SECTION 84 OF THE LAW OF PROPERTY ACT 1925: A SHORT GUIDE TO A DIFFICULT PROVISION

Tom Weekes QC

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1. Even for a specialist property lawyer, section 84 of the Law of Property Act 1925 ("LPA 1925") is not the easiest provision to understand (at least, simply by reading it). In a 2011 report[1], the Law Commission noted that one of its consultees (who happened to be George Bartlett QC, then President of the Lands Chamber) had complained about the *"difficulty of reading and navigating section 84"*. As the Law Commission has explained, section 84 is *"unusually long"*, *"the interrelationship of some of its provisions is not clear"*, and *"the practice of the [Tribunal] in applying the section 84 grounds has evolved over the years and is not readily discernible from the section itself"*[2].

WHAT IS THE POINT OF SECTION 84(1)?

2. To understand how section 84 operates, it helps to understand what it is trying to achieve.

3. The story starts in 1848 with the great case of Tulk v Moxhay (1848) 41 ER 1143. The owner of both Leicester Square and some surrounding houses sold Leicester Square whilst retaining the houses. The conveyance

[1] Making Land Work: Easements, Covenants and Profits a Prendre (Law Com, No.327), paragraph 7.24.
[2] Easements, Covenants and Profits a Prendre: Consultation Analysis (Consultation Paper No.186), paragraph 14.28.

stipulated that the purchaser, his heirs and assigns could use the square only as *"a pleasure ground"* and that the inhabitants of the houses on Leicester Square should have keys to, and a right of admission to, the square. Some years later, the square was purchased by Mr Moxhay. He wanted to build on the square. The question was whether he was entitled to do so. The Lord Chancellor held that a court of equity, being a court of conscience, would not permit Mr Moxhay from disregarding the contractual obligation contained in the conveyance to his predecessor in title of which he had notice.

4. Especially in the days before the enactment of the planning system (in 1947), the rule that restrictive covenants could be an equitable burden on land performed a useful role in regulating the use and development of land.

5. Nevertheless, the recognition that restrictive covenants could be an interest in land raised the prospect that the use of any particular parcel of land might become fossilized by restrictive covenants, even in (perhaps changed) circumstances in which it would, for one reason or another, be inequitable for the covenants to prevent a development.

6. Restrictive covenants are, however, enforceable against successors in title in equity. And, as Lord Templeman said[3], "equity is not a computer". So, in a typically flexible way, equity came to refuse to enforce restrictive covenants in situations where it would, for one reason or another, be inequitable for covenants to be used to prevent a development. Amongst other things, equity refused to enforce restrictive covenants: (i) if those with the benefit of the covenant had acquiesced in breaches of the covenant[4]; or (ii) if a covenant was designed to protect the character of the neighbourhood and, since the covenant was imposed, the character of the

[3] Winkworth v Edward Baron Development Co Ltd [1986] 1 WLR 1512, at page 1516.
[4] Hepworth v Pickles [1900] 1 Ch 108 and Attorney General of Hong Kong v Fairfax Ltd [1995] UKPC 55, [1997] 1 WLR 149.

neighbourhood had so changed as to render the covenant "obsolete"[5]. Also, equity refused to enforce a restrictive covenant by an injunction if, in an exceptional case, only trivial harm was caused by any breach and an injunction would be oppressive[6].

7. What Parliament did by enacting section 84 of the LPA 1925 was to establish a parallel system by which, not the Courts, but the Tribunal[7] can render a covenant unenforceable - or, sometimes, in effect, to confirm that an already "dead" covenant is unenforceable - by making an order for the discharge or modification of the covenant.[8]

8. To succeed under section 84(1), an applicant is required: (i) to establish that at least one of the statutory grounds is satisfied; and (ii) to persuade the Tribunal to exercise its discretion to discharge or modify the covenant (which, if a statutory ground is made out, is usually easy to do).

