

Restrictive covenants in the case of HAE Development Ltd v The Croft Ealing Ltd [2022]



The Courts have again shown their willingness to remove restrictions on the use of land in the recent case of *HAE Development Ltd v The Croft Ealing Ltd [2022]*. Whilst this is relevant to developers, it should also be noted by those involved with [collective enfranchisement](#) claims.

In short, a collective enfranchisement claim is a claim brought by a sufficient number of qualifying leaseholders to acquire the freehold of the building in which their flats are located (please see [leasehold enfranchisement](#) for further details).

The case

HAE Development Ltd v The Croft Ealing Ltd [2022] involved a developer that had planning permission to construct a block of eight flats on the subject land. However, that land was subject to a restrictive covenant imposed in 1955 which restricted the use to a single dwelling. The developer applied to the Court under section 84 of the Law of Property Act 1925 for the restrictive covenant to be discharged. In order for the Court to exercise this power, the developer had to prove one of the grounds set out in section 84. The developer's case was based on three grounds, including that the restriction was obsolete due to changes in the character of the subject property or neighbourhood. The Court accepted the developer's arguments on all three grounds, including that the neighbourhood had changed considerably, with many buildings now converted into flats. Therefore the purpose of the restriction, namely to preserve the neighbourhood as one of houses, was now obsolete. As such, the covenant was discharged and the developer was free to proceed.

Collective enfranchisement and restrictive covenants

Following a collective enfranchisement claim brought by the requisite number of long leaseholders to acquire the freehold to their building, the freehold will be transferred subject to certain rights, reservations and covenants.

The Leasehold Reform, Housing and Urban Development Act 1993 sets out which restrictive covenants can be included within the transfer. These include restrictions set out in the relevant leases, provided that the freeholder can show that they not only benefit other land, but also materially enhance the value of that land. It is not unusual for a freeholder to seek to restrict the development of the subject building if they own neighbouring property. This could be on the basis that the division of the subject property into a number of smaller units may affect the value of that neighbouring property.

Equally, it is established that development hope value can be taken into account when determining the price of the freehold interest being acquired. Essentially this means that the future development potential of the subject building can be taken into account when valuing the property, although the calculation of the figure would involve considering certain costs, risks and limitations. Clearly, for example, a restriction on the number of units at the property would impact on any development potential. Conversely, no such restriction could result in a higher price being paid at the point that the freehold is transferred.

As such, a freeholder will need to carefully consider the future enforceability of proposed restrictive covenants against the potentially higher price that could be obtained at the point of transfer. The above case should serve as a warning that even if a restrictive covenant is included in the transfer, there is no guarantee that it will not be discharged at a later date.

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