

Restrictive Covenants



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INTRODUCTION

1. Restrictive covenants can appear in both leases and in relation to freehold land. They are contractual obligations that prohibit certain specific conduct. Unlike normal contractual promises, which bind only the original parties, these can bind subsequent owners of the affected land.
2. Common examples of restrictive covenants include:
 - (i) Not to erect any building or structures on the land that has been acquired.
 - (ii) Not to use the land for any business activity.
 - (iii) Not to use the land other than for agricultural use and not to carry out any building or residential development.
3. This is only the briefest of overviews of the law relating to restrictive covenants relating to freehold land. It is not in any way intended to provide all the answers, in some places there are more questions than answers.

The Nature of the Covenants

4. Importantly, it is the effect, not the language, of the covenant that matters. By way of example, a promise to keep a plot as a garden has been held to be a restriction on building on that plot.
5. Whether the proposed activity is a breach of the covenant is a matter of interpretation. For example, a proposed extension was held to be a breach of a restrictive covenant against causing annoyance to owners of nearby land because it would ruin their sea view and compromise the value of their home: *Dennis v. Davies* [2009] EWCA Civ 1081.

Who Is Bound By The Burden Of The Covenant?

6. The original party to the restrictive covenant will always be bound unless the covenant contains an automatic release. Because a restrictive covenant could be found in a deed now vested in other parties, one must consider whether the party said to be in breach is bound by the restriction.
7. Sometimes, the restrictive covenant will only be expressed to bind the original covenantor whilst that covenantor owns the restricted land. There are some restrictive covenants which do not bind the successors in title. For example:
 - (i) Personal obligations.
 - (ii) Those not protected by registration when the ownership of the land was passed on for value (registration of a covenant against unregistered land takes effect as a Class D(ii) land charge or by way of notice from the Charges Register in respect of registered land).
 - (iii) Where the same party after the restrictive covenant is agreed has owned both the benefited and burdened land.
 - (iv) Where the land intended to benefit from the restriction cannot do so, usually because it is too far away.
 - (v) There may be un-enforceability due to anti-competitive effects.

Who Has The Benefit Of The Covenant?

8. The next thing to determine is who can complain of the perceived breach. Clearly, the original covenantee can enforce the restriction and may continue to do so even after the covenantee has parted with ownership of the retained land (unless there is a restriction within the covenant prohibiting this). However, and as might be expected, to seek to enforce a covenant where ownership has been given up would only lead to the recovery of nominal damages.

9. Successors in title may enforce the covenants, but will not be able to if:
- (i) The covenant was expressly or in part for the personal benefit of the original covenantee.
 - (ii) The retained land is not capable of benefiting from the restrictive covenant.
 - (iii) The retained land cannot be identified either under the deed or from other intrinsic evidence: see *Crest Nicholson Residential (South) Ltd v. McAllister* [2004] EWCA Civ 410, [2004] 1 WLR 2409.
 - (iv) If the covenant is expressed to be for the benefit of retained land as a whole, and the successor in title only owns part of the retained land, then it would be unenforceable.
 - (v) The successor in title has acted in a way which will be inequitable to allow enforcement of the restrictive covenant, for example, by acquiescence.

Enforceability

10. Even where a restrictive covenant continues to be in force and binds the parties, all may not be lost. It is possible, to negotiate a release fee or to seek some form of insurance against the possibility that someone will seek remedies for breaches.
11. Alternatively, under section 84(1) of the Law of Property Act 1925, an application may be made for the release or the variation of the restriction. This may occur despite opposition from one of the parties. Usually, for this to succeed, the applicant needs to show that the restrictive covenant is obsolete or that it impedes a reasonable use of the plot without achieving any other substantial benefit.

Remedies for Breach of Covenant

12. A party in breach of a restrictive covenant may claim damages or injunctive relief. If a party seeks injunctive relief, then that party may ultimately be granted that injunction; granted a more limited injunction; be awarded damages or a combination of both remedies. Specific performance may also be sought if appropriate.

ENFORCEABILITY AND INTERPRETATION

13. The question as to whether a restrictive covenant remains enforceable is often one that is of paramount importance to the advisor. If the covenant remains enforceable then sometimes much will depend upon the interpretation of the covenant.
14. The original covenantee can always enforce any express covenant against the original covenantor so long as the covenantee has not expressly assigned the benefit to some other person.
15. Once the covenantee disposes of the land the benefit may pass at law in one of two ways:
 - 1 An express assignment as a chose in action – usually by way of a statutory assignment under section 136 of the Law of Property Act 1925;
 - 2 The benefit of the covenant may run with the land. The covenant must “touch and concern” the land and both the covenantee and assignee must have legal estate in the land benefited.
16. Section 78 of the LPA 1925 provides:

“a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and 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”.

17. This section means that an assignee does not have to have the same legal estate as the covenantee in order to enforce the covenant.
18. In law the burden of a covenant does not pass with freehold land. But the position in equity is different. In equity the rules of restrictive covenants developed in the nineteenth century when there was an expansion in building and industrial activities. The demands of living in a densely populated country led to the need to control activities on land. It was held that a restrictive covenant could be enforced against a later purchaser of burdened land so long as the land was purchased with notice of the covenant.
19. The original covenantor remains liable on the covenant even if there is no dominant tenement and even if he has parted with the servient tenement. In that case his liability is purely contractual.
20. An assignee of the original covenantor's land is bound only if 4 conditions are fulfilled:
 - 1 The covenant must be negative. It does not matter whether the wording is positive or negative. It is the substance of the covenant that is important;
 - 2 The covenant must be made for the protection of the land retained by the covenantee. There must be two plots of land, a dominant and servient parcel of land. The two pieces of land must be near one

another. There are statutory exceptions to this rule and it also does not apply to schemes of development;

- 3 The burden of the covenant must be intended to run with the covenantor's land; and
- 4 The burden of the covenant only runs in equity. Thus it needs to be protected through the appropriate form of registration and equitable remedies are open to enforce it.

21. In order to benefit from a restrictive covenant the claimant needs to show that he has the benefit of the covenant.

- 1 The covenant must touch and concern land of the covenantee;
- 2 The benefit must have been transmitted in one of 3 ways:
 - (a) annexation;
 - (b) assignment;
 - (c) under a scheme of development.

22. Most restrictive covenants entered into after 1925 are automatically annexed by statute to the covenantee's land benefited by them. Annexation is now relevant only to covenants entered into prior to 1926. Section 78 of the LPA has the effect of annexing covenants entered into after the LPA came into force. *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594 confirmed the section was for the benefit of the land and not the covenantee personally. A covenant against erecting more than 300 dwellings on the covenantor's land was enforceable by successors in title of the covenantor. *Federated Homes* was most recently followed in *Bryant Homes Southern Ltd v Stein Management Ltd* [2016] EWHC 2435 (Ch). A covenant only to use land for agricultural purposes touched and concerned the land and section 78 rendered it capable of transmission without assignment.

23. It is still necessary to be able to identify the land to be benefited by the covenant. Thus in *Crest Nicholson Residential (South) Limited v McAllister* [2004] EWCA Civ 410, Chadwick LJ decided that statutory annexation via the decision in *Federated Homes* could only take place if the covenant or conveyance identified the land to be benefited, either explicitly or by implication.
24. Statutory annexation will only take place if the covenant is unqualified. Annexation will not take place if it is clear the covenant is only to pass by way of express assignment.
25. Since *Federated Homes* the circumstances where it is necessary to rely upon assignment are rare. This will be the case in four situations:
- 1 where the covenant was entered into prior to 1926 and the benefit was not expressly or impliedly annexed;
 - 2 where the covenant was expressly for the benefit of and annexed to the whole of the covenantee's land only and the covenantee wished to dispose of part of the land with the benefit;
 - 3 where the terms of the covenant are that the benefit must pass by express assignment; and
 - 4 where statutory annexation fails because the land cannot be identified.
26. A scheme of development has its own distinct rules. This is where a series of plots are sold and covenants are imposed on the purchasers of each lot for the benefit of the estate generally.
27. If a scheme of development exists then the covenants that are given upon each sale of a plot are enforceable by the owner for the time being of any plot on the estate.

