UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 189 (LC)

LC-2022-401

Royal Courts of Justice,
London WC2A

8 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

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

RESTRICTIVE COVENANTS – modification – obsolescence – qualified leasehold covenants preventing improvement or change of use without landlord's consent – 60 year term remaining – proposal to replace redundant warehouses with residential towers – landlord willing to consent on conditions unacceptable to applicant – s.84(1)(a),(aa), (c), Law of Property Act 1925 – application refused

BETWEEN

GREAT JACKSON STREET ESTATES LIMITED

Applicant

-and-

MANCHESTER CITY COUNCIL

Objector

Re: 34 Great Jackson Street,
Manchester M15

Martin Rodger KC, Deputy Chamber President and Mr Peter D McCrea FRICS FCIArb

5 - 6 July 2023

Martin Hutchings KC, instructed by Walker Morris LLP, for the applicant
Elisabeth Tythcott, instructed by Manchester City Council, for the objector

The following cases are referred to in this decision:

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

Driscoll v Church Commissioners for England [1957] 1 QB 330

Truman, Hanbury, Buxton & Co's Application [1956] 1 QB 261

Chatsworth Estates Ltd v Fewell [1931] 1 Ch 224

Caledonian Associated Properties Ltd v East Kilbride DC (1985) 49 P&CR 410

Introduction

1. The applicant holds the lease of two redundant warehouses in a part of Manchester which is rapidly being developed as an area of modern, high-density housing. It wants to demolish the warehouses and, at a cost of £300 million, to replace them with two 56-storey tower blocks containing 1037 flats. But the applicant faces three problems. First, the unexpired term of the lease has just under 61 years to run (which is too short to enable any flats it completes to be sold on mortgageable leases). Secondly, the lease includes a series of covenants which prevent the redevelopment of the warehouses without the consent of its landlord, Manchester City Council ('the Council'). And, thirdly, the Council is willing to consent to the redevelopment, but only on terms which the applicant considers unacceptable.

2. The applicant's solution, at least to the second of these problems, has been to apply to the Tribunal under section 84, Law of Property Act 1925, for the modification or discharge of eleven covenants to enable the redevelopment to be carried out without the consent of its landlord. It is submitted on its behalf that it will then be able to complete the project using only its own money and that, rather than selling it on, it will be in a position to hold the development, letting the individual flats on short tenancies at rack rents, before the land reverts to the Council at the expiry of the term.

3. The redundant warehouses are at 34 Great Jackson Street (the Site), from which the applicant derives its name.

4. At the hearing of the application the applicant was represented by Mr Martin Hutchings KC, and the Council by Ms Elisabeth Tythcott. We are grateful to them both for their submissions.

Background to the application

5. The applicant is a special purpose vehicle with no assets other than its lease of the Site. It is said to be part of a substantial group of companies operating under the name "Commercial Property Centre" or "CPC" and controlled by Mr Aubrey Weis, a property investor based in Manchester. The applicant itself was described as dormant by Mr Benjamin Rose, who gave evidence on its behalf.

6. The Site comprises an area of approximately 1.49 acres situated between the Mancunian Way ring road to the south and Great Jackson Street to the north. The only buildings on the Site are the two warehouses which date from the 1970s. At that time the Site was part of a predominantly industrial area marked out by light industrial units separated by extensive surface car parking.

7. The warehouses were built pursuant to an Agreement for Lease dated 15 August 1973 by which the Council agreed to grant a predecessor of the applicants a term of 99 years from 25 March 1973. On completion of the warehouses the lease was granted on 18 July 1978 by the Council to Hanover St George Ltd. Later, a supplemental deed of 17 September 1985 between the Council and Pyrawand Ltd, in which the lease was then vested,

extended the term to one of 99 years from 29 September 1984. At the date of the hearing before the Tribunal just under 61 years of that term remained unexpired.

8. The lease includes covenants by the lessee to which we will refer in greater detail below. None of those covenants is unusual or inappropriate for a long lease of premises intended to be used, initially at least, for light industrial or warehouse purposes.

9. The lease initially provided for rent review every 14 years to one sixth of the rack rental value of the land and warehouses. In 1985 these provisions were varied by deed. The rent was apportioned between the two warehouses, each occupying approximately half of the Site. The rent review dates were altered to fall in 1987 for one building and in 1994 for the other, and then every ten-years in each case. The basis of review was changed to one tenth of rack rental value. The effect of the rent review clause is therefore that, if the applicant carries out improvements by building the proposed residential towers it will pay rent equal to 10% of the rack rental value of one of them from 2054 and of the other from 2057, in each case until the expiry of the term in 2083.

10. The 1985 deed also introduced an option in favour of the tenant to acquire a further term of 26 years from the expiry of the lease in 2083. That right is exercisable only if the lessee has rebuilt or replaced at least one of the buildings on the Site "with the consent and approval of the Lessors (which consent shall not be unreasonably withheld or delayed)". There was some debate about whether that option would be exercisable if the development takes place without the consent of the Council after the covenants had been modified by the Tribunal.

11. Shortly after the lease was extended in 1985, the Site was acquired by a company in the CPC group before eventually being transferred to the applicant in April 2019. Both warehouses were let until about 2008 but since then they have remained unoccupied, although, we were told, available to let.

