THE CONTROL OF LAND USE AND DEVELOPMENT
with primary reference to
RESTRICTIVE COVENANT CONTROL
and with reference to
PLANNING (DEVELOPMENT) CONTROL

Thesis submitted for the Degree of
Doctor of Philosophy
at the University of Leicester

by

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May 1997
The Control of Land Use and Development with primary reference to Restrictive Covenant Control and with reference to Planning (Development) Control.

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Abstract

This thesis is concerned with certain legal 'instruments' for the regulation of land use and development. These are, in the private arena, the restrictive covenant, and in the public arena, aspects of the development control planning system.

The major theme is the restrictive covenant, its origins, evolution, adoption and adaptation. This theme takes an historical, 'case-based' approach to the growth of the law, with emphasis on the 'building scheme'. It illustrates the concern of the courts to keep the concept in check, whilst adapting it to meet changing social and economic conditions. There follows a critical examination of the practical operation of the statutory mechanism for the discharge or modification of restrictive covenants, with emphasis on planning and environmental issues, first in the era of the Official Arbitrator and later in the jurisdiction of the Lands Tribunal.

The thesis then turns to a selective commentary on planning (development) control. It deals both with significant aspects of planning as a mechanism for the control of land use and development and with certain contrasts between features of the public régime of planning and the private régime of the restrictive covenant. It considers the impact of the 'plan-led' system, planning conditions and obligations, limitations of control, enforcement issues and the concept of an Environmental Court or Tribunal.

The thesis concludes by examining the continuing relevance of the restrictive covenant in an area now dominated by comprehensive planning control, considers proposals for reform, makes comparison with United States proposals for servitude law reform, and ends with a brief 'vision' for the future,
Preface

The year was 1848. On the 31st August the Royal Assent was given to 11 & 12 Vict. c. 63 and on the 22nd December the House of Lords, affirming the decision of the Master of the Rolls, granted an injunction to a Mr Tulk.

These two events were to have far-reaching implications for the control of the use and development of land. The former, known by its 'short title' as the Public Health Act, 1848, would come to be seen as the 'father' of control in the public interest, through a series of Acts dealing with health, housing, planning and the environment. The latter, the seminal case of Tulk v Moxhay, was the genesis of a long line of 'celebrated' cases giving form to the Restrictive Covenant and its 'composite identity' in the building or development scheme.

Until 1848 control had depended on 'ownership' of the freehold in possession or in reversion (leasehold control), with such minor exceptions as the rarely invoked power of the state in respect of compulsory acquisition or requisition, strictly limited statutory control in respect of 'health and safety', and certain specific rights of the individual 'landowner' such as the natural right of support of land and the easements of light and way. It is no exaggeration to assert that the events of 1848 were, each in their own way, a 'watershed'.

* * *

The subject of this study is control of land use both 'private' and 'public'. It deals with two instruments of land use control of major importance for estate management practice. In the 'private' arena it focuses on the restrictive covenant, and in the 'public', on certain features of town and country planning. Approached from the viewpoint of the law and practice of land management, it is concerned with the pros and cons of 'private' and 'public' control measures.

Of the chosen instruments of regulation, consideration of the development control aspects of the planning system is given to the extent required to enable examination of the two kinds of measure. Much greater emphasis is afforded though, to the restrictive covenant. The reason is that while the progress of the planning legislation (as likewise of public health and housing legislation) is well documented, it is less so in the case of the history of the Restrictive Covenant and the Building Scheme and the way in which they have impacted on land use and development. Accordingly, prominence is afforded to the origins, evolution, adoption and adaptation of the Restrictive Covenant.

By way of preliminary to the treatment of the restrictive covenant, it is thought appropriate at this very early stage briefly to acknowledge its broad land law and land management context, although anything more than such acknowledgement is outwith the scope of the study.

From a land law and management standpoint, the inception of the doctrine of the restrictive covenant has to be seen against the background of the management 'tools' that the law had provided for the 'landowner' and his professional advisers to achieve management
and control of the use and development of their 'estates'. With increasing population, urbanisation and industrialisation the 'aristocratic' control of vast acres through the medium of the strict settlement and the trust for sale, whilst still an important element and one which would remain so until the end of the 19th century, had already passed the peak of its influence and, in spite of the measures brought in during the 19th century to increase the powers of the tenant for life and thereby enable a more efficient management and control, the concept of settled land was of little relevance in a society which was in the process of becoming the 'world' leader in industry and commerce.

The 'commercial' instruments of management - the lease, the mortgage, the easement and the rentcharge - were available and were adapted and refined to meet the ever-increasing demand for housing and industrial development in the expanding urban settlements, market towns and cities. Apart from the limited range of issues which could be embraced within the law relating to easements and the control that the rentcharge afforded - the latter restricted mainly to low-cost high-density developments of artisans dwellings and confined to a few specific areas of the country, namely the Midlands and the north west - no powers existed whereby land, the freehold of which had been disposed of to another, could be controlled in either its use or its development. The restrictive covenant would, as will be demonstrated, become an important 'instrument' to the achievement of that end.

A study concerned with the control of land use has to recognise the distinct connotations ascribed to 'control' when qualified as being either 'private' or 'public'. From the point of view of the 'landed interest' the history of the use of land is dominated by the desire of landowners for the power privately to exercise ever-increasing control. The individual estate owner has sought to extend his control as far into the future as the law allowed him, as for example the strict settlement and the long term lease. He has sought tightly to control the management of the use of land through covenants in leases and collateral stipulations in mortgages. He has striven to achieve control over the land of others through the acquisition of easements and, eventually, by the imposition of restrictive covenants.

By contrast, the introduction of public control - first health, then housing, planning and most recently environment - was to be met by landowners, certainly in the early days, by attitudes varying between reluctant acceptance and outright antagonism to 'outside' interference in the use and development of their land. Indeed, in the early years, certainly up to the mid 1870's, the only statutory control was as a direct result of some real or perceived 'disaster' affecting either 'health' or 'safety'. It is only in comparatively recent times that landowners have generally acknowledged (with varying degrees of acceptance) the need for 'planning' and 'environmental' control.

The arrival of 'public' control was not, furthermore, to eclipse 'private' control. Many forms of 'private' control are as relevant today as they were a hundred years ago; the lease (and more recently, the licence), the mortgage and the easement are still essential constituents of estate management and development.

For more than a century now some 'public' control of land use and development has existed alongside the 'private' control of the estate owner. Sometimes the various controls
conflict, sometimes they are complementary, sometimes supplementary. In their myriad potential relationships, however, it is suggested that the relationship between the restrictive covenant and town and country planning is of particular interest. The restrictive covenant may seek to prevent development entirely, to restrict development to a particular use or group of uses, to control the density of development and its size, form and design, all of which matters are the very substance of planning control as it has now been administered in this country for nearly half a century.

On the surface, therefore, the objectives of these two leading forms of land use control may appear very similar. Such superficial similarity is, though, misleading. The former being geared to the protection of private property rights, and the latter to the protection and benefit of the public interest and good, each régime has its distinctive and fundamentally different raison d'être. The bearing in mind of this distinction is important, it is believed, when coming to contemplate the use and effectiveness of the one system vis à vis the other.

* * * *

These observations having been made, the scene is set for a study which, in essence, is perceived as contemplating three things.

First, to consider THE EVOLUTION OF THE LAW OF RESTRICTIVE COVENANTS, by means of an historical study and analysis of the considerable body of case law which the concept has engendered in the course of its development.

Second, to consider the operation of section 84 of the Law of Property Act, 1925 in THE DISCHARGE OR MODIFICATION OF RESTRICTIVE COVENANTS, by means of an analytical examination of, and commentary on, the decisions of the Official Arbitrator and the Lands Tribunal, whereby the restrictive covenant was enabled to retain credibility and utility.

Third, to discuss those parts of the planning system directed to PLANNING (DEVELOPMENT) CONTROL, doing so in so far as, and to the extent necessary, to enable an examination of the merits and demerits of 'private' and 'public' control measures.

Finally, the study concludes with a section dealing with possible reform of the law of restrictive covenants, makes comparison with United States proposals for servitude law reform, and considers the future for the restrictive covenant and the form it may take, together with some indication as to where the future relationship between 'private' and 'public' control of land use and development may lie.
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THE EVOLUTION OF THE LAW OF
RESTRICTIVE COVENANTS

INTRODUCTION

'The starting point for the modern development of restrictive covenants is, of course, the case of Tulk v Moxhay in 1848; from that decision there has been developed a body of law which proved to be, if not an unmixed blessing, yet of very great importance in regulating the urban development of the country before the introduction of modern planning legislation, for it became possible to impose upon land by private treaty a wide variety of restrictions upon user and development. Today the older system of private regulation continues alongside the modern system of public regulation, and both have their distinctive merits, and their distinctive disadvantages.' (Professor A.W.B. Simpson)

It is with these words that Professor Simpson\(^1\) introduces restrictive covenants and coincidentally provides an appropriate 'text' for this historical analysis of the evolution of the law relating to restrictive covenants affecting freehold land. As Simpson goes on to observe, *Tulk v Moxhay\(^2\)* was not an entirely new departure and "if we are to understand the history of the equitable doctrine we must . . . examine not only the doctrines of equity but also the doctrines of law on the running of covenants'.

Indeed, to appreciate fully the significance of the development in the law which would flow from *Tulk v Moxhay* it is necessary to understand first, the influence of Equity upon the rigours of the Common Law doctrine of privity of contract and, second, the position pertaining to covenants immediately prior to the decision - a position that had remained fundamentally unchanged for 300 years.

In the early part of the nineteenth century, 'privity' (the doctrine which in a sense confines the concept of contract) became firmly established in the Common Law. In *Price v Easton\(^3\)* decided in 1833, it was made clear that '. . . no-one [might] be entitled to or bound by the terms of a contract to which he [was] not an original party'. Although the doctrine survives it has not been unreservedly accepted - its history is obscure, it is subject to the well-founded exception of the notion of the undisclosed principal in agency, and (particularly important in the present context) it clashes '. . . with the needs and concepts of the law of property'.\(^4\)

It had long been appreciated that property rights could not be contained by so restrictive an idea as privity. For centuries, the Common Law had facilitated the running with the land of the benefit of a covenant\(^5\) and, likewise, statute and the Common Law had combined in the law of leases to accommodate the running of both the benefit and the burden of covenants.\(^6\) Such principles, however, could not cover the range of situations in which a perceived need for the

\(^2\) (1848) 2 Ph 774.
\(^3\) (1833) 4 B & Ad 433.
\(^5\) See *The Prior's or Pakenham's Case* (1369) YB 42 Edw 3, pt 14, fol 3a, Co Litt 385a.
\(^6\) Through a body of law with its roots in the Grantees of Reversions Act, 1540 and *Spencer's Case* (1583) 5 Co Rep 16a.
enforcement by or against a 'non-party' of a land-related covenant might arise. In particular, it
did not cover the situation where a purchaser of land had voluntarily accepted a covenant
upon purchase, later sold the land to a third party, and the third party then having broken the
covenant the original vendor sought to enforce it. Because of the long standing Common Law
rule that only the benefit and not the burden might run, the obstacle of privity prevented the
enforcement of any such covenant.

It was into this sector of privity's domain that Equity was to make a spectacular incursion,
albeit in respect only of negative or restrictive covenants. As will soon emerge far more fully,
Equity was able via its crucial decision in Tulk v Moxhay7 to distance itself from the stance of the
Common Law by granting an injunction to restrain a breach of covenant on the part of a third
person into whose hands, with notice of the covenant, affected land had come. In itself, such an
effort by Equity to circumvent a Common Law inconvenience was not remarkable. From the
18th century, attempts had been made to limit the impact of privity by resort to the device of
the trust, while as far back as the 17th century the Court of Chancery proved itself able to
overcome the Common Law view that a right arising under a contract could not be assigned, so
as to enable the assignee to seek to enforce the right in his own name. What was to prove
remarkable was rather the way in which from humble beginnings Equity's incursion was to
blossom.8 As time went by the doctrine of the restrictive covenant was to develop into one of
great import for land management and further, was not only to contribute significantly to
private land law but also to influence, if only indirectly, the public law of planning control.

So far as the law of covenants was concerned the position immediately prior to Tulk v
Moxhay may be briefly outlined. First, a distinction has to be drawn as between leaseholds and
freeholds; secondly, as between the original parties and their successors in title; thirdly, as
between 'benefit' and 'burden', and, lastly, as between positive and negative covenants.

Regarding LEASEHOLDS:

- As between the original lessor and lessee, both parties were bound by all
covenants by virtue of privity of contract.
- As between the lessor and an assignee of the lessee's term, both the lessor and the
assignee of the lessee's term might enforce covenants which 'touched and concerned' the
land - both the benefit and the burden ran with the land by virtue of privity of estate.9
- As between the assignee of the lessor's reversion and the lessee, both the assignee of the
lesser's reversion and the lessee might enforce covenants which 'touched and concerned'
the land - both the benefit and the burden ran with the reversion by virtue of certain
statutory provisions.10

7 (1848) 2 Ph 774.
8 Here is yet another instance of the judiciary's great ingenuity in developing the law to accommodate new situations and
requirements - what other legal jurisdiction could have developed the unique concept of the trust from a statute (the Statute of Uses,
1535) which had virtually 'outlawed' the use?
9 Since Spencer's case (1583) 5 Co Rep 16a, which distinguished between covenants referring to a thing in esse (e.g. to repair an existing
wall) which bound assignees in all cases and covenants referring to a thing in posse (e.g. to build a new wall) which bound assignees
only where the original lessee covenanted for himself and his assigns: the distinction was abolished by the Law of Property Act,
1925, s.79(1).
10 Since the Grantees of Reversions Act, 1540.
Regarding FREEHOLDS:

- As between the original covenantee and covenantor, both parties were bound by all covenants by virtue of privity of contract.
- As between successors in title of the original covenantee and covenantor the *benefit* of covenants (both positive and negative) which 'touched and concerned' the land could run to successors in title of the covenantee, but the *burden* could not run to successors in title of the covenantor.

Such was the position at Common Law when Equity intervened in the first half of the 19th Century to address the problem of the enforcement of the burden (as well as the benefit) of restrictive (but not of positive) covenants affecting freehold land and it is, of course, with the development of the equitable doctrine that this study is primarily concerned. Furthermore, it should be noted that although the cases soon to be cited relate in the main to covenants affecting freehold land, occasional reference is also made to cases concerning covenants in 'long leases' where a matter of principle is involved which throws light on the way the law relating to covenants affecting freeholds was evolving.

During the course of the evolution of the restrictive covenant changes in the law relating to leasehold covenants would occur and, whilst the law would remain substantially as already stated for many years, two changes to the law in the 20th century need to be noted, namely, first the effect of the Law of Property Act, 1925, s.141 (replacing the Conveyancing Act, 1881, s.10) and secondly, the Landlord and Tenant (Covenants) Act, 1995. Whilst neither affects directly the law concerning restrictive covenants they are of sufficient significance to warrant mention at this stage. Consideration of further sections of the Law of Property Act, 1925, as for example sections 56, 78 & 79, will feature as appropriate in the main text (post).

**Law of Property Act, 1925**

In the mid 19th century the position of the assignee of the reversion depended upon the provisions of the Grantees of the Reversions Act, 1540. According to Wilde, CJ in *Bickford v Parson* this Act 'annexes, or rather creates, a privity of contract between those who have a privity of estate'. Later, however, the position of the assignee of the reversion was to be governed by sections 141 & 142 of the Law of Property Act, 1925 and their provisions do not work in quite the same way as the concept of privity of estate. For instance, under these provisions, if there exists between the original parties only an equitable lease, an assignee of the reversion may be able to sue and be sued on covenants contained therein, even though there would exist between the assignee and the intended 'lessee' no privity of estate.
Again, because section 141(1) provides in effect that the benefit of leasehold covenants which touch and concern the land should pass with the reversion, in *Re King*\textsuperscript{15} it was held that it was the assignee and not the assignor who was entitled to sue in respect of breaches of covenants to repair and re-instate the property which were committed prior to the date of the assignment but which remained outstanding.

*Landlord and Tenant (Covenants) Act, 1995*

For a leasehold covenant to run, it has been clear law that the covenant must not only touch and concern the land but that there must also exist 'privity of estate' between the parties. Privity of estate embraces all persons within the leasehold relationship who stand as between each other in the position of lessor and lessee and include all those who trace their leasehold status directly to the 'estate' comprised within the head lease. For privity of estate to exist there has to be what Cheshire calls ' ... an assignment in the true and proper sense of that term. ...'\textsuperscript{16} by which is meant that to be an assignee of a lease the transferee has to take the identical term which the lessee had, and the whole of it. In summary therefore there has had to be, as between the original parties, privity of contract and as between assignees of either or both of the original parties privity of estate and compliance with the 'touch and concern' requirement.\textsuperscript{17}

Although this was the position up to the 1st January 1996, and remains so in respect of leases entered into before that date, leases entered into from that date onwards are subject to the provisions of the Landlord and Tenant (Covenants) Act, 1995 and the 'new code' established therein. Three factors of the 'new code' warrant mention.

First, and broadly, the benefit and burden of all landlord and tenant covenants will pass on assignment (of the whole or part of the demised premises), with the exception of those expressed to be personal, thus removing the necessity in future leases to consider whether or not a covenant 'touches and concerns' the land.\textsuperscript{18}

Secondly, the Act addresses the problem faced by many tenants who (on account of privity) remained liable on covenants after assigning their interests. Upon assignment of his interest, a tenant is automatically released from his obligations under the lease; however, the release of the landlord from his obligations upon assignment of the reversion is subject to the consent of the tenant or the Court.

Thirdly, and of most interest and relevance to this study, section 3(5) of the Act provides that where a landlord or tenant enters into a covenant restricting the use of land, such covenant shall be enforceable not only against assignees but against any other person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the tenancy to that effect. Under the law as it stood prior to this enactment, it had long been the case that, there being no privity of estate between them, a landlord could not directly enforce a covenant against a sub-tenant unless, the covenant being one restrictive of the use of land, he was able to rely upon the equitable doctrine of *Tulk v Moxhay*. Since the enactment of section 3(5), it is clear that he will no longer have to rely upon Equity nor concern

\textsuperscript{15} [1963] Ch 459.


\textsuperscript{17} For an explanation of the 'touch and concern' requirement see post, A Retrospect, A Prospect and A Conclusion.

\textsuperscript{18} The distinction will, however, remain important in respect of leases entered into before the coming into operation of the Act and, more particularly for the purpose of the current study, will remain an essential element in respect of restrictive covenants affecting freehold land.
himself about the rules of restrictive covenants. The full impact of the broad wording of the sub-section is, however, not so clear and will have to be worked out. Depending on just how widely the Courts interpret this sub-section, it presents a potentially important provision in the realm of commercial estate management, perhaps in particular regarding complex town centre 'mixed-use' developments.  

* * * *

With both the challenge made by Chancery to the Common Law doctrine of privity and the position regarding covenants respectively outlined, the basic contours of the ground which was to host the new equitable doctrine of the restrictive covenant have been surveyed and it is now possible to embark on an analysis of the development of the doctrine itself.

In order to relate the evolving state of the law to the different stages in the development of land and land use the analysis is undertaken chronologically and under seven headings representing clearly defined periods, namely:

- The period up to 1848
  The formative years leading up to Tulk v Moxhay.
- The period from 1849 to 1875
  Tulk v Moxhay to the Judicature Acts.
- The period from 1876 to 1899
  The Judicature Acts to the end of the 19th century.
- The period from 1900 to 1925
  The early years of the 20th century to the 1925 Property Acts.
- The period from 1926 to 1949
  The Property Acts to the post-war planning legislation.
- The period from 1950 to 1969
  Post-war 'development' years to the Law of Property Act, 1969.
- The period from 1970 to 1995
  The 'modern' period with some important developments in the law and proposals for reform.

As these periods are embarked upon two matters should be borne in mind. First, the land management background to the study imparts objectives which have influenced the basic form of the analysis. Through the cases a study will be made of the doctrine's origins, evolution, adoption and adaptation with particular reference to:

(a) the promotion and control of development and use through, in particular, the building scheme;
(b) the evolving importance and influence of planning, amenity and environmental issues, and
(c) the continuing relevance of restrictive covenant control through the medium of the statutory procedure for discharge or modification.  

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19 In the commentary provided in Current Law Statutes it is observed that: 'No definition is given of owner, but this is presumably the owner of the interest from whom the landlord's own interest is derived - a head landlord or freeholder. The occupier would apparently include a subtenant or licensee of the tenant...'. It is of interest to note also the breadth of the phrase "....any demised premises to which the covenant relates". Would this for instance embrace other units in a shopping mall?

20 Confined in this section to matters of law and legal interpretation. The practice, first of the Official Arbitrator and later of the Lands Tribunal, is considered separately in the next section dealing specifically with The Discharge or Modification of Restrictive Covenants.
Secondly, there is the importance, peculiarly so in the case of the restrictive covenant, of its socio-economic context. The decades in which the doctrine was formed were years of far-reaching change in that they witnessed:

(a) the rapid growth in the population of England and Wales;
(b) the change from a rural to a primarily urban society with the growth of employment in manufacturing and extractive industries and the decline of employment in agriculture;
(c) the improvement in communications, notably as a result of the development of the railways, affording greater mobility and accessibility;
(d) the break up of the large estates resulting in an increase in the number of 'landowners' and a decrease in the size of 'landholdings', and
(e) the sheer volume of urban (town) development leading to the need to control building in the interest of public health.

Here were changes to the national fabric fundamental in character and pursued with unprecedented speed. To them the restrictive covenant made its own distinctive contribution. Although in name it suggested inhibition, in reality it was a facilitative device enabling land, which otherwise might not have been disposed of, to be freed for 'controlled' use and development to meet the escalating demands and needs of the market.
THE PERIOD UP TO 1848

Cases cited:

The Prior's or Pakenham's Case (1369) YB 42 Edw.111, pl 14, fol 3a

Spencer's Case (1583) 5 Co Rep 16a

Bally v Wells (1769) 3 Wils KB 25

Webb v Russell (1789) 3 TR 393

Mayor of Congleton v Pattison (1808) 10 East 130

Duke of Bedford v Trustees of the British Museum (1822) 2 My & K 552

Roper v Williams (1822) T & R 18

Keppell v Bailey (1834) 2 My & K 517

Whatman v Gibson (1838) 9 Sim 196

Schreiber v Creed (1839) 10 Sim 9

Mann v Stephens (1846) 15 Sim 377

Peacock v Penson (1848) 11 Beav 355

Tulk v Moxhay (1848) 2 Ph 774, 1 H & Tw 105, 11 Beav 571

As already remarked in the introduction, in order to understand the decision in *Tulk v Moxhay*\(^1\) it is essential to consider some of the earlier cases, and a useful starting point is *Keppell v Bailey*\(^2\) if for no other reason than that Lord Brougham in that case took the opportunity of reviewing the authorities:

'This case was argued with much learning on both sides, and was presented to the Court in every view that could be taken of the various points raised...I shall advert to some of them beyond which the decision turns, on account of their intrinsic importance.'\(^3\)

The facts may be briefly stated. Certain landowners and owners of ironworks formed a Joint Stock Company and constructed a railroad connecting a lime quarry (Trevil) with several ironworks and with the railroad of a canal company (Monmouthshire Canal Navigation). In the partnership deed the lessees of one of the ironworks (Beaufort) covenanted '...to procure all the limestone used in the said works from the Trevil Quarry, and to convey all such limestone, and also all the ironstone from the mines to the said works along Trevil Railroad...'. A bill was later filed by the shareholders of the railroad to enforce the covenant against a purchaser of the Beaufort Works who had notice of the partnership deed.

It was held, *inter alia*, that '...the covenant did not run with the land so as to bind assignees at law; and that a Court of Equity would not, by holding the conscience of the purchaser to be affected by the notice, give the covenant a more extensive operation than the law allowed to it...'\(^4\).

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1 (1848) 2 Ph 774, 1 H & Tw 105, 11 Beav 571.
2 (1834) 2 My & K 517
3 *ibid*, at 527. It is interesting to conjecture as to why the Lord Chancellor should have taken the opportunity to consider at great length cases and issues which he recognised as falling outside the argument upon which his decision was based. It would be naive to suggest that he was taking the opportunity merely to exercise his forensic skills. Perhaps he foresaw the way matters were to develop and, fearful of the outcome, did what he could to forestall it. Whatever the reason, his commentary on the earlier decisions make the case a valuable starting point.
4 This last point was much criticised by Lord Cottenham in *Tulk v Moxhay* (1848) 2 Ph 774.
Lord Brougham found that the covenant was not repugnant to the rules respecting perpetuity, that it was not in restraint of trade, nor was there 'want of mutuality', and although he considered that there was one objection of such a serious nature, viz: 'an arrangement among the parties wholly contrary to the plain intention of the Legislature [as formulated in the private Act of Parliament conferring the statutory powers], and in fraud, if not in defiance of it...to dispose of the present application for...[an] injunction', he went on to consider the nature of the covenant which...very clearly...does not run with the land, and therefore is not binding upon the assignees...'.

Lord Brougham considered some fifteen cases in the course of his learned commentary - cases confirming his instant view that the covenant in question did not run with the land at law and was accordingly not binding upon the assignees. Taking the view that equity should follow the law and only enforce the covenant if it were enforceable in a court of common law he concluded that as the burden of the covenant did not run at law it could not run in equity either.

Prior to his review of the authorities he intimated the problems which would arise if land could be burdened with enforceable covenants:

'...it must not...be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner...great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote...if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge...besides many other restraints as infinite in variety as the imagination can conceive.'

This said, he took pains to emphasise the great difference between:

'...such a case as this and the case of covenants in a lease, whereby the demised premises are affected with certain rights in favour of the lessor. The lessor or his assignees continue in the reversion while the term lasts. The estate is not out of them, although the possession is in the lessee or his assigns. It is not at all inconsistent with the nature of property that certain things should be reserved to the reversioners all the while the term continues.'

Having made this crucial distinction between freeholds and leaseholds in respect of the running of the burden of a covenant, he then took similar pains to point out that even though (for the reasons given) in the case of leaseholds the burden of a covenant can run, the law is restrictive. Pursuing this equally critical point he observed:

'...the law does not leave the reversioner the absolute licence to invent covenants which shall affect the lands in the hands of those who take by assignment of the term. The covenant must be of such a nature as to inhere in the land...[and only then shall it]...follow into the hands of persons who are strangers to the contract of lease, and who only become privy to the lessor through the estate which they take by assignment...'.

5 To the argument that though one party is bound to use the railway, the other is not bound to maintain it, it may be implied that there is an undertaking to keep the railway in repair.
6 Keppell v Bailey (1834) 2 My & K 517, at 536.
7 Ibid.
8 Ibid, at 537.
Of the cases to which Lord Brougham refers attention must first be given to two of the earliest. In *Pakenham’s Case* (a case of particular relevance in that it involved freeholds), the issue of the running of the burden did not arise because the covenantor was a corporation, and the question was whether the benefit ran in favour of the assignee of the covenantee. By contrast, *Spencer’s Case* (a case of leaseholds), which was to become a leading authority on the running of covenants so as both to burden and benefit the assignees of lessees, showed that even in the more tolerant arena of ‘chattels real’, the assignee of a lessee would not there be bound by a covenant to build a new brick wall on the land demised on account of a limiting distinction then being drawn between covenants relating to things in esse and in posse.

The consideration and critical review by the Lord Chancellor of a range of later cases amply supported his *prima facie* impression that the covenant in question could not run, that it was purely collateral, that it did not inhere in the land, and that there was no privity of estate between the estates of the occupiers of the ironworks and the estates of those with whom they covenanted. Of the later cases he considered, reference may usefully be made, for instance, to *Webb v Russell*, where the observation was made that, for a covenant to run with the land, there had to be a privity of estate between the covenantee and the assignee of the lessee, confirming the earlier case of *Bally v Wells* in which it was emphasised that ‘there must always be a privity between the plaintiff and the defendant to make the defendant liable to an action of covenant’, and to the *Mayor of Congleton v Pattison*, where it was found that the covenant could not run so as to bind the assignee of the lessee in as much as it did not directly concern the landlord/tenant relationship as such.

Particular mention must be made of the case of the *Duke of Bedford v The Trustees of the British Museum*, a case concerning the enforceability of a restrictive covenant in the context of freeholds. Here, though the matter turned upon the fact of the feoffor having, subsequently to the making of the covenant, so altered the adjoining land as to cause the covenant to cease to be applicable, care was taken to avoid the giving of any opinion as to whether the covenant in question ran with the land.

Having concluded that the construction *at law* would be against the running of the covenant so as to bind assignees, Lord Brougham proceeded to consider whether the notice which the purchaser had of its existence would, upon an application for an injunction (i.e. an equitable remedy), alter the position. He was of the firm opinion that it certainly would not as otherwise there could be ‘wild attempts’ to create new devices which, however repugnant to rules of law, would succeed...because equity would enable their authors to prevail... Consequently, the Lord Chancellor was not prepared, on the ground of the doctrine of notice, to provide a covenant with a more extensive sphere of operation than the law would afford it.

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9. (1369) YB 42 Edw. II, fol 14, fol 1a.
10. (1583) 5 Co Rep 16a.
11. *Spencer’s Case* laid down a series of ‘resolutions’ concerning leasehold covenants and their running, which were later clearly summarised in *Bally v Wells* (1769) 3 Wils KB 25.
12. *ante*.
13. (1789) 3 TR 393.
15. (1808) 10 East 130. A lease of ground with liberty to make a watercourse and erect a mill contained a covenant ‘not to hire persons to work in the mill who were settled in other parishes, without a Parish Certificate’.
16. (1822) 2 My & K 552.
17. The covenant was one not to use land in a certain manner, with a view to the more ample enjoyment by the feoffor of adjoining lands. The refusal by the Court to grant an injunction was on the basis of the ‘alteration in character’ - an early recognition of the relevance of changed circumstances - as, too, an illustration of the maxim that ‘Equity does nothing in vain’.
This situation, so clearly propounded by Lord Brougham, was to remain until the cases of Mann v Stephens\(^{19}\) in 1846 and Tulk v Moxhay\(^{20}\) itself in 1848. Before considering them, however, an event of potential importance (and later to prove highly significant in the control of ‘estate’ development), namely the ‘birth of the building scheme’, was taking place and the development of that concept in this period is important to the central theme of restrictive covenant control.


The Building Scheme

One of the earliest references to attempts to control the way in which building development should take place occurs in Roper v Williams\(^{21}\) - a case that concerned a covenant for the erection of buildings according to a ‘general plan’. An injunction to restrain the breach of such a covenant having been refused, the covenantee having already acquiesced in a partial deviation from the plan, it was held that: ‘A landlord who relaxes in favour of some of his tenants a covenant entered into for the benefit of them all is not entitled to an injunction to restrain the other tenants from infringing that covenant’. But one had to wait until 1838 and the case of Whatman v Gibson\(^{22}\) for a clear statement of what was later to become ‘the development (or building) scheme’. The essential facts of the case may be summarised in the following way. A, the owner of a piece of land, divided it into lots for building a row of houses, and a deed was made between him of the one part and X and Y (who had purchased some of the lots from him) and the several persons who should at any time execute the deed of the other parts, thereby creating (and imposing) a network of covenants.

It was expressly declared that it should be a ‘...general and indispensable condition of the sale of all or any of the lots that the proprietors thereof for the time being should observe and abide by the several stipulations and restrictions thereinafter contained...’. A sold and conveyed one of the plots to B, and another to C, both of whom executed the deed of covenant. The Plaintiff afterwards purchased B’s lot, and the Defendant purchased C’s lot with notice of the deed of covenant. The Defendant, intending to use the house on his lot as a family hotel, an injunction was granted to restrain him from so doing.

The detail of the plan was such that ‘...the form of the front building line of [the] intended row of houses was delineated in a ground plan thereof in the margin of the indenture, and did contain, including the curve in length, 400 feet in front towards the south east; and, in order to preserve some degree of similarity and uniformity of appearance in such intended row of houses...declared, that...the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereinafter contained or expressed in regard to the several houses to be erected thereon...’

The issues of both ‘notice’ and ‘community of interest’ featured in the judgment of Sir Lancelot Shadwell, Vice-Chancellor, who observed:

‘It is quite clear that all the parties who executed this deed were bound by it: and the only question is whether, there being an agreement, all persons who come in as deviseses or assignees under those who took with notice of the deed are not bound by it. I see no

\(^{19}\) (1846) 15 Sim 377.
\(^{20}\) (1848) 2 Ph 774, 1 H & Tw 105, 11 Beav 571.
\(^{21}\) (1822) T & R 118.
\(^{22}\) (1838) 9 Sim 196.
reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row, and, consequently, in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.  

The extent to which the courts would take cognisance of plans purporting to control (or at least influence) the form of development was again considered in the following year in *Schreiber v Creed*24. By a deed dated in 1827 (made between one, Pitt, and others)'...Pitt, being seized in fee of the lands delineated in the plan thereto annexed (being Pittville), and having it in contemplation...to erect a pump room near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure-grounds, roads etc., had caused the plan to be drawn up whereby the mode in which the lands were intended to be laid out and the purposes for which they were intended to be converted and used were described, in order that the beauty and regularity of the whole of the design might be for ever thereafter, preserved, subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns and as should not destroy the general beauty of the same design, and that each of the other parties to the deed had purchased or agreed to purchase one or more of the pieces of land described in the plan as set out for building'.

In 1833 a number of lots were sold off for building. Creed, who subsequently purchased one of the lots, began to build a house some 12 feet in advance of the plaintiff's house, which the plaintiff alleged would be a nuisance and annoyance to him and would lessen the value of his house and consequently would be a violation of the covenant in the deed of 1827 and of the agreement of 1833. It was held that '...the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and with his sanction, by the purchasers from him, and the plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827 or the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended...'. A careful reading of the judgment however reveals that it was perhaps not the absence of specific detail in the general plan that was the issue so much as the absence of proof that the plaintiff Schreiber was, in any sense, an assignee of the benefit of the covenants.

One further case dealing with 'the sale of land in lots for building' should be noted. In *Peacock v Penson*25 the vendor of land in lots for the purpose of building accompanied his conditions of sale with a map delineating the intended divisions of the property by new roads. In doing so it was held that '...he must be understood to hold out expectations that the lots would be so divided, and it would not be competent to him to divide the land in a different manner, so as to attract an occupancy and population entirely different from that which would have been produced by acting on the plan proposed and held out at the sale'.

23 *Ibid*, at 207.
24 (1839) 10 Sim 9.
25 (1848) 11 Beav 355.
Thus, in the first half of the 19th century are the seeds sown for a concept (i.e. the building scheme) which was to develop and become of great significance and importance in the latter half of that century and into the 20th. This was occurring at the same time as the restrictive covenant was gestating and it is to the birth of the restrictive covenant that attention must now be directed.

The Birth of the Restrictive Covenant

The watershed came in the case of Mann v Stephens\(^{26}\) which paved the way for Tulk v Moxhay\(^{27}\). The facts of Mann v Stephens are conveniently set out in the headnote to that case:

'A being seized in fee of a house and a piece of open land near to it, sold and conveyed the house to B, and covenanted, for himself, his heirs and assigns, with B, his heirs and assigns, that no building whatever should at any time thereafter be erected on the piece of land. He afterwards sold and conveyed the piece of land to M in fee and took a covenant from him in the terms that he himself had entered into with B. The house, after divers mesne conveyances, became vested in X in fee; and the piece of land after one mesne conveyance became vested in Y in fee. Y, before the land was conveyed to him, had notice of the covenant; but, notwithstanding, he began to build upon the land.'

Two judges moved for the injunction on the ground that the defendant purchased the piece of land with notice of the covenant; two (contra) said that there was no privity between the plaintiff and the defendant and that the burden of the covenant did not run with the land. The Vice-Chancellor, Sir Lancelot Shadwell, was of the opinion that the erection of a beer-shop and brewery was a 'gross violation of the covenant' and accordingly he granted an injunction'...to restrain the Defendant from erecting on the piece of land any brewery or other building except one private house or ornamental cottage...so as to be an ornament, rather than otherwise, to the surrounding property'. On appeal, the Lord Chancellor, Lord Cottenham upheld the injunction but directed the omission of the words ‘...so as to be an ornament, rather than otherwise, to the surrounding property' as being too indefinite.\(^{28}\)

The position had now been reached (two years before Tulk v Moxhay) whereby a 'restrictive covenant' was held to 'run with the land' and to be binding on a 'purchaser with notice' of the covenant. Having considered the cases leading up to Tulk v Moxhay\(^{29}\) it is now appropriate to deal with that case in some detail.

The case was on a motion by way of appeal from the Master of the Rolls to dissolve an injunction. The facts of the case may be briefly stated. In 1808 the Plaintiff conveyed to one, Elms, in fee simple 'all that piece or parcel of land, commonly called Leicester Square Garden or pleasure-ground, with the equestrian statue then standing in the centre thereof, and the iron railings and stonework round the garden, and all easements or ways, etc., to hold the same to Elms, his heirs and assigns for ever'. Further, it was therein covenanted that the said '...Elms, his heirs and assigns, shall and will, from time to time, and for all times hereafter, at his and their own proper costs and charges, keep and maintain the said piece and parcel of ground and square garden, and the iron railing round the same, in its present form, and in sufficient and proper repair as a square garden and pleasure-ground, in an open state, uncovered with any

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26 (1846) 15 Sim 377.
27 (1848) 2 Ph 774, 1 H & Tw 105, 11 Beav 571.
28 Mann v Stephens (1846) 15 Sim 377, at 378. The direction of Lord Cottenham provides an example of the reluctance of the Courts to embrace anything in the category of 'aesthetics'. Matters of personal taste and opinion do not lend themselves to judicial interpretation and enforcement.
29 (1848) 2 Ph 774, 1 H & Tw 105, 11 Beav 571.
buildings, in a neat ornamental order...". The defendant, who derived title from Elms, formed a plan, or scheme, for erecting certain lines of shops and buildings on the square. The Plaintiff objected to the scheme as being contrary to the covenant and injurious to the Plaintiff’s houses in the square. The Defendant had, nevertheless, proceeded to cut down several trees and shrubs and pull down part of the iron railing, and had erected a hoarding or boards across the ground.

The Master of the Rolls, in considering an application for an injunction had identified two very important questions namely ‘...first, the important legal question whether such a covenant as this runs with the land; and if it does not, then, secondly whether it can be enforced, or, rather whether the violation of it can be prevented by this Court...’. Whilst it had not been alleged that there was any decision of these questions in the case of Keppell v Bailey, there certainly was a dictum (by the then Lord Chancellor, Lord Brougham) of very great importance. The Master of the Rolls, however, went on to indicate that he considered the case of Mann v Stephens, which had been heard before the present Lord Chancellor (Lord Cottenham), to be of much greater importance for his attention.

In granting the ex parte injunction, subject to a variation, the Master of the Rolls went on to make a point of considerable interest, viz:

'It is said, that the Defendant is bound to keep the square open and uncovered, and in a neat and ornamental state; this he confesses he has not done. He insists that he is not bound to do it unless he pleases. I think he is, and that he cannot leave it in that foul and disgraceful state, which he maintains he has a right to do. I think that he will not find that this can be maintained; he must now do something to prevent it...I do not go the whole length asked by the Plaintiff, as to the neat and ornamental order, but I must restrain the Defendant from converting or using the square garden, or removing the iron railings in such a manner as is inconsistent with the use of it as an open garden and pleasure-ground.'

In answer to the ex parte injunction the Defendant stated that ‘...the inhabitants of Leicester Square and of the Plaintiff’s houses had entirely ceased to use this piece of ground as a garden and pleasure-ground...[and]...the advantages of the square as a place of residence are so changed by circumstances, that such a piece of open ground is of little use’. The chief question is whether the covenant is binding at law upon the Defendant and, if not, whether the Defendant will be bound by it in equity.

The Lord Chancellor (Lord Cottenham) expressed the view that 'he had no doubt whatever upon the subject' (to such extent that he found it unnecessary to hear the case for the Plaintiff):

'Where the owner of a piece of land enters into a contract with his neighbour, founded, of course, upon valuable or other good consideration, that he will either use or abstain from using his land in such a manner as the other party by contract particularly specifies, it appears to me the very foundation of the whole of this jurisdiction, to maintain that this Court has authority for such a contract.... I do not apprehend that the jurisdiction of this Court is fettered by the question, whether the covenant runs with the land or not. The question is, whether a party taking property with a stipulation to use it in a particular manner - that stipulation being imposed upon him by the vendor

30 (1848) 1 H & Tw 105, at 106.
31 (1848) 11 Beav 571, at 582.
32 (1834) 2 My & K 517.
33 (1846) 15 Sim 377.
34 (1848) 11 Beav 571, at 586.
35 (1848) 1 H & Tw 105, at 107 and 109, citing The Duke of Bedford v The Trustees of the British Museum (1822) 2 My & K 552.
in such a manner as to be binding by the law and principles of this Court - will be permitted by this Court to use it in a way diametrically opposite to that which the party has stipulated for.\textsuperscript{36}

Regarding the doctrine supposed to have been laid down by Lord Brougham in \textit{Keppell v Bailey}\textsuperscript{37}, he expressed the view that:

'...it cannot be supposed that Lord Brougham intended to lay this down that this Court would not consider any equity attaching to land in such a manner that this Court would enforce it, except in cases in which it might be enforced at law...I consider the rule of law is not at all the measure for the administration of equity...the only point at all affecting the present question is that the parties - neither of them being parties to the covenant, but both having derivative titles, one under the vendor one under the vendee - had given effect to the contract between the vendor and the vendee to bind those who should claim under them. The party in possession of the land had obtained it from the covenantor, with knowledge of the contract he had entered into.'\textsuperscript{38}

This, being in line with the judgment in \textit{Mann v Stephens}\textsuperscript{39}, the decision in which would not stand with the present case if the order of the Master of the Rolls was wrong and, it being Lord Cottenham's opinion that both were right, then the motion to dissolve the injunction had to be refused.

The decision in \textit{Tulk v Moxhay} is clearly summarised in the first sentence to the headnote in the following words:

'A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.'\textsuperscript{40}

What then can be said about the status of the 'restrictive' covenant immediately following the decision in \textit{Tulk v Moxhay}? First, it appears to be immaterial whether or not the covenant is of a kind which is capable of running with the land, although incidentally in \textit{Tulk v Moxhay} it probably would have done so\textsuperscript{41}. Secondly, no specific mention was made of the necessity of retaining land which could benefit from the covenant, although incidentally in \textit{Tulk v Moxhay} there was such land. Thirdly, it is clear that the covenant may include aspects that are both negative and positive in terms of performance; whilst not addressing a covenant which was exclusively positive the covenant in \textit{Tulk v Moxhay} contained, apart from the negative element of 'not building', a positive element of 'maintaining the square in a neat and ornamental order', which inevitably involved the expenditure of money, the accepted 'rule of thumb' in deciding whether a covenant be positive. Fourthly, the question of 'notice' was at the root of the decision; the absence of a 'purchaser for value with notice' would have been a fatal 'flaw'. Indeed, it can be argued that the judgment in \textit{Tulk v Moxhay}, of itself, did no more than uphold the 'sanctity of contract', coupled with the 'equitable doctrine of notice'.

\textsuperscript{36} (1848) I H & Tw 105, at 111 and 113.
\textsuperscript{37} (1834) 2 My & K 517.
\textsuperscript{38} (1848) I H & Tw 105, at 116, 117.
\textsuperscript{39} (1846) 15 Sim 377.
\textsuperscript{40} (1848) 2 Ph 774.
\textsuperscript{41} In as much as it was the type of covenant which, in a leasehold situation, would (as it appears) touch and concern the land.
For a practical viewpoint of Lord Cottenham’s decision in *Tulk v Moxhay* one can do no better than advert to Professor Simpson’s\(^\text{42}\) summary of that judgment, which may be paraphrased thus:

Whilst not disputing Lord Brougham’s view that the burden of covenants did not run with the land *at law*, Lord Cottenham decided that an injunction could be obtained in a *court of equity* (quite unrelated to any doctrine about the running of covenants with land) on the basis of the ‘peculiar equitable doctrine of notice’. He took the view that it would be inequitable to allow a purchaser of land who bought it with express notice of the covenant to act in defiance of it. Furthermore, if a landowner could, by selling his land convert it from burdened land to unburdened land, he would transfer something he had never himself owned; ‘...if an equity is attached to the property by the owner no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased’.\(^\text{43}\)

So stated, this provides a sound basis for not only ‘controlling’ development and use but also for commercial transactions in land and property which depend on confidence in the ‘degree of certainty’ that can be placed on the value of realty.

The speed with which the new concept came into being is all the more surprising considering the conservative nature of the law and the lawyers of the time and the inbred and resolute resistance to change.

In 1834 Lord Brougham in *Keppell v Bailey*\(^\text{44}\) ‘was not at liberty to create a new interest in land’. Four years later in 1838, (by which time Lord Cottenham held the office of Chancellor), Sir Lancelot Shadwell, V-C in *Whatman v Gibson*\(^\text{45}\) held that the burden of a covenant could run in equity in a ‘building scheme’ case. In 1846 a similar decision by Sir Lancelot Shadwell, V-C was upheld by Lord Cottenham in *Mann v Stephens*\(^\text{46}\). Two years later in 1848 the same point was decided in the same way and upheld by Lord Cottenham in *Tulk v Moxhay*\(^\text{47}\).

But, as will be demonstrated, it would be many years before the boundaries of this ‘new interest in land’ would be defined authoritively. As Wade\(^\text{48}\) has observed:

‘The invention of a new proprietary interest is bound to unsettle the law of property for many years. For example, it took over sixty years to settle the principle that restrictive covenants will not bind third parties unless taken for the benefit of other land belonging to the covenantee.’

Challis\(^\text{49}\) predicted that the new doctrine, resting upon ‘dubious grounds of equity’, is due to have ‘its wings clipped when it comes before the House of Lords’, although it would in fact be the Court of Appeal in *London County Council v Allen*\(^\text{50}\) in 1914 that finally decided that the ‘new doctrine’ was confined to covenants restricting the use of one piece of land for the benefit of another.

The way in which the new doctrine evolved, and the further development of the concept of the building scheme, form the subject-matter of the next periods to be considered.


\(^{43}\) This latter argument assumes that the equity is attached to the property, though this is the very question for decision, and the said argument can equally well be applied to any contract affecting any property, *ibid*, p. 259.

\(^{44}\) (1834) 2 My & K 517.

\(^{45}\) (1838) 9 Sim 196.

\(^{46}\) (1846) 15 Sim 377.

\(^{47}\) (1848) 2 Ph 774, 1 H & T 105, 11 Beav 571.


\(^{50}\) [1914] 3 KB 642.
THE PERIOD FROM 1849 TO 1875

Cased cited:

Kemp v Sober (1851) 1 Sim NS 517
Child v Douglas (1854) Kay 560
Coles v Sims (1853) Kay 56, (1854) 5 De GM & G1
Eastwood v Lever (1863) 4 De GJ & S 114
Sidney v Clarkson (1865) 35 Beav 118
Western v MacDermot (1866) LR 2 Ch App 72, LR 1 Eq 499
Peek v Matthews (1867) LR Eq 515
Morland v Cook (1868) LR 6Eq 252
Tulk v Metropolitan Board of Works (1868) 16 WR 212
Catt v Tourle (1869) 4 Ch App 654
Lord Manners v Johnson (1875) 1 Ch D 673

‘...Leicester Square, which is a centre of attraction to indifferent foreign hotels and indifferent foreigners, racket-courts, fightingmen, swordsmen, footguards, old china, gaming-houses, exhibitions, and a large medley of shabbiness and shrinking out of sight.’ (Charles Dickens)

‘...Leicester Square, formerly the home of great artists, was a ‘dreary abomination of desolation’. In its centre a headless statue, perpetually bombarded by ragged urchins with brickbats, stood in a wilderness of weeds frequented by starved and half-savage cats.’ (Arthur Bryant)

Although the decision in Tulk v Moxhay achieved the objective of preventing the development of land in Leicester Square it apparently was unsuccessful in securing its ‘maintenance’ as an open space. The objective of the negative element of the covenant was achieved - the positive element was not - providing an early recognition that in practice the specific performance of a positive covenant creates problems.

Lord Brougham in Keppell v Bailey had refused to allow that ‘incidents of a novel kind can be devised and attached to land at the fancy and caprice of any owner’ as to do so would ‘fetter the use and development of the land in perpetuity’. Lord Cottenham’s view, as adopted in Tulk v Moxhay was the opposite, namely that far from leading to sterilisation of land use, such an ‘incident of a novel kind’ could be seen as promoting the commerciability of land - unless restrictive covenants could be enforced against the covenantor’s successors ‘it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless’.

The practical effects of the ruling in Tulk v Moxhay were quickly recognised as was the perennial dilemma of the law and lawyers, namely the need to balance the freedom of contract (to control) with the freedom of alienability (to dispose). The same ‘restriction’ can be both a

2 Arthur Bryant, English Saga (1840-1940), Collins, 1940, p.147, referring to the early 1850’s.
3 (1848) 2 Ph 774.
4 See also Tulk v Metropolitan Board of Works (1868) 16 WR 212, post.
5 (1834) 2 My & K 517 at 536.
6 (1848) 2 Ph 774 at 777.
‘form of control’ to regulate use and development in the commercial interest and a ‘fetter’ on both the free alienability of land and its use and development in either the private or public interest.

The decision in *Tulk v Moxhay* was broadly based and, as Gray\(^7\) has observed, the proposition that ‘Equity was prepared to intervene in restraint of any unconscionable conduct in respect of a contractual undertaking of which the wrongdoer - although not himself a contracting party - nevertheless had notice’, was capable of wide application. Accordingly the ruling in *Tulk v Moxhay* was ‘applied with enthusiasm during the years which followed that decision’ to, for example, both positive and negative covenants\(^8\), on behalf of litigants who held no estate in the land benefited by the covenant\(^9\) and even outside the realm of real property.\(^10\)

The immediate effect of the doctrine in *Tulk v Moxhay* was felt both in the law of contract and in the law of property:

‘The covenantee was widely regarded as having not merely a contractual interest in the performance of the covenant...but also a proprietary interest in the land of the covenantor...[which] could run with the land of the covenantor, so as to bind those into whose hands that land came, until...[it] was conveyed to a bona fide purchaser of a legal estate for value without notice...The covenantee was thus given a contractual right to control activities on the land of the covenantor and, by virtue of the equitable doctrine, that contractual right enlarged into...a proprietary right in land.\(^11\)

It is worthy of note that while the courts of equity were being called upon to consider ever wider extensions of the doctrine of the ‘running of the burden’, the common law, some nine years after *Tulk v Moxhay*, took the opportunity to clarify its position regarding the ‘running of the benefit’ in *Sharp v Waterhouse*.\(^12\)

As already indicated, the doctrine of *Tulk v Moxhay* would eventually be modified, clarified and limited, although this would not occur during the quarter of a century (1849-1875) now being considered\(^13\), which, whilst seeing important developments in the building scheme, featured no significant developments in the law relating to restrictive covenants *per se*.

The Building Scheme

The period between *Tulk v Moxhay*\(^14\) in 1848 and the Judicature Acts 1873-5 was characterised by the ever-increasing rate of urban expansion and with it the development and adaptation of the concept of the ‘restrictive covenant’ to ‘estate development’ and the requirements for the building (or development) scheme, thus paving the way for the

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\(^8\) *Morland v Cook* (1868) LR6 Eq 252.

\(^9\) *Catt v Tourle* (1869) 4 Ch App 654.

\(^10\) *De Mattos v Gibson* (1858) 4 De G & J 276. Within ten years of *Tulk v Moxhay* the propriety of a similar restriction upon use was canvassed in the case of a ship, but without success - on the facts of the case it was held that no injunction be granted.

\(^11\) Gray, ibid, p. 1138.

\(^12\) (1857) 7 E & B 816. For the benefit to run the covenant must touch of concern the land of the covenantee; there must be an intention that the benefit should run with the land of the covenantee; the covenantee, at the time of making the covenant, must have the legal estate in the land to be benefited, and an assignee must have the same legal estate in the land as the original covenantee. This last requirement was rescinded for covenants made after 1925; see the Law of Property Act,1925, s. 78 and *Smith and Snipes Hall Farm Ltd. v River Douglas Catchment Board* [1949] 2 K B 500.


\(^14\) (1848) 2 Ph 774, 11 Beav 571, 1 H & Tw 105.
authoritative statement on the latter finally to be laid down in *Elliston v Reacher* in 1908. Few of the cases referred specifically to a 'building scheme' but an analysis of the judgments laid down therein starts to shed light on the criteria that the courts considered appropriate not only in respect of the area over which a restrictive covenant should apply but also to the nature of the conditions which the law was prepared to accept as falling within the concept of the 'restrictive covenant'.

One of the first cases to be decided was that of *Kemp v Sober*. The owner of an estate had developed it with houses and sold some of them subject to a covenant not to carry on any trade, business or calling to the 'annoyance, nuisance or injury of any of the houses' on the estate. It was held that the carrying on of a girls' school in one of the houses was a breach of the covenant, it having previously been decided in *Doe v Keeling* that the keeping of a boys' school was a business within the meaning of the covenant in that case. The Vice-Chancellor, Lord Cranworth, was of the opinion that 'the keeping of a girls' school is *pari passu* a business or calling within the meaning of the covenant in this case'. Referring to the argument that the case came within the principle of those cases in which the Court has refused to interfere because no damage has actually been sustained, he went on to state that '...a person who stipulates that her neighbour shall not keep a school stipulates that she shall be relieved from all anxiety arising from a school being kept; and the feeling of anxiety is damage'. Furthermore, '..neighbours will suffer annoyance not only from their [20 young ladies] practising music and dancing, but from their relations and friends continually calling upon them'. Thus, although no damage had been actually sustained and indeed might never be sustained, the 'feeling of anxiety is damage' and the contemplation thereof is sufficient ground to grant an injunction.

In *Child v Douglas* reference is made in the headnote to a 'building scheme', although as reported this appears to have been no more than the fact that land had been laid out for building a row of houses on a general plan. The defendant having covenanted that he would not erect any building, on the plot purchased, within the distance of six feet from the intended street it was held that '...the erection of a wall fifteen feet high, at right angles to the principal street, and extending quite up to it, was an infringement of this covenant'. It was further held that a subsequent purchaser of a neighbouring plot might obtain an injunction against the first purchaser to restrain him from infringing his covenant, even though the vendor had not entered into reciprocal covenants with the purchaser, the conveyance of the land being a sufficient reciprocal advantage to support the covenant.

The case is of interest in two ways. First, the Vice-Chancellor, Sir W. Page Wood, had no doubt that the covenant would preclude the erection of the whole extent of the wall being built to the height of 15 feet; whether the covenant would extend to prevent the erection of such a wall 5 feet high was doubtful, but he did not think it would prevent the building of such a wall.

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15 [1908] 2 Ch 374, 2 Ch 665 CA.
16 (1851) 1 Sim NS 517.
17 (1813) 1 Mau & Selw 95.
18 This wide interpretation of 'damage' would be again adopted in one of the early cases heard by the Lands Tribunal under the Law of Property Act, 1925, s. 84 concerning the discharge or modification of restrictive covenants; see *Re Dr. Barnado's Homes Application* (1955) 7 P & CR 176, pos.
19 Contra, in *Harrison v Good* (1871) I. R 11 Eq 352, where, land having been sold with a covenant not to do on the premises anything which should be a nuisance to the vendor or his tenants or the occupiers or owners of the 'adjoining' property, it was held that the establishment of a national school was not a legal nuisance.
20 (1854) Kay 560.
to the height of two feet or putting an iron railing thereon, nor did he think that the projection of
the brick-built porch one foot beyond the prescribed limit would be an infringement of the
covenant:

'...the object being to have one uniform range of buildings, I am of the opinion that the
Defendant cannot be allowed to erect this wall, as he is now doing, to the height of fifteen
feet, quite up to the road. Suppose that every individual who has bought land along this
street did the same, the character of the row would be much altered, and the light and air
and general comfort of the houses would be considerably interfered with by the walls of this kind,
which I have no doubt are buildings within the meaning of the covenant.\textsuperscript{21}

It seems not unfair to conclude that this 'common sense' ruling owed more to matters of
general environment and health than to matters of legal construction.

The second point of interest in this case concerned the question of reciprocal advantage.
Neither the contract nor the deed showed with any definition what land was intended to have
the benefit of the covenant; the vendors had entered into no reciprocal covenants as in the case
of \textit{Whatman v Gibson}\textsuperscript{22} (where relief was granted). Sir W. Page Wood was of the opinion that:

'The reciprocal advantage here obtained [by the defendant]...is really the conveyance of the land;
and it cannot be said that, for want of a reciprocal benefit which he did not stipulate for, he
cannot be compelled to perform that which he has expressly covenanted to do. The case of
\textit{Tulk v Moxhay}\textsuperscript{23} was in this respect a case of a similar description. Tulk had not bound
himself to the purchaser from him of Leicester Square, but the purchaser had bound
himself to Tulk to keep the Square in good order...if Tulk had afterwards assigned the
remaining land to others, the parties to whom he assigned would no doubt have had a
right to have the agreement specifically performed by an injunction to restrain the
purchaser of the square from allowing it to remain in its neglected condition.'\textsuperscript{24}

Furthermore, it appears that the Vice-Chancellor was contemplating, on the basis of the ruling
in \textit{Tulk v Moxhay}, a mandatory injunction to the effect of achieving specific performance of
what in effect was a 'positive covenant' to maintain in 'good order'.

In \textit{Coles v Sims}\textsuperscript{25} land was sold in lots for building purposes, the vendor reserving to
himself a portion, with covenants between the vendor and purchasers respectively that the
purchasers should within a certain time erect dwelling houses upon their respective lots in a
uniform row in a certain specified position and that no building should be erected on the piece
of ground in front of each house, which was to be laid out as a garden, and that the vendor
would dispose of all the lots subject to the same conditions; and further that if the vendor
should build on the portion reserved by him he would build in a line with the other houses and
keep a similar piece of land in front for a garden. Before the contracts were completed by
conveyance the vendor sold the reserved land, the deed of conveyance reciting the said sales,
and containing the said covenant, and after a number of assignments the land became vested in
the defendants, with notice of the covenants, and the land of the first purchaser came in like
manner to the plaintiff.

An effort having been made to restrain building in a manner contrary to the general
scheme, two judges found for the plaintiff on the grounds that the defendants, being assigns,
with notice of the covenants, were bound in equity to observe them (\textit{Whatman v Gibson}\textsuperscript{26}, \textit{Tulk v

\textsuperscript{21} \textit{ibid}, at 567.
\textsuperscript{22} (1838) 9 Sim 196.
\textsuperscript{23} (1848) 2 Ph 774.
\textsuperscript{24} (1854) Kay 560, at 570.
\textsuperscript{25} (1853) Kay 56.
\textsuperscript{26} (1838) 9 Sim 196.
Moxhay27, Mann v Stephens28). Two other judges found that the deed would not run with the land for the benefit of the purchaser or his assigns - the equitable obligation cannot be carried further than the legal obligation of the covenant29.

It was held, with a lack of unanimity, that whether the covenants ran with the land or not, as the Defendants had notice of them, the Plaintiff might have an injunction to restrain the Defendants from building in a manner contrary to the general scheme for the benefit of all the original parties. Here then, is a decision based on 'notice' but emphasising also the issue of 'benefit' flowing from the 'general scheme'.

An appeal from the order of the Vice-Chancellor was later heard before the Lords Justices of Appeal30, who upheld the granting of an injunction on a base expressly confirming the Tulk v Moxhay approach. In the opinion of Lord Justice Knight Bruce it was quite clear that 'the contract...was intended by the parties...to bind the land into whatsoever hands it might come'. In his view the question was whether, as the present defendants were not parties to the agreement, they were entitled to stand in a better position than the person under whom they claimed, who was a party to the agreement: Tulk v Moxhay31 was not the first nor the last case which decided that in a Court of Equity it may be 'competent to any person to bind land perpetually in the sense and manner in which the land here is affected to be bound'; whatever the state of the law with regard to covenants running with the land 'the course of this court is now clearly understood to be to maintain such a covenant - such an agreement'32.

The case of Eastwood v Lever33, heard before the Lords Justices of Appeal, likewise emphasised the key element of 'notice' as expounded in Tulk v Moxhay. Property, vested in the trustees of a building society, had been laid out to a plan and allotted or sold in lots to members or purchasers (aware of the existence of the plan) subject to certain restrictive covenants.

Lord Justice Turner held, inter alia, that he was not satisfied, having regard to the case of Squire v Campbell34, that the defendant ought to be held bound by the general plan, but that without reference to that question he thought that the plaintiffs had an equity against the defendant by force of the covenant entered into with the trustees and of which he had had notice. Further, it was held that such a 'degree of acquiescence' was involved as to debar the plaintiffs from relief by way of injunction (as sought) but that they might be entitled to damages for such injury as may have been done to their property by the defendant having built otherwise than in conformity with the covenant.

Mention may be made also of four further cases in the 1860's, all of them showing the courts' willingness to participate in the control and, at the same time the furtherance, of 'building estate development'. Sidney v Clarkson35 indicates the readiness of the courts to

27 (1848) 2 Ph 774.
28 (1846) 15 Sim 377.
29 The Vice-Chancellor, Sir W. Page Wood, (interrupting) ... that was not the view of Lord Cottenham in Tulk v Moxhay'.
30 Coles v Sims (1854) 5 De G M & G 1.
31 (1848) 2 Ph 774.
32 A photographic impression from (sic) the building, which was the subject of complaint, was put in evidence. Surely one of the first, if not the first, examples of 'photographic evidence' being produced in a court of law.
33 (1863) 4 De G J & S 114.
34 I M & Cr 459, postulating that a 'general plan' is not binding but only the covenants in the deed of conveyance and, with more certainty, that a 'general plan' that has been deviated from cannot be enforced.
35 (1865) 35 Beav 118.
advance the ‘sense of a local regime’ and Western v MacDermot\textsuperscript{36} the readiness of Chancery to enforce, on the basis of Tulk v Moxhay, a building covenant, so long as there would flow substantial injury from its breach and there was no acquiescence in any breach of it. From Morland v Cook\textsuperscript{37} comes the point that the crucial ‘notice’ element of Tulk v Moxhay can be constructive - the physical nature of the affected land being such as to put purchasers on enquiry as to the manner of its protection and the concomitant burden which that would impose - and from Peek v Matthews\textsuperscript{38} emerges Equity’s reasonable insistence that damages at law can be the plaintiff’s only remedy if, by permitting material breaches of the covenant by some purchasers, he himself has failed to preserve a common scheme of building.

Before leaving consideration of the cases heard in this period, mention should be made of three which, for very different reasons, are of general interest and relevance to this study.

Whilst not throwing any new light on ‘the law relating to restrictive covenants’ the case of Tulk v the Metropolitan Board of Works\textsuperscript{39}, heard in the Exchequer Chamber, is of historical interest. In 1865, the garden (Leicester Square) being in a neglected and dilapidated state\textsuperscript{40}, the Metropolitan Board of Works took possession of it under an Act for the Protection of Garden or Ornamental Grounds in Cities and Boroughs (26 Victoria c.13, s.1) which enacted that:

‘where in any city or borough any enclosed garden or ornamental ground has been set apart, otherwise than by the revocable permission of the owner thereof, in any public square, etc., for the use and enjoyment of the inhabitants thereof, and where the trustees or other body appointed for the care of the same have neglected to keep it in proper order...the Metropolitan Boards of Work [or the City of London or in any other city or borough the corporate authorities]...shall take charge of the same.’

The Court of Exchequer Chamber, affirming the judgment of the Queen’s Bench, held that whatever might be the rights at law or in equity of the owners and occupiers of the houses round the square, the garden had not been set apart for the use and enjoyment of the inhabitants of the square otherwise than by the revocable permission of the owner (within the meaning of section 1 of the Act) and that consequently the Board were trespassers.\textsuperscript{41}

Towards the close of the decade a case emerged which, with hindsight, was to become of particular importance. In Catt v Tourle\textsuperscript{42}, it was held that a covenant in favour of a brewer (in respect of land sold by him) giving him the exclusive right of supplying beer to any public house erected on that land was not void for, inter alia, either uncertainty or mutuality, and that though in terms positive it was in substance negative. Accordingly the defendant, having taken the land with notice of the covenant, might be restrained by means of an injunction from acting in contravention of it.

\textsuperscript{36} (1866) L R 2 Ch App 72, L R 1 Eq 499.
\textsuperscript{37} (1868) L R 6 Eq 252.
\textsuperscript{38} (1867) L R Eq 515.
\textsuperscript{39} (1868) 16 W R 212.
\textsuperscript{40} Twenty years after the ruling in Tulk v Moxhay that a covenant containing both restrictive and positive elements was enforceable by way of an injunction, no progress had been made to enforce the ‘positive’ part of the covenant regarding the ‘square garden’ to be kept and maintained ‘in an open state...in a neat and ornamental order’.
\textsuperscript{41} Bramwell, B, concurring with the judgment, added: ‘...it is not to be assumed that we think it is open to the owners of land to build upon it; that is quite a different thing from deciding that the defendants cannot proceed under the Statute’. The binding nature of the restrictive covenant in Tulk v Moxhay was to be again upheld over 120 years later in R v Westminster City Council & the London Electricity Board, ex parte Leicester Square Coventry Street Association Ltd. (1989) 59 P & CR 51. Being satisfied that the burden of the covenant ran with the land and that the benefit was annexed to the covenantee’s land, the Court held that it did not matter that ‘nothing was known about the dominant land and who presently enjoyed the benefit’. Westminster City Council, the present owners of Leicester Square, were bound by the covenant; per Simon Brown, J: ‘...I conclude that this covenant remains binding on Westminster, its benefit a “hidden treasure” in the hands of the present owner (whoever he may be) of Tulk’s retained land’.
\textsuperscript{42} (1869) 4 Ch App 654.
Not only does this case show that Equity looked to the substance of a covenant when
determining its negative or positive quality, it also shows that in this period, unlike in later
years, it did not matter that the covenant was personal in nature, i.e. that it was not taken to
protect other land. As would emerge later, this important tolerance was to disappear and with
it the whole course of the restrictive covenant would change when it became settled that Equity
would only enforce a restrictive covenant if it was made to benefit other land, i.e. if there were,
in the language of easements, a 'dominant tenement'.

The period (1849-1875) concluded with a further building estate case, namely that of Lord
Manners v Johnson43, which made the point that 'invasion of privacy' can constitute damage.
This period of a quarter of a century of cases, following Tulk v Moxhay, concerning restrictive
covenants and the building scheme may perhaps be characterised in the following way. It was
a period in which the concept of a potentially binding building scheme continued and,
importantly with it, the practical line that a plaintiff seeking an injunction must not himself
have so acquiesced in breaches of the relevant covenants as to have failed to preserve it. More
basically, the doctrine of Tulk v Moxhay is confirmed as depending upon the taking of land with
notice - the concept of which is widely construed. However, as yet there is no requirement that
the covenant be taken for the benefit of other (the dominant) land, the question of enforceability
resting entirely on the basis of the broad doctrine of the 'equity' of notice.

43 (1875) 1 Ch D 673.
THE PERIOD FROM 1876 TO 1899

Cases cited:

Cooke v Chilcott (1876) 3 Ch D 694
Luker v Dennis (1877) 7 Ch D 227
Renals v Cowlishaw (1878) 9 Ch D 125, (1879) 11 Ch D 866
Haywood v The Brunswick Permanent Building Society (1881) 8 Q BD 403
London & South Western Railway Co. v Gomm (1882) 20 Ch D 562
Austerberry v Corporation of Oldham (1885) 29 Ch D 750
Spicer v Martin (1889) 14 App Cas 12
MacKenzie v Childers (1889) 43 Ch D 265
German v Chapman (1877) 7 Ch D 271
Gaskin v Balls (1879) 13 Ch D 324
Kelsey v Dodd (1881) 52 LJ Ch 34
Jackson v Winnifrith (1882) 47 LT 243
Sayers v Collyer (1884) 28 Ch D 103
Collins v Castle (1887) 36 Ch D 243
Sheppard v Gilmore (1887) 57 LJ Ch 6
Spencer v Bailey (1893) 69 LT 179
Tucker v Voles [1893] 1 Ch 195
Knight v Simmons [1896] 1 Ch 653, [1896] 2 Ch 294
Webb v Fagotti (1899) 79 LT 683
Jackson v Normanby Brick Co. [1899] 1 Ch 438

Whereas the third quarter of the 19th century had witnessed a number of decisions in the courts which consolidated the doctrine as laid down in Tulk v Moxhay¹, together with a number of cases related to the 'building scheme', it was not until the last quarter of the 19th century that there was any significant development of the law. In the 10 to 15 years following the Judicature Acts (1873-5) a number of important decisions were arrived at by the courts which helped to shape and give substance to the concept of the restrictive covenant whilst at the same time there was an ever-increasing number of cases dealing with the 'building scheme' (resulting no doubt from the ever-increasing level of building activity to meet the growing urban population) and which themselves were significant in laying the foundation for the judgment in the leading case of Elliston v Reacher².

It is more helpful to an understanding of what was taking place to deal first with the leading cases 'shaping' the law and then to consider the ways in which the courts were dealing with the concept of the building scheme.

The first case of significance is that of Cooke v Chilcott³ concerning the distinction between restrictive and positive covenants. A covenant by a purchaser of land to construct a pump and reservoir to supply water to houses to be built on land retained by the vendor, was held to be one that ran, not only as regards the benefit but, importantly, as regards the burden, and it was so held despite the fact that it was not a negative covenant. Further, it was held that a person who took with notice of the covenant was bound by it. As will be apparent shortly, there would soon be a refusal by the courts to extend the principle of Tulk v Moxhay to covenants of a positive nature.

¹ (1848) 2 Ph 774.
² [1908] 2 Ch 374, 2 Ch 665 CA.
³ (1876) 3 Ch D 694.
A year after Cooke v Chilcott had signalled the court’s willingness to permit the burden of a positive covenant to run on the basis of none other than notice, there emerged a case indicating in further fashion the court’s tolerance in the arena of the restrictive covenant. This was Luker v Dennis in 1877 which showed clearly that the judges were not at that point requiring (as later they would) that nearby land be kept to benefit from the restrictive covenant. Rather, at this stage, reliance is being placed on notions of contract, notice and natural justice.

Briefly the facts were that the lease of a public house contained a covenant by the publican (lessee) to purchase from the brewer (lessor) all the beer consumed at that public house and also at another public house of which the publican held a lease under a different landlord. It was held that the covenant was binding in equity upon an assignee at the second public house who had notice of the covenant.

Fry, J appears to have been influenced by the judgment of the Court of Appeal in Catt v Tourle, which itself had relied on the observations of Lord Justice Knight Bruce in De Mattos v Gibson, in which he had laid down the general proposition:

‘Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller’.