EXAMPLE CASES

Building scheme?

28. In the recent case of *Birdlip Ltd v Hunter* [2016] EWCA Civ 603 the court had to determine whether a building scheme existed and whether the Claimant was bound by restrictive covenants. The Claimant owned a plot of land with one house on it but wanted to build two new detached houses on the land. The Defendants were the owners of a neighbouring property. The properties had originally been sold by the same vendor in 1909 and 1910 at a time when a road had been laid out but none of the plots had properties constructed on them. The Claimant's plot was subject to a covenant not to build "one or two detached residences" on it. Eighteen other plots were subject to the same covenant and it was said to bind the purchasers' and vendors' "heirs and assigns".
29. The Claimant initially made an application under section 84(1) to modify but this was transferred by the Upper Tribunal to the High Court to be heard together with an application for a declaration under section 84(2). The court had to determine whether the covenant remained enforceable under a building scheme.
30. The Claimant said there was no defined estate; the property did not have the benefit of the scheme and that it had not been shown the restrictions were intended to enure for the benefit of future purchasers.
31. HHJ Behrens sitting as a Deputy Judge of the Chancery Division dismissed the Claimant's claim. For an enforceable scheme to exist it was necessary to be able to define the physical extent of the scheme at the date of its creation. The judge looked at a 1908 plan and considered that when the parties' properties were sold in 1909 and 1910 there would have been a plan attached to the agreement for sale. The court inferred that the plans would have

contained the same boundaries as the 1908 plan. The court considered that the estate had many features of a classic building scheme as there was a defined estate and it was laid out in lots. The judge also took into account the fact that in two previous Lands Tribunal cases the restrictive covenants had been treated as enforceable. The court concluded that a building scheme existed and thus the development could not take place.

32. This was reversed by the Court of Appeal who held:

- (i) One of the pre-requisites of a building scheme is that the land is capable of identification. Here the plans only showed the individual plots conveyed;
- (ii) A second pre-requisite is that each purchaser must have accepted from the common seller the mutual benefit of the covenant; and-
- (iii) A subsequent plan, the 1914 plan, stated that it depicted the estate boundaries but showed a different boundary and smaller estate than the 1909 and 1910 plans.

33. Simply because a series of conveyances contain similar covenants is not sufficient for a scheme of development to be inferred. Similarly, an express power to vary the covenants is equivocal and in fact may support the conclusion that there is no scheme of development.

34. Lewison LJ held that there was insufficient evidence to demonstrate the existence of a scheme of development. In particular the conveyances did not refer in the parcels clause to any estate of which the land was said to form part, the conveyance did not show any lots or refer to any other plans and there was no provision of mutual enforceability between purchasers.

35. It is clearly important to focus upon the terms of the conveyance. The Court of Appeal was also dismissive of the extent that inference may be used to fill evidential gaps when seeking to determine the existence of a scheme. Thirdly, Lewison LJ suggested that it would require cogent evidence for the court to allow extrinsic alone to prove a scheme of development.

Annexation

36. *Small v Oliver & Saunders (Developments) Ltd* [2006] EWHC 1293 (Ch) concerned the Beech Hill Park Estate in Hertfordshire. This was developed between 1920 and 1950. Mr Small objected to the building of a new house in the rear of one of the existing properties. His objection was that access to the new house would be over land subject to a restrictive covenant prohibiting any use save that of a private residence. Whilst the construction of the house might not be in breach of covenant he argued that the construction of an access road was.
37. The developer conceded that the burden of the covenant bound their land. They disputed however whether Mr Small had the benefit of the covenant and if he did whether they were in breach.
38. The deputy judge decided that there had been no express assignment to Mr Small. He went on to consider whether the benefit of the covenant had been annexed to the land at the time it was given but in such a way that only the person who owned all the original benefited land could enforce it. If the judge had found this, it would have been fatal to Mr Small's claim as neither he nor anyone else owned all the estate when the covenant was given. If the covenant had been given after 1 January 1926 this interpretation would have been unarguable as a result of section 78 and *Federated Homes*.
39. The judge held that there had been express annexation to each and every part of the estate. Mr Small was entitled to the benefit as a successor in title from the original covenantee. Thus, even though the covenant was granted in 1925 and it pre dated section 78 of the LPA 1925, the judge found that there is a presumption independent of section 78 that an annexed covenant endures for the benefit of each part of the original covenantee's land and is enforceable by the several purchasers when the land is split up.

40. Even though it was not necessary, the judge went on to consider whether a building scheme existed. It was a fine decision but the judge rejected the existence of such a scheme. This was because there was a lack of evidence that the first owners of the plots knew of the reciprocal nature of the obligations there were entering into.
41. The court then turned to the question of breach. On that issue the matter was clear as the court was bound to follow the Court of Appeal decision in *Jarvis Homes Ltd v Marshall* [2004] EWCA Civ 839 where the court had held unanimously that a similar covenant prohibits the use of the burdened land as an access way for land on which development was taking place.

Construction of covenants

42. In *Dennis v Davies* [2009] EWCA Civ 1081 the dispute concerned a series of covenants imposed on residential properties on Heron Island in the River Thames at Caversham. The development was designed so that most of the properties have water frontage with mooring rights. All the houses were sold on almost identical terms. The key covenants required each purchaser and his successors not to:
- (i) erect any building save in accordance with plans approved by the management company; and
 - (ii) do or suffer to be done on the plot or any part thereof anything of whatever nature that may be or become a nuisance or annoyance to the owners or occupiers of the estate or neighbourhood.
43. In 2005 Mr Davies obtained planning permission for a three storey extension to his house. The work started in 2007 but was stopped when Mr Dennis complained that it amounted to a breach of the restrictive covenants.
44. At trial the judge concluded that the extension did amount to a breach of the covenants and an injunction was granted preventing the works from

continuing. The Court of Appeal had to decide whether the covenant preventing a nuisance or annoyance could apply to the erection of a building; whether the extension amounted to a nuisance or annoyance and if not whether the Appellant had obtained permission from the management company.

45. The Appellant argued that the covenant against nuisance or annoyance did not apply to the erection of buildings but instead regulated activities on the land. The court rejected this as there was existing authority that a covenant in this form can apply to a building.
46. The Appellant then ran an argument that in this specific case the covenant did not include building work as there was a separate specific covenant covering approval of building work. He argued that when it came to building work only the management company had control over this and neighbours would have control over whether there was a nuisance or annoyance on the land.
47. Rimer LJ did not accept that the control of building works was exclusively governed by the first covenant. He held that it would require an express exclusion to cut down the ambit of the second covenant. The Appellant did not appeal the finding that the works amounted to an annoyance. This term having been previously defined as being something that would cause ordinary sensible inhabitants of a property to feel aggrieved. This principle was followed by HHJ Behrens in *Tupholme v Firth* (Leeds County Court) 17 September 2015 where the court held that the proposed development of a bungalow in the garden of a house on a housing development would be a nuisance or annoyance to the immediate neighbours.
48. A recent authority dealing with the scope of a restrictive covenant is *Coventry School Foundation Trustees v Whitehouse* [2013] EWCA Civ 885. The Claimant appealed the judge's refusal to grant a declaration that the proposed

development of school buildings together with an access road would not be in breach of a 1931 covenant.

