RESTRICTIVE AND POSITIVE COVENANTS UPDATE – MARCH 2017

By Richard Snape
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RESTRICTIVE AND POSITIVE COVENANTS

Restrictive covenants

Restrictive covenants are of dubious value for various reasons. Long term in particular they may be discharged under section 84 Law of Property Act 1925, for instance if obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Lands Chamber damages may be awarded but may be limited. Moreover in any court proceedings an injunction will not necessarily be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability.

See Wrotham Park Estates v Parkside Homes [1973]. Here 5% of enhanced value was awarded in damages, i.e. how much was reasonably expected to be paid for relaxing the covenants. See also Stockport Borough Council v Alwiyah [1983] 52 P & CR 278. Lost value was calculated in relation to the fact that neighbouring houses on the benefited land would lose their view of open farm land. This was further reduced as the local authorities tenants had the Right to Buy. Damages for a breach of covenant and the building of 42 houses were limited to £2,250. George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC), the developer blatently disregarded restrictive covenants in the expectation that they would be discharged under s84. This, together with the fact that loss of views could not be compensated, was held to be sufficient not to discharge the covenants.

In Jaggard v Sawyer [1995] 1 WLR 269 the owner of land entitled to the benefit of a covenant against building a private dwellinghouse was not able to obtain an injunction when the building was already substantially completed. Damages for loss of value were limited to £699.

Enforceability after a breach has occurred

In the case of Hepworth v Pickles [1900] 1 Ch.108 the Court recognised that where a breach had been allowed to occur without taking steps to enforce for 24 years, the covenant was not enforceable. Based on this the CML Lenders’ Handboook states that if a breach has not been enforced for 20 years, the solicitor may take a view or take out insurance. On a reading of the Limitation Act 1980, enforcement is probably not possible after 12 years.

Note: If insurance is to be relied on, then if the seller pays for the policy, some mortgage companies may treat this as an allowance and withdraw the mortgage offer.

Section 610 Housing Act 1985

Lawntown Ltd v Camenzuli (2007). This case, which specifically discusses a little used method of modifying restrictive covenants: 5.610 Housing Act 1985 as amended. Although section 610 provides for a totally separate regime for modifying restrictive covenants then the much more familiar process
of a Lands Tribunal ruling, under the much more frequently used section 84 Law of Property Act 1925 it is submitted that it may be relevant in this area also.

The case involved a large Victoria dwelling house in Streatham in London. The property was subject to a restrictive covenant not to use land other than as a single private dwelling Lawntown Ltd purchased the house and obtained planning permission from Streatham Borough Council to convert the property into flats. The owners of a neighbouring property Mr and Mrs Camenzuli objected to this and tried to enforce the benefit of the restrictive covenant and prevent the development. Section 610 of the Housing Act 1985 provides that:

“(a) … the Housing Authority or a person interested in any premises may apply to the County Court where, owing to changes in the character of the neighbourhood in which the premises are situated they cannot readily be let as a single dwellinghouse but readily be let for occupation if converted into two or more dwellinghouses, or

(b) planning permission has been granted under Part III of the Town and Country Planning Act 1990 (general planning control) for use of the premises as converted into two or more separate dwellinghouses instead of a single dwellinghouse and the conversion is prohibited or restricted by the provision of the lease of the premises or by a restrictive covenant affecting the premises or otherwise…”

Here it was accepted by the Court of Appeal that as the planning authority had granted planning permission, there was a shortage of housing in the locality and, importantly, a large number of the dwellings had already been converted into flats, the covenants should be discharged.

This case involved the rather limited but important area of converting dwellinghouses into flats and the regime is quite distinct from section 84 Law of Property Act 1925 but it is submitted that a similar argument may be used to discharge or modify covenants by the Lands Tribunal. In terms of development land, the most obvious reason for discharging such covenants is that they are obsolete, and/or that they impede reasonable user and do not secure any practical benefit to anybody entitled to enforce the covenants under section 84(i)(a) and (b) of the Act. There must be a strong argument generally that covenants which prevent development which the Planning Authority has already agreed to and when we are told that there is a shortage of housing, might be discharged “compensation” may be paid by the Lands Tribunal to the beneficiary who loses the right to enforce the covenant but this will usually be based on the reduced value of the land as opposed to a percentage of the increased value of the burdened property based on Stokes v Cambridge County Council 1968 principles. This may be fairly limited.

Note, also, that there is another possible means of questioning covenants building works without the need to pay any compensation to the beneficiary whatsoever.

