Restrictive covenants versus housing shortage

By Natalie Johnston | 18-09-2018 | 10:33

The Department of Housing, Communities and Local Government was busy over the summer. It issued a number of statements about housing policy including the Rough Sleeping Strategy, a New Deal for Social Housing, and the New Garden Communities Programme, among others.

The proposal for new garden towns is building on the success of older garden cities, such as Milton Keynes, and has the potential to deliver many thousands of badly needed homes.

However, people need to live near their place of work. Will new garden cities provide that or will they be situated where occupiers have to commute ever longer distances? We will have to wait and see.

In the meantime, smaller developments (and developers) can play their part.

Where there are large plots of land containing only one home, land can, in appropriate cases, be sold to create new homes. However, it is not uncommon for plots of land to be affected by restrictive covenants that restrict use to one home or restrict building without consent.

All may not be lost even if such covenants exist. The Upper Tribunal (Lands Chamber) (the UT) has jurisdiction under section 84(1) of the Law of Property Act 1925 to modify or discharge restrictive covenants (see box, next page). A review of decisions this year shows some development-friendly decisions.

Is the Upper Tribunal playing its part?

The UT has the task of weighing up the benefits of the development against the effect of the proposals. The competing interests are between the legitimate expectations of those who thought they had the benefit of an enforceable promise against the desire of the owner to make greater use of the land and, in so doing, making a profit, but where the outcome is often more housing.

Original parties and recent covenant

Where the application to discharge or modify a covenant is made by the person who agreed the covenant, why should the UT relieve that person from the consequences of their promise?

The UT was faced with that question in a case about a property called Solitude (*Re Geall* [2018] UKUT 154 (LC)). The applicant, Susan Geall, purchased Solitude in 1987.

The transfer to her was subject to a covenant, first against building on the plot without the consent of the neighbouring owners, the Maltbys, and second against using the property other than as a single private dwelling.

In 2015, Geall obtained planning permission to convert a barn on her land to a separate dwelling. The UT allowed the modification to enable Geall to implement the planning permission. The UT said the covenant cannot "be said to be recent" even though it was less than 30 years old.

Despite this case concerning a promise given by the applicant to the objectors, a modification was permitted.

Small money payment

Where the disadvantage suffered by an objector is not substantial enough to prevent the modification, a compensatory payment can be made. This is usually in the low thousands of pounds, as any substantial payment would suggest that the disadvantage is substantial and so the modification should not go ahead. However, some fairly large sums are being awarded.

In *Re Geall*, the UT awarded £65,000, which was held not to be substantial in the context of an estate worth £2.6m (2.5%).

In another case this year, *Lamble* v *Buttaci* [2018] UKUT 175 (LC), an application by Lamble to build a new larger house and garage in breach of a restrictive covenant was allowed, with compensation awarded amounting to £50,000 or 2-2.5% of the value of the objector's estate (£2.25m).

Those are fairly substantial sums to most people but the sum itself is assessed in the context of the value of the estate affected.

In contrast, in *Re Fogg* [2018] UKUT 114 (LC), where there was diminution in value of 5% (£21,000 to £25,000) on properties worth between £400,000 and £450,000, the application failed on other grounds but would have failed on the amount of compensation as a proportion of the value of the property.

While at first blush large compensation sums would seem to be against the interests of developers, in fact it may allow a modification to go ahead which would otherwise fail. It is for the developer to assess whether the development is still viable.

Thin edge of the wedge

The UT continues to be concerned that the effect of modification may allow further changes in the neighbourhood.

One such example this year was in *Re Theodossiades* [2017] UKUT 461 (LC) concerning a large home that was to be demolished to allow the construction of a number of flats.

The UT addressed the "thin edge of the wedge" argument, saying that it is a question of fact in each case. In that case it was accepted that there may be further applications for modification – but the modification was permitted anyway.

The effect of charitable or public purpose

One of the grounds for modification or discharge is that the restriction impedes a reasonable use of land and is in the public interest (ground (aa)(1A)).

In *Re Thomas Pocklington Trust Ltd* [2018] UKUT 256 (LC); [2018] PLSCS 145, a charity was seeking to develop land previously used as a care home into flats to release funds for other charitable purposes.

The application succeeded on the ground that it did not secure to the objectors benefits of substantial value or advantage.

However, the UT made it clear that being a charity does not mean that the development is in the public interest.

In October the Court of Appeal will consider issues of public interest in *Re Millgate Developments Ltd* [2016] UKUT 515 (LC); [2016] PLSCS 339.

Millgate concerns a developer that built 13 affordable homes in breach of covenant. The UT allowed the modification of the covenant despite the covenant securing practical benefits of substantial value and found that the public interest in the affordable homes outweighed a need to punish the developer. The UT awarded £150,000 (an amount previously offered).

It will be interesting to see the Court of Appeal's decision in *Millgate*. How far can the UT go in permitting the building of badly needed homes in the public interest against the legitimate expectations of neighbouring owners?

Development friendly?

It's difficult to extract any firm trends because restrictive covenant cases are so fact-specific. However, applications to modify restrictive covenants are succeeding on facts that would be considered difficult.

Nonetheless, development plans should minimise the impact on sight lines, noise, traffic and light.

Developers seeking to insure against a neighbour's challenge should keep in mind sensitive design, which will make underwriters more comfortable with a project.

If insurance is not an available option, consult a neighbour at an early stage. Even if agreement cannot be reached, at least there is an understanding of the arguments and it might be possible to ensure that any disadvantage is not substantial.

If you decide to apply for a modification or discharge, modification is by far the easier route and careful preparation of evidence of the impact on neighbours (financial and otherwise) is key.

None of us want the places we live to feel cramped or overpopulated, and sensitive design can help enormously.

Experienced developers building homes where people want to be is part of the solution to the housing crisis.

The careful consideration applied by the UT is the check and balance to protect legitimate expectations of landowners while promoting effective land use.

Grounds for altering restrictive covenants

Summary of the grounds to modify or discharge a restrictive covenant in section 84(1) of the Law of Property Act 1925 (see Act for full terms)

(a) The restriction is deemed obsolete due to changes in the property, neighbourhood or other reasons

(aa) The covenant impedes a reasonable user of land and

(1A) the covenant does not secure to the person with the benefit practical benefits of substantial value or advantage or is contrary to the public interest

(c) The proposed discharge or modification will not injure the person with the benefit of the covenant. An order discharging or modifying a restriction may direct the applicant to pay:

(i) A sum to make up for any loss or disadvantage suffered as a consequence of the modification or discharge

(ii) A sum to make up for any effect the restriction had at the time when it was imposed on the money received for the land

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See more on restrictive covenants