49. The covenant included the following, not to use the relevant land “for any purpose which shall or may be or grow to be in any way a nuisance damage annoyance or disturbance to the Vendors and their successors in title”. The Defendants were the owners and occupiers of houses built on the former farm land retained by the vendor. The Claimant wanted to construct a junior school on land currently being used as playing fields. The judge at first instance held that the covenant was not intended to prohibit the development of the school but held that traffic issues caused by the school might grow into a nuisance or annoyance.
50. The Court of Appeal allowed the appeal and held that the declaration as sought by the school should have been granted. They held that traffic considerations are now essentially a matter for the Highways Authority. Whilst a restrictive covenant could cover traffic this covenant was directed at prohibiting activities that took place on the burdened land. The objections were not based upon activities which would take place on the land but traffic on nearby roads.
51. The scope of a covenant was also examined by the Court of Appeal in *Shebelle Enterprises Ltd v Hampstead Garden Suburb Trust Ltd* [2014] EWCA Civ 305. The Claimant sought to prevent the Defendant Trust from granting consent to a large basement development. Henderson J had refused to grant an injunction.
52. The appeal was dismissed. It was held that a covenant for quiet enjoyment provided that the tenant’s lawful possession of the property would not be substantially interfered with by acts of the lessor. The court saw as the central issue whether the proper and bona fide performance by the Trust of its duties

and obligations under the Scheme could amount to a breach of the covenant for quiet enjoyment. The court considered that there was no breach as the Trust was merely carrying out its proper public duties.

Enforceability

53. Two cases in 2009 dealt with the issue of enforceability and the use of section 84(2) Law of Property Act 1925. This is a possible route to take when it is thought likely that the covenant is not enforceable. The validity and enforceability of the covenant can in effect be tested by the court and where it is plain that the covenant is no longer enforceable this is a useful way of removing it from the Land Register. In doing so the court has to be satisfied that all those who have standing to oppose the declaration have had a chance to do so.

54. In *Southwark Roman Catholic Diocesan Corporation v South London Church Fund & Southwark Diocesan Board of Finance* [2009] EWHC 3368 (Ch) the owner applied for declarations as to the meaning and effect of covenants imposed in a conveyance of 1888. One was to allow the land to be used for religious services according to the rites of the Church of England. The other was to use the premises as a place of divine worship.

55. The property was used until the 1940s as a Church of England hall or youth club. The land was never consecrated. In 1968 the land was conveyed to the Rochester and Southwark Diocesan Church and then on to the Roman Catholic Archbishop of Southwark. The property continued to be used as a church hall and youth club but they were clearly purposes outside the terms of the 1888 conveyance.

56. There were no words of annexation in the 1888 conveyance and no words specifying who might be entitled to the benefit of the covenant. The judge held that as the conveyance pre-dated section 78 of the LPA that section would not

assist. Following *Crest Nicholson* the land intended to be benefited must be easily identified or identifiable. The court held that it was not possible to identify what land was intended to benefit from the covenant.

57. The second reason why the covenant was not enforceable was because since 1968 there had been open non-observance of the stipulations and there had been no attempt to enforce the covenant.
58. Declarations were granted in terms that the covenants were no longer enforceable.
59. In *Norwich City College of Further and Higher Education v McQuillin* [2009] EWHC 1496 (Ch) the claimant wanted to redevelop the campus. There were covenants imposed in a conveyance in 1936 which if they had been enforceable would have impeded the development.
60. Kitchin J held that applying *Crest Nicholson* the covenants were in favour of the land that remained unsold. It did not favour the owners of land sold off since 1936 and thus there was no one entitled to the benefit of the covenants.
61. Section 84(2) should not be used when the covenant is clearly enforceable by someone, unless a release has been secured. It is important to work out who might have the right to enforce and examine what words of annexation are used. A circular letter should be sent to those landowners who might have the benefit of the covenant. The advantage of a court application under section 84(2) is that it is relatively straightforward and can be issued as a Part 8 claim and the hearing time is usually short as there is little contested evidence.
62. Enforceability was raised in the case of *Seymour Road (Southampton) Ltd v Williams* [2010] EWHC 111 (Ch). Declarations were sought that covenants

were no longer enforceable. The common vendor was a building society that no longer existed and the deeds were entered into in 1896.

63. As the covenants pre-dated the LPA the words did not create an implied annexation. There was no evidence of an implied annexation via the words of the covenant or the surrounding circumstances. There was also the problem that the land to benefit from the covenant could not readily be identified.
64. Peter Smith J concluded that the covenants were only intended to be exercisable by the building society so long as it retained land. As the society has no land in the area and the society no longer existed the covenants were no longer enforceable. He held that once the society disappeared, its interest in enforcing the covenants disappeared and once it had sold off its land it ceased to have any interest in enforcing the covenants.

MODIFICATION AND DISCHARGE

65. As restrictive covenants may last indefinitely and the court has limited powers to declare that a covenant is obsolete the Upper Tribunal (Lands Chamber) has been given statutory power to modify or discharge a covenant.
66. Section 84(1) of the LPA 1925 provides the statutory power to modify or discharge.
67. The Upper Tribunal needs to be satisfied of the one of the following four grounds:
 - (a) That by reason of changes in the character of the property or neighbourhood or other material circumstances the restriction ought to be deemed obsolete.

- (aa) That the existence of the covenant would impede a reasonable use of the land where it confers no practical benefit of substantial value or is contrary to public interest and can be adequately compensated in money.
- (b) That the parties agree either expressly or impliedly to discharge or modify the covenant.
- (c) That the discharge or modification will not injure the persons entitled to the benefit of the covenant.

68. In addition to the well-known provision of section 84 there is a little known provision whereby a party is able to apply to the County Court under section 610 of Housing Act 1985. This provision concerns the power of the courts to authorise the conversion of premises into flats. It permits an application when either the character of a neighbourhood has changed so that the premises could no longer be let as a single dwelling or when planning permission has been granted for the conversion of premises into two or more dwelling houses.

69. The Court of Appeal had to consider this section in *Lawntown Ltd v Camenzuli* [2007] EWCA Civ 949; [2008] 01 EG 136. The case concerned a pair of semi-detached houses in south west London. The purchaser wanted to convert them into flats but the neighbours were none too happy about this as planning permission had not been obtained and the houses were subject to restrictive covenants requiring them to be used solely as a single dwelling-house. Planning permission was then obtained but those with the benefit of the restrictive covenant still refused to consent. An application was made under section 610 and at first instance the judge concluded that:

The court should not have regard to planning matters which have already been considered and decided upon by the...planning authority, but should have regard to considerations which were not before the planning authority or which were not relevant to the decision.

70. The judge considered three main objections. First that the objectors would lose the benefit of the restrictive covenant; second, that any relaxation of the covenant would pave the way for similar applications in the future; and, third that the conversion of the property would diminish the value of the other houses in the area. He felt when considering the application that the need for housing in London tipped the scales in favour of allowing the conversion.
71. The Court of Appeal held that it was necessary for the court to consider planning matters and notably the effect of the conversion on the amenity of nearby properties. The judge had exercised his discretion incorrectly and the Court of Appeal should consider the matter afresh. The court considered factors including the effect on noise levels, the character of the neighbourhood and whether this would set a precedent for future conversions. Ultimately the court agreed with the trial judge that the pressure on housing was such that the restrictive covenant should be modified to permit the conversion to take place.
72. As previously described the court has power to rule that a covenant has ceased to be enforceable through obsolescence, but this power should only be exercised in very clear cases. The Upper Tribunal has power to modify or discharge covenants including where the restriction is deemed obsolete. It has been suggested that the Upper Tribunal is the appropriate forum for the determination of such matters and this was a relevant factor where an injunction was granted to prevent construction work from being carried out in breach of a covenant: *Turner and Turner v Pryce & ors* [2008] EWHC B1 (Ch). If there is doubt it is probably going to be safer to go to the Upper Tribunal and have the matter determined there, rather than press on with the case in court.
73. It is worth looking at some of the recent cases where section 84(1) applications have been made to the Upper Tribunal. In *Re Morningside (Leicester) Ltd's application* [2014] UKUT 70 (LC), the applicant sought the discharge of two covenants, one from 1864 which permitted residential development subject to terms and one from 1881 prohibiting building on specified parts of the land.
74. The land had been used for many years as a doctor's surgery which was in breach of the 1864 covenant. The property at the date of the application was

vacant and it was said that the character of the area had changed dramatically since 1864. The applicant wanted to open a pharmacy shop from the site. The Tribunal was satisfied that the character of the area had changed but did not accept that the covenant was obsolete as the area retained a predominantly residential presence. The use as a doctor's surgery for a long period was a clear breach which those with the benefit of the covenant had acquiesced in. Thus this aspect of the covenant was obsolete and there would be a partial discharge. As to the 1881 covenant this continued in its purpose of maintaining a building line.