The decade concluded with a case looking not to the running of the burden, but of the benefit, and its rigour is in sharp contrast to the tolerance shown in the two afore-mentioned cases. This was Renals v Cowlishaw, which displays the strictness of the law in the matter of the annexation to land of the benefit of a restrictive covenant. The owners in fee of a residential estate and adjoining lands sold part of the adjoining lands to the defendants’ predecessors in title who entered into covenants with the vendors and their assigns restricting their right to build on and use the purchased land. The same vendors afterwards sold the residential estate to the plaintiffs’ predecessors in title, the conveyance containing no reference to the restrictive covenants nor was there any contract or representation that the purchasers of the residential estate were to have the benefit of them. In an action by the plaintiffs to restrain the defendants (who had purchased the land with notice of the restrictive covenants) from building in contravention of those covenants it was held that although the plaintiffs were ‘assigns’ of the original covenantee they were not entitled to sue on the original covenants; there being no reference to the existence of such covenants the plaintiffs cannot be treated as being entitled to the benefit of them. A decision upheld by the Court of Appeal.

4 (1877) 7 Ch D 227.
5 See post, per Scrutton, J in London County Council v Allen [1914] 3 KB 642: ‘The question is whether it is essential to the doctrine of Tulk v Moxhay that the covenantee should have...land for the benefit of which the covenant is created...’. After reviewing the authorities (including Luker v Dennis) he went on to conclude that for many years after Tulk v Moxhay it was not essential, but that since the Court of Appeal decision in Formby v Barker [1903] 2 Ch 539 it was, and that Formby v Barker (and two other decisions of the Court of Appeal) were the authorities for that view.
6 (1869) 4 Ch App 654.
7 (1859) 4 De G & J 276, at 282.
8 (1878) 9 Ch D 125.
9 (1879) 11 Ch D 866.
With the turn of the decade appeared the landmark case of *Haywood v The Brunswick Permanent Building Society* in 1881. It was in this case that the Court of Appeal demonstrated that the doctrine of *Tulk v Moxhay* was not to be deployed for other than negative covenants. Land had been granted in fee in consideration of a rentcharge and a covenant to build and repair buildings. The assignee of the grantee of the land was held not liable either at law or in equity on the ground of notice to the assignee of the grantee of the rentcharge on the covenant to repair. Brett, LJ was of the opinion, both on principle and on the authority of *Milnes v Branch*, that the action could not be maintained at common law as, quoting Lord St Leonards, ‘...a covenant to build does not run with the rent in the hands of an assignee’. Lindley, LJ, being of the same opinion, questioned the principle of *Cooke v Chilcot* but went on to say ‘...I should be sorry to overrule that case and prefer to leave it to be reconsidered on some future occasion. It is enough to say that in the present case we have been asked to extend *Tulk v Moxhay* as it has never been extended before and we decline to do so’.

Yet another case underlining the ‘nervousness’ of the courts that the principles of *Tulk v Moxhay* might be extended too far came before the Court of Appeal in 1882 in *London & South Western Railway Company v Gomm*. This case dealt primarily with questions of *ultra vires* and the rule against perpetuities but Kay, J, in the court of first instance, had held that specific performance must be decreed, the covenant being binding on an alienee with notice on the principle of *Tulk v Moxhay*. The covenant in respect of which Kay, J had decreed specific performance was one requiring the re-conveyance of land to the Railway Company should it at some time in the future be required by them for ‘operational’ purposes and drew from the Court of Appeal the decision that ‘the doctrine of *Tulk v Moxhay* only applies to restrictive covenants and not to covenants to do acts related to the land’.

In the Court of Appeal, Lindley, LJ, commenting on the broad proposition that there is a general assumption that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants, drew particular attention to the fact that that proposition had been considered in *Haywood v Brunswick Permanent Building Society* and ‘...because it was sought there to extend the doctrine of *Tulk v Moxhay* to a degree which was thought dangerous, considerable pains were taken by the Court to point out the limits of that doctrine’. He went on to say ‘...it was contended, on the authority of *Tulk v Moxhay*, that in as much as the defendants took the land with notice of the covenants that they were bound by them in equity. The Court of Appeal declined so to extend the doctrine of *Tulk v Moxhay* and their reasons will be found very carefully stated by Lord Justice Cotton in his judgment’.

It was in the case of *London & South Western Railway Co. v Gomm* that Sir George Jessel, MR sought to justify the doctrine of *Tulk v Moxhay* as being ‘...either an extension in equity of the doctrine of *Spencer’s Case* to another line of cases, or else an extension in equity of the doctrine of negative easements; such for instance, as a right to the access of light, which prevents the

10 (1881) 8 Q B D 403.
11 (1816) 5 M & S 411.
13 (1876) 3 Ch D 694.
14 (1848) 2 Ph 774.
15 (1882) 20 Ch D 562.
16 (1881) 8 Q B D 403.
17 The covenant to repair can only be enforced by making the owner put his hand into his pocket, and there is nothing which would justify us in going to that length’, per Cotton, LJ.
owner of the servient tenement from building so as to obstruct the light. This view has been the subject of much critical commentary, perhaps most trenchantly and clearly expressed by Behan who, in his LL.D. thesis, distinguishes Spencer’s Case which was based on privity of estate - there being no privity of estate in Tulk v Moxhay - and departs from the theory of the negative easement on grounds inter alia that a common law easement is a jus in rem of a strictly limited subject matter whereas a restrictive covenant is not a genuine jus in rem, being subject to the caveat of notice and not restricted to one or other of the six categories of accepted easements.

In Austerberry v Corporation of Oldham an abortive attempt was made to extend the doctrine in Tulk v Moxhay to enforce a covenant to expend money to make, and keep in repair, a road. The report of the case opens thus:

‘The doctrine in Tulk v Moxhay is limited to restrictive stipulations, and will not be extended so as to bind in equity a purchaser taking with notice of a covenant to expend money on repairs or otherwise which does not run with the land at law.’

In an unequivocal and clear statement Cotton, LJ said, inter alia:

‘In my opinion, if this is not a covenant running at law, there can be no relief in respect of it in equity; it is not a restrictive covenant; it is not a covenant restraining the corporation or the trustees from using the land in any particular way ...[The] covenant which is attempted to be insisted upon is a covenant to lay out money in doing certain work upon this land...[A] Court of Equity...will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money and in that way to undertake a burden upon themselves.’

The Building Scheme

Before turning to a consideration of cases relating to the substance of the building scheme, there are two decisions which, in their concern with such schemes, yield points of general importance, namely the House of Lords case of Spicer v Martin and the case of MacKenzie v Childers heard in the Chancery Division.

The importance of Spicer v Martin lies in two directions. First, it was in this case that the House of Lords approved the doctrine underlying the enforceability of schemes of development, namely that the covenants should run on the basis of ‘common intention’. Secondly, as Megarry and Wade note, it shows that while the concept originated with building schemes it works equally well where an estate which is already fully developed is disposed of in sections.

18 (1882) 20 Ch D 562, at 583.
19 Published as J.C.V. Behan, The Use of Land affected by Covenants, Sweet and Maxwell, 1924.
20 For a full account of Behan’s argument, see ibid, pp. 43-51. Whilst not invalidating his general conclusions he may have overstated his case by referring to ‘the six categories of accepted easements’, bearing in mind the words of Lord St. Leonards in Dyce v Hay (1852) 1 Macq 305: ‘The category of ...easements must alter and expand with the changes that take place in the circumstances of mankind’.
21 (1885) 29 Ch D 750.
22 Ibid, at 773.
23 (1889) 14 App Cas 12.
24 (1889) 43 Ch D 265.
In this case Spicer purchased the fee simple of several houses forming one block of dwellings upon a site laid out in accordance with a building scheme, by a number of conveyances each containing a covenant by him not to carry on or permit on the premises conveyed any trade or business. Spicer then granted to the respondent a lease of one of the houses 'containing a restrictive covenant of the same nature and a block plan of the houses', the respondent being aware that similar restrictive covenants were contained in all the leases granted by Spicer of houses in that block. It was held that although the statements made to the respondent did not amount to a collateral contract with him as to the future management of the estate, the respondent was from the nature of the transaction entitled to an injunction restraining Spicer from authorising any other houses in the block to be used for business or trade.

*MacKenzie v Childers*\(^\text{26}\) underlines the forcefulness of arrangements made under the umbrella of a building scheme. In this case a building estate was offered for sale by auction, in plots according to a plan and particulars and conditions of sale referring to a deed of mutual restrictive covenants\(^\text{27}\) to be executed by the vendors and each of the purchasers; the deed contained a recital that it was intended to be a part of all future contracts for sale. Some of the plots were sold and the purchasers executed the deed as did the vendors. For 20 years subsequently the stipulations were observed but at the expiration of that period a portion of the estate was put up for sale in different plots and under conditions authorising a mode of building not in conformity with the stipulations contained in the deed. Purchasers who had executed the deed brought an action for an injunction and it was held that '...the recital in the deed was not a mere expression of intention which the vendors were at liberty to change, but the effect of the deed was that the vendors thereby entered into a covenant not to authorise the use of the unsold plots in a manner inconsistent with the conditions of the building scheme...'. Even though there was no express covenant made by the vendors they were '...bound by a contract, implied from the whole transaction, restricting their dealing with the land in violation of the building scheme...'. Furthermore, a restrictive covenant was not to be considered void as obnoxious to the rule against perpetuities.

From these two cases taken together emerges not only the strength of the idea of a scheme - with its reliance upon 'communality' - but also the fact that the law is willing to accommodate the notion of the relevant covenants being intended to endure well into the future and not being merely of an ephemeral nature.

Turning now to the way in which the substance of the 'building scheme' developed during this quarter of a century the following dozen cases, chosen from this period, give some indication of the range of restrictive covenants that were considered and the attitude of the courts thereto.

*German v Chapman*\(^\text{28}\) relates to 'the question of proximity'. Where all the purchasers of an estate were bound by restrictive covenants not to use their houses other than as private residences, and the vendor had given permission to one of the purchasers to open a school in his house, this was held not to be a waiver of the covenant as to another purchaser whose house was at some distance.

\(^{26}\) (1889) 43 Ch D 265.

\(^{27}\) That is, restrictive of the mode of building on the plots.

\(^{28}\) (1877) 7 Ch D 271.
Gaskin v Balls\textsuperscript{29} dealt with 'the question of acquiescence and the passage of time' since the commission of the breach of the covenant. The Court of Appeal held that an injunction ought not to extend to the removal of a building which had been allowed to remain for five years without complaint, and which was erected before the defendant acquired his title (and of which he was aware), but must be confined to buildings erected since he acquired his title.

Kelsey v Dodd\textsuperscript{30} was a case dealing with 'long-continued acquiescence' and the matter of 'nuisance'. It was held that the plaintiffs had lost their right to bring an action by long-continued acquiescence in breaches of the covenant both by the defendant and other similar covenators, and consequently were not entitled either to an injunction or to any damages: also that they were not entitled to sue on the covenant at law, even for nominal damages. The Master of the Rolls commented:

'A man cannot come into a Court of equity for an injunction who has wilfully allowed it to be broken by divers persons bound to the same restrictive covenant...[The vendors had taken] a covenant in rather a special form that the purchasers of that estate would not allow what I may call offensive businesses to be carried on...obviously a covenant for the protection of their estate from nuisance.'

Jackson v Winnifrith\textsuperscript{31} dealt with the extent to which 'other breaches of the covenants' may affect the plaintiff's claim for an injunction. On the sale of an estate in plots for building purposes, all the purchasers covenanted to observe certain stipulations as to the number of houses to be built, the building lines and other similar matters. The defendant had contracted for the purchase of some plots adjoining that of the plaintiff and on which he was commencing to build more houses than were allowed and in a position at variance with the building line laid down, so that the houses would overlook the plaintiff's grounds more than if built within the building line. The original vendors had allowed considerable breaches of the covenants to be committed elsewhere and it appeared that the plaintiff's own house had been built two feet in advance of the building line. It was held that, as the breaches of covenant allowed were in relation to other portions of the property, not affecting the plaintiff's enjoyment of his own plots, they could not be set up against him and that the deviation with regard to his own house was 'too trifling to affect his right'. From which it may be concluded that breaches that are acquiesced in and are remote and do not affect the person claiming the benefit of the restrictive covenant are not a bar to an injunction and that indeed minor breaches by the plaintiff himself appear not to be disabling, although it must be questionable as to whether building two feet in front of a building line could be classed as a minor infringement?

Sayers v Collyer\textsuperscript{32} dealt with the implications of a 'change in the character of the neighbourhood' and the question of 'acquiescence'. The plaintiff, in common with the purchasers of other lots on a building estate, covenanted not to build a shop on his land or to use his house as a shop or to carry on any trade therein. The defendant had used his house as a beer shop (a fact known to the plaintiff for three years before the action was commenced) and there was evidence that some of the houses on other plots had been for some time used as shops and that some of the houses near the plaintiff's house were in multi-occupation (on weekly rents). It was held that the change in the character of the neighbourhood was not in itself a ground for

\textsuperscript{29} (1879) 13 Ch D 324.
\textsuperscript{30} (1881) 52 LJ Ch 34.
\textsuperscript{31} (1882) 47 LT 243.
\textsuperscript{32} (1884) 28 Ch D 103.
refusing relief to the plaintiff as the change was not caused by his conduct, but that the plaintiff had lost the right to enforce his covenant, either by injunction or damages, through his acquiescence.

**Collins v Castle**33 dealt with the issue of ‘value of property’ and ‘proof of damage’. In 1882 some unsold plots on an estate laid out for building were sold by auction subject to a covenant by the purchaser to expend not less than £1200 on each dwelling house built. It was held that the doctrine of **Nottingham Patent Brick & Tile Co. v Butler**34 could be extended to cover the case and that the plaintiffs were entitled to restrain the defendant from building houses of less value. It was further held that the plaintiff was not obliged to prove damage in order to obtain an injunction.

**Sheppard v Gilmore**35 concerned a restrictive covenant relating to ‘elevational control’. Several purchasers bought lots of freehold land laid out for building to erect a row of houses theron each covenaniting with the vendor to erect a house according to a plan (signed by the vendor and the purchaser) with a further covenant that ‘the front of the house when built should never be altered’. Houses were built and were similar in appearance (but no plan was produced in evidence). It was held that the covenant not to alter the front of the house was not enforceable by one purchaser against another. The decision seems to have been influenced by the absence of the plan and the absence of evidence that each purchaser had signed the same plan and that therefore it was held to be inconclusive as to whether the restrictive covenants were intended to be for the benefit of the purchasers or solely for the benefit of the vendor.

**Spencer v Bailey**36 dealt with the ‘continued liability of the owner of an estate after parting with all interest in it’. Bailey, the assignee of the tenant of a shop who had covenanted with the lessor not to use the premises for any trade or business other than that of a poulterer or cheesemonger, used the premises as a grocer’s shop for the sale of wines and spirits under an off-licence. The shop formed one of a row of shops each of which was limited by covenant to a particular trade. Spencer, having disposed of all his interest in the estate, brought an action against Bailey for an injunction to restrain him from using the shop except as a cheesemonger and poulterers. The defendant contended that Spencer, having parted with all his interest in the estate, could not enforce the covenant. It was held that though the plaintiff had parted with his interest in the estate he still had an interest in enforcing the covenant in as much as he had by his other covenants to similar effect made himself liable to be sued by the purchasers of the other shops if the covenant were infringed.

**Tucker v Voles**37 addressed the problem as to ‘when a building scheme may be implied’. Where a vendor prepares a plan of a building estate showing lots with houses marked on them and an intending purchaser is shown that plan, the purchaser is not entitled to assume that the whole estate is governed by a building scheme, that each plot shall, without variation, be built on strictly in accordance with the indications on the plan nor of necessity be governed by any printed portions of the agreement.

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33 (1887) 36 Ch D 243.
34 (1885) 15 Q B D 261, (1886) 16 Q B D 778, in which it was held that restrictive covenants could be enforced, by the owners of ‘other lots’ purchased from the original vendor, against the defendant whose deed of conveyance did not mention the restrictive covenants but who had ‘notice’ of them.
35 (1887) 57 L J Ch 6.
36 (1909) 69 LT 179.
37 [1893] 1 Ch 198.
An important case in 'land management' terms and one that also demonstrates the need for the exercise of jurisdiction regarding the discharge or modification of restrictive covenants was that of Knight v Simmonds - a case dealing with 'the value of property to be erected', 'the prohibition of trade or business', and 'the question of enforcement of the original scheme where a modified scheme had been substituted in respect of part of the area'. It was held that where all the purchasers of lots of an estate are bound by restrictive covenants not to allow any trade or business to be carried on upon their lots, equitable relief in enforcing the covenants will be refused if the party suing has debarred himself from such relief by delay or acquiescence or if the property has been so laid out and used that the object of the covenants, namely, the preserving of the property as a residential property, can no longer be attained. Knight, who had acquired his lot with notice of the original conditions, and who had not acquiesced in the breaches that had been committed, was able to enforce the original conditions as there had not been such a departure from the original scheme, nor a change in the original residential character of the estate, to render it inequitable for him to do so. But a purchaser under the sub-scheme could only enforce the modified provisions which, inter alia, had modified the prohibition in respect of any trade or business to one requiring no trade or business to be carried on that would be 'noisy, noxious, dangerous or offensive to the neighbourhood' and in consequence could not enforce the removal of a 'public laundry' which was not a breach of the modified restriction against trade.

In the same case it was held that a covenant, requiring the value of single houses to be not less than £600 and a pair of semi-detached villas not less than £900, was not broken 'as to value' merely by the building in the first instance of one of a pair of semi-detached villas (in itself of value less than £600) but that there was an obligation to erect the companion villa within a reasonable time. This decision inevitably raises the question, first as to how long it could remain unbuilt without a breach of the condition being committed and, second if at the end of that time it were not constructed, would a mandatory injunction to demolish the 'semi-detached villa' be obtainable?

Webb v Fagotti was a case dealing with the 'interpretation of the meaning of a covenant'. Land was sold subject to a covenant that 'except on lots marked 'tavern lots' no hotel, tavern, public house, beer shop or other building for the sale of wines, spirits, beer or stout or any spirituous malt or any excisable liquor of any kind shall be built upon any lot now offered for sale'. The lessees from the purchaser of two lots (not marked 'tavern lots') erected a restaurant and opened it to the public without any wine, spirit or beer licence. Later they obtained such a licence and the vendor brought an action against the lessees for an injunction to restrain them from using their restaurant for any purpose mentioned in the stipulation. It was held that the true meaning of the covenant was that no hotel, tavern, etc. should 'be' upon any lot except marked 'tavern lot'; that it would not be possible to tell whether a building in the course of erection was intended for a hotel, tavern etc.; that the user would have to be looked to before declaring that the covenant had been infringed, and that therefore the plaintiffs were entitled to the injunction claimed.

39 (1899) 79 LT 683.
The case of Jackson v Normanby Brick Co\textsuperscript{40}, dealing with 'the form of an injunction', is seemingly an appropriate way of bringing the 19th century to a close it being held that:

"An injunction, the effect of which is to require the performance of a certain act, such as the pulling down and removal of buildings, should now be made in a direct mandatory form and not in the indirect form hitherto in use."

Lindley, MR:

"The Registrar has called our attention to the form in which orders of this kind have hitherto been made, namely, restraining the defendant from allowing the buildings to remain on the land; but in future it will be better for the Court to say in plain terms what it means, and in direct words to order the buildings to be pulled down and removed."\textsuperscript{41}

What then may be learned from this brief review of cases concerning the substance of the 'building scheme'? It highlights the great variety of issues that came before the Courts during this period and, in addition, indicates the initial steps that the Courts were taking to deal with the practical implications of such matters as, \textit{inter alia}, - proximity; acquiescence in the breach; nuisance; changes in the character of the neighbourhood; value of property; proof of damage; elevational control; continued liability; implied schemes and obligations; part-modified schemes; interpretation of covenants and, lastly, the form of the injunction. In both the variety and the basic practicality of the matters involved is reflected the growth in strength of the building scheme as an emerging 'tool of land management'.

At first sight it might appear strange that there were so many cases in this short period but one explanation is surely to be found in the fact that in the whole course of English history no other period had (or even since) experienced a growth of building activity (especially housing) so prolific and so intense. What is significant, however, is the number of different aspects of the subject - aspects foreshadowing twentieth century issues for consideration - which were coming before the courts.

As will shortly appear, it is in the next period, during the early part of the twentieth century that the strands are bought together, culminating in Elliston v Reacher\textsuperscript{42} and the cases that followed that 'memorable' decision.

\textsuperscript{40} [1899] 1 Ch 438.
\textsuperscript{41} An interesting foreshadowing of the modern enforcement notice in planning control.
\textsuperscript{42} [1908] 2 Ch 374.
THE PERIOD FROM 1900 TO 1925

Cases cited:

Rogers v Hosegood [1900] 2 Ch 388 CA
Formby v Barker [1903] 2 Ch 539
In re Nisbet & Potts' Contract [1906] 1 Ch 386 CA
Wilkes v Spooner and Another [1911] 2 KB 473 CA
London County Council v Allen [1914] 3 KB 642 CA
Kember v Adams [1900] 1 Ch 412
Alexander v Mansions Proprietary (Ltd) [1900] TLR XVI, 431
Osborne v Bradley [1903] 2 Ch 446
Elliston v Reacher [1908] 2 Ch 374
Reid v Bickerstaff [1909] 2 Ch 305
Sobey v Sainsbury [1913] 2 Ch 513
Alliance Economic Investment Co. v Berton and Others [1923] KBD Vol 91, 750
Lord Northbourne v Johnston & Son [1922] 2 Ch 309

This period, from the turn of the century to the 'reforming' property legislation of 1925, witnessed a continuation of the 'building boom' which had already by the end of the first decade of the 20th century started to slow down - a process which was to be accelerated by the outbreak of the 1914-18 Great War and which, as far as house building was concerned, was not to recover (and then nothing to the same or like extent) until the era of the 'great council housing estates' of the late 1920's and the 1930's. It was a period of burgeoning social awareness, albeit tentative, but one in which building controls and standards were no longer restricted to those required to meet the twin needs of health and safety. Standards relating to 'general' amenity such as, for example, density, air, light and space about buildings, the provision of open space, the protection of the 'character of the neighbourhood', the exclusion of obnoxious uses (abattoirs, gasworks and public houses), were more and more commonly becoming controlled features of housing estate development. As such they were increasingly embraced within the 'regime' of the restrictive covenant. Many of these issues had formed the subject of 'restrictive covenants' during the 19th century but it was only towards the end of that century and during the early years of the 20th century that their use became more universal and their application, content and intent more refined.

The period (1900-25) was to prove, moreover, to be a period especially important in the evolution of the concept of the restrictive covenant, as well as in the development of an understanding of the building scheme. In considering the growth of the law during this period, it is proposed to adopt the format already used, dealing first with the cases concerned with general principles and then proceeding to consider those cases concerning the building scheme.

General Principles

Opening the century is the important case of Rogers v Hosegood, which shows that if the benefit of the covenant has been clearly annexed, it can be enforced by a successor of the covenantee even though, when he purchased the relevant land, he knew nothing of the

1 Evidence of their 'popularity' may be gauged from the number of applications for the discharge or modification of restrictive covenants (under section 84(1) of the Law of Property Act, 1925) which related to covenants imposed during this period (late 19th early 20th century).
2 It was during this period also that legislation relating to town planning first appeared on the Statute Book in the Housing, Town Planning, etc. Acts of 1909 and 1919 and the Town Planning Act of 1925.
3 [1900] 2 Ch 388 CA.
Dealing with the conditions under which the benefit of a restrictive covenant might pass to persons claiming the same under the original covenantee, Collins, LJ observed:

'...when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhere in or was annexed to the land bought'.

Equally important was the question of the clarity of annexation. Whether the benefit is sufficiently annexed for it to run is a matter of the intention of the parties and, at the time of Rogers v Hosegood, it was vital that adequate words of annexation be used in the deed creating the covenant for the intention of ‘running’ to be capable of being inferred. The words used in this instance, namely, ‘...with intent that [the covenant] might so far as possible bind the premises..., and might enure to the benefit of the [vendors], their heirs and assigns and others claiming under them...’, were regarded as sufficient to constitute a valid annexation.

Following closely in time on Rogers v Hosegood was Formby v Barker, again concerned with fundamental principles of the concept, but this time with the running of the burden of the covenant rather than the benefit. The case appears to indicate that if the burden of the covenant is to run, the covenantee must keep nearby land for the protection and benefit of which the covenant is taken. Here, crucially, the covenant (essentially, not to carry on any noxious industry) into which the purchaser entered was upon a sale to him of the whole of the vendor’s land, and a later action upon the covenant against a successor of the covenantor was hence doomed to fail.

Vaughan Williams, LJ, intimating that the covenant had not been entered into for the benefit of any land of the vendor, explained that there was ‘...no relation of ‘dominancy’ and ‘serviency’ of lands which [would] enable an action to be bought against a person not a party to the origional contract...’. In the view of the learned judge the covenant was ‘merely personal and collateral’, and not within the doctrine of Tulk v Moxhay.

The first decade of the century was also to witness the strength of the growing concept of the restrictive covenant. Given the fulfilment of the necessary conditions for its existence, it would bind all comers to the burdened land other than a bona fide purchaser. The point was vividly made by the case of In re Nisbet and Potts’ Contract, involving a squatter. After stating on the authority of London and South Western Railway Company v Gomm, that a negative covenant validly created, entered into by an owner of land with an adjoining owner, ‘...binds the land in equity, as being in the nature of a negative easement’, the headnote to the case goes on to state that it can therefore ‘...be enforced against any subsequent owner of the land not being a bona fide purchaser for value of the legal estate without notice’. It is equally binding in equity upon land to which a squatter has subsequently acquired a statutory title by adverse

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5 [1903] 2 Ch 539.
6 Ibid, at 552.
7 He cited with approval the judgment of Collins, LJ in Rogers v Hosegood [1900] 2 Ch 388 CA where, at 407, it is noted that ‘...the purchaser’s conscience is not affected by notice of covenants which [are] part of the original bargain on the first sale, but [are] merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser’s conscience and the equity affecting it can come into discussion’.
8 [1906] 1 Ch 386 CA.
9 (1882) 20 Ch D 562.
possession. The statutory 'extinguishment' of the title of the dispossessed owner of the land has not the effect of destroying the covenant and the covenantee can enforce the covenant against the squatter both before and after he has acquired his possessory title and also against any subsequent owner of the land not being a bona fide purchaser for value without notice. So, even though a squatter gains a new title, and might accordingly be thought to stand clear of a restrictive covenant, he is not a bona fide purchaser and he is, of necessity, bound.

The first decade concluded with a case in which litigation involving a restrictive covenant highlighted the force of the barrier effected in Equity by 'purchase without notice'. The case in question was Wilkes v Spooner. Here, the Court of Appeal held that '...the purchaser of land from one who has purchased it for value, without notice, either actual or constructive, of a restrictive covenant, is not bound by the covenant, although he himself had notice of it'. Vaughan Williams, LJ quoted with approval from Ashburner's Principles of Equity (page 75) that: 'A purchaser for valuable consideration without notice can give a good title to a purchaser from him with notice'. Farwell, LJ, endorsing the respectable antiquity of the equitable doctrine, agreed: '...It is impossible for us or any Court to upset law which has been settled for so many years'.

Not many years were to pass before there came from the Court of Appeal the landmark decision in London County Council v Allen. This case decided categorically in the affirmative the even yet 'lingering question' as to whether or not it was indeed necessary for a covenantee to possess land which the restrictive covenant sought to benefit. The clear unequivocal ruling on the point is basic to the current study and warrants examination in some depth. The decision is succinctly set out in the first paragraph of the headnote:

'An owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, which covenant does not run with the land at law, is not bound in equity by the covenant even if he took the land with notice of its existence, if the covenantee is not in possession of or interested in land for the benefit of which the covenant was entered into. In such a case the doctrine of Tulk v Moxhay (1848) 2 Ph 774 does not apply'.

The judgments in London County Council v Allen, particularly that of Buckley, LJ who reviewed historically the authorities, are not only important in themselves, but shed considerable light on the changing attitudes of the courts to the way in which landowners and developers were attempting to extend the control of the use of land by means of the restrictive covenant.

Buckley, LJ, after stating the proposition that'...as a matter of law a derivative owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, is not bound by the covenant even if he took with notice of its existence if the covenantee has no land adjoining or affected by the observance or non-observance of the covenant'14, then went on to consider the legal authorities. These included, inter alia: Tulk v Moxhay itself, in which Lord Cottenham had reasoned that if the covenant was unenforceable against a derivative owner taking with notice then, the covenant being one for the protection of land, it would be impossible for an owner of land to sell part without incurring the risk of rendering

10 [1911] 2 KB 473 CA.
11 Ibid, at 483.
12 Ibid, at 488.
13 [1914] 3 KB 642 CA.
14 Ibid, at 653.
15 (1848) 2 Ph 774.
what he retained worthless\textsuperscript{16}; \textit{London and South Western Railway Co. v Gomm}\textsuperscript{17}, in which Sir George Jessell regarded the doctrine of \textit{Tulk v Moxhay} as either an extension in equity of the doctrine of \textit{Spencer's Case}\textsuperscript{18} or of the doctrine of negative easements; and \textit{Haywood v Brunswick Permanent Building Society}\textsuperscript{19}, in which limits were set to any general assumption that every purchaser with notice of covenants would be thereby bound.

Buckley, LJ, recognising that the decisions of the Court of Appeal, particularly that of Fry, J in \textit{Luker v Dennis}\textsuperscript{20}, created certain difficulties, went on to say: 'The decision in \textit{Luker v Dennis}\textsuperscript{21} was in 1877 and since that date this doctrine has been so extended and developed by \textit{London and South Western Railway Co. v Gomm}\textsuperscript{22}, \textit{Austerberry v Oldham Corporation}\textsuperscript{23}, and quite recently by \textit{Formby v Barker}\textsuperscript{24} and \textit{Millbourn v Lyons}\textsuperscript{25}, that it cannot I think be relied upon as now accurately stating the law.'\textsuperscript{26}

Upon the authorities as a whole Buckley, LJ was of the opinion that:

'...the doctrine in \textit{Tulk v Moxhay} does not extend to the case in which the covenantee had no land capable of enjoying, as against the land of the covenator, the benefit of the restrictive covenant...Where the covenantee has no land, the derivative owner claiming under the covenator is bound neither in contract nor by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.'\textsuperscript{27}

Scrutton, J, whilst finally arriving at the same conclusion, was less than enthusiastic in so doing. After having identified the question in the present case as being 'whether it is essential to the doctrine of \textit{Tulk v Moxhay} that the covenantee should have at the time of the creation of the covenant, and afterwards, land for the benefit of which the covenant is created', he concluded that the answer to that question required the investigation of the historical growth of the doctrine of \textit{Tulk v Moxhay}.

Briefly summarising the main thrust of his investigation it may be said that he found in \textit{Tulk v Moxhay} itself, that while the covenantee did hold adjacent land there was no trace in Lord Cottenham's judgment of any requirement for the covenantee to have and continue to hold land\textsuperscript{28}, that in numerous cases thereafter the successful application of the doctrine in \textit{Tulk v Moxhay} had been based on nothing but notice, that the first departure came in \textit{Gomm's case}\textsuperscript{29}, but that since \textit{Formby v Barker}\textsuperscript{30} in particular, and a series of like decisions following that case, the plaintiffs must fail on the ground that they have never had any land for the benefit of which this 'equitable interest analogous to a negative easement' could be created.

\textsuperscript{16} Although in fact, in \textit{Tulk v Moxhay} there was nearby land kept which benefited, in the early days the doctrine was based on notice and conscience.
\textsuperscript{17} (1882) 20 Ch D 562 at 583.
\textsuperscript{18} (1583) 5 Co Rep 16a.
\textsuperscript{19} (1881) 8 QBD 403.
\textsuperscript{20} (1877) 7 Ch D 227, i.e. to the effect that notice sufficed.
\textsuperscript{21} \textit{Ibid}.
\textsuperscript{22} (1882) 20 Ch D 562 at 587.
\textsuperscript{23} (1885) 29 Ch D 750.
\textsuperscript{24} [1903] 2 Ch 539.
\textsuperscript{25} [1914] 1 Ch 34, 2 Ch 231.
\textsuperscript{26} \textit{London County Council v Allen} [1914] 3 KB 642, at 659.
\textsuperscript{27} \textit{Ibid}., at 660.
\textsuperscript{28} The learned judge observed, \textit{ibid} at 664, that: 'I read Lord Cottenham's judgment as proceeding entirely on the question of notice... and on the equitable ground that a man purchasing land with notice...would not be allowed to violate the covenant he knew of when he bought the land'.
\textsuperscript{29} (1882) 20 Ch D 562 at 583.
\textsuperscript{30} [1903] 2 Ch 539.
That Scrutton, J was not at ease with the decision to which he was a party, can be gauged from certain comments that he made by way of conclusion. First, he postulated that if the matter were to be considered by a higher tribunal, that tribunal might see its way to revert to the earlier doctrine of notice or at least to treat it as co-existing with the 'equitable interest analogous to a negative easement binding on persons who are ignorant of it'. Secondly, he regarded it as very regrettable that a public body (as here involved) should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body did not own any land in the immediate neighbourhood.

Behan\textsuperscript{31}, commenting upon the views of Scrutton, J, concludes, regarding the issue of 'public interest' as follows:

'The implied proposition that Courts of Equity should endeavour to mould doctrines which refer exclusively to matters of private right in a manner calculated to promote some supposed interest of the public, is as novel and startling as it is indefensible. It may, with all respect, be suggested that it should be the sole aim of the Courts to function in a manner which tends least to the disturbance of individual interests, that the redress of public ills should be left to legislative action.'

Scrutton, J, would not see (nor indeed would anyone else) a higher tribunal revert to the earlier doctrine of notice and the decision in \textit{London County Council v Allen}\textsuperscript{32} has survived intact in that, save for the 'building scheme' and certain statutory exceptions, the enforcement of a restrictive covenant depends on the possession of land which can benefit. The concern of Scrutton, J, for the 'public interest' has been taken care of (as Behan suggested) by Parliament giving to specified public authorities the power to enforce restrictive covenants in gross, even though they are not possessed of any dominant land which could benefit therefrom.\textsuperscript{33}

\textit{The Building Scheme}

The period under consideration (1900-1925) saw not only such historic decisions as that in \textit{London County Council v Allen}\textsuperscript{34} but also the establishment of firm criteria for the 'building scheme'. A spate of cases in the last years of the 19th century had resulted in the gradual establishment of a number of criteria for a successful building scheme and a range of issues which the courts had held as the appropriate subject matter for restrictive covenants such as, for example, density, use and character of development. These were followed in the early years of the 20th century by a number of cases illustrating the depth of detail then being ascribed to the concept and content of the building scheme.

Two contrasting cases from the early part of the period serve vividly to make the point and, furthermore, show how all depended, in terms of outcome, upon the Court's conception of the 'implied intent' of the particular 'building scheme' in question. In \textit{Kember v Adams}\textsuperscript{35} a building containing several residential flats was held to constitute only one house within the meaning of the word 'house' in a covenant not to erect more than a certain number of houses, unless there were some context which would cut down or alter the popular interpretation of the word. For the plaintiffs it was contended that the block of buildings was a series of houses.

\textsuperscript{31} J.C.V. Behan, \textit{The Use of Land as affected by Covenants}, 1924, pp. 34-39, providing an early illustration of the continuing theme of this study devoted, as it is, to comparing the different and distinct requirements of private and public control of land use and development.

\textsuperscript{32} [1914] 3 KB 642 CA.

\textsuperscript{33} For example, Local Authorities (under the Housing Acts) and the National Trust.

\textsuperscript{34} [1914] 3 KB 642 CA.

\textsuperscript{35} [1900] 1 Ch 412.
superimposed one upon the other and if that were not a breach of the covenant it would be open to any purchaser to 'destroy the neighbourhood by building a block of tenements for working men' - in ordinary parlance each flat is properly described as a house. Their Lordships were unanimous in rejecting this proposition, holding that where a property was sold in lots according to a plan for building purposes, and where each lot was subject to a covenant that not more than one house should be built upon it, the meaning of the word 'house' applies to the 'whole amalgamation' and 'not to the interior portions of the building, but to the whole building'.

By contrast, in Rogers v Hosegood, it was held that the erection of a block of buildings to be occupied as residential flats would be in breach of a covenant 'that no more than one messuage or dwelling house should at one time be erected or be standing on the plot, and that such messuage should be adapted for and used as a private residence only'. Collins, LJ, reading the judgment of the court, concluded: '...The covenant must, we think, be construed in an ordinary or popular, and not in a legal and technical, sense; and we do not think that residential flats, though for many purposes separate dwelling houses, come within the popular description of the class of buildings which it was intended to permit.

It was in the first decade of the century that the landmark decision of Elliston v Reach emerged, the number of cases in which the presence or absence of a building scheme had been contested having increased significantly. Of the courts' careful approach to such schemes the case of Osborne v Bradley is an instance; therein it was held that no mutual covenants between purchasers would be implied unless both the persons and the plots to be bound were in some way defined. In Elliston v Reach, however, a few years after Osborne, the requirements were brought together with such clarity that for many years after, in only a handful of cases (it is alleged) was the existence of a building scheme proved. Though it is suggested that it was the 'clarity of the requirements' that reduced the need for the intervention of the courts, rather than there being any widespread inability to comply with the strictness of the requirements.

The importance of the decision (and its basic relevance to this study) requires that it be set down in some detail. The headnote to the case provides a convenient summary of Parker, J's judgment and the first paragraph is here quoted in extenso:

'Restrictive covenants may be enforced by one purchaser or his successor in title against another or his successor irrespective of the dates of the respective purchases...(1) if both plaintiff and defendant derive title under a common vendor; and (2) if before selling the lands now owned by plaintiff and defendant the vendor laid out his estate or a defined portion thereof (including the lands of the plaintiff and defendant) for sale in lots subject to restrictions intended to be imposed on all the lots and which, though varying in details as to particular lots, are consistent and consistent only with a general scheme of development; and (3) if those restrictions were intended by the common vendor to be and were for the benefit of all the lots intended to be sold - whether or not for the benefit also of the land retained by the vendor - the vendor's object in imposing the restrictions being in general to be gathered from all the circumstances, including in particular the nature of the

36 Per Lindley, MR, ibid at 415. Vaughan Williams, LJ, agreeing, did not think that anyone who was familiar with building estates in London would have any difficulty in ascertaining the object of the covenant if 'we construe it as a covenant in which the word 'house' means the physical erection and not the interior arrangement'. In other words it applies to the 'bricks and mortar' and not to the 'user'.

37 [1900] 2 Ch 388.

38 Ibid, at 409. Again, in Alexander v Mansion's Proprietary Ltd. [1900] TLR XVI 431, it was held that the conversion of flats in a building into an hotel was a departure from the scheme in accordance with which the building was to be managed as 'residential flats suitable to the convenience of all persons who should be tenants of the flats'.

39 [1908] 2 Ch 374.

40 [1903] 2 Ch 446.

41 [1908] 2 Ch 374.
restrictions, and it being easily inferred from the fact that general observance of the restrictions is calculated to enhance the value of the several lots offered for sale that the vendor intended the restrictions to be for the benefit of all the lots even though he may retain other lands the value of which might be similarly enhanced; and (4) if both plaintiff and defendant or their predecessors purchased from the common vendor on the footing that the restrictions were to ensure for the benefit of the other lots included in the scheme, whether or not for the benefit of the land retained by the vendor, this fourth point being readily inferred if the first three points be established, provided the purchasers have notice of the facts involved in them, but difficult if not impossible to establish if the purchase is made in ignorance of any material part of those facts. When the four points are established the community of interest imports in equity the reciprocity of obligation which each purchaser contemplates when he purchases.42

Such painstaking a crystallisation of Equity's conditions was to provide guidance for years to come and its cautious approach was reinforced by the Court of Appeal only a little while later in Reid v Bickerstaff43. Here the Court affirmed that in order to establish the existence of a building scheme there must be definite reciprocal rights and obligations extending over a defined area. The plaintiffs failed to establish the essential requisites of a building scheme and so, on this basis, could not succeed, Cozens-Hardy, MR, being of the view that a purchaser must know the extent of both his burden and his benefit.44

The next case of interest, Sobey v Sainsbury45, is significant for its dealing with certain possible defences to an action for breach of covenant. Equity had long taken the view that a 'change in the character of the neighbourhood' may render an injunction inappropriate46, but here two distinct (but often converging) principles were involved: first, if the plaintiff has himself brought about a change, through consistent acquiescence in breaches, he cannot thereafter seek specific relief; and secondly, if, though outside his control, the character of the area has declined, it may still be impractical to enjoin a breach. In Sobey's case, it having been concluded that there did exist a building scheme but that the acts and omissions of the plaintiff and his predecessors in title, and particularly the non-enforcement of the covenant as to building on parts of the estate, prevented the Court from granting the equitable relief by way of injunction, Sargant, J, went on to state that the court was 'entitled also to take into account the general change in the character of the neighbourhood'. Furthermore, on account of the degree of alteration which had taken place, the learned judge found it 'difficult to imagine a stronger case than this for declining to grant specific performance of the covenant by way of injunction'.47

Before 1925 the effect of 'changes in the character of a neighbourhood' could only be considered in the Courts by way of defence to an action for breach of a restrictive covenant. The one exception was that provided by the Housing, Town Planning, etc, Act, 1919, section 27. Under that section an application could be made to a County Court for an order varying a restrictive covenant on the ground that, owing to changes in the character of the neighbourhood a house could not readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements and that by reason of the provisions of the restrictive covenant affecting the house such conversion was prohibited or restricted; the Court could then, if satisfied, vary the terms of the restrictive covenant to enable the house to be so converted.

42 Parker, J's statement of the requisites for enforcing restrictive covenants as between different purchasers was approved by the Court of Appeal, affirming his decision.
43 (1909) 2 Ch 305.
44 Ibid, at 319.
45 [1913] 2 Ch 513.
46 See, for example, Osborne v Bradley [1903] 2 Ch 446.
47 [1913] 2 Ch 513, at 529.
In *Alliance Economic Investment Co. v Berton & Others* the County Court Judge had found as a fact that the plaintiffs had brought themselves within the policy of the Act as regards having a house which could not readily be let owing to the change in the character of the district and was prepared to vary the terms of the covenant accordingly. In the Court of Appeal, Banks, LJ, having stated that the onus of proof that the house ‘cannot readily be let as a single tenement but could more readily be let as occupation if converted into two or more tenements’ is upon the applicant, then stated that the ‘difficulty in letting as a single tenement must be proved to be owing to changes in the character of the neighbourhood’.

He then went on to consider what constituted a ‘change of character’ and ‘of what does a neighbourhood consist’. Regarding the first he was of the view that:

‘...changes in a neighbourhood must not be taken into account unless they are changes which have affected the character of the neighbourhood. Great changes may have taken place in the mode of life of all the inhabitants of a neighbourhood owing to heavy taxation and loss of income. Carriages and motor cars may have had to be given up, women servants substituted for men servants, all entertaining abolished, and though the inhabitants have entirely changed their mode of life, they continue to occupy the same houses, and I do not think that such a change as I have indicated constitutes a change of character of the neighbourhood within the meaning of the section’.49

Regarding the expression ‘neighbourhood’ he found it impossible to lay down any general rule. Whereas in country districts people are said to be neighbours who live many miles apart, the same cannot be said of dwellers in a town ‘where a single street or a single square may constitute a neighbourhood within the meaning of the section’. Again, physical conditions may determine the boundary or boundaries of a neighbourhood, as, for instance, a range of hills, a river, a railway, or the line which separates a high class residential district from ‘a district consisting only of artisans’ or workmen’s dwellings’. Considering the relevance of changes which may have occurred in the surrounding districts, he expressed the view that:

‘...It seems obvious that changes occurring outside a neighbourhood may materially affect the character of a neighbourhood. For instance, a neighbourhood in a country district may become so surrounded by working class dwellings, factories, tramlines or omnibus routes as to drive all the inhabitants out of the neighbourhood, and to render it uninhabitable by the class of persons who formerly inhabited it’.50

The Court of Appeal then proceeded to reverse the judgment of the County Court on the grounds, *inter alia*, that there was a sufficient misdirection as to entitle the appellant to a new trial. On the evidence, the ‘neighbourhood’ was compact, distinct in its physical conditions and self-contained and the County Court Judge had apparently been of the opinion that no sufficient change had taken place within that area so defined as to constitute a change in the character of that area. Furthermore, there was no evidence of any increased difficulty in letting the property as a single tenement. The importance of the case (in the context of the present study) is not the decision but the *obiter dicta* relating to neighbourhood definition, change and character: matters which would exercise the minds of the Official Arbitrator and the Lands Tribunal in the years to come.

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49 Ibid, at 752.
50 Ibid, at 753.
A decision towards the end of the period shows plainly the strength of the notion of a building scheme and, as a consequence, its worth as a ‘tool’ for the maintenance of the value of property. This was the decision in Lord Northbourne v Johnston & Son51, where it was held that it was not encumbent upon the plaintiff to show that the covenants imposed by the original conveyance were in the first instance intended to be for the benefit of any particular portions of the estate retained by the covenantors but it was sufficient to show that those covenants were intended to be enforceable for the purpose of preserving the general residential character of the estate as a whole and that it was not encumbent upon a plaintiff on each occasion of enforcing such covenants to show that the covenants were in fact beneficial to any portions of the retained estate.

This expansive approach again testifies to the very practical base from which Equity proceeds. Sargant, J took the line that were the conclusion to be otherwise there would be almost entirely destroyed ‘...the enforceability of the restrictive covenants on any considerable building estate that was being developed on the freehold system’.52

Of the many important cases featuring in the first quarter of the present century, two perhaps stand out in the growing history of the restrictive covenant. First, London County Council v Allen53 in 1914 clarified once and for all the issue of the necessity of retaining land that could benefit from the covenant. Whilst not ‘clipping the wings’ of the doctrine of Tulk v Moxhay54 to the extent as indicated by Challis55 in 1911 as being ‘its not improbable destiny’, the decision did finally make clear that the doctrine depended on more than notice, which had been the position during the whole of the period up to the time of the Judicature Acts of 1873-5 and even beyond.56

Secondly, Elliston v Reacher57 in 1908 had clarified the requirments for a valid and enforceable building scheme, which had been the subject of commentary and judgment in a long line of cases from Whatman v Gibson58 onwards.

The next phase of the evolution of the restrictive covenant would take place against the background and under the influence of the property legislation of 1925.

51 [1922] 2 Ch 309.
52 Ibid, at 318.
53 [1914] 3 KB 642.
54 (1848) 2 Ph 774.
56 See Luker v Dennis (1877) 7 Ch D 227.
57 [1908] 2 Ch 374.
58 (1838) 9 Sim 196.
THE PERIOD FROM 1926 TO 1949

Cases cited:

Miles v Easter (In re Union of London & Smith's Bank Limited's Conveyance) [1933] 1 Ch 611
In re Ballard's Conveyance [1937] 1 Ch 473
Marquess of Zetland v Driver [1939] 1 Ch 1
In re Ecclesiastical Commissioners for England's Conveyance [1936] 1 Ch 430
White v Bijou Mansions Limited [1937] 1 Ch 610, [1938] 1 Ch 351 CA
Chatsworth Estates Co. v Fewell [1931] 1 Ch 224
Westripp v Baldock [1939] 1 All ER 279
In re Henderson's Conveyance [1940] 1 Ch 835
Torbay Hotel Ltd v Jenkins & Lawley [1927] 2 Ch 225
Pearce v Maryon-Wilson [1935] 1 Ch 188
Lawrence v South County Freeholds Ltd [1939] 1 Ch 656
Hodges v Jones [1935] 1 Ch 657
Newman v Real Estate Debenture Corporation Ltd [1939] 1 All ER 131

In a study concerned with the interface between the private and public control of land use and development there can be no period of greater change or of more significance than that represented by the ethos of the Law of Property Act, 1925 at one end and the Town & Country Planning Act, 1947 at the other. The Law of Property Act, 1925 was the first statute to refer to restrictive covenants specifically, viz. in section 84 (discharge or modification of restrictive covenants), but other sections also of that Act have proved to have had relevance to the development of the restrictive covenant, viz. section 56 (replacing section 5 of the Real Property Act, 1845) and sections 78 & 79. The significance of sections 78 & 79 was not to become apparent until very much later but the impact of section 56, was to be felt quite early on.

As has been the pattern of treatment in the earlier periods, cases featuring general principles will be considered first and those dealing with the building scheme second.

General Principles

Early in this period there was decided a case of singular importance on the issue of the running of the benefit of a restrictive covenant. This was Miles v Easter, a case universally regarded as the leading case on the passing of the benefit by assignment, in which the Court of Appeal was concerned with deciding two basic issues.

The ruling on the first, relating to the question of the enforcement of a restrictive covenant not 'expressly' annexed, is most clearly expressed in the headnote to the case:

"Where on a sale otherwise than under a building scheme a restrictive covenant is taken, the benefit of which is not on the sale annexed to the land retained by the covenantee so as to run with it, an assign of the covenantee's retained land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless he can show (i) that the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant, and (ii) that he (the covenantee's assign) is an express assign of the benefit of the covenant.'
The second issue decided by that case concerned the question of enforcement once the covenantee had parted with the whole of his retained land. Citing with approval the opinion of Sargant, J in *Chambers v Randall*², Romer, LJ (adopting the words of Sargant, J) declared that:

'...the covenant having been entered into to enable the covenantee to dispose of his property to
advantage, that result will in fact have been obtained when all that property has been disposed of...[and]...although on a sale of the whole or part of the property intended to be protected by the covenant the right to enforce the covenant may be expressly assigned to the purchaser, such an assignment will be ineffective if made at a later date when the covenantee has parted with the whole of his land.³

In this important case, in which Romer, LJ set out the rules which should be met if the benefit of a covenant is to pass by assignment, there stands out the limiting quality of those rules. As Cheshire explains⁴, this is founded on Equity's understanding of a restrictive covenant as a device to protect the land of the covenantee and not as having its own intrinsic value. Hence the vital point that the assignment must take place at the same time as the sale of the benefiting land.

Just as the judges of the time were concerned with the passing of the benefit of a restrictive covenant by assignment so too were they involved in the intricacies of the passing of the benefit by *annexation*. In *In re Ballard's Conveyance*⁵, the question arose as to the enforcement of restrictive covenants in respect of a very large estate (some 1700 acres), where there was no building scheme, and assignees of the whole of the dominant land sought the advantage of the covenants on the basis of annexation. In this they failed, it being held that the property for the benefit of which the restrictions were imposed was the *whole*, of the estate and that the restrictions, being the usual building restrictions, could not possibly benefit the whole of so large an area and were therefore unenforceable. Distinguishing *Rogers v Hosegood*⁶, where the covenant in question was annexed to *all or any* of certain lands, it was further held that even if there were some part of the land which the covenant did 'concern or touch', the Court would not sever it and treat it as annexed to that part.

One year later, the decision of the Court of Appeal in *Marquess of Zetland v Driver*⁷, was in marked contrast. In this case, there was a 'covenant against nuisance' taken for the benefit of 'such part or parts' of the land as should remain unsold or should be sold by the vendor or his successors with its express benefit. Distinguishing *Ballard's case*, it was held that the covenant was enforceable, since it was expressed to be for the benefit of the whole or any part or parts of the unsold settled property, and not for that of the whole estate. As the 'unsold portion' might be far distant from the premises in question (reportedly in this case a mile away) and quite unaffected by the 'nuisance' thereon, the decision might well, it is suggested, be seen as an effective reversal of *Ballard*. That aside, what appears plain is the concern which the Courts were having with the legitimate *coverage* of a restrictive covenant and hence with the *amount* of land, the enjoyment or use of which, might properly be in some way restrained. The 'boundless' potential of the restrictive covenant was well recognised and its control a marked feature of judicial endeavour.

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² [1923] 1 Ch 149.
³ *Miles v Easter* [1933] 1 Ch 611 at 632.
⁵ [1937] 1 Ch 473.
⁶ [1900] 2 Ch 388.
⁷ [1939] 1 Ch 1.
In addition to the attention given in this period to the aspect of the passing of a benefit from person to person, light was also being thrown on the way in which, by reason of section 56 of the Law of Property Act, 1925, the benefit of a restrictive covenant could be bestowed, at the time the covenant was taken, upon a person other than the covenantee. Such a possibility was the concern of the leading case of In re Ecclesiastical Commissioners for England's Conveyance\(^8\), decided in the mid 1930's.

In this case, a conveyance provided that restrictions expressed therein should 'run with and bind the said land' and by a separate covenant contained therein, that such restrictive covenants should enure for the benefit of 'lands adjoining or adjacent to the said land'. Several plots of freehold land had been conveyed by the original vendors to various purchasers before the date of the conveyance. It was held that on the true construction of the covenant, the land referred to as 'adjacent' included certain plots of land 'near to but not adjoining' and that the original purchasers of the land so held to be adjoining or adjacent, and the present owners of such land, were entitled to enforce the covenants, although the original covenantee were not parties to the conveyance.

Before the decade closed a 'section 56' issue arose again, this time in White v Bijou Mansions Limited.\(^9\) This case emphasises the fact that the operation of the section is restricted. It can only be used, as Cheshire makes clear\(^10\), by a person who is ascertainable at the time the deed is made purporting to make a covenant available to him; it cannot bestow the advantage of a covenant on a future owner of specified land.\(^11\)

The Bijou Mansions case also raises the issue of 'changes in the neighbourhood' which, as in earlier times, was still continuing to exercise the minds of the judges. Whereas in this case, Simonds, J, found it unnecessary to deal with the defence, he offered comments on it which indicate the way in which the Courts were formulating views on what many would consider in part at least, a 'subjective' issue. From his observations it is clear that to him two propositions were of particular relevance. First, there was the question of 'responsibility' for the changes, with the inference that if they were 'not changes for which the plaintiff himself was substantially responsible', that (in some way) affected the question of 'change in the neighbourhood'. In other words, changes for which the plaintiff was not responsible were, somehow, less of a 'change' than changes for which he was responsible. Secondly, there was the question of the degree of importance that the plaintiff himself attached to the covenants contained in the originating deed, to the extent that Simonds, J was constrained to conclude that:

'It may be that at any particular time the user is not detrimental, that it does not cause an annoyance to anybody, but... that it is depreciatory of property...\(^12\).

These observations appear to underline the reluctance of the Courts to interfere with the 'sanctity of contract' conferred, over the years by the law, on the restrictive covenant.

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8. [1936] 1 Ch 430.
9. [1937] 1 Ch 610, [1938] 1 Ch 351 CA, affirming Simonds, J.
11. It is worthy of note that, some years later, in Smith and Snipes Hall Farm Ltd. v River Douglas Catchment Board [1949] 2 KB 500 (a case involving the passing of the benefit of a positive covenant to preserve certain river banks), Lord Denning strove to introduce and extend the limited interpretation that Simonds, J had placed upon section 56, stating (at 517) that 'there is no reason why the section should not be given its full scope [to the unequivocal extent that] a person may enforce an agreement respecting property made for his benefit, although he was not a party to it'.
12. White v Bijou Mansions Ltd. [1937] 1 Ch 610 at 626.
Only a few years before the *Bijou Mansions* case, much light had been thrown on the issue of 'change in the character of a neighbourhood' in *Chatsworth Estates Co. v Fewell*[^13^], a case showing how, some three decades into the century, swiftly changing social conditions were being reflected in the altering patterns of land use. In this case an action was brought to enforce a restrictive covenant designed to keep an estate residential in character. The defendant relied on two equitable defences, namely (i) a general change in the character of the neighbourhood and (ii) an allegation that this change was brought about by the acts or omissions of the plaintiffs or their predecessors.

It was held that in order to succeed on the first ground the defendant must show so total a change in the character of the neighbourhood as to render the covenants valueless to the plaintiffs and in order to succeed on the second ground the defendant must show that the plaintiffs acts or omissions were such as to justify a reasonable person taking the view that the covenants were no longer enforceable.[^14^]

To keep the estate purely residential, covenants had been imposed preventing any house being used 'otherwise than as a private dwelling-house', and although the plaintiffs (or their predecessors) had licensed a number of schools, some blocks of flats, a hotel and three boarding houses, it was held that this did not prevent the plaintiffs from restraining the defendant from using his house as a guest house, and further that the area was not so changed as to render the covenants valueless to the plaintiffs.

On the first defence, Farwell, J, while venturing the view that Sargant, J, had probably gone too far in *Sobey v Sainsbury*[^15^] in taking into account the change in property outside the district (a matter which it was agreed was not an issue in the present case), considered that:

> "...although there are many flats, some few boarding houses, some schools and so on [and although] the area is no longer confined to single dwelling-houses, and the covenants have been somewhat relaxed...the area still retains its character of being a residential area"[^16^].

On the second defence, in an interesting comment on the plaintiff's conduct and approach, he went on to note that the plaintiffs had not unduly insisted on their covenants saying:

> "...I cannot think that plaintiffs lose their rights merely because they treat their neighbours with consideration. They are doing what they think sufficient to preserve the character of the neighbourhood. Whether they do enough is another matter, but I am quite satisfied that they are not intending by their acts or omissions to commit this area to be turned into anything other than a mainly residential area"[^17^].

Always a matter of degree he concluded it could not be thought that the plaintiffs had here, by their conduct, represented to the defendants that the covenants were no longer enforceable.[^18^] An injunction was granted.[^19^] *Prima facia*, this raises the important question as to whether change in the character of a neighbourhood should be decided on the facts or on the intention (successful or otherwise) of those seeking to enforce the restrictive covenant. But it

[^13^]: [1931] 1 Ch 224.

[^14^]: In other words, the defendant must establish a 'sort of estoppel'.

[^15^]: [1913] 2 Ch 513 at 529.

[^16^]: *Chatsworth Estates Co. v Fewell* [1931] 1 Ch 224 at 229.


[^18^]: Ibid, at 232.

[^19^]: In granting the injunction, the learned judge observed (at 233) that: 'Damages are no remedy, because the object of the covenant is not to make persons pay for committing breaches but to prevent those breaches'.

has to be borne in mind that this apparently 'public' subject is being raised in the context of purely 'private' litigation. Furthermore, what is primarily in issue is the seeking of an equitable remedy which, being discretionary, calls for an examination of the plaintiff's relevant conduct. If he has acquiesced in breaches, Equity does not look favourably upon his request for an injunction, regarding a grant of an injunction in such circumstances as unjust.

Clearly, a heavy burden is placed upon a party to an action who seeks to show that a restrictive covenant has become unenforceable by reason of a change in the character of the neighbourhood. This is emphasised yet again by the decision of the Court of Appeal in 1939 in *Westripp v Baldock.*\(^{20}\) The court below, having determined as a finding of fact that the business of a jobbing builder was in contravention of a restrictive covenant prohibiting the carrying on of any trade or manufacture within the area covered by a building scheme and that the area was 'still mainly residential', the Court of Appeal upheld the grant of an injunction, the neighbourhood not having suffered such a change as would release the covenant. The change must be such that the covenant has become valueless to the plaintiff.

Here is a clear signal that while Equity does nothing in vain, it is not over anxious to refuse to protect, via an injunction, the equitable interest which the benefit of a restrictive covenant raises.

With the turn of the decade there emerged, in the same context, the decision in *In re Henderson's Conveyance*\(^{21}\) (an appeal and cross-appeal from an Arbitrator's Order under section 84 of the Law of Property Act, 1925). Whilst it was concerned again with 'change in character of property or neighbourhood' it was important not only in that respect but, more particularly, as an adverse commentary on the growing practice of 'buying out restrictive covenants' that was being pursued by the Official Arbitrator in respect of the Orders he was making under section 84 of the Law of Property Act, 1925.\(^{22}\)

The relevant facts may be briefly stated. A house was conveyed (in 1918) with the benefit of a covenant (entered into in 1865) not to erect any building upon an adjoining piece of land lying at the end of the garden. In 1938 the purchaser of the land subject to the restrictive covenant applied to the Official Arbitrator under section 84 of the Law of Property Act, 1925 for a discharge or modification to enable him to build a house on the land. The Arbitrator made an Order permitting the development subject to the payment of £500 compensation. The Court held that section 84 was 'not designed to enable a person to expropriate the private rights of another for his own profit'; that the present case was not a proper case for its application; that there was no evidence of any change in the character of the property or the immediate neighbourhood; that the continued existence of the restriction would not impede the reasonable development of adjoining land, and that the preservation of the land unbuilt upon was of value to the owner of the house (for the benefit of which it had been imposed) as it increased the value of his property. This case was an important reminder to the Official Arbitrator of the need to apply strictly the criteria laid down in section 84 governing the discharge or modification of restrictive covenants.

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20 [1939] 1 All ER 279.
21 [1940] 1 Ch 835.
22 Post, The Discharge or Modification of Restrictive Covenants - The Era of the Official Arbitrator.
The Building Scheme

Turning now to the theme of the evolving nature of the building scheme the first case to which reference must be made is that of *Torbay Hotel Ltd. v Jenkins & Lawley*\(^{23}\) in 1927. In that case, although a scheme of mutual obligations had been established by common intention, owing to the absence of a defined geographical area of intended operation the plaintiffs were not entitled to relief by way of injunction. The adoption of a 'systematic policy of granting the fee simple when sales of the freehold became practicable, involving the imposition of a regular system of covenants intended to enure for the benefit *inter se* of all the persons who from time to time became owners of portions of the estate', had established a common intention that there should be mutual obligations.

In the opinion of Clauson, J\(^{24}\) '...the principle as regards the common intention of the parties on which the building scheme cases proceed would apply to the present case, notwithstanding the circumstances differ from those of the ordinary building scheme'. And, he went on: 'Such a common intention...will be carried into effect by the Court by enforcing the agreed restrictions on any owner for the time being...but only if, the Court can ascertain with reasonably clear definitiveness the geographical area within which those mutual obligations are intended to operate'. So, the plea failed for lack of evidence defining the area. The case is, however, important in establishing that the principle of *Elliston v Reacher*\(^{25}\) may be applied to an estate scheme which is not a building scheme as usually understood.

An important issue of principle was raised in *Pearce v Maryon-Wilson*\(^{26}\) in 1935 concerning the entitlement to relax a restrictive covenant in a building scheme. Although in itself a 'leasehold' case it would appear to be applicable also to a freehold situation. The defendant (the successor in title to the original lessor) was the owner of a building estate (assumed by the Court to be a 'building scheme') comprising houses let subject to identical covenants, including one not to 'convert, use or occupy the premises' other than as a private dwelling-house 'without the consent in writing of the said lessor having been first obtained'. The plaintiff alleged that under an implied condition in the general building scheme the defendant was not entitled to permit any relaxation of the covenant so as to depreciate the value of other parts of the estate (and in particular the plaintiff's own property) and claimed an injunction to restrain the defendant from relaxing the covenant. It was held that the words 'without the consent...' conferred on the lessor the 'widest possible power of giving or withholding his consent' and he was therefore entitled to authorise whatever use of the property he desired without regard to anything but his own wishes. This decision challenges the raison d'être of the building scheme concept, which is based on principles of 'mutuality' and 'reciprocity' of benefit and burden for its role in controlling use and development to the advantage of all embraced by a particular scheme. It is supposedly possible that the Court took the view that, as it was dealing with a leasehold situation, the defendant would not sanction any use or development which might 'injure' the value of his reversion and that, therefore, what he had permitted could not be of such a grievous nature as to harm the plaintiff.

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\(^{23}\) [1927] 2 Ch 225.
\(^{24}\) Ibid, at 241.
\(^{25}\) [1908] 2 Ch 374.
\(^{26}\) [1935] 1 Ch 188.
Although a case in which the existence of a building scheme had not been proved, *Lawrence v South County Freeholds Ltd*[^27], decided in 1939, is of note for the *obiter dictum* of Simonds, J[^28] concerning the enforcement of covenants as between owners of sub lots. In essence, this suggests that where two houses are built on the same original lot, each party (having regard to the form of the conveyances to them inferring 'common intention') will be entitled to enforce such covenants against the other, if a general building scheme has been proved to exist. It seems that this view is restricted to the position regarding sub lots, i.e. one lot divided into two or more sub lots.[^29]

The status of building estate plans arose in *Hodges v Jones*[^30] which, although a case concerning collateral agreements, provides an interesting comment which may have a more general application within the province of the building scheme. Briefly the facts in *Hodges* case were that before purchasing a house plot the plaintiffs had been shown a plan of the proposed layout of the estate on which a strip of land adjoining the plaintiff's plot was enscribed 'tennis courts'. The defendants erected three garages on the 'tennis court' site and the plaintiffs sought a mandatory injunction to remove them, alleging that when they purchased the plot there was a collateral agreement that this strip was only to be used as tennis courts. Luxmoore, J,[^31] distinguishing cases where 'some reliance' on a plan in establishing a collateral contract had been successful, went on to refer with approval to Lord Eldon in the case of *Feoffees of Heriot's Hospital v Gibson*[^32] who considered that it was 'perfectly wild to say that the mere exhibition of a plan was sufficient to form a binding contract' and in *Child v Douglas*[^33], where, a plan of the land on which the buildings alone were drawn was shown by the vendor to the plaintiff, the Court was so doubtful as to whether there was any general scheme that an injunction was refused.

The final case for consideration in this period was concerned with the seemingly simple question of 'size' in relation to a building scheme. In *Newman v Real Estate Debenture Corporation Ltd.*[^34] interesting light was thrown upon this very basic feature. The case dealt primarily with such issues as 'derogation from grant' and the limitations on registration of a certain covenant under the Land Charges Act, 1925, but its relevance here is to the decision that a building scheme had been established in respect of 'a small number of flats in a single building'. The principle of the building scheme is commonly applied to a substantial area and no lower limit to the size of the 'building estate' had previously been suggested. If, as it appears from this decision, it was logical that the principle should be applied even to a small number of flats in a single building, since the user of any one part of the premises must materially affect the comfort of the remainder, could it be concluded that the minimum 'size' for a building scheme would be a pair of semi-detached houses?

That the 1940’s exhibited a dearth of cases relating to restrictive covenants and in particular the building scheme is not surprising. Building, especially house building, was virtually moribund for the period of the 1939-45 war and for the rest of the decade was subject to restrictions, both financial and administrative (licensing control). When it was to revive it

[^27]: [1939] 1 Ch 656.
[^28]: Ibid, at 676.
[^29]: For an authoritative ruling on sub schemes see *Brunner & Another v Greenslade* [1971] 1 Ch 993, post.
[^31]: Ibid, at 669.
[^32]: 2 Dow 301, at 307.
[^33]: (1854) 5 DGM & G 739.
[^34]: [1939] 1 All ER 131.
would be under an entirely different regime of control. The Town & Country Planning Act, 1947, which came into operation on 1 July 1948, made all ‘development’ (with minor exceptions covered by the General Development Order and the Use Classes Order) the subject of ‘public control’. This control would bring into the universal public domain those matters which previously had been the subject only of private control through the medium of the restrictive covenant in selected, and more often than not ‘select’, areas. The way in which the restrictive covenant survived and in some cases ‘prospered’ in the changed climate of planning control is the subject matter of the final periods under review.
THE PERIOD FROM 1950 TO 1969

Cases cited:
- Newton Abbot Co-operative Society Ltd. v Williamson & Treadgold Ltd. [1952] 1 Ch 286
- Halsall v Brizell [1957] 1 Ch 169
- Marten and Another v Flight Refuelling Ltd. and Another [1962] 1 Ch 115
- Russell and Another v Archdale [1964] 1 Ch 38
- In re Jeff's Transfer (No.2) [1966] 1 WLR 841
- In re Selwyn's Conveyance [1967] 1 Ch 674
- Tophams Ltd. v Earl of Sefton [1967] AC 50
- Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd. [1968] AC 269
- In re Pinewood Estate, Farnborough [1958] 1 Ch 280
- Baxter and Others v Four Oaks Properties Ltd. [1965] 1 Ch 816
- Richardson v Jackson [1954] 1 WLR 447
- Driscoll v Church Commissioners for England [1957] 1 QB 330
- Re Freeman - Thomas Indenture [1957] 1 All ER 532
- In re Ghey and Galton's Application [1957] 2 QB 650
- Ridley and Another v Taylor [1965] 1 WLR 611
- Gee v The National Trust [1966] 1 WLR 170
- In re Wembley Park Estate Co. Ltd's Transfer [1968] 1 Ch 491

The development of the law relating to the restrictive covenant during this period has to be seen against the background of the newly introduced regime of strict planning control embodied in the Town & Country Planning Act, 1947, which became operative on 1st July 1948. The two decades of the 1950's and 1960's covered the period of post-war reconstruction and redevelopment (residential, industrial and commercial) but the important development insofar as the restrictive covenant was concerned was that of the large 'private' housing estate. The period was characterised by 'feverish' house building activity, mainly local authority housing in the first instance but to be followed in the late 1950's and the 1960's by 'private' housing estates and local authority slum clearance and housing redevelopment schemes. The volume of house building in this period had only once previously been exceeded, namely in the 'by-law housing' development of the last quarter of the 19th century. Not only was this post-war house building required to meet the deficiencies resulting from the physical destruction and the virtual moratorium on house building during the war years, it had also to cater for the natural increase in the population (epitomised by the growth of single households, new families and the post-war 'baby boom') and inward migration. It was a period of large housing estate development, both council and private, subject to town & country planning control and, insofar as much private estate development was concerned, supplemented by 'restrictive covenant' control.

The sub-division of the post-war period into two phases, namely 1950 to 1969 and 1970 to 1995 may seem arbitrary but, in addition to the 'legal landmark' provided by the Law of Property Act, 1969, the significance of which becomes apparent when considering cases relating to the discharge or modification of restrictive covenants, the move from the 1960's to the 1970's exhibits a 'culture change' from a period in which 'quantity' and comprehensive
redevelopment were the criteria to one in which 'quality' of development, conservation and environmental issues and the quality of life would increasingly become factors, even if yet not criteria, in development decisions.¹

Many of the cases decided by the courts in the post-war period of public planning control illustrate the 'culture of independence' - historically the jealously regarded (and safeguarded) province of the judiciary - whereby the courts repeatedly emphasise the distinction between 'planning' and 'the law', varying from 'a virtual refusal to acknowledge the existence of planning decisions' to the need to distinguish the results of this 'administrative' decision-making process (development plans and development control decisions) from the legal jurisdiction and decision-making process of the courts (preserving the 'sanctity and integrity' of English Land Law).²

Turning now to a consideration of a number of important and relevant cases decided in this period up to 1969 it is appropriate to deal first with a series of cases which 'clarified' some aspects of the general principles of Equity relating to the interpretation of restrictive covenants; secondly to examine two important 'building scheme' cases and finally to consider a growing number of cases concerned with various aspects of section 84 of the Law of Property Act, 1925.

General Principles

The first case to which reference must be made is that of Newton Abbot Co-operative Society Limited v Williamson & Treadgold Limited³ in which a number of important issues were considered. The owner of a shop called 'Devonia', in which she carried on an ironmongery business, sold a shop opposite to a buyer who traded as a grocer. The buyer covenanted not to trade as an ironmonger on these premises. Eventually, a successor in title of the vendor brought an action to enforce the covenant against a successor in title of the purchaser. The question arose as to whether the benefit of the covenant had passed, either by annexation or, alternatively, by assignment.