Discharge of Restrictive Covenants
Graham v Easington District Council (2009)

The Lands Tribunal allowed discharge of a restrictive covenant under section 84 of the Law of Property Act 1925 as not securing any practical benefits where the beneficiary of the covenant was a local authority whose planning department had already given planning permission for development. The land, which was the subject of the Lands Tribunal application, was situated in the north east of England. It was on the site of a former colliery in Horden in County Durham. The Local Authority, Easington District Council, had sold the land in August 2000 and had imposed restrictive covenants against use other than as a coach depot and an associated residential bungalow, which would be used in conjunction with the coach depot. The bungalow had been built but no coach depot had subsequently materialised.

Soon afterwards a planning application to build housing on the site was made. The Planning Officer objected, on the grounds that the area including the depot had been earmarked for the industrial regeneration within the locality, and, if residential housing was allowed, this would detract from the possibility of industrial development. Nevertheless, the Planning Authority gave planning permission for thirty houses.

Planning permission would, of course, be of little worth unless the covenants were discharged and the local authority Estates Department refused to do this.

This led to an application to The Lands Tribunal under S.84(1) Law of Property Act 1925.

S.84(1) provides that a covenant may be discharged on the following grounds:

“(a) By reason of changes in the character of the property or the neighbourhood or other circumstances the restriction ought to be deemed obsolete.

(aa) The restriction impedes reasonable use of the land and does not secure to the persons entitled to the benefit any practical benefits of substantial value or the restriction is contrary to public interest. It may be the case that if the owners’ interest in the land is only in relation to a monetary payment there may be no practical benefit.

(b) The person entitled to the benefits of the restriction has agreed either expressly or by implication for the covenant to be discharged.

(c) The proposed discharge or modification will not injure the person entitled to the benefit.”

In the current case, the Tribunal accepts that a covenant might be obsolete even though, as here, it was less than eight years old. However, the ground was not applicable here.
However, ground (aa) the covenant prevents reasonable use of the land and does not secure to the person entitled any practical benefits was highly relevant. In particular, the argument was accepted that, as the local authority Planning Committee had given planning permission, and as there was a perceived need for affordable housing in the area, the District Council were preventing reasonable use of the land in failing to discharge the covenants.

Moreover, it also followed that ground (d) was also applicable in that the authority would suffer no loss or injury should the covenant be discharged.

The Lands Tribunal may award compensation to the beneficiary of a restrictive covenant which has been discharged. The Local Authority wanted compensation based on *Stokes v Cambridge (1968)* principles, i.e., one third of the enhanced value of the land, which amounted to some £272,000. However, the Tribunal accepted that, following *Stockport Borough Council v Alwiyah Developments (1983)*, this was not a valid means of assessing compensation in the present case. In the Stockport Borough Council case, compensation for the discharge of restrictive covenants which allowed the building of 42 houses on open land was assessed by reference to the reduced value of neighbouring land. This was valued at £2,250.

However, neither was compensation on this basis valid in the present case as the Local Authority had suffered no loss and would, therefore, receive no compensation. Instead the Tribunal awarded compensation based on the difference in value of the land with and without the restrictive covenants at the time of the original purchase in August 2000. This amounted to £23,500.

**Conclusion**

This rather startling proposition that a Local Authority Planning Authority, by giving planning permission for a particular activity, most notably residential development, might tie the hands of the Estates Department in relation to the discharge of local authorities must be noted by all, both in the public and the private sector.

It might be envisaged, in particular, that a large number of covenants may be open to being questioned from covenants, as here, preventing major development down to more everyday residential covenants against, for instance, use other than as a single private dwelling only, and consent to plans and alterations covenants.

Specifically, in *R v Braintree District Council ex parte Halls (2000)*, the Court of Appeal held that a local authority could not charge the owner of a former council house purchased under the Right to Buy provisions in Schedule 6 of the Housing Act 1985 for discharge of a restrictive covenant preventing use other than as a single private dwelling. This, as an indirect form of clawback, was ultra vires the authorities’ powers. This has always led to something of a dilemma, in that a local authority may be tempted, therefore, not to discharge the covenant at all.
In these circumstances, Graham v Easington District Council 2009 may, it is submitted, be effectively used and such covenants may, in the future, be of little worth.

In terms of compensation, if there is no loss suffered to the beneficiary of the covenant, then compensation will be assessed as being the reduced value of the land due to the covenants existing. However, remember that this will be assessed at the time of imposition. In the present case this was less than eight years previously and compensation was only £23,500. Some of the more antiquated covenants may be of little worth whatsoever.

If, in the future, a local authority wishes to enforce user covenants as a means of development planning on their disposals, it might be more effective to impose positive clawback, for example, on planning permission being obtained 90% of the enhanced volume of the land will be paid to the authority.
This cannot be used in relation to council house right to buy, because of the Braintree case above, but may be effective elsewhere.

