

The jurisdiction to discharge or modify restrictive covenants

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1 Jurisdiction of the Lands Chamber

Statutory basis of the jurisdiction: s84(1) of the Law of Property Act 1925 (as amended in 1969). Full text of s84(1) is set out in Appendix 1.

Section 84(1) granted the Lands Tribunal (now Upper Tribunal / Lands Chamber) jurisdiction to discharge or modify restrictive covenants. Important amendments were made by the LPA 1969 which, with effect from 1970, added the new ground (aa) – to be read in conjunction with sub-paragraphs (1A) and (1B). Most cases now proceed under the new ground (aa) which has greatly extended the jurisdiction.

Powers of the Lands Tribunal were transferred to the Lands Chamber / Upper Tribunal ('LC') by the Tribunals Courts and Enforcement Act 2007 and new Rules of Procedure issued.

LC has power to review its own decisions. Appeals on points of law lie to the Court of Appeal.

2 **s84(1) in context: other methods of extinguishing Restrictive Covenants**

- (1) There must always be a competent claimant able to enforce the Covenant – i.e. a claimant who can prove a chain of assignments or a building scheme.

Requirements of LPA s78 must be satisfied, as per the judgment in ***Federated Homes and Crest Nicolson v McAllister*** [2004] EWCA Civ 410 – clear evidence required of the land to be benefited. Without proof of this no application to the LC can proceed.

- (2) Extinguishment by express or implied release.
- (3) Extinguishment by acquiescence in breach continued over a period of years with full knowledge of covenantee.
- (4) Extinguishment by operation of law – i.e. joint ownership.
- (5) Order of the court under LPA s84(2) which gives the court power to make a declaration that land is not affected by any restriction.

Injunction proceedings to enforce a covenant can be stayed pending an application under s84(2). Application under s84(2) will stay any application to the LC under s84(1).

- (6) Local authorities have various powers to override restrictive covenants, and can extinguish them under TCPA 1990 s237. Compulsory purchase powers in TCPA 1990 s236.

Section 237 enables local authorities which *own* land acquired or appropriated for planning purposes to override restrictions where development is being carried out in accordance with planning permission.

3 Section 84(1): preliminary matters

- (1) Section 84(1) only applies to an application by a person interested in freehold land affected by a restriction arising under covenant as to *user of land* or *building thereon*.

- (2) LC can decline jurisdiction if it appears covenant is not enforceable by the applicant or has been extinguished by any of the above methods.

- (3) LC has an overriding *discretion* in all cases – i.e. even if an applicant makes out the grounds for relief, LC can decline to make an order. This discretion is subject to review if exercised on wrong principles:

Ridley v Taylor [1965] 1 WLR 611.

Cresswell v Proctor [1968] 1 WLR 906.

- (4) There is no necessary correlation between how old a covenant is and whether it is obsolete (ground a) or provides no substantial benefit (ground aa). These

issues depend not on the age of the covenant but on whether changes have occurred since the covenant was granted. On the other hand, the fact that the covenant was granted recently may count against the applicant.

4 Summary of grounds for relief under s84(1)

- (1) Ground (a): covenant obsolete.
- (2) Ground (b): agreement between all beneficiaries to discharge or modify.
- (3) Ground (aa):
 - (i) covenant restricts reasonable use of land *and*
 - (ii) confers no practical benefit of substantial value or advantage on those entitled to enforce it *or* is contrary to public interest *and*
 - (iii) loss can be compensated in money.
- (4) Ground (c): no injury will be caused to those entitled to the benefit of the covenant by its discharge or modification.

5 General points in relation to the grounds for relief

- (1) Ground (aa) is now the basis of most applications and the ground on which relief is most frequently granted. As distinct from the other grounds, ground (aa) enables the LC to award compensation.

- (2) Significance of planning: subsection (1B) provides that for the purposes of ground (aa) in conjunction with subsection (1A), the LC shall take into account the development plan and any declared or ascertainable pattern for grant or refusal of planning permission.

Lack of planning permission may count against the applicant:

Re Davies [2008] LP/65/2006.

However, a grant of planning permission is not a passport to success:

Re Martin [1988] 57 P&CR 119.

- (3) The 'precedent' argument: the argument most commonly raised by objectors is that if the application is granted it will set a precedent and open the floodgates. This argument most commonly arises in relation to building schemes. Preservation of the scheme may in itself therefore be a benefit of substantial value, and on this basis the application may fail:

Zaineeb Al-Saeed's Application [2004] LP/41/1999.

6 Ground (aa)

Subsection (aa) is to be read in conjunction with subsections (1A) and (1B). This is the most commonly pursued ground.

