Neutral Citation Number: [2018] EWCA Civ 2679

Case No: C3/2017/0336

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(LANDS CHAMBER)
[2016] UKUT 0515 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/11/2018

Before:

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal (Civil Division))
LORD JUSTICE SALES
and
LORD JUSTICE MOYLAN

- -

Between:

The Alexander Devine Children's Cancer Trust	**Appellant**
- and -	
(1) Millgate Developments Limited	
(2) Housing Solutions Limited	**Respondents**

- -
- -

Emily Windsor (instructed by **Key IP Limited**) for the **Appellant**
Michael Driscoll QC (instructed by **DAC Beachcroft LLP**) for the **Respondents**

Hearing date: 4 October 2018

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Approved Judgment

Lord Justice Sales:

1. This is an appeal against the judgment of the Upper Tribunal (Lands Chamber) (Martin Rodger QC and Paul Francis FRICS) ([2016] UKUT 0515 (LC)) by which it granted an application by the first respondent ("Millgate") under section 84 of the Law of Property Act 1925 to modify restrictive covenants which prevented residential development on an area of open land so as to allow such development.

2. Millgate was the developer of the land in question. It built houses and bungalows on it in breach of the restrictive covenants in their unmodified form. It later sold them to the second respondent ("Housing Solutions"), a provider of social housing, for use as affordable housing. Millgate did this in order to satisfy a planning obligation imposed on it by the local planning authority, the Royal Borough of Windsor and Maidenhead ("the Council"), in respect of a much bigger and more valuable housing development by Millgate in the vicinity, at a site called Woolley Hall. Millgate has given an indemnity against any loss which might be suffered by Housing Solutions if it is unsuccessful in these proceedings. Housing Solutions joined in the proceedings as a "person interested" in the land. Mr Driscoll QC acts for both Millgate and Housing Solutions on this appeal.

3. Although the developer, Millgate, was aware of the restrictive covenants and of objections to the development by owners of neighbouring property which had the benefit of the covenants, it only brought its application under section 84 to clarify whether it could build on the land after it had already constructed nine two storey houses and four bungalows on the site in breach of the restrictive covenants, thereby presenting the Upper Tribunal with a *fait accompli*. The Upper Tribunal held that the restrictive covenants against development of the land, in impeding the continued existence and the occupation of the houses and bungalows, were contrary to the public interest, as that term is used in section 84(1A)(b) of the 1925 Act and should be overridden. There are a number of indications in the Upper Tribunal's judgment that it might well have come to a different view if Millgate had made its application before the houses and bungalows had been built and that it was the risk that (having in fact been built) they might have to be demolished if the Upper Tribunal did not accede to Millgate's application which was the decisive factor for the Upper Tribunal in its decision to accede to Millgate's application.

Section 84 of the Law of Property Act 1925

4. Section 84 provides in relevant part as follows:

> "**84 – Power to discharge or modify restrictive covenants affecting land**
>
> (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) [modification or discharge is agreed by relevant persons]; 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.
>
> …"

Factual background

5. The land in question affected by the restrictive covenants ("the application land") is close to Maidenhead. It is located in an area designated as Green Belt in the applicable development plan.

6. The restrictive covenants in issue 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 to the south of Maidenhead. SSPC owned some industrial buildings (later known as Exchange House) on land adjacent to the application land (I will call this land "the unencumbered land"). By the conveyance, the application land was transferred to SSPC making, in combination with the unencumbered land, a rectangular plot of land ("the Exchange House site") running between fields owned by Mr John Smith to the east and a road to the west called Woodlands Park Avenue.

7. 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 situated within three quarters of a mile of the application land that at all times thereafter it would observe and perform certain stipulations which include the restrictive covenants in issue. 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."

8. In due course, Mr John Smith's son Bartholomew ("Mr Barty Smith") inherited the adjacent agricultural land from his father. In December 2011 he proposed gifting the part of that land which lay along the border of the application land to the trustees of the Alexander Devine Children's Cancer Trust (I will refer to them as "the Trust") for the construction of a hospice for children who are seriously ill with life-limiting conditions and their carers. I will refer to this land as "the hospice land". Mrs Fiona Devine is the co-founder and chief executive of the Trust.

9. The plans for the hospice were developed to make full use of the hospice land, including with recreational areas and a pleasant 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 gifted the hospice land to the Trust. However, construction of the hospice had to await the raising of adequate funds from charitable donations.

10. We were not told when Millgate acquired the Exchange House site. It seems this happened 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 persons with ability 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 is 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: [50]-[51].

11. 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 the Woolley Hall site for commercial sale. In due course, in March 2014 the Council granted planning permission for both developments, with the permission for the Woolley Hall development being conditional on the provision of the affordable housing on the Exchange House site. By clause 1.3 of a unilateral obligation by deed made pursuant to section 106 of the Town and Country Planning Act 1990, Millgate undertook not to occupy (i.e. 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 constructed and transferred to an affordable housing provider.

12. The plans submitted with the application for permission for the development of the Exchange House site showed 10 residential units to be provided in a block of flats on the unencumbered land part of the site plus the nine two-storey houses and four bungalows on the application land part of the site. It seems that the Council was not aware of the position in relation to the restrictive covenants affecting the application land. In any event it is unlikely that the Council would have viewed it as its function to use its planning powers to police or enforce those covenants or the private rights and obligations of Millgate and the Trust, rather than leaving it to them to negotiate to try to remove any private rights which might prevent the planned development of the Exchange House site from proceeding.

