Michaelmas Term
[2020] UKSC 45
On appeal from: [2018] EWCA Civ 2679

JUDGMENT

Alexander Devine Children's Cancer Trust (Respondent) *v* Housing Solutions Ltd (Appellant)

before

Lord Kerr
Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON

6 November 2020

Heard on 20 July 2020

Appellant	*Respondent*
Martin Hutchings QC James McCreath (Instructed by DAC Beachcroft LLP (Bristol))	Stephen Jourdan QC Emily Windsor (Instructed by Russell-Cooke LLP (Putney))

LORD BURROWS: (with whom Lord Kerr, Lord Lloyd-Jones, Lord Kitchin and Lord Hamblen agree)

1. Introduction

1. This is the first time the highest court (whether the House of Lords or Supreme Court) has been required to decide an appeal on section 84 of the Law of Property Act 1925. That section confers on the Upper Tribunal a power, in specified circumstances, to discharge or modify restrictive covenants affecting land.

2. In this case the party entitled to the benefit of a restrictive covenant, preventing development of an area of open land, is the Alexander Devine Children's Cancer Trust ("the Trust"). The party seeking the discharge or modification of the restrictive covenant under section 84 of the 1925 Act is now Housing Solutions Ltd ("Housing Solutions") which is a property company concerned with the provision of affordable housing. Housing Solutions acquired the land encumbered by the restrictive covenant (which I shall refer to as "the application land") from a property developer, Millgate Developments Ltd ("Millgate"). It was Millgate which made the application to the Upper Tribunal under section 84. Housing Solutions was named as having an interest in the application land as prospective purchaser.

3. The underlying dilemma posed by this case is clear. On the one hand, there is a charitable children's cancer trust that seeks to maintain the benefit of a restrictive covenant, to which it is entitled, so that terminally ill children in a hospice built on the Trust's land can fully enjoy, in privacy, the use of the grounds. On the other hand, there is a company that is seeking to ensure that 13 units of affordable housing, built in breach of the restrictive covenant on the application land adjoining the Trust's land, do not go to waste.

4. Millgate's application succeeded before the Upper Tribunal (Lands Chamber) (Martin Rodger QC and Paul Francis FRICS): [2016] UKUT 515 (LC). The Upper Tribunal decided that the restrictive covenant should be modified to allow the occupation and use of the application land for the 13 housing units built on it provided that Millgate paid £150,000 as compensation to the Trust. That decision was overturned by the Court of Appeal ([2018] EWCA Civ 2679; [2019] 1 WLR 2729) with the leading judgment being given by Sales LJ with whom Underhill and Moylan LJJ agreed. The basis of the Court of Appeal's decision was that the Upper Tribunal had made various errors of law; and, exercising its powers to re-make the decision, the Court of Appeal refused the application. Housing Solutions now appeals to this court against that decision. It is our essential task to

decide whether the Court of Appeal was correct that errors of law were made by the Upper Tribunal.

5. The facts will first be summarised before setting out section 84 of the Law of Property Act 1925 and explaining the distinction contained within it between the Upper Tribunal's jurisdiction and discretion. After looking at the proceedings below, I shall then turn to the central issue on this appeal which is the relevance of Millgate's cynical breach (a term which is explained at para 36). Finally, I shall briefly examine the two other issues raised on this appeal.

2. The facts

6. This summary of the facts draws heavily on the very clear "factual background" set out by Sales LJ in his judgment in the Court of Appeal for which I am most grateful.

7. The application land is close to Maidenhead and is located in an area designated as Green Belt in the applicable development plan. The relevant restrictive covenants are contained in a conveyance dated 31 July 1972 made between John Lindsay Eric Smith ("Mr John Smith") as vendor and Stainless Steel Profile Cutters Ltd ("SSPC") as purchaser. Mr John Smith was a local farmer who owned extensive open agricultural land. SSPC owned some land and industrial buildings next to the application land (I shall call this "the unencumbered land"). By the conveyance, the application land was sold and transferred by Mr John Smith to SSPC making, in combination with the unencumbered land already owned by SSPC, a rectangular plot of land ("the Exchange House site").

8. The conveyance provided that SSPC covenanted for the benefit of the owners for the time being of the land then belonging to Mr John Smith (and situated within three quarters of a mile of the application land) that at all times thereafter it would observe and perform certain stipulations which included the relevant restrictive covenants. Those restrictive covenants provide as follows:

> "1. No building structure or other erection of whatsoever nature shall be built erected or placed on [the application land].
>
> 2. The [application land] shall not be used for any purposes whatsoever other than as an open space for the parking of motor vehicles."

9. The conveyance also contained an overage provision. This provided that if, within 21 years from the date of the conveyance, planning permission was granted for the development of the application land for any purpose other than the parking of vehicles, SSPC would pay an overage payment equivalent to 75% of the uplift in the value of land. On payment of the overage sum, those with the benefit of the restriction would execute a discharge to enable the planning permission to be implemented. The overage provision expired in 1994.

10. In due course, Mr John Smith's son Bartholomew ("Mr Barty Smith") inherited from his father agricultural land, including land next to the application land. In December 2011 he proposed making a gift to the Trust of part of his land (next to the application land), for the construction of a hospice for seriously ill children with terminal cancer and their carers. Mrs Fiona Devine is the co-founder and chief executive of the Trust. The plans for the hospice were to make full use of the land to be given by Mr Barty Smith, including recreational areas and a wheelchair path around its circuit. Planning permission was granted for the construction of the hospice on 2 December 2011. In March 2012 Mr Barty Smith made the gift of the land to the Trust. However, construction of the hospice had to await the raising of adequate funds from charitable donations.

11. Millgate acquired the Exchange House site in the first part of 2013. Millgate was aware of the restrictive covenants at the time it acquired the site, presumably as a result of its own investigation of title at that time. Millgate did not adduce evidence to suggest that it made any attempt to identify those entitled to enforce the restrictive covenants. The Upper Tribunal found that Millgate's solicitors, DAC Beachcroft, could readily have identified Mr Barty Smith and the Trust as beneficiaries of the restrictive covenants if they had tried; and it drew the inference (which was not challenged) that Millgate either took no steps to find out who the beneficiaries were or knew the identity of some or all of them and chose not to raise the issue of the restrictive covenants before beginning to build in breach of them.

12. In July 2013 Millgate applied for planning permission to build 23 affordable housing units on the Exchange House site. This was linked to Millgate's application for planning permission to build 75 housing units on another site ("the Woolley Hall site") for commercial sale. In due course, in March 2014 the local planning authority granted planning permission for both developments, with the permission for the development of the Woolley Hall site being conditional on the provision of the affordable housing on the Exchange House site. By a clause in a deed made pursuant to section 106 of the Town and Country Planning Act 1990, Millgate unilaterally undertook not to occupy (ie not to make available for sale) more than 15 units constructed pursuant to the planning permission for the Woolley Hall site until 23 units constructed pursuant to the planning permission for the Exchange House site had been transferred to an affordable housing provider.

13. The plans submitted with the application for permission for the development of the Exchange House site showed ten residential units to be provided in a block of flats on the unencumbered land plus nine two-storey houses and four bungalows on the application land. It seems that the local planning authority was not aware of the position in relation to the restrictive covenants affecting the application land although, in any event, it is unlikely that the local planning authority would have viewed it as its role to use its planning powers to ensure compliance with those covenants. Its concern was to ensure that the requisite number of affordable housing units should be provided on the Exchange House site.