12. By 2007 the Council had recognised that the area previously given over to light industrial and commercial uses on either side of Great Jackson Street was in decline and in need of regeneration. That area was first included as a distinct district with its own development framework in the Council's 2007 Development Plan which forms part of the current City Centre Strategic Plan published in 2016. Under that framework the area bisected by Great Jackson Street and bounded by Chester Road and the River Medlock to the north and west and by Mancunian Way to the south is to become a new high-quality residential neighbourhood. The Site is designated as Plot G on the framework masterplan and was originally earmarked as a location for three new residential buildings.

13. The Council owns the freehold reversionary interest in three of the Great Jackson Street development plots, including Plot G. Some of those plots were the subject of long leases in terms very similar to the applicant's lease of Plot G but the Council has worked with the holders of those leases to facilitate development. For example, it holds the freehold of part of Plot C subject to the residue of a number of long leases granted in the 1970s'. These were surrendered to the Council by the leaseholder, Renaker Build Ltd, in return for new 999-year building leases which provide for a phased development of Plot C to an agreed timetable. Companies in the Renaker group already owned the freehold of the remainder

of Plot C and much of the rest of the land within the development framework masterplan. Since 2016 it has secured planning consent for eleven substantial residential towers in the immediate neighbourhood, four of which have been completed, with a further two nearing completion.

14. The applicant has been working on its own detailed proposals for the redevelopment of the Site since 2017 and was said by Mr Rose to have spent more than £700,000 on the project so far. The presence of a main sewer running under the Site has added significantly to the cost of redevelopment and prompted the applicant to redesign its original scheme for three more modest buildings and replace it with the current proposal for two 56 storey towers. An application for planning consent for that scheme was submitted in December 2020 and obtained the approval of the Council's planning committee on 29 July 2021, subject to the negotiation of an acceptable section 106 agreement. We understand that the basic terms of a section 106 agreement are broadly agreed but have not yet been finalised.

15. We were given no reason to doubt that, acting in its capacity as local planning authority, the Council will enter into a section 106 agreement with the applicant and grant planning consent for the proposed development. We were provided with written evidence prepared by the applicant's planning expert, Mr Murray Lloyd of Continuum, explaining how its proposals were consistent with the local development plan, but that proposition was never in doubt.

16. The Council has offered to grant the applicant a new lease of the Site for a term of 250 years to facilitate the implementation of the anticipated planning permission. The lease would be a building lease on terms very similar to those agreed with Renaker for the development of Plot C, and with other developers for different development sites in the city, and the Council regards its terms as standard. The applicant strongly disagrees and considers the proposed terms to be onerous and thinks that they would be unacceptable to any potential funder or investor in the project. Despite protracted negotiations the parties have so far been unable to reach agreement on terms acceptable to them both.

17. The applicant requested the Council's consent to the proposed development under the terms of the existing lease on 27 May 2022, but it has not received an unqualified approval. The request for consent was contained in a letter before action threatening that in the absence of a positive response, proceedings for the discharge of the restriction would be commenced in this Tribunal. We were told that the Council's response to the letter was marked "without prejudice" and we have not been shown it. Nevertheless, we understand the Council's position to have been and to remain that while it is strongly in favour of the development of the Site, it is not willing to consent to the proposed works being carried out under the terms of the existing lease; it nevertheless remains willing to negotiate over the terms of a new building lease to be granted to the applicant to enable the works to proceed.

The Tribunal's jurisdiction

18. Section 84 of the 1925 Act gives the Tribunal power to discharge or modify restrictive covenants affecting land where certain grounds in section 84(1) are made out. That power

is discretionary. As the Supreme Court explained in *Alexander Devine Children's Cancer Trust v Housing Solutions Ltd* [2020] UKSC 45 (at [33]):

> 'It is well-established (see, for example, *Driscoll v Church Comrs for England* [1957] 1 QB 330) that, if satisfied that one of the prescribed grounds has been made out, the Upper Tribunal has a discretion whether or not to make an order for modification or discharge of the restrictive covenant. The important statutory words to this effect are in section 84(1): the Upper Tribunal "shall … have power". The five grounds are therefore concerned with establishing the Upper Tribunal's jurisdiction and can be helpfully labelled the "jurisdictional grounds": at least one of those jurisdictional grounds must be established by the applicant before the Upper Tribunal can go on to make what is ultimately a discretionary decision.'

19. The application is made under three of the grounds in section 84(1): ground (a), the restrictions being said to be obsolete; ground (aa), because the proposal is a reasonable use of the land and its completion will cause the landlord no substantial loss or disadvantage; and ground (c), on the basis that the objector will not be injured by the proposed modification. It was common ground that the burden of showing that at least one of these grounds is made out falls on the applicant and that the Tribunal will then have a discretion whether to modify the restrictions or not. It was also agreed that the fact that the restrictions are leasehold rather than freehold covenants is no obstacle to their being modified as the conditions in section 84(12) are met.

The restrictions

20. The applicant invites the Tribunal to modify eleven of the twenty-five covenants contained in the 1978 lease in its original form. They are lengthy and it is unnecessary to quote them verbatim, as their effect, and the extent to which they interfere with the applicant's proposals, can more usefully be summarised. They fall into three types: first, those which prohibit carrying out works on the Site without the consent of the Council, and which are not qualified by a condition that the Council's consent is not to be unreasonably withheld; secondly, those which impose restrictions on development or future use of the Site without the consent of the Council, where it is expressly provided that consent is not to be unreasonably withheld; and thirdly, other restrictions not concerned with development.

