



Neutral Citation Number: [2025] EWCA Civ 652

Case No: CA 2024 000214

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Martin Rodger KC, Deputy Chamber President
and Peter D McCrea FRICS FCI Arb
[2023] UKUT 189 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2025

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE BAKER
and
LORD JUSTICE NUGEE

Between:

GREAT JACKSON ST ESTATES LIMITED	<u>Appellants</u>
- and -	
THE COUNCIL OF THE CITY OF MANCHESTER	<u>Respondents</u>

Stephen Jourdan KC and Martin Dray (instructed by Walker Morris LLP) for the
Appellants
Timothy Morshead KC and Elisabeth Tythcott (instructed by Manchester & Salford
Combined Legal Services) for the Respondents

Hearing dates: 30 April 2025

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 May 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin :

The issues

1. The central issue in this appeal is whether restrictive covenants in a lease provide the lessor, which is also the planning authority, with practical benefits of substantial value or advantage to it for the purposes of section 84(1)(aa) and section 84(1A) of the Law of Property Act 1925 (the “1925 Act”), in enabling the lessor to prevent a proposed development from going ahead in an uncontrolled manner. The lessor’s concern is that the proposed development might not be completed in a timely fashion or not completed at all. This arises in a context in which only 60 years of the unexpired term of the lease remain and negotiations for a new building lease, subject to stringent conditions, have faltered.

Background

2. The Appellant, Great Jackson St Estates Limited, (“Great Jackson”) is the tenant of two redundant warehouses in a part of Manchester which is rapidly being developed as an area of modern, high-density housing (“the Site”). It is a special purpose vehicle which has been described as dormant and which has no assets other than the lease of the Site. The Respondent, the Council of the City of Manchester (“the Council”), is the freehold owner of the Site and the relevant planning authority. The warehouses were built pursuant to an Agreement for a Lease dated 15 August 1973 by which the Council agreed to grant a predecessor to Great Jackson a term of 99 years from 25 March 1973. On completion of the warehouses, a lease was granted on 18 July 1978 (the “Lease”). The term of the Lease was subsequently extended to one of 99 years from 29 September 1984. At the date of the hearing before the Upper Tribunal, 61 years of that term remained unexpired.
3. At the time the Lease was granted, the Site was part of a predominantly industrial area containing light industrial units separated by car parks. The Site was included in the Council’s 2007 development plan, however. That plan now forms part of the City Centre Strategic Plan published in 2016. It was designated as a new high-quality residential neighbourhood. The Site was designated as “Plot G” on the framework masterplan and was earmarked as the location for three new residential buildings. The Council owns the freehold reversion interest in three of the Great Jackson Street development plots, including Plot G. It has worked with the leasehold owners of other plots to facilitate development of the area and has granted new 999 year building leases which provide for phased development to an agreed timetable. Some of those other developments are complete and others are close to completion.
4. Great Jackson has been working on its own plan for redevelopment of Plot G. It wants to demolish the warehouses and replace them with two 56-storey tower blocks containing 1037 flats, at a cost of £300-350 million. It is not in doubt that its proposals are consistent with the local development plan. Planning consent for that scheme was granted subject to an agreement under section 106 of the Town and Country Planning Act 1990 and since the hearing before the Upper Tribunal, a section 106 agreement has been executed.
5. Great Jackson faces a number of difficulties, however. First, the Lease contains a number of covenants which prevent the redevelopment of the warehouses without the consent of the Council and other covenants which are subject to the Council’s consent, not to be unreasonably withheld. Secondly, as I have already mentioned, the term of the

Lease left unexpired is 60 years or so. Thirdly, although both Great Jackson and the Council wish the redevelopment to take place, the parties have been unable to reach agreement in relation to a new long lease of the Site which would be granted on similar terms to those agreed with the developers of other plots within the development area. The Council has proposed that Great Jackson enter into a new 250 year building lease at a premium. The new lease would be subject to numerous conditions and milestones in relation to the development and would provide for forfeiture if the development milestones were not achieved.

6. Instead, Great Jackson sought the Council's consent to the proposed development under the Lease which was not forthcoming. It then applied to the Upper Tribunal pursuant to section 84 of the 1925 Act, for the modification or discharge of eleven covenants contained in the Lease to enable the redevelopment to be carried out without the need for the grant of a new lease. As they are lengthy, I shall describe the covenants in summary only. In doing so, I rely heavily upon the judgment of the Upper Tribunal.
7. The first group of restrictions prevent the applicant from carrying out development without the Council's consent, but do not stipulate that the Council may not refuse its consent unreasonably:
 - (a) Clause 2(ii) prohibits building over a public sewer, a gas main and a service duct containing electric cables running under the Site, without the Council's consent; the covenant also prohibits doing anything which may cause damage to those installations;
 - (b) Clause 2(iii) prohibits building without the consent of the Council over more than two thirds of the Site or within 10 feet of the side or rear boundaries;
 - (c) Clause 2(viii) prohibits the use of the Site other than for the two warehouses. It also prohibits the use of the buildings, without the consent of the Council, other than as light industrial buildings or wholesale warehouses or repositories for any purpose; and
 - (d) Clause 2(xiii) is a covenant against damaging or removing any trees or shrubs growing on the Site without the consent of the Council's Estates and Valuation Officer.
8. The second group of covenants comprises two restrictions giving the Council qualified control over the development and use of the Site, by requiring that the applicant obtain its consent which may not be refused unreasonably. They are:
 - (a) Clause 2(vii), which prevents the applicant from making additions, alterations or improvements to the existing warehouses, or erecting any other buildings, without the consent in writing of the Council, which is not to be unreasonably withheld. If consent is given by the Council the covenant obliges the applicant to carry out the permitted work in accordance with plans and specifications prepared by, and under the supervision of, a registered architect and with materials previously approved by the Council; and
 - (b) Clause 2(x) prohibits the use of any open area of the Site at any time for the open storage of goods or materials without the consent of the Council (not to be unreasonably withheld) and requires the applicant to comply with any conditions subject to which any such consent may be given.
9. Lastly, Great Jackson invited the Upper Tribunal to modify the third group of five miscellaneous restrictions concerned with the general use and management of the Site:

