OVERCOMING AND ENFORCING RESTRICTIVE COVENANTS

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Gary Webber was a practising barrister for 22 years specialising in property law. Since 2003 he has practised as a mediator and run training courses in various areas of property law. He is the author of Business Premises: Possession and Lease Renewal, 4ed (Sweet & Maxwell) and co-author of Residential Possession Proceedings, 9ed (Sweet & Maxwell). He also maintains and is the general editor of the property law website at www.propertylawuk.net. He is frequently asked to speak at conferences, is on the editorial board of the White Book, is an associate member of Tanfield Chambers and sits as a Deputy District Judge. He is a founding member of The Property Mediators (www.thepropertymediators.co.uk), with Jacqui Joyce, Alan Langleben and Sara Benbow. Gary Webber is based in Bath but mediates everywhere in the country.

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Mediation experience

Gary is a full-time property mediator and has extensive experience, both as a barrister and as a mediator, in landlord and tenant disputes (commercial and residential) and disputes involving boundaries, rights of way and other easements, restrictive covenants, property joint ventures, co-ownership and other areas of property law. He also has a great deal of experience in family disputes having mediated many cases between parents and children, siblings, separating couples and divorcing partners. Much of this work has related to the dissolution of family businesses, co-ownership, inheritance and administration of estates.

Mediation style

Gary's style is relaxed, friendly and empathetic. He calms things down and listens carefully so as to understand what the parties really want and need and to extract those interests from the various matters that get encrusted onto disputes. He focuses on solutions and steers the parties in that direction from an early stage in the mediation. He is exceedingly patient but will speak plainly when required. His background in property law allows him quickly to grasp any technical issues, reality test where necessary, suggest possible solutions and to help with the practical matters that arise during drafting. Except in limited circumstances he is not the sort of mediator who goes on late into the night.

Some comments from clients

"My client was very impressed with the way in which Mr Webber handled what was a very emotional situation for her. He brought a real calm to what had been a long running and acrimonious dispute. The result was that both parties became very clear headed and each obtained a very good outcome. Mr Webber is a first class mediator." (Samuel Waritay, barrister).

"Gary was very amiable and easy to talk to which was so important in the circumstances. Very down-to-earth." (Sean Powell, Powell & Co Property (Brighton)).

"My clients and I were delighted with the sensitive but businesslike way you dealt with the mediation, grasping the important key points at an early stage and maintaining pace and progress throughout, towards the eventual (seemingly inevitable) development of a mutually acceptable settlement" (James Taylor, Wards)

"Gary was fantastic. He took the time to understand my clients' concerns and build a rapport with them, but also knew when to put pressure on to move things along towards a settlement. I shall certainly be recommending him to other clients." (Joanne Wicks QC, Wilberforce Chambers)

"It can take several months before parties agree the appointment of a mediator. Not so with Gary Webber. His appointment was approved by both sides without question: a testament to his experience and reputation. As a result of Gary's skilful handling the parties achieved a successful result at mediation and avoided the cost and heartache of proceedings." (Azeam Akram, MTG Solicitors).

"I found Gary's approach as a mediator to be very direct which enabled the parties to focus on the objective of the mediation very early on. At some mediations that I have been to you spend the first three of fours hours getting nowhere but with Gary we felt that progress was being made at every stage. Although we did not settle the dispute that day it was only a matter of days later that a settlement was agreed and Gary's assistance was much appreciated." (Andrew Robins, Kyriakides & Braier).

"Gary is a first rate mediator. He is effective, enthusiastic and popular with clients. Should the parties approach a stalemate, he will always search hard for a fresh, creative approach to finding a solution." (Jane Senior, Wright Hassall)

"Gary was extremely patient and thorough, and enabled us to reach a sound business settlement that all the parties were very happy with." (Michael Large, Thomas Eggar)

"I can't tell you how much we admired and appreciated all your efforts. It is such a huge relief to know that the cloud which has hung over us for so many years has been lifted. We started the day not believing that there was any hope of settlement and therefore to come away at the end of a grueling twelve-hour day with a comprehensive Order drafted and signed is beyond all expectation! It was an arduous day for everyone but especially exhausting for you. However, you found a way through the morass and we are deeply indebted to you. Thank you very much for achieving what seemed to us impossible." (A client)

RE: 39, 41, 43 WINDSOR ROAD, HENLEY

The directors of Hogwash Developments Ltd reckon that they have found a great little site for a bit of infill development. It is at Windsor Road, in Henley, Oxfordshire. They have purchased the rear portions of the back gardens at 39, 41 and 43 Windsor Road. The gardens are very long and there is plenty of room to build five houses. The development will continue an existing pattern of development, which has already taken place, extending a road called Small Road. Hogwash did have a bit of trouble obtaining planning permission, not because the planning authority objected in principle, but because they regarded the initial plans, which were rejected, as an over development. Hogwash then submitted some revised plans, which the officers supported. Unfortunately, the members had been got at and the planning committee also rejected these plans. However, on appeal they were passed.

