

Commercial and Chancery team



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Restrictive covenants and barriers to development

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Issues for the developer (1)



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- does the covenant bind me?
- do I know who can enforce it?
- restrictive covenant indemnity insurance
- inform lender?
- who can give an effective discharge?
- would the work be in breach?

Issues for the developer (2)



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- special considerations regarding covenants not to build without consent
- approach the objectors (effect on insurance?)
- start the works?
- apply to the UTLC?
- consider objections/address./evidence

Issues for the objector(s)



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- has the benefit of the covenant passed to me?
- can anyone else sue?
- is it protected by registration?
- (household/ATE) insurance?
- what does the covenant require?
- practical impact of the works
- need to start claim / likely remedy
- evidence required to oppose UTLC application

Enforcing the covenant – can you sue?



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See flowchart p.3 of long notes

Enforcing the covenant – can you be sued?



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See flowchart p.4 of long notes

Applications to the UTLC



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- Ground (a): covenant is obsolete *
- Ground (aa): impedes reasonable use & no practical benefit of substantial value/contrary to public interest/compensation adequate *
- Ground (b): consent to modify
- Ground (c): no injury to party entitled to enforce (longstop)
- discretionary power

Applications generally



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- highly fact sensitive
- consider specific benefits of covenant – see examples long notes p.5
- need to marshal evidence
- costs : presumption successful objectors get costs; no presumption in favour of successful applicant (unless objectors have no entitlement to object)

Ground (a): general



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- requires very clear case
- change in character of (a) property (b) neighbourhood (c) other circumstance
- renders original purpose incapable of fulfilment
- take account (a) development plan (b) pattern for grant/refusal of planning permission (c) period/context when covenant made

Ground (a): issues



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- original purpose of the covenant?
- changes in burdened land / "neighbourhood"
- extent of neighbourhood
- in light of changes, can original purpose still be fulfilled?

Ground (a): practical tips



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Burdened land: original vs current use:
conveyance plans? photos? local records
(planning, rating, archives)?

Neighbourhood: current vs historic use: OS
maps? aerial photos? local plans (changes in
planning history/purpose)

Paradox: partial change

Ground (aa): general



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Shephard v Turner [2006] EWCA Civ. 8 at [58]:

The general purpose [of ground (aa)] is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "

Ground (aa): issues



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Re Bass' Application (1973) 26 P&CR 156:-

1. is the proposed user reasonable?
2. does the covenant impede it?
3. does impeding the user secure practical benefits *
4. if so are they of substantial advantage/value *
5. if no, would money be adequate compensation *
6. is impeding the user contrary to public interest
7. if yes, would money be adequate compensation?

Ground (aa): practical benefits



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- identify specific benefit
- reduction in value? (useful, not essential)
- the "even worse" alternative
- not loss of bargaining position
- normally long term effects only, not temporary nuisance: Shephard v Turner
- "thin end of the wedge" arguments
- effect on building scheme?

Ground (aa): substantial advantage/value



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- 'considerable, solid, big" : Shephard v Turner
- broad, common-sense approach
- not confined to financial value, etc.
- financial value: no rule, but as broad guide
 - diminutions in value of 10%+: substantial
 - diminutions of 5% or less: not substantial

Ground (aa): contrary to public interest?



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- exceptional
- mere fact it prevents development insufficient
- possible examples
 - pressing, local, social need e.g. elderly housing
 - loss of use of already-built stock

Ground (aa): adequate compensation



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- no substantial practical benefit: compensation usually “adequate” (and modest)
- contrary to public interest: possibly greater
- based on diminution in value, not loss of bargaining position: Winter v Traditional & Contemporary Contracts [2008] 1 EGLR 80
- exceptional “consumer surplus cases” : subjective value of covenant ; wayleave basis is permissible tool

Ground (aa): practical tips



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- secure planning permission first: issues overlap
- purpose of covenant?
- what could be built without offending covenant?
- effect on development elsewhere?
- “condescend to particularity”: inspect site / obtain reports, mock ups, etc.