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Court makes example of developer for breach of restrictive covenant

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15 January 2019

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In a recent decision of the Court of Appeal in Alexander Devine Children's Cancer Trust v Millgate Developments Ltd and others [2018] EWCA Civ 2679 ('Millgate and Others'), developers were given a somewhat unwelcome reminder of the risks of ignoring restrictive covenants during development.

In 2013, Millgate Developments Ltd ('Millgate') acquired land neighbouring that owned by the Alexander Devine Children's Cancer Trust (the 'Trust'). The Trust was to designate their land for the purpose of a hospice and had a restrictive covenant over Millgate's land to stop development that would overlook the gardens of the hospice. Millgate became aware of the restrictive covenant upon purchase of the land but made no attempts to approach the Trust. Millgate developed 13 affordable housing units overlooking the Trust's land prior to applying to the tribunal to cancel or modify the restriction. The tribunal concluded there was significant public interest in ensuring the affordable housing (now built) did not go to waste and allowed the modification of the covenant. However, on review, the Court of Appeal was highly critical of Millgate's wilful behaviour and chose to uphold the sanctity of the restrictive covenant. This decision sends a strong message to developers of the importance of respecting restrictive covenants.

Background

In 2012, the Trust was gifted a portion of agricultural land by Mr Smith for the purposes of development into a hospice for children to live out their remaining days in peace.

In 2013, Millgate acquired some land for the purpose of developing a 75 unit residential site with a planning requirement to provide 13 off-site affordable housing units. Millgate designated land neighbouring that of the Trust's to build the 13 off-site units. In purchasing the property, Millgate became aware of restrictive covenants agreed in the 1970's which stated that "*no building structure or other erection of whatsoever nature shall be built erected or placed on [Millgate's land]*". No attempt was made at this stage to identify the beneficiaries of the restrictive covenant and Millgate continued with their plans for development.

No objections were raised by the Trust during the planning process and it wasn't until building works began in 2014 when the grantor of land, Mr Smith, became aware of the development and raised objection on the Trust's behalf. Mr Smith requested the works desist in recognition of the restrictive covenant however Millgate, acting on legal advice, continued with the works. Their legal advisers were particularly dismissive given that Mr Smith did not own or occupy the Trust's land and he himself was therefore not 'harmed'. Millgate exchanged contracts for the sale of the affordable housing units in July 2014 and applied for discharge of the covenant to the land tribunal shortly after.

On the basis of the Trust's land ownership and the harm directly caused to their intended hospice, the Trust objected to Millgate's application.

Millgate's first argument rested on s.84(1)(aa), read alongside s.84(1)(c), of the Law of Property Act 1925 (the 'Act'). They argued that the development constituted reasonable use of the land and that no harm had been caused to the Hospice. The Tribunal found that due to the

nuances of the hospice, the planned wheelchair route and the now substantially overlooked garden that harm had indeed been caused. Instead, they found on the basis of Millgate's second argument under s.84(1)(aa), read alongside s.84(1)(b), that it was in the public interest for the affordable housing units to have been built. The Tribunal were swayed by the comparison found by Millgate's representatives with the case of Lawrence v Fen Tigers [2014] AC 822 ('Fen Tigers'). In Fen Tigers, a nuisance caused by a new stadium was found to be in the public interest on the basis of the economic and public benefit provided. The nuisance was compensated financially as opposed to being stopped. Millgate were therefore required to compensate the Trust for the harm caused to the overlooked hospice gardens and the restriction was modified to permit development.

The Trust appealed the decision on the last day of the appeal window. At such time, Millgate had already completed the sale of the affordable housing units and had made no attempt to identify if the Trust were to appeal.

