

RESTRICTIVE COVENANTS:
AN IMPERFECT MEANS OF DEVELOPMENT CONTROL

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1. Restrictive covenants are an early form of planning control. With the increase in built development following industrialisation, landowners who had alienated part of their land wished to control how it was developed in the future to protect the remainder of their estates. While there was nothing to prevent a landowner from agreeing with a purchaser that the latter would not develop the land which was sold to him and such a contract could be enforced between the original parties, at law the ability of the landowner to bind successors to the purchaser was very limited. To fill the gap, in the early 19th century, equity intervened and principles by which restrictive covenants could be enforced against successive owners of property were developed.

2. While a developer would be foolhardy to press ahead with development in flagrant breach of a restrictive covenant in the face of objections by those entitled to its benefit, such covenants have a number of limitations as a method of controlling development. The constraints on the effectiveness of restrictive covenants are of two sorts: (1) constraints arising from the nature of restrictive covenants themselves and (2) constraints arising from statutory intervention. In this paper, I will deal very briefly with these principle constraints. This is not intended as a comprehensive treatment of the subject and many of the nuances which one comes across in practice will be glossed over.

Enforceability of covenants

3. First, it is necessary for the technicalities of land law and equity to be observed if restrictive covenants are to be enforced by or against parties who are not the

original contracting party. This is not a place to discuss those technicalities and their rationale. In essence, the law may be summarised as follows¹:

- (1) For a subsequent purchaser of the land subject to the covenant to be bound by the covenant there are three requirements:
 - (a) the covenant must be negative in nature;
 - (b) the covenant must be either (i) for the protection of land retained by the covenantee or (ii) part of a scheme; and
 - (c) the subsequent purchaser must have notice of the covenant.

 - (2) For the subsequent purchaser of other land to be able to enforce the covenant there are also three requirements:
 - (a) the covenant must, to use the old expression, touch and concern his land;
 - (b) the benefit of the covenants must have passed to him by (i) annexation (ii) assignment or (iii) pursuant to a scheme; and
 - (c) there must be no good grounds for depriving him of the right to enforce the covenant.
4. Each of these elements provides scope for argument. It is important to note, however, that to be enforceable against successors to the covenantor it is necessary for the covenant to be for the protection of land other than the land sold. Restrictive covenants are *not* a mechanism for securing additional payments for dealing with the land sold. Accordingly, a covenant not to use land for a specified purpose unless overage is paid, would on the face of things be outside these rules and unenforceable.
5. Under Law of Property Act 1925 s.84(2)(a) the court is given the power on the application of any person interested to declare whether or not in any particular case any freehold land is or would in any given event be affected by a restriction imposed by any instrument.

¹See *Whitgift Homes Ltd v Stocks* [2001] EWCA Civ 1732 at [12]

Construction of covenants

6. If a covenant is to restrict a proposed development, what is proposed must come within the scope of the covenant upon its true construction. This is not the place to review the many and various sorts of restrictive covenant that one finds. Under Law of Property Act 1925 s.84(2)(b) the court has jurisdiction to declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is or would in any given event be enforceable and if so by whom.

7. One cannot, however, predict how the Court will react to issues of construction and how a covenant may apply in specific circumstances. For instance, in *Dennis v Davies* [2009] EWCA Civ 1081 the respondents (N) were neighbours of D's on a residential estate next to the River Thames. The transfer to which N was subject contained a covenant (the paragraph 1 covenant) "not to erect on the Plot ... any building ... except such as shall be in accordance with plans and elevations which shall have been approved in writing by the Management Company". It also contained a covenant (the paragraph 2 covenant) "not to use the Dwellinghouse for any purpose other than that of a private residence ... and not to carry on ... any trade business or manufacture whatsoever nor to do or suffer to be done on the Plot ... anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the Estate or the neighbourhood". D obtained planning permission to build a three-storey extension to his house. N objected to the extension, asserting, among other things, that it would impede their views of the river. The judge held that the paragraph 2 covenant extended to restraining the erection of buildings "which may be or become a nuisance or annoyance" to covenantees. D argued that if paragraph 2 was construed, as it should be, in a context that included paragraph 1, it could sensibly only be regarded as concerned with the covenantor's *activities* on his plot, not including activities in the nature of the erection of annoying buildings: building was clearly contemplated as being permissible provided that it had been approved by the Management Company. The appeal was dismissed. Paragraph 2 contained covenants in a form whose

essence had long been familiar to conveyancers. The ordinary and natural construction of the purchaser's covenant "[not] to do or suffer to be done on the Plot ... anything of whatsoever nature which may be or become a nuisance or annoyance" was clearly wide enough to be capable of extending to activities of all natures, including building an extension to an existing house which, when built, would be such an "annoyance", *Wood v Cooper* [1894] 3 Ch. 671 applied. It was held that paragraph 1 did not cut down the apparently unambiguous scope of paragraph 2, and there was no good reason why the two paragraphs could not operate alongside each other.

