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RESTRICTIVE COVENANTS IN FREEHOLD LAND

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Richard Snape

www.LawSureInsurance.co.uk

TEL: **0345 557 0845**
EMAIL: enquiries@lawsure.co.uk

ABOUT RICHARD SNAPE

Richard has been the Head of Legal Training at Davitt Jones Bould (DJB) since 2002. He speaks at numerous courses for law societies all over the country, various public courses, in-house seminars within solicitors' firms 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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Lecture is aimed at: Property professionals and fee earners involved in both contentious and non-contentious property work

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RESTRICTIVE COVENANTS

Restrictive covenants are of dubious value for various reasons. Long term, in particular, they may be discharged under **S.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 Lands 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.

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, but on different grounds, 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. Subsequently, Alexander Devine agreed to discharge the covenants in return for a monetary payment and Housing Solutions applied to discharge the covenants. In the case of ***Housing Solutions v Bartholomew Smith [2023] UKUT 25*** the original land owner objected to the discharge but were found to be preventing reasonable use of the land and the covenants were discharged.

Contrast this with ***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.

See ***Wrotham Park Estates v Parkside Homes [1973] 1WLR798.*** 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.

In ***Re Coplestone and Norton [2021] UKUT 18*** the Tribunal stated that not merely the benefitted land but also other land owned by the beneficiaries of the covenants could be taken into account in deciding not to discharge the covenants.

Re ***Holden [2018] UKUT 21*** here there was a covenant not to carry out a trade or business. The applicant wanted to convert their garage to a dog grooming parlour. It was held that the covenants were not obsolete as this required material change in character of the locality. The covenant did prevent reasonable use of the land, but as it had been deliberately flouted it would only be modified to allow current and not general business use.

HAE Developments v The Croft Ealing [2022] UKUT 120. The original land with the benefit of the covenants was a substantial house but was now 11 flats and 22 maisonettes. Neighbouring land had

planning permission for a three-storey building of 8 flats. The covenants were obsolete and prevent a reasonable use of the land. They were discharged and the fact that privacy and light would be affected by the building was irrelevant to the covenant.

Dickinson v Adams (2022) There was a covenant against use other than as a single dwelling. The applicant wished to knock down a bungalow and build two houses on the land. The covenant was held to prevent reasonable use of the land and there would be no injury to the beneficiary. The covenant was discharged.

Collins v Howell [2022] UKUT 72. H owned a 16 acre former farm house and land. When they purchased the land in 2003 they imposed on neighbouring land a covenant that it should not be used other than for grazing. C purchased the neighbouring land and obtained planning permission for a manege. **S.84 (1B)** state that the tribunal should take into account any development plan and ascertainable pattern for grant or refusal of planning permission. Nevertheless, the Upper Tribunal decided that discharge of the covenant would alter the nature of the benefitted land as a rural setting and in relation to privacy. They refused to discharge the covenant.

Note: Local authorities can also use **S.203 of the Housing and Planning Act 2016** to discharge restrictive user covenants. For this to apply there must be

a) planning consent for building or maintenance work;
b) the land has become vested or acquired by a specific authority or appropriated for planning purposes;
c) the authority could have compulsorily acquired the land;
d) the building or maintenance work is for a purpose related to the appropriation or acquisition of the land.

Re Cammiade [2023] UKUT 96 here there were four flats in a block all held on 999 year leases. A previous deed of covenant, presumably relating to mutually enforceable covenants, have been lost there was a substitution deed resighted, but no information was available. The following restriction appeared on the register, 'except under the order of the Registrar no transfer or lease is to be registered without the consent of the lower lessor or other proprietor of registered title number SY245193' A new title number had been allocated for the lower flat.

Under S.84 (12) where there is a lease of 40 years or more with more than 25 years unexpired application may be made to the tribunal which may modify or discharge a covenant where there is a restriction as to use thereof or building thereon. It was held that this did not allow jurisdiction in relation to completion if a disposition by legislation in any case such a restriction would be subject to consent of the beneficiary which cannot be unreasonably withheld.

