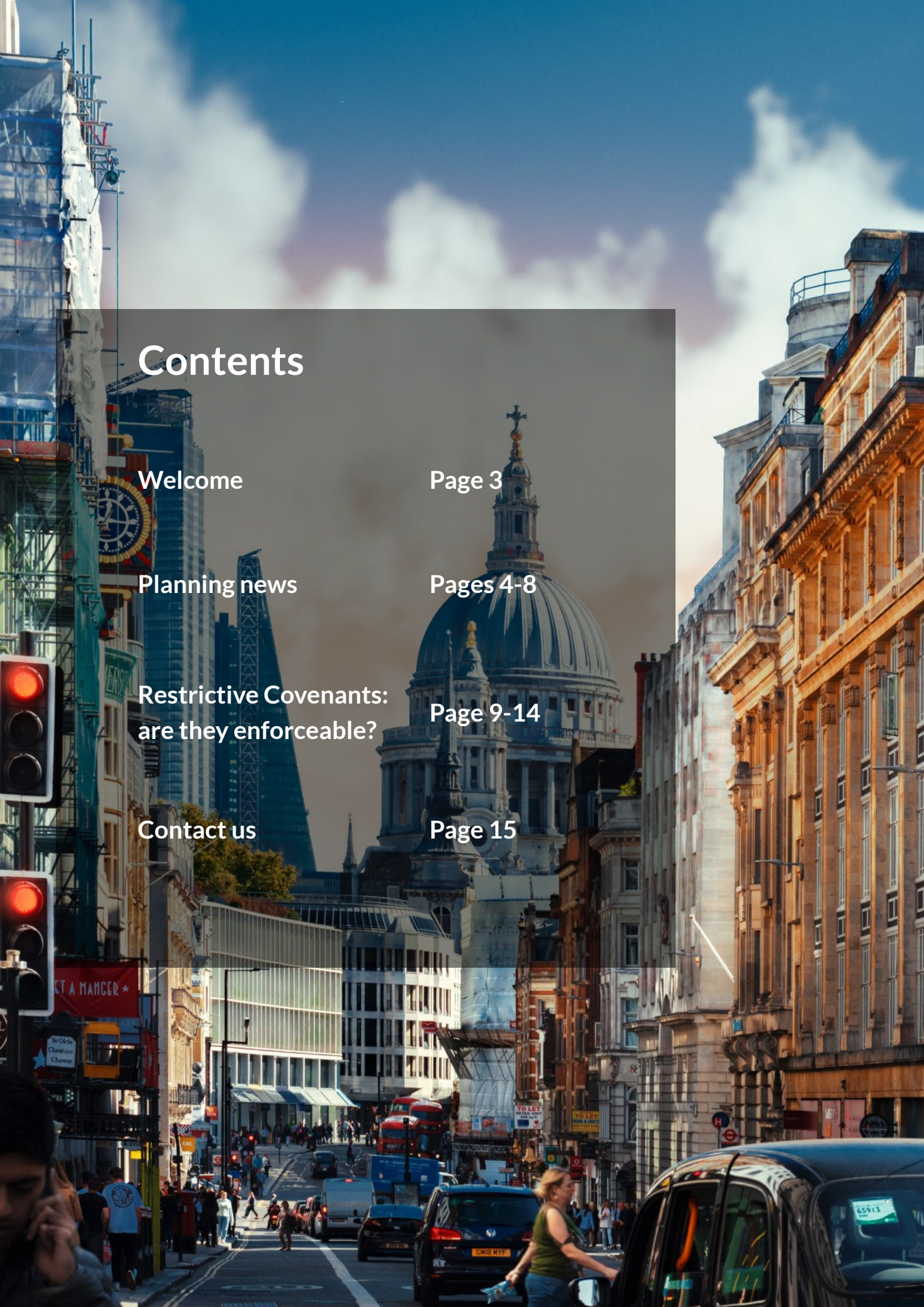
DRUCES LLP

Real Estate Newsletter

Autumn 2022



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Welcome

Welcome to the Autumn edition of our Druces Real Estate Newsletter.

Though we continue to deliver the latest stories from the sector as usual, the format and design of our newsletter has changed. Instead of posting all the stories on the website as one exhaustive list, we have given the newsletter a new lease of life, with added imagery, easier access to the news relevant to you, and a more focused, refined list of articles.

Taking over from Nicholas Brent, this is my first Real Estate Newsletter to you, so I am sure there will always be room for improvement in future editions. Therefore, any feedback and comments on the content covered will always be welcomed.

