DISTINCTLY FOCUSED
ON REAL ESTATE

DAVITT
JONES
BOULD
REAL ESTATE LAW SPECIALISTS

DEVELOPMENT LAND PART 1: OVERAGE, CLAWBACK AND RESTRICTIVE COVENANTS

DJB SEMINARS: THE LEGAL SERIES
24TH AUGUST 2020

ABOUT DJB

FOR SURVEYORS & PROPERTY PROFESSIONALS

Davitt Jones Bould "DJB" is the largest niche real estate law firm in the UK.

We are renowned for our high-quality legal work and service. We only recruit experienced solicitors and, as a result, our legal team of 45 solicitors has an average post-qualification experience that exceeds 20 years. Most have joined us from other City firms, in-house departments and/or senior roles.

Our solicitors have advised some of the UK's most significant land owners including The Royal Parks, The Cabinet Office, the Department for Environment Food & Rural Affairs (Defra), DSTL and a number of local authorities and private-sector clients.

All of our clients are provided with a dedicated client care professional at no extra charge, to ensure they receive the highest standard of service at all times.

DJB is regularly selected to advise on high-profile projects such as the hosting of the London 2012 Olympic Games by The Royal Parks and the first Sukuk Bond to be entered into by a Western Government on behalf of HM Treasury.

The firm enjoys top-tier rankings in all of the main directories, including Chambers and the Legal 500. We were recently commended for Commercial Property in The Times Best Law Firms 2020 list, are shortlisted for Real Estate Team of the Year 2020 at the Legal Business Awards and were Finalists for National Firm of the Year at The Lawyer Awards 2019.

"The service we receive from DJB is first class. Their lawyers are excellent, with detailed knowledge of their areas of expertise… Put simply, DJB are my first choice when I need to instruct external solicitors."

Peter Bryant, Head of Democratic and Legal Services at Woking Borough Council

FOR SOLICITORS

Senior solicitors are drawn to DJB because of the innovative structure we have developed over a number of years.

We separate client care from legal advice. This means our core solicitors can focus entirely on their legal work, unfettered from the competing demands of business development, client liaison and matter administration. Everything is taken care of for them from case opening to case completion and beyond. This approach allows our solicitors to be just that – solicitors.

In addition to protecting our clients' interests and delivering expert advice, our goal is to ensure we find work for our solicitors at the right level to give them the lifestyle they want. As such, our solicitors are in complete control of their capacity and have the option to work remotely at home or hot-desk at one of our offices in London, Manchester, Birmingham or Taunton. All DJB core solicitors receive a percentage of the fees they bill, so their workload and lifestyle can work hand in hand.

All of this is possible whilst still having access to complex work for prestigious clients both in the private and public sector. The success of this model is exemplified by our 50-50 gender split at partner level and our exemplary lawyer retention rate.

"After too many years in the legal rat-race, life at DJB is a great comfort. Fantastic work, great clients, flexible working routine, the ability to work from home, 100% support from the firm. It's a great all in one package for any lawyer seeking autonomy with a top firm and top work"

A DJB Lawyer

OUTCOME FOCUSED TRAINING INFORMATION

Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

Learning Outcome: To give an increased knowledge of the subject matter. To update on current issues, case law and statutory provisions and to be able to apply the knowledge gained in the better provision of service to the client.

Satisfying Competency Statement Section: B – Technical Legal Practice

For further information please see http://www.sra.org.uk/competence

CONTENTS

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS

OVERAGE AND CLAWBACK

Introduction

Overage clauses and clawback provisions are designed to achieve full value in relation to land being sold where a subsequent purchaser achieves additional value at a later time. As a consequence of the ***Herstmonceux*** case Treasury guidelines provide that government land should normally be sold with planning permission. However, where there are delays in resolving uncertainties over planning permission it may be appropriate to dispose of land early and in such cases introduce clawback provisions to achieve full value. Where overage clauses have not been included, for example, on the sale of the Royal Brompton Hospital, the National Audit Office has produced adverse reports.