13. The Council's concern was to ensure that the requisite number of affordable housing units should be provided on the Exchange House site. The Upper Tribunal found 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 part of the site and using the application land part of the site for a car park for the flats, the Council would have approved such a proposal: [62].

14. 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 seems that 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. At this time 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 set aside. 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.

15. On 1 July 2014 Millgate began clearing the site preparatory for construction. The nine two-storey houses which it proposed building on the application land were to be erected close to the boundary with the Hospice land and the upper windows would overlook the gardens and wheelchair walk which the Trust was proposing to develop as part of its plans for the construction of the Hospice. The four bungalows were also to be erected close to that boundary.

16. 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 part of the site had been cleared and work on the new foundations across the whole site had commenced.

17. 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 already to be in breach of them by reason of the works it had already carried out on the application land. He wrote that Millgate should immediately halt any plans it had to build on the application land. Despite this, Millgate continued with its construction works.

18. It seems that Millgate passed Mr Barty Smith's letter on to DAC Beachcroft for reply. We were told that the reply was by a letter which was eventually 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" (the letter did not address the position of land adjacent or close to the Exchange House site if it were to be developed).

19. Mr Barty Smith took counsel's advice. With the benefit of this, he replied to DAC Beachcroft by 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."

20. 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 overlook the hospice gardens. In continued breach of the restrictive covenants, Millgate continued to build the houses and bungalows on the application land. We were told that 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.

21. 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.

22. On 20 July 2015 Millgate issued its present 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 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.

23. On 28 July 2015 Millgate transferred and Housing Solutions accepted conveyance of the unencumbered land part of the Exchange House site (with the block of 10 residential flats on it).

24. In September 2015, the construction of the hospice began.

25. By an agreement dated 9 February 2016, the relevant section 106 obligation in respect of the Woolley Hall site (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 meant 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. In any event, as an alternative, presumably Millgate could have agreed with the Council to allocate 13 units from those built on the Woolley Hall site to satisfy the Council's affordable housing requirement, albeit that would have reduced Millgate's profits from the development of that site.

26. On 18 November 2016 the Upper Tribunal promulgated 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 as the site of the houses and bungalows which had been constructed on it. As a condition of this ruling taking effect, 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 garden from view plus an element of compensation for loss of amenity.

27. On 15 February 2017, the day before the last day on which the Trust could 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 had been satisfied and Millgate immediately that day transferred the 13 housing units on the application land to Housing Solutions. Although, of course, extensions of time for appealing are frequently granted, 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 a short extension of time in which to do so, if that was necessary. Floyd LJ granted permission to appeal and an extension of time.

28. Housing Solutions is 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 above. As against Millgate, Housing Solutions continues to have the benefit of the indemnity provision in the sale agreement, should the restrictive covenants be restored and enforced. Some of the 13 housing units are now occupied by tenants.

The decision of the Upper Tribunal

29. Before the Upper Tribunal, Millgate submitted that the restrictive covenants conferred no substantial advantage on the land belonging to Mr Barty Smith and the hospice land and that the requirements of section 84(1)(aa), read with subsections (1A) and (1B), were satisfied. Millgate also relied on section 84(1)(c). The Trust, on the other hand, submitted that the carefully planned environment of the hospice and the outdoor amenities which were to be provided there for terminally ill children and their carers were seriously compromised by the presence of new housing so close to the boundary of the hospice land.

30. The Upper Tribunal found that the restrictive covenants were not of benefit to the land owned by Mr Barty Smith, by reason of the interposition of the hospice land between the application land and the open fields which Mr Barty Smith continued to own. On this basis the Upper Tribunal dismissed his objections to Millgate's application under section 84. It is unnecessary to say more about this aspect of the case.

31. The Upper Tribunal found that the visual impact of the nine new houses and four new bungalows built on the application land would be significant for sick children and their carers and visitors using the grounds and outdoor facilities at the hospice, including the wheelchair walk and a treehouse located near the boundary with the application land. Much denser and less attractive planting along the boundary would be required to screen the buildings than had been planned for the hospice, for which it

had been hoped that there could be relatively open planting along the boundary with unimpeded views of sky through the gaps. The Upper Tribunal found that the effect of the nine houses on the application land along the boundary with the hospice land was that sick children and others using the outdoor facilities at the hospice would be subjected to a more urban, less private, less secluded and less attractive environment than would have been the case if the restrictive covenants had been honoured by Millgate, and that Millgate's conduct meant that practical benefits in the form of enhanced privacy and seclusion for the hospice land had been lost: [67]. In the special circumstances of the hospice, the Upper Tribunal also found that protection from the ordinary noise associated with use of the adjoining gardens of the houses and the bungalows and the children's recreation area on the application land next to the bungalows was a practical benefit: [68].

32. The Upper Tribunal directed itself by reference to the seven questions relevant to an application made under section 84 identified by the Lands Tribunal (J. Stuart Daniel QC) in *Re Bass Ltd's Application* (1973) 26 P&CR 156, 158-159. It was common ground that the proposed use of the application land to provide 13 units of affordable housing was "reasonable user of the land" within the meaning of that phrase in section 84(1)(aa) which would be impeded by the covenants. The Upper Tribunal identified the practical benefits associated with the restrictive covenants referred to above; and held that those practical benefits were of substantial value or advantage to the Trust: [95]. Accordingly, the Upper Tribunal held that Millgate's case based on section 84(1)(aa) read with subsection (1A)(a) and its case based on section 84(1)(c) should be dismissed.