- (1) Policy behind ground (aa):

Shephard v Turner [2006] EWCA Civ 8.

Carnwath LJ at paragraph 58:

"In my view account must be taken of the policy behind paragraph (aa) in the amended statute. The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of provisions in the area. The section seeks to provide a fair balance between the needs of the development in the area, public and private, and protection of private contractual rights. 'Reasonable user' in this context seems to me to refer naturally to a long term of use of land, rather than the process of transition to such a use. The primary consideration therefore is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project."

(2) Issues arising under ground (aa):

(as per ***Re Bass Application*** [1973] 26 P&CR 156):

Question 1: Is the proposed user reasonable?

Question 2: Do the covenants impede that user?

Question 3: Does the proposed user secure practical benefits to the objectors?

Question 4: Are those benefits of substantial value or advantage?

Question 5: Is impeding the proposed user contrary to the public interest?

Question 6: If the answer to questions 4/5 is 'yes', would money be an adequate compensation?

Question 1: Do the covenants impede a reasonable user of the land? Grant of planning permission is very persuasive, but not conclusive – see:

Caledonian Ass Properties Ltd v Kilbride Development Corporation [1984] 49 P&CR 410.

Question 2: Do the covenants impede the proposed user? The answer is usually obvious.

Questions 3 and 4: Does impeding the proposed user secure to persons entitled practical benefits of substantial value or advantage? This is the issue on which most applications will turn. A judgment has to be formed as to the relative significance of the benefits secured by the covenants, and their value to the objector in order to decide whether they are capable of being compensated by a modest award of compensation.

(i) Some illustrations of "practical benefits":

a view

peace and quiet

light

open character of the neighbourhood

(ii) Building schemes and the preservation of an established estate: existence of a building scheme has to be given weight:

Dobbin v Redpath [2007] EWCA Civ 570.

Re Bromor [1995] 70 R&CR 569.

Re Tillotson [2008] LP/56/2006.

- (iii) Bargaining power and the ability to extract a ransom – do *not* constitute a practical benefit:

Stockport MBC v Alwiyah Dev [1983] 52 P&CR 278.

- (iv) Practical benefit must be real, not illusory:

O'Reilly's Application [1993] 66 P&CR 485.

- (v) Consent unreasonably withheld where the covenant is subject to a proviso:

Reynolds Application [1993] 24 P&CR 542.

- (vi) The meaning of "substantial value or advantage":

Re Gaffney [1974] 35 P&CR 440.

- (vii) Summary: The question overall under subsection (aa) is whether the unmodified restriction would impede a proposed user which is reasonable notwithstanding that the modification will cause some damage to the objectors, which though specific is unsubstantial in relation to the whole value of the restriction to the objectors.

Question 5: Is impeding the proposed user contrary to the public interest?

Rarely argued.

Question 6: Will money be an adequate compensation? Adequacy of

compensation means:

- (i) a sum to make up for the loss or disadvantage suffered by a 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 it was imposed in reducing the consideration received for the land affected.

7 Ground (a): the restriction ought to be deemed obsolete

- (1) The issues: have there been changes in:
 - (a) the character of the land,
 - (b) the character of the neighbourhood, or
 - (c) some other material change of circumstances?

- (2) To address this issue, you have to establish what was the original purpose of the covenant, and then decide whether the changes which have occurred mean that the covenant can no longer fulfil its original purpose:

Re Truman, Hanbury and Buxton [1956] 1 QB 261, Romer LJ at 272:

"It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time comes, it may be said that the covenants have become obsolete, because their original purpose can no longer be served, and in my opinion it is in that sense that the word 'obsolete' is used in s84(1)(a)."

- (3) Changes in the character of the 'neighbourhood': meaning of 'neighbourhood' – a question of fact.

8 Ground (c): proposed modification or discharge will not injure persons entitled to the benefit of the restriction

The issue here is not whether the *development* will cause injury but whether modification / discharge of the covenant will cause injury. Thus the modification or discharge may threaten the enforceability of a whole scheme.

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Appendix 1

- 84 (1) The Lands 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,¹ by order wholly or partially to discharge or modify any such restriction on being satisfied:
- (a) that by the reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, 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, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, 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;
- 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

¹ So far as the phrase "the user thereof or the building thereon" might not include some types of alteration to buildings, the Law Commission has recommended (as part of its recommendations relating to tenanted land) that the phrase should be extended: Law Comm No 127 (1985).

- (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 Lands 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 adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

- (1B) 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 Lands 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.

- (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 Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify a restriction without some such addition."