# GROUND (AA) OF SECTION 84(1) OF THE LAW OF PROPERTY ACT 1925

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***by***


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**Tom Weekes** is "noted for having an exceptional property litigation practice" (Chambers and Partners, 2016). Before taking silk, Tom was named "real estate junior of the year" at the Chambers UK Bar Awards in 2014.

He has vast experience as a trial advocate and has appeared in many leading appellate cases (including in the Supreme Court and Privy Council).

Tom's recent cases have included *Fearn v Tate* [2019] Ch 369 (Tate Modern's viewing platform invading the privacy of leaseholders of neighbouring flats); *Knight v Goulandris* [2018] 1 P&CR 19 (a Court of Appeal case about the service of party wall notices); *Sparks v Biden* [2017] EWHC 1994 (whether a term should be implied into overage provisions to prevent an attempt to avoid paying overage); *Starham v Green King (2017)* (interpretation and effect of a 19th century conveyance of land above railway tunnels); and several applications to the Upper Tribunal under section 84 of the *Law of Property Act 1925* for the modification of restrictive covenants including *Re Falmouth Dockyard* [2017] UKUT 430 (LC) (acting for a commercial/military shipyard opposing an attempt by a superyacht company to modify covenants affecting a "wet dock"), *Re Surana's Application* [2016] UKUT 368 (acting for a developer attempting to build houses on designated amenity land), *University of Chester's Application* [2016] UKUT 457 (opposing a university's attempt to build a boathouse) and *Re Theodossiades' Application* [2017] UKUT 0461 (opposing an attempt to relax a one-dwelling-per-plot covenant).

He is the author of the leading practitioner work on notices (Property Notices (Jordans, 2011, 2nd ed) and he is the co-author of *Rights of Light* (Jordans, 2015, 3rd ed).

Recommendations in the legal directories have included:

- "He is brilliant – very reactive, straightforward, practical and commercial" (Chambers and Partners, 2019).
- "Carving out a name as the primus inter pares for property development disputes" (Legal 500, 2019).
- "…really gets to grips with a case and delivers highly effective advocacy" (Chambers and Partners, 2018).
- "peerless in his breadth of knowledge" (Legal 500, 2017).
- "excellent in every respect" (Chambers and Partners, 2016).
- "incredibly able…his performance in court is particularly impressive" (Legal 500, 2014).
- "extremely able advocate" (Legal 500, 2013).
- "gets great results" (Legal 500, 2011).
- "up and coming star of the property bar" (Legal 500, 2010).


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1. One of the big themes of English land law is that land should not be overburdened with encumbrances. To that end, the Upper Tribunal (Lands Chamber) has power under s.84(1) of the Law of Property Act 1925 to discharging or modifying restrictions "as to the user of land or the building thereon".

2. For the uninitiated, s.84 is a challenging provision. Just by reading s.84, it is hard to work out what the drafting is getting at. 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 went on to explain, s.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].

3. Today, I propose to explain how the Tribunal interprets, and how it goes about applying, ground (aa) (being the statutory ground in s.84 that is most often relied upon by applicants). I will then explain how the Tribunal dealt with the six ground (aa) applications in which I have appeared[3].

## WHAT "RESTRICTIONS" CAN THE TRIBUNAL DISCHARGE OR MODIFY?

4. The Tribunal can discharge or modify: (i) a restriction affecting freehold land affected by any restriction "under covenant or otherwise"; and (ii) a restriction affecting leasehold land where a term of more than 40 years has been created and at least 25 years of the term have expired.

[1] Making Land Work: Easements, Covenants and Profits a Prendre (Law Com, No.327), para 7.24.

[2] Easements, Covenants and Profits a Prendre: Consultation Analysis (Consultation Paper No.186), para 14.28.

[3] Re Zenios [2010] UKUT 260 (LC), Stanborough's Application [2012] JPL 756, Re Surana's Application [2016] UKUT 368 (LC), Theodossiades' Application [2017] UKUT 461, University of Chester's Application [2016] UKUT 457 (LC) and Pendennis Shipyard (Holdings) Ltd's Application [2017] UKUT 430 (LC).

5. If an application succeeds, the Tribunal, rather than discharging the restriction, will generally modify the restriction to the extent required to enable the applicant to put his land to the proposed use.

6. To succeed, an applicant must: (i) establish that one or more of the statutory grounds listed in s.84 is satisfied; and then (ii) persuade the Tribunal to exercise its discretion to discharge or modify the restriction. If an applicant establishes a statutory ground, the Tribunal will, almost always, go on to exercise its discretion to modify the restriction[4].