Note: In early 2009 the Court of Appeal confirmed this decision.
ENFORCEABILITY OF RESTRICTIVE COVENANTS

Although the burden of a covenant cannot run at law, it may run in equity providing certain requirements are met. The binding effect of a restrictive covenant was first recognised by Lord Cottenham LC in the seminal case of Tulk v Moxhay [1848].

1. The Benefit running

Equity provides three ways in which the benefit may pass – annexation, assignment and under a building scheme.

Whether or not the benefit of a restrictive covenant has been annexed is a question of construction. However, purely personal covenants cannot run; therefore the restrictive covenant must be made with the dominant owner as the owner of the dominant land, not just as an individual.

Thus in Renals v Cowlishaw [1878] 9 Ch D125, where a purchaser covenanted with the vendors and “their heirs, executors, administrators and assigns” not to build on the land conveyed, it was held that the word “assigns” meant merely assignees of the covenant as a separate entity from the land. Therefore upon a later conveyance of the land without mention of the covenant, it did not pass.

However in Rogers v Hosegood [1900] 2 Ch 388 where a covenant was expressed to be for the benefit of the dominant owners, “their heirs and assigns and others claiming under them to all or any lands adjoining”, it was held to run with the land, the benefit of the covenant passing with the subsequent conveyance of the land.

As to how much of the conveyed land the covenant must benefit, the approach of the courts has been relaxed over recent years. In Re Ballard’s Conveyance [1937] Ch 473 a covenant was said to be for the benefit of an estate of 1,700 acres. In fact, the covenant could only benefit a small portion of the estate, and the court, refusing to sever the covenant from the whole estate and attach it instead to only a part of it, held that the covenant could not run on the sale of the estate because it did not benefit the whole of the 1,700 acres.

This attitude was modified in Wrotham Park Estate Co Ltd v Parkside Homes [1974]. It was held there that where the covenant benefits a substantial part of the dominant tenement, that will enable it to run. There is a presumption that the covenant does benefit the land, unless it is very clear that it is not capable of doing so.
The latest case on this point is **Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594** where Brightman L J stated that:

“…..if the benefit of the covenant is on a proper construction of a document, annexed to the land, prima facie it is annexed to every part thereof, unless the contrary clearly appears”.

Thus once a covenant is annexed, it benefits each and every part of the dominant land.

**Implied**

This is a suggestion from case law but should never be relied upon.

**Statutory**

**s78 LPA 1925** automatically annexes the benefit of a covenant to successors in title - this will only apply to covenants created from 1 January 1926 onwards.

It appears from **Federated Homes v Mill Lodge [1980] 1 WLR 594** that the effect of this is to automatically pass the benefit of a restrictive covenant. The case has been accepted without argument in **Robins v Berkeley Homes (Kent) [1996] 2 EGLR 75**; however, in the absence of a House of Lords decision, practitioners would be wise to include an express annexation and not merely rely on **s78** and statutory annexation.

However, in **Roake v Chadha [1984] 1WLR40**, Judge Paul Baker QC held that **s78** could not be applied where the original covenating parties had expressly stipulated that their covenant should “not ensue for the benefit of any subsequent purchaser of any part of the ... estate unless benefit...shall be expressly assigned”. Baker J felt that such an unambiguous term could not be construed in such a way as to render the covenant attached to the land, but only to the original parties.

**More Problems in Interpreting Restrictive Covenants**

**City Inn (Jersey) Ltd v 10 Trinity Square Ltd [2008] EWCA Civ 156**

The Court of Appeal has recently confirmed the High Court decision in this important case on the interpretation of restrictive covenants.

The case involved a dispute between two hotels and a restrictive covenant, requiring the consent of the ‘Transferor’ of land to alterations. It has now been confirmed that the ‘Transferor’ meant the original transferor and not any successor in title. If successors were intended to obtain the benefit of restrictive covenants then this should have been made clear in drafting.

Presumably, the same would apply to restrictive covenants and their enforceability by subsequent purchasers of the dominant land generally, in which case the decision has major significance in relation to such matters as consents to plans by the Transferor.
At first glance, the case seems to fly in the face of previous case law in relation to the interpretation of Section 78 of the Law of Property Act 1925 whereby the benefit of restrictive covenants is “deemed to be made with the covenantor, successors in title and persons deriving the title under him or them”

This was interpreted by the Court of Appeal in the case of Federated Homes v Mill Lodge Ltd [1980] and in Robins v Berkeley Homes (Kent) Ltd [1999] as automatically annexing the benefit of a restrictive covenant to the land and, in Roake v Chadha [1985] the High Court held that the only way in which the benefit of a restrictive covenant would not be annexed to the land was if the document creating the covenant either expressly or by implication made the covenant personal.

