

# Wollen Michelmore

SOLICITORS

## **DON'T LET RESTRICTIVE COVENANTS BE YOUR PROPERTY NIGHTMARE!**

Restrictive covenants affecting land – promises not to do something – are a problem for a landowner and future owners who are bound by the promises, because these are said to “run with the land” and continue to bind each and every owner of the affected land so that the value and enjoyment of land that has the benefit of the restriction is preserved.

There are many different examples of restrictions, such as not to cause a nuisance, not to use land other than for agricultural purposes, not to divide a house into separate flats, or not to use property as holiday flats.

One of the most frequently broken covenants is that prohibiting any alterations or additions to existing buildings without first obtaining the written consent of a named third party.

Developers often impose such restrictions on newly built properties in order to preserve the uniform appearance of their estate. The prohibition may be limited to, say, 5 years from the first sale, but if the restriction was not time limited, then some years after the restriction was first imposed it may not be known who might now be able to enforce the restriction, and whose consent must be obtained. It could be argued that this means that the owner cannot build at all, because he does not have consent!

If the person or property with the benefit is known, they could be approached and their consent obtained, but probably at a price, and always at the risk that they may not agree and (see below) this approach could invalidate Indemnity Insurance. There is a procedure available for applying to the Lands Tribunal to have the restriction removed if it is thought to be unenforceable or obsolete, but it is lengthy and costly with no guarantee of a successful outcome.

A house owner may build without such consent, either not knowing or remembering that the restriction exists, or perhaps believing that obtaining planning permission was sufficient, and may not receive any complaints. However, when he or she comes to sell the property later, the Buyer's conveyancer could raise the awkward question as to whether consent has been obtained under the restrictive covenant, and may advise the Buyer not to proceed if the breach is not rectified! One way of overcoming the problem is to provide an insurance policy indemnifying the Buyer against any financial loss if anyone should ever successfully claim to have the benefit of the restriction in the future. Fortunately such policies are readily available provided the work was carried out at least 12 months before taking out the

policy, that the Seller is not aware of any objections or disputes relating to the use of the property or the covenants, and no attempt has been made to contact anyone for consent and thus alerting them to a possible breach.

The greatest period of risk for the house owner comes after he starts building work. A person claiming the benefit of the restriction can object to the work at any time (as long as he does so within a reasonable period of first becoming aware of the work) and depending on the nature of the work and the nature of the land being protected by the restriction, a fee may be payable for consent or release of the covenant, but in the worst case the work can be stopped and the house owner required to restore the house to its original condition, and pay damages and costs!

A house owner must check his title deeds before carrying out any substantial work on a property or changing its use, and if appropriate he should check with a local conveyancer as to whether the person or company named as having the benefit of any restrictions is known to still be active, and if so whether they are known to have a standard policy for dealing with requests for consent. The house owner should then consider whether an approach for consent should be made before commencing the work.

However, just because it is not known who might claim the benefit of the restriction, does not mean that the restriction is unenforceable, and a house owner who proceeds without consent faces a disturbing period of uncertainty and potential expense.

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