14. It is a very important point (as I shall later explain) that the Upper Tribunal recorded (at para 62 of its decision) that, had Millgate chosen to lay out its development of the Exchange House site differently so as to honour the restrictive covenants, by building a larger block of flats with 23 units on the unencumbered land, with the application land (presumably) remaining as a car park for the flats, the local planning authority indicated that it would have approved such a proposal.

15. In July 2013 Mrs Devine had a conversation about the Exchange House site with a director of Millgate, Mr Graeme Simpson. As appears from paras 44-45 of the Upper Tribunal's decision, it was about this time that Mrs Devine became aware of Millgate's application for planning permission in relation to that site, although she did not see the plans it had submitted and was unaware of the detail of Millgate's proposals. She was also unaware of the restrictive covenants. She only learned of their existence after Millgate made its application to the Upper Tribunal to have them discharged or modified. In the period prior to that application, Mrs Devine, for the Trust, made no adverse comment concerning Millgate's application for planning permission for its development of the Exchange House site.

16. In granting planning permission for the application land in March 2014, the local planning authority determined that although the proposal was, in principle, inappropriate for the Green Belt, and was contrary to the development plan, special circumstances existed which justified the grant of permission. The local planning authority considered that those special circumstances were that the development would enhance the character and amenity of the area, was on previously developed land, would improve the access to and relationship with the hospice (for which, as we have seen in para 10, planning permission had already been approved) and was sensitive to adjoining uses.

17. On 1 July 2014 Millgate began clearing the site preparatory for construction. Mr Barty Smith was unaware of Millgate's application for planning permission in relation to the Exchange House site. He first became aware of physical development of the site when he flew over it in a light aeroplane on 30 August 2014. He consulted a solicitor. He visited the site on 15 September 2014, by which time the original

light industrial buildings on the unencumbered land had been cleared and work on the new foundations across the whole site had commenced.

18. By letter dated 26 September 2014, Mr Barty Smith wrote to Millgate to object to the development on the application land. He referred to the restrictive covenants and stated that Millgate seemed to be in breach of them by reason of the works it had already carried out on the application land. His letter stated that Millgate should immediately halt any plans it had to build on the application land. Despite this, Millgate continued with its construction works.

19. It appears that Millgate passed Mr Barty Smith's letter on to DAC Beachcroft for reply. The eventual reply was by a letter sent by DAC Beachcroft to Mr Barty Smith dated 20 November 2014. This pointed out that the restrictive covenants had to "touch and concern" the land of anyone claiming to be entitled to enforce them; said that Mr Barty Smith could only enforce them if they benefited land which he owned; and suggested that as he only owned open land close to the site "it is not immediately obvious why the covenants benefit your land".

20. Mr Barty Smith took counsel's advice. With the benefit of this, he replied to DAC Beachcroft by a letter dated 11 December 2014. He maintained that the restrictive covenants self-evidently "touch and concern" the land neighbouring the application land and specifically asserted that they benefited both his own land (open fields retained by him in the vicinity of the application land, as identified in a map he enclosed with his letter) and the hospice land adjacent to the application land. He claimed that it was improper for Millgate to commence building works in breach of covenant and said that any application to the Upper Tribunal to modify the restrictive covenants would be vigorously opposed. He explained the reason why the enforcement of the restrictive covenants was particularly important in relation to the hospice:

> "In 2012 I donated land worth £500,000 to the charity to build the hospice as a peaceful place for children with terminal cancer to end their days in calm and dignity with access to private country gardens. Now your client seeks to build multiple units with windows and open areas facing directly into hospice land. That is regrettable."

21. It seems that at this stage Millgate was still far from completing the buildings on the application land. It was not suggested that it had yet erected the second storey of the nine houses which would directly overlook the hospice gardens. In continued breach of the restrictive covenants, Millgate continued to build the houses and bungalows on the application land. It was only on 10 July 2015 that the development

of the 23 residential units on the Exchange House site, together with a children's recreation area next to the bungalows, was completed. The 13 housing units on the application land comprise the following: four bungalows, the roofs of which are visible over a timber boundary fence separating the gardens of the bungalows from the hospice land; and nine two-storey houses, the gardens of which are separated from the hospice land by a timber fence. The upper floor bedrooms of these houses directly overlook the hospice grounds.

22. By an agreement dated 22 May 2015, Millgate agreed to sell the development at the Exchange House site, once it was completed, to Housing Solutions. The sale of the site was subject to a condition that there should be no reasonable risk of any court application being successful, in respect of the restrictive covenants, for an injunction to stop or restrict the development or demolish the existing development; and Millgate provided Housing Solutions with the benefit of certain insurance policies and an indemnity against any wasted expenses or losses which Housing Solutions might suffer if that condition was not fulfilled.

23. On 20 July 2015 Millgate issued its application to the Upper Tribunal seeking modification of the restrictive covenants pursuant to section 84. The modification sought was to allow the nine houses and four bungalows, which Millgate had already built on the application land, to continue to stand there and to be occupied as residential properties. Millgate gave notice of the application to Mr Barty Smith and the Trust. They both entered objections to the application. On 28 July 2015 Millgate conveyed to Housing Solutions the unencumbered land (with the block of ten residential flats on it). In September 2015, the construction of the hospice began.

24. By an agreement dated 9 February 2016, the relevant section 106 obligation in respect of the Woolley Hall site (referred to in para 12 above and which required Millgate to provide 23 units of affordable housing on the Exchange House site as a condition for being able to release properties at the Woolley Hall site for sale) was varied to permit Millgate, in partial substitution for that original obligation, to make a payment of £1,639,904 to the Council if Millgate's application to the Upper Tribunal was not successful and the application land was not transferred to Housing Solutions by 30 September 2017. This payment was intended to enable the Council to secure an equivalent amount of replacement affordable housing (13 units) at other locations in its area. The effect of Millgate making this payment would be that it would be able to market and sell the residential units it had built on the Woolley Hall site. This agreement was designed to ensure that the Council's requirement for affordable housing as the quid pro quo for planning permission for development of the Woolley Hall site would be satisfied whether the restrictive covenants remained in place and were enforced or not.

25. The Upper Tribunal found that the Exchange House Site as a whole gave the appearance of having been well designed and built. The houses and bungalows, which the Upper Tribunal inspected, were described as simple and functional but neither shoddy nor utilitarian. The Upper Tribunal regarded the development as one which would be likely, in time, to mellow into a modest and not unattractive environment providing decent accommodation suitable for people in different stages of life living in what might become a neighbourly community.

26. The Upper Tribunal found that despite the proximity of the houses to the boundary of the hospice, and their visibility from the hospice, it was unlikely that they would make much visual impression on the children, or on staff or visitors, while within the hospice building itself. However, the visual impact of the buildings would be much more apparent from the grounds of the hospice land.

27. On 18 November 2016 the Upper Tribunal gave its decision on Millgate's application to modify the restrictive covenants. The Upper Tribunal held that the restrictive covenants should be modified pursuant to section 84 so as to permit the occupation and use of the application land for the houses and bungalows which had been constructed on it. As a condition of this ruling, Millgate was ordered to pay £150,000 as compensation to the Trust, that being the Upper Tribunal's assessment of the cost of remedial planting and landscaping works to screen the hospice grounds plus an element of compensation for loss of amenity.

28. On 15 February 2017, the day before the last day on which the Trust could serve an in-time notice of appeal according to the Civil Procedure Rules, when no application had been received for permission to appeal, the view was taken that the condition in the sale agreement between Millgate and Housing Solutions (referred to in para 22 above) had been satisfied and Millgate immediately that day transferred the 13 housing units on the application land to Housing Solutions. No effort was made to check with the Trust whether it intended to apply for permission to appeal. On the following day, 16 February, Millgate received notice of the Trust's application for permission to appeal and for a short extension of time in which to do so. Floyd LJ granted permission to appeal and an extension of time.