It must be assumed, therefore, that the City Inns case is, to some extent, dependant on its facts and may be of little use outside the area of consents to alterations, and, presumably, consents to plans by a named individual. Nevertheless, it is a highly significant case.

In Margerison v Bates [2008] EWHC 1211 (Ch) the Court held that a consent to plans covenant which referred to a named individual only was extinguished on the death of the individual.

In Churchill v Temple [2010] EWHC 3369 (Ch), the vendor had to consent to a demolition. The covenant was interpreted as being personal to the vendor and did not pass with the land.

In the case of Crest Nicholson Homes v McAlister [2004] the court made clear that for the benefit to pass the covenantee must own a benefited land nearby. If all land in that part of the development has already been sold there will be problems of enforceability of covenants.

Sugarman v Porter [2006] 11 EG195

Here there was a restriction against builds other than a private dwelling. The covenant benefited land that remained unsold. This was held to discharge statutory annexation under S.78. The covenants only bound whilst the land was unsold. When there was no express annexation on sale, the purchaser did not obtain the benefit.

In Martin v David Wilson Homes [2004] the court stated that a covenant not to use other than as a private dwelling did not incorporate the singular and might include more than one dwelling being built on the land. This has now been doubted in Mahon v Sims [2005] 49EG.

Small v Oliver and Saunders Ltd [2006] 23 EG 164

Here a covenant restricted use of land for a private garden only. The covenantor’s successor obtained planning permission to build on the plot behind the covenanted land. The covenantee’s successor successfully argued that this was a breach. Following from Jarvis Homes v Marshall [2004] 3 EGLR 81 use as a private residence did not include access to a private residence. The covenants passed by annexation.
In **Davies v Dennis** (2009) **EWCA 1081** there was held to be a breach of covenant against committing a nuisance when an extension was built near to a neighbouring boundary. The three storey extensions with planning permission obscured the neighbour’s view of the River Thames. The Court of Appeal has now confirmed this decision.

Contrast **William Aldreds Case** (1610): views cannot be protected by means of an easement. According to the present case, however, loss of views may be in breach of an annoyance covenant.

**Re Hutchinson** [2009] **UKUT 182** - A transfer created restrictive covenants which were expressed to be for the benefit of the retained land. The only other reference to such land was in part of a deed of gift some 15 years previously which had been lost. As the beneficiary could not show the retained land, the covenants were unenforceable. In **Coventry School Foundation v Whitehouse** [2012] **EWHC 235** the courts allowed extrinsic evidence outside the contract to identify the benifitted land.

Note: the Registry will not state where the benefitted land is and if original documentation is lost many such covenants must be unenforceable.

**Norwich City College v McQuillan** [2009] **EWHC 1496** – where restrictive covenants were expressed to be for the benefit of the unsold land, they did not pass to successors as the implication was that the covenants would only benefit whilst the land remained unsold.

**Assignment**
- of a chose in action

**A building scheme or scheme of development**

A building scheme, or scheme of development, arises where a property developer who intends building an estate of houses, wishes to impose restrictions on the purchasers of each of the plots of land in order to retain the overall characteristics of the estate and to maintain the values of the properties thereon, for the mutual benefit of all purchasers. In such situations, equity will enable the restrictive covenants which relate to each and every plot on the estate to be enforced by all who currently own any land within the scheme. The principle applies not only to the usual housing development, but also to units in a shopping precinct according to the Canadian case of **Re Spike and Rocca Group Ltd** [1980]. In **Williams v Kiley** (2001) a building scheme was inferred and was used in a shopping arcade as a means of mutually enforcing user covenants.

**Note:** In **Sugarman v Porter** (2006) it was held that for a scheme to apply there must be an expectation, and not merely a suspicion, of its existence.

**Note:** Building schemes may affect the value of land and should be reported to a mortgage company valuer.

The essential elements of a building scheme were laid down in **Elliston v Reacher** [1908] **2 Ch374** by Parker J. The requirements were strict:
(a) both the claimant and defendant must derive title from a common owner;

(b) such common vendor must have laid out a definite scheme of development prior to the sales of the plots now owned by the claimant and defendant;

(c) there was an intention to impose a scheme of mutually enforceable restrictions upon all purchasers of land within the development and their successors in title;

(d) every purchaser bought his land knowing of the scheme and intending to be bound by the mutually enforceable restrictions.

To these four requirements, a fifth – that the area affected by the scheme must be clearly defined – was added in Reid v Bickerstaff [1900] 2 Ch 305.