21. The first group of restrictions prevent the applicant from carrying out development without the Council's consent, but do not stipulate that the Council may not refuse its consent unreasonably:

    (a) Clause 2(ii) prohibits building over a public sewer, a gas main and a service duct containing electric cables running under the Site, without the Council's consent; the covenant also prohibits doing anything which may cause damage to those installations. In 2019 the applicant reached agreement with United Utilities for the diversion of the sewer but it still needs the Council's consent; its scheme involves building over the service duct, for which it also requires the Council's consent.

(b) Clause 2(iii) prohibits building without the consent of the Council over more than two thirds of the Site or within 10 feet of the side or rear boundaries. The applicant's proposed development would encroach over that building line. Although the development would just come within the permitted maximum site coverage, the margin is so small that the applicant also wishes to obtain a modification acknowledging that the proposal will not breach the restriction.

(c) Clause 2(viii) is a restriction on use, rather than on works. It prohibits the use of the Site other than for "the said buildings" (meaning, initially at least, the two warehouses); it also prohibits the use of the buildings, without the consent of the Council, other than as light industrial buildings or wholesale warehouses or repositories for any purpose. Although by section 19(3), Landlord and Tenant Act 1927, a qualified leasehold covenant restricting use is subject to an implied condition that consent may not be unreasonably withheld, that condition does not apply where the proposed change of use will also involve structural alterations, as in this case. The applicant therefore needs the consent of the Council to use the Site for its residential tower blocks.

(d) Clause 2(xiii) is a covenant against damaging or removing any trees or shrubs growing on the Site without the consent of the Council's Estates and Valuation Officer. 49 trees or shrubs will be removed as part of the applicant's works. It is intended that some of these will be replaced on site and that the applicant will pay a sum to enable more to be planted elsewhere. The intended landscaping scheme has been approved by the Council in its capacity as local planning authority, on the advice of its arboriculturist.

22. The second group comprises two restrictions giving the Council qualified control over the development and use of the Site, by requiring that the applicant obtain its consent which may not be refused unreasonably. They are:

(a) Clause 2(vii), which prevents the applicant from making additions, alterations or improvements to the existing warehouses, or erecting any other buildings, without the consent in writing of the Council, which is not to be unreasonably withheld. If consent is given by the Council the covenant obliges the applicant to carry out the permitted work in accordance with plans and specifications prepared by, and under the supervision of, a registered architect and with materials previously approved by the Council.

(b) Clause 2(x) prohibits the use of any open area of the Site at any time for the open storage of goods or materials without the consent of the Council (not to be unreasonably withheld) and requires the applicant to comply with any conditions subject to which any such consent may be given. It is anticipated that goods will be stored on the Site during the construction of the new buildings, for which the Council's consent will be required.

23. Finally, the applicant invites the Tribunal to modify the third group of five miscellaneous restrictions concerned less with development than with the general use and management of the Site:

(a) Clause 2(ix) is a covenant against the use of the buildings in any manner which the Council may deem to be "a nuisance damage grievance or annoyance" to it or its tenants, or to the owners or occupiers of other property in the neighbourhood, or to the neighbourhood itself. The applicant intends to abide by the usual planning conditions which will regulate the development of the Site but anticipates that its works will be likely to cause some level of inconvenience to those covered by the wide terms of this restriction.

(b) Clause 2(xii) prohibits the deposit or storage of waste material or receptacles for waste so as to be visible from any public footpath street or road. The anticipated planning permission will provide for a comprehensive scheme of waste management while the proposed works are being undertaken and once the new buildings have been completed areas for the storage of waste will be provided within the new buildings. The applicant nevertheless asks for this restriction to be modified.

(c) Clause 2(xvi) prohibits the posting of bills or advertisements on hoardings or on the walls or fences surrounding the Site. It is proposed that, in the short term, site safety notices and marketing advertisements will be displayed which will breach this restriction.

(d) Clauses 2(xxi) and (xxii) are covenants dealing with alienation appropriate to a commercial building but not commonly found in leases of residential buildings. The Tribunal's jurisdiction to modify these restrictions is in issue, and depends on whether they are restrictions "as to the user" of land. The first prohibits assignment, sub-letting or parting with the possession of the whole or part of the demised premises without the consent in writing of the Council, which is not to be unreasonably withheld or delayed. It also requires that every permitted underlease should contain a similar covenant requiring the consent of the Council to any such dealing. The second requires notice in writing to be given to the Council within one month of any assignment, sub-letting or devolution of any part of the demised premises. Mr Hutchings KC acknowledged in opening the application that this covenant was not restrictive in nature and that the Tribunal had no jurisdiction to modify it, but he maintained that the covenant against subletting without consent was a restriction "as to the user" of the land.

