

Restrictive covenants

10 July 2017

Simon Brading and James Styles consider lessons from recent cases on restrictive covenants in the context of a development

You have got your eye on an exciting new development site. It's a little rundown, but you are planning to tidy it up and add more buildings, and you don't see any planning problems because you're not going to change the use. But you've done some light-touch due diligence, through which you've discovered some old restrictive covenants that date back to the late 1800s. These prohibit the current use, which you had planned to continue and expand.

Old covenants

Under [section 84 of the Law of Property Act 1925](#), there's a procedure allowing you to apply for restrictive covenants to be discharged or modified if certain criteria can be met. One of the potential grounds for satisfying section 84 is to show that the restriction is obsolete on the basis of changes in the neighbourhood or the property.

In the example above, the seller has also been told about this procedure for discharge and says that the fact that the property has been used in breach of the covenant for more than 30 years means that you can now ignore the covenant, because it must have become obsolete. How would this approach play in practice, though?

Tribunal decision

The precise facts will determine the outcome; however, the recent tribunal decision in [Re University of Chester](#)'s Application reminds us that you certainly cannot depend on the previous use to render the covenant completely obsolete. The central question is the extent of this previous use: if it involved a small and limited breach, then it does not give you free rein for later, wider and more significant breaches. Care and analysis is therefore required.

In [University of Chester](#), the university wanted to demolish an old, dilapidated boathouse and replace it with a new, significantly larger 2-storey building to be used as a 'rowing and fitness facility'. It obtained planning permission for the new building, but the property was subject to restrictive covenants dating back to 1896, which:

1. prohibited the property from being used for any kind of trade or business
2. prohibited the property from being used for anything other than as gardens or a pleasure ground
3. limited the height of any buildings on the land.

Not surprisingly, the tribunal found that the proposed new use and building breached the restrictive covenants, so the next question was whether the covenant could be discharged under section 84(1)(a) on the basis that it had become obsolete.

The tribunal noted that the covenant had already been breached by the old boathouse and previous use by the university, but also noted that the new use and building would involve further, more extensive breaches. The university argued that because the previous breaches had been accepted for so long, they had become impossible to enforce, so the covenants as a whole should be deemed to be obsolete.

The tribunal rejected that argument. It referred to *Richards v Revitt* (1877) 7 Ch D 224, where it was stated that: 'The fact that the Plaintiff did not interfere to prevent a small and limited breach does not conclude him for all time in respect of a wider and more important breach.'

The tribunal added: 'It is clearly important that those with the benefit of covenants should not feel compelled to object to every inconsequential infringement for fear of losing the right to object to something which may threaten their enjoyment of their own land to a much more significant degree.'

The point is that you should not ignore old restrictive covenants that have not been enforced when you are intending to increase the extent or intensity of the breach.

Other solutions

There are usually a number of ways to deal with problematic restrictive covenants. Options range from insurance to negotiation to applications under alternative heads of section 84. Your solicitors should work with you to assess the options and then recommend an appropriate solution.

Simon Brading is a partner and James Styles is a consultant at [Stephenson Harwood LLP](#)

Further information

- Related competencies include [Access and rights over land](#) , [Development/project briefs](#) , [Legal/regulatory compliance](#)
- This feature is taken from the RICS *Land journal* (May/June 2017)