FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BK/OAF/2017/0006**
Property	:	**37 Great Cumberland Place, London W1H 7TD**
Applicants	:	**The Portman Estate Nominees (One) Limited & The Portman Estate Nominees (Two) Limited**
Representative	:	**Pemberton Greenish LLP**
Attendance for the applicants	:	**Anthony Radevsky (counsel)** **Giles Pemberton (solicitor)** **Julian Briant BA FRICS (surveyor)**
Respondent	:	**David Lonsdale**
Representative	:	**In person**
Type of application	:	**Leasehold Reform Act 1967**
Tribunal members	:	**Judge Timothy Powell** **Mrs Helen Bowers MRICS**
Date of determination and venue	:	**29 March 2017 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**24 May 2017**

PRELIMINARY DECISION

As to the rights, covenants and declarations to go into the conveyance

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Relevant page numbers are in square brackets

Background

1. By notice of claim dated 28 September 2015, the respondent leaseholder, David Lonsdale, in exercise of his rights under Part I of the Leasehold Reform Act 1967 ("the Act"), gave notice to the applicant

freeholders, The Portman Estate Nominees (One) Limited and The Portman Estate Nominees (Two) Limited, of his desire to have the freehold of the house and premises known as 37 Great Cumberland Place, London W1H 7TD ("the Property").

2. By a notice in reply dated 20 June 2016, the applicant freeholders, through Pemberton Greenish LLP solicitors, admitted Mr Lonsdale's right to have the freehold of the house and premises described in his notice of claim.

3. By application dated 26 January 2017, the applicants applied to the tribunal under section 21(1)(a) of the Act for a determination of the price payable for the Property and, under section 21(2) of the Act, for a determination of the provisions which ought to be contained in the conveyance and to apportion the rent payable under the tenancy between the house and premises (or part of them) and other property. A copy of the draft transfer with plans was attached to the application and the tribunal was asked to determine the terms of the proposed draft. The price that the freeholders considered appropriate for the Property was £9,116,500.

4. By letter dated 10 February 2017, Mr Lonsdale wrote to the tribunal seeking three orders in respect of the application, namely:

   (1) for the applicants to state which legal entity had retained their solicitors and surveyors;

   (2) for the proceedings to be stayed for three months; and

   (3) for the issue of which any restrictive covenants should be included in the transfer to be determined as a preliminary issue.

5. In essence, Mr Lonsdale said that the draft transfer prepared by the applicants' solicitors contained a large number of onerous covenants, which he did not believe the applicants were entitled to under the 1967 Act, but which, if he were wrong about that, would have a significant impact on valuation. He already regarded the price sought by the applicants as "quite staggering" and "vastly in excess of any sums that could be justified under the 1967 Act". However, if the tribunal were to find that the applicants were indeed entitled to all of the restrictive covenants they sought, then there would be no point in the tribunal engaging on the complicated and time-consuming task of considering valuation evidence, because Mr Lonsdale would not wish to proceed with the purchase at all.

6. That request was considered by a judge at the tribunal, who replied to both parties by letter dated 15 February 2017 directing a preliminary hearing of the terms of the transfer. A subsequent letter from the tribunal indicated that all the matters raised by Mr Lonsdale would be dealt with at the hearing, which was fixed for 29 March 2017.

The hearing

7. At the hearing on 29 March 2017, the applicants were represented by Mr Anthony Radevsky of counsel. Evidence for the applicants was given by Mr Giles Pemberton, a partner in the firm of Pemberton Greenish LLP, who spoke to his witness statement of 21 March 2017 and documents contained within exhibit "GEP1". In addition, Mr Julian Briant BA FRICS, a partner in the firm of Cluttons LLP chartered surveyors, spoke to his expert report dated 22 March 2017. Mr Radevsky also relied upon his skeleton argument of 28 March 2017 and several photocopy documents handed in at the beginning of the hearing.

8. The respondent, Mr David Lonsdale, appeared in person. As well as being the tenant of the Property, he is an experienced property barrister and co-author of a book about leasehold enfranchisement law. He spoke to his two witness statements, dated 16 March and 22 March 2017, respectively.

9. In addition to the aforementioned documents, there was a hearing bundle containing a notice of claim, notice in reply, application and relevant correspondence.

10. The relevant transfer of part, form TP1, was found at pages [126] to [136] of exhibit "GEP1".

11. Having heard evidence and submissions, the tribunal directed Mr Lonsdale to file and serve a note of one of the particular legal points that he raised for the first time at the hearing, by 7 April 2017; and for Mr Radevsky to reply on behalf of the applicants, if he so wished, by 18 April 2017. The parties' respective submissions were duly received and considered.

