SQUIRE PATTON BOGGS

Enforcing Restrictive Covenants: Whose Interests will be Considered?

UK – July 2020

Where land has the benefit of a restrictive covenant over neighbouring premises, whose interest will be taken into account when enforced and what considerations are permitted when deciding to grant consent?

This was the question that the Court of Appeal faced in *89 Holland Park Management LTD v Hicks [2020] EWCA Civ 758*.

Facts

Ms Hicks acquired the site neighbouring 89 Holland Park (the Building) in 2011. The Building had been divided into flats held under long leases.

Ms Hicks' land was subject to restrictive covenants that benefited the Building which prevented Ms Hicks from making any planning application, nor commencing any works, without such application or works being approved by the adjoining owner of the Building.

Ms Hicks submitted plans for approval to the management company (the Company), who owned the freehold of the Building. The proposed works were opposed for various reasons, including aesthetic and environmental concerns held by the leaseholders occupying the flats in the Building.

Decision

High Court

In the High Court proceedings resulting from this dispute it was found that, although the leaseholders could enforce the restrictive covenants, the Company was not entitled to take into account the leaseholders' interest when deciding whether or not to grant consent. As such, consent could not be refused by the Company to Ms Hicks' proposed works, based upon aesthetic and environmental concerns.

In short, the High Court held that the Company was only entitled to take into account matters that affected its own reversionary interest, such as the capital value of the Building.

Court of Appeal

The Court of Appeal disagreed with the High Court and found that the restrictive covenants were for the benefit of the Building as a whole and not just for the benefit of the freeholder's interest.

It was noted that s78 Law of Property Act 1925 deems a covenant to be made with the covenantee and its successors in title.

This would include the owners and the occupiers of the Building. As such, the Court of Appeal found that the Company was entitled to take into account the interest of the leaseholders.

As the restrictive covenant related to approval of "plans, drawings and specifications", the Court of Appeal found that "it would be extraordinary if . . . the decision maker could not take into account what the proposed building would look like".

With a covenant such as this, the property interests taken into account have to go further than a mere interest in the bricks and mortar or capital or rental value of the property. As such, the Company was permitted to take into account the occupiers view on the aesthetics of the proposed works.

This case has now been referred to the Chancery Division to consider whether the aesthetic and environmental concerns were reasonable grounds on which to withhold consent.

Practical Significance

This case has widened the scope in regards to whose interest can be taken into account when enforcing restrictive covenants. As such, long leaseholders of premises will welcome this decision when a restrictive covenant is in place and benefits the relevant premises.

In widening the pool of whose interest will be considered, this case will serve as a warning to developers looking to develop land that has restrictive covenants in place. It will also serve as a reminder that aesthetic concerns may be a reasonable consideration in withholding consent.

Should you require any assistance in respect of restrictive covenants over land, or otherwise, please do not hesitate to contact our Real Estate Litigation team.

Contacts

Bethany Reid
Senior Associate, Leeds
T +44 113 284 7037
E bethany.reid@squirepb.com

David Holland
Partner, Leeds
T +44 113 284 7014
E david.holland@squirepb.com

39043/07/20