Having obtained planning permission Hogwash thought there would be no further problems. They were wrong. The neighbours who caused difficulties with the planning application now say that they have the benefit of restrictive covenants that will prevent the development.

The neighbour at number 45 is no problem. He has been bought off at a modest price but the owners of numbers 47 and 49 are vehemently against. They have been saying that the development will ruin the pleasant views they have in and from their gardens, will invade their privacy, destroy the open character of the area, will be unsightly, encourage further backland development and lead to a substantial nuisance during the construction process.

There is also an association of local busybodies who object to infill development in principle. Most of these people have houses further up or across the road. They also claim the benefit of the covenants.

The land was originally divided up in 1925 when Earl Snodgrass created Windsor Road. So far as relevant, the conveyances provide as follows:

> "… the Purchaser for himself, his heirs and assigns owners or occupiers for the time being of the land hereby conveyed and to the intent that the burden of this

covenant shall run with the land hereby conveyed and the benefit thereof with the adjoining land of the Vendor hereby covenants with the Vendor to observe and perform the stipulations and restrictions mentioned in the First Schedule hereto."

The First Schedule contains two particular restrictions:

"Not more than one detached or semi-detached house shall be erected on the said land"

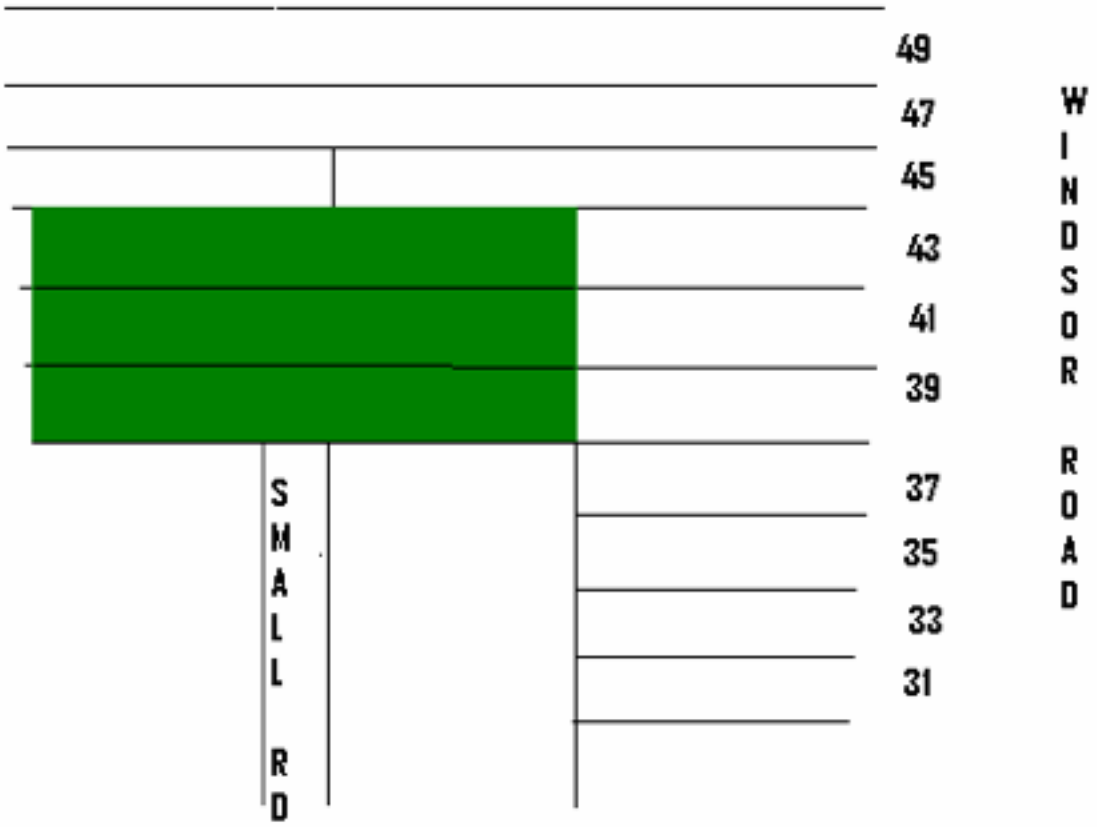
"No house shall be erected on the said land until the plans thereof have been submitted to and approved by the Vendor's Agents and their fee of 10s 6d for such approval paid by the Purchaser".