However, some forms of overage and clawback, e.g. ransom strips, may be inappropriate for government bodies. See also ***R v Braintree District Council ex parte Halls [2000] 36 EG 164*** where a local authority which sold a council house subject to use as a single private dwelling sought to charge 90% of profits to discharge the covenant. This was held to be ultra vires its powers under ***Schedule 6 Housing Act 1985.***

Overage may act either positively in that if additional value is received additional money will be given to the seller, or negatively, i.e. the purchaser will not develop or does not have a sufficient interest in land. In such case, there is no need for any overage clause as the seller has control over the situation and can charge what he likes.

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.

Time Period

The duration of the overage clause depends very much on its facts. Some clauses refer to 80 years. It is suggested that this is excessive and arises through confusion with the statutory perpetuity period of 80 years.

Enforcement

Between the original parties there will be a contract and the covenantor will be able to fully enforce. Third party purchasers must however take the benefit of the covenant. This may always be done by an express assignment. In any case, as we will see many covenants are automatically annexed to land. The problem lies in relation to the burden passing to subsequent purchasers as this cannot be contractually assigned. Some form of property rights which is binding on the purchaser will therefore need to be created. The commonest methods, which we will look at, are: -

(a) positive covenants and restrictions

(b) restrictive covenants

(c) ransom strips

(d) a charge or mortgage

Note: In the case of ***Akasus v Farmar & Shirreff [2003] EWHC 1275***, a firm of solicitors who failed to include provisions allowing enforcement against third party purchasers were held to be negligent.

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]***. 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.

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 Land Tribunal 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.

Cosmichome v Southampton City Council [2013] EWHC 1378. In this case the Council sold land with restrictive covenants against building. The covenants could be released if a development charge was paid. The covenants did not bind a purchaser as they did not benefit any dominant land but were personal.

THE TRIGGER EVENT

Uplift in Value

The most typical uplift is the grant of a planning consent. The main advantage of this approach is certainly in that it is an ascertainable event the knowledge of which is publicly available and the terms of which are ascertainable to anyone who enquires of the local authority. The main disadvantage from the landowner's point of view is that the grant of consent does not itself give the landowner cash. It gives it the means of obtaining cash, for example by borrowing on the security of the increased value. From the overage owner's point of view, it is possible that a future consent may produce greater value to that linking overage to a specific planning consent or perhaps the first planning consent to be granted may not necessarily secure the best value for the overage owner.

Certain developments will not require planning permission, for example, under the ***Town and Country Planning Act (Permitted Developments) Order 1995*** as amended. Also, changes of use within the use classes order as amended will be exempt. In particular, on 1 September 2020 Part A and D of the Use Classes Order 1987 will be revoked. Class A1 (shops), A2 (financial and professional services), A3 (restaurants and cafes) and B1 (business) are all to fall within a new Class E. Drinking establishments and takeaways will be sui generis and require planning permission for a change of use.

If operational development is started, it is exempt from an enforcement notice after 4 years and, if there is a change of use or breach of planning condition, it is exempt after 10 years. Under the ***Localism Act 2011***, if there is a deliberate concealment of planning breaches these time periods will continue to run. In such cases there will be no formal grant of planning consent, but it may still be possible for the landowner to realise the value if the local authority decides not to serve an enforcement notice or is simply not aware that the development has taken place.

If overage is payable by reference to the grant of consent, the payer may be concerned at a consent granted on the application of some totally unconnected third party. Therefore, it may seek to link the payment to development carried out by itself. However, the recipient will be concerned to cover this in case the consent is granted to (or implemented by) a person associated with the landowner such as a connected company or a tenant. See, however, ***Micro Design Group Ltd & Anor v BDW Trading Ltd [2008] EWCA Civ 488***, where on the facts it was implied that the trigger event would not occur if the seller obtained planning permission. In ***Johnson v Secretary of State for Communities and Local Government [2007] EWHC 1839*** the applicant obtained planning permission for the conversion of existing outbuildings but not for a new building. Without the full planning permission development of the outbuildings was impractical as there would be restricted access to a proposed garage. The applicant therefore wished to apply to quash the planning permission. They failed and therefore overage had to be paid.

