

Released by Death

The Message:

An obligation requiring "vendors' consent" to alterations ceased with the original vendors' death.

The Case:

Churchill v. Temple [14 December 2010] concerned the important issue of whether a property owner, whose land was burdened by an obligation to obtain "vendors' consent" to alterations to his property, still had that obligation following the death of the "vendors".

Mr Churchill owned a property in Radlett, which was subject to a restrictive covenant contained in a conveyance of the property to Churchill's predecessor. The covenant prohibited "any structural alteration or addition to a permitted dwellinghouse without the written consent of the vendors or their surveyor". Churchill wished to demolish his property and build a new house. The Temples, who were the current owners of the land benefiting from the covenant, claimed to be entitled to enforce the covenant in order to prevent Churchill's redevelopment.

The High Court was asked to determine, firstly, whether the requirement for the written consent of "the vendors or their surveyor" should be construed as meaning the consent of the vendors or their successors in title or their respective surveyors. If it did, then Churchill would have to obtain the consent of the Temples.

The original vendors who benefited from the covenant had died and the second issue for the Court was whether their deaths had freed Churchill from the need to obtain "the vendors'" consent to the redevelopment, or alternatively, had made it impossible for him to obtain such consent and, therefore, made the prohibition absolute. That is, Churchill would not be able to carry out the redevelopment at all.

In determining those issues, the Court considered the following points. The word "vendors" was used inconsistently in its inclusion of successors in title in the conveyance containing the covenant. In view of the absence of clear language, in interpreting the meaning of "vendors", the "commercial realities" would not have to overwhelm the literal meaning in order to prevail. There was no clear language to prevail over the commercial realities. To try to avoid educated guesswork, it was assumed that the original parties took into account reasonably foreseeable contingencies.

It was also always necessary to keep in mind the position of both parties. There are possible aesthetic, financial and altruistic reasons why original vendors would wish to have a power of veto after they have sold part of their property. They may wish to be in a position, when they come to sell their retained part, to promise the purchaser that they will exercise their rights under the covenant if requested to do so, which may assist in achieving a sale at a good price.

From the perspective of the owners burdened by the covenant, it was unlikely that the requirement to obtain the permission of subsequent owners of whom they had no knowledge, would have been acceptable.

Looked at from the viewpoint of both parties, the Court considered that reading the covenant in accordance with its literal terms, restricting the right to withhold consent to the original vendors, made perfectly good sense, representing a reasonable balance between both parties' interests. The provisions were designed to operate in the short term and, therefore, the Court found that "the vendors" did not extend to successors in title.

The Court held that the deaths of the original vendors discharged the covenant and Churchill was not obliged to obtain the consent. The reasonable outside person equipped with the relevant background knowledge would read the covenant as one which applied only in the original vendors' lifetime.

Every case needs to be determined on its particular facts, but this decision will be welcomed by many faced with restrictive covenants of this type.