Restrictive Covenants:

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Remedies for Breach

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INTRODUCTION

1. There are whole books written on restrictive covenants in relation to property, and so instead of a whistle-stop tour of the area, this part of the seminar concentrates instead on remedies for breach. This is the most transferable aspect of this area of law, and the same principles are of application generally within litigation.

2. 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.

3. 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.

REMEDIES FOR BREACH

4. 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 pleaded[1]. 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

[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".

also award damages or grant an injunction for future infringements, including in relation to human rights.

5. 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

6. 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.

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

8. There are three 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.

   (iii) The starting point is that the damages should be assessed on the basis that they are compensatory in nature.

Non compensatory damages

9. 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.

10. 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".

11. 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].

[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.

***Wrotham Park* Damages**

12. There are a number of principles that can be discerned from the authorities as to how damages should be assessed for breach of restrictive covenant[3]:

    (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.

13. 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. 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).

14. There are various ways of doing this:

    • Looking at fair percentage of the defendant's profits.

[3] A statement of the principles to be derived from the case law 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

- 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*).

Assessment under Wrotham Park Damages[4]

15. There are a number of important points to note in relation to the assessment of Wrotham *Park* damages:

(iv) They may be awarded irrespective of whether the claim is brought in common law or at equity.

(v) 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 jurisdiction[5].

(vi) *Wrotham Park* damages cannot be used to plug a gap in an incompletely pleaded case.[6]

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

16. 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].

17. When the Stokes percentage has been calculated, various different checks often alter this percentage, and the cases show a variation of anywhere

[4] 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).

[5] 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)

[7] *Arroyo v Equion Energia Ltd* [2013] EWHC 3150
per Stokes v. Cambridge Corporation (1962) 13 P&CR 77

between 5% (*Wrotham Park*) and 50% (*Re SJC Construction Co Ltd Application* (1975) 29 P&CR 322).

18. 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.

19. 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.

INJUNCTIVE RELIEF

Introduction

20. 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.

21. 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.

22. 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

23. 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 injunction[8]. There may be circumstances in which damages would be an adequate remedy but it is for the wrongdoer to satisfy the Court that those special circumstances exist[9].

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

24. 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

[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.

[9] See *Shelfer*, below.

[1895] 1 Ch. 287

(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.

25. 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)

26. *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 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...

27. In order for an injunction to be granted, one need not 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.

28. 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.

29. 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)

[11] [2009] 3 All ER 249

At Para 44

30. 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.

31. 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 trail judge's decision was restored by the Supreme Court. Lord Neuberger gave the leading judgment, with which the other SCJs agreed.

32. 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 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]

33. 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.

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[14] [2014] UKSC 13
At Para 117

34. 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]

35. 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.

Coventry v Lawrence **in practice**

Circumstances in Which Injunctions Will Not Be Granted

36. The obvious circumstance is in situations where damages would be an adequate remedy[16].

37. 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 junction 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

[15]

[16] At Para 123
On this point, note also Para 107, below.

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".

38. 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 covenants[17]. The power to override certain restrictive covenants is not the same as a power to extinguish adverse rights[18].

Post <u>Coventry v Lawrence</u> case law

39. There have been a number of reported cases, particularly in the last few months, that have considered *Coventry v Lawrence*. A number of these have related to restrictive covenants in employment contracts[19]. The subsequent cases appear to have grappled with the approach endorsed by the Supreme Court relatively successfully and without demur.

[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.

40. 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.

41. 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].

42. For the purposes of those proceedings, the judge distilled *Coventry v Lawrence* down to two propositions:

(i) The

(ii) The

4 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.

[20] Despite the citation, the proceedings appear to have been heard in the County Court.

At paragraph 70.

44. 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.

45. 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.

46. 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.

47. 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." "

48. 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.

Seeking a Mandatory Injunction at Trial

49. As stated above, courts are traditionally more reluctant to grant mandatory injunctions than prohibitory injunctions. By granting a prohibitory injunction, the court does no more than prevent the future continued repetition of conduct of which the claimant complains. A mandatory injunction often goes much further than that.

50. 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.

51. 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

52. 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).

53. 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.

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

DEFENCES

Acquiescence

55. A perfectly good claim to injunctive relief could be totally undermined by acquiescence in the breach of which complaint is made. 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 shop[22].

56. 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.

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

57. 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.

Laches

58. 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.

59. 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 interim[23].

60. 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]

61. 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.

[23]

[24] *Lindsay Petroleum Co. v. Hurd* (1874) LR5 PC 221
Harris v. Williams-Wynne [2006] 2 P&CR 27, at Para. 36

62. Various estoppels or waivers may also preclude the granting of injunctive relief, but these points are beyond the scope of this paper.

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

64. Finally, and of importance to 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 injunction[25]. However, following the guidance in *Coventry v Lawrence*, there is a (theoretical) possibility that this outcome would not necessarily follow as a matter of course.

SPECIFIC PERFORMANCE

65. 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.

INSURANCE

66. 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

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

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.

67. 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. 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.

68. 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.

69. 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.

70. 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

71. 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.

72. 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.

73. Existing restrictive covenants would be unaffected by reform, and there would be no need for them to be converted into the new interest.

74. 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.

75. 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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