HM Courts &
Tribunals Service

T**608**

Upper Tribunal (Lands Chamber)

Explanatory leaflet for applications to discharge or modify restrictive covenants

A guide for users

January 2016

Addresses

The Lands Chamber is based at:

5th Floor
Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL
Tel: 020 7612 9710
Fax: 0870 761 7751
DX: 160042 Strand 4
Email: lands@hmcts.gsi.gov.uk
The office hours are 9am to 4:30pm

Please contact us if you are unable to find the information you require in this or the other documents on our website. Our administrative staff can answer questions about the procedures relating to Tribunal cases. They are not trained or permitted to give general legal advice or to advise about the law relating to a particular case.

Our website address is www.gov.uk/appeal-upper-tribunal-lands

On this website you will find information to help you with your case including our procedural flowcharts which show the steps in the different procedures that may apply depending on the type and complexity of your case. Also available on the website are the forms you will need to make or object to an application. If you do not have access to the internet you can request a copy of any of the documents from our office. Free assistance in gaining access to the internet may be offered by your local library. You will need to follow our Rules and Practice Directions.

Our recently published decisions are also available via our website.

The Lands Chamber deals with land in England and Wales only. The equivalent bodies for Scotland and Northern Ireland are:

The Lands Tribunal for Scotland
George House
126 George Street
Edinburgh EH2 4HH

DX ED 259
LP 14 Edinburgh 2

Tel: 0131 271 4350
Fax: 0131 271 4399
mailbox@lands-tribunal-scotland.org.uk

The Lands Tribunal for Northern Ireland
Royal Courts of Justice
Chichester Street
Belfast BT1 3JJ

Tel: 02890 327703
Fax: 02890 546187
lands.tribunal@dfpni.gov.uk

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1. Glossary of terms

Alternative dispute resolution (ADR): ways of resolving or settling a dispute outside the court or tribunal process. ADR includes mediation, adjudication, arbitration, conciliation, early neutral evaluation and ombudsman schemes. (See 3.2)

Benefited land: land which is expressed by the legal document that created a covenant as having the benefit of the restriction.

Burdened land: land which is expressed by the legal document that created a covenant as being subject to the restriction.

Covenant: a promise contained in a deed or contract.

Covenantee: a party to an instrument creating a restriction on the use of land who was intended to be able to enforce the restriction for the of benefit his own land.

Help with fees: the waiving of all or part of a fee normally payable because of financial hardship. (See paragraph 3.1)

Member: one of the specialist chartered surveyors appointed to hear Lands Chamber cases.

Objector: a person who files a notice of objection to an application for the modification or discharge of a restrictive covenant.

Registrar: a legally-qualified officer of the Lands Chamber exercising certain judicial powers and functions in relation to case management and costs.

Restrictive covenant: a covenant creating a restriction on the use of land (see 4.1).

Statement of case: a statement setting out the basis of a party's case.

2. Introduction

This leaflet provides basic information concerning applications to discharge or modify restrictive covenants affecting land. It is not a substitute for professional advice or attention when necessary to our Rules and Practice Directions.

2.1. What is the Lands Chamber?

We are a specialist chamber of the Upper Tribunal established to determine certain disputes concerning land in England and Wales. Amongst its jurisdictions the Lands Chamber considers applications to discharge or modify restrictive covenants affecting land in England and Wales.

Procedure in the Tribunal is governed by rules, namely The Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, and by Practice Directions. You can view these documents online at www.gov.uk/appeal-upper-tribunal-lands

2.2. Who are the members of the Lands Chamber?

The Chamber's President is the Honourable Mr Justice Holgate. Mr Martin Rodger QC is the Deputy President and there are seven part-time judges who are His Honour Judge Behrens, His Honour Judge Bridge, His Honour Judge Gerald, His Honour Judge Hodge QC, His Honour Judge Huskinson, His Honour Judge Millwyn Jarman QC and Her Honour Judge Alice Robinson.There are three full-time specialist members, Mr Paul Francis (FRICS), Mr Andrew Trott (FRICS) and Mr Peter McCrea (FRICS FCIArb) who are Fellows of the Royal Institution of Chartered Surveyors. Assisting them is the registrar, Donald Scannell who has certain case management and decision making powers.

