IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 0384 (LC)
Case No: LP/2/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – Leasehold Grade I Listed building in Berkeley Square – user clause restricted to offices – application to modify to allow use as a private members' club – whether restriction obsolete – whether practical benefit of substantial value or advantage secured – whether injury would be caused by modification - section 84(1)(a), (aa) and (c), Law of Property Act 1925 – modification of user covenant ordered.

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

BETWEEN:

BERKELEY SQUARE INVESTMENTS LTD	**Applicant**
and	
BERKELEY SQUARE HOLDINGS LTD	**Respondent**

Re: 45 Berkeley Square and 45 Hays Mews, London, W1J 5AS

His Honour Judge Stuart Bridge and Mr P D McCrea FRICS

Royal Courts of Justice
on
4-5 June 2019

Philip Rainey QC, instructed by Mishcon de Reya, for the applicant
Gary Cowen, instructed by Eversheds Sutherland, for the respondent

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The following cases are referred to in this decision:

Re Bass Ltd's Application (1973) 26 P&CR 156

Re Diggens' Application (No.2) [2001] 2 EGLR 163

Re Hextall's Application (1998) 79 P & CR 382

Re James Hall & Co's Application [2017] UKUT 0240 (LC)

Re Pendennis's Application [2007] UKUT 0430 (LC)

Re Phillips' Application [2011] UKUT 346 (LC)

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

Ridley v Taylor [1965] 1 WLR 611

Shaviram Normandy Ltd v Basingstoke & Deane Borough Council [2019] UKUT 0256 (LC)

Shephard v Turner [2006] 2 P & CR 28

Introduction

1. There is no reliable ornithological evidence to the effect that nightingales have ever sung there (nor can there be many who have seen angels dining at the Ritz), but Berkeley Square remains an iconic part of London's Mayfair. Recognised as one of London's premier garden squares, its west side includes a row of Grade I listed buildings erected in the eighteenth century, number 45 being the one-time residence of Lord Clive of India, and the location of his death in somewhat mysterious circumstances in 1774.

2. This application, pursuant to section 84 of the Law of Property Act 1925, is made by Berkeley Square Investments Ltd ("the applicant"), the long leaseholder of 45 Berkeley Square and its ancillary mews property to the rear, known as 45 Hays Mews (together – "the premises"), for the modification of a single user covenant which restricts use of the premises to that of an office, with a small element of residential use. The applicant wishes to implement a planning consent which it has obtained in order to convert the premises into a private members' club. The proposed club would have something in the order of three restaurants, eight bars and a private dining room together with ancillary accommodation.

3. The application is opposed by the freeholders, Berkeley Square Holdings Ltd ("the respondent").

The hearing

4. The application was heard on 4 and 5 June 2019 in the Royal Courts of Justice. The Tribunal had inspected the premises and environs of Berkeley Square on the previous day.

5. The applicant was represented by Philip Rainey QC, who called as witnesses: Matthew Bees, Project & Facilities Manager of Buckingham Securities & Investments plc who is retained by the Halabi family Trust (the beneficial owners of the applicant company) as their property adviser; Katherine Jane Sowter BSc (Hons), MRICS, a Chartered Surveyor and Director of Metrus, as expert witness on valuation; and Paul Burley MRTPI, Partner at Montagu Evans, as expert witness on planning matters.

6. The respondent was represented by Gary Cowen of counsel, who called as witnesses: Giles Easter MRICS, Chief Executive Officer of Astrea Asset Management Ltd (hereafter "Astrea"), the appointed asset managers of the respondent company; and Chartered Surveyor Nicholas Powell BSc (Hons) DipArb, MRICS, MCIArb, of Blue Book, as expert witness on valuation.

7. Ms Sowter, Mr Burley and Mr Powell all provided expert reports. We are grateful to them, and to counsel for their succinct and careful submissions.

Facts

8. There is little by way of substantial dispute about the premises, their location, the terms of the lease and the planning permissions that have been obtained. From a helpful joint statement, the evidence, and our inspection, we find the following facts.

9. The premises occupy a central position on the west side of Berkeley Square, to the south of its junction with Hill Street. Berkeley Square is a prestigious address, situated as it is at the heart of Mayfair, one of London's most affluent areas, and bounded by Oxford Street to the north, Piccadilly to the south, Regent Street to the east and Park Lane to the west.

