Restrictive Covenants and Injunctions: How to understand the former and avoid the latter

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1. Let us suppose that a developer client rings you up on a busy Tuesday afternoon in May. He is not happy. He tells you that the arrival of his construction vehicles on the development site has elicited a letter from the owner of certain adjoining land in which it is alleged that the development would constitute a breach of a restrictive covenant. If construction work does not cease within 24 hours of the letter, the adjoining owner is going to apply for an injunction to restrain further progress. After turning the air a little blue, the client asks you to tell him about options and merits and, in any event, to "deal with it".

2. What do you do now? The purpose of today's talk is to look, from a practical perspective, at the thought processes that you would go through when advising a client in these circumstances. The following '10 point plan' might serve as a handy checklist.

(1) Where is the conveyance or transfer?

3. The first thing to do is to get hold of the conveyance or transfer in which the particular covenant was given. It will tell you what the covenant means and by whom and against whom it can be enforced.

4. But what if the conveyance or transfer is not available, can you look at the schedule of restrictive covenants in the charges register instead (assuming your client's land is registered land)? If the instrument really cannot be found, you may have little choice in the matter. But beware: it is by no means unheard of for inaccuracies in the transcription of restrictive covenants to creep into the register. It can in any event be dangerous to attempt to resolve questions of construction of the covenant without seeing the whole instrument. *Morells of Oxford Ltd v Oxford United Football Club* [2001] 1 Ch 459 is a real life example of just that problem. So, if at all possible, start with the

transfer or conveyance itself. Alternatively, if you are having to advise solely by reference to the charges register, advise the client of the attendant risks.

(2) What does the covenant mean?

5. Once you have the conveyance or transfer, you can construe the covenant so as to determine what activities it requires or proscribes. There is no particular magic to this: ordinary canons of construction (*ICS Ltd v West Bromwich Building Society* [1997] UKHL 28 and all that) apply to restrictive covenants.

6. But there are one or two particular problems of interpretation that crop up in relation to covenants that require *consent* to be obtained that you should keep in mind:

(1) *From whom should consent be obtained?* A qualified restrictive covenant will often require consent to be obtained from "the Vendor". But what happens if the land with the benefit of the covenant has since been sold – is consent required from the original vendor or the current owner? The answer to that question will turn on a detailed textual analysis of the conveyance or transfer and the particular context in which the covenant was given. But you will get some help along the way by considering whether particular features that made the difference in some of the decided cases[1] could be said to apply here.

(2) *May consent be unreasonably withheld?* No, if the covenant says, in terms, that it may not be unreasonably refused. But what if the covenant is silent – should a proviso that consent must not be unreasonably refused be implied? As ever, there are authorities that go each way.[2] Just to make matters more complicated, it is possible that the Court may instead imply some more limited duty on the consenter (eg. a duty to act in good faith or not arbitrarily or capriciously[3]).

(3) *What happens if consent can no longer be obtained because the relevant person no longer exists*? Does the covenant go from being a qualified covenant to an absolute covenant or does it simply lapse? Again, this is a question of

[1] *Bell v Ashton* (1956) 7 P & CR 359, *Mahon v Sims* [2005] 3 EGLR 67, *Sugarman v Porter* [2006] 2 P&CR 14 and *Churchill v Temple* [2011] 1 EGLR 73.
[2] See *Pryce v Bouch* (1987) 53 P&CR 257 (no implied term) and *Cryer v Scott Bros (Sunbury) Ltd* (1986) 55 P&CR 183.
[3] See *Mahon v Sims* [2005] 3 EGLR 67

construction in respect of which there are authorities that go each way.[4] Although each case will turn on its own facts, if your covenant is either (a) expressly subject to the proviso that consent should not be unreasonably withheld or (b) so broad in its scope that it would substantially sterilise the land if it became absolute, you are probably looking at a lapsed covenant.

(3) Is the client bound by the covenant?

7. If the client is one of the original covenanting parties, then yes – he's stuck with it.

8. But if your client is a successor to the original covenanting party, things are a little more complicated. In such cases, your first task is to work out whether the burden of this particular covenant 'runs with the land' in equity. You do that by asking yourself these three questions:

(1) *Is the covenant restrictive in nature?* That usually simple enough to work out. But remember: the question is, not whether the covenant is negatively phrased, but whether it is negative in substance[5] – a covenant to maintain Leicester Square "in an open state and uncovered by buildings" sounds positive but is in substance a negative covenant.[6]

(2) *Is there land benefitted ('touched and concerned') by the covenant?* Cutting through the archaic language, the question is whether "the land to which the benefit purports to be attached [can] be reasonably regarded as capable of affected by the performance or breach of the covenant in question".[7] Essentially, you are looking to see whether the covenant:

(a) is *not* personal; and

(b) is one that preserves the *value* and/or the *amenity* of the relevant land.