Preliminary point

12. As a preliminary point, Mr Lonsdale sought confirmation of the identity of the legal entity which had retained Pemberton Greenish LLP and Cluttons LLP, on the part of the applicant freeholders. He disputed that it could be the freeholder companies themselves, because, by their own annual returns to the Companies House, each of the companies had declared themselves to be dormant, with assets of only £2 each.

13. Mr Radevsky confirmed that it had been the trustees of the Portman Estate, who had instructed Pemberton Greenish and Cluttons as their solicitors and surveyors respectively. Mr Radevsky referred to a letter dated 16 March 2017 sent by Pemberton Greenish to Mr Lonsdale, which confirmed that the applicant companies were, indeed, dormant, but that the trustees hold the residential properties, which comprise the

Portman Estate in London, through the two applicant companies, which are but nominees.

14. Mr Lonsdale asked the tribunal, therefore, to record that there was no retainer between the applicant companies themselves and Pemberton Greenish or Cluttons; and that the only retainer was with the trustees themselves.

15. Nothing further turns on this preliminary point, at this stage, because there was no current application before the tribunal for a determination of any costs payable by Mr Lonsdale, pursuant to section 9(4) of the Act.

The main issues

The law

16. The obligation to enfranchise is dealt with by section 8 of the 1967 Act; and section 8(1) states that:

> "(1) Where a tenant of a house has under this Part of this Act a right to acquire the freehold, and gives to the landlord written notice of his desire to have the freehold, then except as provided by this Part of this Act the landlord shall be bound to make to the tenant, and the tenant to accept, (at the price and on the conditions so provided) a grant of the house and premises for an estate in fee simple absolute, subject to the tenancy and to tenant's incumbrances, but otherwise free of incumbrances."

17. The rights to be conveyed to the tenant on enfranchisement are set out in section 10 of the 1967 Act, which so far as material states as follows:

> "(1) Except for the purpose of preserving or recognising any existing interest of the landlord in tenant's incumbrances or any existing right or interest of any other person, a conveyance executed to give effect to section 8 above shall not be framed so as to exclude or restrict the general words implied in conveyances under section 62 of the Law of Property Act 1925, or the all-estate clause implied under section 63 , unless the tenant consents to the exclusion or restriction; but the landlord shall not be bound to convey to the tenant any better title than that which he has or could require to be vested in him, [...]
>
> (2) As regards rights of any of the following descriptions, that is to say,—
>
> (a) rights of support for any building or part of a building;
>
> (b) rights to the access of light and air to any building or part of a building;
>
> (c) rights to the passage of water or of gas or other piped fuel, or to the drainage or disposal of water, sewage, smoke or fumes, or to the use or maintenance of pipes or other installations for such passage, drainage or disposal;

(d) rights to the use or maintenance of cables or other installations for the supply of electricity, for the telephone or for the receipt directly or by landline of visual or other wireless transmissions;

a conveyance executed to give effect to section 8 above shall by virtue of this subsection (but without prejudice to any larger operation it may have apart from this subsection) have effect—

(i) to grant with the house and premises all such easements and rights over other property, so far as the landlord is capable of granting them, as are necessary to secure to the tenant as nearly as may be the same rights as at the relevant time were available to him under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made on the severance of the house and premises or any part thereof from other property then comprised in the same tenancy; and

(ii) to make the house and premises subject to all such easements and rights for the benefit of other property as are capable of existing in law and are necessary to secure to the person interested in the other property as nearly as may be the same rights as at the relevant time were available against the tenant under or by virtue of the tenancy or any agreement collateral thereto, or under or by virtue of any grant, reservation or agreement made as is mentioned in paragraph (i) above.

(3) As regards rights of way, a conveyance executed to give effect to section 8 above shall include—

(a) such provisions (if any) as the tenant may require for the purpose of securing to him rights of way over property not conveyed, so far as the landlord is capable of granting them, being rights of way which are necessary for the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy and in accordance with its provisions; and

(b) such provisions (if any) as the landlord may require for the purpose of making the property conveyed subject to rights of way necessary for the reasonable enjoyment of other property, being property in which at the relevant time the landlord has an interest, or to rights of way granted or agreed to be granted before the relevant time by the landlord or by the person then entitled to the reversion on the tenancy.

(4) As regards restrictive covenants (that is to say, any covenant or agreement restrictive of the user of any land or premises), a conveyance executed to give effect to section 8 above shall include—

(a) such provisions (if any) as the landlord may require to secure that the tenant is bound by, or to indemnify the landlord against breaches of, restrictive covenants which affect the house and premises otherwise than by virtue of the tenancy or any agreement collateral thereto and are enforceable for the benefit of other property; and

(b) such provisions (if any) as the landlord or the tenant may require to secure the continuance (with suitable adaptations) of restrictions arising by virtue of the tenancy or any agreement collateral thereto, being either—

(i) restrictions affecting the house and premises which are capable of benefiting other property and (if enforceable only by the landlord) are such as materially to enhance the value of the other property; or

(ii) restrictions affecting other property which are such as materially to enhance the value of the house and premises;

(c) such further provisions (if any) as the landlord may require to restrict the use of the house and premises in any way which will not interfere with the reasonable enjoyment of the house and premises as they have been enjoyed during the tenancy but will materially enhance the value of other property in which the landlord has an interest.

