Build in haste, repent at leisure – Alexander Devine Children's Cancer Trust v Housing Solutions Ltd

For the first time, the Supreme Court has considered the power of the Upper Tribunal (Lands Chamber) to modify or discharge restrictive covenants. Its recent Judgment in the case of Alexander Devine Children's Cancer Trust v Housing Solutions Ltd confirms that a developer will not be allowed to rely on its own deliberate breach of a restrictive covenant so as to create the necessary public interest ground for modification.

The facts

Part of the land purchased by Housing Solutions Ltd in September 2015 was burdened by restrictive covenants which prevented use of the land for anything other than car parking and provided that no building structure should be erected on the land.

The previous owner, Millgate Developments Ltd, was fully aware of the restrictive covenants but failed to make any application to the Upper Tribunal to modify or discharge the covenants before seeking planning consent and starting to build houses on the land. By the time Millgate eventually applied to the Upper Tribunal for modification of the covenants (in accordance with Section 84(1) of the Law of Property Act 1925) in July 2015, Millgate had already built 13 houses on the burdened land.

The Upper Tribunal granted Millgate's application. However, this decision was overturned by the Court of Appeal on appeal by the Trust. Following its purchase of the land in September 2015, Housing Solutions Ltd appealed to the Supreme Court.

The Supreme Court Decision

Whilst there were 4 grounds of appeal to the Supreme Court, the key issue was the extent to which Millgate's conduct should be taken into account in deciding whether or not the covenant should be modified on the ground that it was "contrary to public interest". Millgate was only able to satisfy the public interest test in Section 84(1) because it had already obtained planning consent and built 13 social housing units on the land before making the application to the Upper Tribunal.

In a Judgment which may have ramifications for all developers, the Supreme Court held that Millgate's conduct had fundamentally altered the position in relation to public interest and that it would be wrong to allow a developer to secure modification of a covenant in reliance on a state of affairs that the developer had itself created by its own deliberate and cynical breach.

The Supreme Court also placed emphasis on the fact that Millgate could have discharged its planning obligation in relation to delivering social housing by providing the social housing units on an alternative site or by paying a commuted sum to the Local Authority. In either case, the public benefit would still have been delivered.

The decision on this ground of appeal alone was held to be sufficient for the dismissal of the appeal.

Lessons to be learnt

The obvious learning point from this Judgment is that developers should take legal advice in relation to restrictive covenants burdening the land they wish to develop, arguably before an application for planning consent is made and certainly before they actually start to build.

The Supreme Court is also sending a clear message that a developer will not be able to engineer the circumstances needed to support modification of a covenant and that presenting the Upper Tribunal with a fait accompli will not help.

Where land is burdened with restrictive covenants, options for a developer to consider include:

- Seeking indemnity insurance to protect against any claims made under the covenants;
- Negotiating a release from the party with the benefit of the covenants;
- Applying to the Upper Tribunal to modify or discharge the covenants.

Taking advice as to the best option at an early stage can put you in a stronger position and may save time and cost, particularly if proceedings can then be avoided.

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