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**City Council Retains 'Degree of Control' Over Tower Blocks Development**

To what extent is a local authority entitled to use its powers as a private landlord to promote its strategic objectives as a public planning authority? The Upper Tribunal (UT) pondered that issue in a case concerning the proposed demolition of two warehouses to make way for a major residential development.

The land on which the redundant warehouses stood was owned by a city council and was held by a corporate tenant under a lease that had about 60 years to run. Both landlord and tenant were anxious to see the site redeveloped as part of a wider regeneration project. The council had approved in principle the company's planning application to remove the warehouses and construct in their place two 56-storey tower blocks, comprising over 1,000 flats.

To that end, the council was willing to grant the tenant a fresh, 250-year lease. However, the tenant was dissatisfied with the proposed terms of the new lease, which would, amongst other things, include provisions requiring commencement and completion of the development by specified dates. The tenant therefore wished to press ahead with the development under the terms of its existing lease.

Standing in the tenant's path, however, were numerous restrictive covenants in the lease which prevented the development from proceeding without the consent of the council, as landlord. The tenant applied to the UT under Section 84 of the Law of Property Act 1925 to modify 11 of them. The principal focus of the case, however, was a covenant forbidding use of buildings on the site for anything other than light industrial, warehousing or repository purposes.

Ruling on the matter, the UT found that the proposed development represented a reasonable use of the land. As planning authority, the council had enthusiastically encouraged the project. Given the neighbourhood's ongoing transformation from a light industrial to a residential area, it could readily be concluded that the use of buildings on the site as warehouses had become obsolete.

In rejecting the tenant's application, however, the UT noted that it did not necessarily follow that the covenant was itself obsolete. Its purpose was not to fossilise the land's light industrial use but to give the council a degree of control over any future change in its permitted use. It had indicated its willingness to grant the required consent for residential use, but only on terms that it viewed as necessary to ensure the project's viability and timely delivery.

The council's motives for relying on the covenant were not merely pecuniary or to boost its bargaining position. In the public interest, it was entitled to insist on provisions in any new lease that would ensure that the project was realised promptly and not left incomplete. In maintaining its significant degree of control over development of the site, the covenant continued to provide practical benefits of substantial advantage to the council.

The UT noted that the law should be slow to interfere with the judgment of a local authority which seeks to use its private rights as a landlord to promote its strategic objectives as a public planning authority. To modify the covenant in the manner proposed would inflict injury on the council's interests. The UT had no doubt that development of the site would ultimately prove capable of being achieved through sensible commercial negotiation.

We can advise you on all aspects of planning law. Contact **<<CONTACT DETAILS>>** for advice.

**Partner Note**

*Great Jackson Street Estates Ltd v Manchester City Council [2023] UKUT 189 (LC)*

**Education Charity Overcomes Restrictive Covenant in College's Title Deeds**

Restrictions on the use to which properties can be put are often to be found in their title deeds and, in some cases, can have a dramatic impact on their value. A High Court case on point concerned the future of a further education college that was already struggling financially when it closed at the height of the COVID-19 pandemic.

The college's owner, a charity, was bound by a restrictive covenant which required it to use the property for no purpose other than that of a further education college. That embargo could, however, be overcome if the local council provided confirmation in writing that it was satisfied that the Learning and Skills Council (LSC), or any successor to that body's functions, had properly determined that there was no longer a functional need for a college in the relevant town.

The council's refusal to provide such written confirmation had left the charity with a vacant building of very limited value in that it could be sold only for use as a further education college. It launched proceedings with a view to selling the property free from the covenant and using the proceeds to further its wider educational objectives.

Ruling on the matter, the Court noted that the LSC had ceased to exist. The charity had, however, received confirmation from the Education and Skills Funding Agency (ESFA) that there was no functional need for a college in the town to serve students aged between 16 and 19. It was unable to provide such confirmation in respect of leisure provision for older students because that fell outside its funding remit.

