No release permitted

Andrew Ross and Sarah Quy discuss a case where the court emphasised the public interest in honouring private rights

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'The court's decision indicates that responsible developers should seek release of covenants before developing in breach.'

In November 2018 the Court of Appeal decided in *Alexander Devine Children's Cancer Trust v Millgate Developments Ltd* [2018] that the developer, who had knowingly built in breach of a restrictive covenant, was not entitled to secure its release or modification under s84 of the Law of Property Act 1925. In a judgment that has been welcomed as sensible and balanced, Sales LJ confirmed that 'it is in the public interest that contracts should be honoured and that property rights should be upheld and protected'.

What happened in this case?

Millgate was the developer of a high-end residential scheme in Maidenhead on a site of 24 acres of park and woodland called Woolley Hall. This involved the conversion of a listed mansion house and stables into 11 flats, and the construction of 11 new houses. As part of its planning consent for this scheme, *Millgate* was obliged to provide 23 affordable homes. It decided not to build these at Woolley Hall and instead, in 2013, it bought a greenbelt site called Exchange House. Some of the site is affected by restrictive covenants against building any structures on the land, or parking on it. The covenants are for the benefit of the adjacent agricultural land, a section of which has been gifted to a charity with the intention that it would build and run a children's hospice there. Planning permission for the hospice was granted in 2011 and construction started in 2015.

In March 2014, Millgate had obtained permission for both the Woolley Hall and the Exchange House developments. As part of this arrangement, Millgate agreed not to make available for sale more than 15 units at Woolley Hall until the affordable homes at Exchange House had been built and transferred to an affordable housing provider, which in this case was an entity called Housing Solutions. The affordable housing comprised a block of flats on the part of the land that was not affected by the covenants (the 'unaffected land'), and 13 houses on the land that was affected by them (the 'covenanted land').

Millgate entered into a sale and purchase agreement with Housing Solutions, which was conditional on there being no reasonable risk of a court granting an injunction to stop or restrict the development of the housing, or an order to demolish them. It also obtained defective title insurance cover for itself and Housing Solutions, and indemnified Housing Solutions against any wasted expenses or losses which it might incur if the condition was not fulfilled. In July 2015 the properties at Exchange Court were completed, and in the same month Millgate applied to court for the modification of the covenants pursuant to s84 of the 1925 Act.

In November 2016, the Upper Tribunal found in Millgate's favour and on 15 February 2017, the penultimate day of the appeal period, Millgate transferred the 13 units on the covenanted land to Housing Solutions, without asking the charity whether it planned to appeal. The charity appealed to the Court of Appeal the next day.

What does s84 say and how does it work?

Section 84 of the 1925 Act enables the Upper Tribunal to order the whole or partial discharge or modification of a restriction where it is satisfied that one or more of the following applies:

- **Obsolescence:** the character of the property or the neighbourhood has changed, or there are other material circumstances, which mean that the restriction ought to be deemed obsolete.

- **Impediment to a reasonable use of the property:** the continued existence of the covenant would impede a reasonable use of the land for public or private purposes or, as the case may be, would unless modified so impede such user. This can only be considered where the restriction does not give the beneficiary any practical benefits or substantial value or advantage, or is contrary to the public interest, and money would be an adequate compensation for the loss of the covenant.

There has been considerable recent interest from developers in using the argument that restrictive covenants are contrary to the public interest.

- **No detriment:** the proposed discharge or modification would not be detrimental to the persons entitled to the benefit of the restriction.

The Upper Tribunal can also award compensation to the person entitled to the benefit of the restriction; either a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification, or 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.

The Upper Tribunal's decision in 2016

It emerged during the tribunal hearing that Millgate's conduct had been less than straightforward. In particular:

- It knew about the covenants and decided to build in breach of them without attempting to obtain a discharge or negotiate a release beforehand.

- It may have been able to obtain planning consent for a different layout at Exchange House whereby all 23 affordable units were built on the unaffected land – for instance by building a larger block of flats instead of a small block plus some houses. It had not investigated this.

- It could have built affordable housing on the more valuable Woolley Hall site but chose not to do so, with the result of increasing its own profit.

- It obtained a variation of its planning arrangements in 2016 so that, if it was not successful in the Upper Tribunal or if the affordable housing had not been transferred to Housing Solutions by 30 September 2017, it could pay £1.6m to the local planning authority (LPA) to be released from provision of this affordable housing. The LPA could use these funds to build affordable housing elsewhere in the area.

Despite Millgate's deliberate breach of the restrictive covenants, it succeeded in its 2016 application. The tribunal accepted that it had no power to modify the covenants under s84(1A)(1aa)(a), Law of Property Act 1925 because they secured a practical benefit of substantial value or advantage to the hospice, but determined that the covenants could be discharged because they were contrary to public interest pursuant to s84(1A)(1aa)(b). It awarded the charity £150,000 compensation, which it intended would cover the cost of remedial planting and landscaping to screen the hospice garden from the housing estate, plus damages for loss of amenity.

The tribunal mentioned Lord Sumption's view in relation to public interest in *Coventry v Lawrence* [2014] that:

> The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution.