(3) *Is the burden of the covenant intended to run?* In covenants imposed after the coming into force of the Law of Property Act 1925, section 79(1) of that Act

[4] See *Bell v Ashton* (1956) 7 P & CR 359 and *Re Beechwood Homes Ltd Application* [1994] 2 EGLR 178 (where the covenants were held to have become absolute) and *Crest Nicholson v McAllister* [2003] 1 All ER 46 and *Churchill v Temple* [2011] 1 EGLR 73 (where the covenants were held to have lapsed).
[5] *Shepherd Homes Ltd v Sandham (No. 2)* [1971] 1 WLR 1062, per Megarry J.
[6] *Tulk v Moxhay* (1848) 2 PH 774.
[7] *Kelly v Barrett* [1924] 2 Ch 379, at 411 per Warrington LJ.

deems an intention to run unless the conveyance or transfer contains evidence of a contrary intention. But if the covenant was imposed *before* 31 December 1925, it will be necessary to look closely at the text of the instrument in order to see whether, as a matter of construction, it evinces an intention that the covenantor's successors be bound.

9. But that is not the end of the story. Even if the burden of this covenant does run in equity, your client will not be bound unless the requirements of notice or registration (as the case may be) were satisfied when he acquired his land. In summary:

(1) If the covenant was imposed *after* 31 December 1925, it will be binding on your client:

(i) in the case of *registered* land, only if it was protected by means of a notice in the charges register of your client land at the time he became the registered proprietor of it.

(ii) in the case of *unregistered* land, only if it was registered as a D(ii) Land Charge at the time of your client purchased the land.

(2) If the covenant was imposed *before* 31 December 1925, it will be binding on him if he was a purchaser for value of the legal estate without actual, constructive or imputed notice of the covenant at the time of acquisition.

(4) Does the adjoining owner have the benefit of the covenant?

10. Once again, if the adjoining owner is the original covenantee the answer is simply 'yes'. But if the adjoining owner is a successor in title, he will have the benefit of our covenant if:

(1) The covenant benefits ('touches and concerns') the adjoining owner's land – as to which see paragraph 8(2) above.

(2) The benefit of the covenant has passed to him by one or other of the three recognised modes of transmission, namely (i) annexation, (ii) assignment and (iii) under a scheme of development.

11. In any covenant imposed *after* 31 December 1925, section 78 of the Law of Property 1925 – which deems the covenant to have been made with both the original

covenanting party and his successors – provides a short answer to this particular problem. But watch out for three things:

(1) For statutory annexation to occur, the benefitted land must be *clearly identifiable* from the conveyance or transfer (*Crest Nicholson Residential (South) Ltd v McAllister* [2004] 1 WLR 2409). That does not mean that the instrument must exhaustively describe and delimit the benefitted land: if the covenant is expressed to be for the benefit of "the Vendor's adjoining land" or the "Joe Bloggs Estate", extrinsic evidence may be admitted to show what the parties meant by that. But if the instrument gives no clue about the land intended to be benefitted, extrinsic evidence about what the parties must have intended may not be admitted to fill the gap.

(2) Although the default position is that a restrictive covenant is annexed both to the whole and each and every part of it,[8] section 78 of the Law of Property Act 1925 does not prevent the parties from providing that a given covenant will have some more limited geographic application. A covenant may be annexed to the whole of the land only and not to each and every part.[9] Equally, it is not uncommon to find covenants in 'vanishing form' (eg. 'for the benefit of the Joe Bloggs Estate or the part or parts of it for the time being remaining unsold).[10]

(3) Section 78 of the Law of Property Act 1925 does not apply to covenants imposed *before* 31 December 1925. In such cases, the adjoining owner would need to fall back on express words of annexation in the instrument[11] or alternatively to establish either an unbroken chain of assignments or a scheme of development.

12. If there are doubts about whether the adjoining owner has the benefit of the covenant, your client may well wish to consider going on the offensive by making an application under section 84(2) of the 1925 Act (see paragraph 21 below).

(5) Is there really a breach?

[8] *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594.
[9] Re Union of London and Smith's Bank Ltd's Conveyance [1933] Ch 611; *Re Ballard's Conveyance* [1937] Ch 473.
[10] *Sugarman v Porter* [2006] 2 P&CR 14; Norwich City College of Further and Higher Education v McQuillin [2009] EWHC 1496; *Rees v Peters* [2011] EWCA Civ 836.
[11] It is just about possible that, although express words of annexation are not present, the terms of the instrument, viewed in the light of known facts, will nevertheless justify the implication of an intention to annex: *Sainsbury plc v Enfield LBC* [1989] 1 WLR 590.

