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[headline]Why restrictive covenants are a rising risk

[standfirst]The profession is seeing increasing demand for expertise in neighbourly matters – and it's not because more people are spending time at home

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The experience of spending more time at home this year has led to a collective reassessment of our priorities. As a nation, the home has become the centre of everything, our place of work and relaxation. Housing sales are buoyant according to RICS market research, and finding the right home has become increasingly complex. New factors such as space for an office have become more important than a short walk to station, while an excellent broadband connection and access to outdoor spaces have also rocketed up the priority list.

We have also become increasingly aware of our neighbours. Is this something professional developers should focus on, and change the culture of aggressive bully schemes?

Emerging risk

Major cases this year help illustrate that development is a high-risk endeavour. Restrictive covenants are now a greatly increased risk, and as the full impact of November's Supreme Court decision in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 ripples through the profession, market risk registers for 2021 will be changing.

In this case, Millgate Developments Ltd acquired a site and then applied for planning permission to build 23 affordable houses there, in line with its planning obligations. However, a problem arose with the neighbours because 13 houses were to be built on land under a restrictive covenant, which said: *"No building structure or other erection of whatsoever nature shall be built or erected or placed on [the land]"; and "[The land] shall not be used for any other purposes whatsoever other than as an open space for parking of motor vehicles"*. The original vendor that created the restrictive covenant in 1972 was a John Smith, a major landowner and farmer in the local area. The original transaction also included an overage provision however this expired in 1994.

It is important to remember that private rights, such as restrictive covenants, do not prevent the granting of planning approval. Planning permission had been given in March 2014 and Millgate began construction in July that year. Therefore the existence of a planning permission should give zero comfort to a Technical Due Diligence or Project Monitoring Surveyor, the risk of enforcement from neighbours is still fully live.

The neighbour and beneficiary of the restrictive covenant in this instance was the owner of the adjacent land, the Alexander Devine Children's Cancer Trust. Neighbour disputes commonly have circle within circle relationships and this is a classic example of the interlink of relationships over time. At the centre of the dispute was the fact that the land in question had been gifted by Barty Smith, the son of the original John Smith, on 2nd December 2011 for the construction of a hospice for terminally ill children. This direct relationship in the parties seeking to enforce the restrictive covenant was commented upon by the Supreme Court.

In September 2014, in line with known best practice, the Trust wrote to Millgate to object to the development. This meant that Millgate continued to build in full knowledge that it was breaching the covenants.

Aggressive applications

At the core of this case is the established concept, now reinforced by the Supreme Court, that developers must avoid committing a cynical breach, which the court defined as the act of *"deliberately committing a breach of the restrictive covenant with a view to making profit"*.

Aggressive developers have, over the past 20 years, become emboldened to use the cost of prospective litigation and the complexity of this specialist area of law to build regardless, and then seek release after development has been completed. This strategy has in part been enabled by poor technical due diligence from funders and those parties unknowingly holding the risk. That tactic was used by Millgate in *Alexander Devine* when, in July 2015, it applied to the Upper Tribunal seeking modification of the restrictive covenants after it had completed the development.

In the first instance this aggressive strategy appeared to have worked, and in November 2016 the Tribunal allowed Millgate's application. This decision took the view that the injury could be resolved by compensation of £150,000 to the Trust – effectively rewarding Millgate for poor conduct with super profit. The tactic was cynically deployed in full knowledge of the potential reward.

The Trust then did something amazing by appealing the decision. This was a courageous decision for a charity, and it was rewarded with a favourable reversal of the tribunal decision in the Court of Appeal.

Typically, it is at this stage that restrictive covenant litigation would have ceased – almost by tradition, because no case under the Law of Property Act 1925 involving the modification of a covenant had ever escalated to either the House of Lords or Supreme Court. Nevertheless, Millgate appealed to the Supreme Court. On 6 November 2020, it refused the application to modify the restrictive covenant, and this now means the Trust could seek an injunction to enforce it requiring the demolition of the now built housing units.

Powerful precedent

Let the enormity of this decision sink in. All those aggressive developers – and some who might think of themselves as simply being commercial in the strategies they deploy – are now at risk, the pendulum in the negotiation having swung firmly and decisively towards the holder of the adjacent land.