9. Although enacted by Parliament, the fingerprints of equity's approach to restrictive covenants are all over section 84. To a considerable extent (albeit by no means entirely), the grounds on which an application can be made under section 84 reflect the circumstances in which equity will refused to enforce a restrictive covenant. For example, ground (a) applies where "the restriction ought to be deemed obsolete", which reflects equity's refusal to enforce an obsolete covenant. Equally, ground (b) applies where those with the benefit of the covenant "have agreed, either expressly or by implication, by their acts or omissions, to the [restriction]

[5] Knight v Simmonds [1896] 1 Ch 653.
[6] Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287. The Supreme Court revised that test in Coventry v Lawrence [2014] AC 822 (by holding that the Court should have no inclination either way as to whether to grant an injunction).
[7] The jurisdiction was initially conferred on specified members of the body of Official Arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act 1919; it was transferred in 1950 to the Lands Tribunal; and, since 2009, it has been vested in the Upper Tribunal (Lands Chamber).
[8] The jurisdiction conferred by section 84(1) looks, on the face of it, confined to modifying or discharging restrictions. However, the Tribunal can also resolve issues about the interpretation of a restriction. In Jillas' Application [2003] 23 EG 147, the President said (at page 150) that it was "self-evident that the Tribunal must determine the meaning of the restriction to the extent that it is necessary to enable it to determine the application before it…".

being discharged or modified", which (amongst other things) covers cases in which equity would regard the benefit of a covenant as having been lost by acquiescence. And ground (aa), which we will consider in more detail below, bears some similarity to the circumstances in which the Courts declined to grant an injunction.

10. It was presumably thought necessary to confer on a tribunal a jurisdiction parallel to that of the courts because, when the LPA 1925 was enacted, the Courts would "hardly ever" make a "negative declaration". In other words, the Courts would hardly ever make a declaration that a claimant would not incur a liability if he did something or other[9]. So it was hard for a developer to obtain from a Court a declaration that, if he went ahead with his development, someone with the benefit of a covenant would not be granted an injunction stopping him half way through the development. Yet a developer would not want to risk going ahead without that reassurance. What section 84 gives a developer is the ability, at the outset, to take the initiative and obtain a ruling on whether a development is capable of being frustrated by a covenant.

[9] See Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, per Pickford LJ at page 563. In North Eastern Marine Engineering Co v Leeds Forge Co [1906] 1 Ch 324, Joyce J said (at page 329): "[T]he mere fact that A. is supposed to contemplate the bringing of an action against B., or that A. may have stated that he has grounds for such an action, does not, in my opinion, entitle B. to institute an action against A. to have it declared that A. has not a good cause of action against B. Ordinarily, an intending [claimant] may postpone his action as long as he pleases, at the risk of finding himself ultimately barred by some Statute of Limitations, and he may choose his own time for commencing proceedings. He is entitled to wait until he has collected the necessary evidence, or has made such inquiries as he thinks fit, or has obtained the requisite funds, or what not". Today, the Courts are more willing to make negative declarations. In Messier-Dowty Ltd v Sabena SA [2000] 1 WLR 2040, Lord Woolf MR said (at page 2049): "The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinized and their use rejected where it would serve no useful purpose. However where a negative declaration would be helpful to ensure that he aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice…[I]n my judgment the development of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction." In Greenwich Healthcare NHS Trust v London & Quadrant Housing Trust [1998] 1 WLR 1749 a healthcare trust that wanted to build a hospital obtained a declaration that, if it realigned a right of way, the servient owners would not be entitled to an injunction.

THE GROUND THAT IS MOST OFTEN RELIED UPON: GROUND (AA)

11. Of all the statutory grounds, ground (aa)[10] is most often relied upon. It enables the Tribunal to discharge or modify a restriction if:

    - The restriction impedes **"some reasonable user of land for public or private purposes"**.

    - In impeding that user, the restriction **"…does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them"**.[11]

    - 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"**.

The first requirement: the restriction impedes "some reasonable user of the land for public or private purposes"

12. You would never guess it from the drafting of this requirement, but, as interpreted by the Tribunal, it is relatively easy for an applicant to satisfy this requirement. For any parcel of land, there will be a wide range of potentially reasonable uses of it. And, importantly, the Tribunal resolves the question whether a proposed use of land would be reasonable on the assumption that the covenants do not exist: see Re Bass Ltd's Application

[10] Ground (aa) was introduced by an amendment made by the Law of Property Act 1969.

