

Father's Field Developments Ltd v Namulas Pension Trustees Ltd [2021] UKUT 169 (LC)

A case which illustrates the danger of using a restrictive covenant to secure an overage payment.

05 October 2021

A case which illustrates the danger of using a restrictive covenant to secure an overage payment.

Facts

The applicant (FFD) bought a golf course from the objector (NPT) in 2001. The transfer contained a covenant by FFD prohibiting for a period of 30 years any residential development on the land without first obtaining the written consent of the transferor (unless the development was to be occupied by a family member or employee of the transferee).

FFD applied to the Upper Tribunal (Lands Chamber) (UT) to discharge or modify the covenant under section 84(1) of the Law of Property Act 1925 (the 1925 Act) in relation to a cottage built in 2006 and two new houses currently under construction to allow occupation by a wider variety of people.

NPT did not retain any land following the 2001 transfer. Its only reason for imposing the covenant was financial – it was happy for the covenant to be discharged as long as it received a share of the development value of the land.

Issues

1. Was there jurisdiction to discharge or modify the covenant under ground (aa)?
2. If so, should the UT exercise its discretion to do so?
3. If the covenant was discharged or modified, was any compensation payable to NPT?

Decision

1. Ground (aa) allows a covenant to be discharged or modified if it impedes a reasonable use of the land (which was not in doubt) and (in this case) did not secure to the person entitled to the benefit any practical benefits of substantial value or advantage.

In this context, a 'practical benefit' is an amenity (i.e. something practically useful or pleasant). The right to demand a price for consent is not sufficient. Ground (aa) was therefore made out in this case.

2. In 2018, FFD had sought consent from NPT for the construction of 53 houses, which had been refused. NPT was concerned that the grant of this current application would set a precedent, making it more likely that a future application in relation to that housing development would be successful. However, this argument was rejected. Every application is different and the success of this present application would not necessarily help an application in relation to a much larger development.

The UT also rejected an argument that the covenant should not be discharged or modified because of its age and the fact that the

application concerned the original contracting parties. The commercial needs of the applicant and local planning context had radically changed in the 20 years since the transfer. Had parliament wish to preclude original contracting parties from the jurisdiction, it would have expressly said so.

The UT therefore exercised its discretion to discharge the covenant.

3. No compensation was payable. It was not appropriate to award compensation (as NPT had argued) based on what it would have demanded as a price for releasing the covenant. Such a measure of assessing compensation may only be awarded if it is the best or only way to value a loss of amenity (and there was no such loss here). In addition, there was no evidence that the price of the golf course was reduced in 2001 because of the covenant (another ground for assessing compensation).

Points to note/consider

This case shows the danger of using a restrictive covenant to secure a future overage payment.

The covenant will not automatically bind a buyer of the servient land unless it 'touches and concerns' land retained by the covenantee. In this case, NPT did not retain any land. However, it got around this problem by obtaining a covenant from FFD preventing a disposition of the land without the disponent providing a new direct covenant in NPT's favour (presumably backed up by an appropriate restriction on the title of the servient land).

However, this did not get around the problem that a restrictive covenant can be discharged or modified by the UT under section 84(1) of the 1925 Act. Whilst the UT does have power to award compensation to someone for any loss or disadvantage suffered by the discharge or modification, that compensation (even if awarded) is unlikely to be anywhere near the value of the overage payment that the restrictive covenant may have been designed to protect.

On the other hand, the UT has no jurisdiction to discharge or modify a 'traditional' positive overage covenant, where the share of any future development value payable to the covenantee is stipulated at the outset.

Contact



David Harris

Professional Development Lawyer

david.harris@brownejacobson.com

+44 (0)115 934 2019

Related expertise