75. *Re Walker's application* [2010] UKUT 16 (LC) concerned a covenant preventing the erection of more than one dwelling house on land. The property in question had been extended in 1991 and the objectors had approved the plans albeit informally. The Applicants sought to build an extension and increase the floor area of the house by 17.5%. The application was made on the basis that the covenant did not confer practical benefits of substantial value or advantage to those who had the benefit of it.
76. The objection was based on the view that the alterations would be intrusive and the height and angle of the house would be oppressive to the neighbours.
77. The Tribunal rejected the application on the ground that the objectors had a high value property, with a large secluded garden in a conservation area. The objectors' privacy would be compromised and thus the application failed. A similar approach was adopted by the Upper Tribunal in *Re Snook* (judgment in 20 November 2015 but reported probably mistakenly as [2014] UKUT 0623 (LC). In that case the Tribunal held that the character of a leafy suburb of Sheffield had not changed since the date of the covenant and the covenant still served a purpose for the neighbour who sought to prevent the development of a new house.
78. It is clear that in some cases the strength of objections and in particular issues of privacy and the character of the neighbourhood are of great importance when dealing with such applications. And yet it would be wrong to suggest that there is particular consistency in the way the Upper Tribunal makes its decisions. This can be seen in the case of *Vertical Properties Ltd v New*

Hampstead Garden Suburb Trust Ltd [2010] UKUT 51 (LC). The Applicant owned a property in Hampstead Garden Suburb which was affected by restrictive covenants. The Applicant wanted to demolish a house and replace it with two homes. The first restriction was against using the property for two residences and the second was a prohibition against the construction of two new houses without the trust's consent.

79. The application for modification was granted. It was common ground that the existing covenants would impede the development. In this case there was nothing to suggest that the demolition of a dilapidated house and the replacement of it with two new properties was not a reasonable user of the property. The new development would not harm the view held by the neighbours and would not have an effect on the value of neighbouring properties.
80. In *Re Kerai* [2014] UKUT 153 (LC) the applicant wanted to construct a new house. The neighbours had the benefit of a covenant restricting the development. The Upper Tribunal considered that the development was reasonable and then went on to consider whether impeding the proposed user secures practical benefits for the objector. The Tribunal concluded that the applicant would be able to use the land in a number of ways that would not require the objector's consent. The Tribunal then went on to examine whether money would be adequate compensation. It held that it would be and after having heard valuation evidence considered that there would be a diminution in value of 5% which on a £1.5m property amounted to £75,000. The objector was awarded compensation in the sum of £75,000. More recently in *Re Surana's application* [2016] UKUT 0368 (LC) the Tribunal allowed modification of a covenant preventing any construction and held that the covenant did not afford the objectors any practical benefits or substantial value and therefore awarded no compensation.

REMEDIES FOR BREACH

Introduction

81. There are a number of remedies for breach of restrictive covenants and the most important two are damages and injunctive relief. However, these two remedies do not sit discretely side by side, as by section 50 of the Senior Courts Act 1981; the Court has a general power to award damages in lieu of injunction even if there was no separate claim for damages pleaded¹. There are some limits to this, not least of which is that the court must first have jurisdiction to grant an injunction. The effect of section 50 is wide enough to allow a limited injunction to be granted together with damages to compensate for that limitation. Importantly in the area of restrictive covenants, a court can also award damages or grant an injunction for future infringements, including in relation to human rights.
82. As such, section 50 provides a stark illustration as to the discretionary nature of relief in this area. To split the two apart can be somewhat artificial, but what can be of use is an overview of some of the factors taken into consideration when courts turn to consider remedies for breach of restrictive covenants.

DAMAGES

83. Damages for breach of covenant may be awarded under two distinct heads:
- (i) for breach of the covenant on a contractual basis at common law; or
 - (ii) for breach of the covenant in equity in situations where damages are awarded in lieu of an injunction.
84. In practice, there is very little difference between the two, the only real difference being that a claim for damages on a contractual basis will be affected by the operation of the Limitation Act; whereas damages in lieu of an

¹ Section 50 states: "Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance".

injunction is a discretionary remedy and the limitations are equitable such as acquiescence or the doctrine of Laches.

85. There are two main principles to be borne in mind when assessing damages for breach of restrictive covenants:
- (i) Irrespective of the positions of the parties, whether they be original covenantees or successors, the principles governing an award of damages should be the same.
 - (ii) Damages fall to be assessed on the basis of the usual rules relating to remoteness and causation.

Non compensatory damages

86. Exemplary damages are damages awarded against the defendant as punishment and therefore go beyond mere compensation of the claimant. The traditional position in English law is that this is unacceptable: damages are to assess the claimant's loss and not to affect the defendant's profit. Damages are intended to be compensatory in nature. However, in the first half of the 20th century, there was "creep" under which certain torts were found to allow for such punitive damages, until the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129 restricted their use to limited exceptions.

87. Until 2000, only those limited exceptions remained. The most important exception that existed pre-2000 from the land lawyer's perspective was that if there had been an invasion of a property interest, then a remedy which has the effect of depriving the contract breaker of some of his profit, could be awarded. However, by the decision in *Attorney General v. Blake* [2001] 1 AC 268, these exceptions were extended. The House of Lords expressly approved the *Wrotham Park* line of authorities and did not restrict the use of *Wrotham Park* damages to circumstances in which there had been an invasion on a property interest. At page 283 of the Report, their Lordships stated:

“In a suitable case, damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained”.

88. For land lawyers, this measure of damages was not uncommon particularly in relation to restrictive covenant cases, but what this does mean is that this measure of damages will be more readily available in cases following the decision in *AG v. Blake*².

Wrotham Park Damages

89. There are a number of principles that can be discerned from the authorities as to how damages should be assessed for breach of restrictive covenant³:

- (i) Damages should be compensatory in nature and based upon placing the claimant in the position that he would have been in had the covenant been observed or performed.
- (ii) The starting point is that the measure of damages will be the diminution in value of the benefit of the land by virtue of the breach of the covenant, whether that is a past or continuing breach. Usually, the date of the breach will be the date taken for assessing the value of that loss.
- (iii) Although the starting point is to look at the diminution in value of the land, there will be occasions where this does not produce a truly compensatory measure of damages as it may fail to take into account the value of what the claimant would have retained or maintained if the covenant had been observed.

² For example, in *Experience Hendrix LLC v. PPX Enterprises Inc* [2003] EWCA Civ 323, the Court of Appeal allowed *Wrotham Park* damages to be awarded in a straightforward commercial dispute; and in *CF Partners (UK) LLP v Barclays Bank PLC & Tricorona* [2014] EWHC 3049 (Ch), in a misuse of confidential information case, the High Court applied the hypothetical negotiation to the cost of releasing the Defendants from their obligations of trust and confidence owed to the Claimant.

A statement of the principles to be derived from the caselaw and practice points are also set out at Paras 48 and 49 of the Privy Council's Opinion in *Pell Frischman Engineering v Bow Valley Iran Ltd* [2009] UKPC 45

(iv) If this is the case, then the courts may award the claimant an amount which represents what the defendant would have been willing to pay to secure release from the covenant. There are various ways of doing this:

- Looking at fair percentage of the defendant's profits.
- By reference to another profit which may accrue to the defendant from release (as may be the case if there is simply an increase in the value of the released land rather than a profit *per se*).

In circumstances such as these, the court will seek to assess damages on the basis of a hypothetical negotiation and are known colloquially as *Wrotham Park* damages (named after the decision of Brightman J at [1974] 1 WLR 798).