10. The premises comprise 45 Berkeley Square – an inner-terrace Grade I listed self-contained Mayfair townhouse dating from the mid-eighteenth century fronting the Square; 45 Hays Mews – a Grade II listed mews house to the rear of the main property, constructed during the same period; and a two-storey generally open-plan pavilion style building with an enclosed courtyard garden.

11. 45 Berkeley Square, constructed between 1744 and 1750, is arranged over basement, ground and four upper floors. Its exterior is faced with Portland stone and the windows at first floor level are pedimented with stone Juliet balconies. It is entered from the pavement of Berkeley Square into a ground floor reception room, which leads into a hallway and the grand main staircase. The staircase, which has ionic columns, extends to the third-floor minstrels' gallery which is top lit. The remainder of the ground floor is laid out in ornate staterooms, which retain many period features including fireplaces, doorframes and light fittings. The first floor comprises a large room to the front, occupying the full width of the building, and two further rooms to the rear, all benefitting from period features. The second and third floors have lower ceiling heights, with each floor having two rooms to the front, overlooking Berkeley Square, with three further rooms to the rear, one of which is used for residential purposes. The fourth floor, refurbished in 2014, is currently arranged as a three-bedroom residential apartment. The basement provides meeting rooms, a kitchen and staff rooms. There is vault accommodation under the pavement of Berkeley Square. The basement accommodation has some natural light. There is a secondary staircase to the rear, and a passenger lift, serving basement to fourth floors.

12. To the rear, 45 Hays Mews is arranged over lower ground, ground, first and second floors. The accommodation is mostly open plan and a lift serves all levels. Internally, the premises are comfort cooled and have under-floor trunking and a mixture of recessed and surface mounted lighting.

13. The valuation experts agree that in valuing the premises as an office a net internal area basis should be adopted, which they agreed at 16,469 sq ft; whereas in valuing as a private members' club, a gross internal area basis is appropriate, which they agreed would be 25,284 sq ft following completion of the proposed works.

14. The premises were one of a number of buildings in the wider Berkeley Square Estate purchased by the respondent from the BP Pension Fund in July 2001. As we mention below, the extent of the freeholder's estate around Berkeley Square was never fully explained to us. At the time when the respondent acquired the freehold, the tenant of the premises was the University Superannuation Scheme ("USS"), the premises having been fully sub-let since 1988 to Cluttons LLP as offices, and prior to that as offices to others. The applicant acquired the leasehold interest from USS on 1 July 2004, at a premium of £5.175 million plus VAT.

15. Among its freehold estate, the respondent owns the properties either side of the premises. Immediately to the north, 44 Berkeley Square is currently vacant, but the main building was home to the Clermont Club from 1962, whilst Annabel's commenced trading in the basement the following year. Their co-residence at 44 continued for many years until the Clermont closed in 2016. Immediately to the south, 46 Berkeley Square is considered in heritage terms as part of a pair with No.45 (and is subject to the same listing status).

16. Between 2013 and 2017, there was a series of planning applications by the applicant in relation to the premises and by a potential operator of the adjoining building, No.46.

17. From around 2013, the applicant had begun to explore ways in which it might put the premises to more profitable use, and after some research it was felt that they would be an appropriate location for a private members' club. On 21 February 2014, it made a planning application (14/01621/FULL) to Westminster City Council for a change of use and alterations to the listed building, including excavations to the basement.

18. As we outline below, there were discussions between the applicant's representative, Mr Bees, and the respondent's then asset manager, Mr Duncan Ferguson of Lancer Asset Management ("Lancer"). On 7 January 2015 Mr Ferguson visited the premises with representatives of the Arts Club as potential operators of the premises as a club.

19. On 26 August 2015 the respondent entered into an agreement for lease of the adjoining 46 Berkeley Square and 46 Hays Mews with a company known as 46 Berkeley Square Ltd for a term of 40 years. The holding company of 46 Berkeley Square Limited, and surety under the lease, is Caprice Holdings Ltd, itself owned by Mr Richard Caring, the proprietor of Annabel's. The terms of the 2015 lease made it clear that from the outset the parties were contemplating the use of 46 Berkeley Square as a private members' club. There was a rent-free period of 18 months. The rent comprised a base amount of £2.1 million, which was subject to five-yearly rent reviews, plus a turnover rent which was calculated at 5% of the amount by which the annual turnover (excluding certain items including membership subscriptions) exceeded £18 million.

20. We understand that the Birley Group of clubs, including Annabel's, was acquired by Mr Caring in 2007. On 4 December 2015, the Birley Group submitted a planning application (15/11330/FULL) for a change of use of 46 Berkeley Square and 46 Hays Mews to a private members club, which was validated by the council on 17 December 2015.