## GROUND (AA)

7. To succeed under ground (aa), an applicant has to establish three things:
    - The continued existence of the restriction "would impede some reasonable user of land…".
    - 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".
        - Or, 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".

### *The first requirement: the restriction "impedes some reasonable user of land…"*

[4] In Re George Wimpey Bristol Ltd's Application [2011] UKUT 91 (LC), Mr NJ Rose FRICS said (at para 35) that it was unlikely, had ground (aa) been made out, that he would have exercised his discretion to modify the covenant because the applicant had adopted a deliberate strategy to force through the development in knowing breach of the restriction in order to change the character and appearance of the site and thereby persuade the Tribunal to allow it to continue with the development.

8. You might not guess it just from reading of this requirement, but, as interpreted by the Tribunal, this requirement tends to be easy for an applicant to satisfy.

9. The emphasis is on the word "some". For any parcel of land, there will be a wide range of reasonable uses that can be made of it. The applicant merely has to establish his proposed use of the land is one of those reasonable uses. And, when the Tribunal asks whether a use of land is reasonable, it disregards the restriction: see Re Bass Ltd's Application (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."

10. An applicant must, however, have a concrete, worked-up proposal[5]. Generally speaking, an applicant should apply under ground (aa) only if he has first obtained planning permission. But, if he has planning permission, the planning permission is regarded as "very persuasive" evidence that the proposed use of the land would be "reasonable": see Re Bass Ltd's Application (supra), per Stuart Daniel QC at p.158.

11. The applicant's "reasonable user of land" must be "impeded" by the restriction.

12. Two recent cases have considered what it means to say that a use of land is "impeded" by a restriction.

13. In O'Byrne's Application [2018] UKUT 395 (LC) a freehold covenant required a farmhouse to be used as "a single private dwellinghouse". The applicant wanted

[5] See Lloyd's Bank Ltd's Application (1978) 35 P&CR 128 and Whiting's Application (1989) 58 P&CR 321. Owen and Richards' Application [2019] UKUT 171 (LC) (in which covenants were modified, not because they would impede a proposed use of land, but, instead, because they had put off purchasers of the property) was wrongly decided.

to build a second house on the land. The objector with the benefit of the covenant argued that the covenant did not "impede" that development because the applicant's right of way could be exercised only if the farm was used as "a single private dwellinghouse". HHJ Behrens and AJ Trott FRICS rejected that argument (at para 53):

> "There is nothing in the section which states that the covenant has to be the sole impediment to the reasonable user, or even the main impediment to such user. There is no reason to imply such a provision. It simply has to be an impediment. We accept that a second impediment may be relevant to the question of the discretion to accede to the application. We do not however accept that it is a matter going to jurisdiction under subsection (1)(aa)."

14. In Lamble's Application [2018] 2 P&CR DG19, Mr Lamble owned a bungalow. A covenant prohibited him from erecting new buildings without the consent of Mr and Mrs Buttaci (who owned a next-door house). Mr Lamble wanted to build a replacement house and also a garage. He asked Mr and Mrs Buttaci for consent. Mr and Mrs Buttaci refused. On Mr Lamble's application under s.84 to modify the covenant, Mr and Mrs Buttaci argued that the covenant didn't "impede" Mr Lamble's proposed development because the covenant could "impede" that development only if their refusal of consent was unreasonable; Mr and Mrs Buttaci had not established that the refusal of consent was unreasonable; and the Tribunal lacked jurisdiction to determine that issue. The Tribunal rejected that argument. Even an unreasonable (and therefore legally-ineffective) refusal of consent could impede a development because the owner of the burdened land might not want to proceed without the comfort of a determination to that effect. Martin Roger QC and Mr P McCrea FRICs said (at para 59):

> "Before the Tribunal can exercise its jurisdiction under ground (aa) it must be satisfied that the continued existence of the restriction in its unmodified form would "impede" some reasonable use of the applicant's land. In ordinary speech to impede a use of land means to delay or to prevent it. An objection or obstacle which is capable of being overcome may nevertheless be said to impede a proposed use of land. There is nothing

in the purpose of section 84(1)(aa) (the discharge or modification of restrictions which unreasonably impede the use of land), or in the statutory language, which requires that the impediment must otherwise be insuperable before the Tribunal's jurisdiction is engaged."

***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" or "is contrary to the public interest***

*The first limb: In impeding the reasonable user of land, does the restriction "secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them"?*

15. Almost always, an application under ground (aa) will succeed or fail depending on whether this requirement is satisfied. In essence, the applicant needs to establish that an objector with the benefit of the restriction will not be greatly benefitted by stopping the applicant's proposed use of his land.

