

Tribunal has jurisdiction to modify restrictive covenant (*Lamble v Buttaci and another*)

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Property analysis: Andrew Bruce, senior junior barrister at Serle Court Chambers, discusses the Upper Tribunal's (UT) decision in *Lamble v Buttaci*, which concerns the jurisdiction of the UT to alter a qualified restrictive covenant relating to consent in the event that there wasn't a determination to the unreasonableness of the refusal of consent.

Lamble v Buttaci and another [\[2018\] UKUT 175 \(LC\)](#)

What are the practical implications of this case?

This is a very interesting case for property practitioners. The UT addresses three important matters. First and foremost, the case establishes that the UT has jurisdiction to modify a qualified restrictive covenant relating to consent notwithstanding that there has been no determination as to the unreasonableness of the refusal of consent. This means that there is no need for a developer to apply to the court for a determination that consent has been unreasonably refused, rather the developer can proceed simply to seek a modification of the covenant under [section 84\(1\)](#) of the Law of Property Act 1925 ([LPA 1925](#)). Secondly, the case recognises that a development that complies with planning law might nonetheless not be a reasonable use of land for the purposes of [LPA 1925, s 84](#). Developers must not assume that just because planning permission has been granted, the UT will modify a restrictive covenant. Thirdly, the case provides a valuable reminder for experts that their duties to the UT are continuing and that a change of opinion is not necessarily a weakness or a sign of a lack of expertise.

What was the background?

The applicants wanted to build three new structures on their property:

- a (replacement) house
- a (replacement) garage
- a large summerhouse

Their neighbours objected to this because of the effect the new buildings would have on their amenity, privacy and views. The neighbours relied on restrictive covenants which prevented the applicants erecting any buildings on their land without first obtaining the neighbours' written approval of the plans. The neighbours refused to approve the applicants' plans. The applicants therefore applied to the UT to modify the restrictive covenants under ground aa of [LPA 1925, s 84\(1\)](#)—that the restrictions conferred no practical benefits of substantial value on the neighbours' land and that money would be an adequate compensation.

The neighbours maintained that, although planning consent had been granted for the new house, specific discrete approval had not been granted for the garage and the summerhouse. Rather, these were to be constructed under permitted development rights and by sequencing the building of the house as the last of the construction works, the applicants would be able to build three large structures on its land in place of a small bungalow and double garage. This had not been appreciated by the local planning authority as it had given consent to the building of the new house on green belt land believing this would reduce the spread of the development on the applicants'

property. In fact, the building of the three structures (as the applicants intended and were lawfully entitled to) would significantly increase the spread of the development.

The applicants contended that as the planning consent had not been challenged by judicial review, the proposed use of their land was reasonable. Moreover, the applicants' expert initially stated that the development would have no effect on the value of the neighbours' property. But, very shortly before the trial, he altered this view to concede that the perception of a larger house on the applicants' land might reduce the market value of the neighbours' property by 2–2.5%.

What did the UT decide?

The UT concluded that it should modify the covenants to permit the construction of the replacement house and garage upon payment of compensation of £50,000 (being 2.25% of the value of the neighbours' property). The UT held that the covenants did impede the use of the land regardless of whether the neighbours' refusal of consent was reasonable. It was therefore not necessary for a potential applicant concerned about a qualified covenant to make (and fail in) an application to the court for a declaration that the refusal of consent was unreasonable in order to found the UT's jurisdiction under ground aa of [LPA 1925, s 84\(1\)](#) (contrary to what was said in *Re: Wild's Application* [2012] UKUT 306 (LC)). It mattered not that had the refusal of consent been unreasonable, the applicants could have built free from the covenants, as the very delay and uncertainty about the reasonableness of the refusal of consent was sufficient to give the UT jurisdiction.

The UT did, though, consider that the building of the summerhouse would not be a reasonable use of the land and so refused to modify the covenant to permit its erection. This was because the UT—in accordance with [LPA 1925, s 84\(1B\)](#)—took account of the local development plan and considered the intensification of use and damage to the green belt necessitated by this building. Having regard to this, the UT found the use of the land for the erection of the summerhouse to be unreasonable.

Finally, in determining the proper level of compensation, the UT was 'impressed' by the evidence of the applicants' expert who had changed his mind (contrary to his clients' interests) late in the day as to the effect of the proposed development. The UT's award was entirely consistent with the applicants' expert's revised opinion.

Andrew Bruce specialises in property litigation work. He acts for estate owners, developers, land promoters, high-net worth individuals and public authorities and combines a thriving paper practice with advocacy at all levels of the court-structure. He is consistently recommended for his real property expertise in Chambers & Partners and Legal 500. He is a past committee member of the Property Bar Association and sits as a judge of the First Tier Tribunal (Property Chamber) (Land Registration).

Interviewed by Kate Beaumont.

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