(5) Neither the landlord nor the tenant shall be entitled under subsection (3) or (4) above to require the inclusion in a conveyance of any provision which is unreasonable in all the circumstances, in view—

(a) of the date at which the tenancy commenced, and changes since that date which affect the suitability at the relevant time of the provisions of the tenancy; and

(b) where the tenancy is or was one of a number of tenancies of neighbouring houses, of the interests of those affected in respect of other houses."

The property

18. Mr Lonsdale is the leasehold owner of 37 and 39 Great Cumberland Place, London W1, pursuant to a lease of both dated 29 September 1999 ("the Lease") [GEP1: 41-87], made between (1) Rodney John Berkeley Portland, Robert Antony Stuart Brock, Anthony Seymour Berkeley Portman and John Arnold Fell, as the then trustees, and (2) Sunlink Development Limited, for the term of 20 years from 25 December 1997. The passing rent is £88,000 per annum for both buildings. The leasehold title to both buildings is registered at the Land Registry under title number NGL896046.

19. The two building are located on the western side of Great Cumberland Place, near to the junction with Upper Berkeley Street. The northern end of Great Cumberland Place between Upper Berkeley Street and George Street is lined with Georgian townhouses. Further north lies Bryantson Square, one of four garden squares on The Portman Estate.

20. Mr Lonsdale's claim is in respect of the freehold of only 37 Great Cumberland Place ("the Property"), which is a mid-terrace, Georgian townhouse covering the lower ground, ground and four upper floors. The Property is Grade II listed and lies within The Portman Estate Conservation Area. Notwithstanding the user covenants in the lease to the effect that the building should be used as not more than six flats, the Property is currently arranged as seven flats, it being understood the boiler room has been converted into a lower ground floor flat.

21. Other residential properties within The Portman Estate are held by the applicant companies as nominees, except where there is outright ownership by others. As demonstrated by the plans in Exhibit GEP1, the applicants also hold several close and adjoining properties in the block within which the Property is found. The applicants also hold a substantial part of the block to the south of it and a number of blocks surrounding and diagonally opposite to the Property.

The tribunal's determination

22. The disputed terms of the draft transfer were those contained in clause 12.3 (rights reserved for the benefit of other land), clause 12.4 (restrictive covenants by the transferee) and clause 12.6 (declarations). The tribunal's determination in respect of each of these is set out below, in turn, with reasons.

Rights reserved for the benefit of other land

23. By draft clause 12.3, it is proposed that several rights and easements are excepted and reserved from the Property to the owners, lessees and occupiers from time to time of other land in the vicinity of the Property known as the "Red Land" meaning each and every part (other than the Property) of the land shown edged red on the plans numbered 3, 4, 5 and 6 annexed to the transfer, being land retained in the ownership of the applicants.

Clause 12.3.1

24. Draft clause 12.3.1 in the transfer is:

> "A right to redevelop, rebuild or alter any of the buildings from time to time on the Red Land and to build upon to such height elevation extent or otherwise as the Transferor may think fit and use any land forming part of the Red Land at any time and for any purpose including the erection of scaffolding if necessary without payment of any compensation to the Transferee NOTWITHSTANDING THAT such building(s) redevelopment rebuilding alterations or use shall effect obstruct or diminish the light or air which may now or at any time after the date of this Transfer be enjoyed by the Property".

25. The applicants argue that upon execution of a transfer of the freehold of the Property, they will remain the freeholders of the immediately adjacent premises at 39 Great Cumberland Place; and they will also remain owners and have substantial holdings in the block within which the Property is situated and three surrounding blocks. The provisions in draft clause 12.3.1 of the transfer are said to be in like terms to those in Part II of the First Schedule of the Lease [GEP1: 69].

26. Part II of the Lease sets out various "Rights reserved to the Landlord", of which paragraph 6 is:

> "The right without obtaining consent from or making compensation to the Tenant to deal as the Landlord thinks fit with any land or premises adjoining or near to the Premises and to carry out any works thereon or thereto notwithstanding that the enjoyment or the access of light or air to the Premises may be interfered with".

27. The applicants rely upon section 10(2)(ii) of the Act with regard to the inclusion of this reservation, and the rights reserved, as set out above.