The application

24. The application was commenced on 11 August 2022 and was initially for the discharge entirely of the eleven covenants. It was later amended to request modification of the covenants as an alternative remedy. The suggested form of modification was not revealed to the Council or the Tribunal until the hearing. In his skeleton argument Mr Hutchings KC confirmed that the applicant's case was now solely for a modification of the covenants to the extent required to enable it to implement the planning permission it anticipates being granted once the section 106 agreement has been completed. Discharge is no longer sought.

25. Before we consider the grounds on which the application is brought, it is relevant to mention the limits of the evidence provided by the applicant in support of the application.

We heard no evidence about the details of the negotiations over the grant of a new long lease of the Site which have been going on in parallel to the planning process and we have not been asked to consider whether the position adopted by either side or the terms they propose in those negotiations are reasonable or unreasonable. Nor have we been asked to determine whether the Council's refusal to consent to the proposed redevelopment under the existing lease has been reasonable or unreasonable. We therefore express no view on any of those questions, which might nevertheless have been relevant to our determination had we been provided with relevant evidence.

26. The applicant's only factual witness was Mr Rose. He is a Chartered Surveyor who has worked for Mr Weis and his companies since 2004. He described his role as that of a 'fixer' and explained that it involves advising in relation to property investments, development opportunities and general asset management issues. He has been advising the applicant on the redevelopment of the Site since 2017, project managing the planning process and leading on the s.106 negotiations. He is not an officer or director of the applicant, but he was authorised to speak on its behalf.

27. In view of his long association with the applicant, Mr Rose was in a position to provide evidence dealing in some detail with its track record, resources, and business model; such evidence would have been of assistance, since the Council's main concern is over the deliverability of the project, but Mr Rose preferred (or had been advised) to describe the operations of the group of which the applicant is part in only very general terms. The explanation he gave for this reticence was the owner's preference for privacy. He attempted to make good a lack of detail by adopting a combative approach in the witness box, often responding to questions from Ms Tythcott with questions of his own. He was more conciliatory towards the Tribunal, but not much more transparent. When asked by us about gaps in the applicant's evidence (for example about other projects it had successfully completed) he suggested we should 'Google it'; when asked whether there was a document evidencing his client's wealth, his response was 'well what do you want to see?'; when asked to comment on why other developers had been willing to agree terms similar to those which the Council sought from the applicant, his response was that they were 'idiots'. From a Chartered Surveyor, we found his general approach disappointing.

28. Mr Rose's written evidence also appeared to be inconsistent with the case he and Mr Hutchings advanced at the hearing. In particular, in his witness statement prepared on 23 March, he explained that the restriction on subletting contained in the warehouse lease was impractical and obsolete in view of the applicant's plans for the proposed development: "the very nature of the scheme means that the applicant will be seeking to sublet the apartments and where the owners may wish to grant short term occupational tenancies". It was not until he began to give his oral evidence that Mr Rose suggested that the applicant's intention was to develop the buildings with a view to itself letting individual flats on short term tenancies.

29. The evidence given on behalf of the applicant by its expert witness, Mr Robert Davies MRICS MRTPI of Gerald Eve, was more considered but provided some similar surprises. In his oral evidence Mr Davies suggested that the development could be made viable over the remaining 60-year term of the existing lease by a funding arrangement which he described as an 'income strip' transaction, but this option had not featured in his written report. The only issue Mr Davies had been asked to consider in his written evidence was

the effect of the proposed development on the value of the Council's reversionary interest, and his thoughts on how the development could be funded emerged in cross examination, so we make no criticism of him for the fact that evidence on the viability of the scheme was distinctly under-cooked.

30. We were left with two concerning impressions. The first was that the applicant's proposals were being formulated or adapted on the hoof or had undergone significant recent changes the viability of which was not adequately explained and may not yet have been worked out by the applicant itself. The second was that Mr Rose's account of the applicant's intentions may simply have been its latest negotiating gambit and that its real object is to use this application to chip away at the restrictions as far as it can before reopening discussions with the Council on re-gearing the lease with a view to securing more favourable terms for whatever its preferred letting model may be. As a commercial objective there is nothing whatsoever wrong with that approach, and we make no criticism of it at that level, but it may explain why much of the applicant's evidence appeared vague and incomplete.

31. We will now consider the individual grounds of the application.

Ground (a)

32. To succeed on ground (a) the applicants must demonstrate that by reason of changes in the character of the property, or the neighbourhood, or other circumstances of the case the restrictions ought to be deemed "obsolete".

33. The circumstances in which a restriction will be deemed to be obsolete, and liable to discharge or modification under section 84(1)(a) were explained by Romer LJ in *Truman, Hanbury, Buxton & Co's Application* [1956] 1 QB 261, at 272, in the context of an application to modify a scheme of freehold covenants imposed when a building estate was laid out:

> "… these covenants are imposed when a building estate in land is laid out, as was the case here of this estate in 1898, for the purpose of preserving the character of the estate as a residential area for the mutual benefit of all those who build houses on the estate or subsequently buy them … If, as sometimes happens, the character of the estate as a whole, or of a particular part of it, gradually changes, a time may come when the purpose to which I have referred can no longer be achieved, for what was intended at first to be a residential area has become, either through express or tacit waiver of the covenants, substantially a commercial area. When that time does come, it may be said that the covenants have become obsolete, because their original purpose can no longer be served and, in my opinion, it is in that sense that the word "obsolete" is used in section 84(1)(a)."