Changes in the character of the area

8. Secondly, since the covenant is for the protection of land, if the character of the area has changed since the covenant was imposed so that the covenant no longer performs the function intended (irrespective of the acts or omissions of those entitled to the benefit of the covenant), then the covenant may be unenforceable: eg *Knight v Simmonds*²; *Sobey v Sainsbury*³.

Consents, acquiescence and abandonment

9. Thirdly, long acquiescence in a breach of covenant will give rise to an inference that the persons with the benefit of a covenant have granted a licence or that the covenant has been abandoned. So, where a covenant in a lease contained preventing the erection of buildings other than single storey villas, but high rise blocks had been erected on parts of the land over a period of over 45 years, it was held that the whole of the covenant had been abandoned and could not be enforced by the landlord so as to prevent the erection of further high rise blocks: see *A-G for Hong Kong v Fairfax*⁴, PC applying the long-established principle in *Hepworth v Pickles*⁵.

²[1896] 2 Ch 294, 297-298 per Lindley LJ

³[1913] 2 Ch 513, 529

⁴[1997] 1 WLR 149

⁵[1900] 1 Ch 108. See too *Knight v Simmonds* [1896] 2 Ch 294, 297-298 per Lindley LJ; *Sobey v Sainsbury* [1913] 2 Ch 513, 529; and *Dano v Earl Cadogan* [2003] EWHC 239 Ch at [40]

Injunctions: discretion and damages in lieu

10. Fourthly, (and more generally) the primary means of enforcing a restrictive covenant is an injunction: it is only because of the intervention of equity that successors to the original parties may enforce and be bound by such covenants. Unless equity would in principle impose an injunction in favour of a successor to a covenantee and against the successor to a covenantor, then the covenant will be unenforceable.
11. Even where in principle an injunction may be awarded, following Lord Cairns's Act damages may be awarded in lieu of an injunction. Developers, however, should not assume that the court will always award damages instead of an injunction where a covenant has been breached or that damages will be insubstantial.
12. The classic statement of when damages may be awarded in lieu of an injunction is in *Shelfer's case*⁶. It is only in extraordinary circumstances that an injunction is not granted to protect rights which are infringed and the test is in essence whether it would be oppressive to grant the injunction. The test is not one of a balance of convenience. The starting point remains (as it was before Lord Cairns's Act) that a claimant who has established both a legal right and a threat to infringe it is prima facie entitled to an injunction. It is only special circumstances which will justify withholding the injunction⁷.
13. The restrictive approach to the Court's jurisdiction to award damages in lieu of an injunction was restated in *Regan v Paul Properties Ltd*⁸. In essence, where a

⁶*Shelfer v. City of London Electric Lighting Co* [1895] 1 Ch. 287 at 322-323 per A.L. Smith LJ

⁷*Jaggard v. Sawyer* [1995] 1 W.L.R. 269 at 282F, 283C per Sir Thomas Bingham MR and at 286H, 287F-G, 288B per Millett LJ.

⁸ [2006] EWCA 1319 Mummery LJ at paragraphs 36-37 summarised the law as follows:

[36] *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.

[37] *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 AL 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.

claimant's rights have been infringed and continue to be infringed, he will on the face of things be entitled to an injunction against the person committing a wrongful act. It is only in "very exceptional circumstances" that the Claimant will be deprived of his prima facie right. Relevant factors which the Court will consider in determining whether or not the case is appropriate for awarding damages in lieu of an injunction are those where (1) the injury to the claimant's rights is small, (2) it is one capable of being estimated in money, (3) it can adequately be compensated by a small payment of money and (3) the case in one in which it would be "oppressive" to grant an injunction.

