



# PUMP COURT CHAMBERS

Modification of restrictive covenants, s 84 LPA 1925, & *Great Jackson St Estates*  
Ezra Macdonald



## 84.—Power to discharge or modify restrictive covenants affecting land.

- (1) [The [Upper Tribunal]<sup>24</sup> shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction [...]<sup>12</sup> on being satisfied—
- (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which [the [Upper Tribunal]<sup>24</sup> may deem material, the restriction ought to be deemed obsolete; or
- (aa) that [in a case falling within subsection (1A) below]<sup>14</sup> the continued existence thereof would impede [some reasonable user]<sup>1</sup> of the land for public or private purposes [...]<sup>16</sup> or, as the case may be, would unless modified so impede such user; or
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
- (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;] and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—
- (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
- (ii) 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.
- (1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the [Upper Tribunal]<sup>24</sup> is satisfied that the restriction, in impeding that user, either—
- (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or
- (b) is contrary to the public interest;
- and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.
- (1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the [Upper Tribunal]<sup>24</sup> shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.
- (1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the [Upper Tribunal]<sup>24</sup> to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the [Upper Tribunal]<sup>24</sup> may accordingly refuse to modify a restriction without some such addition.
- (2) The court shall have power on the application of any person interested—
- (a) To declare whether or not in any particular case any freehold land is [or would in any given event be]<sup>14</sup> affected by a restriction imposed by any instrument; or
- (b) To declare 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]<sup>14</sup> enforceable and if so by whom.
- [Neither subsections (7) and (11) of this section nor, unless the contrary is expressed, any later enactment providing for this section not to apply to any restrictions shall affect the operation of this subsection or the operation for purposes of this subsection of any other provisions of this section.]<sup>12</sup>
- (3) [The [Upper Tribunal]<sup>24</sup> shall, before making any order under this section, direct such enquiries, if any, to be made of any [government department or]<sup>14</sup> local authority, and such notices, if any, whether by way of advertisement or otherwise, to be given to such of the persons who appear to be entitled to the benefit of the restriction intended to be discharged, modified, or dealt with as, having regard to any enquiries notices or other proceedings previously made, given or taken, [the [Upper Tribunal]<sup>24</sup> may think fit.
- (3A) On an application to the [Upper Tribunal]<sup>12</sup> under this section the [Upper Tribunal]<sup>12</sup> shall give any necessary directions as to the persons who are or are not to be admitted (as appearing to be entitled to the benefit of the restriction) to oppose the application, and no appeal shall lie against any such direction; but [Tribunal Procedure Rules]<sup>12</sup> shall make provision whereby, in cases in which there arises on such an application (whether or not in connection with the admission of persons to oppose) any such question as is referred to in subsection (2)(a) or (b) of this section, the proceedings on the application can and, if the rules so provide, shall be suspended to enable the decision of the court to be obtained on that question by an application under that subsection, [...]<sup>14</sup> or otherwise, as may be provided by those rules or by rules of court.
- (3) Any order made under this section shall be binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of any restriction, which is thereby discharged, modified, or dealt with, and whether such persons are parties to the proceedings or have been served with notice or not [...]<sup>12</sup>.
- (6) An order may be made under this section notwithstanding that any instrument which is alleged to impose the restriction intended to be discharged, modified, or dealt with, may not have been produced to the court or [the [Upper Tribunal]<sup>24</sup>], and the court or [the [Upper Tribunal]<sup>24</sup> may act on such evidence of that instrument as it may think sufficient.
- (7) This section applies to restrictions whether subsisting at the commencement of this Act or imposed thereafter, but this section does not apply where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes.
- (8) This section applies whether the land affected by the restrictions is registered or not [...]<sup>12</sup>.
- (9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to [the [Upper Tribunal]<sup>24</sup> under this section, and staying the proceedings in the meantime.
- (11) This section does not apply to restrictions imposed by the Commissioners of Works under any statutory power for the protection of any Royal Park or Garden or to restrictions of a like character imposed upon the occasion of any enfranchisement effected before the commencement of this Act in any manor vested in His Majesty in right of the Crown or the Duchy of Lancaster, nor [subject to subsection (11A) below]<sup>12</sup> to restrictions created or imposed—

- **84.— Power to discharge or modify restrictive covenants affecting land.**
- (1) The Upper Tribunal shall . . . have power . . . on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise [as to user or the building] by order wholly or partially to discharge or modify any such restriction . . . On being satisfied-



- S 84(1)(a) obsolescence by reason of changes
- S 84(1)(aa) restriction impedes reasonable user
- S 84(1)(b) beneficiary agrees
- S 84(1)(c) discharge / modification won't injure the beneficiary (with possible compensation)
- NB s 84(1)(aa) is qualified by s 84(1A)

- S 84(1A)

(1A) Subsection (1) (aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land [where] that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and [. . .] money will be an adequate compensation



S 84(1B) – UT will take account of development plan and any . . . plan for the grant or refusal of planning permissions, as well as period and context in which the restriction was created + “any other material circumstances”

S 84(1C) – the power to modify a restriction includes the power to add further restrictive provisions as to user or the building on the land [etc]

- shortly post-dates the 1969 amendments
- adopts analogy with injunctive proceedings against nuisance (*Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287
  - Is proposed user reasonable?
  - Do covenants impede that user?
  - Does impeding the proposed user secure practical benefits to the objectors?
  - If so, are those benefits of substantial value or advantage?
  - Is impeding the proposed user contrary to the public interest?
  - If no, would money be adequate compensation?
  - If yes, would money be an adequate compensation?

