



ADVISING ON RESTRICTIVE COVENANTS IN RESIDENTIAL TRANSACTIONS PROFESSIONAL CONFERENCES

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INTRODUCTION

- What are restrictive covenants?
- What is the role of the Upper Chamber of the Lands Tribunal?
- Can title indemnity cover be used?
- Recent Case Law.

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WHAT ARE COVENANTS?

- Contractual obligations that compel or prohibit specific conduct.
- That are binding on the original contractual parties.
- AND that have the potential to bind subsequent owners of the affected land.

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KEY POINTS TO BEAR IN MIND

- What is the objective of the buyer?
- Are there any covenants that will impact on that objective?
- Is/Are the covenant(s) enforceable?
- If so by whom?
- Can the covenant be bought out removed or varied?

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DAVIES V DENNIS [2009] EWCA CIV 1081

- A cautionary tale.
- The covenant “Not...to do or suffer to be done on the Plot or any part thereof anything of whatsoever nature which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the estate or the neighbourhood”.
- Could this block the construction of an extension to a property?
- Ensure you consider how a covenant could impact on the objective of the client.
- The Court of Appeal held the ordinary construction of a nuisance covenant was sufficiently wide to be capable of extending to the activity of all nature including the building of a house extension.
- Be careful about how you advise as to the scope of a covenant.

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DAVIES V DENNIS [2009] EWCA CIV 1081

- Could this block the construction of an extension to a property?
- **YES**
- First Instance

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DAVIES V DENNIS [2009] EWCA CIV 1081

- Could this block the construction of an extension to a property?
- **YES**
- Court of Appeal

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WHO IS BOUND BY THE BURDEN OF A COVENANT?

- What does the covenant say?
- Definitely the original covenantor whilst that covenantor owns the land.
- Will it bind successors in title?
- Not if the covenant imposes personal obligations.
- Not if the restrictive covenant is not protected and the relevant land is sold for value.
- Not if the land that is intended to benefit from the covenant cannot derive benefit.
- Not if the restrictive covenant is anti-competitive.

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IMPORTANT POINTS

- How can a restrictive covenant be protected?
- By D(ii) Land Charge.
- By Agreed or Unilateral Notice in the Charges Register of the land which is subject to the covenant.
- A Notice does not validate a restrictive covenant.

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WHO HAS THE BENEFIT OF A COVENANT?

- The original covenantee.
- A successor in title unless.
- The covenant was expressly or in part for the personal benefit of the original covenantee.
- The retained land is not capable of benefiting from the restrictive covenant.
- The retained land cannot be identified either by the deed or other intrinsic evidence.
- The covenant is expressed to benefit the retained land as a whole and the successor in title owns only part.
- The owner has acted in a way which means it is inequitable to allow enforcement of the restrictive covenant.

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DEFECTIVE TITLE INSURANCE

- When might defective title insurance be required?
- Beware of undertaking investigation.
- What is an appropriate level of indemnity?
- Should a policy be taken out by the seller or buyer.

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REMEDIES FOR BREACH OF COVENANT

- Damages for loss - what loss is sustained
- Injunctions – equitable
- Specific performance – equitable

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SECTION 84(2) LAW OF PROPERTY ACT 1925

“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] 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] enforceable and if so by whom.”

- See Signature of St Albans (Property) Guernsey Ltd v Wragg and others [2017] EWHC 2352 (Ch).

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SECTION 84(9) LAW OF PROPERTY ACT 1925

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 under this section, and staying the proceedings in the meantime.

This provision enables a defendant to a claim to enforce a restrictive covenant a right to apply for a stay of those proceedings to enable an application under Section 84(1) to be made.

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VARIATION OR REMOVAL OF RESTRICTIVE COVENANTS - SECTION 84(1) LAW OF PROPERTY ACT 1925

- a) Change in the character of the property or neighborhood or other material circumstances renders the restriction obsolete.
- b) Covenant would impede a reasonable use of the land and confers no practical benefit of substantial value / or is contrary to public interest and can be adequately compensated in money.
- c) Parties agree expressly or impliedly to discharge or modify the covenant.
- d) Discharge or modification will not injure the persons entitled to the benefit of the covenant.

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PRACTICAL POINTS

- Obtain evidence of land use, changes to the area
- What is the planning position for the land or property?
- Which land has the benefit of the covenant?
- Who owns the land?
- Does the covenant confer benefit for the land and the owner of the land?
- There is a danger in breaching the covenant and then seeking an order.