33. The Upper Tribunal then turned to consider Millgate's alternative case based on section 84(1)(aa) read with subsection (1B)(b), namely that the restriction posed by the restrictive covenants, in impeding the reasonable user of the application land for occupation of the 13 units for affordable housing, for which planning permission had been given, "is contrary to the public interest" and that money would "be an adequate compensation for the loss or disadvantage" which the Trust would suffer from the modification of those covenants.

34. In his submissions to the Upper Tribunal Mr Driscoll argued that there was a relevant analogy with the approach of Lord Sumption JSC in his judgment in *Lawrence v Fen Tigers* [2014] AC 822 at [155]-[161]. That case concerned a claim based on the tort of nuisance, for an injunction to restrain noise created by the use of a stadium for motor sports, being a use authorised by planning permission. The use of the stadium might be a breach of the private rights of the objecting landowner but it served the interest of other people who derive enjoyment or economic benefit from such use, as recognised by the grant of planning permission; Lord Sumption suggested that in a nuisance case in such circumstances the solution to the problem posed by such conflicting interests should be to allow the activity to continue but to compensate the objecting landowner financially for the loss of amenity and the diminished value of his property ([157]). The Upper Tribunal accepted Mr Driscoll's submission that this provided a relevant parallel for the present case and agreed with him that the existence of planning permission for use of the application land is a material consideration under section 84(1)(aa) read with subsection (1B)(b), as indicating that the restrictive covenant operates contrary to the public interest: [100]-[102].

35. At [102]-[107] the Upper Tribunal said this:

"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. Section 84(1B) of the 1925 Act specifically requires that when determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal must 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 any other material circumstances.

103. The policy behind paragraph (aa) and its supporting provisions which were added to section 84(1) by the Law of Property Act 1969 was explained by Carnwath LJ in *Shephard v Turner* [2006] 2 P&CR 28:

> "The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights"

104. The fact that the housing in this case is social housing intended for occupation by tenants who are likely to have been waiting for such accommodation for a very long time is also a highly material consideration. The local planning authority clearly considered that the provision of affordable housing was an important part of the balancing of interests which led to Millgate being granted planning permission for its more profitable residential development at Woolley Hall. The houses which have been built are attractive and well built, and are currently standing empty because of the restriction imposed by the covenants.

105. The objectors' case on this aspect of the application was understandably rather muted. Although he was clearly outraged by Millgate's highhanded and opportunistic behaviour, and thought the new housing estate was "horrendous" (an assessment with which we cannot agree) Mr Smith acknowledged that it was unlikely that the houses would be pulled down. Mrs Devine was more positive and did not want to see them left empty.

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.
>
> 107. In reaching that conclusion we are mindful of the Tribunal's early jurisprudence in public interest cases, and in particular of the dictum of Douglas Frank QC in *Re Collins' Application* (1975) 30 P&CR 527, 531 that for an application to succeed on the ground of public interest it must be shown that that interest is "so important and immediate as to justify the serious interference with private rights and the sanctity of contract". 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,* 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(1)(aa) to override the objector's private rights."

36. Although on the appeal Mr Driscoll drew attention to the position of Mrs Devine as recorded at [105], I do not think that significant weight should be attached to this. The Upper Tribunal was there recording an answer given by Mrs Devine in the context of cross-examination, which does not represent the settled position of the Trust in the litigation. That position has throughout been that the Trust would far prefer the restrictive covenants to be honoured and enforced, to secure the benefits for terminally ill children and their carers using the facilities of the hospice which the Upper Tribunal identified. Mrs Devine was not being asked for her view of the overall public interest in this case, and she was not the right person to give such a view. An answer given by her in the heat of cross-examination cannot be regarded as determinative of the public interest issue which the Upper Tribunal had to address.

37. The Upper Tribunal then held that 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: [110]. Mr Driscoll emphasises that no appeal has been brought in respect of that part of the Upper Tribunal's decision. (I have some doubt whether in the circumstances of this case the finding by the Upper Tribunal that money would be adequate compensation for the detriment which it found would arise for sick children and their carers using the facilities of the Trust if the restrictive covenants were

modified was correct, but as there is no appeal in relation to this it is not necessary to explore this issue).

38. The Upper Tribunal correctly identified, as is common ground, that satisfaction of the relevant conditions set out in section 84(1)(aa), read with subsections (1A) and (1B), gave rise to a discretion in the tribunal (" … shall have power …") whether to modify the restrictive covenants or not. At [113]-[121] the Upper Tribunal considered how it should exercise its discretion. It noted that the tribunal will not generally be inclined to reward parties who deliberately flout their legal obligations by deliberately breaching a restrictive covenant ([114], referring to *Re George Wimpey Bristol Ltd's Application* [2011] UKUT 91 (LC) at [35]), and also that "[i]f it was thought easier to secure a modification in favour of a completed development than for one not yet commenced the contract breaker would have a real incentive to press on even in the face of strong objections by the beneficiaries of a covenant" ([115]). However, partly in reliance on *Re the Trustees of Green Masjid and Madrasah's application* [2013] UKUT 355 at [129], the Upper Tribunal held as follows at [120]:

> " … our 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."

