IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 256 (LC)
Case No: LP/5/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – ***modification – 1980s office building let on long lease - covenants restricting use to offices only and controlling terms of underletting – modification sought to permit conversion to residential use and letting on assured shorthold tenancies – Law of Property Act 1925 section 84(1) (aa) and (c) – modification of user covenant ordered – modification of restriction on underletting refused***

IN THE MATTER OF AN APPLICATION UNDER SECTION 84 OF THE LAW OF PROPERTY ACT 1925

Between

SHAVIRAM NORMANDY LIMITED

Applicant

and

BASINGSTOKE AND DEANE BOROUGH COUNCIL **Respondent**

Re: Normandy House, Bunnian Place, Alencon Link, Basingstoke, Hants RG21 7JE

Martin Rodger QC, Deputy Chamber President and Paul Francis FRICS

Royal Courts of Justice

28-30 May 2019

Mr Philip Rainey QC, instructed by Teacher Stern LLP, solicitors, for the applicants
Mr Ranjit Bhose QC and *Ms Tara O'Leary*, instructed by Basingstoke and Deane Borough Council Legal Services, for the respondent

The following cases are referred to in this decision:

Re Diggens' Application (No.2) [2001] 2 EGLR 163
Gilbert v Spoor [1983] 1 Ch 27
Helena Partnerships Ltd v Brown [2015] UKUT 0324 (LC)
Re Hextall's Application (1998) 79 P & CR 382
IBM UK v Rockware Glass Ltd [1980] FSR 335
James Hall & Co's Application [2017] UKUT 240
Re Morgan's Application (2006) LP/79/2004
Ridley v Taylor [1965] 1 WLR 611
Sheffield District Railway v Great Central Railway Co (1911) 27 TLR 451
Shephard v Turner [2006] P & CR 28
Re Snaith and Dolding's Application [1995] 71 P & CR 104
Re Willis' Application (1998) 76 P & CR 97

Introduction

1. Normandy House is a purpose-built office building of over 76,000 sq ft in the centre of Basingstoke. Built in the early 1980s to what was then a high specification, it occupies a prime location adjoining the town's railway station. The freehold of the building is owned by Basingstoke and Deane Borough Council ("the Council") which granted a headlease to Greytown Investments Ltd on 29 March 1985 for a term of 150 years. The headlease includes a covenant restricting the use of the building to offices only and reserves an annual rent equal to 15.5% of the "aggregate of the net annual rents…actually received by the lessee."

2. The building was formerly part of the UK headquarters of IBM which occupied it from 1985 until 2013 under an underlease which expired on 25 December 2014. Since IBM's departure it has been vacant and has been allowed to fall into a state of significant disrepair, accelerated by vandalism.

3. In May 2015 the headlease was acquired by the applicant, Shaviram Normandy Ltd, which wishes to convert Normandy House to provide 114 residential flats, to be let on assured shorthold tenancies at open market rents. Shaviram paid £5.25 million plus £1.05 million VAT for its interest.

4. The required statutory permitted development rights have been confirmed by the Council in its capacity as local planning authority, but the applicant cannot implement its proposals while the headlease requires the building be used only as offices.

5. In its capacity as landlord, rather than planning authority, the Council wishes the building to be put back into a lettable condition and made available to businesses seeking office accommodation in the town centre. It regards the building as an important part of Basing View, its prime 65-acre (26.3 hectare) office park which lies to the south of the railway line, east of the station. Because the Council refuses to agree to the applicant's request to vary the headlease, the applicant has no means of carrying its proposals into effect except by applying to the Tribunal under section 84, Law of Property Act 1925, for the modification of the restrictions in the headlease to permit residential use. It made that application on 11 June 2018.

6. At the hearing the applicant was represented by Mr Philip Rainey QC of counsel. Mr Raphael Wechsler and Mr Aron Lipschitz of the applicant, and their agent, Mr Andrew Newman, of Hollis Hockley gave evidence in support of the application. Expert evidence was given by Mr Peter Beckett FRICS of Beckett & Kay LLP. The respondent was represented by Mr Ranjit Bhose QC and Ms Tara O'Leary of counsel who called Ms Kate Dean, an officer of the Council whose title is Project Director for Basing View and Commercial. Expert evidence was provided by Ms Emma Goodford MRICS of Knight Frank LLP.

7. After the hearing, on 31 May 2019, we undertook an accompanied inspection of Normandy House, and familiarised ourselves with the area to the south east of the station which was the focus of most of the evidence. We were able to make external and part internal

inspections of a number of the office buildings on Basing View (most of which had vacant office suites of varying sizes available to let) including Matrix House, Southern Cross House, Northern Cross House, View Point, Network House, Mountbatten House and The Florence Building. We are grateful to the parties and the various building managers or agents for their assistance in facilitating our inspections.

The relevant statutory provisions

8. Section 84 of the 1925 Act gives the Tribunal power to discharge or modify a restriction as to the use of freehold land provided one of the grounds in section 84(1) is made out. By section 84(12) the jurisdiction extends to leasehold covenants after the expiry of 25 years of a term of more than 40 years. This application is made under grounds (a), (aa) and (c).

9. Ground (a) applies where the restriction sought to be modified or discharged has become obsolete because of changes of circumstances in the neighbourhood since its imposition. Although Mr Rainey was initially inclined to abandon this ground of application it reappeared in a limited form in his closing submissions.

10. Ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction impedes some reasonable use of the land for public or private purposes.

11. It is agreed in this case that the use of Normandy House as a residential building would be a reasonable use, and that such a use is impeded by the covenants in the headlease. The issue concerns the further conditions found in subsection (1A). So far as relevant, these require that the Tribunal be satisfied that the restriction, in impeding the use of the building for residential purposes, does not secure to the Council "any practical benefits of substantial value or advantage to them", and that money will be adequate compensation for the loss or disadvantage (if any) which it will suffer from the proposed modification.

12. When considering whether sub-section (1A) is satisfied the Tribunal is required by section 84(1B) to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area.

13. Ground (c) permits the Tribunal to make an order where it is satisfied that the proposed modification will not injure the person entitled to the benefit of the restriction. Mr Rainey QC acknowledged that if he could not succeed on ground (aa) he was unlikely to do so on ground (c).

14. At this stage we can conveniently refer to a point of principle raised by Mr Bhose QC. He submitted that in a case like this, where the restrictions sought to be modified are contained in a long lease, to which the objector is the reversioner, the Tribunal should be particularly cautious in the exercise of its discretion under section 84. He relied in support of that submission on the following observations by Harman LJ in *Ridley v Taylor* [1965] 1 WLR 611, at 617H:

> "It seems to me that it should be more difficult to persuade the court to exercise its discretion in leasehold than in freehold cases. In the latter the court is relaxing in

> favour of a freeholder's own land restrictions entered into for the benefit of persons owning other land. In the former the land in question is the property of the covenantee who prima facie is entitled to preserve the character of his reversion."

In the same case Russell LJ also recognised that in the case of leasehold land "the freeholder is directly interested in the land in question as owner of the reversion" (at 619F). Diplock LJ concurred with both judgments (at 623F).

15. *Ridley v Taylor* concerned a 90-year lease of premises on the Duke of Westminster's estate in Mayfair with about 22 years of the term unexpired. The application was brought on ground (c) of section 84(1) before the 1969 amendment which introduced ground (aa). Those points of detail do not detract from the respect due to the views expressed in the Court of Appeal although, as the appeal turned on the assessment of the injury which would be caused by the proposed modification rather than on the exercise of any discretion, those views cannot be regarded as part of its essential reasoning.

16. It is clearly correct that in section 84(12) Parliament has recognised the special position of landlords and afforded them protection not available to freehold covenantees. The covenants in a lease granted for a term of 40 years or less are outside the scope of section 84 altogether, and no application may be made for the first 25 years of a term of longer than 40. But beyond that there are no separate conditions for leasehold covenants. The nature of an objector's interest is always a relevant consideration in an application under section 84(1), all of which turn on their own facts and on the impact which the proposed modification or discharge will have on the enjoyment by others of their own property. While the landlord of an extensive estate whose reversion will come in hand in the short or medium term has obvious estate management concerns to protect, we do not see why, in principle, the interest of a landlord should necessarily be more deserving of protection than that of a neighbouring owner or other person having the benefit of a restriction. It will all depend on the facts, and on the practical consequences of the suggested change.

17. In particular, it will be relevant in a leasehold case to consider the length of the unexpired term, the rent receivable, the other obligations owed by the tenant, the extent of the landlord's interests in neighbouring land, and how all of those matters may be affected by the modification. Those factors will all be weighed up in addressing the statutory grounds of application before any question of discretion arises. If one of the statutory grounds is established the Tribunal will acquire jurisdiction and will then have to consider whether and how to exercise it. We would expect it to be an unusual case in which a landlord's preference for preserving the character of its reversion justified refusal on a discretionary basis when the considerations underpinning that preference had not been judged strong enough to defeat the claim on substantive grounds.