28. In his first witness statement dated 16 March 2017, Mr Lonsdale objected to draft clause 12.3.1, and others, submitting by way of general background, as follows:

> "17. By reason of section 8 of the 1967 Act, I am entitled to acquire the estate in fee simple free from incumbrances unless such incumbrances can be justified by the provisions contained in the Act. These provisions are sections 10(2)(ii), 10(3)(b) and 10(4).
>
> 18. By reason of section 10(1) and (2) of the Act, I am entitled to the rights which I would acquire pursuant to section 62 of the Law of Property Act 1925 and such rights as are expressly mentioned in section 10(2) of the 1967 Act. So, for example, if the property has acquired a right of light under the Prescription Act 1832 or at common law (as No 37 most certainly has), then that easement should pass to me on the transfer of the freehold."

29. Turning to draft clause 12.3.1, he develops his argument in the following way:

> "20. In relation to 12.3.1 I am entitled to acquire the easement in question for the reason set out in paragraph 18.
>
> 21. I appreciate that it may be argued that section 10(2)(ii) applies because the current tenancy reserves to the lessors a right to build even if it interferes with my right to light or air. But I do not accept that section 10(2)(ii) may be used to preserve for eternity that reservation.
>
> 22. In any case, the restriction would not confer any practical advantage on the Applicants or any trustees as there is no property in which they have a legal or beneficial interest that could ever be developed so as to interfere with the right to light or air.
>
> 23. The only building where there is the remotest possibility of it being developed in such a way to interfere with the natural light

coming into No 37 would be the former New Cavendish or VAD Ladies Club opposite. It is just possible that if this building were increased in height it would affect the light to [the] front basement flat. However, this building is not even owned by the Applicants.

24. The inclusion of a provision which serves no useful purpose to the Applicants denies me an easement which would normally go with any property that has stood for 20 years or more. I would also be prevented for an eternity from ever acquiring it under the Prescription Act 1832."

30. At the hearing, Mr Lonsdale described his argument against draft clause 12.3.1 as a "pure point of law, which has never been dealt with before". As his oral submissions on this point were very detailed, the tribunal invited Mr Lonsdale to reduce them to writing after the hearing; which he did in a document dated 6 April 2017. Mr Radevsky then responded to them, in a document dated 10 April. These were followed in quick succession by a Reply from Mr Lonsdale dated 11 April and a Response by Mr Radevsky (containing an objection to Reply) dated 12 April 2017.

31. In his written submissions, Mr Lonsdale developed the theme of his witness statement and his oral submissions. In short, and with underlining for emphasis of the main points, Mr Lonsdale relied upon section 8(1) of the 1967 Act, by which, except as provided, the landlord was bound to grant him the house for an estate in fee simple absolute free of incumbrances (apart from those that do not concern us).

32. Section 10(1) expands on this, by stating that a conveyance under section 8 shall not exclude or restrict the general words in section 62 or the all estate clause implied in section 63 of the Law of Property Act 1925. As the applicants have acquired the freehold title with a right to light, under the doctrine of modern lost grant or under the Prescription Act 1832, on the transfer of the freehold to Mr Lonsdale, that right to light is an easement that would pass to him automatically under sections 62 and 63 (because the effect of those sections cannot be excluded or restricted).

33. So, the question then is: what is the effect on all this of section 10(2)(ii), which applies to rights to light and air, and which states that the conveyance shall have effect to make the house subject to all such easements and rights for the benefit of other property in similar terms as appear in the tenancy? Does section 10(2)(ii) reverse or substantially "cut back" on the clearly intended effect of section 10(1)?

34. Mr Lonsdale says not, for three reasons: the absence of qualifying words "subject to" in section 10(1); the inclusion of words in section 10(2) that "a conveyance intended to give effect to section 8 above shall

by virtue of this subsection (but without prejudice to any larger operation it may have apart from this subsection) ..." [*emphasis added*], which words in parenthesis are plainly intended to give primacy to section 10(1); and, in any event, the right contended for does not come within section 10(2)(ii), because "a right to block someone else's light by building ... is not an easement which the law has ever recognised and is therefore not "capable of existing at law" as the section requires".

35. Having considered Mr Radevsky's counter submissions and the cited authority and legal textbooks, the tribunal comes to the conclusion that Mr Lonsdale is incorrect in his submissions.

36. The tension is between the tenant's legitimate desire to acquire, so nearly as possible, an unencumbered freehold with an unfettered right to light; and the landlord's legitimate desire to ensure that the freehold transferred is subject to such reserved rights as protect the retained land, notwithstanding that it may affect the new freeholder's right to light.

