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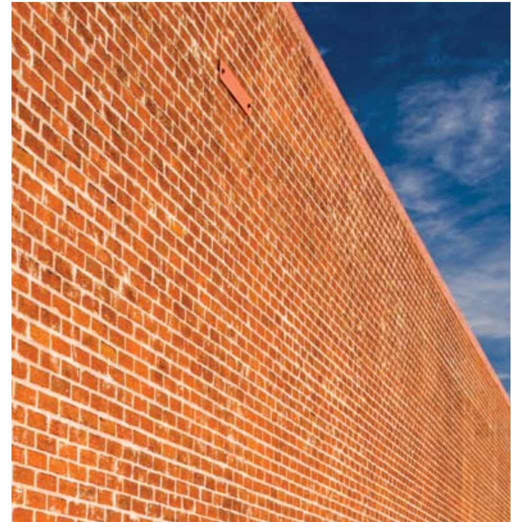
Real Estate Update

The annoying extension



Back in the late 1980s, a former mill on the banks of the river Thames got a facelift. It was transformed into 50 smart new homes, all carefully oriented to maximise views of the river through deliberately designed gaps between the houses.

Harriet Forster
+44 (0)20 3060 6371
harriet.forster@rpc.co.uk

Each purchaser entered into a restrictive covenant, not to "*do or suffer to be done …anything …which may be or become a nuisance or annoyance to the owners or occupiers for the time being of the estate or the neighbourhood*". The covenant was made with the developer, the management company and all the other property owners on the estate for the benefit of the rest of the estate.

Fast forward 20 years and one owner (Mr Davies) decided to build a three storey extension to his riverside pad, but his neighbours had other ideas. They argued that the extension would create an "annoyance", by reducing their views of the river. Some pointed to a significant reduction in their view of the river through the gaps between the houses; others merely complained that the development was not in keeping with the rest of the estate. They also tried to argue that the extension would reduce the value of their own properties, although later expert valuation evidence revealed that this was not the case.

The owner accepted that he was bound by the restrictive covenant, but denied that his proposed extension would breach it. He also sought to argue (unsuccessfully) that the restrictive covenant only applied to what he did in the property, not to the building itself – there was a separate restrictive covenant dealing with alterations to the building, which required him to get all plans and elevations approved in advance by the management company.

What is a nuisance or annoyance?

The judge decided this is an objective test, to be determined by "*robust and common sense standards*": would reasonable people, having regard to the ordinary use of the neighbours' houses for pleasurable enjoyment, be annoyed and aggrieved by the extension? Would the extension trouble the mind of the ordinary sensible English inhabitant of the neighbours' houses?

The judge decided that the answer to all these questions was yes. Based upon his visit to the site, he concluded that "*the three storey red brick extension would trouble the minds of the ordinary sensible English inhabitant of any of those houses and in those circumstances it does constitute an annoyance.*"

What does this mean?

- This case confirms that a covenant against annoyance and nuisance can apply to the alteration and construction of buildings.
- It also highlights the fact that would-be developers may need more than planning permission to go ahead with their building works. Mr Davies had already obtained planning permission but his troubles were by no means over. As well as the restrictive covenant against annoyance and nuisance, there was a further restrictive covenant requiring him to get his plans approved by the management company before starting work.

Possibly Mr Davies could have tried to obtain indemnity insurance, but it is unlikely in the circumstances that insurers would have considered this, especially if there had been objections to his planning application. An approach to the neighbours was clearly not going to receive a positive response so another option would have been to make an application to the Lands Tribunal to discharge or modify the restrictive covenant, but this is a slow and expensive process, with no guarantee of the desired result, especially as the reason for the covenant being imposed in the first place was still very much in existence.

Landlords beware

The courts have recently reminded landlords and their advisors that landlords can inadvertently grant their consent even if their correspondence with the tenant (or their advisor) contained the warning that "*this correspondence does not constitute the provision of consent by our client*" and that " *such consent will only be provided on the completion and delivery of a formal licence executed as a deed*".

Alex Prew
+44 (0)20 3060 6526
alex.prew@rpc.co.uk

The case

The contract for the sale of a leasehold property incorporated a condition that if the landlord's consent to the assignment was not provided three working days prior to the completion date or consent had been given subject to conditions which the buyer reasonably objected to, either party could rescind the contract.

As the facts would have it, the buyer sought to rescind the contract on grounds which included that the landlord's consent had not been given by the completion date. Although a formal licence had not been completed, the court ruled that the correspondence from the landlord's advisor had amounted to clear consent. This is despite a number of their letters being headed "*subject to licence*" and coupled with a statement of conditions attached to their consent ie a condition that an undertaking for their fees was to be given. The landlord's advisors had also written various letters confirming their client's consent in principle to the assignment "*subject to licence*".

The court referred to a previous case which had determined that the words "*subject to licence*" added little and could not qualify the unambiguous consent the body of their letters contained. This was on the basis that the terms of the lease did not require consent to be given as a deed but simply in "*writing*".

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The lessons

The court stressed that by heading a letter "*subject to licence*" the landlord would, at most, emphasise the degree of formality should the terms of the lease require a full blown licence which is executed as a deed (which was different to the case which has recently been decided). So if the landlord states their consent is granted in principle subject to formal completion as a deed, that statement may not be seen as granting consent if the lease requires that consent must be given by deed.

Therefore, if it is not intended that any correspondence should amount to a consent, great care needs to be taken in its drafting. In correspondence with the tenant or its advisors, the landlord or those advising him should not state that consent is given in principle but should emphasise that nothing other than completion of a formal licence executed as a deed is to be taken as constituting consent.

Why this matters for landlords

The downsides to the landlord of accidentally granting a consent can be serious and materially adversely affect the value of its reversion. First of all the landlord might end up with a tenant whose covenant strength is not what they might have wished for – why would the new "*consented*" tenant subsequently pay over a rent deposit? Secondly, for leases granted on or after January 1996 the landlord will have lost the opportunity of obtaining an authorised guarantee agreement from the previous tenant and therefore will have no ability to claim against the previous tenant should the new one default.

Editor

Mark Lavers
+44(0)20 3060 6432
mark.lavers@rpc.co.uk

Reynolds Porter Chamberlain LLP

Tower Bridge House
St Katharine's Way
London E1W 1AA
+44(0)20 3060 6000

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