29. Housing Solutions is therefore now the owner of the 13 housing units on the application land. This means that, in the event, Millgate did not have to pay the Council the sum stipulated in the agreement of 9 February 2016, referred to in para 24 above. As against Millgate, Housing Solutions continues to have the benefit of the indemnity provision in the sale agreement, should the decision of the Upper Tribunal be reversed and the restrictive covenants enforced. The 13 housing units are now occupied by tenants.

30. On 28 November 2018, the Court of Appeal (as has been mentioned in para 4 above) overturned the Upper Tribunal and re-made the decision by refusing the application. Housing Solutions appeals against that decision. As at the time of the hearing before the Supreme Court, the Trust had not made any application for an injunction to demolish the nine houses and four bungalows built on the application land or for damages for breach in lieu of an injunction. Following the Court of Appeal's decision, the Trust's solicitors, Russell-Cooke, wrote to the solicitors for Housing Solutions, DAC Beachcroft, by letter dated 19 December 2018, indicating an intention to issue injunction proceedings. By a letter dated 20 December 2018 the solicitors for Housing Solutions responded that, since these proceedings were ongoing, it would be inappropriate for the Trust to apply for injunctive relief and that, should the Trust choose to do so, Housing Solutions would apply for a stay pending the outcome of this appeal.

3. Section 84 of the Law of Property Act 1925, jurisdiction and discretion

31. So far as relevant to this case, section 84 of the Law of Property Act 1925 (as amended by section 28(1)-(3) of the Law of Property Act 1969 and paragraph 5(a) of Schedule 1 to the Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009) reads as follows:

> "84. Power to discharge or modify restrictive covenants affecting land
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> (1) The Upper Tribunal shall … have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction … on being satisfied -
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
>
> (aa) that in a case falling within subsection (1A) below the continued existence thereof would impede some reasonable user of the land for public or private purposes … or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction … have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:

and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either -

(i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or

(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either -

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

> (1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.
>
> …
>
> (9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom the proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the [Upper Tribunal] under this section, and staying the proceedings in the meantime. …"

32. The original version of section 84 of the Law of Property Act 1925 laid down four grounds under which the relevant "Authority" (now the Upper Tribunal) was given the power to discharge or modify restrictive covenants. These were, in short, where the restrictive covenant was obsolete; where the restriction was impeding the reasonable user of the land without securing practical benefits; where the persons entitled had agreed to the discharge or modification; and where the discharge or modification would be non-injurious. These correspond (with some modification to the second ground) to what are now, respectively, section 84(1)(a); section 84(1)(aa), (1A)(a); section 84(1)(b); and section 84(1)(c). However, following a Report of the Law Commission on Transfer of Land: Restrictive Covenants (1967) (Law Com No 11), pp 21-23, a significant extension was made by adding a fifth ground (what is now section 84(1)(aa), (1A)(b)) so that discharge or modification may be ordered where the restriction is impeding the reasonable user of land and that impeding of reasonable user is contrary to the public interest (and provided money will be adequate compensation for any loss suffered by the person entitled to the benefit of the restrictive covenant). It is with that "contrary to the public interest" ground that this appeal is concerned.

33. It is well-established (see, for example, *Driscoll v Church Comrs for England* [1957] 1 QB 330) that, if satisfied that one of the prescribed grounds has been made out, the Upper Tribunal has a discretion whether or not to make an order for modification or discharge of the restrictive covenant. The important statutory words to this effect are in section 84(1): the Upper Tribunal "shall … have power". The five grounds are therefore concerned with establishing the Upper Tribunal's

jurisdiction and can be helpfully labelled the "jurisdictional grounds": at least one of those jurisdictional grounds must be established by the applicant before the Upper Tribunal can go on to make what is ultimately a discretionary decision.

4. The proceedings below and the appeal to this court

34. The Upper Tribunal held that the "contrary to public interest" jurisdictional ground (section 84(1)(aa), 84(1A)(b)) was made out by Millgate. The reasoning was as follows:

> (i) It was common ground that the proposed use of the application land to provide 13 units of affordable housing was a "reasonable user of the land".
>
> (ii) Impeding that reasonable user was contrary to the public interest because "it is not in the public interest for these houses to remain empty and the covenants are the only obstacle to them being used" (para 106 of the decision). That public interest was so important and immediate that, even assuming that the cautious approach to the public interest ground put forward in *In re Collins' Application* (1975) 30 P & CR 527, 531, remains good law, the public interest here justified the serious interference with private rights and with the sanctity of contract (para 107).
>
> (iii) Although the provision of significant additional boundary planting would not insulate the hospice land from all the adverse consequences of the use of the application land for housing, an award of money to allow for such additional planting was capable of providing adequate compensation to the Trust (para 110).

35. Turning to the exercise of its discretion, the Upper Tribunal looked at the conduct of Millgate. In an earlier passage, referring to Mr Barty Smith's view, it described Millgate's behaviour as "highhanded and opportunistic" (para 105). It contrasted the conduct of applicants in past cases (such as *In re SJC Construction Co Ltd's Application* (1974) 28 P & CR 200 (LT), affd (1975) 29 P & CR 322; *Winter v Traditional & Contemporary Contracts Ltd* [2007] EWCA Civ 1008; [2008] 1 EGLR 80; and *In re Trustees of the Green Masjid and Madrasah's Application* [2013] UKUT 355 (LC)). It was not prepared to accept that Millgate "had acted in good faith and without any intention to force the hand of the beneficiary of the covenant" (para 117). Nevertheless, the Upper Tribunal considered that it should exercise its discretion to grant Millgate's application because the public interest outweighed that high-handed and opportunistic conduct (and all other factors) in this case. In the words of the Upper Tribunal, at para 120:

> "[O]ur decision will have an effect not only on the parties but also on 13 families or individuals who are waiting to be housed in these properties if, and as soon as, the restrictions are modified. We consider that the public interest outweighs all other factors in this case. It would indeed be an unconscionable waste of resources for those houses to continue to remain empty."

36. I interject here that the description of Millgate's behaviour as "highhanded and opportunistic" is what some commentators, especially in the context of breach of contract, have described as "cynical": see, for example, Peter Birks, "Restitutionary Damages for Breach of Contract: *Snepp* and the Fusion of Law and Equity" [1989] LMCLQ 421. In line with this, I shall use the phrase "cynical breach" as a useful shorthand description of the conduct of Millgate in deliberately committing a breach of the restrictive covenant with a view to making profit from so doing.

37. The Trust appealed against the Upper Tribunal's granting of the section 84 application. It put forward four grounds of appeal ie four grounds on which it alleged that the Upper Tribunal had erred in law. Those four grounds of appeal were as follows (see Sales LJ's judgment at para 41): applying *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822 by analogy (ground one); at the jurisdictional stage, ignoring Millgate's cynical breach while regarding as highly relevant the fact that, by the time of the application, 13 housing units had been built (ground two); ignoring (including in the exercise of the Upper Tribunal's discretion) Millgate's ability to satisfy its planning obligation by making alternative provision of equivalent affordable housing elsewhere (ground three); failing properly to take account of Millgate's cynical breach in the exercise of the Upper Tribunal's discretion (ground four). The first two grounds of appeal and part of the third ground went to the jurisdiction of the Upper Tribunal (under the "contrary to public interest" jurisdictional ground), whereas part of the third ground of appeal and the whole of the fourth ground went to the discretion of the Upper Tribunal.