This is not just a trend in restrictive covenants. For instance, on 13th March 2020 the High Court handed down its second judgment in a complex and lengthy City of London rights of light dispute. Readers wishing to follow the case should start at the first decision, *Beaumont Business Centres Ltd v Florala Properties Ltd* [2018] EWHC 2112 (Ch), and then move to [Beaumont Business Centres Ltd v Florala Properties Ltd \[2020\] EWHC 550 \(ch\)](#). Here, the court granted a neighbour's injunction to cut back a building in this case the property was not only built but had already been tenanted.

This case can also be traced back to decisions made by the developers to adopt highly aggressive strategies, seeking to impose schemes on neighbouring landowners only to realise that the courts are no longer supporting this stance. What may shock readers is that a deal had been negotiated which the developer walked away from in the false belief that it could impose the scheme on the neighbour.

The courts are therefore clearly signalling to the market that such aggressive tactics will not now be rewarded. So how is this going to affect professional practice in 2021?

Early signs of the mood change can be seen in the [debate](#) on Schedule 23 of the High-Speed Rail (West Midlands to Crewe) Bill 2020 in Parliament on 12 November 2020

There was little support for the idea of a public infrastructure body, such as HS2, appearing to act in a high-handed or aggressive manner against the private rights of adjacent landowners. As this article is being drafted, further ministerial meetings are being held to seek to achieve a more balanced solution that protects landowners' rights. RICS has been formally requested to form an industry expert working group to prepare practitioner guidance on the operation of the legislation. This grouping has representation from the Institution of Civil Engineers (ICE) and senior legal practitioners. This grouping is now meeting online in compliance with lockdown conditions and this should be in a position to published draft guidance in early 2021.

Revising the register

Experts in neighbourly matters will tell you that, as a professional discipline, it is booming. Developers are realising that the risk requires management, meaning that professionals are rediscovering soft skills such as negotiation. Development land is also being given more detailed investigation by developers and surveyors with the topic becoming high on TDD and project monitoring registers, this is to ensure the site it is free from the risk of neighbour injunction.

With any emerging trend, there is an increasing risk of non-qualified persons purporting to be expert. We suggest that the term should apply only to those with professional qualifications, established expertise, proper training, CPD, and professional indemnity insurance. RICS publishes professional guidance notes on technical due diligence, project monitoring, rights of light and party wall practice such that Chartered Building Surveyors are well placed to support clients seeking advice on this complex area of practice.

Developers' risk registers are likely to be adjusted to focus on negotiation and settlement and early release from issues. Table 1 suggests how a neighbourly matters section of the red–amber–green (RAG) risk register structure might look.

| Risk | Action |
|---|--|
| Is the project open to threat of injunction from third parties or adjacent landowners over rights of light or restrictive covenants? | Has an RICS member been appointed to resolve all neighbourly matters disputes? |
| Does the project need access to or over neighbouring land? Look for tower crane, scaffolding and buildability issues | Has the RICS member advised on potential negotiation positions and the possibility of insurance cover? Has an insurance broker been appointed to deal with this risk? |
| Does the development site have clear, well-defined and understood boundary features? | Does the project have a technical due diligence (TDD) report that expressly addresses restrictive covenant risk? |
| Does the proposed scheme of development trigger the need for notice under the Party Wall etc. Act 1996? | Does the project have a right to light report supported by 3D laser land survey and model assessment of the 360-degree risk profile for the height or distance coverage recommended in BRE BR 209? |
| Will the construction phase trigger noise, dust, vibration or structural damage risks that prompt action under either the Control of Pollution Act 1974 or Environmental Protection Act 1990? | Does the project have a report from an RICS member dealing with tower crane, scaffolding and development access rights? |
| Does the proposed design have a planning impact on daylight/sunlight? | Does the project site have a site survey from an RICS member identifying all boundary features and confirming the reasonable interpretation of ownership? |
| Does the project have a clear lead consultant responsible for all neighbourly matters reporting, or is risk fragmented with unclear lines of responsibility? | Does the scheme need to appoint a chartered building surveyor to perform the duties of named surveyor under the Party Wall etc. Act 1996? |

Table 1. Sample neighbourly matters section for a project RAG register