39. The Upper Tribunal so ruled even though it was not satisfied that Millgate had acted in good faith and without any intention to force the hand of the beneficiaries of the restrictive covenants ([117], distinguishing in that regard *Re SJC Construction Company Ltd's application* (1974) 28 P&CR 200), nor that Millgate had been unaware of the objectors' right to enforce the covenants until the works were nearing completion ([117], distinguishing in that regard *Winter v Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80); and even though it had rightly characterised Millgate's behaviour as "highhanded and opportunistic" at [105]. In its respondent's notice Millgate tried to mitigate the impact of these findings by contending that it was not aware that the restrictive covenants were enforceable, albeit it took the risk that they were. However, there was no evidence from Millgate which said this and in the absence of such evidence the inference is that it did in fact appreciate that the restrictive covenants were enforceable, as indeed they are. Mr Driscoll could not identify for us any reasonable argument to impugn the enforceability of the restrictive covenants for the benefit of the Trust, and again the inference is that Millgate did appreciate that they were enforceable. The Upper Tribunal did not make a finding that Millgate had no awareness that the restrictive covenants were enforceable, and any such finding would have been contrary to the basic tenor of its decision and the findings it did make.

40. In reaching its decision in relation to the exercise of discretion, the Upper Tribunal also attached weight at [119] to the fact that Millgate had responded positively to encouragement by the tribunal at the hearing to try to come to a compromise solution satisfactory to both sides, by making an open offer to the objectors to contribute £150,000 to the Trust and to pay its costs if it would consent to the modification. The

Upper Tribunal said, "We regard Millgate's proposal as constructive and it is regrettable that it appears not to have elicited a positive response from the objectors."

41. The Trust appeals to this Court on four grounds: (1) the Upper Tribunal erred in treating Lord Sumption's observations in the *Fen Tigers* case as providing relevant guidance in the present case; (2) the Upper Tribunal erred in its interpretation and application of section 84(1A)(b) (public interest) by treating the fact that the 13 housing units had been built by the time of the application under section 84 as a highly relevant factor, thereby incentivising law breaking and unduly undermining the protection against development afforded by the restrictive covenants in this case; (3) the Upper Tribunal erred in its assessment of the public interest, in its application of subsection 84(1B) and in its exercise of discretion, by failing to have regard to a material circumstance, namely that Millgate had by the agreement dated 9 February 2016 assumed an obligation owed to the Council to make alternative provision of equivalent affordable housing elsewhere by means of the payment of £1,639,904 should the restrictive covenants remain in place and liable to be enforced; and (4) the Upper Tribunal erred in its exercise of discretion by failing to attach appropriate weight to the fact that Millgate had deliberately and knowingly breached the restrictive covenants by proceeding with the development on the application land in the way that it did.

Discussion

42. I begin with some observations regarding the interaction of restrictive covenants affecting land, the grant of planning permission and the operation of section 84.

43. The grant of planning permission does not generally have any impact upon private property rights. It is a decision taken regarding what development of a particular site can be regarded as acceptable in planning terms, with reference to the public interest. Actual development in accordance with a grant of planning permission may depend upon the developer being able to negotiate to buy out or overcome any private property rights which stand in the way of the development. A developer is able to apply for planning permission in relation to land it does not yet own, in which case it would obviously have to acquire the land before it can proceed to develop it. There is no difference in principle where a private contractual or property right in the form of a restrictive covenant stands in the way of a proposed development: the developer has to negotiate to secure release from the restrictive covenant (or make an application under section 84 to have it discharged or modified) if the development is to proceed in accordance with the planning permission.

44. Mr Driscoll was critical of the Trust in the present case for not writing on its own behalf to object to the application for planning permission for the development and for not seeking an interlocutory injunction to restrain Millgate from building in breach of the restrictive covenants. I do not consider that this absence of action by the Trust has any significant bearing on the issues we have to decide. Well before any significant harm had been caused in relation to the hospice Millgate knew (or recklessly shut its eyes to the possibility) that the restrictive covenants applied for the benefit of the hospice land; it had been specifically warned by Mr Barty Smith that it should desist building on the application land in breach of those covenants; and it had had its attention drawn to the particular interest of the Trust in having the restrictive covenants honoured. Mr Driscoll did not suggest to us that Millgate had any good

argument that the restrictive covenants were not enforceable; nor that Millgate had any good argument in answer to the complaint that it was acting in continuing breach of those covenants from the commencement of the development of the application land. If Millgate wished to act lawfully and in a way which would avoid this state of affairs, on the footing that it thought it had a good case for modification of the restrictive covenants pursuant to section 84, it was incumbent on Millgate to make the relevant application for modification rather than just acting in violation of those covenants as it did.

45. Even if the Trust had been aware of the restrictive covenants at the time of the application for planning permission for the Exchange House site (which it was not), it would not have been incumbent on the Trust to object to the grant of planning permission as a condition for its being able to enforce the restrictive covenants of which it was the beneficiary. It would have been entitled to sit and wait and rely upon its private contractual or property rights (as Mr Barty Smith effectively did on its behalf) if Millgate ever tried to carry out the development in breach of those rights.