As to the former, i.e. annexation, it was held by Upjohn, J that it could not have passed because, in the conveyance in which the covenant was created, there was nothing clearly identifying the land for the benefit of which the covenant was taken.⁴ The learned judge pointed out that to annex the benefit so that the covenant runs, 'the land for the benefit of which it is taken must be clearly identified'.

As to the latter, i.e. assignment, it was held that the benefit did pass. First, the covenant was taken for the benefit of the land of the covenantee and not just to protect business goodwill⁵, and secondly, the land to be benefited was capable of identification with reasonable certainty.⁶

¹ This change in attitude is mostly clearly demonstrated in the decisions of the Official Arbitrator and the Lands Tribunal in respect of applications under section 84(1) of the Law of Property Act, 1925, throughout the period 1925 to the present day, post.
² The relationship between restrictive covenant control and planning control is explored in detail in the concluding sections of this thesis, post.
³ [1952] 1 Ch 286.
⁴ The conveyance did not define any dominant land for the benefit of which the covenant was taken but simply described the vendor as 'of Devonia'.
⁵ In Miles v Easter [1933] 1 Ch 611, it was emphasised that the covenant must be taken for the benefit of the land of the covenantee.
⁶ Again, ibid, this is cited as a requirement.
Notwithstanding the judgement in *In re Union of London & Smith’s Bank Limited’s Conveyance*\(^7\) that ‘there must be something in the deed containing the covenant to define the land for the benefit of which the covenant was entered into’, the court was entitled to look at the attendant circumstances to see if the land to be benefited was shown otherwise with reasonable certainty. On the crucial point of a sufficient identification of the land to benefit an interesting contrast emerged - in the case of annexation, Equity’s requirement was more rigorous than in the case of assignment.\(^8\)

If the *Treadgold* case was to illustrate the potential force of the notion of a restrictive covenant, *Halsall v Brizell*, decided only a few years later, would serve as a lasting (if oblique) reminder of the limitations of the equitable doctrine. It threw into sharp focus the twin facts that Equity is only concerned with a *restrictive* covenant and that, at Common Law, the burden of either a positive or a negative covenant cannot pass. It, however, overcame the latter obstacle by resorting to the long established principle that *he who takes a benefit must suffer an associated burden*. In this case, quickly to assume fame as a ‘landmark’ decision, it was held that: ‘the defendants...were not entitled to take advantage...of the trusts concerning the user of the road contained in the deed and the other benefits created by it without undertaking the obligations thereunder...’. Authority for the proposition that it is ancient law that a man cannot take a benefit under a deed without subscribing to the obligations thereunder may be found in the observation of Lord Cozens-Hardy, MR in *Elliston v Reacher*\(^10\) that: ‘It is laid down in Co. Litt. 230b, that a man who takes the benefit of a deed is bound by a condition contained in it, though he does not execute it’.

At the start of the next decade, litigation arose in which the important and interesting question emerged as to whether it was possible for the benefit of a restrictive covenant to be annexed not expressly, but on the basis of implication from circumstances. In *Marten and Another v Flight Refuelling Ltd. and Another*, Wilberforce, J looked favourably upon such an approach. On the sale of part of an agricultural estate, it was argued that the conveyance did not annex the benefit of a covenant (not to use the land for non-agricultural purposes) so that it would pass automatically, that it did not indicate that it was made for the benefit of any land and that, even if it was so made, it did not identify the land. The learned judge was, however, prepared to hold that annexation could be implied, he being willing to have regard to the circumstances surrounding the conveyance and to take ‘a broad and reasonable view of the proof of the identity of the estate’. Here indeed was a most tolerant attitude to the restrictive covenant, though Gray notes that today it is ‘still somewhat uncertain to what extent annexation of a covenanted benefit may arise by implication from circumstances’.\(^12\)

Three cases in the middle of the second decade show clearly how, despite the development of *general* principles in the arena of the restrictive covenant, in a quest to enforce a covenant all may well depend upon the precise words used in its creation. They concern the fact that if a person buys part of the dominant land, he must show that the benefit was annexed either to the very part he purchased or to all and every part of the dominant land. So, in *Russell*

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7 More usually cited as *Miles v Easter*, [1933] 1 Ch 611 at 625.  
8 It was also submitted that a covenant restrictive of business could not be annexed to land unless it was a covenant not to carry on a business so as to be a nuisance or annoyance to an adjoining occupier, but it was held that, there being no authorities cited for that position, it could not be maintained.  
9 [1957] 1 Ch 169.  
10 [1908] 2 Ch 665 at 669.  
and Another v Archdale\textsuperscript{13}, the words 'the vendor's adjoining and neighbouring land 'were insufficient for the purpose, and likewise in In re Jeff's Transfer (No.2)\textsuperscript{14} so were the words 'for the benefit of the remainder of the estate belonging to the vendor'. But, by contrast, in In re Selwyn's Conveyance\textsuperscript{15}, a covenant 'to enure for the protection of the adjoining or neighbouring land part of or lately part of the Selwyn estate' whilst on its true construction was not annexed to the Selwyn estate as a whole, the words 'adjoining or neighbouring land' being not conclusive on the issue, the further phrase 'lately part of the Selwyn estate' meant every part of that estate and sufficed to protect all the lands sold.\textsuperscript{16}

This review of the leading cases in the period concludes with two appeal decisions of the House of Lords which are significant for estate management practice. The first is that of Tophams Ltd. v Earl of Sefton\textsuperscript{17}. The underlying facts were briefly that on the sale of freehold land used as a racecourse, the purchasers (Tophams Ltd) had covenanted with the vendor (Earl of Sefton) not to cause or permit the land to be used otherwise than for the purpose of horse racing and agricultural purposes and not to cause or permit any buildings then or thereafter to be erected on the land other, generally speaking, than those necessary for or incidental to the promotion of racing.

In due course, Topham's Ltd agreed to sell the land to a development company who, to the knowledge of Tophams, intended to develop the land for housing. Thereupon the Earl of Sefton sought an injunction to restrain Tophams from causing or permitting the land to be used for other than the permitted uses and to restrain Tophams and the development company from carrying their agreement into effect. This action succeeded, the trial judge taking the view (as did later the Court of Appeal) that to convey the land to the development company would be to breach the covenant.

The first point of interest is that no land was kept by the covenantee which could benefit from the covenant and, accordingly, the covenant was enforceable only against Tophams - its burden could not 'run'\textsuperscript{18}. Indeed, this was agreed, although the development company's entry into the sale agreement knowing of the covenants was tortious conduct in as much as it induced a breach of contract.

The second point of interest involves the very matter with which the House of Lords was concerned, namely whether Tophams, by selling the land to the development company knowing that the latter were intending to build on it, were 'permitting' development in breach of the covenant. The view of the majority was to the effect that for 'permission' there had to be some 'control' and that, since by parting with the land, Tophams would divest themselves of

\textsuperscript{13} [1964] 1 Ch 38.
\textsuperscript{14} [1966] 1 WLR 841.
\textsuperscript{15} [1967] 1 Ch 674.
\textsuperscript{16} For a criticism of this narrow construction see note by R.E. Megarry, (1962) 78 LQR 334 at 335, in which he draws comparison with the law of easements (where an easement would normally be enforced in similar circumstances) and asks why not with restrictive covenants? Also, later note by Megarry, (1962) 78 LQR 482, in which he refers to the dissenting judgment of Sholl, J, in Re Arcade Hotel Property Ltd. [1962] VR 274 at 287-296, before the Full Court of the Supreme Court of Victoria, for a 'convincing judgment' in support of that view. Also, P.V. Baker, The Benefit of Restrictive Covenants, (1966) 84 LQR 22 at 28, where he expresses the view, (supported by Proposition 4 in Law Commission No.11, Transfer of Land-Report on Restrictive Covenants, 1967, p.15), that 'a covenant for the benefit of land by a generalised description should prima facie be construed as annexing the benefit to each and every part'. This would eventually be achieved via the judgment of Brightman, LJ in Federated Homes Ltd. v Mill Lodge Properties Ltd. [1980] 1 WLR 594, giving a wide construction to s.78 of the Law of Property Act, 1925 so as to construe 'annexation' of the benefit to 'any adjoining property retained', thereby inter alia overcoming the 'part' or 'whole' dichotomy: see The Period from 1970 to 1995, post.
\textsuperscript{17} [1967] AC 50.
\textsuperscript{18} It is noteworthy that the covenant was binding on Tophams only during the Earl's lifetime.
any authority in respect of that land, it could not be said that by the conveyance to a purchaser they as vendors permitted subsequent user of the land by the purchasing development company and accordingly no breach of the covenant had been threatened by Tophams.

Although the legal arguments of their Lordships were lengthy and contrived, it is submitted that the situation in practice was both clear and reasonable.

The second of the two House of Lords decisions significant for estate management practice was *Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd.*\(^\text{19}\). In fact, this case concerned certain agreements restraining the respondents from buying or selling motor fuels at their garages other than those of the appellants. Whereas in the circumstances it was concluded that such agreements were embraced by the common law doctrine of restraint of trade,\(^\text{20}\) the case is important here for the general proposition contained in the judgment, namely that:

'...the ordinary negative covenants preventing the use of a particular site for trading are not within the doctrine of restraint of trade, because a person buying or leasing a particular piece of land has no previous right to trade there and, when he took possession subject to a negative covenant he gave up no freedom which he had previously possessed.'

*The Building Scheme*

During this period two cases involving building schemes are worthy of note. The first, *In re Pinewood Estate, Farnborough*\(^\text{21}\), in fact related to a 'post building scheme' situation. It did not actually concern Equity's requirements as to building schemes and rather raised a point of much wider interest but it is treated here on account of its 'building scheme' base.

In consideration of the release of covenants in a building scheme the parties had covenanted with each other to bind certain land 'into whosoever's hands the same might come' to observe, perform, fulfil and keep certain restrictive stipulations contained in a new deed. On a summons by the applicants for a declaration that the use and enjoyment of their property was not in any way affected by the restrictions covenanted to be observed in the new deed it was conceded by the applicants that immediately before the execution of that deed there was in existence a building scheme and further it was conceded by the respondent that the benefit of the covenants had not been annexed by any proper words of annexation and there had been no complete chain of assignments of the benefits of the covenants. It was held that the existing building scheme had been brought to an end by the new deed and that on the construction of that deed no new building scheme within *Elliston v Reacher*\(^\text{22}\) had been brought into existence. Accordingly in the absence of (i) a building scheme, (ii) any annexation by proper words of annexation, or (iii) any complete chain of assignments, the benefit of the covenants did not extend to the respondent.

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\(^{19}\) [1968] AC 269.

\(^{20}\) With the object of promoting competition, the Common Law has long been ready to strike down agreements which unreasonably restrain trade; unreasonably that is, viewed from the interests of the parties and the interests of the public.

\(^{21}\) [1958] 1 Ch 280.

\(^{22}\) [1908] 2 Ch 374.
The significant feature of the case was the argument raised for the respondent which depended on the ‘existence of a fourth class’, namely that the respondent is entitled to the benefit of the restrictive provisions because the deed containing them showed clearly by its language an intention that the parties should be mutually bound by the restrictions and that element of mutuality was enough to carry the benefit of the restrictive stipulations. Wynn-Parry, J was of the opinion that there was no authority which established the ‘fourth class’ suggested and that it was not open either to the respondent or to anybody else to rely on this line of reasoning to establish the enforceability of the benefit of these restrictive stipulations.

It is worth adding that no second building scheme had been brought into being within the Elliston v Reacher rules because there was at that point no common vendor.

The second case, Baxter and Others v Four Oaks Properties Ltd.\(^{23}\), is an important case in establishing how far the courts will go to interpret and meet the ‘intention’ of the parties to the extent of ‘inferring’ a building scheme where none strictly existed. In the Four Oaks case it was held that ‘...where the court was satisfied that it was the intention of the parties that the various purchasers from a common vendor of parts of a defined area of land should have rights inter se, the court would give effect to that intention, and that the fact that the common vendor did not lay out the defined area in lots did not as a matter of law preclude sufficient proof of that intention.’\(^{24}\) ‘The view taken by the courts has been that the common vendor imposed a common law on a defined area of land and that whenever he sold a piece of it to a purchaser who knew of the common law, that piece of land automatically became entitled to the benefit of, and subject to the burden of, the common law.’\(^{25}\)

Cases concerning aspects of Section 84 of the Law of Property Act, 1925

It will be noted that under s. 84(1) of the Law of Property Act, 1925\(^{26}\) application can be made to have restrictive covenants discharged or modified on grounds including those such as that the restriction is obsolete, as a result of changes in the character of the property or the neighbourhood, or that the proposed discharge or modification will not injure persons entitled to the benefit of the restriction. Further, it will be remembered that under s.84(2) jurisdiction is conferred for the making of declarations to clear cases of doubt as to whether ‘...an effectual restrictive covenant has been imposed on the land and if so what persons it now affects...’\(^{27}\)

The Lands Tribunal, set up under the Lands Tribunal Act, 1949, had (from the beginning of the period currently under review) the responsibility for determining applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925. Questions of Law were still matters for the courts but they had no power to modify covenants. The decisions of the Lands Tribunal are considered separately (post) but a number of decisions of the courts during these early years in the life of the Lands Tribunal relating to section 84 are important and germane to this study. The 1950’s was, as earlier noted, a period of accelerating house building activity and it is not unexpected that there should have been a ‘surge’ of applications to discharge or modify restrictive covenants inhibiting new housing estate developments.

\(^{23}\) [1965] 1 Ch 816.

\(^{24}\) Ibid, at 817.

\(^{25}\) Ibid, at 826.

\(^{26}\) Substantive changes were made to section 84 by the Law of Property Act, 1969.

In Richardson v Jackson, an action for the enforcement of restrictive covenants, it was held that an application made under section 84(9) of the Law of Property Act, 1925 for a stay of proceedings for leave to apply to the Lands Tribunal for the modification of the covenants should normally be granted to a person against whom the proceedings were brought, if the applicants can show a prima facie case and have proceeded without unreasonable delay, since the court has no power to modify restrictive covenants.

The case of In re Truman, Hanbury, Buxton & Co Ltd's Application concerned an appeal against an order made by the Lands Tribunal. The applicant company had applied to have a restrictive covenant modified to permit the erection of a public house, contending that changes consequent on the erection of shops had rendered the covenant obsolete. The Lands Tribunal had found that although there was a change in the character of the area, that did not render the covenant in relation to licensed premises obsolete and that objects entitled to the benefit of the covenant would be seriously injured if it were discharged or modified. The Court of Appeal held that if the character of an area changed, a time might come when the purpose for which the covenant was imposed could no longer be achieved, and when that time came it might be said that the covenant had become 'obsolete' within the meaning of section 84(1)(a) of the Law of Property Act, 1925. The finding of the Tribunal that the desired discharge of the covenant would severely injure persons entitled to enforce it made it impossible to say that it had become 'obsolete'. The decision of the Lands Tribunal was affirmed.

Driscoll v Church Commissioners for England in the Court of Appeal decided that the power of the Lands Tribunal under section 84 was discretionary and did not contain a mandatory element. It was argued that the words 'the authority shall have the power by order wholly or partially to discharge or modify any restriction' imposed a duty on the Lands Tribunal to modify the restriction in some way or other, though it had discretion as to the precise way to be adopted, but it was held that the section gave a discretion in the Tribunal whether to modify the restriction at all.

Denning, LJ had some useful words of advice to say about appeals from the Lands Tribunal. Noting that the Lands Tribunal Act, 1949, section 3(4) provides that any person aggrieved by the decision of the Lands Tribunal as being erroneous in point of law may require the Tribunal to 'state and sign a case for the decision of the court', he went on to say:

'...it is well settled that the question whether or not there is any evidence to support a particular finding is a question of law. It is also well settled that the question whether an inference drawn from primary facts is a legitimate inference is also a question of law...In this case, therefore, we have to see what are the facts which the tribunal has found, and to see what are the conclusions it has drawn from those facts. Then we have to see whether the conclusions it has drawn are reasonable conclusions for it to draw'.

In an interesting observation on the practical interpretation of 'obsolescence' he said:

'...so long as the [Church Commissioners use] this covenant reasonably for a useful purpose, then, even though that purpose goes beyond what was contemplated 90 years ago, the covenant is not obsolete; whereas, if the covenant is shown no longer to serve any useful purpose, then, of course, it is obsolete.'

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29 Following Fielden v Byrne [1926] 1 Ch 620, where a request for leave to apply to the statutory authority was granted in similar circumstances.
32 Ibid, at 340.
33 Ibid, at 341.
The Court of Appeal held that in the circumstances the Tribunal were justified in coming to the conclusion that the covenants were not obsolete or restrictive of reasonable user as they tended to preserve the amenities of the neighbourhood and were still capable of affording protection to the parties entitled to enforce them.

Whereas jurisdiction under section 84(1) of the Law of Property Act, 1925 to modify or discharge restrictive covenants is generally exercised by the Lands Tribunal, under section 84(2) it is the court which has a jurisdiction to declare whether land is affected by a restriction imposed by any instrument.34 In Re Freeman-Thomas Indenture35 a local authority applied for a declaration under section 84(2) that the land on which it desired to build a school was no longer affected by restrictive covenants to maintain the land 'as a public park or common' and 'not to erect any building on any part of the land' without the consent of the owner or the trustees of the 'large settled estate'. It was held that as the estate had been 'broken up into small plots', as there was no owner of the 'large settled estate', as the covenants were obsolete, and as there was no-one legally able to enforce them, the court in the exercise of its discretion would issue a declaration that the land was no longer affected by the restrictive covenants.

In In re Ghay & Galton's Application36 the decision of the Court of Appeal dealt with the interpretation of the words 'impeding reasonable user' in that part of section 84(1)(a) of the Law of Property Act, 1925 which, as it then stood, enabled the Lands Tribunal to discharge or modify a restriction on the ground, inter alia, that its continued existence would impede the reasonable user of the land without securing practical benefits to other persons.

The Lands Tribunal, having found that the covenants (the subject of the proposed modification) could not be deemed obsolete nor could their continued existence impede the reasonable user of the land, nevertheless held that the granting of the application to modify (to enable a private dwelling house to be used as a convalescent or rest home) would not undermine the original scheme of development and proceeded to make an order modifying the restrictions to permit the use of the dwelling house as a convalescent or rest home. The Court of Appeal held that in order to satisfy the requirement in the second part of paragraph (a) of section 84(1) that 'the continued existence [of the covenant] would impede the reasonable user of the land' it must be shown that unmodified the covenant hindered to a real or sensible degree the land being reasonably used, having due regard to the situation it occupied, to the surrounding property and to the purposes of the covenant. The headnote points out that section 84 did not enable the Court, in effect, to 'expropriate the covenantees in order to make possible the estimable enterprise of the covenantors'. The Lands Tribunal should have refused to make an order.

Section 84(1) of the Law of Property Act, 1925 primarily applies to restrictions on freehold land, but by subsection (12), as amended by the Landlord and Tenant Act, 1954, is made applicable to restrictions affecting leasehold land where a term of more than 40 years is created

34 This point was forcefully reinforced by In re Purkiss' Application [1962] 1 WLR 902, where it was held that questions as to 'whether land was affected by the covenants' or 'whether the objectors were entitled to the benefit' were for the court to decide under section 84(2), LPA, 1925. Per Upjohn, L J: 'The [Lands Tribunal] has no jurisdiction to determine any question falling within the ambit of subsection (2), but has a right to investigate the title of individual objectors...The proper practice, however, in all but simple cases is for the tribunal not to do so but to assume that there are persons entitled to enforce the restriction or, alternatively, to stand the matter over for the decision of the court under subsection (2).... This decision of the Court of Appeal, according to G.H. Newson, Restrictive Covenants 1979/80, (1981) JPL 656, 'almost established that the Tribunal was not competent to decide any questions of title' and had repercussions for its proceedings post 1962, certainly until the changes made to section 84 by the Law of Property Act ,1969.
35 [1957] 2 QB 650.
by a lease of which more than 25 years have expired. Ridley and Another v Taylor\textsuperscript{37} illustrates the degree of protection that the courts will afford to the landlord’s reversion. Here it was held that as the ‘modification would have injured the landlord financially as well as depriving him of the opportunity of persuading the lessee to convert the property as the landlord wished’, the Lands Tribunal were not entitled to grant the application under section 84(1)(c). A basic distinction between freeholds and leaseholds in the context of discharge or modification is clearly signalled by Harman, LJ, who observed that:

‘...it should be more difficult to persuade the court to exercise its discretion in leasehold than in freehold cases. In the latter the court is relaxing in favour of a freeholder’s own land restrictions entered into for the benefit of persons owning other land. In the former the land in question is the property of the covenantee who is \textit{prima facie} entitled to preserve the character of his reversion’.\textsuperscript{38}

Gee v The National Trust\textsuperscript{39} provided another reminder to the Lands Tribunal that it acts in a ‘quasi judicial ‘capacity and that ‘extraneous’ issues, however laudable, must be abhorred. Here, the National Trust, having the benefit of a covenant made under section 8 of the National Trust Act, 1957, objected to the building of a certain house on land in the area of the Helford River in Cornwall. The proposing builder thereupon made an application under section 84(1)(c) of the Law of Property Act, 1925 for the restriction to be removed or modified. The Lands Tribunal, having taken the view that the proposed new house would not impair the visual amenities of the adjacent land, even so exercised their discretion against the applicant on the grounds that the proposed modification would ‘hamper the obtaining of such covenants and would prejudice a national appeal by the Trust for funds’ and rejected the application. The Court of Appeal, accepting that the National Trust were entitled to enforce such a covenant in order to protect their interests as custodians, held that the Lands Tribunal, having accepted that the proposed house would not injure the amenities or beauty of the district, had no basis for the grounds on which it declined to exercise its discretion to modify the covenant. Consequently an order would be made under section 84(1)(c) for the modification of the covenant to permit the building of the house.

The last of the ‘section 84’ cases in this period to which reference must be made is that of In re Wembley Park Estate Co Ltd’s Transfer\textsuperscript{40}, concerning an application under section 84(2), which section confers on the court the jurisdiction to declare whether land is affected by a restriction or to declare its nature, extent and enforceability. In this case, an application was made for a declaration as to whether certain land was intended to be affected by a building scheme. On the evidence as it stood, it was held that ‘there was nothing more than conjecture to show that any defined area had been laid out for sale in lots or that a building scheme was intended, and, therefore, the effect of the reservation was that retained land sold to the plaintiff would be sold free from the restrictions in the transfer’. The importance of this, and similar cases, to an estate developer in ‘clearing the legal ground’ before ‘clearing the physical ground’ and avoiding the expenditure of time and money which might prove abortive, cannot in planning, estate management and development terms be over-emphasised.

This period, in its last year, saw the passing of the Law of Property Act, 1969 which, in its amendment and expansion of section 84 of the Law of Property Act, 1925 was, as will be seen later, to be of particular significance and importance.

\textsuperscript{37} [1965] 1 WLR 611.
\textsuperscript{38} Ibid, at 617.
\textsuperscript{39} [1966] 1 WLR 170.
\textsuperscript{40} [1968] 1 Ch 491.
THE PERIOD FROM 1970 TO 1995

Cases cited:

- *Earl of Leicester v Wells-next-the-sea UDC* [1973] 1 Ch 110
- *Wrotham Park Estate Co. v Parkside Homes Ltd. and Others* [1974] 2 All ER 321
- *Shaw and Another v Applegate* [1977] 1 WLR 970 CA
- *Tito and Others v Waddell and Others (No.2)* [1977] 1 Ch 106
- *Roake and Others v Chadha and Another* [1984] 1 WLR 40
- *J. Sainsbury plc and Another v Enfield BC* [1989] 2 All ER 817
- *In re Dolphin's Conveyance* [1970] 1 Ch 654
- *Eagling and Another v Gardner* [1970] 2 All ER 838
- *Brunner and Another v Greenslade* [1971] 1 Ch 993
- *Texaco Antilles Ltd. v Kernochan and Another* [1973] AC 609
- *Harlow v Hartog* (1977) 245 EG 140
- *Jamaica Mutual Life Assurance Society v Hillsborough Ltd. and Others* [1989] 1 WLR 1101
- *Shepherd Homes Ltd. v Sandham (No.2)* [1971] 1 WLR 1062
- *Re Beecham Group Ltd's Application* (1980) 256 EG 829
- *Creswell & Another v Proctor & Others* [1968] 1 WLR 906
- *Gilbert v Spoor and Others* [1983] 1 Ch 27
- *Rhone and Another v Stephens* [1994] 2 All ER HL 65

In this, the last and most recent period to be considered, the restrictive covenant continues to occupy the time of the courts and the expertise (and in some cases the ‘ingenuity’) of the judiciary. Apart from a number of cases relating to the building scheme and the legal implications of section 84 of the Law of Property Act, 1925 (as amended by section 28 of the Law of Property Act, 1969), there have been a number of important decisions relating to the generality of the law and not least the ‘celebrated’ decision in the *Federated Homes* case. Following the procedure previously adopted decisions relating to the ‘general’ law are examined first, followed by those relating to the building scheme and lastly the courts’ involvement in section 84 applications.

**General Principles**

The insistence of the courts on maintaining a clear distinction between public need and private rights is illustrated by the case of *Earl of Leicester v Wells-next-the-sea Urban District Council.* On the sale of a small part of a very large agricultural settled estate by the tenant for life, the purchaser (the defendant local urban district council) covenanted not to ‘use or permit the use’ of the land for any other purpose than smallholdings and allotments. The defendant council later proposed to sell land for housing purposes and the question before the court was whether by so doing the council were ‘permitting’ a breach of the covenant. It was held that the covenant was not personal to the defendants, and that the defendants, by proposing to require a purchaser to use the land for housing, were indeed ‘permitting’ a use contravening the covenant. It was submitted that the court should not exercise its discretion by granting an injunction as ‘...this was a conflict between private right and public need and that public need

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3 It having been argued so to be because of a specific reference in the covenant to the Small Holdings and Allotments Act, 1926.
4 It was argued, but without success, that a restriction placed on a small part of a very large estate cannot benefit the whole. The Court saw no reason to substitute its own standards for those of the parties.
should prevail'. But Plowman, J saw no reason why the defendants should not be held to the bargain into which they had freely entered and accordingly granted an injunction.

The case of Wrotham Park Estate Company v Parkside Homes Ltd. & Others\(^5\) dealt, *inter alia*, with two equally important matters of practical significance, namely whether the benefit of the particular covenant was still a 'real benefit', and the principles concerning the exercise of the mandatory injunction, damages in lieu and the quantum of damages. The substance of the case was whether the particular 'layout stipulation' (compliance with which was the subject of the restrictive covenant) was enforceable as between the present parties\(^6\), whether the development carried out was in breach, and what the remedy should be.

In the process of holding that the layout stipulation was enforceable as between the plaintiffs and the defendants on the principles of annexation, particular attention was paid to the question whether the dominant land had been and was still capable of benefiting, and the conclusion reached that '...the validity of the restriction should be upheld so long as an estate owner might reasonably take the view that the restriction remained of value to his estate [and] the restriction should not be discarded merely because others might reasonably argue that the restriction was spent...'.

It having been found also that the development carried out by the defendants Parkside was a clear and material breach of the layout stipulation, it was concluded that the plaintiffs were not entitled to relief by way of a mandatory injunction, because '...it would be an unpardonable waste of much needed houses to direct their demolition; furthermore it was unnecessary to demolish the houses in order to preserve the integrity of the restrictive covenants imposed on the rest of the area...'.

In as much as the Court had jurisdiction to grant mandatory injunctions against the defendants Parkside for building in breach of the covenant, the Court had power in consequence to award damages in lieu of an injunction and accordingly the next matter was to consider the proper amount. On this point the relevant part of the headnote to the case reads as follows:

'Although the value of Wrotham Park estate [the dominant land] had not been diminished by the breach of the layout stipulation it did not follow that the plaintiffs were only entitled to nominal damages, for that would mean that the defendants would be left in undisturbed possession of the fruits of their wrongdoing. A just substitute...would be such a sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant. A developer would have expected to make about £50,000 profit on the development and in all the circumstances a sum equal to 5 per cent of the anticipated profit would be a reasonable sum...'.

Such, briefly, being the thrust of the Wrotham Park decision, certain further comments need to be added.

The evidence of expert witnesses as to the value of the restrictive covenant in estate management and environmental terms polarised the difference between the approach of the dominant 'estate owner' claiming the benefit and the 'estate developer' bearing the burden.

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6 Both the burdened and the benefited land had passed to successors.
In essence the plaintiff’s case was that the covenant was a very valuable benefit to the estate in 1935 (when it had been imposed) because it enabled the then estate owner to control the type of development which could take place on the land affected; the retention of open spaces within a development was of environmental importance, and the layout covenant still remained of latent value to the estate:

‘... the layout covenant enabled, and still enables, the estate owner to ensure that the development that takes place on the periphery of his estate is pleasing to him and not out of character with the neighbourhood and the estate. It is not a sufficient protection for the landowner to rely on the planning authorities’.

On behalf of the defendants, the development in and around the area was described as being low in terms of height and density and that although the layout covenant had benefited the estate at the time when the covenant was given, the covenant ceased to benefit the estate when the area to the south was developed:

‘...a layout covenant and, indeed, other restrictive covenants taken for the benefit of an estate owner and intended to control the nature of development, die off as the tide of development advances’.

In finding, on this point, in favour of the plaintiffs, Brightman, J was, as earlier noted, of the view that ‘...the validity of the restriction should be upheld so long as an estate owner may reasonably take the view that the restriction remains of value to his estate, and that the restriction should not be discarded merely because others may reasonably argue that the restriction is spent’. He then continued:

‘...an estate owner, living on a residential and agricultural estate sandwiched between two developing towns is properly interested in the standard of development of those towns. To take an extreme case...a Wrotham Park estate lying between two overcrowded slum districts would be a less desirable and less marketable property than a Wrotham Park estate lying between two carefully developed and uncrowded districts. [He concluded that]...the layout covenant imposed...is still capable of benefiting the Wrotham Park estate, or, at any rate, that the contrary has not been proved.’

Regarding the question of a mandatory injunction or damages in lieu, Brightman, J observed that he had never had a moment’s doubt during the hearing of the case that a mandatory injunction for demolition ought to be refused:

‘The erection of houses...is a fait accompli and the houses are now the homes of people...It would be an unpardonable waste of much needed houses to direct that they now be pulled down...No damage of a financial nature has been done to the plaintiffs...’

This appears, on the face of it, to be a remarkably sympathetic view of the defendants’ breach in the light of the fact that Parkside had been warned of the plaintiffs’ right and that a writ claiming a mandatory injunction had been served on them before any substantial construction had taken place. Neither does this view sit comfortably with Brightman, J’s observation that:

‘...the fact that these houses will remain does not spell out a charter entitling others to despoil adjacent areas of land in breach of valid restrictions imposed by the conveyances. A developer who tries that course may be in for a rude awakening.’

Commenting on the Wrotham Park case, Newsom noted that the covenants were expressly annexed to the estate ‘in its broad and popular sense’ and the court had no difficulty

7 Ibid, at 335.
8 Ibid, at 337. Following the precedent set by Brightman, J, the question is ‘How rude an awakening?’
in holding that they enured for the benefit of the estate remaining, notwithstanding it had shrunk (by reason of sales) considerably in size. He also commended the adoption by the judge of the method of assessment of damages on the so-called wayleave principle (borrowed partly from the law of tort and partly from that of patents) as being a useful alternative to nominal damages in cases where a mandatory injunction would not be justified.

Shaw and Another v Applegate was concerned also with the appropriateness of an injunction or damages by way of remedy. The plaintiffs' failure to apply for interlocutory relief and the goodwill built up and considerable expenditure incurred by the defendant over a period of 6 years (and of which the plaintiffs had notice and in respect of which they had impliedly acquiesced) meant that the appropriate remedy was not an injunction but damages.

The case of Tito and Others v Waddell and Others (No2) dealt with a range of issues, of which only the question of liability under the 'doctrine of benefit and burden' is here of relevance. In a comprehensive review of the authorities Megarry, V-C considered the principle 'that he who takes the benefit of a transaction must also bear the burden'. Referring to the 'celebrated' decision of Upjohn, J in Halsall v Brizell (amongst others), the learned judge found an ample base for regarding the 'pure principle of benefit and burden' as having become established in the law, a doctrine by reason of which on occasion it may be possible to overcome the Common Law rule precluding the running of the burden of either a positive or a negative covenant.

With the turn of the decade came the case which was to emerge as perhaps the leading case of the current period. This was that of Federated Homes Ltd. v Mill Lodge Properties Ltd. in the Court of Appeal. The plaintiff (Federated Homes) claimed to be entitled to the benefit of a restrictive covenant debarring the defendants (Mill Lodge) from building more than 300 houses on land in respect of which the defendants had obtained planning permission to build 332 houses. On appeal against the grant of an injunction restraining the defendants from building more than 300 dwellings on the land the judgment of the Court of Appeal is of significance in a number of ways. First, it is important for its exploration of the relationship existing between a planning permission and a restrictive covenant. Contrary to the argument raised, it was held that since the planning permission by its terms was available to a subsidiary of the grantee it

10 See also, C.T. Emery, Restrictive Covenants - Annexation to the whole or to all or any parts of land, [1974] CLJ 214.
12 [1977] 1 WLR 970 CA.
14 [1957] 1 Ch 169.
15 It would be presumptuous to attempt a summary of this discourse were it not that Megarry, V-C himself, after a consideration of the authorities, puts forward a number of conclusions (and uncertainties), namely:-
(1) There is ample authority for holding that there has become established in the law the 'pure principle of benefit and burden' (Upjohn, J in Halsall v Brizell [1957]: '...It is ancient law that a man cannot take benefit under a deed without subscribing to the obligations thereunder').
(2) This principle is distinct from the conditional benefit cases, and cases of burdens annexed to property. The latter are special cases in that:...A burden that has been made a condition of the benefit, or is annexed to property, simply passes with it: if you take the benefit of the property you must take it as it stands, with all its appendages, good or bad. It is only where the benefit and the burden are independent can the pure principle of benefit and burden apply.'
(3) It is a question of construction of the instrument or transaction whether or not it has created a conditional benefit or a burden annexed to property.
(4) The application of the benefit and the burden principle will normally come later than the question of construction.
(5)A problem that is unsolved is that of who falls within the benefit and burden principle:...'In the old forms of the rule there was no difficulty; a person named as a party to a deed, or a person granted an estate by a deed, could be identified without difficulty...It seems to me that the principle ought to embrace anybody whose connection with the transaction creating the benefit and burden is sufficient to show that he has some claim to the benefit, whether or not he has a valid title to it.' ([1977] 1 Ch 106, at 302-3 especially).
was not exclusive to the grantee and its benefit was therefore assignable and again, that since the restrictive covenant was not personal, but 'in accordance with business realities', its benefit was assignable. It was further held that the benefit of the covenant was not 'spent' when a particular related planning permission died, because the covenant and the planning permission were not rigidly linked together. So here is emphasised yet again the fact that the courts, in a dispute between two 'private' parties, (the position where one of the parties is a public body possessing compulsory powers must be distinguished), will not allow a planning permission to override or interfere with the effect of a (legally enforceable) restrictive covenant.

The special importance of the case lies, however, in its approach to the running of the benefit of a restrictive covenant by annexation and in particular in the interpretation by Brightman, LJ of the effect of section 78 of the Law of Property Act, 1925.17

Prior to this case, it had always been the rule that effectively to annex a benefit so that it might run, the clearest words evidencing the necessary intention had to be used. For example, in Rogers v Hosegood18 a covenant ran couched in terms that its benefit might enure for the vendors, their heirs and assigns and others claiming under them to all or any of their lands adjoining or near to the said premises. In the Federated Homes case, the purchaser simply covenanted not to build above a certain density '...so as not to reduce the number of units which the vendor might eventually build on the retained land', described as '...any adjoining property retained...'. The Court was, however, prepared to hold that the benefit passed on the basis of annexation, taking the view that the wording used was sufficient to regard the covenant as one 'relating to the land of the covenantee' in the sense of section 78 of the Law of Property Act, 1925. This being so it concluded that the section caused the benefit to run, Brightman, LJ rejecting the long-standing narrow interpretation of the section that it was no more than 'word saving' shorthand. This decision, by making it so much easier for the future to ensure the passing of the benefit19 of a covenant on the basis of annexation, completely transformed this aspect of the equitable doctrine of restrictive covenants.

The interpretation of section 78 of the Law of Property Act, 1925 received further consideration and clarification in Roake and Others v Chadha and Another,20 where the benefit of a covenant was expressly stated not to enure for a successor unless it was specifically assigned. The plaintiffs argued that annexation had come about through section 78, because its provisions could not be excluded by the expression of a contrary intention, but without success. Judge Paul Baker, QC, whilst having no difficulty in accepting that the covenant was one that came within section 78, was 'far from satisfied that section 78 has the mandatory operation ...claimed for it'. He went on to state, in terms as equally unequivocal as those adopted by Brightman, LJ in the Federated Homes case, that:

'The true position as I see it is that even where a covenant is deemed to be made with successors in title as section 78 requires, one still has to construe the covenant as a whole to see whether the benefit of the covenant is annexed. Where one finds, as in the Federated Homes case, the covenant is not qualified in any way, annexation may be readily inferred; but where, as in the present case, it is

17 Section 78 provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them. MacKenzie & Phillips, A Practical Approach to Land Law, 6th edn., 1996, note (at p. 347) that a 'strange' feature of [the Federated Homes] case is that the defendant was the original covenantor.' Therefore, there was no need to show that the burden had run with the land in Equity and accordingly the court need only have been concerned with whether the benefit ran at common law.

18 [1900] 2 Ch 388.

19 Since this case, the position also appears to be that where a covenant is annexed to the whole of an estate, it is also implicitly intended to benefit each and every part, without any need in the conveyance expressly so to state.

expressly provided [that]: '...this covenant shall not enure for the benefit of any owner or
dependent purchaser of any part of the vendor's...estate...unless the benefit of this covenant shall
be expressly assigned...' one cannot just ignore these words.'

Thus it was held in Roake's case that 'the covenant could not be deemed to have enured
for the benefit of the plaintiffs under section 78', nor could it 'appertain or be reputed to
appertain to the land under section 62.' The present position would seem to be that the
decision in Federated Homes may be less radical than had been previously supposed as
automatic annexation, in the face of the contrary intentions of the parties, is unlikely to
materialise.

The final case for consideration under the heading of 'general principles' throws light on
Federated Homes and, according to Gray '...places an important limitation on the otherwise
impressive span of the Federated Homes approach.' J. Sainsbury plc and Another v Enfield London
Borough Council concerned an application for a declaration that certain land was no longer
subject to restrictive covenants attached to it by a conveyance of 1894. It was not contended
that there was a building scheme or that the benefit of the purchaser's covenant was expressly
assigned on the subsequent sales of the retained land, and the Court held that the required
declaration would be granted as it could not be inferred from the conveyance that the benefit of
the purchaser's covenant was intended to be annexed to the land retained. Further, there were
no longer any persons entitled to the benefit of the purchaser's covenants. In particular, it was
also held that the restrictive covenants, being undertaken before 1926, were not subject to s. 78,
but to an earlier, more narrowly worded provision, which was not apt to bring about an effect
of automatic annexation. In so doing the Court was drawing attention to the fact that old
restrictive covenants are not amenable to the 'generous' Federated Homes approach and, given
the number of old covenants this plainly serves to diminish the Federated Homes impact.

During this period a number of cases concerning the building scheme and section 84
applications were considered by the courts and attention must now be directed to them.

The Building Scheme

The building scheme decisions in this period exhibit, even if not a relaxation of the 'rules'
in Elliston v Reacher, a more liberal interpretation of them to the extent of going 'behind the
actual words' in order to establish the intention of the parties.

21 The alternative argument of the plaintiffs based on section 62 of the Law of Property Act, 1925 could not succeed. In the present case the covenant was in terms precluding the benefit passing unless expressly assigned and that being so it was not a right 'appertaining or reputed to appertain' to land within the meaning of section 62.
22 The judgment in the Federated Homes case was subject to adverse criticism both at the time and subsequently. In particular, G.H. Newsom, Universal Annexation? (1981) 97 LQR 32, comments, inter alia, that Federated Homes means that 'there is always annexation and therefore there is always an owner of the land of the covenantee and he can always sue', and is critical of Brightman, LJ's judgment on the ground that the s. 78, LPA, 1925 (replacing s. 58, Conveyancing Act, 1881) point had never previously been argued in 55 years. In a postscript, G.H. Newsom, (1982) 98 LQR 202, asserts that the more natural construction of s. 78 is that it introduces a 'statutory shorthand' into the drafting, just as does s. 79. See also, G.H. Newsom, Annexation of Restrictive Covenants, (1980) JPL 371 and (1982) JPL 295.
24 (1989) 2 All ER 817.
25 This case illustrates one of the ways which a prospective developer can safeguard his position against the possibility of a successful action in respect of restrictive covenants which he believes no longer to apply or which, for any other reason, he believes to be unenforceable.
26 Section 58, Conveyancing Act, 1881.
27 [1908] 2 Ch 374.
Such was the case in *In re Dolphin's Conveyance*\(^{29}\). Here, several parcels of land, being part of an identified named estate, were conveyed with restrictive covenants requiring, *inter alia*, that every dwelling house should be detached and have a site area of at least \(\frac{1}{4}\) acre, and that any other part of the estate should be sold or leased subject to the same stipulations. As far as the requirements for the existence of a building scheme as laid down in *Elliston v Reacher* were concerned, the scenario in question was lacking. There was no single, common vendor, nor had the land been laid out in pre-determined lots. Nevertheless it was held (as a matter of construction of the several conveyances) that the covenants were imposed for the common benefit of the vendors and the several purchasers with the intention that they should be enforceable by each purchaser against the others, that all of them had a common interest in their enforcement and that there was an equity in each purchaser to enforce them against the others, and that this was so both where the intention and the common interest were found on the face of the several conveyances and where not so found but were found in a deed of mutual consent or were deduced from the existence of the necessary constituents of a binding scheme.\(^{30}\)

In the same year, in the case of *Eagling and Another v Gardner*,\(^ {31}\) there was similarly displayed a willingness to accept the establishment of a building scheme. Giving consideration to the question whether there was exhibited the requisite feature that ‘restrictions were to be imposed on all the lots and were consistent only with some scheme of development’, Ungoed-Thomas, J regarded this requisite as having been met. In so doing he rejected the suggestion that this conclusion was vitiated by the fact that one out of a number of transfers did not contain a covenant.\(^ {32}\) Clearly, here is a more liberal attitude, with a readiness to infer from the intention of the parties, the ‘mutuality’ of benefit and the ‘ambient’ circumstances, the existence of a building scheme.

Two further cases from the early part of the decade also highlighted the developing strength of the concept of the building scheme as being of particular utility for the effective preservation of land value and amenity. The first, *Brunner and Another v Greenslade*\(^ {33}\), dealt with the position arising where an estate, the subject of a building scheme, is divided into sub-lots. Megarry, J addressed the problem of enforceability in the arena of sub-lots by posing the question as one of intention. Assuming the existence of a building scheme, will the equity apply as between the purchasers of sub-lots only if a positive intention to this effect is established, or


30 Per Stamp, J, following what he conceived to be the *ratio deciderendi* of *Baxter v Four Oaks Properties Ltd.* [1965] 1 Ch 816, equating the conveyances with the ‘deed of mutual covenant’ showing the common intention. P.V. Baker, in an ‘untitled’ note in (1970) 86 LQR 445, objects to such a broad principle of ‘inference’ of a building scheme from mere evidence of intention to establish (Baxter’s case) or existence of common interest and intention (Dolphin’s case) and hopes for early review by the Court of Appeal. Apparently intention and common interest are not of themselves sufficient as the Court of Appeal, later in *Lund v Taylor* (1975) 31 P & CR 167, refused to infer a building scheme where there was no clear evidence of an intention to create reciprocal rights and obligations over a defined area which was found in Baxter’s and Dolphin’s cases. See also G.H. Newsom, *Restrictive Covenants 1975-76*, (1976) JPL 407 at 408 for the view that, at least since *Reid v Bickerstaff* [1909] 2 Ch 305, ‘the area of a scheme must be clearly defined.’

31 [1970] 2 All ER 838.

32 From the estate management viewpoint in particular, it is interesting to note that (i) the covenant in issue was not to erect on the site any building save a private dwelling house, (ii) the defendant proposed to erect a dwelling house in the garden of the existing house, (iii) the defendant argued, *inter alia*, that the covenant meant not to erect a building except one dwelling house additional to that on the property at the date of transfer, and (iv) the conclusion reached was that, as the estate was being sold in lots according to a layout of one house and garden per lot, the covenant should not be construed as submitted by the defendant. So a common-sense view prevailed. (To the defendant’s further suggestion that as there was no damage there could be no injunction as claimed, it was noted that, in accordance with *Elliston v Reacher*, there is no need to prove damage where there is a direct breach of the covenant.)

33 [1971] 1 Ch 993.
will it apply unless a contrary intention appears? On taking the view that he preferred the latter and more generous interpretation, he went on to say ‘...it will be presumed that each sub-purchaser will take the benefit and be subject to the burden of the equity arising from the scheme...’. 34

The second case, that of Texaco Antilles Ltd. v Dorothy Kernochan and Another,35 is an important Privy Council decision upon the impact on the enforceability of restrictive covenants of ‘unity of seisin’. Whereas the coming into one set of hands of both the dominant and servient tenements discharges a restrictive covenant,36 the Privy Council concluded in this case that in the situation of a building scheme it may be otherwise. Cheshire explains the holding of the Privy Council thus:

‘...if there is a scheme of development, unity of seisin does not automatically discharge a covenant within the area of unity, and that on severance it remains, unless there is evidence that the parties intended that it should not do so.’37

On the particular facts of the case, it was held that the scheme of development was ‘in the legal sense’ a building scheme, and that covenants which were unenforceable whilst the two sets of lots were in the same hands became enforceable again when the lots were separated.

The case is instructive also in illustrating the problem of interpreting words of ‘common’ meaning. The question arose as to whether a restrictive covenant entered into in 1925 prohibiting the development of a ‘public garage’ would be applicable to and prevent the development of a petrol service station as proposed in the 1970’s. The judge of the first instance and two of the three judges in the Court of Appeal (for the Bahama Islands) had no doubt that the building and use of a petrol filling station would be a breach of the 1925 covenant against a public garage. Their Lordships in the Privy Council were of the opinion that the question was akin to a question of fact and ‘their Lordships would not think it right to overrule the decision of both lower courts unless they were satisfied that it was wrong.’ The meaning of words in a restrictive covenant must be construed according to the meaning that those words had at the time that the restrictive covenant was entered into but the case does illustrate the ‘desire’ of the courts to perpetuate the relevance of restrictive covenants by a liberal ‘update’ of intent and, although from the report of the case it is apparent that their Lordships in the Privy Council were not quite so sure as the judge of first instance and two of the three judges in the Court of Appeal, they did not consider the interpretation and decision of both lower courts to be so wrong as to overrule them.

The last case of the decade in the arena of building schemes, namely that of Harlow v Hartog,38 makes two points of import. First, the fact that despite the relaxation of the requirements for a scheme made apparent by the then recent cases, there were, even so, certain limits; secondly, the evident wish of the judiciary to ‘mould’ the impact of a particular covenant so as to accommodate changing social conditions.

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34 Though he noted that the presumption would be rebutted if, inter alia, the sub-purchasers entered into new covenants of a sub-scheme which differed from those of the principal scheme.
36 The case of In re Tiltwood, Sussex [1978] 1 Ch 269 was to be yet further authority for ‘extinguishing through unity of seisin’, it being held therein that where the fee simple of land benefited and land burdened by restrictive covenants became vested in the same person, the restrictive covenants were extinguished unless the common owner recreated them.
38 (1977) 245 EG 140.
The claimant had sought an injunction to prevent the erection of a building to cover an existing swimming pool, relying on a covenant that: ‘No building other than private dwelling-houses shall be erected on the said land ...’. The issues were (i) whether there was in force a building scheme so as to enable the plaintiff to enforce restrictive covenants and (ii) if so, whether the proposed building was a building other than a private dwelling house. Whilst finding no evidence that there was an estate plan (the plan in the conveyance falling a long way short of being a plan of a defined area or a building estate) and still less that it was brought to the attention of any of the purchasers, the Deputy Judge then went on to consider whether a breach of the covenant had occurred, being of the opinion that it was ‘a matter of fact and degree whether a building was other than a private dwelling house.’ Although the swimming pool in question was somewhat large for a private dwelling house there could be no question but that its use was part of the enjoyment of the dwelling house and it followed that the fact that it was to be enclosed would not alter its status. To substantiate that view the Deputy Judge appears to have ‘gone behind the actual words of the restrictive covenant’ to consider its intended purpose, for he went on to express the opinion that ‘...the purpose of the covenant...was to prevent the erection of say, a factory on the land or possibly a block of flats’. Thus, whilst the erection of a large covered swimming pool would probably not have been in the contemplation of the parties in 1927, the Deputy Judge sought to ‘up-date’ the relevance of the restrictive covenant to conditions in the 1970’s, by seeking to provide a reason (of which apparently there was no hint in the 1927 conveyance) to justify a wide interpretation of the meaning of ‘private dwelling house’ by the expedient of contrasting it with an obviously incompatible use for industrial purposes.

The case of *Jamaica Mutual Life Assurance Society v Hillsborough Ltd. & Others* 39 in 1989 is a fitting one with which to conclude this section on the building scheme. It illustrates once again the broadening of the approach to such schemes but, nevertheless, emphasises the continuing essential nature of reciprocal obligations. The Privy Council, allowing an appeal against the judgment of the lower court that ‘the covenants in the applicant’s title ran with the land and enured to the benefit of [certain] objectors and their successors’, re-affirmed this basic requirement. Lord Jauncey of Tullichettle, explained that it was:

‘...now well established that there are two pre-requisites of a building scheme namely: (1) the identification of the land to which the scheme relates, and (2) an acceptance by each purchaser of part of the lands from the common vendor that the benefit of the covenants into which he has entered will enure to the vendor and to others deriving title from him and that he correspondingly will enjoy the benefit of covenants entered into by other purchasers of part of the land.’ 40

Reciprocity, his Lordship believed, was essential and, no recipocity having been proved, no building scheme existed. 41

Cases concerning aspects of Section 84 of the Law of Property Act, 1925

During this period the courts considered a number of cases relating to the jurisdiction of the Lands Tribunal under section 84 of the Law of Property Act, 1925 (as amended). In *Shepherd Homes Ltd. v Sandham (No2)* 42 the facts, very briefly, were that the defendant purchaser had covenanted with the plaintiff vendor to keep and use land lying in advance of a building line as

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40 Ibid, 1106.
41 Likewise, no assignment or annexation could be shown, and so the restrictions in issue (*inter alia*, not to carry on trade) were enforceable only by the original parties.
42 [1971] 1 WLR 1062.
an ornamental garden and entrance drive only and not, *inter alia*, to 'erect or plant or grow or permit to be erected planted or grown any fence or hedge in advance of the said building line'. After building his house, the defendant, in order to exclude ‘incursions of sheep and horses from neighbouring open land’ erected a fence round his front garden. On a procedure summons to determine whether the Lands Tribunal had jurisdiction to modify the covenant it was held that there was no point of law which excluded their jurisdiction. The case is important for two conclusions from the judgment. First, in affirming that whether a covenant was negative was not a question of wording but of substance, it was held that a single covenant could give rise to more than one obligation and that the presence of a positive obligation did not prevent a neighbouring negative obligation from being enforced as such.43 Secondly, the distinction between personal covenants and those running with the land was of no consequence as far as the jurisdiction of the Lands Tribunal was concerned, for either might ‘affect’ land for the purpose of section 84(1) of the Law of Property Act, 1925.

The question as to what length of time, if any, must elapse before the Lands Tribunal can modify a restrictive covenant was considered in *Re Beecham Group Ltd's Application*44 concerning an application to modify a restriction in a ten-year-old agreement made under section 37 of the Town & Country Planning Act, 1962. The Tribunal was not persuaded to refuse the application because the restriction was only ten years old and, as on the evidence, ‘the district council (being the only body or person entitled to the benefit of the restriction) will not in any way be injured if the proposed modification takes effect’, granted a partial discharge so as to permit the particular building desired by the Beecham Group to be erected.

Two previous Court of Appeal decisions are of relevance. In *Jones & Another v Rhys-Jones*45, it was held that ‘there was no general principle that the shortness of time between the imposition of the burden of a restrictive covenant...and an application for its modification was a decisive factor forbidding grant of the application...[and that]...modification of a restrictive covenant was a matter of discretion for the Tribunal and each case must be considered on its merits; that the time that had elapsed might be a factor to be taken into consideration as were also the nature of the covenant, the relationship of the parties to the original covenants and changes in the property benefited by the covenant or in the neighbourhood...’ In an earlier Court of Appeal decision in *Creswell & Another v Proctor & Others*46, on an application made within two years of the covenant being entered into, it was held that under section 84(1) of the Law of Property Act, 1925 the Tribunal had jurisdiction to modify a covenant the day after it was made if it thought fit to do so, but that the Tribunal’s powers were discretionary and it was within its discretion not to accede to an application for modification and that (per Harman & Danckwerts, LJJ) ‘...since this was a covenant under seal, voluntarily entered into a short time before the application was made, which could be enforced by injunction, and there had been no change in the character of the property, it was not a case where modification should be sanctioned’. The facts of the case, briefly, were that having entered into a covenant not to erect any building whatsoever and to use land as a private garden only, the covenantor had been granted planning permission to build a bungalow on the said land. The Lands Tribunal, in spite of having found that there was no evidence of potential injury to persons entitled to the benefit of the restriction, nevertheless in the exercise of its discretion had dismissed the

43 Megarry, J (as he then was) made the basic point that 'it is a matter of substance not of wording', *ibid*, 1067.
application on the ground that '...it would be contrary to public policy and an abuse of the Tribunal's powers to grant an application within four years of the date on which the covenant was imposed when, in effect, the applicants were the original covenants and the objectors the original covenantees'.

From the case of *Gilbert v Spoor and Others*47 in the Court of Appeal a number of valuable points emerge. The applicant, the owner of land subject to a covenant not to erect thereon any building other than one dwelling house (under a building scheme in 1954) was granted planning permission in 1976 to build two additional houses on his land. He applied to the Lands Tribunal under section 84(1)(aa) of the Law of Property Act, 1925, for the discharge or modification of the covenant, and objections were made by persons who were the successors in title to purchasers of other properties governed by the building scheme.

It was found by the Tribunal that additional houses would interfere with a 'resplendent landscape view' which was visible, though not from any of the objectors' properties themselves, from land in their immediate vicinity, and also that the restrictive covenant, because it prevented the interference, secured for the objectors a 'practical benefit of substantial value or advantage' as envisaged by section 84(1A) of the Law of Property Act, 1925. So the application was dismissed.

The applicant appealed, arguing that, in as much as the view was not enjoyed from the very land of the objectors, it could not constitute a 'practical benefit' within the terms of s. 84(1A). This failed, the Court of Appeal taking the line that the view did not have to be enjoyed actually from the objectors' land as s. 84(1A) was not limited to covenants which run with the land.48

The second point of interest concerns an argument raised to the effect that 'since detailed planning permission had been given for the development the implementation of which depended on the successful outcome of the applicants application, the tribunal should not have taken into account the 'view' in exercising its discretion against the applicant'. The argument did not find favour, emphasising yet again the distinction the courts continue to draw between the effect of a planning permission and that of a restrictive covenant.

Thirdly, the case underscores the fact that whereas there cannot, at Common Law, be an easement of a view,49 a restrictive covenant can confer such a right.50

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Reverting to matters of 'general principle', an important recent decision of the House of Lords serves to conclude this study of the evolution of the law of restrictive covenants. The case of *Rhone & Another v Stephens*51, in the House of Lords on an appeal from the Court of Appeal decision in 1993, raised the question of the enforceability of positive covenants between owners of freehold estates and involved consideration of the rule in *Austerberry v Oldham Corporation*.52 The facts, in essence, were that by a conveyance in 1960, one clause of that conveyance had in

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48 Again, the Court thought that in any event, the loss of the view might have an adverse effect on the objectors' land itself in that it could prove detrimental to the estate as a whole.
49 It not being sufficiently precise; see *William Aldred's Case* (1610) 9 Co Rep 57b at 58b.
50 The view was described by Waller, LJ as 'priceless'.
51 [1994] 2 All ER HL 65.
52 (1885) 29 Ch D 750.
effect conferred (and confirmed) mutual rights of support in respect of two adjoining properties and another clause, by its express terms, appeared to confer on the owners of one of the properties the right to sue the owner of the other for damages if the roof of the latter’s premises (which overhung the plaintiff’s property) was not kept ‘wind and water tight’. Since 1960 both properties had been sold. Lord Templeman, in a forthright affirmation of the rule in Austerberry v Oldham Corporation, made a number of observations which provide an apposite conclusion to this study of the case law relating to the restrictive covenant and its ‘historical development.’ Lord Justice Nourse, in the Court of Appeal, had been clear that Austerberry v Oldham Corporation had established that although the benefit of positive covenants which touched and concerned other land could run with freehold land, the burden of them could not.

Lord Templeman, in the House of Lords, developed the reasoning behind that rule and, after reminding their Lordships that ‘equity supplements but does not contradict the common law’, went on to make a statement which, both by reason of its clarity and its appropriateness to the current study, is reproduced in extenso:

‘For over 100 years it has been clear and accepted law that equity will enforce negative covenants against freehold land but has no power to enforce positive covenants against successors in title of the land. To enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted. To enforce a negative covenant is only to treat the land as subject to a restriction. … In 1965 the Report of the Committee on Positive Covenants Affecting Land (Cmd 2719), which was a report by a committee appointed by the Lord Chancellor and under the chairmanship of Lord Wilberforce, referred to difficulties caused by the decision in the Austerberry case and recommended legislation to provide that positive covenants which relate to the use of land and are intended to benefit other land should run with the land. In Transfer of Land: Appurtenant Rights (Law Commission working paper no.36, published on 5th July 1971) the present law on positive rights was described as being illogical, uncertain, incomplete and inflexible. The Law Commission Report Transfer of Land: The Law of Positive and Restrictive Covenants (Law Com no. 127) laid before Parliament in 1984 made recommendations for the reform of the law relating to positive and restrictive obligations and submitted a draft Bill for that purpose. Nothing has been done. In these circumstances your Lordships were invited to overrule the decision of the Court of Appeal in the Austerberry case. To do so would destroy the distinction between law and equity and to convert the rule of equity into a rule of notice…[J]udicial legislation to overrule the Austerberry case would create a number of difficulties, anomalies and uncertainties and affect the rights and liabilities of people who have for over 100 years bought and sold land in the knowledge, imparted at an elementary stage to every student of the law of real property, that positive covenants affecting freehold land are not directly enforceable except against the original covenantor. Parliamentary legislation to deal with the decision in the Austerberry case would require careful consideration of the consequences. Moreover, experience with leasehold tenure where covenants are enforceable by virtue of privity of estate has demonstrated that social injustice can be caused by logic.’

Referring to the submission on behalf of the plaintiffs that the decision in the Austerberry case had been blunted by the ‘pure principle of benefit and burden’, Lord Templeman was not prepared to recognise the ‘pure principle’ that any party deriving any benefit from a conveyance had to accept any burden in the same conveyance. Halsall v Brizell is the authority for ‘reciprocal benefits and burdens’ and for the proposition that the condition has to be relevant to the exercise of the right. In the present case, one clause imposed reciprocal benefits and burdens of support and another clause which imposed an obligation to repair the roof, was an independent provision. In theory and in practice, the defendants could not be deprived of the benefit of the mutual rights of support if they failed to repair the roof.

54 [1957] 1 Ch 169.
The distinction between the ‘restrictive’ covenant and the ‘positive’ covenant has never been more clearly drawn than by Lord Templeman:

‘To enforce a positive covenant would be to enforce a personal obligation... To enforce a restrictive covenant is only to treat land as subject to a restriction.’

Thus, in this short extract, are highlighted two important themes. First, by characterising the effect of the restrictive covenant as ‘only to treat land as subject to a restriction’, it invites comparison with ‘public’ land use planning control.55 Secondly, by emphasising the difference between restrictive and positive covenants, it opens up consideration of the issues raised in the debate concerning reform of the law relating to covenants and ‘land obligations’ generally.56

55 This theme is developed in the penultimate section of this study: Planning (Development) Control, post.

56 The distinctive roles of positive and negative covenants and proposals for reform of the law are considered in the final section of this study: A Retrospect, A Prospect and A Conclusion, post.
CONCLUSION

No study of the evolution of the law of restrictive covenants can be considered complete without some reference to the various proposals for reform which have been made over a period of some 30 years since 1965. These proposals will be examined in more critical detail later but it is convenient to conclude this section with a very brief summary of the relevant reports and their main recommendations. The fact that, as Lord Templeman noted in Rhone v Stephens, no action has been taken to implement any of the proposed reforms, is in itself significant, whether due to indifference, a general lethargy regarding law reform, anxiety as to the consequences, lack of parliamentary time or tacit acceptance that such changes are unnecessary or undesirable.

The main reports (and recommendations) are:

1965 Cmnd. 2719 . Wilberforce Committee - Report on Positive Covenants
- In the case of positive covenants, as in that of negative covenants, the burden of the covenant should run with the land encumbered (the ‘servient land’) and the benefit should run with the land advantaged (the ‘dominant land’).

1967 Law Com. 11. Transfer of Land - Report on Restrictive Covenants
- In general terms ‘Restrictive Land Obligations’ should be substituted for ‘Restrictive Covenants’.
- Section 84(1) of the Law of Property Act, 1925 should be re-written to give the Lands Tribunal powers of modifying or discharging land obligations wider than those which it has at the present time in respect of restrictive covenants.

- The comprehensive reform of the whole of the area of law of positive and restrictive covenants affecting freehold land, taking the existing law of easements as a model, to enable obligations, whether restrictive or positive in nature, to run with the benefited and the burdened land so as to be directly enforceable by and against the current owners of each.
- The introduction of a new interest in land (land obligation) capable of subsisting as a legal interest if it is equivalent to an estate in fee simple absolute in possession or a term of years absolute.
- The Lands Tribunal should have power to extinguish or modify any land obligation.

1991 Law Com. 201. Transfer of Land - Obsolete Restrictive Covenants
- To phase out most existing restrictive covenants after the introduction of a land obligations scheme.
- All restrictive covenants should lapse eighty years after their creation; any covenant which is not then obsolete should be capable of being replaced by a land obligation to the like effect.
- The scheme should apply to all covenants restricting the use of freehold land except covenants between landlord and tenant, covenants imposed pursuant to statute which do not depend for their enforceability against successors in title on the person with the benefit being interested in an identifiable parcel of land, and covenants to which the Lands Tribunal’s jurisdiction to modify or discharge restrictions does not apply.

1 See A Retrospect, A Prospect and A Conclusion, post.
2 [1994]2 All ER HL 65.
3 The amendment of s. 84(1) by the Law of Property Act, 1969, whilst not adopting the term ‘Land Obligation’, went some way to extending the remit of the Lands Tribunal.
Following these reports the only action appears to be peripheral to the reform of the law which has remained unchanged in so far as restrictive covenants (and positive covenants) are concerned. The only changes that can be traced to these Reports are those relating to the Lands Tribunal, namely the widening of its powers through the amendment of s. 84(1) by the Law of Property Act, 1969 and the loss of jurisdiction in respect of Planning Obligations following the amendment of s.106 of the Town & Country Planning Act, 1990 by the Planning & Compensation Act, 1991.

Substantive conclusions must be deferred until after consideration of the operation of the mechanism for the Discharge or Modification of Restrictive Covenants and the implications of Planning Control, but some general conclusions are appropriate at this juncture, namely:

(1) The courts, with virtually no assistance from the legislature, have evolved a broad (if not comprehensive) regime of control of land use and development from the decision in Tulk v Moxhay\(^4\) - a decision which at the time did no more than acknowledge that equity would not permit a man to gain financially through the breach of an obligation of which he had notice. From that decision has evolved a whole branch of the law which has enabled private estate owners to control the use and form of development of land (for the benefit of land remaining in their ownership) and the concept of a ‘local law’ through the medium of the building scheme (for the benefit of all persons, being either freeholders or leaseholders, in a defined local community).

(2) In the 100 years between Tulk v Moxhay in 1848 and the coming into operation of the Town & Country Planning Act, 1947 in 1948, followed by nearly 50 years of ‘universal planning control’, the restrictive covenant has not only survived but has ‘prospered’ in both its extent and content. The diversity of the issues which the courts have considered as being relevant subjects of restrictive covenant control and the way in which the building scheme has evolved over the years (with the active encouragement of the courts) bear witness to its continuing importance.

(3) Comprehensive planning control, far from weakening the role of the restrictive covenant, has emphasised both its importance and its relevance. The results of the two may be similar but the objectives remain distinct. The restrictive covenant is essentially for the benefit and protection of the ‘private’ interest (financial and environmental) of the ‘estate owner’. Town and country planning control and planning conditions and agreements are for the benefit of and the protection of the wider public interest. They may incidentally protect the private interest; they may supplement or complement it, but in certain cases they may negate that private interest.

(4) Essentially the difference lies in the answer to the question - who can enforce? The restrictive covenant is enforceable by the ‘estate owner,’ that is the beneficiary or the owner of the ‘dominant tenement’, for his own (or rather his land's) benefit and protection. The planning condition is only enforceable by the local planning authority who may decide not to take enforcement action or to review the condition (on application) or indeed to grant a new planning permission without (or contrary to) conditions previously imposed.
(5) From an estate management point of view the most effective form of control is that of ‘landlord and tenant’. It not only affords a means of controlling the use and development of land during the course of the lease, it protects the landlord’s freehold reversion and is the only method by which the burden of ‘positive’ covenants can be directly enforced. The estate manager (developer) who relies on town planning measures is in the hands of an authority whose policies (be they centrally or locally determined) are outside his control. In those circumstances therefore where the freehold is disposed of the restrictive covenant is the one effective control that the ‘estate owner’ has and, in spite of its imperfections, has served to impose a measure of control to the benefit (financial and environmental) of the ‘estate owner’ and of the purchasers of land and property from him (particularly where a building scheme has been involved). As long as such control continues to be relevant to contemporary requirements and aspirations the restrictive covenant will continue to serve a valuable purpose in controlling land use and development alongside town planning controls.

It is primarily with a critical examination of that degree of relevance that the next section, dealing with the Discharge or Modification of Restrictive Covenants, is concerned.
THE DISCHARGE OR MODIFICATION OF
RESTRICTIVE COVENANTS

INTRODUCTION

'Before 1926 an owner of land who wished to develop it but who had on his
title restrictive covenants, however old or obscure, incompatible with such
development, was compelled to take the risk that he would be sued upon
them if he put his plans into effect. In many cases, no doubt, the danger was
illusory and often the action would have failed. But the anxiety and expense
even of successful proceedings may be considerable, and their pendency may
well occasion costly delays. Section 84 of the Law of Property Act 1925, is
designed to enable an owner of land to establish for certain whether the land
is subject to valid restrictions, and if so what their effect is. Further, if there
are valid restrictions which serve no useful and legitimate purpose,
provisions are made for their discharge or modification.' (G.H. Newsom, QC)

In this introductory paragraph to Volume 7 of the Planning and Compensation Reports,
Mr. G.H. Newsom provides, in the most succinct and clear way, the setting for this study and
analysis of the effect of section 84 of the Law of Property Act, 1925. The danger of legal
proceedings, as he states, may have been illusory in many cases but the fear was nonetheless
real, risking an injunction or, since Lord Cairn's Act 1858, damages by way of compensation in
lieu.1

The validity and effect of restrictive covenants is dealt with in the Law of Property Act,
1925, section 84(2). The court (in practice the Chancery Division) upon the application of any
person interested has power (a) to declare whether or not in any particular case any freehold
land is affected by a restriction or (b) to declare what is the nature and extent of the restriction
imposed, whether the same is enforceable and if so by whom.

Under section 84(1) an application may be made for either the discharge or modification
of a restrictive covenant. Originally it was provided that applications should be to 'the
Authority', i.e. an Official Arbitrator appointed for the purposes of the Acquisition of Land
(Assessment of Compensation) Act, 1919, and selected by the Reference Committee under that
Act. Such a person was normally one concerned with compensation for the compulsory
acquisition of land and the arrangement did not perhaps allow sufficiently for the difficult
questions of law to which s.84(1) gives rise and furthermore tended to suggest that the problem
was not so much whether the restriction should be discharged or modified as to how much
should be paid in the way of compensation for the discharge or modification sought.

The Lands Tribunal Act, 1949 substituted for 'the Authority', the Lands Tribunal (a
mixed body of lawyers and surveyors) and applications for discharge or modification are now
heard by the Lands Tribunal.

1 The Chancery Amendment Act, 1858, s.2, now replaced by the Supreme Court Act, 1981, s.50.
Decisions of the Authority (before 1950) and of the Lands Tribunal (since 1949) are subject to appeal. Appeal from the Authority was to the Chancery Division by way of a rehearing, a comparatively expensive method which left the whole matter open to the court’s consideration, and was available only where the Authority had modified or discharged a restriction. Appeal from decisions of the Lands Tribunal lies to the Court of Appeal, by way of case stated, and consequently the powers of the Court of Appeal are more limited than were those of the Chancery Division under the former procedure, although appeals can now be heard in cases where the application had been dismissed as well as to those where it had been granted by way of discharge or modification.

Before 1950, decisions of the Authority (the Official Arbitrator) were seldom the subject of official reporting, although many featured in ‘unofficial’ reports in the Estates Gazette. Unfortunately the Official Arbitrator gave no reasons for his decisions - apparently he was not required so to do - although towards the end of his period of tenure he adopted the practice of indicating his reasons, albeit briefly. Nevertheless an analysis of his decisions as reported in the Estates Gazette is instructive and illustrates the way in which s.84(1) was being used in practice and the influence that external factors, in particular town planning issues, were having on the decisions of the Official Arbitrator.

Since 1949 the Lands Tribunal decisions, together with reasons for those decisions, have been reported, and in the Property, Planning and Compensation Reports alone (over a period of more than 40 years) hundreds of cases have now been documented. An analysis of these decisions, the earliest of which start from a time when town and country planning legislation in the form of the Town & Country Planning Act, 1947 was starting to have a significant effect on the control of land use and development, charts the way in which the private control of land through the restrictive covenant was seen by the Lands Tribunal and the Courts as either supplementing, complementing or inhibiting the ‘public’ control of the use and development of land.

Analysis of these decisions, with particular reference to the way in which the Official Arbitrator and later the Lands Tribunal has interpreted and ruled upon s.84(1) in the light of planning and environmental issues and the changing economic and social clime is considered under the following headings:

The Era of the Official Arbitrator (1926-1949)
   The Orders of the Official Arbitrator, 1926-1935
   The Orders of the Official Arbitrator, 1936-1949

The Jurisdiction of the Lands Tribunal (1950-1995)
   The Decisions of the Lands Tribunal, 1950-1969

The interpretation of s.84(1) is, or at least should be, central to the deliberations of both the Official Arbitrator and the Lands Tribunal. Constant reference to that section (sometimes by omission rather than commission) occurs in the cases analysed and it is convenient here to set out the full text of s.84(1), as first enacted, to which reference back will frequently be unavoidable.