The appeal

On 28 November 2018, the Court of Appeal heard the case and was highly critical of Millgate's behaviour. The court found in favour of the Trust on all four grounds of appeal, refusing to allow modification to the restrictive covenant. They were reliant on the following points:

- The Tribunal had erred in law in relying on Fen Tigers. There is public interest in ensuring the rule of law is upheld and that breaches of property rights are not encouraged. Although the court acknowledged that there was an interest in not allowing needed affordable housing to go to waste, the court drew a distinction between a right arising by tort and one contractually agreed.
- The Tribunal had placed undue weight on the grant of planning permission. It is well established in case law that planning permission can be indicative that a permitted use is being restricted (s.84(1)(aa)). Indeed, a recent decision of Veee Limited v Anne Barnard and others [2018] UKUT 379 (LC) ('Veee') was swayed on this point. However, in Veee, whilst it was agreed planning permission could be of assistance in determining whether the Tribunal could intervene under s.84 of the Act, the case itself related to the development of one unit in circumstances where local residents were deemed to suffer no harm in its creation. The Tribunal had erred in putting little weight into the alternative options open to Millgate. In 2016, when it was established that the affordable housing units may not be usable due to the restrictive covenant, the local authority agreed a variation to the s.106 Agreement to permit Millgate to pay a contribution in lieu of providing the units themselves. The local authority would also have accepted a planning permission in the first instance that placed the units on the main development site. Millgate could also have sought to negotiate and discuss with the Trust prior to development, perhaps compromising with an alternate layout further away from the gardens. Indeed, the court was throughout highly critical of Millgate's 'opportunistic behaviour'.
- The court formed the view that the proper reading of s.84 requires that the public interest test be passed first before the Tribunal can consider whether their discretion arises under the Act. Previously it has been understood that the public interest test was part of the discretion and it will be interesting to see if this aspect is tested further.

Our view

There is a fine balance to be struck throughout the development process. Many developers acknowledge that risk accompanies most new developments and in often cases there is a benefit in perseverance. However, this case acts as a reminder to consider what constitutes an 'acceptable risk'.

Advisors and developers alike will often take a view on the risks of a restrictive covenant. In certain cases, it is better to walk away; in others it is better not to contact the covenant owner in order to ensure appropriate insurance can be sought; and the more daring developer may indeed seek to 'flush out' a restrictive covenant by breaching it in a temporary or minor way. This case is a reminder that whilst all of the above may be sensible in a given circumstance, each matter must be taken on a case by case basis. Many advisors tend to shy away from application to the Tribunal due to the costs and time delay associated with doing so. However, upon becoming aware of the objection, an application to the Tribunal for discharge or modification should have been triggered – after all, the application to court may be expensive but so are the fees incurred by Millgate's solicitors in attempting to dissuade Mr Smith in the first place.

It is well noted throughout the decision that the conduct of Millgate weighed heavily in the decision of the court to refuse their application. The very fact that the affordable housing units had been built before applying to the Tribunal was particularly frowned upon. It is important to note that this decision is reflective of a 'worst case scenario' and does not serve to show that restrictive covenants can never be modified. Indeed, in the case of Veee the applicant applied successfully to the Tribunal to remove the restrictive covenant. In the case of Veee the applicant applied to the Tribunal before beginning any development on the property. The Tribunal was therefore not influenced by any previous works that may have been taken and indeed the applicant showed far more respect for the restrictive covenants in place

over their title. In Veee it is clear that true and considered thought was given to the objections of the other parties and the applicants were correctly advised as to the unsubstantiated ‘harm’ claimed by the respondents. Quite on the contrary, it is difficult to see how Millgate’s advisors could not see the damage caused given the particularly sensitive and vulnerable nature of the intended residents of the hospice.

Another key reminder arising from the case is the weight attached to the existence of planning permission. A local authority can grant planning permission in abstract to individuals that do not even own property. They are required to consider planning policy and the public interest in development, not the legal restrictions placed upon the property by virtue of its title. As shown in both cases noted above, planning permission can be persuasive. However it is not determinative and it is important to not place too much weight on the presence of planning permission in being sufficient alone to meet the test of s.84(1)(aa) of the Act.

A final point (which is perhaps more academic than practical) is the balancing act undertaken by both the Tribunal and court between the public interest in upholding the restrictive covenant against the waste of much needed affordable housing units. It is possible that Millgate and their advisors placed too much significance in the public benefit of affordable housing and indeed it is accepted by the Tribunal that the decision at first instance may well have been different had the units not already been built and left empty. The court however adopted a different view and was in fact very dismissive of the existence of the units, regardless that both Mr Smith and the Trust director, under cross examination, admitted they would not like to see the units go to waste. In the court’s view, it was more important that the restrictive covenant was upheld however it is perfectly possible that a different conclusion would have been reached if Millgate had applied to the Tribunal prior to development.

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