The Upper Tribunal commented that the existence of planning permission for the use of the land for housing is significant when it is suggested that a covenant operates contrary to public interest. In reaching its decision, the tribunal noted that it was highly material that the housing was social housing intended for occupation by tenants who had been waiting for a very long time. It said the houses were attractive, well-made and were currently standing empty because of the restriction imposed by the covenants. The decision seemed to indicate that:

- courts and tribunals would be inclined to give more weight to public interest than private rights in disputes concerning land, particularly where injunctions are sought to restrain housing development;

- developers might be able to override restrictive covenants against development simply by obtaining planning permission;

- it might be necessary for parties in section 84(1) applications relying on the 'impediment to reasonable use of the property' ground to provide evidence of how a planning decision had been reached; and

- developers could in some circumstances be rewarded for what the tribunal described as 'high-handed and opportunistic' behaviour.

With remarkable coincidence of timing, Millgate transferred the affordable housing to Housing Solutions on the day before the trust applied for permission to appeal. Millgate was therefore released from the obligation to pay £1.6m to the LPA. The next day, the charity appealed against the decision on four grounds:

- the Upper Tribunal was wrong to treat Lord Sumption's observations in the *Coventry* nuisance case as providing relevant guidance in this case;

- the Upper Tribunal was wrong to treat the fact that the 13 affordable houses had already been built on

the covenanted land at the time of the hearing as a highly relevant factor;

- the Upper Tribunal was wrong to have disregarded, when assessing the public interest, that Millgate could have opted to pay £1.6m to the LPA instead of building the remaining units; and

- the Upper Tribunal should have taken into account the fact that Millgate had deliberately and knowingly breached the restrictive covenants by proceeding with the development on the covenanted land in the way that it did.

The Court of Appeal's decision

The court decided for the charity, agreeing that:

- Lord Sumption's guidance in the *Coventry* case about nuisance was not appropriate in the context of a section 84 application regarding restrictive covenants, which are agreed contractual rights 'with property-like effects' rather than 'the more open-textured sort of private rights which are protected by the law of nuisance'. It pointed out that Lord Sumption's view on this in *Coventry* was not supported by the other justices of the Supreme Court.

- The court decided that the tribunal should not have assumed that the grant of planning consent indicated that the development was in the public interest. The site is on greenbelt land, which indicates a presumption against development, and the process by which a planning application is determined is very different from the process of deciding whether to uphold a restrictive covenant. The court identified that it was in the public interest that contracts should be honoured not breached and that property rights should be upheld and protected.

- The tribunal should have taken into account the fact that Millgate chose to build on the covenanted land rather than pay the LPA the commuted sum or seek to build the affordable housing entirely on the unaffected land.

- The application should have been refused because Millgate had acted without proper regard to the rights of the trust and with a view to circumventing the proper consideration of the public interest under s84. The Court of Appeal decided Millgate's conduct was 'deliberately unlawful and opportunistic'.

This means that the restrictive covenants still stand and the 13 affordable houses have been built in breach of them. If the charity wants them to be demolished then it will need to bring another case in order to obtain an injunction. It is not yet known if it will do so or if Millgate will appeal this decision.

What does this decision mean for developers and landowners in the future?

For developers: The court's advice is clear for developers who know that a site is affected by a restrictive covenant which impedes development: before building, either negotiate a release of the covenant or make an application under s84 to see if it can be modified or discharged.

This may make it more difficult or more expensive to obtain insurance against the loss resulting from breach of a restrictive covenant. The court's decision indicates that responsible developers should seek release of covenants before developing in breach. This would entail notifying covenantees, which at present is not acceptable to many insurers.

The court accepted, however, that there may be reasons why, in a particular case, a developer might not be able to make a section 84 application before starting work on site – for instance, where the developer did not know about the existence of the covenant, or thought that it had managed to negotiate its release.

The court also restated an obiter warning from *George Wimpey Bristol Ltd v Gloucestershire Housing Association Ltd* [2011] at 35 that the courts will decide against applicants who build in breach of restrictive covenants as part of a deliberate strategy of forcing through the development on restricted land in order to change the appearance and character of the application land to such an extent that the courts would be persuaded to allow them to continue with the development under the 'obsolescence' ground.

For landowners: Landowners should be reassured by the court's assertion that it would be contrary to the public interest for a person's contractual rights under a restrictive covenant to be circumvented by a developer building first then seeking a discharge under s84.

There was also comfort for landowners in the court's refusal to take into account the fact that the charity did not seek an injunction as soon as the developer started to build in breach of the covenants. The judge found that there could be a number of good reasons why a beneficiary of a covenant might not want to resort to litigation, and that this should have no bearing on a section 84 application. It is not unreasonable to consider alternative means of restraining development quickly through seeking a summary decision from a court or trying to expedite a trial rather than taking the risk and costs of an injunction.

However, on a practical note the court did refer to the fact that the neighbouring landowner (who had gifted the hospice land to the charity) contacted Millgate in September 2014, referring to the restrictive covenants, and stating that Millgate was breaching them by undertaking its works on the covenanted land, and should therefore immediately halt the development. Despite this, Millgate continued with its construction works. This was useful evidence in court that Millgate knew about the covenants at an early stage, so landowners facing a breach of covenant would be wise to adopt a similar approach. ■

Alexander Devine Children's Cancer trust v Millgate Developments Ltd & ors [2018] EWCA Civ 2679

Coventry & ors v Lawrence & anor [2014] UKSC 13

George Wimpey Bristol Ltd v Gloucestershire Housing Association Ltd [2011] UKUT 91 (LC)