# In a Bind: Discharging or Modifying Restrictive Covenants

*Alexander Devine Children's Cancer Trust v. Housing Solutions Ltd* **[2020] UKSC 45**

**Where a property developer had carried out building works in "cynical breach" of a restrictive covenant, a subsequent application to discharge or modify that covenant as being contrary to the public interest was unsuccessful.**

## A. Introduction

1. In *Alexander Devine Children's Cancer Trust v. Housing Solutions Ltd* [2020] UKSC 45, the Supreme Court examined (for the first time) s.84 of the Law of Property Act 1925, which allows for the discharge or modification of restrictive freehold covenants in specified circumstances.

2. The Supreme Court had to resolve a "land-use conflict" in which two competing uses of a one-acre plot of land a few miles outside Maidenhead ("**the Application Land**") were pitted against each other:

> "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" [3].

3. That was not all: the affordable housing provider ("**Housing Solutions**") had acquired the disputed units from a property developer ("**Millgate**") which had acted in "cynical breach" of the restrictive covenant in question, knowingly undertaking the building works in breach of covenant with a view to making a very significant profit on another development in doing so.

4. The decision in *Devine* is an important statement of the approach which the Upper Tribunal will take on applications under s.84. It is also a stark warning to developers – albeit on "exceptional" facts – to take restrictive covenants seriously.



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**B. Key Facts**

5. In July 1972, a Berkshire farmer named John Smith sold the Application Land to Stainless Steel Profile Cutters Ltd ("**SSPC**"). On purchasing the Application Land, SSPC promised not to build on it or to use it "for any purposes whatsoever other than as an open space for the parking of motor vehicles" ("**the Restrictive Covenant**").

6. Importantly, SSPC owned an adjoining plot of land (on which it had a number of industrial units) which was not subject to the Restrictive Covenant. Although the two plots made a neat rectangle when combined together – known, in due course, as "**the Exchange House Site**" – strictly speaking there were at all times two separate parcels of land with different rights and obligations attaching to each.

7. The story then moves forward to 2011. By this time, Mr Smith's son, Barty, had inherited his father's landholdings. Barty proposed to donate a six-acre plot of land next to the Application Land to the Alexander Devine Children's Cancer Trust ("**the Trust**") for the purpose of building a hospice. It was intended that the hospice would make full use of the land donated by Barty, with recreational areas in the grounds and a wheelchair path along its perimeter. Planning permission for the hospice was granted in December 2011, and in March 2012 Barty formally gifted the plot of land to the Trust. Due to funding constraints, though, the construction of the hospice did not actually begin until September 2015.

8. In the meantime, Millgate entered the picture. The developer's primary intention was to build 75 residential units at Woolley Hall for commercial sale. As a condition of granting planning permission for that development, however, the Royal Borough of Windsor and Maidenhead ("**the Council**") required that Millgate also build a certain number of affordable housing units.

9. It was to satisfy this condition that, at some point in the first half of 2013, Millgate purchased the Exchange House Site. Millgate never disputed that it knew of the Restrictive Covenant when it purchased the Exchange House Site. (This was not surprising, given that the Restrictive Covenant was recorded on the Charges Register for the Application Land.)

10. Nonetheless, on 19 July 2013 Millgate applied for planning permission to build 23 affordable housing units on the Exchange House Site. Crucially, of those 23 affordable housing units, 13



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(nine two-storey houses and four bungalows) would be located on the Application Land. During the legal proceedings which followed, the Upper Tribunal ("**UT**") found that planning permission would still have been granted if Millgate had altered its plans so that all 23 of the affordable housing units would be situated on the unencumbered part of the Exchange House Site.

11. On 10 March 2014, Millgate gave the Council an undertaking under s.106 of the Town and Country Planning Act 1990 that it would not sell more than 15 of the Woolley Hall units until all 23 of the affordable housing units at the Exchange House Site had been built and transferred to an affordable housing provider. On the basis of that undertaking, permission for the development of the Exchange House Site was granted on 14 March 2014.