Another issue in overage and clawback relating to the uplift in value is that the value of the overage land may accrue because it is part of a larger assembly of land. The land itself may provide access to

some other plot perhaps as a ransom strip or it may need to be taken into account for example for the provision of public open space without itself being used for valuable development. It may be desirable that on the trigger in relation to a part of a property, a new base value is determined by reference to the then value of the property.

Start of Development

For these reasons, overage is sometimes linked to the implementation of any planning consent. If the land becomes available for or involved in any larger development or if development is commenced with the authority or approval of the landowner for the time being, then overage becomes payable.

Realisation of Value

The alternative approach is to provide that when cash accrues to the landowner that will trigger the payment of overage. Normally, it will not be any sale because the parties usually do not intend that a simple increase in current use value will by itself trigger overage. That is not invariably the case and sometimes the parties may agree that a straightforward resale at an increased price for whatever reason will trigger a payment to the recipient.

Note: To avoid the possibility of further planning permission at a later stage, a new base value may be considered to calculate the payments. This will be based on the former betterment value with the overage payments.

INTERPRETATION OF OVERAGE CLAUSES

Walker v Kenley [2008] EWHC

In this rather startling case, overage was payable if 'residential flats' were built upon land. The buyer of the land who was bound by the overage wished to build holiday flats on the land. The question for the High Court was whether holiday flats fell within the meaning of residential flats, thus triggering the overage payment.

Quite surprisingly, it was held that the term 'residential flats' suggested a degree of permanence, i.e., residence as a dwelling, and that this did not include holiday homes: no money was, therefore, payable.

This case is a timely reminder of the need to clearly specify the event, which triggers the overage payment. With the benefit of hindsight, it would have been much better to merely refer to 'flats' without the prefix of residential. It may also, however, be asked whether this decision may be transposed into other areas of law. Does, for instance, reference to a residence or indeed a single private dwelling, in a restrictive covenant, prevent use as an only or principal home but not prevent use as a holiday home. The question must be considered a moot one.

Renewal Leeds v Lowry Properties [2010] EWHC 2902

Here, because of low housing expectation, no overage was payable until the last house was sold. The houses were built and 80 were sold but the developer deliberately left the last 4 houses unsold. RL tried to buy them at market value but the developer refused to sell. The court implied a term that the developer should take all reasonable steps to sell and therefore the overage was payable. It is suggested that there should not be reliance on implied terms and that such matters should be expressed.

Whether this case would be decided in the same way post the Supreme Court cases ***of Arnold v Britton [2015] UKSC 36*** and ***Marks & Spencer v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor [2015] UKSC 72*** where the courts held that implied terms would not be allowed to re-write express wording is debatable.

In ***Primapus v Hall Aggregates (2000)*** 50% overage became payable on planning permission except for use as a garden centre, sport centre or recreation ground. Permission was granted for a sports hall, driving range and fishing lake. This was held to be within the exception as was a golf shop which was ancillary to use. No overage was therefore payable.

In ***Berkeley Group v Pullen [2007] EWHC 1330*** there was provision in the overage clause that the parties would act in good faith. B would maximise potential value by procuring planning permission

and when P disposed of the land B would obtain further payment. B acted to obtain planning permission but became aware that P wished to sell the property to a third party. B successfully obtained an injunction to prevent this on the basis of the good faith clause. Likewise, in ***Ross River and Blue River v Cambridge City Football Club [2007] EWHC 2115*** presence of good faith enabled an overage buyout agreement to be rescinded because of lack of openness of the developer.

Harris v Berkeley Strategic Land Ltd [2014] EWHC 3355 (Ch) Here 60 flats for use in a care home and 15 units of sheltered accommodation constituted residential accommodation by reference to the physical character of the land and the fact that it was within current planning permission. Overage therefore had to be paid.