34. In *Chatsworth Estates Ltd v Fewell* [1931] 1 Ch 224, Farwell J provided a more concise explanation, at 229:

> "To succeed on [ground (a)] the defendant must show that there has been so complete a change in the character of the neighbourhood that there is no longer any value left in the covenants at all."

35. These citations emphasise the extent of the change necessary for a covenant to become obsolete, but the critical consideration is not the degree of change which the character of a neighbourhood or a property undergoes, but the extent to which that change renders the original purpose of the covenant incapable of achievement.

36. In presenting the case for the applicant on this ground Mr Hutchings did not differentiate between the various restrictions, but his main focus was on clause 2(viii) of the lease which restricts the use of the Site. In order properly to interpret the restriction it is necessary first to refer to clause 2(vii), coming immediately before it, which restricts alterations and prevents the erection of any building other than those existing on the Site without the Lessor's consent (which is not to be unreasonably withheld). The Lessee's covenants then continue with clause 2(viii), as follows:

> "Not to use the said plot of land for any other purpose than as the site of the said buildings nor without the consent in writing of the Lessors use or permit to be used the said buildings other than as a light industrial building or buildings or wholesale warehouse or repository or warehouses or repositories for any purpose."

The reference to "the said buildings" is to whatever buildings may be on the Site from time to time, whether the original warehouses or any replacement for which the Lessors have given consent. Read in context, therefore, the restriction on use prohibits the use of the site for any purpose other than as the site of buildings to which the Lessors have given their consent and restricts the use of those buildings to light industry, warehousing etc unless the Lessors consent to a different use.

37. Mr Hutchings submitted that the restriction was obsolete by all three standards identified in ground (a), to changes in the buildings themselves, the neighbourhood, and the general circumstances. The buildings had not been used for industrial purposes for at least 16 years and since there was no prospect of them being so used in the future, the current permitted use had become an anachronism. That submission was undermined to an extent by Mr Rose's evidence that, should the application be unsuccessful, his client would refurbish the buildings and let them 'tomorrow, five times over' to operators of 'dark kitchens' (explained to us as being where food ordered by online apps such as Deliveroo was prepared). He was confident that could be achieved without breaching the restriction on use in the lease, but if that wasn't right his evidence was that the buildings could still be let as warehouses. If we accept that Mr Rose's confidence is well founded, we would be justified in concluding that there have been no changes in the character of the Site itself such that the restriction on use could be considered obsolete. However, we are more inclined to think that these were examples of Mr Rose resorting to debating or negotiating points without much connection to reality.

38. There is no doubt that there have been significant changes to the neighbourhood since the lease was granted in 1978. What was a wholly industrial and warehousing area of the city

is now, and will increasingly become, dominated by tall residential towers. Mr Hutchings submitted that, in the light of the changes in the neighbourhood the use of the Site as light industrial buildings or wholesale warehouses or repositories should be considered obsolete. On that basis, we could readily conclude from the totality of the evidence that the use of the buildings on the Site as warehouses has become obsolete. Whether that conclusion is of any assistance to the applicant begs the question whether the purpose of the restriction was to retain the buildings as warehouses.

39. It is clear that clause 2(viii) is not as restrictive as Mr Hutchings implied. Buildings on the Site need not be used as warehouses and can also be used for other purposes, with the consent in writing of the Council. The purpose and effect of the covenant is not to fossilise the use of the Site, but to give the Council a degree of control over any change in the permitted use from the original light industrial or warehouse uses. The Council has indicated its willingness to grant consent, but on terms which it considers are necessary to ensure the viability of the development.

40. Mr Hutchings nevertheless submitted that the Council was withholding consent simply to improve its bargaining position in negotiations for a re-gearing of the lease. He referred to *Driscoll v Church Commissioners for England* [1957] 1 QB 330 which was an application for the modification of leasehold covenants restricting the use of large houses to single private dwellings on the ground that the houses were too large for such use and the restrictions had become obsolete. The Church Commissioners, as landlords, had offered to consent to the proposed changes of use to allow multiple occupation, but only on terms which the lessee found too onerous and refused to accept. Mr Hutchings cited the following passage from the judgment of Denning LJ, after he had referred to the findings of the Lands Tribunal that changes in the neighbourhood and social circumstances meant that very large houses could no longer conveniently be retained in single occupation:

> "In one sense, therefore, the covenant is obsolete, because it can be said no longer to serve the purposes originally contemplated; but, as [the President of the Lands Tribunal] says, the covenant still serves a useful purpose in another way: it enables the landlords, the Church Commissioners, to keep control over the use to which these houses are put. It enables the landlords to keep the area as a residential area, instead of being used, as it might have been, for commercial purposes. It seems to me that, so long as the landlord uses this covenant reasonably for a useful purpose, then, even though that purpose goes beyond what was contemplated 90 years ago, the covenant is not obsolete; whereas, if the covenant is shown no longer to serve any useful purpose, then, of course, it is obsolete. and in considering whether it still serves a useful purpose, I think it very important to see the way in which the landlord, or whoever is entitled to the benefit of the covenant, has used it in the past and seeks to use it in the present. If he uses it reasonably, not in his own selfish interests but in the interests of the people of the neighbourhood generally - as, for instance, when he gives his consent for any reasonable change of user - then it will serve a useful purpose. I should have thought that if he uses it unreasonably - for instance, to exact a premium as a condition of his consent; or if he refuses consent altogether when he ought to give it - as, for instance, for turning the house into flats - it would no longer serve a useful purpose. In short, so long as the landlord uses the covenant reasonably in the interests of

> the public at large it is not obsolete, but, if he seeks to use it unreasonably, then it is obsolete."

