions nevertheless barred from making a further application? Mr Smith said in his skeleton argument:

> "The Supreme Court in substance told HS that Millgate's high-handed and cynical conduct had extinguished their right to modification."

43. That is not a correct description of the Supreme Court's decision. Housing Solutions never had a "right" to modification. The Supreme Court's decision was that the Tribunal had made an error of law in the exercise of its discretion as regards the application before it in 2016. It is open to Housing Solutions to make a further application now if circumstances have changed, and indeed they have; the objector with the real benefit from the covenants is now content for them to be modified, and the only objector is one who derives no benefit from the covenants. Mr Smith of course disagrees about the benefit point, but the fact remains that it is open to the Housing Solutions to argue that circumstances have changed just as it is open to Mr Smith to argue that he does now derive a benefit from the covenants.

44. Accordingly we refuse the application to strike out the proceedings.

Is Housing Solutions estopped from making the application?

45. Mr Smith said in his skeleton argument that Housing Solutions is estopped from applying to the Upper Tribunal and denying that the High Court has jurisdiction.

46. The applicant has not denied, and could not deny, that the High Court has jurisdiction to grant an injunction or damages if Mr Smith applies to it. The Supreme Court did not decide, and could not have decided, that only the High Court had jurisdiction for the future. The High Court and the Tribunal have two different jurisdictions that do not overlap – the one to hear applications for an injunction or damages in response to a breach of covenant, the other to decide applications for modification and discharge of restrictive covenants. It has been open to Mr Smith since he first spotted the building work in 2014 to apply to the High Court for an injunction or damages, and it remains open to him now to do so; but that door is one that only he can open. Housing Solutions cannot bring proceedings in the High Court if Mr Smith chooses not to do so. Conversely the door to the Tribunal remains open to Housing Solutions if it can show that circumstances have changed so that modification is appropriate, and indeed it is a sensible step for Housing Solutions to have taken to try to resolve the impasse.

47. The rest of Mr Smith's argument about this point related to Housing Solutions' attempts to negotiate with him. In January 2021 Housing Solutions' solicitors sent him an open email in an endeavour to open negotiations. Mr Smith says he was therefore "forced to incur costs", and retained specialist accountants to quantify damages and represented him in negotiations. He complains that in going into negotiations Housing Solutions did not reserve its right to apply to the Tribunal, and also that Housing Solutions never suggested that it could settle proceedings unilaterally with the Hospice Trust without also settling with him.

48. We see no possible basis for an argument based on estoppel here. There was no need for Housing Solutions to reserve a right to apply to the Tribunal. There is no sense in which its attempts to negotiate with Mr Smith could be regarded as a representation that it would not do so. There was nothing to prevent Housing Solutions from making an offer to the Hospice

Trust alone and nothing to prevent the Hospice Trust from accepting it and wisely putting an end to the dispute,

49. We are sorry to have to deal with this point so briefly because we understand that Mr Smith is aggrieved at having again to respond to an application to the Tribunal and we understand that he thought that the Supreme Court decision was the end of the road for any attempt to modify the covenants, but we cannot see any merit in the estoppel argument.

The Tribunal's jurisdiction to modify the covenants

50. The application is made on the basis that the Tribunal has jurisdiction to modify the covenants on grounds (c) and (aa). The parties' arguments focused on ground (aa), and we turn to the familiar questions from *Re Bass Ltd's Application* (1973) 26 P & CR 156:

    (1) Is the applicant's use of the application land reasonable?

    (2) Do the covenants impede that use?