Please feel free to forward the newsletter onto your colleagues and contacts who may find it interesting.

I am also pleased to announce that our Residential Property team has been ranked in The Legal 500 directory for the first time, to find out more about this please read our website article.

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Planning

‘Hope Value’ and the Opportunity for Upward Extension of Residential Blocks

A relaxation of planning rules has presented landlords of residential blocks with the tempting opportunity to extend them skywards, creating additional apartments. In a guideline case, the Upper Tribunal (UT) addressed the thorny question of whether one such project could be embarked upon without breaching tenants’ rights.

A tenant-owned management company applied to purchase the freehold of a block of flats under the leasehold enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993. There was an extant planning consent to construct two new flats on top of the block. An issue arose as to whether, or to what extent, the so-called ‘hope value’ arising from the planning permission should be reflected in the price the landlord was entitled to receive for the freehold.

In fixing the price (inclusive of hope value) at £49,500, the First-tier Tribunal (FTT) found that, despite the planning permission, the new flats could not be built without substantially interfering with the rights and obligations of the company and the flats’ tenants, as set out in their long leases. On the basis that the landlord might be able to reach a negotiated compromise with the tenants, the FTT assessed the hope value at £25,000.

Upholding the landlord’s appeal against that outcome, the UT noted that it had never parted with possession of the block’s roof and the airspace above it. They had not been demised to the tenants and, in principle, the landlord had the right to develop its own property as it saw fit. The UT acknowledged that the landlord would face practical challenges in building the flats without interfering with the rights and obligations of the company and the tenants. However, it assessed the hope value at £166,725 and the total price payable by the company for the freehold at £191,225.

Defying Planning Rules is Not a Route to Profit But to Stern Punishment

There are sadly always a few people who see defiance of the planning system as a route to a quick profit. However, as a High Court ruling showed, those who fail to respect the rule of law can expect to be publicly shamed and sternly punished.

The case concerned a developer who, with others, bought a plot of agricultural land at auction for £55,000. Soon afterwards, he set about clearing, levelling and fencing the site without making any attempt to engage in the planning process. Fearing that his ultimate objective was to convert the site into an unauthorised caravan park, local residents complained to the local authority.

The council obtained a number of court orders against him and subsequently sought his committal to prison for his contempt of court in failing to obey them. He belatedly admitted that, in breach of one order, four loads of topsoil had been brought onto the site for levelling purposes. He also accepted that aggregate and topsoil previously deposited on the site had not been removed prior to a deadline set by a judge.

Ruling on the matter, the Court noted that his behaviour matched the playbook of unscrupulous developers who seek to make a quick profit from land transactions by undertaking unauthorised development and then presenting local authorities with a fait accompli in the hope of obtaining after the event planning permission which, they calculate, is worth the risk of enforcement action being taken against them.

His flagrant and serious disregard of planning restrictions undermined both the rule of law and public confidence in the planning system. Prior to admitting the acts of contempt, his evidence to the Court was largely made up of bare denials, vague explanations, evasions and untruths.

His activities caused anxiety and distress to local residents who endured the sudden and unheralded loss of familiar woodland, the erection of unsightly fencing and the comings and goings of heavy lorries. The council had expended considerable time and resources in dealing with his unlawful behaviour, including numerous site visits, preparation of evidence and attendance at four court hearings.

The Court acknowledged that he had admitted the breaches, albeit at the 11th hour, and had now substantially complied with the court orders. Having belatedly sought planning permission, he was now engaging actively and constructively in the lawful process. He lived with his elderly parents, one of whom was terminally ill, and he had apologised personally to the Court for his disobedience.

Sentencing him to a three-month suspended jail term, the Court warned him that any further breaches of court orders would be likely to result in immediate imprisonment. In also ordering him to pay a £5,000 fine, the Court noted his modest income and that he already owed the council £20,000 in legal costs.

Upward Extension of Residential Blocks – Guideline High Court Ruling

Advances in building techniques have made it possible to build additional storeys on many blocks of flats. Such developments may not be popular with existing residents but, as a High Court case showed, the pressure on housing stocks is such that planning permission for them is frequently forthcoming.

The case concerned planning consent granted for a one-storey upward extension to a four-storey block. The development, which included five exterior elevators, would provide 16 additional residential units in an area of high housing demand. The block's residents' association was united in opposing the scheme.