The Court was satisfied that, for the purposes of the covenant, the ESFA was the functional successor to the LSC. Whilst the confirmation that the ESFA had provided to the charity was incomplete, in that it did not embrace older students, it was nevertheless a determination that satisfied the requirement of the covenant.

The council could not rationally conclude that the ESFA's determination was itself irrational or otherwise unsatisfactory. It was required to accept that it should be satisfied that the determination was properly made and covered the issue of functional need for a college in the town.

The power conferred on the council by the covenant was one of review only and it had neither an absolute discretion to withhold the written confirmation required nor an absolute veto over the proposed sale. On the basis that the ESFA's determination had been properly made, the council was obliged to provide such confirmation.

The Court noted that the college's history of significant financial losses, even prior to the pandemic, rendered it beyond doubt that its continuation in its current form was not a viable option. Simply put, the users of the college had themselves decided that its services were no longer necessary in that they were not prepared to pay enough for their courses to cover its operating costs.

**Partner Note**

*Warwickshire College v Malvern Hills District Council [2023] EWHC 2008 (Ch)*

**High Court Upholds £6.5 Million Housing Maintenance Adjudication Award**

Contract adjudications can involve analysis of vast amounts of detailed evidence, but can an award be challenged on the basis that one side or the other was not afforded enough time to prepare its case? The High Court pondered that question in a guideline ruling.

The case concerned a contract by which a social housing provider engaged a property services company to carry out repair and maintenance work on a large part of its housing stock. The company's work generally consisted of a high volume of small jobs.

After the company purported to terminate the contract, the provider referred the matter to an adjudicator. He found that the termination was invalid and that the company had acted in repudiatory breach of the contract. Following a second adjudication, the company was directed to pay the provider compensation in excess of £6.5 million, plus interest.

In the latter proceedings, the provider presented the adjudicator with voluminous evidence, including a lengthy expert report and hundreds of megabytes of data comprised in thousands of files. The company asserted that it was afforded insufficient time – 13 working days – in which to digest such a vast quantity of evidence and prepare an effective response to the provider's case. That, it contended, amounted to a breach of natural justice that rendered the award unenforceable.

In rejecting the company's challenge to the award, however, the Court noted the general rule that, in the interest of finality, adjudicators' decisions must be enforced, even if they contain errors of procedure, fact or law. Judges are very reticent to do otherwise. Both complexity and restraint of time to respond are inherent in many adjudication processes and are, in themselves, no bar to enforcement.

Despite the sheer volume of evidence placed before the adjudicator, the issues that he had to decide were not unusually complex. He engaged in a legitimate process of sampling and spot checking. The company was able to properly and thoroughly engage in the substance of the matter and in fact enjoyed relatively significant success in undermining aspects of the provider's claim. The Court directed enforcement of the award by way of summary judgment.

It is important to source expert legal guidance in matters concerning property maintenance contracts. Our specialist team can advise.

**Partner Note**

*Home Group Ltd v MPS Housing Ltd [2023] EWHC 1946 (TCC)*

**Landlord of Converted Office Block Pays Price for Breaching Fire Safety Rules**

To what extent should landlords who have breached fire safety rules be entitled to recover the costs of remedying such breaches from tenants by way of service charges? The Upper Tribunal (UT) considered that important issue in a case concerning a former office building that had been converted into 96 flats.

The building came to the attention of the local fire and rescue service when its fire alarm was disabled by a leak. A fire officer attended and found evidence that fire compartmentation and separation measures were inadequate. Given the building's height, he also expressed concern that its lifts were inadequately protected against fire.

In the absence of any information about the material used to clad the exterior of the building, the officer assumed that it was an aluminium composite which represented a risk to all residents. Although that assumption subsequently turned out to be incorrect, the officer threatened to prohibit occupation of the building unless fire safety measures were instigated, including a 24-hour waking watch.