2 The full text of s.84 (1), as amended by the Law of Property Act, 1969, is reproduced immediately preceding the section dealing with the decisions of the Lands Tribunal, 1970-1995.
Law of Property Act, 1925

Power to discharge or modify restrictive covenants affecting land

84.-(1) The Authority hereinafter defined shall (without prejudice to any concurrent jurisdiction of the court) 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 (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied --

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

Provided that no compensation shall be payable in respect of the discharge or modification of a restriction by reason of any advantage thereby accruing to the owner of the land affected by the restriction, unless the person entitled to the benefit of the restriction also suffers loss in consequence of the discharge or modification, nor shall any compensation be payable in excess of such loss; but this provision shall not affect any right to compensation where the person claiming the compensation proves that by reason of the imposition of the restriction, the amount of the consideration paid for the acquisition of the land was reduced.
THE ERA OF THE OFFICIAL ARBITRATOR (1926-1949)

From 1 January 1926 applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925 were, until the introduction of the Lands Tribunal Act, 1949, dealt with by the Official Arbitrator. Although his decisions (orders) rarely contained reasons for his conclusions many were reported in the Estates Gazette and occasionally in the Journals of the Chartered Surveyors’ Institution (as it then was). The reports in the Estates Gazette became over the years more detailed and the evidence of both the applicants and the objectors came increasingly to be reported at length as similarly did the Official Arbitrator’s Order. The absence of the Official Arbitrator’s ‘stated reasons’ means that any conclusions concerning the basis of his decisions must to a degree be speculative but analysis of the evidence as reported and the decision of the arbitrator, taken together, permits of some general assumptions as to the criteria on which he based his order. Such assumptions and conclusions become more certain as a pattern emerges from a consideration of a number of cases over a period of time and this section of the study is concerned with such analysis.

The decisions of the Lands Tribunal (post 1949), which will be considered later, do not suffer from the same disability in that they have been reported fully in the Planning and Compensation Reports (later the Property, Planning and Compensation Reports) together with the Tribunal’s reasons and conclusions supporting the award.

It is important to attempt to discern the way in which the Official Arbitrator came to his decisions during the period of his authority (1926-1949) which coincided with the development of town planning law from the first statute dealing solely with town planning (the Town Planning Act, 1925) to the introduction of the Town & Country Planning Act, 1947, which still forms the basis of town & country planning law as we know it today. Reference to planning schemes and planning decisions appear, as will be seen later, to assume ever greater importance and indeed influence on the arbitrator’s order. Such influence needs to be interpreted alongside the development of planning law between 1925 and 1947, through three Acts in particular, namely the Town & Country Planning Act, 1932, which was the first Act to deal with country planning as well as town planning and which imposed on local authorities the power to make planning schemes; secondly, the Restriction of Ribbon Development Act, 1935, which contained powers restricting development along highways, and lastly the Town & Country Planning (Interim Development) Act, 1943, which imposed planning control over all land in England and Wales and dealt with control during the period before a scheme finally became operative.

Turning now to an analysis of the decisions of the Official Arbitrator, these (as earlier explained) will be dealt with in two main periods. The first period (1926-1935) covers the formative years during which the Official Arbitrator was developing a framework (and even a code of practice) for dealing with applications, as evidenced by his issue of rulings and increasing tendency to question witnesses (and even comment on their replies) and impose conditions in his order (conditions which would not disgrace an over-zealous planning authority of today). Some 60 cases are considered in this particular period. Far fewer cases are reported and considered in the second period (1936-1949), which is understandable in view of the almost complete moratorium on domestic building during the period of the 1939-45 war and its immediate aftermath.
The Orders of the Official Arbitrator, 1926-1935

The 60 cases consulted from the period 1926-1935 are identified by the name of the applicant and the Estates Gazette reference, followed by a brief description of the modification (discharge) sought. These form the basis for the overall analysis; cases cited specifically in the text are identified by an asterisk. The inclusion of the full list at this point not only helps to ‘set the scene’ but demonstrates the variety of the subject matter and illustrates the changing social and economic climate in which the Official Arbitrator was operating.

Cases consulted:

- Michaels (1926) 108 EG 741 & 846 .......................................................... Houses to lock-up garages
- Christmas & Wythe's Trustees (1926) 108 EG 812 & (1927) 109 EG 117 ................Increase housing density
- Cowan (1927) 109 EG 157 & 450 ................................................................. Garden to school tennis courts
- Hobbs, Lewis & Lambert (1927) 109 EG 625 & 110 EG 160 ..................... Houses to business purposes
- Gas Light & Coke Co. (1927) 109 EG 842 & 110 EG 160 ............................... House to showroom & stores
- Sir Berkeley Sheffield (1927) 109 EG 93 & 221 ........................................... House to professional or business purposes
- Cowan (1927) 110 EG 372 ............................................................................. Increase housing density
- Gas Light & Coke Co. (1927) 110 EG 842 & 110 EG 160 ......................... House to showroom & stores
- Bacon (1927) 110 EG 93 & 180 ................................................................. Increase housing density
- Gas Light & Coke Co. (1927) 110 EG 93 & 221 ........................................... House to professional or business purposes
- Spiller (1927) 110 EG 372 ............................................................................. House to hotel, hostel or school
- Hobbs, Lewis & Lambert (1927) 110 EG 793 ............................................. Houses to shops
- Death (1927) 110 EG 829 & (1928) 111 EG 89 ............................................. Houses to shops
- Hayward (1928) 111 EG 194 & 466 ............................................................. Increase housing density
- Hayes Ltd. (1928) 111 EG 390 & 784 ............................................................ Reduce ‘prime cost’ of houses
- Allen (1928) 111 EG 685 ............................................................................. Increase housing density
- Evershed & Vignoles Ltd. (1928) 111 EG 784 & 112 EG 24 ....................... Discharge restriction prohibiting trade or manufacture
- Higgs, Murrell & Wooding (1928) 112 EG 24 & 666 ..................................... Increase housing density
- Crampton (1928) 112 EG 24 & 235 ............................................................. Discharge restriction save for ‘noise or nuisance’
- Proctor (1928) 112 EG 50 & 261 ................................................................. Houses to shops & showrooms
- Sharp (1928) 112 EG 630 & 691 .................................................................. Increase housing density
- Bremner (1928) 112 EG 630 & 771 ................................................................. Houses to club premises
- Kirton (1929) 113 EG 181 & 219 ................................................................. House to club
- Parkes (1929) 113 EG 219 .......................................................................... Increase housing density
- Lambert (1929) 114 EG 52 & 197 ................................................................. Houses to factory or warehouse
- Wilson & Chitty (1929) 114 EG 600 & 777 .................................................... House to institutional purposes, nursing home or flats
- Spooner (1929) 114 EG 636 & (1930) 115 EG 114 ....................................... Increase housing density
- Wright (1930) 115 EG 221 & 768 ................................................................. Increase housing density
- Marshall (1930) 115 EG 268 ............................................................................. Houses to shops
- Bexhill Pavilion Ltd. (1930) 115 EG 331 & 903 ............................................. Discharge restriction protecting views to permit houses, shops, swimming baths, etc.
- Tunbridge Wells Gas Co. (1930) 116 EG 23 & 172 ......................................... Discharge restriction prohibiting development to permit gasometer
- Stone (1930) 116 EG 139 .............................................................................. House plot to use as road access
- Trustees of William Earp (1930) EG 492 & 582 & (1931) 117 EG 12 ........... House to hotel, school or other educational purpose
- Yewens (1930) 116 EG 546 & (1931) 117 EG 12 ........................................... Houses to builders yard, shops, offices & storage
Brandt (1931) 117 EG 416 & 918 ................. House & mews to flats and garages
• Chamberlain (1931) 140 & 331 ................ Increase housing density
Basser (1931) 118 EG 862 .......................... House & grounds to flats and dwellings
• Newcombe Estates Co. (1932) 119 EG 673 & 120 EG 601 ........ Increase housing density & permit shops & business premises
Lambert (1932) 120 EG 953 ............................ House to hotel or boarding house
• Gas Light & Coke Co. (1933) 121 EG 57 ........ Increase height of flats
Revill (1933) 121 EG 219 ............................. Increase housing density
• Foster (1933) 121 EG 611 .......................... Reduce 'prime cost' of houses
How (1933) 121 EG 929 .............................. Houses to self-contained flats
Nash (1933) 122 EG 287 ............................. Houses, nursing home or hotel to offices
Pard Estate Ltd. (1933) 122 EG 780 ................ Reduce 'prime cost' of houses and permit use as public sports ground
• Mortimer (1933) 122 EG 973 ........................ Increase housing density
Tull & the Public Trustee (1933) 122 EG 1011 ....... Houses to blocks of flats
• Frost & Brand Estates Ltd. (1934) 123 EG 306 ...... Increase housing density & reduce 'prime cost'
Fulford (1934) 123 EG 436 .......................... Reduce 'prime cost' of houses
Chamberlain (1934) 123 EG 1011 ................ Increase housing density & reduce 'prime cost'
Slaughter (1934) 123 EG 1012 ..................... Shops to bakery
Bell Property Trust Ltd. (1934) 123 EG 1012 ......... Houses to block of flats
• Smith & Cooke (1934) 123 EG 1054 ............. Discharge restriction prohibiting hotel, public house, trade or manufacture
London County Council (1934) 124 EG 243 ....... Coroner's court & weights & measures office to 'Drainage' depot, stores & workshop
Streather (1935) 125 EG 245 .......................... Houses to flats
Methodist Chapel Trustees (1935) 125 EG 245 ........ Discharge restriction prohibiting trade or manufacture
Adams (1935) 125 EG 246 ............................. Houses to shops
Sharvatt (1935) 125 EG 741 ........................ Increase housing density or permit block of flats
Ground (1935) 125 EG 949 ............................. Houses to flats
• Haywards (Brighton) Ltd. (1935) 126 EG 325 ... Residential to garage, showrooms, shops, etc.
Tricker (1935) 126 EG 326 ........................... Houses to shops
Cox-Johnson (1935) 126 EG 966 ........................ Houses to lock-up shops with flats over

(1) The Arbitrator's Order

Of the 60 cases reported in the Estates Gazette (1926-1935) on only five occasions did the arbitrator dismiss the application. Apart from a few cases where he made no decision (e.g. where the matter was adjourned for a particular legal issue to be determined by the High Court) in all other instances the arbitrator's order modified (but rarely discharged entirely) the restrictive covenant. In many of these instances the modification was in the form of a compromise between that sought by the applicant and the substance of the objector's opposition, such orders frequently being subject to the payment of compensation and increasingly subject to detailed conditions. Any conclusions from an analysis of these decisions must be treated with caution (because of the nature of reporting and the possibly arbitrary nature of selection) but the small number of cases dismissed and the compromise modifications made (often accompanied by compensation) lead to the conclusion that the arbitrator was more concerned with the 'commercial value' of the restrictive covenant rather than the 'environment and amenities' which it protected. This is, perhaps, to be expected as the restrictive covenants entered into in the last decades of the 19th century and the early 20th century were primarily to
'protect property values' and only incidentally to 'protect amenity', although the latter may well in certain circumstances have been the basis for the former.

(2) The Location of Land subject to the Restrictive Covenant

Some two-thirds of the applications reported related to land and property in the Greater London area. With one notable exception (in the north east) the remainder were located in the south east, the 'prosperous' south coast resorts and the home counties. There may be a number of reasons for this distribution. First, these were the areas least affected by the great depression of the 1920's and 1930's and were the subject of such limited growth as occurred during that period; secondly, they were areas where freehold estates had been broken up and developed in the latter part of the 19th century and the early 20th century (as compared with the midlands and north west where much development had been 'working class' and the 'wealthier' estate development had taken place under leasehold control, e.g. the Calthorpe Estate in Birmingham), and lastly, as the heart of the property market lay in the city and the west end of London where the major property agents for the large estates were located, their influence and initiative to use the new section 84 on behalf of their clients must not be discounted.

(3) The Date of Origin of the Restrictive Covenant

The date of imposition of the restrictive covenant is not always recorded but where so recorded the majority fall within the period 1875-1914. The age (or venerability) of the restrictive covenant does not appear to have been a factor in the Official Arbitrator's decision.

In three cases he modified restrictive covenants that had been in operation for only three, two and six years respectively. The modifications were comparatively minor and in the last case were only made after hearing evidence as to the local authority's planning scheme. In Re Hayes Ltd's Application he would appear to have been influenced by the fact that after part of an estate had been sold subject to restrictive covenants the remainder had been sold without such covenants, thus seemingly over-riding the objector's submission that no changes in the character of the neighbourhood had occurred since the restrictive covenants were imposed.

(4) The Number of Objectors, their Status and the issue of 'Public Need'

In the earlier cases the Official Arbitrator shows signs of having been 'influenced' by the sheer body of objection. Later, however, he draws a clear distinction between those objectors who can substantiate a claim to the benefit of the restrictive covenant and those he is prepared to hear as interested members of the general public.

The first recorded and reported case was that of Re Michaels' Application heard on 23 November 1926. Although only reported in brief it is interesting, apart from being the first case to be heard under section 84 of the Law of Property Act, 1925, in that the stated grounds for the application included, apart from what was to become the almost universal reason of 'change in character of the neighbourhood or property', the additional ground of 'demonstrated need'. The application was to modify a restrictive covenant which prohibited any use other than as a private dwelling house in order to permit the erection of 40 lock-up garages in the grounds of a

1 Re Hayes Ltd's Application (1928) 111 EG 390 & 784; Re Gaslight & Coke Co's Application (1933) 121 EG 57; Re Foster's Application (1933) 121 EG 611.
2 (1928) 111 EG 390 & 784.
3 (1926) 108 EG 741 & 846.
house (over 1 acre) for the storage of motor cars only 'to meet the needs of 1270 houses in the locality with no garage accommodation'. Having heard from the objectors that there had been no change in character such as to render the restrictive covenant obsolete and that 'garages would spoil amenities and depreciate value of properties (RV) and constitute a nuisance in this valuable residential district' - the 'demonstrated need' apparently not being challenged - the Official Arbitrator dismissed the application, it being reported that some 268 objectors were believed to be concerned and represented. Later, evidence of 'public need' was to be more favourably received by the Official Arbitrator.

The Act, in referring to restrictions impeding the reasonable use of land, equates both 'public and private purposes', apparently not distinguishing between them so as to give greater weight to public than private purposes. In *Re Marshall's Application* the Arbitrator accepted a 'public need' for local shops to serve a rapidly expanded housing estate development and modified a restrictive covenant so as to permit shops where otherwise only housing was allowed; a true expression of a 'public purpose' to satisfy a local 'public interest' or need.

The Arbitrator, however, has accepted submissions of 'public purpose' as not only covering 'public interest' but, seemingly without distinction, covering the needs of a public body or authority to discharge its public duty. In *Re Tunbridge Wells Gas Co's Application* he discharged a restrictive covenant in order to permit the erection of a Gasometer and in *Re London County Council's Application* he modified a restrictive covenant so as to permit a Council 'Main Drainage' Depot in place of a Coroner's Court and Council Office. But the need of a public authority to discharge its public duty or responsibility is not *prima facie* a sufficient reason to override the 'public interest' of those persons living in the vicinity of the activity to be protected from, for example, noise and toxic fumes.

The Official Arbitrator (and, as will be seen later, the Lands Tribunal) has not always drawn a clear distinction and has tended to let 'public purpose', as in the 'Gasometer' case, nullify the proviso in s.84(1)(a) that to discharge or modify a restrictive covenant for reasons of public (or indeed private) purposes the restriction must be one that no longer secures 'practical benefits to other persons'.

(5) The Main Relaxation or Modification Sought

Generally, the restrictive covenant applied to housing development in one form or another. The type of relaxation or modification sought fell into one of three categories, namely:

(i) To retain the residential use but to modify the type of development (e.g. in place of detached private dwellings, to permit semi-detached dwellings, flats or tenements); to increase housing density, or to reduce the 'prime cost' of housing.

(ii) To change the use from residential to, for example, shops and showrooms or workshops, stores and manufactory or offices, commercial and business uses.

(iii) To change the use from housing to private schools and institutional uses or to hotels and licensed premises.

There was a fourth category in which, in a limited number of cases, the applicant applied for the discharge of the restrictive covenant without putting forward specific proposals for either the use of the land or the type of development.

4 (1930) 115 EG 268.
5 (1930) 116 EG 23 & 172.
6 (1934) 124 EG 243.
(6) The Main Grounds of the Application

It is convenient to consider the grounds on which applications were made under the headings of the three categories mentioned above.

(i) Apart from 'changes in the character of the neighbourhood (and of the property)' the main grounds for modifying restrictions relating to the type of housing that could be developed were that the continuance of the restrictive covenant impeded reasonable user, that no person entitled to the benefit would be injured and later, although not a statutory ground, the difficulty of sale or other disposition of the land or property with the restrictive covenant in force. It had been the practice in many restrictive covenants to lay down maximum densities and minimum 'prime costs' of building. The social change that had taken place since the restrictive covenant was entered into had often resulted in 'desirable residential estates' being 'swamped and surrounded by higher density and lower cost housing' making it difficult to find developers prepared to conform with the restrictive covenants to meet a demand which no longer existed by reason of the change in character and the extent of surrounding development. This situation was exacerbated in respect of the more recently imposed restrictive covenants laying down minimum 'prime costs' in that the period saw a reduction in house-building costs, making the achievement of the 'prime cost' requirement both uneconomic and unrealistic.

(ii) The modification of restrictive covenants to permit the development of land (previously restricted to some form of residential development) for either shops and showrooms, workshops, stores and manufactory or offices, commercial and business uses, was often based on grounds (apart from changes in the character of the neighbourhood) that continuance of the restrictive covenant impeded reasonable user, that no property would be harmed by the modification and that no person entitled to the benefit of the restrictive covenant would be injured. But it is within this category that the 'change in the character of the neighbourhood' dominates and that issues of nuisance including noise and traffic, start to feature in the evidence and in the conditions imposed by the Arbitrator. The majority of applications concerned isolated pockets of land and property which had become or were becoming surrounded by non-residential development. Typical examples were where, since the restrictive covenant was imposed, a community had expanded and shopping and other commercial uses had been introduced either by way of conversions of dwelling houses or by, for example, the construction of shopping parades, workshops and 'service industry'. In all the reported cases the Arbitrator's Orders effected some modification (often less than that sought) and were more often than not accompanied by conditions excluding noisome, noxious or other objectionable uses and frequently the payment of compensation.

(iii) The third main category concerned applications to modify covenants (restricting development to some form of private housing) to permit the use, conversion or development of land and buildings for uses such as private schools, other

7 Whilst in itself the problem of disposition is not a statutory ground it could arguably be brought within the ambit of 'impeding reasonable user' and within the general proposition that the law views with distaste fetters on the free alienation of land.
8 The question of relaxation of 'prime cost' is dealt with more fully in (9) Conditions Imposed by the Official Arbitrator's Order, post.
institutional uses (private hospitals and hostels) and hotels (including licensed premises). The grounds for such applications were, variously, changes in the character of the neighbourhood, demand for the proposed use coupled with no demand for the restricted use and the assertion that 'no persons or other land' would be harmed. Most of these applications occurred in what were described as 'high-class residential areas' and involved either the conversion of existing large dwellings (sometimes with significant extensions) or new buildings in the grounds. It is in this category in particular that environment and amenity issues (loss of light, air, views and privacy) and concerns relating to nuisance (noise, traffic, danger, etc.) were raised in evidence and featured in the Arbitrator's Order by way of explicit conditions.9

(7) The Objector's Main Grounds and Concerns

Apart from refuting the 'universal' grounds for modification by submitting that there had been no change in the character of the neighbourhood sufficient to make the restrictive covenant obsolete and/or that reasonable user was possible within the restriction, the most frequent grounds, in order of importance attached to them by the objectors, were:

(i) modification of the restrictive covenants as required by the applicant would result in development which would 'lower the tone' of the neighbourhood and depreciate property values;
(ii) the development proposed would result in nuisance by way of noise, traffic, danger, etc., and,
(iii) the development proposed would spoil existing amenities through loss of light, air, views and privacy.

A fear that the 'tone of the neighbourhood would be lowered' (or less euphemistically that property values would be depreciated) featured most prominently in those applications for a relaxation permitting multiple occupation, higher density or lower building costs and were often accompanied by claims for compensation for depreciation in property values. Objections relating to the loss of amenities (light, air, views and privacy), particularly where they occurred in applications for private schools, other institutional uses and hotels in 'high-class residential areas' were generally pursued more rigorously on environmental and amenity grounds or accompanied by such statements as 'money cannot compensate for their loss'. In the world of 'private' property it would seem that the poor man's 'environment and amenity' can the more easily be bought out while the rich man is in a better position to resist and thus safeguard his amenity.10

In a few cases objectors raised the issue of 'injustice' if the restrictive covenant were to be modified or discharged. In Re Chamberlain's Application11 the objectors maintained that it would be an 'injustice to all other owners on the estate if the restrictive covenant were modified', they having complied with (or been bound by) the covenant. Similarly in Re Newcombe Estate Company's Application12 the objectors claimed that as they had complied with the restrictive

9 See (7) The Objector's Main Grounds and Concerns and (9) Conditions Imposed by the Official Arbitrator's Order, post.
10 For examples of cases dealing with amenities and nuisance see: Re Haywood's Application (1928) 111 EG 194 & 466; Re Wilson & Chitty's Application (1929) 114 EG 600 & 777; Re Trustees of William Earp's Application (1930) 116 EG 492 & 528 and (1931) 117 EG 12.
11 (1931) 118 EG 140 & 331.
12 (1932) 119 EG 673 & 120 EG 601.
covenant it would be an injustice if it were now to be modified in favour of the applicant. And in *Re Foster's Application*¹³, where the restrictive covenant dated only from 1927, the objectors contended that the applicant's real motive was to achieve more profit. In all three cases however the Arbitrator proceeded to modify the restrictive covenants.

(8) The Influence of Town Planning Schemes and Planning Authority Decisions

During the course of the first ten years of the operation of section 84 of the Law of Property Act, 1925 town planning schemes and decisions featured ever increasingly in the evidence of both applicants and objectors and influenced in no small degree the Official Arbitrator in the formulation of his order. As early as 1926 it was reported in *Re Christmas and Wythe's Trustees' Application*¹⁴ that the 'LCC as town planning authority' had no objection to the application to modify the restrictive covenant and in 1927 in *Re Death's Application*¹⁵, following evidence by the UDC Engineer & Surveyor that Middlesex CC and the District Council had 'selected the area as an established centre for shops' and zoned it accordingly, the Arbitrator modified the restrictive covenant so as to permit shops.

In *Re Spooner's Application*¹⁶ a restrictive covenant limiting development to four houses on some three acres of land was, following evidence given by the town planning assistant for the Guilford Corporation that its town planning scheme was being revised to a density of 8 houses per acre, modified to permit development at a density of 7 houses per acre.

In 1932 in *Re Newcombe Estate Company's Application*¹⁷, evidence having been given that the town planning scheme for Great Stanmore allowed 6 houses per acre on the land, the Arbitrator proceeded to modify a restrictive covenant restricting development to a maximum density of 4 houses per acre to permit 6 houses per acre in line with the town planning scheme. A year later, in 1933, in *Re Foster's Application*¹⁸ the Town Clerk of Twickenham gives evidence to the effect that whereas the corporation is not directly concerned in estate covenants it welcomes them 'where they enured to supplement the schemes of the corporation for the effective town planning of the district'.

In *Re Frost's Application (freeholder) and Brand Estates Limited's Application (purchaser)*¹⁹ the second applicant (Brand Estates), having applied to modify the restrictive covenant to enable development of part of the land at 6 houses per acre and the remainder at 12 houses per acre, was permitted during the course of the hearing to submit a revised plan based on zoning at 4½ houses per acre rising by stages to 10 houses per acre and, after evidence by an official of Epsom UDC that this layout was preferred by its Town Planning Committee which was prepared to recommend it to the Council, went on to submit that 'zoning under the town planning scheme indicated that the restrictions ought to be deemed obsolete'. The Arbitrator modified the restrictive covenant.

The intervention of a local authority in the arbitration proceedings was further demonstrated in *Re Fulford's Application*²⁰ where the Coulsdon & Purley UDC opposed an

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²³ (1933) 121 EG 611.
²⁵ (1927) 110 EG 829 & (1928) 111 EG 89.
²⁶ (1929) 114 EG 636 & (1930) 115 EG 114.
²⁷ (1932) 119 EG 673 & 120 EG 601.
²⁸ (1933) 121 EG 611.
²⁹ (1934) 123 EG 306.
³⁰ (1934) 123 EG 436.
application under two heads, namely town planning and rating\textsuperscript{21}. Although land within the area was originally zoned in the town planning scheme at 6 houses per acre, following objection the town planning scheme had been modified to zone part at 2 houses per acre. The Arbitrator’s Order provided for a modification of the restrictive covenant but he appears not to have been convinced by the ‘rating argument’ nor, in this case, by the ‘planning argument’, in that his modification provided for part of the land to be developed at 4 houses per acre and the remainder at 6 houses per acre.

One last case from this period underlines the increasing importance that the arbitration process and the Official Arbitrator were attaching to planning proposals. In \textit{Re Smith and Cook’s Application}\textsuperscript{22} the objectors (a brewery company) objected to the modification of a restrictive covenant so as to remove the prohibition of the use of the property as a ‘hotel, tavern, public house or bar shop’, as did the Twickenham Town Council\textsuperscript{23}. The Town Council, while agreeing that the present restrictions were obsolete, having regard to developments in the area, opposed the use as a public house, off-licence or factory and ‘felt it was desirable that any restrictive covenant should as far as possible synchronise with town planning proposals’. The Official Arbitrator seems to have been of a similar mind for, after an adjournment, the parties (applicants and Town Council) announced they would ‘endeavour to agree town planning arrangements and enter into an agreement under section 34 of the Town & Country Planning Act, 1932’, whereupon the Arbitrator in his Order discharged the restrictions subject to an agreement between the applicants and the Corporation of Twickenham.

These decisions, in the way they almost mirror the proposals in town planning schemes and local authority planning decisions, are, as will be seen later, in marked contrast to the attitude of the Lands Tribunal during the early years of its jurisdiction.

\textit{(9) Conditions Imposed by the Official Arbitrator’s Order}

In those cases where the relaxation or modification of the restrictive covenant concerned housing but without any change to a non-residential use, the standard conditions imposed by the Arbitrator related to housing density (including height of buildings, aspect and building lines), housing cost (expressed in terms of prime cost) and housing type (for example restrictions against flats and tenements). Often the Order would provide for housing at lower densities and higher prime costs on important road frontages and attach detailed conditions as to house type, particularly where flats or conversions to flats were permitted. Where the modification provided for a change of use from housing to, for example, shopping or commercial such modification more often than not was subject to a standard condition against nuisance, noise, noxious uses, etc.

Increasingly the Arbitrator’s Order hedged the modification with more and more detailed conditions and in the 1930’s (particularly after the Town & Country Planning Act, 1932) ‘environment’ conditions came to be included. As early as 1929 in \textit{Re Wilson and Chitty’s}

\textsuperscript{21} The objection on rating grounds was to the loss of rateable value of existing houses and the ‘uneconomic’ return from low rated properties - ‘the local authority had a line below which properties of a certain rateable value were receiving more services than they produced in rates, and therefore it was of the greatest benefit to the Council that they should retain as far as possible the premises which had a large rateable value’.

\textsuperscript{22} (1934) 123 EG 1054.

\textsuperscript{23} Although it was submitted on behalf of the applicant that the Town Council had adequate powers under the Town & Country Planning Act, 1932, to control development within their area, thus questioning their status at the arbitration hearing, their evidence and intervention appears to have been crucial to the Official Arbitrator’s conduct of the case and his subsequent decision.
Application\textsuperscript{24}, an application to permit the use of premises for 'prevention and rescue work either for institutional purposes, nursing home or conversion into flats', resulted in the Arbitrator's Order modifying the restrictive covenant as requested but subject to conditions relating to (i) retention of the private appearance of the premises, (ii) fencing, (iii) the height of the existing premises not to be increased, (iv) garden and grounds to be reasonably maintained, (v) no building within 100 feet of property in an abutting road, (vi) no flats (other than the conversion of the premises), (vii) no trees to be felled or lopped except for safety grounds or the erection of such dwellings as were permitted (by the deed of mutual covenants dated January 1853), which conditions will run with the land and be binding on any sale.

In \textit{Re Frost's Application (freeholder) and Brand Estates Limited's Application (purchaser)}\textsuperscript{25}, a joint application already referred to above, the Arbitrator's Order included \textit{inter alia} conditions that 'trees and timber-like trees on [two plots of land indicated on the plan] are not to be felled unless...dangerous...the intention of the applicants being to convey these two plots...to the Epsom UDC to be preserved as a screen...'; houses are to be restricted to use as private dwellings only; garages for occupiers private motor cars only to be restricted to the occupiers of the house erected on the same or adjoining plot; no outbuilding is to exceed nine feet in height; fences in front of the building line are not to exceed 3ft. 6ins.; no timber or timber-like trees except as necessary for the development (or dangerous) are to be felled; and 'the large copper beech at the junction of Grafton Road and Cromwell Road is to be preserved'.\textsuperscript{26}

Subsequent cases contain further examples of detailed 'planning conditions' imposed by the Official Arbitrator in his Order but these two examples should suffice to indicate how the Arbitrator was emulating the role of the local planning authority and the comprehensive range of detailed conditions of a 'planning' nature he was attaching to his decisions.\textsuperscript{27} Apart from the fact that some of these conditions were of a 'positive' nature, as for example the requirement for fencing and the condition regarding maintenance of the garden and grounds, it is questionable as to whether strictly under the provisions of the Act he was entitled to add conditions at all.

\textbf{(10) Some Observations on Powers, Procedure & Interpretation}

The interpretation of section 84(1) and its intended effect were the subject of rulings by the Official Arbitrator and submissions or observations by both applicants and objectors. In no small measure, due to the innovative nature of the modification (discharge) procedure, they represent a disparate miscellany of issues (difficult to co-relate) but nevertheless illustrating the diversity of problems arising within the Official Arbitrator's kingdom. Before attempting to draw interim conclusions as to the way in which section 84(1) was being interpreted it is instructive to examine these briefly, dealing first with the rulings of the Official Arbitrator.

In \textit{Re Higgs, Murrell & Wooding's Application}\textsuperscript{28} the Arbitrator (apparently for the first time) ruled that 'unless an objector was entitled to the benefit of the covenant he could not seek

\textsuperscript{24} (1929) 114 EG 600 & 777.
\textsuperscript{25} (1934) 123 EG 306.
\textsuperscript{26} Probably the first example of a 'Tree Preservation Order'.
\textsuperscript{27} Hart's, \textit{Introduction to the Law of Local Government Administration}, 9th edition, at p.549 points out that town planning legislation 'confers on local authorities powers which are derived from the practice of landowners': a clear reference to the practice of control over land use exercised through estate management by way of covenants in leases and, more particularly, restrictive covenants. At this stage in the operation of section 84(1) of the Law of Property Act, 1925 it would not perhaps be unfair to suggest that 'the Official Arbitrator is attempting to impose on landowners decisions which are derived from the practice of local planning authorities'.
\textsuperscript{28} (1928) 112 EG 24 & 666.
compensation’ but that ‘one might object as a matter of public policy’. From this case onwards
the Arbitrator draws a clear distinction between those objectors who are entitled to the benefit
and those objecting ‘as a matter of public policy’ to the harm that modification of the restrictive
covenant will do to their properties.

The issue of compensation, together with that of costs, was the subject of a
memorandum of procedure produced by the Official Arbitrators for the special benefit of
members of the Chartered Surveyors’ Institution (as it then was) and published in the
Institution’s Journal.

First, the Official Arbitrators confirmed that they act on the assumption that an objector
is not entitled to compensation unless he is legally entitled to the benefit of the restriction, thus
acknowledging the ‘rule’ that they had adopted at least since ‘Higgs’ case in 1928, and that
when compensation is ‘awarded’ the Order only becomes Operative after an endorsement by
the Official Arbitrator certifying that all compensation has been paid.

Secondly, the Official Arbitrators considered that they had no power to deal with costs
as...’Under Section 84 the Official Arbitrator makes an ‘Order’, which cannot be regarded as an
Award; consequently they are of the opinion that the Arbitration Act, which empowers an
Arbitrator to deal with costs, does not apply’. This omission was soon there-after to be
remedied by the Administration of Justice Act, 1932, s.6 which gave the ‘Authority’ (the Official
Arbitrators) wide powers, exercisable in its discretion, to deal with costs, including the ability
to ‘direct by whom and to whom and in what manner the costs...are to be paid’.

In Re Crampton’s Application the Arbitrator discharged a restrictive covenant except for
a condition re ‘noise, etc.’, specifically stipulating (almost certainly in excess of his jurisdiction)
that such condition should ‘run with the land and be binding on the aforesaid land and
premises into whosoever’s possession the same may come’.

In Re Bremner’s Application, where the London County Council objected to a relaxation
of a restrictive covenant ‘unless sufficient land was given up for widening the road [Bacon
Lane] to a width of 40 feet’, the Arbitrator modified the restrictive covenant to permit the use
applied for subject to ‘reserving (and permitting) land for widening of Bacon Lane’. By what
authority the Official Arbitrator used a hearing under section 84(1) to reserve land for a
highway authority is not clear, other than a general proposition that he felt he should not
modify a restrictive covenant in such a way as to impede the use of land for a ‘public purpose’.

In a number of cases (the most significant of which are here considered) submissions or
observations of applicants or objectors led to fresh light, or at the least a gloss, on interpretation
and procedure.

29 Where there is doubt as to the legal entitlement of an objector to the benefit of the restrictive covenant the Official Arbitrator
will, where his Order is made subject to the payment of compensation, make such compensation subject to the objector being
legally entitled to the benefit of the restrictive covenant, thus avoiding an adjournment of the hearing whilst the point is being
decided by the High Court.
Arbitrators.
31 (1928) 112 EG 24 & 235.
32 (1928) 112 EG 630 & 771.
In Re Gaslight & Coke Company's Application the objector submitted that 'The Act never meant that [development by a busy and active corporation] could be done at the expense of a small man who had observed the stipulations himself'. Nevertheless, the Arbitrator proceeded to modify the restrictive covenant to permit showrooms and stores on land subject to a restrictive covenant limiting use to that of a private dwelling house only.

In Re Evershed & Vignoles Limited's Application, in refuting the objection that discharge of the covenant would tend to force down rents and depreciate property by 'diminishing light and air', Counsel for the applicant suggested that these rights could be upheld by the common law, as most of the houses had been erected more than 20 years and 'even if the Arbitrator released the restriction they would still have their common law rights to light and air'. This submission was not an issue in the Arbitrator's Order as there were sufficient grounds, based on change in character and impediment to reasonable user apart from the fact that 'persons entitled to benefit had agreed by implication by their acts and omissions to the restrictive covenant being discharged', to justify modification.

In Re Parkes' Application the Arbitrator, having reminded the hearing that he had laid down the rule that an objector could not receive compensation unless entitled to the benefit, heard submissions to the effect that the Law of Property Act, 1925, section 84 (1) provided for compensation to 'any person suffering loss in consequence of the Order'. The case was adjourned pending consideration whether the point of law should be raised in the High Court but apparently it never was and, following his ruling in 1928, the Official Arbitrator never 'awarded' compensation to persons other than those legally entitled to the benefit.

In Re Trustees of William Earp's Application some interesting light is thrown on how one of the large estates viewed the importance of the restrictive covenant. Land at Eastbourne (part of the Chatsworth Estate) had been in the possession of the Dukes of Devonshire since the 18th century who had 'done their best to avoid haphazard and speculative development. They felt strongly their moral obligation to the freeholders to whom they sold and they were seeking to enforce covenants which were for the benefit of those freeholders'. The substance of the application was not simply a removal of a restriction but 'the removal of the consent of the Chatsworth Estate'. Removal would affect the Duke's successors in 'the control and development of the whole of the estate...it would injure persons who were entitled to benefit from the amenities and good management...'. Having heard from the Eastbourne Corporation that they had no objection except to buildings on the gardens 'likely to spoil the present fine view' the Arbitrator by order made a modest modification subject to stringent conditions and the submission of plans to the Chatsworth Estate for approval.

33 (1927) 109 EG 842 & 110 EG 160.
34 Apparently section 84(1) (c) was not considered; neither apparently was the maxim that 'Equality is Equity'.
35 (1928) 111 EG 784 & 112 EG 24.
36 This case does, however, raise the question as to whether a restrictive covenant which does no more than confer rights which are already, or have through the passage of time become, available at common law, is thereby to be deemed obsolete on the sole ground that the restriction is superfluous?
37 (1929) 113 EG 219.
38 In Re Higgs, Murrell & Wooding's Application (1928) 112 EG 24 & 666.
39 (1930) 116 EG 492 & 582; (1931) 117 EG 12.
40 Contrast this with subsequent cases where the Arbitrator consistently discharged any obligation to obtain the vendor's approval to plans.
In Re Mortimer's Application\textsuperscript{41} the modification of a restrictive covenant so as to permit housing development at a higher density was objected to by the Wytham Estate on the grounds that the development would be prominent 'from the southern slope of Wytham Woods' and the loss of 'views' would adversely affect property values. Complementing the line taken in the 'Chatsworth Estate' case (above) the owner of Wytham Estate emphasised the important 'environment' role of the restrictive covenant:...I suggest that there are important questions of principle entailed, not only questions that affect the people who are next door, or even those in sight of it, the question goes a good deal beyond that. What we should regard are not only the interests of private individuals, but the interests of the public'. This statement and that in the 'Chatsworth Estate' case give credence to the view that the large estate owners saw the restrictive covenant (amongst other management tools) as a means of achieving that to which in due course public planning control would aspire.

In Re Fulford's Application\textsuperscript{42} the objector submitted that the Arbitrator could not modify a restrictive covenant unless he was satisfied that it 'did not secure practical benefit to other persons...even if the covenant sterilised the land...' and that as the restrictive covenant was of practical benefit to owners in the immediate neighbourhood he could not modify it. The Arbitrator's Order provided for a modest compromise modification, with apparently no response to the submission that he had no power to modify in the particular circumstances of the case.

In Re Hayward's (Brighton) Limited's Application\textsuperscript{43} the impact of the local planning authority's proposals on the Arbitrator's decision were such as to question whether the original intent of section 84(1) had not been lost and that it was being used to further local planning authority ambitions. The application was to discharge or modify a restrictive covenant in order to permit the erection of a motor garage and showrooms, shops with flats or offices over and a block of flats or offices with shops on the ground floor. The objectors claimed that there was no need for more shops (Worthing had reached 'saturation point') and a garage would be 'noisy' and a nuisance from vehicles. The application was supported by the Worthing Corporation (there being little evidence from the applicant himself) on the ground of need (the police were of the view that 'there was a need for a central garage in the centre of Worthing to accommodate not fewer than 5000 cars') and the Council were of the opinion that the proposed scheme would be an improvement from the 'point of view of appearance, traffic conditions and general amenities of the district'. Counsel for the applicant submitted that as the objectors had produced no evidence to say the scheme was not wanted and that all they had claimed was compensation, in consequence the application must be considered as uncontested. The Arbitrator's Order modified the restrictions to permit the uses and development as specified in the application in accordance with plans approved by the Housing & Town Planning Committee of Worthing Corporation, subject to conditions. Thus, ten years after its introduction, section 84(1) of the Law of Property Act, 1925 is quite blatantly being used to achieve local planning objectives and doing so expressly, or at least effectively, on planning grounds.

Following this analysis of some 60 cases heard by the Official Arbitrator over the first ten years some interim conclusions may be drawn.

\textsuperscript{41} (1933) 122 EG 973.
\textsuperscript{42} (1934) 123 EG 436.
\textsuperscript{43} (1935) 126 EG 325.
Interim Conclusions (1926-1935)

These conclusions have to be seen against the criteria that are required to be satisfied by section 84(1), which in summary are: (i) by reason of changes in the character of the property or the neighbourhood the restriction ought to be deemed obsolete, or (ii) continued existence of the restriction would impede the reasonable user of the land without securing practical benefits to other persons, or (iii) the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.

On a strict interpretation, if changes in character of the property or neighbourhood are such as to render the restriction obsolete then it has no value and no compensation should follow. However in many cases the Official Arbitrator, seeking a compromise, appears to decide in favour of a modification subject to the payment of compensation, on the grounds presumably of partial obsolescence. This attitude encouraged objectors to claim compensation rather than retention of the benefit of the right, but the object of the Act was to modify or discharge obsolete restrictive covenants, not to facilitate the buying-out (compulsorily) of property interests.

Similarly, the criteria in respect of impeding reasonable user came to be interpreted as impeding a more profitable user and restrictions were modified, with or without compensation, to permit the more profitable even though the less profitable might still have been achieved over time.

The criteria relating to the concept that ‘the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction’ if, construed in its strict sense, would have at least called in question a number of the Arbitrator’s decisions. Section 84(1) (c) appears not to have been much used which must be a matter of comment as where a person is so entitled and can substantiate benefit, that must be a surer defence than contesting matters of opinion relating to changes in character or impediment to reasonable user. Applicants, as noted, tended to proceed under s. 84(1) (a) and, having made their case under one or the other ‘limb’ of that section, objectors seemingly were either unable to raise (or discouraged from raising) a defence based on s. 84(1) (c).

Finally, it must be concluded at this stage in its operation that section 84(1) is being used to bolster planning schemes and decisions on the one hand and to buy out property rights on the other, both being objectives outside its purpose and intent. An examination of cases over the remaining years until the powers of the Official Arbitrator are transferred to the Lands Tribunal will show whether these approaches are sustained or reversed.
The Orders of the Official Arbitrator, 1936-1949

A further 33 cases covering the second period (1936-1949), as reported in the Estates Gazette, have been analysed in similar manner to that adopted for the 60 cases in the first period (1926-1935). Using the convention previously adopted they are identified by the name of the applicant and the Estates Gazette reference, followed by a brief description of the discharge or modification sought. Cases cited in the text are identified by an asterisk.

Cases consulted:

- Blake & Leake (1936) 127 EG 726 ............................. Houses, with no development on backland, to Blocks of flats and houses over the whole area
- Bennett, Worskett & Bennett (1936) 127 EG 818 ................. Discharge restriction prohibiting use of strip of land as a ‘pathway’ access
- Collins (1936) 127 EG 884 ...................................... Houses to School, hotel, club, nursing home or flats
- * Jarman & Jarman (1936) 128 EG 918 ............................ Increase housing density
- * Wavertree Green (1936) 128 EG 1044 .............................. Discharge restriction prohibiting all structures to permit Cinema & flats
- Reuben & Touchan (1938) 131 EG 31 .............................. House to Block of flats
- * Price (1938) 131 EG 31 ............................................. Discharge restriction limiting development to houses
- * Croydon & South London Building Co. Ltd. (1938) 131 EG 593 ................ Increase housing density
- * Ramuz (1938) 131 EG 778 .......................................... House to Block of flats
- Hinsley, O'Grady & Others (1938) 131 EG 958 .................... House to Residential hostel for boys
- * Stanford (1938) 132 EG 854 ........................................ Modify Building line
- * Countess de Cardi & Others (1939) 133 EG 31 .............................. Houses to Flats & garages
- * British & Dominions Film Corporation Ltd. (1939) 133 EG 571 ........................... Film studio to Houses, shops, business premises and factories
- * Samuel, Abraham & Mackover (1939) 133EG 1076 ............. House to Hostel for mothers and babies
- * Robertson (1939) 134 EG 1076 ...................................... House to School, flats, club, hospital etc.
- * Knight & Co. Ltd. (1939) 133 EG 1125 ................................ House to Club, school, offices or flats
- * Salt (1939) 134 EG 325 .............................................. Open space to Theatre, hall, car park & bowling green
- Gates (1939) 134 EG 628 ............................................. Increase housing density
- * Porn (1939) 134 EG 866 .............................................. House to self-contained flats
- Victoria Hall Trustees (1940) 135 EG 258 .............................. Residential to Hall & Institute
- Corner & the Earl Spencer (1940) 135 EG 530 ............................. Houses & ‘smallholdings’ to Shops & Public Buildings
- * Tilley & Trenor & Ashton & Jones (1940) 136 EG 224 ............... Houses to Shops with flats over
- * Corden (1941) 138 EG 545 ............................................... Residential to Monumental Mason’s showroom
- * Wilson (1943) 141 EG 498 .............................................. Residential to Film Studios
- Simonds Ltd. & Bennett & Kersley (1944) 144EG 65 ...................... House to Public House
- Thornbank Ltd. & Liverpool Victoria Friendly Society (1945) 144 EG 182 ........................... School to Convalescent Home for women
- West Ham Corporation (1946) 147 EG 538 .............................. House to Holiday Home for old people
- Lang (1946) 148 EG 555 ............................................... Modify restriction prohibiting factory to permit light engineering workshop
- Bell (1947) 149 EG 404 ................................................................. Houses to flats
- Curton Ltd. (1948) 152 EG 75 & 111 & 130 ............................. Houses to Flats, Nursing Home & School
- * Baker & Co. Ltd. (1948) 152 EG 494 ................................. Houses to Offices & ‘approach road’
- * Ramsden & Son Ltd. (1949) 153 EG 443 ............................... Discharge restriction prohibiting any ‘noisy or noxious’ trade, business or process
- * Coles (1950) 155 EG 149 ....................................................... Houses to furnished or unfurnished flats
Consideration of these cases reported in the later period confirms the trend (with one or two notable exceptions) already discerned. In order to put any differences in context, the order of analysis adopted for the first period is here reproduced, dealing summarily with those issues where little change took place and extensively where the 'section 84 regime' was changing in both concept and practical effect. The two main influences were first the developing law of Town & Country Planning and second the burgeoning social and environmental aspirations (social welfare, full employment, good housing and a pleasant healthy environment) formulated in the late 1930's and published in the early 1940's in various Official Reports (Beveridge\(^1\), Barlow\(^2\), Scott\(^3\) and Uthwatt\(^4\)). This 'Brave New World', epitomised in the programme for post-war reconstruction, naturally only started to influence the nature and content of evidence presented to the Official Arbitrator towards the very end of the period now under review and will feature more prominently when consideration is given to the cases considered by the Lands Tribunal, post 1949.

The influence of the developing Town & Country Planning legislation is however to be seen throughout the whole of the period during which cases under section 84 were dealt with by the Official Arbitrator. It has already been noted that by 1935 reference to the 'planning position' appeared regularly in evidence at the Arbitration Hearings and became an element which 'influenced' the Arbitrator in his decisions. This influence assumes increasing importance during the period 1936-1949 and a brief reference to the statutory provisions in force and brought into operation during that period is necessary for a full understanding of the background against which section 84 applications were being determined.

The Town Planning Act, 1925 (operative from 1 July 1925) pre-dated by six months the coming into operation of section 84 of the Law of Property Act, 1925. Although enacted in the same year as the six Statutes collectively referred to as 'the Property Statutes of 1925' the Town Planning Act of that year, which laid the foundations for the comprehensive Town Planning legislation of today, passed almost unnoticed. Had it been foreseen in 1925 how this modest piece of legislation (a Town & Country Planning Act containing only 21 sections) would lead to a Town & Country Planning regime with far-reaching implications for the property lawyer it might well have been included as one of 'the Property Statutes' of that year.

Under the Town Planning Act, 1925 a Town Planning Scheme could be made for 'any land in course of development or which appears likely to be used for building purposes' with the object of securing 'proper sanitary conditions, amenity and convenience' (section 1). It was the duty of every Borough or Urban District with a population exceeding 20,000 (at 1921 census) to prepare a Scheme and submit it to the Minister of Health by 1 January 1929 (section 3). The Act also provided for the compulsory purchase of land comprised in Schemes (section 8) and compensation for property injuriously affected (section 10) and a Schedule to the Act listed the matters which could be dealt with in the Town Planning Scheme.

These provisions were extended by the Town & Country Planning Act, 1932 which provided for the making of a Scheme for 'any land (built on or not)' with the object of 'controlling development, securing proper sanitary conditions, amenity and convenience and

\(^1\) Report on Social Insurance & Allied Services, 1942.
\(^3\) Report of the Committee on Land Utilisation in Rural Areas, Cmd. 6378, 1942.
preserving buildings of architectural, historic or artistic interest and places of natural interest or beauty and generally protecting amenities’ (section 1). The duty of preparing Schemes was placed in the hands of County Councils and County Borough Councils who were empowered to form Joint Committees of two or more authoriries to prepare Schemes (section 2). A Schedule to the Act listed the matters to be dealt with, supplementing to a modest degree the matters listed in the comparable Schedule to the 1925 Act.

Apart from placing the duty on County Councils and County Borough Councils, the main changes made by the 1932 Act were to make the control of development universal throughout the whole of the area covered by a Scheme and to extend the remit of that control to cover the built and natural heritage.

The 1932 Act formed the main body of the law relating to Town & Country Planning until the Town & Country Planning Act, 1947. There were however other Acts concerning ‘town planning' related issues during this period and brief reference must be made to them. The Restriction of Ribbon Development Act, 1935 contained powers restricting development along the frontages of highways and powers restricting access to highways - such powers being exercisable by the Government Department responsible for Transport. The Housing Act, 1936, dealing with the development of land subject to Clearance Orders and to land in Redevelopment Areas, whilst providing that regard be had to any Planning Schemes relating to land, placed the control of the development of that land in the hands of the Government Department responsible for Housing.

The powers of the Government Department responsible for Planning were those contained in the 1932 Act as supplemented by the Town & Country Planning (Interim Development) Act, 1943, which brought all land in England and Wales under planning control and dealt with control during the period before a Scheme became operative, and the Town & Country Planning Act, 1944, the main purpose of which being to empower Local Authorities to purchase land so as to enable it to be properly planned under the Town & Country Planning Act, 1932.\(^5\)

It is against the background of the ‘Town Planning' law operating during this period that the arbitration cases (1936-1949) are analysed. For the sake of comparison the headings are as for those adopted for the earlier period (1926-1935) but commentary thereon is restricted to those matters where there are noticeable changes from the pattern and trends exhibited in the earlier period. Thus in respect of the following matters (with the exception of the issue of ‘Public Need') the arbitration cases in the later period require no further comment:

1. The Arbitrator’s Order
2. The Location of Land Subject to the Restrictive Covenant
3. The Date of Origin of the Restrictive Covenant
4. The Number of Objectors, their Status and the issue of ‘Public Need’
5. The Main Relaxation or Modification Sought
6. The Main Grounds of the Application
7. The Objector’s Main Grounds and Concerns

\(^5\) Town planning issues at this time came under three separate Government Departments and three separate Ministers. Despite criticism in the Scott Report of the confusion and conflict caused by this division, the fragmentation still exists some 50 years later with responsibility shared between three Departments of State - Environment, National Heritage and Transport.
Commentary on the Official Arbitrator’s Decisions (1936-1949) is concentrated and subsumed under the three remaining headings:

(8) The Influence of Town Planning Schemes and Planning Authority Decisions, including planning policies (hereinafter referred to as ‘Town Planning Issues’)

(9) Conditions Imposed by the Arbitrator’s Order, including in particular matters relating to the environment and amenity (hereinafter referred to as ‘Environment Issues’)

(10) Some Observations on Powers, Procedure & Interpretation, including legal submissions and points of legal interest and the introduction of new matter and new interpretation (hereinafter referred to as ‘Legal and Administrative Issues’)

**Town Planning Issues**

The decisions of the Official Arbitrator during this later period start to exhibit the attitude which was later to be adopted by the Lands Tribunal, namely that whilst Town Planning Schemes and Planning Authority Decisions and Policies may be relevant to the Hearing, there is no obligation on the Arbitrator to follow them in his decision. The inconsistency of the Arbitrator in this area is well illustrated in four cases determined in this period.

In *Re Jarman & Jarman’s Application* an application to modify a restrictive covenant (dating from 1865) limiting development to one detached or one pair of semi-detached houses on a plot of about half an acre, so as to permit the erection of not less than three private dwellings was dismissed by the Arbitrator’s Order. The objectors submitted that no property on the estate (which had altered little in the last 30 years) had such small gardens (38 feet) as proposed and no property so small a site area as one-sixth of an acre. Evidence that the Town Planning Scheme (in course of preparation) zoned the land at 8 houses per acre apparently had no influence on the Arbitrator who by his dismissal of the application confirmed development at a maximum density of four houses per acre.

**Contra,** in *Re Countess de Cardi and Other’s Application* an application to modify a restrictive covenant (entered into as recently as 1920) limiting use to private residences only, so as to permit the erection of flats and garages on the grounds that it would be uneconomic to modernise or to rebuild houses, was allowed, despite objection that there had been no physical change in the character of the area, that it would be possible to develop the site with a cul-de-sac and say 20 houses, and that flats would depreciate property values. The Town Planning Assistant to Ealing Borough having given evidence that plans for a three storey block of flats with garages had been approved under ‘Town Planning and the Restriction of Ribbon Development Act,’ the Arbitrator issued an Order modifying the restrictive covenant to permit flats (maximum three storeys) subject to conditions re siting, screening, elevational treatment and tree preservation and awarding compensation to three adjoining owners provided they were legally entitled to the benefit of the restrictive covenant. That the restrictive covenant was still of value was acknowledged by the Arbitrator in his award of compensation but the Planning Authority’s approval of plans and the applicant’s submission that houses would be uneconomic appear on the face of it to have carried more weight than an absence of physical change in the character of the area or evidence that the continuance of a restrictive covenant (entered into as recently as 1920) was impeding reasonable user.

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6 They were considerations but not in modern parlance in the nature of ‘material considerations’ in that they could be ignored with impunity and departed from without reason.

7 (1936) 128 EG 918.

8 (1939) 133 EG 31.
In *Re Pom's Application* the Official Arbitrator appears not to have been impressed by evidence of the Hampstead Borough Council. The case involved an application to modify a restrictive covenant (in a lease of 96 years from 1884, i.e. 55 years expired, 41 years to run), so as to permit the conversion of a dwelling house on land at Strathray Gardens, Hampstead (part of Eton College Estate) to four self-contained flats. The applicant’s grounds included, *inter alia*, changes in the character of the neighbourhood; no demand for (large) houses for private occupation, and that the amenities of the area would not be affected by granting the application as ‘people who lived in flats were not necessarily of a different class from those who occupied houses - the question was one of the class of accommodation provided’. The objectors feared that the conversion would ‘create a precedent’ and Hampstead Borough Council considered that in planning policy terms ‘Strathray Gardens was not the type of road in which a house should be permitted to be converted into four flats’. Nevertheless the Arbitrator’s Order modified the restrictive covenant to permit the conversion into four self-contained flats (subject to 15 conditions and the approval of plans by the lessors).

A post 1939-45 war case illustrates even more dramatically the Arbitrator’s independence of planning considerations. In *Re West Ham Corporation’s Application*, upon an application to modify a restrictive covenant (1893) on a private dwelling house to permit its use as a holiday home for old people from West Ham Social Services Institution, the Arbitrator by his Order modified the restrictive covenant to permit the use of the dwelling house as a holiday home for a maximum of 15 elderly people from West Ham Social Services, despite the evidence of an unsuccessful appeal (in 1945) against the refusal by Southend Corporation (within whose planning jurisdiction the property lay) to allow the dwelling house to be so used.

Three cases from the year 1939 illustrate the degree of reliance being placed by applicants, objectors and the Arbitrator on Town Planning criteria and proposals.

*Re Samuel, Abraham & Mackover’s Application* concerned an application to discharge or modify a restrictive covenant (dating from 1844) limiting development and use to that of a private residence, in order to permit use as a hostel for mothers and babies requiring medical treatment (or for some other use, including flats, hotel or guest house). The premises were required as an adjunct to the Royal Free Hospital, the London County Council as Town Planning Authority having approved plans and the proposed use. Changes in the neighbourhood had been confined to multiple occupation and the objectors, whilst agreeing to conversion to flats objected strongly to a hostel in a quiet residential area. The Arbitrator’s Order modified the restrictive covenant to permit conversion of the existing building into self-contained flats or the erection of a number of private residences not exceeding the number permitted by the Town Planning Authority. Thus, whilst rejecting the Town Planning Authority's approval regarding use he nevertheless made his Order subject to a condition requiring the approval of the Town Planning Authority.

In *Re Robertson’s Application* the proposal was to modify a restrictive covenant (dating from 1855, as modified in 1925) permitting ‘taking in paying guests’ in a private dwelling

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9 (1939) 134 EG 866.
10 (1946) 147 EG 538.
11 (1939) 133 EG 1076.
12 (1939) 133 EG 1076.
house, to allow (by further modification) use as ‘school, flats, flatlets, residential or bridge club, boarding house, guest house (transient), nursing home, hospital, learned or artistic professional use, offices or business premises, but not a home or hospital for contagious diseases or persons of unsound mind, nor shops, nor trade or business of a noisy or offensive nature’. The objector would agree to flats, residential or bridge club, boarding house or learned or artistic professional use but objected to all the other uses; on the other hand the Planning Authority (Hampstead Borough Council) objected only to the flatlets, bridge club, offices and business premises. By his Order the Arbitrator modified the restrictive covenant to permit the conversion or adaptation to self-contained flats, residential club (supervised), boarding house (supervised), artistic or learned professional use or private school (up to 14 years of age), subject to preserving the present elevational treatment. In this case the criteria in section 84(1) appear (at least as reported) not to have been raised either in the application or in the case for the objector. The only ground stated for the applicant was the impossibility of selling the property as a private house. Of the comprehensive list of uses featuring in the application, the Arbitrator appears to have accepted the range endorsed by the Hampstead Borough Council as Planning Authority in preference to the rather more limited range agreeable to the objector.

In Re Gates’ Application the Applicant sought to modify a restrictive covenant (dating from 1929) limiting development to one dwelling per plot to allow development (of apparently smaller plots and therefore more dwellings) such as would be permitted or required by the local Town Planning Scheme and the Town Planning and other Local Authorities. In other words the form of this application is clearly to equate the restrictive covenant as modified with the town planning requirement. A considerable opposition (some 70 objectors) contended that ‘...the purchasers of adjoining lots had to rely as much, if not more, on the restrictions as to value as on town planning. Even in areas zoned 6 houses to the acre, development of an unfortunate nature could occur’. The Arbitrator’s Order, whilst permitting some reduction in the ‘prime costs’ of houses, the relaxation of building lines and the distance of building from plot boundaries, nevertheless refused any modification which would have increased density, regardless as to whether or not it be permitted or required by the local planning and other authorities.

One final example from this period illustrates the almost reverential attitude to the omnipotence of planning that prevailed in the immediate post-war situation. Re Long’s Application concerned an application to modify a restrictive covenant (dating from 1844) ‘that the land should not be used as a cemetery, burial ground or tarpit, nor should there be erected and built on the land ...any Union house, workhouse, nunnery, factory, steam engine house or gasometer, nor should there ...be carried on any noisy, noisome or offensive trade or business’, so as to permit a light engineering workshop. The application had the support of the Ministry of Works for a licence to erect a factory and the support of the Urban District Council that in its Town Planning Scheme (operative from 1937) the land was in an area zoned for industrial or general business purposes. The objector’s main concern was that the 13 feet high factory wall at the bottom of his garden would interfere with light, air, sun and view. The Arbitrator modified the restrictive covenant by excluding the word ‘factory’ (thus enabling the erection of a light engineering workshop) and substituting for ‘noisy, noisome or offensive trade or business’ words securing the exclusion of ‘processes, industries, businesses or trades’ in Clauses (i), (ii) and (iii) of the Third Schedule to the Friern Barnet Planning Scheme No. 1 and subject to no

13 (1939) 134 EG 628.
14 (1946) 148 EG 555.
building exceeding 14 feet in height. Apart from ignoring the objector's concern about the height of the building, the Arbitrator inextricably linked the modification of the restrictive covenant to the specific wording of a Town Planning Scheme.  

**Environment Issues**

The protection of the environment appears, from the facts as reported in the Estates Gazette, to have been the overriding issue in the mind of the Official Arbitrator in the 'Wavertree Green' Application. Land at Wavertree Green, Liverpool, had 'since the reign of George III' been subject to restrictions prohibiting 'the erection of buildings or walls, fences or other structures more than 4½ feet high'. The modification sought was to permit the erection of a cinema and 8 blocks of flats on 6 acres of the Green at present used for sports purposes. It was submitted on behalf of the Applicant that the Act of George III (under which the restrictions were imposed) was a private Act passed to control the rights between the Lord of the Manor of Wavertree and the Copyholders of the Manor and '...the section of the Act lays down specifically that it is to be enforced by the Copyholders [who] ceased to exist in 1925'. This being so (it was argued) none of the 61 objectors was entitled to enforce the restrictions. After hearing evidence from the Applicant that the changed character of the neighbourhood had rendered the restrictions obsolete and that their continuance would impede reasonable user of the land (and that the plans for the cinema had been passed by the local authority), the Arbitrator (without apparently hearing any evidence on behalf of the objectors) adjourned the proceedings pending submission of full details of the buildings proposed (and the rentals of the flats), commenting that in applications of this kind 'great care had to be taken with regard to the protection of the neighbourhood'. Whilst the final outcome of this case is not reported, the observations of the Official Arbitrator are significant in that this case dating from 1936 appears to be the first instance in which the 'environment issue' is significant.

In *Re Croydon & South London Building Co. Ltd's Application* the Official Arbitrator dismissed an application to modify a restrictive covenant (dating from 1874) for a modest increase from a permitted development of 50 houses to permit a further three on land not yet built on, in spite of evidence to the fact that the resulting density of 10 houses per acre on the applicant's part of the site had the approval of the local Town Planning Committee. Submissions were made on behalf of the objectors that removal of the restrictions would 'lead to further undesirable development of a speculative nature' and that retention of the unbuilt on land 'as an open space would contribute substantially to the health of the people in the immediate district'.

The preservation of a 'class' structure and standards had throughout been a prominent feature in restrictive covenants, especially those restricting development to private houses where restrictions laid down maximum density (often as low as one or two houses per acre)
and minimum prime building costs. Reference is repeatedly made to 'high-class residential areas' and *Re Hinsley, O'Grady and Others Application* illustrates the problem of siting 'socially impaired' groups in residential areas. In an application to modify a restrictive covenant limiting development to private houses in order to permit premises to be used as a residential hostel for men and boys it was submitted that 40 boys (15 - 18 years) would live on the premises under the supervision of four priests. They were 'perfectly respectable boys, of elementary school type' employed in the district and 'no less respectable citizens than the people residing in [neighbouring houses in the same road] though they would perhaps be from a slightly lower class in the social estate'. In spite of changes in the neighbourhood (multiple occupation and a number of nursing homes and schools) the objectors (a large number) contended that the area remained 'high class residential' and that its character was retained because of the covenants. The applicants 'had the whole of the suburbs to choose from and it seemed very unfortunate that they should have selected a site in the heart of a good residential estate'. In an Order recognising 'social need' covertly and 'residential respectability' overtly, the Arbitrator modified the restrictive covenant to permit the use of the dwelling house as a hostel for working men and boys subject to conditions, *inter alia*, that no person charged with a criminal offence (other than under the Road Traffic Act) be admitted and nothing done to destroy the character of the premises as a private dwelling.

During this period an increasing number of the Arbitrator's decisions contained conditions relating to noise, materials, elevational treatment and rights of light, air and privacy. Brief reference to a few of the cases illustrates not only the range of issues but the increasing importance being given to them by the Official Arbitrator. In *Re British & Dominions Film Corporation Limited's Application* the Arbitrator modified a restrictive covenant limiting land to the use of the Elstree Studios in connection with their business of producing cinematographic films, so as to permit the erection of 'light industry' factories subject to, *inter alia*, 'a 200 ft cordon sanitaire in which development shall not emit noise exceeding 65 phons'.

In *Re Robertson's Application* the Arbitrator's Order, in permitting conversion of a dwelling house to flats, residential club, boarding house or private school made such modification subject to 'preserving the present elevational treatment'. In *Re Corden's Application* his Order was made subject, *inter alia*, to the use of 'appropriate brickwork' and maintenance of the verge alongside the public footway and again, in *Re Thornbank Ltd & Liverpool Victoria Friendly Society's Application* his Order to permit a building (at present used for scholastic purposes) to be used as a convalescent home for women, was made subject to 'no material alteration to the layout of the front and any further building to conform with elevation and appearance of existing buildings'.

In those cases where the modification of a restrictive covenant resulted in a conflict between meeting 'public need' on the one hand and preserving 'amenity' on the other, environmental considerations appear to have carried less weight in influencing decisions of the Official Arbitrator than in those cases where the applicant and the 'beneficiary' were both private individuals.

20 (1938) 131 EG 958.
21 (1939) 133 EG 571.
22 A restriction prohibiting the acquisition of any rights of light or air was discharged by the Arbitrator's Order, subject to the right to take steps to prevent the acquisition of such rights.
23 (1939) 133 EG 1076.
24 (1941) 138 EG 545.
25 (1945) 145 EG 182.
Re Salt's Application\textsuperscript{26} was for the modification of restrictive covenants (dating from 1824, 1831 and 1870) banning all building operations, i.e. to keep the land described as The Dell, Warwick Terrace, Leamington Spa and comprising some 4860 sq yds as an open space properly fenced - shades of \textit{Tulk v Moxhay} - so as to permit the erection of a theatre, assembly hall, underground car park and a four-rink indoor bowling green (or otherwise as the Arbitrator deemed just). Considerable changes in the character of the area had taken place in the last 100 years and an area once entirely residential now included flats, a factory, shops and (proposed) a police and fire station. There was a need for the theatre and assembly hall and the 'underground garage might also have a useful ARP function'. Whilst agreeing that changes had taken place in the past 100 years the objects contended that the area was still a quiet, pleasant residential district, using such expressions as 'we came because there was an open space', 'we can look out on trees and see the sunset' and the development would involve 'the wanton destruction of an open space of a type which was growing all too rare in our towns'.

Following a submission on behalf of the applicant that 'the restrictions were so old that the objectors were no longer entitled to the benefit of them,' the Arbitrator by his Order modified the restrictive covenant to permit development as applied for, substantially in accordance with plans already submitted to the local authority for approval. Apparently it was not submitted that the objectors were not legally entitled to the benefit of the restrictive covenants but that by reason of the age of those covenants they 'were no longer entitled to the benefit of them' - a wholly untenable proposition. On the evidence of the objectors it is clear that the restrictive covenants were of benefit to the enjoyment of their properties, but nevertheless the Arbitrator quite inconsistently and, it is suggested, without legal foundation set aside the provisions of section 84(1) and substituted therefor the 'public good' as enshrined in the anticipated planning approval of the local authority, even though that approval had not yet been granted\textsuperscript{27}.

\textit{Legal and Administrative Issues}

A number of important legal and procedural issues arose during this period. By way of illustration, two early ones are noted - one involving a point of substance, and one of procedure. In Re Price's Application\textsuperscript{28} the Arbitrator (after inspection of the relevant deeds) ruled that the property of the sole objector was not part of the estate and therefore he was not legally entitled to the benefit; he proceeded to modify the restrictive covenant in accordance with the application. In Re Ramuz's Application\textsuperscript{29} he ruled that, as the application did not accord with that as advertised he could not proceed with the case and consequently terminated the proceedings.

Two attempts to use section 84 to achieve objectives outwith its remit were dismissed by the Official Arbitrator. In Re Stanford's Application\textsuperscript{30} application was made to modify a building line from 50 feet to 20 feet in order to 'enable the owner and the District Valuer to settle a dispute re the purchase price' of the land subject to the restriction. The Beckenham Borough

\begin{itemize}
  \item \textsuperscript{26} (1939) 134 EG 325.
  \item \textsuperscript{27} It would not be until after the war that the arbitration hearings would revert to a stricter application of the wording of the Statute, as demonstrated in the later cases coming before the Official Arbitrator and more particularly those under the aegis of the Lands Tribunal.
  \item \textsuperscript{28} (1938) 131 EG 31.
  \item \textsuperscript{29} (1938) 131 EG 778.
  \item \textsuperscript{30} (1938) 132 EG 854.
\end{itemize}
Council in pursuance of their powers in Clause 35 of their Planning Scheme (in operation since 1930) had made in 1937 an Order fixing a building line at 20 feet and, a Compulsory Purchase Order for the land having been confirmed, the only issue concerned the building line and its effect on the market value of the land. The parties chose to proceed under section 84(1) of the Law of Property Act, 1925 rather than by arbitration under the Acquisition of Land (Assessment of Compensation) Act, 1919 and submitted that this was 'perfectly in order'. The restrictions did not prevent the land being used for public purposes (the ultimate user of the land was not in dispute and the objectors could not enforce the restrictive covenants against the authority). The Official Arbitrator ruled that the proceedings were 'misconceived and not bona fide' and in all the circumstances dismissed the application as having no merit at all.31

In Re Cole’s Application 32 (the last report of a decision by the Official Arbitrator as recorded in the Estates Gazette), an application to modify a restrictive covenant (dating from 1881) limiting the use to a private dwelling house so as to permit its letting out as serviced or non-serviced furnished or unfurnished flats, was dismissed by the Official Arbitrator. Permission to use the premises as five non-self-contained flats had been given in an Interim Development Order in 1946 and it was contended that the existence of this planning permission (in principle the same as a permission under the 1947 Act) was proof of change in the character of the neighbourhood. The Objector (Cadogan Estate) submitted that ‘the real purpose of the application was to secure to [the applicant] the benefit of the Rent Restriction Acts’, his lease expiring in June 1952; that there was no evidence that the covenant was not of great value to the lessor and other tenants holding under similar terms, and that whilst the dwelling houses could be used as self-contained flats without detriment their letting as unfurnished apartments or non-self-contained flats would injure the estate.

Four cases show how, with varying degrees of success, section 84(1) was being used, as it were, to ‘remedy’ breaches of restrictive covenants and provide a clear title free from covenants the breach of which had been acquiesced in. In Re Tilley and Trenor’s Application and Ashton and Jones’ Application 33 joint applications were made to modify restrictive covenants to permit the erection of shops with flats over. Development by way of conversion to shops had been partly carried out but not in accord with the Arbitrator’s Order of 1938 which had provided for modification of the restrictive covenants. The reason for the application was to ‘have a clear title’ but following a submission by the objectors that the application could not properly be made under section 84(1) - the breach had already been committed and it was merely an attempt to put right the title - the Arbitrator dismissed both applications.

However, in Re Wilson’s Application 34 an application to permit properties to be used as film studios, they having been used as such for the last ten years in breach of a restrictive covenant, in spite of objection and evidence that the land was zoned as residential in the Town Planning Scheme, the Arbitrator proceeded to modify the restrictive covenant to permit the use of the premises as film studios in the terms of the application.

