Restrictive covenants and barriers to development

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I. Introduction

Developments can often be contentious, yet the pressure to build is unrelenting. The need for more housing is well known[1]. Land is increasingly seen, even by residential owners, as an exploitable asset, if only because extending is often cheaper than moving. And speculators obviously look to maximise their returns. All this can create conflict with neighbours, who fear the effect the development may have on them.

Once planning permission is granted, it is tempting to think the war is over. But there may be restrictive covenants which impinge on the development. These can be a second hurdle for the developer to overcome and/or a second chance for the objector to stop the work.

Restrictive covenants are notoriously difficult to deal with and they create pitfalls for the unwary/ opportunities for the diligent. Yet like most land issues, as long as they are approached methodically they can be successfully negotiated.

II. Issues for those intending to develop

A landowner intending to develop should ask himself a number of questions before breaking soil. Of course in each case these will vary according to the particular circumstances, the wording of the covenant(s), etc. but they will include typically some/more of the following:-

1. Am I bound by the covenant? For example
   - am I the original covenantor?
   - if not, does the burden run with my land?
   - did any of my predecessors take clear of it?

[1] http://www.telegraph.co.uk/business/2016/07/14/england-needs-to-build-50pc-more-homes-than-governments-target-s/

- is it registered against my title?

2. Do I know who can enforce it against me?
   - what land was it originally intended to benefit?
   - does it in fact do so?
   - who now owns that land e.g. has it been subdivided
3. If there is uncertainty, can I get restrictive covenant indemnity insurance?
4. Do I need to inform my lender?
5. What does the covenant require? E.g. if I need consent to build
   - who can give it to me?
   - can they refuse?
6. Who can give me an effective discharge from the covenant?
7. Is what I am intending a breach? Is there any way to avoid that or mitigate the effects?
8. Should I approach the potential claimants (risk tipping them off, prejudice chances of insurance) or let sleeping dogs lie (risk an injunction)?
9. Should I take a risk and start the works. E.g.
   - am I under any pressure to start (e.g. funding requirements, planning conditions)
   - how confident can I be there is no-one entitled, wiling and able to sue?
   - will that improve my chances of (a) lifting the covenant or (b) an injunction being refused?
   - what remedy do they really want?
   - what is the downside of starting
10. What are the chances of the UTLC releasing/modifying the covenant? How long will it take? What evidence will I need? What if any compensation will be ordered? What will it cost and who will pay?

III. Issues for the objectors

These are largely the converse of the questions for the developer and again will vary according to the circumstances:

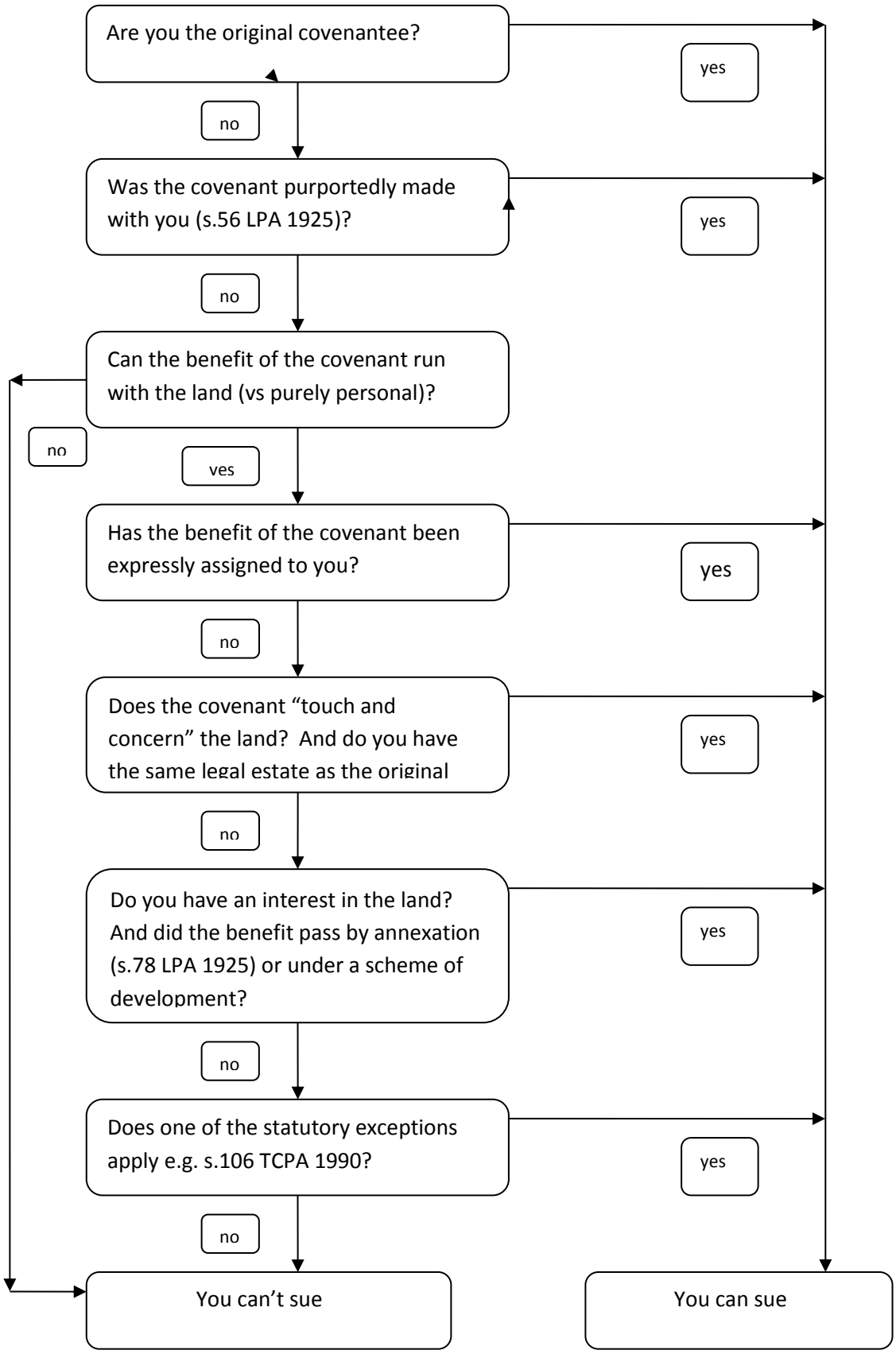
1. can I sue on the covenant?
2. can anyone else? If so what is their position regarding the development?
3. is the covenant protected by registration? If not can I still do so or is it too late?
4. do I have any (e.g. household/ATE) insurance in relation to any breach/enforcement/ application to the UTLC to discharge/modify the covenant?
5. what does the covenant require? E.g. if it requires someone else's consent to the works do they owe me any duties in giving consent or imposing terms? If so, make representations.
6. practically how will the development affect me? Will it impact on the enforceability of any other covenants e.g. schemes of development / alter the character of the neighbourhood?

7. is what is planned a breach?
8. practically how will it affect me?
9 how soon do I need to start a claim?
10. what are the chances of the covenant being discharged/modified? And what specific evidence do I need to oppose that?