The association's core concerns were that the extension could not be safely built and that top-floor residents might have to vacate their homes during the construction works. A local authority planning officer's report, however, praised the proposal as a high-quality, attractive development of appropriate scale. It stated that there would be no harm to a nearby conservation area, that the project accorded with the local development plan and that, despite some loss of sunlight, the effect on local residents' amenities would be negligible to minor.

In rejecting the association's judicial review challenge to the planning permission, the Court found that the council had properly addressed the issue of whether the block was structurally capable of accommodating an additional storey. It was entitled to conclude that structural issues would be more appropriately dealt with under the building control, rather than the planning, regime.

The developer's representatives had expressed confidence that solutions to any structural challenges could and would be found and that temporary displacement of existing top-floor residents was highly unlikely. That chimed with the professional experience of planning officers, the council was not required to insist on the developer submitting a full structural survey.

Inconsistent Planning Permissions – Guideline Ruling Focuses on Solar Farm

It may seem counterintuitive, but there is nothing wrong in principle with a council granting two planning permissions that are mutually inconsistent. The High Court made that point in upholding planning consent for a solar electricity substation.

A developer was granted permission in 2017 to develop a 72-hectare solar energy farm in the countryside, together with associated equipment and a 33kV substation to house switching gear. Crucially, a condition attached to the permission required that the development was not to be carried out other than in complete accordance with approved plans, which showed the substation located to the west of some overhead power lines.

It was, however, subsequently realised that the proposed substation would not be capable of connecting the farm to the grid via the power lines. In response to that difficulty, a further planning application was made to construct an enlarged 132kV substation in a new location to the east of the power lines. The local authority granted planning permission for that development in 2021.

In mounting a judicial review challenge to the 2021 permission, a local resident argued that the council erred in having no regard to the fact that it was inconsistent with the 2017 permission and could not be implemented without breaching planning control. That was because, if the 2021 permission were implemented, the project authorised by the 2017 permission – on which work had already begun – could not be carried out in complete compliance with the approved plans.

Rejecting her arguments, however, the Court noted that there is, in principle, nothing objectionable about a local authority granting two permissions that are inconsistent with each other. Such a course enables developers to choose which development to carry out. It was not inevitable that the developer would implement the 2021 permission, thus breaching planning control. There were other options available, including a fresh application for a composite permission to permit the solar park and substation as currently proposed.

The Court acknowledged that it might well be that the potential difficulties arising from the incompatibility of the two permissions were simply not considered by the developer before it submitted the 2021 planning application. It was, however, unsurprising that planning a project of such magnitude should be an evolving process.

The incompatibility between the two permissions was a matter for the developer to resolve and it was not something the council was compelled to grapple with or speculate upon. It was for the developer to decide how to complete the solar farm in a way that would not involve a breach of planning control.

Restrictive Covenants

Are they enforceable?

Land is often sold subject to restrictive covenants that inhibit the use to which it can be put. The restrictive covenants looked at in isolation can be very prohibitive. A broader review of the restrictions in terms of time, the person or land which they were imposed to benefit can lead to the covenant having lost its bite. However, they should not be ignored and planning permission does not cancel them or dilute their affect as the following examples demonstrate.

Rugby Club's Expansion Plans were not Inhibited by a 1922 Restrictive Covenant

The case concerned open land, part of which was leased to a rugby club. The club wished to build a new, larger stadium on the site, together with retail and commercial outlets and car parking. Potentially standing in its way, however, was a restrictive covenant that formed part of a 1922 conveyance. The club launched proceedings seeking a declaration that the covenant was no longer enforceable.

By entering into the covenant, the purchaser of the land in 1922 promised, both for itself and its successors, that nothing would thereafter be erected, placed, built or done on the land that might be or grow to become a nuisance, annoyance or disturbance, or otherwise prejudicially affect the adjoining premises or the neighbourhood.

In refusing to grant the declaration sought, a judge rejected the club's argument that, following the original vendor's death, there was no one who could claim to have the benefit of the covenant. The judge found that the benefit was annexed to the land and bound all future proprietors. On that basis, the covenant could potentially be enforced against the club by any owner of land in the neighbourhood.

Upholding the club's challenge to that outcome, the Court found that the conveyance did not identify the land intended to be benefited by the covenant with sufficient clarity. The word 'neighbourhood' was inherently imprecise and lacked conceptual certainty. It was a singularly inapt term to use to identify properties to which the benefit of a covenant is intended to attach. The Court concluded that the benefit of the covenant did not run with the land and was therefore not binding on either the club or the land's freeholder.

