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**DEVELOPERS BEWARE
OF RESTRICTIVE
CONVENANTS**

A summary of a recent case showing the scope of restrictive covenants

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The recent High Court decision in *Churchill v Temple* [2010] highlights the need for developers to consider carefully whether a property is affected by restrictive covenants requiring consent for redevelopment and, if so, whose consent is needed.

Facts

The developer intended to demolish and replace the existing property. Although planning permission had been granted, two restrictive covenants on the title prevented building works and structural alterations, unless consent was obtained from the “Vendors or their surveyor”. The term “the Vendors” was defined as Mr and Mrs S (who were the owners of the property at the date of the relevant conveyance and who had subsequently died). There was no reference to successors in title in the restrictive covenants, so The Court had to decide:

- Whether consent was required only from the original vendors or if the term “the Vendors” impliedly included their successors in title (who opposed the development); and
- If only the original vendors’ consent was required, whether the death of the original vendors caused the restrictions against development to become “absolute” (i.e. because consent could no longer be obtained the buildings could not be built); or whether the restrictive covenants had become “discharged” (i.e. consent was no longer needed at all).



Decision

- The Court, doing its best to interpret the intention of the original parties to the covenant from the conveyance and from the surrounding circumstances at the time (of which there was little evidence), determined that, although the use of the term “Vendor” in the conveyance was inconsistent and ambiguous, on balance it referred to the original vendors only and not to successors in title.
- The Court also concluded, distinguishing previous Court of Appeal authority, that the covenants should be discharged by the death of the original vendors. To find otherwise would flout the likely commercial purpose of the covenant, which, in the Court’s view was likely to provide short term protection to the original vendors. The developer was therefore no longer required to obtain consent and was therefore free to proceed with the redevelopment of the property despite the objections of the vendors’ successors in title.

Consequences

The High Court’s decision illustrates the need for developers to obtain an early understanding of the scope and extent of any restrictive covenants and, if consent is required, who needs to give that consent. It also demonstrates the Court’s willingness to apply common sense to ambiguous agreements with a view to achieving what the Court perceives to be the parties likely original commercial purpose.