38. The Court of Appeal overturned the decision of the Upper Tribunal on all four grounds of appeal and re-made the decision by refusing the application. I shall explain in due course the Court of Appeal's reasoning in doing so.

39. In the appeal by Housing Solutions to this court, counsel for Housing Solutions, Martin Hutchings QC, submits that the Court of Appeal was wrong as a matter of law on all those four grounds of appeal and that the Upper Tribunal's decision should be restored. In contrast, Stephen Jourdan QC for the Trust, the respondent, submits that the Court of Appeal was correct, for the reasons it gave, to have overturned the decision of the Upper Tribunal and to have re-made the decision

by refusing the application. It follows that, on this appeal, it is convenient to continue to refer to the four grounds of appeal with the questions being whether the Court of Appeal was correct in holding that the Upper Tribunal had erred in law on each of those four grounds.

40. The focus of most of the submissions of counsel - reflecting this as being the central issue in the case - was on the relevance of Millgate's cynical breach (using that shorthand description of Millgate's conduct as explained in para 36 above). In other words, I am primarily concerned with grounds two and four of the grounds of appeal. I shall therefore deal with that central issue first before going on to look more briefly at grounds one and three of the grounds of appeal.

5. The central issue: the relevance of Millgate's cynical breach

(1) Did the Upper Tribunal, at the jurisdictional stage, make an error of law by ignoring Millgate's cynical breach while regarding as highly relevant the fact that, by the time of the application, 13 housing units had been built?

41. The essential elements of section 84 in relation to the "contrary to public interest" jurisdictional ground are sections 84(1)(aa) and (1A)(b). These have been set out in para 31 above. Reduced to their core, they read as follows:

> "(1) [The Upper Tribunal shall have the power to discharge or modify a restrictive covenant on being satisfied] -
>
> (aa) that in a case falling within subsection (1A) below the continued existence [of the restriction under the covenant] would impede some reasonable user of the land …;
>
> (1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user …
>
> (b) is contrary to the public interest;

> and that money will be an adequate compensation for the loss or disadvantage (if any) which any … person will suffer from the discharge or modification."

42. Mr Hutchings submitted that the statute requires a narrow interpretation of what is meant by "contrary to the public interest". I agree. It is clear from the statutory words that one must ask whether the impeding of the reasonable user of the land by the continuation of the restrictive covenant is contrary to the public interest. If one is satisfied that the proposed use of the land is reasonable (and it was common ground that that was satisfied in this case) one must ask whether the impediment of that use by the continuation of the restrictive covenant is contrary to the public interest. It is of central importance that the question that has to be asked is not the wider one of whether in all the circumstances of the case it would be contrary to the public interest to maintain the restrictive covenant. Rather the wording requires one to focus more narrowly on the impeding of the reasonable user of the land and to ask whether that impediment, by continuation of the restrictive covenant, is contrary to the public interest.

43. On the facts of this case, therefore, that narrow wording required the Upper Tribunal to determine whether it was contrary to the public interest for the 13 housing units not to be able to be used. The waste involved would be a very strong factor indicating that that would indeed be contrary to the public interest. To be weighed against that would be the public interest in the hospice providing a sanctuary for children dying of cancer which would be protected by the continuation of the restrictive covenant. Two competing uses of the land are therefore pitted against each other. It is the resolution of a land-use conflict that we are here dealing with. That was the approach taken by the Upper Tribunal and there was no error of law in its deciding that the "contrary to public interest" jurisdictional ground was made out on these facts.

44. Once one appreciates that the relevant wording requires a narrow enquiry and does not involve asking the wide question of whether in all the circumstances it is contrary to the public interest to maintain the restrictive covenant, it is clear that the good or bad conduct of the applicant is irrelevant at this jurisdictional stage. The manner of the breach of the restrictive covenant (ie whether the breach was cynical or not) is irrelevant because that tells us nothing about the merits of what the burdened land is being used for or will be used for. This, of course, is not to deny that the manner of breach - the cynical breach by the applicant - is a highly relevant consideration when it comes to the discretionary stage of the decision. But it is irrelevant at the jurisdictional stage.

45. There are three further points supporting that interpretation of the "contrary to the public interest" jurisdictional ground:

(i) There is plainly no room for a consideration of the manner of breach - the applicant's cynical breach - under any of the other four jurisdictional grounds. Yet at least in relation to the first limb of section 84(1)(aa) - the jurisdictional ground concerned with where the restriction was impeding the reasonable user of the land without securing substantial practical benefits - it must be relevant to the ultimate decision to take into account at the discretionary stage the applicant's cynical breach. There is no other stage at which to consider it. And that is borne out by, for example, *In re Trustees of the Green Masjid and Madrasah's Application* where the applicant's conduct was considered at the discretionary stage in a case in which jurisdiction arose under the first limb of section 84(1)(aa). It undermines the coherence of section 84 if the same conduct is taken into account at the jurisdictional stage in relation to one jurisdictional ground and at the discretionary stage in relation to other jurisdictional grounds.

(ii) Linked to that first point is that the purpose of section 84, reflected in its structure, is that the five jurisdictional grounds (with the possible exception of the "consent" jurisdictional ground in section 84(1)(b)) are concerned to identify restrictive covenants that unreasonably fetter a preferable use of the land. The manner of the defendant's breach is irrelevant to that. As the Law Commission in its Report on Transfer of Land: Restrictive Covenants (1967) (Law Com No 11) at p 23 said of its proposal to introduce the "contrary to public interest" ground:

> "This [proposal] is designed to contain a restatement of the powers of the Lands Tribunal [the predecessor of the Upper Tribunal] in such terms as to enable it to take a broader view of whether the use of land is being unreasonably impeded …"

Kevin Gray and Susan Gray, *Elements of Land Law*, 5th ed (2009), helpfully set out, at p 292, at the start of their examination of section 84, what may be regarded as the high-level aim of the section:

> "Like all property in land, the benefit of a restrictive covenant cannot be regarded as 'absolute and inviolable for all time' [citing Sir Thomas Bingham MR in *Jaggard v Sawyer* [1995] 1 WLR 269, 283]. Restrictive covenants place a long-term fetter upon the affected land, but in some cases it is clearly undesirable that the inhibition upon land use should continue indefinitely. There may arise changes of circumstance where it becomes preferable, in the interests of general social utility, that the constraints imposed by a particular covenant should be abrogated or modified. Narrowly conceived private interests

> cannot be allowed to frustrate proposed developments which promise a distinct benefit to the entire community or to some significant section of it." (footnotes omitted)

See also Law Commission Report on Making Land Work: Easements, Covenants and Profits à Prendre (2011) (Law Com No 327), paras 7.3-7.4.

(iii) As the conduct of an applicant can embrace a wide spectrum of blameworthy behaviour (from negligence through to outrageous dishonesty), it is ideally suited to being considered at the discretionary rather than the jurisdictional stage.

46. It should also be noted that section 84(1B) is consistent with the interpretation advocated by Mr Hutchings and with which I agree. That subsection reads as follows:

> "(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances."

The main body of this emphasises, as one would expect for the resolution of a land-use conflict, that the development plan and patterns of planning permission in the area are relevant considerations. The last phrase "any other material circumstances" means that the circumstance must be material to the question one is asking; and I have clarified in para 42 above that the question one should be asking in relation to the "contrary to public interest" jurisdictional ground is whether the impeding of the reasonable user of the land by the continuation of the restrictive covenant is contrary to the public interest. What the phrase does not mean is that one should be taking into account all circumstances that may be said to be relevant to deciding the incorrect and wider question of whether it would be contrary to the public interest to maintain the restrictive covenant.

