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Supreme Court Case: Restrictive Covenants

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I have sometimes come across blasé attitudes from developers when it comes to existing restrictive covenants on the title that may conflict with the proposed development – "the covenants are old I'm sure it will be OK" or "it's fine let's just get insurance" are a common response to raising a potential restrictive covenant issue. Alexander Devine Children's Cancer Trust v Housing Solutions Limited [2020] UKSC 45 provides a useful warning to property investors and developers of the worst-case scenario that can arise when a restrictive covenant is intentionally breached, and an interesting discussion regarding public interest in the context of restrictive covenants.

Background law

The Law of Property Act 1925 section 84, provides amongst other things that a party can apply to the Upper Tribunal to discharge or modify a restrictive covenant if the covenant does not secure any practical benefits of substantial value or advantage, or is contrary to the public interest. In such instances the restrictive covenants can be modified or discharged, and money will be an adequate compensation for the loss or disadvantage (if any), which any such person will suffer from the discharge or modification.

The facts of Alexander Devine Children's Cancer Trust v Housing Solutions Ltd

In this case, 13 affordable homes were built on land that was subject to a restrictive covenant. The restrictive covenant provided that the land could only be used for car parking and no building structure should be built on the land. The adjoining land that benefitted from the covenant was a children's hospice, and some of the housing units overlooked the hospice's planned gardens and wheelchair walk.

After constructing the houses, the developer applied to the Upper Tribunal to modify the restrictive covenants on the grounds that it impended reasonable use of the land, was contrary to public interest and the beneficiary of the covenants could be compensated. The Developer sought to argue that the public interest in the affordable housing being in existence was sufficiently important and immediate to justify the modification of the restrictive covenant.

The case made its way to the Supreme Court, after the Upper Tribunal granted the developer's application to modify the covenants and the Court of Appeal overturned the decision. There were four grounds of appeal to the Supreme Court, but the key issue related to the extent to which the developer's conduct should be taken into account when deciding whether or not the covenant should be modified on the ground that it was "contrary to public interest".

The two stage test

The Supreme Court held that in deciding whether or not a restrictive covenant should be modified or released there were two stages – firstly to make out one of the prescribed grounds (the jurisdictional stage), then a second stage to decide whether or not to make an order for modification or discharge of the restrictive covenants (the discretionary stage).

For the jurisdictional stage, the question to be asked was the continuation of the restrictive covenant contrary to the public interest, and not the wider one of whether in all the circumstances it would be contrary to the public interest to maintain the restrictive covenant. The good or bad conduct of the developer was irrelevant at the jurisdictional stage, as was the manner of the breach of the restrictive covenant. However, the discretionary stage enabled these factors to be taken into account.

Developer's conduct

The Supreme Court held it was right to take into account (amongst other things) two particular factors concerning the developer's conduct at the discretionary stage. Firstly, the developer could have applied for planning permission on the unencumbered land and avoided having to apply to discharge the covenant under s.84, leaving the hospice unaffected. Secondly, had the developer applied to discharge the restrictive covenant under section 84 before starting to build on the property, it was likely that it would not have been able to satisfy the "contrary to public interest" jurisdictional ground. By going ahead without first applying under section 84, the developer put itself in the position of being able to present the Upper Tribunal with a fait accompli where the provision of affordable housing satisfied the "contrary to public interest" jurisdictional ground.

As ever there were specific facts in this case which may make it difficult to apply more widely, however it is likely that, following this decision, we may now see that the Courts will be more reluctant to allow developers to profit where they have knowingly breached a restrictive covenant. In the judgment, Lord Burrows refrained from deciding that a developer who commits a cynical breach should have its application to discharge a restrictive covenant refused, however he did concede that he was sorely tempted to agree such a principle should give rise to caution by those considering breaching a restrictive covenant. PIN