Applications to discharge restrictive covenants under s. 84 of the Law of Property Act 1925

A short overview and some practical tips.

1. This paper is intended to provide an overview of applications to modify or discharge restrictions under s. 84(1) of the Law of Property Act 1925, and to provide some practical advice as to how to consider and approach such applications.

The jurisdiction

2. S. 84(1) states:

> *The Lands Tribunal shall... 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....*

Points to note on the Jurisdiction of the Lands Tribunal

3. The following 5 points should be noted as to the application of s. 84:

(i) The power covers only *restrictions*.

- This consideration may necessitate careful consideration as to whether the obligation is really a restriction, or whether, whilst framed in a negative form, a positive obligation (such as may be the case with overage obligations).

(ii) The power does not just extend to a 'restrictive covenant' but to *any restriction arising under covenant or otherwise*.

- A recent example of this is *Zenios v. Hampstead Garden Suburb Trust Limited [2011] EWCA Civ 1645*, an application in relation to, amongst other things, a restriction within a scheme of management of the Hampstead Garden Suburb authorised by the Minister of Housing and Local Government under s. 9(1) of the Leasehold Reform Act 1967.

(iii) S. 84(1) applies to *freehold land* but s. 84(12) applies the power *'in like manner'* to '*restrictions affecting leasehold land*' where a lease of the land was granted for more than 40 years, and 25 years have already expired of the term.

(iv) The power only covers restrictions which affect the *user of Freehold land* or *the building thereon.* So it does not, for example, apply to a restriction on the class of occupants, as in *Westminster City Council v. Duke of Westminster [1991] 4 All ER 136*.

(v) There are specific exclusions, some of which are important:

(i) S. 84(11); royal parks, Crown or Duchy of Lancaster land, restrictions for the purposes of the armed forces or civil aviation.

(ii) S. 84(7): *"where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes".*

(iii) Most importantly, s. 106A(10) dis-applies s. 84 in respect of planning obligations – i.e. obligations imposed by 's. 106 Agreements'.

Powers of the Lands Tribunal

4. Where the restriction in question falls within the scope of s. 84(1), and one or more grounds are made out (as to which see below), it then has power to discharge or modify the covenant. In doing so it:

(i) may award compensation:

(a) To make up for the loss or disadvantage to the person with the benefit which they suffer as a consequence of the modification; or

(b) To make up for the effect that the restriction originally had in reducing the consideration received for the land originally.

(ii) may (if acceptable to the applicant) add such further provisions restricting the user of or the building on land as may be reasonable in view of the relaxation of the original restriction. The Tribunal cannot impose a new restriction, but can refuse to modify or discharge an existing restriction without it.

5. It should be stressed that the power to modify the restriction is discretionary. Even where one or more of the grounds is made out, the Lands Tribunal still has to consider whether to exercise its power. This can be a serious consideration (see, for example, *George Wimpey Bristol Ltd v. Gloucstershire Housing Association Ltd [2011] UKUT 91 (LC)).*

6. If the tribunal does make an order, it is effective against all persons who would otherwise have the benefit of the covenant (s. 84(5)).

The Application

7. An application is made to the Upper Tribunal (Lands Chamber), the statutory successor to the Lands Tribunal, under the Tribunals, Courts and Enforcement Act 2007) ("the Lands Tribunal"). The Lands Tribunal is governed by the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010[1], supplemented by a practice direction.

The Applicants

8. An application can be made by any *person interested* in the freehold or leasehold land, thus including option holders, mortgagees, and persons holding the benefit of a conditional agreement to purchase the land.

9. An application may be provoked by enforcement proceedings. By s. 84(9), where any proceedings are taken to enforce a restrictive covenant, any person against whom those proceedings are taken, may apply for an order staying enforcement and giving leave to apply to the Lands Tribunal under s. 84. If such an application is made to the court 'sufficiently promptly'[2] the 'normal' order will be a stay to allow the application to the Lands Tribunal.

The Application

10. There are detailed provisions within the rules of procedure governing the Lands Tribunal[3] ("the Rules") as to what the application must include (Rule 32), which include

[1] SI 2010/2060
[2] After a review of the authorities, in *Luckies v. Simons [2003] 2 P&CR* HHJ Rich QC concluded that 4 ½ months delay was "near the limits", but no prejudice other than costs had arisen from it.
[3] The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010, s. 31

the address or description of the land which, and the identity of any person (if known) who, the applicant believes *may* have the benefit of the covenant.