47. It follows that, with great respect, I cannot agree with the approach taken by the Court of Appeal which regarded the manner of breach/cynical breach as being

of importance at the jurisdictional stage under the "contrary to the public interest" ground. Of course, the Court of Appeal was correct that these considerations are important to the overall decision and must be taken into account at the discretionary stage. But, on the correct interpretation of the Act, they are relevant at the discretionary stage only and not at the jurisdictional stage.

48. As I am respectfully disagreeing with his reasoning (and with Mr Jourdan's submissions on this point), it is appropriate to set out Sales LJ's full discussion of this matter which extended over several paragraphs:

> "56. … There is a public interest in having private contractual and property rights respected in dealings between private persons. Further, if private contractual/property rights under a restrictive covenant are to be overridden in the public interest, the Upper Tribunal should be astute to see that the public interest reasons for discharge or modification of the covenant are clearly made out.
>
> 57. In my judgment, this means that at the stage of application of the 'contrary to the public interest' test in section 84(1A)(b) the Upper Tribunal should have regard to whether the applicant has made fair use of opportunities available to it to try to negotiate a waiver of a restrictive covenant or, if necessary, to test the public interest arguments in an application made under section 84 in advance of acting in breach of that covenant. … In general, if the applicant has not made fair use of opportunities available to it to test the position in a way which affords proper recognition to the contractual/property rights of the beneficiary of the restrictive covenant, it will not be contrary to the public interest for the restriction (ie the restrictive covenant) to be allowed to continue to impede the applicant's proposed user of the restricted land. The 'contrary to the public interest' test has an important dimension which is concerned with such procedural matters and the process followed by the applicant before making its application under section 84.
>
> 58. I note in that regard that the then President of the Lands Tribunal, Douglas Frank QC, also took the view (rightly, in my opinion) that the way in which the applicant had behaved in bringing about a state of affairs in which building had taken place on the restricted land was relevant to the question whether the test in section 84(1A)(b) was satisfied, in *In re SJC Construction Co Ltd's Application* (1974) 28 P & CR 200, 205. The case went on

appeal on a different point: *SJC Construction Co Ltd v Sutton London Borough Council* (1975) 29 P & CR 322. On the appeal, the Lands Tribunal judgment on the other aspects of section 84, including section 84(1)(b), was noted by Lord Denning MR at pp 324-325 without him suggesting any doubt about the tribunal's reasoning in respect of them.

59. As I have said, enforcement of contractual and property rights is generally in the public interest, so it is relevant when assessing under section 84(1A)(b) whether 'the restriction, in impeding [some reasonable user of land], is contrary to the public interest' to see whether an applicant has behaved appropriately in seeking to respect and give due weight to such rights in the course of its dealings with the holder of such rights, so that the question of the public interest has been tested in an appropriate way. If the property developer has bargained for a waiver of the restrictive covenant and it is found that there is a price acceptable to both parties, it could not be said (at any rate, in ordinary circumstances) to be contrary to the public interest that the covenant should be maintained in place unless and until that price is paid. Similarly, if an application under section 84 is made in advance of any conduct by the developer in breach of the covenant, that will allow the public interest to be tested in the context of due weight being given to upholding the public interest as regards respect for property and contract rights, rather than in a context where the developer has unilaterally and unlawfully violated those rights.

…

61. In my view, in the circumstances of this case, in which Millgate had deliberately circumvented the proper procedures for testing and respecting the Trust's rights under the restrictive covenants, the Upper Tribunal could not properly be 'satisfied' that it was contrary to the public interest for the restrictive covenants to be maintained in place. Millgate has acted in an unlawful and precipitate manner by building in breach of the restrictive covenants. It has acted with its eyes open and completely at its own risk. As a result it is appropriate and in conformity with the public interest that it should bear the risk that it may have wasted its own resources in building the 13 housing units on the application land.

…

64. … in general terms it is in the public interest that contracts should be honoured and not breached and that property rights should be upheld and protected. A property developer which knows of a restrictive covenant which impedes its development of land has a fair opportunity before building either to negotiate a release of the covenant or to make an application under section 84 to see if it can be modified or discharged. That is how the developer ought to proceed. It is contrary to the public interest in ensuring that proper respect is given to contractual or property rights for a property developer to proceed without any good excuse to build in violation of such rights, as contained in an enforceable restrictive covenant, in an attempt to improve its position on a subsequent application under section 84. Put another way, it is contrary to the public interest for the usual protections for a person with the benefit of a restrictive covenant to be circumvented by a developer seeking to obtain an advantage for itself by presenting the tribunal with a fait accompli in terms of having constructed buildings on the affected land without following the proper procedure, and then in effect daring the tribunal to make a ruling which might have the result that those buildings have to be taken down. If the presence on the affected land of a building constructed in breach of the relevant covenant is to be regarded as capable of being relevant to the public interest question under subsection (1A)(b) - as in principle it is … - I consider that the issue of *how* that situation arose is also highly relevant to that question.

65. It should be noted that the discussion in relation to these grounds is directed to the issue whether the condition in section 84(1A)(b) has been satisfied, which is a precondition for the Upper Tribunal to have any discretionary power under section 84(1) to discharge or modify a restrictive covenant. That is different in important respects from the distinct issue … of how such a discretionary power should be exercised, once it is found to have arisen. In this case, the Upper Tribunal wrongly postponed consideration of the conduct of Millgate to the discretionary stage (paras 113-121), and at para 117 treated the decision of the Lands Tribunal (Douglas Frank QC, President) in *In re SJC Construction Co Ltd's Application* (1974) 28 P & CR 200 as relevant to that stage, even though in the relevant passage (at p 205) referred to by the Upper Tribunal the President in fact referred to the conduct of the applicant in the context of

> addressing the question whether the precondition in section 84(1A)(b) had been satisfied.
>
> 66. In my view, it is appropriate to bring into account the rights-based and procedural dimension of the public interest in the interpretation of section 84(1A)(b), as in the *SJC Construction Co* case, in order to secure fuller protection and due respect for the contractual rights with property characteristics which are sought to be overridden on an application under section 84. I do not consider that Parliament intended that section 84 should operate so as to allow those rights to be deliberately ignored by an applicant, with it then being left as a purely discretionary matter for the Upper Tribunal to decide whether to override them."

49. I shall not repeat the reasons set out above why I regard that approach as incorrect. But I would like to make two final points on this issue triggered by Sales LJ's discussion. The first is that, as Mr Hutchings submitted, one can detect in various passages in Sales LJ's judgment (for example, in paras 59 and 61) a diversion into the wider and incorrect question of whether maintaining the restrictive covenant is contrary to the public interest. Secondly, I do not regard it as entirely clear that Douglas Frank QC in *In re SJC Construction Co Ltd's Application* took the applicant's conduct into account at the jurisdictional stage. The difficulty is that that decision made no reference to the two distinct stages of jurisdiction and discretion and, as Mr Hutchings submitted, one can read the relevant passage about the applicant's behaviour as in effect a point in parenthesis that cuts across the five matters that Douglas Frank QC said he was taking into account. In any event, the applicant's conduct in question in that case was acting "in good faith in the sense that they did not intend to force the Council's hand" (at p 205) whereas, as we have seen at para 35 above, in the instant case, the Upper Tribunal was not prepared to accept that Millgate "had acted in good faith and without any intention to force the hand of the beneficiary of the covenant" (para 117).

50. It follows from my reasoning above that, contrary to the decision of the Court of Appeal on the second ground of appeal, the Upper Tribunal did not make an error of law at the jurisdictional stage by ignoring Millgate's cynical breach while regarding as highly relevant the fact that, by the time of the application, 13 housing units had been built.

