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Supreme Court:

A Word of Warning to Developers Considering "Cynical Breach" of Restrictive Covenants in Landmark Case Alexander Devine Children's Cancer Trust v Housing Solutions Ltd

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In the recent case of *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*[1], the Supreme Court confirmed that any "cynical conduct" should be taken into account when a restrictive covenant has been breached. This is a significant outcome for property developers who wish to build on burdened land.

Restrictive Covenants

Restrictive covenants prevent the covenantor from performing a specified act, whether it be building on or prohibiting particular trades on the land. If the owner of burdened land wishes to carry out an act that would breach the restrictive covenant, there are three options:

1. Negotiate a release or variation with the person(s) benefiting from the restrictive covenant
2. Obtain indemnity insurance
3. Make an application to the Upper Tribunal (Lands Chamber) to have the covenant modified or discharged

An application to the Upper Tribunal should be considered if no agreement can be reached or insurance is not an option. This application would need to be made on at least one of the grounds stipulated in section 84 of the Law of Property Act 1925 (the 1925 Act), these being:

- The covenant is obsolete
- The covenant impedes some reasonable use of the land
- An agreement has been reached between the parties
- No injury will be caused to the person entitled to the benefit of the covenant

Under section 84(1A) of the 1925 Act, any party applying to the Upper Tribunal on the second ground will have to prove that money would be adequate compensation for any breach and that the restrictive covenant a) does not provide any practical benefits of substantial value to the person benefiting; or b) is contrary to the public interest.

Background

Alexander Devine Children's Cancer Trust (the Trust) has the benefit of a restrictive covenant that allows terminally ill children to use the grounds of a hospice in privacy. Housing Solutions acquired the encumbered land and Milgate Developments Ltd (Milgate) built 13 affordable houses on it in breach of the restrictive covenant. Housing Solutions subsequently made an application to the Upper Tribunal to have the covenant modified under section 84 of the 1925 Act, arguing that the covenant impeded use of the land on the ground that it would be contrary to public interest not to modify it.

In 2016, the Upper Tribunal accepted that the restrictive covenant should be modified, on the grounds that it would be contrary to public interest to allow affordable houses to sit vacant. Milgate was ordered to pay the Trust £150,000 in compensation. On appeal, the decision was overturned by the Court of Appeal in 2018. The Court of Appeal rejected the application to have the covenant modified or discharged, stating that the Upper Tribunal had failed to take into account the developer's conduct.

In November 2020, five years after the works had been completed, the Supreme Court made the final decision. This is the first time the Supreme Court has been required to make a decision on the appeal of a section 84 notice. The Court found that the Upper Tribunal had failed to take into account two significant factors regarding the cynical breach and conduct of the developers:

1. The development could have been built elsewhere without breaching the restrictive covenant. It became clear that the burdened land could have been used as a car park, instead of being used for building.
2. The public interest ground that the developers had been relying on was, in fact, created by the developers themselves. It would not be in the public interest to allow a party who had flagrantly disregarded a lawful covenant to immediately request the modification of the same in order to redeem themselves.

Lord Burrows stated that he was "sorely tempted" to agree that any developer who had initiated construction in knowing breach of a restrictive covenant should automatically have an application to the Upper Tribunal refused. It was agreed that, although this would be too rigid an approach, the Upper Tribunal had failed to attach sufficient weight to Milgate's conduct at the discretionary stage of the trial.

Decision

The Supreme Court unanimously dismissed the appeal made by Housing Solutions, refusing to modify or discharge the covenant. While it was agreed that it would be an unconscionable waste to leave the restrictive covenant as it is, turning away 13 families waiting for social housing, the cynical conduct of the developers could not be ignored. The significant human interest in this case created a fundamental dilemma for the courts, but the outcome of the case was clear.

1 https://www.supremecourt.uk/cases/uksc-2019-0006.html

It is now at the discretion of the Trust to seek remedies for breach of covenant by use of an injunction and/or damages. If the Trust chooses to seek an injunction, it will be a matter for the courts to decide. It may well be that the Trust will decide to reach a financial settlement instead.

Lessons

1. **Avoid Building on Encumbered Land Without Taking Steps to Protect Your Position**

   Developers may choose to negotiate with the benefiting party, or to seek indemnity insurance before building. If this is not an option, an application should be made to the Upper Tribunal to request a modification or full discharge of the restrictive covenant. If a section 84 application is made, the conduct of the developer will be taken into account by the Upper Tribunal.

2. **Relying on the Public Interest Ground**

   If a section 84 application has been made on the grounds that the covenant is contrary to public interest, remember that the Tribunal will make a decision based on the land before any breach has occurred. The public interest ground will be construed strictly.

3. **Check Your Policy**

   Most insurance policies will prevent you from approaching the person with the benefit of the covenant, but some will allow it. Ensure you communicate with your insurance company if you wish to negotiate with the benefiting party and/or wish to seek modification of the covenant at the Upper Tribunal. The good news is that you do not necessarily have to approach the benefitting party to show good conduct if your policy prevents it.

Contacts

David Holland
Partner, Leeds
T +44 113 284 7014
E david.holland@squirepb.com

Michelle Adams
Director, Birmingham
T +44 121 222 3137
E michelle.adams@squirepb.com

Helen Hoath
Director, Manchester
T +44 161 830 5068
E helen.hoath@squirepb.com

Billi Chamberlain
Trainee, Birmingham
T +44 121 222 3217
E billi.chamberlain@squirepb.com