Browne Jacobson

# The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd and another [2018] EWCA Civ 2679

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## Facts

A developer (M) constructed a social housing development of 23 units on a site called Exchange House. Of these, 13 units were built on the part of the site burdened by restrictive covenants that prohibited the land from being used for building or for any purpose other than a car park. M went ahead with the development despite objections from Mr Smith (S), who owned part of the land that benefited from the covenants. The remainder of the land that benefited from the covenants had been donated by S to a children's cancer trust (the Trust), which was in the process of building a hospice to accommodate terminally ill children.

M applied to the Upper Tribunal (Lands Chamber) (UT) to modify the restrictive covenants under section 84(1) of the Law of Property Act 1925. The ground M relied on was (aa). This allows the UT to discharge or modify a restrictive covenant if the covenant impedes some reasonable use of the land, but only if: (a) either the covenant does not secure any practical benefit of substantial value or advantage or is contrary to the public interest; and (b) money would be adequate compensation to anyone suffering loss or disadvantage from the discharge or modification.

The UT initially granted M's application even though M had deliberately chosen to build in breach of the covenants, despite being requested not to do so. It ruled that the covenants were contrary to the public interest as it was not in the public interest for houses that were otherwise available to meet a pressing social need to remain unoccupied.

The Trust appealed against the UT's decision.

## Issue

Were the covenants contrary to the public interest?

## Decision

In applying the public interest test under section 84(1), the UT should have had regard to whether an applicant had made fair use of the opportunities available to it to try to negotiate a waiver of a covenant or, if necessary, to test the public interest arguments in an application made before acting in breach of that covenant. Whilst there may on occasions be reasons why it was not practical for a developer to do that, generally it was in the public interest that contracts should be honoured and not breached and that property rights should be upheld and protected.
As M had deliberately circumvented the proper procedures for testing the Trust's rights under the covenants (by not applying to the UT until the units had been built), the UT could not properly have been satisfied that it was contrary to the public interest for the covenants to be maintained. Given M's conduct, it was in the public interest that M should bear the risk of wasting its resources in building on the site.

## Points to note/consider

One of the factors influencing the UT's decision was that M had obtained planning permission to build the units and that this showed an objective assessment of appropriate land use which fully took into account the public interest. However, the Court of Appeal reaffirmed orthodox thinking that this was irrelevant and that the questions of whether planning permission should be granted and whether upholding a restrictive covenant was contrary to the public interest were different and arose in very different contexts.

This case therefore serves as a clear warning to developers of the risks involved in carrying out a development in breach of a restrictive covenant even if planning permission has been obtained without any objections (neither S nor the Trust objected to M's planning application). It is not clear from this case whether the 13 units in question (which have already been transferred to a provider of social housing) will now need to be demolished, but that would seem to be the most likely outcome (especially as Slade LJ doubted the correctness of the UT's finding that money would be adequate compensation if the covenants were modified).

## Contact

David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

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