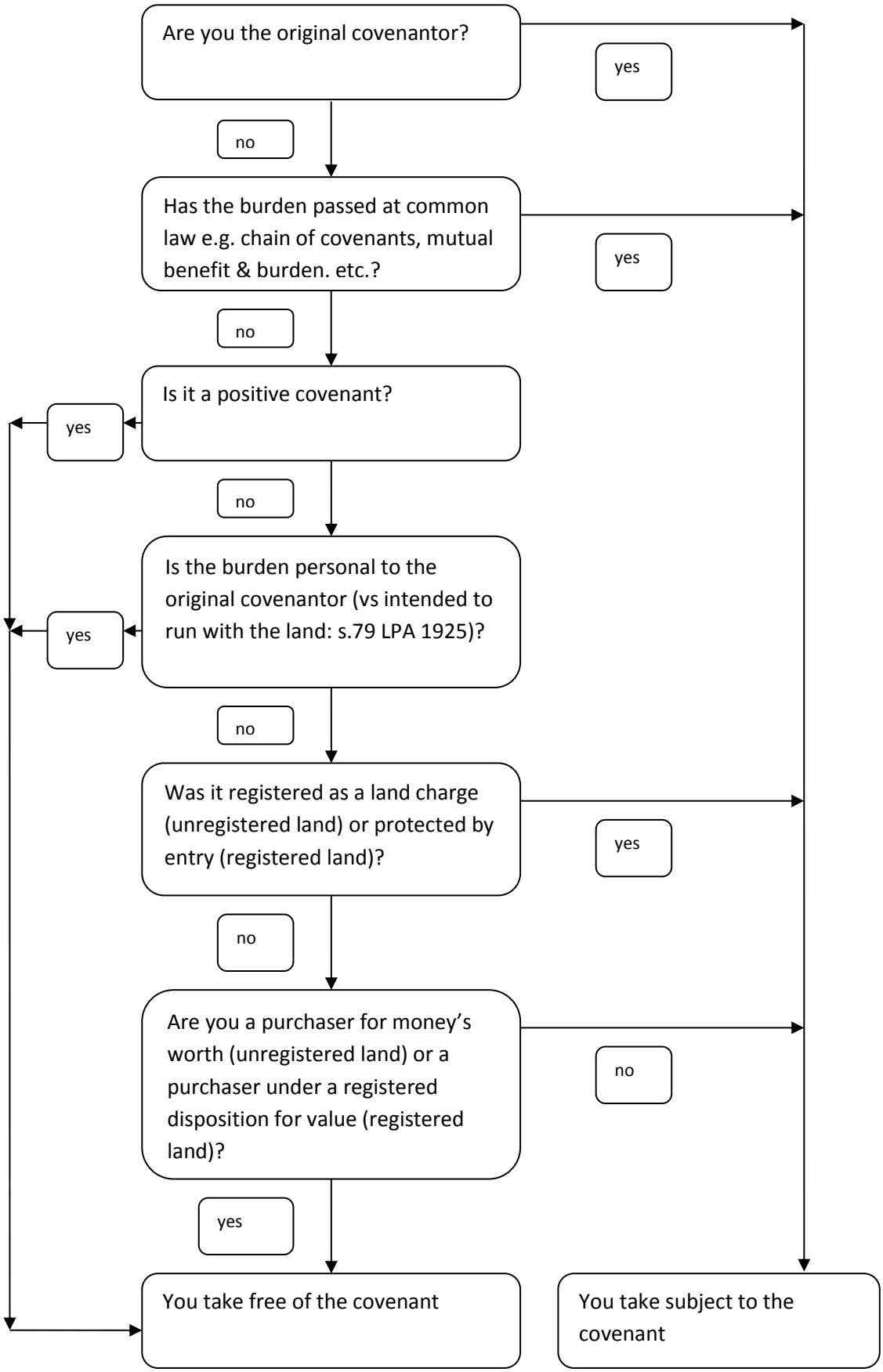
IV. Who can sue/be sued on the covenant(s)?

Whether the benefit- and burden of the covenant has passed gives many law students (and some practitioners) nightmares. In reality the questions are not that difficult and can be answered using the following flowcharts.

(a) Enforcing the covenant – can you sue?



(b) Enforcing the covenant – can you be sued?



V. Applying to discharge/modify the covenants

Introduction

The main method is of course an application to the UTLC under s.84 LPA 1925. The four grounds for applying are:-

Ground (a) the restriction is obsolete
Ground (aa) it impedes some reasonable user and does not secure any practical benefits of substantial advantage/value or is contrary to the public interest
Ground (b) the parties entitled to enforce the covenant have agreed to its modification/release
Ground (c) modifying/releasing the covenant will not injure the parties entitled to enforce it

In reality the vast majority of cases rely on Grounds (a) and/or (aa) (more than one can be pleaded). Ground (b) cases by definition are rarely necessary/contentious. And Ground (c) is regarded as a "longstop" against frivolous objections; if it is made out almost inevitably Ground (aa) will too. The advantage of relying on (c) is that no compensation is payable to the objector.