In Baxter v Four Oaks Properties Ltd [1965] a scheme was found notwithstanding the whole area had not been divided into lots in advance of the first sale, the intention being that purchasers be able to choose lots of varying sizes.

In Re Dolphin’s Conveyance [1970] Ch 654 the purchasers had not acquired their plots from a common vendor. Nevertheless a scheme was found, based upon the clear intention of the various vendors that a local law in the area be created.

Whilst the courts are still wary of finding the existence of a building scheme, it was stated in Re Wembley Park Estate Co Ltd’s Transfer [1968] that if extreme circumstances suggest a scheme, the inference will be readily drawn. In any event, following the decision in Federated Homes, the importance of building schemes as a means of running the benefit of a restrictive covenant in equity has probably diminished.

In Dobbin v Redpath [2007] the court decided that the normal principles applicable to the discharge of restrictive covenants as being obsolete do not apply to building schemes which are comparatively much more difficult to discharge.

Following on from this, in the case of Turner v Pryce [2008] the High Court held that a restrictive covenant against using land other than as a single private dwelling, enforced by means of a building scheme which applied generally to the locality, would not be discharged by the Lands Tribunal as being obsolete even though many other such covenants within the area had already been breached with impunity and the character of the neighbourhood had changed. This may be contrasted with Lawntown Ltd v Camenzuli [2007] above whereby a single private dwelling covenant was discharged as preventing reasonable use of land. Of particular bearing in the case was the fact that much of the housing in the area had already been converted into flats, and locality had, consequently changed since the covenants were imposed.

**Note:** The CML Lenders Handbook requires the conveyancer to look at Part 2 of the Handbook to see whether the mortgage company should be informed of restrictive covenants. Mutually
enforceable covenants, especially in relation to consent to plans and alterations, can devalue land and the matter should be referred to a valuer.

**Note:** Estate management schemes - In *Zenios v Hampstead Garden Suburb Trust Ltd* [2011] EWCA Civ 1645 it was held that an estate management scheme was binding and would not be discharged as preventing reasonable use of the land. Moreover, compensation would not be sufficient to allow discharge of the covenant.

2. **Passing in Equity: Burden**

**Note:** Local Authorities can use either Section 609 of the Housing Act 1985 or Section 33 of the Local Government (Miscellaneous Provisions) Act 1982, to enforce restrictive covenants even if they do not own any neighbouring land which is benefitted. Since Central Government bodies and bodies such as the National Trust and Church of England have similar powers.

But s609 Housing Act 1985 allows local authorities to enforce covenants in relation to disposals to which the Act applies. However, in *Cantrell v Wycombe District Council* [2008] EWCA Civ 866 this only allows the enforceability of restrictive, and not positive, covenants.

Section 33 may be used to enforce both positive and restrictive covenants, but only if the transfer document expressly refers to its use, or its predecessor in the Housing Act 1974.

In order for the burden to run in equity four requirements must be satisfied:

1. The covenant must be negative in nature, such as a covenant not to build on land, or not to use the land for business purposes. See *Austerberry v Oldham Corporation* [1885] 29 Ch D750 and *Rhone v Stephens* [1994] 2AC 310. A covenant may be worded in a negative way, yet be positive in fact. Positive covenants run neither at law nor in equity.

2. There must be a dominant and servient tenement. Both the covenantee and the covenantor must own an estate in their respective tenements. The Court of Appeal, in *London County Council v Allen* [1914] held that the claimant was unable to enforce a restrictive covenant against the covenantor’s successor in title, as he (the claimant) did not have any estate in the dominant land. The dominant land must be reasonably close to the servient tenement:

   See also *Kelly v Barrett* [1924] 2 CH 379 where only the subsoil of the highway was retained, the surface belonging to the Highways Authority, this was not enough to give rise to a benefited covenant. See also *North Foreland Limited v Ward*, unreported, where it was accepted that retention of private roads would not be enough to support a covenant.

3. The covenant must touch and concern the dominant land, that is it must benefit the land. It was stated in *Re Gadd’s Land Transfer* [1966] that a “benefit” must be “something affecting either the value of the land or the method of its occupation or enjoyment”. We have already seen the extent to which the dominant land must be benefited.
(4) The covenant must have been intended to run with the covenanter’s land. Therefore a covenant
which is phrased in such a way as to bind the covenanter only will not run with the land. In the
absence of such a limitation, however, it will be assumed that the burden of the restrictive
covenant was intended to run with the covenanter’s land.