The restrictions

18. The principal restriction which the applicant seeks to have modified is part of the lessee's covenant at clause 2(15) of the headlease which obliges it:

> " … to use the Demised Premises only as a building of the type specified in Class II in the Schedule to the Town and Country Planning (Use Classes) Order 1972 as defined in Section 2 thereof and amenities and purposes ancillary thereto."

Class II of the 1972 Order (now Class B1 in Part 3 of the Town and Country Planning (General Permitted Development) (Amendment) Order 2013) refers to office use.

19. A consequential modification is also sought to clause 2(12)(b) which requires that every subletting of part of the building be at a full market rent and on terms approved in advance by the landlord. The proposed modification would avoid the need for the applicant to obtain the Council's consent before a residential letting of an individual flat in the building.

20. It is convenient at this stage also to mention clause 2(12)(a), by which the lessee covenants:

> "To use its best endeavours at all times to fully let the Demised Premises and not at any time withhold or knowingly permit to be withheld the sub-letting of any part or parts of the Demised Premises so as to delay or avoid any increase in the rent payable hereunder."

This covenant is an important part of the structure of the headlease and was clearly included to protect the Council's income. The headlease does not include a base rent or minimum guaranteed return to the landlord, but entitles it to 15.5% of the net annual rent actually received by the tenant. The best endeavours obligation provides some assurance to the Council that the tenant will not restrict or manipulate the letting of the building in a way which diminishes the rent it receives. The requirement in clause 2(12)(b) that the tenant must obtain the consent of the Council to the rent and terms of each subletting was no doubt included for the same reason, as it allows the Council to satisfy itself in advance that the proposed rent is at a full market level and subject to an appropriate rent review clause.

The location

21. The parties prepared a helpful plan of the locality, which we include as an appendix to this decision. Normandy House is on the corner of Bunnian Place and Alencon Link, just southeast of Basingstoke Station on the eastern side of the town centre. It is identified as plot B on the plan. Immediately adjacent are two further office buildings: Clifton House to the west (plot A) and St Clement House (B1) to the east. A vacant site (C) earmarked for development adjoins St Clement House. This group of buildings is to the north west of the large Eastrop Roundabout and they are the first one encounters on leaving the main southern exit of the station and turning east.

22. South of Normandy House are a number of modern apartment blocks. In close proximity on the opposite side of Alencon Link are Skyline Plaza (D) containing more than 300 residential units and Crown Heights with 288. A third residential complex known as Churchill Plaza lies further to the south; this was converted from an office building in 2016 using statutory permitted development rights. Skyline Plaza is also a converted office building which was let on a headlease similar to the lease of Normandy House. To facilitate the conversion of the building to residential use the Council, as freeholder, agreed to re-gear the lease in 2006 and to permit the

subletting of the individual units on 150 year leases at a ground rent. Crown Heights was purpose built as an apartment building on the site of a former office in about 2000.

23. The buildings just described all lie to the west of the Eastrop Roundabout through which the dual carriageway known as Churchill Way East runs in a west/east direction.

24. Running directly north from the Eastrop Roundabout before turning east is a road named Basing View. This is the principal vehicular link into the Council's prime 65 acre Basing View office park which extends east of the station between Churchill Way East and the railway line as far as the A339 Ringway. Basing View is characterised by office buildings and development sites and is entirely in the Council's freehold ownership. We were informed that it is home to more than 100 businesses, employing over 4,000 people and occupying approximately 102,000 sq m of floor space.

25. A new John Lewis/Waitrose superstore (F) has recently been completed to the east of the roundabout.

26. It was a significant part of the Council's case that the cluster comprising Normandy House, the two smaller office buildings beside it, and the development site are part of the Basing View office park. This suggested designation of Basing View is delineated by the heavy black line on the plan from which it will also be seen that the Council does not consider any of the residential buildings south of Alencon Link to be part of Basing View.

27. The Council also regards Normandy House as occupying a crucial position on the pedestrian route between the station and the rest of Basing View, as well as having a strategic importance as the closest major office building to the station. It therefore wishes to prevent the incursion of residential use into this location and to retain the current offices.

28. Despite the Council's insistence in its statement of case and evidence, on our inspection of the locality we formed the clear impression that Normandy House and its immediate neighbours cannot sensibly be described as being within the Basing View office park. Although the office buildings on the park are of different ages and designs, they comprise a distinct district of their own which has its own character. The whole of the office park lies to the east of the large and busy roundabout, which separates it from the buildings closer to the station. Further functional and physical separation is provided by the new superstore which itself is a very large building.

29. The group of buildings closest to the station, including Normandy House, is not part of Basing View. Rather, it is an area of mixed uses sandwiched between the station car park to the north and Churchill Way to the south. Together with the residential buildings they comprise a mixed office/residential area noticeably different from Basing View and which was referred to in the evidence as either the "Station Quarter" or "Station Zone".

30. Nor, from our observation and consideration of the evidence, can the Station Quarter as a whole, or Normandy House and its immediate neighbours, be described as the essential gateway

into Basing View. Pedestrian access into the principal office district from the station and the town centre beyond is past Normandy House, but there is no traffic light controlled pedestrian crossing at the bottom of Bunnian Place, nor on the southern residential side of Alencon Link, onto the footpath that leads to Basing View past John Lewis/Waitrose and Matrix House. If this was such an important pedestrian thoroughfare into the office park, it is surprising that proper safe crossings have not been provided all the way through from the station

31. Far from Normandy House being the "gateway" to the Basing View park, as the Council's witnesses described it, in reality the start of the park is at the western end of the avenue of office buildings marked by the new superstore on one side of the road and the landmark modern office building, Matrix House (H), on the other. Normandy House, St Clements House and Clifton House form a separate cluster of office buildings remote both geographically and in character from Basing View proper.

32. Normandy House has not been treated as part of Basing View in planning terms. The Station Quarter features as a separate zone in the Council's planning policies to which the Basing View Policy, Policy SS8 of the Local Plan, does not apply.

33. When the Council agreed at the Cabinet meeting of 11 September 2018 to disapply Class O permitted development rights allowing office to residential conversions in order to protect Basing View as a high-quality strategic employment area reserved for B1 office use, Normandy House and its neighbours were not included. It was not until after these proceedings commenced that the boundary of the proposed protection zone had been modified to include the building in the required public consultation. The Council's own planning officers advised in August 2018 that the removal of permitted development rights could not be justified on planning grounds in the Station Quarter because there was currently "no overwhelming evidence to indicate that it should be protected for the economic wellbeing of the area".

34. That is not to say that Normandy House is not an important building in its own right. We accept that with its prominent location adjoining the station it is. We also accept that it is a landmark on the pedestrian route to the office park. But it is certainly not part of the park.

35. Finally, we note that the Council's Basing View Executive Committee adopted a Masterplan for the future of its estate on 6 March 2018 which envisages the Station Quarter as a district of new Grade A office buildings with restaurants and retail units on ground floors fronting a new Station Boulevard giving improved pedestrian access to Basing View. The Masterplan does indeed identify this area as a gateway, but the plan is entirely inconsistent with the current layout and ownership of the buildings. Its achievement would require the demolition of Normandy House and its immediate neighbours and would necessitate the acquisition of the applicant's headlease. Although we were shown the Masterplan documents, it was described by Ms Dean as "aspirational" and it was not suggested that the Council's vision was material to the issues we have to determine.

The Building

36. Normandy House occupies a site of approximately 1.3 acres. It is an imposing building with two wings arranged in an L-shaped configuration with a decked car park to the rear. The main entrance to the offices is on the corner of Bunnian Place and Alencon Link on the station side of the site.

37. The building was constructed in the early 1980s with a concrete frame, brick facings and a central core linking the two wings. A small reception area gives access to a staircase and four passenger lifts. Both wings of the building have a basement, lower ground and ground floors. There are eight upper floors in the north wing and four in the east wing.

38. The net internal area of the building is 76,364 sq ft (7,094 sq m). Both wings are of similar dimensions on the upper floors, having about 5,000 sq ft on each side of the central core (the eighth floor is smaller and is not served by the lifts). The floorplates are relatively narrow by modern standards but offer ample natural light. The original specification included suspended ceilings, an HVAC cooling system and three-compartment under floor trunking. Those features remain today but all mechanical and engineering services are now inoperative. The slab to slab height of each floor is 3.30m. The current clear floor to ceiling height is 2.7m, although this is reduced to 2.4m below a central bulkhead which houses ducting running the length of the office floors.

39. The car park provides spaces for 287 vehicles on six levels, a ratio of one space per 266 sq ft of office accommodation – generous by modern standards.

40. The applicant has not complied with its repairing covenants in the headlease and the building is unlettable in its current condition. The experts agree that to put it into a state of repair it would be necessary to replace most if not all of the mechanical and engineering installations. With new comfort cooling or air conditioning to all office areas, category 7 lighting and new lift carcassing, all presented in a repaired and redecorated condition, the experts agree the building would be considered a Grade B office building under the standard British Council for Offices specification.