By the time that the problems identified by the officer had been remedied, a waking watch had been in place for about four months, at a cost of almost £58,000. The building's landlord sought to recover that cost via tenants' service charges. After many of them objected, however, the First-tier Tribunal (FTT) limited the landlord's recovery to about £6,000. That sum represented the cost of the first seven days of the waking watch, prior to reinstatement of the alarm system.

Ruling on the landlord's challenge to that outcome, the UT noted that a fire risk assessment was conducted whilst the building was undergoing conversion. It found a medium likelihood of the building catching fire and stated that it was essential that efforts be made to reduce that risk. It recommended that the assessment should be reviewed at regular intervals, usually not exceeding 12 months.

The UT observed, however, that there was no evidence that either the landlord or its managing agents had taken any steps to review the assessment or to commission a further assessment after it acquired the building's freehold. The landlord's continuing duty under Article 9 of the Regulatory Reform (Fire Safety) Order 2005 to commission a suitable and sufficient fire risk assessment remained unfulfilled when the waking watch was imposed.

Had an up-to-date fire assessment been commissioned when it should have been, the defects would have been identified and remedied prior to the fire officer's visit. Most of the cost of the waking watch was thus wholly avoidable and attributable to the acts or omissions of the landlord or its agents. On that basis, it was open to the FTT to find that it would be unreasonable to include that cost on tenants' service charge bills.

There is no room for compromise when it comes to buildings and fire safety. To ensure your health and safety measures are up to date and meet legal requirements, contact us for advice.

**Partner Note**

*Radcliffe Investment Properties Ltd v Meeson and Others [2023] UKUT 209 (LC)*

**Tempted by a Guaranteed High-Return Investment? High Court Cautionary Tale**

Investment schemes offering guaranteed high rates of return may be too good to be true and should always be approached with extreme caution. A High Court case on point concerned a scheme in which retail investors ploughed millions into acquiring rooms in care homes with a view to letting them out at a profit.

After the Financial Conduct Authority (FCA) took action with a view to achieving restitution of funds lost by investors, the Court noted that the scheme involved the sale of long leases of care home rooms to private investors. Its operator did not conceal the fact that the rooms were being sold at a substantial overvalue. The apparent sales pitch was that surplus funds would be spent on renewing or refurbishing properties concerned, thereby improving their rental yield.

The offerings, which were presented as buy-to-let investments, typically indicated that investors would receive a guaranteed annual return of 10 per cent during the first 25 years. Investors were further attracted by an indication that, at various points during that period, the operator would be prepared to repurchase their rooms from them for at least 115 per cent of their initial investment. That was whether or not their rooms were actually let and regardless of the commercial performance of underlying care home businesses.

Part of the attraction of the scheme's model to investors was that it appeared to offer enhanced security. Evidence that long leases of specific rooms had been registered in investors' names at HM Land Registry gave the appearance of securing at least part of their money.

Ruling on certain preliminary issues in the case, the Court noted that a view was taken that the operator was not required to recognise its obligations to investors under the guarantees as liabilities on its balance sheet. That approach seemed to have been adopted on the basis that those obligations were mere contingencies that might not arise.

Despite having no capital resources, the operator was thus able to raise funds from investors at promised high rates of return without recognising on its balance sheet the liabilities to which the promises made to them gave rise. Had such recognition been given, it would have been transparently clear that, far from being based on a viable financial structure, it was hopelessly balance sheet insolvent.

An important feature of the scheme's structure was that it required no investment at all from its originator. Because the sales were at an overvalue, each of them created an accounting profit that appeared to constitute capital of the company. Although the operator appeared well capitalised and solvent, in reality it was the investors who were taking all the risk involved in the commercial operation of the properties concerned.

Says **<<CONTACT DETAILS>>**, "Always seek legal advice before entering into a property investment scheme. Our specialist solicitors can provide guidance."

**Partner Note**

*The Financial Conduct Authority v Forster [2023] EWHC 1973 (Ch)*

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