31 Presumably the parties saw the section 84(1) procedure as a means of settling independently the question of the relevant building line, be it 50', 20' or something in between. An Order of the Official Arbitrator would have provided an undisputed basis for the compulsory purchase valuation.
32 (1950) 155 EG 149.
33 (1940) 136 EG 224.
34 (1943) 141 EG 498.
Again in Re Simonds Ltd’s Application and Bennett & Kersley’s Application, a joint application to discharge restrictive covenants (dating from 1882) that no building on the land should be used for the sale of intoxicating liquors, on the grounds that the covenant had been breached since 1924 and no action taken and none likely after 20 years, the Arbitrator discharged the restrictive covenants in toto.

Similarly, in Re Ramsden & Son Ltd’s Application, an application to discharge a restrictive covenant (dating from 1853) against the carrying on of ‘any trade business process or deposit which shall be noisy noxious dangerous or offensive’ in order to permit the continuation of the use of the property as a factory and provide a clear title, resulted in the Arbitrator, by his Order, discharging the restrictive covenant in its entirety. The main concern of the objectors was that of noise. The development of the area was quite different from that which had been intended when the restrictive covenants had been imposed, there being much industrial development and the noise complained of emanated from factories other than that of the applicants who in respect of complaints regarding noise had carried out extensive remedial measures. It was further submitted on behalf of the applicants that the breach had been acquiesced in for many years and that having regard to what had happened in the area ‘the appropriate protection was that provided by common law and not by the covenants’. There being no enforceable right (presumably as a result of long acquiescence) there was no loss and therefore no liability to compensation.

Two cases decided in 1948 (at the very end of the period of the Official Arbitrator’s jurisdiction) are important in that they presage the changes that would take place when the applications for discharge or modification of restrictive covenants under section 84(1) would come under the Lands Tribunal. They exhibit a return to a full and proper consideration of the legal meaning of section 84(1) - even if at one stage a rather bizarre interpretation - and the introduction by the Official Arbitrator of the practice of giving reasons for his decisions.

Re Curton Ltd’s Application concerned an application to modify a restrictive covenant (dating from 1922) not to erect other than private houses, so as to permit, in addition, blocks of flats, a nursing home and/or a private school. The stated grounds in the application to modify were changes in the character of the neighbourhood and ‘other circumstances’. As the ‘other circumstances’ were not specified in the application, Counsel for the Objectors submitted that he would ‘object to evidence directed to anything but change in the character of the property or neighbourhood’: this submission was overruled by the Arbitrator who was ‘anxious to get any evidence’ he could. Regarding ‘changes in the character of the neighbourhood’, Counsel submitted that as the whole of section 84(1) is governed by the conception of ‘change in the character’ the applicants could not plead ‘impediment to reasonable user’ unless they showed change in the character first and the Arbitrator’s jurisdiction arose only if there had been changes: the Arbitrator after commenting on the presence of the word ‘or’ separating the two limbs of section 84(1)(a) ruled that ‘the hearing must proceed ...[and]... if my Order is wrong in law you have your right of appeal’. A further submission, that the only reason for modifying the restrictive covenant was because of the war and the desire to meet ‘temporary circumstances’, drew the response that the Official Arbitrator is entitled to take into account all

35 (1944) 144 EG 65.
36 This case is important in another respect, namely the revival of specific reference to section 84(1) which, according to the report of the case, was quoted in full as the grounds for discharging the restrictive covenant.
37 (1949) 153 EG 443.
38 (1948) 152 EG 75, 111 & 130.
the circumstances at the time of the application (including present building difficulties). In dismissing the application (apart from a modification to allow a private school and flats on part of the land) the Arbitrator gave as reasons for his decision that the restrictive covenants (unmodified) did not impede reasonable user; that the modification as sought would injure persons entitled to the benefit, and that compensation was not in this case appropriate.

Finally, the case of Re Barker & Co Ltd’s Application39 had all the hallmarks of a planning appeal under the Town & Country Planning Acts and may well have influenced the terms of reference for, and the ‘stricter control’ of, proceedings by the Lands Tribunal. The application was to modify a restrictive covenant (1924) on land at Kensington Square to permit its use in connection with the business of ‘general drapers and storekeepers’ and to provide an approach road to gain access to the rear of the premises and to a proposed loading dock. The applicant called Police evidence as to the traffic congestion and the need to provide space off the highway and evidence of a Planning Consultant that the proposals would not be detrimental as the general character of the square would be maintained. The objector’s case was supported by evidence of an architect member of the Town & Country Planning Advisory Committee on Buildings of Architectural and Historic Interest as to the architectural value of this ‘very important and attractive group of representative houses of the whole of the 18th and the beginning of the 19th century’ and evidence of a London County Council employed architect that construction of the access would be detrimental to the residential amenities of the square.

Following evidence as to change in the character, need, impediment to reasonable user, absence of injury to persons entitled and the breaches of the covenant by others in the Square, the hearing then proceeded to consider the ‘environmental’ impact of three alternative schemes illustrating ways in which the applicant’s objectives could be achieved. By his Order the Arbitrator modified the restrictive covenants so as to permit the uses as applied for, subject to the approach road being accessed from the rear and exiting through an archway on to Kensington Square and to such modifications as the Town Planning (or any other) authority sought fit to impose, seemingly regardless of the fact that in evidence they had opposed the scheme and presumably would carry that opposition to a consideration of any planning application. Giving reasons for his Order he found that changes had taken place which ‘changed the character’ and that enforcement of the restrictions conferred ‘no practical benefit’ on persons entitled, following which he (quite illogically) awarded compensation to a number of adjoining property owners.40

39 (1948) 152 EG 494.
40 This case demonstrates probably more clearly than any other the abuse of section 84 of the Law of Property Act, 1925 and the need for a body such as the Lands Tribunal to restore the credibility of section 84(1) applications for the discharge or modification of restrictive covenants.
CONCLUSIONS (1926-1949)

Before considering the Lands Tribunal cases (post 1949) it is useful to draw a few general conclusions from the analysis of the 93 cases decided by the Official Arbitrator as a background to the 'climate' in which the Lands Tribunal took over.

The main criticisms of the arbitration hearings may be summarised as follows:
(i) The proceedings and the Arbitrator's Order show increasingly over the years a departure from (and even an abuse of) the statutory provisions of section 84(1) as legislated, generally to achieve planning ends and/or to facilitate the development of land.41
(ii) There was an increasing tendency to allow 'public' need to override 'private' property rights and as such to take section 84(1) outside its legitimate function as a provision designed to reconcile and update the rights and obligations as between 'private' property interests.
(iii) The proceedings provided a forum for members of the general public to be heard as objectors even when it had been accepted by all parties that they were not persons entitled to the benefit of the restrictive covenant, leading to confusion in the determination of 'inter-party' property rights and obligations.
(iv) An apparent inconsistency of decisions, probably due to the desire of the Arbitrator (in the very nature of his calling) to arrive at a compromise through the device of awarding compensation as part of the modification Order. There is a fine line between cases where the benefit is still of such value as to dictate that no modification should be made and those cases where compensation can recompense for the element of benefit remaining.

These criticisms were to an extent tempered (certainly towards the end of the period) allowing the favourable conclusions to be summarised as follows:
(i) The arbitration proceedings and the Arbitrator himself came to acknowledge the 'planning issues' as considerations which the Arbitrator could take into account but which were clearly not overriding considerations that he had necessarily to follow.
(ii) An acknowledgement that the restrictive covenant may protect property values in more than just financial terms. The value of a restrictive covenant in safeguarding environmental issues such as amenity, traffic and industrial pollution, noise levels, views, etc. was reflected in a reduction in the number of cases where compensation was awarded in order to facilitate (or even justify) modification or where section 84(1) was used as an instrument to enable the buying out of property rights (as between individuals).
(iii) At the close of the Official Arbitrator's period of jurisdiction following the end of the 1939-45 war he starts to accompany his Order with findings, conclusions and reasons for his decision.
(iv) The later cases reveal a return to a consideration of the intention of section 84(1) and an application to the legal interpretation and legal effect of the section.

41 This, in spite of the judgment of Farwell, J in Re Henderson's Conveyance [1940] Ch. 835 that the Official Arbitrator had been wrong to discharge a restrictive covenant, which had neither become obsolete nor prevented the reasonable user of land, on the payment of compensation: 'The purpose of section 84(1) is not a matter of the development of land but of the personal benefit of one owner as against another.'
Two elements in particular, namely the issue of compensation and the influence of town planning, made a more balanced form of hearing, i.e. the Lands Tribunal, virtually inevitable if section 84(1) applications were to be dealt with as prescribed under the Act. The new body needed to be able:

(a) to deal with the legal aspects and questions that arise;

(b) to counter the ‘valuation approach’ by recognising ‘amenity (environmental)’ value as well as ‘financial’ value, and

(c) to distinguish the town planning (public interest) wider dimension from the narrower section 84(1) consideration of private property rights and obligations.

How far the Lands Tribunal achieved these objectives is the subject of the next section.

On 1 January 1950 the Lands Tribunal Act, 1949 came into operation and thenceforth applications for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925 were dealt with by the Lands Tribunal. The deficiencies in the operation of section 84 in arbitration proceedings presided over by the Official Arbitrator have already been noted. Such a person, selected by the Reference Committee under the Acquisition of Land (Assessment of Compensation) Act, 1919, was normally someone concerned with compensation for the compulsory acquisition of land and rarely sufficiently versed in the law to deal with the difficult legal questions to which section 84(1) often gives rise. Furthermore, the appointment of a valuation surveyor as Official Arbitrator tended to suggest that the problem was not so much whether a restriction should be discharged or modified as to how much should be paid by way of compensation for the discharge or modification sought. The transfer of authority to the Lands Tribunal, comprising both lawyers and surveyors and whose President is always an eminent silk did much, as will be seen later, to remedy these problems.

The difficulties experienced in an analysis of the decisions of the Official Arbitrator, namely the considerable variations in both the detail and quality of reporting, and the absence of conclusions and reasons for the Official Arbitrator’s decision, do not apply to the decisions of the Lands Tribunal. From 1950 onwards the Lands Tribunal decisions, together with reasons, have been reported fully, and in the Property, Planning & Compensation Reports alone, covering a period of 45 years, hundreds of cases have been documented.

The three main issues that the Lands Tribunal needed to address were identified at the end of the last section, following the analysis of some 93 cases reported in the Estates Gazette. The analysis which follow seeks to deal with those issues, namely:

(i) The relationship between town planning and the restrictive covenant.
(ii) The environment versus compensation issue.
(iii) The evolving legal and administrative issues.

The analysis does not follow, nor does it attempt to replicate, the traditional approach adopted in standard works (especially Preston & Newsom) of considering seriatim jurisdiction under sub-sections (a), (b) & (c) of section 84(1) and, following amendment by the Law of Property Act, 1969, sub-section (aa), but adopts a division related to subject matter rather than juridical grounds.

A further subdivision of the analysis is necessary by reason of the substantial amendments made to section 84(1) by the Law of Property Act, 1969, which provided, inter alia, a ‘formula’ for dealing with town planning matters in the decision-making process of the Lands Tribunal and a ‘re-statement’ of the circumstances governing the award of compensation which the Lands Tribunal in its formative years strove so strenuously to resist. These changes had such a fundamental effect on the decisions of the Lands Tribunal that a consideration of cases in two parts is called for, namely those cases decided before the coming into operation of the Law of Property Act, 1969 and those after.
The Decisions of the Lands Tribunal, 1950-1969

The Lands Tribunal cases chosen for study relate primarily to those issues where overlap or conflict is most likely to occur as between public and private control of the use and development of land. They are deliberately selective in order to permit examination in some degree of detail and depth of subject matter.

**Town Planning Issues**

Cases cited:

- *Re Davis' Application* (1950) 7 P & CR 1
- *Re Hickman & Sons Ltd's Application* (1951) 7 P & CR 33
- *Re M. Howard (Mitchum) Ltd's Application* (1956) 7 P & CR 219
- *Re Hedges' Application* (1956) 7 P & CR 270
- *Bell v Norman C. Ashton Ltd.* (1956) 7 P & CR 359
- *Re Emery's Application* (1956) 8 P & CR 113
- *Re James T. Cook & Son's Application* (1957) 8 P & CR 460
- *Re The Cleveland Petroleum Co. Ltd's Application* (1957) 9 P & CR 506
- *Re Potter's Application* (1958) 10 P & CR 68
- *Re Carshalton Urban District Council's Application* (1963) 16 P & CR 68
- *Re Greaves' Application* (1965) 17 P & CR 57
- *Re Shaw's Application* (1966) 18 P & CR 144
- *Re Hathway's Application* (1968) 20 P & CR 505

The Lands Tribunal cases decided in this period exhibit an ambivalent attitude towards town planning. At times the Tribunal embraces the views and decisions of the Local Planning Authority and at other times takes great pains to distance itself from such views and decisions often in terms which leave little doubt as to the low regard in which it held 'public control' in general and town planning control in particular. To an extent the attitude of the Lands Tribunal reflects the changing popular attitudes and public perceptions. It is informative therefore to consider the cases in chronological order to confirm or refute the proposition that the Tribunal might in some way have been influenced by the changing fortunes and credibility of town planning.

The first reported case, viz. *Re Davis' Application*\(^1\) addressed the issue head on. An application to modify a restrictive covenant limiting development to private dwelling houses only, on the grounds that such development was contrary to good town planning as evidenced by the granting of a planning consent for flats, was refused, it being held that 'a private covenant which still offers valuable protection will not be set aside on planning grounds'.

In *Re Hickman & Sons Ltd's Application*\(^2\), a restrictive covenant limiting use firstly to allotments and later to 'one private dwelling house per plot' was discharged, following evidence that the Local Authority had approved a development plan for mainly light industrial

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\(^1\) (1950) 7 P & CR 1.
\(^2\) (1951) 7 P & CR 33.
purposes, on the grounds that 'the Local Authority's Development Plan was a reasonable one and provided sufficient safeguards' and that the restrictions were cumbersome, obsolete (within the category of 'other circumstances' in section 84(1)(a)) and ineffective. On the other hand it held in Re M. Howard (Mitchum) Ltd's Application that, where the Local Authority had approved a higher density development than that permissible under the restrictive covenant, 'though the applicants' proposed development had received planning permission and was reasonable, it was not the only reasonable form of user of the plot' and furthermore the restriction did not impede reasonable user, was not obsolete and was still of benefit to the persons entitled. Accordingly the application was dismissed.

A second case decided in 1956 illustrates a situation where a planning authority 'used' the Lands Tribunal to achieve its objective. In Re Hedges' Application, following a modification made by the Lands Tribunal in March 1955 to permit a block of 6 maisonettes, a further modification was sought for a block of 10 maisonettes for which planning permission had been granted in September 1955. The planning authority appeared at the Tribunal as an objector intimating that it regretted having granted planning permission and that the right number was six (or possibly 8) but had not revoked the permission for fear of a claim for compensation. The Lands Tribunal, dismissing the application on the grounds that it failed under both section 84(1)(a) & (c), commented that '...the planning history of this case shows how little assistance the Tribunal, in exercising its jurisdiction under section 84(1) of the Act, can receive from the decision of a planning authority'.

Possibly the nadir was reached in the same year. Although not a Lands Tribunal case, Bell v Norman C. Ashton Ltd in the Chancery Division concerned an action to enforce a restrictive covenant imposed under a building scheme limiting development to not more than two houses on any one plot. Planning permission had been granted for a higher density. The defendants' surveyor in evidence is reported as having said:

'...town planning approval had been obtained for houses on this scale of density; modern conditions demand that suburban planning should be on that kind of scale; that is the right density at which suburban people ought to live, and if they do not they are obsolete and they ought to be disregarded as being anti-social persons wanting more room than in a crowded country it is right that they should occupy.'

Commenting thereon, Harman, J confessed that he '...was much incensed by this evidence. There does remain in a world full of restrictions just a little freedom of contract'. He went on to state unequivocally that the fact that planning permission had been granted was immaterial.

These cases in the mid 1950's reflect what was then an almost universal disenchantment with town planning. The Town & Country Planning Act, 1947 had been heralded as the instrument, along with other legislation such as the New Towns Act, 1946, to achieve the 'post-war reconstruction' which had been promised in the early 1940's in such reports as Barlow, Scott and Uthwatt and in White Papers such as 'The Control of Land Use'. The post-war planning legislation however, had not and could not of itself achieve these objectives for two main reasons.

4 (1956) 7 P & CR 270.
7 Report of the Committee on Land Utilisation in Rural Areas, Cmd. 6378.
9 White Paper on The Control of Land Use, Cmd. 6537.
The legislation was primarily restrictive in nature and that part which was positive (for example, comprehensive redevelopment) was largely unimplemented due to lack of finance and the generally depressed economic situation of the country. The development which took place in the decade following the 1939-45 war was concentrated on local authority housing (very often at high density) with little in the way of local community facilities and shops. Industrial development was basic and town centre renewal and redevelopment confined to a limited number of the more severely war-damaged cities.

Planning control at this stage was not only negative it was also over-interventionist in the minutiae of control and an unnecessary interference in the liberty of the individual. It was administered by planning committees of lay members with limited experience and little appreciation of the need for continuity and consistency in decision-making. On the other hand, control of development through the restrictive covenant was exercised by professionals with both experience and an appreciation of the need for consistency and stability in the management of land and in particular the larger urban landed estates. It is little wonder therefore that those charged with the responsibility of handling applications for the discharge or modification of restrictive covenants should at this particular period have been sceptical of the town planning regime and protective of the well-tried and familiar control by way of restrictive covenant.

Re Emery’s Application\(^{10}\), considered the question of what a local planning authority might do in the future and the possible precedent for further development presented by the ‘thin end of the wedge’ argument. Planning evidence that ‘no houses would be allowed to be built on the back land’ in the future was, in the eyes of the Tribunal, ‘...mere conjecture based apparently on the suburban ideas of the present planning officer... [A] great many houses [could] be built on the land either by the severance of the existing plots...or by the re-arrangement of boundaries’. The ‘thin end of the wedge’ argument (common to many of these applications and not always of great significance) was a relevant consideration to the decision to dismiss the application, although it is not clear how a modification (as applied for) to permit a second house on a plot restricted to one only, could invoke the ‘thin end of the wedge’ argument in respect of the back land which would still be protected by the restrictive covenant.

In Re James T. Cook & Son’s Application\(^{11}\), an application to increase density to permit development of a type already allowed (following the necessary modification) on other land forming part of the same original estate, was dismissed on the grounds that the proposed development (as exemplified by that which had already taken place and in respect of which the approval of the planning authority had been obtained) would be out of keeping and ‘an intrusion of inferior houses into a better class area’. Presumably the particular circumstances in the immediate area of the application were overriding in what on the face of it appears to be a contrary decision. In contrast to this decision is that in Re The Cleveland Petroleum Co Ltd’s Application\(^{12}\) where the London County Council had given outline planning permission for a petrol filling station and the Local Borough Council Planning Officer had given evidence that ‘...it is not good planning to put a petrol station in a residential area’. The Tribunal held, granting the application, that the site might be said to be on the edge of a residential area and ‘much nearer a commercial and industrial area’.

\(^{10}\) (1956) 8 P & CR 113.
\(^{11}\) (1957) 8 P & CR 460.
\(^{12}\) (1957) 9 P & CR 506.
Re Potter’s Application\textsuperscript{13} appears on the face of it to be a case that was influenced by ‘town planning arguments’ to such an extent as to have resulted in a dubious decision. Briefly the facts were that a restrictive covenant (dating from 1851) prohibited ‘any trade business process...which shall be noisy noxious dangerous or offensive to the neighbourhood’. The area was mainly residential with some commercial development and the application was to modify the restrictive covenant to allow light industrial use. Reference was made to the meaning assigned to ‘light industrial building’ in the Town & Country Planning (Use Classes) Order, 1950:

‘...it means an industrial building...in which the processes carried on or the machinery installed are such as could be carried on or installed in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, soot, ash, dust or grit...’

It was held that whilst the restriction was not obsolete nor did it impede reasonable user, the objectors would not be injured by the use of a light industry and the restrictive covenant should be modified to allow such use. The question arises as to whether or not the Tribunal was over-influenced by a then quite commonly held but fallacious view of the effect of the meaning of ‘light industrial building’ in the Use Classes Order. That it is a use that \textit{could} be carried on or installed in any residential area without detriment is no case for the argument that a light industrial building \textit{should} be installed in a residential area - an argument often put in the simplistic form that as the application is for a light industrial building in a residential area it \textit{ipso facto} be approved. Could it be that the Lands Tribunal on this particular occasion fell into the trap of that argument?

A series of Lands Tribunal cases towards the end of the 1950’s continues to show a degree of ambivalence. Re Allnatt (London) Ltd’s Application\textsuperscript{14} concerned an application to modify a restrictive covenant prohibiting other than industrial-related development in order to allow residential development, a planning application for permission to erect a factory having been refused and on appeal refusal having been upheld by the Minister who agreed ‘with the local planning authority’s policy to restrict...growth of industry in [the county]’. The land was not allocated for industry in the County Development Plan, planning consent for a factory or workshop was not likely to be granted, although planning approval for residential use was likely. The Tribunal held that ‘...the attitude of the planning authority, supported as it is by the Minister [is a] material circumstance which impedes the reasonable user of the land. Unless modified the restrictions in practice render the land sterile’. The Tribunal proceeded to modify the restrictive covenant to permit residential development (subject to conditions). In Re Byrom’s Application\textsuperscript{15} an application to modify a restrictive covenant to permit flats, on the ground that the existing restriction requiring the approval of plans by the covenantee or his assigns ought to be deemed obsolete ‘bearing in mind the powers of the planning authority’, was dismissed on the grounds that there was no basis for deciding the covenant ought to be deemed obsolete and ‘any lessening of [the assignee’s] rights would injure him’.

In Re Carshalton Urban District Council’s Application\textsuperscript{16} an application to modify a restrictive covenant in respect of six acres of land acquired for use as a park and open space, in order to permit half of the site to be developed by the erection of 26 bungalows, was refused on the grounds that use as a public open space was both possible and reasonable and that the restriction secured practical benefit to the objectors. The Tribunal, in criticising the absence of

\textsuperscript{13} (1958) 10 P & CR 68.
\textsuperscript{14} (1959) 12 P & CR 256.
\textsuperscript{15} (1960) 12 P & CR 273.
\textsuperscript{16} (1963) 16 P & CR 68.
particulars of the proposed buildings, stated that ‘the Tribunal cannot leave the rights of those entitled to the benefit of restrictions to be protected by the planning authority’. On the other hand in *Re Greaves’ Application* the Tribunal discharged covenants requiring some 10 acres of land to be used for allotments on an application by building contractors (apparently with no plans or other details of the development and in the absence of any indication that any form of development had, or would be likely to receive, planning permission) on the ground that there was now no demand for allotments and that most of the land was an uncultivated ‘jungle’.

In *Re Shaw’s Application* an application to modify a restrictive covenant limiting development to a single house on each plot so as to permit higher density development, supported by planning evidence that ‘because of the serious shortage of residential building land in the city and that the city council had adopted a much higher density of persons to the acre than currently existed on the estate’, was dismissed on the grounds that the restrictions were still of benefit, had resulted in an estate of higher amenity value and that ‘the applicant’s evidence was preponderantly directed to planning matters, with which the Tribunal is only indirectly concerned, rather than to matters set out in section 84(1), which were not established’. But in *Re Hathway’s Application* an application to allow the erection of a three-storey block of flats on land subject to a restriction limiting development to detached and semi-detached houses, was ‘modified as prayed’, subject to conditions requiring that ‘the building should comply with the planning permission which was before the Tribunal’.

Thus by the end of the 1960’s, after 20 years experience of dealing with applications for the discharge or modification of restrictive covenants, the Lands Tribunal is still uncertain as to how to accommodate planning evidence. Its initial suspicion of planning control, as shown in the early 1950’s, has been replaced by an acknowledgement that planning control exists but an inconsistency of approach as to how statutory plans and planning decisions should be embraced by the Lands Tribunal. How far this dilemma would be remedied by the amendments to section 84(1) to be made by the Law of Property Act, 1969 is a matter for the next period (1970 to 1995) but before turning to that it is necessary to examine the way in which the Lands Tribunal was dealing with environmental matters during the period up to 1970.

**Environment Issues**

Whereas, as has been demonstrated, in those cases decided by the Official Arbitrator in the period up to 1950 the overriding criterion was that of ‘effect on property values’, by the 1950’s, regardless of its attitude towards town planning, the Lands Tribunal began to concern itself with ‘environmental effects’. Its concerns fall under two main headings, namely: matters of environmental pollution (noise, traffic, noxious emissions) and matters relating to environmental amenity (open spaces, nature conservation, privacy, views). From the reported cases it appears that issues relating to environmental pollution and in particular noise pollution surfaced in the early 1950’s, whilst matters relating to environmental amenity came to the fore in the late 1950’s and 1960’s. The cases are examined under three headings, namely: (i) noise, (ii) amenity and (iii) the specific issue of ‘views’, because of their legal connotation (‘no right to a view’) and their significance in planning and development.
(i) Noise

Cases cited:

- Re Solihull District Council's Application (1953) 7 P & CR 97
- Re Hall & Co Ltd's Application (1955) 7 P & CR 159
- Re Reid's Application (1955) 7 P & CR 165
- Re Cowderoy's Application (1955) 7 P & CR 184
- Re Jamelson Property Co Ltd's Application (1956) 7 P & CR 253

A series of cases taken from the early 1950's illustrates how issues relating to potential 'injury' resulting from increased noise levels become the reasons for refusing to modify restrictive covenants, rather than as a matter relating to the level of compensation awarded as they might well have been in the 1930's.

In Re Solihull District Council's Application20 the noise and disturbance associated with a proposed community centre was held to be an altogether different matter from that associated with the small gatherings of the local youth club and the application was refused on the grounds that neighbours would be injured if the modification sought were granted. In Re Hall & Co Ltd's Application21 a distinction was drawn as between noise levels which were acceptable and those which were not. On evidence that the process of winning gravel and ballast was much noisier than that of winning sand the Tribunal held that, as the applicants could consistently with the covenants build houses on the land and fell more trees on it, the extraction of sand would cause the objectors no injury but, owing to the greater noise of winning gravel and ballast, authority should be given for winning sand only. In Re Reid's Application22 the Tribunal dismissed an application to modify a restrictive covenant to permit the continued keeping of pigs on land restricted to use as private gardens on the grounds that 'the noise and smell of the piggeries must depreciate the other plots'.

Questions of noise levels from the use of a church hall for dancing and the ringing of church bells arose in Re Cowderoy's Application23. Having decided there had been no change in the character of the neighbourhood the Tribunal refused an application for the erection of a church hall on the grounds that the noise from dancing might well depreciate the neighbouring properties but granted the application for the erection of a church on the grounds that it would not injure the persons (if any) entitled to the benefit of the restrictions, provided that no external bells were rung (and a limit imposed on the parking of cars). A rather different outcome resulted from Re Jamelson Property Co Ltd's Application24. An application for offices, a masonic suite, a restaurant and parking for 50 cars was held not to be objectionable in itself but, as there might well be excessive noise by the user of the car park at night and by music and dancing in the restaurant, restrictions to obviate these dangers must be imposed. It appears from the report of the case that these restrictions were confined to the siting of the car park and the restaurant within the development and did not control either the hours of use or the levels of noise.

20 (1953) 7 P & CR 97.
21 (1955) 7 P & CR 159.
22 (1955) 7 P & CR 165.
This recognition by the Lands Tribunal of the potential damage and injury from noise came at a time when planning authorities were starting to deal with noise problems in earnest by the imposition of very specific and stringent conditions governing hours of operation and permissible noise levels, backed up by an enforcement procedure under the Town & Country Planning Acts. Non-observance of noise restrictions in a modified restrictive covenant could only be enforced by injunction through the courts and, although there is little evidence to substantiate the point, it would appear the more prudent for the Lands Tribunal to refuse an application where problems of noise might arise rather than grant a modification subject to noise restrictions which could only be enforced by way of injunction. This raises the question as to whether it is equitable to impose such a ‘burden’ of enforcement on the person or persons entitled to the benefit of the restrictive covenant which, in its unmodified form, may well have been clear and unequivocal, for example ‘private dwelling houses only’. Furthermore, it raises the wider issue as to how far the Lands Tribunal is justified in attaching lists of general, specific and even elaborate conditions to its grant of a modification. If the modification is only acceptable if made subject to such a list of conditions there would appear to be a good *prima facie* argument that the modification should not be made at all. Is it right that a clear contract freely entered into by two parties should be complicated and made ‘less certain’ by a third party? Was the Lands Tribunal, like the Official Arbitrator before it, straying from the purport of section 84(1)?

(ii) Amenity

Cases cited:

Re Emery’s Application (1956) 8 P & CR 113
Re Cowderoy’s Application (1957) 9 P & CR 522
Re K.& C. Bhavanani (Holdings) Ltd’s Application (1960) 12 P & CR 269
Re The Independent Television Authority’s Application (1961) 13 P & CR 222
Re Trollope’s & Andrew’s Application (1962) 14 P & CR 80
Re Stephens’ Application (1962) 14 P & CR 59
Re Zopat Developments’ Application (1966) 18 P & CR 156

Towards the end of the 1950’s and during the 1960’s a number of Lands Tribunal decisions to refuse applications to modify restrictive covenants mention ‘loss of amenity’ as either the main ground for refusal or a significant contributory reason. In *Re Emery’s Application*25 the Tribunal accepted the submission that woodland retained in a building scheme had been regarded as a special feature and maintained as an amenity and refused to grant a modification to permit the erection of a dwelling house on land on the edge of the wood. It was a relevant consideration that the granting of such a modification would set an example which might lead to a deterioration in the character of the estate as a whole. Evidence that an open space (protected by a restrictive covenant limiting its use for sports or games) was an attraction to residential properties surrounding it, was accepted in *Re Cowderoy’s Application*26 and resulted in the application to modify being dismissed on the grounds that the owners of houses immediately adjoining and overlooking the open space would inevitably suffer some loss of amenity making those houses less readily saleable.

26 (1957) 9 P & CR 522.
Generally the Lands Tribunal has taken great pains to distance itself from matters of aesthetics and design, claiming that it has neither the remit nor the expertise to assume the role of an arbiter of taste. It did however stray into this field in two cases in the early 1960’s. In Re K. & C. Bhavnani (Holdings) Ltd’s Application27, in dismissing an application on the grounds that the objectors would suffer injury by the proposed development and that any deterioration in the tone of the neighbourhood was to a considerable extent caused by the applicants, the Tribunal took the opportunity to refer to the design of a Regency chalet bungalow built by the applicants as follows:

‘I can only think that it is a modern house likely to have been approved by the Prince Regent, reincarnate as a kind of town planning authority, if in the mean time he had studied domestic architecture first in Geneva and then in Bengal’.

John Watson, presiding, then went on to emphasise that ‘the Lands Tribunal is not a town planning authority; nor, in emulation of the Prince Regent, am I an arbiter of taste’.

By contrast, in Re The Independent Television Authority’s Application28 the Tribunal appears to have been ‘overwhelmed’ by the eminence of the ‘aesthetic’ witness. Planning permission had been given for the erection of a television tower on land restricted to use as a public park and pleasure ground. Sir Hugh Casson, on behalf of the applicant, expressed the opinion that the proposed tower was well designed and the site was appropriate for such a structure and that he did not consider it would harm the neighbourhood and that viewed from a distance it would be ‘an attractive feature of the landscape’. The Tribunal held that the application ought to be granted having regard to the facts, *inter alia*, that the applicant was a public body and that the mast would be ‘surprisingly unnoticeable’. Apart from the debatable issue of ‘aesthetics’ the case raises an important question concerning the status of a public body. If it be right to take that into account, surely the issue is whether or not the application is in the ‘public interest’ and not merely whether it is made by a ‘public body’.

Arguments relating to amenity arose yet again in Re Trollope’s & Andrew’s Application29. Development having taken place on one side of a property it was argued that a restrictive covenant preventing development on the other side was obsolete. The Tribunal dismissed the application holding that ‘the more [the property] was beset on other sides the more precious to it was the open outlook on one side secured by the covenant’.

The enjoyment of privacy as such has rarely been the subject of a Lands Tribunal hearing but it did arise in two cases in the 1960’s. Re Stephens’ Application30 brought the conclusion from the Tribunal that ‘a proposed development would injuriously affect the seclusion and privacy which [the objector’s] property at present enjoys’. The Tribunal was satisfied that the proposed development would be visible from the objector’s property and emphasised ‘as this Tribunal has more than once pointed out, the benefits conferred by a restrictive covenant need not be financial’.

*Contra*, in Re Zopat Developments’ Application31 the Tribunal modified a restrictive covenant in a case where the objector had opposed the application on the ground that the proposed house (which had received planning permission) would overlook his garden and that he

27 (1960) 12 F & CR 269.
29 (1962) 14 F & CR 80.
30 (1962) 14 F & CR 59.
31 (1966) 18 F & CR 156.
valued his privacy. The Tribunal, having inspected the site, accepted that the occupier of the proposed new house would be as likely to secure his privacy as was the objector and went on to state that it could not believe that ‘the occupants of the proposed house will spend their days looking out of the bedroom windows’. The Tribunal hoped that the applicant would take steps to see that as many as possible of the trees between the house and the boundary fence were retained but did not feel justified in making this a term of the modification. It is difficult to reconcile this latter decision in the light of previous pronouncements that an injury does not necessarily have to be a ‘real injury’ and that a ‘perceived injury’ may be none the less real.

(iii) Views

Cases cited:

- Re St. Albans Investments Ltd’s Application (1958) 9 P & CR 536
- Re Peyton’s Application (1959) 12 P & CR 263
- Re Collett’s Application (1963) 15 P & CR 106
- Re Saddlington’s Application (1964) 16 P & CR 81
- Re Mawdit Harris’s Application (1966) 18 P & CR 138
- Re Poulton’s Application (1969) 21 P & CR 664
- Re Margate Corporation’s Application (1969) 21 P & CR 669

Turning now to a specific aspect of amenity, namely that of the ‘protection of a view’, because of the common law canon that there can be no right to a view, restrictive covenants (particularly relating to landed estates bordering on towns and other areas where development was likely) were essential as the only practicable means of protecting a view.

Perhaps the most celebrated decision of the Lands Tribunal regarding ‘a view’ was that of Re St Albans Investments Ltd’s Application in which an application to modify a restrictive covenant forbidding the erection of any buildings, so as to enable development, was dismissed by the Tribunal on the grounds that ‘modification would injuriously affect the view from Richmond Hill’, the restrictive covenants having been imposed for ‘the express purpose of preserving the well known view from Richmond Hill’. The Tribunal went on to add that ‘even if the applicants had succeeded in making out a case under paragraphs (a) or (c) of the Law of Property Act, 1925, section 84(1) the Tribunal would not have been inclined to exercise its discretion in their favour; the view from Richmond Hill is one of outstanding beauty and the local authority’s efforts to preserve it should not be frustrated in any way’. It is difficult to envisage a clearer statement of the Tribunal’s assumed role as protector of nationally acknowledged sites of ‘natural beauty’.

Its attitude is less clearcut when dealing with applications of a more local nature. In Re Peyton’s Application it granted an application in spite of the fact that an objector might lose the benefit of a view in that he will ‘look out on a bungalow instead of a garden’, whereas in Re Collett’s Application the Tribunal dismissed an application on the ground that the proposed modification would seriously obstruct the objector’s view ‘across the sea as far as Portland Bill’ and depreciate the value of the objector’s property. In Re Saddlington’s Application the Tribunal dismissed an application on the grounds that the restrictive covenant secured practical benefits to the owners of the house which ‘enjoyed extensive views across the field’, the subject of the

32 (1958) 9 P & CR 536.
33 (1959) 12 P & CR 263.
35 (1964) 16 P & CR 81.
covenant forbidding any building, and in *Re Mawdit Harris's Application*\textsuperscript{36} the Tribunal held that 'the change in the character of the neighbourhood since 1812, by countryside giving way to built up city, had not made the restrictions obsolete but more valuable, mainly by preserving the view to Plymouth Sound'. Again, in *Re Poulton's Application*\textsuperscript{37} an application was dismissed on the grounds that development would interrupt a 'fine view of open country' with the meadow, the subject of the application, prominent in that view.

One further example, namely *Re Margate Corporation's Application*\textsuperscript{38}, illustrates the 'environmental' attitude the Lands Tribunal had adopted by the end of the 1960's. Margate Corporation sought a modification to enable it to reconstruct an amphitheatre to house a 'marineland' exhibition by the erection of a low dome rising to some 15 feet above the level of the surrounding land together with the erection of a lavatory block which would be visible above the surface of the restricted land. The amphitheatre, excavated in 1903 in breach of the restriction, was below the surface of the restricted land and consequently concealed from view. The Tribunal, in dismissing the application on the ground that the proposed change in the outlook from the premises of the objectors over the amphitheatre would be injurious to them, could not resist comparing 'the care and foresight of the corporation in 1903...with the insensible [sic] approach of the present day planners'. In doing so it reinforced the continuing distinct role that the restrictive covenant can play in the protection of private property interests (environmental as well as financial) which from time to time may be jeopardised by the actions of 'public bodies'.

The decisions of the Lands Tribunal regarding the 'protection of views' support the premise that where there is a view that is, in the eyes of the Tribunal, worth preserving and where the restrictive covenant has been expressly formulated to protect that view it will be less than sympathetic to an application affecting it. This appears to be the case regardless of whether the restrictive covenant was of some antiquity or more recently imposed and regardless of changes in the character of the neighbourhood which, in one case at least, appears to have been an added reason for retaining the restriction and protecting the view. The only exception in the cases here reported is that where a view over an adjoining plot of land was held to be an insufficient reason for refusing an application, but the case in question, although referring to a loss of view, could perhaps more realistically have been described as a potential loss of privacy.

**Legal and Administrative Issues**

Under this heading it is proposed to deal with a number of matters which are of particular relevance to aspects of estate management and development. During its formative years in particular the Lands Tribunal, through a series of decisions, provided much useful guidance on a number of practical issues, some of a quasi legal nature, and including: (i) the meaning of 'neighbourhood', (ii) the extent and nature of the Tribunal's 'discretion', (iii) the interpretation of certain 'words and phrases', and (iv) the Tribunal's attitude regarding 'compensation'.

\textsuperscript{36} (1966) 18 P & CR 138.
\textsuperscript{38} (1969) 21 P & CR 669.
(i) Neighbourhood

Cases cited:
Re Davis' Application (1950) 7 P & CR 1
Re Knott's Application (1953) 7 P & CR 100
Re F. & H. Joyce Ltd's Application (1956) 7 P & CR 245
Re Hedges' Application (1956) 7 P & CR 270

In spite of its significance the term ‘neighbourhood’ had received little attention from the Official Arbitrator, apart from one or two instances where an area was held to be too large to be classified as a ‘neighbourhood’. The Lands Tribunal remedied this omission in its early days and considered the issue in the first reported case, Re Davis' Application, holding that a map of a surrounding district half a mile square submitted by the applicant was too large to be regarded as a ‘neighbourhood’ but being of the opinion that ‘...Provided that a neighbourhood is sufficiently clearly defined to attract to itself and to maintain a reputation for quality or amenity, the size of that neighbourhood and what occurs outside it are of little consequence’. In this case the ‘neighbourhood’ was clearly shown by ‘the area comprised in the 1914 deed and certain nearby land which was not comprised in that deed but was developed similarly’.

In Re Knott's Application it was held that ‘Berkeley Square is [for this purpose] a neighbourhood’. In Re F. & H. Joyce Ltd’s Application the Tribunal held that in considering whether changes had occurred in the character of the neighbourhood it was not bound to have regard only to the area which belonged to the trustees (in 1925) but might consider ‘a much wider area’, and in Re Hedges’ Application, where the Tribunal had already modified a restriction on the same site, held that the only changes in the neighbourhood which could be considered were such as had occurred since the modification.

(ii) Discretion

Cases cited:
Re S. & K. Darvill Ltd’s Application (1955) 7 P & CR 212
Driscoll v Church Commissioners for England (1956) 7 P & CR 371
Re Wrighton’s Application (1961) 13 P & CR 189
Re Wickin’s Application (1961) 13 P & CR 227
Re Wymates Smith Ltd’s Application (1963) 15 P & CR 85
Re The Luton Trade Unionist Club & Institute Ltd’s Application (1969) 20 P & CR 1131

The degree of discretion afforded to the Lands Tribunal was the subject of a number of cases in the 1950’s and 1960’s. In Re S. & K. Darvill Ltd’s Application the Tribunal held that notwithstanding the doubt as to whether the covenant was enforceable by any person (save perhaps the original covenantee, who did not object) the application should be dealt with on its merits.

39 Compare the concept of the urban ‘neighbourhood’ in town planning terms (derived from the Report of the Study Group of the Ministry of Town & Country Planning, published as an appendix to the Dudley Report on the Design of Dwellings, 1944) as a social unit of between 5,000 and 10,000 population, with a range of facilities including, in addition to a diversity of housing types, a primary school, open spaces, local shops, public buildings, service industry and workshops, and contained within defined boundaries, either natural (rivers and open spaces) or man-made (railways and main roads).
41 (1953) 7 P & CR 100.
42 (1956) 7 P & CR 245.
43 (1956) 7 P & CR 270.
44 (1955) 7 P & CR 212.
Any doubt that there might have been that the power of the Tribunal under section 84 was discretionary was settled by the judgments of Denning and Morris, L JJ in the Court of Appeal in *Driscoll v. Church Commissioners for England*\(^5\): the power of the Tribunal under section 84 is discretionary and not mandatory.

In *Re Wrighton’s Application*\(^6\) the Tribunal decided not to exercise its discretion to modify a restriction because ‘the proposed flats would be inconsistent with the existing development of the neighbourhood and would have an injurious effect on the neighbouring owners’, in spite of the fact that it had held that there was no-one now entitled to the benefit of the restrictions and therefore no-one entitled to such benefit could be injured and that the restriction ‘would be modified under paragraph (c) of section 84(1)’. And again in *Re Wickin’s Application*\(^7\), where the Tribunal found that no person having the benefit of the restriction would be injured and that the case fell within paragraph (c) of section 84(1), nevertheless decided that it would be ‘an abuse of the Tribunal’s powers to grant a modification to the applicant, for he had bought his land only about two years ago and the restriction has very recently voluntarily been endorsed by him, though apparently without any intention of being bound by it’. The Tribunal’s antipathy to modify covenants recently entered into was further demonstrated in *Re Wynyates Smith Ltd’s Application*\(^8\) where, although satisfied that the proposed modification would not injure the persons entitled to the benefit, nevertheless exercised its discretion by dismissing the application ‘having regard to the facts that the covenant was very recently imposed, that the difficulty was owing to the original covenantor’s own actions, and that the applicant was closely associated with the original covenantor’.

The exercise of its discretion caused the Lands Tribunal ‘some heart searching’ in *Re The Luton Trade Unionist Club & Institute Ltd’s Application*\(^9\). Having decided that the object of the covenant was no longer capable of fulfilment, and that any injury which would be caused to the objectors as a result of the proposed development and its use was co-incidental and should not prevent the Tribunal from being satisfied that the covenant was obsolete, the Tribunal in granting the application as drafted went on to say: ‘We do not think it would be right to refuse to exercise our discretion because of the injury we have mentioned, for we think that that would be to import purely town planning considerations into our decision’.

(iii) Interpretation

Cases cited:

- Re Hobbs’ & Marshall’s Application (1951) 7 P & CR 25
- Re Winship’s Application (1954) 7 P & CR 151
- Re Fisher’s Application (1954) 7 P & CR 153
- Re Murray’s Application (1962) 14 P & CR 63
- Re Teagle’s & Sparks’ Application (1962) 14 P & CR 68
- Re Associated Property Owners Ltd’s Application (1964) 16 P & CR 89

\(^5\) (1956) 7 P & CR 371.
\(^7\) (1961) 13 P & CR 227.
\(^8\) (1963) 15 P & CR 85.
In its early years the Lands Tribunal took the opportunity to clarify a number of 'legal' points and matters of legal interpretation. For example in Re Hobbs & Marshall’s Application\textsuperscript{50} it made it clear that ‘... it is for the Court and not for the Tribunal to determine the validity of the restriction or the parties entitled to the benefit of it. The Tribunal’s Order is made on the assumption that the restriction brought before it is enforceable in the courts, but without making any determination on the point’.

Two cases in 1954 clarified the status of objectors claiming that they were ‘other persons’. In Re Winship’s Application\textsuperscript{51} it was held that ‘the other persons in paragraph (a) must be other persons who are entitled to the benefit of the restriction’ and in Re Fisher’s Application\textsuperscript{52} it was held that the objectors failure to establish their titles ‘would not exclude them when assessing the practical benefit of the covenants to ‘other persons’ within the second limb of paragraph (a)’. Presumably, the Tribunal for the purposes of its deliberations is assuming ‘proper title’, leaving it to the Courts to resolve any dispute if it should arise in the future.

The conduct of the covenantee was a deciding issue in two cases in 1962. In Re Murray’s Application\textsuperscript{53} the Tribunal accepted that the covenantee had in the past ‘paid strict attention to his obligations, perhaps in the main moral obligations, towards the covenantors and consequently that the part of the restriction which required his blessing on plans of development has not been an empty or valueless one’; the evidence showed that the whole area had been very well developed and maintained and that the covenantee would be injured ‘if his control of development, exercised with skill and discretion in the past, were to be weakened by the grant of this application for what I find to be inconsistent development’. Again, in Re Teagle’s & Sparks’ Application\textsuperscript{54}, it having found that ‘the system of covenants was either wholly or substantially intact’ it went on to hold that the applicant had to show that the proposed discharge or modification would not be injurious to [the covenantee]. The very making of an Order for modification would injure the covenantee, as it would show that the system of restrictions had become vulnerable, and the application therefore must be dismissed’.

Very few cases succeeded on the grounds of ‘other circumstances’, an exception being that of Re Associated Property Owners Ltd’s Application\textsuperscript{55}. The facts were that in December 1963 the Minister of Housing & Local Government, acting under the planning legislation, had approved the development of 51 acres of land to the west of the application site by the erection of council houses at a density of 80 persons per acre and the development of 108 acres immediately to the south of the application site by private housing development of a like density. The Tribunal held that these ministerial decisions amounted to ‘other circumstances of the case’ which should be deemed material within the wording of paragraph (a) of section 84(1) of the Law of Property Act, 1925 and that they had the effect of rendering obsolete the restrictions on the application site.

Generally, these decisions, taken together with those relating to the exercise of the discretion of the Lands Tribunal, showed, in contrast to some of the decisions of the Official Arbitrator, that the Tribunal considered itself very much a ‘court of equity’ and that persons seeking the modification or discharge of restrictive covenants must act in both a responsible and moral manner if they hoped to succeed in the Lands Tribunal.

\textsuperscript{50} (1951) 7 P & CR 25.
\textsuperscript{51} (1954) 7 P & CR 151.
\textsuperscript{52} (1954) 7 P & CR 153.
\textsuperscript{53} (1962) 14 P & CR 63.
\textsuperscript{54} (1962) 14 P & CR 68.
\textsuperscript{55} (1964) 16 P & CR 89.
(iv) Compensation

Cases cited:

Re Davis’ Application (1950) 7 P & CR 1
Re Watson’s Application (1966) 17 P & CR 176

The decisions of the Official Arbitrator were often accompanied by the award of compensation, which led to the criticism that modification was a question of the ‘buying out of private property rights’, sometimes with scant regard for the proper interpretation of section 84(1). This criticism could not be laid at the door of the Lands Tribunal in the period up to 1970 and in the cases reported there are few examples of the award of compensation. From the first reported case (Re Davis’ Application\textsuperscript{56}) the Lands Tribunal made its position very clear. Holding that the case was not one for granting the application with compensation it went on to observe that the compensation provisions appeared to be directed only to such cases as those where the covenant is set aside under the ‘other circumstances’ provision, e.g. where a future change of character is inevitable and an Order is made to enable the development to conform.

In Re Watson’s Application\textsuperscript{57}, having found that the restriction would impede reasonable user and that its discharge would ‘not injure the objector except to the extent that he would be deprived of the opportunity of obtaining damages \textit{ex contractu} for its breach’, the Tribunal proceeded to discharge the restriction subject to the payment of compensation to the objector. This is apparently an exceptional case and in general the Lands Tribunal seems to have gone out of its way to avoid the criticisms levelled against the Official Arbitrator in respect of the award of compensation in cases where the application would have more properly been dismissed.

\textit{Interim Conclusions (1950-1969)}

At the end of the section dealing with the decisions of the Official Arbitrator some three points of criticism were identified, namely:

(i) A failure to have due regard to the legal interpretation and purport of section 84(1).
(ii) A bias towards the granting of a modification on the basis that compensation would recompense for any loss, i.e. a financial rather than an environmental approach.
(iii) A tendency towards accepting the decisions of planning authorities and current planning policies and principles uncritically as evidence of obsolescence and of themselves a ground for modification.

From the evidence of reported decisions the Lands Tribunal (no doubt by reason of its judicious mix of lawyers and valuation surveyors) was successful in meeting the first-named criticism. Regarding the second criticism, namely the compensation issue, it may well have overreacted and, in an effort to show that it was not concerned with the ‘buying out of private property rights’, have in certain cases refused to modify where modification with a degree of compensation might have been more appropriate. Regarding the third criticism, namely the attitude it should take to town planning matters, the cases examined force the conclusion that it replaced the previous embrace of the Official Arbitrator with a degree of both scepticism and

\textsuperscript{56} (1950) 7 P & CR 1.
\textsuperscript{57} (1966) 17 P & CR 176.
ambivalence to the extent at times of seeing itself as a Tribunal whose duty it was to correct and remedy the indiscretions of local planning authorities and at other times (perhaps less frequently) as having to accept and adopt town planning decisions as an inevitable fait accompli.

That it had not been entirely successful in dealing with the issue of compensation and the role of town planning in its decisions lay behind the amendments to section 84 introduced by the Law of Property Act, 1969. But the amendments made by the 1969 Act and how far they would be instrumental in reconciling the private property law of the restrictive covenant with the public law of planning control is a matter for the next section of this study.

The Law of Property Act, 1969, which came into operation on 1 January 1970, made significant changes to section 84(1) of the Law of Property Act, 1925. That some amendment, or at the least clarification, was needed has already been demonstrated through the decisions of the Lands Tribunal in the period 1950-1969. The 1960's had witnessed a resurgence in the building construction industry, particularly in private house building, the redevelopment of town centre shopping areas and the construction of major high-rise office developments. The reluctance of the Lands Tribunal to modify restrictive covenants which still retained an element of value to the beneficiary but which impeded some reasonable user of the land for public or private purposes and where the award of compensation would have been an adequate recompense, has already been noted. The aspirations of 'developers' in the 1960's demanded an approach to the issue of compensation more in line with that adopted by the Official Arbitrator in the inter-war period. The reaction to the 'buying out' of restrictive covenants and the apparent determination of the Lands Tribunal not to place itself in the position of being similarly criticised had led to a situation where restrictive covenants with little residual value were in danger of frustrating the development or use of land in the wider public interest.

When the Lands Tribunal in 1950 took over the jurisdiction previously exercised by the Official Arbitrator, the new town & country planning regime ushered in by the Town & Country Planning Act, 1947 had been in operation for just 18 months. By 1969 development planning and planning control had become an accepted (if not always an acceptable) way of life. The Lands Tribunal, in the absence of any statutory guidance in section 84(1) of the Law of Property Act, 1925, and consisting as it did of eminent lawyers and valuation surveyors drawn from the senior echelons of their professions, was never sure as to how it should deal with, and what its attitude should be towards, this new 'public planning regime' controlling the use and development of land.

The Law of Property Act, 1969 addressed both these issues and before considering the decisions of the Lands Tribunal (post 1969) it is necessary to examine the amendments, which were to have a marked effect on the decisions of the Tribunal, in some detail. The 1925 Act in the second limb of paragraph 84(1)(a) had provided for discharge or modification where the continued existence of the restrictive covenant would 'impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons'. In essence this was replaced in the 1969 Act by sections 84(1)(aa) and (1A) and their effect may be summarised as follows:

(i) The benefits must be benefits to 'persons entitled to the benefit', thus making it clear that it is only those persons who can show a legal entitlement to the benefit of the restrictive covenant that have any locus.
(ii) The practical benefits claimed must be of 'substantial value or advantage' to the beneficiary to counter successfully the contention of the applicant that the restriction is impeding 'some reasonable user of land'.
(iii) That, in impeding some reasonable user of the land for public or private purposes, the restriction is 'contrary to the public interest', thus inviting the inference that there may be cases where 'public interest' may be prayed in aid of modifying or discharging a restrictive covenant impeding some reasonable user of the land for purely private purposes.
(iv) That money will be adequate compensation for the loss or disadvantage (if any) suffered by any person legally entitled to the benefit of the restrictive covenant.

The amended section 84(1) makes clear that when compensation is to be awarded it shall be assessed as either a sum representing the loss or disadvantage suffered as a result of the discharge or modification, or a sum to recompense for the reduced consideration received on the disposition of the land when the restrictive covenant was imposed. Thus, as will be seen later, attempts to obtain a share of 'developers' profit' realisable on the modification or discharge of a restrictive covenant cannot (or at least should not) succeed, being outside the limits laid down in section 84(1) governing compensation awards.

The 1969 Act dealt also with the position that the Tribunal should adopt in respect of town planning matters. In section 84(1B) it states that in determining whether a case is one falling within sub-section (1A) the Tribunal shall take into account 'the development plan and any declared or ascertained pattern for the grant or refusal of planning permissions'. Although sub-section (1A) relates to sub-section (1) (aa) it seems clear that the inclusion of the words 'in any such case or otherwise' in parenthesis in sub-section (1B) implies that the Tribunal shall take this planning advice into account when considering applications under the other headings of section 84(1), namely (a), (b) and (c). Furthermore, the opportunity is taken to widen the view that the Tribunal should take in dealing with applications for discharge or modification by drawing attention to the relevance of 'the period at which and context in which the restriction was created or imposed and any other material circumstances'. Finally, under sub-section (1C) it declared that the power conferred to modify a restrictive covenant included a power to add 'such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions'. In declaring such a power it was giving statutory recognition to a practice that had been in operation since 1925, first by the Official Arbitrator and later by the Lands Tribunal itself.

For purposes of comparison, and to assist the frequent reference to the amendments and their effect on the decisions of the Lands Tribunal (post 1969), the amended text is reproduced in full (overleaf) with the major changes printed in bold.

Against this background of the important changes made by the Law of Property Act, 1969 the decisions of the Lands Tribunal can now be examined to see how far they were affected by the amended objectives of 'freeing' land from restrictions which, although not obsolete, were nevertheless an unnecessary 'clog' on the freedom of use and development, and how far the operation of section 84(1) could be made relevant to the planning system and the changed economic and social structure of the 1970's and 1980's.

For comparison purposes the cases will be examined chronologically (in order better to discern trends) under the general headings previously adopted of dealing first with planning issues, secondly with environment issues and thirdly with legal and administrative issues. Two further issues, arising partly from the amendments introduced by the Law of Property Act, 1969 and partly as a result of the increasing use of planning agreements, necessitate two further sub-divisions dealing with first, compensation matters and secondly, the role of the Lands Tribunal in the discharge and modification of 'restrictive conditions' in planning agreements made under the Town and Country Planning Acts.

Power to discharge or modify restrictive covenants affecting land

84.-(1) The Lands Tribunal shall (without prejudice to any concurrent jurisdiction of the court) 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 on being satisfied—

(a) 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; or

(aa) that (in a case falling within sub-section (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; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interest in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction;

and an order discharging or modifying a restriction under this sub-section may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

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

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

(1A) Sub-section (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;

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.

(1B) In determining whether a case is one falling within sub-section (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Lands Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes the power to add such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Lands Tribunal may accordingly refuse to modify without some such addition.
Town Planning Issues

Cases cited:

Re Henman’s Application (1970) 23 P & CR 102
Re Davies’ Application (1971) 25 P & CR 115
Re Beardsley’s Application (1972) 25 P & CR 233
Re S.J.C. Construction Co. Ltd’s Application (1974) 28 P & CR 200
Re Collins’ & Others’ Application (1974) 30 P & CR 527
Re Patten Ltd’s Application (1975) 31 P & CR 180
Re Mansfield District Council’s Application (1976) 33 P & CR 141
Re Brierfield’s Application (1976) 35 P & CR 124
Re Osborn’s & Easton’s Application (1978) 38 P & CR 251
Re Chapman’s Application (1980) 42 P & CR 114
Re Farmiloe’s Application (1983) 48 P & CR 317
Re Solarfilms (Sales) Ltd’s Application (1993) 67 P & CR 110
Re Seven Trent Water Ltd’s Application (1993) 67 P & CR 236

One of the first cases to be heard under the amended code introduced by the Law of Property Act, 1969 was that of Re Henman’s Application. The Wentworth Estate, Virginia Water had been ‘systematically developed’ under a building scheme providing, *inter alia*, for one dwelling house per plot. One plot having been sub-divided and the Planning Authority having given permission for a second house on the undeveloped sub-plot, the applicant sought the modification of the covenant so as to enable implementation of the planning permission. The Tribunal, whilst acknowledging that planning permission was from the Planning Authority’s point of view quite proper, was of the opinion that the Tribunal had to take a ‘rather wider view’ and after reviewing the history of the planning of, and the restrictions affecting, the Wentworth Estate, concluded that ‘the continuance of the scheme of covenants secured practical benefits’ to the Estate Company and to the Roads Committee as the elected representatives of the owners, and proceeded to dismiss the application.

Furthermore it was of the opinion that ‘the thin end of the wedge’ argument had some real force in this case as ‘in these days’ owners might be tempted to use the ‘infilling’ arguments and to grant the application would give them encouragement, thereby ultimately wrecking the whole of a ‘carefully worked out development’. The policy of the Local Planning Authority was to increase density and to encourage infilling where appropriate, as it was with many planning authorities at that time (and indeed today) in line with general policies relating to the safeguarding of agricultural land and the preservation of green field sites. The Tribunal, having as the 1969 Act required, considered the materiality of the development plan and planning control criteria, quite properly drew a distinction between the objectives of statutory planning control and private estate management; a distinction which, as will be demonstrated, it has pursued to this day in spite of occasional ‘lapses’.

Questions relating to planning and ‘the public interest’ arose in Re Davies’ Application. The Tribunal considered the application to modify under sub-sections 84 (1) (a), (aa) and (c). Having decided that there was no case under para (a), there being no change such as to render...
the restriction obsolete, nor under para (c), as the objectors would be injured if the application
were granted, it proceeded to deal with the application under para (aa) and by reference to sub-
section (1A). In this regard the Tribunal was of the opinion that although the proposed user
would be a reasonable one within section 84(1) (aa), the restriction still secured practical
benefits of substantial value and advantage to the objectors. Turning then to the question of
whether the restriction was ‘contrary to the public interest’ it proceeded to put into context the
relationship between a planning permission and the public interest in the following terms:

‘It could not be said that this restriction, in preventing development for which planning permission
had been given, was operating against the public interest. When planning permission is granted
the authority granting it is merely saying that the permitted development would not be contrary to
the public interest; it is not saying that it would be contrary to the public interest if such
development did not take place. The planning permission is therefore relevant to the point of
public interest but is in no way decisive.’

The application was dismissed as failing on all three grounds.

The question of ‘public interest’ arose again in Re Beardsley’s Application⁴, in which the
Tribunal was of the opinion that it did not follow that ‘because there is an acute shortage of
building land in a given locality, that any restriction which prevents development of land is
ipso facto contrary to the public interest’. The public interest has to be considered in a broad
context having regard to the meaning of the words in section 84(1B) to ‘consider not only the
ascertainable pattern for the grant or refusal of planning permissions but also the context in
which the restriction was imposed, and any other material circumstances’. From which it may
be inferred that a general statement of an acute shortage of building land in a given locality is
not sufficient to establish a case based on public interest.

A contrary decision was arrived at in Re S.J.C. Construction Co. Ltd’s Application⁵ in which
the Tribunal held that the restriction ought to be modified, under para (b) of sub-section (1A),
on the ground that in impeding the reasonable user of the burdened land the restrictions were
contrary to the public interest, there being ‘a scarcity of land available for building in the whole
of southeast England, including Cheam’. The Tribunal was influenced by the fact that planning
permission had been granted; that in its view the adverse effect was not serious; that building
work so far done would be wasted; that the applicants had acted in good faith, and... ‘On the
assumption that a substantial amount of compensation can be awarded, although there will be
a loss to the public interest insofar as publicly owned land would suffer some disadvantage, yet
some other public interest could be furthered’. The Tribunal held that the application must fail
under all of the other provisions of section 84(1), save under para (b) of sub-section (1A). In this
respect it may be argued that the Tribunal was influenced by the fact that the ‘dominant land’
was ‘publicly owned land’ and that by the award of substantial compensation to the local
authority ‘some other public interest could be furthered’⁶.

The provision in section 84(1A) under which the Lands Tribunal is required to consider
whether a restrictive covenant is impeding some reasonable user of land ‘contrary to the public
interest’ seems to have caused the Tribunal much anguish in the interpretation of what is meant
by ‘public interest’ and how it should deal with varying degrees of public interest and the

⁶ This case is considered again later together with other cases dealing with compensation.
conflicts between different public interests arising in the same case. In Re Collins' & Others' Application\textsuperscript{7} the Tribunal was of the view that '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'. The case is also important in the clear distinction that the Tribunal drew between its jurisdiction and that of a Town Planning Inquiry. Having heard arguments for the admission of 'a large number of documents issued at various times by public authorities concerned with planning, either in the immediate vicinity of the property of the applicants or in various wider areas in which that property was comprised', it held that under the new sub-section (1B) of section 84 the 'only admissible documents are those which, like an approved town map or development plan, have been published, subjected to a public inquiry and then approved by the Minister'. To avoid all doubt as to the view it took the Tribunal added \textit{per curiam}: 'It would seem most inappropriate for a hearing under this jurisdiction before the Lands Tribunal to become something in the nature of a town planning inquiry'.

This clear statement of principle concerning 'public interest' and the jurisdiction of the Lands Tribunal \textit{vis a vis} a Town Planning Inquiry appears not always to have found favour with the Tribunal in subsequent cases. In Re Patten Limited's Application\textsuperscript{8} the Tribunal arrived at what, on the face of it, can only be described as a contrived and 'precious' decision. The restrictive covenant prevented any building on a piece of back land; the applicants sought authority to build ten houses on the land; the Tribunal found that the proposals of the applicants were reasonable but that in impeding them the restriction was not contrary to the public interest. Noting that it had power under section 84(1C) to grant a modification permitting a smaller number of houses it stated that if seven houses (rather than ten) were built in reasonable positions they would not cause serious loss of amenity and furthermore if only seven houses were built, to prevent such a development would be contrary to the public interest. Thus, the Tribunal appears to be saying that while the building of ten houses would cause a serious loss of amenity, the building of seven would not and that to prevent the building of ten would not be contrary to the public interest but to prevent the building of seven would. Fortuitously, and for reasons unstated, the modification was unacceptable to the applicants and, having no power to impose new restrictions unless accepted by the applicant, the Tribunal was later forced to refuse the application, thereby (it is suggested) saving itself from an embarrassing decision and untold consequences if a similar approach were to be pursued in subsequent cases.

Conflict between competing 'public interests' and the role of town planning arose in Re Mansfield District Council's Application\textsuperscript{9}. The application was for the total discharge of a restrictive covenant limiting the use of land 'for the purpose of markets and fairs generally and especially of a cattle market', in order to enable the District Council who owned the land subject to the restrictive covenant to develop it as a leisure centre for which they had granted themselves planning permission. The Tribunal, in considering the question as to whether the covenant in impeding the leisure centre use was contrary to the public interest and, noting that in doing so it was compelled to make a decision between two conflicting public interests (a cattle market especially or a leisure centre) quite properly had to have regard to 'the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area...and any other material considerations'.

\textsuperscript{7} (1974) 30 P & CR 527.
\textsuperscript{8} (1975) 31 P & CR 180.
\textsuperscript{9} (1976) 33 P & CR 141.
Having reviewed the relevant planning documentation, the Tribunal then proceeded to consider such issues as (i) the need for a cattle market, (ii) alternative sites for a cattle market and (iii) the intention of the council as to the provision of another cattle market on an alternative site. Furthermore, it was of the opinion (iv) that the grant of planning permission by the District Council to themselves as planning authority could not be regarded as being at all persuasive on town planning grounds as that Council were 'judges in their own cause' and (v) that the proposed use as a leisure centre, contrary to the Development Plan and without providing an alternative site for a cattle market, was in conflict with the Development Plan, and that that aspect should have been drawn to the attention of the Secretary of State who should have held a Public Inquiry.

That the Tribunal should have regard to the Development Plan and planning permissions is quite proper. That it should go behind those decisions to the extent of questioning both their integrity and their effect would seem to be quite improper and outside the scope of section 84(1B). That indeed may have been in the mind of the Tribunal for, having commented on the decisions themselves and the manner in which they were taken, Douglas Frank, QC, presiding, in dismissing the application then went on to say:

'It is not for me to make [the] planning judgment, and in the absence of it the burden seems to be fairly and squarely on the applicants to show that, notwithstanding the planning position, it would be contrary to the public interests to allow the covenant to stand in the way of the leisure centre. I think the applicants would at least have to show first that there is no suitable alternative site for the leisure centre and secondly that it was either wholly impractical or uneconomic to continue the cattle market at the present site or on another site.'

In this case the Tribunal, by introducing its own views regarding the planning merits, clouded the issue which, even if the resolution of it was difficult, was of itself quite straightforward. The restrictive covenant prevented the building of a leisure centre, which had a valid planning permission, was a reasonable user of the land and the development of which was prima facie in the public interest. The restrictive covenant safeguarded the use of the land as a cattle market, being an established use which, again prima facie, was in the public interest. It can be argued that it is not within the jurisdiction of the Lands Tribunal to adjudicate as between conflicting public interests. Section 84 (1A) requires the Lands Tribunal to satisfy itself that the restriction in impeding some reasonable user of land is contrary to the public interest. Having accepted that the use of land as a leisure centre was a reasonable user in the public interest, it was not called upon to consider whether the present user was one in the public interest let alone whether that be a greater or lesser public interest than use as a leisure centre. The Local Planning Authority, being the authority charged with the duty of considering applications ‘in the public interest’ had already decided that issue in favour of the leisure centre. Being satisfied that the use as a leisure centre was a reasonable user and that its impediment was contrary to the public interest the Lands Tribunal had the option of either granting the modification (subject to the payment of compensation if appropriate) or, because its decisions are always discretionary, refusing the application on some ground based in equity or on ethics. The Tribunal appears not to have addressed the real issues, namely: (i) does the public interest (a leisure centre) outweigh the benefit of the restrictive covenant to the owner of the dominant land and (ii) is the value of that restrictive covenant (limiting use especially to a cattle market) of substantial benefit to the dominant owner? Even by the mid 1970’s the Tribunal cannot resist, despite frequent protestations to the contrary, espousing (and contesting) planning argument.
Two further cases in the latter half of the 1970's show a hardening of attitude by the Lands Tribunal to the question of 'the public interest'. In *Re Brierfield's Application*\(^\text{10}\) the Tribunal held that the 'fact that planning permission had been granted did not of itself come near to establishing the proposition that the restriction, in impeding the proposed user, was contrary to the public interest'. To make this submission good it must be shown that the public interest is such that it overrides all other objections. Later, *Re Osborn's & Easton's Application*\(^\text{11}\) dealt with the status of Government policy in the consideration of questions of public interest. The applicants having received planning permission (granted on appeal by the Minister) for the erection of blocks of flats, sought to have restrictive covenants limiting development to one house per plot modified to enable them to implement those permissions. The Tribunal, refusing the application, held that the proposed buildings would be substantially different in scale from the existing buildings on the plots and the other houses on the estate and that the proposed development would substantially increase noise, the covenants having been imposed to avoid the kind of development now proposed. On the question of public interest the Lands Tribunal held that, while declared Government policy is that when redevelopment takes place advantage should be taken of such opportunities that occur for redeveloping at higher densities, it does not follow that redevelopment by single dwellings would be contrary to the public interest. The Tribunal is now on much firmer ground by distinguishing very clearly between the public and the private interests and its role as distinct from that of planning.

The 'thin end of the wedge' argument which featured so prominently in the early days of the Lands Tribunal appears to have been laid to rest finally in the early 1980's. In *Re Chapman's Application*\(^\text{12}\) the argument that if the application were granted a similar application to build on an adjoining site would be likely to succeed, drew from the Tribunal the response that qualified objectors could then oppose any such application and that it would be 'wrong for the Tribunal now to discuss or pre-judge any such future case'. Again, in *Re Farmiloe's Application*\(^\text{13}\) the Tribunal, commenting on the 'thin end of the wedge' argument, said that each future application would have to be decided on its own merits, uninfluenced by the present decision. Thus, the Lands Tribunal is borrowing from the town planning regime the criterion that each case must be considered on its merits, without acknowledging that the decision in the instant case will influence, if not be a precedent for, like decisions in similar cases.

There is probably no better way of concluding this section dealing with town planning issues\(^\text{14}\) than to refer to some recent cases taken from 1993 and 1994 to illustrate the current attitude of the Lands Tribunal to town planning. *Re Love's & Love's Application*\(^\text{15}\) concerned an application to build a garage (with the benefit of planning permission obtained on appeal) on land the subject of a restrictive covenant imposed on the sale of a council house in pursuance of the statutory right to buy under provisions of the Housing Act, 1985. The Council objected on grounds including detriment to visual amenity, creation of a traffic hazard, and that it would be the 'thin end of the wedge' in that it would destroy the Council's control over the estate by means of the covenants. The Council was considered to be a custodian of the public interest by reason both of its retention of substantial parts of the estate and the provisions of the Housing Act, 1985, section 609. The Tribunal, holding *inter alia* that the estate was of no special

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\(^\text{10}\) (1976) 35 P & CR 124.

\(^\text{11}\) (1978) 38 P & CR 251.


\(^\text{13}\) (1983) 48 P & CR 317.

\(^\text{14}\) Planning agreements are dealt with as a separate item, *post*.

architectural merit, that on the evidence the garage would not create a traffic hazard and that few buildings on the estate could accommodate a garage in the same manner, granted such limited modification as that sought as it would not 'inhibit the Council from enforcing similar covenants affecting its houses on the estate'.

The Tribunal added a proviso to the relevant covenant to the effect that 'the erection of a garage, in accordance with planning permission, should not be deemed to be in breach of any covenant therein, thus leaving the full benefit and protection of the covenant in the hands of the Council'. This raises the question as to whether the Tribunal was in fact modifying the covenant or was it merely allowing the garage as a specific exception to the covenant, the wording of which remained unchanged.

By comparison, in Re Solarfilms (Sales) Limited's Application\textsuperscript{16} the Tribunal dismissed an application to modify a restrictive covenant to permit use as a children's day care nursery - a reasonable user for which planning permission had been granted on appeal - there not being such a degree of urgency as to justify the modification on the grounds of public interest. The Tribunal was apparently influenced by the fact that although it was accepted that property values would not be affected, the objectors aims in insisting on the observance of the covenant to maintain their estate as strictly residential were 'sincere and not tinged with any ulterior motive'. The outcome of the decision of the Lands Tribunal in this case resulted in the restrictive covenant not only effectively protecting the rights of the beneficiaries but also upholding the planning decision of the Local Planning Authority as against that of the Secretary of State for the Environment.

