

# *Restrictive Covenants: Modification & Discharge*

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# Setting the scene...

- We are today concerned with restrictive covenants affecting **freehold land**
- Benefitting vs burdened – competing perspectives
- Competing principles – private rights, upholding contract and legitimate interest in controlling adjacent land use vs stifling use of adjacent land
- Importance of s.84 jurisdiction – potentially a powerful tool but jurisdiction has limits
- Understanding those limits important on both sides as it ought to inform decision-making throughout

# What we are not concerned with...

- **Interpretation**
- **Enforceability** and whether covenant continues to burden?
  - registered vs unregistered land
  - if land unregistered when covenant created and created after 1 January 1926, for burden to bind successors, needed to be registered as class D(ii) land charge
  - if not so registered, on occasion of next conveyance of burdened land to a 'purchaser for money or money's worth', burden rendered void against that purchaser and void and unenforceable for all time
  - cannot be revived by registration on first registration of land
  - NB chain of personal indemnity covenants but only personal (monetary) remedy rather than proprietary
- **Annexation**

# Our hypothetical scenario...

- Enforceable covenant
- Benefit validly annexed to benefitting land
- Owner of burdened land wishes to put land to some use
- As properly construed, the covenant *prima facie* impedes that use
- Can covenant be modified or discharged in the event that agreement cannot be reached between the parties
- Prospects of modification or discharge ought to inform pre-action negotiations

# Structure

- Jurisdiction to modify or discharge (MS)
- The 4 grounds & compensation (MS)
- A few words on procedure (MS)
- Ground (*aa*) and the so-called 'public interest' test (JJ)
- *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd (formerly Millgate Developments)* (JJ)
- Recent UKUT cases & discernible trends (JJ)

# Law of Property Act 1925, Section 84(1)

In essence... the Upper Tribunal has power, on the application of a person interested in freehold land affected by a restrictive covenant, to order the discharge or modification of such covenant, upon being satisfied that the case falls within one or more specified grounds, and may also direct the payment of certain compensation.

# Context

- Applicant wishes to undertake development or activity on land subject to restrictive covenant which impedes the same
- Injunction Proceedings?
- (Section 84(2): Declaration)

# Jurisdiction

- Upper Tribunal
- Freehold land
- Restrictive covenants
- ‘Persons interested in’
- ‘User or building’
- Enforceable
- Limited non-application

# Alternatives?

- Agreement/Deed
- Insurance
- Enforcement Risk?

# Requirements

- Grounds
- Discretion

# Grounds

- (a): 'obsolete'
- (b): consent
- (c): no injury
- (aa): impedes reasonable user, no more than minor benefit or contrary to public interest

# Ground (a)

## Section 84(1)(a):

by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Tribunal may deem material, the restriction ought to be deemed obsolete

# Ground (b)

## Section 84(1)(b):

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

# Ground (c)

Section 84(1)(c):

the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction

# Ground (aa)

## Section 84(1)(aa)

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

## Section 84(1A)

... 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.

## Section 84(1B): planning and other matters

# ***Bass' Application (1973) 26 P&CR 156***

- (1) Is the proposed user reasonable?
- (2) Do the covenants impede that user?
- (3) Does impeding the proposed user secure practical benefits to the objectors?
- (4) If yes, are those benefits of substantial value or advantage to them?
- (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?

# Powers

- Wholly or partially discharge or modify
- Modify with addition of further restrictions  
(if accepted)

# Compensation

## Section 84(1)

...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.

