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## Property Newsletter

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Welcome to the 2009 First Quarter edition of Property News.

Restrictive covenants on land preventing or restricting development have always been a cause of concern for developers. As a result of the recent case of Dennis and others v Davis it is now necessary to consider whether a restrictive covenant against causing "annoyance or nuisance" could prohibit property development.

In this newsletter we take a look at this case, its effect and what steps can be taken in the event that proposed development land is adversely affected by a restrictive covenant.

Any landlord who lets residential property on assured shorthold tenancies where a deposit is taken will be interested in the outcome of the first case relating to Tenancy Deposit Schemes has now been decided in the courts.

This case considers when the automatic penalty payment of three times the amount of the deposit is triggered. Details of this case and the implications of the decision are set out below.

In the current market conditions, restructuring your business can play an important part in maximising the profitability of a business. Andrew Evans our Tax Partner provides good advice on the tax efficient property planning..



Rowland Davies,  
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## → Restrictive covenants: prohibitive?



**It is common knowledge that a restrictive covenant prohibiting building more than one house on an area of land, or prohibiting alterations or additions to a house has a direct impact on whether a particular site will be suitable for development.**

However, as a result of the recent case of *Dennis and others v Davis* it is also now necessary to consider whether there is a restrictive covenant against nuisance and annoyance affecting a potential development site.

The judgement in the *Dennis* case confirms that a covenant against nuisance and annoyance could apply to the construction of, and alterations to, buildings. The case also illustrates the importance of checking whether the proposed development is permitted from both a title and a planning law perspective.

### Facts

A developer had built a housing estate of 47 three storey houses close to the Thames. Nearly every house had a waterside frontage and the estate was laid out so that each house has river views.

The transfer of each property contained the following restrictive covenants for the benefit of the developer, the Management Company (who own the communal parts and the mooring facilities) and the owners of any part of the estate:

- A restrictive covenant prohibiting anything being done on the plot which became a nuisance or annoyance to the owners or occupiers of the estate (the Nuisance and Annoyance Covenant).





- A restrictive covenant prohibiting any building to be erected except where the plans and elevations have been approved by the Management Company (the Permission Covenant).
- Davis had purchased one of the houses and wished to build a three storey extension to the side of his house. He obtained planning permission on appeal to build a three storey side extension to his property and received e-mail confirmation from the Management Company that on provision of professional drawings confirming the extension is in line with existing properties and confirmation from an independent RICS surveyor that the boundary lines are not being altered as a result of the works that it would give its consent.

A number of Davis' neighbours had objected unsuccessfully to the planning application and also opposed the Management Company's consent.

The documentation requested by the Management Company was not provided by Davis but works began in May 2007.

The work was put on hold when some of Davis' neighbours claimed that the extension breached the following covenants affecting the property:

- The Nuisance and Annoyance Covenant as the extension would wholly or partially obscure the neighbours' river views and would diminish the value of their properties
- The Permission Covenant as the Management Company had not approved the plans and elevations.

Davis denied that there had been any breach and

claimed that the Nuisance and Annoyance Covenant only applied to his activities rather than the building itself and that the e-mail from the Management Company detailed above amounted to the Management Company's approval (despite the fact that Davis had not provided the documentation requested by the Management Company).

The High Court found that:

- The extension would constitute an annoyance within the meaning of the Nuisance and Annoyance Covenant. (The value of the resident's houses was not found to decrease as a result of the extension works).

The Judges stated that a covenant against nuisance and annoyance could apply to the erection or alteration of a building. The nuisance and annoyance covenant in this case required Davis not to "suffer to be done... anything of whatsoever nature which may be or become a nuisance or annoyance". This wording was wide enough to apply to the extension.

The loss of view from three of the five houses owned by the neighbours who objected to the extension would be significant and therefore the extension would be an "annoyance" for the purposes of this nuisance and annoyance covenant.

- The consent of the Management Company had not been given.

The e-mail was at best a statement of intent to consent in the future if the two conditions were satisfied. As the two conditions had not been satisfied, the consent had not been given.





## Conclusion

It is important to ensure that a proposed development is permitted from both a title and a planning law perspective and that ALL necessary consents have been obtained prior to starting any works.

In the Dennis case, the fact that planning permission had been obtained for the extension did not prevent the court from finding that the loss of view would be significant and therefore in breach of the nuisance and annoyance covenant.

If the title investigation reveals a restrictive covenant that could potentially restrict the proposed development, there are solutions available such as:

- Enquire as to the availability of indemnity insurance.
- Seek expert advice or obtain counsel's opinion.
- Approach the person(s) with the benefit of the covenant to request a release, or a waiver in respect of a specific development.
- Apply to the Lands Tribunal to have the restriction discharged or modified under section 84(1) of the Law of Property Act 1925
- Apply to the county court for a variation of the covenant if the development is the conversion of a single house into flats under section 610 of the Housing Act 1985.

