

## IT'S THE LAW:

# A what, when, where, why and how guide to restrictive covenants.

### What are they?

A restrictive covenant is an obligation on one landowner to refrain from doing something on their land (the **Burdened Land**, also sometimes referred to as the **Servient Land**) for the benefit of someone else's land (the **Benefited Land**, also sometimes referred to as the **Dominant Land**). Restrictive covenants come in all shapes and sizes. Common examples include:-

- Covenants against the use of land for particular trades (such as prohibiting the sale of alcohol or the farming of pigs);
- Covenants which limit the use of land to just one thing (such as a covenant not to use the property otherwise than as a house);
- Regulations designed to prohibit antisocial behaviour (such as a restriction against playing music after 11pm); and
- Rules which seek to control the specifications of new buildings (such as an obligation not to build before getting plans approved by the owner of the Benefited Land).

There are two common themes. Firstly, they are restrictive. A positive obligation to do something (such as an obligation to build a house) is not a restrictive covenant. Secondly, they must be designed to benefit land (whoever owns it) rather than benefit individuals.

### When are they created? (and this covers the 'Where' too)

Restrictive covenants are usually, although not always, created when the owner of a large piece of land is selling off part, but

wants to retain some control. For example, the owner of a meditation centre selling off part of its land might not want that land to be used to host heavy metal concerts. So they add a restrictive covenant to the transfer document to limit noise and nuisance. Alas, a covenant to have good taste in music is positive – and so, not a restrictive covenant.

Another common scenario is where a developer sells off plots of land on their newly built out estate but wants to ensure that, over time, the estate retains its original 'ambience'. So they'll impose restrictions on parking caravans, building extensions or installing satellite dishes in the transfer documents which are then registered on the Land Registry title.

### Why are they a problem?

As a matter of law, subject to some detailed details, restrictive covenants 'run with the land'. That means that they bind not just the person who entered into them originally – but also anyone who subsequently owns the Burdened Land. So, if a buyer of a house agrees to be bound by a restrictive covenant in a transfer deed, the seller can enforce a breach not only against the original buyer but also against anyone who owns the house after them.

If either party sells their interest on, the parties' successors in title step into their shoes. The successor to the original seller can enforce the restrictive covenant against the successor of the original buyer.

So if you've found a great development site with planning permission to build a block of 50 flats – but it's subject to a restrictive covenant, created in 1850, not to use the land otherwise than for



**Neil Toner**  
Partner  
020 7065 1823  
neil.toner@devonshires.co.uk



**Krissun Soodin**  
Solicitor  
020 7880 4336  
krissun.soodin@devonshires.co.uk

purposes of a single house then you've got a problem.

The owner of the Benefited Land can make your life a misery. If you start building, they could begin enforcement action by filing a claim at the County Court. Enforcement could take the form of (i) a Court order requiring you to stop (and remove) your development; (ii) a Court order requiring you to pay damages; or (iii) a Court order requiring you to do both.

### How do you deal with it?

If you find yourself in a position where you might breach or are already in breach of a restrictive covenant you have 5 options:

**The Ostrich Option:** Ignore it, bury your head in the sand, pretend you never read this edition of IT'S THE LAW. It's a risky move that we wouldn't recommend.

**Interpretation, interpretation, interpretation:** It is important that you get a lawyer (hopefully us) to read the covenant you are worried about.

- We'd check - is it in fact restrictive? If it creates an obligation requiring action (as opposed to inaction) this will be a 'positive obligation' which does not necessarily run with the land and might not be enforceable against you.
- We'd check – does your proposed use of the Property actually amount to a breach? Covenants are often quite poorly drafted and it's not always obvious at first, second or third reading precisely what they prohibit. So, if in doubt, don't immediately assume the worst. If necessary, we can make an application for a court declaration as to the construction of a restrictive covenant under section 84(2) of the Law of Property Act 1925.

**Deal or no deal:** If you've discovered a restrictive covenant that's binding, then there will be someone (or some people) who have the benefit. You might be able to negotiate with them for the removal or variation of the restrictive covenant. But (and it's a very big but) before you embark on this process you should consider the following points:

- the beneficiaries will likely seek a premium for the removal or variation. If they can see that they have you over the proverbial barrel then they may use their bargaining position to the max;
- it's not always possible to trace all of the possible beneficiaries – so you can be left with paying for a release but knowing it might not be fully effective;
- one of the pre-conditions to getting insurance cover against this risk (see the final option below) is that you must not have held prior discussions with the beneficiaries of the covenant. These negotiations could effectively 'tip off' a beneficiary about a potential breach of a restrictive covenant which they previously knew nothing about. This could lead to insurers refusing to cover you; and
- even if the beneficiary enters into a Deed of Release, the

Land Registry rarely ever just removes the restrictive covenant from the title. They will often, instead, add a note to the title explaining that the restrictive covenant is 'expressed to be released'. That means that anyone who you sell to is still going to have nagging doubts about whether the restrictive covenant is still enforceable.

### On your uppers (you will be once you pay the legal fees):

An application to the Upper Tribunal to modify or discharge a restrictive covenant under section 84 of the Law of Property Act 1925 may be possible. You'd need to satisfy the Upper Tribunal that:

- changes in the character of the land or the neighbourhood, or other material circumstances, means the restrictive covenant ought to be deemed obsolete;
- the restrictive covenant prohibits reasonable use of the land;
- the beneficiaries expressly or impliedly agree to wholly or partially modify or discharge the restrictive covenant; or
- the proposed discharge or modification will not injure the beneficiaries.

Note that if the Upper Tribunal accept your application and agree to a variation or discharge they may require you to financially compensate the beneficiary. In practice, this route is very rarely used. It's great in theory and law students spend many happy hours in the library studying the procedure – but it's costly, time consuming and risky (because it's difficult to predict what the Upper Tribunal will say). And, did we mention costly?

**Indemnity Insurance:** Indemnity insurance will never be the answer to all of your problems. But it does mean that if a beneficiary comes out of the woodwork and enforces the restrictive covenant against you, you will at least be compensated financially. So the loss you suffer because you can't build the development you wanted, the abortive costs you've incurred, the compensation you have to pay out – should all be covered by the insurance company.

Indemnity insurance always comes with strings attached. The insurers will impose a number of conditions that you must comply with. These will include obligations to tell the insurers immediately if you become aware of a potential claim and requirements to keep the existence of the policy a secret from third parties.

### The tiny print

This is one of a series of leaflets published by Devonshires Solicitors LLP's Real Estate & Projects Department aimed at our developer clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

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**Neil Toner**  
Partner, Head of Real Estate  
020 7065 1823  
[neil.toner@devonshires.co.uk](mailto:neil.toner@devonshires.co.uk)