Enforceability After a Breach has Occurred

In the case of ***Hepworth v Pickles [1900] 1 Ch.108*** the Court recognised that where a breach had been allowed to occur without taking steps to enforce for 24 years, the covenant was not enforceable. Based on this the Lenders' Handboook states that if a breach has not been enforced for 20 years, the solicitor may take a view or take out insurance. On a reading of the Limitation Act 1980, enforcement is probably not possible after 12 years.

Section 610 Housing Act 1985

Lawntown Ltd v Camenzuli (2007) EWCA 949. This case, which specifically discusses a little used method of modifying restrictive covenants: **S.610 Housing Act 1985** as amended. Although section 610 provides for a totally separate regime for modifying restrictive covenants then the much more familiar process of a Lands Tribunal ruling, under the much more frequently used **S.84 Law of Property Act 1925** it is submitted that it may be relevant in this area also.

The case involved a large dwelling house in Streatham in London. The property was subject to a restrictive covenant not to use land other than as a single private dwelling Lawntown Ltd purchased the house and obtained planning permission from Lambeth Borough Council to convert the property into flats. The owners of a neighbouring property, Mr and Mrs Camenzuli, objected to this and tried to enforce the benefit of the restrictive covenant and prevent the development. **S.610 of the Housing Act 1985** provides that:

"(a) … the Housing Authority or a person interested in any premises may apply to the County Court where, owing to changes in the character of the neighbourhood in which the premises are situated they cannot readily be let as a single dwellinghouse but readily be let for occupation if converted into two or more dwellinghouses, or

(b) planning permission has been granted under Part III of the Town and Country Planning Act 1990 (general planning control) for use of the premises as converted into two or more separate dwellinghouses instead of a single dwellinghouse and the conversion is prohibited or restricted by the provision of the lease of the premises or by a restrictive covenant affecting the premises or otherwise…"

Here it was accepted by the Court of Appeal that as the planning authority had granted planning permission, there was a shortage of housing in the locality and, importantly, a large number of the dwellings had already been converted into flats, the covenants should be discharged.

This case involved the rather limited but important area of converting dwellinghouses into flats and the regime is quite distinct from **S.84 Law of Property Act 1925** but it is submitted that a similar argument may be used to discharge or modify covenants by the Lands Tribunal. In terms of development land, the most obvious reason for discharging such covenants is that they are obsolete, and/or that they impede reasonable user and do not secure any practical benefit to anybody entitled to enforce the covenants under **S.84(i)(a) and (b) of the Act**. There must be a strong argument generally that covenants which prevent development which the Planning Authority has already agreed to and when we are told that there is a shortage of housing, might be discharged "compensation" may be paid by the Lands Tribunal to the beneficiary who loses the right to enforce the covenant but this will usually be based on the reduced value of the land as opposed to a percentage of the increased value of the burdened property based on ***Stokes v Cambridge County Council 1968*** principles. This may be fairly limited. Note also that there is another possible means of questioning covenant building works without the need to pay any compensation to the beneficiary whatsoever.

DISCHARGE OF RESTRICTIVE COVENANTS

Graham v Easington District Council (2009)

The Lands Tribunal allowed discharge of a restrictive covenant under **S.84 of the Law of Property Act 1925** as not securing any practical benefits where the beneficiary of the covenant was a local authority whose planning department had already given planning permission for development. The land, which was the subject of the Lands Tribunal application, was situated in the north east of England. It was on the site of a former colliery in Horden in County Durham. The Local Authority, Easington District Council, had sold the land in August 2000 and had imposed restrictive covenants against use other than as a coach depot and an associated residential bungalow, which would be used in conjunction with the coach depot. The bungalow had been built but no coach depot had subsequently materialised.

Soon afterwards a planning application to build housing on the site was made. The Planning Officer objected, on the grounds that the area including the depot had been earmarked for the industrial regeneration within the locality, and, if residential housing was allowed, this would detract from the possibility of industrial development. Nevertheless, the Planning Authority gave planning permission for thirty houses.

Planning permission would, of course, be of little worth unless the covenants were discharged and the local authority Estates Department refused to do this.

This led to an application to **The Lands Tribunal under S.84(1) Law of Property Act 1925**.

S.84(1) provides that a covenant may be discharged on the following grounds: -

"(a) By reason of changes in the character of the property or the neighbourhood or other circumstances the restriction ought to be deemed obsolete.