41. The experts also agree that to maximise the marketability of the building as offices, work would be required going beyond simple repair. They referred to this as "refurbishment" by which they meant the provision of modernised toilet facilities, a raised floor, top-grade lighting, a redesigned entrance and reception area, new air conditioning and a new ceiling system. No significant external works would be required. These modifications would produce a refurbished building suitable for occupation on a multi-let basis.

42. A programme of refurbishment of this scale would take one year to complete and would result in an office building of a Grade A specification (in the view of the respondent's expert) or at the top of the Grade B specification (in the view of the applicant's expert). These classifications are fluid and imprecise, but the experts agree that there is a market in Basingstoke town centre for refurbished office buildings of the sort which Normandy House could become.

43. Opening the application on behalf of the applicant Mr Rainey QC indicated that it would be established by the evidence that Normandy House is obsolete as an office building because of its design and relatively narrow floorplate, but that the same features make it a very good subject for conversion to provide regularly shaped, well-lit flats.

44. The suggestion that the building is not suitable for modern office use was based on what were eventually agreed to be misconceptions by Mr Beckett, the applicant's expert, concerning the minimum floor to ceiling heights required to accommodate lighting, air-handling and electronic communications services, and the permanence or otherwise of the central bulkhead. It is not necessary for us to rehearse the details of those suggested limitations because by the conclusion of his evidence Mr Beckett had accepted that he had been mistaken and that the 3.3m slab to ceiling height available is sufficient to satisfy modern requirements.

45. The agreed position was therefore that, depending on the extent of the repair or refurbishment undertaken, Normandy House is capable of meeting current market needs for either Grade A or top-quality Grade B offices. The building is unlikely now to attract a single occupier but would probably be let floor by floor in individual wings of around 5,000 sq ft. That consensus was consistent with the impression we formed on our inspection of a number of buildings in each category on Basing View.

The applicant's acquisition and management of Normandy House

46. The applicant is part of the Shaviram Group, a private equity investor established in 2013 which owns 23 properties in England. Evidence was given on its behalf by Mr Wechsler, Chief Operating Officer for the Group's activities in the UK, and by Mr Lipschitz, its Head of Acquisitions who was responsible for negotiating the purchase of the headlease of Normandy House.

47. The applicant acquired the headlease in July 2015, intending to convert the building to provide 114 flats for letting on assured shorthold tenancies at open market rents. Its vendor, Benedikt Estates (Normandy House Assets Ltd) ("Benedikt"), had previously approached the Council in 2014 concerning the potential for residential conversion. At that time the Council was willing at least to explore that possibility and a thus a joint marketing exercise began in February 2015~~which~~ saw the headlease and the freehold being offered for sale jointly. The joint marketing brochure described the building as "a Permitted Development Rights opportunity" subject to necessary consents, and stated that "the vendors will accept offers which include a sales and planning overage structure…which recognise[s] the value uplift associated with change of use and redevelopment".

48. In April 2015 Benedikt obtained prior approval from the Council under Part 3 of the Town and Country Planning (General Permitted Development) (Amendment) Order 2013 confirming that it enjoyed permitted development rights to change the use of the building from offices to residential providing 153 flats. This procedure was intended by government to encourage the provision of new residential accommodation on sites where the previous uses were either redundant or no longer appropriate.

49. Confirmation of permitted development rights made the building attractive to the applicant, which has specialised in the acquisition of commercial properties for conversion to residential use, and it acquired the headlease on 22 July 2015. Mr Lipschitz acknowledged that he had not approached the Council to discuss his intentions before proceeding with the deal.

50. Mr Wechsler confirmed that the applicant's board had appreciated the headlease contained a covenant restricting the use of the building to offices. He had also been aware that a number of bids had been received, nearly all of them being from residential developers, but none had been accepted by the Council. He nevertheless took comfort from the recent joint marketing which indicated a willingness by the Council to allow a development of the property involving at least part residential use. The Council's subsequent refusal to contemplate non-office use was obviously an unexpected and unwelcome turn of events.

51. Mr Wechsler also drew attention to the fact that Normandy House had been included by the Council in its strategic housing land availability assessments which list land available to meet housing need. In the August 2015 assessment it is listed as an opportunity site with no policy constraints preventing change of use to residential. Although the document was prepared by the Council in its capacity as local planning authority it nevertheless stated that the landowner (i.e. the Council) "recognises the potential for re-development". The document described the location as suitable for residential use and a residential conversion as "achievable and realistic". Those views were repeated in a monitoring report in December 2017 and were only removed from the Council's public assessments in May 2018 after the current dispute had emerged.

52. He acknowledged that the applicant had not complied with its covenant to keep the building in repair but that was because, in his words, there was no sense in carrying out works to facilitate occupation as offices in circumstances where there was no demand. Nor had it actively marketed the building seeking office tenants although costs had been incurred early in 2016 in preparing feasibility studies for one potential occupier whose initial interest had not developed. Marketing was restricted to a single for sale banner, with an old brochure from 2009 also available on request. The only lettings achieved were at rents of £1 to companies destined immediately to go into administration as part of a rates mitigation scheme. In the applicant's defence Mr Wechsler relied on the fact that at no time had the Council complained that it was in breach of the headlease; while that may be true of the parties' dealings with each other outside the boundaries of these proceedings, the Council's statement of case and evidence to the Tribunal contain just such complaints.

53. In April 2018 Shaviram obtained its own prior approval for two residential schemes: one for 150 flats and a second for 114 (two studios, 80 one-bedroom and 32 two-bedroom flats). Mr Weschler confirmed that its intention was to implement the 114-unit scheme.

The issues

54. The main issues between the parties focus on whether the office use restriction in clause 2(15) secures any practical benefit of substantial value or advantage to the Council. If the applicant cannot persuade the Tribunal that it does not, the requirements of ground (aa) will not be

satisfied and its application will fail. The make-weight case on ground (c) and the consequential modifications to clause 2(12)(b) could not succeed on their own.

55. In his closing submissions Mr Rainey identified no fewer than 13 separate sub-issues, but it is sufficient at this stage to identify the main questions we will now consider.

56. The experts disagreed over whether the reversionary value of the Council's freehold interest was more valuable with the building used as offices or as residential. This debate required consideration of the most appropriate valuation method, yield rate and rental value on each hypothesis, which in turn spawned questions of construction of the headlease.

57. Much less evidence was provided on the second issue, namely whether wider estate management considerations justified the conclusion that the restriction conferred a substantial practical advantage on the Council, other than in terms of value, by enabling it to require continued office use in this location. Those benefits were said to include the avoidance of a damaging precedent which might make resistance to similar applications in relation to other buildings more difficult to fend off (the so called "thin end of the wedge" argument).

58. If we are satisfied that ground (aa) has been made out by the applicant, there will then be an issue as to whether the Tribunal's discretion should be exercised in its favour.

59. Finally, if the Tribunal is persuaded to modify clause 2(15) as requested there will be further discrete issues in respect of the application concerning clause 2(12)(b). In particular, the Council contends that the Tribunal has no jurisdiction to modify a qualified covenant against underletting without landlord's approval of terms, since it is said not to be a restriction on the use of land.

Practical benefits of substantial value

60. The applicant's case was that the Council would receive a higher rent for the building and the value of its reversion would be greater, if Normandy House was converted to residential use as 114 flats than if it was retained as offices. For that reason, it was argued, the restriction to office use not only failed to secure any practical benefit of substantial value, it made the Council worse off than it need be.

61. Most of the dispute was over the value of the reversion if the building was retained in office use. Mr Beckett considered the value of the Council's reversion as offices to be £1m, while Ms Goodford valued the same reversion at £3m. In contrast, the disagreement over the value of the reversion in residential use was much smaller, apparently within any sensible margin of valuation judgment, with Mr Beckett valuing it at £2.45m and Ms Goodford at £2.47m. We will address the value of the building for office use first.

Office use

62. As the Tribunal (PH Clarke FRICS) explained in *Re Diggens' Application (No.2)* [2001] 2 EGLR 163, at [67] the mere existence of a restriction cannot, in itself, be a practical benefit: "A practical benefit is secured by a restriction when it flows directly from the observance of that restriction". For example, a covenant prohibiting any use other than as a public house does not oblige the owner to keep premises open as a public house, so the continuance of the business of the public house cannot be said to be a practical benefit secured by the covenant: *James Hall & Co's Application* [2017] UKUT 240. We therefore agree with Mr Rainey's submission that, when considering the value of the Council's reversionary interest, the correct comparison is between the proposed residential use and the current covenanted position, and it is irrelevant that the lessee might, in its own interests, take uncovenanted steps which enhance that value; any such additional value cannot be said to be secured by the covenant.

63. In this case the restriction is part of a series of covenants which do more than simply limit the use of Normandy House. Although clause 2(15) is expressed as an obligation to use the building only as offices, it does not oblige the headlessee to use the building at all. Its practical effect must, however, be considered in conjunction with clause 2(12)(a), which requires the Lessee to use its best endeavours at all times to fully let the Demised Premises. In combination, the covenants oblige the Lessee to use its best endeavours to keep the building fully let as offices. The benefits secured by the restriction are therefore the continuance of the use of the building as offices and the receipt by the Council of 15.5% of the net rents received from office tenants.