For restrictive covenants created after 1 January 1926, s79(1) LPA 1925 provides that, unless a
contrary intention is shown, a covenant

...relating to any land of a covenanter or capable of being bound by him, shall be deemed
to be made by the covenanter on behalf of himself, his successors in title and the persons
deriving title under him or them, and shall have effect as if such successors and other
persons were expressed.

In Morrell’s of Oxford v Oxford United Football Club (1998), some covenants were expressed to pass
with the land. The current covenants, in relation to sale of alcohol, did not state this and it was held,
therefore, not to pass with the land.

In addition and most importantly, a purchaser of land which is subject to a restrictive covenant may
take free of it if, as with any equitable right, he is not sufficiently bound by it. In unregistered land
the covenant, if created on or after 1st January 1926, must be registered as a D(ii) land charge if it is to
bind a purchaser. Registration is deemed to constitute actual notice of the covenant: S198 LPA 1925.
If not registered, a purchaser for money or money’s worth will be free of the charge regardless of his
actual state of mind: s198 LPA 1925. If the covenant was entered into prior to 1926, then whether it
binds will depend on whether or not the purchaser had actual, constructive or imputed notice of it.

In registered land the covenant must always be registered.

The Land Registry on first registration will systematically note all restrictive covenants even if not
registered as D(ii) land charges. Ensure that a request is made to take these off the Register. On
subsequent transfers a Land Charges search may be desirable to find out if restrictive covenants
bound on first registration.

Before ensuring against the existence of restrictive covenants, you might wish to check whether the
covenant was registered as a land charge on first registration if it was created from 1st January 1926
onwards. In addition covenants which are obsolete could be discharged at no cost under section 84
Law of Property Act 1925 although the process is long-winded.

The mortgagee will require insurance unless (a) there is no risk to the security; or (b) the breach has
continued for more than 20 years without action; and (c) there is no suggestion of action being taken.

In spite of the above covenants may not be enforceable after 12 years and injunction will certainly not
be available after a short delay.

If self issue insurance is not available the insurer will need the following documents:-
(a) a copy of the document imposing the covenants
(b) the exact nature of the breach
(c) the date the covenant was imposed
(d) whether the covenant was registered
(e) the nature of other properties in the immediate neighbourhood. This is in order to ascertain whether the covenant is obsolete.
(f) a copy of any planning permission
(g) what steps have been taken to trace the person with the benefit of the covenant.

As the original covenantor will remain liable throughout the duration of the covenant in contracts, then insurance might not be available in favour of such a person.

Self issue insurance may be available but not for the benefit of the original covenantor.
DISCHARGE OF COVENANTS

Section 84 of the Law of Property Act 1925

The ability of the Lands Chamber to discharge covenants with compensation where appropriate is a further factor which renders many overage clauses supported by restrictive covenants unenforceable. The grounds for discharge are as follows:

(a) by reason of changes in the character of the property or the neighbourhood or other circumstances the restriction ought to be deemed obsolete. For example, the land may have become surrounded by developed land and the owner would succeed in an application for removal. See Stockport Borough Council v Alwiyah above. Compensation would be based on loss of value in the new position and not the original one.

(aa) the restriction impedes reasonable use of the land and does not secure to the persons entitled to the benefit any practical benefits of substantial value or the restriction is contrary to public interest. It may be the case that if the owners' interest in the land is only in relation to a monetary payment there may be no practical benefit.

(b) the person entitled to the benefits of the restriction has agreed either expressly or by implication for the covenant to be discharged. See Gafford v Graham [1998] 77 P & CR 73 where the covenantee had originally been prepared to negotiate a release in return for cash. An injunction was not therefore available.

(c) the proposed discharge or modification will not injure the person entitled to the benefit.

The benefit of the restrictive covenant does not have to be registered, but, unless it is, its existence may simply not be discovered. There is no obligation on the Land Registrar to register the benefit of a restrictive covenant, as it is an equitable and not a legal right. This highlights the importance of finding the old conveyances (a) to clarify for what land the covenant was originally imposed and (b) to trace the subsequent sales of that land.

Note: Under Section 237 of the Town and Country Planning Act 1990 Local Authorities may acquire land for development free of any restrictive covenants. According to the case of Thames Water v Oxfordshire County Council, this would only apply to building covenants. However, this has been amended and as of 6 April 2009 user covenants may also be discharged.

Practical Considerations for the Owner of the Burdened Land

1. Is the burden of the covenant registered against the title? If not, it cannot be enforced against a later owner.
2. Even if the covenant is registered, the charges register may just state that there are covenants, but give no details, because the conveyance imposing the covenants was not produced on registration – probably because they could not be located.

3. On purchase: does the covenant affect what the buyer intends to do with the land? Even if not, might it affect a future sale.