The administrative staff who support the tribunal are civil servants and members of HM Courts & Tribunals Service. They are managed by the delivery manager, Sharon Sober.

3. Generally

3.1. What fees will I have to pay?

The Lands Chamber is required by law to charge fees. The fee for lodging an application to discharge or modify restrictive covenants is £880. The fee for hearing an application is £1,100, but this is reduced to £275 if the Tribunal determines the application without a hearing. Certain other fees will be charged during the proceedings. For example you will need to pay a fee of £110 if you make an application for an extension of time for complying with any rule or a direction given by the Tribunal.

A fee of £550 is payable by the applicant if a hearing is needed to determine an objector's entitlement to object to the application. If the application is successful a fee of £220 is payable for drawing up the Tribunal's final order. Further information is given in the Fees Order with its schedule of fees which may be viewed online on our website.

If you think you may be entitled to a reduced fee, the 'EX160 Apply for help with fees' guide will outline how you can submit an application for a fee remission. You can get the guide and application form online,
http://hmctsformfinder.justice.gov.uk/HMCTS/FormFinder.do

You have to send the help with fees form with your application.

3.2. Is there an alternative?

Once you have lodged an application if you are willing to try to settle your dispute without a Tribunal hearing and the objector (or objectors) to the application agrees, the Tribunal will allow a short stay in the proceedings while you try to settle the case by means of alternative dispute resolution.

There are a number of less formal and less expensive methods of resolving disputes, known as alternative dispute resolution (ADR) because they offer an alternative to the courts and tribunals. For more information about ADR you can visit the website of an independent charity that offers an overview of ADR schemes in the UK see www.adrnow.org.uk.

Mediation is a way of resolving or narrowing disputes by agreement. It is voluntary and works outside the Tribunal process. An independent person (the mediator) helps the parties look for a solution they both find acceptable. Together the mediator and parties develop and explore options for settling the dispute.

Mediation is simple, quick and less expensive than legal proceedings. It has a high success rate and parties tend to be satisfied with it. The Court of Appeal has strongly encouraged parties to consider mediation.

Many different organisations provide mediation and other ADR services. To find a mediator we suggest you visit the Ministry of Justice's website's Find a Civil Mediation Provider service at www.civilmediation.justice.gov.uk, or contact the National Mediation Providers' Association at www.nmpa.org.uk, telephone 0845 544 2199, or The Royal Institution of Chartered Surveyors (RICS) www.rics.org/uk dispute resolution service, which offers mediators who are experienced property specialists.

The Tribunal will allow a six week stay of proceedings where the parties agree to ADR. The Tribunal will not charge the £110 fee that a party applying for a stay of

proceedings must usually pay. The fees charged by mediation or other ADR providers are in addition to and separate from the fees charged by the Tribunal.

3.3. Will there be a hearing in court?

If the parties do not settle the case, a Tribunal hearing will usually take place to consider the appeal. At the hearing each party puts forward their arguments and evidence, usually under oath, and each witness may be cross-examined by the opposing side. Hearings are open to the public. If all parties agree and the Tribunal considers it appropriate, the appeal may be decided without a hearing.

3.4. How long will it take?

The Tribunal seeks to determine applications as quickly as possible and aims to deal with 75% of all applications within 70 weeks. The Tribunal is able to hear and decide applications most quickly if the dispute is relatively simple or straightforward, and if the parties have provided all the relevant documents promptly and can attend a hearing at an early date. Some applications, especially if they are large, complex or have many parties, may require many months before they are ready for hearing. If you are ready to proceed to hearing you may apply to the Tribunal for the earliest available hearing date.