64. That much was not in issue, but the parties disagreed about the steps which the headlessee was required to take by clause 2(12)(a). The repairing covenant simply requires that the building be kept in good and substantial repair and condition throughout the term (clause 2(3)). Mr Rainey submitted that the "best endeavours" obligation could not be interpreted to require the applicant to do more than keep the building in repair. When assessing the benefits secured by the restriction to office use, therefore, the relevant comparator was the value of the building in repair, rather than any higher value which might be achieved by a comprehensive refurbishment.

65. The effect of a "best endeavours" obligation was explained by Buckley LJ in *IBM UK v Rockware Glass Ltd* [1980] FSR 335 at 343, which concerned a covenant to use best endeavours to obtain planning permission. It requires the covenantor to "take all those steps in their power which are capable of producing the desired results … being steps which a prudent, determined and reasonable owner, acting in his own interests and desiring to achieve that result, would take." Elsewhere it has been said that it requires the covenantor to do its best, not its second best: *Sheffield District Railway v Great Central Railway Co* (1911) 27 TLR 451 at 452.

66. We do not accept Mr Rainey's submission that the best endeavours required of the applicant to keep Normandy House fully let cannot extend to improving or upgrading it. If a reasonable building owner who wished in its own interests to maximise the prospects of letting the building would do more than merely keep it in repair and would instead refurbish it to a much higher standard, that course would be required of the applicant by clause 2(12)(a). Giving full effect to that obligation does not "override" the repairing obligation, as Mr Rainey put it. The two covenants are concerned with different things and there is no reason why the scope of the best endeavours obligation should be constrained by the repairing covenant. The commercial context, in which the Council shares only in the rents actually received during a term of 150 years, point

strongly to an expectation that the Lessee would be required to do whatever it would take to achieve a fully let building. Given the length of the term it is inevitable that the required steps will include periodically upgrading the facilities on offer to the standard expected in the market from time to time, rather than simply keeping them in repair.

67. Clause 2(12)(a) does not require the lessee to use its best endeavours to maximise the rent achieved through letting the building. The object of the obligation is to keep the building fully let, not fully let at the highest rent. The measure of the rent which must be obtained is provided by clause 2(12)(b), which requires the lessee to obtain the Council's consent to the rent for each proposed sublease "which shall be at a full market rent". The full market rent means the rent achievable for the building in its current condition. If the building can be kept fully let by maintaining it in a state of repair, but without undertaking a comprehensive refurbishment, there is therefore no obligation on the applicant to do more than repair.

68. The practical effect of the best endeavours obligation will therefore depend on the evidence about how readily the building could be kept fully let.

69. The experts agreed that the building would be more likely to let in individual suites, rather than as a whole. They identified various advantages (in particular its prominence and proximity to the railway station) and disadvantages (its relatively narrow floor plates) but agreed that, properly marketed, it would attract sub-tenants whether it was comprehensively refurbished or only put into a state of repair. The more basic the condition it was presented in, the more restricted the market it would appeal to. A commercial lessee would undertake a full refurbishment in their own interests in order to secure a higher return from the building.

70. In their joint statement filed before the hearing the experts also agreed that works going beyond simple repair and involving refurbishment would be required to maximise the marketability of the property. There is a healthy demand for both Grade A and Grade B space in Basingstoke, but the vacancy rate in Grade B buildings is higher, as Ms Goodford's evidence illustrated. She considered that the building would take four years to let fully in a repaired condition and two years if refurbished. At the conclusion of his oral evidence Mr Beckett confirmed his opinion that an owner of the building would be more likely to achieve a fully let building by upgrading it rather than by simply putting it into a state of repair consistent with the lessee's repairing covenant. Such a refurbishment would entail the installation of raised floors and a new suspended ceiling, modernised toilets, new mechanical and engineering systems including air conditioning and lighting, and a redesign of the current entrance and reception area. Ms Goodford estimated that the cost of that programme of works would be about £9m (as would the cost of a residential conversion) and would take 12 months.

71. It follows from our conclusion on the meaning of clause 2(12)(a) and from the consensus between the experts that the building would be more likely to be fully let if it were to be refurbished to the standard they described, that the lessee's obligation to use its best endeavours to fully let the building requires it to undertake that refurbishment.

72. The benefits secured to the Council by the office use restriction therefore includes maintenance of the value of the reversion, assuming the building will be refurbished to the agreed specification and not simply repaired. The fact that the building is not currently in that condition is the consequence of a breach of covenant by the applicant, on which in principle it cannot be allowed to rely to its advantage.

73. Ms Goodford's valuation of the Council's freehold interest assuming the building was refurbished as offices was £3m. This assumed a letting value of £22 per sq ft for the principal floors, giving an annual rent of £1,560,796, which she capitalised at 6%.

74. Mr Beckett was more pessimistic than Ms Goodford about the letting value of the refurbished building which he expected to achieve £18 to £20 per sq ft. He adopted a figure of £19 for the purpose of his own revised valuation which was carried out on a discounted cash flow basis and produced a value for the Council's reversion of only £1.05m.

75. We preferred Ms Goodford's assessment of the letting value of the refurbished building. She has considerably more experience of the office market, including in Basingstoke, than Mr Beckett, who relied on advice from Mr Newman, of Hollis Hockley. Although Mr Newman is active in the local letting market and well placed to express a view, he was not asked to give expert evidence. It was not clear what specification Mr Newman had assumed when advising Mr Beckett, or whether Mr Beckett had made the same assumption when forming his original view. Having initially thought that the building could not satisfy modern requirements for floor to ceiling heights and so could not be refurbished to the contemplated standard (a view which he subsequently acknowledged was incorrect), Mr Beckett's final opinion on the rental value of the refurbished building was an afterthought, volunteered following overnight reflection during cross examination. We found Ms Goodford's evidence on this issue more consistent and convincing and we accept it.

76. In his cross examination of Ms Goodford Mr Rainey devoted considerable effort to establishing that her suggested yield of 6% was far too low (Mr Beckett suggested 8 to 12% would be more appropriate, although he adopted a different method of valuation in arriving at his own reversionary value). In part Mr Rainey's attack was based on the proposition that a purchaser of the reversion could not be sure that the building would be refurbished. This would lead them to be cautious about the prospects of sharing in a rent of £22 per sq ft and to factor in the risk that the headlessee might do no more than repair the building, producing a rent of around £15 per sq ft. Logical though that proposition might appear, we accept Ms Goodford's evidence that in reality the interests of the prospective freeholder and the headlessee would be aligned in wishing to achieve the highest value, and that the prospective purchaser of the freehold would therefore be confident that the refurbishment would proceed.

77. When assessing whether the covenant secures to the Council a benefit of substantial value, we will therefore proceed on the basis that the value of its reversionary interest in the building configured for office use and refurbished in accordance with the applicant's best endeavours obligation, is £3m.

78. It is also relevant to consider the annual income receivable by the Council which, it will be remembered, is equal to 15.5% of the net rent received by the headlessee. On the basis of Ms Goodford's rental value of £22 per sq ft this sum would amount to £241,923 on the assumption that the building was fully let and income producing across all floors. Because of the way Mr Beckett presented his valuation on a discounted cash flow basis it was not apparent what the annual letting value of the fully let building would be assuming a rate of £19 per sq ft, but it must have been somewhat less than £1,450,000 providing an income to the Council of less than £224,000.

79. We received some evidence about the effect of rent-free periods and other inducements on the Council's income from the refurbished building. Ms Goodford's rent of £22 per sq ft was on a headline basis, prior to incentives, and she considered that to achieve a letting of space for a 5-year term incentives equivalent to 9 to 12 months' rent free would have to be granted. Mr Beckett thought 12 months was the appropriate level. Assuming 12 months and reducing the Council's income by 20% leaves an average annual return to the Council of £179,200, assuming the building to be fully let. We received no evidence about the likely incidence of voids (these were accounted for by Ms Goodford in the yield she selected) but inevitably these would be experienced and would reduce the Council's actual income further. If a rate of around 10% is assumed the average annual income would fall to about £160,000.

80. If the building was simply put into a state of repair, rather than refurbished, there was consensus between the experts that it would achieve a headline letting value of about £15 per sq ft (Ms Goodford's figure falling within the range spoken to by Mr Beckett). Assuming a 6% yield the value of the Council's reversion would be £1.875m. Fully let and income producing the building would produce an annual income to the Council of £162,204 but reducing this by 20% to reflect the same assumption regarding incentives would result in a figure of about £130,000, reducing to £117,000 with a 10% allowance for voids.

81. Our relevant conclusions are therefore that, refurbished to the agreed specification for office use, the value of the Council's freehold reversion would be £3m and its average annual income would be £160,000. If the building was repaired the average annual income would be £117,000 and its reversion would be worth £1.875m

Residential value

82. The apparently modest disagreement over the value of the building for residential use (Mr Beckett valuing at £2.45m and Ms Goodford at £2.47m) in fact concealed a greater divergence over the proper approach to valuation. Mr Beckett estimated the rental value of 114 flats in the building, fully let, to be £1,149,180 and his valuation proceeded on the basis that the Council would be entitled to receive 15.5% of those gross rents. Ms Goodford's residential valuations assumed gross rents of £1,116,000 but that before the Council's share was calculated the costs of insurance, services provided to the sub-lessees which would ordinarily be recouped through a service charge, and the headlessee's costs of management and letting would first be deducted. This would leave a net rent of £848,000, or £993,340 if only the costs of insurance and service charge items were deducted.