In ***Groveholt v Hughes [2012] EWHC 3351 (Ch)*** it was held that purchase money that was not ascertained at the date that the person who was subject to the overage went into liquidation would not be payable.

In ***Walton v Staffordshire County Council [2013] EWHC 2554*** the case involved a former school playing field. The value of the land in calculating the uplift was based on an assumption that there was no planning permission. The court held that the recommendation of the planning officer and a resolution of the planning committee that planning permission would be granted should also be disregarded.

Sparks v Biden [2017] EWHC 1994 (Ch) here there were no express provisions as to the time in which properties would be sold to trigger the overage payments. The courts implied that the person subject to the overage would endeavour to sell within a reasonable time.

London & Ilford Ltd v Sovereign Property Holdings Ltd [2018] EWCA Civ 1618 overage was triggered on prior approval of permitted development. Prior approval was given for conversion of an office block into 60 flats. The overage was payable even though the development was impossible as building regulations approval was not given.

Loxleigh v Dartford Borough Council [2019] EWHC 2063

Here overage was triggered by the obtaining of detailed planning permission. The Court decided that this meant that when reserved matters in relation to outline planning permission were agreed the payment was due.

Good Faith

Sainsbury's Plc v Bristol Rovers Football Club [2016] EWCA Civ 160. In this case a requirement of good faith did not mean that Sainsbury's had to appeal conditions as to planning permission and therefore could avoid a contract which was subject to satisfactory planning permission. In the present case Sainsbury's had contracted to buy the Memorial Ground, home of Bristol Rovers Football Club, from the latter. They were then going to lease back the site to Bristol Rovers for £1 whilst the latter built a new stadium that the University of West of England. The purchase price was £30m.

The contract was subject to satisfactory planning permission for a supermarket. Planning permission was granted but it placed restrictions on delivery which the contract specifically stated would allow Sainsbury's to terminate it. Sainsbury's were seeking judicial review but applied out of time as they had decided that they did not want the site after all.

Bristol Rovers argued that a good faith provision in the contract required them to pursue an appeal. The courts held otherwise especially as legal opinion was that there would be less than 60% chance of success.

The Court of Appeal have now confirmed this decision. A requirement to act in good faith will not override clear provisions of the contract. Although the case involves conditional contracts, presumably the same would apply to overage clauses.

Note: In ***Rentokil Initial 1927 Plc v Goodman Derrick LLP [2014] EWHC 2994 (Ch)*** relates to a claim in negligence by a seller of property, Rentokil, against its lawyers. Rentokil had agreed to sell property to Taylor Wimpey for £4.388m conditionally upon the grant of a satisfactory planning permission for residential development. A satisfactory planning permission was one that was free from "Unacceptable Planning Conditions". Following the grant of planning permission on appeal (subject to conditions largely on terms the same as those negotiated by Taylor Wimpey with the local planning authority) Taylor Wimpey asserted that some of the planning conditions attached to its planning permission fell within the definition of "Unacceptable Planning Conditions" under the conditional sale agreement. Rentokil contested this, and brought about arbitration proceedings, but ultimately compromised those proceedings on terms that resulted in a revised sale to Taylor Wimpey at £2.5m. Rentokil brought an action in negligence against its lawyers, alleging that as a result of the definition of "Unacceptable Planning Conditions" Taylor Wimpey was able to argue that the planning conditions that were ultimately imposed were unacceptable and entitled to treat the contract as terminated. The court held that the solicitors were not liable as it is there job to draft the clause in accordance with the wishes of the client and their agents and not to decide the detail of the clause.

The solicitors are required to draft on the basis of client's instructions. Presumably the same may apply to overage.

OVERAGE CHARGES

The final type of overage that will be looked at is by way of a charge.