(v) *Wrotham Park* damages may be awarded irrespective of whether the claim is brought in common law or at equity.

(vi) It seems likely that *Wrotham Park* damages would be available in circumstances even where if at the date of issue of the Claim Form the court could not award an injunction as a matter of jurisdiction⁴. However, *Wrotham Park* damages cannot be used to plug a gap in an incompletely drafted pleaded case.⁵

(vii) *Wrotham Park* damages are available even if the court did have jurisdiction to grant an injunction but declined so to do.

(viii) If there are multiple claimants or multiple potential claimants and the court decided that *Wrotham Park* damages are applicable, then the calculation may involve a division of the total damages payable between the potential claimants. This is a factor that may well occur if a developer is seeking to buy rights of various individuals.

This appears to be because *Wrotham Park* damages are a remedy available at common law and do not depend upon the operation of section 50 of the Senior Courts Act: see *WWF Worldwide Fund for Nature v. World Russian Federation Entertainment Inc* [2007] EWCA Civ. 286 at paragraph 54 *per* Chadwick LJ. See also *Pell Frischman* (2009)

Assessment under Wrotham Park Damages⁶

90. As is often the case, there is no hard and fast rule, and the amount awarded often varies. However some people first calculate one third of the anticipated net profit that could be made from the development in breach of covenant. This is often referred to as “the Stokes percentage”⁷.
91. When the Stokes percentage has been calculated, various different checks often alter this percentage, and the cases show a variation of anywhere between 5% (*Wrotham Park*) and 50% (*Re SJC Construction Co Ltd Application* (1975) 29 P&CR 322).
92. A Stokes percentage cannot always be applied and this can result in even more headaches for legal advisers. Although the Stokes percentage is 33%, and that is a figure that many people remember, it is not the case that the usual award is one third of the net profits of a development undertaken in breach. Clients who have in mind this figure alone are often disappointed by the litigation process. The court, having undertaken as many quantifiable calculations as is possible, will then take a step back and have a look at the product of the calculations. If this does not “feel right”, then the damages will not be assessed at that level.

INJUNCTIVE RELIEF

Introduction

A very helpful list of factors relating to this exercise are set out at paragraph 35 of *Amec Developments Ltd v. Jury's Hotel Management (UK) Ltd* (2001) 82 P&CR 22, qualified in part at Para 50 of *Pell Frischman*. If time allows, then there is a review of many authorities at paragraphs 55 to 92 of Warren J's judgment in *Field Common Ltd v. Elmbridge Borough Council* [2008] EWHC 2079 (Ch).

per Stokes v. Cambridge Corporation (1962) 13 P&CR 77

93. There appears to have been a trend in recent years for litigants in increasing numbers to instruct their lawyers to seek injunctive relief. Presumably, this is because injunctions provide a swift route to reasserting rights that is commensurate with the busy workings of a commercial enterprise. Sadly, over the same period of time, the machinations of the legal system seem to have meant that litigants have to wait longer for their day in court. However, in many instances, injunctive relief is sought in circumstances where in reality injunctive relief will not be granted, or that any application for the relief is premature. It is always worth pausing to think whether an injunction would be likely to be granted.
94. But don't pause too long! The difficulty with the "wait and see" approach is that a litigant does not want to lose the right to injunctive relief by having left it too long before bringing the application. An obvious example of is the difference between getting an interim injunction seeking prohibitory relief (to stop somebody building a structure) as opposed to seeking final mandatory relief (for that structure's removal). Here, it is much harder to satisfy the court that the injunction should be granted on a mandatory basis than on an interim or prohibitory basis.
95. However, it has been held that a failure to seek interim prohibitory relief is not fatal to obtaining final mandatory relief at trial: see *Mortimer v. Bailey* [2004] EWCA Civ 1514, [2005] 2 P&CR 9.

Damages in lieu of an injunction

96. An injunction will be granted almost as a matter of course to restrain a breach of restrictive covenants. It has been settled for some time that where a defendant has wrongly interfered with the claimant's rights as an owner of property and intends to continue that interference, then the claimant is prima facie entitled to that injunction⁸. There may be circumstances in which

⁸ *Pride of Derby & Derbyshire Angling Association Ltd v. British Celanese Ltd* [1953] Ch. 149. The same principle applies to a restriction not to ride someone else's horse in the Derby, see *Araci v Fallon* [2011] EWCA Civ 668.

damages would be an adequate remedy but it is for the wrongdoer to satisfy the Court that those special circumstances exist⁹.

Shelfer v. City of London Electric Lighting Co (1895)

97. In *Shelfer v. City of London Electric Lighting Co*¹⁰, it was suggested that a good working rule as to whether damages in substitution for an injunction may be given would be:

- (i) if the injury to the Claimant's legal rights is small; and
- (ii) is one which is capable of being estimated in money; and
- (iii) is one which can adequately be compensated for by a small money payment; and
- (iv) the case is one in which it would be oppressive to the Defendant to grant an injunction.

98. Although AL Smith LJ went on to say that what this would mean in practice must be left to the good sense of the tribunal which deals with each case and each case must decide upon its own facts, *Shelfer* has been established law for over a century, but later cases have differed as to what guiding principles can be taken from the decision. Should it be the 'Shelfer 4-part test', or should emphasis be placed upon the good sense of the tribunal?

Regan v. Paul Properties (2007)

99. *Shelfer* was placed firmly back in the spotlight by Mummery LJ giving the judgment of the Court of Appeal case of *Regan v. Paul Properties DPF No. 1 Limited & Others* [2007] Ch. 135, a case concerning rights to light. When considering the position relating to damages in lieu of an injunction, he said:

35 *Shelfer is the best known case. It is a decision of the Court of Appeal. It has never been overruled and it is binding on this court. The cause of*

⁹ See *Shelfer*, below.
¹⁰ [1895] 1 Ch. 287

action was nuisance, as in this case, though in the form of noise and vibration rather than interference with a right of light.

36 *Shelfer has, for over a century, been the leading case on the power of the court to award damages instead of an injunction. It is authority for the following propositions which I derive from the judgments of Lord Halsbury and Lindley and A L Smith LJJ. (1) A claimant is prima facie entitled to an injunction against a person committing a wrongful act, such as continuing nuisance, which invades the claimant's legal right. (2) The wrongdoer is not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court. (3) The court has jurisdiction to award damages instead of an injunction, even in cases of a continuing nuisance; but the jurisdiction does not mean that the court is "a tribunal for legalising wrongful acts" by a defendant, who is able and willing to pay damages: per Lindley LJ, at pp 315 and 316. (4) The judicial discretion to award damages in lieu should pay attention to well settled principles and should not be exercised to deprive a claimant of his prima facie right "except under very exceptional circumstances": per Lindley LJ, at pp 315 and 316. (5) Although it is not possible to specify all the circumstances relevant to the exercise of the discretion or to lay down rules for its exercise, the judgments indicated that it was relevant to consider the following factors: whether the injury to the claimant's legal rights was small; whether the injury could be estimated in money; whether it could be adequately compensated by a small money payment; whether it would be oppressive to the defendant to grant an injunction; whether the claimant had shown that he only wanted money; whether the conduct of the claimant rendered it unjust to give him more than pecuniary relief; and whether there were any other circumstances which justified the refusal of an injunction: see A L Smith LJ, at pp 322 and 323, and Lindley LJ, at p 317.*

37 *In my judgment, none of the above propositions has been overruled by later decisions of any higher court or of this court...*

100. In order for an injunction to be granted, one not need prove pecuniary loss, although clearly this may assist. The claimant would be entitled to the injunctive relief sought upon proof of the breach of the covenant alone. The question of loss subsequently becomes relevant to the question as to whether or not damages would subsequently be awarded in lieu of any injunction.