The Objectors

11. The following classes of persons are usually entitled to oppose the application:

    (i) Those with the benefit of the restriction as original covenantee, or persons with the benefit by virtue of annexation, assignment, or under a building scheme;

    (ii) Persons claiming through them (eg tenants, mortgagees, option holders);

    (iii) Persons who remain entitled to grant or withhold consent under the provisions of the restriction;

    (iv) Persons who otherwise have the right to enforce the provision by statute (eg the National Trust[4], a local authority, Hampsted Garden Suburb Trust Ltd).

12. Once the application is made the Tribunal will give directions (which may include advertising) to give appropriate notice to those who may have the benefit of the covenant (Rule 33).

13. Unlike most of the elements of a s. 84(1) application, the burden of showing that an objector is entitled to the benefit of the restriction falls upon the objector:

    13.1. The rules provide (Rule 35) a mechanism for the Applicant to state that he does not accept that the objector has standing; for the objector to provide evidence of their entitlement within 14 days; for the Applicant to decide whether to maintain its objection in the face of the evidence; for the objector to be heard by the tribunal, and for the tribunal to determine whether the objector has standing.

    13.2. If the objection is not admitted, the objector can apply within 14 days to the High Court under s. 84(2) for a declaration as to who is entitled to enforce. The Lands Tribunal must then stay the s. 84(1) application and then re-determine the objector's standing following the court's decision.

[4] See S. 8 of the National Trust Act 1937

The Grounds for seeking discharge/modification

14. There are four potential grounds upon which the Lands Tribunal can discharge a covenant:

    (1) The covenant is obsolete (Ground (a))

    (2) There is agreement to the discharge or modification between all those with the benefit of the restriction (Ground (b))

    (3) The restriction restricts a reasonable use of the land and confers no practical benefit of substantial value or advantage on the persons entitled to the benefit of it(or is contrary to the public interest) and the loss of the covenant can be compensated in money (Ground (aa))

    (4) No injury will be caused to those entitled to the benefit of the covenant by reason of its discharge or modification (Ground (c)).

Ground (a) Obsolescence

15. The full wording of ground (a) is as follows:

    that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete.

16. *Changes in the character of the property* may, for example, include use of the property in breach of the relevant restriction for many years.

17. As regards *changes in the character of the neighbourhood or other circumstances* the test is the same, whether the consideration is of covenants imposed to preserve the character of an estate, or for the benefit of a particular property: *"... the question that requires to be answered is whether the purpose for which the restrictions were imposed can no longer be served"*(per Francis FRCIS in *Re Shaw's Application (12.2.09)*[5])

[5] Considering *Re Truman, Hanbury Buxton & Co Ltd's Application [1956]1 QB 261*, in which the Court of Appeal expressed the test in similar terms in a 'preservation of the character of the estate' case.

18. Ultimately evidence will have to be directed at (i) the purpose of the original covenant and (ii) the changes that have occurred which demonstrate that the purpose can no longer be fulfilled or furthered by the restriction. When considering reliance upon Ground (a), it is necessary to consider conveyancing documentation and other relevant documents from which that purpose can be discerned.

19. The difficulty in establishing Ground (a) in a *'character of the neighbourhood'* case is neatly illustrated by the comments of P R Francis FRICS, in *Re Shaw's Application (12.2.09)*:

> *"The purpose of the restrictions is, in my judgement, clear. They were imposed to protect 207 from development that might adversely affect it. They do that by restricting development of the burdened land to a single dwellinghouse with the usual out offices and garages, and limiting its location on the site and the location of any roadway or drive. That this purpose can still be served is obvious when one asks the question, is there development of the burdened land that could adversely affect 307? Clearly, to take examples, a four storey block of flats or a hotel or some industrial use, could well have an adverse effect. But so also, I think, could intensification of residential development on the burdened land, and despite the fact that the rear of the benefited land is quite well screened by the mature line of conifers along the boundary separating the rear gardens of 207 and 309, protection from the loss of privacy and spaciousness that in my view could reasonably be expected to have formed part of the reason for the imposition of the restrictions would be severely compromised"*

20. Even in cases where the Lands Tribunal has held that the character of the neighbourhood has changed, reliance upon ground (a) still usually fails. However, in many of the cases where ground (a) has not been established, the application has nevertheless succeeded under ground (aa).