- (a) Clause 2(ix) is a covenant against the use of the buildings in any manner which the Council may deem to be “a nuisance damage grievance or annoyance” to it or its tenants, or to the owners or occupiers of other property in the neighbourhood, or to the neighbourhood itself;
- (b) Clause 2(xii) prohibits the deposit or storage of waste material or receptacles for waste so as to be visible from any public footpath street or road;
- (c) Clause 2(xvi) prohibits the posting of bills or advertisements on hoardings or on the walls or fences surrounding the Site; and
- (d) Clauses 2(xxi) and (xxii) are covenants dealing with alienation appropriate to a commercial building but not commonly found in leases of residential buildings. The first prohibits assignment, sub-letting or parting with the possession of the whole or part of the demised premises without the consent in writing of the Council, which is not to be unreasonably withheld or delayed. It also requires that every permitted underlease should contain a similar covenant requiring the consent of the Council to any such dealing. The second requires notice in writing to be given to the Council within one month of any assignment, sub-letting or devolution of any part of the demised premises.

(It was accepted that the Upper Tribunal had no jurisdiction to modify this covenant, but it was argued that the covenant against subletting without consent was a restriction “as to the user” of the land).

10. Great Jackson’s application to the Upper Tribunal was made under three of the grounds in section 84(1) of the 1925 Act: ground (a), the restrictions being said to be obsolete; ground (aa), because the proposal is a reasonable use of the land and its completion will cause the landlord no substantial loss or disadvantage; and ground (c), on the basis that the objector will not be injured by the proposed modification. It was common ground that the burden of showing that a ground is made out falls on the applicant. It was also agreed that the fact that the restrictions are leasehold rather than freehold covenants is no obstacle to their being modified as the conditions in section 84(12) of the 1925 Act are met.
11. Shortly before the hearing before the Upper Tribunal, Great Jackson circulated proposed modifications to the covenants. Before the hearing, the Tribunal itself made enquiries about whether the question before it would be the terms upon which the covenants should be modified pursuant to the Tribunal’s discretion under section 84(1C) of the 1925 Act or whether the parties also intended to argue about whether the statutory grounds were made out. In fact, the hearing went ahead on the basis of the substantive issue of whether the statutory grounds were made out and reference to the modifications to the covenants which had been circulated before the hearing was made only in general terms by Great Jackson’s counsel in closing and the matter was not pursued in any detail.
12. A much more succinct version of proposed modification to the covenants was appended to the Appellant’s Notice and was referred to as “Clause X”. Mr Jourdan KC, who appeared before us with Mr Dray on behalf of Great Jackson, submitted that Clause X was a neater and shorter form of the modifications which had been circulated before the hearing before the Upper Tribunal. In short, Clause X provides that the covenants be modified so that the redevelopment can proceed once planning consent is granted (which has taken place) on the terms of that consent.

Summary of the relevant parts of the decision

13. The Upper Tribunal recorded the position between the parties in relation to the Lease and the grant of a new lease in the following way. At [16] it stated that the Council had offered to grant a new lease of the Site for a term of 250 years to facilitate the implementation of the anticipated planning permission. Despite protracted negotiations, the parties had been unable to reach agreement and in May 2022, Great Jackson had requested the Council's consent to the proposed development under the terms of the existing lease. The Upper Tribunal stated that: "we understand the Council's position to have been and to remain that while it is strongly in favour of the development of the Site, it is not willing to consent to the proposed works being carried out under the terms of the existing lease; it nevertheless remains willing to negotiate over the terms of a new building lease to be granted to the applicant to enable the works to proceed" [17].
14. The Upper Tribunal also made clear at [25] that it did not hear any evidence about the details of the negotiation about the grant of the new long lease of the Site and was not asked to consider whether the position adopted by either Great Jackson or the Council was reasonable or unreasonable. Nor was the Upper Tribunal asked to determine whether the Council's refusal to consent to the proposed development under the Lease was reasonable or unreasonable.
15. The Upper Tribunal's findings based on oral evidence given by Mr Rose, on behalf of Great Jackson, are also of some relevance. At [27], it noted that despite the fact that Great Jackson's track record, resources and business model were relevant as the Council's main concern was over the "deliverability" of the project, Mr Rose, who had been long associated with Mr Weis and his group of companies, which includes Great Jackson, chose to describe the operation of the group of companies only in very general terms. It was also noted that Mr Rose's written evidence was contrary to the case he and Mr Hutchings KC, who appeared for Great Jackson at that stage, advanced at the hearing. In particular, he had stated in his witness statement that the restriction on sub-letting in the Lease was impractical and obsolete in the light of Great Jackson's plans for the development. He stated that it would be seeking to sub-let the apartments and that the owners might wish to grant short term occupational tenancies. In his oral evidence, however, Mr Rose suggested that Great Jackson itself intended to let individual flats on short term tenancies. Furthermore, in his oral evidence, Great Jackson's expert witness suggested that the development could be viable over the remaining 60 years of the Lease by a funding method referred to as an "income strip", an option which had not appeared in his written report [29].
16. The Upper Tribunal concluded at [30] that:

"We were left with two concerning impressions. The first was that the applicant's proposals were being formulated or adapted on the hoof or had undergone significant recent changes the viability of which was not adequately explained and may not yet have been worked out by the applicant itself. The second was that Mr Rose's account of the applicant's intentions may simply have been its latest negotiating gambit and that its real object is to use this application to chip away at the restrictions as far as it can before reopening discussions with the Council on re-gearing the lease with a view to securing more favourable terms for

whatever its preferred letting model may be. As a commercial objective there is nothing whatsoever wrong with that approach, and we make no criticism of it at that level, but it may explain why much of the applicant's evidence appeared vague and incomplete."

17. The Upper Tribunal decided that Great Jackson's case in relation to ground (a) (obsolescence) had not been made out [32] – [43]. In particular, at [41], the Upper Tribunal agreed that at least part of the purpose of the restrictive covenants was to protect the reversionary interest of the Council and that nothing in the evidence suggested that it was being used for any different purpose. The Upper Tribunal explained at [42] that it had no doubt that the Council's aim in the negotiations for a new lease was not a purely commercial one. It went on:

" . . . It has a legitimate strategic interest in continuing to influence the use of land on the fringe of the city centre and to secure its orderly and appropriate development. That interest is promoted through the statutory planning process, but there is no reason why its promotion and protection must end there, and the leasehold covenants allow it a further opportunity to control the use of the Site. The evidence of Mr Ken Richards, the Council's Principal Development Surveyor, fully satisfied us that the Council wishes to ensure that development of the Site takes place in the manner proposed by the applicant subject to appropriate safeguards to ensure that it is commenced in a timely fashion and not left incomplete. That objective is plainly in the interests of the public of Manchester, and its achievement is a facet of the control over the use of the Site which the covenants were intended to allow the Council."

18. The Upper Tribunal also held that injury would be caused to the Council by modification of the restrictions in the manner proposed, since the Council would lose the practical control which it currently enjoys over the redevelopment of the Site. As a result, the application pursuant to ground (c) also failed [61].
19. The ground which is central to this appeal is ground (aa). The Upper Tribunal held that for the purposes of ground (aa), the "sole focus of the issue of reasonable use is on the land use itself" [48]. It distinguished *Caledonian Associated Properties Ltd v East Kilbride DC* (1985) 49 P&CR 410 and held that considerations of practicality or "deliverability" could be taken into account when the Upper Tribunal was exercising its discretion but not when determining whether ground (aa) was made out. It noted that the proposed development was in accordance with the development plan and that the impracticability did not depend on the prospects of planning permission being granted (which appeared to have been the difficulty in the *Caledonian* case) "but on the ability of the [applicant] to fund, manage and complete the development without securing a new, longer lease" [49]. The Upper Tribunal went on, also at [49], to state that:

" . . . Without proper evidence on those issues we are not prepared to form a judgment on the basis of mere assertions by

one side or the other. Given that both parties are keen to see the Site developed for residential use, and that such use is in accordance with the development plan, we are satisfied that it is a reasonable use.”

20. At [50], the Upper Tribunal stated that it was satisfied that the restrictions impede the proposed use and went on at [51] to consider whether by impeding that use, the restrictions secured practical benefits to the Council, and if so, whether those benefits are of substantial value or advantage to it. It noted, also at [51], that:

“... As planning authority the Council not only does not object in principle to the development occurring, it has positively and enthusiastically encouraged it. As landlord it nevertheless seeks to include provisions within a new extended lease to which the applicant objects. The purpose of those provisions, the Council says, is to ensure the development is completed, and within a reasonable time. The principal conditions it requires are a set of development milestones requiring the developer to commence construction within a certain period of being granted the new lease, and to complete the development within a certain period. To enable this timetable to be enforced and to ensure the development is completed if they are not, the Council envisages forfeiture provisions, (subject to force majeure), and step-in rights in favour of the project’s funders in the event of the applicant’s insolvency. ...”

21. It went on at [52] to note that it had not been asked to consider the reasonableness of the conditions and stated that it was clear that “the Council’s ability to rely on the restrictions within the lease [the Lease] to prevent the applicant [Great Jackson] from carrying out the development without agreement to provisions intended to secure the Council’s development objective, does secure a practical benefit.”

22. Also at [52], the Upper Tribunal addressed the argument that the practical benefits for the purposes of section 84 must be direct rather than peripheral and that benefits were not “practical” if they were merely pecuniary. In other words, if the only benefit derived from the restrictions was to enable the Council to extract a higher premium for agreement to their relaxation it should not be treated as a practical benefit at all. The Tribunal accepted that proposition but held that:

“... The Council is not simply seeking to obtain a monetary advantage or relying on the covenants as an obstacle which the applicant [Great Jackson] must negotiate away. The Council is using the covenants for their intended purpose, namely, to afford it a significant degree of control over the development of the Site.”