41. Mr Hutchings submitted that the purpose of the restriction when the lease was granted was to protect the reversionary interest of the Council. We agree that that was at least part of the purpose of the covenant but nothing in the evidence suggested that it was being used for any different purpose. Nor was there any evidential basis to support his submission that the Council is seeking to use the covenants unreasonably. We were not asked to determine whether any commercial objective of the Council (for example, to negotiate a premium for the grant of a lease on terms more appropriate to the site of a major residential development) was being pursued unreasonably. Nothing in the evidence allows us to make such an assessment.

42. In any event, we have no doubt that the Council's aim in the negotiations is not a purely commercial one. It has a legitimate strategic interest in continuing to influence the use of land on the fringe of the city centre and to secure its orderly and appropriate development. That interest is promoted through the statutory planning process, but there is no reason why its promotion and protection must end there, and the leasehold covenants allow it a further opportunity to control the use of the Site. The evidence of Mr Ken Richards, the Council's Principal Development Surveyor, fully satisfied us that the Council wishes to ensure that development of the Site takes place in the manner proposed by the applicant subject to appropriate safeguards to ensure that it is commenced in a timely fashion and not left incomplete. That objective is plainly in the interests of the public of Manchester, and its achievement is a facet of the control over the use of the Site which the covenants were intended to allow the Council.

43. As Mr Hutchings submitted, the touchstone of obsolescence is whether the object of the covenant is still capable of fulfilment. We have no doubt that the object of the restriction on use, on which his submissions were primarily based, remains capable of fulfilment. The case on obsolescence was not developed in relation to other restrictions. We therefore conclude that the applicant's case on ground (a) has not been made out.

Ground (aa)

44. Mr Hutchings submitted that the question of whether the proposed use is reasonable must be considered assuming the restrictions do not exist. We agree. The proposed development has the benefit of a resolution to grant planning permission, subject to the negotiation of a s.106 agreement. The Council, both as the local planning authority and as landlord and respondent to this application, wishes to see the development take place. How could it be said that the use of the Site for residential purposes was other than reasonable?

45. Ms Tythcott submitted that when considering whether a particular use is reasonable, the Tribunal cannot entirely ignore the related question of what she referred to as "practicability". Even if a proposed use appears reasonable, if it cannot practically be achieved then for the purposes of the statute it should be deemed unreasonable. In support of that submission she relied on *Caledonian Associated Properties Ltd v East Kilbride DC* (1985) 49 P&CR 410.

46. *Caledonian* was a decision of the Lands Tribunal for Scotland on an application under the (subsequently repealed) Conveyancing and Feudal Reform (Scotland) Act 1970 which contained similar powers to those found in section 84, 1925 Act. Sections 1 and 2 of the Act provided that the Tribunal might by order vary or discharge a restriction on the use of land (referred to as a "land obligation") on being satisfied of certain conditions. One condition was where the obligation was "unduly burdensome"; another, in section 1(3)(c), was where, in all the circumstances the existence of the obligation impeded some reasonable use of the land. The Tribunal could refuse to vary or discharge a land obligation on that ground if they concluded that, "due to exceptional circumstances related to amenity or otherwise, money would not be an adequate compensation for any loss or disadvantage which a benefited proprietor would suffer from the variation or discharge".

47. The applicant was the owner of a cinema which was at risk of closure unless the Tribunal allowed a change to a combined use as a bingo hall with a much smaller cinema element. The respondent was the local development corporation. It opposed the modification of the restriction and made it clear that it would also resist the grant of planning permission because of the adverse effect it might have on its own proposals to attract a rival bingo hall operator as the anchor tenant for a new leisure complex elsewhere in the town. The Tribunal accepted that the respondent's scheme would not be commercially sustainable if another bingo hall was already established at the cinema. The Tribunal explained that the question before it was this:

> 'Under section 1(3)(c) it is necessary for us to consider whether in all the circumstances use as a bingo club is a reasonable use of the cinema premises. Looking simply at the cinema alone and ignoring for the moment any other circumstances, such a use would appear reasonable - many cinemas are now so used and the applicants already hold the necessary bingo licence. However, it would appear from the evidence of the Corporation's witnesses, notably Mr. Shaw, that planning permission for this change of use would not be given. This was a matter which was dealt with by Lord Grant in *Murrayfield Ice Rink v. Scottish Rugby Union* [1973 SC 21]:
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> > "On the facts stated it is clear . . . that even if the burden which they seek to have varied . . . they would still be deadlocked . . . in their development proposals. They would still face other and unfathomable difficulties in regard to planning, building alterations, parking and access. In the circumstances, I cannot see that the obligation sought to be varied is "unduly burdensome" (in the sense of head (b)) or that its existence impedes some reasonable use of the land. I have difficulty in seeing how the appellants can be said to have shown that the proposed use is "reasonable" if, as in this case, they are unable to show it is practicable."'

