

# Breaches of Restrictive Covenants

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## Overview

1. What is a restrictive covenant, and why are they important?
2. Remedies for breaches of restrictive covenants
3. Ways of dealing with restrictive covenants
4. Section 84 of the Law of Property Act 1925

## What is a restrictive covenant?

- An agreement by deed that one party will limit the use of its land in some way for the benefit of the land of another party
- Bind successors in title
- Absolute prohibitions vs. qualified prohibitions

## Why are they important?

- Proprietary rights that sit outside of the planning regime (***Coventry v Lawrence***)
- Significant consequences for breach

## Remedies for breach

- Between the original covenantor and covenantee, common law damages are available
- However, on most occasions, equitable relief will be sought because either:
  - the owner of the burdened land is a successor in title; or
  - injunctive relief to restrain the breach is required
- Equitable damages can be sought under the **Senior Courts Act 1981, s50** (in addition to or in lieu of injunctive relief)
- See ***Wrotham Park Estate Co Ltd v Parkside Homes*** and ***Morris-Garner v One Step (Support) Ltd***

# How to deal with restrictive covenants

- Negotiate an express release or variation
- Indemnity insurance
- Law of Property Act 1925, s84
  - application to modify or discharge; or
  - application for a declaration

## Section 84: key practical points

- Application is to the Upper Tribunal (Lands Chamber)
- Timing of the application – consider s84(9)
- Not a costs neutral jurisdiction
  - Upper Tribunal Lands Chamber Rules, rule 10(6)(c)
  - Upper Tribunal (Lands Chamber) Practice Direction, paras 16.7 to 16.11, and paras 25.1 to 25.24
- Two-stage process: (i) establish one of the jurisdictional grounds in s84(1) and (ii) discretion

# The jurisdiction to modify or discharge

- Section 84(1):
  - Ground a: "...by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed **obsolete**" (see *Re Truman, Hanbury, Buxton & Co's Application*)
  - Ground aa: "...in a case falling within subsection (1A) below the continued existence [of the restriction] would impede some **reasonable user** of the land for public or private purposes..." (see *Re Bass Ltd's Application*)
  - Ground b: all beneficiaries of the restriction **agree** "either expressly or by implication, by their acts or omissions, to the [restriction] being discharged or modified"

# The jurisdiction to modify or discharge

- Section 84(1)
  - Ground c: "...the proposed discharge or modification will **not injure** the persons entitled to the benefit of the restriction"
- Upon modification or discharge, the Tribunal may direct the applicant to pay compensation under one, but not both, of the following heads:
  - a sum to make up for any **loss or disadvantage** suffered by the modification or discharge
  - a sum to make up for any effect that the restriction had, at the time when it was imposed, in **reducing the consideration** then received for the land affected by it



# The jurisdiction to modify or discharge

- Section 84(1A): in impeding the reasonable user either
  - The restriction does not secure to the persons entitled to the benefit of it any **practical benefits of substantial value or advantage**
  - **OR** is contrary to the **public interest**
  - **AND** money will be adequate compensation for the loss or disadvantage suffered (if any)
- Section 84(1B): the Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions, as well as the period and context in which the restriction was created or imposed and any other material circumstances

## Ground (aa): the planning regime

- Planning permission and permitted development rights can inform whether the proposed user under Ground (aa) is 'reasonable'
  - ***James Hall and Co (Property) Ltd v Maughan***: change of use from A4 (public house) to A1 (retail) was covered by PD, but prohibited under the covenant. Upper Tribunal modified the covenant. It weighed in the Tribunal's consideration that the reasonableness of the user had not been considered by the local planning authority
  - ***Jackson v Roselease Ltd***: Class Q PD, with prior approval subject to conditions (those being the consent of the objector, or modification or discharge of the relevant covenant). PD rights made the use "arguably reasonable"