(aa) The restriction impedes reasonable use of the land and does not secure to the persons entitled to the benefit any practical benefits of substantial value or the restriction is contrary to public interest. It may be the case that if the owners' interest in the land is only in relation to a monetary payment there may be no practical benefit.

(b) The person entitled to the benefits of the restriction has agreed either expressly or by implication for the covenant to be discharged.

(c) The proposed discharge or modification will not injure the person entitled to the benefit."

In the current case, the Tribunal accepts that a covenant might be obsolete even though, as here, it was less than eight years old. However, the ground was not applicable here.

However, ground (aa) the covenant prevents reasonable use of the land and does not secure to the person entitled any practical benefits was highly relevant. In particular, the argument was accepted that, as the local authority Planning Committee had given planning permission, and as there was a perceived need for affordable housing in the area, the District Council were preventing reasonable use of the land in failing to discharge the covenants.

Moreover, it also followed that ground (d) was also applicable in that the authority would suffer no loss or injury should the covenant be discharged.

The Lands Tribunal may award compensation to the beneficiary of a restrictive covenant which has been discharged. The Local Authority wanted compensation based on ***Stokes v Cambridge [1968]***

principles, i.e., one third of the enhanced value of the land, which amounted to some £272,000. However, the Tribunal accepted that, following ***Stockport Borough Council v Alwiyah Developments [1983],*** this was not a valid means of assessing compensation in the present case. In the Stockport Borough Council case, compensation for the discharge of restrictive covenants which allowed the building of 42 houses on open land was assessed by reference to the reduced value of neighbouring land. This was valued at £2,250.

However, neither was compensation on this basis valid in the present case as the Local Authority had suffered no loss and would, therefore, receive no compensation. Instead, the Tribunal awarded compensation based on the difference in value of the land with and without the restrictive covenants at the time of the original purchase in August 2000. This amounted to £23,500.

The decision was confirmed by the Court of Appeal. However, they stated that the fact that a planning authority has given planning permission is a strong pointer to the covenants preventing the reasonable use of the land but is not conclusive.

Conclusion

This rather startling proposition that a Local Authority Planning Authority, by giving planning permission for a particular activity, most notably residential development, might tie the hands of the Estates Department in relation to the discharge of local authorities must be noted by all, both in the public and the private sector.

It might be envisaged, in particular, that a large number of covenants may be open to being questioned from covenants, as here, preventing major development down to more everyday residential covenants against, for instance, use other than as a single private dwelling only, and consent to plans and alterations covenants.

Specifically, in ***R v Braintree District Council ex parte Halls [2000]***, the Court of Appeal held that a local authority could not charge the owner of a former council house purchased under the Right to Buy provisions in Schedule 6 of the Housing Act 1985 for discharge of a restrictive covenant preventing use other than as a single private dwelling. This, as an indirect form of clawback, was ultra vires the authorities' powers. This has always led to something of a dilemma, in that a local authority may be tempted, therefore, not to discharge the covenant at all. In spite of this a local authority may enforce if there is a nuisance and annoyance covenant and damages or an injunction may be available here (see later).

In these circumstances, ***Graham v Easington District Council 2009*** may, it is submitted, be effectively used and such covenants may, in the future, be of little worth.

In terms of compensation, if there is no loss suffered to the beneficiary of the covenant, then compensation will be assessed as being the reduced value of the land due to the covenants existing. However, remember that this will be assessed at the time of imposition. In the present case this was less than eight years previously and compensation was only £23,500. Some of the more antiquated covenants may be of little worth whatsoever.

If, in the future, a local authority wishes to enforce user covenants as a means of development planning on their disposals, it might be more effective to impose positive clawback, for example, on planning permission being obtained 90% of the enhanced volume of the land will be paid to the authority.

This cannot be used in relation to council house right to buy, because of the ***Braintree*** case above, but may be effective elsewhere.