The Upper Tribunal concluded at [53] that the ability to withhold consent to the development until it was satisfied that the proposals could be delivered was not an indirect or peripheral benefit. It allowed the Council: “to influence the form of the development and mitigate the risk that the Site might not be developed in an orderly and timely way. It would no doubt also be commercially desirable for a new longer

lease to be granted to underpin the development, and to enable the applicant to recoup its investment over a longer period, but that would be the case whether or not the restrictions in the current lease impeded development. The Council's negotiating position is not a benefit which it derives from the terms of the lease, or not from those terms alone, but from the fact that the lease will expire in only 60 years."

23. Lastly under this head, the Upper Tribunal stated that it was satisfied that, measured in monetary terms, the restrictions did not (by impeding the development) secure to the Council a practical benefit of substantial value. It noted, however, that whether the practical benefit was a "substantial advantage" was a different question. It went on as follows:

"60. . . The nub of this application is about the control the restrictions secure to the Council as a local authority. We are satisfied that the Council's concerns about the viability of the development are genuine, and the conditions that it seeks to impose address its wish to see the development commencing and being completed within a certain period. We have no view as to whether the proposed periods are realistic or reasonable, but that isn't the issue before us. The question is about the extent of the advantage which the restrictions secure for the Council, by preventing the development going ahead unless the applicant satisfies its concerns. Those concerns are not pecuniary in nature but are aimed at ensuring one of the last pieces of the development jigsaw slots into place. We are satisfied that this control is a substantial advantage, and the application on ground (aa) therefore fails."

24. Despite the fact that Great Jackson had failed to satisfy the Upper Tribunal that the ground was made out, it went on to address what it would have decided had it been necessary to consider the exercise of its discretion. It stated that it would have refused to exercise its discretion to modify the covenants for two reasons. First, it "should be equally slow to interfere with a local authority which seeks to use its private rights as landlord to promote its strategic development plan, and to ensure that a desired development takes place" [63]. Secondly, it "would also be reluctant to use the Tribunal's discretionary power in a manner which would be liable to disrupt continuing negotiations between a local authority and a commercial developer, both of whom are well able to protect their own interests." It went on, also at [63]: "Having visited the locality and observed the results of recent and continuing development on adjoining land belonging to the Council we are in no doubt that the development of the Site is capable of being achieved through sensible commercial negotiations. If the necessary jurisdictional conditions had been satisfied in this case giving the Tribunal the opportunity to intervene in the parties' negotiations, it would in our judgment have been unnecessary and inappropriate to have done so."

Section 84 Law of Property Act 1925 and the Upper Tribunal's jurisdiction

25. Section 84(1)(aa) and (1A) to which it refers are, where relevant, in the following terms:

"(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to

time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied ...

(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...

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either:

(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.

...

(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.”

Sub-section 84(1B) provides that:

“In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.”

Sub-section 84(1C) contains a power to impose further provisions restricting the use of land when modifying a restriction. Where relevant, it is in the following form:

“(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition....”

Sub-section 84(12) which extends the application of section 84 to covenants in leases and which applies in this case, is as follows:

“(12) Where a term of more than forty years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of twenty-five years of the term, apply to restrictions, affecting such leasehold land in like manner as it would have applied had the land been freehold: . . .”

26. As the Upper Tribunal explained at [18] of its Decision, section 84 confers power upon it to discharge or modify covenants affecting land where the grounds in section 84 are made out. The power is discretionary. As Lord Burrows JSC, with whom Lords Lloyd-Jones, Kitchin and Lord Hamblen, JJSC and Lord Kerr agreed, explained in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 at [33]:

“It is well-established (see, for example, *Driscoll v Church Comrs for England* [1957] 1 QB 330) that, if satisfied that one of the prescribed grounds has been made out, the Upper Tribunal has a discretion whether or not to make an order for modification or discharge of the restrictive covenant. The important statutory words to this effect are in section 84(1): the Upper Tribunal “shall . . . have power”. The five grounds are therefore concerned with establishing the Upper Tribunal’s jurisdiction and can be helpfully labelled the “jurisdictional grounds”: at least one of those jurisdictional grounds must be established by the applicant before the Upper Tribunal can go on to make what is ultimately a discretionary decision.”

He also added at [52] that the Upper Tribunal in the *Trustees of the Green Masjid* case had been correct to say that once a jurisdictional ground has been established, the discretion to refuse the application should be “cautiously exercised”.

27. Mr Morshead KC, who appeared with Ms Tythcott on behalf of the Council, emphasised that the exercise which the Upper Tribunal must perform, both at the jurisdictional and the discretionary stage, is evaluative, a proposition from which Mr Jourdan did not demur.

