

Practice & Law

CONSENTING ADULTS

Covenants Jonathan Kenwright and Andrew Francis offer a case study on obtaining consent for development where a restrictive covenant applies



Developers will be aware that, even with the necessary planning consents in place, a restrictive covenant may still be a bar to development.

Sometimes a covenant may state that there should be no further building at all. In other cases it may provide that building can take place but only with the consent of another, often the owner of the adjoining plot.

This type of covenant, requiring consent,

can be as problematic as those which impose an absolute bar on development. With the assistance of a case study based on a real case we recently concluded, we review the practical and legal issues involved in obtaining consent.

The facts

Our clients, Mr and Mrs Brown, wished to carry out substantial development work on their London home. This would involve

rebuilding the basement and constructing a large three-storey extension. Mr and Mrs Brown's home had formed part of a single property owned by Mrs Smith who had sold off part of her property to Mr and Mrs Brown's predecessors in the 1980s. The transfer contained the following covenant:

"Not without previous consent in writing of the transferors or their successors in title or owners for the time being of the retained land, such consent not to be



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unreasonably withheld, to erect or allow to be erected on the land hereby transferred any building or other structure (either of a permanent or temporary nature)."

Mr and Mrs Brown obtained planning permission for the proposed development and, in accordance with the terms of the covenant, asked Mrs Smith, who lived next door, for permission to carry out the works. However, Mrs Smith was reluctant to agree. Before we consider Mr and Mrs Brown's

options it is useful to look at how we identified who had the benefit of the covenant and some other preliminary questions.

Who is to give consent?

The party required to give consent must be identified.

The issue of who can give consent and whether that privilege stops with them is crucial. For example, there may have been

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ONLINE THIS WEEK

LAW REPORT The Estates Gazette Law Reports are now available exclusively on EGI each week and in bound volume three times a year. This week we report *Freifeld v West Kensington Court Ltd*.

several owners since the original covenant, so if the named party is no longer in existence then it is possible that the consent proviso is no longer enforceable.

Is reasonableness implied in the giving of consent?

In our case study Mrs Smith could not withhold her consent unreasonably. However, if there is no reference to reasonableness the court will sometimes imply a requirement for reasonableness, especially where the consent is required for a specific matter such as the approval of architectural plans.

If the covenant implies that something will be permitted (eg the erection of an extension) but that this will be subject to regulatory controls (eg approval of plans) then the court is more likely to imply a requirement for reasonableness in the consent.

In our case, we wrote to Mrs Smith making a formal request that she grant consent specifying full details of the proposed works, including plans. Our clients also offered to comply with the Party Wall Act 1996 requirements.

Mrs Smith's initial response was not to give consent, indicating that the proposed building was too large and the disruption would be too great. She also hinted that if she were to provide consent she wished to receive substantial compensation.

What can Mr and Mrs Brown do?

Can Mrs Smith refuse consent? There is an express obligation on her not to refuse consent unreasonably. The existence of Mr

carried out on Mr and Mrs Brown's property. It concluded that a future buyer would not know the background and would have no knowledge of what the property was like before, in which case there was no diminution in value. However, in this case the surveyor also took a more subjective approach and asked what Mrs Smith, as a prudent person (within the definition of a purchaser in the RICS definition of market value) might be prepared to pay to stop the development going ahead.

The surveyor also provided a loss of amenity value based on the building works being carried out for approximately one year. He factored into his valuation the fact that Mrs Smith may have had to rent another property for the more disruptive part of the building work. The report also addressed the specific concerns Mrs Smith raised in her correspondence. The report concluded with a statement that any diminution in value would be limited to a few thousand pounds and that the maximum loss of amenity was assessed as the same.

Tactics

Our aim was to demonstrate to Mrs Smith that she could have no tenable objections to the proposed development and on the facts she would be unreasonable to withhold her consent.

Our clients agreed to pay her solicitor's fees for dealing with the approval and we set a limit on these. We then exchanged correspondence with her solicitor while at the same time imposing a tight timetable. We commissioned the expert report, which

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and Mrs Brown's planning consent is not relevant as the planning considerations are different to those under the covenant.

The burden of proving unreasonableness by Mrs Smith, in her refusal to allow the proposed works or part of them, is on Mr and Mrs Brown. Mrs Smith must show that the conclusions which led her to refuse consent were ones which might be reached by a reasonable person, but she does not have to show that she was justified in reaching those decisions.

As a way of assessing whether Mrs Smith would be reasonable or unreasonable in refusing consent to all or any of the proposed works, we commissioned an expert report by an experienced chartered surveyor. We asked him to examine the impact of the proposed works on Mrs Smith's property in terms of value and also the effect of the temporary disruption on Mrs Smith.

The report considered whether a future buyer would pay less for Mrs Smith's property once the proposed works had been

make a claim in the Chancery Division of the High Court. The general rule is that the claimant seeking a declaration will pay its own costs even though it is successful (and those of the defendant until that party takes the decision to dispute the claim in his or her own right).

The second remedy would be to seek modification of the covenant to allow the proposed works by applying to the Upper Tribunal (Lands Chamber). The tribunal is the traditional forum for challenging a covenant.

In terms of tactics, it may be better not to make a formal application to the High Court and instead apply to modify the covenant under section 84(1)(aa) of the Act in the tribunal.

This application would be made on the basis that the covenant does not secure to Mrs Smith any benefit of substantial value. In other words, the proposed works will not cause any significant diminution in value to Mrs Smith's property.

In adopting such a course there is a risk that the tribunal might find that Mrs Smith had been reasonable in refusing consent, and in such an event the application would fail; see *Re Wild's Application* [2012] UKUT (LC) 306.

In the tribunal, if successful, the claimant may have to pay some compensation. With regard to costs, these can be high, depending on the case, the evidence and the nature of the objection. Under the tribunal's practice directions it is normal for the applicant to bear his own as well as his opponent's costs of the substantive application even if successful.

However, the respondent's conduct and other factors can change the application of this rule; eg where the respondent acts unreasonably by taking bad points and wasting time at the hearing.

It should be noted that compensation is not usually based on a release fee but on the diminution in value of the respondent's property as a result of the proposed works being carried out. There may also be a smaller award to allow for the temporary effect on him while they are carrying out the proposed works.

A positive outcome

In our case we, as a legal team, planned each response methodically and aimed at a conciliatory approach. Front-loading a lot of the work and having a full expert report prepared at an early stage we believe helped bring about a successful result.

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