46. Mr Driscoll was also critical of the Trust for failing to take prompt action at an earlier stage to seek interlocutory injunctive relief against Millgate in respect of its breach of the restrictive covenants. However, I do not think that is significant for present purposes. The Trust was not aware of the restrictive covenants until the buildings on the application land were complete and Millgate made its section 84 application. In any event, there may be many reasons why a person might not wish to proceed to litigation and usually their attitude and actions in that regard will have little or no bearing on the issues which arise on an application under section 84. That is the case here. In fact, Ms Windsor told us that when Mr Barty Smith considered the possibility of an application for interlocutory relief, he did not consider that he could afford to take the risk on a cross-undertaking in damages which might well have covered potentially very substantial commercial losses of Millgate if it had continued to be prevented from selling the residential units at the Woolley Hall development.

47. Section 84 sets out a power for the Upper Tribunal in certain circumstances to discharge or modify restrictive covenants affecting land. However, in interpreting and applying that provision it is necessary to bear in mind that it is a private contractual right with property-like characteristics which is sought to be removed or modified, against the objection of the right-holder. That is not something which Parliament intended should occur lightly or without very good reason. As Carnwath LJ (as he then was) put it in *Shephard v Turner* [2006] EWCA Civ 8; [2006] 2 P&CR 28 at [58], section 84(1)(aa) "seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights." In my view, the statement by Douglas Frank QC as President of the Lands Tribunal in *Re Collins' Application* (1975) 30 P&CR 527, at 531, that for an application to succeed in reliance on the public interest ground in section 84(1A)(b) it must be shown that that interest is "so important and immediate as to justify the serious interference [which discharge or modification under section 84 would involve] with private rights and sanctity of contract" remains the proper approach. Rather than expressing doubt about this guidance at para. [107] of its decision, the Upper Tribunal ought to have followed it.

Ground (1): error in applying Lord Sumption's guidance in Fen Tigers *by analogy*

Ground (2): construction of subsection 84(1A)(b) - incentivisation of law-breaking by giving weight to development in breach of restrictive covenant before an application is made under section 84 to discharge or modify that covenant

48. It is convenient to take these Grounds together, as they raise issues which are closely interrelated.

49. On a fair and proper reading of the decision, the Upper Tribunal acceded to Mr Driscoll's submission that Lord Sumption's guidance in the *Fen Tigers* case regarding the tort of nuisance should be applied by analogy in the context of applications under section 84 to discharge or modify restrictive covenants affecting land: [99]-[102]. The Upper Tribunal relied in particular on paras. [157], [160] and [161] in the judgment of Lord Sumption in the *Fen Tigers* case. In the light of that guidance, at [102] the Upper Tribunal said that the fact that planning permission was granted for the development of the Exchange House site reflected "an objective assessment of appropriate land use which fully takes into account the public interest." In my judgment, in proceeding in this way the Upper Tribunal fell into error.

50. In the *Fen Tigers* case, at [157]-[161] Lord Sumption addressed the question of when injunctive relief should be granted to prevent the continuance of a nuisance, or whether damages should be granted instead, and suggested that in balancing the various interests at stake the law should move to the position

> "… 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. …" ([161]).

51. Even in the *Fen Tigers* case, Lord Sumption's view was not endorsed by the other Justices: see in particular at [127] (Lord Neuberger of Abbotsbury PSC) and [168] (Lord Mance JSC). Lord Mance emphasised that Lord Sumption's view did not give proper weight to the private property interests of the claimant and that it put "the significance of planning permission and public benefit too high, in the context of the remedy to be afforded for a private nuisance". I consider that for these and other reasons Lord Sumption's suggested approach in that case does not constitute appropriate guidance in the present context. In my view, in addition to the points made by Lord Mance in the context of the tort of nuisance, there are three reasons of principle why that is so.

52. First, on an application under section 84, subsection (1B) provides focused relevant guidance as to the significance of the position under the planning regime. Lord Sumption's guidance given in a different context is not compatible with that statutory provision. In fact, as I explain below, the Upper Tribunal did not apply subsection (1B) correctly.

53. Secondly, I consider there is a major difference between what might be appropriate in relation to remedies in respect of the more open-textured sort of private rights which are protected by the law of nuisance (which typically depend on assessments of the

nature of the relevant locality and of what might constitute a reasonable use of land in that locality, as well as of the public interest), which arise by inference from background circumstances, and what should be the position in respect of a more hard-edged and specific private right in the form of a binding restrictive covenant agreed with a neighbouring landowner. Although rights protected by the law of nuisance can be regarded as a kind of private property right, they are not based on specific binding contractual terms and are infused with ideas of reasonableness in a way that the rights constituted by restrictive covenants are not. Since the law of nuisance can more readily be said to be concerned with questions of reasonable adjustments between competing interests in the use of neighbouring land, it is easier to regard the grant of planning permission as having a bearing on remedies in that context. Remedial adjustment in relation to rights in nuisance as contemplated by Lord Sumption, essentially by saying that it may be reasonable overall to allow infringement of the relevant open-textured rights by the defendant on payment of a fair sum in compensation to the claimant, is much easier to contemplate than the overriding of agreed contractual rights with property-like effects, in the case of restrictive covenants in respect of land. In my view, to apply Lord Sumption's guidance in the context of deciding whether restrictive covenants should be discharged or overridden pursuant to section 84, as the Upper Tribunal did, fails to give proper weight to the nature of the private rights in issue in that context.

