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# OVERAGE CLAUSES AND CLAWBACK

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# ABOUT RICHARD SNAPE

Richard has been the Head of Professional Support at Davitt Jones Bould since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firm and has also talked extensively to local authorities and central government bodies. His areas of specialism include both commercial and residential property, in particular in relation to local government law, conveyancing issues, development land, commercial property and incumbrances in relation to land.

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**TABLE OF CONTENTS**

## OVERAGE AND CLAWBACK

### Introduction

Overage clauses and clawback provisions are designed to achieve full value in relation to land being sold where a subsequent purchaser achieves additional value at a later time. As a consequence of the ***Herstmonceux*** case in 1986 Treasury guidelines provided that government land should normally be sold with planning permission. However, where there are delays in resolving uncertainties over planning permission it may be appropriate to dispose of land early and in such cases introduce clawback provisions to achieve full value. Where overage clauses have not been included, for example, on the sale of the Royal Brompton Hospital, the National Audit Office has produced adverse reports.

However, some forms of overage and clawback, e.g. ransom strips, may be inappropriate for government bodies. See also ***R v Braintree District Council ex parte Halls [2000] 36 EG 164*** where a local authority which sold a council house subject to use as a single private dwelling sought to charge 90% of profits to discharge the covenant. This was held to be ultra vires its powers under **Schedule 6 Housing Act 1985**. The local authority may have a claim in relation to breaching a nuisance or annoyance covenant which may be infringed by building work.

Overage may act either positively in that if additional value is received additional money will be given to the seller, or negatively, i.e. the purchaser will not develop or does not have a sufficient interest in land. In such case, there is no need for any overage clause as the seller has control over the situation and can charge what he likes.

### Stamp Duty Land Tax and Land Transaction Tax

SDLT and LTT will attach to positive overage but not to negative. A best estimate of the total consideration based on the contingent event occurring, no matter how remote, must be made and the tax calculated accordingly. When the triggering event actually occurs, a further return must then be made. Developers should accommodate any extra SDLT liability in their tendering process.

How any estimate of final liability may be made is debatable but note that the client must be made aware that if a trigger event occurs, they will have to fill in a new return with a balancing payment. If the estimate were to tip the SDLT liability from one band to another, the higher payment must be paid initially.

On subsequent transfers where there is clawback post 1 December 2003, enquiry must be made as to whether a deferral was requested. If this has occurred then the subsequent purchaser will have a further tax bill on the trigger event occurring. The CPSE Enquiries envisage that a request to see the Land Transaction Return must be made.

**Time Period**

The duration of the overage clause depends very much on its facts. Some clauses refer to 80 years. It is suggested that this is excessive and arises through confusion with the previous statutory perpetuity period of 80 years.

**Enforcement**

Between the original parties there will be a contract and the covenantor will be able to fully enforce. Third party purchasers must however take the benefit of the covenant. This may always be done by an express assignment. In any case, as we will see many covenants are automatically annexed to land. The problem lies in relation to the burden passing to subsequent purchasers as this cannot be contractually assigned. Some form of property rights which is binding on the purchaser will therefore need to be created. The commonest methods, which we will look at, are: -

a) positive covenants and restrictions

b) restrictive covenants

c) ransom strips

d) a charge or mortgage

Note: In the case of ***Akasus v Farmar & Shirreff [2003] EWHC 1275,*** a firm of solicitors who failed to include provisions allowing enforcement against third party purchasers were held to be negligent.

**Positive covenants and restrictions**

The problem here is that in freehold land a positive covenant will not burden third party purchasers. See ***Austerberry v Oldham Corporation [1885] Ch.D750***. There are many ways of circumventing this, e.g. estate rentcharges and the doctrine of mutual benefit and burden, i.e. if a right is claimed a corresponding obligation must be taken on. The classic example of this is in relation to maintenance of private roads and drains in small estates. This is not suitable however in relation to overage.

