Court of Appeal takes a no-nonsense approach to “opportunistic” developers

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Developers should be aware of the impact of knowingly breaching restrictive covenants after a strong message sent by the Court of Appeal. A recent decision could result in 13 units of social housing being torn down after they were constructed on land on which building was prohibited.

What happened?

In a recent case*, the Upper Tribunal considered whether a covenant could be modified following the construction of social housing on land affected by the covenant.

You may consider that a deliberate breach of a restrictive covenant would prevent a developer from succeeding in its application. It did not. The Upper Tribunal ordered the developer to pay the neighbouring landowner £65,000 in compensation; a figure calculated as being the affected land’s worth.

The Upper Tribunal effectively allowed the developer to bypass the law after it ruled that a restrictive covenant could be modified, despite the developer knowingly building on the land in breach of that covenant. A recent decision in The Court of Appeal has now described this as “unlawful and opportunistic”.

The appeal

Following an appeal by the Trust, the Court of Appeal ruled that restrictive covenants should not be modified to allow development, which was knowingly carried out in breach. The Court of Appeal criticised the decision of the Upper Tribunal for failing to properly assess whether the public interest test had been passed before ruling to discharge the restrictive covenant.

A developer who is aware of a covenant can easily seek to modify or discharge it before starting to build on the benefiting land. Similarly, the developer could have negotiated with the planning authority to pay a sum to the affordable housing association, which may have satisfied the public interest test.

The Court of Appeal condemned the Upper Tribunal for placing too much weight in their decision making

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process on the fact the developer had developed the land into a block of newly-built social housing. Had the buildings comprised newly-built residential homes, the Upper Tribunal may have reached a different judgment entirely.

What does this mean for developers?

It is not possible to glean from the information available whether the developer had defective title insurance to manage the risk of enforcement of the restrictive covenant. Insurance is often viewed as a magic solution to issues of title, however, an indemnity policy has a number of limitations and may not be appropriate given the circumstances. Whilst insurers may have been dictating this process, the Court of Appeal has made it clear that developers must have a solution for dealing with restrictive covenants before commencing development.

The judgment serves as a useful reminder to developers to ensure they receive appropriate professional advice both before they acquire land and before they seek to build on land in breach of a restrictive covenant.

Need advice?

Lester Aldridge's Real Estate Development team advises national and regional developers on all legal aspects of development. Contact Mark Benham at mark.benham@la-law.com.

**Millgate Developments Ltd & others v Smith & The Alexander Devine Children's Cancer Trust [2016]*

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