The vendor's agents are defined in the conveyance as "Messrs Bumbling Idiots". The firm still exists, although it is now called "Messrs Bumbling Fools", but they are no longer employed by the current Earl Snodgrass.

The owners of no.47 wrote to Hogwash threatening an injunction if the work started. This did not bother Hogwash too much. They were confident that as they had planning permission they had no real problems. They therefore started the work and are now about half way through the building work. However, things have now got really serious in that the owners of no.47 have applied for an injunction to prevent the development taking place.

The current Earl Snodgrass has also taken an interest. He no longer owns any property in the area but he claims the benefit of the restrictions. He has demanded some money to release the covenants. Previous developers of Small Road have in the past paid him to release the covenants.

What are the issues? What questions arise? What is Hogwash going to do?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WINDSOR ROAD
SMALL RD

SOME POINTS ARISING OUT OF THE CASE STUDY

Transfer of benefit of the covenant: Annexation

Annexation is the most common method by which a person will seek to show that he has the benefit of the covenant. The elements are as follows:

- The person claiming the benefit must have an interest in the land to which the covenant refers.
- The covenant must relate to (touch and concern) the land retained by the covenantee (the benefited land).
- The land which is intended to be benefited must be easily ascertainable, from a description, plan or other reference in the conveyance itself, but aided if necessary, by external evidence to identify the land so described. This last element is important and was re-inforced in (Crest Nicholson Residential (South) Ltd v McAllister [2004] EWCA Civ 410).

Pre 1/1/1926 covenants

The benefit will only be annexed if there is an express or implied annexation. For express annexation the covenant must state that it is made for the benefit of the land or it must state that it has been made with the covenantee in his capacity as owner of the land. For implied annexation, the document containing the covenant must clearly show both the land intended to be benefitted and an intention to benefit that land rather than the current owner of that land.

> "In covenants made before 1926 it was necessary to show, by construing the instrument in the light of the surrounding circumstances, that annexation to the covenantee's retained land (or some part of it) was intended. Express words of annexation were not required. 'If on the construction of the instrument creating the restrictive covenant, both the land which is intended to be benefited and an intention to benefit that land, as distinct from benefiting the covenantee personally, can clearly be established, then the benefit of the covenant will be annexed to that land and run with it, notwithstanding the absence of express words of annexation'". (Crest at para 23, citing Megarry and Wade).

Covenants entered into on or after 1/1/1926

Law of Property Act 1925, s78(1):

> "(1) 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.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited".

In Crest Nicholson the Court of Appeal pointed out that unless you could identify the land that was "intended to be benefited" the section would not apply to pass the benefit of the covenant:

> "There is .. a statutory annexation of the benefit of the covenant to 'the land intended to be benefited by the covenant" (para 29).
>
> "The question … is whether the land intended to be benefited can be identified (from a description, plan or other reference in the conveyance itself, but aided, if necessary, by external evidence to identify the land so described, depicted or otherwise referred to) so as to enable the statutory annexation under s78(1) of the 1925 Act to have effect." (para 45)
>
> "It seems to me that there is nothing in the [conveyance] which enables the Court to identify, even with the aid of external evidence to assist general words of description, what land (if any) was intended to be benefited by the covenants." (para 50).

The practical importance of this case is that unless the person claiming the benefit can show what land was intended to be benefited by the conveyance, at the date of the conveyance, the covenant cannot be enforced. This is not always easy as the conveyance creating the covenant may not have a clear description or plan showing the land to be benefited. And, although the CA did also say that if necessary one can use other evidence, outside the conveyance itself, to establish what land was intended to be benefited, this can also be very difficult when the conveyances were entered into many decades beforehand.

It will be assumed that the covenant benefits each and every part of the covenantee's land, unless a contrary appears (Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594).