**Direct covenants and restrictions**

Here each new purchaser enters into a direct covenant with the original seller or their successor. They are therefore contractually bound. A restriction should be placed on the register (in registered land) to the extent that no disposition is to be registered unless the transferee produces to the Land Registry a deed of covenant in that form.

**Restrictive covenants**

Restrictive covenants are of dubious value for various reasons. Long term, in particular, they may be discharged under section 84 Law of Property Act 1925, for instance if obsolete or if they prevent reasonable use and enjoyment of land. In event of discharge by the Property Chamber, damages may be awarded but may be limited. Moreover, in any court proceedings an injunction will not necessarily

be awarded to prevent breach and again damages will be limited to the loss of value to neighbouring land. If there is little or no loss in value there will be no enforceability.

See ***Wrotham Park Estates v Parkside Homes [1973]***. Here 5% of enhanced value was awarded in damages, i.e. how much was reasonably expected to be paid for relaxing the covenants. See also ***Stockport Borough Council v Alwiyah [1983] 52 P & CR 278***. Lost value was calculated in relation to the fact that neighbouring houses on the benefited land would lose their view of open farm land. This was further reduced as the local authority's tenants had the Right to Buy. Damages for a breach of covenant and the building of 42 houses were limited to £2,250. ***George Wimpey (Bristol) Ltd v Gloucester Housing Association [2011] UKUT 91 (LC),*** the developer blatantly disregarded restrictive covenants in the expectation that they would be discharged under **S.84**. This, together with the fact that loss of views could not be compensated, was held to be sufficient not to discharge the covenants.

***Alexander Devine Children's Cancer Trust v (1) Millgate Development Ltd and (2) Housing Solutions Ltd [2018] EWCA Civ 2679*** here, thirteen units of social housing were built upon land which was subject to covenants not to use other than for car parking. The Court of Appeal reversed the Upper Tribunal decision and held that public interest in additional housing did not prevail over contractual provisions and the Court refused to discharge the covenant. This has now been confirmed by the Supreme Court in ***Alexander Devine Children's Cancer Trust v Housing Solutions Limited [2020] UKSC 45***. A cynical disregard of restrictive covenants would not be permitted, nor would a clear and unambiguous breach of a restrictive covenant. The Supreme Court stated that there were two stages. Firstly, whether the covenant prevented a reasonable use of the land. The covenant was unambiguous and in any case the developer chose to build the social housing on the land subject to the covenant when planning permission allowed them to build elsewhere. Secondly, whether it was reasonable to discharge the covenant. As there had been a cynical breach of covenant it would not be reasonable.

In ***Jaggard v Sawyer [1995] 1 WLR 269*** the owner of land entitled to the benefit of a covenant against building a private dwellinghouse was not able to obtain an injunction when the building was already substantially completed. Damages for loss of value were limited to £699.

***Cosmichome v Southampton City Council [2013] EWHC 1378*.** In this case the Council sold land with restrictive covenants against building. The covenants could be released if a development charge was paid. The covenants did not bind a purchaser as they did not benefit any dominant land but were personal.

**THE TRIGGER EVENT**

**Uplift in Value**

The most typical uplift is the grant of a planning consent. The main advantage of this approach is certainly in that it is an ascertainable event the knowledge of which is publicly available and the terms of which are ascertainable to anyone who enquires of the local authority. The main disadvantage from the landowner's point of view is that the grant of consent does not itself give the landowner cash. It gives it the means of obtaining cash, for example by borrowing on the security of the increased value. From the overage owner's point of view, it is possible that a future consent may produce greater value to that linking overage to a specific planning consent or perhaps the first planning consent to be granted may not necessarily secure the best value for the overage owner.

A number of other matters need to be considered at the point. A major development will normally go ahead by initially obtaining outline consent subject to subsequent approval of a number of reserved matters by the local authority. When these have been approved, a detailed consent is granted. A detailed consent is often easier to value than an outline consent and it may be preferable to link the overage to that.