14. This emphasis on "oppression" is reflected in modern judgments such as that of Millett LJ in *Jaggard v. Sawyer*⁹ but can be traced back to cases such as *Colls v. Home and Colonial Stores Ltd*¹⁰ in which Lord Macnaghton considered it

(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 pages 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 p 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 AL Smith LJ at pages 322 and 323 and Lindley LJ at page 317.*

[38] *In my judgment, none of the above propositions has been overruled by later decisions of any higher court or of this court. Only one case in the House of Lords was cited, Colls v. Home and Colonial Stores Limited [1904] AC 179 (Colls). The case is authority for the proposition that the test for infringement of the right to light is whether the obstruction complained of is a nuisance, that is whether there is a substantial loss of light so as to render the occupation of the house less fit for occupation and uncomfortable according to the ordinary notions of mankind. It is not enough for the claimant simply to prove that the light is less than it was."*⁹ [1995] 1 WLR 269 at pp 288-289. *"In considering whether the grant of an injunction would be oppressive to the defendant, all the circumstances of the case have to be considered. At one extreme, the defendant may have acted openly and in good faith and in ignorance of the plaintiff's rights, and thereby inadvertently placed himself in a position where the grant of an injunction would either force him to yield to the plaintiff's extortionate demands or expose him to substantial loss. At the other extreme, the defendant may have acted with his eyes open and in full knowledge that he was invading the plaintiff's rights, and hurried on his work in the hope that by presenting the court with a fait accompli he could compel the plaintiff to accept monetary compensation. Most cases, like the present, fall somewhere in between."*

¹⁰[1904] AC 179 at 193. *"...if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the Court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money. Often a person who is engaged in a large building*

“oppressive” to award injunctions in circumstances where ancient lights were being used as a “means of extorting money” where “there is really a question as to whether the obstruction is legal or not”.

15. This does not mean, however, that if an owner with *legal* rights genuinely wishes to protect his rights and to preserve them for the future or that where there was never any serious question that a legal right would be substantially infringed by the defendant that the equity should not restrain the interference with an injunction save in extraordinary circumstances even if the consequences for the wrongdoer are severe. In judging whether to exercise its discretion and the extent to which the award of an injunction is really to be considered oppressive, the Court will bear in mind the sort of right which the defendant has infringed and the nature of the interference. There is a particular point, however, to note about restrictive covenants. The enforceability of restrictive covenants arises from the intervention of equity to deal with a particular situation. Where a restrictive covenant is enforceable against a successor to the original covenantor, it is only enforceable if it is taken *for the protection of the covenantee’s land*. If, therefore, the person seeking to enforce the covenant is interested only in money (rather than the protection of his land), it is easier to see why damages are an adequate remedy than in the case of someone seeking to assert a legal right of possession or use of land. In *Gafford v. Graham*¹¹ (a restrictive covenant case) an injunction was inappropriate because the plaintiff’s “willingness to settle the dispute on payment of a cash sum can properly be reflected by an award of damages”. This position can be contrasted with legal rights to land or an interest in land: a possessory right or a legal right to use land such as an easement does not exist for the *protection* of the other land of the owner and (subject to the terms of any grant) may be used by the owner without regard to his *motive*.

scheme has to pay money right and left in order to avoid litigation, which will put him to even greater expense by delaying his proceedings. As far as my own experience goes, there is quite as much oppression on the part of those who invoke the assistance of the Court to protect some ancient lights, which they have never before considered of any great value, as there is on the part of those who are improving the neighbourhood by the erection of buildings that must necessarily to some extent interfere with the light of adjoining premises.”

¹¹ [1999] 3 EGLR 75

16. In any event, the conduct of a claimant will be relevant and a failure by a claimant to take steps to protect himself and which prejudices the defendant may even in the absence of an estoppel may make it oppressive to award an injunction (particularly a mandatory injunction) and may result in an award of damages instead. Nourse LJ (with whom Pill and Thorpe LJJ agreed) in *Gafford v. Graham*¹², said:

As a general rule, someone who, with the knowledge that he has clearly enforceable rights and the ability to enforce them, stands by while a permanent and substantial structure is unlawfully erected, ought not to be granted an injunction to have it pulled down.