Grounds of Appeal and Re-Amended Respondent’s Notice

28. There are two grounds of appeal. First, it is said that the Upper Tribunal was wrong in law to hold that the restrictions imposed by the covenants secured practical benefits to the Council. The Tribunal should have held that the restrictions secured no practical benefit, and therefore it had power by order to modify the restrictions to permit the development to be carried out. This ground has two aspects to it:
- a. It is said that “practical benefits” for the purposes of section 84(1)(aa) are benefits which are enjoyed as a result of the covenant being complied with and the proposed user being prevented. In appropriate cases, terms may be imposed upon how the reasonable user is implemented and this is reflected in section 84(1C);
 - b. Even if that is wrong, it is said that the ability to use a restriction to prevent a reasonable user from being put into effect unless the applicant agrees to enter into a new lease is not a “practical benefit” for the purposes of section 84(1)(aa).
29. Secondly, it is said that the Upper Tribunal erred in law in stating that had it had the power to modify the covenants, it would not have exercised its discretion to do so for the reasons it set out at [62] and [63] of its decision.
30. The Re-Amended Respondent’s Notice raises an issue which arises logically prior to those considered by the Upper Tribunal. It is said that the Upper Tribunal ought also to have dismissed the application on the basis that the ground at section 84(1)(aa) is only available where an applicant shows that the continued existence of a restrictive covenant (in unmodified form) would “impede” a “reasonable user” of the land. It is said that the ordinary meaning of the statutory language is that it is incumbent upon the applicant to establish that the covenant(s) in question would “impede” that specific user, unless modified or discharged. It is said that Great Jackson failed to cross that threshold because it did not satisfy the Upper Tribunal that it was in a position to carry out the re-development of the Site under the Lease.
31. It is also said that money would not be adequate compensation for the loss or disadvantage which the Council would suffer if the covenants were discharged or modified and accordingly, section 84(1)(aa) could not be satisfied.

Submissions in relation to the appeal in summary

32. Mr Jourdan, on behalf of Great Jackson, submits that the Tribunal was wrong in law to hold that the Council’s power to prevent the development from taking place save under a new lease on the terms required by the Council was a “practical benefit” for the purposes of s.84(1)(aa). He says that the “practical benefits” referred to in s.84(1)(aa) are benefits which will be enjoyed as a result of the covenant being complied with, and the proposed reasonable user not being put into effect. The “practical benefits” are those secured by the effect of the restriction, if it remains in place, in impeding the proposed user. The need in appropriate cases to impose terms on how the reasonable user is implemented is reflected in section 84(1C).
33. In any event, he says that the ability to use a restriction to prevent the reasonable user from being put into effect unless the applicant agrees to enter into a new lease is not a “practical benefit” for the purposes of s.84(1)(aa). The ability to charge a money premium in return for permitting a development is not a “practical benefit”. Nor, he

says, is the ability to insist on any other form of quid pro quo, including requiring that a new lease be entered into. The benefits which are envisaged are practical ones in relation to the land and not a financial bargaining position which the person entitled to the benefit of the covenant can use to extract money for consent to the release or modification of the restriction: *Stockport Metropolitan Borough Council v Alwiyah Developments* (1986) 52 P&CR 278 at 281.

34. Even if that is incorrect and the ability to control how a reasonable user is implemented is capable of being a “practical benefit”, Mr Jourdan says that that can only be so in the context of the existing legal relationship between applicant and objector. The Council never sought to exercise control of the development under the Lease, however. It would only consider allowing the development to proceed under a new 250 year building lease containing stringent conditions.
35. He says that if the Council’s position is that the reasonable user will do it no harm provided it is carried out on terms, its proper course was to accept that the Upper Tribunal has jurisdiction to modify the restrictions (pursuant to section 84(1C)) and to seek to persuade it to impose the terms it seeks. He says that the Council cannot in that situation say that the ability to control how the reasonable user is implemented is itself a practical benefit of a substantial nature. The ability to impose conditions on how the development is to be carried out is not a “practical benefit” for the purposes of section 84(1)(aa) because it does not flow from the restriction being complied with.
36. Mr Morshead KC, with Ms Tythcott, on behalf of the Council, made clear that the Council is concerned with the viability of Great Jackson’s proposal to develop the Site and the risk that it will be unable to complete the development in a timely fashion, or at all. It is concerned that the development plan for the entire area, of which Plot G is the last component, should be completed for the benefit of the city of Manchester as a whole.
37. He submits that the existence of the restrictive covenants confers an ability to mitigate those risks, which is a “practical benefit” which depends upon continued compliance with the covenants. He says that the Upper Tribunal recognised that the covenants in the Lease do more than secure a negotiating position for the Council in relation to the terms of a new lease. The “practical benefit” is secured by the Lease and the Council seeks to retain that practical benefit under a new lease.
38. He emphasises that whether the covenants secure “practical benefits” is a matter of evaluative judgment for the Upper Tribunal, as is the question of whether those “practical benefits” are “substantial”. The Upper Tribunal’s reasoning in relation to both matters contains no error of law and there is no basis upon which its evaluation can otherwise be challenged.
39. Furthermore, Mr Morshead submits that it is too late for Great Jackson to rely upon section 84(1C) in the light of the fact that the imposition of conditions/the amendment of the covenants was not pursued before the Upper Tribunal. Even if that is not the case, he says therefore, that this court is not in a position to evaluate whether the terms of Clause X are appropriate in the circumstances and there is no proper basis upon which the issue might be remitted to the Upper Tribunal.

Ground 1 - “practical benefit” for the purposes of section 84(1)(aa) and 84(1A)

40. As Carnwath LJ (as he then was) explained in *Shephard v Turner* [2006] 2 P&CR 28 at [16] – [17], section 84(1)(aa) was introduced by amendment by the Law of Property Act 1969. It replaced the second part of the former ground (a) which was in the following terms:

“ . . . that the continued existence [of the restriction] would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons . . . ”

The most significant changes, therefore, were the substitution of “some” for “the” in the reference to reasonable user; and the introduction of the criterion that the practical benefits should be “of substantial value or advantage”. Carnwath LJ noted that the changes followed a report of the Law Commission (Report on Restrictive Covenants Law Com No.11 (1967)), which recommended a restatement of the Tribunal’s powers “ . . . in such terms as to enable it to take a broader view of whether the use of land is being unreasonably impeded . . . ” He also explained that when introducing the Bill in the House of Lords, the Lord Chancellor explained that the existing provisions had been strictly interpreted, so that in practice it was rare for a restriction to be modified or discharged unless it was obsolete or of no value to the person entitled to enjoy its benefits and that the development of land had often been frustrated as a result.