13. Having construed the covenant and established that your client has the burden of it covenant and that the adjoining owner has the benefit of it, the next question whether the development will constitute a breach. In many cases, this will actually be the most straightforward part of the exercise: a covenant to maintain and use the land as a meadow will plainly be broken if your client constructs 14 houses on it.

14. But in other cases, the debate may be of more subtle kind. Cases that turn on whether the covenantee has or has not unreasonably refused consent, under the covenant, to the construction of this particular development often fall into the latter category.

(6) What is the insurance position?

15. If there is a breach or at least a possibility breach having been committed, it is time think about insurance. If the risk posed by the covenant was picked up at the time of your client's acquisition of the development site, he may well have obtained defective title insurance. You will need to find out whether that is the case and, if so, to obtain a copy of the insurance policy.

16. Is the policy still valid and what precisely does it cover? Is there anything that the client is required to do or not do in order to make a successful claim? What role does the insurer play if proceedings are now issued? Are your firm's costs going to be covered under the policy (probably not)? These are the sorts of questions that you will need to consider in tandem with the main issues if defective title insurance is in place.

(7) Can sections 84(1) and 84(9) of the 1925 Act help you?

17. Let us assume that, following your analysis of the covenant, as it presently stands, your client is, quite simply, bang to rights. Whilst the client is not in an ideal position, it is not quite the end of the road.

18. The Upper Tribunal has jurisdiction, under section 84(1) of the 1925 Act, to modify or discharge a covenant on the grounds that the covenant:

(a) is obsolete;
(aa) impedes some reasonable user of the land (and does not confer a practical benefit of substantial advantage or is contrary to the public interest);
(b) has been the subject of an express or implied agreement to modify or discharge; and/or
(c) will not injure the persons entitled to the benefit.

19. Importantly, for present purposes, section 84(9) of the 1925 Act gives any defendant to a claim to enforce a restrictive covenant a right to apply for a stay of those proceedings to enable an application for an order under section 84(1) of the 1925 Act to be made.

20. In the right sort of case, an application for a stay under section 84(9) followed by an application under section 84(1) of the 1925 Act may provide the client a handy means to extract himself from the current predicament. But beware: section 84 is not a general panacea. You will need to sound the following notes of caution when considering this possibility with the client:

    (1) *Stay:* There is no automatic right to have the injunction proceedings stayed; it is a matter for the Court's discretion. In order to persuade the Court to exercise its discretion in your client's favour, your client will in all likelihood need to (i) act promptly,[12] (ii) demonstrate that there is at least some prospect that the section 84(1) application will succeed and (iii) agree to prosecute section 84(1) application with appropriate diligence

    (2) *Costs:* Unlike ordinary proceedings, costs of a section 84(1) application do not simply follow the event. The reason is that the applicant is seeking an indulgence from the Upper Tribunal to release him from an otherwise binding obligation. The person who has the benefit of the covenant will not generally therefore be ordered to pay the costs of the applicant, even if he appears at the hearing to object to the modification and is unsuccessful. It is only if the objector has (i) acted *unreasonably* or (ii) lost a contest about whether he is entitled to the benefit of the covenant that costs will be ordered against the objector.[13] By contrast, if the application fails, the application will usually be ordered to pay the objector's costs.

    (3) *Time*: Applications under section 84(1) of the 1925 are no simple matter. They generally raise a multiplicity of factual, legal and expert issues and, in practice, take every bit as long as Part 7 proceedings in the High Court. Your client will need therefore need to bank on it taking something of the order of 12 months to

[12] *Feilden v Byrne* [1926] Ch 620.
[13] See para 12.5 of the Lands Chamber Practice Direction.

see the process through. But, of course, many developer clients just cannot wait that long.

(4) *Prospects*: More often than not applications under section 84(1) of the 1925 Act fail. The grounds in section 84(1) sound beguilingly simple, but, in practice, as the authorities show, are devilishly hard to satisfy. That is not to say that section 84(1) will not in an appropriate case provide a solution,[14] but appropriately cautious advice will need to be given before inviting your client to proceed down this road.

(5) *Compensation*: There is no such thing as a free lunch: a successful application under section 84(1) of the 1925 Act can and usually will be ordered to pay compensation to the objector(s). Compensation may be calculated either (i) as "a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification" or (ii) as "a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it". Accordingly, your client will probably need to budget for both compensation and payment of his own costs when considering the viability of an application under section 84(1).

(8) What about section 84(2) of the 1925?

21. Let us now assume that, having considered the covenant, you conclude that (i) your client's activities will probably not amount to a breach of it or alternatively (ii) that the troublesome neighbour may well not be entitled to enforce any breach. Why not go on the offensive and deal with the problem once and for all? Section 84(2) gives the power to the court to declare:

(1) whether or not in any particular case any freehold land is, or would in any given event be, affected by a restriction imposed by any instrument; and

(2) what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is, or would in any given event be, enforceable and if so by whom.