If a Ground is made out the UTLC still has a *discretion* whether/not to modify or discharge the covenant. It need not do so, although it would need good reason(s) for refusing. For example if a developer starts to build in the face of objections and knowing he is in breach and only later applies to the UTLC, hoping that that will improve his chances[2].

Every case is fact-sensitive. Fundamentally the UTLC looks at the purpose(s) of the covenant. These depend on its wording and the nature of the surrounding area at the time. Typically the purpose(s) are said to be one or more of the following:

- prevent the open character of the neighbourhood/over-development of particular plots
- preserve a view/restrict the visual impact of a building
- preserve light/avoid shadowing
- maintain privacy/prevent overlooking
- preserve the residential, etc. character of the area
- more specifically, preserve it as (e.g.) an area of single family occupancy or of high value properties

[2] George Wimpey Bristol Ltd.'s application [2011] UKUT 91 (LC) at [35]

- preserve peace and tranquillity/prevent noise
- prevent excessive traffic/human movement
- freedom from light pollution

One of the best ways of getting a feel for how the UTLC approaches these cases is to look on its website http://landschamber.decisions.tribunals.gov.uk//Aspx/Default.aspx. There is a useful search tool. Cases are listed chronologically (most recent at the top) and restrictive covenants cases are listed by category.

There is a standard form for applying:
https://formfinder.hmctsformfinder.justice.gov.uk/t379-eng.pdf.

The UTLC applies the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010[3]:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/357450/upper-tribunal-lands-chamber-procedure-rules.pdf

Its practice directions are here: https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/PracticeDirectionsUTLandsChamber_291110.pdf. These contain (para 12) the rules as to costs before the UTLC.

Paragraph (a) obsolescence

"that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which may deem material, the restriction ought to be deemed obsolete"

When considering the merits the UTLC has to consider subs.(1B) which states :-

"In determining whether a case falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the [UTLC] shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

The meaning of "obsolete" in this context was considered in *Re Truman, Hanbury, Buxton & Co Ltd's Application*[4]:-

[3] SI 2010/2600 (as amended)

[4] [1956] 1 QB 261, 272; see In Re Surana's Application [2016] UKUT 0368 (LC) at [45].

*"It seems to me that if, as sometimes happens, the character of an estate as a whole or of a particular part of it gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in section 84 (1) (*a*)."*

The UTLC will only decide a covenant in obsolete "in a very clear case"[5]. The onus is on the applicant.

There are generally two types of change which lead to a restrictive covenant being declared obsolete:

- social changes (e.g. restrictions on the sale of alcohol in what are now commercial areas) and
- environmental changes (e.g. single occupancy restrictions where the surrounding area has since been converted into flats/HMOs).

But mere change (of itself) is not enough.

Issues:-

- what was the original purpose of the covenant? Sometimes this is obvious (e.g. density restrictions, prevent overlooking). But in other cases there can be several purposes, in which case it is the main one that counts.

- have there been material changes in the character of the burdened land since the covenant was imposed? or the neighbourhood? or has there been some other material (e.g. legislative) change of circumstance?

  There is often a dispute about what the "neighbourhood" is for these purposes:
  - objectors contend for a narrow definition to limit the possible changes
  - developers contend for a wider meaning, to bring in as many as possible.
  - what constitutes neighbourhood may itself change over time

- in light of them, can *the original purpose* still now be achieved? It is not enough that it still fulfils *some* purpose if it is not the original one(s).

[5] Turner v Pryce [2008] 1 P&CR D52.

Practical tips:-

Changes in the character of the burdened land:-

- what was it used for when the covenant was taken out?
- what changes have there been since then? when did they occur? was the covenantee aware?