Shaviram Normandy v Basingstoke and Deane Borough Council [2019] UKUT 256. Here a long lease stated that the premises could only be used for commercial purposes. Conversion into residential flats was possible through permitted development however, the landlord refused to surrender the covenants. A tenant can apply to the Lands Chamber to discharge covenants under **S.84 (12) Law of Property Act 1925** if the Lease is for a term of more than 40 years and at least 25 years has expired. Here the Upper Tribunal held that rentals would not be affected by a change from commercial to residential use and the covenants did not secure any practicable benefits and were contrary to public policy as there was a need for housing.

A requirement the landlord give their licence for underletting was not discharged as the head rent was dependent on the underletting rents and the landlord had an interest in who the underlessees were.

In terms of enforcement of leasehold covenants consider the case of ***Sequent Nominees v Hautford [2019]***.

In relation to consent to make a planning application the Supreme Court have decided, in the case of ***Sequent Nominees v Hautford [2019]***, the landlord can take into account their own business needs even if the tenant is unduly prejudiced. The Supreme Court also stated that the guidance in ***International Drilling Fluids v Louisville [1986] Ch.513*** was correct.

Sequent Nominees v Hautford [2019] UKSC 47 Here consent to a change of use could not be unreasonably withheld and there was also provision the tenant would not apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld. The premises consisted of a six-storey building with 70 years remaining on the lease. The tenant ran an ironmonger's business from the basement. He wished to obtain planning permission to let out the upper storeys as residential units. The landlord objected as if a tenant is not in occupation for business purposes, they may be a qualifying tenant for the purpose of the Leasehold Reform Act 1967 and could apply for enfranchisement of the premises. In ***Bickel v Duke of Westminster [1977] 1QB 517*** it was held that the landlord's fear of enfranchisement was a reasonable ground for refusal of consent to assignment. The Supreme Court have now reversed the Court of Appeal decision. It was held that although residential use was not a breach of user covenants the requirement for consent to a planning application must be read together with the user covenants. It was reasonable to refuse consent because of the possibility of enfranchisement. The Supreme Court expressly accepted the guidance in ***International Drilling Fluids*.**

THE TOWN AND COUNTRY PLANNING (AMENDMENT) (ENGLAND) ORDER 2020

The town and country planning regulations 2020 (ENGLAND ONLY)

These provisions apply to England only. In 2018 the Welsh Government announced a review of planning use, but we have heard nothing since.

Part of these came to force on 1 August 2020. Purpose built blocks of flats will be able to build two additional storeys of no more than 7 metres in extent and the new building must be no more than 30 metres. This is subject to prior approval which can be refused because of flooding, external appearance, natural light, traffic and highway impact or defence assets.

From 1 September 2020 Class A1, shops, A2 financial and professional services, A3 restaurants and cafes and B1 business will all be subsumed in a new Class E. Class E will include the following:

1. the display or retail sale of goods, other than hot food, principally to visiting members of the public,
2. the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises,
3. the provision of the following kinds of services principally to visiting members of the public
    a. financial services,
    b. professional services (other than health or medical services), or
4. any other services which it is appropriate to provide in a commercial, business or service locality,the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner, a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public, for:
    a. an office to carry out any operational or administrative functions,

    b. research and development of products or processes, or
    c. any industrial process.

IN ADDITION:

Drinking establishments, takeaways (the old use classes A4 and A5) are now added to the list of sui generis uses along with cinemas and live performance venues. A change of use involving those uses still requires planning permission.

There is a new Class F1 use class applies to residential and non-residential institutions; and

A new Class F2 use class applies to community uses.

Note: These regulations underwent judicial review. On 18 November 2020 the High Court threw out the claim. The Court of Appeal have now also thrown out the claim.

Note: On 31 March 2021 the Government made the Town and Country Planning General Permitted Development (Amendment) (England) Order 2021 in front of Parliament. It comes into force on 1 August 2021 and introduces a new Class MA (Mercantile Abode). This will allow Class E to be converted into Class C3 dwellings subject to prior approval. It will only apply to buildings with a floor area of 1500 sq metres or less. They will have to have commercial use for at least two years and have been vacant for at least three months. The provisions will not apply to listed buildings, World Heritage Sites, sites of special scientific interest or national parks. In

relation to conservation areas, an impact assessment must be made if the ground floor is to be altered.

Due to the above, it becomes essential to include and enforce restrictive user covenants both in freehold and leasehold land.