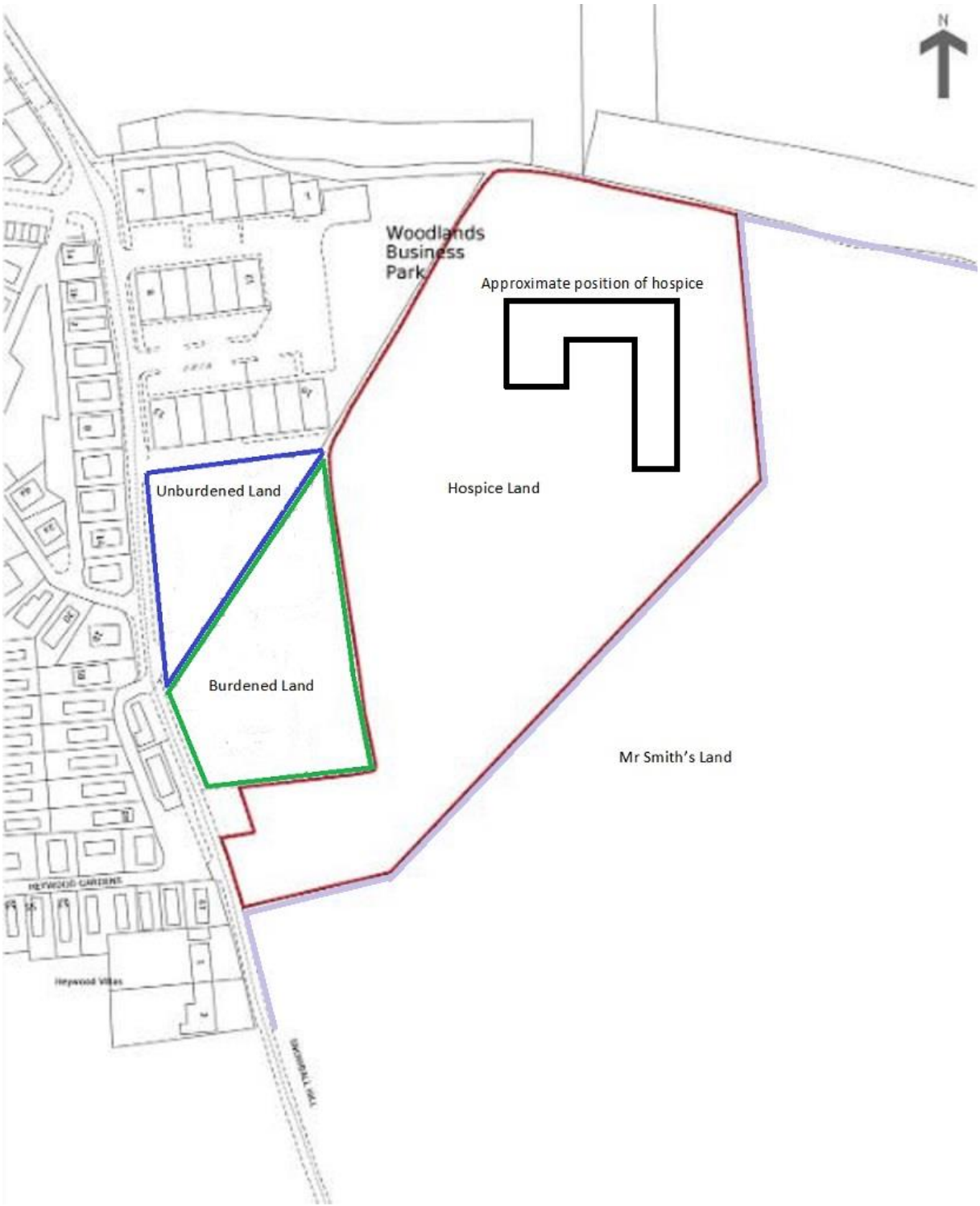
    (3) Does impeding the use secure to Mr Smith practical benefits?

    (4) If so, are those benefits of substantial value and advantage?

    (5) If not, would money be an adequate compensation?

51. There is no dispute that the use of the application land for affordable housing is a reasonable use of it and that the covenants impede that use.

52. As we turn to the question whether the covenants secure a practical benefit to Mr Smith, it will be helpful to refer to a plan of the area:



53. It is also convenient at this point to refer to the Tribunal's site visit. We started from the application land. The Supreme Court (Lord Burrows at paragraph 25) described the new development as follows:

> "The houses and bungalows, which the Upper Tribunal inspected, were described as simple and functional but neither shoddy nor utilitarian. The Upper Tribunal regarded the development as one which would be likely, in time, to mellow into a

> modest and not unattractive environment providing decent accommodation suitable for people in different stages of life living in what might become a neighbourly community."

54. We agree with that assessment. We walked on to Woodlands Park Avenue, past the hospice drive, and turned left to walk round the outer edge of Mr Smit's field which is planted with cabbages and then back to the road along the public footpath to the north. The application land can be seen from the field, across the hospice land south of the hospice building. The land to the west of the hospice remains unplanted. Mr Smith has produced photographs from when the houses were first built and says that the view is the same today, and indeed it is. The view westwards from the hospice is stark, not because of the housing but because of the absence of planting; the view is of grass, of an uncultivated hedge, and of the upper floors of the houses. And of course the west side of the hospice and the grounds are visible from the houses. That is not relevant to what the Tribunal now has to decide.

55. Mr Smith's field can no doubt be seen from the upper windows of the houses, and as the field is used for arable farming we cannot imagine that that is of any disbenefit to Mr Smith. Nor can we see any practical advantage for Mr Smith in the covenant preventing him from seeing houses from his cabbage field.

56. So far as can be seen from the land itself the situation so far as Mr Smith is concerned is exactly as it was when the Tribunal made its decision in *Millgate Developments Limited* in 2016. The covenants in preventing the current use of the application land are of no benefit to Mr Smith at all. That is Mr Dray's argument, and he adds that therefore questions (4) and (5) from *Re Bass Limited* do not arise.