The overage works by the grantor giving a charge to secure the amount of overage payment. Nothing occurs until the trigger event, e.g. planning consent, occurs. The charge will then automatically secure the payment. If the payer does not pay, the recipient can sell the land and take payment out of the proceeds. He will have the same rights and remedies as any other mortgagee.

Future Payments

The fact that the overage cannot be ascertained at the time the arrangements are made is not fatal. See e.g. ***Multiservice Bookbinding v Marden [1979] Ch 84*** where an amount payable by reference to the Swiss Franc was valid, and also ***Nationwide Building Society v Registry of Friendly Societies [1983] 3 All ER 296*** where index linking of a charge was accepted.

The Perpetuity Period

In ***Knightsbridge Estates Ltd v Byrne [1939] 1 Ch*** 441 it was held the Rule against Perpetuities does not apply to mortgages.

Priority

The overage owner will require priority of payment over other charges. In theory any other charge will be based on current use value whereas the overage charge is based on any enhanced development value. However, as the two are difficult to separate subsequent mortgagees may be reluctant to accept an overage charge with priority. This may mean that overage charges are of less importance in relation to residential properties and properties where financing is required. With this proviso, in registered land, priority would be based on the date of restriction and there is no distinction between legal and equitable charges.

However, legal charges have the benefit of enhanced remedies as the power of sale may automatically arise and become exercisable without the need to apply to court.

To satisfy the lender there would have to be a provision whereby priority is given to a subsequent charge. Typically, there may be provision that such a charge would be consented to if reasonable. An example of an unreasonable refusal of consent might be where the charge is used for a collateral security.

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.

Alexander Devine Children's Cancer Trust v (1) Millgate Development Ltd and (2) Housing Solutions Ltd [2018] EWCA Civ 2679 here, 13 units of social housing were built upon land which was subject to covenants not to use other than for car parking. The Court of Appeal have now reversed the Upper Tribunal decision and held that public interest in additional housing did not prevail over contractual provisions and an injunction was awarded. Contrast this with ***George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC)*** the developer blatantly 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.

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.

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 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.

Section 610 Housing Act 1985

Lawntown Ltd v Camenzuli (2007). This case, which specifically discusses a little used method of modifying restrictive covenants: ***S.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 covenant 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.

Shaviram Normandy v Basingstoke and Deane Borough Council [2019] UKUT 256. Here a long lease stated that the premises could only be used for commercial purposes. Conversion into residential flats was possible through permitted development however, the Landlord refused to surrender the covenants. A Tenant can apply to the Lands Chamber to discharge covenants under ***S 84 (12) Law of Property Act 1925*** if the Lease is for a term of 40 years or more and at least 25 years is unexpired. Here the Upper Tribunal held that rentals would not be affected by a change from commercial to residential use and the covenants did not secure any practicable benefits and were contrary to public policy as there was a need for housing.

A requirement the Landlord give their licence for underletting was not discharged as the head rent was dependent on the underletting rents and the Landlord had an interest in who the underlessees were.

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

S.78 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] 2EGLR 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 ***S.78*** and statutory annexation.

However, in ***Roake v Chadha [1984] 1WLR40***, Judge Paul Baker QC held that **S.78** could not be applied where the original covenanting parties had expressly stipulated that their covenant should "not enure 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 ***Churchilll 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 benefitted 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.

Holland Park (Management) Ltd v Hicks [2020] EWCA 758 – HPML was the freeholder of a large Victorian building which was divided into five flats all of which were held under long leases. The leases were subject to the freeholder giving consent development which was not to be unreasonably withheld.

The Court of Appeal held that the freeholder was entitled to take into account the interest of the leaseholders as well as its own interests. The freeholder could also raise valid objections on aesthetic grounds even though this would not affect the value of the reversion.

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 ***Birdlip Ltd v Hunter & Anor [2016] EWCA Civ 603*** the Court of Appeal limited the existence of building schemes. The land which is subject to mutual obligation must be clearly defined and it must be made clear that the parties have a mutual benefit and suffer a mutual burden. Preferably this should be referred to in the deeds.