4. Is there anyone who can enforce the covenant? This may not be easy to answer.

5. There is no general principle of desuetude, or lapse through age, but it has been suggested there should be. Many, many titles are cluttered with old covenants that will never be enforced. One exception to this is where a specific company is required to consent to plans. If the company is dissolved, such a covenant will lapse.

6. If you do plan to break a covenant, should you take out (or ask the seller to) insurance against the risk of enforcement or just take a gamble?

7. If there is a covenant and you have identified someone entitled to enforce it, but there is uncertainty as to its meaning, go to court on the issue of construction under s.84(2) of the Law of Property Act.

8. Negotiate with person entitled to enforce the covenant for a modification or relaxation.

9. Seek a modification from Lands Chamber under s.84(1) of the LPA.

**Practical Considerations for the Owner of the Benefited Land**

1. Is the right to enforce the covenant clearly established?

2. Is the covenant registered against the title to the burdened land? If not, it is worthless (other than as against the original covenantor).

3. Assuming a breach to be threatened, is it better to seek to negotiate a release or relaxation of the covenant in return for a payment, rather than the uncertainty of having to go to court to enforce?

**The Court’s Powers: Injunction or Damages?**

1. If you go to court for an injunction – can you take the risk of having to give a cross-undertaking in damages? Many people will be deterred.

   See Mortimer v Bailey [2004] EWCA Civ 1514 – mandatory injunction to take an extension down was granted at trial, even though no application had been made for an interim injunction when the works first started. The court was sympathetic to Cs’ apprehension about giving a cross-undertaking.
2. To the person entitled, the threat of applying for an injunction may be the most powerful commercial weapon and stimulate negotiation.

3. An injunction is always discretionary, but the basic rules are:-
   
   (1) the sooner you apply, the more likely you are to be granted it as the injunction will preserve the status quo
   
   (2) it will generally be easier to obtain one to restrain a threatened breach than to undo work that has been carried out already

4. If an injunction is refused a trial and damages are awarded instead, there are 3 possible bases:-
   
   (1) compensatory damages – assessed by reference to the diminution in value of the land by reason of the breach of the covenant
   
   (2) negotiating damages – assessed by reference to what D would have to pay for the necessary release
   
   (3) an account of the benefit to D acquired by reason of the breach

5. The usual rule is to assess the damages as at the date of the breach, but that is not an inflexible rule. In Gafford v Graham [1999] 3 EGLR Nourse LJ honestly, but perhaps unhelpfully, said that issues of damages in these cases are incapable of strictly rational and logical exposition from beginning to end

6. Some recent assessments include:-

   Amec Developments Ltd v Jury’s Hotel Management (UK) Ltd [2001] 82 P&CR 286 D benefited by 25 extra hotel rooms by building over the boundary line. Damages were assessed by reference to the capital value of the rooms.

   In Harris v Williams-Wynne [2005] EWHC 151 an injunction was refused, because of D’s delay in applying for it. D recovered damages assessed at the date when permission would have been sought and granted – 1997, in the sum of £8,000.

   In Small v Oliver (unrep.25/5/06) the breach was using land other than as a dwelling, by using it as an access to a new development in the rear garden. An injunction was refused. Damages were assessed at 35% of the development value, which was agreed at £448,536. Unfortunately for Mr Small, he was one of 48 potential beneficiaries of the covenant and so his share was a mere £3,270.

Some Recent Points on Construction
1. Use of land as a roadway for access to a new development is a breach of a covenant not to use the land other than as a private dwelling – Jarvis Homes Ltd v Marshall [2004] EWCA Civ 839.

2. An unqualified requirement to obtain consent will usually be construed as meaning that the consent should not be unreasonably withheld. See Mahon v Sims [2005] 3 EGLR 67 and Rickman v Brudenell-Bruce (27/6/05, unreported)

3. In Joint London Holdings Ltd v Mount Cook Land Ltd [2005] 3 EGLR 119 the issue was whether the word “victualler” should be construed by reference to its meaning when the covenant was imposed or at the time of the trial in 2004. Any restrictive covenant should be interpreted as to its meaning when imposed and not when enforced.

