

How builders can banish the covenant problem

As demand for housing rises, lawyers are deploying s 84 applications to overcome the barrier of restrictive covenants. **Andrew Francis** offers advice



IN BRIEF

- ▶ Discharging or modifying restrictive covenants over freehold land. Using s 84(1) of the Law of Property Act 1925.
- ▶ Why this is a useful jurisdiction now.

The importance of the jurisdiction under s 84 of the Law of Property Act 1925 cannot be overestimated. The government's housing and new national planning policy framework seeks to release land for much needed housing. There is a new Garden City movement supported by the government. As it is economic to develop to a greater intensity, a policy generally favoured under planning law, land values warrant steps being taken to remove covenant problems. Finally, there has been a growth in the re-use of sites where obsolescent houses are suitable for demolition with either replacement houses, or a greater number of houses, or flats being built.

The barriers

In this context, restrictive covenants often act as a barrier to the carrying out of the policies referred to above. In the absence of agreement, or the exercise of statutory powers (eg under s 203, Housing and Planning Act 2016) and unless the jurisdiction referred to below can be used successfully, restrictive covenants which are enforceable and which would be broken by development are a real impediment. Sadly, the Law Commission's proposals on the reform of land covenants published nearly seven years ago in June 2011 so as to remove some of the barriers to the most economic (and in many cases reasonable) use of land are at present unlikely to be implemented in the near future. As all property lawyers know, the law of restrictive covenants is a complex one, inhabiting an uncomfortable berth between the harbour

walls of land and contract law, the rules of equity and legislation which is nearly 100 years old. This article cannot explain that law. It will be assumed that the hypothetical client will have been advised that there are binding covenants on the land which are enforceable by neighbouring land owners. But the covenants prevent the proposed development, which has planning consent. If it can be carried out, the net development value may be in millions of pounds. How can that value be unlocked?

The potential of s 84

The answer is the use of the jurisdiction in the Upper Tribunal (Lands Chamber) (UTLC) under s 84(1), Law of Property Act 1925 (s 84) to discharge, or modify restrictive covenants. There are a number of grounds in s 84(1) under which this can be done. The one with the greatest chance of success is to show that the covenants impeding the development do not secure any practical benefits of substantial value, or advantage to those who can enforce the covenants; s 84(1)(aa) and s 84(1A). There are many cases about what this means. Invariably each application will turn on its facts on whether this test is satisfied. Many legal advisers fight shy of using this jurisdiction and in most cases they are correct to do so. These applications take time and cost money and while most settle well before trial, their outcome at trial is not easy to predict. But for some reason (no doubt due to the economic need to extract land values and a stubborn approach to agreed releases) there has been an increase in not only the number

of applications made, but also those which have reached a final hearing in the past year. Applications under s 84 can be hard to win, but it should be obvious that the reward for success, even after costs have been factored in, can be huge. What makes them more attractive is that the UTLC is conducting final hearings of disputed applications under s 84 generally within four months from the stage when the parties have completed the formal written stages of the application, which generally means a start to finish time of about nine months.

A case in point

One recent example can be given of the usefulness of the jurisdiction. *Re Theodossiadis' Application* [2017] UKUT 0461 (LC) was a successful application to modify covenants preventing a large late Victorian house, Gaisgill, on Barnet Lane, Elstree, Herts, from being demolished and replaced by a 'mansion' house, containing six flats. Gaisgill, the objectors' land, and other land to the east along Barnet Lane, had been sold off in plots between 1886 and 1910 by a common vendor with covenants restricting development on each plot. The objectors (who could enforce the covenants on Gaisgill imposed in 1896 and 1900) were concerned not only with the modest detrimental impact of the development on their houses and gardens to the east of Gaisgill, but also with the effect which any modification would have as a precedent in leading to similar development on sites to the east of their properties. The latter objection was the main ground of objection pursued at the hearing. The tribunal rejected that ground, finding principally that on the facts, there had been a large number of breaches of the covenants imposed on the land sold off by the common vendor, and technical reasons, based on covenant law, as to why enforcement would be difficult against other plot owners seeking to redevelop in future.

For the legal adviser and the client, the lesson to be taken away from *Re Theodossiadis* is that it is not impossible to unlock value, despite the presence of covenants which might seem to make development of a site a poor prospect. If planning consent for the development can be obtained (generally a prerequisite for s 84 applications) and if the evidence supports one of the grounds, a skilled team of legal advisers and an expert surveyor, or town planner should be able to achieve the discharge, or modification required. The task is not an easy one, but the economic benefits of the change can be huge. **NLJ**

Andrew Francis, barrister, Serle Court
(www.serlecourt.co.uk).