The argument and decision in Re Severn Trent Water Limited's Application\textsuperscript{17} are important as illustrating the extent to which the Tribunal is prepared to go in order to accommodate the 'town planning climate' within which it operates. The case concerned an application for the discharge or modification of restrictive covenants imposed in 1939, which prevented land from being used other than as a sewage disposal works, for agricultural purposes, or as a cemetery, so as to enable the land to be used as a leisure centre, for which the Local Planning Authority had resolved to grant conditional planning permission, subject to the making of an agreement under the Town & Country Planning Act 1990, section 106. The objector, who had the benefit of the restrictions, owned five acres of land to the south of the application land and considered that the possibility that he might obtain planning permission in the future to build upon that land would be prejudiced if the leisure centre as proposed should go ahead. Although it had been planning policy to maintain the five acres as open space to provide a buffer zone, the objector considered that the need to provide more housing than already allocated in the current Structure Plan would lead to the need to identify further 'green field sites' of which his was one of those most suitably located for release for housing development. The emerging Structure Plan for the area identified the application site for leisure use and the objector's site as an open buffer zone and the applicants contended that there was thus no reasonable likelihood of development being permitted on the objector's land and even if it were permitted the proposed use of the application site as a leisure centre would have no adverse effect upon it.

The Lands Tribunal, modifying the covenants so as to permit the proposed leisure use, held that such use of the application site was a reasonable user impeded by the restrictions

\textsuperscript{17} (1993) 67 P & CR 236.
without securing any practical benefit to the objectors, that the evidence supported the contention that the possibility of obtaining planning permission for the objector’s site was ‘so remote as to be negligible’, and that in any event the proposed development of the application site would not hinder the obtaining of such a permission, nor would it prejudicially affect any residential development carried out in accordance with such a permission.

It would seem quite proper for the Lands Tribunal to hold that the proposed leisure use was a reasonable use and that the restrictions impeded such a use without securing any practical benefit to the objectors. It would have been quite proper for it to conclude that the restriction preventing the use as a leisure centre was contrary to the public interest and any residual benefit to the objectors could be adequately recompensed by the award of compensation. It is questionable, however, as to whether it was necessary or prudent for it to have concluded that ‘the possibility of obtaining planning permission for the objector’s site was so remote as to be negligible’, and that the proposed development of the application site would not hinder the obtaining of such a permission, nor would it prejudicially affect any residential development carried out in accordance with such a permission.

The Tribunal’s view may well have been a fair interpretation of what might happen in the future, but it is not for the Tribunal, any more than it is for a planning authority, to forecast the outcome of future planning applications and, in particular, to make a subjective value judgment that the leisure centre use would not ‘prejudicially affect any residential development’ if such were to be permitted on the objector’s land. The Tribunal had earlier ruled that references to the ‘planning background’ in section 84(1), as modified by the Law of Property Act, 1969, should include only statutory development plans and any discernible pattern of planning control decisions in the locality, that other documentation of an ‘informal’ nature should be excluded, and that future applications would be considered on their merits as and when they were made.

The planning comments in the instant case are both gratuitous and, it may be argued, outside the jurisdiction of the Lands Tribunal. Nonetheless this is an instructive case on which to conclude an examination of the way in which the Lands Tribunal handles town planning issues. It illustrates the Lands Tribunal’s distinct and individual approach to the modification or discharge of restrictive covenants within the realm of ‘private land law’ whilst at the same time recognising that it takes such decisions within the context of an established planning regime statutorily empowered and mandated to control the use and development of land in the public interest. That it chose in this case to comment further than was necessary in arriving at its decision does not in itself question the correctness of that decision but, unless such comment is considered as obiter, the practice of attaching planning reasons for its decision would be one to be treated with concern. Section 84(1B) requires the Lands Tribunal to take into account ‘planning matters’ in determining whether a case is one falling within section 84(1A). Having so decided that it does, the Tribunal then proceeds under this section as authorised by section 84(1) (aa) in the context of the planning background but not by reason of it. This interpretation of the position would be quite clear were it not for the words in parenthesis in section 84(1B) adding to the words ‘in any such case’ the additional words ‘or otherwise’ that seem to imply (as noted earlier) that the planning criteria should be taken into account in section 84(1) as a whole and not merely by reference to decisions given under section 84(1) (aa).
**Environment Issues**

Cases cited:


In at least three cases in the 1970's the Lands Tribunal decisions embrace in one form or another a kind of environmental evaluation. In *Re Mercian Housing Society Limited's Application*¹⁸ a modification of a restrictive covenant, limiting development to one private dwelling house to each quarter of an acre plot, was sought in order to permit the erection of six blocks of flats. The Tribunal, in granting the modification so as to permit five of the blocks (excluding the sixth on the ground that it would have a 'devastating' effect on one house and a 'serious' effect on another), then went on to compare the scheme submitted by the applicant with proposals put forward by the objectors for the development of the site in accordance with the restrictions. Apparently, it was not contended that the proposals put forward by the objectors for the development of the site in accordance with the restrictions (being part of a 'scheme of development') were not 'some reasonable user of the land' nor was evidence adduced that such proposals would be uneconomic. The Tribunal (as reported) took its decision solely on the basis of a comparison between the applicant's scheme and the objectors' proposals, founded on environmental preference and in particular the preservation of trees. The applicants had negotiated with the Local Planning Authority a scheme which preserved 'over 99% of the trees and the most important part of the landscaping' as a result of which they had obtained planning permission. Commenting that '...It would be a crying shame if the glade was destroyed and the [applicant's] scheme avoids this and preserves many more trees elsewhere, whereas ... [the objectors' scheme] would inevitably fragment the glade and involve much more destruction of trees...', the Tribunal proceeded to 'set aside' the objectors' scheme of development, contrary to the wishes of some 100 residents on the estate, without any evidence of any change in the character of the neighbourhood and solely on the ground that development of the site of 2.685 acres by the erection of nine houses would be unlikely to receive planning permission and that such development would result in the destruction of many mature trees and much landscaping. By the introduction of an alien form of development (three-storey blocks of flats in an area of low density housing) it must be a debatable point as to whether the 'wider environmental character' of the estate was not being sacrificed in the interests of the 'narrower environmental landscape' of the immediate arboreal locality. In the event the decision of the Lands Tribunal appears to have been based entirely on a selective and subjective 'value judgment', without apparently any attempt to weigh all the environmental issues, and with scant regard for the provisions of s. 84(1).

In *Re Wards Construction (Medway) Limited's Application*¹⁹ an application failed despite the fact that the proposed user was a reasonable one and that the unmodified restriction impeded it, on the grounds that it 'secured the objectors practical benefits of substantial value'. Among

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other things ‘they valued space, quiet and light, while the proposed building would blot out the sky and some of the valuable sunlight’. Whilst in Re Forestmere Properties Limited’s Application\textsuperscript{20} the Tribunal, in exercising its discretion to discharge parts of a restrictive covenant, were not prepared to do so without the imposition of new restrictions to preserve the trustee’s control of development over the application land, requiring the trustee’s approval to the plans of any new building or subsequent alteration thereto. The Tribunal emphasised the importance of restrictive covenants (in this case imposed in 999 year leases made in 1931, 1935 and 1943) to ‘good estate management’ and the need to preserve the trustee’s control of development which the trustees have, either by ownership or powers of management, exercised in respect of such matters as density and plot ratio in a reasonable and generous manner.

In the former case the Tribunal recognised the rights of an individual to secure ‘living standards’ over and above those that might be protected at common law or under the law relating to Town & Country Planning. Whereas in the latter case it recognised the value of restrictive covenants controlling design matters as part of the practice of good estate management, whilst accepting at the same time that the modification of restrictive covenants is needed to meet changed circumstances, albeit still retaining the power of the trustees to control design, density, plot ratio and use through the submission of plans for the trustee’s approval.

In the 1980’s a number of cases were heard wherein the question of a ‘right to a view’ was a paramount consideration. The scene was set by two Court of Appeal cases, the first being by way of an appeal from the County Court and the second by way of appeal from the Lands Tribunal itself. In \textit{Wakeham v Wood}\textsuperscript{21} the Court of Appeal held that the judge in the County Court was in error in awarding damages in lieu of a mandatory injunction, having found that the defendant (in the instant case) had acted in flagrant disregard of the plaintiff’s rights under the restrictive covenant, there having been a ‘serious interference with the plaintiff’s legal right to a view of the sea and that interference was incapable of being estimated in money terms’. On these grounds the appeal was allowed.

In \textit{Gilbert v Spoor}\textsuperscript{22} the appellant contended, \textit{inter alia}, that the enjoyment of the landscape view could not in law be of practical benefit to the objectors under the restrictive covenant because it was not a benefit annexed to the land owned by the objectors, since the view was not one obtainable from their land. In dismissing the appeal the Court held that ‘the Tribunal was entitled to hold that a view was a benefit whether or not that benefit could be said to touch and concern the land’ but in any event ‘the land of the objectors in this case was touched and concerned by the covenant, since the covenant was intended to preserve the amenity of the neighbourhood generally, and loss of a view just round the corner could well affect the estate detrimentally’. Per Waller, LJ:

‘If a building estate contains a pleasant approach with restrictions upon it and some building is done contrary to those restrictions which spoils the approach, if then the owner of a plot complains about breach, the fact that he does not see it until he drives along the road, in my opinion does not affect the matter... A view is not something which can be valued in money terms; indeed it may be and perhaps I would say in this case is, priceless’.

These two Court of Appeal cases provide a firm foundation for the deliberations of the Lands Tribunal over the next decade.

\textsuperscript{20} (1980) 41 P & CR 390.
\textsuperscript{22} (1982) 44 P & CR 239.
Thus, for instance, in Re Bushell's Application\textsuperscript{23} the Tribunal dismissed an application on the ground that 'the intrusion of the roofline of the proposed house into the unusual view enjoyed by one objector' was sufficient to defeat the application. The proposed new house would interfere significantly with the 'high quality landscape view southeastwards across the roofs and houses and trees towards St Mary's Church', that it was unusual to find such a landscape view so close to the centre of London (Wimbledon) and money could not be an adequate compensation.

The other aspect of environmental amenity which exercised the Lands Tribunal in this period was that relating to noise and disturbance. In Re William's Application\textsuperscript{24}, having accepted that the proposed development would constitute a reasonable user of the application land and would be impeded by the continued existence of the restrictions, the Tribunal dismissed the application on the ground that at least two of the objectors would suffer serious detriment to their amenities in a loss of spaciousness, nuisance from building works and diminution in the value of their properties, for which compensation would not provide adequate recompense. Thus, even short term nuisance arising from building works is seen, at least in part, as a reason for refusing modification. On the other hand in Re Shah & Shah's Application\textsuperscript{25} objections relating to noise and other possible disturbance resulting from the use of a private dwelling house as a nursing home were countered by the Tribunal making its decision subject to a condition that the applicants should not permit 'anything amounting to a nuisance, annoyance or disturbance to the neighbours' and that the objectors would be adequately protected by the remedies available to them at law in respect of nuisance, annoyance and disturbance, should these problems arise.

A recent Lands Tribunal case, Re Lloyd's & Lloyd's Application\textsuperscript{26}, raises the question that first appeared in 1955\textsuperscript{27} as to how far the perception of possible nuisance or disturbance should be taken into account when considering applications under section 84(1). The application in the instant case was for the use of a private house as a community care home for ten psychiatric patients. The objectors contended that mental patients in the area would be disruptive and that their presence would inevitably detract from the value of neighbouring properties. Having held that there had been no change in the character of the neighbourhood such as to render the restrictions obsolete as the essential character of the neighbourhood as a high class residential area had been preserved by them, the Tribunal held that the restrictions, in impeding what was accepted as a reasonable use of the property, were contrary to the public interest, in that Government Policy in regard to mental illness required the provision of care homes in the community; that the need for such a facility in this area was desperate; that the present premises were well located to answer that need, and that the owners were well qualified and able and willing to adapt the premises for that use. Being of the opinion also that there was no evidence that the proposed use would be more or less objectionable than a school or boarding house both of which were permitted under the covenants, the Tribunal proceeded to modify the restrictions so as to permit the proposed use as a community care home for psychiatric patients. No doubt this was a 'politically correct' decision, but it was also one which on the face of it seems harsh to the beneficiaries of a restrictive covenant which had been successful (on the admission of the Lands Tribunal itself) in maintaining the 'essential character of the neighbourhood as a high class residential area'.

\textsuperscript{23} (1987) 54 P & CR 386.
\textsuperscript{24} (1987) 55 P & CR 400.
\textsuperscript{25} (1991) 62 P & CR 450.
\textsuperscript{26} (1993) 66 P & CR 112.
\textsuperscript{27} Re Dr Barnardo's Homes National Incorporated Association's Application (1955) 7 P & CR 176.
Legal and Administrative Issues

(i) Discretion - Some further observations

Cases cited:
Re Goodman’s Application (1970) 23 P & CR 110
Re Saviker’s Application (No. 2) (1973) 26 P & CR 441
Re Pearson’s Application (1978) 36 P & CR 285

Decisions of the Lands Tribunal to grant or refuse applications for the modification or discharge of restrictive covenants are, as the Lands Tribunal itself has made clear, discretionary. The way it exercises that discretion has been a matter for comment and explanation on a number of occasions by the Tribunal. Where the evidence and conclusions of the Tribunal lead inexorably to a particular decision and in the exercise of its discretion the Tribunal holds to the contrary, it should give reasons for exercising its discretion against the run of evidence and conclusions of fact.

A number of cases in the 1970’s throw light on the way in which the Lands Tribunal then sought to exercise its discretion.28 In Re Goodman’s Application29 Sir Michael Rowe, Q.C., President, referring to the exercise of the Tribunal’s discretion where there were no objectors stated that ‘even if there are no objections the Tribunal still has a discretion not to make any Order without requiring an applicant to prove his case or to satisfy the Tribunal by other means that the application should succeed’. Three years later, the same learned President, in Re Saviker’s Application (No. 2)30, where an estate owner had sold plots forbidding the erection of more than one house per plot and the applicant had sought modification to enable the building of a second house on one of the plots, dismissed the application, noting inter alia that the estate owners had ‘a moral obligation to honour their bargain with their purchasers’ and that the Tribunal ought to exercise its discretion against the application.

The exercise of the Lands Tribunal’s discretion came before the courts in 1974 in Jones & Another v Rhys-Jones31. The Lands Tribunal had held that in line with a general principle dating back to 1968, it was not right that purchasers should agree to be bound by a covenant and then seek to modify it within a matter of months32. Following dismissal of the application the appellants appealed and in allowing the appeal the Court held:

‘...there was no general principle that the shortness of the time between the imposition of the burden of the restrictive covenant...and an application for its modification was a decisive factor forbidding the grant of the application...[and that]... modification of a restrictive covenant was a matter of discretion for the tribunal and each case must be considered on its merits; that the time which had elapsed might be a factor to be taken into consideration as were also the nature of the covenant, the relationship of the parties to the original covenantors and changes in the property benefited by the covenant or in the neighbourhood; and that the matter should be remitted to the tribunal for reconsideration accordingly’.

28 Cases concerning discretion decided before 1970 have already been commented on, ante.
30 (1973) 26 P & CR 441.
32 Harman and Danckwerts, LJI in Cresswell v. Proctor (1968) 19 P & CR 516, dismissing an appeal, held that the Lands Tribunal had acted rightly in refusing to exercise its discretion in favour of an application made within so short a time (4 years) of covenants having been voluntarily entered into - to do so would be contrary to public policy and an abuse of the Tribunal’s powers.
The Court of Appeal distinguished *Cresswell v Proctor*\(^{33}\), there being no guidance in that case which compelled the Lands Tribunal to dismiss the application.

This admonition administered by the Court of Appeal in *Jones & Another v Rhys-Jones*\(^{34}\) registered with the Lands Tribunal for in *Re Pearson's Application*\(^{35}\), in granting a modification of the restrictions ‘imposed only in 1970’, the Tribunal held that ‘it would not be right to exercise the discretion of the Tribunal by refusing the application’ adding that but for the decision of the Court of Appeal in *Jones & Another v Rhys-Jones* it might have adopted a stricter view and followed the observations of Harman and Danckwerts, LJJ in *Cresswell v Proctor*\(^{36}\). In exercising its discretion, therefore, the Lands Tribunal must always be aware that the manner in which that discretion is exercised is a matter that may become the concern of the Court of Appeal.

Appeal against any decision of the Lands Tribunal is by way of case stated on a question of law, but to bring the ‘exercise of a discretion’ before the Court of Appeal the appellant may have to do no more than show that the rules of natural justice were not followed in the exercise of that discretion. Matters of fact are for the Lands Tribunal but as the exercise of its discretion will almost inevitably mean that it is deciding ‘against the facts’, it follows that wherever the Tribunal exercises its discretion it will *prima facie* lay itself open to an appeal against such decision.

(ii) Obsolescence - Some further observations

Cases cited:


The meaning and interpretation of ‘obsolescence’ within the context of s. 84(1) have been considered from the very early days of the operation of the Act and many Orders of the Official Arbitrator and Decisions of the Lands Tribunal on the issue have already been noted and commented upon, but two recent cases add to the ‘case law’ on the subject.

In *Re Quaffers Limited's Application*\(^{37}\) the Tribunal discharged restrictions imposed in 1972 and 1974 absolutely. Whilst accepting that there had been no change in the character of the neighbourhood since 1974, it considered that the restrictions were obsolete when imposed as the land retained was not capable of being benefited by the restrictions ‘on account of the motorway round the...site’ and furthermore that no compensation would be awarded ‘as there would be no detriment to amenity’. That ‘obsolescence’ is not merely a question of the passage of time is further illustrated by *Re Barclays Bank plc's Application*\(^{38}\). This case concerned an application to discharge a restrictive covenant imposed by an agreement under section 52 of the Town & Country Planning Act, 1971. The Lands Tribunal’s jurisdiction regarding ‘planning

\(^{33}\) (1968) 19 P & CR 1.
\(^{36}\) (1968) 19 P & CR 516.
\(^{38}\) (1990) 60 P & CR 354.
agreements' is discussed later but this case is important for the general principle that it establishes. The restriction, being part of a section 52 agreement, was entered into in 1977 on the sale of land and provided that the use of the dwelling for which planning permission was being granted was subject to an ‘agricultural occupancy condition’. Because most of the land held with the dwelling at the date of the section 52 agreement had since been disposed of for non-agricultural purposes the Tribunal held that it was not possible for any prospective purchaser to achieve the original object of the restrictions imposed by the agreement and consequently the restrictions must be deemed obsolete. Thus obsolescence, as in the former case, can be built in and, as in the latter case, ensue within a few years of its imposition through changed circumstances which could not necessarily have been foreseen.

Reference has already been made to the fact that two further issues need to be addressed, namely the award of compensation and the modification of planning agreements. The former is as a direct result of the changes made by the Law of Property Act, 1969 to section 84(1) of the Law of Property Act, 1925 ‘encouraging’ the award of compensation which, as has been demonstrated, was discouraged following the ‘enthusiasm’ of the Official Arbitrator for this method of resolving competing interests. The Lands Tribunal’s involvement in applications for the modification or discharge of restrictions in planning agreements came about indirectly through the Town & Country Planning Act, 1968. The power to make planning agreements had first been introduced by the Town & Country Planning Act, 1947, section 25 and later re-enacted in the Town & Country Planning Act, 1962 section 37, but until 1968 that power had only been exercisable with the approval of the Secretary of State and as a result very few local planning authorities had availed themselves of it. In the 1970’s and in particular following Local Government reorganisation in 1974, Local Planning Authorities made great use of planning agreements first under section 37 of the 1962 Town & Country Planning Act, later under section 52 of the 1971 Town & Country Planning Act, and now under section 106 (as amended) of the 1990 Town & Country Planning Act. Both the increasing award of compensation (and its assessment) and the greatly increased use of planning agreements (and the attitude of the Lands Tribunal to the modification of restrictions contained in such planning based documents) are important to the practice of estate management and development, the implementation of planning policy and environmental protection generally. The main implications are now discussed with reference to Lands Tribunal decisions taken in the last 25 years.

The Award and Basis of Assessment of Compensation

By way of introduction to this section it should be pointed out that the Law of Property Act, 1969 in its amendment to section 84(1) made it very clear as to when compensation should be considered an adequate remedy and the basis for its assessment. It is surprising therefore that the Lands Tribunal and the Court of Appeal seem to have had so much trouble in coming to terms with it.

The Act provides that in awarding compensation the basis shall be either (i) a sum to make up for any loss or disadvantage suffered by the beneficiary as a result of the discharge or modification, or (ii) a sum representing the reduction in the purchase price attributable to the effect of the imposition of the restrictive covenant. The wording of the amended section 84(1) clearly excludes, on any interpretation, an allowance for possible ‘development value’ although it will be seen that in a few cases the Lands Tribunal (aided and abetted by the Court of
Appeal) has found means of awarding increased compensation, wrongly it is suggested, to reflect a share of the 'development value' released by the discharge or modification of the restriction.

Under section 84(1A), in its decision to award compensation as being adequate for the loss or disadvantage, the Tribunal is called on to determine whether benefits are of 'substantial value' and what constitutes 'public interest'. Both of these criteria have from time to time exercised the judgment of the Tribunal. What is or is not 'substantial value' in the eyes of the beneficiary often does not equate with the view of what constitutes 'practical benefits of substantial value' to those who may be able to adopt a more objective stance. Similarly, what constitutes 'public interest' is influenced by prevailing public perception and varies through time and circumstance and as between areas of differing social and economic structure.

(i) Compensation as an adequate remedy

Case cited:
Re Bass Ltd's Application (1973) 26 P & CR 156

Turning now to an examination of the cases dealing with compensation issues it is instructive to start with one which attempted to set down for the benefit of the Tribunal the questions that had to be asked in coming to a decision as to whether or not compensation was an adequate remedy for the loss of the benefit of the restrictive covenant. In Re Bass Limited's Application Counsel for the applicants submitted that in arriving at a decision under section 84(1) (aa) the Tribunal had to consider a number of questions. This approach commended itself to the Tribunal in that case and indeed has been adopted as a 'formula' in subsequent cases by the Tribunal. The approach may be summarised as follows:

(i) Is the proposed user reasonable under sub-section (1) (aa)?
(ii) Do the covenants impede that user?
(iii) Does impeding the proposed user secure practical benefit to the objectors under sub-section (1A)?
(iv) If so, are those benefits of substantial value or advantage? If not, would money be an adequate compensation?
(v) Is impeding the proposed user contrary to the public interest? If so, would money be an adequate compensation?

It was further submitted by Counsel that in questions arising under sub-section (1A) regard should be had to the planning context as required by sub-section (1B). Having found that the proposed user was reasonable and that the covenants impeded that user, the Tribunal, being in no doubt that the impeding of the proposed user secured practical benefits of substantial advantage to the objectors and that it was not satisfied that impeding the proposed user was contrary to the public interest, held in the instant case that the application must be refused. The discipline imposed on the Tribunal by the adoption of a logical approach of this nature does much to assist the Tribunal in coming to a decision which both parties can understand even though the decision goes against one of them.

39 (1973) 26 P & CR 156.
(ii) Practical benefits of substantial value

Cases cited:

Re John Twiname Limited’s Application (1971) 23 P & CR 413
Re Gaffney’s Application (1974) 35 P & CR 440
Re Da Costa’s Application (1986) 52 P & CR 99

One of the key questions concerns an assessment of whether the proposed user impedes ‘practical benefits of substantial value or advantage’. In Re John Twiname Limited’s Application, one of the earlier cases to be decided under the amended section 84(1), the Tribunal held that although the advantages were not of ‘substantial value’ the removal of the restriction would entail some loss or disadvantage to the objectors but that money would be an adequate compensation. In Re Gaffney’s Application the Tribunal concluded that the ‘true measure of substantiality lies in the degree of depreciation in the value of the enjoyment of the property of the objector which would result from the application being granted’, thereby asserting that it is the value of the benefit as seen through the eyes of the beneficiary.

In Re Da Costa’s Application the Tribunal, whilst finding that the restriction did secure ‘practical benefits of substantial value or advantage’, nevertheless held that money would be sufficient compensation since the objector’s interest was in effect reversionary. It is difficult to understand why a freeholder not in possession should be adequately compensated by a money payment whereas if he had been in possession he would not, the Tribunal having found that the benefit was of substantial value. Presumably the Tribunal considered that any practical benefit from the restriction, though substantial, would be limited to the effect on the value of the reversionary interest, which could be calculated in purely financial terms and that, therefore, the payment of money by way of compensation would be both appropriate and adequate, there being no question of any ‘personal enjoyment’ of the benefit as such in, for example, ‘environmental terms’, which a beneficiary in possession might enjoy.

(iii) Development Value, Hope Value and Market Value

Cases cited:

Re S. J. C. Construction Co. Ltd’s Application (1974) 28 P & CR 200
Re Vaizey’s Application (1974) 28 P & CR 517
S.J.C. Construction Co. Ltd v Sutton London Borough Council (1975) 29 P & CR 322
Re Kershaw’s Application (1975) 31 P & CR 187
Re New Ideal Homes Ltd’s Application (1978) 36 P & CR 476
Re Briarwood Estates Ltd’s Application (1979) 39 P & CR 419
Re Edwards’ Application (1983) 47 P & CR 458
Re Richards’ Application (1983) 47 P & CR 467
Re Harper’s Application (1986) 52 P & CR 104
Re Bradley Clare Estates Ltd’s Application (1987) 55 P & CR 126
Re Fisher & Gimson (Builders) Ltd’s Application (1992) 65 P & CR 312
Re Cornick’s Application (1994) 68 P & CR 372

Although the modified section 84(1) makes clear the basis on which compensation is to be awarded the Lands Tribunal and the Court of Appeal have experienced difficulty in dealing with 'hope' value and claims for a share in 'development' value. The dilemma is well illustrated in *Re S.J.C. Construction Co. Limited's Application*44 in which the Tribunal held that though the restriction secured 'practical benefits of substantial advantage' the restrictions ought to be modified on the ground that in impeding the proposed user the restrictions were contrary to the public interest. Having stated that the relevant basis for the award of compensation was 'a sum to make up for any loss or disadvantage suffered by [the person entitled] in consequence of the discharge or modification', the Tribunal then went on to consider the effect of the judgment in *Stokes v Cambridge*45 and concluded that, although it was arguable that the only loss or disadvantage which could be considered is that affecting the dominant land as such, the construction which it regarded as equitable was one which involved the sharing of the development value flowing from the modification of the restriction. Douglas Frank, QC (presiding) said:

'In *Stokes v Cambridge* the Tribunal would have split equally the development value, but for the fact that they considered that the owner of the 'dominant' land would have obtained some advantage or some potential advantage from the development and therefore decided that the 'dominant' owner would have accepted one third of the development value. In the instant case no such consideration arises and I think that the most likely outcome of friendly negotiations would have been an agreement to split the development value equally and I so decide'.

The decision of the Lands Tribunal was contested in the Court of Appeal in *S.J.C. Construction Co. Limited v Sutton London Borough Council*46 on the ground that the Tribunal had erred in principle in awarding compensation on the basis of 50% of the development value. In dismissing the appeal the Court held that the 'loss or disadvantage' for which compensation was to be awarded was 'an intangible matter incapable of exact calculation in money...and that the Tribunal had adopted a fair and reasonable way of assessing the loss or disadvantage and had not erred in law in taking 50% of the realisable development value of the site'. The reluctance of the Court of Appeal to involve itself in valuation matters is understandable, but to contend that the assessment of compensation is 'an intangible matter incapable of exact calculation in money' is an inadequate reason for accepting a 50:50 division of development value as a basis for complying with the requirement of section 84(1) para (i) to assess a sum representing 'any loss or disadvantage suffered...in consequence of the discharge or modification' of a restrictive covenant. The appellants contended that section 84(1) as amended required assessment 'by reference to any depreciation in value of the respondent's land consequent upon the modification' and that the Tribunal wrongly declined to adopt that method of assessment. The decision of the Lands Tribunal, supported as it was by the Court of Appeal, in the assessment of compensation is not only arbitrary but wrong in law as the basis is clearly laid down in section 84(1) as amended. Furthermore, the art and practice of valuation is not so 'intangible' as to justify such a crude approach.

The decision of the Court of Appeal in the *S.J.C. Construction case* has been criticised in a number of quarters. Perhaps the most useful commentary is to be found in a probing article in the Journal of Planning Law47 published shortly after the decision of the Court of Appeal. The comments are particularly important as they were made by a leading Chartered Surveyor with

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46 (1975) 29 P & CR 322.
extensive practical valuation experience and the author of many standard works on Valuation and Estate Management.

The award in the *S.J.C. Construction case* was made under para (i) of the amended s. 84(1), i.e. based on 'loss or disadvantage' flowing from the discharge or modification and as Leach points out the power of the Tribunal to award 'such compensation as it thinks just' means as is just within the rules and does not extend to 'loss of bargaining power'. Moreover ‘...there is no basis of relationship between the loss and disadvantage sustained by the objector and the value of the gain of the applicant. The Act does not provide for an applicant's gain to be brought into account as a means of compensation to an objector'.

Claims for a 'share in the development value' had a chequered history throughout this period. Following shortly after the decision in *Re S.J.C. Construction Co. Limited's Application* and before the Court of Appeal's affirmation of that decision in *S.J.C. Construction Co. Limited v Sutton LBC*, the Lands Tribunal in *Re Vaizey's Application* held in that case that the 'correct measure for compensation was not to give the objector a share in the development value of the burdened land released...and that since the objector would suffer no substantial damage the compensation should be £75'. The Tribunal sought to distinguish the *S.J.C. Construction case* on a number of grounds including *inter alia* that in that case modification was granted on the ground of public interest and that the applicant had been a 'wrongdoer', whereas in *Vaizey's case* he was not. A stronger and more relevant ground, it is suggested, was that the decision in *Stokes v Cambridge Corporation* was inapplicable in that it related to a case of compensation for the compulsory purchase of land to enable the development of an area which was landlocked. The 'ransom strip' valuation approach, however applicable it may be to a matter of compulsory purchase, has no relevance in a case involving the modification of a restrictive covenant. V.G. Wellings, QC (presiding) declined to make any award on the basis of *Stokes v Cambridge* as it would be 'quite unjust if I were to award to [the objector] a share of the development value' resulting from the modification.

In *Re Kershaw's Application* Douglas Frank, QC (presiding) held that although the houses of the objectors might sustain some loss in market value, 'market value would not be the correct measure for compensation, since it would not allow for the loss peculiar to the occupier of a house...the correct test would be what the objectors, being reasonable persons would have accepted in friendly negotiations'.

There appears in this statement to be a contradiction in that what 'reasonable persons in friendly negotiations' would have accepted is precisely 'market value' which is based on the assumption of a 'willing buyer and a willing seller'. The objectors are not 'willing sellers' of their rights under the restrictive covenants and a more appropriate basis would appear to be the loss in 'market value' plus some additional sum to represent the 'peculiar' loss that the objectors would suffer, i.e. to compensate for the element of compulsion in the loss of their particular (and personal) enjoyment of their property.

52 (1962) 13 P & CR 77.  
A return to the assessment of compensation in accordance with the Act occurred in *Re New Ideal Homes Limited’s Application*\(^{54}\) in which, having decided that there was ‘no real detriment to objectors’ the Tribunal awarded under para (ii) by way of compensation ‘the sum of £51,000, being a sum to make up for any effect which the restriction had, at the time it was imposed, in reducing the consideration then received for the land affected by it’.\(^{55}\) An attempt to claim compensation on the basis of a ‘reasonable’ proportion of the value of the site failed in *Re Brairwood Estates Limited’s Application*\(^{56}\) as the Tribunal did not consider that the objectors would suffer any loss in consequence of the proposed modification, it appearing that their main purpose in objecting was to claim compensation.

That the Lands Tribunal was still not at ease with the question of the assessment of compensation is illustrated by *Re Edwards’ Application*\(^{57}\) in which V.G. Wellings, QC (presiding) awarded £500 for the objector’s loss of amenity adding that: ‘It is a sum which I calculated by a form of intelligent guesswork, not in any way related to what might be assumed to be diminution in value of the property as a result of the change’. Whereas in *Re Richards’ Application*\(^{58}\) and *Re Harper’s Application*\(^{59}\) the Tribunal awarded compensation on the basis of a sum representing the reduction of the original purchase price due to the imposition of the restrictions.

In some of its more recent decisions the Lands Tribunal has again had to consider the issue of ‘development value’. In *Re Bradley Clare Estates Limited’s Application*\(^{60}\) where the objectors claimed compensation of £30,000 (one third of the agreed development value which the discharge or modification of the restrictions would release) the Tribunal, in granting the application, refused to award any compensation on the ground that the restrictions were obsolete by reason of changes in the character of the neighbourhood and the proposed development was in the public interest. *Contra*, in *Re Fisher & Gimson (Builders) Limited’s Application*\(^{61}\) the Tribunal, having held that ‘the practical benefits were not of substantial value to the objectors’ and that ‘the restriction in impeding reasonable user was contrary to the public interest’ then proceeded to award compensation of £6,000 as ‘a share in the development value of the application land released by the modification’.

A very recent case, namely *Re Cornick’s Application*\(^{62}\) should, if it is followed in subsequent decisions, have provided much needed guidance as to the limited relevance of ‘development value’ in any award of compensation. In that case Judge Bernard Marder, QC, President, held that although the discharge of the restriction would not affect the market value of the objector’s property he would have asked a higher price for the land without the restriction thus reflecting any potential development value it possessed, and proceeded to award £5,000 as compensation.

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54 (1978) 36 P & CR 476.
55 A not inconsiderable sum in 1978, particularly as the loss occasioned ‘no real detriment’. This case is an example of where it is advantageous to substantiate a claim under para (ii) of section 84(1) based on reduced consideration rather than under para (i) based on resulting loss.
56 (1979) 39 P & CR 419.
59 (1986) 52 P & CR 104.
62 (1994) 68 P & CR 372. Two years previously it had been held in *Surrey CC v Bredero Homes* [1992] 3 All ER 302, that the basis of compensation was the loss suffered by reason of the breach and not a share of the profits. This view has been reinforced in a recent case, *Jaggard v Sawyer and Another* [1995] 1 WLR 269, in which it was held that ‘...in assessing damages to compensate the plaintiff for the continuing invasions of her rights the court would value those rights, not at a ransom price, but on the price which might reasonably be demanded by the plaintiff for relaxing the covenant...’
This last case would seem to hold the key in that 'development value', which, as has been asserted, should never feature in an assessment of compensation under section 84(1) para (i), should only feature under section 84(1) para (ii) when an element of 'hope' value could have been foreseen at the time the restriction was imposed and it can be shown that the consideration then received for the land was discounted on that account.

There is, however, a case for the proposition that it is never appropriate for compensation under section 84(1) to include any element of 'hope' value, let alone 'development value', by reference to the objective of a restrictive covenant. A landowner imposes a restrictive covenant on the sale of land because he wants to control the use and/or development of the land sold in the interest of preserving or even enhancing the value, be it financial or environmental, of the land he retains, by either restricting all development, the density of development or some specified kind of development or use. The object is to 'prevent' all or some specific use or development.

Should an owner of land want at the time he disposes of land to safeguard a share in any future increase in value of the land sold resulting from development of that land he will not do so by way of a restrictive covenant. His motive is entirely different. Far from wishing to restrict development or use he is 'hoping' to participate in the fruits of some future development. In such case the sale will be subject to an agreement in terms providing that as and when planning permission is obtained for development he will be entitled either to a fixed sum or a percentage share in the 'development value' released by the planning permission.

If he proceeds by way of restrictive covenant he is not contemplating, far from encouraging, development of the land sold. He is entitled, under the Act, to compensation for either loss or disadvantage attributable to the removal of the restriction or a sum reflecting the reduced consideration he received at the time the restriction was entered into. The former excludes compensation based on any gain to the person relieved of the restrictive covenant; the latter excludes 'hope' value, or it should, as the restrictive covenant is not in contemplation of development, but rather the opposite, and therefore the reduced consideration was not in respect of any loss of future development value but reflected the increase in value of the retained land resulting from the reduced value of the land disposed of by reason of the restriction placed on its use and/or development.

(iv) Discharge or modification and Compulsory Purchase

Cases cited:

Re Abbey Homesteads (Developments) Ltd's Application (1984) 49 P & CR 263
Abbey Homesteads (Developments) Ltd v Northamptonshire County Council (1986) 53 P & CR 1
Abbey Homesteads (Developments) Ltd v Northamptonshire County Council (1990) 61 P & CR 295
Abbey Homesteads (Developments) Ltd v Northamptonshire County Council (1992) 64 P & CR 377

The problems of the Lands Tribunal seem to have been compounded in those cases involving both the modification or discharge of a restrictive covenant and the assessment of compensation for compulsory acquisition. The saga of Abbey Homesteads and Northamptonshire County Council illustrates the need to keep a clear distinction between consideration of the two issues. The matter started in the Lands Tribunal in Re Abbey Homesteads (Developments) Limited's Application where, upon preliminary issues, the Tribunal held that a condition requiring some
1.23 hectares to be ‘made available for educational purposes’ out of a larger area of some 13 to 14 hectares with planning consents for residential development, was ‘a positive covenant’. On appeal, in *Abbey Homesteads (Developments) Ltd v Northamptonshire County Council*\(^\text{64}\) the Court of Appeal reversed the decision of the Lands Tribunal holding that the ‘covenant was just as restrictive as the seminal one in *Tulk v Moxhay*’ and the compensation payable on the compulsory purchase of the 1.23 hectares of land must be determined on the basis that such land was affected by the restrictive covenant.

Having determined the legal basis for the assessment of compensation the matter came before the Lands Tribunal again in *Re Abbey Homesteads (Developments) Ltd v Northamptonshire County Council*\(^\text{65}\) for determination of the award of compensation for the compulsory purchase. In awarding compensation of £300,000 the Tribunal held that ‘the diminution in the value of the land caused by the restrictive covenant must be disregarded under the Pointe-Gourde Principle\(^\text{66}\) and that ‘the Court of Appeal was dealing with the real world when determining that the land must be valued for compensation purposes subject to the restrictive covenant, but the Lands Tribunal, in assessing compensation, was not concerned with the real world, and so was unfettered by that decision’. Nonetheless it made an alternative award of £255,000 (£300,000 less 15% to cover diminution caused by the existence of the covenant) in case its findings were incorrect. The matter was again considered by the Court of Appeal in *Abbey Homesteads (Developments) Ltd v Northamptonshire C.C.*\(^\text{67}\). Allowing the appeal, the Court held that ‘the interest to be valued was the freehold of the site subject to the restrictive covenant...and that neither the Pointe Gourde Principle nor the Land Compensation Act, 1961, section 9\(^\text{68}\) could apply so as to remove that restriction or require it to be disregarded’.\(^\text{69}\)

The Court of Appeal accepted the alternative valuation of £255,000 (full market value less 15%) arrived at in the Lands Tribunal on the making of ‘various assumptions based on the position in the no-scheme world,’ adding that ‘...the Lands Tribunal, as we were reminded, is a specialist Tribunal, specifically charged with dealing, amongst other matters, with problems of compensation. There is no material upon which we could disagree with that judgment of the President’. Put bluntly, law is for the Court of Appeal, assessment of compensation is for the Lands Tribunal. Provided that in assessing compensation the Lands Tribunal follows the law the Court will not challenge the quantum of the assessment.

The restriction in the *Abbey Homesteads case* was enshrined in an agreement made under section 52 of the Town & Country Planning Act, 1971 and attention must now be directed to the way in which the Lands Tribunal has exercised its jurisdiction in applications for the discharge or modification of restrictions in planning agreements.

\(\text{\textsuperscript{64}}\) (1986) 53 P & CR 1.

\(\text{\textsuperscript{65}}\) (1990) 61 P & CR 295.

\(\text{\textsuperscript{66}}\) In essence, the Pointe-Gourde principle (originating in the decision of the House of Lords in *Pointe Gourde Quarrying and Transport Co. Ltd. v Sub-Intendent of Crown Lands* [1947] AC 565 PC and expanded in later statute and case law) provides that in the assessment of compensation for land following compulsory purchase, any increase or decrease in value arising as a result of the ‘scheme’ necessitating the compulsory acquisition is to be disregarded.

\(\text{\textsuperscript{67}}\) (1992) 64 P & CR 377.

\(\text{\textsuperscript{68}}\) This section, which is an extension of the Pointe-Gourde principle, requires depreciation in the value of land to be ignored in the assessment of compulsory purchase compensation where such depreciation is attributable to an indication of future compulsory acquisition having been given in a development plan or ‘by any other means’.

\(\text{\textsuperscript{69}}\) Notwithstanding that the restrictive covenant arose from a planning agreement, with the beneficiary being the local authority concerned, it was essentially part of the ‘interest’ itself and not just part of a scheme or project for compulsory acquisition.
The Lands Tribunal and Planning Agreements

Cases cited:

Re Beecham Groups Ltd's Application (1980) 41 P & CR 369
Re Martin's Application (1986) 53 P & CR 146
Re Martin's Application (1988) 57 P & CR 119
Re Towner's & Goddard's Application (1989) 58 P & CR 316
Re Jones' & White & Co.'s Application (1989) 58 P & CR 512
Re Hopcraft's Application (1993) 66 P & CR 475
Re Williamson's Application (1994) 68 P & CR 384

Although the power to deal with applications for the discharge or modification of restrictions in planning agreements made under the Town & Country Planning Acts had been with the Lands Tribunal from its inception in 1950 it appears that the first occasion on which it was called upon to consider such an application was in Re Beecham Groups Limited's Application. The Local Planning Authority had entered into an agreement under section 37 of the Town & Country Planning Act, 1962, as part of a planning permission, with the applicant that certain land be kept free of development in line with its declared planning policy to retain open land between two distinct settlements. The applicant had obtained planning permission on appeal to the Secretary of State for the Environment in spite of the fact that his Inspector, after an Inquiry, had recommended otherwise. The Lands Tribunal allowed the modification on grounds including inter alia that the application site was the only piece of land available and suitable for the proposed building; that the Tribunal had jurisdiction to modify or discharge restrictions imposed by planning agreements; that important factors in the case were the decision of the Secretary of State, and that the Council did not own any land in the area and had not put forward any objection on aesthetic grounds.

Apart from the fact that the Tribunal appears not to have indicated the sub-section of section 84(1) under which it arrived at its decision, its reasoning that one of the important factors in the case was that 'the Council did not own any land in the area' demonstrates a confusion as to the purpose of Town & Country Planning law and practice under which decisions are taken in the public interest and not for the 'benefit of the Council'.

Fortunately the reasoning and 'perverse' decision in Beecham's case was not repeated in Re Martin's Application. The Local Planning Authority had refused a planning application for development on a site, protected under a section 37 agreement restricting its use to that of a private open space only. The decision was reversed by the Minister on appeal but the Council nevertheless insisted on its rights under the agreement. The Tribunal, dismissing the application, held that the restriction was 'taken to protect the amenities of the area and that the provisions of section 37, under which the Council was to be treated as if it owned adjacent land, were intended to give the covenant the validity of a normal restrictive covenant'. The Tribunal added:
'Decisions of the Secretary of State on planning questions do not necessarily determine whether the restriction ought to be deemed obsolete or whether, in impeding reasonable user, it is a practical benefit to the Local Authority or is contrary to the public interest. These questions have to be determined on their merits'.

This view was upheld in the Court of Appeal in *Re Martin's Application*\(^\text{72}\) when the Court held, in dismissing an appeal, that 'a grant of planning permission was merely a circumstance that the Lands Tribunal should take into account' and 'did not necessarily require that the Lands Tribunal discharge the covenant'. It found on the facts that there was no ground to interfere with the conclusion of the Lands Tribunal that the purpose of the covenant was not obsolete, notwithstanding the existence of the planning permission, and that the covenant should not be discharged. Similarly, in *Re Houdret & Company's Application*\(^\text{73}\) the Lands Tribunal dismissed an application on the ground that 'the Council would be injured in its capacity as custodian of the public interest if the modification sought was allowed and that this was of substantial value and advantage to it', adding that money would be no adequate compensation for the loss.

In *Re Towner's & Goddard's Application*\(^\text{74}\) the Tribunal allowed an application to modify a restriction in a section 52 agreement made under the Town & Country Planning Act, 1971 holding that, 'although the Council was right to guard the Green Belt jealously, the Council, as custodian of the public interest, would suffer no injury in this case...'. *Contra in Re Whiting's Application*\(^\text{75}\) the Tribunal refused to modify a restriction entered into in a section 52 agreement on the ground that 'the National Trust in its capacity as custodian of the natural beauty of the land would be seriously injured by the modification sought, suffering a loss or disadvantage, aesthetic in character, for which money would provide no adequate compensation'.

The appropriateness of compensation in cases concerning the discharge or modification of restrictions in planning agreements has been a matter of comment and opinion in two recent articles in the Journal of Planning and Environment Law. In the one, the author\(^\text{76}\) states that '...money will never be adequate compensation for a local authority or other public body acting in the public interest...' and in the other\(^\text{77}\) that '...planning and similar agreements taken for public purposes cannot generally be released by the payment of money. However this is not necessarily the case with private agreements or occasionally with public authorities...'.

These views emphasise the clear distinction that has to be drawn between those matters where the local authority or other public body is acting as custodian or guardian of the public interest and those matters which are in furtherance of the interests of public bodies and private individuals.

An important gloss on these decisions was provided by *Re Jones' & White & Co's Application*\(^\text{78}\). In that case the District Council sought to oppose an application to modify a restriction in a section 52 agreement where it had itself been responsible for granting planning permission for the proposed development. The Tribunal held that the section 52 agreement

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76 H.C. Abraham, *The Local Authority as Objector to Applications for Modification or Discharge of Restrictive Covenants*, (1994) JPL 792 at 796.
enabled the District Council to consider matters from a subjective point of view, whereas when exercising its functions in relation to planning permission, it had to be objective. The District Council had in submission drawn a clear distinction between the general powers to control development under the Town & Country Planning Acts and those flowing from the benefit of a restriction upon the use of land in a specific agreement or deed. For this proposition the District Council relied on the decision of the Court of Appeal in Re Martin’s Application79 in which Fox, LJ said ‘...it seems to me that, while the two regimes impinge upon each other to some extent, they constitute different systems of control and each has, and retains an independent existence’. This persuasive argument influenced the Lands Tribunal in dismissing the application, regardless of the fact that a restriction imposed in a section 52 or any other planning agreement is attached to the planning permission and is part of it and is therefore not in the category of a free-standing restrictive covenant, where the distinction so clearly drawn by Fox, LJ would apply.80

Three recent cases show how far the Lands Tribunal has moved from the position it first adopted in Beecham’s case back in 1980. In Re Wallace & Co’s Application81 the Lands Tribunal dismissed an application on the ground that ‘the object of the section 52 agreement...was to keep restricted land open’ and although impeding a reasonable user it ‘secured a practical benefit of substantial value to the Local Authority as custodian of the public interest’. Even though the Local Authority possessed no land in the area it could in any event under section 52 enforce the restriction as if it possessed adjoining land. Similarly in Re Hopcraft’s Application82 the Lands Tribunal dismissed an application on the ground that ‘the proposed development would be damaging to visual amenity and would bring about intrusion on a significant scale of an urban form of commercial development into a pleasant open area which should remain open ...the public interest required that the application land be kept free from development’.

Finally in Re Williamson’s Application83 the Lands Tribunal, in modifying a restriction in a section 52 agreement so as to allow a use in accordance with a planning permission obtained on appeal, concluded...‘The fact that planning permission had been granted for the proposed use was taken into account by the Tribunal but was held not to be binding, as the planning regime was separate from the restrictive covenant regime’. Thereby, yet again, compounding the confusion as the restriction in a planning agreement attached to a planning permission is part of the ‘planning regime’, not part of the ‘restrictive covenant regime’.

This anomalous situation has at last been recognised by Parliament and, following the amendment to section 106 of the Town & Country Planning Act, 1990 by the Planning & Compensation Act, 1991, applications for the discharge or modification of restrictions in planning agreements or obligations (entered into after 25th October 1991) will be determined on appeal by the Secretary of State for the Environment and not by the Lands Tribunal, although agreements entered into before the coming into operation of the Act will still only be capable of discharge or modification under section 84(1) and will remain within the jurisdiction of the Lands Tribunal.

80 This inter-relationship between planning permissions and restrictions in accompanying planning agreements (obligations) is examined in detail in Planning (Development) Control, post.
CONCLUSION

‘...the jurisdiction, as increased by the provisions of the Law of Property Act 1969, and the procedure as re-arranged by the amendments to the Lands Tribunal rules..., is operating in a business-like way along lines that are becoming well understood’. (G.H. Newsom, QC).

These concluding words1 of the last of a long and valuable series of articles by Mr. G. H. Newsom in the Journal of Planning (& Environment) Law, on the jurisdiction and practice of the Lands Tribunal in the discharge or modification of restrictive covenants serve as an appropriate ‘head-note’ to the conclusion of this section of the study.

Satisfaction with the procedure and more pertinently the resulting decisions of the Lands Tribunal has never been universal and, as has been noted, there have been times in the past when its decisions have been unsound on matters of fact and questionable in matters of law even though supported by the Court of Appeal.

It is 70 years since section 84(1) of the Law of Property Act, 1925 came into operation. The varying interpretations of meaning of s. 84(1) and inconsistencies of decisions, first by the Official Arbitrator and later by the Lands Tribunal itself, have already been the subject of comment, which it would be tedious and unnecessary to repeat.

The period of most vociferous criticism probably occurred in the mid 1960’s and was expressed in measured terms in the Law Commission Report on Restrictive Covenants2 which, although dealing primarily with the creation of a new interest in land called a ‘Restrictive Land Obligation’, made specific recommendations for widening the powers of the Lands Tribunal to enable it to consider ‘all the existing circumstances including the age of the restriction, the circumstances in which it was imposed, the planning position and the development policy for the area’.

More forthright criticism appeared at this time in the law journals and the professional press and found probably its most trenchant expression in an article in the Conveyancer and Property Lawyer, of which the following is an extract from the author’s3 conclusion:

‘There is an uneasy compromise between planning restrictions and restrictive covenants. If the whole basis of the planning legislation is to secure that land is put to the use which is best from the point of view of the community, why should that object be frustrated by privately imposed covenants when most private property rights are overridden...[The] position would be improved if it were clearly recognised that the grant of planning permission should be taken into account when dealing with section 84 applications. At present, one mentions the planning aspect of the matter and hopes the Tribunal will not be incensed: if he is a lawyer, he is far more likely to be than if he is a surveyor. Planning has had a striking impact on English real property law; perhaps it is a pity that more effort has not been made to dovetail it into the previous law so that a coherent result could be produced’.

Few surveyors, and it is suggested even fewer lawyers, charged with the task of advising property owners contesting applications for the discharge or modification of restrictive

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3 A.R. Mellows, Solicitor, Planning and Restrictive Covenants, (1964) 28 Conv. (NS) 190 at 204.
covenants would have supported then (or, for that matter, now) the proposition that implies the universal supremacy of planning law. Such a radical view has rarely been propounded, at least seriously, and the premise that private property interests should be subservient to public administrative decisions is contrary not only to English land law but also to planning law itself. Planning legislation, through the instrument of the planning permission, restores to the individual property owner (or occupier) rights which the same planning legislation had denied him. To follow the line of reasoning whereby a planning permission frustrated by a restrictive covenant should override that restrictive covenant would result in the effective transfer of a right which the applicant for planning permission had not previously enjoyed and which, in law, 'belonged' to another.

As has been pointed out many times, both in the Lands Tribunal and in the Court of Appeal, the two regimes exist side by side. There is no more justification or support now for a proposition implying the supremacy of planning law than when it was first mooted 30 years ago. The two regimes are distinct, fulfilling different purposes, although at times they may have similar objectives. All the evidence supports the view that they should remain distinct.

The reference to the attitude of the Lands Tribunal to planning matters, however, had substance and was largely remedied by the amendments to section 84(1) made by the Law of Property Act, 1969, embracing the suggestions made in general terms by the Law Commission in its 1967 Report. Mellows expressed a commonly held view, borne out it is suggested by an examination of the reported cases of the Lands Tribunal in the Planning and Compensation Reports of the time, and the legislature responded.

The 'dovetailing' of planning into English land law raises many issues, most of which are outside the scope of this study, but if by 'dovetailing' is meant no more than a recognition by each that the other exists and that the two systems have to be cognisant of the other's effect in land transactions this has been achieved. If by 'dovetailing' is meant 'fusion', in the sense that where the two conflict one, presumably (according to Mellows) planning, should prevail, that is a proposition which would make the 'equality of the law' as between private landed interests subservient to the vagaries of decision - making in the 'public arena'.

In the operation of section 84(1) in particular (and probably in the area of restrictive covenant control in general) a distinction should be drawn between planning decisions taken in the wider public interest, as for example the regeneration of a town centre, the development of a major industrial or business park or a 'free-standing' shopping centre or mall, where the 'public interest' may (and perhaps even should) prevail, and planning permissions for narrower and essentially private purposes, as for example a house or house extension or a change of use from a house to a shop or office, where the planning permission of itself would rarely justify the discharge or modification of a restrictive covenant (taken to protect the property of a neighbouring landowner) on the grounds that the restriction frustrated the implementation of the planning permission.

That there is a conflict is to an extent demonstrated by the many attempts to address such issues as the relationship between restrictive covenants and positive covenants, and between restrictive covenants and planning (agreements), the creation of new forms of land obligation and the automatic lapse of 'old' restrictive covenants. Reference has already been made to the more significant reports in the section dealing with the evolution of the restrictive
covenant but brief mention is necessary here to cover the role of the Lands Tribunal. The virtual complete lack of any action on the Reports of the Law Commission may be attributed to the absence of parliamentary time or that, in the area of discharge or modification under section 84(1), the adaptability of the Lands Tribunal has resulted in the jurisdiction 'operating in a business-like way along lines that are becoming well understood' and so rendering change unnecessary.

In 1965 the Wilberforce Committee⁴, which had recommended that positive covenants should be treated in so far as the 'running of both the burden and the benefit' was concerned in the same way as restrictive covenants, proposed that the Lands Tribunal's powers should be extended to include the discharge or modification of positive covenants. No action was ever taken on this report.

Two years later the Law Commission, in a Report⁵ recommending the substitution of 'Restrictive Land Obligations' for 'Restrictive Covenants', proposed that section 84(1) should be re-written to give the Lands Tribunal wider powers in respect of restrictive covenants and that they 'should be directed to consider all the existing circumstances including the age of the restriction, the circumstances in which it was imposed, the planning position and the development policy for the area'. This resulted in an amendment in like terms to section 84(1) by the Law of Property Act, 1969.

In 1984 the Law Commission, in a Report⁶ recommending the comprehensive reform of the whole area of the law relating to positive and restrictive covenants affecting freehold land, proposed inter alia the creation of a new interest in land to be known as a 'Land Obligation' and that the Lands Tribunal should have power to extinguish or modify any such Land Obligation be it restrictive or positive. Yet again no action was taken to implement the fundamental change whereby positive covenants would run with the land in the same way as restrictive covenants and, in consequence, the powers of the Lands Tribunal remained unaffected.

More recently the Law Commission has considered the specific issue of Obsolete Restrictive Covenants⁷ and recommended that, following the introduction of a Land Obligation scheme, Restrictive Covenants should lapse eighty years after their creation but that any covenant not then obsolete should be replaced by a land obligation. Although these recommendations have no direct implications for the Lands Tribunal in so far as its jurisdiction is concerned they could, in the longer term, result in a reduction in the number of cases it would be called upon to consider under section 84(1).

Finally, to conclude this study of the role and practical implications of section 84(1) and to provide a form of 'position statement' or background against which the next section concerning planning control can be set and evaluated, two major points need to be emphasised:

(1) The Restrictive Covenant, through the medium of the regime for the discharge or modification under the Law of Property Act, 1925, s. 84(1), is adaptable to changing circumstances whilst at the same time providing for the protection of private property interests

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where still relevant. Such relevance could be enhanced in practice if conveyancers were more often prepared to 'weed out' spent, anachronistic and patently obsolete restrictive covenants, thereby reducing the need for recourse to section 84(1) and providing a more immediate remedy than one depending on 'obsolete' covenants lapsing after eighty years.

(2) The Restrictive Covenant is complementary to planning control but essentially separate and distinct therefrom. It is an important, and arguably an indispensable, 'tool' in estate management and development control by private individuals, particularly in those cases where planning control may be supine, anachronistic or occasionally perverse. Furthermore, it is enforceable by the 'beneficiary' in and at his own discretion, whereas the enforcement of planning control is in the hands of another, namely the Local Planning Authority, exercisable, or not as the case may be, at its discretion and by its choice.

    Having not only drawn the distinction between Restrictive Covenant control and Planning control but also made the case for the continued existence of that distinction, it is now necessary to look in a little more detail at the complementary 'public' law control of land use and development before drawing some final conclusions regarding the Restrictive Covenant in general and its relationship to Planning control in particular.
INTRODUCTION

'Each Local Planning Authority was required under the [Town & Country Planning] Act of 1947 to carry out a survey of the whole of its area and to prepare a Development Plan based on the results of the survey; the Development Plan was to be reviewed five years from the date of approval in the light of a fresh survey of the area. By requiring that development plans should be based on the results of a physical, social and economic survey of the area, the Act moved away from planning primarily in terms of amenity and convenience to planning on the basis of securing proper control over the use of land.' (Telling & Duxbury)1

At this point, the focus of the study changes. Having concentrated this far on the restrictive covenant, it now turns to consider control under the town and country planning régime. In so doing, a few preliminary observations are needed. First, because the touchstone of the thesis is the control of land use and development, the treatment of planning will be confined to 'regulatory' or 'restrictive' planning. Secondly, in order to reflect both the control imperative and the emphasis so far accorded the restrictive covenant, the subject will be furthered from overlapping standpoints. One is to consider the approaches to control taken respectively by planning and by the restrictive covenant; the other is to explore certain issues of moment which are affecting the exercise of planning control. The material for this section is being taken in two stages. In the earlier part there will be treated, by way of an overview, the broad principles governing the regulatory components of the planning system, namely those relating to planning permissions, conditions, agreements and obligations. In the latter part there will then be explored issues affecting the implementation of planning control in its own right, bringing in the wider context of environmental control and, where relevant, making comparison with restrictive covenant control.

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The move to 'planning on the basis of securing proper control over the use of land' has meant that from 1948 onwards it has been possible to make a more direct comparison between the effects of planning control and restrictive covenant control. Both are concerned with securing 'control over the use of land', the difference lies between who, or which agency, decides what constitutes 'proper' control - in the one case in the 'public' interest, in the other in the 'private' interest. This section is concerned primarily with what constitutes 'proper control in the public interest' - a term which is only meaningful if measured against stated public planning policy objectives. It concentrates on the 'regulatory' function and is not concerned with 'positive' planning as such.2

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2 It may be noted that the Town and Country Planning Act, 1947 empowered Local Authorities to acquire land compulsorily for comprehensive development schemes for areas requiring total replanning as a result of extensive war damage (a power first introduced by the Town & Country Planning Act, 1944) and general obsolescence. Apart from schemes for the rebuilding of war damaged town centres these powers were not extensively used due initially to the depressed economic situation and later to a growing political antipathy to the use of powers of compulsory purchase. The positive planning that took place in the 1950's and 1960's was mainly in respect of housing, roads and discrete major projects such as power stations, under powers in the appropriate 'Special' Act, as for instance the Housing Act, 1936 and the Highways Act, 1935.
It is through regulatory planning that the use and development of land has, for the main part, been controlled. The Development Plan (and its later constituents, namely Structure Plan, Local Plan and Unitary Plan) differed from the old Planning Scheme prepared under the previous planning legislation (in particular the Town & Country Planning Act, 1932) in that it did not confer any rights to develop in the way that 'zoning' had given a general right to develop provided that the zoning requirements were met. Thus, with exceptions of a comparatively minor nature, all development and changes of use following the coming into operation of the Town and Country Planning Act, 1947 on 1st July 1948 require planning permission.

The regulatory control under the Planning Acts, although at times achieving similar objectives, derives from an opposite approach to that of the restrictive covenant. Restrictive covenant control starts from a position where land is 'unencumbered' at the moment of imposition and then the restrictive covenant imposes restrictions on some specific use or development of that land (or in some cases even prevents all development). In other words, the restrictive covenant 'limits' the right of the owner or occupier of the land subject to it to use or develop that land, in whole or in part. On the other hand planning control starts from the position where the land is 'encumbered', where no development or change of use can occur without planning permission, and then allows some specific use or development: the planning permission, with or without conditions, gives the owner or occupier of land the right to use or develop that land for a specific use or a particular development. In other words, the planning permission restores part of the rights in respect of which owners and occupiers of land were disenfranchised by the town and country planning legislation. The restrictive covenant 'encumbers' land previously free from such restriction; the planning permission partially frees land which was previously 'encumbered' (in the popular sense of that word, rather than its legal connotation).

From the survey about to follow it will emerge that while restrictive covenants and planning share a common aspiration to control land use and development, they are nevertheless essentially different mechanisms. On the one hand, the limitations on what may be controlled by a restrictive covenant are few. It may prohibit all or any specified use or development provided it does not thereby contravene 'the general law of the land', as would, for example, a restriction unlawful under the Race Relations Acts. On the other hand, the limitations on what may be allowed under planning law are governed in particular by sections 70 and 72 of the Town & Country Planning Act, 1990, the interpretation of which has imposed strict criteria on what may or may not be refused, permitted or permitted subject to conditions.

As earlier noted it is proposed, first, to examine the broad principles concerning the regulatory power and then to consider issues of moment affecting the implementation of planning control.

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3 As, for example, those covered by the General Development Order Consolidation (DOE Circular 9/95) and the Use Classes Order (DOE Circular13/87).
4 Development was defined in the 1947 Act, and carried forward into section 55 of the Town & Country Planning Act, 1990, as (in essence) the carrying out of building, engineering, mining or other operations or the making of any material change in the use of buildings or land.
5 Other than those of a purely personal nature which do not 'touch and concern' the land and will not run.
THE BROAD PRINCIPLES OF THE REGULATORY POWER

The current planning régime is to be found in the Town and Country Planning Act, 1990 (as amended) and the criteria governing the operation of its regulatory function are now considered.¹

The Determination of Planning Applications

The power to determine planning applications is contained within section 70 of the 1990 Act which provides that a Local Planning Authority may grant planning permission, either unconditionally or subject to such conditions as it thinks fit, or refuse planning permission, and that in dealing with such an application it should have regard to the provisions of the Development Plan, so far as material to the application, and to any other material considerations.

The general power dates from the 1947 Town & Country Planning Act, and section 70 of the 1990 Act together with its predecessor sections from the 1947 Act onwards have spawned a plethora of case law relating to its interpretation, supplemented by an almost continuous stream of Government advice and policy guidance reflecting the then current political, economic and social ‘correctness’ of the day. Not all the issues are relevant to a study which is here concerned primarily with drawing comparisons between planning control and restrictive covenant control. Those that are relevant are considered under four headings, namely:

(i) the Development Plan (including statutory environmental matters and consultation);
(ii) other material considerations of particular relevance;
(iii) certain policy issues, and
(iv) the question of racial discrimination.

(i) The Development Plan

In determining a planning application the authority is required to have regard to the provisions of the Development Plan and may take into account plans in the course of preparation. The significance of this requirement has been greatly increased following the introduction of section 54A and what now is described as a ‘plan-led’ system.² Previously the courts had held that the duty to ‘have regard’ to the provisions of the Development Plan imposed no obligation to adhere slavishly to the Plan but since the introduction of section 54A there is a presumption that development which accords with the Development Plan should only be refused if there are compelling reasons adduced by the planning authority to justify that refusal. The significance of the changes wrought by section 54A is reflected in the revisions made to PPG1,³ General Policies & Principles, issued by the Department of the Environment. The assertion in the 1988 edition that -

‘...there is always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause harm to interests of acknowledged importance’

was replaced in the 1992 edition (para. 5) by -

‘It [the planning system] should operate on the basis that applications for development should be

¹ Following generally the arrangement adopted in the Encyclopedia of Planning Law and Practice, Sweet and Maxwell.
² The control implications of s. 54A are considered in more detail later.
³ The first of a series of Planning Policy Guidance Notes which are assuming increasing importance in influencing planning decisions and appeals.
allowed having regard to the Development Plan and all material considerations, unless the proposed development would cause demonstrable harm to interests of acknowledged importance'

and most recently in the 1997 edition (para. 40) by -

'...section 54A requires that an application for planning permission...shall be determined in accordance with the plan, unless material considerations indicate otherwise. Conversely, applications which are not in accordance with relevant policies in the plan should not be allowed...Those deciding such planning applications...should always take into account whether the proposed development would cause demonstrable harm to interests of acknowledged importance.'

The effect of section 54A has been to enhance the status of the Development Plan from being one of the considerations to the 'most material' of the considerations (a kind of primus inter non pares) introducing a presumption in favour of development proposals that are in accordance with the Development Plan.

Development Plans which are in the course of preparation may be taken into account as a 'material consideration' in development control, even when objections to the policies proposed therein remain unresolved and proposals for the making, alteration or replacement of Development Plans may also be taken into account as a material consideration for development control purposes. The weight accorded to them will be determined by such matters as the stage reached in the statutory procedure, the firmness of the proposal, the degree of public acceptance or opposition and, in the case of plans which have been in operation for some time, their continuing relevance or degree of obsolescence.

In addition to the statutory Development Plan, Local Planning Authorities must in determining planning applications have regard to a number of statutory and other policy requirements nearly all of which relate to 'environmental' issues. These include:

(a) Environmental Impact Assessments.4

(b) The protection of 'European Designated Habitats'.5

(c) Special requirements relating to listed buildings and development in conservation areas.

(d) Development constraint policies, including Green Belts, Areas of Outstanding Natural Beauty, National Parks, Sites of Special Scientific Interest, Nature Reserves, Coastal Conservation Areas, Agricultural Land Conservation Policies, and Environmentally Sensitive Areas.

A Local Planning Authority has a duty to consult and to receive and consider representations from statutory consultees, landowners and the public.6 In marked contrast with all these constraints, in imposing a restrictive covenant an owner of land has no duty to have any regard to the development plan, nor to any of the environmental directives or policies, nor does he have to consult with anyone be they the general public or adjoining landowners. As has already been noted, however, planning and environmental issues feature in the deliberations of the Lands Tribunal when considering applications for the discharge or modification of restrictive covenants and this has been a statutory requirement in respect of certain applications, under section 1(aa) of section 84 of the Law of Property Act, 1925, following its amendment by the Law of Property Act, 1969. The general public has no locus in such hearings (certainly since the early days of the Official Arbitrator) and only those persons identified and notified by the Lands Tribunal have the right to appear and be heard.

5 Conservation (Natural Habitats, etc.) Regulations, SI 1994 No. 2716.
6 Thus, public involvement, which plays an important and essential part in the plan-making process, also has a role in the development control process.
(ii) Other Material Considerations

Before considering some specific examples of ‘other material considerations’ one or two general points need to be made. The requirement to have regard to ‘any other material considerations’ means in essence that all relevant matters should be taken into account. Whether or not a particular consideration is material is a matter for the courts which have gone so far as to assume that the grant of a permission based upon an irrelevant consideration may render the permission invalid. The authority is required to have regard to all considerations which are material to the application and disregard those that are not material or are irrelevant. For a consideration to be material it must be a planning consideration and it is a matter for the determining authority (and not the courts) to decide what weight to accord to it.

In a study concerning the control of land use and development the parameters governing the exercise of the power of development control are important and two cases in particular assist in the interpretation of the words ‘material considerations’ in section 70 of the 1990 Act and its predecessor sections dating from 1947.

In Stringer v Minister of Housing & Local Government, Cooke, J was of the opinion that:
‘In principle, it seems to me that any consideration which relates to the use and development of land is capable of being a planning consideration. Whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances.’

In Great Portland Estates plc v Westminster City Council, the House of Lords, whilst accepting that the general principle should be that planning should be concerned only with the development and use of land was of the opinion, expressed by Lord Scarman (and concurred with by their Lordships), that:
‘Personal circumstances of an occupier, personal hardship, the difficulties of business which are of value to the character of a community are not to be ignored in the administration of planning control... But such circumstances, when they arise, fall to be considered not as a general rule but as exceptions to a general rule to be met in special cases. If the planning authority is to give effect to them, a specific case has to be made and the planning authority must give reasons for accepting it.’

It is surely right that the personal circumstances referred to in the Great Portland Estates case should be rare exceptions to the general rule laid down so clearly in Stringer’s case and that in any event if an exception is to be made there must be a ‘genuine planning purpose’ for making it. The body of case law concerning the interpretation of ‘material considerations’ is, as has already been noted, extensive and covers many diverse situations. The cases relevant to this study may however be grouped under three main headings, namely:
(a) matters of purely private interest;
(b) matters regulated by other statutory codes, and
(c) matters relating to ‘precedent’ and ‘consistency’.

7 Adopting a converse test to the formula devised by the courts that for the validity of administrative action all relevant matters should be taken into account.
8 [1971] 1 All ER 65.
10 A further, and rather different, example of an exception, is provided by the case of Clyde & Co. v Secretary of State for the Environment [1977] 1 WLR 926, in which the Court of Appeal held that planning permission for office development could be refused solely to preserve a site for social housing.
(a) Matters of Purely Private Interest

Following the judgments in Stringer's case and the Great Portland Estates case a planning authority may refuse planning permission in order to protect a purely private interest, provided there is a planning purpose involved. Furthermore, the Act does not require the drawing of any distinction between private and public interests. But in Brewer v Secretary of State for the Environment the court took the view that 'in general planning was concerned with land use from the point of view of the public interest, and as a generality was not concerned with private rights'. In that case the court held that the existence or absence of private rights of light was an irrelevant consideration in determining a planning application.

It is suggested that the approach adopted in Brewer's case is, as a general proposition, the more defensible in distinguishing clearly between 'planning control' in the wider public interest and the protection and enforcement of private proprietary rights such as easements and restrictive covenants. The exercise of planning control is essentially a political and administrative procedure within a legal framework whereas the protection and enforcement of private proprietary rights is a matter for the courts alone in the administration of justice.

(b) Matters Regulated by Other Statutory Codes

It has been held that planning authorities are entitled (and, indeed, sometimes required) to have regard to matters (particularly environmental matters) regulated by other statutory codes, provided those matters are 'material in planning terms'. With ever increasing environmental controls such as for example the Environmental Protection Act, 1990, the Environment Act, 1995 and the many European Directives relating to environmental issues, the relationship between planning control and environmental control is becoming more difficult to resolve. The Local Planning Authority (and the Secretary of State on appeal) is entitled to have regard to the need to protect the environment and indeed it has a duty so to do. Where the environmental issues are covered by 'codes' forming part of the regime of town & country planning control, i.e. matters relating to countryside protection, the preservation of buildings of architectural or historic interest, the protection of natural habitats and sites of special scientific interest, there is no problem. In the main the problem arises in respect of environmental pollution and the control of, for example, noxious emissions (into air, land or water), hazardous waste and excessive noise levels.