54. Thirdly, Lord Sumption's guidance is addressed to a stage of analysis which is distinct from that which arises under section 84. Even if a restrictive covenant is upheld and maintained in place after examination under section 84, the question of whether an injunction should be granted remains to be determined in court proceedings which may be brought to enforce that covenant. Whilst there may be a degree of similarity regarding some of the considerations relevant to the application of section 84 and to a court's determination whether a restrictive covenant should be enforced by the grant of injunctive relief (or whether damages pursuant to Lord Cairns' Act might be more appropriate), the issues are not identical. Indeed, the fact that there is scope for a degree of flexibility at the remedial stage in relation to an injunction tends to reinforce the appropriateness of interpreting and applying section 84 more strictly, in recognition of the private contractual/property rights which an applicant seeks to have discharged or modified. This is in fact to follow the pattern of Lord Sumption's own reasoning in the *Fen Tigers* case: at para. [156] he emphasised, in agreement with Lord Neuberger, that "the existence of planning permission for a given use is of very limited relevance to the question whether that use constitutes a private nuisance" (i.e. in determining whether the claimant's rights exist or not, at the stage prior to examination of what remedy might be appropriate in respect of infringement of those rights). As Lord Sumption pointed out in support of this view at [156]:

> "Planning powers do not exist to enforce or override private rights in respect of land use, whether arising from restrictive covenants, contracts or the law of tort. Likewise, the question whether a neighbouring landowner has a right of action in nuisance in respect of some use of land has to be decided by the courts regardless of any public interest engaged."

55. Similarly, in the context of section 84(1A)(b), it has previously rightly been emphasised by the Lands Tribunal that a grant of planning permission for some use of an applicant's land which is subject to a restrictive covenant does not mean that the condition in that sub-paragraph is satisfied: see *Re Bass Ltd's Application* (1973) 16 P&CR 156 (J. Stuart Daniel QC), at 159:

> "Mr Eyre [for the applicant] submitted that prima facie a planning permission also meant that the proposal was in the public interest. But that is not the question. The question is whether impeding the proposal is contrary to the public interest. There is here more than a narrow nuance of difference; a planning permission only says, in effect, that a proposal will be allowed; it implies perhaps that such a proposal will not be a bad thing but it does not necessarily imply that it will be positively a good thing and in the public interest, and that failure of the proposal to materialise would be positively bad."

56. The grant of planning permission in relation to the applicant's proposed use of his land is not at all the same as saying that upholding a restrictive covenant which impedes some reasonable user of land by the applicant is contrary to the public interest. The questions whether planning permission should be granted and whether upholding a restrictive covenant is contrary to the public interest are different. They arise in very different contexts. The question concerning the grant of planning permission does not address what should happen to private rights affecting the land in question (it simply leaves them in place); whereas that is precisely what is in issue in the context of an application under section 84. 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. This point was put to Mr Driscoll; in my view, he had no good answer to it. 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 (i.e. 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 *Re S.J.C. Construction Company Limited's Application* (1974) 28 P&CR 200, at 205. The case went on appeal on a different point: (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.

60. This latter point is particularly significant in the present case. That is because it has emerged that Millgate could have devised a scheme for the development of the Exchange House site which, by concentrating the housing units on the unencumbered land at the site, would have satisfied the Council so far as its requirement for provision of affordable housing in the public interest was concerned while at the same time respecting the Trust's rights under the restrictive covenants: see [62]. If that had been done, it could not have been said that it was contrary to the public interest for the restrictive covenants to be maintained in place. The possibility that the public interest in having affordable housing built in this way could have been met without the need to override the Trust's private rights could and should have been explored by way of an application by Millgate pursuant to section 84 at a stage prior to its building on the application land in breach of 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.

62. There is one aspect of Ms Windsor's submissions under these Grounds which I do not accept. In the most far-reaching aspect of her submissions under Ground (2), Ms Windsor suggested that a tribunal applying section 84 is always obliged to assess the question under subsection (1A)(b) whether a restrictive covenant, in impeding some reasonable user of land, is contrary to the public interest, by ignoring any actual construction which has already occurred in breach of that covenant before the section

84 application was made or before the Upper Tribunal applies section 84. I do not agree. Section 84 does not mandate such a theoretical approach.

63. In my view, section 84 has a more practical focus. There may be reasons why, in a particular case, it was not possible or practicable for a person who develops land in breach of a restrictive covenant to make an application under section 84 before doing so; and in such a case I think that section 84, and subsection (1A)(b) in particular, enables the Upper Tribunal to make an assessment of the public interest in the circumstances that then apply. One example would be where, without any lack of reasonable diligence, the developer failed to identify the existence of the covenant until after building in breach of it and then sought to regularise the position: see *Winter v Traditional & Contemporary Contracts Ltd* [2008] 1 EGLR 80. Another might be if the developer had good reason to think that the covenant was going to be waived by the person entitled to rely upon it, and therefore had a reasonable excuse for not making an application under section 84 before building: the decision of the Lands Tribunal in *Re S.J.C. Construction Company Limited's Application* (1974) 28 P&CR 200 to the effect that subsection (1A)(b) was satisfied in that case appears to be of this character (see p. 202). In such circumstances, it may well be legitimate in assessing whether enforcement of the covenant is contrary to the public interest for the tribunal to have regard to the waste of resources which may be involved if the covenant is not modified and is later enforced, as the Lands Tribunal did in the *S.J.C. Construction Company* case: see (1974) 28 P&CR 200, 205.