12. Construction started on 1 July 2014, with the works first coming to Barty Smith's attention "when he flew over the site in his light aeroplane on 30 August 2014". Having consulted a solicitor, on 26 September 2014 Barty wrote to Millgate setting out his objections to the development. Despite a cursory response from Millgate's solicitors on 20 November 2014, the works continued – and, by 10 July 2015, were finished.

13. On 22 May 2015, as the development neared completion, Millgate agreed to sell the finished Exchange House Site to Housing Solutions. To guard against the risks relating to the Restrictive Covenant, Millgate provided Housing Solutions with the benefit of certain insurance policies as well an indemnity against any losses or wasted expenses which Housing Solutions might incur if the Restrictive Covenant should in fact be enforced.

**C. Route to the Supreme Court**

14. **Upper Tribunal**. It was only on 20 July 2015 – i.e., with the offending housing units already finished – that Millgate applied to the UT to modify or discharge the Restrictive Covenant pursuant to s.84.

15. For present purposes, it is only necessary to consider one of the s.84 grounds on which Millgate relied (the others having fallen by the wayside before the case reached the Supreme Court). This was the so-called "public interest test" under s.84(1A)(b), pursuant to which Millgate argued that:



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15.1. In impeding the reasonable use of the Application Land, the continued existence of the Restrictive Covenant was contrary to the public interest; and

15.2. If the Restrictive Covenant was discharged or modified, money would be an adequate compensation for any loss or disadvantage thereby suffered.

16. If those conditions ("*the jurisdictional gateway*") were satisfied, the UT then had a discretion whether or not to grant the relief sought by Millgate.

17. In the event, the UT found in Millgate's favour, holding that the Restrictive Covenant should be modified to allow the 13 housing units on the Application Land to be used and occupied, but on condition that Millgate pay £150,000 by way of compensation to the Trust. (That was the UT's assessment of (i) the cost of the planting and landscaping works which would be necessary to screen the hospice's garden from view and (ii) compensation for loss of amenity.)

18. As regards the jurisdictional gateway, the UT's specific conclusions were as follows:

18.1. The Restrictive Covenant impeded the reasonable use of the Application Land (as both parties in fact agreed);

18.2. In impeding the occupation of the 13 affordable housing units ("which are otherwise immediately available to meet a pressing social need"), the Restrictive Covenant was contrary to the "sufficiently important and immediate" public interest involved; and

18.3. Money (to be spent on additional boundary planting) would be an adequate compensation for any loss or disadvantage suffered as a result of the discharge or modification of the Restrictive Covenant.

19. Furthermore, the UT was persuaded to exercise its discretion in Millgate's favour because "the public interest outweighs all other factors in this case [and] it would indeed be an unconscionable waste of resources for those houses to continue to remain empty".

20. Accordingly, Millgate was able to secure the necessary modification of the Restrictive Covenant (albeit on the "public interest" ground alone). Millgate then sold the Application



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Land to Housing Solutions on 15 February 2017, the unburdened portion having already been transferred back in July 2015.

21. That was not, however, the end of the matter. The following day, Millgate received notice of the Trust's application for permission to appeal on the basis that the UT had erred in law on four grounds. For present purposes it is only necessary to focus on two of these grounds. These were that:

    21.1. At the jurisdictional gateway stage, the UT had incorrectly interpreted and applied the "contrary to public interest" test by ignoring Millgate's cynical breach whilst treating as highly relevant the fact that the 13 housing units on the Application Land *had already been built* by the time of the s.84 application; and

    21.2. The UT had incorrectly exercised its discretion by failing to place appropriate weight on Millgate's deliberate and knowing breach of the Restrictive Covenant.

22. **Court of Appeal**. The Trust's application was granted by Floyd LJ, and the case came before the Court of Appeal in October 2018. By this stage, some of the 13 units were actually occupied by tenants. However, in a unanimous judgment handed down the following month, Sales, Moylan, and Underhill LJJ accepted all four grounds of appeal and overturned the UT's decision.