3.5. Do I need to instruct lawyers or expert witnesses?

You may conduct your own case and appear on your own behalf at the hearing. However, as the law and facts may be complex, you may wish to have professional representation from a lawyer or surveyor. When a professional representative is instructed to act, the Tribunal will correspond directly with them, rather than with the party they represent. Given the nature of our cases, very often surveyors and or other professionals need to be engaged to appear as expert witnesses. The Tribunal considers that experts should not act both as advocate and as expert witness.

3.6. Will there be a site inspection?

When necessary the Tribunal will view the land or building in question and may also view other sites. This may be before or after the hearing. Notice is given to the parties who are entitled to be represented at the inspection. For an inspection inside any building and for entry on any land the permission of the occupier is required. An accompanied inspection will not usually take place if the occupier does not consent to the other party or their representative attending the inspection.

At an inspection the parties may not make submissions or arguments about the case. However the parties may point out any features of the land or building to which they wish to draw the Tribunal’s attention and may answer specific questions raised by the Tribunal.

3.7. Will the Tribunal return my papers to me?

The Tribunal is not able to return documents to you. This applies both during the case and after the end of the case so it is very important for your own records that you keep a copy of every application, notice or document that you send to us.

3.8. Extensions of time

If you cannot comply with a time limit imposed by the rules or by a direction you can apply to the Registrar for an extension of time but it will only be given if he considers it appropriate to do so. You must explain why you require the extension and for how long. You must also send a cheque for the £110 fee, payable to 'HM Courts & Tribunals Service' with your application.

Before sending in the application you should see if the other party or parties will consent to the extension. If they do agree a joint application signed by the parties may be submitted, or each of you may send a letter to the Tribunal confirming what has been agreed. If the other party (or parties) does not agree you need to serve a copy of your application for an extension of time on all the other parties. You also need to explain to them that if they wish to object to your application they must send a letter giving the reasons for their objection to the Tribunal so that it arrives within 10 days of the date you served the application on them.

3.9. How can I apply for a stay of proceedings?

You can apply for a stay of proceedings (a pause or temporary break in the proceedings) in exactly the same way as applying for an extension of time. The process is the same as that in the paragraph above regarding extensions of time.

3.10. What is a statement of case?

It is a statement setting out the basis of your case. The purpose of a statement of case is to enable the other party and the Tribunal to identify easily the issues to be determined. Your statement of case must therefore set out the facts and the law on which you rely. It must be in summary form but should contain sufficient particulars or details to tell the other party the case that you are making. Your attention is drawn to section 6 of the Practice Directions which deals with statements of case in more detail.

3.11. Expert witness evidence

An expert witness is a witness instructed by one or more of the parties who provides a professional opinion on the matters in dispute. You do not have to call an expert witness in support of your case but it may be the only or best way to establish the merits of your case. The type of expert witness most commonly called is a surveyor or

valuer. Only one expert witness may be called by a party unless they have applied for and been given permission to call more.

Each expert witness who is to give evidence to the Tribunal is required to file a report setting out that evidence, accompanied by any relevant plans, valuations, lists of comparable properties and other supporting information. Copies of these documents must be sent to the Tribunal and the other party well in advance of the hearing. Before and again after the exchange of the experts' reports the Tribunal requires experts to meet in order to identify the issues to be resolved, to reach agreement as to facts, to agree any relevant plans and photographs, and to settle as many issues as possible. The experts will normally be required to prepare a statement for the Tribunal showing the facts and issues on which they agree and disagree and a summary of their reasons for disagreeing.

Witnesses of fact may also be called to give relevant evidence of facts known to them, but such witnesses do not give professional opinions.

4. Restrictive Covenants

4.1. Restrictive covenants

A restrictive covenant is a legally binding restriction imposed for the benefit of one plot or area of land that prevents another plot or area of land or buildings on it from being used in certain ways. Restrictive covenants are usually (but not always) created by a legal document following agreement made between the owner of the land with the benefit of the covenant and the owner of the land that is subject to the restrictions contained in the covenant. The legal document might be described as a transfer, a conveyance, a deed of covenant or an indenture.