# Basic Procedure (1/2)

- Application
- Notice/Advertisement
- Objections
- Title/Preliminary Issues
- Procedure/Directions

# Basic Procedure (2/2)

- Final Hearing
- Decision
- Costs
- Order
- Review/Appeal/Set Aside?
- Post-proceedings

# Further Procedure

- Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010
- Practice Directions, Statements
- Standard Forms
- Fees Order
  
- Final Hearing Decisions

# Public interest Test – statutory requirements

- Ground (aa) – Tribunal must be satisfied, in a **case falling within s.84(1A)**, that the continued existence of covenant would impede **some reasonable user** of land for **public or private purposes** or would do so unless modified
- S.84(1A) = Tribunal must be satisfied that the restriction, in impeding that (reasonable) user, either (1) does not secure to persons entitled to benefit practical benefits of substantial value or advantage to them **or (2) is contrary to the public interest and (3) that money will be adequate compensation for loss or disadvantage suffered from discharge or modification**
- NB s.84(1B) – Tribunal required to take into account the **development plan**, any declared or ascertainable pattern for **grant or refusal of planning permissions** in relevant area, **period** at which and **context** in which restriction created or imposed and any **other material circumstances**

# Question 1: Is the proposed user reasonable?

- Requirement can be fulfilled by proposing a defined, reasonable use of the affected land, that the restriction impedes (*Re Lloyds Bank Ltd's App*)
- Few applicants who will fail to do that and affirmative answer to this question is often agreed
- Tribunal is required to proceed on counterfactual that covenant does not exist
- Objective exercise and views of benefitting party irrelevant
- Fact that proposed use may be locally unpopular does not make such use unreasonable (*Trustees of the Green Masjid*)
- Relevance of planning – permission can be very persuasive support that user is reasonable – absence of any prospect of permission might prove fatal

# Question 2: Does covenant impede that user?

- Question normally answers itself or is evident from fact that application made to Tribunal
- Construction?
- Enforceability?
- Annexation?
- NB jurisdiction of the court to determine disputes involving those matters
- Question 3 = does impeding proposed user secure practical benefits to objector?
- Question 4 = if yes, are those benefits of substantial value or advantage to benefitting party?

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

- Not as easy as, for example, ‘there is a housing crisis and the proposed new homes are needed for the public interest’
- Policy = “*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 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*” (*Shepard v Turner*, per Carnwath LJ)
- Demanding test – has succeeded in some cases but a considerable number of attempts have failed  
*...for an application to succeed on the grounds of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract (Re Collins’ App, per President Douglas Frank QC)*
- **Test is not whether it would be in public interest for land to be developed in the manner proposed but whether not developing it in that manner would be contrary to public interest**

# Question 5 cont.

- Relevance of planning permission = generally considered necessary but not sufficient, because it merely shows that proposal is not contrary to public interest
- More is needed in order to demonstrate that impeding proposed use at the particular premises is contrary to public interest
- The ground is “*more likely to be invoked with success by someone who has the backing of a public authority that will supply the necessary evidence of need...In most cases...the applicant should call the senior officer of the relevant public interest authority or another expert to give oral evidence; otherwise the submission is very likely to fail...the evidence must show a need to use the particular premises: the application can fail if it is not shown that suitable alternative suitable premises would be impossible or difficult to find, or that the public need is desperate*” (Preston & Newsom)

# Questions 6 & 7: If no to (4) or yes to (5), is money adequate compensation?

- Only relevant if an applicant can get this far
- NB difference of treatment depending on whether limited benefit or public interest tests satisfied
- Limited benefit: *“The circumstances in which money will not be capable adequately of compensating...are quite limited. In a case relying on ground (aa) where the release or modification...is not justified on public interest grounds, the adequacy of financial compensation only arises where the Tribunal has already found that the restriction does not secure a practical benefit of substantial value or advantage. Some unusual circumstance is likely to be involved before it can be said that the less than substantial value or advantage cannot be measured adequately in financial terms” (O’Callaghan’s App)*
- Public interest: loss or disadvantage suffered not necessarily small and could be large

# *Alexander Devine v Housing Solutions: The facts*

- 1972 - farmer conveyed parcel of land and retained adjacent land – conveyance subject to RCs that **no buildings or structures would be erected on land conveyed and that it would be used solely for parking cars**
- Fast forward a number of years – land conveyed acquired by property developer – developer fully aware of RCs
- Developer sought and obtained PP to erect 23 affordable homes, 13 of which were on the land subject to RCs with remaining 10 to be built on adjacent unencumbered land
- Grant of PP linked to larger development of houses by developer for commercial sale, which was conditional on the provision of the 23 affordable homes
- Would have been possible for developer to have constructed the 23 homes on the unencumbered land and to have continued to use encumbered land as car park – LPA indicated it would have granted PP for such a development