It is important to seek legal advice as to which course of action is the best one to take given the circumstances.

If you require any further information in respect of this or any other topic please contact:

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## → First court decision on tenancy deposits

**At a time when domestic lettings are inevitably increasing, the first decision on the new tenancy deposit scheme legislation has been decided.**



As a result, the automatic penalty payment of three times the amount of the deposit is not triggered where the landlord has, albeit belatedly, provided the tenant with the required information prior to the latter's application to court. However, it is likely that the penalty is payable if the information is not provided until after the tenant's application.

### The Case

The tenant entered into an assured shorthold tenancy in respect of 37 Wortley Avenue in June 2007. A deposit was paid to the landlord which the landlord via its agents placed in an approved deposit insurance scheme within fourteen days of the beginning of the tenancy. No details of the tenancy deposit scheme entered into were given to the tenant initially.

Proceedings for possession of 37 Wortley Avenue were issued in January 2008 as the tenant had failed to pay the rent since October 2007.

The possession proceedings were withdrawn on 28th February 2008 as it was submitted to the landlord that there had been a failure to comply with the tenancy deposit scheme legislation.

On the 22nd February 2008 the prescribed information relating to the tenancy deposit scheme was sent to the tenant and on the 3 March 2008 the tenant made an application under the tenancy deposit scheme legislation for the return of the deposit and for a penalty to be paid to him.





Initially, in the County Court, judgement was found for the tenant and the landlord was ordered to pay the deposit and a sum equal to three times the deposit to the tenant (although it was agreed that these sums could be set off against the unpaid rent).

The landlord appealed and it was found on appeal that the judgement given in the County Court was incorrect.

The reason for this was that although the landlord had not given the information relating to the tenancy deposit scheme to the tenant within the statutory requirement of 14 days from the date that the deposit was paid to the landlord, the information had been given to the tenant.

The legislation allows the tenant to apply to the courts for the return of the deposit and a penalty payment (equal to three times the deposit) if the landlord has breached the requirement to place the deposit in one of the approved tenancy deposit schemes or the requirement to provide the necessary information to the tenant regarding the tenancy deposit scheme.

The conditions for enforcing these provisions don't include a breach by the landlord of the requirement to provide the necessary information to the tenant within the 14 day statutory time limit.

## Effect Of The Case

This case confirms that provided the landlord has given the written information regarding the tenancy deposit scheme to the tenant, albeit outside the 14 day time limit, before the tenant makes an application for failure to comply with the tenancy deposit scheme legislation, the landlord is protected from a claim for the return of the deposit and a penalty payment of three times the deposit.

However please note, as is also shown in this case, if the written information regarding the tenancy deposit

scheme has not been given to the tenant it is not possible for possession proceedings under S.21 of the Housing Act 1988 to be issued against that tenant.

Therefore upon receipt of a deposit from a tenant occupying a property under an assured shorthold tenancy it is important to:

→ Place the deposit in one of the three authorised Deposit Schemes within 14 days of receipt of the deposit:

- Custodial Scheme: The Deposit Protection Service Limited
- Insurance Scheme: Tenancy Deposit Solutions Limited
- Insurance Scheme: The Dispute Service Limited

Notify the tenant in writing of the details of the tenancy deposit scheme chosen within 14 days of receipt of the deposit.

If you require any further information in respect of this or any other topic please contact:

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## → Tax Efficient Property Planning

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For many property holding companies the current market conditions present many challenges.

However, the market downturn may provide an ideal opportunity to evaluate the structure of the business and implement changes to ensure that shareholder value continues to be maximised. For owner managers in particular the structure often needs the additional flexibility to facilitate wealth and succession planning.

You may be considering or carrying out a strategic review of your property holdings and business structure and there may be opportunities to implement planning which ensures that the future growth in value of these property assets is realised in as tax efficient manner as possible.

The planning involves altering the method of ownership of the property assets.

The key benefits of the planning can include:

Future growth can be realised directly by the shareholders whilst maintaining the benefit of limited liability

There should be no immediate corporation tax or stamp duty land tax charges

Increased flexibility for family wealth planning

Reduction in the effective rate of tax on a disposal of property and therefore increasing shareholder returns

The above benefits can normally be achieved without the need to refinance any borrowings secured on the property and should have





no material impact on the value of the company shares.

In addition it should still be possible to show the current value of the properties on the company balance sheet for the purposes of public perception and banking covenants.

If you would like to discuss the benefits of the restructuring please do not hesitate to contact:



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Or talk to your usual Property contact at Geldards.

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