Covenants Against 'Annoyance'?

Restrictive covenants that forbid property owners from causing annoyance, nuisance or disturbance to their neighbours commonly appear in title deeds – but how are they to be interpreted? A dispute between residents of a housing estate lead to the High Court giving authoritative guidance on that issue.

Properties on the estate were subject to a covenant prohibiting their owners from doing anything that would or might be, or grow to be, an annoyance, nuisance or disturbance to other residents. Despite opposition from their neighbours, a couple who lived on the estate obtained planning permission to build an extension.

The neighbours argued that the extension should nevertheless be prohibited in that it would breach the covenant. After a hearing, however, a judge found that there would be no such breach. In doing so, he asked himself whether a hypothetical reasonable person would be annoyed or otherwise aggrieved by the extension. He cited the example of an **ordinary, sensible English inhabitant of the estate.**

In challenging that outcome, the neighbours argued that the judge applied the wrong legal test and set the bar of reasonableness too high. They contended that, even if it could be said that the proverbial reasonable person would not be annoyed by the extension, the project should still be prohibited in that they would in fact be annoyed by it and their views could not be described as unreasonable.

Upholding the judge's ruling, however, the Court found that his interpretation of the covenant, which was of a very common type. Was entirely logical and sensible. In asking whether an ordinary, reasonable person, having regard to the ordinary use of the relevant properties, would be annoyed by the extension, he deployed a commonplace test that the courts are well equipped to apply.

Times Change and Antique Restrictive Covenants Become Obsolete

Antique restrictive covenants are found in the title deeds of many period properties and can have a deadening effect on development opportunities. However, as an Upper Tribunal (UT) ruling showed, they are not written in stone.

A large suburban house was subject to a number of restrictive covenants, some of which dated back to the Victorian era. One of them forbade construction of more than one dwelling on the plot. A developer had obtained planning permission to demolish the house and replace it with a block of eight flats.

Being unable to proceed with the project whilst the covenant remained in place, the developer applied to the UT under Section 84(1) of the Law of Property Act 1925 to discharge it. The application was fiercely resisted by residents of a neighbouring property, which had itself been converted into flats in the 1960s.

The objectors argued that, despite its age, the covenant continued to serve a useful purpose in preserving the character of the locality. They asserted that the proposed new block would lead to increased noise, light pollution, cooking odours and parking congestion. They calculated that, if the development proceeded, the value of their homes would be collectively diminished by over £500,000.

Ruling on the matter, the UT noted that, when the covenant was entered into, most of the houses in the area would have been in single-family ownership. At the time, flats would have been viewed as poor-quality, overcrowded accommodation. The perception of flats had fundamentally changed in the decades since and the area had seen a large number of apartment developments.

Finding the covenant obsolete, the UT noted that the proposed development was not only consistent with the local development plan but in keeping with its surroundings and consistent with the pattern of planning permissions nearby. The objectors' homes were already surrounded by blocks of flats and maisonettes and, in those circumstances, the covenant had become entirely superfluous.

The proposed use of the property to provide much-needed housing was reasonable and, if the intention of the covenant was to preserve the character of the area as it was at the time, that battle had long ago been lost. Disadvantages feared by the objectors were in any event illusory and there was therefore no basis on which compensation could be awarded. The covenant was discharged.

Not all restrictive covenants are obsolete or are too vague to apply. A couple wanted to construct an equestrian training facility on a field that they had recently purchased.

Less than a year after purchasing a field, the couple obtained planning permission to construct on it an unroofed manège that would enable the training of horses in a safe, all-weather environment. The facility was intended to benefit their daughter, a competitive equestrian. They were in for a nasty shock, however.

The occupants of a nearby farmhouse (the objectors) had the benefit of a restrictive covenant that restricted use of the field to arable farming and the grazing of sheep and horses. The couple were unaware of the full implications of the covenant when they purchased the field but accepted that, as things stood, construction of the proposed manège would breach its terms.

In an attempt to save their project, the couple applied to the First-tier Tribunal (FTT) for the covenant to be amended so that development of the manège could proceed. Given the grant of planning permission, there was no dispute that the manège would constitute a reasonable use of the land. The objectors, however, said that it would impinge on their privacy and views from their home.