Grounds (aa) and (c)

21. These grounds are usually relied upon in the alternative (often also in the alternative to ground (a)).

22. Ground (c) is as follows:

> *That the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.*

23. Ground (c) usually comes into play in relation to frivolous objections. It has the advantage that, if it is made out, then no compensation will normally arise.

24. Ground (aa) states:

> *That (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified, so impede such user*

25. Subsection (1A) then provides:

> *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 Lands Tribunal 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*
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> *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.*

26. The policy which ground (aa) seeks to further was discussed by Carnwarth LJ in *Shephard v. Turner [2006] 2 P&CR 28* at 16-17:

> *"The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of planning permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "Reasonable user" in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."*

27. In *Re Bass Ltd's Application (1973) 26 P&CR 156* the considerations which arise under Ground (aa) were framed as 7 questions, which are cited in almost every case:

> (1) Is the proposed user reasonable?

(2) Do the covenants impede that user?

(3) Does impeding the proposed use secure to the objectors practical benefits?

(4) If so, are those benefits of substantial value or advantage?

(5) Is impeding the proposed user contrary to the public interest?

(6) If the answer to (4) is 'no', would money be an adequate compensation?

(7) If the answer (5) is 'yes', would money be an adequate compensation?

28. In considering these 7 questions, the following practical points should be noted:

(i) Questions 1 to 3 show that the Lands Tribunal does not consider applications under (aa) in isolation. There must be a sufficiently detailed, worked up development proposal for the tribunal to consider.

(ii) In considering the "reasonableness" of the proposed user the Lands Tribunal is specifically directed (s. 84(1B)) to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas. The applicant must generally show he already has planning permission for the development, or (which may be difficult) that he is sufficiently likely to obtain it - an attempt at the latter failed in *Re Davies' Application (13.8.08)*[6].

(iii) The grant of planning permission strongly supports a finding that the proposed user is "reasonable" but is not strictly determinative.

(iv) Any attempt to establish ground (aa) is likely to require expert valuation and expert amenity evidence to assess the impact of the proposed user/development.

(v) The *public interest* limb is rarely successfully invoked. It is not made out, as is sometimes assumed, simply by the existence of planning permission[7].

[6] And other reasons. The Lands Tribunal reference is LP/65/2009

[7] An example of successful reliance on public interest occurred in *Re Lloyds and Lloyd's Application (1993) 66 P&CR 112* where the application was to permit a community care home for psychiatric patient of which there

(vi) *Practical benefits* include view, light, spaciousness, quiet, upholding the ethos of an estate etc. They do not include the benefit of being able to secure a 'ransom' for the release of the right.

(vii) *Practical benefits* can include the disruption of building works themselves. In the absence of special facts, the prevention of disruption during the building works is not considered to be of substantial value or advantage (*Shephard v. Turner [2006] 2 P&CR 28*). However, in an extreme case it may prevent a Ground (aa) claim succeeding (as occurred recently in *Re Perkins' Application [2011] UKUT 219 (LC)*[8]) and this aspect cannot be overlooked.

(viii) If a substantially similar property could be built without breaching the covenants, the Lands Tribunal may conclude that the covenants are not securing a *practical benefit of substantial value or advantage*. However, demonstrating a "worst case scenario" which does not breach the covenant is not enough. The degree of value and advantage secured by avoiding this scheme, despite the threat of another development depends upon "*the degree of probability of such other development being carried out and how bad, in comparison to the appellant's scheme, the effects of that development would be"* (per George Bartlett QC(President) in *Re Fairclough Homes Ltd*[9]).

(ix) There is no 'tariff', in terms of monetary value, by which the question of *substantial value or advantage* is to be measured. Each case is one of fact and degree, and a practical benefit of substantial advantage may be found without there being a discernable effect on value (as where the integrity of a scheme of covenants would be compromised: eg *Re Hunt's Application (1996) 73 P&CR 126).*

(x) If the person holding the benefit of the covenant is doing so as *"custodian of the public interest"* the requirement that money be an 'adequate

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was pressing need. The public interest is also being invoked in *Thames Valley Holdings Ltd v. National Trust [2011] UKUT 325* – the application by NT to strike out the s 84 application as an abuse.