# Discretion

- ***Alexander Devine Children's Cancer Trust v Housing Solutions Ltd***
  - Affordable housing units built in deliberate and knowing breach of covenant
  - Ground (aa) sought – impeding the reasonable user was contrary to the public interest
  - The Applicant's conduct was irrelevant at the jurisdictional stage
  - Supreme Court refused at the discretion stage by reason of the 'cynical' nature of the breach

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# Return to Vendor: Fraudulent Misrepresentation in Residential Conveyancing

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# Today's Topics

- Vendor Duties of Disclosure
- Recap: Fraudulent Misrepresentation
- Property Disputes Caselaw
- Patarkatsishvili v Woodward-Fisher [2025] EWHC 265
- Key Takeaways

# Vendor Duties of Disclosure

- Caveat Emptor
  - *Fox v Mackreth* (1791) 2 Cox 320
  - Standard Condition 3.2.1 - "The buyer accepts the property in the physical state it is in at the date of the contract ..."
- No general duty of disclosure
- Exceptions?
  - Statute
  - Industry Codes
  - **Law Society Property Information Forms**



# Recap: Fraudulent Misrepresentation

- Four Ingredients:
  - False Representation
  - Known to be false or reckless to whether true or false
  - Intention that the Claimant should act in reliance
  - Claimant does act in reliance and suffers loss
- Civil Standard of Proof But Convincing Evidence - (UK Insurance Ltd v Gentry [2018] EWHC 37 (QB), [19] – [21])
- Remedies
  - Rescission
  - Damages
  - Bars to Rescission



# Property Disputes 1

- *McMeekin v Long* - [2003] 2 E.G.L.R. 81 – Astill J
  - Answered “No” to “Do you know of any disputes about this or any neighbouring property?” and, “Have you received any complaints about anything you have or have not done as owners?”
  - Claimant alleged fraudulent misrepresentation as there had been a dispute about parking (including a dilapidated caravan) on a private access road and another regarding dumping of rubbish.
  - Claimant successful
  - “atmosphere of constant confrontation”, “continuation of running dispute... which is a continuation of the problem that was suffered by the occupants when the Defendants were there”
  - “occupiers of the houses on the road, including the Defendants, frequently discussed the problems that were arising... it is inconceivable that the Defendants were not aware of what I believe can be properly categorised as disputes”
  - “The Seller's Property Information Form could not be expressed in clearer language. **It is not a lawyer's form, but one which is designed for everyone to be able to understand.**”



# Property Disputes 2

- *Doe v Skegg [2006] EWHC 3746 – Pelling J*
- Answered “No” to “Do you know of any disputes about this or any neighbouring property?”, “Have you received any complaints about anything you have or have not done as owners?”, and “Have you made any such complaints to any neighbour about what the neighbour has or has not done?”
- Sellers had experienced problems with trespass and harassment from a neighbour’s son and had threatened legal action
- Judge rejected submission that a dispute required assertion of a right by alleged wrongdoer. - “Not necessary or desirable that I attempt a comprehensive definition of what is meant by “dispute” in this context”
- A dispute concerning trespass fell within definition of “disputes about this... property” – “[the question] is capable of covering a number of different disputes, from boundary disputes, building disputes, disputes concerning disputed rights of way and disputes concerning other easements and the like, I do not think it can be limited to that”
- Defendants knew what was said was untrue. Careful consideration, ongoing problems, and concern of impact of disclosure on sale of property and price.
- Judge noted benefit of s2(1) Misrepresentation Act 1967

# Patarkatsishvili v Woodward-Fisher [2025] EWHC 265

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- Horbury Villa, Ladbroke Road, purchased in 2012 and renovated
- £32,500,000 sale price to Claimants
- “unusually large and attractive”
- Clothes moths started appearing in early 2018
- Conflicting opinions and reports from pest control as to source but ultimately identified as the natural wool insulation
- Property marketed for sale and viewed by Claimants 6 or 7 times before sale agreed in February 2019
- Upon Claimants moving in moth problem apparent. Over £300,000 spent in removing insulation and treatments. Defendant’s reports obtained.
- Fraudulent misrepresentation claim issued for rescission, return of purchase price and damages for associated costs (stamp duty, clothes, loss of enjoyment).



