

Interested Party – Mr and Mrs McAleer

I propose to make 6 short points, all related to deliverability of the proposed scheme which is the subject matter of this appeal.

1. My clients have the benefit of a restrictive covenant in the following terms.
"not to do or suffer on the land anything which may become a nuisance or annoyance excluding normal agricultural use to any person who may from time to time own or occupy the House or any land adjacent to the land." (Emphasis added).
2. It is, I hope, common ground that restrictive covenants have not been superseded by planning control. A landowner must therefore see that what is proposed will contravene neither the private system of restrictive covenants nor the public system of planning control.
3. As such, the grant of planning permission does not by itself authorise the breach of a restrictive covenant. On the contrary, the planning process will take into account whether any permission can in fact be implemented.
4. Whilst I do not wish to become embroiled in a legal debate within this process, there is Court of Appeal authority which has held that *"Covenantshave long been used in conveyances, transfers and leases and it is clear that the expanded phrase "nuisance or annoyance" in such covenants is directed at conferring a wider protection than the remedies available for the tort of nuisance at common law"*. *Davies v Dennis* [2009] EWCA Civ 1081.
5. Further, the Court of Appeal also cited with approval observations in *Tod-Heatty v Benham* (1888) 40 Ch. D. 80 to the effect that "annoyance" must be decided *"not upon what their own individual thoughts are, but on what, in their opinions and upon the evidence before them, would be an annoyance or grievance to reasonable, sensible people."* And *"an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance."*
6. Finally, and returning to *Davies v Dennis*, the Court held that *"in principle, a clause preventing nuisance and annoyance can cover the building of an extension to a house which, when built, will be such an annoyance."*

In my submission, the covenant in issue in the present case can and will be interpreted to extend to the construction and subsequent existence of the building development proposed.

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On behalf of Mr and Mrs McAleer
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