



Developing in the new normal

Covering the latest topics, aimed at developers, investors and contractors

8 November 2023

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Agenda

1. **CMA review of estate management-** Digby Morgan
2. **Japanese Knotweed- what buyers look for, and developers need to provide-** Kate Davies
3. **Restrictive Covenants- Perils, Pitfalls and how to get out of them –** Guy Willetts
4. **Title insurance- What can it cover?** Danielle Roberts



CMA review of estate management arrangements

Digby Morgan



CMA review of estate management arrangements

- The Competition and Markets Authority (CMA) has announced a review of the management of public amenities on housing estates.
- Part of its wider review of housebuilding sector.
- Why?
 - Public adoption increasingly rare
 - Perceived unfairness and lack of transparency
 - High charges
 - Lack of services
 - Lack of options
- Consultation closes **24 November**.
- See: www.gov.uk/cma-cases/housebuilding-market-study

Japanese Knotweed- what buyers look for, and developers need to provide

Kate Davies



Japanese knotweed - what buyers will look for, and what developers need to provide

- what is the issue with invasive species?
- how do you get rid of it?
- residual risks?

Things to consider on an insurance backed contractor guarantee

- What area is covered?
- Beneficiaries - assignable? Cost?
- Additional cover - Building Damage covered? Duration?
- Limitations / endorsements - “ground disturbance” - does policy allow for construction /redevelopment of affected land?

Restrictive covenants: Perils, pitfalls and how to get out of them

Guy Willetts



What is a restrictive covenant?

- An agreement in a deed that one party will restrict or limit use of its land in some way for the benefit of someone else's land
- Enforceable as between original parties, and (subject to satisfying certain legal tests) enforceable between successors in title as well
- Negative, not positive

Examples of restrictive covenants

Limit use of land (e.g. residential purposes only)

Prohibit particular trades or businesses (e.g. not for sale of alcohol)

Forbid undesirable activities

Restrict number or type of buildings that can be built

Restrict height of buildings


Remedies for breach (a.k.a. the perils and pitfalls)

- Starting point; an injunction
- Equitable remedy (i.e. Judge's discretion paramount)
- Do not delay
- Damages in lieu may be awarded
 - Injury to Claimant's rights is small
 - Value of injury can be calculated in money
 - Injury can be adequately compensated by money payment
 - Oppressive/disproportionate to grant injunction

Legal strategies (a.k.a. how to avoid the perils)

- Is covenant genuinely restrictive (or is it positive in disguise)
- Has benefit passed
- Has burden passed
- Precise wording of what is prohibited

Practical strategies (a.k.a. how to avoid the pitfalls)



Do nothing – highest risk
Modify the development
Get indemnity insurance
Negotiate release or modification
Section 84 Law of Property Act 1925

Section 84 Law of Property Act 1925 – not a get-out-of-jail-free card

Upper Tribunal (Property Chamber) has power to modify or discharge restrictive covenants



Limited number of criteria to satisfy



Overlapping criteria



Quite a high bar to satisfy requirements, especially the discretionary requirements

Defective Title Indemnity Insurance

Danielle Roberts



What is indemnity insurance?

- Aims to cover legal costs and potential damages.
- Aims to protect from financial loss.
- Covers legal defect with the property that either cannot be resolved or would be very costly/time consuming to do so.
- Common indemnity policies in property transactions:
 - Restrictive covenants – e.g. covenants that restrict the use of the property.
 - Planning permissions – e.g. previous owner has made an alteration to the property without planning permission.

What is a defective title?

Missing documents

Illegible wording or plans

Access issues/lack or rights over access in use

Outstanding rights

No or limited title guarantee

Indemnity insurance for defective title

- Many indemnity insurance providers will offer insurance for defective title.
- Check the conditions and assumptions contained within the policy – it may be easy to invalidate.
- For example, many policies will assume:
 - There has been no communication with any person(s) that may be entitled to enforce.
 - No breach is planned.
 - The property or right has been in existence for over X years.

Access – "inadequate legal rights of way to and from your property and the true owner(s) of the unadopted access attempts to prevent your use"

This quotation is provided on the understanding that the following are correct, and if this is the case, you do not need to confirm them further:

1. The property has been used for the same purpose for the last 12 months
2. There has been no communication, relating to the access, with any person(s) or organisation that may be the owner of the access
3. The access to the property is unobstructed and believed to have been in use 'as of right' without interruption or payment, for at least the last 12 months



What are my obligations?

- You, or anyone acting on your behalf, must not:
 - attempt to register a claimed right of way at the Land Registry
 - disclose the existence of this policy to any third party other than genuine prospective purchasers, lenders, lessees and their legal advisers, without our prior written consent

Restrictive covenants – "where any third party attempts to enforce restrictive covenants affecting the title to the property"

This quotation is provided on the understanding that the following are correct, and if this is the case, you do not need to confirm them further:

1. The property has been used for the same purpose and has remained unaltered for the last 12 months
2. There has been no communication with any person(s) or organisation that may be entitled to enforce the restrictive covenants
3. The proposed Insured is not party to the deed containing the restrictive covenants (if the parties are known)
4. No structural alterations or extensions are proposed at the property following completion which may affect the Insured Risk



What are my obligations?

- You, or anyone acting on your behalf, must not:
 - apply for a release or modification of the restrictive covenants, without our prior written consent
 - disclose the existence of this policy to any third party other than genuine prospective purchasers, lenders, lessees and their legal advisers, without our prior written consent

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