37. The historical context and the purpose of section 10 is set out in Hill and Redman at E[591]:

> "First, this section deals with the operation of certain conveyancing provisions of the Law of Property Act 1925 as regards the conveyance to the tenant [i.e. sections 62 and 63] ... Secondly, the section deals with various ancillary rights and obligations to be contained in the conveyance. Sub-s (2) lists certain easements and rights such as ... the right of access to light and air. The general purpose is that the conveyance is to secure that as far as possible the tenant will enjoy the same rights and be subject to the same rights in others as he enjoyed or was subject to under the tenancy. Sub-s (3) is concerned with rights of way ... sub-s (4) deals with restrictive covenants ..." [*emphasis added*]

38. From this, it can be seen that section 10 is a self-contained set of provisions relating to the conveyance that must be read as a whole. Being self-contained, the absence of qualifying words "subject to" in section 10(1) is of no consequence. Through section 10, the 1967 Act preserves the tenant's position as prospective freeholder, as far as may be, by preventing the conveyance from restricting the automatic transfer of existing rights and easements under sections 62 and 63 of the 1925 Act, but seeks to balance that by preserving the landlord's position, as regards other property. The latter provision is by making reference to the parties' respective rights and obligations in the tenancy, before the freehold transfer.

39. This is not at all surprising, because the other context is that this is not a freehold purchase between willing parties on the open market, but a forced sale by an unwilling vendor by way of compulsory acquisition; a sale which only arises in the first place because the tenant has a lease and because of the existence of the 1967 Act. Section 10 seeks to balance the contending interests that arise from this situation and, in particular, from the provisions of the existing lease; its purpose is not to extend rights in the way that Mr Lonsdale contends.

40. At present, the lease contains a reservation by which the tenant does not have the right to prevent the landlords from developing their other property by reason of a claimed right to light or air. Section 10(2) refers expressly to rights of access to light and air and expressly provides for the current reservation to be continued in the conveyance to effect the eventual transfer of the freehold to the tenant.

41. The meaning of the words in parenthesis in section 10(2), namely that "a conveyance intended to give effect to section 8 above shall by virtue of this subsection (but without prejudice to any larger operation it may have apart from this subsection) ..." is not clear, but the "it" could as equally apply to the "larger operation" of the conveyance or to section 8, as it could to section 10(1); and there is nothing to support Mr Lonsdale's submission that these words are "plainly intended to give primacy to section 10(1)", over section 10(2). Indeed, if section 10(1) had such primacy, there is a risk that it would always trump the provisions of section 10(2), which cannot have been the intention.

42. With regard to the argument turning on whether easements and rights are "capable of existing at law", the submissions were inconclusive; however, rights to light can clearly be legal easements. As to whether or not the property No 37 had once acquired a right to light, either by modern lost grant or under the Prescription Act 1832, even if it had, the problem for the tenant in the present case is that there is unity of ownership of the freehold. This is dealt with in Megarry & Wade on The Law of Real Property, 8th Ed, para.29-014, which states that:

> "If the dominant and servient tenements come into the ownership and possession of the same person, any easement or profit is extinguished".

43. Overall, the tribunal is persuaded by the statement in Hague on Leasehold Enfranchisement, 6th Ed, which said of section 10(2)(ii), at para.6-26 that:

> "It is thought that this will preserve any right to build notwithstanding obstruction of light to the house and premises if such a right was reserved to the landlord in the tenant's lease (as is commonly the case), and that it will amount to a written consent under s.3 of the Prescription Act 1832, thus preventing the acquisition of a prescriptive right to light after 20 years.

However, in cases where this is of importance, it is suggested that any express reservation of such right should be incorporated in the conveyance in order to remove doubts on the matter."

44. The tribunal does not accept Mr Lonsdale's submission that this is an incorrect statement of the law. While it is not supported by authority, it has stood unchallenged since it first appeared in the 2nd Edition, written by Nigel Hague QC in 1987. As it has not been suggested to have been incorrect in any case decided in the 30 years since then, nor has it been adversely commented on in any textbook, the passage has stood the test of time and the tribunal is willing to accept it as an accurate statement of the law.

45. It follows that, in the tribunal's judgement, clause 12.3.1 should be in the conveyance, as proposed by the applicants.

Clauses 12.3.2 and 12.3.3

46. These are not disputed.

Clauses 12.3.4 and 12.3.5

47. At the hearing, the applicants conceded that these reserved rights should be deleted from the transfer.

Clause 12.3.6

48. Draft clause 12.3.6 reserves from the Property the right:

> "Of access (if required) at all times in case of emergency as a means of escape from adjoining or neighbouring property".

49. The applicants say that this provision is written in like terms to paragraph 8 of Part II of the First Schedule of the Lease which, in full, reserves to the landlord [GEP1: 70]:

> "The right for the Landlord and tenants and other lawful occupiers of the Landlord's adjoining or neighbouring premises to enter the Premises after reasonable prior written notice or any part or parts thereof to construct repair maintain and alter from time to time the Fire Escape and in the event only of fire or other similar emergency without notice to pass through the Premises and any part or parts thereof in order to escape from such adjoining or neighbouring premises to a place of safety PROVIDED THAT any persons exercising such right shall make good any damage caused to the Premises in the exercise of such right".