16. The reference to "practical" benefits means that the Tribunal disregards the applicant's ability to use a covenant to extract a ransom payment or the like: see Stockport MBC v Alwiyah Development (1983) 52 P&CR 278 and Winter v Traditional & Contemporary Contracts Ltd [2008] 1 EGLR 80.

17. 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 para 23) that, of those cases, the "safer guide" about the meaning of "substantial" in s.84 was an authority in which a judge had said that something was "substantial" if it was "considerable, solid, big". However, Carnwath LJ went on to say:

"…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."

18. How does the Tribunal approach the question of whether a restriction secures to persons with the benefit of it any practical benefits of substantial value or advantage?

19. First, the Tribunal will generally hear evidence from: (i) valuation surveyors; and/or (ii) an "amenity experts" (who tend to be planning consultants).

20. Secondly, in most cases, the Tribunal will need to consider whether a proposed development would harm the amenity of an objector's land. So the Tribunal will be thinking about the respects in which the amenity of land can be harmed by a development on neighbouring land. For example, a development on neighbouring land can harm the amenity of an objector's land as a result of: (i) noise; (ii) light pollution; (iii) shadowing; (iv) overlooking; (v) the sight of something (maybe a building) that is overbearing or unattractive; (vi) the loss of light/daylight/sunlight; (vii) the loss of a feeling of spaciousness and tranquillity; (viii) the loss of an attractive view; or (ix) an increase in traffic and a loss of parking.

21. Thirdly, the Tribunal will be alive to the fact that, for reasons deeply rooted in human psychology, land owners (especially home owners) are often over-anxious about proposed changes in the use of neighbouring land. For example, they will often overestimate the extent to which a development will be harmful to the enjoyment of their land. It is often the case, as Erskine Simes QC said in Re Zopats Developments' Application [1966] 18 P&CR 156 that:

> "…the prospect terrifies while the reality will prove harmless."

22. Fourthly, to work out whether an objector would be harmed by a modification of a restriction, the Tribunal will need to work out what would happen if the restriction is not modified. A big part of the Tribunal's task is often the identification that comparator. The Tribunal will need to work out whether the comparison is between: (i) what would happen if the restriction is modified; and (ii) the status quo. Or, whether change is coming whatever the Tribunal might do with the restriction.

23. Fifthly, the Tribunal tends to be sceptical about claims by applicants that, if the restriction is not modified to enable them to carry out their preferred scheme, they will carry out some alternative schemes which, whilst permitted by any restriction, will be just as bad for any objectors (with the result, that the modification of the restriction will not harm those objectors). The Tribunal knows that such evidence is often self-serving. In Stannard v Issa [1987] AC 175 (a Privy Council case about a similar provision to s.84 in a Jamaican statute), Lord Oliver said (at pp.187-188):

> "Given any set of restrictions it is not usually difficult to conjure up colourful or 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…".

24. Sixthly, the harmful impact of modifying a restriction on an objector might not be limited to the harmful impact of the particular development that the applicant wants to carry out. That development might be a "thin end of the wedge". In other words, the development might create a precedent that might result in other developments. So the Tribunal will need to take into account the cumulative effect of those developments. 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 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."

25. With those points in minds, applicants often rush too quickly into making s.84 applications. Frequently, there are things that an applicant can do, before making his application, to help frame the issues before the Tribunal in the most helpful way.

26. For example, if an applicant wants to argue that, if the Tribunal dismisses his application, he will carry out an alternative development that is allowed by the restriction, but which will be just as bad for an objector, he will stand a better chance of being believed if he has taken practical steps to define, and to carrying out, that alternative development. Such as by obtaining planning permission. Equally, if it is likely that, if an applicant makes a s.84 application, an objector will complain that the proposed development would create noise and light that would harm the amenity of his land, the applicant might address that concern, before making his application, by planting mature trees or shrubs that would effectively shield the objector any noise and light.

27. In Hennessey's Application [2018] RVR 133 there was an unattractive, but ultimately successful, use by an applicant of planting in order to frame the issue before the Tribunal in the most helpful way. Mrs Hennessey wanted to build three houses on a plot subject to a one-house-per-plot covenant. Before making her application, Mr Kent (the owner of the next-door house with the benefit of the covenant) complained to Mrs Hennessey that the proposed development would block a view that he enjoyed over Mrs Hennessey's land of Castle Hedingham[6].