64. However, it remains the case that 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, as I have outlined above - 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, addressed under Grounds (3) and (4) below, 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 ([113]-[121]), and at [117] treated the decision of the Lands Tribunal (Douglas Frank QC, President) in *Re S.J.C. Construction Company 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 *S.J.C. Construction* 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.

67. For these reasons, it is my view that the Upper Tribunal fell into error in following the guidance given by Lord Sumption in the *Fen Tigers* case by analogy in the present context, and also when it held at [102] that the grant of planning permission in this case "fully takes into account the public interest." It does not. I would therefore allow the appeal under both Ground (1) and Ground (2).

68. In addition under these Grounds, as indicated above I consider that in this part of its decision the Upper Tribunal has in two respects failed to apply section 84(1B) correctly when arriving at its conclusion under section 84(1A)(b). The first respect again relates to the improper weight which the Upper Tribunal gave at [102] to the grant of planning permission. The Upper Tribunal treated section 84(1B) as supportive of its view; but it does not support it. 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.

69. Secondly, section 84(1B) states that in determining whether a case falls within subsection (1A), the Upper Tribunal shall take into account along with the listed items "any other material circumstances". In my view, the "other material circumstances" in this case which are relevant to the application of subsection (1A)(b) include the failure of Millgate to take proper steps to test the public interest question at the appropriate time, before breaching the restrictive covenants. This does not add materially to the analysis given by interpretation of subsection (1A)(b) itself as set out above, but it does provide further support for adopting the approach to the application of that provision which I have set out.

Ground (3): failure to have regard to the alternative provision for affordable housing in assessment of the public interest

70. This Ground of appeal is put in two ways: (a) it is said that by failing to have proper regard to the availability of alternative provision for affordable housing the Upper Tribunal erred in its assessment of whether upholding the restrictive covenants would

be "contrary to the public interest" (i.e. in relation to the statutory precondition in section 84(1A)(b), read with the "other material circumstances" provision in subsection (1B)) and hence erred in its assessment whether the statutory discretion in section 84(1) had arisen; and (b) it is said that even if that discretion had arisen, the Upper Tribunal erred in its exercise of that discretion by failing to have proper regard to the availability of such alternative housing.

71. In my judgment, both aspects of this Ground of appeal are made out. Strictly, point (b) would only arise on the assumption, contrary to my view under Grounds (1) and (2) above and in relation to point (a) of Ground (3), that it can be said that the relevant discretion for the Upper Tribunal had in fact arisen under section 84(1).

72. The Upper Tribunal correctly noted at [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 part of the Exchange House site by payment of £1,639,904, "thus allowing [the Council] to provide equivalent affordable housing elsewhere". But at [104] and, in particular, at [106], in the Upper Tribunal's assessment in respect of section 84(1A)(b), although it treated the provision of affordable housing as relevant to the public interest issue, it left that possibility for provision of the same amount of affordable housing by the alternative means it had identified out of account. That was so even though those alternative means of provision would have meant that this aspect of the public interest could be satisfied without the need to override the restrictive covenants.

73. In my view, there was no proper basis for the Upper Tribunal to leave this feature of the circumstances out of account at this point in its analysis. Therefore, I consider that its assessment of the public interest for the purposes of section 84(1A)(b) was flawed for this reason as well.

74. It is right to observe that at [106] the Upper Tribunal also emphasised that the 13 units then standing on the application land were "immediately available". But by that point in its reasoning it had already improperly discounted the relevance of the possibility of provision of affordable housing by the alternative means identified. Moreover, it conducted no comparative analysis to ascertain when the alternative housing could have been made available (it would in fact very probably be housing already in existence, the only question being how quickly appropriate alternative units could be bought in the market) or whether such difference in the timing of availability as might be found to exist could justify the Upper Tribunal in finding that upholding the restrictive covenants would be contrary to the public interest.

75. Turning to point (b) and the exercise of discretion, the Upper Tribunal addressed this issue at [113]-[121]. At [120] it again attached critical weight to the public interest in providing affordable housing to persons on the Council's waiting list, but without bringing into account the possibility of such provision by the alternative means identified in [53]. In my view, there was no proper basis for leaving this possibility out of account. On the Upper Tribunal's analysis, it was plainly a relevant factor which ought to have been taken into account and assessed before any decision as to the exercise of discretion was made. This was not done. Accordingly, if the question of exercise of discretion did arise, I consider that the Upper Tribunal erred at this stage of the analysis as well.

Ground (4): failure by the Upper Tribunal properly to bring Millgate's behaviour into account when exercising its discretion

76. The Upper Tribunal aptly characterised Millgate's conduct as "high handed and opportunistic" at [105]. It found itself unable to say that Millgate had acted in good faith and without any intention to force the hand of the Trust; or that Millgate had proceeded in ignorance of the objectors' right to enforce the restrictive covenants: [117]. As I understand it, at [118] the Upper Tribunal accepted Ms Windsor's submissions for the Trust that Millgate had acted in deliberate breach of the restrictive covenants in order to try to force the Upper Tribunal's hand to grant Millgate's application to modify the restrictive covenants in view of the waste involved in potentially having to take down the 13 units already built on the application land. Yet despite this, at [120] the Upper Tribunal held that the public interest in preserving the units built in breach of covenant, as affordable housing, was so great as to justify the exercise of discretion in favour of Millgate.