48. Refusing the application, the Tribunal accepted that whilst the proposed bingo use on the face of it appeared reasonable, it was not practicable, by reason of planning difficulties. We are not inclined to apply the same approach to the "reasonable use" question as it arises under section 84(1)(a). While the purpose of the two pieces of legislation is very similar, the statutory context is slightly different. In our judgment the sole focus of the issue of reasonable use is on the land use itself. When considering whether a proposed use of land is reasonable, and whether it should be modified or discharged on ground (aa) of

section 84(1), the Tribunal is specifically directed to take into account the statutory development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant area (section 84(1B)). The Scottish statute with which the *Caledonian* case was concerned contained no such direction; that seems to us to justify the rather wider consideration given to the issue of reasonable use by the Lands Tribunal for Scotland in that case. Considerations of practicality or "deliverability" could of course be taken into account if the Tribunal gets to the stage of exercising its discretion, but not, we think, when determining whether ground (aa) has been made out. The proposed development with which we are concerned is entirely in accordance with the development plan, as the uncontested evidence of the applicant's planning expert, Mr Lloyd, confirmed.

49. In any event, the suggested impracticality in this case does not depend on the prospects of planning permission being granted (which appears to have been the difficulty in the *Caledonian* case), but on the ability of the applicant to fund, manage and complete the development without securing a new, longer lease. Without proper evidence on those issues we are not prepared to form a judgment on the basis of mere assertions by one side or the other. Given that both parties are keen to see the Site developed for residential use, and that such use is in accordance with the development plan, we are satisfied that it is a reasonable use.

50. As for whether the restrictions impede the proposed use, we are satisfied that they do, including by the restriction on use itself (clause 2(viii)) which requires the Council's consent to any change, the restriction on alterations (2(vii)) (notwithstanding that the Council may not withhold its consent unreasonably), or more peripherally by the restriction on the removal of trees (2(xiii).

51. The next question is whether, by impeding the proposed use, the restrictions secure to the Council practical benefits, and if so whether those benefits are of substantial value or advantage to it. This question highlights the Council's dual role as local planning authority exercising public functions on the one hand, and its "private" capacity as landlord on the other. As planning authority the Council not only does not object in principle to the development occurring, it has positively and enthusiastically encouraged it. As landlord it nevertheless seeks to include provisions within a new extended lease to which the applicant objects. The purpose of those provisions, the Council says, is to ensure the development is completed, and within a reasonable time. The principal conditions it requires are a set of development milestones requiring the developer to commence construction within a certain period of being granted the new lease, and to complete the development within a certain period. To enable this timetable to be enforced and to ensure the development is completed if they are not, the Council envisages forfeiture provisions, (subject to force majeure), and step-in rights in favour of the project's funders in the event of the applicant's insolvency. Mr Rose took particular exception to these provisions.

52. We have not been asked to consider the reasonableness or otherwise of these conditions, to which we were referred in only the most general terms. However, it is clear that the Council's ability to rely on the restrictions within the lease to prevent the applicant from carrying out the development without agreeing to provisions intended to secure the Council's development objective, does secure a practical benefit. Mr Hutchings

submitted that practical benefits for the purpose of the Act must be direct, rather than peripheral benefits secured by the covenants, and that benefits were not "practical" if they were merely pecuniary in nature i.e. if the only benefit derived from the restrictions was in enabling the Council to extract a higher premium for agreeing to their relaxation. It is the restrictions themselves that must secure the practical benefit, and not the ability of the Council to bargain them away – "that the restriction, in impeding the [reasonable] user does not secure….any practical benefit of substantial value or advantage..". We accept Mr Hutchings propositions, but we do not accept that they assist him in this case. The Council is not simply seeking to obtain a monetary advantage or relying on the covenants as an obstacle which the applicant must negotiate away. The Council is using the covenants for their intended purpose, namely, to afford it a significant degree of control over the development of the Site.

53. The Council's ability to withhold its consent to the development of the Site until it is satisfied that the applicant's proposals can be delivered does not confer only "peripheral" or indirect benefits. They allow it to influence the form of the development and mitigate the risk that the Site might not be developed in an orderly and timely way. It would no doubt also be commercially desirable for a new longer lease to be granted to underpin the development, and to enable the applicant to recoup its investment over a longer period, but that would be the case whether or not the restrictions in the current lease impeded development. The Council's negotiating position is not a benefit which it derives from the terms of the lease, or not from those terms alone, but from the fact that the lease will expire in only 60 years.

54. We now turn to the substantiality of those practical benefits, first as regards value.

55. Mr Davies, the applicant's valuation expert, had carried out an exercise valuing the Council's reversionary interest at the end of the 60.5-year lease based on the restrictions being modified as the applicant wishes, compared with that value if the restrictions remain unaltered. Assuming the restrictions remained, Mr Davies postulated that the Site would remain undeveloped and that the Council would itself carry out the development, or sell to a developer, at the end of the lease. He assumed the eventual development would be similar to the buildings permitted by the applicant's anticipated planning permission and used a residual valuation method, deducting from the projected gross development value the usual build costs, acquisition costs etc, to arrive at a negative land value of -£33,023,276. His next step was to apply a sensitivity analysis, increasing rental value by 5-10%, and reducing construction costs by the same amount, which produced a positive land value of £31,625,897. A swing of £60 million highlights the fragility of the residual approach when applied to very large developments, where a very slight touch on the tiller can result in significant, and potentially unreliable, changes in the course of the valuation. This caused Mr Davies, quite rightly, to consider comparable land sales as an alternative approach to valuation; these ranged from £5.6 to £6.2 million per acre, from which he came to a land value for the Site of £8.75 million. Deferring this amount for 60.5 years at 6% resulted in a present land value of say £260,000.