28. Mrs Hennessy's responded by planting a row of Leylandii trees to blocked that view. That meant that, when she made her s.84 application, she was able to say that building the three houses would not result in Mr Kent losing his view of the castle. That view had already been blocked by the Leyandii trees. And, whatever

[6] The best-preserved Norman keep in England.

the Tribunal did, Mr Kent was not going to get that view back. At the hearing, the Tribunal asked Mrs Hennessey whether she would trim her Leylandii trees. She answered by saying that she would not trim her Leylandii trees. Mr Kent argued that, when assessing the impact that the proposed development would have on him as the objector, the Tribunal should disregard Mrs Hennessey's unneighbourly act of planting of the Leylandii trees. The Tribunal (Martin Roger QC and Mr AJ Trott) rejected that argument. Whilst describing the planting of the Leylandii trees as an "unattractive strategy" (para 56) they said (at para 59)

> "The Tribunal cannot disregard the presence of the trees, or any other of the facts on the ground, when considering whether the density restriction secures practical benefits of substantial value or advantage. At most the Tribunal might consider the possibility that a more sympathetic owner of the application land might, in future, be prepared to remove the trees…"[7].

*"Is contrary to the public interest"*

29. As an alternative to establishing that a restriction does not secure to objectors any practical benefits of substantial value or advantage, an objector can establish that the restriction, in impeding the proposed user, is "contrary to the public interest".

30. Historically, this limb of the second requirement of ground (aa) has been something of a dead letter. When ascertaining whether this requirement is satisfied, the Tribunal takes into account the existence of the restriction. It takes the view that there is a strong public interest in upholding private rights. And it is a strong thing to say that it would be "contrary to the public interest" for someone to be permitted to rely upon a private right. In Re Collins' Application (1975) 30 P&CR 527, the President (Douglas Frank QC) said at page 531 that:

[7] The Tribunal also held that the deliberate planting of the trees was not a reason to decline to exercise the discretion to modify the covenant. At para 79, the Tribunal said:

> "…[the applicant] did not flout any legal obligation by planting the screen of trees that she knew would obstruct Mr Kent's view of the countryside beyond. It was an unneighbourly act but the objector has no right to a view and she was entitled to do it."

> "…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".

31. Earlier this year, the Tribunal attempted to breath fresh life into this limb of the second requirement.

32. In Alexander Devine Children's Cancer Trust v Millgate Developments Ltd [2019] 1 WLR 2729, a restrictive covenant prohibited building on agricultural land. A hospice was to be built on the land with the benefit of the covenant. A developer built some houses and bungalows on the burdened land in breach of the covenant. Those homes would be used to provide social housing. When it built the homes, the developer knew that it was breaching the covenant; and, indeed, the developer disregarded objections that building on the land would harm the hospice.

33. It was only after the developer had built most of the homes, that it bought a s.84 application to modify the covenants.

34. The Tribunal allowed the application on the ground that it would be "contrary to the public interest" for the covenants to impede occupation of the houses: which (i) had already been built; and (ii) would be occupied by people with a pressing social need.

35. With a degree of outrage, the Court of Appeal reversed that decision. Sales LJ said (at para 64):

> "A property developer which knows of a restrictive covenant which impedes its development of land has a fair opportunity before building either to negotiate a release of the covenant or to make an application under section 84 to see if it can be modified or discharged. That is how a developer ought to proceed. It is contrary to the public interest in ensuring that proper respect is given to contractual or property rights for a property developer to proceed without any good excuse to build in violation of such rights, as

contained in an enforceable restrictive covenant, in an attempt to improve its position on a subsequent application under section 84."

36. The Supreme Court has granted permission to appeal.

***The third 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"***

37. At first sight, this requirement might seem puzzling. It is a basic principle of land law that any particular parcel of land (or the enjoyment of any parcel of land) is unique. It is therefore said that land (or any enjoyment of land) is not exchangeable of money. That explains why specific performance is granted to require the performance of contracts for the sale or lease of land.

38. In fact, for reasons that are not explored in the case law, the Tribunal assumes that objectors can generally be adequately compensated by money for a modest interference with the amenity of their land arising from an applicant's development.

39. There is, however, an exception if the applicant is a "custodian of the public interest". If a local authority (or some other land owner) holds the benefit of a restriction, not for their own benefit but instead for the public, the Tribunal takes the view that a payment of money to that land owner will not provide adequate compensation for any loss or disadvantage arising from the modification of the restriction. That is because, if the covenant is modified, it would be the land owner would get the money, but it would be the public who 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 p.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."