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CASE LAW

- Harrison-Ellis & Anor v Hunt & Anor 2 September 2025 [2025] UKUT 295 – not all cynical breaches will mean S84(1) will not apply
- Anthony & Anor v Hardy & Anor [2025] UKUT 209 (LC) - proposed changes were modest and would result in only a minimal loss of amenity.

The covenant did not provide the defendants with benefits of substantial value or advantage, and ground (aa) was made out.

As the covenant was qualified refusal of consent to the proposed modification could very well be unreasonable.

The application was allowed and since there was no evidence of diminution in value at Roche House no award of compensation was made.

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COMPENSATION

- Wrotham Park Damages.
- A share in the uplift.
- Diminution in the value of the land with the benefit of the covenant.

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ISSUES FOR CONVEYANCERS – ACTING FOR BUYERS

- Are there restrictive covenants on the title?
- Do they impact on client objectives?
- Can it be ascertained if the covenants are enforceable?
- Is client to be advised that there are covenants but that it is not possible to confirm whether they are enforceable or not?
- Is defective title insurance appropriate?

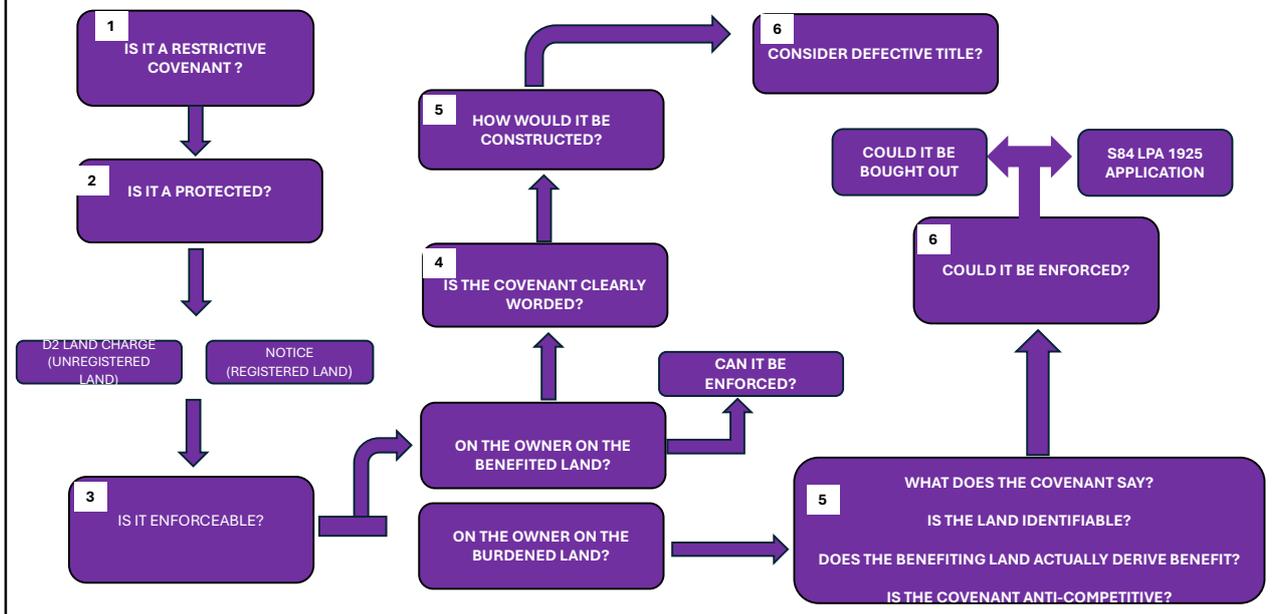
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WHAT IF LAND IS BOUGHT THAT BENEFITS FROM A COVENANT?

- Client should be made aware.
- Client should be told that the right to enforce could be lost.
- By application under Section 84 LPA 1925.
- By delay, inaction, waiver or estoppel.

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HOW TO DEAL WITH RESTRICTIVE COVENANTS



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CONCLUSIONS

- Do the simple things well.
- Ascertain client's objective.
- Check the wording of covenants.
- Is the covenant enforceable?
- By whom and against whom.

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DO YOU HAVE ANY QUESTIONS?

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Thank You!



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