21. On 8 December 2015, Lancer made representations to the council regarding the applicant’s planning application in relation to the premises, asking that the application be deferred to allow further consideration of the effect on the structure of adjoining buildings of the proposed basement excavation. On the same day, the council’s planning committee resolved to refuse consent on the grounds that the basement excavation was unacceptable.

22. On 16 December 2015, the applicant submitted a further planning application, (15/11738/FULL), omitting the basement excavation but in other respects similar to the previous application. The application documents included an “operational management plan”, prepared by Mr Bees. Only one objection was received, from the owner of 47 Berkeley Square – which was not the respondent.

23. The planning application was granted on 7 March 2016, making provision for principal alterations being the erection of a single-storey glazed extension within the central courtyard of the premises (as a ‘winter garden’), and the creation of external terraces at the first and third floors.

24. A premises licence was granted on 10 August 2016 by Westminster City Council for recorded and live music, dance, and film, and the retail sale of alcohol, between the hours of 10.00 and 03.30 Monday to Saturday; Late night refreshment was permitted between 2300 and 0330 Monday to Saturday; and the general opening hours were between 08.00 and 04.00 on Monday to Saturday. On Sundays, all activities were to cease at midnight.

25. On 4 October 2016, the Council granted planning permission to the Birley Group in respect of its application for a change of use at 46 Berkeley Square and 46 Hays Mews.

26. On 28 November 2016 the applicant applied (under reference 16/11297/FULL) to the council to vary the conditions imposed which were permitted by the Council on 28 February 2017. By that later date, however, the respondent, via its solicitors, had refused the applicant consent to change of use of No.45, that letter being sent on 16 February 2017.

27. In September 2017, Astrea took over management of the respondent’s estate from Lancer.

28. In March 2018 Annabel’s (“the new Annabel’s” as it has been referred to) opened for trade in its new location at No.46.

The lease

29. The lease was made on 20 August 1978 between the British Petroleum Pension Trust Ltd and Crown Circle Ltd for a term of 92 years commencing on 24 June 1978, thus expiring on 23 June 2070. It is relevant to note the description of the demised premises as “45 Berkeley Square and 45 Hays Mews, London W1 including appurtenances thereto, all buildings thereon, all additions alterations improvements and landlord's fixtures and fittings”. The initial rent was £20,000 per annum.

30. The lease imposes full repairing liability on the tenant who is required to repair and renew and cleanse and to put and keep the demised premises, both inside and out, in good and substantial repair and condition. The landlord is responsible for insuring the premises, the premium of which is recoverable from the tenant. Internal redecoration is required in every seventh year, and in the final year, of the term. External redecoration is required in every third year and in the final year, of the term. Business rates and other outgoings are payable by the tenant, consistent with standard market practice for self-contained buildings.

31. The tenant is not permitted to carry out any alterations or additions to the structure or exterior, nor any alterations which restrict the lettable area of the demised premises. The tenant is not permitted to carry out any other alterations without the landlord's prior consent (not to be unreasonably withheld) and subject to the tenant entering into covenants for reinstatement at the end or sooner determination of the term.

32. The tenant may assign the whole with landlord's consent, such consent not to be unreasonably withheld. The landlord can reasonably refuse consent to assignments to group companies. Assignment of part only is prohibited. Under-letting of the whole is permitted. Underletting of part is prohibited, subject to the single exception that the under-letting of the premises in two parts, being the entire main building or the entire mews building, is permitted. The consent of the landlord is required to under-let the whole, and to under-let the two permitted parts: it shall not be unreasonably withheld. The tenant is not permitted to assign or under-let unless the incoming assignee or sub-tenant enters into direct covenants with the landlord as to rent and other tenant obligations. Under-lettings are to be at a rent which is at least equivalent to 17.5% of the Rack Rental Market Value or the premises under-let and subject to review so that on any review date the rent from the sub-tenants is not less than 17.5% of the Rack Rental Market Value. Under-lettings may not be at a rent which is or could at any time become less than the rent payable.

33. The lease provides for rent reviews at the expiration of the fifth year, namely 24 June 1983, and each period of five years thereafter. The last rent review took place as at 24 June 2013, the next rent review therefore being due on 24 June 2018. The rent is to be reviewed to the greater of 17.5% of the amount of rent receivable by the tenant at each date of review, whether arising out of leases, licences or tenancies or otherwise; or 17.5% of the rack rental market value of the demised premises.