[11] There is an alternative limb that is satisfied where the restriction, in impeding a reasonable user, "is contrary to the public interest". This is exceptionally difficult to satisfy because: (i) to say that preventing a development is "contrary to the public interest" is a strong thing to say (see Re Bass Ltd's Application (1973) 26 P&CR 156, per Stuart Daniel at page 159); and (ii) when considering whether preventing a development is "contrary to the public interest" the Tribunal takes into account the existence of the covenants (see Re Collins' Application (1975) 30 P&CR 527, per Douglas Frank QC at page 531 ("…for an application to succeed on the ground of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract"). Accordingly, only very rarely has this limb of ground (aa) carried the day: see Re Lloyd's and Lloyd's Application (1993) 66 P&CR 112 and Millgate Developments Ltd v Smith [2016] UKUT 515 (UC)).

(1973) 26 P&CR 156, per Stuart Daniel QC at page 158. In Re Lloyds Bank Ltd's Application (1976) 35 P&CR 128, Russell-Davis FRICS approved the following passage from a practitioner book:

> "All that an applicant…has to show, so far as this part of the legislation is concerned, is that he has a definite project, that it is a reasonable one and that the unmodified restriction impedes it. There can be few applicants who would fail to do that."

13. As that passage indicates, this does require the Tribunal to consider applications by reference to a particular proposed use of land. That has been interpreted as requiring an applicant to have a concrete, worked-up proposal[12]. At least generally speaking, an applicant should make an application under ground (aa) only if he has first obtained planning permission. But, if he has a planning consent, that planning consent will be regarded by the Tribunal as "very persuasive" evidence that a development would be a "reasonable user of land": see Re Bass Ltd's Application (supra), at page 158.

The second requirement: the restriction, in impeding the reasonable user "does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them"[13]

14. This is the condition that is central to most applications under ground (aa). In almost all ground (aa) cases, an application will succeed or fail depending on whether this condition is made out.

[12] See Lloyd's Bank Ltd's Application (1978) 35 P&CR 128 and Whiting's Application (1989) 58 P&CR 321.

[13] There is an alternative limb that is satisfied if the restriction, in impeding a user of land, "is contrary to the public interest". At least historically, the Tribunal has interpreted that requirement in a way that makes it difficult for an applicant to satisfy the requirement. That is because: (i) when ascertaining whether this requirement is satisfied the Tribunal will take into account the existence of the covenants; and (ii) there is a strong public interest in upholding private rights which is capable of being outweighed only by an "interest…so important and immediate as to justify the serious interference with private rights and the sanctity of contract" (see Re Collins' Application (1975) 30 P&CR 527, per the President (Douglas Frank QC) at page 531).

15. What are "practical benefits of substantial value or advantage"? In Shephard v Turner [2006] 2 P&CR 28 the parties cited authorities in which judges, in quite different contexts, had considered what is meant by the word "substantial". Carnwath LJ said (at paragraph 23) that, of those cases, the "safer guide", in relation to the use of the "substantial" in section 84, was the case in which a judge had said that something was "substantial" if it was "considerable, solid, big". However, he went on to say that "I would prefer not to seek a degree of precision which Parliament has avoided. It was no doubt thought appropriate to leave it to the Tribunal, as an expert body…to apply the section in a commonsense way."

16. In the event, the Tribunal has interpreted this limb as being relatively difficult for an applicant to satisfy. The thinking seems to be that an applicant, if he gets home only on this ground, will make an inroad on an extant property right (which is something that is not done lightly).

17. So, an objector does not need to establish a great deal in the way of harm that would be caused by a development to obtain a finding from the Tribunal that a covenant, by preventing the development, confers on him benefits of substantial value or advantage.