4.2. Discharging or modifying restrictive covenants

The owner of (or sometimes a person having certain other legal interests in) land that is subject to the burden of a restrictive covenant may apply to the Lands Chamber to have the restriction discharged or modified.

The Lands Chamber has the power to discharge or modify most restrictive covenants affecting land but there are some types of restrictive covenants that the Tribunal cannot discharge or modify. Please see the full text of section 84 of the Law of Property Act 1925 on legislation.gov.uk

It is always advisable to seek professional advice before applying to the Tribunal as the law on restrictions affecting land is complex. Legal costs, sometimes substantial, and exposure to the risk of being required to pay all or part of another party's costs

can be incurred. Owners of land with the benefit of a covenant subject of an application, or an original covenantee, may object to the proposed loss of or variation to their current legal rights. A successful applicant may be ordered to pay compensation to an objector (or objectors) for the discharge or modification.

The Lands Chamber has no power to discharge or modify positive covenants (i.e. a covenant requiring the landowner to do something, rather than not to do something) or to discharge or modify easements, such as a right of way.

5. The Procedure

5.1. Making an application

An application is made by sending a completed application on Form LPA to the Tribunal. Other than the documents specified by the form, you do not need to include evidence in support of your application at this stage; that comes later.

5.2. Serving notice

After an application has been registered and given a case number the Registrar will give directions on how notice of the application must be given by the applicant to those who may own an interest in land with the benefit of the covenant. This may involve placing a newspaper advertisement, placing of notices on the application land where they can be read by the public, or by serving publicity notices on the owners or occupiers of land owners specified by the Registrar in his service directions. The applicant must then certify that they have properly carried out the service directions and provide proof of service.

If there are no objections received the applicant may ask the Tribunal to determine the application without a hearing.

5.3. Objecting to an application

If your property has the benefit of a restrictive covenant that is the subject of an application to the Tribunal and you wish to object to it, you must send an objection to the Tribunal and also directly to the applicant using the Tribunal's notice of objection form, form LPD (T381). Your objection must be received by the Tribunal and the applicant within one month of the date notice of the application was given. There is no fee payable for objecting.

You need only say at this stage what grounds you are relying on in support of your objection. You must also explain why you believe you are entitled to the benefit of the

covenant. You do not need to provide evidence to support your case at this stage: that comes later.

If you are not sure if you do have a legal right to the benefit of the restrictions subject of the application, you should seek legal advice. Please note that whilst HM Land Registry normally notes on the Land Registry titles that *burdened land* is subject to restrictive covenants, it does not normally note on the Land Registry title of *benefited land* that it has the benefit of restrictive covenants over neighbouring land. You may need to look at the legal document that created the restriction, or some other evidence, to establish your entitlement.

5.4. The admission of objectors

Only those persons with a legal right to the benefit of the restrictions are entitled to object to an application.

Within 14 days of receipt of each notice of objection the applicant must inform the Tribunal and the objector whether or not the applicant believes the objector is entitled to the benefit of the restrictions to which the application relates.

If there are objectors all of whom are accepted by the applicant as being entitled to the benefit of the restriction, the case proceeds to dealing with the substantive issues.

If the applicant disputes an objector's entitlement to object they must say why. Any objector whose entitlement is not disputed by the applicant within 14 days is automatically admitted to oppose the application.

An objector whose entitlement to object is disputed must, within 14 days of being notified by the applicant, provide the applicant and the Tribunal with evidence of their *entitlement* to object. At this stage the objector need only provide evidence of their entitlement to object; they don't need to provide evidence at this stage about how the discharge or modification will affect them: that will come later.

Within 14 days of receipt of the objector's evidence of entitlement to object the applicant must inform the Tribunal and the objector whether or not, having seen the objector's evidence, the applicant now accepts the objector is entitled to object.

If necessary the Tribunal will hold a preliminary hearing to decide whether or not an objector is entitled to oppose the application. However, if both parties agree and the Tribunal consents, the issue may be decided without a hearing on the basis of written representations.

Once the question of any disputed objector's entitlement has been resolved, the case proceeds to dealing with the substantive issues.