23. In particular, the Court of Appeal found that:

    23.1. The UT had incorrectly interpreted and applied the "contrary to public interest" jurisdictional gateway because, in assessing the public interest, it had failed to ask the *procedural* question of whether Millgate had "made fair use of opportunities available to it to try to negotiate a waiver of a restrictive covenant or, if necessary, [to apply under s.84]" in advance of acting in breach of covenant, so as to give due weight to the public interest in the enforcement of contractual and property rights; and

    23.2. The UT had failed, when exercising its discretion, "to attach sufficient weight to the deliberately unlawful and opportunistic conduct of Millgate". Put differently, the s.84 application "should have been refused in the exercise of discretion by the [UT] because



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Millgate had acted without proper regard for the rights of the Trust and with a view to circumventing the proper consideration of the public interest under s.84".

24. In what are likely to prove much-cited comments, Sales LJ expanded on the issue of Millgate's conduct as follows (italics added):

> "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*" [64].

25. The success of the Trust's appeal meant that the Restrictive Covenant remained in force; that Housing Solutions was in breach of the Restrictive Covenant and that the Trust could apply for injunctive relief against Housing Solutions. Unsurprisingly, Housing Solutions then lodged its own challenge to the Court of Appeal's decision.

## D. The Supreme Court's Decision

26. **Summary**. In the Supreme Court, Housing Solutions sought to overturn the Court of Appeal's conclusions on both jurisdiction and discretion. Ultimately, however, the appeal was dismissed. That was because, although the Supreme Court disagreed with the Court of Appeal's approach to the application of the jurisdictional gateway, it nonetheless agreed that the UT had failed to exercise its discretion appropriately in all the circumstances of the case. Accordingly, the Restrictive Covenant remained in place without any modification.

27. How did the Supreme Court reach that decision? Lord Burrows started by rehearsing the statutory provisions and confirming that the wording of s.84 gave rise to a two-stage test: if



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one or more of the five jurisdictional gateways was made out, the UT then had a discretionary power whether or not to discharge or modify the covenant(s) in question ([31] – [33]).

28. Lord Burrows then acknowledged that – as per the focus of counsels' submissions – the central issue in the case was the question of how and to what extent Millgate's "cynical breach" of the Restrictive Covenant was relevant to its application under s.84 ([40]). This led Lord Burrows to effectively re-formulate the case as follows:

    28.1. Was Millgate's cynical breach relevant when considering whether the "contrary to public interest" jurisdictional gateway was made out (and, if so, to what effect)?

    28.2. Was Millgate's cynical breach relevant when considering whether the Court should exercise its discretion to grant relief (and, if so, to what effect)?

29. **Jurisdiction**. On the jurisdictional question, Lord Burrows emphasised that, in the specific context of s.84(1A), the phrase "contrary to the public interest" was to be interpreted narrowly ([42]). The question was not whether, in all the circumstances of the case, it would be contrary to the public interest to maintain the Restrictive Covenant. Rather, the proper question was whether it was contrary to the public interest for the Restrictive Covenant to continue to impede (what was agreed to be) a reasonable use of the Application Land.

30. Accordingly, the Supreme Court held that Sales LJ had been wrong to introduce a broader "procedural dimension" to the jurisdictional stage of a s.84 application. That emerges from the following quotation (italics added):

> "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 (i.e., 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" [44].

31. When the right question was asked – i.e., a question which focused simply on the proposed use of the Application Land and not on any broader considerations – it was plain that the



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continuation of the Restrictive Covenant was contrary to the public interest in preventing the use of 13 already-built units of affordable housing on the Application Land.

32. **Discretion**. Lord Burrows did underscore, however, that "the manner of breach … is a highly relevant consideration when it comes to the discretionary stage of the decision" ([44]). What, then, did the Supreme Court have to say as regards the UT's exercise of its discretion?

33. Given that it was a specialist tribunal's discretionary decision which was under review, Lord Burrows was "acutely conscious of the need to tread very carefully so as to avoid simply substituting [his] views of how the considerations should be weighed" ([51]).