Certain developments will not require planning permission, for example, under the **Town and Country Planning Act (Permitted Developments) Order 1995** as amended in 2008, 2013 and under the **Town and Country Planning Act (Consequential Provisions) Regulations 2014** in England, and in 2013 and 2014 in Wales. Also, changes of use within the use classes order as amended will be exempt. Note that permitted development is only allowed within the curtilage of the property and development, for example, in a paddock, may give rise to liability. A decision needs to be made as to whether these will trigger overage. In most cases it will not be appropriate, but there may be special circumstances where overage may be linked to them.

From 1 September 2020, in England, Class A1, shops, A2 financial and professional services, A3 restaurants and cafes and B1 business is subsumed in a new Class E. As of 1 August 2021, Class E is interchangeable with Class C3 dwellings creating a new Class MA (Mercantile Abode). The major provisos to this are that the premises must have had commercial use for at least two years, must have been vacant for at least three months and must have a gross internal floor area of no more than 1,500 sq metres. This is subject to prior approval from the council.

***London & Ilford Ltd v Sovereign Property Holdings Ltd [2018] EWCA Civ 1618*** a fixed overage payment of £750,000 was triggered on prior approval of permitted development. Prior approval was given for conversion of an office block into 60 flats. The overage was payable even though the development was impossible as building regulations approval was not given.

Certain types of development may be exempt from planning consent. Thus, under **S.55(2)** of the **Town and Country Planning Act 1990**, certain integral works, the use of land for agriculture, forestry and certain types of demolition do not constitute development at all. Some types of landowner, most importantly the Crown, do not need to obtain planning consent for their own development, although in practice they either do so or follow a similar procedure and it is possible to define development as referring to that.

Quite apart from this there is unauthorised development where an occupier of land carries out development without consent. If operational development is started, it is exempt from an enforcement notice after 4 years and, if there is a change of use or breach of planning condition, it is exempt after 10 years. Under the **Localism Act 2011**, if there is a deliberate concealment of planning breaches these time periods will continue to run. In such cases there will be no formal grant of planning consent, but it may still be possible for the landowner to realise the value if the local authority decides not to serve an enforcement notice or is simply not aware that the development has taken place.

If overage is payable by reference to the grant of consent, the payer may be concerned at a consent granted on the application of some totally unconnected third party. Therefore, it may seek to link the payment to development carried out by itself. However, the recipient will be concerned to cover this in case the consent is granted to (or implemented by) a person associated with the landowner such as a connected company or a tenant. See, however, ***Micro Design Group Ltd & Anor v BDW Trading Ltd [2008] EWCA Civ 488***, where on the facts it was implied that the trigger event would not occur if the seller obtained planning permission. In ***Johnson v Secretary of State for Communities and Local Government [2007] EWHC 1839*** the applicant obtained planning permission for the conversion of existing outbuildings but not for a new building. Without the full planning permission development of the outbuildings was impractical as there would be restricted access to a proposed garage. The applicant therefore wished to apply to quash the planning permission. They failed and therefore overage had to be paid.

Another issue in overage and clawback relating to the uplift in value is that the value of the overage land may accrue because it is part of a larger assembly of land. The land itself may provide access to some other plot perhaps as a ransom strip or it may need to be taken into account for example for the provision of public open space without itself being used for valuable development. It may be desirable that on the trigger in relation to a part of a property, a new base value is determined by reference to the then value of the property.

**Start of Development**

For these reasons, overage is sometimes linked to the implementation of any planning consent. If the land becomes available for or involved in any larger development or if development is commenced with the authority or approval of the landowner for the time being, then overage becomes payable.

One problem is that a consent may be obtained and implemented by a squatter. Normally the owner of valuable land can be relied on to protect its interests, but particularly where the overage percentage is high the landowner may not have any particular incentive to do so if a large proportion of the development value is going off to the recipient. Sometimes, therefore, a squatter may move in, particularly if the land has been left vacant for some time while waiting for a consent. The overage may need to be drafted so that it is binding on anyone having an interest in the land whether derived from the granter or not. For example, restrictive covenants remain binding on the land even in the hands of a squatter.

