Avoiding the stigma of cynical breach

What can we learn from the Supreme Court's judgment in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd*, asks Andrew Francis

IN BRIEF

▶ The Supreme Court has just emphasised the importance of the applicant's conduct in applications to discharge, or modify restrictive covenants under s 84(1) Law of Property Act 1925. What can we learn from the judgment of that Court?

On 6 November 2020, the Supreme Court handed down its judgment in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45, [2020] All ER (D) 37 (Nov).

This article suggests that some lessons can be learnt from that judgment. It concentrates on those lessons and does not set out the facts in any detail. For those, reference can be made to the judgment itself, as well as to the other commentaries on the decision.

In this case the Supreme Court upheld the decision of the Court of Appeal in November 2018 which had allowed the Trust's appeal against the decision of the Upper Tribunal (Lands Chamber) (UTLC). It had allowed the application by Housing Solutions and its predecessor in title, Millgate Development Ltd made under s 84(1) of the Law of Property Act 1925 to modify restrictive covenants affecting the applicants' land near Maidenhead. In this article the appellants are referred to together as 'Millgate'.

This was the first time the jurisdiction under s 84(1) to discharge, or modify restrictive covenants over land had been considered by the highest court since the jurisdiction came into force on 1 January 1926.

Background facts

The background facts are relatively simple. In 2015 Millgate constructed 13 affordable houses on land burdened by restrictive covenants imposed in 1972 (the Covenants) (of which the Trust clearly had the benefit) in breach of them and despite warnings from the Trust about that breach. The Covenants burdened about two thirds of the development site, the other part not being so encumbered. The development could have been built on the latter area, but Millgate chose not to do that. Only after completion of the houses (built in the face of warnings from the Trust) did Millgate apply to the UTLC under s 84(1) to modify the Covenants.

In November 2016 the UTLC allowed the application. It did so on the ground that it was in the public interest to do so, despite Millgate's conduct, under s 84(1A)(b) (see box out). The UTLC refused the application under s 84(1A)(a) as the Covenants secured practical benefits of substantial value and advantage to the Trust as owner of the adjoining hospice on the benefited land. The Court of Appeal disagreed with the UTLC in allowing the application under the public interest ground. (There was no cross appeal by Millgate on the refusal to allow the application under s 84(1A)(a)). The Court of Appeal said that the conduct of Millgate was such that both as a matter of jurisdiction and discretion, the application should be dismissed. So the Trust won its appeal in that court.

What did the Supreme Court decide & why?

On 20 July 2020 the Supreme Court heard Millgate's appeal. The judgment delivered on 6 November dismissed that appeal. It did so upon fairly narrow and somewhat technically complex grounds. In dismissing that appeal, the Supreme Court effectively 'stripped back' much of the reasoning of the Court of Appeal and went back to the decision of the UTLC and, having done that, it identified two main reasons why the UTLC was wrong to have allowed Millgate's application. As we shall see below, the lessons to be drawn from that decision are of more practical importance for the future than the way in which that decision was reached.

The core findings by the Supreme Court related to Millgate's conduct. This was described as a 'cynical breach' of the Covenants. The Supreme Court considered that where an applicant who commits a cynical breach of covenant, its application ought to be refused, as that conduct 'trumps' the 'gateways' relied on under s 84(1). But rather than rely on that general principle, and in finding an error of law by the UTLC, the Supreme Court referred to the 'two omitted factors' which the Tribunal had failed to take into account. Those omissions by the Tribunal made 'the facts of this case exceptional'. It was this finding which gave the Supreme Court a 'peg' on which it could hang its 'hat' of dismissing the appeal from the Court of Appeal.

The first omitted factor was the fact that Millgate could have developed on the unencumbered land, but it did not do so

and by its cynical breach that 'put paid' to a satisfactory outcome for Millgate.

The second omitted factor was the fact that had Millgate applied to the UTLC before starting to build on the burdened land, it is unlikely that the public interest ground under s 84(1A)(b) would have been satisfied. It was wrong for the UTLC to allow the application on that ground when Millgate's cynical breach of the Covenants was used to support that ground, as a 'fait accompli'.