Establishing order of plot sales

It is often difficult to show that the land which you now own has the benefit of a covenant by annexation where there are a number of plots sold at different times

> Example: In 1950 five plots were sold off in succession. All are adjacent to each other and run up the road. They are numbers 1, 3, 5, 7 and 9 Hogwarts Road. Lord Snape sold no.1 first and retained the other four plots. The purchaser of no.1 covenanted not to build more than one house on the plot. The remaining land (plots 3, 5, 7 and 9) are clearly defined on a plan. Lord Snape can therefore enforce the covenant against the purchaser of plot 1. So can the subsequent owners of plots 3, 5, 7 and 9. Lord Snape then sold no.3. The conveyance contained the same covenant, and again the remaining land owned by Lord Snape (now plots 5, 7 and 9) were clearly defined on a plan. Lord Snape and the subsequent owners of plots 5, 7 and 9 can enforce the covenant against the owners of number 3. However, note that the owner of no. 1 cannot sue the owner of no.3 because the covenant in the conveyance to no.3 was not taken for the benefit of no 1. By the time Lord Snape had conveyed no.3 he was no longer the owner of no.1.

Burden

The burden must be intended to run with the covenantor's land. This condition will be satisfied if the covenant is expressed to be made by the covenantor for himself and his successors in title. Section 79 of the LPA 1925 – contains a word saving provision where the covenant was made on or after 1 January 1926:

> "(1) A covenant relating to any land of a covenantor or capable of being bound by him, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself his successors in title and the persons deriving title under him or them, and subject as aforesaid, shall have effect as if such successors and other persons were expressed.
>
> This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.
>
> (2) For the purpose of this section in connection with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of such land.

Thus, unless the covenant is a personal covenant (Morrells of Oxford Ltd v Oxford UFC [2001] Ch 459) it will bind successors. Where the covenant was entered into prior to 1/1/1926 it is necessary to construe the covenant to see whether or not it was intended to be binding on successors

The restrictive covenant may have been created by an old fashioned "conveyance" entered into many years ago, or it may have been created in a Land Registry "transfer". Either way, where the land is now registered it will appear on the title of the land, which is subject to the covenant; or at least it should be.

In deciding whether land is still subject to the burden of the covenant there are three particular points to note relating to registration:

- Covenants created before 1/1/1926: Equitable doctrine of notice applies. Covenant not binding on a bona fide purchaser for value of a legal estate without notice of the covenant, or a person claiming through such a person.
- Covenanted created on or after 1/1/1926 – land unregistered: Void against purchaser for money or money's worth unless registered against the name of the estate owner of the burdened land when created as a D(ii) land charge.
- Covenanted created on or after 1/1/1926 – registered land: Void against purchaser if not registered as a charge on the charges register of the burdened land. Notice or caution under LRA 1925 Act. Notice (agreed or unilateral) under 2002 Act since 13 October 2003.

(Last case: If the restrictive covenant is not registered a way of avoiding the burden of the covenant is to transfer the land to a nominee who will not be bound).

Plans approval – person who was supposed to approve them gone

Crest Nicholson Residential (South) Ltd v McAllister [2002] EWHC 2442 (the first instance decision).

The restrictive covenant provided that no building should be erected on the land conveyed, "unless the plans drawings and elevation thereof shall have been previously submitted to and approved by the Company such approval not to be unreasonably withheld". The Company was the original vendor of the plot that had imposed the restrictive covenants but had long since gone into liquidation. An argument to the effect that it was impossible to carry out any development because it was impossible to get the Company's consent was rejected. The court implied a term to the effect that the covenant was discharged on the demise of the company. Alternatively, the exception was so fundamental to the prohibition that the prohibition fell with the exception. (The case was overturned on appeal on another point – see above).

Interim injunctions

Gafford v Graham [1999] 41 EG 159

Plaintiff's failure to apply for an interlocutory injunction deprived him of an injunction at the trial. It was considered that it would be oppressive to grant the injunction. Instead he was awarded damages in lieu. However …

Bailey v Mortimer [2004] EWCA Civ 1514

Final injunction granted to remove an extension built in breach of a restrictive covenant even though an interim injunction had been refused. The key dates were as follows:

- Work on the extension started at the beginning of June 2003
- 5 June – Neighbours wrote to the land owners demanding that the work cease and threatening legal action
- End of July – proceedings commenced
- 7 August – interim injunction hearing – works nearly finished – refused
- 14 November – trial of main action – granted

The owners argument that the neighbours (who had the benefit of the covenant) had stood by and allowed the works to continue was rejected. The neighbours had delayed in seeking an interim injunction until the works were well under way. However, they had warned at a very early stage that proceedings might be taken. Nevertheless the owners took the risk and carried on building the extension. Damages in lieu would not be an adequate remedy because the damage was not small. The judge had estimated them at £40,000.

