

Property: No reward for a cynical breach of a restrictive covenant

Adam Swirsky

When a developer originally applied to the Upper Tribunal (Lands Chamber) to modify a restrictive covenant under section 84(1) Law of Property Act 1925 the tribunal allowed the application despite the fact that the developer had built on land burdened by a covenant restricting the land's use to a car park. The developed land was situated next to the Claimant's hospice and the developer argued and the tribunal accepted that, because the developer had built 23 units for social housing, the covenant was contrary to the public interest.

The Court of Appeal and now the Supreme Court disagreed (**Millgate Developments Ltd and another v Alexander Devine Children's Cancer Trust and another [2020] UKSC 45**). Although the Supreme Court was satisfied that the Tribunal had taken the developer's cynical conduct into account, it found, exceptionally, that something had gone fundamentally wrong with the exercise of its discretion because the Tribunal had failed to take into account two factors of particular importance.

The first of these omissions was to disregard the fact that, had the developer respected the rights of the trust by applying for planning permission on nearby land, there would then have been no need to apply to discharge the covenant and the Claimant's hospice would have been unaffected. The second was, had the developer respected the rights of the trust by applying under section 84 before starting to build, it was likely that the developer would not have been able to satisfy the "contrary to the public interest" jurisdictional ground.

In respect of these factors, the court pointed out that, first, it was important to deter a cynical breach under section 84 but it was especially important to do so where that cynical conduct had produced a land-use conflict that could reasonably have been avoided altogether by submitting an alternative plan and, second, it was not in the public interest that those who deliberately breached a restrictive covenant should be able to secure the modification of the covenant in reliance on the state of affairs created by their own deliberate breach.

The case is important because it underlines the court's approach to applications made under section 84 where there has been a cynical disregard of a restrictive covenant but also because it demonstrates that, in an appropriate case, an appeal court will interfere with the exercise of a discretion by a lower tribunal.