83. On further consideration Mr Bhose QC did not support the position taken by Ms Goodford in relation to the deduction of the headlessee's costs of management and letting. Taking 15.5% of Mr Beckett's £1,149,180 and Ms Goodford's £993,240, net only of insurance and service charges, the relevant comparison when considering the Council's projected annual rental income from the building in residential use is between £178,123 and £153,952.

84. This divergence depended on a question of interpretation of the headlease which we will resolve first.

85. The headlease includes a rather elaborate rent review clause at paragraph 2 of the Fourth Schedule. Its effect is to entitle the Council to receive, from the rent commencement date or rent review date in any sub-lease of the whole or any part of the building, a sum equal to 15.5% of the "net annual rents (including interest payable in respect of late payment but excluding insurance rents and where applicable service charge rents) actually received by the Lessee".

86. It was common ground that the Lessee is entitled to charge its sub-tenants both an insurance rent and a service charge, and that those sums are to be excluded from a calculation of the "net annual rents". It was also agreed that, in practice, a separate service charge or contribution towards costs of insurance would not be found in a standard assured shorthold tenancy agreement, under which the tenant would almost invariably pay a fixed annual rent.

87. Nevertheless, Mr Bhose submitted that the "net annual rent" should be quantified on the assumption that separate sums for insurance and service charges would first be deducted. If the headlease was modified to permit residential use, the Lessee would still be entitled to charge a service charge rent and an insurance rent. Clause 2(12)(b) required that the building be sublet at a "full market rent", whether to commercial or to residential sub-tenants, but there was nothing in the Housing Act 1988 or in the general law to prevent the Lessee from making separate charges for insurance and for the cost of services under an assured shorthold tenancy. That could readily be done in practice without increasing the sum paid by the shorthold tenant by designating an element of the total rent as referable to those items.

88. Since there was no contractual or regulatory reason for the lessee not to include separate insurance and service rents in its assured shorthold tenancy agreements Mr Bhose submitted that it should be assumed that that is what it would do. If it did not do so it would pay at least £20,000 a year more to the Council than if it did.

89. On behalf of the applicant Mr Rainey submitted that the full market rent required by clause 2(12)(b) is, in the case of a short residential tenancy, an all-inclusive rent. Private sector assured shorthold tenancies do not include service charge covenants, and there was no evidence that the applicant would try to let flats with a service charge clause.

90. Mr Bhose's submissions on this issue are clearly correct.

91. On examination the dispute is not over the meaning of "net annual rent" in paragraph 2 of the Fourth Schedule. The parties agree that if an insurance rent or a service charge rent are included in the terms of any subletting they have to be deducted from the gross figure paid by the subtenant before the Council's 15.5% is calculated. The real issue is whether the Lessee's obligation in clause 2(12)(b) that any underletting must be at a "full market rent", prevents the Lessee from including a service charge and insurance rent in an assured shorthold tenancy. In principle we see no reason why it should have that effect.

92. We agree with Mr Beckett that most short-term residential tenants would be discouraged by exposure to a variable service charge, but there would be no need for an insurance or service rent to be variable. A fixed sum could be calculated at the start of each tenancy, and revised on the agreement of any new rent, as representing the tenant's contribution towards the cost of services. Although that approach is rarely, perhaps never, encountered in short term private sector residential lettings, it is far from unknown in housing association assured tenancies (an example can be found in *Helena Partnerships Ltd v Brown* [2015] UKUT 0324 (LC)). Mr Beckett agreed that such an arrangement would be possible and there is no reason it could not be adopted at Normandy House.

93. Clause 2(12)(b) requires that the Lessee obtain the Council's consent to each subletting of the whole or part of the building, such consent not to be unreasonably withheld. Given that the basis of the rent sharing agreement is that the Council's share will be calculated net of insurance and service charge costs, it would plainly be unreasonable for it to refuse consent to a letting which included those features. Nor do we consider that objection could reasonably be made on the basis that the letting was not at the full market rent for an assured shorthold tenancy because insurance and service charges are unknown in that market. Whether a particular rent represents a full market rent depends on the other terms of the letting, and the appropriate level cannot be determined until those terms are known. Provided the total sum payable by the tenant, including insurance and service charge rents, is no lower in aggregate than the total rent usually achieved on a letting on more conventional terms, and provided the charges for insurance and services are justifiable as genuine estimates of the costs to be incurred, the net sum could not be said to be less than a full market rent. Since the headlease anticipates that any sublease may include a service rent and an insurance rent there is no reason to give a restrictive meaning to the expression "full market rent" to exclude a rent agreed on the basis that such sums will additionally be payable.

94. It follows that we are satisfied that the net annual rent to be taken into account in determining the value of the Council's reversionary interest is a figure net of the costs of insurance and services. Mr Rainey did not cross examine Ms Goodford on her 11% allowance for the cost of those items and Mr Beckett did not suggest an alternative figure. Reducing Mr Beckett's estimated rental value of £1,149,180 by 11% and then taking 15.5% of the net figure produces an annual rental return to the Council at January 2019 levels of £158,530. Ms Goodford's equivalent figure was £153,952. The difference is within a normal valuation range and we will adopt a mid-point of £156,250 as the anticipated annual return to the Council assuming the building is fully let as 114 flats.

95. If, as Ms Goodford suggested and as we accept is appropriate, it is assumed for the purpose of estimating the value of the Council's reversionary interest that voids are accounted for in her yield of 5%, the resulting reversionary value would be £3.125m.

96. In order to arrive at an estimate of the average annual return to the Council this figure must be further reduced to reflect bad debts and voids between lettings. Mr Beckett allowed 2 months for each 15-month letting, equivalent to about 12%. Ms Goodford allowed only 2.5%. Given the excellent location, the reasonable size of the flats which are proposed, and the headlessee's obligation to use best endeavours to keep the building fully let, we believe a more realistic estimate to be 7.5%, equivalent to about one month between lettings averaging 15 months.

97. If the annual income of £156,250 is adjusted by 7.5% for voids the average annual return to the Council would be around £144,500.

Conclusion

98. In summary:

(a) The value of the Council's reversion, assuming the building remains in office use and is refurbished to the agreed specification in accordance with the applicant's best endeavours obligation, would be £3m. Converted for residential use the reversion would be worth £3.125m.

(b) The Council's estimated annual income from the building if refurbished to the agreed office specification would be £160,000. Its estimated annual income from the building converted for residential use would be £144,500.

(c) If the building was repaired the Council's average annual income assuming office use would be £117,000 and the value of its reversion would be £1.875m.

99. Our conclusion is therefore that the continuation of the restriction on the use of the building to offices secures no benefit to the Council in terms of the capital value of its reversion, which was the main focus of the parties' submissions. It is true that the restriction secures a slightly higher annual income for the Council which we estimate at £15,500 a year, but the receipt of any rent over the lifetime of the headlease is subject to risks. Those risks are reflected in the yields of 5% for residential use and 6% for offices (adopting Ms Goodford's figure in both cases) and are fully reflected in the resulting capital values of the Council's reversion. We are therefore satisfied that the restriction to office use does not secure the Council a practical benefit of substantial value.

Other substantial advantages

100. In considering whether the restrictions secure for the Council any practical benefits which amount to a substantial advantage, it is relevant to have regard both to the Council's position as

owner of Normandy House and its interests as freehold owner of substantial land holdings in the neighbourhood, including the cluster of buildings immediately adjacent, its Basing View estate, and perhaps beyond that. No comparison is required between the benefit secured for the Council by the covenant and the advantage to the applicant of securing a release or modification. As Carnwath LJ observed in *Shephard v Turner* [2006] P & CR 28 at [21]:

> The "substantiality" of the benefits, as I understand paragraph (aa), is to be judged by their practical value to the covenantee, not by comparison with the importance of the proposed development to the applicant.

101. The assessment is not restricted to benefits of a particular type, such as the protection of land, or benefits measurable in money, but must be conducted on a wide-ranging basis. In *Gilbert v Spoor* [1983] 1 Ch 27, the Court of Appeal held that the potential loss of a landscape view was a practical benefit, even though it was not a loss which was observable from the benefitted land. At 32E-G, Eveleigh LJ said that the words of section 84(1A)(a) were used quite generally, and that "when one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right either in law or in equity, it is not surprising that the tribunal is required to consider the adverse effects upon a broad basis."

