



Restrictive Covenants: Ignore at your Peril

Michelle Caney (2004)

Introduction

1. In the first appeal in which the Supreme Court has been required to deal with s. 84 of the Law of Property Act 1925, it has delivered a strong warning to developers who may contemplate building on land in breach of a restrictive covenant: **Ignore at your Peril**.
2. Delivering judgment in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 on 6 November 2020, the Supreme Court determined that the Court of Appeal was correct to overturn the Upper Tribunal's decision to modify a restrictive covenant on condition that compensation of £150,000 was paid to the affected landowner.

The Underlying Dilemma

3. The underlying dilemma posed by this case was the conflict between two legitimate uses of land. On the one hand, there was a charitable children's cancer trust that sought to maintain the benefit of a restrictive covenant (to which there was no dispute that it was entitled) so that terminally ill children in a hospice built on the Trust's land could fully enjoy the use of the grounds in privacy. On the other hand, there was a housing provider which was seeking to ensure that thirteen units of affordable housing, built in breach of a restrictive covenant on the application land adjoining the Trust's land, did not go to waste.

The Facts

4. In July 1972, a farmer sold part of his land (“the application land”) to a company (“SSPC”) that already owned adjacent land (“the unencumbered land”), together forming a rectangular plot of land (“the Exchange House site”). As part of the sale, SSPC covenanted that: (i) no building structure would be built on the application land; and (ii) the application land would only be used for car parking (“the restrictive covenants”).
5. In 2012, the farmer’s son (who had inherited land adjacent to the application land) made a gift of part of this land to the Alexander Devine Children’s Cancer Trust (“the Trust”) for the construction of a children’s hospice. Shortly thereafter, Millgate Developments Ltd (“Millgate”) acquired the Exchange House site. In July 2013, Millgate applied for planning permission to build 23 affordable houses on the site. Thirteen of these houses were proposed to be built on the application land, in breach of the restrictive covenants.
6. Planning permission was granted in March 2014. Millgate began construction in July 2014. In September 2014, the farmer’s son wrote to Millgate objecting to them building on the application land. Millgate continued with construction despite his objections.
7. In May 2015, Millgate agreed to sell the development at the Exchange House site to Housing Solutions Ltd (“Housing Solutions”). After completing the development, Millgate made an application to the Upper Tribunal, seeking modification of the restrictive covenants, pursuant to s. 84 of the Law of Property Act 1925, in July 2015. The farmer’s son and the Trust both objected to Millgate’s application.

The Law

8. Insofar as material, s. 84 of the Law of Property Act 1925 provides as follows:

84. Power to discharge or modify restrictive covenants affecting land

- (1) The Upper Tribunal shall ... 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 -

- (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
- (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; or
- (b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction ... have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or
- (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

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.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

...

(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the Upper Tribunal under this section, and staying the proceedings in the meantime..."

9. The original version of s. 84 of the Law of Property Act 1925 laid down four grounds under which the relevant “Authority” (now the Upper Tribunal) was given the power to discharge or modify restrictive covenants. In summary, these were where the restrictive covenant was obsolete; where the restriction was impeding the reasonable user of the land without securing practical benefits; where the persons entitled had agreed to the discharge or modification; and where the discharge or modification would be non-injurious.
10. The original grounds correspond (with some modification to the second ground) to what are now, respectively, s. 84(1)(a); s. 84(1)(aa), (1A)(a); s. 84(1)(b); and s. 84(1)(c). However, following a Report of the Law Commission on Transfer of Land: Restrictive Covenants (1967) (Law Com No 11), a significant extension was made by adding a fifth ground (what is now s. 84(1)(aa), (1A)(b)) so that discharge or modification may be ordered where the restriction is impeding the reasonable user of land and that impeding of reasonable user is contrary to the public interest (and provided money will be adequate compensation for any loss suffered by the person entitled to the benefit of the restrictive covenant). This is commonly referred to as the “contrary to the public interest” ground.
11. It is well-established that, if satisfied that one of the prescribed grounds has been made out, the Upper Tribunal nevertheless has a discretion whether or not to make an order for modification or discharge of the restrictive covenant. The five grounds are therefore concerned with establishing the Upper Tribunal’s jurisdiction: the “jurisdictional grounds”. At least one of the jurisdictional grounds must be established by the applicant before the Upper Tribunal can go on to make what is ultimately a discretionary decision.

The Upper Tribunal

12. On 18 November 2016, the Upper Tribunal gave its decision on Millgate’s application to modify the restrictive covenants. The Upper Tribunal held that the restrictive covenants should be modified pursuant to s. 84 so as to permit the occupation and use of the application land for the houses and bungalows which had been constructed on it.
13. The Upper Tribunal held that the “contrary to public interest” jurisdictional ground (section 84(1)(aa), 84(1A)(b)) was made out by Millgate for the following reasons:

- (a) It was common ground that the proposed use of the application land to provide thirteen units of affordable housing was a “reasonable user of the land”.
- (b) Impeding that reasonable user was contrary to the public interest because “it is not in the public interest for these houses to remain empty and the covenants are the only obstacle to them being used”.
- (c) Although the provision of significant additional boundary planting would not insulate the hospice land from all the adverse consequences of the use of the application land for housing, an award of money to allow for such additional planting was capable of providing adequate compensation to the Trust.