In ***Khoury & Anor v Kensell [2018] EWHC 217 (Ch)*** there was found to be no evidence that three dwellings were the subject matter of a building scheme.

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. <u>Passing in Equity: Burden</u>

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 ***S.609 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 covenantor's land. Therefore, a covenant which is phrased in such a way as to bind the covenantor 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 covenantor's land.

For restrictive covenants created after 1 January 1926, ***S.79(1) LPA 1925*** provides that, unless a contrary intention is shown, a covenant

…relating to any land of a covenantor or capable of being bound by him, shall be deemed to be made by the covenantor 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: ***S.198 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: ***S.198 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 HMLR 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 insuring 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 under ***section 84 Law of Property Act 1925.***

Copyright © Davitt Jones Bould ("DJB") and Richard Snape 2020

Published June 2020

DISCLAIMER

This oral presentation including answers given in any question and answer session ("the presentation") and this accompanying paper are intended for general purposes only and should not be viewed as a comprehensive summary of the subject matters covered. Nothing said in this presentation or contained in this paper constitutes legal or other professional advice and no warranty is given nor liability accepted for the contents of the presentation or the accompanying paper. Richard Snape and Davitt Jones Bould will not accept responsibility for any loss suffered in consequence of reliance on information contained in the presentation or paper.

OUR CREDENTIALS

LEGAL 500

- London: Real Estate: Corporate Occupiers; Investors; Property Litigation; Local Government
- North West: Commercial Property
- South West: Real Estate: Commercial Property, Planning, Property Litigation, Local Government

"Excellent niche property and planning firm"

LEGAL 500 2019

CHAMBERS UK

- London: Real Estate
- South West: Real Estate, Planning, Property Litigation

"Immense depth and knowledge enabling them to deal with anything that is thrown at them"

CHAMBERS 2019

INDUSTRY AWARDS

- Times Best Law Firm List 2020 – Commended for Commercial Real Estate
- 2019 Lawyer Awards – Finalists – National Firm of the Year
- 2018 British Legal Awards – Winner – Boutique Firm of the Year
- 2018 Estates Gazette Awards – Finalists – Legal Team of the Year 2018
- 2017 Estates Gazette Awards – Finalists – Real Estate Law Firm of the Year
- 2016 Amercian Lawyer Legal Awards - Global Finance Deal of the Year – Honoree
- 2013 Lawyer Awards – Boutique Firm –
- National – Winner
- 2013 Lawyer Awards – Real Estate Team – 2nd

"Extremely client focused and solutions driven"

LEGAL 500 2019

"'They're approachable and helpful". "

CHAMBERS 2019

www.djblaw.co.uk
0344 880 8000

CONTACTS

Madeleine F Davitt, Senior Partner
Central Government and Property Companies
T: +44 203 026 8295
M:+44 7904 677 739
E: madeleine.davitt@djblaw.co.uk

Peter Allinson, Chief Executive
Real Estate Support for Other Law Firms
T: +44 203 026 8290
M: +44 7904 677 773
E: peter.allinson@djblaw.co.uk

Sue McCormick, Account Director
Local Authorities
T: +44 1823 328 084
M: +44 7535 655 060
E: sue.mccormick@djblaw.co.uk

Yvonne Hills, Client Director
Property Companies
T: +44 20 3026 3467
M: +44 7921 925 761
E: yvonne.hills@djblaw.co.uk

OFFICES

LONDON - CITY
Level 24 The Shard,
32 London Bridge Street,
London SE1 9SG

BIRMINGHAM
2 Snow Hill,
Birmingham BG4 6GA

TAUNTON
12-14 The Crescent, Taunton,
Somerset TA1 4EB

LONDON - WEST END
48 Dover St,
Mayfair,
London W1S 4NX

MANCHESTER
Floor 2, 3 Hardman Square,
Manchester M3 3EB

DAVITT JONES BOULD
REAL ESTATE LAW SPECIALISTS