102. The breadth of considerations which may be relevant is not confined to the immediate consequences of the proposed modification and it will be legitimate in an appropriate case to take into account the possibility that one successful application may improve the prospects of others seeking the release of restrictions applying to other land. In *Re Snaith and Dolding's Application* [1995] 71 P & CR 104, 118 (in a passage approved by the Court of Appeal in *Shepherd v Turner)* the Lands Tribunal (Judge Marder QC, President) said that, although each application must be determined on its own merits, in the case of a building scheme it is legitimate to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme. Thus:

> "Insofar as this application would have the effect if granted of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would in my view deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme. Furthermore, I see the force of the argument that erection of this house could materially alter the context in which possible future applications would be considered."

That observation was made in a building scheme case involving a set of mutually enforceable covenants, and is likely to be of greatest significance in that context, but the principle (the so called "thin end of the wedge") is not confined to building scheme cases as the Tribunal (George Bartlett QC, President) observed in *Re Hextall's Application* (1998) 79 P & CR 382, at 391.

103. On behalf of the applicant, Mr Beckett analysed the benefits of the covenant in purely commercial terms, treating the Council as no different from any other substantial property owner. Mr Rainey QC took the same approach, describing the Council's interest as an investment. Although agreement between experts on what is an issue of law cannot be determinative, Ms Goodford and Mr Beckett also recorded in their statement of agreed facts that the Council was "to be viewed only as a landlord and as a commercial entity".

104. In contrast, Mr Bhose QC submitted that the Council had interests less immediately connected to the value of the reversion, but which were nonetheless important to it. He described the Council as the "custodian of the public interest*"* (an expression borrowed from *Re Willis' Application* (1998) 76 P & CR 97). Normandy House and the whole of the Basing View estate had been developed in the 1970s and 1980s as office buildings with the same restriction on use, and Mr Bhose invited the Tribunal to infer that the Council's purpose had been to bring economic prosperity to the town by securing investment and employment opportunities for local people. Ms Dean's evidence was that the Council was the owner of 75% of the employment land in the borough. It had now embarked on a long-term project to regenerate Basing View and the Station Quarter as a catalyst for attracting inward investment. The covenant restricting the use of Normandy House conferred a significant benefit on the Council by contributing to the achievement of that objective.

105. Despite it being a major point of contention between Mr Bhose and Mr Rainey it was not obvious to the Tribunal what the designation of the Council as custodian of the public interest added to its status as the owner of substantial land holdings in the centre of Basingstoke, and the benefits it could claim to derive from the restrictions in that capacity. The authorities to which Mr Bhose referred, while recognising a local authority's wider concerns, did not appear to attribute any decisive significance to them.

106. In *Re Willis' Application* a local authority objected to the modification of covenants prohibiting business use of a house on an estate where it retained the freehold of 70 houses, about half the total of which were let to council tenants. The applicant, who had acquired the freehold of her own home under the 'right to buy' legislation, wished to continue to conduct a bed and breakfast establishment from it. The council objected "as custodian of the public interest (i.e. for the benefit of its tenants and owners and occupiers of other properties on the estate)" and relied on arguments concerning the preservation of the amenity of the estate and the scheme of mutual covenants. The Tribunal accepted that description of the council, but its decision did not consider the significance of the "public interest" and addressed the arguments in an entirely conventional way. The same arguments would have been available to the council in its capacity as covenantor and as owner of the freehold of the tenanted houses on the estate. Given the broad basis on which the Court of Appeal in *Gilbert v Spoor* said the assessment of benefit should be conducted, the council must have been entitled to defend the scheme of covenants and the amenity of its tenants in any event.

107. The same can be said of the other case on which Mr Bhose relied, *Re Morgan's Application* (2006) LP/79/2004 (an unreported decision of the Lands Tribunal, Mr A J Trott FRICS) in which a local authority objected to the relaxation of a restrictive covenant prohibiting the sale of alcohol in a shop. The authority successfully argued that the modification would have an adverse impact on its nearby estate. It pointed out that the prohibition had not been imposed to protect the commercial interest of the council, but to protect "social amenity". The Tribunal accepted (at [61]) that the protection of the amenity of residents (tenants of the council) was a practical benefit to the council secured by the observance of the covenant. It also took into account the council's long-term policy of regenerating the neighbourhood and making lasting improvements in the lives of people living in deprived areas. There appears to have been no dispute over the relevance of those considerations, which went directly to what the Tribunal called "the physical and social fabric of the neighbourhood", but we can see no reason why a substantial

landowner could not rely on similar factors as part of the broad basis of assessment of the advantages secured by restrictions imposed for reasons which were more than purely commercial.

108. We therefore have no difficulty in accepting Mr Bhose's submission that in principle a covenantor which has imposed restrictions for a particular purpose, whether commercial or not, may rely on the achievement of that purpose as a benefit derived from the maintenance of the restrictions. We do not accept that it is necessary for the Council in this case to demonstrate that it holds its land for some particular statutory object, such as for the promotion of employment, before it will be entitled to pray in aid wider social and economic benefits to the citizens of Basingstoke if these can credibly be said to be promoted by the observance of the restriction on the use of Normandy House. Mr Rainey asked us to determine that the same principles apply to the Council as to any private landowner and we are content to proceed on that basis. But in our judgment those principles enable the Council, and any other substantial private landowner, to regard the prosperity and amenity of the wider neighbourhood in which their land is situated as practical benefits secured for them by restrictions they have imposed.

109. Even looking at the matter on a narrow basis, the general prosperity and attractiveness of an area is likely to have a positive influence on the value of a large landowner's retained land, including land which is let. It was common ground that practical benefits need not be measurable in purely financial terms to be relevant. Whether there are any such practical benefits will be a question of fact, but to the extent that covenants are imposed on land to promote general prosperity or social, philanthropic or community objects in the locality of the benefitted land, we see no reason why a covenantor or other beneficiary may not rely on the achievement of those objects in response to an application made on ground (aa).

110. The Council's evidence on what were referred to as estate management considerations was given by Ms Dean, its Project Director for Basing View and Commercial, who explained that since 2006 the Council had constituted a cabinet sub-committee, styled the Basing View Executive Committee, to manage its office estate and to plan for its future as older buildings came to the end of their useful lives. The functions formally delegated to the Committee included supporting the economic prosperity of the town and borough and promoting the long-term regeneration of Basing View as a vibrant business district and catalyst for inward investment.

111. The area for which the Committee has responsibility includes the Station Quarter, but it was formed after the Council had permitted Brook House and Skyline Plaza to be converted from office to residential use. The inclusion of the Station Quarter reflects the Council's view of the boundaries of its office estate and the relevance of the transport hub and the routes connecting it to Basing View.

112. The Committee has promoted a 15-year development agreement intended to regenerate 13 acres of land in Basing View as new office buildings and ancillary facilities. Recent developments include: the Florence Building (Plot 'O'), a 60,000 sq ft office building now let to a housing association, which has brought 450 new jobs to the borough; the grant of a lease on Plot 'W' for the construction of a business hotel and leisure facilities, intended to support the business park; and the refurbishment of Matrix House (Plot 'H') where all but 14,000 sq ft of a total of 95,000 sq ft Grade A office space is now let.

113. It is for the applicant to satisfy the Tribunal that the covenant does not secure practical benefits of substantial value or advantage. Nevertheless, it is convenient first to identify the suggested benefits on which the Council relies, and which the applicant must address. These were summarised by Mr Bhose in his closing submissions under six headings which overlapped to a significant degree and can be considered as falling into two categories: the prosperity and economic advantages for the town of retaining office use in preference to residential use; and the related but narrower benefit of avoiding any weakening of the Council's ability to rely on the office covenants in the headleases of other buildings to prevent them from being converted to residential use. We will deal with the narrower point first.

The suggested ratchet effect

114. The Council's argument was based on the so-called ratchet or "thin end of the wedge" effect of relaxing the office use restriction at Normandy House. Mr Bhose acknowledged that the decision of the Tribunal would not be binding in other cases but nevertheless argued that if this modification is permitted any application by another lessee would be determined against a changed background. The development of this building for residential use risked opening the way to further such developments and undermining the efficacy of the restrictions imposed in the Basing View headleases since the 1970s.

115. The Council's retained land in Basing View is let on long-term leases of individual plots containing similar prohibitions on non-office use. Many of these buildings are capable of conversion to residential use. Some are in need of refurbishment and one leased plot, the Glasshouse, is a vacant site, currently awaiting redevelopment. The potential for requests to be made to allow residential use is a genuine one, as Mr Beckett accepted. He and Ms Goodford agreed that Clifton House was a potential residential conversion in the Station Quarter area. Other potential targets were Springpark House (M), Norden House (J), Northern Cross (R), Viewpoint (U), and Network House (T).

116. Ms Dean identified seven buildings where the Council had been asked to consider relaxing restrictions to enable residential conversion. She considered it likely that further requests had been discouraged because the Council's unwillingness to contemplate such changes was well known. In the same way, Mr Bhose submitted, if the proposed modification was allowed at Normandy House, that would quickly become known in the market. The lessees of the various at-risk buildings would have a brief window until 1 October 2019 when the Council's Article 4 direction removing permitted development rights takes effect. Applications could be made during that period relying on those rights; after the direction had come into force ordinary planning applications could be made seeking change of use.