17. On the other hand, even if damages are awarded in lieu of damages, this could provide the developer with a nasty surprise. In the case of *Jaggard v Sawyer* it was held that the damages should reflect what a reasonable seller would sell the rights for “but the court will not value the right at the ransom price which a very reluctant plaintiff might put on it”. The test is thus a “reasonable seller” test. The damages might thus include some “ransom” element but not the ransom which a “very reluctant” seller might seek. To arrive at this notional purchase price it is necessary to consider what would have happened had the parties freely negotiated a purchase price for the claimant’s rights. This hypothetical negotiation is to be treated as taking place prior to the unlawful development starting (i.e. before the claimant would have been able to hold the defendant to ransom by threatening to waste all of the defendant’s work to date). Detailed guidelines were provided in *AMEC v Jury’s Hotel Management*¹³. The hypothetical negotiation is to be assumed to be:

- a. between a willing seller and willing buyer who are seeking to agree a proper price, not a ransom;
- b. on the basis that each party would put forward their best points; on the basis that the price is to be a split of the profit gained by the hypothetical buyer from

¹² [1999] 3 EGLR 75 at page 79

¹³ [2001] 1 EGLR 81, applied in *Lane v O’Brien Homes* [2004] EWHC 303 (QB) and *Crestfort v Tesco Stores* [2005] EWHC 805 (Ch).

the acquisition of the rights, although that gain would not have been obvious and would have been the subject of debate;

- c. the negotiating parties are assumed to know all such things as real people in their position would have been able to discover; and
- d. such that “the deal has to feel right”.

So, while a “ransom” is seemingly excluded, it is clear that a split of the profits is contemplated. This can be significant since the parties must assume that the covenantor has the power to stop the development albeit that he is willing to trade that power for the right price.

Section 237 of the Town and Country Planning Act 1990

18. Fifthly, Town and Country Planning Act 1990 allows for the overriding of covenants restricting the user of land. Section s.237(1) and (2) provides:

(1)... the erection, construction or carrying out, or maintenance of any building or work on land which has been acquired or appropriated by a local authority for planning purposes (whether done by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is done in accordance with planning permission, notwithstanding that it involves –

- (a) interference with an interest or right to which this section applies, or**
- (b) a breach of a restriction as to the user of land arising by virtue of a contract.**

(1A) ... the use of any land in England which has been acquired or appropriated by a local authority for planning purposes (whether the use is by the local authority or by a person deriving title under them) is authorised by virtue of this section if it is in accordance with planning permission even if the use involves –

- (a) interference with an interest or right to which this section applies, or**
- (b) a breach of a restriction as to the user of land arising by virtue of a contract**

(2).... the interests and rights to which this section applies are any easement, liberty, privilege, right or advantage annexed to land and adversely affecting other land including any natural right to support.

19. A number of points may be noted:

- a. Section 237(1A) was introduced to remedy the effect of *Thames Water Utilities Ltd v Oxford City Council*¹⁴ in which HHJ Rich Q.C. held that only

¹⁴[1999] 1 EGLR 167

the operational development listed in s.237(1) was authorised by the section and the subsequent use of buildings constructed as authorised under s.237(1) was not authorised. This judgment was probably wrong¹⁵, so the amendment was unnecessary.

- b. In principle, if the relevant local authority can be persuaded to acquire the land needed for this particular development “for planning purposes” then (subject to the payment of compensation) the erection of the building can take place notwithstanding that it interferes with restrictive covenants enjoyed by the Claimants provided that the development is “in accordance with planning permission”. The erection of the building can take place whether this is done by the local authority “or by a person deriving title under them”. Accordingly, once the site has been acquired by a local planning authority for planning purposes, the site could then be re-conveyed or let on a long lease to a developer who could then themselves carry out the development notwithstanding interference with a claimant’s restrictive covenants. The use of powers such as this for “washing” a title seems unobjectionable: compare *Ford-Camber Ltd v Deanminster Ltd*¹⁶.
- c. On the other hand, it should be noted that while section 237 was clearly intended to enable a local authority (and its successor) to redevelop or continue to redevelop a site appropriated for planning purposes from time to time, it has been held that it does not enable a developer who is merely a successor to the local authority subsequently to develop the land for purposes otherwise than for which the land was appropriated by the local authority: *Midtown Ltd v City of London Real Property Company Ltd*¹⁷.
- d. Where section 237 applies, compensation is payable by the person carrying out the development though the local authority retains a residual liability (s.237(4),(5)). Compensation is payable under section 63 or 68 of the Lands Clauses Consolidation Act 1845 or under section 7 or 10 of the Compulsory

¹⁵Karas & Harper [2008] JPEL 9

¹⁶[2007] EWCA 458

¹⁷[2005] EWHC 33 (Ch) at para 47 cfR –v- *City of London Council & another Ex-parte Master Governors and Commonality of the Mystery of the Barbers of London* [1996] 2 EGLR 128.