41. He also noted that under the amended provisions, the courts have emphasised the breadth of the considerations which may be taken into account. There is no dispute that the phrase “practical benefits” in section 84(1A)(a) of the 1925 Act is a wide one. Eveleigh LJ explained the correct approach in *Gilbert v Spoor* [1983] Ch 27 at 32E-G in the following way:

“ . . . the words . . . are used quite generally. The phrase ‘any practical benefits of substantial value or advantage to them’ is wide. The subsection does not speak of a restriction for the benefit or protection of land, which is a reasonably common phrase, but rather of a restriction which secures any practical benefits. The expression “any practical benefits” is so wide that I would require very compelling considerations before I felt able to limit it in the matter contended for. When one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the Tribunal is required to consider the adverse effect upon a broad basis.”

In that case, the applicant to the Tribunal was the owner of land which was conveyed subject to a building scheme and was subject to a covenant not to erect more than one dwelling house upon it. The applicant was granted planning permission to erect two additional houses and applied for discharge or modification of the covenants under section 84(1)(aa). The Lands Tribunal found that the additional houses would interfere with the view from land in the immediate vicinity of the objectors’ properties but not from their properties themselves. It was held that in preventing interference with the view, the covenant secured a practical benefit of substantial value or advantage. The

application was dismissed. The Court of Appeal dismissed an appeal from the Tribunal's decision.

42. It is also accepted that “practical benefits” must be practical rather than afford the covenantee an opportunity to extract monies from the covenantor or his successor for their release and that the benefits must flow from compliance with the covenants rather than from their discharge. As I have already mentioned, Mr Jourdan took us to *Stockport Metropolitan Borough Council v Alwiyah Developments* in this regard. That was a case in which the Borough Council owned a housing estate and had sold adjacent land subject to a covenant that it be used for agriculture only. Some of the houses on the estate had a pleasant view over the farmland. The owner of the farmland applied to the Lands Tribunal under section 84(1)(aa) and (1A) to modify the restrictions to enable it to erect houses on part of the land. The Tribunal granted the application on the basis that the only detriment which the Borough Council would suffer would be the diminution of the price to be obtained for eleven of the houses on its estate as and when the statutory right to buy was exercised. The Borough Council's appeal was dismissed by the Court of Appeal. Eveleigh LJ stated at 281 that the benefit for the purposes of section 84(1)(aa) must be “a practical one as opposed to a pecuniary one” and it must be afforded by the observation of the covenant”. He added that: “[B]argaining power is only a benefit when it results in the receipt of the price upon the covenant being discharged. Such a benefit cannot be of the kind contemplated by the subsection for it results from the discharge and not the continuance of the covenant.”
43. Dillon LJ, with whom Griffiths LJ agreed, also stated at 284 that section 84(1)(aa) is “concerned with the practical benefits on the land in the nature of amenities and not with the merely financial bargaining position which the person entitled to the benefits of the covenant could have used to extract money for his consent to a release or modification of the restriction if the section had never been enacted.”
44. Mr Jourdan also submitted that a mere ability to insist on a covenant being observed and, as a result, being able to control the use of land, cannot be a “practical benefit”. I agree that mere control by enforcement of the covenant cannot be sufficient to amount to a “practical benefit”. If that were not the case, as Mr Jourdan pointed out, section 84(1)(aa) would be of little or no use.
45. *Edgware Road (2015) Ltd v Church Commissioners for England* [2020] L&TR 13, a decision of the Upper Tribunal (Lands Chamber), provides an example, however, of a restriction which was held to be of practical benefit despite the fact that the covenantee sought to use it to maintain control of the use of the land. In that case a lease of premises prohibited its use for sleeping and restricted the use of certain floors to offices. The tenant wished to change the use of the first and second floors to a pod-style hotel for which it had planning permission. It applied to modify the covenants pursuant to section 84(1)(aa) and (c) of the 1925 Act. The application failed because the landlords' ability to exert control over that part of their estate was of significant benefit to them in the management of their interests of their estate as a whole.
46. The Tribunal stated at [126] that there was extensive evidence that the landlords almost always relied upon lease restrictions as part of their wider estate policy. That evidence was accepted and the Tribunal stated that it had no doubt that the user restriction was an “important tool of estate management” and that “by preventing hotel use in a location

where for strategic reasons the Commissioners do not wish to see it, the restriction secures to the Commissioners the specific and practical benefit of control.” It went on at [138], as follows:

“ . . . the effect on the wider estate of a relaxation of the Commissioners’ ability to manage the Estate in accordance with their own strategy could be significant in the medium to long term. It would make the implementation of their Office Strategy more difficult and could, depending on the eventual form and success of the applicant’s hotel concept, undermine their aspirations to improve the quality of Edgware Road. The impossibility of reliably measuring those impacts in financial terms is an indicator that the disadvantage that the Commissioners would suffer by modification of the covenant cannot adequately be compensated by money. In my judgment the ability of the Commissioners to enforce the restrictive user clauses in the subject lease, and in doing so to impede the proposed user, does secure to them a practical benefit of substantial advantage.”