**Realisation of Value**

The alternative approach is to provide that when cash accrues to the landowner that will trigger the payment of overage. Normally, it will not be any sale because the parties usually do not intend that a simple increase in current use value will by itself trigger overage. That is not invariably the case and sometimes the parties may agree that a straightforward resale at an increased price for whatever reason will trigger a payment to the recipient.

Note: To avoid the possibility of further planning permission at a later stage, a new base value may be considered to calculate the payments. This will be based on the former betterment value with the overage payments.

**INTERPRETATION OF OVERAGE CLAUSES**

**Walker v Kenley [2008] EWHC 370**

In this rather startling case, overage was payable if 'residential flats' were built upon land. The buyer of the land who was bound by the overage wished to build holiday flats on the land. The question for the High Court was whether holiday flats fell within the meaning of residential flats, thus triggering the overage payment.

Quite surprisingly, it was held that the term 'residential flats' suggested a degree of permanence, i.e., residence as a dwelling, and that this did not include holiday homes: no money was, therefore, payable.

This case is a timely reminder of the need to clearly specify the event, which triggers the overage payment. With the benefit of hindsight, it would have been much better to merely refer to 'flats' without the prefix of residential. It may also, however, be asked whether this decision may be transposed into other areas of law. Does, for instance, reference to a residence or indeed a single private dwelling, in a restrictive covenant, prevent use as an only or principal home but not prevent use as a holiday home. The question must be considered a moot one.

***Renewal Leeds v Lowry Properties [2010] EWHC 2902***

Here, because of low housing expectation, no overage was payable until the last house was sold. The houses were built and 80 were sold but the developer deliberately left the last 4 houses unsold. RL tried to buy them at market value but the developer refused to sell. The court implied a term that the developer should take all reasonable steps to sell and therefore the overage was payable. It is suggested that there should not be reliance on implied terms and that such matters should be expressed.

Whether this case would be decided in the same way post the Supreme Court cases of ***Arnold v Britton [2015] UKSC 36*** *and* ***Marks & Spencer v BNP Paribas Securities Services Trust Company (Jersey) Ltd & Anor [2015] UKSC 72*** where the courts held that implied terms would not be allowed to re-write express wording is debatable.

***Harris v Berkeley Strategic Land Ltd [2014] EWHC 3355 (Ch)*** Here 60 flats for use in a care home and 15 units of sheltered accommodation constituted residential accommodation by reference to the physical character of the land and the fact that it was within current planning permission. Overage therefore had to be paid.

In ***Groveholt v Hughes [2012] EWHC 3351 (Ch*)** it was held that purchase money that was not ascertained at the date that the person who was subject to the overage went into liquidation would not be payable.

In ***Walton v Staffordshire County Council [2013] EWHC 2554*** the case involved a former school playing field. The value of the land in calculating the uplift was based on an assumption that there was no planning permission. The court held that the recommendation of the planning officer and a resolution of the planning committee that planning permission would be granted should also be disregarded.

***Sparks v Biden [2017] EWHC 1994 (Ch)****,* here there were no express provisions as to the time in which properties would be sold to trigger the overage payments. The courts implied that the person subject to the overage would endeavour to sell within a reasonable time.

***Loxleigh v Dartford Borough Council [2019] EWHC 2063***

Here overage was triggered by the obtaining of detailed planning permission. The Court decided that this meant that when reserved matters in relation to outline planning permission were agreed the payment was due.

**OVERAGE CHARGES**

The final type of overage that will be looked at is by way of a charge.

The overage works by the grantor giving a charge to secure the amount of overage payment. Nothing occurs until the trigger event, e.g. planning consent, occurs. The charge will then automatically secure the payment. If the payer does not pay, the recipient can sell the land and take payment out of the proceeds. He will have the same rights and remedies as any other mortgagee.