It is precisely because of the overlap between planning control and environmental pollution control that it is important that planning authorities do not impose conditions properly within the remit and duty of the appropriate body responsible for enforcing a specific environmental 'code'.

This is an area of growing potential conflict which might be resolved if proposals for an Environmental Court or Tribunal are implemented. The Department of Environment advice is not particularly helpful nor will it be assisted by the draft revision to PPG 23 which, whilst repeating the advice to local planning authorities not to embrace specific environmental 'codes'

12 This proposition is developed more fully in the final section: A Retrospect, A Prospect and A Conclusion.
13 See, for example, Maurice v London County Council [1964] 2 QB 362. (Overlap between building control and planning control).
14 See, The Case for an Environmental Court or Tribunal, post.
and impose conditions which would overlap (or conflict with) such discrete régimes, nevertheless requires local planning authorities to acknowledge the presence of pollution in such matters as contaminated land and, more recently, air quality. As, in the *Gateshead case*, it places the initial onus for the resolution of the issue of conflict between the two on the 'decision-maker', i.e. the local planning authority, whilst at the same time leaving open the opportunity to challenge the decision in the courts.

Where a planning authority is satisfied on all other grounds, leaving aside the question of environmental pollution, that planning permission should be granted (with or without conditions) there are three possible situations with which it may be presented, namely:

(i) Where it is satisfied that the potential pollution problems have been or can be substantially overcome and can be satisfactorily monitored and controlled by the specific enforcing body, it may approve.

(ii) Where the environmental pollution problems are great and it has no evidence that they can be overcome, it should refuse.

(iii) Where the environmental pollution problems are great and there is doubt that existing and known methods of control will be effective, again it should refuse.

It is suggested that in cases where doubt exists as to effective means of pollution control the Planning Authority should refuse, there being a right of appeal against a refusal but no right of appeal against an approval.

(c) Matters Relating to 'Precedent' and 'Consistency'

The courts have held that permission may as a matter of law be refused on the grounds of a possible precedent of a distinctive nature that the decision might create but that mere fear or generalised concern of creating a precedent, in the absence of evidence of its likely occurrence and effect, is not normally sufficient. The acceptance of possible precedent needs to be seen as a corollary to the proposition that there should be consistency in decision making. Like applications should receive like decisions: a proposition that has influenced many an appeal decision. A local planning authority deciding a 'similar' application in a manner at variance with its previous decision will, on appeal, be required to explain the 'material consideration' which caused it to distinguish its latter decision from its former. In comparable situations the Lands Tribunal in its dealings with restrictive covenants, whilst acknowledging precedent, appears to be more relaxed in its decisions, taking 'personal' circumstances into account more freely.

There are many other 'material considerations', including for example financial considerations, 'enabling development', the availability of alternative sites and planning gain, but these, not being of direct relevance to a comparison with restrictive covenant control, are outwith the scope of this element of the study.

15 *Air Quality and Land Use Planning*, Draft DOE Circular, December 1996.
17 See, for example, *Anglia Building Society v Secretary of State for the Environment* [1984] JPL 175 (Evidence that permission for one site will result in pressures for 'the unlocking of the whole area for development').
18 See *Poundstretcher Ltd v Secretary of State for the Environment* [1988] 3 PLR 69 in which the Deputy Judge (David Widdicombe QC) reviews the authorities and so rules.
19 See, for example, *R v Westminster City Council, ex p. Monahan* [1989] JPL 107 CA (the Royal Opera House Covent Garden case).
(iii) Certain Policy Issues

Reference must be made to the effect of Central Government Policy on planning control and decisions for, as with the issues considered under 'other material considerations' (in particular references to private interests, precedent and consistency), they are all matters which from time to time have also influenced the Lands Tribunal in its decisions under section 84 of the Law of Property Act, 1925.

Central Government policy, including the policy of Government Departments other than those of the Department of the Environment, is a matter to be taken into account in development control decisions. General development control policies are disseminated through Government Circulars, Development Control Policy Notes and Planning Policy Guidance Notes, supplemented by Ministerial Statements, White Papers, Appeal Decisions and other means. Unless issued under some specific statutory authority (e.g. the General Development Order Consolidation or the Use Classes Order) they are not formally binding on a local planning authority but if a planning authority chooses not to follow 'policy' advice it must give sound and clear reasons for departing therefrom. This is particularly the case regarding the latest form of policy advice, whereby PPG Notes are coming to be considered as instruments having the 'near' force of law, embracing 'presumptions' which are becoming more and more difficult to rebut (on appeal) and thereby 'directing' the decisions of local planning authorities.\(^20\)

(iv) Racial Discrimination

Under the Race Relations Act, 1976, section 19A, it is unlawful for a planning authority to discriminate against a person when carrying out any of its planning functions. The Race Relations Acts apply to restrictive covenants equally\(^21\) as to planning control, but apart therefrom restrictive covenants may be discriminatory in all other respects. Restrictive covenants can protect trade and commercial interests, class and social status (through a pricing mechanism), discriminate between sexes (e.g. permitting a girls' school but not a boys' school), discriminate against the mentally and/or physically disabled (by differentiating between different types of hostels and care accommodation), discriminate between different political groups (by permitting a conservative club but excluding a trade union sponsored working men's club) and as between different religions (permitting an Anglican Church and hall but excluding any religious establishment based on the Church of Rome). Planning control, based on the proper use of land and buildings in the public interest, can do none of these overtly (or even covertly) unless a distinction can be made on 'planning grounds' as for example the greater impact of traffic generation and car parking provision in one case rather than another.

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\(^{20}\) An example of their importance is provided in the reference to PPG1, ante, and its revision to take account of the 'sea change' introduced by the new section 54A of the 1990 Act. The relationship between policy and the law is developed later with particular reference to planning obligations.

\(^{21}\) J.F. Garner, in an article entitled Racial Restrictive Covenants in England and the United States (1972) MLR 478, suggests that a restrictive covenant of a form providing that 'the premises shall be used and occupied by persons of the white or Caucasian race' might be invalid as being contrary to public policy. An injunction or damages might be refused on grounds, inter alia, that the benefit did not touch and concern the dominant land; that it would be unlawful under the Race Relations Acts to comply with the covenant by refusing 'prohibited' persons, thus rendering the covenant void; or that simply the covenant was void as being contrary to public policy. Megarry and Wade, The Law of Real Property, 3rd. edition, 1966, at p. 701, were of the opinion, citing section 5(2) of the Race Relations Act, 1965, that: 'Racial provisions in restrictive covenants concerning freehold land clearly seem to be unaffected'. However, the current position should be clear as section 21(1) of the Race Relations Act, 1976 states it to be: 'Unlawful for a person, in relation to premises of which he has power to dispose, to discriminate against another (a) in the terms on which he offers him those premises...'.

The Conditional Grant of Planning Permission

Whilst section 70 of the Town & Country Planning Act, 1990 gives the general power to grant or refuse planning permission, section 72 empowers the Local Planning Authority to impose conditions (a) for regulating the development or use of any land under the control of the applicant or requiring the carrying out of works on any such land, so far as appears to the Local Planning Authority to be expedient for the purposes of or in connection with the development authorised by the permission, and (b) for requiring the removal of any building or works authorised by the permission, or the discontinuance of any use of land so authorised, at the end of a specified period, and the carrying out of any works required for the reinstatement of land at the end of that period.

Although section 70 of the 1990 Act empowers local planning authorities in granting planning permission to impose 'such conditions as they think fit' those conditions to be valid must, in the words of Lord Denning in Pyx Granite Co Ltd. v Minister of Housing & Local Government 22, 'fairly and reasonably relate to the permitted development'. The interpretation of 'fairly and reasonably' was considered in Newbury District Council v Secretary of State for the Environment 23, and from the opinions of their Lordships in that case three criteria emerged and have seemingly over the years assumed the status of 'rules' by which the validity of conditions is judged.

In essence any condition must:
(i) fulfil some planning purpose;
(ii) fairly and reasonably relate to the permitted development, and
(iii) not be manifestly unreasonable.

The effect of the first requirement is to invalidate any condition imposed solely or primarily to serve some non planning purpose. Whether or not the condition serves some non planning purpose is generally a matter of interpretation but it is suggested that few conditions will fail under this rule, as the great majority will be drafted in such a way that they have a 'planning pedigree', however tenuous, and the majority will fall to be considered under the second and third requirements laid down in the Newbury case.

In the Newbury case the House of Lords held to be invalid a condition which had been imposed on the grant of temporary permission for the change of use of two aircraft hangars and which required their removal upon the expiry of the permission. The purpose of the condition was to restore the area as a whole rather than to meet any planning need arising from the change of use. This may be considered a borderline decision. The House of Lords itself in the Newbury case recognised that there might be circumstances in which a 'removal' condition might be appropriate. A more liberal interpretation of 'fairly and reasonably' has been adopted in cases heard both pre and post Newbury. Conditions have been upheld as 'fairly and reasonably' relating when affecting buildings on the site other than those comprising the actual development permitted.24

22 [1958] 1 QB 554. In an earlier case, Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223, [1947] 2 All ER 680, Lord Greene, MR, had stated that a planning condition will be held by the courts to be void for unreasonableness only if it is one 'which no reasonable authority acting within the four corners of their jurisdiction could have decided to impose'.


24 For example, Penwith District Council v Secretary of State for the Environment (1977) 34 P & CR 269, in which a condition imposed on permission for the erection of an extension to an existing factory requiring restriction of noise levels, working hours and noxious emissions from the premises as a whole, was held to be valid.
The power conferred by section 70 is limited to conditions relating to land within the application and it is not possible under section 70 to impose requirements relating to other land, such as the construction of visibility splay s or sight lines on adjoining land. However the courts have taken the view that a condition may be imposed under section 72 on land not embraced by the application where the applicant has ‘control’ of the land to which the condition relates.

The proposition that a condition concerning land outside the ‘control’ of the applicant is invalid must now be reviewed in the light of the judgment in *Grampian Regional Council v City of Aberdeen* 25 In that case the House of Lords decided that a planning condition would not be invalid merely because it prevented development proceeding unless and until an event had occurred (a road closure) which was not wholly within the power of the applicant to bring about. Following the *Grampian* case the position would now appear to be that a condition requiring something on land outside the control of the applicant and not within the application site would not necessarily be invalid provided it were made as a ‘pre-condition to development proceeding’. The use of ‘Grampian conditions’, which have proved to be popular with both planning authorities and developers, is circumscribed by two criteria. The Secretary of State for the Environment has advised 26 that their use should be limited to cases where there are ‘at least reasonable prospects of the action in question being fulfilled’, so as to enable the development to be commenced ‘within the time limit imposed by the permission.’

This advice has now to be interpreted and reassessed in the light of the recent decision of the House of Lords in *British Railways Board v Secretary of State for the Environment* 27 Commenting that planning legislation contemplated that an application for planning permission could be made by a person who did not own the land to which it related and that if there were good planning reasons why the development should be allowed the owner’s objections were not necessarily a ground for refusal of permission, their Lordships (through Lord Keith of Kinkel) asserted that there was no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desired development, and went on to state:

‘A would-be developer may be faced with difficulties of many different kinds, in the way of site assembly or securing the discharge of a restrictive covenant. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are.’

This judgment supports the line taken by the Lands Tribunal that the order of procedure in respect of the discharge or modification of a restrictive covenant should be first to overcome the ‘planning hurdle’ and then to proceed to consider the discharge or modification of any restrictive covenant thereafter.

A considerable body of case law has grown up around the interpretation of ‘fairly and reasonably’ relate, but rather less in the interpretation of ‘manifestly unreasonable.’ To be invalid on this ground it has been held that the condition must be so unreasonable that no reasonable

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26 DOE Circular 1/85, replaced by DOE Circular 11/95.
planning authority could have imposed it. Apart from setting down a kind of double assumption of what constitutes an 'unreasonable' condition, a number of principles have emerged as a test of validity. These may be summarised as follows:

(i) A planning condition may not lawfully require the payment of money or other consideration by the developer: *City of Bradford MBC v Secretary of State for the Environment*, where it was held that a condition which required a highway maintainable at public expense to be widened by the applicant was manifestly unreasonable and *ultra vires*.

(ii) A condition will be invalid if its effect is to destroy private proprietary rights: *Hall & Co. Ltd. v Shoreham -by-Sea UDC*, where a condition to construct a road and to make it available for use by owners of adjoining properties was held to be invalid as effectively requiring its dedication as a highway without compensation.

(iii) A condition removing statutory rights will be invalid unless it can be shown that it is required to achieve a legitimate planning objective of importance: per Sir Graham Eyre, QC (Deputy Judge) in *Mirai Networks Ltd. v Secretary of State for the Environment*, where a condition requiring prior approval to an activity excluded from the definition of 'development' (in this case, additional floor space within the existing 'building envelope') was held *not* invalid on the grounds that it related to a legitimate planning objective of importance.

(iv) A condition may be 'bad for uncertainty', but only in 'extreme cases of unintelligibility', or impossible to enforce, and thus absurd: cases are few but see *Shanley M.J. Ltd. (in liquidation) v Secretary of State for the Environment*, where a condition requiring local people to be given first opportunity to buy houses to be erected was held to be invalid for uncertainty, there being no indication as to method or terms upon which the 'first opportunity' was to be offered.

(v) A condition may be (but is not necessarily) unreasonable where its purpose is one for which compensation would have to be paid if achieved under other statutory powers: see, for example, *Kingston-upon-Thames Royal LBC v Secretary of State for the Environment*. In cases of doubt a local planning authority would be advised to seek an 'obligation' under s.106 to cover matters which might not lawfully be imposed by a planning condition.

Whilst the imposition of conditions may not require developers' contributions, interference with private proprietary rights, the removal of statutory rights or the forgoing of compensation, these matters can all be addressed through the mechanism of planning agreements and obligations now briefly considered.

**Planning Agreements and Obligations**

It must be emphasised that this section is concerned solely with broad principles. The combined effect of, and relationship between, Planning Agreements/Obligations and
Conditions is developed later as one of a number of specific issues of moment, examining the law, the policy and the practice, and including in particular a commentary on recent case law.

Before the introduction by the Planning & Compensation Act, 1991 of revised sections 106, 106A and 106B to the Town & Country Planning Act, 1990, local planning authorities could enter into agreements with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land. The revisionary effect of the Planning & Compensation Act, 1991, has been to replace these bilateral agreements with 'planning obligations' which may be unilateral (on the part of the applicant) as well as bilateral (obligations agreed between the applicant and the planning authority). Agreements made under previous legislation remain in force and unaffected by the amended section 106. The powers of local planning authorities prior to the introduction of the revised section 106 were subject to a narrow restrictive interpretation by the courts, it being held that whilst planning agreements were not required to relate to planning needs arising from the development permitted, they must serve a planning purpose.34

Nevertheless one of the reasons given for introducing the revised section 106 was the abuse of the former provision by the growing practice of 'bargaining for planning gain'.35 The introduction of a concept of a 'unilateral' obligation will, in theory at least, enable a clear distinction to be drawn between that which the planning authority seeks to impose by way of agreement (bilateral obligation) and what the applicant is prepared to offer as his 'contribution' in support of the proposed development. It is difficult to see however how the concept of the unilateral obligation will prevent a zealous applicant from offering financial and physical inducements, with a tenuous planning connection, in the hope of 'buying' a planning permission. It is clear that the adoption of the unilateral obligation is viewed as an alternative to the preferred bilateral agreement, that planning authorities should do their best to reach agreement by negotiation and it is only where the developer considers that negotiations are being unnecessarily protracted or unreasonable that he should enter into a unilateral undertaking.

There are a number of distinctions both in law and practice between the planning agreement and the planning obligation but the two most important relate to the content of planning obligations and the enforcement of planning obligations.

Content

Dealing first with content, s.106 provides in essence that a planning obligation may:
(a) Restrict the development or use of the land (much in the same way as a restrictive covenant).
(b) Require specified operations or activities to be carried out in relation to the land. There was

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35 Although 'planning gain' is nowhere defined and although the term 'has no statutory significance and is not found in any of the Planning Acts', it is generally understood to embrace those situations where a local planning authority requires, or an applicant offers, some additional benefit as an enhancement or pre condition to the grant of planning permission. DOE Circular 16/91 made it clear that planning gain is 'outside the scope of the planning process' and since the term is 'imprecise and misleading, it is not used in this policy guidance, which relates to the role of planning obligations in the proper exercise of planning control'. Nevertheless the Circular then went on to consider the appropriate circumstances in which benefit might be sought, i.e. where it is 'related to the development and necessary to the grant of permission', with the caveat that local planning authorities should ensure that 'the presence or absence of extraneous inducements or benefits does not influence their decision on the planning application'. The matter is now covered by DOE Circular 1/97, revised following recent cases but retaining the general thrust of the former Circular.
doubt as to how far an agreement could impose obligations to carry out positive duties,\textsuperscript{36} which were authorised only so far as they were ‘incidental to’ the primary purpose of
restricting and regulating the use or development of the land.
(c) Require the land to be used in any specified way, (i.e. actually require that the use be
implemented and not permitted to lapse).
(d) Require payment of a sum or sums of money to the local authority.

Although the Secretary of State has urged that, as with conditions, planning obligations
should be sought ‘only where they are necessary to the grant of permission, relevant to
planning and relevant to the development being permitted’ and although it is likely that the
courts would require such a planning obligation to have at least some demonstrable ‘planning’
purpose, section 106(1)(d) which provides for the payment of money to the local authority, is
subject to no express limitation to that effect.

Under section 106(2)(a) a planning obligation may be unconditional or subject to
conditions. Thus it may be wholly conditional on planning permission being granted or it may
include ‘Grampian conditions’ which prevent the development or some part of it proceeding or
being used until some condition precedent is satisfied. The most common use of planning
obligations is as an accompaniment to the grant of planning permission and the Secretary of
State for the Environment\textsuperscript{37} has sought to ensure that the use of planning obligations should
not be abused either by authorities seeking extraneous inducements as the price of granting a
planning permission or by developers offering unrelated benefits in an attempt to get planning
permission for unacceptable development.

Policy guidance (as expressed in DOE Circular 1/97) would suggest that the test of
reasonableness applicable to a planning obligation (contrasting the test of reasonableness
applicable to a planning condition) depends on whether the benefit:
(a) is needed to enable the development to go ahead, e.g. the provision of an adequate access,
or
(b) in the case of financial payment, will contribute to meeting the cost of providing such
facilities, or
(c) is otherwise so directly related to the proposed development and to the use of land after its
completion that the development ought not to be permitted without it, e.g. the provision of car
parking or open space, or
(d) is designed, in the case of mixed development, to secure an acceptable balance of uses or the
implementation of Local Plan policies, e.g. affordable housing, or
(e) is intended to offset the loss of or impact on any amenity or resource present on the site
prior to development, e.g. tree planting in the interests of nature conservation.

\textit{Enforcement}

The other area in which planning obligations differ from planning agreements is in
respect of enforcement. Only the local planning authority identified in a planning obligation as
entitled to enforce it has the power to do so. Before the introduction of section 106(3) there was
some doubt as to whether a member of the public could sue directly under a doctrine of public

\textsuperscript{36} As already noted, at common law there is no power to enforce positive covenants against successors in title to freehold land:
\textit{Austerberry v Oldham Corporation} (1885) 29 Ch D 750, confirmed by the House of Lords in \textit{Rhone v Stephens} [1994] 2 All ER 65.

\textsuperscript{37} DOE Circular 1/97.
interest: see Attorney General ex rel. Scotland v Barratt Manchester Ltd.\textsuperscript{38}, where it was held that although the public at large had no right to bring enforcement proceedings, the authority's decision to enforce or not enforce is amenable to judicial review.

The principal method of enforcement is by way of an injunction which may be resorted to regardless of whether or not the local planning authority has invoked the enforcement remedies in section 172 of the Town & Country Planning Act, 1990. Furthermore, as a local planning authority would not normally suffer financial loss, an injunction rather than damages would normally be the only remedy. Since planning obligations may include positive obligations to carry out operations, and to overcome the need to obtain a mandatory injunction in such a case, the local authority may enter upon the land and recover any costs incurred in implementing the positive obligations.\textsuperscript{39}

A planning obligation may be modified or discharged by agreement between the local planning authority and all the parties against whom it is enforceable. Alternatively, any one party may apply to the local planning authority under section 106A for modification or discharge, with the right of appeal to the Secretary of State under section 106B. The provision for the modification or discharge of planning obligations in sections 106A and 106B was introduced by the Planning & Compensation Act, 1991, section 12 and came into force on 9 November 1992. The main change made by the Planning & Compensation Act was the introduction of a power to the Secretary of State to modify or discharge a planning obligation in place of the former jurisdiction of the Lands Tribunal.\textsuperscript{40} Planning agreements made under the former section 106, and its predecessor sections in the earlier Town & Country Planning Acts, will still be subject to the procedure and jurisdiction of the Lands Tribunal under the Law of Property Act, 1925, section 84. Consequently, in the future, the confusion that has arisen from restrictive conditions in planning agreements (attached to planning permissions) and restrictive covenants (for purely private proprietary protection) being dealt with within the same jurisdiction, resulting in the consideration of planning agreements in isolation from the permissions to which they were attached, should no longer occur.\textsuperscript{41}

Application may be made by the person against whom the planning obligation is enforceable only upon the expiry of the 'relevant period', which is five years from the date of entry into the obligation (or some other period prescribed by regulations). A planning obligation is a promise under seal by the covenantor to do or to refrain from doing some act and is legally binding on the parties. Consequently the powers of the local planning authority and the Secretary of State on appeal are only exercisable against that legal background.\textsuperscript{42} If the obligation no longer serves a useful purpose it shall be discharged or if that purpose could

\textsuperscript{38} [1992] JPL 148.
\textsuperscript{39} To the extent that such a move was made possible via the powers conferred by the Local Government (Miscellaneous Provisions) Act, 1982, planning obligations and those agreements entered into since the coming into operation of that Act are not, in that respect, dissimilar.
\textsuperscript{40} Section 106A(10) enacts that section 84 of the Law of Property Act, 1925 (Power to Discharge or Modify Restrictive Covenants Affecting Land) does not apply to an obligation.
\textsuperscript{41} It will, however, be a number of years before the new procedure takes effect and in the meantime (and indeed for all time) planning restrictions in agreements made prior to 9 November 1992 will continue to be subject to the jurisdiction of the Lands Tribunal in respect of discharge or modification under section 84 of the Law of Property Act, 1925.
\textsuperscript{42} The precise legal nature of the 'tie' between the parties to an obligation is not without interest. See, for example, the commentary on s.106A in the Encyclopedia of Planning Law, wherein (dealing with the modification and discharge of planning obligations) it notes that '...a planning obligation is not an imposed obligation in the way that a planning condition is. It is a promise by the covenantor to do or refrain from doing some act. This section does not therefore set out to cut through contract law and confer a power at large on the Secretary of State to relieve covenantors of their promises. There are two conditions: a time threshold [5 years] and a substantive [useful purpose] test.'
equally well be served by a modified obligation as specified in the application it should be modified accordingly. The ‘useful purpose’ test, in substitution for among others the ‘obsolescence’ test in section 84 of the Law of Property Act, 1925, is not a ‘useful planning purpose’ test and although the obligation must have had some planning purpose at the outset provided the obligation still serves a ‘useful purpose’ it must continue without modification. This is both a novel concept and, it is suggested, a potentially dangerous one. An obligation entered into in respect of a specific use or development must continue, although no longer relevant to, or required by, that use or development, if it serves a ‘useful purpose’, prompting the questions as to what constitutes a non planning ‘useful purpose’ and for whom or what is it ‘useful’?

In the introduction to this section it was observed that the limitations on what might be controlled by a restrictive covenant were few but that the limitations on what might be allowed under planning law were strict. The foregoing overview has served, it is believed, to underscore the real intracacy of the latter, and hence highlight the sharpness of the divide between the two régimes. Attention must now be focussed on certain specific issues concerning the implementation and enforcement of the two régimes.
CONTROL ISSUES OF MOMENT

Having sketched in the broad principles concerning permissions, conditions and agreements/obligations, the scene is set to examine in detail some of the more specific issues arising, *inter alia*, from the difficult and at times fraught relationship between the law, the policy guidance and the practice. This is an area which, in the light of sections 54A and 106 of the Town & Country Planning Act, 1990 and recent case law, is in want of clarification.

The effectiveness of any control system depends ultimately on two factors, namely, the limitations placed on the extent and operation of the power and the ease and efficacy of its enforcement. These two aspects of planning control are considered in their own right and in comparison with restrictive covenant control.

It is now clearly apparent that the exercise of planning control is becoming more closely interlinked with the implementation of environmental law and regulation. The contribution that an Environmental Court or Tribunal could make to facilitate planning and environmental control is, finally, examined.

**The Control element of section 54A, Town & Country Planning Act, 1990**

The insertion of section 54A by the Planning & Compensation Act, 1991 had, and continues to have, important implications for the determination of both planning applications and planning appeals. Its interpretation, and indeed its purport, has been the subject of both litigation and learned commentary. In consequence therefore it is necessary to look at the precise language of section 54A before attempting to analyse its effect.

Section 54A provides that:

Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.

It is helpful to an understanding of its purpose, if not its meaning, to reflect on its genesis. It came about as a Government amendment to the Planning & Compensation Act, 1991 in response to an Opposition amendment that had originally proposed that in determining planning applications 'the authority shall first consider the provisions of the development plan, so far as material to the application, and shall then have regard to any other material considerations'. The Government amendment, going much further and giving primacy to the development plan, is in marked contrast to the stance it held in the mid-1980's. In March 1985, addressing the County Planning Officers' Society, the then Secretary of State for the Environment, Patrick Jenkin, called for a 'market-led' approach to planning administered by a new breed of 'market-oriented' planners. By 1991 this approach had been replaced by what is now universally regarded as a (development) plan-led system. This conversion - as dramatic, even if not as significant, as that witnessed on the Road to Damascus - has, in some quarters, been attributed to the particular and personal planning problems of a certain Secretary of State for the Environment who occupied that office during part of the intervening period, but perhaps the better view is that neither the public, nor indeed the majority of developers, liked the 'uncertainty' that a 'market-led' approach created. Developers and investors in particular,
whilst pressing their own case as an exception, favour the degree of certainty that a plan-led system affords, whereby their competitors are denied permission for development outwith the plan.

Turning now to a consideration of section 54A itself the first matter to consider is its relationship to section 70 of the 1990 Act which, *inter alia*, requires the authority in dealing with an application to 'have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations'. On any reasonable interpretation, section 54A gives greater primacy to the development plan than does section 70. The better opinion would appear to be that section 54A should be construed as effecting a complete rewriting of section 70(2). Inconsistencies between the two sections must be resolved in favour of section 54A, as being the more recently enacted. Section 54A suggests a substantive requirement, namely that the determination must actually be made in accordance with the plan, unless material considerations indicate otherwise.

The ensuing debate revolves to a great extent around the question as to what constitutes matters of law and what matters of fact, or in other words what lies within the jurisdiction of the courts and what within the administrative decision-making of the planning authority. The dilemma is cogently set out in the following extract from the learned editor's commentary in the *Encyclopaedia of Planning Law*:

> '... Parliament's purpose is clearly to ensure that the development plan is given added weight in decision making. That does not mean that Parliament's purpose is necessarily directly enforceable as a matter of law. The balance between the development plan and other material considerations is, after all, a matter for the decision-maker; and the courts may intervene only where it can be shown that proper regard was not had to the plan, or that a material consideration was omitted or an immaterial consideration taken into account'.

Some degree of the primacy of the development plan, and consequently the weight of the other material considerations sufficient to 'overturn' it, may be gauged from the Planning Minister's statement of the Government's intention in introducing the amendment to give effect to section 54A. Sir George Young stated, *inter alia*, that:

> '... If the development plan has something to say on a particular application, the starting point would be that the plan should be followed unless the weight of the other considerations turn against it. In other words there would be a presumption in favour of the development plan.'

The precise nature and status of this presumption has been the subject of both judicial interpretation and learned commentary.

**Judicial Interpretation**

In *St. Albans District Council v Secretary of State for the Environment*, the High Court ruled that section 54A does establish a presumption in favour of the development plan, but nevertheless rejected the submission that the plan 'should prevail unless there are strong contrary planning grounds'. Furthermore, in *North Dorset District Council v Secretary of State for the Environment*, the court appears to have accepted that the assessment as to whether or not section 54A has been complied with is a matter of law for the court and not merely a matter of fact and degree for (in that case) the Inspector, and presumably for the Secretary of State where he has made the decision. May it not then be concluded that section 54A provides not only a presumption in favour of the development plan but, in the light of the Minister's statement and the judgments of the courts, that such presumption has the status of a legal presumption (a presumption at law), albeit rebuttable at the instance of other material considerations?

2 [1993] JPL 54.
Learned Commentary

Commentators have not been unanimous on the point. The editor of the Encyclopaedia of Planning Law apparently takes the view that it is a legal presumption by drawing the comparison with 'the presumption in favour of development' which was a policy presumption and not a legal rule. This view is supported by Victor Moore:3

'The effect of the new provision appears to be to raise a legal presumption that if proposed development accords with the provisions of the current development plan, planning permission should be granted; unless, that is, material considerations indicate otherwise. Contrariwise, it would seem that if the development proposal does not accord with the development plan, planning permission may still be granted if material considerations indicate otherwise.'

Michael Purdue4, noting that Malcolm Grant has argued that whether or not the development is or is not in accordance with the plan is a question of law not a matter of fact and degree, asserts that the better view would seem to be that 'while there is a legal duty to decide in accordance with the plan it does not follow that whether an application is in accordance with the plan is purely a matter of law for the courts'. This must surely be so as long as the responsibility for the initial decision lies in the discretion of the decision-maker.

Presumptions

In the light of the above comments it is now possible to see how a general presumption in favour of development may be reconciled with the legal presumption in favour of the development plan. On the face of it it is not possible to have both a presumption in favour of the development plan and a general presumption in favour of development (which may not be in accordance with the plan). The presumption in favour of the development plan, enshrined in law (section 54A), must take precedence over any general presumption in favour of granting planning permission, enshrined in Government Policy Advice (e.g. PPG 1, as revised first in 1992 and again in 1997 to accommodate the impact of section 54A). The clear distinction between a presumption in a statute (or statutory instrument) and a presumption in a Government circular or other guidance is thus made. Nevertheless, having asserted that the presumption in favour of the development plan takes precedence, PPG1 (1992, at para. 5)5 states that:

'It [the planning system] should operate on the basis that applications for development should be allowed, having regard to the development plan and all material considerations unless the proposed development would cause demonstrable harm to interests of acknowledged importance.'

From this, Purdue6 argues that if, after having looked at the purposes behind the development plan policies (a basis propounded by David Keene, Deputy Judge in R v Canterbury City Council, ex parte Springimage Ltd.), it is clear that those policies will not be harmed by the development, this would justify granting permission contrary to the policies in the plan. Purdue goes on to state:

'It would therefore seem that the presumption in favour of the plan may have to give way in appropriate circumstances to the material consideration that no harm will in fact be caused to policies in the plan.'

It is, however, difficult to envisage a situation where granting permission 'contrary to policies in the plan' will in fact cause 'no harm to the policies in the plan'. It would be prudent to go no

5 As noted earlier this has now been replaced by PPG1 (1997, at para. 40) which, whilst avoiding any reference to 'presumption', apparently retains the 'notion of demonstrable harm.'
6 The Impact of Section 54A [1994] JPL 399, at 404. Although Purdue's argument is based on the wording of PPG1 (1992), it is suggested that it holds good for the revised PPG1 (1997).
7 [1994] JPL 427, 3PLR 58.
further than to assert that the absence of harm to policies in the plan could, in the parlance of section 54A, form part of the material considerations which might ‘indicate otherwise’.

*The Effect of Section 54A in Practice*

The practical effects of section 54A may perhaps be best understood by looking at the situation first of all from the point of view of the applicant for planning permission and then from that of the local planning authority.

It has been suggested that where an application proposes development clearly in conflict with the development plan ‘the onus of proof’ shifts to the applicant to demonstrate why the plan should not prevail, i.e. to establish material considerations such as to support his contention that they are of sufficient weight to counter the relevant policies and proposals in the plan. Without necessarily accepting that ‘the onus of proof’ has shifted it is in the interest of the applicant to ‘make a case’ for his planning permission based on the ‘other material considerations’ on which he relies, as he will in any event have to do so should the matter go to an appeal under section 78. Material considerations may be such as, for example, reflect on the age of the plan (as would the issue of superseding Government guidance since the plan became operative), or arise because of the appearance of a significant local or national need unforeseen by the plan, or because of conflicting policies within the plan itself.

In the light of comments made earlier perhaps there should be added to the list of ‘other material considerations’ the proposition that the development proposed may be allowed, even though contrary to development plan policies, if it can be shown that it would do no demonstrable harm to development plan policies.

The local planning authority in determining an application under section 70(2) has to seek to achieve the objectives of the development plan (structure plan, local plan or unitary plan). If the application frustrates those objectives it should be refused, unless the authority is satisfied that there are overriding ‘other material considerations’ which would indicate otherwise. If the application furthers those objectives it should be approved (with or without conditions), unless there are overriding ‘other material considerations’ which would indicate otherwise. It is important however in both arriving at its decision and demonstrating its case at a planning appeal that it show that it has not, in the words of the Deputy Judge in the *Canterbury* case,10

Apparently the planning officer in his report to his committee had observed:

‘Section 54A of the 1990 Planning Act requires local authorities to have regard to the provisions of the development plan in determining planning applications, unless material considerations indicate otherwise . . . I consider this is a situation where ‘material considerations’ do indeed indicate otherwise’.

The Deputy Judge held that this passage misstated the approach embodied in section 54A; by

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8 A local example of the last-mentioned arose recently in an appeal by Leicester University against a decision of the Leicester City Council planning authority to refuse the change of use of a property from student housing to University teaching and administrative use. The property fell within an area delineated in the plan as being within the University’s sphere of influence (for University ‘extension’) but was also affected by conservation policies aimed, *inter alia*, at retaining housing stock. On appeal the Inspector decided that the policy regarding the University’s sphere of influence should take precedence over the conservation area policy restricting the loss of housing stock within the area and in consequence allowed the appeal.

conflating the two requirements imposed by sections 70(2) and 54A it ignored the extra weight to be attributed to the development plan under the new provisions.

From this judgment, therefore, planning officers and planning authorities would be well advised to adopt a clear procedural practice giving primacy to the development plan. The procedure might well take the following form:
(1) Follow section 54A and look first to the development plan. If the applicant's proposal conforms with the plan then there is a *prima facie* case for approval; if it conflicts, there is a *prima facie* case for refusal.
(2) Acknowledging section 70(2), identify all 'other material considerations'. If, and only if, they are significant and sufficient to outweigh the development plan - either as a matter of fact or as a matter of law - then consider whether the *prima facie* case for either approval or refusal (as arrived at under (1) above) may be rebutted.

In considering the weight to be given to the 'other material considerations' it should be borne in mind that although this is in the first instance a matter for the determining authority, the proper interpretation of those facts is itself a matter for the courts, and the planning authority's decision to allow or exclude 'other material considerations' from influencing the decision may result in a legal challenge.

Section 54A and the 'plan-led' approach has resulted in greater importance being attached to the development plan in general and the local plan, and hence the Local Plan Public Inquiry in particular. Developers were quick to recognise that in view of the primacy of the development plan it was necessary to secure their proposals at the local plan stage. The result has been that many developers, in particular the major house builders and retailers, have mounted objections to local plans (*post* 1991) and presented their cases at the Local Plan Inquiry at a near comparable level to that which they would have adopted had it been a section 78 Planning Appeal. The consequent result has been to prolong the Local Plan Inquiry and, if unchecked, will surely jeopardise the very plan-led system that section 54A was designed to achieve.

An example of the effect of section 54A on Local Plan Inquiries was provided by the Trowbridge Local Plan (First Draft Review) Inquiry in October 1991 (only a few days after section 54A was brought into force by SI 1991 No. 2067), in which the main issue was the location of a site of 30 acres for employment use. Apart from the site earmarked by the local planning authority, four alternative sites were suggested by prospective developers, including one that had been recommended by the local authority's own planning officers and rejected in favour of the council's preferred alternative. An attempt was made by each objector to mount a case, to a greater or lesser degree, in accord with that which would have been expected at a section 78 appeal. This evidence took the form, in at least one case, of detailed plans and layouts of the proposed industrial development, accompanied by landscaping proposals and forecasts of projected traffic levels and movements of cars and goods vehicles. All this, in spite of the fact that the objector, whilst having an option on the land, had no prospective occupiers in mind and was therefore in no position to assert the credibility of the scheme and even less the traffic generation from an ultimate development which could differ substantially in terms of density, employment potential and intensity of traffic movement. Such spurious detail, if allowed to influence the outcome of a Local Plan Inquiry, may jeopardise the purpose of the local plan which is to identify and allocate sites which are the most appropriate in 'land use
planning’ terms to meet the objectives and policies of the plan. All that is relevant at the Local Plan Inquiry stage is a range of possible impacts at ‘acceptable’ levels of intensity of development. In this particular Local Plan Inquiry the Inspector resisted, as far as he was able within the limits of not encouraging a challenge to his conduct of the Inquiry, the introduction of unhelpful (and indeed possibly misleading) evidence10.

Law and Policy

The consideration of section 54A - its meaning and impact - has illustrated the divide between on the one hand the law and on the other Government policy and advice. It is important that local planning authorities and the Secretary of State for the Environment continue to recognise the distinction, otherwise they will be given from time to time salutory reminders by the courts. Circulars and PPG’s in particular have in recent times been accorded the near status of rules of law by local planning authorities, the Secretary of State for the Environment and even some lawyers at planning appeals. It is perhaps not surprising that local planning authorities view them in such a light as they are aware that the Secretary of State for the Environment, the Department of the Environment and the Inspectorate will have special regard to them on an appeal and will be reluctant to decide contrary to the Government advice that they themselves have put out. This is not to suggest that local planning authorities should not heed and, where appropriate, follow advice in circulars, PPG’s and other Government pronouncements, provided always that their decisions are within the law (be it either Statute or Statutory Instrument).

It may be too simplistic to state that policy advice may permit something less than that which the law would allow but can never permit something greater, and this matter of the relationship between law and policy will be continued when considering issues of ‘planning gain’ and planning obligations (post), where it has caused concern and where the potential for conflict is of greater consequence.

The Boundaries of the Condition and Obligation Powers

Development control is achieved by the imposition of conditions on a planning permission and by means of obligations (previously agreements) attached to and forming part of that planning permission. In many cases conditions will be all that is required but in an increasing number of cases the addition of obligations is necessary. So far this study has been limited to a consideration of the broad principles relating to the condition and the obligation. That which follows attempts to set out the ‘legal’ limits of the ‘condition and obligation’ powers; to examine the relationship between law and policy (as set out in Circulars, PPG’s, etc.), and to consider the relationship between ‘law and policy’ on the one hand and ‘practice’ on the other.

The law and the legal limits

The rules governing the imposition of planning conditions are comparatively clear - certainly in contrast to those of the ‘obligation’. Having been in ‘daily’ use for nigh on half a century there can be very few new situations to arise. In essence, and as earlier more fully
explained, a condition must not be *Wednesbury* unreasonable\textsuperscript{11}; it must fulfil some planning purpose and fairly and reasonably relate to the permitted development\textsuperscript{12}, and it must relate to land within the ‘control’ of the applicant, with important exceptions\textsuperscript{13}.

One of the problems of defining the legal limits of the ‘condition’ power is that many of the cases that come before the courts challenge the ‘decision’, of which the condition forms only a part, and the issues of unreasonableness, relevancy and irrelevancy are debated in respect of the decision as a whole. Conversely, however, whilst the *Newbury* and *Pyx* cases (referred to above) related to the relevance of specific conditions, it may possibly be thought that the tests laid down in those cases apply equally to the decision to grant or refuse planning permission.\textsuperscript{14} Similarly, most of the cases relating to relevance or irrelevance to planning, whilst being concerned with the decision as a whole, might well *ipso facto* apply to conditions.

A further problem relates to what may be conceived as properly embraced by the word ‘planning’. There was a view that the courts regarded ‘planning’ as exclusively concerned with the protection of the physical environment and the conservation of traditional ‘amenity’ values\textsuperscript{15}, but this view is now widened so as to include social or economic factors relating to the physical use of land as being relevant to planning\textsuperscript{16}. So far as the ‘acceptability of conditions’ is concerned, and generally the perceived view on permissions, the courts have, as previously noted, adopted a liberal interpretation of ‘unreasonableness’ as bordering on the ‘very unreasonable’, and of ‘relevance to planning’ as embracing ‘any social or economic factor that can be related to the physical use of land’. It has been suggested that the latter construction represents a ‘misconception as to the function of the word planning’ on the ground that planning does not refer to any specific subject matter but ‘is a method of achieving objectives and carries no implication as to what these objectives should be’.\textsuperscript{17} That planning is a method of achieving objectives cannot be gainsaid but that it carries no implication as to what those objectives should be is a proposition that is not supported by the law itself, which has firstly required the preparation of development plans setting out objectives, policies and proposals and, secondly, required local planning authorities in the execution of their development control powers not only to have regard to such objectives, policies and proposals in the determination of planning applications but indeed to decide those applications in accordance with them unless ‘outweighed’ by other material considerations\textsuperscript{18}.

Turning now to a consideration of ‘obligations’ the position is less clear. Although the obligation (agreement) power has existed in one form or another for many years - the power to make planning agreements first appearing in the Housing & Town Planning, etc. Act, 1909 (para. 13, 4th Schedule) - it is only since 1968, when the approval of the Secretary of State was no longer necessary for the entering into of such agreements, that they have become common practice. The majority have been made under section 52 of the Town & Country Planning Act,

\textsuperscript{11} Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223; *Pyx Granite Co. Ltd. v Minister of Housing & Local Government* [1958] 1 QB 554.

\textsuperscript{12} *Newbury District Council v Secretary of State for the Environment* [1981] AC 578.

\textsuperscript{13} *Grampian Regional Council v City of Aberdeen* [1984] JPL 590; *British Railways Board v Secretary of State for the Environment* [1994] JPL 32.

\textsuperscript{14} *R v Westminster City Council, ex parte Monahan* [1989] JPL 107.

\textsuperscript{15} See, for example, *Copeland Borough Council v Secretary of State* [1976] 31 P&CR 403.

\textsuperscript{16} See, for example, *Clyde & Co. v Secretary of State* [1977] 1 WLR 926, where the Court of Appeal held that planning permission for office development could be refused solely to preserve the site for social housing, and *Great Portland Estates v Westminster City Council* [1985] AC 661 where, within the overriding principle that a planning consideration must be a consideration related to physical land use, any political, social or economic consideration could be relevant within this broad formulation.

\textsuperscript{17} John Alder, *Development Control*, 2nd edn., 1989, p135.

\textsuperscript{18} See the implications of s. 54A, *Town & Country Planning Act*, 1990, ante.
1971 (known as agreements) and now under section 106 of the Town & Country Planning Act, 1990 (known as obligations). Because of the large number of agreements made under section 52 of the 1971 Act it is necessary to examine their legal effect as well as that of the new obligation (post 1990).

Section 52 Agreements

Section 52(1) of the Town & Country Planning Act, 1971 authorised local planning authorities:

... to enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land.

Section 52(2) provided that:

... an agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.

Although section 52 agreements have come to be associated with the grant of planning permission - and indeed the majority will have been - they can have a quite independent existence. Much of the legal debate has been in respect of that 'independent' aspect of their use, involving wider issues of administrative law, contract, consideration and the 'fettering' of statutory powers. Many of these 'problems' can be overcome, as will be later demonstrated, when the section 52 agreement is attached to a planning permission. Nevertheless, as a starting point, it is useful to attempt to summarise the wider questions that the interpretation of section 52 raises and such summary is conveniently supplied by Alder\textsuperscript{19}, of which the following is an attributed paraphrase:

(1) The formula in sub-section 2 does not seem to go far enough in incorporating the Tulk v Moxhay doctrine. Equity requires not only the expression of an intention to benefit land owned by the covenantee, but also the further requirement that the land be in fact capable of benefiting from the covenant, albeit the requirement of benefit is a liberal one (Wrotham Park Estates v Parkside Homes Ltd. [1974] 1 WLR 798).

(2) The section makes no mention of enforceability by successors in title against the local authority in respect of the authority's obligations under the agreement.

(3) The section can pass the burden only of negative covenants and cannot therefore be used to impose obligations to carry out work or provide facilities unless the obligation is to bind only the original covenantor.

(4) The section uses the term 'agreement' which, although wider than contract, is often used to mean 'contract'. In the absence of specific statutory provision no agreement is legally enforceable unless it is made under seal or supported by consideration. As it is unlikely that a developer would make a gratuitous promise under seal the question of consideration is crucial. Section 52 makes no provision for enforcement, but its incorporation of the Tulk v Moxhay doctrine suggests that a contractual relationship between the original parties is contemplated. The language of Lord Greene, MR in Ransom & Luck v Surbiton B.C. [1949] Ch 180 is consistent only with the proposition that the obligation arises out of contract, although 'it goes beyond mere contract in that it gets the characteristics of a restrictive covenant' (ibid, at 195), and that the section [referring to the predecessor section in the 1947 Act] would be nugatory if no consideration was available. If consideration is required, difficulties arise. The local planning authority cannot promise to exercise its statutory powers in any particular way either to grant planning permission or to refrain from enforcement action since that would amount to an unlawful fettering of its discretion.

\textsuperscript{19} John Alder, Development Control, 2nd edn., 1989, pp. 160-162.
Most of these problems disappear once the planning agreement is linked with the planning permission. This can be achieved in a number of ways:

1. Where the developer enters into a unilateral contract promising that if planning permission is granted he will provide the ‘gain’, thus enabling the authority to take his offer into account but not obliging them to grant planning permission.

2. Where, upon the grant of planning permission the local planning authority impose a condition requiring an agreement to be made.

3. Where the authority postpone granting planning permission until an agreement is made.

The last-mentioned course of action is both the most satisfactory in practice and that which is most frequently used. The ‘legal disabilities’ can thus be overcome (or at least side-stepped), leaving the outstanding question as to what limitations the law may impose on the scope of a planning agreement. A more detailed consideration of this matter will perforce be addressed when examining the implications and extent of section 106 obligations. It appears that as far as section 52 is concerned the agreement must be related to land use matters, must probably be related to the proposed development and that any charges exacted for infrastructure must be no larger than a reasonable estimate of the increased burden generated by the particular development.

Section 106 Obligations

Section 106, which greatly extends the scope of section 52 and overcomes many of the difficulties, provides that:

1. Any person interested in land in the area of a local planning authority may, by agreement or otherwise, enter into an obligation
   
   a. restricting the development or use of the land in any specified way;
   
   b. requiring specified operations or activities to be carried out in, on, or under the land;
   
   c. requiring the land to be used in any specified way; or
   
   d. requiring a sum or sums to be paid to the authority on a specified date or dates periodically.

An analysis of the cases determined since 1991 will show how the courts, and in particular the House of Lords, have given this section an ever wider and more generous interpretation, culminating in the decision of the House of Lords in *Tesco Stores Ltd. v Secretary of State for the Environment and others*20, in respect of which a learned commentator21 has concluded that:

‘The Tesco case confirms that not very much is required to ensure that planning obligations are lawful. They simply have to meet the first and third of the *Newbury* tests, that is, they must be for a planning purpose and not an ulterior one and they must not be *Wednesbury* unreasonable. In order to have a planning purpose the obligation must have a connection with the proposed development that is more than *de minimis* but it does not have to be proportionate nor, in a narrow sense, does it have to resolve planning objections. If it passes those tests it will be a material consideration to which the decision-taker will be entitled to give the weight he reasonably thinks it deserves.’

At the same time, the Secretary of State has been issuing guidance which, whilst naturally not challenging the legal interpretation that the courts have placed on section 106, continues to draw attention to the ‘dangers’ of such a wide interpretation with its possible connotations of ‘buying planning permissions’22.

22 DOE Circular 1/97, Planning Obligations, replacing and updating guidance previously set out in DOE Circular 16/91.
Two issues need to be addressed. First, the way in which the courts have moved from a 'narrow' interpretation of a 'limited' section 52 to a 'generous' interpretation of a 'wider' section 106. Secondly, the way in which the Secretary of State for the Environment has sought to temper and draw back from the expansive view of the courts, through advice setting out the policies to which he and Planning Inspectors will have regard in determining applications or appeals and which local planning authorities should take into account when considering planning applications and drafting development plan policies.

As recently as 198623 it had been argued that if a condition would be invalid as being manifestly unreasonable, it would automatically follow that the same requirement in a planning obligation would also be invalid. But the assertion that only those obligations which could have been imposed by condition could be valid was firmly rejected by the Court of Appeal in Good v Epping Forest DC,24 concerning an application to have a section 52 agreement declared void. The Court accepted that the powers given under section 52 were not controlled by the nature or extent of the powers to grant planning permission. The planning agreement power, which derives from the words used in the section of the statute, will be lawful provided it is used for the purposes specified in the section and is not Wednesbury unreasonable. It is irrelevant that the purpose could not have been achieved by a condition - the two statutory powers are distinct with separate consequences and subject to different procedures.

The legality (or otherwise) of obligations in cases that have come before the courts has generally revolved around questions of 'planning gain', being either actions brought by developers on the ground that some obligation offered has wrongly been excluded from consideration or that 'excessive' obligations have been demanded, or by competitors challenging decisions on the ground that the offer of 'excessive' contributions has influenced the grant of permission to a rival competitor. In the 1990's four cases in particular illustrate the 'developing' attitude of the courts, namely:

Safeway Properties Ltd. v Secretary of State for the Environment 25.
R v Plymouth City Council (ex parte Plymouth & South Devon Co-operative Society) 26.
R v South Northamptonshire DC, ex parte Crest Homes plc27.
Tesco Stores Ltd. v Secretary of State for the Environment and others28.

From the first three some general conclusions will be drawn before looking at the implications of the Tesco case in greater detail.

In the Safeway case the Court of Appeal allowed an appeal from the refusal of the High Court to quash a decision of the Secretary of State to refuse outline planning permission, on the ground that the Inspector who had conducted the Inquiry into the appeal had wrongly excluded from consideration an offer by the developers to provide financial assistance for the implementation of traffic management measures which it was claimed would go some way to alleviate the effects of increased traffic in the vicinity of the appeal site. The Court held that there were insufficient reasons for the Inspector to conclude that the measures to be financed by Safeways were not so directly related to the proposed development of the site that the Superstore ought not to be permitted without them. From this it may be concluded that the offer was a 'material consideration' which the Inspector should have taken into account but that, having done so, he could have come to the view that nevertheless the 'offer' was of less

23 Bradford MBC v Secretary of State [1986] JPL 598.
than sufficient weight to overcome the adverse traffic implications which would flow from the development.

The *Plymouth* case was based on a challenge which, put bluntly, accused the local planning authority of selling planning permissions. Three major foodstores were involved. Plymouth Council approved applications for two (Tesco and Sainsbury), both accompanied by offers of substantial packages of facilities both on and off the Superstore sites. The application for the third (South Devon Co-operative Society) was at first deferred as, in the light of permissions granted to Tesco and Sainsbury, the capacity was now too large, although subsequently permission was granted. The Co-operative Society applied to the High Court for the grants of permission to Tesco and Sainsbury to be quashed on the grounds that Plymouth Council had erred in law by taking extensive packages of community benefits into consideration. The benefit packages had included, apart from contributions to the infrastructure, the provision of crèches, park-and-ride schemes, a wildlife habitat, a bird-watching hide, an art display and a tourist information centre. Some of these facilities were to be provided on site and some off site. Both the High Court and the Court of Appeal held that the 'community benefits' were material considerations even though many were not necessary to overcome any planning problems, and the application to quash the permission was in consequence refused. From this decision it would appear that the law will not intervene to stop a developer attempting to get an advantage over a rival by offering benefits which are in excess of those necessary to overcome any planning problems occasioned by the development. This is at variance with policy advice in DOE Circular 1/97 (superseding DOE Circular 16/91) and, as will later be apparent, is subject to the proviso that the planning authority in arriving at its decision must not be influenced by the offer of benefits over and above those that can be attributed to the 'needs' of the development.

In the *Crest Homes* case the issue was the validity of agreements under which landowners agreed to pay the local planning authority a percentage of the increase in the value of the land caused by the granting of permission for residential (20%) and industrial/commercial (17%). The scheme, devised by the council and a consortium of developers, required developers to enter into planning agreements under which land was to be freely transferred and funds provided for improvements and facilities, including roads, schools, playing fields, footpaths and cycle ways. The agreements were conditional on the adoption of a local plan and the granting of planning permission for development. One developer (Crest Homes) subsequently challenged the legality of the agreements (which had been entered into by the other developers) and applied to the High Court to have them, the grants of permission, (and the other resolutions of the council), declared invalid. However, the Court of Appeal, upholding the decision of the High Court, accepted that all the actions were completely lawful. The case has received much criticism for, amongst other reasons, seemingly legitimising the levying of a 'local development tax', and for adopting a formula which may have scant relevance to the ultimate infrastructure and other costs. The better and more prudent view would be to recognise that the decision, as Henry, LJ himself went out of his way to emphasise, depended on the particular facts that made the formula lawful in the particular case. Having detailed these facts he went on to state that they were 'crucial because they legitimise a formula which, used in other factual contexts, would be struck down as constituting an unauthorised local
development tax'. The precedent that this case sets, it is suggested, is limited by reference to the
facts of the case and such facts may not again be exactly replicated. Although it appears from
the judgments in both the High Court and the Court of Appeal that a local planning authority
is not required to calculate and proportion exactly the infrastructure cost attributable to a
particular development, the contribution agreed or assumed by the developer must be one
which can 'properly be regarded by the planning authority as a genuine pre-estimate of the
developer's proper contribution to the related infrastructure'. Whether or not in practice it is so
will only be apparent much later and probably not until the development is well under way. It
may be concluded therefore that a planning authority would be well advised to refrain from
using a 'formula' approach if other more straightforward options are available.29

Finally, in this brief review of recent cases, attention must be turned to the latest, namely
the Tesco case. It was hoped by many that the House of Lords decision in this case would be the
definitive answer to questions concerning the legal parameters of section 106, the limitations on
what might constitute a planning obligation and the criteria to which a 'legal' obligation should
conform. In the event the case did little more than answer the much narrower question as to
whether or not in the circumstances of an appeal the Secretary of State had 'ignored' a material
consideration. Nevertheless obiter in the case would appear to indicate that as long as the
obligation has some planning purpose, however tenuous, it is prima facie intra vires, provided it
falls short of being a blatant attempt to buy a planning permission.30

At the Public Inquiry into applications to develop rival sites (Tesco and
Sainsbury/Tarmac) the Inspector concluded that there was little to choose between them but
that permission should be granted for one only. The Tesco application was accompanied by an
offer to finance a new link road (the subject of a section 106 agreement with the highway
authority). The Inspector accepted that there was some relationship between the funding of the
road and the proposed superstore but that the full funding of the road was not fairly and
reasonably related in scale to the proposed development and that it would be unreasonable to
require a developer to fund the link road, although there was some support in the local plan
process for the obtaining of contributions from developers and it would be perverse to turn
away such an offer of funding. The Inspector recommended the Tesco site, chiefly because the
Local Plan Inspector had expressed an informal preference for it, and (seemingly) not because
of Tesco's offer of funding. Subsequently the Secretary of State disagreed with the Inspector
and permitted Sainsbury's application and rejected that of Tesco, the Sainsbury site being
'better on planning grounds'. In his decision letter he gave little weight to the Local Plan
Inspector's preference and no weight to the offer of funding. He thought it would be
unreasonable to seek even a partial contribution but that if funding had to be taken into
account to an extent, he concluded that the extent would be of such a limited nature that it
would not tip the balance of the argument in Tesco's favour.

The decision was quashed in the High Court on the grounds that the Secretary of State
had been wrong in law to ignore the offer of funding as it was a material consideration. The
Court of Appeal reversed the decision of the High Court and the House of Lords affirmed the

29 It may be noted, however, that the planning authorities in Leicestershire in the early 1980's were successful in imposing a similar
'formula' approach on a consortium of industrial developers on a site adjacent to a motorway junction, whereby the contributions to
infrastructure were based on a formula related to the land area of each developer for which planning permission was granted.
30 As will later emerge the policy guidance and, even more so, good practice adopt a far more cautious approach.
Court of Appeal's decision.

As asserted by David Mole, QC\textsuperscript{31} the decision itself can be expressed very shortly:

'A planning obligation offered by a developer is a material consideration to which regard should be had if it is relevant to the development, but the weight to be given to the obligation is entirely a matter for the discretion of the decision maker. The Secretary of State had not treated Tesco's offer of funding as \textit{immaterial}, which would have been unlawful, but had given it full and proper consideration and then treated it as of insufficient weight to be determinative.'

Although, apparently, everything else in the judgment is \textit{obiter} the observations of both Lord Keith and Lord Hoffman, whilst not going to the root of the decision, nevertheless provide some very persuasive guidelines:

(1) 'The \textit{vires} of planning obligations depends entirely upon the terms of section 106. This does not require that the planning obligation should relate to any particular development . . . the only tests for the validity of a planning obligation outside the express terms of section 106 are that it must be for a planning purpose and not \textit{Wednesbury} unreasonable'; (per Lord Hoffman, who also went on to make it clear that if a condition were manifestly unreasonable it did not automatically follow that the same requirement in a planning obligation would likewise be unreasonable).

(2) 'An offered planning obligation which has nothing to do with the proposed development will plainly not be a material consideration and could be regarded only as an attempt to buy planning permission. If it has some connection with the proposed development which is not \textit{de minimis}, then regard must be had to it'; (per Lord Keith).

In other words, 'anything goes' provided that there is some connection with the proposed development, although their Lordships give little guidance as to what would constitute a sufficient connection. However it was Lord Hoffman's view that once a relationship has been found it does not matter that what is being proferred is not necessary to make the development acceptable or that the extent of the obligation appears disproportionate to the external costs of the development. This view is in marked contrast to that adopted in the Crest Homes case, in which Henry, LJ was firmly of the opinion that a 'benefit disproportionate to the adverse planning impact of the development to which it was linked would not fairly and reasonably relate to that development'. Thus financial contributions may have to be 'proportionate' and although the courts have always been reluctant to consider such matters as the \textit{quantum} of compensation in compulsory purchase and similar cases (in which 'proportionality' may feature), leaving such issues for the 'decision maker' or for a Tribunal (such as the Lands Tribunal), they might well be required to intervene if the obligation proposed a disproportionate contribution, in that it was manifestly unfair, unreasonable or oppressive.

The decision in the \textit{Tesco} case leaves unanswered the crucial question as to where the boundary line between acceptable and unacceptable obligations lies. Sir Thomas Bingham, MR had observed in the Court of Appeal that the \textit{Tesco} case involved:

' . . .a question of unusual public importance bearing on the conditions which can be imposed, and the obligations which can be accepted, on the granting of planning permission and the point at which the imposition of conditions, and the acceptance of obligations overlaps into the buying and selling of planning permissions which is always agreed to be unacceptable'.

\textsuperscript{31} Planning Gain After the Tesco Case, [1996] JPL 183, at 188.
That question has not been answered. Presumably it will only be answered as and when a particular obligation is challenged in the courts and decided on its particular facts and merits and then only in respect of those criteria. This then is the less than definitive legal background within which the policy makers and local planning authorities and applicants have to work.

**The policy**

As with the law, policy will be considered first in respect of planning conditions and then planning obligations. By comparison, policy advice in respect of the former is clearer and has had the benefit of having been assembled over time and can be dealt with quite briefly. Advice on the use of conditions in planning permissions is contained in DOE Circular 11/95 (replacing and strengthening that in DOE Circular 1/85). Basically it sets down six tests for conditions. They should be: necessary; relevant to planning; relevant to the development to be permitted; enforceable; precise; and reasonable in all other respects. There is no open conflict here with the law (Wednesbury, Newbury, et al) and they provide a ‘working relationship’ between practice, policy and the law which is standing the test of time. Circular 11/95, whilst providing a range of additional advice on specific planning issues, raises two other general matters which are of importance to this study. First, whilst not professing that such would be ultra vires, it strongly recommends that where conditions are imposed on a planning permission they should not be duplicated by a planning obligation. Secondly, it stresses that a condition which duplicates the effect of other controls under separate legislation will normally be unnecessary, and one whose requirements conflict with those other controls will be ultra vires because it is unreasonable. Regrettably, the former is still being breached by a number of local planning authorities, and the latter is causing increasing concern at the interface between planning and environmental control.

There is no such measure of accord between law and policy when entering the field of planning obligations. Department of the Environment Circular 1/97 (replacing Circular 16/91) clarifies and updates previous guidance. In its consultation letter of December 1995 the Department of the Environment emphasises that the proposed revision does not represent a change in policy on the use of planning obligations and that the purpose is to reaffirm the advice contained in Circular 16/91 and clarify existing guidelines on a number of detailed matters. Acknowledging that the policy (Circular 16/91) was held to be lawful by the House of Lords in the Tesco case it represents an attempt to draw back from the wide impact that their Lordships accord to planning obligations by, on the one hand, recognising the law as laid down by the House of Lords’ judgment and, at the same time, giving policy advice that falls short of what the law would allow. The ‘conflict’ arises from the difference in approach to section 106. The courts, quite properly, have interpreted the wording of section 106 as it stands, free from any wider association, whereas the Secretary of State for the Environment sees the implications of section 106 obligations in the wider context of the ‘delivery of the planning service’. The Circular may best be interpreted as setting out the Secretary of State’s view of good practice, within the law.

First, planning obligations must be relevant to planning and directly related to the proposed development if they are to influence a decision on a planning application. In addition, as a matter of policy, they should only be sought where they are necessary to make a

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32 It may be considered a matter of regret that their Lordships did not take the opportunity to follow the examples of judicial clarity provided by Parker, J in Elliston v Reacher [1908] 2 Ch 374 for the building scheme and by Danckwerts, J in Re Ellenborough Park [1956] Ch 131 for the easement.

33 See The Case for an Environmental Court or Tribunal, post.
proposal acceptable in land use planning terms. Planning obligations can relate to land, roads or buildings other than those covered by the planning permission, provided that there is a direct relationship between the two. But they should not be sought where this connection does not exist or is considered too remote to be considered reasonable.

Secondly, in general, it would be reasonable to seek, or to take account of, a planning obligation, if what is required or offered is needed to enable the development to go ahead; or, in the case where financial payment will meet or contribute towards the cost of providing such necessary facilities in the near future; or, is otherwise so directly related to the proposed development and to the use of land after its completion that the development ought not to be permitted without it.

Thirdly, planning obligations may also be used to ensure an acceptable balance of uses in a mixed environment; to secure the inclusion of an element of affordable housing; to protect or reduce harm to ‘protected sites or species’, and to offset the loss of or impact on any resource present on the site prior to development.

Whilst the tests in Circular 11/95 are tighter than the parameters set by the Newbury rules, so the advice in Circular 1/97 is tighter than the law (Tesco, et al).

The policy advice in respect of ‘relevance’ goes some little way to answering the question left unanswered by the House of Lords as to what is meant by the requirement for a direct relationship between a development and an off-site contribution but falls short of defining clearly what is meant by the requirement, leaving it a matter of judgment for, in the first instance, the local planning authority and subsequently the Inspector or the Secretary of State on appeal, and eventually the courts. Neither does it assist in resolving the issue of ‘proportionality’ and the joint financing of infrastructure through local plan policies. It is apparent that although bound by the Crest Homes case, the Secretary of State for the Environment and his Department would prefer to consider it an isolated example confined to the particular facts of a particular situation.

Apart from recommending a policy which is far ‘tighter’ than the law, Circular 1/97 leaves many major questions unanswered. In addition to those already mentioned, very little advice is given in the matter of unilateral obligations. What for example is the position regarding an ‘offered’ planning obligation which has nothing to do with the proposed development and which the planning authority and/or the Secretary of State treat as irrelevant and immaterial in coming to a decision to grant planning permission, but which the developer nevertheless insists on offering unilaterally? If challenged by a rival developer will it form grounds for the courts to question the decision of the planning authority or that of the Secretary of State? If not challenged, will the local planning authority, in accepting it, be acting ultra vires?

The practice

Both the law and the policy approach the limitations they severally place on the ‘obligation’ power seemingly by setting upper limits. The law does so by stating in effect that if the parties go beyond a certain limit (not clearly defined) then they lay themselves open to
challenge on the grounds of the obligation being *ultra vires* or disproportionate. Policy advice, whilst imposing rather more strict limitations, also takes the form of laying down a ‘maximum’ which should be sought or offered, albeit somewhat less than the law may allow. It is within this context of law and policy that local planning authorities and developers have to operate. Rather than approaching the issue as though it is one of defining and regulating the maximum that can be permitted, it is thought that a better approach from the point of view of the applicant developer (and, it is suggested, also the local planning authority) would be to start from the basis of defining what is the minimum required. As with the condition, the obligation is not to make a ‘contrary’ development acceptable, rather it is to make a generally ‘conforming’ development acceptable. The obligation cannot (except in very rare cases) be used to make a non-conforming use or development acceptable in land use planning terms.

It is suggested that the use and extent of the obligation can, in terms of best practice, be arrived at by a ‘formula’ based on a series of questions:

1. Does the proposed development accord with the objectives and policies of the development plan?
2. If yes, what conditions are required?
3. What additional matters, if any, cannot be achieved by conditions and require recourse to obligations to meet:
   a. that which is necessary to enable the development to proceed, e.g. infrastructure;
   b. that which is necessary to allow the use of the development on completion and accommodate projected increases in the intensity and form of that use in the future, up to say 15 years ahead; and, lastly,
   c. what on-site (and possibly off-site) facilities are necessary (or desirable) to offset ‘environmental’ losses occasioned by the development, e.g. displaced sports grounds, felled woodland, etc.?

Such an approach will satisfy the local planning authority as to what is required to make the ‘conforming’ use or development ‘work’ and to make the developer aware of what is ‘essentially’ required of him. Anything over and above, either by way of demand by the local planning authority or offer by the developer, is truly ‘planning gain’. If the development plan (usually the local plan) provides for exacting such ‘planning gain’, e.g. contributions by housing developers to provision of additional infrastructure or social facilities or, following Government advice the inclusion of ‘affordable housing’ or additional facilities in mixed-use development, then provided such ‘imposition’ is proportionate it may be legitimately included as an obligation. Any matter which cannot be brought within the ‘formula’ or within the development plan or specific Government advice will in consequence be identifiable as an attempt to buy (if offered by a developer) or sell (if required by a planning authority) a planning permission, yet may well be legal within the limits of the case law.

Developers who offer this ‘additional planning gain’ fall generally into two main categories. They may be either developers who are attempting to obtain planning permission for a development which might not otherwise be approved and where they believe (unfortunately sometimes correctly) that the offer of some additional inducement may influence the planning authority in their favour so as to obtain a permission which would not otherwise be granted or which would only be granted on appeal after considerable delay and expense. The other occasion is that presented where there are rival developers for a limited number of permissions, and the cases that have come before the courts have primarily been in
respect of rival retailers seeking planning permission for superstores. The value of a planning permission is not only great in itself but is considerably enhanced if competitors are excluded.

The problem for planning authorities is that although they are exhorted not to allow such offers to influence their decisions it is difficult for a committee to exclude the consideration of them when choosing between alternative sites and, even more difficult, to convince the unsuccessful applicant that they were not so influenced.

The whole question of 'planning gain' with its tenuous (at the best) links with the proposed development is in danger of bringing the planning process into disrepute. If planning permission is a restitution of a right, what justification is there for exacting planning gain? If some developers are making too much profit from their development the proper remedy is a 'tax on developers' profits' rather than some 'hit and miss' planning gain. Furthermore, planning gain works best for the community in areas that in reality want to 'discourage' development, i.e. the already more 'prosperous' authorities in areas such as the south and the southeast. In the 'more needy' areas a 'negative' planning gain is required to encourage development through 'contributions' from the local authority. Planning gain in the wider context of the term should be excluded from the obligation power but, until it is, planning authorities (and developers) should strive to avoid it.

An examination of the use of obligations in the area of one county planning authority and its districts (Leicestershire) has not revealed one example of either a request or an offer which went beyond the limits set out above. Recent agreements entered into by the authorities and developers clearly distinguish between obligations under section 106 and others, as for example highway obligations under section 278 of the Highways Act, 1980. This approach is an improvement on the procedure adopted in earlier agreements whereby the planning and highway obligations were 'intermixed' in an agreement described as being made under section 106 of the 1990 Town & Country Planning Act, section 278 of the of the 1980 Highways Act and under various other appropriate sections of the Local Government Acts. As the highway obligations are generally those that include major financial contributions to infrastructure (often for works well removed from the application site) a clear separation of the section 106 'planning' obligations from all others is a practical safeguard in that it goes some way to demonstrate that the major financial payments are specifically for highway purposes which can be costed.

The Limitations of Planning Control and Restrictive Covenant Control

The section on planning conditions and obligations has inevitably drawn attention to the way in which the planning control powers are circumscribed. The combined effect of sections 54A, 72 & 106 is to place limits upon the discretion that the local planning authority enjoys when it is approving or refusing a planning application. Nevertheless, within those limitations a planning authority has the means not only to control the use and development of land but, paradoxically, to promote and encourage its use and development. The primacy of the development plan (section 54A) has focussed the attention of developers, once the plan is approved, on those sites and opportunities within the plan with the result that, there being less
chance than before of obtaining permission for developments outwith the plan, 'demand' is met in those locations 'preferred' by the planning authority. The element of restriction (rationing) imposed by the plan and the plan-led system has encouraged, if not promoted, positive development. This aspect of 'control' must not be over-exaggerated as the real power of control (as the word necessarily implies) is to prevent unacceptable (in land use planning terms) uses and development. In this the planning control system is reasonably successful; it has in general prevented the worst 'excesses', except where 'political' intervention has occurred at the local or national level. Such perverse decisions can, as already shown, be challenged in the courts but only at considerable expense and with minimal chance of success.

The control power, linked as it is to the development plan, is slow to respond to changed circumstances and new demands. Its reputation for fairness and even-handedness suffers when it is required to provide solutions to problems outside its remit, as for example the provision of 'affordable housing' and other instances of 'social engineering', to solve a socio-economic problem by means of a 'spurious planning subsidy'34.