56. He then considered the value of the Council's interest should the restrictions be modified. This, the applicant said, would enable it to fund and build its own 'build to rent' scheme, which Mr Rose and Mr Davies maintained was entirely feasible despite only having a 60.5 year lease. On this scenario, instead of the development occurring at the end of the lease,

the Council would inherit the completed development which had been built by the applicant and would need to carry out refurbishment. We note that this assumption was at odds with Mr Hutchings' closing submissions to the effect that that the applicant could rely on its rights under the Landlord and Tenant Act 1954 to obtain a new 15-year lease, thereby allowing it additional time to recover its investment. Mr Davies' view was that the market would disregard any potential right to extend or continue the lease, which makes it unnecessary for us to resolve the question of whether the applicant will be able to exercise the option. On this basis, Mr Davies valued the completed development at £308 million, which deferred as before resulted in a current value of £9,112,000.

57. Comparing the two, Mr Davies' view was that not only was the Council's interest not diminished by the restrictions being modified, there was in fact a clear positive effect on the value of the reversion of some £8.85 million.

58. Mr Norbury, the Strategic Lead in the Council's city centre development team accepted that there may very well be a positive effect on the Council's reversionary interest, but that did not go to the heart of the Council's objection. The Council's expert, Mr William Ward MRICS of Savills, also agreed that, taken individually, the modification of each restriction as the applicant wishes would not result in a diminution in value of the Council's interest. In his view, the Site was unviable as a commercial development prospect because there was only a 60.5-year wasting leasehold interest, not long enough for normal residential disposals or funding.

59. We have reservations about some aspects of Mr Davies's valuation, for instance that it did not take account of the rent passing, nor that under the terms of the lease that rent would increase significantly once the development was completed. But of more significance, deferring capital values by sixty years renders the resulting figure indicative at best, and of dubious utility. It also assumed that capital values, build costs, and land values, would all increase by the same proportions over sixty years.

60. However, the general thrust of Mr Davies' conclusions, that the reversion to two substantial residential buildings is likely to be more valuable than the reversion to two redundant warehouses, is not difficult to accept. Given the Council's witnesses' acceptance of that proposition we need say little more about it. From the evidence, we are satisfied that, measured in monetary terms, the restrictions do not (by impeding the development) secure to the Council a practical benefit of substantial value. Whether the practical benefit is a "substantial advantage, however, is a different question. The nub of this application is about the control the restrictions secure to the Council as a local authority. We are satisfied that the Council's concerns about the viability of the development are genuine, and the conditions that it seeks to impose address its wish to see the development commencing and being completed within a certain period. We have no view as to whether the proposed periods are realistic or reasonable, but that isn't the issue before us. The question is about the extent of the advantage which the restrictions secure for the Council, by preventing the development going ahead unless the applicant satisfies its concerns. Those concerns are not pecuniary in nature but are aimed at ensuring one of the last pieces of the development jigsaw slots into place. We are satisfied that this control is a substantial advantage, and the application on ground (aa) therefore fails.

Ground (c)

61. It follows from the above that injury would be caused to the Council by modification of the restrictions as the applicant contends, since the Council would lose the practical control which it currently enjoys over the redevelopment of the Site. The application on ground (c) therefore also fails.

Discretion

62. Had the applicants persuaded us at the jurisdictional stage, we would next have had to consider whether we should exercise our discretion and modify the restrictions as the applicant seeks. In the *Caledonian* case the Lands Tribunal for Scotland gave a second reason for refusing the application to modify the restrictions on the use of the cinema, based on the dual function of the objector as both private landlord and local authority responsible for securing development:

> '[T]he Tribunal would be slow to interfere where a local authority in maintaining private obligations was genuinely endeavouring to control a particular environment and that must be equally so in a case where the authority in question in maintaining such obligations is seeking to carry out a development which is part of their overall plan and which they have a statutory duty to carry out.'

63. We agree with that approach. This Tribunal should be equally slow to interfere with a local authority which seeks to use its private rights as landlord to promote its strategic development plan, and to ensure that a desired development takes place. We would also be reluctant to use the Tribunal's discretionary power in a manner which would be liable to disrupt continuing negotiations between a local authority and a commercial developer, both of whom are well able to protect their own interests. Having visited the locality and observed the results of recent and continuing development on adjoining land belonging to the Council we are in no doubt that the development of the Site is capable of being achieved through sensible commercial negotiations. If the necessary jurisdictional conditions had been satisfied in this case giving the Tribunal the opportunity to intervene in the parties' negotiations, it would in our judgment have been unnecessary and inappropriate to have done so.

64. For these reasons the application is dismissed.

Martin Rodger KC FCIArb
Deputy Chamber President

Mr Peter D McCrea FRICS

8 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.