(2) Did the Upper Tribunal make an error of law by failing properly to take account of Millgate's cynical conduct in the exercise of its discretion?

51. It should be stressed at the outset that the issue here is whether the Upper Tribunal made an error of law in the exercise of its discretion. In this case, it would only be appropriate for an appellate court (including this court) to interfere, at the discretionary stage, with the decision of the specialist tribunal charged by Parliament with exercising the discretionary power to decide matters under section 84, if that tribunal has made an error of law. While I may not have reached the same decision when balancing the considerations taken into account by the Upper Tribunal, it is clear that that is not a sufficient reason for this court to intervene with the discretionary decision of the Upper Tribunal. I am acutely conscious of the need to tread very carefully so as to avoid simply substituting my view of how the considerations should be weighed for that of the specialist tribunal.

52. I also accept that the Upper Tribunal in the *Trustees of the Green Masjid* case was correct to say, at para 129, that once a jurisdictional ground has been established, the discretion to refuse the application should be "cautiously exercised".

53. Nevertheless, I agree with the decision of the Court of Appeal that, in relation to the cynical conduct of Millgate, there was indeed an error of law made by the Upper Tribunal in the exercise of its discretion. However, I have some reservations about how the Court of Appeal chose to explain that error of law. Sales LJ said the following:

> "77. On the assumption that the relevant discretion under section 84(1) had arisen, … I consider that the Upper Tribunal fell into error … I reach the view I have notwithstanding the discretionary nature of the exercise which the Upper Tribunal had to conduct at this stage in the analysis and even though the Upper Tribunal correctly referred in this part of its decision to relevant authority and reminded itself at paras 114-115 of factors which pointed against the exercise of discretion in favour of Millgate. In my view, the Upper Tribunal still arrived at a conclusion which was 'wrong' within the meaning of CPR rule 52.21(3)(a) (ex rule 52.11(3)(a)), in that it failed to attach sufficient weight to the deliberately unlawful and opportunistic conduct of Millgate in the circumstances of this case, which was directed to subverting the proper application of section 84 without good reason.
>
> …

> 82. … Millgate acted in a high-handed manner by proceeding to breach the restrictive covenants without any justification or excuse. Millgate had attempted to steal a march on the Trust and had sought to evade the jurisdiction of the Upper Tribunal at the appropriate stage, by failing to make its section 84 application before building. In my judgment, the appropriate course for the Upper Tribunal in the present case, having regard to the need for due protection of the Trust's rights and to the general public interest in having the section 84 procedure invoked at the proper time and in the proper manner, was to exercise its discretion to refuse Millgate's application. It is highly desirable that there should be consistency and predictability as regards the exercise of discretion under section 84(1), and I consider that those values are best promoted by the exercise of discretion against acceding to Millgate's application in the present case.
>
> …
>
> 84. … the application should have been refused in the exercise of discretion by the Upper Tribunal because Millgate had acted without proper regard to the rights of the Trust and with a view to circumventing the proper consideration of the public interest under section 84. Clearly, such an exercise of discretion is called for in part to deter others; and from a certain perspective it might be thought to have a punitive character; but the true reason for the exercise of discretion in this way in the present case is wider than that."

54. It would be inappropriate for an appellate court to interfere with a discretionary decision of a specialist tribunal just because it considers that the tribunal "failed to attach sufficient weight" (see Sales LJ at para 77) to a particular factor. Sales LJ would, of course, be well aware of that. My interpretation of what he was saying, therefore, was that the Upper Tribunal's approach was contrary to principle. And the relevant principle in play here was, as I understand it, that an applicant who has committed a cynical breach of the type committed on these facts should have its application refused. In other words, as a matter of principle, a cynical breach such as that committed in this case outweighs what would otherwise be the public interest in discharging or modifying the restrictive covenant.

55. I am sorely tempted to agree that there is such a principle. However, I have major concerns as to whether, without discretionary qualifications to cater for exceptions, such a principle would be too rigid and would inappropriately fetter the

Upper Tribunal's discretion. And once one lets in discretionary qualifications to temper such a principle, it is hard to see how the Upper Tribunal in this case could be said to have made an error of law. In deciding that the public interest in allowing the houses to be used outweighed all other considerations, including Millgate's cynical conduct, the Upper Tribunal can be said to have been applying such qualifications to any such principle within the legitimate exercise of its discretion.

56. Certainly it is plain that the Upper Tribunal took into account the cynical nature of the breach by Millgate. This is made clear at paras 116-118 of the judgment which included a careful consideration of whether, for example, the egregious nature of the breach of covenant should lead to a denial of the application so as to punish the wrongdoer. The cynical conduct in this case was compared and contrasted with other cases where, for example, the applicant had acted in good faith without knowledge of the covenant or had already partly completed the buildings before objections were raised. What the Upper Tribunal said at para 118 is particularly important in this context:

> "Ms Windsor emphasised that, unlike the applicants in *Green Masjid*, Millgate had acted with professional advice and suggested that its behaviour was so egregious and unconscionable that relief should be refused. We have taken into account all of the matters of conduct which she relied on in reaching our conclusion."

We were supplied with Ms Windsor's expanded closing submissions (for the objectors) at the Upper Tribunal hearing. Those submissions replaced previous skeleton arguments. Under the heading of "Conduct", they set out over ten paragraphs (paras 41-50) Ms Windsor's submissions regarding Millgate's conduct. The details of the alleged "egregious" and "unconscionable" conduct are particularised at paragraph 46(a)-(k).

57. Nevertheless, like the Court of Appeal, I am satisfied that, even though it took into account Millgate's cynical conduct, something has gone fundamentally wrong with the Upper Tribunal's exercise of discretion on the particular facts of this case such that one can say that there has been an error of law. In my view, the correct way of pinpointing this is to recognise that the Upper Tribunal failed to take into account in the exercise of its discretion two particular factors, concerned with the effect of Millgate's conduct, that should have been taken into account. I shall refer to these factors as the "two omitted factors". Taken separately, and certainly taken together, they make the facts of this case exceptional. Neither was referred to by Ms Windsor in her closing submissions and neither was mentioned in the judgment of the Upper Tribunal. Both relate to the important recognition by the Upper Tribunal (see para 14 above) that, had Millgate initially applied for planning permission to

build all the required affordable housing on the unencumbered land, the local planning authority indicated that permission would have been granted.

58. The first omitted factor is that, had the developer respected the rights of the Trust by applying for planning permission on the unencumbered land, there would then have been no need to apply to discharge the covenant under section 84 and the hospice would have been left unaffected. Millgate was not just a cynical wrongdoer which had gone ahead with the development in deliberate breach of the covenants and in the face of objections raised. Rather, in addition, and crucially, Millgate, by its cynical breach, put paid to what, on the face of it, would have been a satisfactory outcome for Millgate and, at the same time, would have respected the rights of the Trust (because building on the unencumbered land would not have involved any breach of the restrictive covenant). It is important to deter a cynical breach under section 84 but it is especially important to do so where that cynical conduct has produced a land-use conflict that would reasonably have been avoided altogether by submitting an alternative plan.