# *Alexander Devine* – The facts cont.

- Meanwhile, adjacent agricultural land had been inherited by farmer's son, who subsequently gifted a plot of that land to the children's cancer trust, for the purpose of building a hospice for seriously ill children with terminal cancer
- Farmer's son unaware of developer's application for PP but became aware when developer commenced preparatory works
- Wrote to developer objecting to development and referring to RCs
- Developer continued with construction work and completed development
- Only once completed did developer make s.84 application

# *Alexander Devine* - UKUT

- Developer sought to rely on grounds (aa) and (c)
- As to (aa), it argued that both the limited benefit and public interest tests were satisfied
- UKUT determined that limited benefit test and (c) not satisfied – ambitious argument by developer given the effects of development on a planned children’s hospice
- UKUT satisfied that public interest test satisfied and, notwithstanding developer’s “*highhanded and opportunistic*” conduct, that it should exercise its discretion to modify – considered grant of PP, provision of social housing and fact houses were already built and standing empty to be material considerations in favour of modification – BUT PP says nothing of respect for private rights and social housing (which could have been built on unencumbered land) and fact houses already built only material because UKUT presented with *fait accompli*
- “*it is not in the public interest for these houses to remain empty and the covenants are the only obstacle to them being used*”

# Alexander Devine - CA

- Appeal allowed – jurisdictional test not satisfied and discretion ought to have been exercised refusing application in any event
- *“in interpreting and applying [s.84] it is necessary to bear in mind that it is a private contractual right with property-like characteristics which is sought to be removed or modified, against the objection of the right-holder. That is not something which Parliament intended should occur lightly or without very good reason”*
- Approved stringency demanded in *Re Collins’ App* (must be shown that interest is *“so important and immediate”*) which was doubted by UKUT below
- Unimpressed by developer’s conduct and considered this material to jurisdictional threshold **and** whether to exercise discretion: *“the Upper Tribunal should have regard to whether the applicant has made fair use of opportunities available to it to try to negotiate a waiver of a restrictive covenant or, if necessary, to test the public interest arguments in an application made under section 84 in advance of acting in breach of that covenant”*

# Alexander Devine – CA cont.

*“Millgate has acted in an unlawful and precipitate manner by building in breach of the restrictive covenants. It has acted with its eyes open and completely at its own risk. As a result it is appropriate and in conformity with the public interest that it should bear the risk that it may have wasted its own resources in building the 13 housing units...”*

*“in general terms it is in the public interest that contracts should be honoured and not breached and that property rights should be upheld and protected. A property developer which knows of a restrictive covenant...has a fair opportunity before building either to negotiate a release...or to make an application under section 84...That is how the developer ought to proceed. It is contrary to the public interest in ensuring that proper respect is given to contractual or property rights for a property developer to proceed without any good excuse to build in violation of such rights...in an attempt to improve its position on a subsequent application...Put another way, it is contrary to the public interest for the usual protections for a person with the benefit of a restrictive covenant to be circumvented by a developer seeking to obtain an advantage for itself by presenting the tribunal with a fait accompli..., and then in effect daring the tribunal to make a ruling which might have the result that those buildings have to be taken down”*

# Alexander Devine - UKSC

- Almost 100 years after its introduction, first time highest court required to decide a.s84 appeal!
- Appeal dismissed but UKSC did so for different reasons than CA
- S.84 required narrow interpretation of what was meant by “*contrary to the public interest*” – question to be asked was not the wider one of whether in all the circumstances of the case it would be contrary to the public interest
- Narrow approach required UKUT to determine whether it was contrary to public interest for 13 houses not to be able to be used – waste involved would be a very strong factor that contrary to public interest – weighed against that would be public interest in hospice which would be protected by continuation of RCs – 2 competing uses of land – that was approach taken by UKUT and no error of law in determining that contrary to public interest jurisdictional ground made out
- Developer’s “*cynical breach*” not relevant at jurisdictional stage