> "Where there is doubt as to whether a restrictive covenant applies or whether consent under a restrictive covenant is being unreasonably withheld, the prudent party will get the matter sorted out before starting building, as could have been done in this case. If he takes a chance, then it will require very strong circumstances where, if the chance having been taken and lost, an injunction will be withheld."

Discharge and modification: Section 84 of LPA 1925

Introduction

A developer seeking to get round a restrictive covenant has four possible options – depending on the circumstances:

- Go to the High Court for a declaration stating that the restrictive covenant is not enforceable for one reason or another.
- Accept that the covenant is valid but ask the Lands Chamber for an order discharging or modifying the restrictive covenant.
- Insurance??
- Do a deal with the objectors and potential objectors / mediation. Release – need to make sure you do a deal with everyone who might have the benefit if you want complete certainty.

In this section we are dealing with discharge and modification of covenants. The Lands Tribunal has the power under s84 to discharge or modify restrictive covenants. The Tribunal will very rarely discharge a covenant. They will instead modify the covenant so as to allow the development to take place.

The grounds

There are four grounds that can be relied upon that can be summarised as follows:

(1) Changes in the character of the property or the neighbourhood or other circumstances mean that the restriction ought be deemed obsolete. Reliance on this ground is rarely successful and including it in the application can lead to adverse costs consequences.

(2) The continued existence of the covenant would impede some reasonable user. This is the most common ground relied upon. It only applies where the Lands Tribunal is also satisfied that the restriction:

- Does not secure any practical benefit of substantial value or advantage to those with the benefit; or
- Is contrary to the public interest (rarely applies – Re Collins Application (1975) 30 P&CR 527 at 531)
- And in either case, that money will be an adequate compensation.

Under this head the Lands Tribunal also takes into account:

- The development plan.
- Any declared or ascertainable pattern for the grant or refusal of planning permissions.
- The period and context in which the restrictions were imposed.
- Any other material circumstances.

(3) Agreement of relevant persons.

(4) No injury to the persons entitled to the benefit of the restriction.

Discretion

It is important to note that the Tribunal has a discretion even where the substantive grounds are established. Every case obviously depends upon its own facts. However, many of the cases are reported one can get a feel for how particular Tribunal members might decide cases by reading those reports.

Reasonable user - most common ground

To succeed before the Lands Tribunal the developer needs to have all these questions answered with the word in brackets:

- Is some reasonable user impeded by the restriction? (Yes)
- Does the restriction secure any practical benefit of substantial value or advantage to those with the benefit? (No).
- Will money be an adequate compensation? (Yes)
- Discretion. (Yes)

This ground was explained by Carnwarth LJ Shephard v Turner [2006] EWCA Civ 8 at para 58:

> "The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "Reasonable user" in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."

Setting out precisely what you want

> "Not more than one detached or semi-detached house shall be erected on the said land SAVE that further houses may be built upon the said land if the houses are built pursuant to the planning permission granted on appeal by Angus Filch BSc DipTp MRTPI, Planning Inspector, in planning application no 9½ /0012345 and [substantially??] in accordance with the conditions imposed by the said inspector [or in accordance with any variations subsequently agreed or made by the planning authority or inspector on appeal??]."

> "No house shall be erected on the said land until the plans thereof have been submitted to and approved by agents for the time being of Earl Snodgrass and their reasonable fee for such approval paid by the Purchaser, such consent not to be unreasonably withheld or delayed, so that in the event of any such unreasonable withholding or delay the said plans shall be deemed to be approved."