Changes in the character of the neighbourhood:-

- identify the neighbourhood using OS maps
- compare previous editions of maps and aerial photos to see how the area/application land has changed
- obtain the local plan and any previous plans, to identify any material changes in the planning history/purpose of the land
- obtain aerial photos of the site
- mark out on plans/photos any relevant changes to the locality
- identify the purpose served by the covenant. That will often be a matter of inference, as the conveyancing files, even if still available, will usually be silent.
- then ask in light of the above if that can still be fulfilled.
- beware the paradox:
    - up to a certain level, changes can render the covenant *more* valuable, in order to preserve what remains (e.g. the last oasis of calm)
    - but there comes a "tipping point" where the changes become so great that the original purpose is lost
    - drawing the line is difficult.

Paragraph (aa): impedes reasonable user/secures no practical advantages

"That a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes. . . or, as the case may be, would unless modified so impede such user"

"1(A) … the restriction, in impeding that user, either (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or (b) is contrary to the public interest; and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification

This is ground most often relied on / succeeds, as it has a lower threshold. As was said in *Shephard v Turner*[6]:-

[6] [2006] EWCA Civ. 8 at [58].

"The general purpose [of Ground (aa)] 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."

Issues[7]:-

1. is the proposed user reasonable?
   In most cases the fact it has planning permission means the answer is "yes". But the detail is important e.g. were PD rights removed, indicating the risk to neighbouring properties of any further development[8].

2. does the covenant impede it?
3. does impeding the user secure practical benefits to the objectors?
4. if so are they of substantial advantage/value
5. if no, would money be adequate compensation
6. is impeding the user contrary to public interest.
7. if yes, would money be adequate compensation?

Normally the key considerations are 3 and 4 and (to a lesser extent) 5.

3. Practical benefits?

The importance of the benefits is normally approached "*on a broad basis and assessed by their value to the objector and not by comparison with the importance of the development to the applicant*".[9]

Here, the devil is in the detail. For example

- in cases where loss of light is feared, where do/will the buildings stand in relation to the passage of the sun?

- by how much (if at all) will the development reduce the value of the benefited land[10]?

[7] Re Bass's Application (1973) 26 P&CR 156.

[8] See e.g. Pearce v Connelly & Bannister [2017] UKUT 0039 (LC) at [36].

[9] Pearce v Connelly & Bannister above at [40].

[10] Se e.g. In re Lynch [2016] UKUT 488: 1.5%-2.5% (£15-£25K) reduction held not substantial. But there is no "absolute" test of what is substantial: compare Millgate Developments v The Alexander Devine Children's Cancer Trust [2016] UKUT 0515 (LC) at [93]: avoiding expenditure of £30-£70K on screening held "substantial".

- could something with a greater impact be built on the burdened land/elsewhere without infringing the covenant? Is that very likely? If so, then the covenant does not secure practical benefits. But a purely theoretical alternative is irrelevant.

- if the benefit is preserving a view, what is the dominant view: distant or intermediate?

- it is avoiding overlooking, what is the arc of vision? Which windows on either property are affected? Could this be mitigated by screening and if so at what cost?

- practical benefits do not include bargaining position e.g. the opportunity to secure a ransom payment for its release[11].

- they are normally treated as the *long-term* effects of the works, not the temporary inconvenience suffered during their execution, unless the covenant is specifically designed to protect against short term nuisances[12]

- sometimes a modification can have a knock-on impact on other land e.g. by compromising the integrity of a building scheme.

- objectors sometimes deploy the "thin end of the wedge" argument: that allowing the application will establish a precedent and so account must be taken of the cumulative effect of the developments which will result if it is allowed. This is usually given little weight on the basis that each application would have to be considered on its own merits[13].

4. Substantial value or advantage?

"Substantial value" means something "*considerable, solid, big*"[14].

"substantial advantage" appears to refer to amenity and connote something wider than "value".

The guidance is fairly amorphous; the issue of "substantiality" has to be approached in a broad, common-sense way.

[11] Stockport MBC v Alwiyah Developments (1983) 52 P&CR 278, 281, 283-4.

[12] Shephard v Turner above. Francis Restrictive Covenants and Freehold Land 4th ed. 2013

[13] See e.g. Re Voss's application LP/11/1973 (unrep'd); Re Lynch's application above at [73].

[14] Shephard v Turner above at [23].