57. Mr Smith said that is not the whole story. His land has development potential, and its development value is reduced by the presence of affordable housing.

58. Mr Smith put this in two ways. First, he said that the Tribunal in 2016 should have been alive to the development potential of his land, and it should have been drawn to the Tribunal's attention by the expert witness for the Millgate. There is no substance in this argument. Mr Smith in the earlier proceedings made no suggestion to the Tribunal in evidence or in argument that his land had development value. It was for him to do so and not for anyone else to make up a case for him. It would indeed have been a surprising argument to have made, because the land is in the Green Belt, but at any rate it was open to Mr Smith to raise the possibility of development value and he did not. Mr Smith observes that at paragraph 18 of the Court of Appeal's judgment Sales LJ noted that a letter sent by Millgate's solicitor to Mr Smith in November 2014, in response to his initial protest about the building works, "did not address the position of land adjacent or close to the Exchange House site if it were to be developed"; and it is true that it did not. But the crucial point is that Mr Smith did not do so; it is not open to him now to complain that others did not raise that possibility before the Tribunal, since it was his responsibility to plead and to adduce evidence for any practical advantage that he claimed from the covenant.

59. That remains the case now.

60. Mr Smith's notice of objection to Housing Solutions' application, in June 2022, made no mention of any development potential in his land. On 11 July 2022 the Tribunal gave directions that if either party wanted to rely on factual evidence they were to file and serve witness statements by 5 August 2022, and observed that it did not appear that any expert evidence would be required but that if either party wished to do so they could seek permission. No factual evidence was filed and neither party sought permission to adduce any expert evidence.

61. The Tribunal's directions also required the parties to agree a hearing bundle, starting with a draft index sent to the objector by the applicant six weeks before the hearing. On 7 October 2022 Mr Smith wrote to the Tribunal asking permission to add to the bundle 7 further documents; five of them were photographs demonstrating the view from the hospice gardens and from Mr Smith's land in 2012, 2016 and 2022. One was a plan which he said had been shown to him by the managing director of Berkeley Homes, from its "South West Maidenhead Site Concept Masterplan" which he said indicated that his land was going to be developed. The other was a page from the Royal Borough of Windsor and Maidenhead Draft Borough Local Plan which he said shows land allocated for 300 residential units to be built by Berkeley Homes. He said in his skeleton argument "This part of the green belt is making way for houses."

62. Mr Dray unsurprisingly objected to the inclusion of these documents, at this late stage and unsupported by evidence, and we said that we would consider their admissibility at the hearing. In the event we were not asked at the hearing to give a ruling about the inclusion of the documents in the bundle. We have looked at them, and we take the view that they do not assist Mr Smith.

63. Mr Smith has not given evidence that he has been asked to sell land for development, nor that he is willing or intending to do so. He has not adduced evidence from Berkeley Homes that the company is looking to develop Mr Smith's land or any land nearby. The collection of documents Mr Smith has produced does not amount to evidence that his land might be developed. And Mr Smith has not adduced any expert evidence of the development value of his land.

64. Even had such evidence been produced, it would be a considerable leap from the proposition that Mr Smith's land may be released from the Green Blet and may have development value, to the further proposition that the presence of affordable housing on the Exchange House site would reduce that development value, which is the real issue here. Even if it does – and we have nothing other than Mr Smith's suggestion to that effect – Mr Smith would also have to prove that the affordable housing specifically on the application land devalued his land, or devalued it more than it would otherwise have been devalued by the affordable housing on the unburdened part of the Exchange House site. That last point in particular would have been tricky, especially as Mr Smith's land is separated from the Exchange House site by the hospice land. Indeed, the Berkeley Homes plan, whatever its status, does not show development on Mr Smith's land up to the boundary with the hospice but depicts a considerable buffer of green space between the hospice and any residential development.

65. In the absence of any evidence that Mr Smith's land has development value which would be diminished by the affordable housing on the application land, we find that the covenants in preventing that housing do not secure to Mr Smith any practical benefit.

66. As Mr Dray said, the other *Re Bass Limited* questions do not arise.

67. Accordingly the Tribunal has jurisdiction to modify the covenants vis-à-vis Mr Smith both on ground (aa) and on ground (c), because the proposed modification will not injure Mr Smith, and on ground (b) so far as the hospice is concerned because the Hospice Trust has expressed to Housing Solutions its consent to the modification.

Should the Tribunal exercise its discretion to modify the covenants?

68. Mr Smith argued that the Tribunal should not, as he put it at the hearing, make the same mistake again. The Supreme Court found that the Tribunal in exercising its discretion in favour of Millgate in 2016 failed to consider the two crucial factors (paragraphs 34 and 35 above). On his case they remain crucial and should determine the application in his favour.