[8] Where the road to the site was such that the Tribunal foresaw "the potential for utter chaos to reign over a period of many months"

[9] A passage cited by the Court of Appeal in *Shepard v. Turner [2006] EWCA Civ 8*

compensation' will rarely be made out: *Re Zenios's Application [2011] EWCA Civ 1645* (Hampsted Garden Suburb Trust Ltd)[10].

Ground (b)

29. Ground (b) states:

> *That the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction... have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified.*

30. If everyone with the benefit of the covenant can be identified, and consents, a deed of release or variation of the covenant will be the easiest and cheapest means of solution.

31. However, ground (b) is useful where there is agreement from some holders of the benefit and silence from the others, or the number of potential beneficiaries is not wholly certain, since an order under s. 84 will bind everyone.

32. It can also be pleaded as an alternative to the main grounds. Since 'consent' may be inferred from the lack of any response to the notice of application or its advertisement if the notice is sufficiently clear as to what is being proposed, and no-one continues to dissent, the application may go through without hearing under this ground (although the tribunal still retains its discretion).

[10] NB this point is currently being argued in the *Thames Valley Holdings Ltd v. National Trust* litigation. The application under ground (aa) was not struck out on the basis of NT's argument that money cannot compensate the loss of a benefit to the public. Thames Valley wish to argue that NT can be compensated by money which can be applied in other areas to the furtherance of their statutory purposes.

Compensation

33. If any application succeeds, compensation may arise under one or other of the following heads:

    (i) A sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification;

    (ii) A sum to make up for the effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

34. The sums awarded under limb (i) are generally modest, since:

    (1) If grounds (a) or (c) are made out, compensation cannot arise.

    (2) If ground (aa) is made out (other than under the 'public interest' limb) compensation will necessarily be small, since otherwise the practical benefit or advantage, the loss of which is being compensated for, will have been 'substantial.

    However, substantial compensation can theoretically arise where ground (b), or the 'public interest' limb of ground (aa) is made out.

35. Substantial compensation can also theoretically arise under limb (ii) – to reflect the original reduction in price. However, it can be extremely difficult for the objector to prove the discount that resulted, or even the price originally paid. Further, no allowance is made for inflation. It is therefore only likely to arise in relation to relatively modern covenants.

36. Compensation *to make up for loss or disadvantage* is measured by reference to the loss of amenity (a matter of expert evidence). The principal element of the award is likely to be a diminution in value of the objector's property, however, modest awards are also made for other losses of amenity not significantly affecting the value of the property.

37. Objectors often expect compensation on the basis of a substantial negotiated release fee (as is often the basis of awards for damages in lieu of injunctive relief). This is a misconception. In *Winter v. Traditional & Contemporary Contracts Ltd [2007] EWCA Civ*

1088 the Court of Appeal gave important guidance as to the approach to compensation under s. 84. The Court of Appeal affirmed that compensation was for the diminution in value and enjoyment of the property, not the loss of bargaining power. There is no hard and fast rule as to how that loss is to be assessed. The 'negotiated' share rule is "a permissible tool for the tribunal" but the compensation must still bear a relationship to the loss being suffered. If such an approach were taken in order to assess the value of the loss suffered, and a percentage share of the benefit released is considered relevant *"it is likely to be at or around the Wrotham Park (5%) end of the scale".*

38. Compensation can be awarded for the temporary inconvenience of the building works, if these would otherwise have been avoided (*Re Gaffney's Application (1974) 35 P&CR 44*)[11].

Costs

39. The issue of costs in s. 84 applications requires careful consideration at an early stage, since the approach to costs differs from the normal rules of litigation. The new Practice Direction for the Lands Tribunal sets out the key principles:

> ***12.5 Applications under s. 84 of the Law of Property Act 1925***
>
> *1) On an application to discharge or modify a restrictive covenant affecting land, the following principles will be applied in respect of the exercise of the Tribunal's discretion regarding liability for costs:*
>
> *2) Where an applicant successfully challenges an objector's entitlement to object to an application, the objector is normally ordered to pay the applicant's costs incurred in dealing with that challenge, but only those costs. Where an applicant unsuccessfully challenges and objector's entitlement to object to an application, the applicant is normally ordered to pay the objector's costs incurred in dealing with that challenge.*
>
> *3) With regard to the costs of the substantive proceedings, because the applicant is seeking to remove or diminish particular property rights that the objector has, unless they have acted unreasonably, unsuccessful objectors to an application will not normally be ordered to pay any of the applicant's costs. And successful objectors will usually be awarded their costs unless they have acted unreasonably.*

[11] Francis on Restrictive Covenants and Freehold Land suggests a 'realistic ceiling' of £5,000 for such claims on the basis of the comment in *Gaffney* that the sum of £500 (in 1974) was generous.

