Restrictive covenants and prevention of development

Gateley Plc

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It is not unusual for development properties to be affected by restrictive covenants governing the future use of the land. A restrictive covenant places restrictions on the use or development of land, for the benefit of another piece of land. They are enforceable by one land owner against another. They must be negative (or restrictive) in nature, and will run with the land so that they can be enforced by subsequent owners against one another.

Often the restrictions will have been imposed many years previously, and the intention of the parties, or the identity of the beneficiaries, is not clear. In these situations the default position is to obtain indemnity insurance. However, a recent case which went before the High Court has served to highlight a practical alternative to insurance when dealing with restrictions that are not clear.

In the case of *Royal Mail Estates Ltd -v- Pridebank Ltd and others* [2015] EWHC 1540 (Ch), the developer applied to the High Court for a declaration as to the nature and extent of a restrictive covenant, instead of obtaining insurance.

Royal Mail Estates Limited (Royal Mail) owned a site in Nine Elms, Vauxhall, close to a property which was being developed for use as the US embassy. This presented the potential for an increase in the demand for residential property in the area. Planning permission was obtained for the redevelopment of the Post Office site for a mixed residential development with retail units, restaurants, offices, sports facilities and a school.

However, the Royal Mail site was subject to a restrictive covenant, as follows:

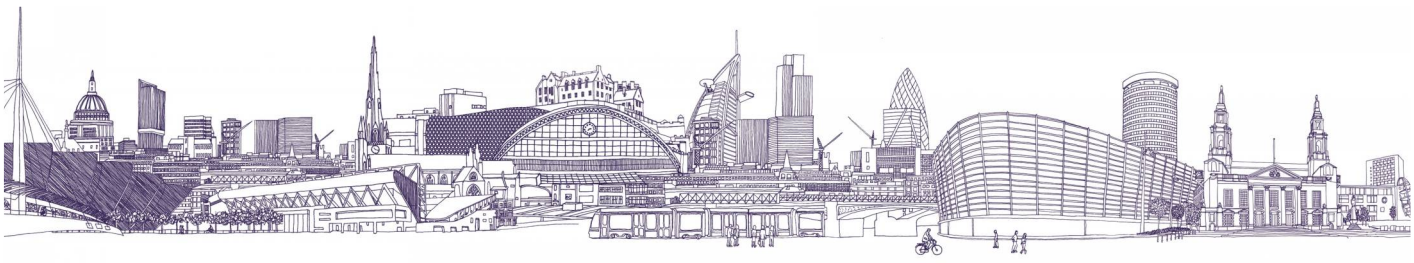
1. "*Not to use the property or any part thereof for uses other than as a parcels constructions office and mechanical letter office telephone exchange or for other Post Office operational purposes or for uses falling within clauses 3, 4 and 10 of the Town and Country Planning (Use Classes) Order No 1385 of 1972 ('the Use Classes Order') or housing and purposes ancillary to Post Office operation uses or to the said classes 3, 4 and 10 including offices and housing*."
2. "*Not to use the property or any part thereof for office development, except as ancillary to the uses permitted in the foregoing clause*."

Royal Mail asked the High Court to rule whether the use of the land for housing had to be ancillary to the use as a parcels construction office, or whether it could be used independently for housing.

The court ruled in Royal Mail's favour, and found that the words 'or housing' operated as a standalone alternative to the other permitted uses. This was supported by the fact that the second paragraph of the restriction lists those uses which are expressly prohibited, office development being the only use mentioned. Therefore, the residential development of the site was not prevented by the restrictive covenant.

This case makes it clear that covenants must be carefully worded and the intention of the parties made clear. The courts will strictly interpret the wording of the restriction in order to ascertain what was actually meant at the time.

Indemnity insurance is a useful tool, but it should be remembered that it is not infallible and in a situation such as this, where the wording of the covenant could potentially prevent the development going ahead, it may be worth applying to the courts for a ruling, if the wording is open to interpretation.



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If you would like to discuss any of the issues raised in this update, please contact

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