77. On the assumption that the relevant discretion under section 84(1) had arisen (contrary to my view above), I consider that the Upper Tribunal fell into error in relation to this as well. Under this Ground, I think the arguments are more finely balanced than in relation to the other Grounds. However, 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 [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 Part 52.21(3)(a) (ex Part 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.

78. At [114] the Upper Tribunal reminded itself of the indication given, obiter, by the Upper Tribunal (N. J. Rose FRICS) in *Re George Wimpey Bristol Ltd's Application* [2011] UKUT 91 (LC) at [35], that in a case involving an applicant who had built in breach of restrictive covenants as part of a deliberate strategy of forcing through the development on restricted land in the face of objections, "to the point where they had so changed the appearance and character of the application land that the Tribunal would be persuaded to allow them to continue with the development", the tribunal would have been unlikely to exercise its discretion in favour of the applicant developer if it had managed to show that the preconditions in section 84(1) had been satisfied; that was on the footing that "It is appropriate for the Tribunal to make it clear that it is not inclined to reward parties who deliberately flout their legal obligations in this way." I would endorse that approach. In my view, the behaviour of Millgate in the present case falls to be characterised in the same way, and the Upper Tribunal failed to identify any public interest factor of sufficient weight to justify departure from this approach at the discretionary stage.

79. Similarly, at [115] the Upper Tribunal made these highly pertinent observations:

> "115. … too great a readiness on the part of the Tribunal to exercise its powers under section 84 in cases where a development has already taken place in breach of covenant

> would be liable to undermine the protection which restrictive covenants afford. 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 the rude awakening threatened by Brightman J in *Wrotham Park* [*Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798, 811C-D]."

80. I endorse what is said there. Again, I do not consider that the Upper Tribunal identified any public interest factor of sufficient weight to outweigh these considerations in the exercise of its discretion.

81. Ms Windsor submits that observations of the Upper Tribunal (Mr A.J. Trott FRICS) in *Re the Trustees of Green Masjid and Madrasah's Application* [2013] UKUT 355 at [129]-[130] also indicate that Millgate's application should have been refused at the discretionary stage and that the observations of the Upper Tribunal in the present case at [114]-[115] are in line with (and gain force from) guidance given by Lord Macnaghten in *Colls v Home and Colonial Stores Ltd* [1904] AC 179, at 193, as regards the exercise of discretion by a court in relation to deciding whether to award injunctive relief or only damages in relation to nuisance (as endorsed by Lord Neuberger in the *Fen Tigers* case at [121]), as follows:

> "In some cases, of course, an injunction is necessary—if, for instance, the injury cannot fairly be compensated by money—if the defendant has acted in a high-handed manner—if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be very careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

82. I agree that, making due allowance for the different context, the observations of Lord Macnaghten are relevant here and again strongly indicate that the proper response of the Upper Tribunal in the present case, on the findings made by it, should have been to refuse Millgate's application under section 84. 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.

83. I also agree that the observations of the Upper Tribunal in the *Green Masjid* case tend to support the Trust's submissions regarding the Upper Tribunal's exercise of discretion in the present case; but I have some reservations as to how the issue was framed by the Upper Tribunal in the *Green Masjid* case at [129]. In that paragraph the Upper Tribunal said:

> "… Where jurisdiction [to exercise the discretion under section 84(1)] has been established I consider that the discretion of the Tribunal to refuse the application should only be cautiously exercised. It should not be exercised arbitrarily and, in my opinion, should not be exercised as, effectively, a punishment for the applicants' conduct unless such conduct, in all the circumstances of the case, is shown to be egregious and unconscionable …"

84. The regime under section 84 is carefully structured, with various competing interests being weighed at the stage of looking to see whether the preconditions have been satisfied in order for the section 84(1) discretion to come into existence. Although it is right to say that once the discretion under section 84(1) has been established to exist the Upper Tribunal should be cautious in exercising it so as then to dismiss an application, and plainly it should not exercise the discretion arbitrarily, I do not think it is entirely correct to characterise an exercise of the discretion to refuse an application as a punishment for an applicant's conduct. Nor do I find the epithets "egregious" and "unconscionable" particularly helpful. I think it is more accurate to say in the present case that 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.

Conclusion

85. I would uphold all four Grounds and allow the appeal. Neither party suggested that this was a case in which it would be appropriate to remit the case to the Upper Tribunal for further consideration. Pursuant to section 14(2)(b)(ii) and (4) of the Tribunals, Courts and Enforcement Act 2007 it is open to this Court to re-make the decision. This is a case in which the relevant facts have been sufficiently explored in the proceedings below and it is appropriate for this Court to do that. In my judgment, as explained under Grounds (1) and (2), on a correct assessment of the circumstances of the case no discretion arose under section 84(1) according to which there was any basis for the Upper Tribunal to modify the restrictive covenants; accordingly, it should have refused Millgate's application. In relation to Ground (3)(a), I consider

that the Upper Tribunal should have found that this was a further reason why no such discretion arose. Even if a discretion had arisen under section 84(1), I consider that for the reasons given in relation to Ground (3)(b) and also for those given in relation to Ground (4) the Upper Tribunal should have exercised that discretion by refusing Millgate's application. I would make an order to carry this outcome into effect.

Lord Justice Moylan:

86. I agree.

Lord Justice Underhill:

87. I also agree.