34. Specifically, the Supreme Court could only legitimately interfere with the UT's exercise of its discretion if the UT had (i) taken an irrelevant factor into consideration, (ii) failed to take a relevant factor into consideration, or (iii) "exceeded the generous ambit within which a reasonable disagreement is possible" or, put differently, "had reached a conclusion which no reasonable judge could reach". (Lord Burrows was therefore uncomfortable with Sales LJ's use of the phrase "failed to attach sufficient weight", which the Supreme Court had to interpret fairly generously in order to explain away.)

35. Bearing that in mind, Lord Burrows proceeded to identify two "omitted factors" which the UT had failed to consider, with the result that "something has gone fundamentally wrong with the [UT's] exercise of discretion on the particular facts of this case" ([57]).

36. The "omitted factors" which the UT should have weighed in the balance were as follows:

    36.1. First, the fact that Millgate could have built the affordable housing units without infringing the Restrictive Covenant (i.e., by building entirely on the other section of the Exchange House Site) ([58]).

    36.2. Secondly, the fact that Millgate was only in a position to satisfy the "public interest" ground because of its cynical conduct in going ahead with the building works and then presenting the UT with a *fait accompli* ([59]). As Lord Burrows said, quoting counsel with approval, "it is not in the public interest that a person who deliberately breaches a



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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".

37. Given the conclusion that the UT had erred in the exercise of its discretion, it was open to the Supreme Court to re-take that decision. The Supreme Court duly did so, holding that – notwithstanding that the "contrary to public interest" jurisdictional gateway had been satisfied – it was not appropriate on the facts of the case for the Restrictive Covenant to be discharged or modified.

**E. Lessons Learned?**

38. The first point to note in seeking to extrapolate from *Devine* is that, as acknowledged by Lord Burrows at [57], the facts of the case were "exceptional". Nonetheless, both developers and objectors can take heart from various aspects of the decision.

39. On the one hand, developers will be cheered by Lord Burrows' refusal (despite being "sorely tempted") to recognise a bright-line principle that a developer which cynically breaches a restrictive covenant will never be able to satisfy the "contrary to public interest" jurisdictional gateway. Lord Burrows had "major concerns as to whether, without discretionary qualifications to cater for exceptions, such a principle would be too rigid and would inappropriately fetter the [UT's] discretion" ([55]). What sorts of facts might generate those exceptions was, however, left tantalisingly open.

40. This means that the question becomes one of discretion – and helpful for developers in that regard was Lord Burrows' endorsement at [52] of the comment in *Re: Trustees of the Green Masjid and Madrasah's Application* [2013] UKUT 355 that the discretion to refuse an application should be "cautiously exercised" once a jurisdictional gateway has been made out.

41. On the other hand, objectors should draw comfort from the clear indication that developers' conduct can and should be scrutinised at the discretionary stage of an application under s.84. Importantly, Sales LJ's comments regarding the proper timing for an application were not disavowed by the Supreme Court.

42. Furthermore, the chain of decisions would appear to confirm that the "public interest test" remains very difficult to satisfy, with the interest in question needing to be "so important and



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immediate as to justify the serious interference with private rights and sanctity of contract" being sought under s.84: *Re: Collins' Application* (1975) 30 P&CR 527, per Douglas Frank QC at 531.

43. Finally, two practical points:

43.1. If it is accepted that the covenant in question is or may well be binding, developers should engage with any objectors promptly *and in open correspondence*. Whether Lord Burrows' comments regarding the effect of a "cynical breach" apply across the other grounds under s.84 is not entirely clear. Certainly, though, a developer would be incredibly ill-advised to present the UT with a *fait accompli* if applying under the "public interest" ground. Developers might also consider taking pre-emptive steps to investigate the position with those neighbours likely to be most affected by any works.

43.2. The beneficiaries of restrictive covenants often feel too financially exposed to vindicate their rights. In particular, the perceived need to apply for an interim injunction can stymie valid objections at an early stage. It is important to note, however, that objectors will *not* compromise their position if they feel unable to seek injunctive relief. Objectors should not, therefore, feel bullied by developers into either applying for an interim injunction or giving up their case prematurely. Sales LJ addressed the point in the following terms:

> "…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" ([46]).

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