6. Hearings

6.1. Preparing for the hearing: witnesses and documents

Once issues of entitlement to object have been resolved, and one or more objectors is still a party to the case, preparations for the main hearing of the application need to be made. Neither party may take their opponents by surprise at the hearing by withholding material until the last minute. Each party will be directed to prepare and send to the Tribunal and to the other party a witness statement for each witness they are planning to call to give evidence, and the report of any expert witness they may wish to call to give opinion evidence at the hearing, together with any supporting documents.

6.2. Venues

The Lands Chamber hears most cases at its courts in London and holds hearings in other local courts if necessary. If the parties request a hearing to take place locally the Tribunal will try to arrange suitable courtroom accommodation. It is usually possible to arrange hearings more quickly in London.

6.3. Length of hearing

Parties are required to tell the Tribunal how long the hearing is expected to take, whether several hours, or one or more days. Parties should consult with each other about this and try to agree time estimates. If the time estimate is too short, there may have to be an inconvenient and possibly expensive adjournment part-way through the case until more available days can be found. On the other hand if parties over-estimate the time, the scheduling of other hearings is delayed. It is in the interests of all litigants that the resources of parties and of the Tribunal are not wasted either by unnecessary adjournments or by over-estimates of the hearing time required.

6.4. If lawyers are instructed

A party is not obliged to instruct lawyers, and individuals are always entitled to appear on their own behalf. However, as the law or facts can be complex, lawyers are often instructed. If you instruct a lawyer or surveyor to represent you, they must inform the Tribunal which will then communicate with you through your representative.

6.5. Special needs

Please let us know when we are arranging the hearing date if you, your representative or any of your witnesses have any special needs that need to be taken into consideration, for instance if one of you is disabled and requires a court with suitable access and facilities.

6.6. Arranging a hearing date

The hearing date is not normally set until after the parties have filed their statements of case, witness statements and any expert's reports.

6.7. Procedure at the hearing

Participants are advised to arrive a little before the appointed time on the day of the hearing so that they can make themselves known to the Tribunal clerk, familiarise themselves with the courtroom layout, meet their witnesses, get the documentation in order and perhaps discuss the case with their opponents.

When the hearing begins, the applicant usually starts first by setting out their case, then calling evidence and presenting documents. Each witness gives evidence on oath or affirmation and is liable to be asked questions by the Tribunal and cross-examined by the objector. The objector (or objectors) then introduces their case and calls evidence. Each party has an opportunity to set out any legal arguments it relies on in support of their case.

Wigs and gowns are not worn in Tribunal proceedings. Judges and surveyor members are addressed as 'Sir' or 'Madam'.

7. Costs

7.1. Costs relating to preliminary hearings to decide whether or not an objector is entitled to the benefit of a restriction

If an applicant disputes that an objector is legally entitled to the benefit of a restrictive covenant which is the subject of an application for discharge or modification, the objector must provide evidence of their entitlement. If this does not resolve the question a hearing may be held for the Tribunal to decide this question as a preliminary issue. Usually the applicant will be required to pay to any objector who establishes at the hearing that they are entitled to the benefit of the covenant the costs the objector has incurred in proving their entitlement. On the other hand, an objector who is not able to establish at the hearing that they are entitled to the benefit of the covenant will not be able to proceed further with their objection. Such an objector is also likely to be liable for the applicant's costs incurred in dealing with this issue.

7.2. Costs relating to the application to modify or discharge a covenant and objections to it

In the substantive proceedings the applicant is seeking to remove or diminish particular property rights enjoyed by the objector. Generally, successful objectors will be awarded their costs. Successful applicants cannot however expect to be awarded their costs. That is, even if unsuccessful, an objector will not usually be ordered to pay the applicant's costs unless the conduct of the unsuccessful objector has been unreasonable. It is only in exceptional circumstances that an applicant would be ordered to pay the costs of an unsuccessful objector.

In an appropriate case the Tribunal may make an order limiting a party's liability in respect of costs subsequently incurred.