59. The second omitted factor is that, had Millgate respected the rights of the Trust by applying under section 84 before starting to build on the application site, it is likely that the developer would not have been able to satisfy the "contrary to public interest" jurisdictional ground under section 84. This is because Millgate would have been met with the objection that planning permission would be granted for affordable housing on the unencumbered land so that the upholding of the restriction would not be contrary to the public interest. It follows that the effect of Millgate's cynical breach of covenant was to alter fundamentally the position in relation to the public interest. As Mr Jourdan expressed it, in a submission with which I agree, "It is not in the public interest that a person who deliberately breaches a restrictive covenant should be able to secure the modification of the covenant in reliance on the state of affairs created by their own deliberate breach". By going ahead without first applying under section 84, Millgate put itself in the position of being able to present to the Upper Tribunal a fait accompli where the provision of affordable housing meant that it could (and did) satisfy the "contrary to public interest" jurisdictional ground. It is important to deter a cynical breach under section 84 but it is especially important to do so where, because the Upper Tribunal will look at the public interest position as at the date of the hearing, that cynical conduct will directly reward the wrongdoer by transforming its prospects of success under the "contrary to public interest" jurisdictional ground.

60. The Upper Tribunal touched on the second of these factors in discussing the "contrary to public interest" jurisdictional ground:

> "106. It is no answer to the current wasteful state of affairs to say, as Ms Windsor did, that Millgate could have built their

> allocation of affordable housing on other land, or that it could now buy its way out of the problem by making a payment towards the provision of social housing elsewhere. Whether those would have been sufficient answers to Millgate's case on public interest if we had been dealing with an application before any housing had been built on the site is not a question which arises. The question for the Tribunal is whether in impeding the occupation of the houses which now stand on the application land, and which are otherwise immediately available to meet a pressing social need, the covenants operate in a way which is contrary to the public interest. We are satisfied that they clearly do because it is not in the public interest for these houses to remain empty and the covenants are the only obstacle to them being used."

This makes clear that at the jurisdictional stage the UT was, correctly, looking at matters as they then stood at the date of the hearing and not as they stood prior to the breach of covenant. But at the discretionary stage the importance of that change having been brought about by the developer's cynical breach should have come back into the reasoning and should have been highly relevant. But that step in the reasoning - taking into account, in the exercise of its discretion, the second of the two omitted factors - was simply never taken by the Upper Tribunal.

61. It might perhaps be counter-argued that the second of those two omitted factors was obliquely referred to by the Upper Tribunal at the discretionary stage at para 115:

> "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 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 …"

However, even if the second factor was here being referred to, it clearly cannot have been taken into account in reaching the decision because the decision directly contradicted the reasoning in that paragraph. The decision of the Upper Tribunal precisely would encourage developers to ignore covenants and to press on with a development even in the face of strong objections. If the Upper Tribunal had been taking that factor into account, an explanation for that contradiction would have been required. Mr Jourdan submitted that the Upper Tribunal was paying lip service to the warning it was giving in para 115. I agree. In truth, the Upper Tribunal ignored that factor in reaching its decision.

62. As I have stressed in para 57, what makes this an exceptional case on the facts is the presence of the two omitted factors. The Upper Tribunal's failure to take either into account in the exercise of its discretion constituted an error of law. Although my precise reasoning is different, I therefore agree with the Court of Appeal that (in relation to the fourth ground of appeal) the Upper Tribunal made an error of law by failing properly to take account of Millgate's cynical conduct in the exercise of its discretion.

63. My decision on that fourth ground of appeal is sufficient for the dismissal of this appeal. But in the light of the full submissions of Mr Hutchings and Mr Jourdan, I shall explain briefly in the next section why I respectfully disagree with the Court of Appeal that the Upper Tribunal made errors of law on the other two issues, which were the first and third grounds of appeal.

6. The other two issues

(1) Applying Lawrence v Fen Tigers Ltd by analogy

64. The first and successful ground of appeal to the Court of Appeal was that the Upper Tribunal had made an error of law by applying by analogy, in relation to the "contrary to public interest" jurisdictional ground in section 84(1)(aa), what Lord Sumption had said in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13; [2014] AC 822, paras 155 to 161. That was a case concerned with the tort of private nuisance. The Supreme Court (with the leading judgment being given by Lord Neuberger) held that the defendants were committing a private nuisance by noise against the claimants who lived in a bungalow 850 yards away from the defendants' speedway racing stadium. There was no appeal against the grant of a (prohibitory) injunction, should the continuing tort be established. However, the Supreme Court took the opportunity to lay down that, while an injunction should prima facie be ordered where a tort of nuisance is continuing, the strong primacy traditionally afforded to the injunction as a remedy for the tort of nuisance should be modified so that the public interest should always be a relevant consideration in deciding whether to grant an injunction for such a tort. In other words, the courts should be more willing than has traditionally been the case to award damages in lieu of an injunction in this context. Lord Sumption indicated that an even more radical rethink of the relationship between an injunction and damages in relation to the tort of nuisance might in due course be needed. Having earlier said, at para 160, that the traditional primacy afforded to an injunction was "based mainly on the court's objection to sanctioning a wrong by allowing the defendant to pay for the right to go on doing it" and that that seemed "an unduly moralistic approach to disputes", he went on to say the following at para 161:

> "The whole jurisprudence in this area will need one day to be reviewed in this court. There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted in a case where it is likely that conflicting interests are engaged other than the parties' interests. In particular, it may well be that an injunction should as a matter of principle not be granted in a case where a use of land to which objection is taken requires and has received planning permission. However, at this stage, in the absence of argument on these points, I can do no more than identify them as calling for consideration in a case in which they arise."

65. As regards Lord Sumption's emphasis on planning permission, the Upper Tribunal made clear that the existence of planning permission for the use of the application land for housing was a material consideration under the "contrary to public interest" jurisdictional ground in section 84(1)(aa). It also said this, at para 102:

> "The fact that planning permission has been granted does not mean that private rights can necessarily be overridden, but it does reflect an objective assessment of appropriate land use which fully takes into account the public interest."

Sales LJ, in the Court of Appeal, thought that that was an incorrect statement because one also needed to take into account the cynical conduct of the defendant in assessing the public interest at the jurisdictional stage. I have made clear earlier that I do not agree with Sales LJ's wide interpretation of the "contrary to public interest" jurisdictional ground and I need say no more about that here.

66. But as regards Lord Sumption's wider comments on the relationship between an injunction and damages, with respect I cannot agree with the Court of Appeal that the Upper Tribunal made an error of law by applying that approach by analogy. This is not because I disagree with what Sales LJ said, in characteristically powerfully reasoned paragraphs (paras 51-54), about Lord Sumption's wider views not being endorsed by the other Supreme Court justices and the important difference in context between remedies for the tort of private nuisance and an application under section 84 (although I would be inclined to accept that, at a high level of generality, useful parallels can be drawn). Rather the important point, as submitted by Mr Hutchings, is that the Upper Tribunal clearly did not take into account the wider comments of Lord Sumption. At para 107, the Upper Tribunal said that it was mindful of the traditional approach, and in particular the dictum of Douglas Frank QC in *In re Collins' Application* (1975) 30 P & CR 527, 531, that for an application

to succeed under the "contrary to public interest" jurisdictional ground it had to be shown that that interest is "so important and immediate as to justify the serious interference with private rights and the sanctity of contract." It then said this:

> "Whether that restrictive gloss remains the correct approach may require reconsideration in light of Carnwath LJ's explanation of the policy underlying ground (aa) in *Shephard v Turner* and Lord Sumption's observations on the reconciliation of public and private rights in *Lawrence v Fen Tigers Ltd, but it is not necessary to pursue that thought further at this time*. We are satisfied that the public interest in play in this case is sufficiently important and immediate to justify the exercise of the Tribunal's power under section 84(aa) to override the objector's private rights." (Emphasis added)

The emphasised words make clear that the Upper Tribunal was not here applying Lord Sumption's wider comments.