Discussion and conclusions

47. It seems to me that in the circumstances with which this appeal is concerned the authorities to which I have referred do not assist Mr Jourdan. The Upper Tribunal was entitled to decide that the covenants afford the Council practical benefits of substantial advantage to it. Its Decision reveals no error of law. It approached this matter by reference to the often used questions which were distilled in *Re Bass’ Application* (1973) 26 P&CR 156. They are:

- (1) Is the proposed user reasonable?
- (2) Do the covenants impede that user?
- (3) Does impeding the proposed user secure practical benefits to the respondent?
- (4) Do the covenants provide the respondent with substantial value or advantage?
- (5) Is impeding the proposed user contrary to the public interest?
- (6) If the answer to question (4) is negative, would money be an adequate compensation?
- (7) If the answer to question (5) is affirmative, would money be an adequate compensation?

They provide a helpful framework which assists the Tribunal and the parties to navigate the detailed and interlocking requirements of section 84(1)(aa) and (1A). They are not prescriptive in any way, however, and should not be approached as if they were a rigid checklist which must be adhered to in every case.

48. Having heard the evidence, the Upper Tribunal made an evaluative judgment in relation to all the relevant elements in order to determine whether there was jurisdiction to discharge or modify the covenants under section 84(1)(aa). As Mr Morshead pointed out, it found at [42] that the Council has a legitimate strategy in continuing to influence the use of the land on the fringe of the city centre and to secure its orderly and appropriate development. The Upper Tribunal stated that there was no reason why that interest in the promotion and protection of the Site should not be furthered through the

leasehold covenants in addition to through the statutory planning process. It was “fully satisfied” that the Council wishes to ensure that the Site is developed in the manner proposed by Great Jackson subject to appropriate safeguards to ensure that it is “commenced in timely fashion and not left incomplete” and that that was a facet of the control over the use of the Site which the covenants were intended to afford to the Council.

49. The Upper Tribunal reached those conclusions in the context of considering whether the covenants were obsolete for the purposes of section 84(1)(a). It had no doubt that the object of the restriction on use remained capable of fulfilment [43]. It is in that context that it went on to decide at [52] that the ability to rely on the restrictions within the Lease to prevent Great Jackson from carrying out the development, without agreeing to provisions which secure the Council’s development objective, secures a practical benefit and that the Council was using the covenants for their intended purpose.
50. As Mr Morshead also pointed out, the Upper Tribunal made clear at [53] that the ability to withhold consent in relation to the covenants in the Lease until it is satisfied that Great Jackson’s proposals can be delivered allows it to influence the development and mitigate the risk that the Site might not be developed in a timely and orderly manner.
51. I agree with Mr Morshead that the ability to prevent development of the Site which forms part of the City Strategic Plan, much of which has already been completed, without appropriate safeguards, is a benefit which flows from compliance with the covenants in the Lease rather than their discharge. Although a new lease might be preferable, in the meantime, the covenants are being used for their intended purpose. That is what the Upper Tribunal held at [42], [50] – [53] and [60] of its Decision.
52. It was suggested that the Council are unable to rely upon their role as the planning authority in this regard and that they are restricted to the advantages which the covenants afford to a private landlord. It seems to me, however, even if one restricts the Council’s role to that of landlord, it is legitimate to take account of the Council’s role. It carries out all of its functions as a public body on behalf of the citizens of Manchester, including its role as freehold landlord of the Site. It must exercise the rights and observe the obligations under the Lease in the light of its duties as a public body. It is legitimate, therefore, to take account of the fact that it should exercise those rights in accordance with its wider public duties, one of which is to ensure the orderly and proper development of the Site for the benefit of Manchester as a whole.
53. Furthermore, in my judgment, the Upper Tribunal quite rightly rejected the submission that the Council was seeking a monetary advantage from discharge of covenants rather than using them for their intended purpose of affording an element of control over the development of the Site. As the Upper Tribunal put it at [53], the Council has the ability to withhold consent under the covenants in the Lease “until” it is satisfied that Great Jackson’s proposals can be delivered in an orderly and timely manner. As the Upper Tribunal made clear at [60], the question was about the extent of the advantage which the restrictions provide to the Council by preventing the development going ahead unless its concerns were satisfied. They were not pecuniary or an attempt to seek a quid pro quo.