Sometimes this is measured by the diminution in the value of the benefited land (although "benefit" is not confined to the purely financial). There is no "absolute" standard of what qualifies but as a *very* broad indication cases involving

- diminutions in value of 5% or less tend to be regarded as not substantial and
- those above 10% tend to be regarded as substantial[15].

6. Contrary to public interest?

This is only exceptionally relied on. In *Re Collins Application*[16] the gloss was added that the interest must be "*so important and immediate as to justify the serious interference with private rights and the sanctity of contract*". But query if this is still good in light of *Shephard v Turner*'s explanation of the policy underlying (aa) and L Sumption's views on the reconciliation of public and private rights in *Lawrence v Fen Tigers*[17].

The mere fact that the covenant prevents a development which has planning permission does not *necessarily* mean it is contrary to public interest. It can apply:

- where there is a critical social need for the development e.g. an acute shortage of housing for the elderly[18]
- where the development has been built before the application is made, where to refuse the application would result in an unconscionable waste of housing stock.[19]

5/7. Adequate compensation?

If the UTLC concludes the advantage is not of substantial value/advantage, it follows compensation will be adequate and is likely to be small. In reality the decision on this issue also 'informs" the decision on "substantiality" i.e. if the UTLC concludes that (only) a larger sum would be adequate compensation it is likely to find that requirements 3 and 4. are not met.

A greater amount may be awarded where the covenant is contrary to public interest, to compensate for the fact objector is losing something of practical benefit which has a substantial advantage/value to him.

[15] Francis Restrictive Covenants and Freehold Land at 16.157 (fn.97) and 16.345 (fn.171).

[16] (1975) 30 P&CR 527, 531

[17] [2014] AC 822 at [155-161].

[18] Re SJC Construction Co. Ltd.'s application (174) 28 P&CR 200

[19] Millgate Developments v The Alexander Devine Children's Cancer Trust above at [106].

In both cases however compensation:-

> *" … is based upon the effect of the development upon the objectors, not upon the loss of the opportunity to extract a share of the development value [But] 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"*[20]

Objectors have sometimes been awarded sums reflecting "consumer surplus". In cases of longstanding residents with no intention of selling "loss" is not best measured by the diminution in the value of their property. Their primary loss is the loss in the enjoyment of their property and the extent of it will depend at least in part on their own subjective assessment of what it is they enjoys. But 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*[21]*."*

Valuation evidence on the effect of allowing the application is often required. But to stress, a practical benefit *can* sometimes be substantial even though it has no significant impact on value[22].

Practical tips:-

- identify at an early stage what the practical advantages are
- ask if they are of value/advantage and capable of being compensated
- obtain planning permission first and consider the impact of any conditions.
- obtain expert evidence, mock-ups showing sight-lines,
- personally inspect the site
- ask if there is any other fetter on the ability to do the work
- identify the purpose of the covenant
- is it a one-off or part of a scheme? If the latter what impact would relaxing it have on the rest of the scheme?
- ask if the modification will achieve the intended result

[20] Winter v Traditional & Contemporary Contracts [2008] 1 EGLR 80 at [28], [33]

[21] Ibid.

[22] See e.g. Re Vince's application (2007) LP/41/2006.

Paragraph (b)

"that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction … have agreed either expressly or by necessary implication, by their acts or omissions to the same being discharged or modified"

Issues:-

- who is entitled to enforce the covenant
- are they all of full age/capacity
- does the particular person consenting have authority to do so on their behalves?
- have they all agreed to the covenant being discharged/modified in the way sought?

Practical tips:-

- identify the original extent of the benefited land
- ask who is now entitled to enforce it
- ensure they consent in writing (if possible) to the particular modification/discharge
- if the consent is to be inferred, identify on what basis and whether any different inference can be drawn as to their intentions.

Paragraph (c)

"that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction"

Issues:-

- would the objector suffer any injury if the modification were granted?
- If so what? Note it is the relaxation, not the development which is referred to. Would it have a knock-on effect on a scheme of covenant?

Practical tips:

- as per Ground (aa)

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