[14] For some recent examples of section 84(1) applications that have succeeded, see: *Re Perkins' Application* [2012] UKUT 300; *Re Tate's Application* [2013] UKUT 289 and *Re Laav's Application* [2015] UKUT 0448.

22. Section 84(2) is not regularly encountered in practice and is very much the forgotten sibling of section 84(1). But section 84(2) has some real advantages to it:

    (1) *Application*: An order under section 84(2) operates *in rem* and will therefore be binding on the owners, present and future, of all of the benefitted land (not simply on the existing agitator).

    (2) *Scope*: Section 84(2) can be used to obtain a determination about a variety of matters pertaining to the enforceability of the covenant. All of the matters discussed under questions (2) – (5) above could be cleared up by means of a declaration under section 84(2) of the 1925 Act. Section 84(2) even enables you to put hypotheticals to the Court. It would therefore be possible for your client to ask the Court to consider whether one or more alternative schemes would be caught by the covenant in the event that his first choice is found to be caught.

    (3) *Time:* The issues that may be determined under section 84(2) of the 1925 Act are question of law. Applications are therefore made under CPR Part 8 (to the Chancery Division of the High Court) and your client can therefore expect to obtain a determination from the Court rather more speedily than would be the case under section 84(1). Indeed, in a clear-cut case, a declaration under section 84(2) might be obtained, earlier still, on an application for summary judgment under CPR Part 24.

23. But, like everything, section 84(2) of the 1925 Act has some downsides:

    (1) *Notice procedure:* The *quid pro quo* for a declaration under section 84(2) being binding on all of the land with the benefit of the covenant is that an applicant is required to take steps to ensure that all the owners of the benefited land are given an opportunity to participate in the proceedings. In particular, your client would need to (i) send a 'circular' letter to anyone who could possibly have the benefit of the covenant, giving them full particulars of the covenant and the proposed application; (ii) give them time to consider that letter and take advice and (iii) join any owners who wish to oppose the application as parties to the

eventual proceedings.[15] The risk, of course, is that the notification procedure brings other challengers out of the woodwork.

(2) *Costs*: Section 84(2) is another jurisdiction which is not a level playing field when it comes to costs. If the applicant lose, he will pay the defendant's costs in the usual way. Even when the applicant wins, he will usually pay the defendant's costs at least until such time as the defendant was in possession of all the material facts required to assess the merits of the application. If the defendant opposes the application thereafter, he does so as his own risk, but absent unreasonable conduct, he will not be ordered to pay the applicant's costs.[16] If the application is ultimately determined on a novel point of law, the applicant may be required to pay the defendant's costs in their entirety.[17]

(3) *No power to stay equivalent to section 84(9):* Curiously, the power to stay a claim for injunctive relief, in section 84(9) of the 1925 Act, only applies where the defendant wishes to apply for an order under section 84(1). However, there is nothing to stop your client from bringing a counterclaim for a declaration under section 84(2) and inviting the Court to determine that application, as a preliminary issue, in the exercise of its ordinary case management powers.

(9) Should any application for an interim injunction be resisted?

24. In many cases, the party with the benefit of the covenant will apply, in the first instance, for an interim injunction, under CPR Part 25, to restrain an alleged breach. Where such an application is made, the first issue for the Court will be whether there is a serious question to be tried.[18] In restrictive covenant cases, the applicant will usually be able to surpass that hurdle.

25. The merits of the interim application will usually therefore turn on (i) whether damages would be an adequate remedy for the applicant and (ii) whether the applicant is able to give (and evidence) a meaningful undertaking in damages.[19] Those are both fact sensitive questions.

[15] See Re *Sunnyfield* [1932] 1 Ch 79.
[16] See *Re Jeffkins Indentures* [1965] 1 WLR 375; *University of East London v London Borough of Barking and Dagenham (No 2)* [2004] EWHC 2908.
[17] *Re Tiltwood* [1978] Ch 269.
[18] See *American Cyanamid v Ethicon* [1975] AC 396.
[19] See, for example, *Gregory v Court Royal Ltd* [2002] EWHC 936.

26. Even where interim injunctive relief is not sought or is sought, but refused, the Court will be sensitive to the need for early resolution of the dispute and will often be willing to expedite the trial of the claim.[20] If the Court can be persuaded to do that, the need for a contested hearing of the application for interim relief may be avoided.

(10) Will a final injunction be made?

27. Absent delay, acquiescence or some other ground for declining to award equitable relief, an injunction will be granted as a matter of course to restrain a breach of a restrictive covenant.

28. But, of course, the Court retains a discretion to award damages in lieu of an injunction. Jonathan Karas QC is about to tell you all about that.

[20] See, for example, *Mortimer v Bailey* [2004] EWCA 1514.