101. The effect of *Regan v. Paul* was to re-establish the primacy of the 'Shelfer 4 part test', which is an approach that favours the granting of injunctive relief to claimants, irrespective of claims that this might be disproportionate to the loss

_____ that would be suffered by the Defendant. *Regan* reminded litigators that one cannot purchase the privilege of infringing upon the Claimant's rights.

102. The problem with *Regan* was that it appeared to commend an unduly prescriptive approach to determining whether damages were an adequate remedy. For example, In *Watson v Croft Promo-Sport Ltd*¹¹, the Court of Appeal reversed the trial judge's decision to award damages instead of an injunction. Sir Andrew Morritt C described 'the appropriate test' as having been clearly established in *Shelfer*, namely "that damages in lieu of an injunction should only be awarded under 'very exceptional circumstances'".¹²

Coventry v Lawrence (2014)

103. This position fell to be tested before the Supreme Court in *Coventry v Lawrence*.¹³ The case concerned the activities carried on at a motor sports stadium, which, with the benefit of planning permission, was used for stock car racing and speedway events. The stadium had been used in this way for several years. It was so noisy, however, that after moving into a property in 2006, the Claimants became inconvenienced in their enjoyment of their home. Their property was around 560m away from the stadium and 860m away from the track, across open fields. The Claimants sought an injunction to restrain the stadium's activities on the basis of nuisance.
104. At first instance, the Claimants succeeded, and were granted relief to restrain the nuisance. This was reversed by the Court of Appeal, which held that nuisance was not made out; but the trial judge's decision was restored by the Supreme Court. Lord Neuberger gave the leading judgment, with which the other SCJs agreed.
105. When tracing the path of the law in *Coventry v Lawrence*, Lord Neuberger noted that there were two strands of authority as to the correct approach to determining whether damages could be awarded in lieu of an injunction. This

¹¹
[2009] 3 All ER 249

At Para 44
13 [2014] UKSC 13

had given rise to a tension on the one hand between cases holding that *Shelfer* is generally to be adopted and that it requires an exceptional case before damages should be awarded in lieu of an injunction; and those favouring a more 'open-minded approach, taking into account the conduct of the parties' on the other.¹⁴

106. The Supreme Court held that the correct position should be much more flexible than that suggested in *Regan* or *Watson*. The Court considered that an almost mechanical application of A L Smith LJ's four tests in *Shelfer*, coupled with an approach which involves damages being awarded only in 'very exceptional circumstances', were each wrong in principle, and gave rise to a serious risk of a Court going wrong in practice. The exercise of the Court's discretion should not be fettered, and each case was likely to turn on its facts.
107. As a result, the Supreme Court has approved the following approach:
- (i) The application of the four tests as set out in *Shelfer* must not be such as "to be a fetter on the exercise of the court's discretion".
 - (ii) It would, in the absence of additional relevant circumstances pointing the other way, normally be right to refuse an injunction if those four tests were satisfied.
 - (iii) The fact that those tests are not all satisfied does not mean that an injunction should be granted.¹⁵
108. Lord Neuberger also identified a failure to properly consider the effect of a public interest argument on the question of whether to award damages in lieu of an injunction. In *Watson*, the Court took the view that this was relevant where the damages were minimal, but not otherwise. Ultimately, the Court concluded that this was indeed a factor that was relevant and should be taken into account in the Court's assessment, but that the qualifier adopted in *Watson* was unsupportable.

¹⁴

¹⁵ At Para 117
At Para 123

Applying *Coventry v Lawrence* - Circumstances in Which Injunctions Will Not Be Granted

109. The obvious circumstance is in situations where damages would be an adequate remedy¹⁶.

110. In *Jaggard v. Sawyer* [1995] 1 WLR 269, the Defendants built a house at the end of cul-de-sac. At the commencement of the building works the Claimant threatened to make an application for an interim injunction to enforce covenants prohibiting access over her part of the private roadway, but did not do so. Mrs. Jaggard later applied for an injunction and was unsuccessful. It was noted by Millett LJ in the Court of Appeal that had she applied for an interim injunction at an early stage, she would almost certainly have obtained it. However, because of the delay, it was inappropriate and disproportionate to grant mandatory injunctive relief by that point in time. Despite the outcome, Millett LJ went on to say:

“the test is one of oppression, and the Court should not slide into application of a general balance of convenience test”.

111. There will be other circumstances in which an injunction may not be granted. For example:

- (i) if one is trying to enforce private rights restricting the use of land against a statutory body discharging its functions in the public interest in circumstances where there is a statutory compensation scheme in place: *Brown v. Heathlands NHS Trust* [1996] 1 All ER 133.
- (ii) A similar position applies even more strongly in circumstances where land is being acquired for public purposes, and there are specific provisions which allow local and other authorities to override restrictive

On this point, note also Para 117, below.

covenants¹⁷. The power to override certain restrictive covenants is not the same as a power to extinguish adverse rights¹⁸.

Post *Coventry v Lawrence* case law

112. There have been a number of reported cases, that have considered *Coventry v Lawrence*. A number of these have related to restrictive covenants in employment contracts¹⁹. The subsequent cases appear to have grappled with the approach endorsed by the Supreme Court relatively successfully and without demur.
113. In *Peires v Bickerton's Aerodromes Ltd* [2016] EWHC 560 (Ch), the Claimant sought an injunction to prevent noise nuisance caused by helicopter training activities at an adjacent aerodrome. Peter Smith J balanced the Claimant's rights to undisturbed enjoyment of her property against the Defendant's right to use its property for its own lawful enjoyment, and granted an injunction which limited the frequency and duration of training at the aerodrome.
114. Unsurprisingly, much of the litigation involving breach of restrictive covenants occurs in the County Court. In *Gott v Lawrence* [2016] EWHC 68 (Ch)²⁰, Recorder Halliwell dealt with a wide-ranging claim involving a disputed title to a strip of land that was being used as an access to a large agricultural shed for free range hens. The Court held that the Defendants were the owners of one half of the disputed strip divided longitudinally and that they were entitled to rights of way over the full width of the disputed strip by virtue of an 1815 Inclosure Award. The Defendants sought injunctive relief on various bases, and the Court considered and applied *Coventry v Lawrence*²¹.

¹⁷ Notably Section 237 of the Town and Country Planning Act, as amended by the Planning Act 2008, which came into force on 6th April 2009. Other statutory provisions which give powers to override covenants include the local government Planning and Land Act 1980, Sch 26, Para 7 and the Housing Act 1988 Sch 10, Para 5 and the Leasehold Reform Housing and Urban Development Act 1993, Sch 20, Para 5.

¹⁸ Such as one may encounter, for example, in Section 236 of the Town and Country Planning Act 1990 or Section 295 of the Housing Act 1985

See, for example, *D v P* [2016] EWCA Civ 87, which applied *Coventry v Lawrence* in determining whether the Court should exercise its discretion and grant an injunction.

²¹ Despite the citation, the proceedings appear to have been heard in the County Court. At paragraph 70.

115. For the purposes of those proceedings, the judge distilled *Coventry v Lawrence* down to two propositions:
- (i) The courts are to be taken to have a wider discretion than allowed by AL Smith LJ's "working rule" in *Shelfer*; and
 - (ii) The prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not, per Para 121 of *Coventry v Lawrence*.
116. The judge balanced the competing positions, and determined that the Claimant should unlock a gate on the disputed strip and refrain from re-locking it; or provide the Defendants with the keys to the gate. If the Claimant was not willing to take these steps voluntarily, then the judge would be minded to direct him to do so by way of injunction, but would not otherwise grant injunctive relief at that stage.
117. It may well be that despite the Supreme Court stepping in to make the position clearer, the position was fairly clear beforehand. The Courts appear to be taking the new test in their stride, and it remains possible to obtain the same outcomes as before.
118. Another example is *Ottercroft Limited v Scandia Care Limited & Dr Mehrdad Rahimian* [2016] EWCA Civ 867. D2 controlled D1, which wanted to redevelop a stable yard. This involved erecting an external metal staircase in place of an existing wooden one. This should have required notice to be served under the Party Walls Act 1996, but this did not occur. Nonetheless, works were commenced, and Ottercroft, which was concerned about interference with its right to light, commenced proceedings to restrain the development. The Defendants gave certain undertakings, but works continued, albeit in a scaled-down form. However, the staircase was built, with no notice to Ottercroft, without planning permission and in breach of the undertakings.
119. The judge at first instance relied upon *Coventry v Lawrence*, and decided that the staircase needed to be rebuilt in such a way as not to interfere with Ottercroft's rights to light. The Defendants appealed.