14. When considering the exercise of its discretion, the Upper Tribunal looked at the conduct of Millgate. Whilst the Upper Tribunal described Millgate’s behaviour as “highhanded and opportunistic”, the Upper Tribunal nevertheless considered that it should exercise its discretion to grant Millgate’s application because the public interest outweighed that high-handed and opportunistic conduct. Specifically, the Upper Tribunal said at [120]:

“[O]ur decision will have an effect not only on the parties but also on 13 families or individuals who are waiting to be housed in these properties if, and as soon as, the restrictions are modified. We consider that the public interest outweighs all other factors in this case. It would indeed be an unconscionable waste of resources for those houses to continue to remain empty.”

15. As a condition of this ruling, Millgate was ordered to pay £150,000 as compensation to the Trust, that being the Upper Tribunal’s assessment of the cost of remedial planting and landscaping works to screen the hospice grounds plus compensation for loss of amenity.

16. The Trust appealed to the Court of Appeal. By the time that the appeal was lodged, Millgate had transferred the thirteen housing units on the application land to Housing Solutions. Housing Solutions was therefore the respondent to the appeal.

The Court of Appeal

17. On 28 November 2018, the Court of Appeal overturned the decision of the Upper Tribunal and re-made the decision by refusing the application. The basis of the Court of Appeal’s decision was that the Upper Tribunal had made various errors of law; and,

exercising its powers to re-make the decision, the Court of Appeal refused the application. It was now Housing Solutions' turn to appeal, this time to the Supreme Court.

The Supreme Court

18. The appeal was heard by the Supreme Court on 20 July 2020. On 6 November 2020, the Supreme Court unanimously dismissed the appeal and upheld the Court of Appeal's decision, though for different reasons to those given by the Court of Appeal.

The central issue: the relevance of Millgate's cynical breach

Jurisdictional Stage

19. The first issue was the relevance of Millgate's conduct at the jurisdictional stage. The Upper Tribunal ignored Millgate's deliberate breach at the jurisdictional stage on the basis that it was irrelevant. The Court of Appeal found that the deliberate and cynical nature of Millgate's breach of the restrictive covenants was relevant at that stage. The Supreme Court disagreed and held that conduct is not relevant to the jurisdictional stage.
20. Crucially, the Supreme Court held that the "contrary to the public interest" ground calls for a narrow interpretation. This requires weighing the public interest in thirteen affordable housing units not going to waste against the public interest in the hospice providing a sanctuary for children dying of cancer. It was therefore irrelevant at the jurisdictional stage whether Millgate deliberately and cynically breached the covenant.

Discretionary Stage

21. The next issue was whether the Upper Tribunal made an error of law by failing properly to take into account Millgate's deliberate and cynical breach at the discretionary stage.
22. The Supreme Court stressed that it would only be appropriate for an appellate court to interfere, at the discretionary stage, with the decision of the specialist tribunal charged by Parliament with exercising the discretionary power to decide matters under s. 84, if that tribunal has made an error of law. The fact that the Supreme Court may not have reached

the same decision when balancing the considerations taken into account by the Upper Tribunal, is not a sufficient reason to intervene with the decision of the Upper Tribunal.

23. The Supreme Court further accepted that once a jurisdictional ground is established, the discretion to refuse the application should be “cautiously exercised”: *Trustees of the Green Masjid and Madrasah v Birmingham City Council* [2013] UKUT 355 (para 129).
24. Nevertheless, the Supreme Court concluded that the Upper Tribunal had made an error of law in the exercise of its discretion in relation to the cynical conduct of Millgate, albeit for different reasons to those given by the Court of Appeal. The Supreme Court held that the Upper Tribunal failed to consider two relevant factors at the discretionary stage: (i) Millgate could have built on the unencumbered land, not the application land; and (ii) Millgate would have been unlikely to satisfy the “contrary to the public interest” ground had it applied to modify the restrictive covenants prior to building on the application land.
25. Fundamentally, Millgate could not be rewarded for presenting the Upper Tribunal with a *fait accompli* by building the thirteen dwellings in deliberate breach of covenant and then applying to modify the covenant on the ground that it would be in the public interest to retain the affordable housing units. Such conduct should be deterred as a matter of policy.

Conclusion

26. This case serves as a cautionary tale for developers dealing with land encumbered by restrictive covenants. Despite the fact that there was a strong argument that it was in the public interest to allow the much-needed social housing units to remain, the Supreme Court concluded that this did not outweigh the public interest in protecting the Trust’s rights in the circumstances. Whilst each case will turn on its own facts, it would be a brave (or foolish) developer who takes such a course of action in the future and chances their arm at applying to modify the covenant. An injunction application to demolish the thirteen housing units is undoubtedly now in the process of being prepared by the Trust.

MICHELLE CANEY

ST IVES CHAMBERS

8 NOVEMBER 2020

Whilst every effort has been taken to ensure that the law in this article is correct, it is intended to give a general overview of the law for educational purposes. Readers are respectfully reminded that it is not intended to be a substitute for legal advice and should not be relied upon for this purpose. No liability is accepted for any error or omission contained herein.