ENFORCEABILITY OF RESTRICTIVE COVENANTS

Although the burden of a covenant cannot run at law, it may run in equity providing certain requirements are met. The binding effect of a restrictive covenant was first recognised by Lord Cottenham LC in the seminal case of ***Tulk v Moxhay [1848].***

The Benefit Running

Equity provides three ways in which the benefit may pass – annexation, assignment and under a building scheme.

Whether or not the benefit of a restrictive covenant has been annexed is a question of construction. However, purely personal covenants cannot run; therefore, the restrictive covenant must be made with the dominant owner as the owner of the dominant land, not just as an individual.

Thus, in ***Renals v Cowlishaw [1878] 9 Ch D125***, where a purchaser covenanted with the vendors and "their heirs, executors, administrators and assigns" not to build on the land conveyed, it was held that the word "assigns" meant merely assignees of the covenant as a separate entity from the land. Therefore, upon a later conveyance of the land without mention of the covenant, it did not pass.

However, in ***Rogers v Hosegood [1900] 2 Ch.388*** where a covenant was expressed to be for the benefit of the dominant owners, "their heirs and assigns and others claiming under them to all or any lands adjoining", it was held to run with the land, the benefit of the covenant passing with the subsequent conveyance of the land.

As to how much of the conveyed land the covenant must benefit, the approach of the courts has been relaxed over recent years. In ***Re Ballard's Conveyance [1937] Ch.473*** a covenant was said to be for the benefit of an estate of 1,700 acres. In fact, the covenant could only benefit a small portion of the estate, and the court, refusing to sever the covenant from the whole estate and attach it instead to only a part of it, held that the covenant could not run on the sale of the estate because it did not benefit the whole of the 1,700 acres.

This attitude was modified in ***Wrotham Park Estate Co Ltd v Parkside Homes [1974]***. It was held there that where the covenant benefits a substantial part of the dominant tenement, that will enable it to run. There is a presumption that the covenant does benefit the land, unless it is very clear that it is not capable of doing so.

The latest case on this point is ***Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 WLR 594*** where Brightman L J stated that:

"…..if the benefit of the covenant is on a proper construction of a document, annexed to the land, prima facie it is annexed to every part thereof, unless the contrary clearly appears".

Thus, once a covenant is annexed, it benefits each and every part of the dominant land.

See also ***Bath Rugby Ltd v Greenwood [2020] EWHC 2662***. This is another case involving local residents trying to stop the development of the Recreation Ground in Bath. The land was subject to 1922 restrictive covenants preventing a nuisance or annoyance on the land. The covenants were stated to be for the benefit of the covenantee, their successors in title and assignees. Although the covenant predated the **Law of Property Act 1925** and was not automatically annexed to the land through statute (see below), use of the word 'title' gave rise to an express annexation. The other issue was trying to identify the benefited land. The Court decided that on its facts the benefited land would be the neighbouring Bathwick estate and the covenants were enforceable. The Court of Appeal passed

judgment on the case in December 2021***. [2021] EWCA 1927***, they held that there was no clear annexation of the covenant to the land. The beneficiaries were stated to be the inhabitants of the Bathwick estate. The High Court stated that it must be inferred that the beneficiaries would be adjoining owners of land within the Bathwick estate. The Court of Appeal held that this could not be inferred and the benefitted land was not clearly identified. The covenants were not therefore binding.

Statutory

S.78 LPA 1925 automatically annexes the benefit of a covenant to successors in title - this will only apply to covenants created from 1 January 1926 onwards.

It appears from ***Federated Homes v Mill Lodge [1980] 1 WLR 594*** that the effect of this is to automatically pass the benefit of a restrictive covenant. The case has been accepted without argument in ***Robins v Berkeley Homes (Kent) [1996] 2EGLR 75***; however, in the absence of a House of Lords decision, practitioners would be wise to include an express annexation and not merely rely on ***S.78*** and statutory annexation.

However, in ***Roake v Chadha [1984] 1WLR40***, Judge Paul Baker QC held that **S.78** could not be applied where the original covenanting parties had expressly stipulated that their covenant should "not enure for the benefit of any subsequent purchaser of any part of the … estate unless benefit…shall be expressly assigned". Baker J felt that such an unambiguous term could not be construed in such a way as to render the covenant attached to the land, but only to the original parties.