18. When thinking about whether this requirement is satisfied, it might be relevant to ask whether the development would be "the thin end of the wedge". In other words, whether the development, whilst greatly harmful in itself, might create a precedent that might result in other developments; and that the cumulative effect of all such development would be seriously harmful[14]. Also, it might be relevant to ask what the applicant would do if

[14] In Re Zenios [2010] UKUT 260 (LC), the President of the Lands Tribunal said (at para 44):
"It unrealistic to suppose that successive developments of this sort can be permitted, on the basis that each in itself does little harm, up to the point at which one further development would significantly affect the character of the area, with an embargo being imposed from then on. The reasons for this are obvious. Each successive development creates pressure to reach a similar decision on the next application (in equity, because it would seem unfair to treat two comparable applications differently; and judgementally, because a similar development will previously have been judged to be acceptable). It is moreover wholly improbable that there could be some identifiable threshold up to which development could be

the application was refused. If the applicant, if his application were to be refused, would, so far as the objectors are concerned, carry out an even more harmful development, it will not be possible to say that the covenant, by preventing the preferred development, confers substantial benefits of the objectors[15].

The final requirement: "…that money will be an adequate compensation for the loss and disadvantage (if any) which [a person with the benefit of the covenant] will suffer from the discharge or modification"

19. On the face of it, this seems a puzzling requirement. The law, generally, does not regard land (or the enjoyment of land) as fungible; with the result that the loss of land, or an injury to land, cannot adequately be converted to money. Yet, for reasons that have not been explored in the case law, this requirement seems to assume that (at least modest) interferences to property rights are often adequately be compensated by money[16].

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seen to be acceptable and beyond which further development could be seen to be unacceptable. Instead there would be the risk that cumulative developments would gradually erode the character of the area to the point at which the erosion itself was seen to reduce the justification for refusing further applications."

[15] However, in Stannard v Issa [1987] AC 175 (a Privy Council case relating to similar statutory provision in Jamaica), Lord Oliver (delivering the judgment of the Privy Council) said (at pages 187 to 188):

> "Given any set of restrictions it is not usually difficult to conjure up colourful hypothetical examples of things which could be done within the framework of the covenants as they stand and which, if done, would substantially impair or defeat the purpose for which the covenants were imposed, but that is not an exercise which the court is enjoined by the section to undertake."

[16] However, in Re Parixax (SA) Pty Ltd (1956) 56 SR (NSW) 130 (a case about an Australian provision similar to section 84), Myers J said (at page 133):

> "An impression seems to have got abroad that when an application is made to modify a restriction one considers the benefit of the person entitled to it wholly from a material point of view; that all one has to do is to say: "Will he be any worse off financially; will his land be less readily saleable, or will it be depreciated in value?" Well, for my part I consider that the benefit which a person gets from a restriction cannot necessarily be measured only by material consideration. There are many of us who derive enjoyment from our surroundings, even though they do not add anything to the value of our homes. Indeed, there are many people who object, because it would be unpleasant to them, to alternations in their neighbourhood, even though it might actually increase the value of their properties.
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> A person who has the benefit of a covenant not to erect flats is, in my view, entitled to say: "I do not like flats near me, and that will diminish my enjoyment of my home", and if he is believed and is sincere, that is reasonable, I consider that that in itself is a sufficient reason for refusing to allow a modification of the restriction, even though the erection of the flats would not result in any material loss whatever…".

20. The type of case in which this requirement has usually be held not to be satisfied is where an objector is a "custodian of the public interest". If a local authority (or some other land owner) holds the benefit of covenants, not for its own benefit but instead for the public, a payment of money to the person or entity with the benefit of the covenant will not provide adequate compensation for the discharge or modification of the covenant. The money would not go to those that suffer the loss. The person with the benefit of the covenant would get the money but it would be the public that would suffer the loss. In Re Martin's Application (1989) 57 P&CR 119 (in which a local authority held the benefit of the covenants), Fox LJ said (at page 126):

> "If the covenant is of value to the corporation for the protection of the public interest in the preservation of the amenities, it is difficult to see how a money payment could be adequate compensation."

21. Another situation in which compensation will not be regarded as adequate (albeit not appearing as yet in the case law under section 84) is if a person's losses, such as future business losses, are highly speculative and therefore difficult to estimate.