67. There is a subsidiary issue that it is convenient to deal with at this stage. The Court of Appeal thought that the Upper Tribunal had failed to apply section 84(1B) correctly because the planning permission granted did not support the Upper Tribunal's view of the public interest. Section 84(1B) has been set out at paras 31 and 46 above. Putting to one side the Court of Appeal's view on the relevance of Millgate's conduct, which I have already dealt with, the point made by the Court of Appeal was this (at para 68):

> "The development plan placed the application land in the Green Belt, thereby indicating that there was the usual strong presumption *against* its residential development as proposed by Millgate. The Upper Tribunal did not identify any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area, let alone one which supported Millgate's arguments regarding the public interest."

68. While the Court of Appeal was correct that the Upper Tribunal did not appear to take into account, as subsection (1B) required it to do, any pattern of planning permissions, the Upper Tribunal did expressly refer to the words in subsection (1B); and, in its description of the facts, it made clear that the planning permission had here been granted, despite the application land being contrary to the development plan and in the Green Belt, because the local authority had decided that there were special circumstances which justified the grant of permission. Moreover, the Upper

Tribunal set out (at para 25 of its description of the facts) what those circumstances were said to be (see para 16 above).

69. In my view, while the Upper Tribunal should have taken into account any pattern of planning permissions, that was not a serious error of law given the planning permission that had actually been granted in this case; and it was certainly not a sufficient error to justify overturning the decision of the Upper Tribunal.

(2) Ignoring (including in the exercise of the Upper Tribunal's discretion) Millgate's ability to satisfy its planning obligation by making alternative provision of equivalent affordable housing elsewhere

70. This was the third and successful ground of appeal to the Court of Appeal. The Upper Tribunal had observed, at para 53, that the effect of the variation of Millgate's section 106 planning obligation by the agreement of 9 February 2016 was that Millgate could secure release from its obligation to the Council to provide the outstanding 13 units of affordable housing on the application land by payment of £1,639,904, "thus allowing [the Council] to provide equivalent affordable housing elsewhere". But although the Upper Tribunal considered the provision of affordable housing as important in deciding on the public interest, at both the jurisdictional and discretionary stages, the Court of Appeal took the view that this precise point was left out of account at both stages and that that constituted an error of law at both stages.

71. I agree with the submission of Mr Hutchings that the Upper Tribunal at para 106 expressly did take account of this precise alternative but regarded it as outweighed by the waste of not using the affordable housing already built, and immediately available, on the application land.

> "106. It is no answer to the current wasteful state of affairs to say, as Ms Windsor did, that Millgate … *could now buy its way out of the problem by making a payment towards the provision of social housing elsewhere*. Whether those would have been sufficient answers to Millgate's case on public interest if we had been dealing with an application before any housing had been built on the site is not a question which arises. The question for the Tribunal is whether in impeding the occupation of the houses which now stand on the application land, and which are otherwise immediately available to meet a pressing social need, the covenants operate in a way which is contrary to the public interest. We are satisfied that they clearly do because it is not in the public interest for these houses to remain

> empty and the covenants are the only obstacle to them being used." (Emphasis added)

72. This was an analysis at the jurisdictional stage but there is no reason to think that this point was then left out of account at the discretionary stage where the Upper Tribunal, at para 120, referred back to it being in the public interest not to waste resources by these houses remaining empty.

73. In my view, therefore, the Court of Appeal was wrong to have regarded the Upper Tribunal as having made an error of law on this point.

7. Conclusions and re-making the decision

74. For the reasons I have given:

(i) The Court of Appeal was correct to overturn the decision of the Upper Tribunal for its failure properly to take account of Millgate's cynical breach in the exercise of its discretion (ground four of the grounds of appeal). But my reasoning in relation to that ground differs from the reasoning of the Court of Appeal: I have held that the Upper Tribunal erred in law by failing to take into account, as it should have done, the two relevant factors, concerned with the effect of Millgate's cynical conduct, that I have termed the two omitted factors (see paras 58-59 above).

(ii) The Court of Appeal was incorrect, as a matter of law, in overturning the Upper Tribunal on the other three grounds of appeal. That is, applying *Lawrence v Fen Tigers Ltd* by analogy (ground one); ignoring, at the jurisdictional stage, Millgate's cynical breach while regarding as highly relevant the fact that, by the time of the application, 13 housing units had been built (ground two); and ignoring (including in the exercise of the Upper Tribunal's discretion) Millgate's ability to satisfy its planning obligation by making alternative provision of equivalent affordable housing elsewhere (ground three).

(iii) Overall, because of my conclusion on (i), the appeal should be dismissed.

75. Given the above conclusions, a further question arises. Should this matter be remitted back to the Upper Tribunal to exercise its discretion afresh in the light of this judgment or should this court exercise its power to re-make the decision? The

power to re-make the decision is conferred by section 14(2)(b)(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007. By this:

> "(1) Subsection (2) applies if the relevant appellate court … finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The relevant appellate court -
>
> (a) may (but need not) set aside the decision of the Upper Tribunal, and
>
> (b) if it does, must either -
>
> (i) remit the case to the Upper Tribunal …, or
>
> (ii) re-make the decision.
>
> (4) In acting under subsection (2)(b)(ii), the relevant appellate court -
>
> (a) may make any decision which the Upper Tribunal could make if the Upper Tribunal were re-making the decision … and
>
> (b) may make such findings of fact as it considers appropriate."

76. The Court of Appeal exercised its power to re-make the decision by refusing the application. However, that was in the context of the Court of Appeal having decided that, on three separate grounds, the Upper Tribunal had not had jurisdiction to allow Millgate's section 84 application. My reasoning has been that the Upper Tribunal has made no errors of law going to jurisdiction but did err in law by failing to take two relevant factors (the two omitted factors) into account in exercising its discretion.

77. Nevertheless, I am satisfied that this Court should now re-make the decision. I am especially influenced by the fact that the application under section 84 was

issued by Millgate over five years ago (on 20 July 2015). Given the length of time that has elapsed - and the corresponding uncertainty for the parties involved and for many others, including residents and potential residents of the 13 housing units and the patients and those working at the hospice - I would regard it as a last resort to send the case back to the Upper Tribunal. Although I have in the forefront of my mind that this court is not a specialist tribunal, had the Upper Tribunal properly taken into account the two omitted factors in exercising its discretion, it would surely have concluded that the application to discharge or modify the restrictive covenants should be refused in this exceptional case. Moreover, that is the decision which, in my view, taking all relevant considerations into account and especially bearing in mind the cynical conduct of Millgate and the two omitted factors, is the correct decision. Therefore, exercising the discretion afresh, the decision of the Upper Tribunal is set aside and re-made by refusing the application.

78. I should add, finally, lest there be any confusion about this, that nothing that I have here said is determinative of how the courts will decide any claim by the Trust for a prohibitory injunction to enforce the restrictive covenant by stopping the 13 housing units being occupied or for a mandatory restorative injunction ordering the removal of the units in part or whole. Mr Jourdan pointed to the range of monetary remedies, going beyond conventional compensatory damages, that a refusal of the section 84 application would leave the Trust free to pursue. Not least given the cynical breach of the restrictive covenant and the difficulty of accurately assessing the Trust's loss, he suggested that these might include an account of profits (see *Attorney General v Blake* [2001] 1 AC 268) as well as negotiating damages (see *Morris-Garner v One Step (Support) Ltd* [2018] UKSC 20; [2019] AC 649). I make no comment on that suggestion. But it is only realistic to recognise that the impact of this decision will plainly be to strengthen the Trust's hands in relation to any financial settlement of this dispute.