

# Restrictive Covenants



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## What is a Restrictive Covenant?

A Restrictive Covenant is a promise by a landowner to use their land in a specified way or not to do certain things on it. Examples include not to use their land as a petrol station or not to build anything taller than 2 stories.

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## Why do you care?

If the promise is made by one landowner (the covenantor) to another landowner (the covenantee) then it may 'run with the land'. This means that anyone who owns the covenantor's land in the future will be obliged to honour the same promise – even though they didn't originally make it. Anyone who owns the covenantee's land in the future will have the benefit of the same promise – even though it wasn't originally made to them.

The covenantor's land is known as the servient land and the covenantee's land is known as the dominant land.

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## Breaking Promises

So, why do you care? – Because, if you buy the servient land, you may be bound by the promise. If you use or develop the land in a way that breaks the promise then the owner of the dominant land has two possible remedies against you – neither of them pleasant. They might be able to:

- obtain an injunction against you (i.e. the court will order you to stop); or
  - get an award of damages against you (i.e. the court will order you to pay compensation).
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## How do you find out if the land you are buying is subject to a Restrictive Covenant?

That's Lewis Silkin's job. If the land is registered at the Land Registry then they will have records of what, if any, Restrictive Covenants bind the land. We review those records as part of the conveyancing process – and, if we find anything, we'll be on the 'phone to you. If the land isn't registered then we will review the old title deeds – they will tell us if there are any Restrictive Covenants.

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## Don't Panic

So what do you do if we find that there is a Restrictive Covenant?

The first question to ask is 'will you actually be breaching it'. Not all Restrictive Covenants will be a problem. A common Restrictive Covenant is one that prohibits using the land for the sale of 'beer, wine or other excisable liquors'. If you are only developing residential properties then this isn't likely to be a concern..

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## OK, panic a little bit

However, if the intended use or development is likely to breach a covenant, then the risks associated with carrying on in breach need to be considered. Relevant considerations are:

- **How old is the covenant?** If the covenant was made two years ago in favour of a next door neighbour who still lives next door – the risk of action is probably quite high.
  - **Existing breach?** If the covenant is already being breached and no one has complained, then the chances of people complaining in the future may be less. In some cases, if your development is not going to make the breach any worse, it may be that the dominant owners have lost their rights.
  - **Who has the benefit?** It isn't just anybody that can come along and take action against a breach of a Restrictive Covenant. They need to show that they own part of the dominant land. It's therefore worth working out in advance who that is and what actual impact the proposal will have on them.
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## Keep Calm and Carry On?

If we have established that there is a Restrictive Covenant and that your proposals will amount to a breach, there are a number of options.

### Indemnity Insurance

The most common way of protecting against the risks associated with breaching a Restrictive Covenant is to obtain an indemnity insurance policy. If the dominant owner then

seeks to enforce their rights, the insurance company will, up to a point, compensate you.

Indemnity insurance isn't a solution to all your problems. At the end of the day you will be pretty unhappy if you can't deliver your scheme because the dominant owner succeeds in obtaining an injunction – but at least it will ease the pain by compensating you financially.

Indemnity insurance comes with strings attached. Policies will include a number of strict conditions that you must comply with. These will include obligations to tell the insurers immediately you become aware of a potential claim and requirements to keep the existence of the policy a secret from third parties. It is important that you make sure that you know what these conditions are and ensure that they are never breached. If they are, the policy may be void.

#### Negotiate a release

You may decide to approach the owners of the dominant land to see whether they would be willing to vary or remove a covenant. It is likely that they will request some sort of financial compensation for this.

It is vital that no approach is made before you have ruled out insurance as an option. Once you have started such discussions, you will have alerted the dominant owner to the situation and, after that, insurers are highly unlikely to be willing to cover the risk if the discussions do not go well.

#### Removal

Restrictive Covenants which are no longer relevant can be removed under s.84 of the Law of Property Act 1925. An application can be made to the Lands Tribunal either to remove or modify a covenant.

This can be a long process, with considerable cost attached, including the possibility that the Tribunal may order compensation to be paid to the owners with the benefit of the covenant. In practice it is rare to go down this route.

have exchanged contracts. Walking away is never easy – but you may have no other option.

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### If you only remember five things, remember these five things:

1. Restrictive Covenants are promises made by a landowner not to use their land in a certain way or not to do certain things on it.
2. Restrictive Covenants may 'run with the land' – that means that they will bind anyone who subsequently owns the land.
3. If your proposed development would breach the terms of a Restrictive Covenant the dominant owner may be able to get an injunction to stop it and/or claim damages.
4. The most common way of dealing with the risks associated with breaching a Restrictive Covenant is insurance.
5. Restrictive Covenant Indemnity Policies contain a number of conditions. If these are breached the policy may be void.

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### OK, panic again

If your scheme is going to breach a Restrictive Covenant and the dominant owner is adamant that they don't want it to go ahead – they may be able to put a stop to it. It is therefore important that all these issues are resolved before you are committed to the development – i.e. before you

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## ...little bits of law

This is one in a series of leaflets published by Lewis Silkin LLP, providing information on a range of legal issues that face our developer clients. Other topics discussed range from boundaries to wildlife.

Professional advice should be obtained before applying the information in this client guide to particular circumstances.

For a full list of available leaflets please visit our website or contact [patrick.brown@lewisilkin.com](mailto:patrick.brown@lewisilkin.com).

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