

Restrictive covenants

Spring 2017

A restrictive covenant is an agreement in a deed that one party will restrict the use of its land in some way for the benefit of another. The covenant may limit the possible uses of the land, prohibit particular trades or business or restrict the number and type of buildings that can be erected.

At common law the remedies for breach of restrictive covenant are:

1. Damages; or
2. An injunction stopping the breach.

Where an injunction could be granted, the court has the discretion to award damages in lieu (i.e. instead of) an injunction, where certain circumstances apply.

Alternatively, if an agreement cannot be reached with the beneficiaries of a restrictive covenant, an application can be made to the Upper Tribunal (Lands Chamber) (the Tribunal), for modification or discharge of a restrictive covenant. There are various grounds for the basis of an application under Section 84 (1) of the Law of Property Act 1925 (the Act).

Two recent decisions of the Land Tribunal demonstrate the differing approaches to modification, in particular where the properties are for social housing.

Millgate Developments Limited and another -v- Smith and another [2016]

In this case the developer built 13 properties on a former industrial site and knowingly breached restrictive covenants relating to the use of the land.

The restrictive covenant benefitted land that had been donated by Mr Smith to the Alexander Devine Children's Cancer Trust [the objectors]. Mr Smith's land no longer adjoined the development land as it was separated from it by the trust land. The objectors were in the process of building a children's hospice for terminally ill children, the gardens of which would back on to the development land. The development was prominent along the boundary, although only the upper floors and roofs were visible. The

objectors were concerned about privacy in the gardens particularly in view of the sensitive nature of the use of the building.

The covenants prohibited the use of the land for building, of whatsoever nature. Shortly after the commencement of the development Mr Smith asked the developer to cease building and to comply with the terms of the covenants, but it refused to do so.

At the time the application to modify the covenant was made, the properties had been built and the developer had entered into a sale contract with Housing Solutions Limited, a social housing provider. The properties were unoccupied pending the outcome of the application.

In its application the developer sought to show that the covenant impeded the reasonable use of the land. To succeed with this argument the developer would need to demonstrate that either:

1. The covenant did not secure any practical benefit of substantial advantage; or
2. Enforcement of the covenant was contrary to the public interest.

The objectors focused on loss of privacy, noise and light and the Tribunal was satisfied that there was a loss of practical benefit in the form of enhanced privacy and seclusion. The loss of this benefit could only be mitigated by expenditure in the region of £37,000 - £70,000 and therefore it was a benefit of substantial value or advantage. As this limb of the Act could not be made out, the Tribunal had to further consider whether impeding the proposed use of the land was contrary to the public interest.

The developer submitted that it was contrary to the public interest to impede the use of land where the proposed use of the land was affordable housing. The developer further contended that the existence of planning permission for the use of the application land was a material consideration as to the reasonable use of the land, as it is generally taken to be evidence that the proposed use of



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the land is reasonable. The Tribunal said that the fact that the housing was intended for occupation by social housing tenants who had been waiting a long time for accommodation was a highly material consideration. The Tribunal decided that impeding the occupation of the houses was contrary to the public interest and decided that damages would be adequate compensation.

The Tribunal, notwithstanding its decision, concluded with the warning given in an earlier case that 'If it was thought to be easier to secure a modification in favour of a completed development than for one which had not yet commenced, the contract breaker would have a real incentive to press on even in the face of strong objections by the beneficiaries of a covenant. Any developer who thinks in that way should think again or risk a rude awakening'.

University of Chester's Application - re land at Sandy Lane

This case concerned a restrictive covenant to protect the enforceability of a scheme that preserved the unusual character of riverside gardens along the banks of the River Dee. By a deed dated 1896 a piece of land was partitioned into 12 lots. The University acquired one of these lots in 1965 and had built a single storey boathouse for its students. In 2002 the facility fell into disrepair and in November 2014 the University was granted planning permission for the demolition of the old boathouse and the erection of a large two-storey building, to be used as a 'community rowing and fitness facility'. The building would consist of boat storage, changing rooms and a new pontoon.

The owners of the other eleven lots objected, but a Dr Witter was the only objector to file any written evidence.

The deed of partition contained 11 covenants, three of which were relevant to this matter:

1. No letting of boats or any trade or business of any kind shall be carried on, but that the same shall be used for private occupation only as gardens or pleasure grounds;
2. That the hedge or fence bounding the Lots shall not be, or grow to more than, 4ft 6 inches in height measuring from the path of the Sandy Lane.
3. No dwelling house shall be erected on any lot. If any summerhouse be erected on any lot the highest point of each summer house or boathouse shall not be higher in a horizontal line than the highest part of the boundary fence against Sandy Lane.

In addition to a number of arguments, the Tribunal had to consider not only the beneficial use which was prevented by the covenant, but the advantages it secured to those entitled to the benefit of the covenant.

The Tribunal considered the case of *Re Collins Application* (1975) 30 P&CR 527 which stated 'In my view for an application to succeed on the ground of public interest it must be shown that that interest is so important and immediate as to justify the serious interference with private rights and the sanctity of contract'.

The Tribunal stated that it was influenced by two factors. The first factor was the degree of damage to the amenity and enjoyment of Dr Witter's riverside garden by the sale and location of the new boathouse. The Tribunal considered that the degree of damage to Dr Witter's garden would be extreme and there was no 'pressing reason' to impose this loss of amenity and enjoyment upon him.

The second factor was the damage which the modification of the covenants would do to the enforceability of the scheme of mutual covenants which preserved the unusual character of the land on the riverbank. The Tribunal did not consider that there was any significant public benefit which could be secured by modifying the covenant and that it should continue to preserve the local law.

The Tribunal was therefore not satisfied that the enforcement of the covenants was contrary to the public interest. It also concluded that no monetary award could be an adequate substitute of the enjoyment of the space which the covenants had preserved for 120 years.

In both of these cases the decision to grant or refuse modification turned on whether the enforcement of the covenant was contrary to the public interest. Both covenants sought to prevent building on adjoining land which was likely to effect the enjoyment and use of gardens and impact on the privacy and the seclusion of those using them. In the case of *Chester University* the Tribunal felt that the damage caused by the large boathouse was so significant that money would not be an adequate remedy. In contrast, in *Millgate Developments* the effect of properties overlooking an end of life hospice could be mitigated by the payment of damages. Whilst this could be due to the highly unusual nature of the riverbank land, it could be seen as an indication to developers that there is a better chance of modification if the properties are for social housing.

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If you would like to discuss any of the issues raised in this update, please contact:

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