69. The difficulty for Mr Smith, as Mr Dray said, is that the two "omitted factors" are either irrelevant where Mr Smith is the sole objector or of greatly reduced relevance.

70. The first omitted factor was that Millgate could have avoided the breach of covenant altogether by building its 27 homes on the unburdened land. That of course remains true. But the Supreme Court said:

> "It is important to deter a cynical breach under section 84 but it is especially important to do so where that cynical conduct has produced a land-use conflict that would reasonably have been avoided altogether by submitting an alternative plan."

71. In the present application there is no land-use conflict. The affordable housing does not do Mr Smith any harm. The Supreme Court was very careful to make it clear (Lord Burrows at paragraph 55) that there is no rule that discharge or modification will not be available where there has been a cynical breach; it regarded the cynical breach as crucial vis-à-vis the hospice because the cynical breach had created a land-use conflict that could have been avoided. That is not the case vis-à-vis Mr Smith. The cynical breach is therefore not decisive in Mr Smith's favour.

72. The second factor was that Millgate's cynical breach had actually created the basis for the Tribunal's jurisdiction to modify the covenants, namely the public interest in having the houses put to use. And that is wholly irrelevant here because the public interest is not relied on.

73. Another way of looking at that is that had Millgate made an application before the houses were built, the Tribunal would have had jurisdiction to modify the covenants on ground (aa). The jurisdiction was not created by the breach as it was where the public interest had to be relied upon so far as the hospice was concerned.

74. Accordingly the two factors that led the Supreme Court to decide the appeal in favour of the Hospice Trust are not decisive in the present application where Mr Smith is the only objector. That is the case even though the two factors were first identified by Mr Smith, he told us, in a briefing note to counsel following the Tribunal's decision in 2016. It may seem ironic or even unfair to him that the two points he came up with should not be decisive in his favour. They were of course crucially important in favour of the Hospice Trust; but where his own circumstances are so different from that of the Hospice Trust (because there is no land use conflict) and where the legal argument is different (because the public interest is not relied upon by the applicant now) it is inevitable that the two "omitted factors" cannot play the same role as they did in the Supreme Court.

75. That does not mean that we can ignore Millgate's cynical breach. Housing Solutions accepts that it stands in Millgate's shoes and we take that fully on board. But in the present application, instead of weighing up the bad conduct of the applicant against the public interest in having the new houses occupied, in the other side of the balance this time is the fact that Mr Smith does not benefit from the covenants. 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.

76. At this point we should mention that Mr Smith sought to place further material before the Tribunal mostly in the form of emails, alleging various wrongs by Millgate, many of them not related to the application land, some of them very serious. None of this material was supported by a witness statement even by Mr Smith himself. Mr Smith at the hearing said that he wanted to bring Millgate's conduct to the attention of the Tribunal and to ask it "Is this the sort of person you want to help?" We are unable to admit Mr Smith's further documents and we give no weight to unevidenced accusations. We are not going to go through those accusations because that would be to give weight and prominence to material that has no evidential value.

77. Mr Smith also suggested that the failure of Millgate and of Housing Solutions to make him an offer of payment should be grounds in itself for dismissing the application. It is not. An offer of settlement was made jointly to Mr Smith and the Hospice Trust after the hearing and before the Tribunal gave its decision in 2016 and that offer was not accepted. It may be that the reason why no further offer has been made to Mr Smith is that he has argued that since he owns 95% of the land that benefits from the covenant, the sum paid to the Hospice Trust should be multiplied in proportion to land area so that he is entitled to around £30 million. The Tribunal is not concerned with the reasons why negotiation has not been fruitful and does not count the breakdown of negotiations against either party.

78. So we revert to the question we are required by section 84 to ask ourselves: should the Tribunal exercise its discretion to modify the covenants in Housing Solutions' favour, so as retrospectively to make lawful the building of the affordable housing that is already on the application land. We have no hesitation in doing so. It is not for the Tribunal to pursue a mission of punishment where the modification of the covenants will not injure Mr Smith, where Millgate 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.

Compensation

79. There are two bases for compensation under section 84(1)©:

> "(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
> (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it."

80. There is no question of compensation under head (i) in light of our findings of fact. And head (ii) does not arise since there is no evidence that the price paid by SSPCL in 1972 was depressed by the imposition of the covenant.

Conclusion

81. The Tribunal has discretion to modify the covenants as against Mr Smith who has objected to the modification, and as against the Hospice Trust which has not objected. It exercises its discretion to modify the covenants so as to permit the building of the affordable housing that now stands on the application land.

Upper Tribunal Judge Elizabeth Cooke — Mr Mark Higgin FRICS

27 January 2023

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.