# Patarkatsishvili (cont'd)

## PIF Questions

- "2.1 Has the property ever been affected by woodworm, dry rot or other timber infestation or decay; defects in drainage, water pipes, gas pipes or electrical wiring; damp; Subsidence, landslip or heave; any structural building or drainage defect; vermin infestation; asbestos.
- 2.2 Please supply a copy of any report concerning any matter referred to in 2.1 above or otherwise concerning the fabric of the property.
- 2.3 Is the seller aware of any defects in the property which are not apparent on inspection (due to the presence of furniture, carpets, cupboards etc?)

## Defendant's Answers

- 2.1 - The Seller is not aware of any such matters affecting the property since the renovation and extension works were undertaken and completed but has not had the property surveyed for such matters so no warranty can be given in this regard and the buyer must rely on the results of its own survey, inspection and professional advice.
- 2.2 - Save as may have been disclosed in the documentation provided, there are none.
- 2.3 - The seller is not aware of any such defects but has not had the property surveyed for any so no warranty can be given in this regard and the buyer must rely on the results of its own survey, inspection and professional advice.

# Patarkatsishvili (cont'd)

- The Defendant's answers were misrepresentations
  - Contextual approach to definition of “vermin”
  - Contextual approach to definition of “report”
  - No basis to restrict “defects in the property” to structural defects
- The Claimants knew of and relied on the replies
  - Defendant argued Claimants were not personally told of the responses to the replies
  - As a matter of law, a solicitor’s knowledge is imputed to the client.
  - Presumption of inducement and reliance?
  - *“Once knowledge is established, if the misrepresentation was made with the intention that it be acted upon and there was action following it, inducement will be presumed (though can be rebutted by evidence).”* [86]
  - *“Had [C’s solicitors] not reported on title or sent the Replies to the Claimants but simply told them directly that they had considered all the documents, that there were no red flags and that it was safe to proceed, and the Claimants then did so following that advice, reliance on the Replies would clearly be established (and in any event would be presumed, unless disproved).”* [100]
- Intent to defraud was established
  - *Derry v Peek (1889) 14 App Cas 337 at 374*
  - Motive may have relevance in assessing knowledge of falsity
  - Defendant aware of reports, recognised possibility that moths were vermin but was reckless, grossly negligent.

# Patarkatsishvili (cont'd)

- Claimant's primary remedy was rescission.
- Defendant's argument that the Court had discretion to refuse rescission rejected
- *The authorities establish that there may be bars to a claim for rescission, which include inability of a claimant to make counter restitution; but if counter restitution can be given and there is no bar, there is no residual discretion that the Court can exercise on the basis that it appears fairer to leave a claimant to recover damages at law. [187]*
- *The question is rather whether, although the parties cannot be restored to their precise positions prior to the contract, restitution can be achieved in a practically just way by making adjustments and allowances. [188]*
- Defences of delay, affirmation and impossibility of rescission rejected.
  - Delay will bar if culpably excessive or gives rise to a benefit that cannot be restored, or causes prejudice to representor rendering rescission inequitable. [201]
  - Affirmation requires (i) an unequivocal act or statement and (ii) communication to the representor. [213]
  - Impossibility is about counter restitution. Court will take practical approach, including use of equitable charges and monetary allowances in defendant's favour. [218], [223], [229]
- Rescission effected with rectification of title register, grant of equitable charge pending sale of property. Allowance at market rent for Claimants' time in occupation. *"a practically just means of granting restitution and effecting counter restitution in this case"*





# Key Takeaways

- Seller has no obligation to answer inquiries, but honesty is paramount if they do
- Consider non-standard, focused questions and explanations of the types of issues expected to be addressed
- PIFs will be subject to contextual everyday constructions
- Imputation of knowledge will make establishing reliance easier
- Rescission will be flexibly granted but beware of defences
- Consider negligent misrepresentation, especially in damages only claims



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