NB the questions of “reasonable user” and “contrary to the public interest” are necessarily related; planning permission is persuasive as to reasonable user

## *Re Bass Ltd's Application* (cont.)

At [159]:

“I am by no means satisfied that to stop this proposal would be contrary to public interest. There is private interest, of course, **and to serve the private interest of so large a concern as Bass Limited which performs so useful and agreeable a function does to some extent serve the public interest, but that is really as far as it goes . . .**”



- s 84(1A) is not confined to covenants which run with the land
- Where “additional houses would interfere with a resplendent landscape view visible from land in the immediate vicinity of the objectors’ properties though not from any of the properties themselves”, the covenant restricting this secured “a practical benefit of substantial value or advantage” . . .

- The kind of benefit under s 84(1A) must be a practical one as opposed to a pecuniary one
- Loss of bargaining power by the covenantee is not a benefit of the kind contemplated by s 84(1) since it results from the **discharge** and not the continuance of the covenant

(NB a case in which the council called no evidence to demonstrate the importance of having a stock of houses with a view – and UT entitled to modify the covenant . . .)

Hyde Park Estate; hotels; planning permission; estate management . . .

- *Re Bass' Application* provides a “convenient list of questions” under s 84(1)(aa), but it is not always necessary to answer those questions in a sequential manner or to address them all; **what is required is an assessment of the issues in the particular application by reference to the relevant parts of the section, and then a consideration as to discretion**
- *NB use of expert evidence on the issue of “substantial benefits or advantages”*

## *Edgeware Road (cont.)*

At [137]:

“The suggestion that nobody would know that the covenants had been modified by the tribunal is unrealistic . . . There will be blood in the water and other applications might well be the consequence. But the thin end of the wedge question is not whether others might seek to relax covenants elsewhere on the Estate, but whether the relaxation of these covenants to permit this development will make it more likely that other applications will succeed, so that the Commissioners’ grip on the future shape of the estate is diminished.”



- A covenant which provides protection against acts causing “nuisance or annoyance” was intended to provide protection against temporary as well as long-term annoyance, and was not to be confined by analogy with the common law of nuisance

# *Pepper v Hart* [1993] AC 593

1. Legislation which is ambiguous or obscure or leads to absurdity, *and*
2. The material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect, *and*
3. The statements relied upon are clear.

# *Great Jackson Street Estates*

- Facts (UT):
  - A (SPV) held a 61-year lease over two redundant warehouses in Manchester.
  - Proposed 1037 flats @ £300m, *but*
  - Leases too short to enable sales; parties negotiating over a new lease
  - Leases included covenants preventing redevelopment w/o consent of the Council
  - Council only willing to consent on terms which A wouldn't accept

- Application:
  - Ground (a), restriction obsolete
  - Ground (aa), because the proposal was a reasonable use and completion would not disadvantage the objector
  - Ground (c), because objector would not be injured



- Covenants:
  - Not to carry out works on site without consent of Council (not qualified by “not to be unreasonably withheld”)
  - Restricting development / user without consent (. . . not to be unreasonably withheld)
  - Other restrictions not concerned with development



- NB para 25 “. . . [w]e heard no evidence about the details of the negotiations over the grant of a new long lease . . . We have not been asked to consider whether the position . . . or the terms [proposed] are reasonable. Nor have we been asked to determine whether the Council’s refusal to consent . . . [was] unreasonable . . . those questions . . . might . . . Have been relevant to our determination had we been provided with relevant evidence.”



- On obsolescence, citing *Chatsworth Estates Ltd v Fewell* [1931] 1 Ch 224

“[t]o succeed on [ground (a)] the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all.”



- Held (para 42) (covenant still capable of fulfilment + hence not obsolete)

“... [w]e have no doubt that the Council’s aims in the negotiations is not a purely commercial one. It has a legitimate strategic interest in continuing to influence the use of land on the fringe of the city centre and to secure its orderly and appropriate development.”

- Reasonable user – held (para 48)
  - The sole focus is on the land use itself
  - User was reasonable
  - Question: whether, by impeding the proposed use, the restrictions secured “practical benefits” and if so whether those “are of substantial value or advantage . . .”
  - Purpose: to ensure completion, and within a reasonable time (primarily via imposing development milestones)



- Distinguished *Caledonian Associated Properties Ltd v East Kilbride DC* (1985) 49 P & CR 410  
(discharge not warranted unless further restrictions were unreasonable; user was reasonable but not practicable – a planning permission issue – application dismissed)
- Held that considerations of practicability or “deliverability” bear on the *exercise* of discretion but not on the jurisdictional gateway (i.e. whether Ground (aa) is made out)

- Further (para 53)

“The Council’s ability to withhold its consent . . . Until it is satisfied that the applicant’s proposals can be delivered does not confer only “peripheral” or indirect benefits. They allow it to influence the form of the development and mitigate the risk that the Site might not be developed in an orderly and timely way . . .”