The Tribunal may also order that a representative personally pay the whole or part of costs it considers to have been wasted as a result of any improper, unreasonable or negligent act (or failure to act) by that representative.

The Tribunal may also order a party to reimburse fees paid by another party to the Tribunal.

8. Decisions

8.1. Written decisions

The Tribunal usually reserves its decision rather than giving a decision immediately at the end of the hearing. Decisions are given in writing and sent to the parties. The Tribunal will also invite the parties' submissions on costs at this stage, where appropriate.

9. Challenging decisions of the Lands Chamber

9.1. Appealing a decision of the Lands Chamber

The Tribunal's decision on all matters of fact is final. There is a limited right of appeal to the Court of Appeal on points of law for which permission to appeal is required. An application for permission to appeal must be received by the Tribunal within one month of the date that the decision was sent to the parties.

If the Tribunal refuses permission to appeal it will send the decision to the parties setting out the reasons for its refusal. The applicant may then apply in writing to the Court of Appeal for permission to appeal within 21 days of the date that the Tribunal's decision refusing permission was sent to the parties. Three copies of an

Appellant's Notice and a copy of the decision of the Tribunal refusing permission to appeal must be filed at the Court of Appeal.

If you are given permission to appeal by the Tribunal, you will need to file three copies of an Appellant's Notice together with the decision giving permission to appeal with the Court of Appeal within 21 days of the date of the Tribunal's decision giving permission to appeal.

Further information on applications for permission to appeal to the Court of Appeal is available from the Court of Appeal's website, www.justice.gov.uk/courts/rcj-rolls-building/court-of-appeal or you can contact the Civil Appeals Office at the Royal Courts of Justice, Strand, London WC2A 2LL on 020 7947 6916/7121.

9.2. Review of a Lands Chamber decision

The Tribunal may only review or reconsider its own decision in two circumstances. First if it overlooked a legislative provision or binding authority which could have made a difference to the decision, or second, if since the Tribunal's decision, a court has made a decision which is binding on the Tribunal and which, had it been made before the tribunal's decision, could have had made a difference to the decision.

If you believe the Tribunal should review its decision, you must apply to the Tribunal for permission to appeal to the Court of Appeal and also at the same time ask the Tribunal to review its decision. If the Tribunal decides not to review the decision or not to vary it, it will consider whether to give permission to appeal.

10. Standards and complaints

10.1. Standards

The Tribunal has certain standards of service and performance which it is committed to reaching. We aim to:

- respond to respond to any requests via email or letter within five working days
- answer phone calls within five rings
- register and acknowledge new cases within five working days (if all necessary documents and fees are sent with the case)
- complete 75% of all applications within 70 weeks

10.2. Comments and complaints

If you have any comments or complaints about the service you have received from the Lands Chamber contact:

The Upper Tribunal (Lands Chamber)
5th Floor
Rolls Building
7 Rolls Buildings
Fetter lane
London
EC4A 1NL
Tel: 020 612 9710
Fax: 0870 761 7751
Email: lands@hmcts.gsi.gov.uk

If upon receiving a response you wish to take the matter further please contact the Operations Manager, Keeley Martin, at the above address and ask her to review your complaint.

Neither the administrative team nor the Tribunal manager can deal with complaints about judicial decisions.

11. Obtaining legal advice and finding a solicitor

For assistance in finding a solicitor with expertise relevant to your matter contact the Law Society of England and Wales. Their website address is www.lawsociety.org.uk and their general enquiries telephone number is 020 7242 1222. The Law Society does not provide legal advice to members of the public but does provide guides on common legal problems written in plain English, including one on using a solicitor. The guides are available on their website and may be requested in hard copy from the Law Society by calling 0191 428 7439.

To obtain free legal information, advice or assistance you may wish to contact the Citizens' Advice Bureau. Their website www.adviceguide.org.uk contains information sheets and also has a search facility to assist you in finding your local office. If you are not able to access the internet you may find details on your local Citizens' Advice Bureau from your local library.