

Discharge or Modification of Restrictive Covenants

In basic terms a restrictive covenant affecting freehold land (or leasehold land where the lease is for more than 40 years of which at least 25 years have expired) consists of an agreement in a deed that one party will restrict the use of its land in some way for the benefit of another's land.

Restrictive covenants may:-

- a. limit possible uses of land, for example to residential purposes only, or educational purposes only
- b. prohibit particular trades or businesses, undesirable activities or potential nuisances
- c. restrict the number or type of buildings that can be erected, for example a covenant restricting the number of houses that can be built on a plot of land to just one or restricting the height of buildings

A restrictive covenant might have been imposed for any of a number of purposes.

For example:

- i. to protect the amenity or character of a neighbourhood; or
- ii. to protect commercial interests; or
- iii. to create a building scheme; or
- iv. to protect the value of retained land.

Where land is burdened by such a restriction, without some form of legal intervention, a landowner will not be able to sell his land for any use which is outside the ambit of the original covenant.

Methods of Intervention

- a. **Express Release or Variation.** In some cases, it may be possible to negotiate the release or variation of a restrictive covenant. To do so, the full extent of the land that benefits from the restrictive covenant has to be ascertained, all the owners identified and located, and a deal done with all of them, which is supported by a deed of release or variation, as the case may be
- b. **Indemnity Insurance**
 - i. it is sometimes possible to obtain indemnity insurance to protect against the risk of a person or persons with the benefit of the covenant seeking to enforce it
 - ii. insurance is particularly useful where it is not possible to ascertain who has the benefit of the covenant, for example, if the covenant is old or the benefited land has been sold in several parts and is now in multiple ownership
 - iii. insurance should be obtained where:
 - a. a quick long term solution is needed
 - b. a funder will not lend funds if there is a risk of enforcement
 - c. the cost of insurance is less than applying to the Court or Lands Tribunal

Lands Tribunal

If agreement cannot be reached with the beneficiaries of a restrictive covenant, or if insurance is for one reason or another not available, an application can be made to the Lands Tribunal for the modification or discharge of a restrictive covenant under Section 84 Law of Property Act 1925.

The Lands Tribunal may discharge or modify the restriction if it is satisfied:-

- a. that the covenant is obsolete, due to changes in the character of the property or the neighbourhood, or other relevant circumstances which might make the covenant pointless today. A restrictive covenant might, for example, have been imposed restricting the number of houses at a time when the surrounding area was totally undeveloped. If the neighbourhood has since become densely developed, it is possible that the original purpose of the restriction might no longer be capable of being fulfilled. Alternatively there might have been a change in social attitudes since a covenant was imposed.

If such changes or other material circumstances lead to the original purpose of the covenant no longer being fulfilled today, the covenant will be obsolete. The Lands Tribunal will therefore consider the original purpose behind the covenant and whether it remains capable of serving its purpose. The applicant in each case must establish the object of the restriction and demonstrate that it is no longer capable of attainment.

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- b. that the covenant impedes some reasonable use of the land and, in doing so does not secure any practical benefit or substantial value or advantage, or is contrary to public interest, and, money would be adequate compensation to any one suffering loss or disadvantage from the discharge or modification of the restriction
- c. that no injury will be caused to the beneficiary of the covenant
- d. there is express agreement with all the beneficiaries of the covenant

In making an order to discharge or vary a covenant, the Lands Tribunal must take into account the development plan and any declared or ascertainable patterns for the grant or refusal of planning permission in the relevant areas, as well as the time and context in which the covenant was imposed and all other material circumstances.

The Lands Tribunal has power to order the applicant to pay compensation to the person entitled to the benefit of the covenant, either for any loss or disadvantage suffered as a result of the discharge or modification of the covenant or to make up for any reduction in the price received for the land, due to the imposition of the covenant.

Reform

In March 2008 the Law Commission published a consultation paper on a proposed system of land obligations to replace the law on, amongst other things, covenants. There are currently proposals to phase out existing restrictive covenants, such as automatic extinguishment after a number of years, or after a trigger date. The commission intends to publish a report setting out its recommendations and draft a bill over the next few months, but it is likely to be a long while before reforming legislation is introduced. This means the existing system will be with us for a time yet.

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