More Problems in Interpreting Restrictive Covenants

City Inn (Jersey) Ltd v 10 Trinity Square Ltd [2008] EWCA Civ 156

The Court of Appeal confirmed the High Court decision in this important case on the interpretation of restrictive covenants.

The case involved a dispute between two hotels and a restrictive covenant, requiring the consent of the 'Transferor' of land to alterations. It has now been confirmed that the 'Transferor' meant the original transferor and not any successor in title. If successors were intended to obtain the benefit of restrictive covenants then this should have been made clear in drafting.

Presumably, the same would apply to restrictive covenants and their enforceability by subsequent purchasers of the dominant land generally, in which case the decision has major significance in relation to such matters as consents to plans by the Transferor.

At first glance, the case seems to fly in the face of previous case law in relation to the interpretation of ***Section 78 of the Law of Property Act 1925*** whereby the benefit of restrictive covenants is "deemed to be made with the covenantor, successors in title and persons deriving the title under him or them."

This was interpreted by the Court of Appeal in the case of ***Federated Homes v Mill Lodge Ltd [1980]*** and in ***Robins v Berkeley Homes (Kent) Ltd [1999]*** as automatically annexing the benefit of a restrictive covenant to the land and, in ***Roake v Chadha [1985]*** the High Court held that the only way in which the benefit of a restrictive covenant would not be annexed to the land was if the document creating the covenant either expressly or by implication made the covenant personal.

It must be assumed, therefore, that the ***City Inn*** case is, to some extent, dependant on its facts and may be of little use outside the area of consents to alterations, and, presumably, consents to plans by a named individual. Nevertheless, it is a highly significant case.

In ***Margerison v Bates [2008] EWHC 1211 (Ch)*** the Court held that a consent to plans covenant which referred to a named individual only was extinguished on the death of the individual.

In ***Tod-Heatley v Benham [1888] Ch. D 81*** The Court accepted that a nuisance or annoyance covenant could be used to prevent building work. Moreover, an annoyance was broader than a nuisance and a breach did not have to constitute common in law nuisance. In ***Davies v Dennis (2009) EWCA 1081*** there was held to be a breach of covenant against committing a nuisance when an extension was built near to a neighbouring boundary. The three storey extensions with planning permission obscured the neighbour's view of the River Thames. The Court of Appeal confirmed this decision. See also ***Bath Rugby v Greenwood*** above. Damages and/or an injunction may be available in relation to breach of a nuisance and annoyance covenant.

See also ***Di Silvio v Sharp [2022] EWHC 909*** where leave to appeal was refused in relation to a declaration that a nuisance and annoyance covenant would not be breached by the building of an extension. The test is an objective one, would a reasonable person find the work an annoyance and in this case they would not.

Contrast ***William Aldreds Case (1610):*** views cannot be protected by means of an easement. According to the present case, however, loss of views may be in breach of an annoyance covenant.

Caradon District Council v Paton [2000] 33 HLR 34 a private dwelling covenant in a former council house bought under Right to Buy was breached by granting a series of short-term lettings. See also ***Triplerose v Beattie [2020] UKUT 180*** Airbnb also amounted to a breach of a private dwelling covenant as well as a breach of a non-business user covenant.

Re Hutchinson [2009] UKUT 182 - A transfer created restrictive covenants which were expressed to be for the benefit of the retained land. The only other reference to such land was in part of a deed of gift some 15 years previously which had been lost. As the beneficiary could not show the retained land, the covenants were unenforceable. In ***Coventry School Foundation v Whitehouse [2012] EWHC 235*** the High Court was allowed extrinsic evidence outside the contract to identify the benefitted land. The case was decided on different grounds by the Court of Appeal ***[2013] EWCA 885***. The Court held that a nuisance and annoyance covenant was not breached by the building of a school on playing fields. The increased traffic at certain times of the day was a part of every day life and there must be a degree of give and take.

Note: HMLR will not state where the benefitted land is and if original documentation is lost many such covenants must be unenforceable.

