

The Alexander Devine Children's Cancer Trust v Housing Solutions Ltd [2020] UKSC 45

The Upper Tribunal was wrong to allow restrictive covenants to be modified where a development was deliberately and cynically carried out in breach of those covenants.

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Facts

A developer (M) constructed a social housing development of 23 units on a site called Exchange House (to comply with a section 106 agreement in relation to the development of another site). 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 began building a hospice to accommodate terminally ill children shortly after M had completed its development (the upper bedrooms of some of the houses built by M directly overlooked the hospice's grounds).

After having completed the development 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 1925 Act). The ground M relied on was (aa). This allows the UT to discharge or modify restrictive covenants if they impede some reasonable use of the land, but only if (in this case) the covenants, by impeding such reasonable use, are contrary to the public interest (and money will be adequate compensation for any person who suffers a loss or disadvantage by the discharge or modification).

The UT initially granted M's application (on payment of £150,000 compensation to the Trust) even though M had deliberately and cynically chosen to build in breach of the restrictive covenants, despite being requested not to do so. The Court of Appeal subsequently overturned this decision. The social housing provider to whom M had transferred the development appealed to the Supreme Court.

Issues

1. Did the UT make an error of law when deciding whether the public interest ground was satisfied (the 'jurisdictional stage') by ignoring M's cynical breach of the restrictive covenants, whilst regarding as highly relevant the fact that 13 social housing units had already been built?
2. Should the UT have exercised its discretion to modify the restrictive covenants in the light of M's conduct (the 'discretionary stage')?

Decision

1. The UT did not make an error of law. The public interest ground (like all the other grounds in section 84(1)) should be interpreted narrowly and involved here weighing the public interest in 13 affordable housing units not going to waste against the public interest in the hospice providing a sanctuary for children dying of cancer. The good or bad conduct of the applicant was irrelevant at the jurisdictional stage.

2. Even though the UT took into account M's conduct, it failed to consider two relevant factors at the discretionary stage. First, M could have built on the part of the site that was unencumbered by the restrictive covenants because planning permission would have been granted for affordable housing to be built on that part of the site. Secondly, M would have been unlikely to satisfy the public interest ground had it applied to modify the restrictive covenants prior to building in breach of them. By building the houses, M had created the situation itself in which it could argue that maintenance of the covenants was contrary to the public interest. M should not be rewarded for presenting the UT with a 'fait accompli'.

Points to note/consider

1. Surprisingly, this is the first time that the Supreme Court (or the House of Lords) has ever considered the effect of section 84(1) of the 1925 Act. The decision serves as a clear warning to developers of the risks involved in deliberately carrying out a development in breach of a restrictive covenant even if planning permission has been obtained without any objections. A developer who is considering applying to the UT to discharge or modify a restrictive covenant under section 84(1) should generally do so before starting development.
2. Ultimately though it is a decision based on its unusual own facts. Lord Burrows (who spoke on behalf of the whole Supreme Court) was clear that there is no unqualified principle that, at the discretionary stage, a cynical breach of covenant will always outweigh what would otherwise be the public interest in discharging or modifying a restrictive covenant.
3. Although this case did not decide whether the Trust should be granted an injunction stopping the 13 units in question being occupied or requiring them to be demolished (that may be a question for another day), Lord Burrows did recognise that this decision will strengthen the Trust's hands when negotiating any final settlement of the dispute.

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