40. Even if the application is successful overall, where time is taken up on individual grounds which fail, the costs order can reflect this.

41. The tribunal can consider, in exercising its discretion, Calderbank offers made by the parties. There is a special procedure for making such offers, which must be sent to the tribunal in a sealed envelope enclosed with an explanatory letter, and opened by the tribunal after the trial (practice direction §12.7)

42. Unreasonable refusals to consider ADR can also be taken into account on costs (practice direction §2.2).

43. The wider behaviour of the parties may also be taken into account. In the recent case of *Re Sheikh's Application [2011] UKHT 141 (LC)* the Lands Tribunal ordered the objector to pay 50% of the applicant's costs on the basis of 'the objector's lack of good faith' and 'attempts to mislead the tribunal'[12].

Tactical points and tips

(i) Consider the options other than s. 84

44. Where a developer is concerned about the presence of a covenant on his title, he may have options outside s.84 which it is important to consider:

    44.1. Insurance may be available in respect of the risk of enforcement of the covenant;

    44.2. Where the persons with the benefit are limited and obvious, it may be easier and ultimately cheaper to negotiate a release.

    44.3. It may be seriously arguable that there is no infringement of the covenant:

        (i) It may be worth arguing that the covenant is not breached, upon a true interpretation of the restriction;

[12] The Tribunal originally ordered the objector to pay 85% of the costs, but reviewed his decision and reduced the percentage having accepted that some (but not all) of his conclusions about being misled were mistaken.

- For example the restriction of the use of land to 'a private dwelling house' has been considered:

  (i) In *Crest Nicholson v. McAllister [2004] EWCA Civ 410* to mean only one dwelling houses: "a" implied singularity and, in the context, meant only one such private dwelling house.

  (ii) In *Martin v. David Wilson Homes [2004] EWCA Civ 1029* to mean any number of dwelling houses: "a" did not imply singularity, and in the context, the provision described the kind of user and not the number.

(ii) It may be arguable that the covenant required consent, and there is no-one left to give it. The trend in the recent cases is that death or dissolution of the consenting party causes the restriction, and not merely the release mechanism, to become spent (see *Crest Nicholson (above); Magerison v. Bates [2008] EWHC 1211*).

(iii) It may be that there remains no-one who has the right to enforce the covenant.

44.4. In such cases your client (and his insurers) may elect to take the risk and proceed. This will require careful consideration of the likely outcome if injunctive proceedings result. If damages are awarded in lieu of an injunction, the Land Registry may be prepared to note the fact on the title if all the potential beneficiaries of the restriction are bound by the decision.

44.5. Alternatively, it may be advisable to make an application under s. 84(2) for an appropriate declaration. If you succeed you may avoid compensation and (possibly much more valuably) paying costs. S. 84(2) applications are also effective against all persons with the benefit of the covenant, whether parties to the proceedings or not.

44.6. You should consider whether there are other powers that might apply. For example, s. 610 of the Housing Act 1985[13]. This provision states:

> *(1) ... a person interested in any premises may apply to the county court where—*
>
> *(a) owing to changes in the character of the neighbourhood in which the premises are situated, they cannot readily be let as a single dwelling-house but could readily be let for occupation if converted into two or more dwelling-houses, or*
>
> *(b) planning permission has been granted under Part III of [the Town and Country Planning Act 1990] 3 (general planning control) for the use of the premises as converted into two or more separate dwelling-houses instead of as a single dwelling-house,*
>
> *and the conversion is prohibited or restricted by the provisions of the lease of the premises, or by a restrictive covenant affecting the premises, or otherwise.*
>
> *(2) The court may, after giving any person interested an opportunity of being heard, vary the terms of the lease or other instrument imposing the prohibition or restriction, subject to such conditions and upon such terms as the court may think just*

44.7. Although only applicable to the subdivision of dwellings, its terms are much broader than the s. 84 grounds. Guidance was given on the operation of the section in *Lawntown v. Camenzuli [2008] 1 WLR 2656* in which the Court of Appeal made clear that the discretion was broad and, although all relevant factors must be taken into account, the strictures of grounds (a) (aa) and (c) do not apply.