# Alexander Devine – UKSC cont.

- No absolute principle that a cynical breach outweighed what would otherwise be the public interest
- UKUT exercise of discretion sufficiently wrong to amount to error of law
- UKUT failed to take account of 2 important factors: (1) developer could have applied for PP on unencumbered land and constructed homes on that land, and no need to apply to discharge RCs (2) had developer not acted cynically and made application prior to construction, likely that developer would not have satisfied jurisdictional threshold because would have been met by objection that PP would be granted on unencumbered land and therefore upholding RCs would not be contrary to public interest
- (1) *“It is important to deter a cynical breach...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”*
- (2) *“It is important to deter a cynical breach...but it is especially important...where, because the [UKUT] will look at the public interest position as at the date of the hearing, that cynical conduct will directly reward the wrongdoer by transforming its prospects...”*

# *Alexander Devine* – Winners & losers

- UKUT right to determine that jurisdictional threshold satisfied – contrary to public interest – heavily influenced by fact that houses built and there would have been significant waste if houses could not be used
- BUT UKUT wrong to exercise its discretion notwithstanding cynical breach
- CA wrong to determine that UKUT erred in law in its approach to jurisdictional threshold – narrow focus endorsed by UKSC – cynical conduct not relevant to jurisdiction
- BUT CA right to determine that UKUT ought not to have exercised discretion on account of cynical conduct
- BUT CA wrong to do so for reasons given – importance of 2 factors – alternative option for developer which was not pursued and improved its prospects on jurisdictional assessment on account of cynical conduct

# Alexander Devine - Conclusions

- Extreme case
- Narrow approach to jurisdiction leaves heavy lifting re other material circumstances to discretionary stage
- BUT (1) once jurisdictional threshold established discretion to refuse application should be “*cautiously exercised*” (*Trustees of the Green Masjid*, cited with approval by UKSC) (2) appellate court can only interfere on exercise of discretion which amounts to error of law
- Will discretionary stage be able to do heavy lifting?
- Hypothetical counterfactual: (1) developer did not have alternative option (2) consequently would not made any difference to prospects of opposing application if developer would have made application prior to building
- Remember the limits of s.84 jurisdiction – modification & discharge – not relief – whether to award injunctive relief or damages in lieu of injunction a separate matter to be decided by different principles - Lord Burrows makes this point in final para of judgment

# Recent UKUT Cases & Trends

- Modest proposals & barn conversions

*O'Byrne* [2018] UKUT 0395 (LC) – covenant restricting use to single dwelling house – proposal to convert barns to additional dwelling – application successful on ground (aa) – compensation = £60k, on account of reduced consideration on sale when covenant created

*Jackson* [2019] UKUT 0273 (LC) – covenant not to build or alter without consent and approval of plans – proposal to convert dilapidated farm buildings to two houses – application successful on grounds (aa) and (c) – no compensation

# Recent UKUT Cases & Trends

- Extreme proposals

*Signature of St Albans* [2019] UKUT 0070 (LC) – covenants not to use for more than 3 dwellings and to use as private dwellinghouse only – proposal to construct 83 bed care home and car park – application rejected – reason = prevention of large-scale institutional development with significant impact on amenity was substantial advantage

*Willis* [2019] UKUT 0315 (LC) – covenants to use as private dwellinghouse only, no trade or business, one house one plot – proposal to construct 25 resident care home on footprint 3 times that of existing house – application rejected – reasons – substantial loss of amenity and also substantial diminutions in value of between 7.5-15%

# Recent UKUT Cases & Trends

- Recently created covenants

*O'Callaghan* [2020] UKUT 0077 (LC) – covenants not to alter without consent of original developer and to use only as garage – proposal to extend garage so capable of being used as 'granny flat' or gym, 3 years after covenant made – application rejected – reasons = unreasonable use of land, generating risk of future disputes & would have also refused to exercise discretion because covenant so recent

# Questions...



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