The Lands Chamber

1. The jurisdiction is complex, but one important point is D’s right in any proceedings to apply for a stay in order to make an application to the Lands Chamber – S.84(9) LPA

2. The Lands Chamber has four distinct grounds for discharging or modifying covenants.

   (1) changes in the character of the property or the neighbourhood making the covenant obsolete – S.84(1)(a)

   (2) the continued existence of the covenant would impede some reasonable user of the land – S.84(1)(aa) – and its existence does not secure practical benefits or is contrary to the public interest and money would compensate – S.84(1A)

   (3) there is express or implied consent – S.84(1)(b)

   (4) discharge or modification would not harm the persons entitled to enforce – S.84(1)(c)

3. In Shephard v Turner [2006] EWCA Civ a decision of the Tribunal modifying a covenant so as to allow an extra house to be built on land was upheld and damages of a few hundred pounds only awarded to those entitled to enforce.
ENFORCEABILITY OF POSITIVE COVENANTS

1. Positive Covenants and Restrictions

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See Austerberry v Oldham Corporation [1885] - this was confirmed by the House Lords in Rhone v Stephens [1994] 2 All ER 65 where maintenance of a flying freehold roof could not be required against third party purchasers. Mortgage companies may be required to be told about flying freeholds and insurance may be available. It is suggested that the best manner of enforcement would be to include direct covenants and restrictions on the register. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed, a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

Direct covenants and restrictions

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

Stamp Duty Land Tax

SDLT will attach to positive overage but not to negative. A best estimate of the total consideration based on the contingent event occurring, no matter how remote, must be made and the tax calculated accordingly, e.g., ransom strips and restrictive covenants. When the triggering event actually occurs a further return must then be made. Developers should accommodate any extra SDLT liability in their tendering process.

A deferral form may be obtained from the Birmingham Stamping Office. How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. If this has occurred then the subsequent
purchaser will have a further tax bill on the trigger event occurring. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

2. **Section 33 Local Government (Miscellaneous Provisions Act) 1982**

As above, Local Authorities may enforce positive covenants if they invoke their powers under the Act and the transfer refers to the 1982 Act, or its predecessor, the Housing Act 1974.

3. **Estate Rentcharges**

Estate Rentcharges can still be created post the Rentcharges Act 1977, which prohibited new annuity rentcharges. The rentcharges will reflect maintenance costs, and will have a right of re-entry if the payment is not made.

**Note:** HSBC appear not to give mortgages where the estate rent charge has right of entry.

**Smith Brothers Farms Ltd v Canwell Estate Company Ltd [2012] EWCA 237.** An Estate Rentcharge, to be valid, needs to reflect maintenance costs and cannot have a profit element – S.2(5) Rentcharges Act 1977. Here, the Estate Rentcharge covered maintenance for the whole of an estate including roads which would not be used by the covenantor. It was still valid as maintenance need not be in relation to the particular piece of land of the covenantor.

4. **Mutual Benefits and Burden: The rule in Halsall v Brizell (1957)**

If a landowner wants to obtain a benefit, then it must submit to any corresponding burden. This may be by way of enforcing obligations in relation to private roads in smaller developments. However, the Thamesmead Town v Allotey (1999), payments for maintenance of private roads and drains was able to be collected, but not for gardening and landscaping if the owner does not wish to avail themselves of such rights.

**Note:** Post the above case, a mortgage company may well require direct covenants and restrictions on the register in relation to maintenance of private roads and drains. This will often be the case in anything but the smallest of developments.

**Wilkinson v Kerdene Ltd [2013] EWCA 44.** Here, the doctrine of mutual benefit and burden was held to apply to the whole of a holiday village in Cornwall. This included maintenance of roads, car parks, footpaths and other recreational facilities and also maintenance to the outside of bungalows and the foul sewer system.

5. **Long Leases**

If the lease was created pre 1 January 1996, both positive and negative covenants will pass with the land if they touch and concern the land, i.e. they are leasehold covenants.
**Note:** Woodall v Clifton (1909) Options to purchase, as opposed to options to renew the lease, will not pass with the land. If the lease was created from 1 January 1996 onwards, then all covenants will pass unless expressed to be personal under Sections 2 and 3 of the Landlord and Tenant (Covenants) Act 1995. On enlargement of a long lease without a rent and without forfeiture provisions, positive covenants will pass onto the freeholds under Section 153 of the Law of Property Act 1925.

6. **Commonhold**

Under Part 1 of the Commonhold and Leasehold Reform Act 2002, a Commonhold Association may be set up, and the various freeholders will become members. They will agree to be bound by positive and restrictive covenants via the Memorandum and Articles of Association. Since September 2004, very few commonholds have been set up, mainly as there is no right to sublet in relation to a dwelling for more than seven years and thus affordable housing cannot be built into the developments via shared ownership leases. Moreover, as the mortgage companies are concerned at the Commonhold Association being struck off, thus giving rise to a series of flying freeholds, many are reluctant to give mortgages.

**Note:** The draft Law of Property Bill was announced in the Queen's Speech 2016. Amongst other things it intends to remove the distinction between restrictive and positive covenants. It is undergoing scrutiny by parliamentary select committee.
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