Lessons: part 1

Before setting those out, it is important to state that this was an unusual case for a number of reasons. The facts in it were exceptional. It is almost unheard of for an applicant to make the application to the UTLC under s 84(1) when his development is completed, even after warnings have been given by the beneficiary of the covenants. In past reported cases there has not been the 'cynical breach' of the Covenants by Millgate. In *George Wimpey Bristol Ltd's Application* [2011] UKUT 91 (LC) the offending houses were nowhere near complete when the application was made. In *The Trustees of the Green Masjid and Madrassah's Application* [2013] UKUT 355 (LC) that was a case about a change of use where the conduct of the applicants (as charitable trustees) was nowhere near as bad as Millgate's and there was no profit motive under the new user in breach. In *SJC Construction Co Ltd's Application* (1975) 29 P&CR 322, the flats in breach of covenant had only been built up to first floor level having been stopped by an injunction and the developer had acted in good faith. So no past cases were as extreme as this one in terms of the applicant's conduct.

It is also usual for development, or change of use to be started after either a release, or modification of the covenant by agreement with those having the benefit of the covenant, or under an indemnity policy, or after an Order is made by the UTLC under s 84(1) to enable the work to be done lawfully. It was only because Millgate could use the affordable houses for occupants under statutory tenancies that the need to 'square up' the covenants was not required. On most developments a failure to 'square up' the covenants will make the units unsaleable and unmortgageable. Finally, it is unusual—but not that rare—for the development site to include a significant area unencumbered by the relevant covenants. Millgate's failure to develop in this way, which it could do with the approval of the local planning authority, was clearly a black mark against Millgate, adding fuel to the description of Millgate having acted in 'cynical breach' of the Covenants. Most developers will try to build on the unencumbered land if they can profitably do so. The burdened areas are often used for landscaped and amenity areas, or other uses not in breach of covenant.

Extracts from s 84 Law of Property Act 1925

(1) The Upper Tribunal shall (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied—

.....

(aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user.

.....

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either—

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either—

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

Lessons: part 2

On jurisdiction within the 'gateways' the public interest ground under s 84(1A)(b) is very limited in its application. The decision of the Lands Tribunal in *Collins's Application* (1975) 30 P&CR 527 applies. That sets a very high threshold for the applicant. The case under it must be important and immediate. In most applications consideration of this ground can be put to one side. Having planning consent etc for the proposed use is not enough on which to base this ground.

On discretion, having passed through the gateway(s) selected, this is a very important factor and must never be overlooked. The applicant's conduct will always be relevant. No applicant will want to be branded with the 'cynical breach' mark when applied to its attitude to enforceable covenants.

The temptation must be avoided to 'brush off' objections from those who may well have the benefit of the covenants with either ill-considered, or misleading letters; usually at the initial stages. Restrictive covenants are a very complex area of land law. It is far better to seek specialist advice and consider fully the merits of any claim to enforce and to conduct research into who may be able to enforce covenants on both a technical and evidential basis.

There is nothing in the judgment which casts any doubt on the rule that an injunction is the prima facie remedy (starting point) for any breach of covenant; see *Coventry v Lawrence* [2014] AC 822. But the fact that the objector has not made an application for an injunction, whether final, or interim, should not matter.

The applicant needs to make out his case on both jurisdiction and discretion and the property right (the benefit of the covenant) will not be discharged, or modified without good reason. It is important to note what the judgment does not do. It does not make any comment on the 'usual' ground in s 84(1A)(a). As explained above, Millgate did not appeal the UTLC's dismissal of its application on that ground. Nor does it resolve the issues over compensation in the UTLC under s 84(1)(i) recently referred to by Lord Carnwath in *Morris-Garner v One Step (Support) Ltd* [2019] AC 649.

Finally, the prospect of the affordable houses on the burdened land being demolished under a mandatory injunction and that the Trust can seek a substantial sum in lieu on a 'negotiating damages' basis, serves as a warning to those tempted to 'chance their arm' in the face of enforceable restrictive covenants. **NLJ**

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