Consider s. 84 early and think about timings and preparation

45. If you proceed down the development route before making a s. 84 application, you may have to change tack in a hurry:

(i) Applications to stay enforcement under s. 84(9) must be made promptly, unless you can find an issue upon which to seek a declaration under s. 84(2).

[13] If your client is in close contact with a local authority there may also be scope for using s. 237 of the Town & Country Planning Act 1990, and do not forget the Allotments Act 1950, s. 12!

(ii) (even assuming you have the planning permission you need) you may still have to settle and make your application without all the evidence in good order.

46. Making the s. 84 application after building works have been stopped by an injunction may very substantially prejudice your chances of success under s. 84 (see *George Wimpey Bristol Ltd v. Gloucstershire Housing Association Ltd [2011] UKUT 91 (LC)* paras 11-13).

47. Making the s. 84 application prematurely can affect its prospects:

(i) Developers often want to 'clear the title' as a first step to development. Since this course precludes all grounds but Ground (a), this is a bad move;

(ii) Wait for planning. Without it you will struggle to establish ground (aa) and if the planning permission requires alterations to the scheme, you may have to amend your application, and possibly re-notify potential objectors;

(iii) In restrictions with a 'consent proviso', making an application without first seeking consent may prevent you from establishing that that the restriction in question prevents the reasonable user.

Weigh the costs/benefits of the application carefully

48. To assess the costs/benefits of a s. 84 application, you will have to consider:

(i) The true chances of success

- consider each element of each ground individually;
- consider carefully the nature of the objector: a Ground (aa) application against a 'custodian of the public interest' is likely to fail.
- consider carefully the likely nature and extent of the potential objections. Note *Gilbert v. Spoor [1983] 1 Ch 27* - *"development 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".* Although note that in *Shephard v. Turner [2006] 2 P&CR 28* *Carnwath LJ* suggested (para 41) that

incidental benefits outside the purposes of the covenant were to be accorded less weight.

- bear in mind the remedy is discretionary, and the central tests for Ground (aa) are ones of 'fact and degree', and necessarily therefore high risk;

(ii) The costs of losing, and the cost of winning;

(iii) The likely value of the compensation claims – do not forget to evaluate the possibility of an award on the basis of the original consideration paid for the land with the restriction.

Consider ways to improve the chances of the application, or reduce costs liability, before making it

49. Consider the drafting of the Application very carefully:

(i) Successful objectors get their costs. If you seek a discharge, when it is unlikely to succeed, you may unnecessarily subject the client to a costs liability;

(ii) 'Belt and braces' reliance on lost grounds, some of which will never work may also have costs consequences: arguing obsolescence (ground (a)) may require serious costs expenditure);

(iii) Consider whether the suggestion of additional restrictions to be imposed by the Tribunal may reduce the loss of amenity to the objectors;

(iv) An amendment to the application, and the proposed modification, may mean re-notifying if potential objectors have not responded;

50. Consider making Calderbank offers on one or more issues, in order to minimise your chances of paying the objector's costs, and maximise the chances of recovering some from the objectors.

51. In order to try and undermine objections based upon practical advantage, you must give timely and full consideration to alternative schemes. Since the probability of other

uses/developments is highly relevant (see above) introducing late evidence of other 'possible scenarios' will not help. Cogent and timely evidence of alternative schemes and evidence that they can and will be implemented may very substantially help the application. That will often require significant planning evidence, if no application for permission has been obtained for the alternative scheme, and factual evidence as to the owners' intentions and/or the likely intention of subsequent owners.

52. In the course of the application, give serious consideration to how you can actually show the tribunal the true impact of the development (eg CAD illustrations; temporary structures). Applications regularly fail where insufficient detail of the impact of the proposal has been presented to the tribunal (eg *Re Davies Application LP/65/2006*).

53. Early on, actually go and have a look, preferably with your expert and counsel. Do not trust your expert, your client or the nice pictures they have taken, to give you a genuine impression.

54. Once you have had a look, be realistic. An unscientific consideration of decisions handed down by the Lands Tribunal in 2011 in contested cases indicated that only about 1/3 of them were successful.

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[14] I am grateful to Camilla Lamont for her invaluable contribution to this paper. All errors are, of course, my own.