The relevance of planning

Although the planning history of the site and its surrounding area is highly relevant (see s84(1B) and see the citation from Shephard v Turner above), the mere fact that planning permission has been granted for the proposed development is by no means conclusive. The position was put rather dramatically by Harman J in Bell v Norman Ashton Ltd (1956) 7 P&CR 359. Harman J:

> "[The defendants' surveyor] said that town planning approval had been obtained for houses on this scale of density; modern conditions demand that suburban planning should be on that kind of scale; that is the right density at which suburban people ought to live; and if they do not they are obsolete and they ought to be disregarded as being anti-social persons wanting more room than in a crowded country it is right that they should occupy. I must confess that I was much incensed by this evidence. There does remain in a world full of restrictions and frustration just a little freedom of contract. I do not see why a man should not contract that he shall have half an acre round him and not four neighbours right on him. I do not see why it is anti-social to wish to have a little longer bit of garden or a little wider bit of frontage. To suggest that because these people live on an estate near others where the density is greater their rights ought to be disregarded by the court and swept away is a proposal which I reject with some indignation."

Some may object that these are the mutterings of an eccentric judge made a long time ago. However, they do dramatically highlight the distinction between planning considerations and property law. A person's property rights (ie the benefit of a restrictive covenant) will only be taken away as provided for by law and the mere grant of planning permission is only part of the story.

By way of example, in In the matter of Zaineeb Al-Saeed (24 April 2002, Lands Tribunal, Mr PH Clarke) the applicant relied upon planning permission for in-fill development in a conservation area. However, the Lands Tribunal held that the modification would be "the thin end of the wedge", would ultimately lead to an adverse effect on density levels and would therefore injure persons entitled to the benefit of the covenant.

More recently in Dobbin v Redpath [2007] EWCA Civ 570 the Tribunal member "accepted that the existence of planning permission was very persuasive in determining the reasonableness of the user" but went on to hold that the mere fact that there was a planning permission which accorded with a development plan was not sufficient to override other objections. In particular, he gave weight to the fact that the restriction against further development was part of a building scheme. The CA upheld the decision.

However, in Graham v Easington District Council [2008] EWCA Civ 1503 it was held that the grant of planning permission by a local authority although not determinative was, on the facts of the case, a relevant factor in determining whether or not that authority could object in its capacity as land owner to modification of the covenant. The modification was allowed. Although the CA was clearly not changing the law in any way, it does highlight that a local authority that has granted planning permission may in some cases have more trouble objecting to a modification under s84 than another private land owner.

To summarise: For all practical purposes a person seeking to modify the restriction in the covenant does need to have planning permission for the development before applying to the Lands Tribunal. But the mere fact that planning permission has been granted will by no means be conclusive; although will perhaps have even more weight where the land owner is the authority that granted the permission.

Calculating compensation

How is it calculated? Is any reference made to the "negotiation principle"? Answer: Basically no, with a little bit of may be.

Winter v Traditional & Contemporary Contracts Ltd [2007] EWCA Civ 1088

Introduction

Where a restrictive covenant is breached damages awarded in lieu of an injunction are assessed by reference to the development value of the property built in breach of covenant. The person with the benefit of the covenant is awarded a sum based on the sum that he would have been likely to have obtained in negotiations had they proceeded prior to the breach of the covenant. However, this case makes clear that where the Tribunal is awarding compensation under s84 that approach is not adopted – although some reference to the profit made by the developer can have some relevance.

Facts

The restrictive covenant prevented there being more than one dwelling built on the land. In breach of that covenant the owner of the development site built two houses on the land. At the time the owner did not realise that the Winters had the benefit of the covenant – nor did the Winters. The development therefore took place without any objection from them. When they realised that they had the benefit of the covenant the development was complete. The owners of the site applied for a retrospective modification of the covenant and the only issue was the amount of compensation payable to the Winters.

Expert evidence

The Winters relied upon an expert witness who said that most people would not consider the modification “seriously detrimental”, but would “require some financial payment”, and “more importantly” would seek some input on the design and size of the development to reduce its impact. He thought that the likely diminution in value of the Winters’ house was “only nominal between £5,000 or £10,000” (the house being worth £375,000). Instead, he proposed a figure based on “a proportionate element of the profits of the development”, which he thought would have been obtained in negotiations for release of the restriction, but against the background that the Winters had lost the opportunity to influence the development. He calculated the developer’s profit as £290,000 overall, of which half was attributable to the extra house. Following what he called “the Stokes percentage” he thought the Winters’ share should be about one third, or £50,000. This would have been reduced to £25,000, if they had been able to negotiate an amendment of the plans for the development “to make it less imposing" (para 24 of the judgment).
The application for the modification was on ground 1(aa), ie that the continued existence of the restriction would impede some reasonable user of the land.

