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

On 6th November 2020, the Supreme Court handed down its judgment in Alexander Devine Children's Cancer Trust v Housing Solutions Ltd. [2020] UKSC 45.

This Note is designed to assist the reader with the lessons to be learned from that judgment.

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") which had allowed the application by Housing Solutions and its predecessor in title, Millgate Development Ltd., made under s. 84(1) Law of Property Act 1925 ("s. 84(1)") to modify restrictive covenants affecting the applicants' land near Maidenhead. I will refer to the applicant as "Millgate".

It 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 1st January 1926.

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 the Covenants and despite warnings from the Trust about that breach. Only after completion of the houses 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 in the ground that it was in the public interest to do so, despite Millgate's conduct. Millgate's relevant ground was the public interest ground under s. 84(1A)(b). 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 bad conduct by Millgate was such that both as a matter of jurisdiction and discretion, the application

should be dismissed. So the Trust won its appeal.

On 20th July 2020, the Supreme Court heard Millgate's appeal. The judgment delivered on 6th November dismissed that appeal but in fairly narrow and somewhat technically complex grounds. The reader of this note may want to listen to the Estates Gazette (EG) podcast with Andrew Francis and Christopher Stoner QC in conversation with the Editor of the EG to learn more about the decision making process.

WHAT CAN WE LEARN FROM THE SC JUDGMENT IN MILLGATE?

(i) An unusual and exceptional case.

Before trying to draw out the lessons from this judgment, it is important to note that this was an unusual case for a number of reasons as the facts of this case were exceptional. It is unusual, if not 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. For that was how the Supreme Court described its conduct. It is also usual for development, or change of use to be started *after* either a release or modification of the covenant by an 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.

(ii) What, therefore, can we learn from the judgment?

(a) The public interest ground is still restricted and exceptional in its application. The old decision of the Lands Tribunal Collins (1975) applies and sets a high threshold for the applicant under that ground to succeed. Thus in most applications consideration of this ground can be put to one side; as can ground (a) (the covenant is obsolete) under s. 84(1).

(b) Discretion is a very important factor in s. 84(1) applications and must never be overlooked. So the applicant's conduct will always be relevant.

(c) It is clear that no developer will want to be branded with the "cynical breach" mark when applied to its attitude to enforceable covenants.

(d) It is tempting, but that temptation must be avoided, to "brush off" initial objections from those who may well have the benefit of the covenants with either ill-considered, or misleading letters. Restrictive covenants are a very complex area of land law. It is far better to seek specialist advice, either within, or outside your firm, and consider the merits of any claim to enforce fully. It is preferable to spend clients' money on research into who may be able to enforce the covenants on a technical basis and on an evidential basis.

(e) 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.

(f) The fact that the objector has not made an application for an injunction, whether final, or interim, should not matter.

(g) 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.

(h) *Finally, 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) (no practical benefit of substantial value, or advantage secured by the Covenants) for, as explained above, Millgate did not appeal the refusal of its application on that ground by the UTLC. It could not and, therefore, does not resolve the issues over compensation in the UTLC under s. 84(1)(i). It says nothing about the social policy issues raised by the fact that the affordable houses on the burdened land are now at risk of demolition and that the Trust can seek a substantial sum in lieu on a negotiating damages basis.

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