50. The applicants relied upon subsection 10(3)(b) of the Act to say that this should be included within the conveyance.

51. Mr Lonsdale's view was "12.3.6 is quite unnecessary. In case of genuine emergency, such as escaping from a fire or an armed gunman ordinary instincts of humanity would apply and no one would ever pay the least bit of attention to whether such a covenant existed or not." In oral evidence, he asked why the title should be cluttered with such a clause, which he said was "over legalistic and unnecessary".

52. The tribunal considered that, in an area of densely-built residential and commercial property, the proposed right of way was necessary for the reasonable enjoyment of other property in which the landlord has an interest. However, in order to balance the potential burden of granting such right of access, even in a case of emergency, there should be added to clause 12.3.6 a proviso in like terms as that in paragraph 8 of Part II to the First Schedule of the Lease, namely: "provided that any persons exercising such right shall make good any damage caused to the Property in the exercise of such right".

Restrictive covenants by the transferee

53. Clause 12.4 of the draft transfer contained covenants by the transferee with the transferor and with the freehold owners of the Red Land and any part thereof, and their successors in title, for the benefit of the Red Land and any part thereof. Mr Lonsdale objected to all of the proposed restrictive covenants, which are dealt with in turn, below.

Clause 12.4.1

54. This clause, which was for the observance and performance of covenants, the benefit of which may be annexed to and run with the Red Land, was withdrawn at the hearing by Mr Radevsky; and should therefore be deleted from the transfer.

Clause 12.4.2

55. The draft covenant proposed in clause 12.4.2 of the transfer states:

> "That the Property hereby transferred shall not be used for any trade or business nor for any illegal or immoral purpose nor for any sale by auction or meeting for religious or political purpose nor for any purpose other than for residential occupation only".

56. This covenant was said by the applicants to reflect the covenants restrictive as to the use which may be made of the Property, to be found at clauses 1.01.22, 3.14.1 and 3.14.2 of the Lease [GEP1: 46, 54 & 55],

which state, so far as material:

> "1.01.22 "Permitted Use" means use of the Premises only as six self-contained private residential flats in No 37 Great Cumberland Place and five self-contained private residential flats in No 39 Great Cumberland Place all in single occupation although for the avoidance of doubt more than one person can reside in each residential flat"
>
> "3.14.1 Not to use the Premises or any part thereof: (A) [...] (E) for any sale by auction or for any public meeting or for any religious or political purpose [...] (K) [...]"
>
> "3.14.2 Not to occupy or use any part of the Premises for any illegal or immoral purpose nor any Residential Unit in the Premises otherwise than for residential purposes and the Tenant shall procure that every occupier of a Residential Unit observes and performs the regulations set out in the Fourth Schedule".

57. The restrictions proposed in the conveyance are considerably less extensive than those found in the Lease and it was submitted by Mr Pemberton "that they are the minimum necessary for maintaining those parts of the Portman Estate as a high class residential area." By way of clarification, the applicants no longer sought to control the number of residential units in which the Property may be used.

58. In particular, clause 12.4.2 of the draft transfer did not seek to reproduce all of the prohibited uses of the Property contained in clause 3.14.1 (A) to (K) of the Lease, which include use for betting or gambling, as a restaurant or cafe, as an undertaker's, bank or building society, as an abortion clinic, sauna or massage parlour, as a charity shop; and others.

59. Mr Lonsdale described the draft clause as "old fashioned, controlling and inappropriate" and as having "all the hallmarks of the 19th century". He questioned how the user clause could make any possible difference to the value of any property owned by the applicants. Although he did not want the property to be used for any business purpose, he did not see how, if planning consent for change of use were granted by the local authority to use the ground floor as an office, it would make any difference to the value of any property proximate to No 37.

60. Mr Lonsdale also said that illegal user was a matter for the police; and he asked: "who wouldn't want to stop immoral user?" He described himself as a "political person" and he did not want to be in breach of such a "patronising and unacceptable" provision, if he held a political meeting at the property.

61. Having balanced the competing submissions, the tribunal determines that the restrictive covenant at clause 12.4.2 of the draft transfer should remain as proposed. The restrictions have been cut down heavily from those in the Lease; but those that remain are clearly for the benefit of The Portman Estate, in particular to maintain it as a high class residential area.

Clause 12.4.3

62. The restriction at clause 12.4.3 is:

> "Not to do in or on the Property anything which may be or become a nuisance annoyance obstruction disturbance to the Transferor or the owners or occupiers of any property adjoining or adjacent to the Property".

