

## Breach Of Restrictive Covenant and Delayed Claims 2

We reviewed the case of *Harris v Williams-Wynne (2005)* in a previous Herrington & Carmichael article ([click here to see](#)), but the case is back in the legal news after an appeal by Mr Harris (*Harris v Williams-Wynne (2006)*).

### Background

Our previous article contains the details of the case as well as the relevant law but in summary, between 1999 and 2002 Mr. Harris carried out building works on some farmland he'd bought from Mr. Williams-Wynne, which was in breach of a covenant against construction. Mr. Williams-Wynne made no effort to stop the works.

Mr. Harris brought court proceedings against Williams-Wynne to force him to meet certain duties under the contract for the sale of land but in turn, Mr Williams-Wynne counter-claimed for damages for breach of the covenant.

In the first judgment, the Court awarded damages to Mr. Williams-Wynne in the sum of £8,000 but the damages were offset against Harris' breach of contract claim and so the outcome was that both parties left court pretty much empty handed.

Somewhat peculiarly, Mr. Harris decided to appeal.

### The Appeal

Mr. Harris argued that the first judge had incorrectly applied the law. He claimed that because Mr. Williams-Wynne had let the construction go ahead, he wasn't entitled to damages. The Court of Appeal dismissed Harris' case and upheld the original decision.

The Appeal Judges confirmed that the right to damages in this type of case might be lost if the person claiming the damages had acquiesced so much that awarding him damages would be unfair. In most circumstances, a court won't stop someone claiming damages unless their delaying or submissive behaviour caused someone else to act to their disadvantage, but each case will turn on its own facts.

In this case, there was no method or procedure in place that would inevitably have made Mr. Williams-Wynne aware of the proposed breach of covenant until construction had started. In fact, he only became aware of the works when the building had reached first floor level. The

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Judges said that by this time, the most practical solution was to accept the building should be finished and to award damages, instead of insisting on the demolition of the building. Also, no disadvantage had been caused to Mr. Harris by Mr. Williams-Wynne's failure to take preventative action and the Court found no other circumstances which would make it unjust for him to claim damages.

### **Restrictive Covenant or Provision for Overage?**

The case shows that in a situation where the value of land has been greatly increased by construction in breach of covenant, the damages awarded to the beneficiary of that covenant will be much less than the development value. For this reason, if the seller's aim is to secure an additional payment on development of the land, it may be better to use a properly drafted overage clause reserving a particular sum or a proportion of the development value in the contract for sale. The case strengthens the view that ultimately, the amount eventually realised by a seller after development of land may be substantially less if claimed under a breach of restrictive covenant than if claimed under an express contractual overage provision.

If you wish to discuss the issues discussed above further in relation to your particular circumstances please contact Tim Hardesty, Adrian Job Charlotte Wood or Andrew Annette on 01276-686222.