120. The Court of Appeal noted that at Paragraph 121, Lord Neuberger 'cautiously approved' a statement from Lord MacNaghten in an earlier case:

—————"In some cases, of course, an injunction is necessary - if, for instance the injury cannot fairly be compensated by money - if the defendant has acted in a high-handed manner - if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others." "

121. The Court of Appeal had no hesitation in determining the breach of the undertakings meant that this requirement was met, and so the appeal was dismissed.

Acquiescence

122. A perfectly good claim to injunctive relief could be totally undermined by acquiescence in the breach complained of. A dramatic example is that of a claimant who sought to enforce restrictive covenants prohibiting the use of premises as a shop in circumstances where evidence emerged that he patronised the same shop²².
123. In order to be acquiescing, the claimant has to stand by while the act complained of is still taking place (or has been forewarned but has not yet taken place). The claimant needs to know that the act is being done and must also know that his legal rights are involved. Without this, one cannot be said to have acquiesced in whatever events have been occurring. For example, in *Armstrong v. Sheppard & Short Limited* [1949] 2 QB 384, the claimant had not appreciated that a sewer was being constructed under a pathway that he owned and therefore was later entitled to bring an action for an injunction to restrain the discharge of effluence through his land.
124. Acquiescence does not debar a claimant from relief altogether unless it would be dishonest or unconscionable for the claimant after such a delay to seek to enforce his rights. In all other circumstances, in other words where the claimant's actions fall short of being dishonest or unconscionable, the court still has a discretion to refuse an injunction but award damages in lieu.

²² *Sayers v. Collyer* (1884) 28 Ch. D.103

Laches

125. The doctrine of laches relates to unreasonable inaction by a potential claimant after the infringement of his rights has already taken place making it unjust to the defendant that an injunction should be granted. Therefore, there are two elements that must be examined. First, the delay and secondly the consequent injustice.
126. In relation to delay, this is akin to the position at common law under the operation of the Limitation Act. However, as equitable remedies are being sought, the important factors to be weighed in the balance are:
- (i) the length of delay; and
 - (ii) the nature of the act done in the interim²³.
127. Ultimately, the test of whether a claimant should be debarred by his conduct from obtaining an injunction comes down to:
- “Would it be unconscionable in all the circumstances for this party seeking the injunction to enforce his right which he undoubtedly had at the date of the breach of covenant by means of an injunction?”²⁴
128. Ultimately, this is again a question of fact and degree. Modern authorities seem to show that the court will look at all aspects of a party’s conduct before deciding whether the conduct disentitles the claimant from obtaining the injunctive relief sought.
129. Various estoppels or waivers may also preclude the granting of injunctive relief, but these points are beyond the scope of this paper.
130. An important point to consider in relation to restrictive covenants is that the past history of an area may be of crucial importance in determining whether an injunction would be granted. If an area has changed sufficiently because of past failures to enforce various covenants, then the whole purpose of the

¹¹ *Harris v. Williams-Wynne* [2006] 2 P&CR 27, at Para. 36

covenants may have already been lost. With the purpose of covenants weakened, so the prospect of injunctive relief being granted is lessened.

131. Finally, and important for practitioners, is that if the claimant makes an open offer indicating that matters can be resolved by the payment of money, then this is usually fatal to the person seeking the injunction. It is fairly obvious that if a party takes an open position that he is happy to take money in lieu of the injunction, then that person should receive damages in lieu of an injunction²⁵.

Seeking a Mandatory Injunction at Trial

132. As stated above, courts are traditionally more reluctant to grant mandatory injunctions than prohibitory injunctions. By granting a prohibitory injunction, the court does not more than prevent for the future the continual repetition of conduct of which the claimant complains. A mandatory injunction often goes much further than that.
133. In *Cooperative Insurance Society Limited v. Argyll Stores (Holdings) Limited* [1998] AC 1, the claimants owned a shopping centre and sought a mandatory injunction to enforce a covenant to keep a supermarket open. The House of Lords held that the claimants should be confined to a remedy in damages, and Lord Hoffman reviewed the law relating to mandatory injunctions. Lord Hoffman distinguished between those forms of mandatory injunction which require the defendant to achieve a result and those which require the carrying on of an activity over a period of time. The effect of Lord Hoffman's reasoning is that whilst of course it is possible to obtain an order requiring the continuation of an activity, the cases in which this discretion will be granted in the favour of the claimants will be few and far between.
134. In the sphere of restrictive covenants, most mandatory injunctions fall in the latter category, namely the requirement to do a particular act.

Quia Timet Mandatory Injunctions

²⁵ *Gafford v. A.H Graham* (1998) 77 P&CR 73, at 84

135. A *quia timet* injunction is one in which either:

- (i) the defendant has as yet done no hurt to the claimant but is threatening and intending (so the claimant alleges) to do works which will render irreparable harm to him or his property if carried to completion; or
- (ii) where the claimant has been fully recompensed both at law and in equity for the damage he has suffered but where he alleges that the earlier actions of the defendant may lead to future causes of action (such as wrongful undermining of land).

136. The principles to be considered were set out by Lord Upjohn in *Redland Bricks Limited v. Morris* 1970 AC 652, at 665 namely:

- (i) Every case must depend essentially upon its own particular circumstances. Any general principles for its application can only be laid down in the most general terms.
- (ii) A mandatory injunction can only be granted where the claimant shows a very strong probability on the facts that grave damage will accrue to him in the future. It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.
- (iii) Damages will not be a sufficient or adequate remedy if such damage does happen.
- (iv) The question of the cost to the defendant to do works to prevent or lessen the likelihood of a future apprehended wrong must be an element to be taken into account:
 - (a) where the defendant has acted without regard to his neighbour's rights, or ... has acted wantonly and quite unreasonably in relation to his neighbour he may be ordered to repair his acts by doing positive work to restore the status quo even if the expense to him is out of all proportion to the advantage thereby accruing to the claimant;

- (b) but where the defendant has acted reasonably, though in the event wrongly, the cost of remedying by positive action his earlier activities is most important for two reasons. First, because no legal wrong has yet occurred (for which he has not been recompensed at law and in equity) and, in spite of gloomy expert opinion, may never occur or possibly only upon a much smaller scale than anticipated. Secondly, because if ultimately heavy damage does occur the claimant is in no way prejudiced for he has his action at law and all his consequential remedies in equity.
- (v) So the amount to be expended under a mandatory order by the defendant must be balanced with these considerations in mind against the anticipated possible damage to the claimant and if, on such balance, it seems unreasonable to inflict such expenditure upon one who for this purpose is no more than a potential wrongdoer then the court must exercise its jurisdiction accordingly.
- (vi) If in the exercise of its discretion the court decides that it is a proper case to grant a mandatory injunction, then the court must be careful to see that the defendant knows exactly in fact what he has to do and this means not as a matter of law but as a matter of fact, so that in carrying out an order he can give his contractors the proper instructions.

137. Under Section 50 of the Senior Courts Act 1981, it is possible to be awarded damages in lieu of a *quia timet* injunction, even though no loss had at that stage been suffered.

SPECIFIC PERFORMANCE

138. It is possible to seek specific performance of an obligation that is placed upon a party within a restrictive covenant. An example of a positive obligation

arising out of a restrictive covenant could be an obligation to submit plans to the local planning department for the approval of a development.