63. This provision is written in like terms to paragraph 3.14.3 of the Lease [GEP1: 55], which reads:

> "Not to do in or on the Premises anything which may be or become a nuisance annoyance obstruction or disturbance to or of the Landlord or neighbouring tenants owners or occupiers and not to sing or play or use any musical instrument radio television record player loud speaker or similar apparatus in such a manner as to be audible outside the Premises."

64. The applicants argued that this provision was necessary for the maintenance of the value of the other properties held by them; and that the trustees through their nominees, the applicants, should not have to rely upon the common law, which will not necessarily be sufficient for the maintenance of those parts of the Portman Estate as a high class residential area. In his evidence, Julian Briant spoke as to the impact of various forms of nuisance, annoyance and obstructive behaviour on the value of those other properties.

65. Mr Lonsdale argued that the proposed covenant affords no benefit that is not afforded by the ordinary tort of nuisance; it did not make any material difference to the value of any other property; and it served no practical purpose.

66. The tribunal noted that a clause in very similar terms was one of those approved in a conveyance by the Lands Tribunal in the decision of *Le Mesurier v Pitt* (LR/110/1970), a version of which, from the Digest of Cases, 1972, appeared at Appendix 1 of the Mr Briant's report. The clause approved by the Lands Tribunal appeared at page 157 of the judgement. In the tribunal's view, this restriction at clause 12.4.3 is sensible and unobjectionable; and it should be allowed in this transfer.

Clause 12.4.4

67. The proposed restrictive covenant in clause 12.4.4 of the draft transfer reads as follows:

> "Not without the previous consent in writing of the Transferor such consent not to be unreasonably withheld or delayed to make any alterations of any kind whether structural or otherwise to the height depth elevation or external appearance of the Property nor cut or alter any of the exterior nor carry out any work which involves the excavation of the Property or any part of it."

68. The lease term prohibiting and restricting alterations is found at clause 3.15 of the Lease [GEP1: 56] and reads:

> "3.15.1 Not to alter divide cut injure or remove any wall timber beam column stanchion ceiling floor or foundation or any structural or loadbearing part of the Premises (save for the purpose of making good any defect therein) or alter the layout or the external appearance of the Premises.
>
> 3.15.2 Not to erect anything on the Premises or any part thereof or any addition to the Premises for which shall project into the Air Space.
>
> 3.15.3 Not to make any alterations or additions to the Roof Space or to the Vaults.
>
> 3.15.4 Not to unite the Premises with any adjoining or neighbouring premises.
>
> 3.15.5 Subject and without prejudice to clauses 13.15.1 to 13.15.4 inclusive not without the consent of the Landlord such consent not to be unreasonably withheld or delayed to make any other alteration to the Premises or any part thereof and the Landlord may as a condition of giving any such consent require the Tenant to enter into such covenants as the Landlord shall require regarding the execution of any such alteration and the reinstatement of the Premises at the end or sooner determination of the Term.
>
> 3.15.6 In the event of the Tenant carrying out any alterations without the consent of the Landlord then at the Landlords request forthwith to make good and reinstate the Premises".

69. The trustees, through their nominees, the applicants, do not seek to control internal alterations. They only seek a qualified right to control the external appearance of the Property, because of the impact which it would have on the other properties held by the applicants. In particular, it was said that much of the historic fabric and street layout

of Great Cumberland Place would be put at risk, if this covenant was not included in the transfer. It was also submitted that it would be appropriate to extend qualified control to basement developments, a phenomenon which would not have been known when the Lease was entered into. In his evidence, Julian Briant spoke about the adverse impact that unrestricted alterations of the Property would have on the value of the other properties in the locality.

70. Mr Lonsdale objected to the new clause because external alterations would require planning and listed building consent anyway; and that consent would not be forthcoming if the proposed alterations did not respect and preserve the historic character of the building and enhance its appearance. He said that Westminster Council was well-run and he could conceive of no circumstances when it would be reasonable for allow a former freeholder to second-guess what the experts at Westminster might allow.

71. The tribunal is satisfied that the historic "look and feel" of Great Cumberland Place needed some protection from unrestricted development. The purpose of the draft clause was not to duplicate the planning regime, but had a different function, namely to protect the remainder of the applicants' estate. The tribunal noted that a similar restrictive covenant had also been approved by the Lands Tribunal in *Le Mesurier v Pitt* (paragraph 5 on page 157 of the judgement). The clause in the draft transfer was a reduced version of the more extensive provisions in the Lease and it should therefore remain as drafted in the form TP1.

Clause 12.4.5

72. Restrictive covenant at clause 12.4.5 stated:

> "Not to place or maintain or suffer to be placed or maintained upon the Property so as to be visible from the outside any advertisement".