Planning control is at its least effective and most unpopular when it intervenes at the domestic level and concerns itself overly with detail and minutiae. Many of these matters are best left to resolution (or even continuing dispute) between the neighbouring parties concerned.35 Planning control also operates less successfully at the other end of the scale in dealing with major installations (e.g. power stations) and 'energy-based' industries, primarily due to lack of any national planning guidance and the incidence of political interference and vested interest pressures.36 It works best at the intermediate level, from quite small scale up to large scale developments, where local decision-making (in the context of local plans) can be seen to be arrived at (even if not welcomed) by an accountable elected body, after public consultation.37

Any attempt to draw a comparison between the effectiveness of planning control powers and restrictive covenant powers must be prefaced by the obvious but important caveat that their exercise is for very different reasons, albeit similar objectives. The extent of the restrictive covenant control power has been the subject matter of many of the cases considered in the previous two main sections and is referred to again in the final section. The only legal limits to the exercise of the power are those arising from the fundamental rules of contract and those imposed by Parliament in such Acts as the Race Relations Acts. However, actual enforcement may be difficult where 'current issues of political correctness' are present. The only practical limits to the exercise of the power are those imposed by what the covenantee is willing to accept.

The restrictive covenant control is potentially wide in scope, whereas planning control is circumscribed by law, regulation and policy. However, in each instance the real measure of power lies in the respective ability to enforce the control and the efficiency and efficacy of enforcement procedures. These matters are now adverted to and addressed.

34 Although planning control is directed to 'the use of the land', the courts have held that planning authorities may in certain circumstances take into account such matters as personal need and hardship, the commercial viability of small businesses, local needs, the needs of agricultural occupation and affordable housing. Nearly all these exceptions fall within the category of what may be termed 'social engineering' and whilst not necessarily contrary to the proper planning control of the use of land and buildings may, unless strictly circumscribed, jeopardise the 'fairness' of the planning system, as for example, by the granting of planning permission for 'affordable housing' on sites outside the village boundary or 'envelope', the development of such sites being denied to all others.

35 This matter is returned to later when considering the future relationship between planning control and restrictive covenant control.

36 But also as a result of an inadequate 'democratic' process whereby local communities and environmental groups are disadvantaged.

37 Even here it is dependent on up-to-date advice and guidance by Circular and PPG, vide the tardy advice on superstores (PPG6) which came too late to control their number and size, to the detriment of town centre renewal.
The Enforcement of Planning Control and Restrictive Covenant Control

The main remedies open to a local planning authority for the enforcement of breaches of planning control are Enforcement Notices, Stop Notices and Injunctions. The more common form of action is the Enforcement Notice; the much rarer is the Stop Notice (which may result in the payment of compensation), and rarely (but increasingly) resort to the courts for an Injunction, particularly in the case of major breaches.

Enforcement action by the issue of an enforcement notice or by the service of a breach of condition notice, may be taken in relation to a breach of planning control, defined as carrying out development without the required planning permission, or failing to comply with any condition subject to which planning permission has been granted.\textsuperscript{38} Action by the local planning authority is discretionary; subject to certain time limits for the bringing of enforcement action, and to the local planning authority being of the opinion that there has been a breach of planning control and that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.\textsuperscript{39} The effect of this last requirement has assumed a greater significance through the introduction of the new section 54A, giving the development plan a status of primacy. Most importantly however is the element of discretion which lies entirely within the hands of the local planning authority, so that 'other' persons who are adversely affected by the breach in their use and enjoyment of their own lands have no more than a persuasive power to force the local planning authority to take action. The only avenues open to them, in dealing with a recalcitrant local authority, are 'peripheral' and with little assurance of success, being either an application for judicial review (expensive and of limited application and scope) or reference to the ombudsman where, if it can be shown that there has been maladministration on the part of the local planning authority, compensation (but not action to stop the breach) may ensue.

In cases where development is in the process of being carried out, either without planning permission or in contravention of planning permission, the local planning authority has the additional power of serving a stop notice 'prohibiting the carrying out of that activity on the land to which the enforcement notice relates, or any part of that land specified in the stop notice'.\textsuperscript{40} The purpose of the stop notice is to overcome the problems that could be associated with delay in the enforcement notice procedure occasioned by appeal and other delaying tactics. The Secretary of State on appeal is less likely to require the demolition of a building which has been completed than one in the early stages of erection. Whilst being undoubtedly an effective control measure, taking effect within three days of it being served, if the enforcement notice which it supplements is quashed or varied on appeal, compensation may become payable. In major construction projects a stop notice can cause considerable loss even if only a few months pass between the issue of the stop notice and the quashing or variation of the enforcement notice. The fear that compensation may be payable and the possibility of local councillors being surcharged, has deterred local planning authorities from issuing stop notices.

Victor Moore\textsuperscript{41} claims that in fact the liability to pay compensation is much restricted as it is only payable if the enforcement notice is quashed on grounds other than that planning permission ought to be granted for the development to which the notice relates, or where the authority decide to withdraw the stop notice, or it is varied on appeal so that the matter alleged

\textsuperscript{38} Town & Country Planning Act, 1990, section 171A (1).
\textsuperscript{39} Ibid, section 172 (1).
\textsuperscript{40} Ibid, section 183 (1).
\textsuperscript{41} A Practical Approach to Planning Law, 5th edn., 1995, p.319.
to constitute a breach of planning control is no longer included in the notice. The circumstances in which compensation is not to be payable are clarified by section 186(5), incorporated in the 1990 Act by the Planning & Compensation Act, 1991, which now provides that no compensation is payable in respect of any prohibition in a stop notice of any activity which, at any time when the notice is in force, constitutes or contributes to a breach of planning control. Nevertheless local planning authorities will still be reluctant to use the stop notice so long as there is a ‘perceived’ fear, no matter how little in reality.

Thus, enforcement notices and stop notices are subject to statutory limitations, procedural constraints, the ‘possibility’ of compensation, and most significantly lie firmly in the discretion of the local planning authority.

Local planning authorities have in the past resorted to injunctions to enforce planning control. Prior to 1991 local planning authorities operated under section 222 of the Local Government Act, 1972, which gave a general power to local authorities who considered it expedient for the promotion or protection of the interests of the inhabitants of their area to ‘prosecute or defend or appear in any legal proceedings and, in the case of civil proceedings, institute them in their own name’. Since 1991, local planning authorities have, through the introduction of section 187B into the 1990 Act, by the 1991 Planning & Compensation Act, an express right in planning law to obtain from the High Court or a County Court an injunction. The section applies to any actual or apprehended breach of control and is available to the local planning authority whether or not it has exercised or proposes to exercise any of its other powers as, for example, enforcement and stop notices. Few cases have as yet been brought under the new section, although it has already been held that it is much wider than the power previously available in that it is no longer necessary to show that criminal penalties are not enough to deter the defendant from infringing planning law.

Again, as with the other remedies, instituting action to enforce planning control by means of an injunction is at the discretion of the local planning authority, with all the consequences that flow from the abuse or non-use of a discretionary power.

Having looked at the ‘limitations’ associated with the enforcement of planning control, attention is now transferred to considering those in relation to restrictive covenant control. As noted earlier only equitable remedies are available and, furthermore, the only equitable remedy appropriate to a negative covenant is that of injunction. Although since 1858 the Court has power to award damages in any case where an injunction could have been awarded, they are not a satisfactory remedy for the breach of a covenant intended to preserve the value of land. Mandatory injunctions may be granted (as in, for example, Wakeham v Wood) but, as with all applications for injunctions, grant lies within the discretion of the court. The rules of Equity apply and an injunction will be refused if it would be ‘inequitable’ to grant it because of, for example, acquiescence in the breach or open acceptance of breaches of covenant such as to indicate an intention not to enforce and where the character of the neighbourhood has been so

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42 See, for example, Westminster City Council v Jones [1981] JPL 750, where the local authority acted to prevent the operation of an amusement arcade causing nuisance and disturbance in a residential area.
44 It is to be noted that damages in lieu of an injunction are rarely if ever appropriate in breaches of planning control.
45 The Chancery Amendment Act, section 2.
46 See the commentary on the Wrotham Park case, ante.
48 Gaskin v Balls (1879) 13 ChD 324.
49 Chatsworth Estates Co. v Fewell [1931] 1 Ch 224.
completely changed that the covenant has become valueless\textsuperscript{50}. As in other areas of Equity there is seen here both a desire to 'do Equity' for the defendant and also an unwillingness to act in vain.

As with planning control, therefore, the enforcement of restrictive covenants by means of injunction is subject to the discretion of the courts, with the inevitable inconsistencies (and reluctance) that they have exhibited (\textit{Wrotham Park, et al}). Unlike planning control, however, procedure for the enforcement of a breach is entirely within the hands of the beneficiary of the covenant. It is the covenantee or his successors who have the power to institute proceedings, at their discretion, though they may well be deterred by the cost of court proceedings and the element of chance for success. Nonetheless, despite the potential inhibition of cost, restrictive covenants have, subject to the limitations of acquiescence and obsolescence, a degree of permanence and endurability\textsuperscript{51}. Furthermore, the discharge or modification mechanism has ensured a continuing relevance whereby a particular control, which might otherwise have failed entirely, has been resuscitated in a modified form, and thus enabled to continue to give at least a measure of regulation where otherwise none may have been extant.

All the control powers that are necessary are, it is submitted, in place\textsuperscript{52}. Local planning authorities have in the Town & Country Planning Acts a comprehensive package of controls. They need to make better use of them and to show better 'foresight' of problems and aspirations. The need for enforcement action should be relegated to the category of 'last resort'. Planning control (through permissions, conditions and obligations) should aim to be self-enforcing and self-regulatory. This can be achieved through a partnership between local planning authorities, developers and the public\textsuperscript{53}, leading to better appreciation of the role of planning control and its wider environmental objectives and to local planning authorities framing planning conditions and obligations in clear language and confined to those relevant to the proposed use or development. In recent years the enforcement of planning control (and that of restrictive covenant control) has not, as noted, been assisted by the interpretation and judgments of the courts, due primarily to the fact that the matters raised in planning and environmental disputes are 'alien' to the higher echelons of the judiciary and are often not susceptible to sensible resolution in the higher courts of the land. How this problem might be addressed is now considered.

\textbf{The Case for an Environmental Court or Tribunal}

The need for a body, other than the established courts, to resolve environmental issues and disputes has been canvassed from time to time and has warranted more urgent consideration in recent years. This is due to a number of factors, namely:

1. The sheer volume of ever-increasing environmental law and regulation.
2. The highly specialist technical and scientific issues raised by this legislation and regulation.
3. The inappropriate nature of the courts with their 'restricted' legalistic and adversarial approach to embrace the matters raised in environmental (and planning) disputes, which often depend on negotiation and mediation (and even arbitration) for their satisfactory resolution.

\textsuperscript{50} See \textit{The Discharge or Modification of Restrictive Covenants, ante.}
\textsuperscript{51} They are, it may also be noted, unaffected by perpetuity rules: \textit{Mackenzie v Childers} (1889) 43 ChD 265 at 279.
\textsuperscript{52} Some might argue for the right of third parties to intervene but, apart from the inevitable delay this might cause and the threat of capricious action, the rights of third parties are (or should be) protected by the democratically elected members of the local planning authority, responsible for both the decision and its enforcement in the public interest.
\textsuperscript{53} As, for example, the very successful liaison committees set up to monitor the implementation of mineral planning permissions, often under a specific requirement in a section 106 obligation.
(4) The higher profile accorded to 'green' issues, the greater Government and public awareness of them and the increasing insistence for 'public' involvement in decision-making on environmental issues.

(5) The need for a more speedy determination than the protracted procedures through a court hearing allow, especially in those cases involving environmental protection and enforcement.

The problems relating to environmental protection and enforcement are further complicated by the overlap between civil and criminal jurisdictions and between planning and environmental law, regulation and policy. This aspect was addressed by Professor Malcolm Grant in ‘Arguments for an Environmental Court’54, wherein he indicates both the legal complexities and the administrative ‘boundaries’ which ‘govern’ the situation. As he points out:

'[A]n environmental dispute may come before a bench of lay magistrates (such as on a prosecution or a statutory nuisance complaint under the Environmental Protection Act 1990, or a prosecution under planning legislation); or it may go to the Crown Court (for major cases or not-guilty pleas), or to the County Court (civil injunctions) or the High Court (civil injunctions and judicial review of decision-making by officials). Other disputes (sometimes even the same dispute), may be determined within the administrative system, such as on a planning appeal to a planning inspector, or an appeal to the Secretary of State for the Environment against refusal of an authorisation under the new system of integrated pollution control. There would be advantages in drawing these jurisdictions together so as to ensure consistency and the development of an environmental jurisprudence.'

There is some evidence to suggest that the existing courts are often not an appropriate vehicle for the determination of environmental disputes55. Apart from the protracted time scale of a court hearing and the adversarial approach which militates against 'compromise' solutions which can only flow from a less formal consideration of technical, scientific and aesthetic issues, the courts themselves have always been reluctant to become involved in matters relating to subjective issues, for example aesthetics56, amenity and design, which many environmental disputes display. When they do involve themselves in such matters it might be said that on occasions they do so with little understanding and no great credit57. Whilst in no way suggesting that it is for other than the courts to determine matters of law and questions of legal liability, a 'strict' interpretation of the letter of the law may not result in socially acceptable solutions to environmental and planning matters - the province of administrative decision-making with acknowledged (although circumscribed) political, social and economic influences58.

Tribunals have in the past fared little better. The cases heard by the Lands Tribunal for the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925 have exhibited an inconsistent approach to environmental issues. In more recent times, however, the judicious mix of lawyers and professional experts has resulted in a more balanced

54 Paper presented to 'Environmental Litigation - Towards an Environmental Court' Conference, Royal Institute of Public Administration, 1992.
55 It may be argued that the existing courts are not suitable for the determination of 'other' complex issues. That may well be so, but their case has to be made elsewhere. As far as the environment is concerned the case is based not just on technical complexity (compounded by the interdisciplinary nature of much of this complexity) but on such issues as the irreversibility of environment damage, the collective (regional and global) interests in resolving environmental problems, the absence of environmental absolutes and the problems of anticipating environmental damage.
56 Though, by contrast, note the willingness to become involved in aesthetics displayed by Harman, LJ in In re Pinion [1965] Ch 85 - a case concerning the charitable nature (or otherwise) of a trust relating to a testator's collection of fine arts.
57 See, for example, Wrotham Park Estate Company v Parkside Homes Ltd and others [1974] 2 All ER 321, ante.
58 See, for example, the courts' interpretation of section 106 of the Town & Country Planning Act, 1990 giving it, in this instance, a 'wider' and more generous interpretation than it is believed the legislature intended. The courts' interpretation appears to accord it wider scope than its content within a planning Act would seemingly afford it, ante.
approach and a greater awareness of the wider environmental and planning objectives - partly as a result of the composition of the Tribunal, but also following a clearer remit as to its role within the legal interpretation of section 84. Nevertheless, even this Tribunal in later years 'stumbled' over its jurisdiction in respect of restrictive covenants in planning agreements, often determining them as though they were 'isolated' from the planning permissions to which they were attached 59.

Even if no more, at least a *prima facie* case has been made (notably by Prof. Grant) for some appropriate forum (other than the courts) for the resolution of environmental disputes and the reconciliation of conflicting environmental and planning objectives. One of the earliest such courts to be set up was the New South Wales Land & Environment Court 60, described by Justice Stein as: 'a specialist one-stop superior court with mixed personnel'. Variations of this theme have been adopted throughout Australia sometimes in the form of a court and sometimes an appeal tribunal, the latter having only powers of administrative review whereas courts have both powers of administrative review and judicial enforcement. Similar arrangements have been adopted in the United States and Canada. Although these models may be of interest, any system adopted in this country must flow 'naturally' through an evolution of the existing legal institutions which, whatever their imperfections, have a sense of history, continuity and status.

Whatever form an Environmental Court or Tribunal (or indeed a combination of both) finally takes it will be necessary to embrace criminal, civil and administrative jurisdictions. The need to accommodate the three types of jurisdiction lends support to a two tier system with a Court (be it of first instance or appellate) providing the ultimate recourse for the decision of criminal and civil cases and a Tribunal (of both fact and law) dealing with administrative issues and the initial consideration of criminal and civil matters (either by remit or by agreement between the parties) and with a right of appeal to the Environmental Court on matters of law.

One form that the two-tier system of a Court and a Tribunal *might* take could be as follows:

(1) A 'superior' Environmental Court acting as a Court of first instance (in respect of defined 'major' breaches of the criminal 'code' and the commission of the 'established' torts of, for example, nuisance and strict liability) and as an Appellate Court from decisions of the Environmental Tribunal on matters of law (and the proper interpretation of fact) and with the power to enforce remedial action and to grant injunctions or damages in lieu.

(2) An Environmental Tribunal acting as a Tribunal of first instance and as an appeal tribunal (probably divided into separate 'arms' for both administrative convenience and 'legal' transparency) embracing much of the current jurisdiction of the Lands Tribunal with added jurisdiction in respect of 'environmental' and 'planning' issues. In its capacity it would be empowered:

(a) To adjudicate 'environmental' disputes between parties who saw advantage in compromise or mediation (known to some as 'alternative dispute resolution') as a means of obviating the more rigid, expensive and protracted procedure of the Court, and with the power to enforce remedial action and to award damages; such decisions of the Tribunal could, with prior agreement, be binding on the parties or alternatively they could enter into the 'mediation' process without prejudice to their right to pursue the matter in the Environmental Court should no acceptable compromise be reached.

59 This problem has been obviated for the future by the transfer of jurisdiction from the Lands Tribunal to the Secretary of State for the Environment on appeal.

60 Established by the Land & Environmental Court Act, 1979 (NSW).
(b) To decide 'minor' breaches of environmental codes, with power to secure enforcement, impose penalties and award damages.
(c) To determine appeals from decisions of the Environment Agency (and other similar bodies).
(d) To determine 'planning' Appeals (with certain exceptions) - a power transferred from the Secretary of State for the Environment and the Planning Inspectorate - and to hear and determine Local Plan Inquiries.

Before proceeding to examine some of these ideas in more detail and, in particular, the role of the Tribunal\(^{61}\) in environmental, planning and property matters, it is important to emphasise that the above scenario is merely an attempt to postulate one possible approach as no more than a starting-point for the debate. The working out of such a major change and its ramifications in practice would require the expertise of both lawyers and 'environmentalists' - surely an appropriate task for a Royal Commission and/or the Law Commission.

**Regarding the Court**

The form that the Environmental Court would take - embracing as it must criminal and civil matters - would have to be such that it kept quite separate, and was seen to keep quite separate, those two jurisdictions.\(^{62}\) That being so it might be prudent to retain reflected within the Environmental Court the existing divisional structure to emphasise the distinction between crime and tort. The criminal jurisdiction would need to embrace breaches of statutory and regulatory regimes as, for example, emission levels and prohibition notices, and enforcement (fines and imprisonment) to make clear the deterrent factor in criminal prosecution of environmental breaches and 'disasters'. The civil jurisdiction would cover the 'land-based environmental' torts\(^{63}\) of, for example, trespass, nuisance, negligence and 'strict liability', and could even extend to the protection of property rights (easements, restrictive covenants, etc.), through actions for civil enforcement seeking injunction or damages.

**Regarding the Tribunal**

The major problems raised by environmental issues relate to their conflict 'internally' with other environmental regimes and their 'external' conflict with planning law and civil property rights. A Tribunal which could bring these conflicts together for mediation, arbitration, resolution and decision would offer a transparency to environmental issues. As already noted, some cases would go to the Tribunal for decision, whereas in other cases the parties to, for example, a civil action would be encouraged to go to the Tribunal for 'mediation and resolution' in an attempt to obviate the need for litigation in a higher court. For the

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61 More emphasis is given to the Tribunal as it is at that level that 'grass roots' issues may be the better resolved and, consequently, it should deal with the majority of issues, save the most serious and politically sensitive.
62 It has to be recognised that some argue the case for an Environmental Court on the ground that, *inter alia*, it would present the opportunity to overcome the rigid distinction between civil and criminal jurisdictions, thereby enabling consideration of alternative remedies (as well as alternative forms of decision-making). Ball & Bell (Environmental Law, 3rd. edn., 1995, at pp. 17 & 21) observe that, by giving consideration to the 'decriminalisation' of whole areas of environmental law, not only would a clear distinction be drawn between infringements that are properly administrative in nature and truly criminal breaches such as blatant environmental vandalism, but also the whole range of alternative remedies (for example, revocation of licences, closure of plants, levying of clean-up costs, imposition of damages) would be available in cases where at the moment a fine or imprisonment is the only (and often inappropriate) remedy. Nonetheless, it is suggested that it is an essential element of English Jurisprudence that the individual (or corporate body) should be made aware of whether he (or it) is in breach of a criminal offence, rather than a civil tort or an administrative regulation.
63 This would embrace all torts concerning and affecting land (in its legal connotation) including everything 'on', 'over' and 'under', i.e. air, water and support (e.g. mineral extraction, subsidence, pollution).
Tribunal to discharge its functions in the ‘overall’ environmental field its remit would have to be comprehensive, embracing environmental, planning and possibly other property-based matters. Again, as tentatively proposed, it should have an appellate function to consider appeals from decisions of the environment agency, decisions of local authorities (environmental health - local air pollution control) and decisions of local planning authorities. In addition it could have a useful role as mediator, arbitrator and decision-maker in a specified area of property disputes. The existing Lands Tribunal, which already deals with certain planning, property and compensation issues, could well form the model, and perhaps its remit could be extended to cover the majority of planning and environmental matters. The composition of the Tribunal would need to be strengthened to include environmental scientists and a wide range of expertise covering land use planning, property and construction.

Focussing on its appellate function in the field of the ‘environment & planning’, it could (as already noted) hear and determine appeals from decisions of the environment agency, the local authority and the local planning authority. In the latter case this would involve transferring such power from the Secretary of State for the Environment and the Planning Inspectorate, whilst nevertheless (acknowledging political reality) retaining the right of the Secretary of State to intervene (call in) matters of major political, national or international importance or sensitivity. The Tribunal in this particular role could for administrative convenience and to recognise the distinct regimes, be divided into an ‘environmental arm’ and a ‘planning arm’, with the opportunity for joint consideration where environmental and planning matters overlap or conflict, by co-opting from the environmental arm in appropriate planning cases and vice versa, on the lines presently adopted in major planning appeals and inquiries where the Inspector is assisted by professional experts as advisers.

The ‘environmental arm’ would have responsibility for dealing with matters of compliance with environmental laws and regulations and best practice and would be concerned mainly with ‘pollution-based’ issues where the scientific evidence is generally quantifiable. It would comprise experts (earth scientists, etc.) together with lawyers wherever points of law were involved or the issue was significant in other than purely technical terms. Apart from its role as an appellate jurisdiction it would (as already observed) be available as a mediator (win/win is better than win/lose) at the pre-decision stage but its far more substantive role would be as an appellate tribunal post decisions of the environment agency and local authorities. In minor cases it might well be afforded the power to restrict evidence to written representations only. From its decisions appeal would lie to the Environmental Court on questions of law, including questions of the proper (legal) interpretation of fact.

The ‘planning arm’, comprising experts on planning and planning-related matters together with lawyers as appropriate, would deal with planning appeals under the Town & Country Planning Act, 1990 and Local Plan Inquiries. The decision of the Tribunal would be binding, as already applies to section 78 appeals determined either by the Secretary of State or more often by the Inspector and, as recently suggested, for Inspectors’ reports to local planning authorities in the case of Local Plan Inquiries. Further matters (yet to be defined) would be dealt with by written submissions or representations only, as for example domestic, household ‘minor’ matters, advertisements, tree preservation orders, etc. Others, as appropriate, would be the subject of either informal (round table) hearings or formal hearings with Counsel and

64 Department of the Environment, Consultation Paper, Speeding up the Delivery of Local Plans and UDP’s, 1997 which suggests that the Local Plan Inspector should make clear recommendations on the changes that need to be made to the plan and that ultimately legislation be introduced making the Inspector’s recommendations binding.
expert witnesses. Decisions of the tribunal would be binding but, as in the case of the 'environmental arm', appeal would lie to the Environmental Court on questions of law.

It might well be argued that as there is often an overlap between environmental and planning matters they should not be separated for purposes of decision-making. It is however important to note that, whilst recognising the possibilities of overlap and conflict, the decision of planning applications is made by elected Councils taking into account public consultation and other matters often of a subjective nature (design, aesthetics and amenity), whereas decisions of in particular the environment agency are generally, but not exclusively, quantitative (as many environmental pollution matters are) and are made by unelected quangos with little political and even less public accountability.

A very strong case can be made for an Environmental Court and an Environmental Tribunal, the latter modelled on the existing Lands Tribunal, though much enhanced both in composition and powers. It would enable a balance to be drawn between competing interests, between public good and private property rights, between differing environmental objectives, and between development and the conservation of resources. It could deal with these issues, and, in its role of mediator, with particular benefit at an early stage before entrenched positions were adopted. It could raise the 'profile' of environment law and policy by:
(1) Enforcement - the speedy remediation of breaches of code and regulations.
(2) Example - the establishment of best practice.
(3) Efficiency - the control of natural finite resources and the promotion of sustainable development.

By this means the planning régime and discrete environmental codes could be brought closer together, whilst retaining the integrity and credibility of the public planning process. Furthermore, property matters, including the discharge or modification of restrictive covenants under section 84 of the Law of Property Act, 1925, would continue to be dealt with by the Lands Tribunal. In all, a wide range of 'property-related' issues would be brought under one roof whilst at the same time respecting the separate and distinct provenance of each element.

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65 It is acknowledged that there is an evaluative element to environment problem solving and that for the future there cannot be ignored the 'political' influence in environment decision-making.
CONCLUSION

This summary of the law and practice of planning control with particular reference to those elements most closely associated with restrictive covenant control paves the way for some general and specific conclusions regarding the two distinct, yet in some way similar, controls of the use and development of land. These conclusions are drawn together in the final section but it should be noted here that, following much exhaustive examination by, for example, the Law Commission and others, and the apparent confusion that practitioners and bodies such as the Lands Tribunal have from time to time exhibited, Parliament in the amended sections 106, 106A & 106B of the Town & Country Planning Act, 1990 has, since the passing of the Planning & Compensation Act, 1991, recognised that the planning obligation containing as it may not only restrictive but positive conditions requires a clear, distinct and separate approach from that accorded to the restrictive covenant, thereby helping to underline the theme that has permeated the whole of this study, namely that both private and public forms of control have their separate but complementary roles to play in the use and development of land.
A RETROSPECT, A PROSPECT
AND A CONCLUSION

'The law of covenants is the province only of a hardy band of real estate lawyers with the temerity to master a complex and imposing body of rules; vertical and horizontal privity; affirmative and negative covenants; matters in esse and in posse; the touch and concern requirement; notice, actual and constructive; and the ins-and-outs of recordation statutes.' (Richard Epstein)1

A Retrospect

This study, concerning the concept of the control of the use and development of land, having noted *en passant* various elements of control, as for example, the trust, the strict settlement, the lease and the easement, converged on the restrictive covenant as being that 'device' which eventually would be most nearly mirrored by the 'public' control of the use and development of land. As already indicated the choice of the restrictive covenant was reinforced by the coincidence of its conception with that of the origin of public control, viz. the Public Health Act, 1848 - a coincidence which, although occurring for very different reasons (sanctity of 'contract and bargain' in the former, the ravages of disease and infant mortality in the latter) was not merely fortuitous. The need for control in the interests of 'private' ownership and occupation on the one hand and of 'public' health on the other was brought about by the rapid growth of population and urbanisation in the early 19th century.

If nothing else the study has demonstrated the ingenuity that the law shows, from time to time, of adopting a decision (arrived at for a completely different purpose) to 'plug' a lacuna elsewhere in the legal 'system'. The restrictive covenant, albeit with some setbacks, not only survived but indeed prospered and its value in 'protecting' the environment, particularly in those areas where it was embodied in a development (or building) scheme - itself an innovative and important example of the development of the doctrine - must not be underestimated. Its ever-widening adoption by practitioners (property lawyers and estate managers) in the interests of landowners and occupiers testifies to the usefulness of the restrictive covenant as a 'new' tool to control the use and development of land to fill a gap which previously could only be filled through leasehold control or by the limited range of matters that could be embraced by such as rentcharges and easements. That it survived into the first quarter of this century is not to be gainsaid - there was no other way of securing control over the land of another. That it has survived since 1925 (the first Town Planning Act of any effect) and more particularly since 1947 (the introduction of comprehensive land use planning control) is due to two factors in particular. First, the opportunities provided by section 84 of the Law of Property Act, 1925 for updating the relevance of restrictive covenants through the procedure for discharge or modification, and secondly, the recognition that the restrictive covenant could supplement, complement and safeguard property interests in a way that 'public' planning control could not do or might choose not to do.

1 R. Epstein, Professor of Law, University of Chicago, *Covenants and Constitutions*, 73 Cornell LR 906 (1987-88).
The sections dealing with the evolution of the law of restrictive covenants and the operation of the discharge or modification procedure have demonstrated the adaptability of restrictive covenants, their resilience and (it is suggested) their continuing relevance in many situations. The section outlining 'public' development control has also (it is suggested) shown, by reason of what planning control excludes or does 'badly', that the restrictive covenant has a role to fulfil, in various and diverse circumstances, alongside public planning control.

The restrictive covenant has retained a degree of utility for nearly 150 years; for the last 70 years in no small measure due to the existence and operation of section 84 of the Law of Property Act, 1925, and for just under 50 years in spite of (and some would say because of) the advent of comprehensive planning control in the public interest. But what are the prospects for the future? There have, since 1965 (the Wilberforce Committee) been numerous suggestions for reform but, as already noted, virtually nothing has changed. The issues appear to fall into three main categories namely:

(1) Some form of unification of the law relating to restrictive covenants and positive covenants.
(2) Some more radical reform embracing all 'servitudes' under a general heading of 'Land Obligations'.
(3) Some clarification/reform vis a vis restrictive covenant control and planning control whereby either restrictive covenant control is subsumed in, or made subservient to, planning control or, more rarely, whether some of the elements of planning control could not be transferred to private 'restrictive covenant' control.

It is now proposed to examine these various suggestions and draw conclusions as to their desirability and their chance of implementation.

A Prospect

Reform Proposals

The Wilberforce Committee in 1965 was not the first to recommend reform of the law of covenants. Official Committees have been considering reform of the law of servitudes since the early 19th century and the Real Property Commissioners in their Third Report in 1832 recommended that for restrictive covenants outside of leases equitable remedies be available except against a purchaser for value without notice of the covenant - the view taken by the courts 16 years later in Tulk v Moxhay - and went on to suggest the same treatment for positive covenants, but Parliament still has not implemented this recommendation.

Reporting in 1965 on positive covenants, the Wilberforce Committee went beyond the strict terms of its mandate and argued for the unification of positive and restrictive covenants, favouring the assimilation of all covenants affecting land through fundamental reform in the law of positive covenants. Under the Committee's proposals a positive covenant would become an interest in land capable of binding the servient property in essentially the same fashion as a
restrictive covenant. But the Committee recognised the basic differences between positive and restrictive covenants by its allocation of responsibility for compliance - whereas the restrictive covenant is binding on all persons having for the time being an interest in the servient land and all such persons are required to observe it, the initial burden of compliance with the positive covenant is on the owner of the fee simple, who would cease to be bound after he had disposed of his interest in the servient property, thereby ultimately removing the original contractual impact of the covenantor's promise and transferring the burden to the new owner of the fee simple.

In 1967 the Law Commission\(^6\) proposed a reformulation of the law of restrictive covenants that would make them 'more akin to easements than to covenants' and noted that in most respects the substance of its proposals was 'applicable in principle...to positive as well as restrictive obligations'.\(^7\) The 1967 Report was followed by further Reports and Working Papers making modified suggestions for reform; all, except the 1971 Law Commission's Working Paper,\(^8\) falling short of a reformulation.

It is submitted that it cannot be merely the lack of parliamentary time that has been responsible for no action to reform the law. It has been suggested that there is universal agreement for the assimilation of the law relating to positive and restrictive covenants - one of the most recent exponents of this 'widely held' view being Professor Clarke.\(^9\) In *Rhone v Stephens*\(^10\), Lord Templeman (with the concurrence of all of their Lordships) had reaffirmed the 'orthodoxy' that positive covenants are part of the law of contract, whereas the enforcement of negative covenants lies in the law of property. He went on to add:

'To enforce a positive covenant would be to enforce a personal obligation against a person who has not covenanted. To enforce negative covenants is only to treat land as subject to a restriction.'\(^11\)

Professor Clarke\(^12\) is of the view that:

'Notwithstanding the doubts expressed by Lord Templeman as to the desirability of reform, the views of the Wilberforce Committee and the Law Commission - repeated in the consultation paper of the Lord Chancellor's Department - are surely sufficiently weighty to persuade Government that there should be change. If covenants freely entered into, and known to successors, bound them, this would ensure that the idea of a 'local law' or a 'building scheme' (itself a concept over a century old - see *Spicer v Martin*\(^13\)) should apply equally to positive and negative covenants. Common sense and the wishes of the vast bulk of landowners would thus both be satisfied.'

There does not appear to be any overwhelming evidence (or even any evidence)\(^14\) that such an approach is supported by 'the wishes of the vast bulk of landowners', nor that there is any degree of urgency. Supporters of assimilation seem to overlook the 'practical' difficulties and the differences so clearly expressed by Lord Templeman in *Rhone v Stephens*.

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7 Ibid, paras. 27 and 30.
10 [1994] 2 All ER 65.
11 Ibid, at 71.
12 All ER Rev. 1994, 245 at 248.
13 (1888) 14 App Cas 12. In fact, a concept over 150 years old - the origin of the building scheme is traditionally attributed to *Whatman v Gibson* (1838) 9 Sim 196.
14 Professor Clarke cites none.
Wilberforce - surely one of the most enthusiastic of supporters - found it necessary to draw a distinction based on compliance but it is not just the question of responsibility for compliance, the real issue is the practicability of enforcement. The remedy for non-compliance with a positive covenant is invariably an award of damages for breach of contract, thereby placing the covenantee in a position whereby he can use that quantum of damages to redress the wrong. The purpose of the restrictive covenant is to control - damages for a breach is generally the least satisfactory outcome - and what the covenantee requires is compliance and he is only satisfied with an injunction preventing or remedying the breach. As Wilberforce so trenchantly observed, a restrictive covenant requires the compliance of all interested parties, whereas it matters not who complies with a positive covenant so long as someone does. Therein lies the distinction and therein lies the fact that there is kinship between the restrictive covenant and planning control on the one hand, and between the positive covenant and leasehold control on the other hand, and therefore it may well be imprudent to seek to assimilate restrictive and positive covenants. The distinction is best preserved by recognising their respective roles and this can be achieved by keeping them separate and by resisting the law reformer's predilection for 'tidying the law' and the belief that in some way 'packaging' will achieve clarity of understanding and ease of application.

Land Obligations

A more radical and, on the face of it, a more comprehensive reform is that espoused by the Law Commission's Working Paper published in 1971 and developed (with much erudition and even more loquacity) by the American Law Society in the Re-statement of the Law of Servitudes. Although the relevance of the US experience (its law and 'customs' being both similar and yet different) is only peripheral to this study it is appropriate to look at their 'proposals' in some detail as providing an extreme position and to highlight why such an approach is neither applicable nor appropriate in this country.

It is proposed to consider first the Law Commission's recommendations, secondly the American experience and its 'possible' relevance to the English situation and lastly to conclude by considering what, if anything, should be done.

The Law Commission's Proposals

The Law Commission in its 1971 Working Paper studied the full range of appurtenant rights (statutory interests; traditional servitudes, including easements, profits and covenants; and rights protected by modern equitable doctrines such as estoppel or 'benefit and burden') and concluded that there should be an extension of the 'natural rights' which are appurtenant to all land (for example the right for support of land in its natural state would be extended to buildings) and an assimilation so far as possible of all other appurtenant rights - this new class of assimilated servitudes to be known as 'Land Obligations'.

The Working Paper recommended eliminating most of the distinctions among the existing categories of servitudes: all Land Obligations could exist as either legal or equitable interests; all would be subject to similar registration requirements; all could run with both the servient and the dominant land, binding only those with an interest in the former and enforceable only by those with an interest in the latter, and all would be subject to the jurisdiction of the Lands Tribunal. The Paper also included a recommendation to increase the power of the Lands Tribunal to allow it to impose Land Obligations as well as to discharge or to modify them.

Having recommended eliminating most of the distinctions, the Working Paper recognised that there are fundamental differences among servitudes and proposed a classification system similar to the current categories. The new system would comprise:

(i) Obligations which restrict the use of the servient land for the advantage of the dominant land; thus including restrictive covenants and negative easements.\(^{16}\)

(ii) and (iii) Obligations to execute or maintain any works (on the servient land) or to pay or contribute to the cost of works (on the dominant land); thus including positive covenants and the (anomalous) easement of a right to have fences maintained.

(iv) Positive easements.\(^{17}\)

(v) Appurtenant profits à prendre.

The Law Commission in 1977,\(^{18}\) there having been no action on its 1971 Working Paper, apparently retreated from its 1971 position and expressed its intention to deal with 'a number of separate matters connected with the appurtenant rights' - the first priority being the 'reform of the law concerning positive and restrictive covenants'. Their proposals appeared in 1984\(^{19}\) and in essence recommended replacing positive and restrictive covenants with Land Obligations capable of running with both the dominant and servient land, thus unifying covenants and bringing them closer to easements in their essential characteristics.

The Law Commission in 1991,\(^{20}\) there having been no action on its 1984 Report, then produced a further Report recommending the phasing out of most restrictive covenants after the introduction of a Land Obligation scheme; all restrictive covenants would lapse after 80 years, although any covenant not then obsolete would be replaced by a land obligation to like effect. Once again no action has ensued: as Lord Denning has observed, in another context, 'Parliament were not interested in reform in the law. There were no votes in it'.\(^{21}\)

It may be argued that the law reformer's recognition that all servitudes are not alike (despite the benefits of unification) is the key factor militating against reform. The main problem would appear to be the enforceability of positive covenants where there is no privity of contract. Maybe it would be better to address that particular discrete issue than attempt a

\(^{16}\) A negative easement is one which 'gives the owner of the dominant tenement a right to stop his neighbour doing something on his (the neighbour's) own land'; long recognised in the cases of the easements of light and support (Cheshire & Burn, 1994, p.527).

\(^{17}\) A positive easement is one which allows the owner of the dominant tenement to do or place something, or make use of some facility, on the servient land, for example easements of way and water.


\(^{21}\) Denning, The Discipline of Law, 1979, p.287.
root and branch reform for which, in spite of support from academics and members of Commissions, has not received much support or enthusiasm from the judiciary. Lord Templeman, in the recent case of *Rhone v Stephens*, questioned the enforceability of positive covenants by distinguishing very clearly between the law of contract and the law of property. Let the unique nature of the restrictive covenant continue to be recognised for what it is and resist jeopardising its utility by imposing upon it problems associated with the enforceability of positive covenants.

From all the Reports considered the only action taken so far is to apply the concept of the ‘Land Obligation’ in the field of planning law, substituting for the Planning Agreement the Planning Obligation.

Before turning to examine the American situation it is interesting to note that the classification in the Law Commission’s Working Paper grouped restrictive covenants and negative easements together in a category separate from the remainder of obligations. From an estate management viewpoint they (together with the ‘positive’ easement) provide the basic ‘tools’ for the private control of the use and development of the land of another. They are complementary in that easements deal with the major issues of ‘enjoyment’ - way (access), air, light, support and water - and as such can exist as ‘legal interests’, whereas restrictive covenants deal with the more ‘intimate’ and ‘qualitative’ issues of ‘enjoyment’ - use, density, design, amenity, freedom from noxious and noisome activities, namely what are today generally described as ‘environmental’ matters - and as such can only exist as ‘equitable interests’.

If reform is to take place it would be better addressed to strengthening the role of the restrictive covenant (rather than confusing and possibly weakening it through ‘amalgamation’ with the positive covenant, which is not an instrument of control) by considering whether in certain circumstances, defined restrictive covenants could exist as legal interests, for example those specifying main categories of use (residential, commercial and industrial) and those safeguarding amenity (density, ‘open space’ provision and the protection of ‘views’ by means of restrictions on building within a defined ‘envelope’). By this means, the difficulties of adding to the traditional categories of easements could be avoided, and two fundamental ‘rights’ could be created to exist as legal interests to meet the ‘environmental’ standards and requirements of ‘home’ and ‘work’ into the next century.

*The American Approach*

Professor Susan French, Professor of Law at the University of California was appointed in the late 1980’s as ‘Reporter’ for the American Law Institute’s Restatement Project - The

23 Town and Country Planning Act, 1990, s.106 (as amended).
25 Although it is claimed that the ‘list of easements is not closed’ - ‘the categories of servitudes and easements must alter and expand with changes that take place in the circumstances of mankind’ (Lord St. Leonard’s in *Dyce v Hay* (1852) 1 Macq 305) - the only rights which have acquired the status of easements (other than the ‘traditional’ easements of way, light, water, support and fencing) have been a miscellaneous collection of ‘trivia’, such as the right to hang clothes on a line passing over neighbouring soil or to run telephone lines over neighbouring land.
Restatement of Servitude Law - designed to 'shake servitude law free from the old controls and forms, and to restate the law as a coherent integrated body of doctrine'. The Design Proposal for the Restatement provided that:

'[People] should be able to create any servitudes they find useful...If the servitude arrangement is valid, it should be permitted to bind successors and continue until it becomes obsolete or unduly burdensome.'

French points out that:

'...American law recognizes between five and fourteen different servitude devices. The primary categories are profits, easements, irrevocable licenses, real covenants, and equitable servitudes.'

She concludes that the first step in reforming servitudes law is to clear away the clutter of the old doctrinal controls, leaving only:

'...four servitudes: the profit, the affirmative easement, the restrictive covenant and the affirmative covenant. Although there are differences among these four that justify their separate labels, the most important fact about them all is what makes them servitudes: they create rights and obligations that run with interests in land.'

The importance of servitudes in the control of land use and development in the United States was clearly expounded by Uriel Reichman nearly 20 years ago:

'During the last decade [late 1960's onwards], several new towns and hundreds of large communities in the United States were planned and constructed almost exclusively by private enterprise. By structuring comprehensive regulatory schemes, private developers were able to exercise land use controls and supply services traditionally provided by municipalities and Government agencies. Primarily facilitated by the extensive use of both regular and 'discretionary' servitudes, the introduction of these so-called residential private governments resulted in a substantial restriction of landowner's liberties.'

He went on to state that:

'Notwithstanding the continued trend of restricting property rights through legislative schemes (zoning, building codes, anti-pollution acts etc.) and more extensive judicial intervention (mainly in nuisance actions), ownership still provides a good deal of freedom and exclusivity of use and the power of transferring of title and granting other interests in land...Servitudes are designed to further implement the economic function of possessory estates. The system of private land holdings creates islands of private sovereignty.'

In these comments Reichman encapsulates the reliance that development in the United States has, in the absence of a comprehensive planning system such as that which exists in England, placed on the use of 'servitudes'. Later he was to summarise the position as follows:

'Servitudes provide the legal foundation of many of today's comprehensive private planning schemes that determine the physical layout regulation and operation of large residential and commercial developments'.

But, as French observes, the presence of comprehensive planning control does not obviate the need for servitudes. Commenting on the English situation she says:

'The advent of comprehensive governmental land use regulation in the twentieth century actually increased the incidence of private land use arrangements for two reasons: public regulation itself

27 Ibid, at 933.
28 Ibid, at 951. (The negative easement is embraced by the restrictive covenant).
29 Senior Lecturer, Faculty of Law, Tel-Aviv University.
31 Ibid, at 144.
32 U. Reichman, Toward a Unified Concept of Servitudes, 55 S Cal LR, 1179 (1982).
often uses private servitudes as tools of regulation; and the inherent shortcomings in public
regulation encourage private arrangements.\textsuperscript{33}

Proposals for the comprehensive reform of the law of servitudes (as propounded by
French) have not received universal approval, not least from other academics.

To understand these criticisms it is first necessary to outline briefly the way in which US
law generally (bearing in mind variations as between State jurisdictions) differs from English
law:

1. The US recordation statutes cover all servitudes, including easements and real covenants
as well as equitable servitudes.

2. Real covenants, so described because the burden can run and they are not merely
personal, are used to impose affirmative duties on the owner or occupier of
land. They are enforceable if in 'a writing manifesting the intent to bind or benefit
successors' and provided that they 'touch and concern' the land and that there is 'privity
of estate' between the original parties and their successors. They can be used to impose
restrictions on land but since the enforcement of restrictions is almost always sought by
injunction, restrictive covenants are litigated as equitable servitudes.

3. To permit the benefit and the burden of real covenants to run two kinds of privity
(horizontal and vertical) have been required. Horizontal privity (a requirement unique to
real covenants) describes the relationship required between the original covenantor and
covenantee without which the burden of promises cannot run. English property law
has required a landlord-tenant relationship between the promisor and promisee to satisfy
the horizontal privity requirement, whereas American courts have accepted a grantor
grantee relationship as satisfying the horizontal privity test. Vertical privity describes the
relationship required between the person seeking the benefit and the original covenantee
or that required between the person from whom the performance is demanded and the
original covenantor, being either 'strict' requiring succession by conveyance or inheritance
to the same estate as that held by the original covenanting party or 'relaxed' requiring
succession by conveyance or inheritance to some but not necessarily the identical estate as
that held by the original covenanting party. Strict vertical privity is required for the
burden to run in all covenants, whether contained in leases or other transactions, but is
not required for the benefit to run in non-lease transactions.

4. Equitable servitudes, commonly referred to as 'restrictive covenants', are used primarily
to impose restrictions on the use of land by its owner or occupier, although they can be
used to impose affirmative burdens. Unlike English law, which excludes from Equity's
embrace affirmative burdens and requires benefits to be appurtenant to a 'dominant
tract', American law requires the latter only and permits the imposition of affirmative
burdens on the 'servient tract'.

5. The 'touch and concern' and the 'vertical privity' requirements for real covenants have
been applied by the courts to equitable servitudes.

6. Real covenants are enforced by actions at law, resulting in the award of damages;
equitable servitudes are normally enforced by injunction, although if conditions have
changed to the extent that enforcement would provide no substantial benefit to the
plaintiff and would be inequitable to the defendant the court will refuse an injunction and
may declare the restriction terminated.

\textsuperscript{33} S. French, Toward a Modern Law of Servitudes, 55 S Cal LR, 1261 at 1262 (1982).
The 'touch and concern' requirement\(^{34}\) has been the subject of much litigation in the States. Attempts, often successful, to extend the range of issues which can be brought within its competence has resulted in much debate and its retention or abolition is one of the more controversial aspects of reform.

In summary therefore, in looking at the US Proposal for reform it is essential to recognise certain significant differences in the law, namely that in the US real covenants (affirmative and, less commonly, restrictive) and equitable servitudes (restrictive and, less commonly, affirmative) are enforceable and secondly that the 'touch and concern' requirement is more loosely or generously interpreted. Furthermore, US law has no equivalent of the English section 84 Law of Property Act, 1925 provision for discharge or modification of 'obsolete' restrictive covenants and the US planning system, based primarily on zoning and building codes, needs imperatively to be supplemented by a comprehensive range of 'servitudes' to achieve environmental and aesthetic protection and enhancement. It is perhaps not too simplistic to state that the US reformers start from a position where they already have the powers of enforcement over the whole range of servitudes and all that is required is an orderly reassembling of the law, removing anomalies and incompatibilities as indeed the title of 'Restatement' would imply.

Criticism of the 'Restatement' has been at two levels. The 'higher' level, debating such aims as 'the enhancement of the legal system's substantive coherence' and 'the development of a set of substantively coherent doctrinal practises' and other erudite incursions into the realms of ideology, must be left to others. At the practical level two issues which surface time and time again are whether or not to retain the 'touch and concern' requirement and whether to recognise a doctrine for 'termination or modification'.

Professor Gregory Alexander\(^{35}\) favours the retention of the 'touch and concern' requirement as a 'discretionary norm, the purpose of which is to protect subsequent purchasers who have behaved foolishly and to prevent promisors and their successors from behaving opportunistically.' Professor Jeffery Stake\(^{36}\) justifies its retention on the grounds that its 'survival alone suggests that the touch and concern element helps to achieve an efficient allocation of resources.' However, he is not satisfied with the way in which the courts at present interpret the 'touch and concern' test and believes that they might define the test 'more accurately and helpfully by asking whether ownership of a particular parcel aids in the enjoyment or performance of the covenant.' He concludes:

'Without evidence that the requirement substantially impedes conveyancers, we should resist the temptation to displace this ancient strand of servitude law.'\(^{37}\)

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\(^{34}\) The expression 'touching and concerning' seems to be derived from Spencer's Case. The rules laid down in that case...are partly rules of common law, and partly derive from the Statute 32 Hen. 8.c.34; (Preston and Newsom, Restrictive Covenants affecting Freethold Land, 1991, p.30). '[To satisfy the condition of 'touch and concern'] the covenant must either affect the land as regards mode of occupation [i.e. use], or it must be such as per se, and not merely from collateral circumstances, affects the value of land', per Farwell, J in Rogers v Hosegood [1900] 2 Ch 388 at 395, adopting the definition of Bayley, J in Congleton Corporation v Pattison (1808) 10 East 1336; (Cheshire and Burn, 1994, p.618). '[The covenant must be] entered into for the benefit of the servantee's land and not merely for his personal benefit;' (Gray, 1993, p.1129). Thus, the covenant must benefit land, affect use or value, and not be personal.


\(^{36}\) J. Stake, Toward an Economic Understanding of Touch & Concern, 1988 Duke LJ, 925 at 933.

\(^{37}\) Ibid, 925 at 974.
But the most persuasive argument for the retention of the ‘touch and concern’ requirements is that enunciated by Reichman. Having stated that: ‘The common denominator of most servitudes is the promotion of the efficient utilisation of land resources’ and that: ‘Servitudes are used to transfer owners’ entitlements, other than possession, for the efficient utilisation of land’, he goes on to describe the three characteristics of servitudes, each of which is important to land use planning, as: ‘limited scope (not amounting to possession), permanency, and flexibility in structuring the right’ and that: ‘Promoting the efficient utilisation of land is more than a common characteristic of servitudes, it is the overriding policy governing these rights...’

Reichman concludes:

‘In situations where a promise has no bearing on land use regulation, the courts treat the arrangement as a contract between the original parties and exempt the promisor’s transferees from liability. In such cases, it is irrelevant whether or not the transacting parties clearly expressed their written intention that the promise would ‘run with the land’, or that the promisor’s transferee had actual or constructive notice of the obligation. As a matter of positive law, where land use efficiency gains could not conceivably be accomplished, servitudes are not recognised...Servitudes are a kind of private legislation affecting a line of future owners. Limiting such ‘legislative powers’ to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom’.  

Personal agreements may not be objectionable, but when such obligations become permanently enforced against an ever-changing group of owners then the courts intervene ‘to deny the permanency of agreements clearly unrelated to land use’.

French in her ‘Restatement’ recommends abandonment of the ‘touch and concern’ doctrine, asking: ‘Why does it matter whether a covenant burden or benefit touches and concerns the land? We are never told’. But she has been told by Alexander, Stake and, most clearly, by Reichman. In support of her recommendation for the abolition of the ‘touch and concern’ doctrine she cites Epstein as being of the view that servitudes law could be very simple, consisting of one rule with two exceptions, namely, to enforce the servitude arrangement as agreed to by the parties, except against successors without notice and except where the arrangement is illegal.

It is submitted that the retention of the ‘touch and concern’ doctrine, albeit improved and clarified, is essential if land transactions are not to be cluttered with irrelevant, extraneous and personal covenants to the detriment of ‘the efficient utilisation of land resources’.

The other practical issue which the ‘Restatement’ has highlighted is that of the degree of permanency of servitudes, and in particular equitable servitudes (restrictive covenants). Commenting on the ‘inter-generational effects of a system of restrictive covenants’, Epstein makes reference to the ‘so-called doctrine of changed conditions’, which holds that a restrictive covenant is no longer enforceable, at least without modification, when the social and environmental conditions which existed when the covenant was created no longer apply. Under the doctrine of changed conditions the courts may invalidate covenants notwithstanding the parties’ express contractual intent to be bound in perpetuity but, unlike the operation of section 84 of the Law of Property Act, 1925, this release can only be obtained by recourse to the courts.

38 U. Reichman, Toward a Unified Concept of Servitudes, 55 S Cal LR, 1179 at 1231-2 (1982).
39 Ibid, 1179 at 1232-3.
41 Ibid, at 928-9.
42 R. Epstein, Covenants and Constitutions, 73 Cornell LR, 906 at 919.
In her ‘Restatement’ French supports the ‘changed conditions doctrine’ for terminating servitudes; on the other hand others, including Epstein, have argued strongly against it. As Alexander points out, the debate, as in the case of the ‘touch and concern’ rule, has been framed by the free choice/coercion dichotomy. He goes on to state:

‘Advocates of the changed conditions doctrine and its analogues in other corners of the property law (such as the _cy pres_ doctrine in the law of trusts) have argued that we should impute to the original contracting parties an intention that the covenant expires if and when it becomes valueless’.

Epstein, pleading the ‘free choice’ school is concerned that:

‘The doctrine of changed conditions should not become the entering wedge of a large-scale system of judicial control over private home owners’ associations’.

If there is any consensus it would appear to rest on leaving the issue for the jurisdiction of the courts, to be used sparingly and with caution, and with no suggestion of the introduction of any power similar to that embodied in section 84 of the Law of Property Act, 1925.

To conclude this section dealing with the situation in the United States two further matters need to be addressed, namely, the degree of importance that is attached to ‘servitudes’ in the control of land use and development in the US, and the relevance of that to the situation in this country.

Reference has already been made to the importance of servitudes in land use planning terms in the comments by Reichman, Alexander and Stake. Professor Winokur has developed the arguments in favour of servitudes. Dealing first with the enhancement of land values and the segregation of land uses, he concludes that:

‘The stability of land development and use promised by regimes of servitudes enforceable between successors has persuaded both courts and scholars that servitudes tend to enhance the very land values they were once thought to diminish’.

Commenting that traditionally the argument has been in favour of unencumbered titles he quotes Judge Charles Clark:

‘...we are coming to see that in many ways permanency of development of land is desirable. Witness the prevalence of equitable restrictions and the tendency towards zoning laws and towards building line restrictions’.

Although there is little hard evidence to support the contention that segregation of land uses influences land values, it is the concern for the segregation of land uses, particularly for shielding single-family residential uses from industrial, commercial and even multi-family residential uses, that pervades _economic arguments_ supporting the enforceability of promissory servitudes between successors. Equally, it is the segregation of land uses that pervades _environmental arguments_ supporting enforceability.

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44 R. Epstein, 73 Cornell LR, 906 at 926.
45 One suggestion has been that ‘beyond a statutory initial period of a few decades, large scale promissory servitude regimes should remain enforceable against any given lot by...an enforcement group much smaller than the entire development’, for example an enforcement group no larger than twelve lots after twenty years, thereby facilitating modification or release negotiations. (J. Winokur, _The Mixed Blessings of Promissory Servitudes_, (1989) Wisc L Rev 1 at 6).
46 Professor of Law, University of Denver College of Law.
48 Ibid, 1 at 17. (Referring to a comment by Clark when he was Dean of the Yale Law School).
Finally, in commenting on the US situation regarding the limited effectiveness of planning control in that country, Winokur observes:

‘Calls for liberalized promissory servitude enforcement sometimes reflect critics’ concerns that modern zoning is of limited effectiveness as a planning and allocation tool. These critics see zoning as particularly ineffective in its role of segregating land uses. In comparison with private systems such as a regime of promissory servitudes, zoning has been criticised as an ineffective land use allocator...’

He concludes:

‘Whether servitude goals are cast in terms of preserving land values, maintaining neighborhood aesthetics, or expressing a community character and style, a substantial proportion of homeowners want to restrict the use of the land adjacent to their homes without having to rely on Government initiatives. ...By creatively addressing the most troublesome problem of promissory servitudes - their inflexibility over time, especially in large servitude regimes - a structural recasting of the enforcement relationships for older servitudes can simplify the current morass of rules, and substantially improve the overall impacts of promissory servitudes on land utility, individual liberty, and personal identity.’

What lessons then can be learnt from an examination of the law of servitudes in the United States? Having ‘enjoyed’ a more comprehensive and extensive recordation system for many years and the enforcement of affirmative covenants from the earliest times, it is suggested that the US experience may be of limited relevance to the English situation where positive and affirmative covenants have never been enforceable (outside the landlord-tenant relationship) and are excluded from registration under the Land Charges Act, 1925. But their experiences with the application of the ‘touch and concern’ doctrine lend support, if such were needed, for its retention, and strict application, in English law. It is thereby that covenants superfluous to, and with adverse effect on, ‘land utility’, may be avoided.

However, the most important lesson to be learnt is that of the importance of servitudes (in particular the restrictive covenant) in the development and use of land, to supplement a ‘deficient’ public planning system.

Restrictive Covenants and Planning Control

Throughout this study continual reference has been made, particularly in the sections dealing with the discharge or modification of restrictive covenants and planning (development) control, to the relationship between restrictive covenant control and planning control. Without reiterating the comments already made, some consideration has to be given as to how the relationship between the two forms of control may develop in the future.

It will be recalled that as long ago as 1964 (and probably before then) the relationship between the two was unsatisfactory. For example, Mellows51 posed the question:

‘If the whole basis of the planning legislation is to secure that land is put to the use which is best from the point of view of the community, why should that object be frustrated by privately imposed covenants when most private property rights are overridden?’

49 Ibid, 1 at 21.
50 Ibid, 1 at 96-7.
51 A.R. Mellows, Planning and Restrictive Covenants, (1964) 28 Conv (NS) 190 at 203-4.
Clearly he was inferring, if not stating specifically, that restrictive covenants should be subservient to and either subsumed in or overridden by planning control. As commented earlier this is an extreme view which found little favour with either lawyers or landowners.

More recently a view has been expressed that some of the ‘controls’ within the remit of the Planning Acts could, certainly insofar as ‘neighbour’ developments are concerned, be transferred (over time) to restrictive covenant control. For example, Pearce\textsuperscript{52} has suggested that:

‘Town planners have traditionally used the instrument of development control to restrain the location of land uses and land users which would impose heavy external diseconomies on adjoining activities and people...’

and has gone on to suggest that, as development control often denies individuals the chance of reaching positions of mutual benefit with neighbours by negotiation, since it requires the local authority to assess the public interest involved in each development rather than allowing private agreement, what is required is a ‘private property rights alternative’ solution. His solution would be to expand greatly the private rights and obligations associated with real property, thereby providing a legal remedy whereby ‘landholders’ could protect those ‘rights’ from ‘harm’ by other persons. Such an extension of the law of nuisance (and trespass) has already occurred in the United States where ‘un-neighbourly acts’ (uses and development) are not embraced by their ‘zoning and building codes’. An extension of private property rights, particularly if enshrined in a written code, would be analogous to, and constitute a kind of universal set of, restrictive covenants.

At the ‘community planning’ level the demarcation between those issues that can be left to private control and those which should be made subject to public control has never been satisfactorily resolved. Planning control has been seen as a means of protecting private property interests ‘on the cheap’, by avoiding the more ‘costly’ remedy available to the landowner through recourse to the courts in respect of nuisance, and by placing less reliance on the use and enforcement of the restrictive covenant. The situation was well summarised by Boynton\textsuperscript{53} as long ago as 1979:

‘...There is one area where the courts could play a bigger role than they do [with respect to town planning]. We could revise and update the law of nuisance. We could set down in statutory form the rights which an owner of property should have and which courts should protect. It puts planning authorities under unreasonable pressure if they are expected to safeguard the interests of adjoining owners, and have to take the place which the law could surely take’.

Those ‘statutory rights’ could well be founded on, \textit{inter alia}, the major issues which restrictive covenant control has embraced. The loosening of planning control, particularly at the ‘community’ level, and the greater reliance on private property rights (in which the restrictive covenant has an important role) are matters to be addressed in the conclusion to this section

The case has already been made for an \textit{Environmental Court and Tribunal}. It may well be that, through painstaking attention to the remit of such a Court & Tribunal and the development of its working practices, not only may the wider environmental issues be addressed and reconciled but also more particularly in the context of this study, the relationship between restrictive covenant control and planning control may be clarified, if not finally resolved.


A Conclusion

'Neighborhood uniformity is preserved by a complex battery of restrictions on everything from permitted uses to permissible colors of garden accessories to storage of personal belongings visible from other lots or the street. Even minor aesthetic changes are often prohibited without advance approval of a neighborhood architectural review committee. Often called conditions, covenants and restrictions, such residential restrictions typically take the form of real covenants and equitable servitudes that bind for several decades, or even permanently, not only the original creating parties but their successors in interest. They are usually reciprocally enforceable among residence owners within a subdivision or condominium project and also by the homeowners or condominium association. These restrictions serve the significant salutary purpose of maintaining a desirable character and quality in many residential areas. Reciprocally enforceable promissory servitudes preserve neighborhood characteristics important to residents who value quiet, privacy and status; who prefer car transportation to walking or public transit; and who favour supermarkets and shopping center department stores over ethnic or esoteric neighborhood shops. Consistency of aesthetic design throughout a neighborhood can produce residential areas of striking beauty. Servitudes often mandate continuing resident financing of owner associations common area maintenance, thereby alleviating residents' individual maintenance burdens'. (James Winokur)54

In such manner, Winokur describes a typically low-density suburban neighbourhood of single-family residences built in a virtually uniform design. It is not suggested that such an extreme scenario could occur under English law. Nevertheless a loosening of public planning control (particularly at the 'community' level) and the reform of the law whereby positive covenants would run so as to bind and benefit in the same manner as restrictive covenants, might well encourage movement in that direction.

Whether or not any reform of the law ever takes place, the role of the restrictive covenant will, it is suggested, remain an important land management 'tool' and, it is believed, will assume even greater importance and significance in the future. The restrictive covenant has survived, with varying degrees of fortune, for nearly 150 years. There are a number of reasons why it will continue to be not only relevant but necessary and its use, for the following reasons, is likely to increase as also will its range and complexity:

1. The number of households in England is projected to grow by 4.4 million between 1991 and 2016.55 Not all of this increase will require new dwellings but a significant proportion of it will. Housing development will generally take place in new settlements (small towns and villages), urban villages, suburban estates, and on reclaimed land in towns and cities.

2. The great majority of new development will be undertaken by private developers and housing associations who will rely on some form of restrictive covenant control. In particular, new types of development, for example in parkland settings as part of recreational complexes (golf courses, marinas), will necessitate 'novel' control regimes for their successful implementation and future maintenance.

(3) The public demand for greater environmental protection of the home and the workplace, embracing both matters of amenity and design on the one hand and security for both person and property (from crime and vandalism) on the other hand, will increase the need for some form of 'extended' restrictive covenant control.

(4) The relaxation of 'public' planning control (by for example the extension of permitted development rights under the General Development Order Consolidation or the simplification of use classes in the Use Classes Order) and the vagaries of the implementation of planning control will mean increasingly that new generations of residents in particular will demand the additional safeguard provided by private control.

(5) Regardless of whether planning control will be loosened, the 'ability to enforce', which is in the hands of the 'property owner' will continue to be the most telling reason for restrictive covenant control to a landowner or occupier who doubts the ability or will of a local planning authority to exercise control in his interest. As earlier indicated the case for taking some planning control at the 'community' level out of the hands of public planning authorities and placing it within the ambit of private landowners is a proposition that may well come to fruition. Whether or not it does, the fear of relaxation of planning control at the 'community' or local level will be sufficient to bolster the clamour for private control.

On the question as to whether the restrictive covenant will survive for another 150 years it would be imprudent to conjecture. What is more certain is that public demand, particularly in new housing, for greater control by residents means that some form of control will be needed for the foreseeable future, be it in the form of the basic restrictive covenant, an 'improved' development or building scheme, an extension of maintenance agreements and charges or 'novel' forms of servitudes, as for example the 'estate rentcharge'.

Having made an uncompromising case for the future of some form of restrictive covenant control perhaps this study should conclude on a more cautionary note:

'Among the most complicated and confusing of all legal rules are those which concern enforceability of promises on behalf of and against successors of the original parties to the agreement...Since the first English case interpreting the first English statute on the subject, commentators have doubted that the courts understood the law, and a study of judicial opinions from *Spencer's Case* on, is bewildering at best'. (Susan French)

Therein, at least for some, lies the fascination.

56 The Rentcharges Act, 1977, which generally prohibited the creation of new rentcharges and provided for the ultimate 'abolition' of existing rentcharges, excepted an 'estate rentcharge' created for the purpose, *inter alia*, of making covenants to be performed by the owner of the land affected by the rentcharge enforceable by the rent owner against the owner for the time being of the land (s.2(4)). By this means 'positive' (as well as restrictive) covenants can be enforced on freehold land against successors in title. Although the positive covenants in themselves will not 'run', the right of entry exercisable on breach of the positive covenant will 'run'. The effect of this is that although right of entry under section 121, Law of Property Act, 1925, is exercisable generally to recover arrears of rentcharge only, the estate rentcharge deed may provide for a wider right of entry, exercisable following breach of a number of positive covenants, under which the rent owner can carry out the covenant and recover the expense of so doing. The position of the rent owner can be further strengthened if the estate rentcharge deed incorporates a right of re-entry providing in effect for forfeiture of the land on breach of any covenant, whether positive or negative. For a fuller explanation see S. Bright, *Estate Rentcharges and the Enforcement of Positive Covenants*, (1988) Conv 99.

Bibliography

ABRAHAM, H.C. The Local Authority as Objector to Applications for Modification or Discharge of Restrictive Covenants, (1994) JPL 792

ALDER, J. Development Control, 2nd edn., 1989


BAKER, P.V. The Benefit of Restrictive Covenants, (1968) 84 LQR 22, and 'Untitled' Note, (1970) 86 LQR 445

BALL & BELL. Environmental Law, 3rd edn., 1995

BEHAN, J.C.V. The Use of Land as Affected by Covenants, 1924


BRIGHT, S. Estate Rentcharges and the Enforcement of Positive Covenants, [1988] Conv 99

BRYANT, A. English Saga (1840-1940), 1940

CHALLIS'S Law of Real Property, 3rd edn., (by C. Sweet), 1911

CHARLESWORTH, J. The Principles of Town Planning Law, 1946


CHESMAN, G. Restrictive Covenants - An Update, (1994) JPL 783

CLARKE, P.J. Freehold Covenants: the triumph of orthodoxy, All ER Rev. 1994, 245

CURRENT LAW STATUTES

DAVIES, K. Law of Compulsory Purchase & Compensation, 1994

DENNING, The Rt. Hon. Lord. The Discipline of Law, 1979

DEPARTMENT OF THE ENVIRONMENT

Planning Policy Guidance, PPG1, General Policy & Principles (1997)

PPG6, Town Centres & Retail Developments (1996)

PPG23, Planning & Pollution Control (1994)


Circular 9/95, General Development Order Consolidation, 1995

Circular 11/95, (superseding 1/85), The Use of Conditions in Planning Permissions

Circular 1/97, (superseding 16/91), Planning & Compensation Act 1991: Planning Obligations

Draft Circular, Air Quality & Land Use Planning, Dec. 1996

Consultation Paper, Speeding up the Delivery of Local Plans and UDP’s, 1997

DICKENS, C. Bleak House, 1853


EMERY, C.T. Restrictive Covenants - Annexation to the whole or to all or any parts of the land, [1974] CLJ 214

ENCYCLOPAEDIA of Planning Law and Practice (edited by M. Grant), regular updating

EPSTEIN, R. Covenants & Constitutions, 73 Cornell LR 906 (1987-88)

ESTATES GAZETTE, Vol. CVII to Vol. CLVI (1926 to 1950)


FRENCH, S. Servitudes Reform & the New Restatement of Property, 73 Cornell LR 928 (1987-88)
GARNER, J.F. The Public Control of Land, 1956

GOVERNMENT COMMAND PAPERS
Cmd. 6153, BARLOW Report of the Royal Commission on The Distribution of the Industrial Population, 1940
Cmd. 6378, SCOTT Report of the Committee on Land Utilisation in Rural Areas, 1942
Cmd. 6386, UTHWATT Final Report of the Expert Committee on Compensation & Betterment, 1942
Cmd. 6537, White Paper on the Control of Land Use
Cmd. 2719, WILBERFORCE Committee Report on Positive Covenants Affecting Land, 1965
Cm. 3471, Household Growth: where shall we live?, 1996

GRANT, M. Arguments for an Environmental Court - a paper presented to Conference on Environmental Litigation, RIPA, 1992
GRAY & SYMES. Real Property and Real People, 1981
GRAY, K. Elements of Land Law, 2nd edn., 1993
HART’S Introduction to the Law of Local Government Administration, 9th edn.
JOLLY, W.A. Restrictive Covenants Affecting Land, 2nd edn., 1931
LANDS TRIBUNAL. A Short Guide for Litigants, 1995

LAW COMMISSION
Report No. 11, Transfer of Land - Report on Restrictive Covenants, 1967
Report No. 201, Transfer of Land - Obsolete Restrictive Covenants, 1991

LEACH, W.A. Compensation under section 84 of the Law of Property Act 1925, (1976) JPL 18
MACKENZIE & PHILLIPS, A Practical Approach to Land Law, 6th edn., 1996
McAUSLAN, P. Land, Law & Planning: Cases, Materials & Text, 1975
MEGARRY & WADE. The Law of Real Property, 5th edn., 1984
MEGARRY, R.E. ‘Untitled’ Note, (1962) 78 LQR 334, and (1962) 78 LQR 482
MELLOWS, A.R. Planning & Restrictive Covenants, (1964) 28 Conv. (NS) 190
MOLE, D. Planning Gain After the Tesco Case, (1996) JPL 183
MOORE, V. A Practical Approach to Planning Law, 5th edn., 1995
NEWSOM, G.H. Planning & Compensation Reports, Vol. 7 (The Discharge & Modification of Restrictive Covenants) - Introductory Chapters, 1957
NEWSOM, G.H. Restrictive Covenants - 2, (1974) JPL 130
NEWSOM, G.H. Restrictive Covenants, (1984) JPL 847
PLANNING & COMPENSATION REPORTS, Vol. 7 (1957) to date
PRESTON & NEWSOM’S Restrictive Covenants Affecting Freehold Land, 8th edn.,
(by G.L. Newsom), 1991 (see also 2nd edn., 1955 and 7th edn., 1982)
PURDUE, YOUNG & ROWAN-ROBINSON. Planning Law & Procedure, 1989
PURDUE, M. The Impact of Section 54A, (1994) JPL 399
REAL PROPERTY COMMISSIONERS. An Inquiry into the Law of England Respecting Real
Property, Third Report, 1832
REICHMANN, U. Judicial Supervision of Servitudes, 7 J Legal Studies, 139 (1978)
REICHMANN, U. Toward a Unified Concept of Servitudes, 55 S Cal LR, 1179 (1982)
STAKE, J. Toward an Economic Understanding of Touch & Concern, 1988 Duke L.J, 925
SUGDEN, E.B. A Practical Treatise of the Law of Vendors and Purchasers of Estates,
14th edn., 1862
TELLING & DUXBURY. Planning Law & Procedure, 9th edn., 1993
WADE, H.W.R. Licences & Third Parties, (1952) 68 LQR 337
WILLMOTT & WEBSTER. Memorandum by the Official Arbitrators, Journal of the Chartered
Surveyors' Institution, Vol. XI (1931-32) 71