**Future Payments**

The fact that the overage cannot be ascertained at the time the arrangements are made is not fatal. See e.g. ***Multiservice Bookbinding v Marden [1979] Ch 84*** where an amount payable by reference to the Swiss Franc was valid, and also ***Nationwide Building Society v Registry of Friendly Societies [1983] 3 All ER 296*** where index linking of a charge was accepted.

**Priority**

The overage owner will require priority of payment over other charges. In theory any other charge will be based on current use value whereas the overage charge is based on any enhanced development value. However, as the two are difficult to separate subsequent mortgagees may be reluctant to accept an overage charge with priority. This may mean that overage charges are of less importance in relation to residential properties and properties where financing is required. With this proviso, in registered land, priority would be based on the date of restriction and there is no distinction between legal and equitable charges.

However, legal charges have the benefit of enhanced remedies as the power of sale may automatically arise and become exercisable without the need to apply to court.

To satisfy the lender there would have to be a provision whereby priority is given to a subsequent charge. Typically, there may be provision that such a charge would be consented to if reasonable. An example of an unreasonable refusal of consent might be where the charge is used for a collateral security.

**COMMUNITY INFRASTRUCTURE LEVY**

The Community Infrastructure Levy is a new planning charge, introduced by the Planning Act 2008. It came into force on 6 April 2010 through the Community Infrastructure Levy Regulations 2010. Development may be liable for a charge under the Community Infrastructure Levy (CIL), if the local planning authority has chosen to set a charge in its area.

**Who may charge the levy?**

The Community Infrastructure Levy charging authorities (charging authorities) in England will be district and metropolitan district councils, London borough councils, unitary authorities, national park authorities, The Broads Authority and the Mayor of London. In Wales, the county and county borough councils and the national park authorities will have the power to charge the levy.

In London, the boroughs will collect the Mayor's levy on behalf of the Mayor.

**What development is subject to a charge?**

Most buildings that people normally use will be liable to pay the levy. But buildings into which people do not normally go, and buildings into which people go only intermittently for the purpose of inspecting or maintaining fixed plant or machinery, will not be liable to pay the levy. Structures which are not buildings, such as pylons and wind turbines, will not be liable to pay the levy.

Any new build – that is a new building or an extension – is only liable for the levy if it has 100 square metres, or more, of gross internal floor space, or involves the creation of one dwelling, even when that is below 100 square metres. Any residential property will attract the levy regardless of the internal floor area, although it will only apply to large residential extensions and annexes of 100 square metres or more. The exceptions are self-builds, the new Government First Homes which was introduced in July 2021 and allows first time buyers with a local connection and/or keyworkers to get onto the property ladder. Social and charitable housing is also excepted with provisos.

While any new build over this size will be subject to CIL, the gross floor space of any existing buildings on the site that are going to be demolished may be deducted from the calculation of the CIL liability. Similarly, the gross floor space arising from development to the interior of an existing building may be disregarded from the calculation of the CIL liability. The deductions in respect of demolition or change of use will only apply where the existing building has been in continuous lawful use for at least six months in the 3 years prior to the development being permitted.

**What will the charge be levied on?**

The Community Infrastructure Levy must be levied in pounds per square metre of floor space arising from any chargeable development. The charge will be applied to the gross floor space of most new buildings or extensions to existing buildings.

**How will the charge be levied?**

The trigger is commencement of development, though payment may be made in instalments if the charging authority has a payment by instalments policy.

**Overage and CIL**

CIL is a form of overage based on betterment value. It is essential for the person subject to overage to pay net of any CIL. The same would apply to conditional contracts and options.

The Government in England is planning a major overhaul of this area but in July 2021 it seemed to back pedal on plans for the replacement of CIL and s.106 agreements and replace them with a nation wide development charge. Nevertheless, such a possibility might be provided for.