89 Holland Park (Management) Ltd v Hicks [2020] EWCA 758 – HPML was the freeholder of a large Victorian building which was divided into five flats all of which were held under long leases. A neighbouring piece of land was subject to the freeholder giving consent to development which was not to be unreasonably withheld.

The Court of Appeal held that the freeholder was entitled to take into account the interest of the leaseholders as well as its own interests. The freeholder could also raise valid objections on aesthetic grounds even though this would not affect the value of the reversion.

Assignment - of a chose in action

A Building Scheme or Scheme of Development

A building scheme, or scheme of development, arises where a property developer who intends building an estate of houses, wishes to impose restrictions on the purchasers of each of the plots of

land in order to retain the overall characteristics of the estate and to maintain the values of the properties thereon, for the mutual benefit of all purchasers. In such situations, equity will enable the restrictive covenants which relate to each and every plot on the estate to be enforced by all who currently own any land within the scheme. The principle applies not only to the usual housing development, but also to units in a shopping precinct according to the Canadian case ***of Re Spike and Rocca Group Ltd [1980].*** In ***Williams v Kiley [2002] EWCA 1645*** a building scheme was inferred and was used in a shopping arcade as a means of mutually enforcing user covenants.

Note: In ***Sugarman v Porter [2006] EWHC 331*** it was held that for a scheme to apply there must be an expectation, and not merely a suspicion, of its existence.

Note: Building schemes may affect the value of land and should be reported to a mortgage company valuer.

The essential elements of a building scheme were laid down in ***Elliston v Reacher [1908] 2 Ch.374*** by Parker J. The requirements were strict:

a) both the claimant and defendant must derive title from a common owner;
b) such common vendor must have laid out a definite scheme of development prior to the sales of the plots now owned by the claimant and defendant;
c) there was an intention to impose a scheme of mutually enforceable restrictions upon all purchasers of land within the development and their successors in title;
d) every purchaser bought his land knowing of the scheme and intending to be bound by the mutually enforceable restrictions.

To these four requirements, a fifth – that the area affected by the scheme must be clearly defined – was added in ***Reid v Bickerstaff [1900] 2 Ch.305***.

In ***Birdlip Ltd v Hunter & Anor [2016] EWCA Civ 603*** the Court of Appeal limited the existence of building schemes. The land which is subject to mutual obligation must be clearly defined and it must be made clear that the parties have a mutual benefit and suffer a mutual burden. Preferably this should be referred to in the deeds.

In ***Khoury & Anor v Kensell [2018] EWHC 217 (Ch)*** there was found to be no evidence that three dwellings were the subject matter of a building scheme.

In ***Dobbin v Redpath [2007] EWCA 570*** the Court of Appeal decided that the normal principles applicable to the discharge of restrictive covenants as being obsolete do not apply to building schemes which are comparatively much more difficult to discharge.

Following on from this, in the case of ***Turner v Pryce [2008] EWHC B1*** the High Court held that a restrictive covenant against using land other than as a single private dwelling, enforced by means of a building scheme which applied generally to the locality, would not be discharged by the Lands Tribunal as being obsolete even though many other such covenants within the area had already been breached with impunity and the character of the neighbourhood had changed. This may be contrasted with ***Lawntown Ltd v Camenzuli [2007]*** above whereby a single private dwelling covenant was discharged as preventing reasonable use of land. Of particular bearing in the case was the fact that much of the housing in the area had already been converted into flats, and locality had, consequently changed since the covenants were imposed.

Note: The UK Lenders Handbook requires the conveyancer to look at Part 2 of the Handbook to see whether the mortgage company should be informed of restrictive covenants. Mutually

enforceable covenants, especially in relation to consent to plans and alterations, can devalue land and the matter should be referred to a valuer.

Note: Estate management schemes - In ***Zenios v Hampstead Garden Suburb Trust Ltd [2011] EWCA Civ 1645*** it was held that an estate management scheme was binding and would not be discharged as preventing reasonable use of the land. Moreover, compensation would not be sufficient to allow discharge of the covenant.

Passing in Equity: Burden

Note: Local Authorities can use either **S.609 of the Housing Act 1985** or **Section 33 of the Local Government (Miscellaneous Provisions) Act 1982**, to enforce covenants even if they do not own any neighbouring land which is benefitted. Since Central Government bodies and bodies such as the National Trust and Church of England have similar powers.