117. Avoidance of any weakening in its regime of covenants was, the Council suggested, a substantial practical benefit.

118. We will address this argument in two parts, first dealing with Basing View and then with the buildings in the Station Quarter immediately adjacent to Normandy House.

119. First, as we have already described above, Basing View is a distinct business district characterised by substantial office buildings. The Station Quarter is geographically and functionally separate from it and already includes two large residential buildings formerly in office use. We do not consider the relaxation of the restriction requiring Normandy House to be used only as offices would make it any more likely that a similar relaxation would be justified in relation to a building or vacant plot on Basing View. Each would be determined on its own merits and in its own context. The considerations which justified the Council's decision to adopt the Article 4 direction to defend employment opportunities in Basing View would be powerful factors militating against any such relaxation. Those considerations were felt by the Council when discharging its planning functions not to apply to Normandy House or the Station Quarter buildings. The suggestion made by Mr Bhose that buildings on the southern side of Basing View, fronting Churchill Way East, might be vulnerable to section 84 applications on the grounds that they were peripheral and not within Basing View 'proper' (despite being within the Article 4 direction) is simply not realistic.

120. Thus, while an agile developer might in theory apply for confirmation of permitted development rights on any building on Basing View in the period of a few weeks between the publication of this decision and the commencement of the Article 4 direction, they would still need to obtain a relaxation of the relevant covenant and we are satisfied that nothing which happens to Normandy House will influence their prospects of success.

121. Secondly, as regards the immediate neighbours of Normandy House, these comprise two office buildings, Clifton House and St Clements House, and a potential development plot.

122. St Clements House is fully let as offices but does not belong to the Council, whose only ability to influence the use of the building is therefore through the planning system. There is no inhibition on the grant of residential planning permission in the Station Quarter, and there is no reason to believe the use of Normandy House will make any difference to the outcome of such an application in respect of St Clements House.

123. The development plot (C) belongs to the Council and is earmarked by it for what Ms Dean described as "business facilities". On the assumption that those facilities, whenever they are built and whatever they comprise, would be leased by the Council on a long lease with a covenant prohibiting non-business use, section 84(12) would prevent any application to modify such a covenant for the first 25 years of the term.

124. Clifton House is an office building on ground and two upper floors comprising 13,300 sq ft of lettable space. It is the building closest to the station and lies directly opposite Crown Heights. Although much smaller than Normandy House, it has a similar relationship to Basing View, being on the pedestrian route from the station but otherwise remote. Mr Beckett understood that planning permission had been granted in the past for its conversion to residential use, although he did not know if that permission was extant. The freehold belongs to the Council.

125. While the conversion of Normandy House to residential use might make a similar application for Clifton House appear sensible, we do not consider that it would add significantly to

the risk already created by the conversion of Skyline Plaza and Crown Heights. Those changes, one of which was of a building on the Council's estate, set an example and helped give the Station Quarter its current mixed character. It is also notable that, when resolving to restructure the lease of Skyline Plaza in 2005, the Council was advised by its officers that the conversion of Crown Heights to residential use meant that such a use at Skyline Plaza would make no difference to the covenant at Normandy House (i.e. they considered the damage was already done). In the same way, we do not think the conversion of Normandy House would make any significant difference to the assessment which would be required if an application under section 84(1) was made in respect of Clifton House. Nor, because of its size and location, do we consider that the conversion of Clifton House to residential use would have any practical effect on the Council's wider estate, and it was not suggested that whether it remains in office use or not was a matter of importance in itself.

126. The pattern of covenants imposed by the Council is not, of course, a building scheme, but the consistency with which the same covenants have been included in leases (albeit without the element of mutual enforceability) means it has something of the same character. Nevertheless, we are satisfied on the facts that the preservation of this pattern of covenants in this location does not confer any substantial benefit or advantage on the Council.

The contribution of the restriction to the economic wellbeing of Basingstoke

127. Turning to the first and more significant suggested benefit, namely the contribution which Normandy House is capable of making to the economic wellbeing of Basingstoke, the Council placed considerable importance on the return to office use of a building in "prime pitch" next to the railway station and at the "gateway" to Basing View. It regarded the resumption of office use as part of the regeneration of Basing View as a high quality, sustainable environment and as an attractive destination for business. Subject to the outcome of these proceedings it intends to insist on the building being brought back into occupation within a relatively short period of time.

128. The evidence established that, while there is no shortage, there is a demand for both Category A and B space in Basingstoke. At 76,000 sq ft, this building is substantial, well located and capable of attracting new tenants. Ms Dean's evidence was that there was a lack of available office space in Basing View, and she received regular enquiries for space, including from office users who wanted to stay in, or locate to, Basing View, but could not find suitable space there. The Council's Economic Needs Assessment published in February 2018 predicts a modest undersupply of office space in the borough by 2029 and this justified its policy of protecting existing office stock.

129. It was said that the new or relocating businesses which would be attracted to occupy the 13 or 15 suites which the experts envisaged for Normandy House would offer new employment opportunities and contribute to the economic prosperity of Basingstoke.

130. Residential use would also be inconsistent with the Council's Masterplan for Basing View, which envisages a residential district at the eastern end of the park and not in the Station Quarter. Ms Dean considered that having residential use at the eastern end of Basing View would drive

footfall through the area, providing support for retail and leisure facilities such as the gym proposed for the hotel. Office use adjoining the station would be more attractive to staff and businesses and would reduce reliance on cars and increase public transport usage, consistent with the Council's transport strategy.

131. We accept the general thrust of Mr Bhose's submission that the Council has had a long-term policy of preserving office use on Basing View which it has promoted through the use of covenants and which contributes to the promotion of employment and the economic wellbeing of the borough. The recent exceptions to that policy are either alternative uses supportive of the office park (the hotel being built on plot W), or are in peripheral locations (such as Plot W, on the opposite side of the railway line, and now let to Network Rail as a training facility, and Plot Z, destined under the Masterplan to be redeveloped as a residential "Neighbourhood Quarter"). The Council's documents would have it that its policy applies as far west as the station but, as one travels west the integrity of this guiding principle is compromised, or more accurately, the area to which it has been applied comes to an end. Perhaps the greatest concession, and the one with the biggest impact in defining the functional western boundary of the office park, is the presence on Plot F of the very large and recently opened John Lewis/Waitrose store. We have already described how the new store acts as a buffer zone between Basing View and the Station Quarter and how Normandy House and its two much smaller neighbouring office buildings are divided from the office park by the store, the Eastrop roundabout and the vacant Plot C. The presence of Crown Heights and Skyline Plaza on the opposite side of the road, in wholly residential use, with The Malls shopping centre beside them contributes to the distinctly mixed character of this district.

132. The Station Quarter has been treated differently from Basing View by the Council, the most significant instances being the restructuring of the leases at Skyline Plaza to enable its conversion to residential use, and the abandonment, on officers' advice, of the proposal to exempt the Station Quarter from general development rights by means of the Article 4 direction. The first was said by Ms Dean, rightly, to be historic, based on decisions taken as long ago as 2006, while the second did not reflect the Council's preference as a landowner, but its responsibilities as a planning authority.

133. Less easy to explain away, however, is the willingness of the Council to market its own freehold interest in 2015, jointly with the marketing of the headlease by the applicant's predecessor, explicitly on the basis of its potential for a change of use. From the documents we were shown there appears to have been some political resistance to carrying this project through to completion, and we infer that it was an appreciation by the headlessee of the difficulty of persuading members of the Council (including those newly arriving in office following an election in May 2015) to authorise an eventual disposal that prompted the sale of the headlease alone to the applicant. Nevertheless, the Council's officers and the responsible cabinet member were prepared, in good faith, to embark on the marketing exercise and to meet preferred residential bidders as late as May 2015.

134. Ms Dean did not become an employee of the Council until February 2016. Although she had acted on a part time consultancy basis for a year before that, she was not party to decisions concerning the joint marketing of Normandy House. Neither the relevant cabinet member nor any

officer with responsibility at the time was called to give evidence. Some of Ms Dean's assumptions about the thinking of those involved seemed improbable (for example, concerning meetings with residential developers).

135. We accept that the Council had not given up hope of retaining Normandy House as an office building, but its willingness to market the freehold is consistent with an assessment that continued office use in that location was not a matter of particular significance. It is also of a piece with the decision made in 2006 to facilitate the conversion of Skyline Plaza and with the professional advice of officers to the planning committee that the Station Quarter was "not identified for its particular economic importance in the Local Plan". It was no doubt also influenced by the fact that four floors of Normandy House had been marketed by IBM since 2009 for sub-letting as offices without success, the whole building had been vacant and to let from 2013 onwards, only one of the 14 expressions of interest received during the joint marketing campaign proposed continued office use, and the three final bids received were all from residential developers.

136. Although Ms Dean gave evidence of regular enquiries concerning vacant space, the evidence in relation to the supply and demand for offices as a whole does not support the view that there is any current shortage. In November 2015 central government approved the designation of the Basing View Enterprise Zone covering the greater part of the office park. The Council's website suggested that the designation was intended to promote the development of underused sites.

