



cornerstone



barristers

Unlocking land for development: removing property barriers

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Restrictive Covenants



Do not get ahead of yourself!

Do not go to the obvious (if uncertain) solution – there might be an easier one.

Or one which may provide the first route to success which will not prevent the ‘obvious’ route being taken even if it fails.

Remember the Basics



Basic requirements of a restrictive covenant:

- (1) The covenant must be negative (not to do something) – and
- (2) restrictive of the use of the land.

- (3) The original covenantee must have had some interest in land for which the benefit of the covenant was taken;

- (4) The covenant must in fact benefit land in which the person seeking to enforce it has an interest at the date when he seeks to enforce it;

- (5) The words of the covenant must be such as to show that the covenant was not intended to be personal to the original covenantee or confined to a class of persons to whom the person seeking to enforce it does not belong;

- (6) The covenant must have been entered into by a competent covenantor.

Otherwise it is unenforceable by subsequent owners of land benefited by it.

Negative/Positive



- “An area of 13 hectares shall be reserved for school purposes”
- - positive or negative?
- *Abbey Homestead Developments Ltd v Northamptonshire CC (1986) 53 P&CR 1*

Assignment/Building Scheme/Annexation



For the benefit to have actually passed on to the current owner of benefited land there must also be:

- (a) A chain of express assignments (rare); or
- (b) A building scheme (rare though less so);
- (c) Annexation to the land (most common)

The Wording of the Covenant Deed



Proceed in a principled way - do not overlook any of the detailed requirements of annexation and see if they are met (or if the development can proceed free of the restriction in the covenant):

- Even the Court of Appeal can miss a trick:

Federated Homes v Mill Lodge Properties Ltd
[1980] 1 WLR 594

(cf *Marquess of Zetland v Driver* [1939] Ch 1 – the land must be easily ascertainable from the covenant deed itself)

Examples



Inferences alone will not do for those seeking to enforce a covenant – see eg:

Re Sutton & East Surrey Water plc's Application [2017] UKUT 248 (LC).

Recent case on 'ascertainability': *Bath Rugby Ltd v Greenwood & Ors* [2021] EWCA civ 1927.

Extinguishment



Check then not extinguished in some way
– eg merger (where the benefited and burdened properties have ever been held by the same person). Will not revive just because subsequently split again: *Texaco Antilles v Kernochan* [1973]AC 609.

Only then: Section 84(1) LPA 1925 – Application to UT(LC) to remove or modify the covenant

Applications to UT to Discharge or Modify



S84(1) LPA 1925:

Power to discharge if:

(a) changes in such things as the area mean the covenant should be deemed obsolete

(aa) if reasonable user of the land would be impeded (as defined by s84(1A))

(b) all those with the benefit of the restriction agree;

(c) the discharge/modification will not injure those with the benefit of the covenant.

Additional considerations



- Compensation may be payable
- Discretionary jurisdiction (eg recent covenant may not be discharged)

Positive Covenants



Generally cannot be enforced against successors in title of the land subject to them.

Do not forget there are exceptions though – esp the ‘easement’ of fencing:

Crow v Wood [1971] 1 QB 77.

and *Haddock v Churston Golf Club Ltd* [2019] 4 WLR 60.

“More Misleading Cases” by AP Herbert



(II) HADDOCK v. THE KING; HADDOCK v. CONSTABLE BOOT; HADDOCK v. THE SOUTHERN RAILWAY

BACK TO THE CONSTITUTION

A DECISION of the highest constitutional importance was given in this case by the House of Lords to-day.

The *Lord Chancellor* said: These three appeals have, by leave of your Lordships, been treated as one appeal. The facts are quickly stated. The appellant, Mr. Albert Haddock, presented himself at Victoria Station with a railway and boat ticket for the French port of Calais, issued to him by the Southern Railway. The official at the barrier of the platform inspected the ticket and requested Mr. Haddock to exhibit his passport. Mr. Haddock replied, in direct but courteous terms, that the Southern Railway had contracted to carry him to Calais, that it was not a term of that contract that he should exhibit or even carry a passport, and that he declined to exhibit his passport to a subordinate official of the Southern Railway, who would be better employed in making his journey comfortable than in harrasing his passage and thus unnecessarily suggesting the nervous strain

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incidental to a journey. There was some debate, but at length the official, either impressed by Mr. Haddock's personality and command of language or preferring to leave the responsibility of a decision to his colleagues at Dover, permitted him to pass on to the train.

At Dover, when Mr. Haddock approached the steam-packet, the same request was made and was again refused. But here the official was not to be persuaded, and, although satisfied that Mr. Haddock's ticket was in order, would not allow him to approach the vessel, but even offered him physical resistance, amounting technically to an assault. Mr. Haddock insisted; the attention of *Comptable Host* was attracted; the constable and the official conferred together; it was decided between them that Mr. Haddock's refusal or inability to exhibit his passport was a suspicious circumstance suggesting that he was a criminal fleeing from justice, and Mr. Haddock was detained—or, to use the proper term, arrested—for inquiries. Mr. Haddock immediately procured his banker's letter of credit and various documents and photographs which established his identity and respectability; but these were not considered sufficient and the vessel proceeded to France without him.

The Southern Railway have attempted to justify their conduct by pleading that they acted as they did under the orders of His Majesty's Secretary of State for Foreign Affairs; and Mr. Haddock was

S106 Planning Obligations



- **S106 TCPA 1990:**

(1) A person interested in land in the area of a LPA may, by agreement or otherwise, enter into a planning obligation enforceable by the LPA:

(a) restricting the development or use of the land in any specified way;

(b) requiring specified operations or activities to be carried out in, on, under or over the land;

(c) requiring the land to be used in a specified way; or

(d) requiring sum(s) to be paid to the authority

S106 Planning Obligations



- Cross-over with land law covenants
- The CA's difficulties in *R (oao Khodari) v Kensington & Chelsea Royal London Borough Council* [2018] 1 WLR 384
- Land law solutions

Easements



Drainage – lateral thinking:

Barratt [2010] 1 P&CR 25

Ditto re avoiding the need for other easements

– eg Rights of way: Highways solutions

(*Rodgers v Minister of Transport* [1952] 1 All ER 634; *R (oao Spicer) v Leeds City Council* [2006] EWHC 661 (admin)).

Boundaries and Ransom Strips



- Land Registry boundaries
- Fixing the boundaries under the Land Registration Act 2002 and Land Registration Rules 2003.
- Compulsory Purchase if all else fails

The Human Factor



- *Millgate Developments v Smith* [2016] UKUT 515 (LC) – No
- *Millgate Developments v Alexander Devine Children's Cancer Trust* [2019] 1 WLR 279 (CA) – Yes
- Dubious, but Yes says the Supreme Court nonetheless [2020] 1 WLR 4783



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