Purchase Act 1965 and is assessed in the same manner and subject to the same rules as in the case of other compensation under those section in respect of injurious affection where –

- (1) the compensation is to be estimated in connection with a purchase under those Acts; or
- (2) the injury arises from the execution of works on or use of land acquired under those Acts.

Section 7 of the 1965 Act (s 63 of the 1845 Act) deals with compensation where land has been taken in cases of severance or injurious affection. Section 10 (s 68 of the 1845 Act) deals with compensation, whether or not land has been taken, where the land of the claimant has been “injuriously affected by the execution of works”.

Law of Property Act 1925 s.84

20. Finally, even if the technicalities of land law, the difficulties of construction and the questions of the Courts discretion all point to a restrictive covenant thwarting proposed development, the provisions of Law of Property Act 1925 s.84 allow for the discharge or modification of the covenant by the Lands Tribunal (which is now the Lands Chamber of the Upper Tribunal):

- (1) under s.84(1)(a) on the ground that the covenant has become obsolete :
- (2) under s.84(1)(aa) on the ground that the continued existence of the covenant impedes a reasonable user of the land for private purposes (assuming that it can be shown that the covenant no longer secures to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them or is contrary to the public interest) (see s.84(1A)); it should be noted that the ability to use a covenant for the purposes of extracting a ransom for development is *not* a practical benefit for these purposes (see *Stockport Metropolitan Borough Council v Alwiyah Developments*¹⁸;

¹⁸ (1983) 52 P & CR 278, CA

- (3) under s.84(1)(b) if all entitled to the benefit of the covenant consent;
 - (4) under s.84(1)(c) if it can be shown that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.
21. An order discharging or modifying a restriction under s.84(1) may direct compensation to be paid to make up for any loss or disadvantage suffered by that person in consequence of the discharge of the covenant: see s.84(1)(i).
22. If it can be proved by the persons with the benefit of the covenant that by reason of the imposition of the restrictions, the amount of consideration paid for the acquisition of the land was reduced, then compensation should reflect the difference in value (and may include compensation to reflect the effects of inflation on the amount by which the consideration was reduced: see s.84(1)(ii)¹⁹.
23. In deciding whether a case is one falling within s.84(1)(A) and in determining whether (in such a case or otherwise) a restriction ought to be discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant areas, as well as the period at which the context in which the restriction was created or imposed and any other material circumstances: see s.84(1B).
24. It should be noted that where proceedings are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the tribunal under s.84 and stay the proceedings in the meantime: s.84(9).
25. The Tribunal retains a discretion whether or not to discharge or modify the covenant. So, for instance, in *Cresswell v Proctor*²⁰ the Court of Appeal considered an application to modify a very recent covenant at the instance, in

¹⁹ See *Dove* [1991] RVR 81

²⁰ [1968] 1 WLR 906; see too *Jones v Rhys-Jones* (1974) 30 P & CR 451, 457.

effect, of the original covenantor. Harman and Danckwerts LJJ expressed the view that the tribunal ought not to exercise its discretion in favour of such an application.

Conclusions

26. While a carefully worded restrictive covenant on its face may seem to provide an objector with substantial obstacle to put in the way of development, it is by no means a simple thing and a determined developer has a number of ways of removing the obstacle.
27. On the other hand, restrictive covenants cannot safely be ignored and may sometimes provide an insuperable obstacle. It should not be thought that the Courts are unsympathetic to those who seek to enforce restrictive covenants.
28. Thus, in *Mortimer v. Bailey*²¹ (dealing with the suggestion that a claimant's failure to seek interim relief should debar it from final relief) Peter Gibson LJ said:

I own to some doubt as to whether it is appropriate to say that a person who does not proceed for an interlocutory injunction when he knows that a building is being erected in breach of covenant, but who has made clear his intention to object to the breach and to bring proceedings for that breach, should generally be debarred from obtaining a final injunction to pull down the building. There may be many circumstances in which a claimant would not be able to take the risk of seeking an interim injunction. He would need to satisfy the *American Cyanamid* test, and would have to provide an undertaking in damages. It may be entirely reasonable for the claimant, having put the defendant on notice, to proceed to trial, rather than take the risk of expending money wastefully by seeking interim relief. However, I accept that not to seek an interim injunction is a factor which can be taken into account in weighing in the balance whether a final injunction should be granted.

At para 41 Jacob LJ said (significantly):

²¹ [2004] EWCA Civ 1514 at para 30

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, the chance having been taken and lost, an injunction will be withheld.