Ruling on the matter, the FTT noted that construction of the manège on top of a substantial earthwork embankment would significantly alter the landscape, creating a feature in plain sight that would be obviously man-made. The skyline viewed from the objectors' home would be permanently altered and not for the better. The proposed development would inevitably increase activity in the field and the character of the setting would change from one which was currently wholly bucolic to one which was busier, more managed and less tranquil.

In refusing to grant the modification sought, The FTT noted that the objectors had bargained for the covenant themselves when purchasing their home. The benefit that it conferred on them, in the form of some degree of control over activities that took place in the field, was of substantial value and advantage to them. Modifying the covenant would diminish the rural setting that underlay the identity of their home. Freehold owners of land generally believe that, subject to planning permission, they can develop their properties in whatever way they wish. However, as a High Court ruling strikingly showed, that is by no means always the case and restrictive covenats can not be ignored.

Two men wished to build homes for themselves on a parcel of land they owned in the heart of a pretty village. Planning consent for the proposed development had been obtained. The land, however, was subject to a restrictive covenant which dated back to 1960. It required them to obtain a neighbouring landowner's written consent before they could erect any building or wall on their property. The covenant stated that such consent was not to be unreasonably withheld.

The neighbouring landowner declined consent for the development and launched proceedings seeking a declaration that his refusal was reasonable. Development of the land having already commenced, he sought an injunction restraining the men from carrying out any further works without his permission. For their part, the men argued that his withholding of consent was unreasonable.

Ruling on the dispute, the Court found that some of the neighbouring landowner's justifications for declining to grant consent were irrelevant, unreasonable or both. However, he had legitimate concerns in respect of potential overlooking and the screening of an access track and his refusal was therefore reasonable. On that basis, he was entitled to an injunction and the declaration sought.

Irresponsibility and disregard of obligations affecting others can lead to serious consequences as the following examples show

Sensible property owners are not just interested in the regular receipt of rent but also choose their tenants wisely and take steps to ensure that they behave themselves. A First-tier Tribunal (FTT) ruling underlined the potentially grave consequences of failing to do so.

The case concerned the long leaseholder of a flat in a purpose-built block who sublet the premises to a couple who had been the subject of a barrage of complaints from other residents. They were said to have continuously disrupted neighbours' lives by smoking drugs in the property, causing regular and severe noise nuisance, littering and engaging in various acts of anti-social behaviour.

The landlord of the block responded by seeking a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the leaseholder had breached various covenants or conditions in her lease. They included a requirement not to create noise that caused annoyance or nuisance to other residents and an embargo on the flat's use for illegal or improper purposes.

In granting the determination, the FTT noted that the leaseholder had not engaged in the proceedings and that evidence from neighbours concerning the couple's behaviour had thus gone unchallenged. She had also breached a term in her lease that forbade subletting of the flat without the landlord's consent. The ruling opened the way for the landlord to seek forfeiture of her valuable lease.

Residential landlords sadly often focus on collecting rent and take a laissez-faire attitude to the condition of their properties. However, as a Court of Appeal ruling underlined, they take a huge financial risk in doing so. A tenant of a shared property asserted that it was in such an extremely poor state of repair that his living conditions became intolerable. He complained of, amongst other things, damp, filthy and infested carpets, a leaky roof, unstable floors and a cooker that had been condemned as unsafe.

His landlord launched possession proceedings against him in respect of rent arrears. Her claim was, however, dismissed by a judge who went on to uphold the tenant's counterclaim. He found that the landlord had breached an implied covenant in the tenant's lease that required her to keep the property in reasonable repair. The landlord was ordered to pay damages equivalent to 50% of the rent that the tenant had paid over a period of over seven years, plus interest. His monthly rent during that period was between £900 and £1,050. His damages were uplifted by 10% and the landlord was additionally ordered to return his deposit and pay a penalty of £3,150 under Section 214 of the Housing Act 2004. She was also required to pay his legal costs. Her initial appeal against the amount of the award was dismissed.

In upholding the landlord's challenge to that outcome, the Court found that the tenant should only have been awarded damages in respect of a period of about three years during which he formally occupied the property as an assured shorthold tenant. The landlord's challenge to the 10% uplift was dismissed. Lawyers were left to calculate the precise amount of compensation payable to the tenant.

We hope you have enjoyed the new-look Real Estate Newsletter. Please visit the website for details of all the services our team can provide, we always welcome calls from clients.

We also welcome feedback, and will use this to generate and develop new ideas to improve this newsletter for future releases. Feel free to get in touch below.

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