COMPETITION LAW

139. Since 6 April 2011 competition law has applied to land agreements. Before that time they enjoyed an exemption by virtue of Chapter I of the Competition Act 1998.
140. The restrictions may well apply to situations where there is a restrictive covenant in place including how land is to be used such as tenant's covenants restricting the use of a property.
141. The OFT produced final guidance on land agreements in March 2011. It is a useful guide as to what types of land agreements may fall foul of competition law. The OFT suggested that the types of restriction most likely to impact on competition are those that keep other companies out of a market or which aim to make it more difficult for other businesses to compete.
142. The prohibition applies only to agreements between undertakings. It does not apply to individuals who are not acting as a business.
143. An analysis of the market both product and geographic often needs to be carried out. As advisors it is worth looking at whether there are any onerous restrictions in the agreement. For example one that prevents an occupier of a retail unit from selling the same products that are being sold in adjacent or nearby premises may distort competition in that product market.
144. The Act does allow for exemptions based on four specific criteria. The agreement must:
- 1 contribute to the improvement of production or distribution or to the promotion of technical or economic progress;
 - 2 provide consumers with a fair share of the resulting benefits;
 - 3 not impose restrictions beyond those that are required to achieve the objectives;

- 4 not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.
145. If an agreement is prohibited the parties may face action by the CMA, the European Commission or a sectoral regulator. This may result in a fine of up to 10% of the firm's worldwide turnover.
146. An agreement which contains a prohibited restriction is void and unenforceable. In some cases it might be possible for a court to sever parts of the agreement.
147. Very helpfully, the OFT provided nine worked examples as guidance. One such example is where a developer of a shopping centre in order to attract a department store to become a tenant offers a covenant that it will not allow any other department store in the development during the period of the lease. There is another department store in a shopping centre 15 minutes drive away.
148. Depending upon the scope of the relevant market this provision may well restrict competition. It is thus necessary to consider whether the agreement would benefit from exemption. The OFT guidance is that if the exclusivity period was to be of unlimited duration then that is unlikely to warrant an exemption but one of limited duration could benefit from exemption.
149. **Martin Retail Group Ltd v Crawley BC [2014] L & TR 17** is the first court decision post dating the revocation of the exemption for Land agreements in April 2011. Martin operated a newsagent in a parade of shops on a housing estate where Crawley BC owned most of the properties. Martin wanted to renew its lease and proposed a wider user clause than the current lease. The landlord objected alleging it had created a letting scheme in the interests of the local community to provide a range of different traders and retail outlets available to the local community. It proposed a user clause that expressly prohibited the sale of alcohol, grocery and convenience goods. Martin said this was unlawful as it breached the Competition Act 1998.

150. It was common ground that the restriction had as its object the distortion of trade but the landlord contended that the clause was exempt on the basis that it contributed to improving production or distribution or promoting technical or economic progress.
151. HHJ Dight held that in the absence of authority the OFT guidance provided a sensible series of guidelines. When considering the user clause regard had to be had to the whole of the parade. The court considered there were no efficiency gains through having different retailers rather than one supermarket or similar retailers. The judge did not consider the community around the parade would benefit from the restriction. In determining the market this would be a short geographical walking distance i.e. the distance consumers would walk to buy a pint of milk. The judge considered that the new user clause would eliminate competition for convenience goods.
152. This is an important case not only because it is the first case since the removal of the land agreements exemption but because it highlights the way a sensible judge can approach what at first blush appear to be difficult economic questions. The expected flurry of competition cases in property law has not materialised but it is vital that practitioners are able to spot the issues and argue them.

INSURANCE

Introduction

153. There are various forms of insurance that can be secured to seek to alleviate the problems associated with a finding that there has been a breach of a restrictive covenant. For the most part, clients seek a one-off single payment for a policy in perpetuity for acts undertaken which may be in breach of restrictive covenants. It is also possible to insure against breach of unknown covenants.

154. Often, if a covenant cannot be dealt with under a s.84(1) application, or there is insufficient time to do so, then the defective title indemnity insurance is something that can be considered on behalf of a client.

A Cautionary Note

155. Before considering the insurance in any detail, it is worth reminding ourselves of the nature of insurance. First and foremost, a contract of insurance is a contract of utmost good faith. Any failure to disclose material facts may lead to the insurance company seeking to avoid the policy on that basis. A recent example of the consequences of material non-disclosure is *Jones v. Environcom Ltd* [2010] EWHC 759.
156. Environcom recycled electrical goods waste which involved the use of oxy-fuel and laser cutting tools known as plasma cutters. There had been two previous fires and a fresh insurance policy was finally renewed via a broker and secured on fairly stringent terms. The broker knew enough to secure insurance, but did not know all of the ins and outs of the way that Environcom operated. Unsurprisingly, another fire occurred and the insurers rejected liability on the grounds that the plasma cutters were the likely cause of the fire and despite knowing generally about Environcom's processes, there had been non-disclosure of the use of plasma cutters.
157. The judge held that the brokers had no particular expertise in the field of electrical recycling and could not be expected to comprehend more than the general industrial processes involved. As there had been no specific mention of plasma cutters, Environcom's claim in negligence against the broker was dismissed.
158. Nonetheless, it is possible to insure against restrictive covenant risks when no other obvious solution can be found. Types of risk that can be insured against include:
- a. The unauthorised building or building of extensions to properties.
Terms of such insurance usually require, amongst other things, that the

buildings have been in place for more than 12 months and there has been no challenge by the covenantee.

- b. Breaches of covenant by unauthorised use. This usually relates to sale by a shop of alcoholic drinks, and again, insurance is usually based upon the fact that there has been ongoing sale for a number of years without complaint.
- c. Unknown covenants. Sometimes, certain documents may indicate the presence of a restrictive covenant, but they may refer to a further document that cannot be traced. Therefore, the legal extent of the covenant is unknown, and insurance is often available to remedy the situation.

159. Most policies will cover:

- a. the damages or compensation awarded to any prospective claimant;
- b. the cost of demolition or alteration of the property; and
- c. the loss in value between the market value at the time of any successful enforcement of the covenant and the open market price at the time of the insurance.

Clearly, as this is a contract, such terms can be tailored, but most indemnity insurance in this field operates in this way.

160. It is also very important to think of insurance early on in the whole process. Often, if there has been an attempt to contact the person who may have the benefit of a covenant, insurers will often refuse to insure. Any insurance should be in place before this is attempted.

161. Fundamentally, any indemnity insurance does not by and of itself sterilise the covenant. If the insurance does not cover the subsequent problem, then the client is in no better position (and is in fact one premium payment worse off).

REFORM

The Law Commission

162. In March 2008, the Law Commission published a wide ranging consultation document headed 'Easements, Covenants and Profits a Prendre'. After a consultation period, in June 2011 the Commission produced its final report entitled "Making Land work: Easements, Covenants and Profits a Prendre" (Law Comm No 327). The Commission recommended the introduction of a new legal interest in land (which it refers to as a land obligation). The land obligation would function within the land registration system in the same way as an easement, with the benefit and burden capable of registration, so that there would be no difficulty in identifying the benefitting parties. The original parties to the land obligation would not be liable for breaches of it occurring after they parted with the land.
163. A land obligation would exist for the benefit of an estate in land, subject to some conditions as to the nature of the obligation. It could be either negative or positive. The latter type of obligation would remove the need for creative measures to make positive obligations enforceable against successors, such as chains of indemnity or estate rentcharges.
163. Existing restrictive covenants would be unaffected by reform, and there would be no need for them to be converted into the new interest.
164. On 18 May 2016, following the Queen's Speech, the Government announced that it would bring forward proposals to respond to the Law Commission's recommendations in a draft Law of Property Bill.
165. Realistically, the landscape has changed since then, and issues relating to restrictive covenants are likely to be placed on the backburner whilst the Government grapples with the implications of Brexit. The ensuing drain on Parliamentary time that will be required over the course of this (and no doubt, future Parliaments) means that the time available for other non-essential legislative amendments is likely to be minimal.

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