6 November 2020

PRESS SUMMARY

Alexander Devine Children's Cancer Trust (Respondent) v Housing Solutions Ltd (Appellant) [2020] UKSC 45
On appeal from [2018] EWCA Civ 2679

JUSTICES: Lord Kerr, Lord Lloyd-Jones, Lord Kitchin, Lord Hamblen, Lord Burrows

BACKGROUND TO THE APPEAL

This case raises a fundamental dilemma over the use of land. On the one side, there is a property company which seeks to ensure that 13 new affordable houses do not go to waste. On the other, there is a charitable children's trust which seeks to ensure that terminally ill children in a hospice can enjoy, in privacy, the use of the hospice grounds without being overlooked, or otherwise detrimentally affected, by the new houses. The legal issues concern restrictive covenants over land and the procedure, under section 84 of the Law of Property Act 1925 (the "**1925 Act**"), by which an application may be made to a tribunal for the discharge of a restrictive covenant. It is the first time that the highest court (whether the House of Lords or the Supreme Court) has been required to decide an appeal on section 84.

In July 1972 a farmer sold part of his land (the "**application land**") to a company ("**SSPC**") that already owned the land next door (the "**unencumbered land**"). The application land and the unencumbered land together form a rectangular plot (the "**Exchange House site**"). As part of the sale, SSPC covenanted that at all times thereafter: (i) no building structure would be built on the application land; and (ii) the application land would only be used for car parking (the "**restrictive covenants**").

The farmer's son, Mr Barty Smith, later inherited the land adjacent to the Exchange House site. In 2012 he made a gift of part of this land (the "**hospice land**") to the Alexander Devine Children's Cancer Trust ("**the Trust**") for the construction of a children's hospice.

Soon afterwards, and with knowledge of the restrictive covenants, Millgate Developments Ltd ("**Millgate**") acquired the Exchange House site. In July 2013 Millgate applied for planning permission to build 23 affordable houses on the site, in line with its affordable housing planning obligations. Thirteen of these houses were to be built on the application land, in breach of the restrictive covenants. Some of them would overlook the hospice's planned gardens and wheelchair walk. Planning permission was granted in March 2014 and Millgate began construction in July 2014.

In September 2014 Mr Barty Smith wrote to Millgate objecting to them building on the application land. Millgate continued regardless and in May 2015 agreed to sell the development at the Exchange House site to Housing Solutions Ltd ("**Housing Solutions**"). In July 2015, after completing the development, Millgate applied to the Upper Tribunal (the "**UT**") seeking modification of the restrictive covenants, pursuant to section 84 of the 1925 Act. Mr Barty Smith and the Trust objected to this application. Shortly afterwards, in September 2015, construction of the hospice began.

On 18 November 2016 the UT allowed Millgate's application to modify the restrictive covenants, on the condition that it paid £150,000 to the Trust as compensation. On 28 November 2018 the Court of Appeal overturned the UT's decision. Housing Solutions now appeals to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the appeal, though for different reasons to those given by the Court of Appeal. Lord Burrows writes the judgment. The application to modify the restrictive covenants is refused.

REASONS FOR THE JUDGMENT

Section 84 of the 1925 Act, as amended, confers upon the UT the power to discharge or modify restrictive covenants on five grounds. The exercise of this power has two stages. At least one of the grounds must be satisfied (the "**jurisdictional stage**") before the UT can then decide whether to exercise its discretion to discharge or modify the restrictive covenants (the "**discretionary stage**"). The ground relevant to this appeal is whether the restrictive covenants, by impeding a reasonable user of land, are contrary to the public interest: sections 84(1)(aa) and 84(1A)(b) **[31-33]**.

The first issue is whether Millgate's deliberate and cynical breach of the restrictive covenants is relevant at the jurisdictional stage **[41]**. The Court of Appeal found that it was **[47]**. The Supreme Court finds that it is not. The "contrary to the public interest" ground requires a narrow interpretation. Its focus is on the impeding of a reasonable user of the land and *"whether that impediment, by continuation of the restrictive covenant, is contrary to the public interest"*. The question is not the wider one of *"whether in all the circumstances it would be contrary to the public interest to maintain the restrictive covenant"* **[42]**.

This narrow interpretation requires 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. **[43]**. The good or bad conduct of the applicant is irrelevant at the jurisdictional stage. It tells us nothing about the merits of what the land in question is being or will be used for **[44]**. This narrow interpretation is also in line with the other four grounds under section 84, accords with the purpose of section 84, and reflects the fact that the applicant's conduct can still be considered at the discretionary stage **[45]**.

The second issue is whether the UT failed properly to consider, at the discretionary stage, Millgate's cynical conduct. The Court of Appeal found that it did **[54]**. The Supreme Court agrees, but for different reasons **[53]**. It is only appropriate for an appellate court to interfere in a discretionary decision of a specialist tribunal if that tribunal has made an error of law **[51]**. In this case, however, even though the UT took into account Millgate's conduct, it did make an error of law **[53]**. The UT failed to consider two relevant factors at the discretionary stage: (i) Millgate could have built on the unencumbered land, not the application land; and (ii) Millgate would have been unlikely to satisfy the "contrary to the public interest" ground had it applied to modify the restrictive covenants prior to building on the application land. Millgate could not be rewarded for presenting the UT with a fait accompli **[57-62]**.

This is sufficient to dismiss the appeal. But, having heard full submissions on two further issues, the Court considers them briefly **[63]**. First, the UT did not rely on Lord Sumption's comments in *Coventry v Lawrence* [2014] UKSC 13 and so any dispute about whether or not it had been correct to do so does not arise **[64-66]**. Second, the UT correctly considered at both stages the fact that Millgate had built on the application land in order to fulfil its affordable housing planning obligations **[70-73]**.

The Court therefore upholds the Court of Appeal's decision, but for different reasons **[74]**. The UT's decision is re-made and the application to modify the restrictive covenants refused **[77]**.

References in square brackets are to paragraphs in the judgment