

All England Reporter/2018/December/Alexander Devine Children's Cancer Trust v Millgate Developments Ltd and another company - [2018] All ER (D) 02 (Dec)

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Alexander Devine Children's Cancer Trust v Millgate Developments Ltd and another company

[2018] EWCA Civ 2679

Court of Appeal, Civil Division

Underhill VP, Sales and Moylan LJ

28 November 2018

Restrictive covenant affecting land – Benefit of covenant – Challenge to covenant

Abstract

Restrictive covenant affecting land – Benefit of covenant. On a correct assessment of the circumstances of the case, no discretion had arisen under s 84(1) of the Law of Property Act 1925 according to which there was any basis for the Upper Tribunal (Lands Chamber) (the UT) to modify restrictive covenants so as to permit residential development. Accordingly, the Court of Appeal, Civil Division, allowed the appellant Trust's appeal against the UT's decision to allow the respondent developer's application to modify the restrictive covenants.

Digest

The judgment is available at: [2018] EWCA Civ 2679

Background

In around 2013, the first respondent developer acquired land with a view to constructing social housing. It did so in order to satisfy a planning obligation imposed on it by the local planning authority. The application land was affected by restrictive covenants, for the benefit of the appellant Trust, preventing residential development. Notwithstanding the covenants and the appellant's objections, the developer constructed nine two-storey houses and four bungalows on the land. The developer agreed to sell the development, once it had been completed, to the second respondent social housing provider. Subsequent to construction, the developer brought an application, under s 84 of the Law of Property Act 1925 (the LPA 1925), to modify the restrictive covenants. In the event that its application was unsuccessful, the developer entered into an agreement whereby its planning obligation to the authority was varied to the extent that in partial substitution

for that obligation, it could make a payment of £1,639,904 to the authority.

The Upper Tribunal (Lands Chamber) (the UT) held that the restrictive covenants against development of the land, in impeding the continued existence and the occupation of the houses and bungalows, were contrary to the public interest, pursuant to the LPA 1925 s 84(1A)(b), and should be overridden. In making its decision, the UT acceded to the developer's submission that guidance in *Lawrence v Fen Tigers Ltd* ([2014] All ER (D) 245 (Feb)) regarding the tort of nuisance should be applied by analogy in the context of applications under the LPA 1925 s 84. The Trust appealed.

Appeal allowed.

Issues and decisions

Whether the UT had erred in its construction of the LPA s 84(1A)(b).

Satisfying the condition in s 84(1A)(b) was a precondition for the UT to have any discretionary power under s 84(1) to discharge or modify a restrictive covenant (see [65] of the judgment).

At the stage of application of the contrary to the public interest test in s 84(1A)(b), the UT should have had regard to whether the applicant had made fair use of opportunities available to it to try to negotiate a waiver of a restrictive covenant or, if necessary, to test the public interest arguments in an application made under s 84 in advance of acting in breach of that covenant (see [57] of the judgment).

In the circumstances of the present case, in which the developer had deliberately circumvented the proper procedures for testing and respecting the Trust's rights under the restrictive covenants, the UT could not properly be satisfied that it was contrary to the public interest for the restrictive covenants to be maintained in place. The developer had acted in an unlawful and precipitate manner by building in breach of the covenants. It had acted with its eyes open and completely at its own risk. As a result, it was appropriate and in conformity with the public interest that it had to bear the risk that it might have wasted its own resources in building the 13 housing units on the application land. The UT had wrongly postponed consideration of the conduct of the developer to the discretionary stage (see [61], [65] of the judgment).

The UT had fallen into error in following the guidance in *Fen Tigers*, and also when it had held that the grant of planning permission in the present case had fully taken into account the public interest (see [67] of the judgment).

Further, the UT had in two respects failed to apply s 84(1B) correctly when arriving at its conclusion under s 84(1A)(b). The first respect again related to the improper weight which the UT had given to the grant of planning permission. The UT had treated s 84(1B) as supportive of its view; but it did not support it. The development plan had placed the land in the Green Belt, thereby indicating that there was the usual strong presumption against its residential development as proposed by the developer. The UT had not identified any declared or ascertainable pattern for the grant or refusal of planning permission in the relevant area, let alone one which had supported the developer's arguments regarding the public interest (see [68] of the judgment).

Second, s 84(1B) stated that in determining whether a case fell within s 84(1A)(b), the UT had to take into account along with the listed items any other material circumstances. The material circumstances in the

present case included the failure of the developer to take proper steps to test the public interest question at the appropriate time, before breaching the restrictive covenants (see [69] of the judgment).

In the UT's assessment in respect of the LPA 1925 s 84(1A)(b), although it had treated the provision of affordable housing (implicit in the developer's varied agreement with the authority) as relevant to the public interest issue, it had left that provision for the same amount of affordable housing by the alternative means out of account. Therefore, its assessment of the public interest for the purposes of s 84(1A)(b) had been flawed (see [73] of the judgment).

Bass Ltd's Application, Re [1973] 26 P & CR 156 considered; *SJC Construction Co Ltd v London Borough of Sutton* [1975] 1 EGLR 105 considered; *Winter v Traditional and Contemporary Contracts Ltd* [2007] All ER (D) 110 (Nov) considered; *Lawrence v Fen Tigers Ltd* [2014] All ER (D) 245 (Feb) considered.

Decision of The Upper Tribunal (Lands Chamber) [2016] UKUT 0515 (LC) Reversed.

Emily Windsor (instructed by Key IP Limited) for the appellant.

Michael Driscoll QC (instructed by DAC Beachcroft LLP) for the respondents.

Paul McLachlan Barrister.