137. More recently, the Economic Needs Assessment of February 2018 covered the period from 2016 to 2029. It suggested that at the start of the period the office market was slow along the M3 corridor and there was a reasonable amount of refurbished space available to meet demand despite permitted development rights having removed a significant amount of office stock from the market. Projections of future demand were not consistent, with one study suggesting an additional 4000 jobs could be expected to be created by 2029 while another projected half that number. On the basis of the more optimistic forecast the borough would have a modest undersupply of office space towards the end of the period of assessment, but there was nevertheless considered to be scope for greater efficiency in the use of existing floor space with the result that there was no need to allocate further sites for office use.

138. Our understanding of the Economic Needs Assessment is that its projections of capacity assumed that all buildings for which permitted development rights had been confirmed would be converted to residential use and did not include them on the supply side of the assessment. Normandy House was therefore taken not to be available to satisfy office demand.

139. The Council's approach did not allow for the contribution which residential use at Normandy House would make to the regeneration of the town centre, although Ms Dean did regard the proposed Neighbourhood Quarter at the opposite end of the business park as a significant support to the prosperity of the park itself, and the Basing View planning policy requires 300 residential units within the park.

140. Looking at the evidence as a whole, we do not accept the Council's case that the retention of Normandy House in office use will make a significant contribution to the economic wellbeing of the town. The likelihood is that the upgrading of the building to provide an additional 76,000 sq ft of Grade A (or superior Grade B) office space would result in a continued oversupply of such space in the short term and would draw potential occupiers away from Basing View making it more difficult to secure the regeneration of the park. The recasting of the Station Quarter as a more consistently residential area would not provide the gateway experience which the Council aspires to in its Masterplan, although the Council acknowledges that plan as aspirational and, in its more developed vision, as inconsistent with the continued presence of Normandy House at all. The continuation of the restriction does not contribute towards the realisation of the Masterplan and we give no weight to it.

141. For these reasons we conclude that the retention of the office use restriction does not secure any benefit of substantial value or advantage to the Council and that ground (aa) has been made out.

142. It is unnecessary for us to consider the claim on ground (c).

Discretion

143. Mr Bhose did not argue that modification of the office use restriction should be refused if ground (aa) was made out, and we think he was right not to do so. This is a purely commercial dispute, and it would not be appropriate to withhold relief on the basis of the applicant's breach of covenant in failing to keep the building in repair. If the Council considers it has a claim in damages arising out of the failure of the applicant to repair or refurbish the building and to make greater efforts to let it, it can pursue that claim elsewhere.

144. We will therefore make a direction modifying clause 2(15) by adding the words "or as a residential building comprising 114 flats", or such other wording as the parties may agree.

The application in relation to clause 2(12)(b)

145. The applicant's statement of case additionally sought the modification of clause 2(12)(b) which requires that every subletting of part of the building be on terms, including a full market rent, approved in advance by the landlord. The proposed modification would avoid the need for the applicant to obtain the Council's consent before each residential letting of any part of the building at a full market rent without a fine or premium for a term of up to three years.

146. This part of the application was formally withdrawn by the applicant in correspondence before the commencement of the hearing. It was revived in closing, although the revival had been foreshadowed in opening. Reliance is placed on ground (a), the suggested obsolescence of the

requirement to obtain prior consent to the identity of the proposed tenant and the terms of letting in the case of assured shorthold tenancies.

147. We are not satisfied that a covenant the effect of which is to require consent to the terms and rent of a proposed underletting before that underletting can proceed, but which is subject to the proviso that consent cannot be unreasonably withheld or delayed, is a restriction "as to the user" of the land in question (as it must be for the Tribunal to have jurisdiction under section 84(1)). But we do not base our decision to refuse the requested modification on jurisdiction alone. We do not accept that the requirement is obsolete, in the sense that it no longer serves the purpose for which it was intended if the building is in residential occupation.

148. The purpose of the relevant portion of clause 2(12)(b) was to provide reassurance to the Council that it is not prejudiced by the terms of any letting and to enable it to be satisfied that a full market rent (in which it will share) is being charged. Mutual self-interest was not considered sufficient to provide that comfort when the building was to be restricted to office use, and the wider use we will permit has not changed that. No doubt the parties will be able to agree standard terms of letting, and the Council may or may not wish in practice to concern itself with the identity of individual sub-tenants, but it is likely to take an interest in the rent being charged and it is entitled to do so.

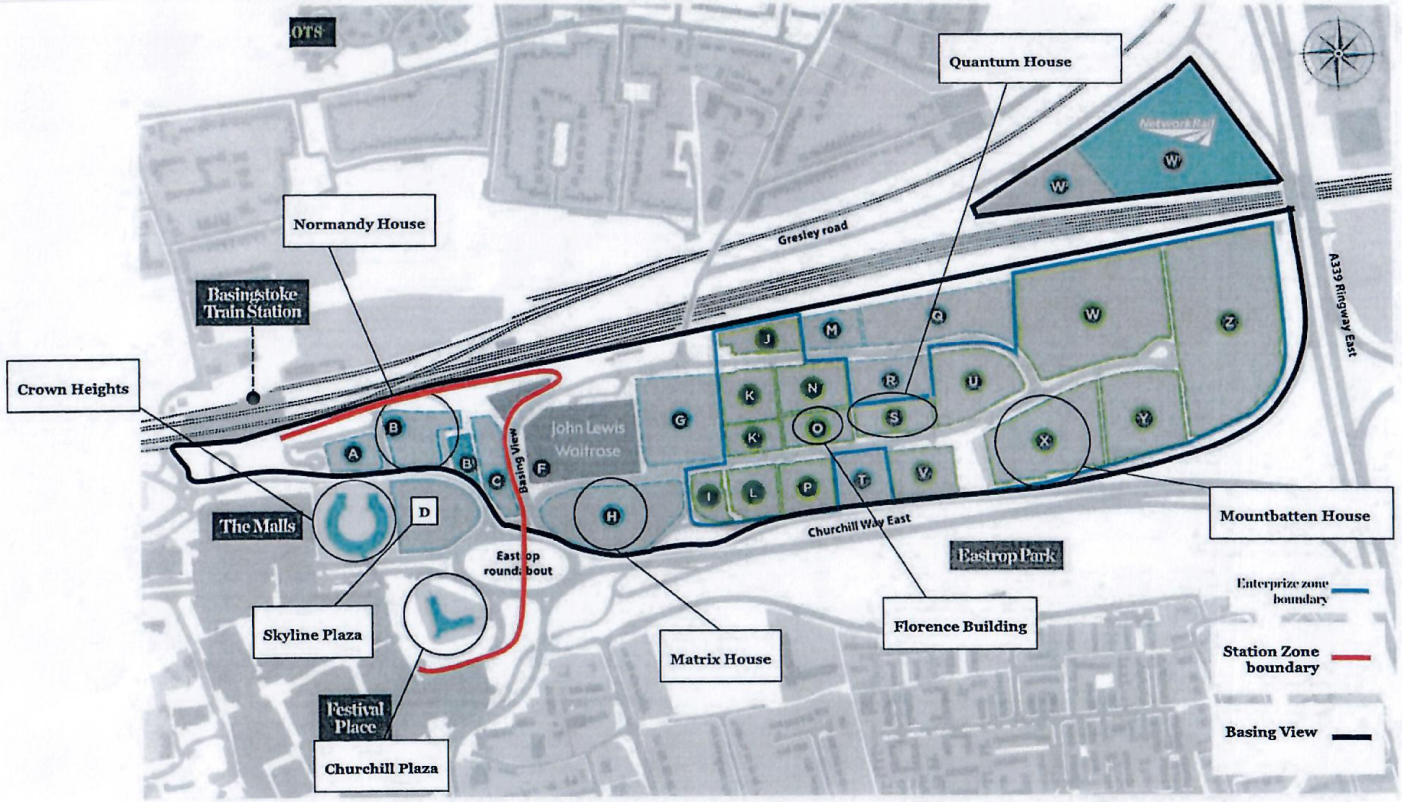
149. This decision is final on all matters other than costs. The parties may now make written submissions on costs, in accordance with the directions contained in the letter accompanying the decision.

Deputy Chamber President

P R Francis FRICS

Dated: 30 August 2019

NORMANDY HOUSE, BASINGSTOKE LP/5/2018 APPENDIX



Key

Within Station Zone

- A Clifton House
- B Normandy House
- B1 St Clement House
- C Development Plot
- F John Lewis at home and Waitrose
- G ENI House
- H Matrix House
- I The Glasshouse
- J Norden House / Innovation Centre
- K Development Plot
- K1 Parade and Marketing Suite
- L Southern Cross
- M Springpark House
- N The Square
- O The Florence Building
- P Grosvenor House
- Q1 De Vinci House
- Q2 Unum House
- Q3 Renaissance
- R Northern Cross
- S Quantum House
- T Network House
- U View Point
- V Development Plot
- W Development Plot
- W1 Network Rail
- W2 Gresley Road Triangle Plot
- X Mountbatten House
- Y Belvedere House
- Z Fanum House

Basing View

-2178-

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