The Tribunal decision

The Tribunal decided that compensation should be assessed by reference to loss of amenity to the Winters rather than by reference to the increased value of the development site. Having regard to all the facts the Tribunal member concluded that the loss of amenities caused by the development which would now be permitted by a modification of the restriction were limited; and that some would probably have occurred in any event over time even if the development had not taken place. On the facts the Tribunal made an award of £10,000, which was not to be paid if the developer carried out certain remedial works to the area that had been backfilled within a limited period of time. The Winters appealed to the Court of Appeal.

How to assess compensation (CA)

On what basis is compensation to be awarded under s84? Is it simply by reference to the impact on the land of the person with the benefit of the covenant? Or should it be by reference to the increase in the value of the development site by reason of the modification; ie is the objector entitled to a sum which might have been agreed in negotiations between the parties – "the negotiated share approach" as it was called in the case?

As has been seen above, the expert evidence indicated that there was no real diminution in the value of the property; and the Tribunal member did not consider that there was any real affect on amenities. A share of the profit would lead to a substantial award. However, Carnwarth LJ at para 28:

> "Had we been starting from a blank page, such cases might have provided a useful parallel for damages under section 84. However, rightly or wrongly, that is not how the law has developed. .. authorities binding on us establish that compensation under section 84 is based on the impact of the development on the objectors, not on the loss of the opportunity to extract a share of the development value. Short of intervention by the House of Lords, or the legislature, it is too late to turn the clock back. … The only issue is the extent to which those cases leave open the possibility that the developer's profit may in some way be relevant to the assessment of that impact, and if so whether the tribunal in the present case erred in not taking that possibility into account."

Note that last sentence. Indeed it does seem that in some cases development value can come into the picture, but only to a limited extent. Having reviewed the various authorities Carnwarth LJ at para 33 said this:

> "Certain points can, in our view, be extracted from those cases taken together. First, the basis of compensation under section 84 is the loss caused by diminution in the value or enjoyment of the objector's property, not the loss of his financial bargaining position. There is no "hard and fast rule" as to how that loss is to be assessed, but the negotiated share approach is a permissible tool for the tribunal. Where that approach is taken, the percentage must bear a reasonable relationship to the actual loss suffered by the objector. The 50% percentage used by the tribunal in SJC establishes no precedent, even in respect of the public interest ground (under which it was decided). It is of no relevance to modifications allowed under the limited benefits ground, such as this case. In such cases, if a percentage is to be used, it is likely to be at or around the Wrotham Park (5%) end of the scale."

And see paragraph 35, after reference to more examples in the Lands Tribunal:

> "These cases are of value, not as precedents as such, but as indications of the flexible approach adopted by three very experienced legal members when assessing compensation for neighbours in a residential area. They do not support the suggestion that there is any established practice of awarding a share of development value. But they show that it is a possible approach in circumstances where a simple estimate of the diminution in value of the objectors' properties is unlikely to be a fair reflection of their subjective loss."

The Court of Appeal rejected submissions that they should give clearer guidance than this. If anyone should to it it is the Lands Tribunal. Carnwarth LJ again at para 36:

> "We agree that consistency is desirable, both in its own right, and because it makes it easier for those advising applicants and objectors to give a realistic assessment of their prospects before the tribunal, and thus promote early settlement of disputes. However, it is the job of the tribunal, not this court, to provide further guidance if necessary."

Decision in the case

Although they seemed to have thought the award to be mean the CA considered that there was no error in law and refused to interfere with the Tribunal's decision.

Comment

This case highlights various issues that frequently arise in restrictive covenant cases:

- The difficulty of knowing who has the benefit of the covenants. Before the Winters turned up on the scene the site owners had in fact negotiated with another party who they thought had the benefit of the covenant and paid it £1600 for a suitable variation.
- The difference between the amount of damages that can be awarded in lieu of an injunction and the damages awarded under s84: The fact that an injunction is unlikely to be granted does not mean that damages cannot be awarded in lieu (Jaggard v Sawyer). However, a claim in the court to enforce a covenant can be suspended whilst an application is made to the Lands Tribunal for modification (s84(9)). Thus, a site owner faced with such proceedings is usually best advised to make such an application. As this case demonstrates the amount awarded to the objector is likely to be substantially less.

Finality

A great advantage of applying to modify or discharge an injunction is finality. Even if there is someone else who has the benefit of the covenant who has been forgotten about the order of the Tribunal will be final. More accurately:

> "s84(5) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not."