- Benefit found to be “substantial” *albeit not in monetary terms* (NB reversion to two large blocks of flats being more valuable than the reversion to two redundant warehouses)
- That also disposed of Ground (c) (“no injury”)



# On appeal to the EWCA

- Issue: whether restrictive covenants provided the lessor (the planning authority) with “practical benefits of substantial value or advantage to it” for the purposes of ss 84(1)(aa) and s 84(1A) LPA 1925 in enabling the lessor to prevent a proposed development in going ahead in an uncontrolled manner.
- Recall: 60 years of the unexpired term remain, and negotiations for a new lease had faltered



- Ground 1 (*the interesting ground*) – argued:
  - UT wrong to hold that the restrictions secured “practical benefits”, as a) “practical benefits” arise from the covenant being complied with and the proposed user prevented; and b) the ability to use a restriction to prevent a reasonable user from being put into effect unless the applicant agrees to a new lease is not a “practical benefit”

- Para 41 & seq
  - The phrase “practical benefits” is a wide one - (citing *Gilbert v Spoor* [1983] Ch 27 at 32E-G per Eveleigh LJ) “. . . [t]he expression “any practical benefits” is so wide that I would require very compelling considerations before I felt able to limit it in the matter contended for . . . .”
  - (recall - *Spoor* was a case in which additional houses would interfere with the view from land in the *vicinity* of the objectors’ properties, but not from the properties themselves . . . .)



- “practical benefits” must be *practical*, rather than simply a (commercial) negotiating tool – i.e. must not simply afford the covenantee an opportunity to extract monies from the covenantor or his successor for their release, and the benefits must flow from compliance with the covenant rather than from their discharge.
- So – a practical, rather than a pecuniary, benefit

# Conclusions

The correct approach (as per the UT) in this case is set out in *Re Bass' Application* (1973) 26 P & CR 156, i.e.

- (1) Is the proposed user reasonable?
- (2) Do the covenants impede that user?
- (3) Does impeding the proposed user secure practical benefits to the respondent?
- (4) Do the covenants provide the respondent with substantial value or advantage?
- (5) Is impeding the proposed user contrary to the public interest?
- (6) If the answer to question (4) is negative, would money be an adequate compensation?
- (7) If the answer to question (5) is affirmative, would money be an adequate compensation?

[these] provide a helpful framework which assists the Tribunal and the parties to navigate the detailed and interlocking requirements of section 84(1)(aa) and (1A). **They are not prescriptive in any way, however, and should not be approached as if they were a rigid checklist which must be adhered to in every case.**

## Similarly

- *In Re Vince's Application* [2007] 9 WLUK 250, a covenant affecting freehold land comprising a house – modification sought to convert the house into five terraced dwellings, with extensions. The covenant was

“not to use the property hereby conveyed for any purpose other than that of a single private dwelling-house in the occupation of one family”



- Held: the maintenance of the view from, and the value of, the objector's property, and the avoidance of building operations were not “practical benefits of substantial value or advantage . . .”
- **but** the increased level of occupancy, activity and vehicular movement “and to some extent loss of sunlight and daylight” *would* have a significant combined effect

- *In Re Hopkins* [2008] 7 WLUK 2008, the UT maintained a covenant “not to erect on the said plot more than one dwellinghouse and garage with tiled roof”, on the bases that the proposed block of flats would interfere with privacy and views; reduce sunlight; would have an adverse effect on the character of a close; the risk of further attempts to carry out residential development would be increased.



## Note also

- Whether the covenant *in fact* secures practical benefits of substantial value or advantage may depend on the probability of development *within* the scope of the covenant being carried out in any event – this will be a comparative exercise (*Re Fairclough Homes Limited's Application* LP/30/2001, unrep.) at para 30 per George Bartlett QC P

# One more example . . .

- *Hodgson v Cook* [2023] UKUT 41 (LC) – the UT maintained a covenant preventing the owners of a house on a modern residential estate from running a beauty therapy business in a cabin in their garden provided a practical benefit of substantial value in that it prevented activities which would significantly impinge on the amenity of the development . . .

## In contrast

- The right to demand a price for consent to a development on land which was subject to a restrictive covenant was not a practical benefit for the purposes of Ground (aa): *Father's Field Developments Ltd v Namulas Pension Trustees Ltd* [2021] UKUT 169 (LC)

# Practical upshots

- The phrase “practical benefits” remains to be widely construed
- The emphasis is (as always) on *practical* benefits, rather than purely economic benefits
- However, practical benefits may underpin the negotiating position (and that is entirely legitimate)
- NB the need for evidence!