54. I also agree that such an ability to prevent the development unless appropriate safeguards are put in place, is not merely “control” in the sense Mr Jourdan mentioned. In this case, the covenants enable the Council to further its overall strategy for the development of the area of which the Site forms part. They enable it to prevent the uncontrolled development of the Site and to mitigate the risk that Great Jackson might not commence the development and continue it in a timely fashion or might leave it unfinished. Such an ability goes beyond mere control and is analogous to the circumstances in the *Church Commissioners* case in which the restriction was a useful tool in the overall management of the estate.
55. It will be clear from what I have already said that Mr Jourdan’s alternative argument does not arise, or, to put it another way, it must be rejected. The “practical benefit” in this case arose from the ability to refuse consent to the development of the Site until the Council’s concerns about the risks relating to the development were mitigated. It was not using the restriction to force Great Jackson to enter into a new lease. That was not what the Upper Tribunal decided.
56. That can be seen very clearly from [53] and the passage at [60] of the Decision to which I referred at [23] above. At [53], the Upper Tribunal stated that it was the Council’s ability to withhold its consent to the development of the Site “until” it is satisfied that Great Jackson’s proposals can be delivered in a timely fashion that was more than a peripheral or indirect benefit. It went on to state that although it might be commercially desirable were there a new longer lease that would be the position whether or not the restrictive covenants in the Lease impeded development. The Council’s negotiating position in relation to the new lease arises because the Lease has only 60 years or so before it expires. In addition, the passage at [60] to which I have referred, makes clear that the Upper Tribunal was focussed on the Council’s ability to prevent the uncontrolled development of the Site.
57. Lastly, in relation to this ground of appeal, I must address Mr Jourdan’s reliance upon section 84(1C) of the 1925 Act. He suggested that the Council had not engaged with the proposition that conditions for the discharge or modification of the covenants might be imposed pursuant to section 84(1C) and that it ought to have done so to obtain the safeguards it sought. He used this proposition in two ways: he stated, expressly, albeit without a great deal of enthusiasm, that we should exercise the powers in section 84(1C) now and impose the terms of Clause X when modifying the covenants; and he implied that the Council had failed to engage with the powers contained in section 84(1C) and the amendments to the covenants circulated before the hearing before the Upper Tribunal in order to force Great Jackson into a new lease on its terms.
58. Mr Morshead objected to reliance on section 84(1C) at this late stage in the proceedings. He submitted that had it been raised earlier, the hearing would have taken a different shape and that Great Jackson should not be allowed to raise a new point now. If Great Jackson were allowed to take the point, however, he says that the question of the imposition of conditions pursuant to section 84(1C) would have to be remitted to the Upper Tribunal.
59. I have already addressed and rejected the alternative argument that the refusal of consent under the covenants was being used to force Great Jackson into a new lease

which could not amount to “practical benefits” for the purposes of section 84(1)(aa). I do not consider that reliance upon the ability to impose conditions under section 84(1C) and an alleged failure of by the Council to engage with the imposition of conditions in a meaningful way adds anything to that argument. As I have already mentioned, the Upper Tribunal decided that the practical benefits arose from the ability to prevent the uncontrolled development under the Lease and they were right to do so.

60. Furthermore, the proposition depends upon the assumption that the onus was on the Council to suggest appropriate conditions which might be imposed pursuant to section 84(1C). The Council’s proposal to meet their legitimate concerns about the proposed development of the Site had been the terms of the new lease. The negotiations in relation to that new lease had broken down because, amongst other things, Great Jackson would not accept the proposed forfeiture provisions. Nothing further took place before the hearing until the first version of the proposed amendments was circulated by Great Jackson shortly before the hearing. As I have already mentioned, those amendments do not address the Council’s concerns. As Mr Morshead submitted, it would be absurd, in those circumstances if there were an onus on the Council to put forward further proposed conditions for the purposes of section 84(1C). It had proffered its solution which had been rejected. It seems to me, therefore, that the point goes nowhere. In those circumstances, it is not necessary to analyse whether the use of section 84(1C) in this way is really an entirely new point in the sense referred to in *Singh v Dass* [2019] EWCA Civ 360.
61. Neither do I consider that it is necessary to consider the *Singh v Dass* question in any detail in relation to the submission that we should exercise the powers in section 84(1C) and impose the terms of Clause X when modifying the covenants. In my judgment, the Upper Tribunal was right to decide as it did in relation to section 84(1)(aa). There is no need, therefore, for us to consider whether to re-make its decision as the Supreme Court did in the *Alexander Devine* case. Furthermore, although the question of conditions for modification of the covenants was floated loosely before the Upper Tribunal, it was not considered by it because it was not asked to do so. As Mr Morshead submitted, had the question of conditions been addressed other than in passing in closing, the shape of the hearing before the Upper Tribunal may well have been different and different evidence might have been given.
62. Even if the point is open to Mr Jourdan at this late stage, it seems to me that it would be entirely inappropriate to exercise the power in section 84(1C) in the manner he suggests. Neither the longer version which was suggested before the hearing before the Upper Tribunal nor Clause X addresses the Council’s concerns in relation to viability, timing and completion of the development project at the Site. In short, they merely state that if planning permission, as defined, is granted then Great Jackson may carry out the development (also defined) in compliance with the conditions in the planning permission. Of course, planning permission has been granted and therefore, the proposed conditions would create an open door for the development without addressing any of the Council’s concerns at all. In effect and in the circumstances, Clause X contains no substantive conditions at all. If the question arose, therefore, I would refuse to exercise the power in section 84(1C) in such a manner.

Exercise of Discretion and Respondent’s Notice

63. In the circumstances, the question of whether the Upper Tribunal's approach to its hypothetical exercise of discretion was correct does not arise. Equally, it is not necessary to consider whether the Upper Tribunal should have also decided that Great Jackson had not satisfied it that proposed user of the Site was viable and therefore, had not made out the elements of the Tribunal's jurisdiction under section 84(1)(aa). Nor is it necessary to consider the issue of whether compensation would have been an adequate remedy were the covenants to have been discharged or modified.

Conclusion

64. For all the reasons set out above, I would dismiss the appeal.

Baker LJ:

65. I agree.

Nugee LJ:

66. I also agree.