73. This reflected the covenant in the Lease at clause 3.16.2 [GEP1: 56] which stated:

> "Not to affix or to exhibit on the outside of the Premises or to or through the window of the Premises any placard sign notice fascia board or advertisement except an Approved Sign".

74. The applicants said that the lease restriction was far more extensive than that which was now proposed to be included in the transfer. The trustees, through their nominees, the applicants, only sought to prohibit advertisements, because they would be contrary to the outward appearance of the Property as a high class residential accommodation. Julian Briant described in his evidence the way in

which advertisements would impact adversely on the value of the applicants' other properties.

75. Mr Lonsdale said that he could not imagine anyone wanting to place an advertisement on the building; but the covenant would preclude putting up even an election poster in the window. In his view, the covenant was far too wide and would not materially enhance the value of any other property. It amounted to "unnecessary interference" in the enjoyment of the property by a new owner.

76. The tribunal noted once again, that a very similar clause had been approved as part of the conveyance by the Lands Tribunal in *Le Mesurier v Pitt* (paragraph 4 on page 157 of the judgement). As previously, the tribunal was satisfied that in order to maintain the historic "look and feel" of Great Cumberland Place and to maintain the value of the applicants' other properties, it was necessary for there to be a restriction on outward advertisements on the subject Property. The restriction proposed was less than that contained within the Lease and the tribunal was satisfied that it was reasonable and appropriate; and that it should remain in the form TP1.

Declarations

77. The transfer contained several declarations at clause 12.6, of which 12.6.3 (the merging of the leasehold interest in the freehold interest) was deleted by agreement. That left the following declarations sought by the applicants:

> "It is hereby declared as follows:
>
> 12.6.1 The walls dividing the Property from the adjoining premises as shown on Plan 1 annexed are party walls and the expense of maintaining them should be borne in equal shares by the Transferee and the owners of the said adjoining premises
>
> 12.6.2 For the avoidance of doubt the Transferee shall not be or become entitled to any right of light or air which would restrict or interfere with the full and free use by the owners lessees and occupiers from time to time of the Red Land or any part thereof and by any persons authorised any such owners lessee or occupier for building or any other purpose
>
> 12.6.3 [deleted]
>
> 12.6.4 This Transfer does not include the road and/or the subsoil beneath the highway up to middle point of the road and that the presumption that this Transfer will include half of the said highway and the subsoil beneath it is rebutted

12.6.5 The access of light and air to and for the benefit of the Property and the buildings or other structures upon it from time to time over the Red Land (or any part thereof) is enjoyed by consent".

78. The applicants justified clause 12.6.1 by saying that it is appropriate that, upon the division of properties under a single lease and in a terrace, to place beyond doubt the status of the walls for the purpose of the Party Wall etc Act 1996, thereby clarifying the extent of the property conveyed.

79. Clause 12.6.2 was a declaration written in like terms to the rights reserved under Part II of the First Schedule of the Lease. 12.6.4 was a declaration that reflected the extent of the demise and the entries on the Land Registry title for the Lease, and subsection 2(6) of the Act.

80. Clause 12.6.5 was a declaration to reflect the rights reserved at clause 12.3.4 of the transfer.

81. Mr Lonsdale objected to all of the declarations sought, which he said were unacceptable or unnecessary. He argued that the tribunal had no power to make declarations and a decision by the tribunal that any of clause 12.6 should go into the draft transfer was tantamount to making declarations on the issues therein contained. These were matters, which, if there were any disputes in future, should be decided by a county court judge, who would have power to make such declarations.

82. For example, with regard to the wall between numbers 37 and 39 Great Cumberland Place, number 39 had been completely rebuilt. Mr Lonsdale was not at all sure that the two walls dividing 37 and 39 constituted a party wall. In the event of a future dispute, that would be for a county court judge to decide; but, in any event it was not the function of this tribunal to make that decision. At the moment, there was no dispute to be resolved by anyone; and the tribunal should therefore decline to make the declarations sought.

83. When pressed, Mr Radevsky said that the applicants accepted that there was nothing in the 1967 Act, which would point to the tribunal having power to include declarations in a form of conveyance; he accepted there was no power to insist on them, though, in his view, it was very sensible to do so, to avoid future litigation over matters which should have been uncontroversial.

84. Taking all of these factors into account, the tribunal concludes that it does not have power to make declarations as to the matters sought by the applicants and, even if it had the power to do so, it would decline as there was no ongoing dispute and no evidence before it to support the making of such declarations. In the absence of any power within the

1967 Act, it is clear that none of the declarations should go into the eventual transfer.

Conclusion

85. A new draft transfer should now be drawn up and agreed by the parties to reflect the tribunal's determinations. If such cannot be agreed within 14 days of the date of this decision, the parties may apply within 28 days of this decision for further directions.

Name: Judge Timothy Powell **Date:** 24 May 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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