But ***S.609 Housing Act 1985*** allows local authorities to enforce covenants in relation to disposals to which the Act applies. However, in ***Cantrell v Wycombe District Council [2008] EWCA Civ 866*** this only allows the enforceability of restrictive, and not positive, covenants.

Section 33 may be used to enforce positive covenants, but only if the transfer document expressly refers to its use, or its predecessor in the ***Housing Act 1974***.

Section 33 provides that the provisions of section 33 apply if a principal council and any other person are parties to an instrument under seal which (a) is executed for the purposes of securing the carrying out of works on land in the council's area in which the other person has an interest or (b) is executed for the purpose of regulating the use of or is otherwise connected with land in or outside the council's area in which the other person has an interest, and which is neither executed for the purpose of facilitating nor connected with the development of the land in question.

In order for the burden to run in equity four requirements must be satisfied:

(1) The covenant must be negative in nature, such as a covenant not to build on land, or not to use the land for business purposes. See ***Austerberry v Oldham Corporation [1885] 29 Ch D750 and Rhone v Stephens [1994] 2AC 310***. A covenant may be worded in a negative way, yet be positive in fact. Positive covenants run neither at law nor in equity.

(2) There must be a dominant and servient tenement. Both the covenantee and the covenantor must own an estate in their respective tenements. The Court of Appeal, in ***London County Council v Allen [1914]*** held that the claimant was unable to enforce a restrictive covenant against the covenantor's successor in title, as he (the claimant) did not have any estate in the dominant land. The dominant land must be reasonably close to the servient tenement:

See also ***Kelly v Barrett [1924] 2 CH 379*** where only the subsoil of the highway was retained, the surface belonging to the Highways Authority, this was not enough to give rise to a benefited covenant. See also ***North Foreland Limited v Ward***, unreported, where it was accepted that retention of private roads would not be enough to support a covenant.

(3) The covenant must touch and concern the dominant land that is it must benefit the land. It was stated in ***Re Gadd's Land Transfer [1966]*** that a "benefit" must be "something affecting either the value of the land or the method of its occupation or enjoyment". We have already seen the extent to which the dominant land must be benefited.

(4) The covenant must have been intended to run with the covenantor's land. Therefore, a covenant which is phrased in such a way as to bind the covenantor only will not run with the land. In the absence of such a limitation, however, it will be assumed that the burden of the restrictive covenant **was** intended to run with the covenantor's land.

For restrictive covenants created after 1 January 1926, ***S.79(1) LPA 1925*** provides that, unless a contrary intention is shown, a covenant

…relating to any land of a covenantor or capable of being bound by him, shall 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 shall have effect as if such successors and other persons were expressed.

In ***Morrell's of Oxford v Oxford United Football Club [1998] Ch.459,*** some covenants were expressed to pass with the land. The current covenants, in relation to sale of alcohol, did not state this and it was held, therefore, not to pass with the land.

In addition, and most importantly, a purchaser of land which is subject to a restrictive covenant may take free of it if, as with any equitable right, he is not sufficiently bound by it. In **unregistered land** the covenant, if created on or after 1st January 1926, must be registered as a **D(ii)** land charge if it is to bind a purchaser. Registration is deemed to constitute actual notice of the covenant: ***S.198 LPA 1925***. If not registered, a purchaser for money or money's worth will be free of the charge regardless of his actual state of mind: ***S.198 LPA 1925***. If the covenant was entered into prior to 1926, then whether it binds will depend on whether or not the purchaser had actual, constructive or imputed notice of it.

In registered land the covenant must always be registered.

HMLR on first registration will systematically note all restrictive covenants even if not registered as D (ii) land charges. Ensure that a request is made to take these off the Register. On subsequent transfers a Land Charges search may be desirable to find out if restrictive covenants bound on first registration.

Before insuring against the existence of restrictive covenants, you might wish to check whether the covenant was registered as a land charge on first registration if it was created from 1st January 1926 onwards. In addition, covenants which are obsolete could be discharged under ***section 84 Law of Property Act 1925.***