34. The "rack rental market value" of the demised premises is to include all alterations and additions for which the landlord has given consent. The basis of valuation assumes a letting of the whole or in such parts as are permitted (namely 45 Berkeley Square and 45 Hays Mews), whichever produces the higher return. The hypothetical lease term to be assumed is 25 years, subject to 5 yearly rent reviews. The following further assumptions apply: open market; willing parties; vacant possession; tenant compliance with all obligations under the lease; terms and conditions of the lease. The following matters are disregarded: goodwill; the tenant's occupation; and any condition or restriction contained or referred to in a planning permission relating to the demised premises.

35. The current rent is £143,000 per annum, representing 17.5% of the rental value as at the 24th June 2013 rent review date.

The restriction

36. The user covenant (3(12)(a)) of which modification is sought, the relevant part being highlighted, reads as follows:

> "(a) Not knowingly to use or permit the demised premises or any part therefore to be used for any illegal or immoral purpose nor for any noxious noisy or offensive trade or business not shall anything be done or permitted upon the demised premises which may be or grow to be a nuisance annoyance or disturbance inconvenience damage to the Landlord or its tenants or the owners or occupiers of other property in the neighbourhood nor which in the reasonable opinion of the Landlord shall prejudicially affect or depreciate any neighbouring premises belonging to the Landlord and that the demised premises shall be used only as offices with ancillary residential accommodation on the Fourth Floor thereof shown edged green on the plan annexed hereto and for no other purpose and that no machinery or engine of any kind (other than normal mechanised office equipment and normal domestic machinery) shall be brought erected or set up in or upon any part of the demised premises and no auction shall take place thereon;
>
> "(b) Not to overload or permit to be overloaded in any way whatsoever the floors and other structural parts of the demised premises."

The proposed modification

37. Mr Bees explained that the applicant is a property holding company owned beneficially by the Halabi family trust but which holds no property other than the premises. The intention at the time of the acquisition was that the premises in Berkeley Square would function as the applicant's 'flagship London office', predominantly for the personal business of Mr Halabi himself. The premises were substantially refurbished in 2007 and 2008 at a cost in the region of £8.5 million, including up-grading the cabling to what Mr Bees described as 'the cutting edge of office technology'. However, since 2008, when Mr Bees became consultant to the Halabi Trust, the use of the premises as offices has been extremely limited, although there is some office use by Buckingham Securities & Investments Plc (his employer) in what is described as the "link area" between 45 Berkeley Square and 45 Hays Mews.

38. The applicant seeks modification to permit use of the premises as a private members' club. It says that the premises are no longer suitable as offices (and hence that the restriction of use is now "obsolete"). Despite the substantial expenditure incurred in 2007 and 2008 in modernising the premises, the applicant argues that they are now considerably behind the times, and it would now struggle to use the premises as offices or let them on the open market.

In order to bring them into use as commercial offices throughout, certain works would be required to provide the necessary mechanical and electrical installations, the main route being that of telecommunications cabling. Modern offices would now expect and require a higher standard of cabling (Category 6) than that currently fitted. In order to achieve this in a Grade I listed building it would be necessary to lift all the floors and the skirting boards, removing temporarily the listed panelling and joinery and then restoring the premises once the cables had been laid. In his view, the costs would be likely to be in the region of £400,000, which he ventured "would be prohibitive to an office occupier". Mr Bees was also concerned that any tenant wishing to use premises which exceed 16,000 square feet would require open floor plates, something that would be impossible to achieve given the listing and heritage status of the premises.

39. Mr Bees' evidence regarding the works that would be required to render the premises marketable as offices was not disputed by the respondent, although the point was made that the cabling works could be done, and that the cost, while not insignificant, was not large when compared with the applicant's overall investment in the premises (a premium in excess of £5 million followed by modernisation works in excess of £8 million). Mr Bees conceded that, since the decision was taken to develop the premises as a private members' club in (he believed) about 2013, no attempt had been made to market them as offices.

40. It is accepted by the applicant that a larger part of the fourth floor is currently being used for residential occupation than is permitted and that the applicant is therefore in breach of the terms of the lease.

41. It is not difficult to understand a sense of grievance on the part of the applicant. According to Mr Bees, Mr Ferguson of Lancer had been enthusiastic about the applicant's initial proposal to open a private members' club at No.45, had supported the application for planning permission and as we outline above, in January 2015 had visited No.45 to introduce a potential club operator.

42. However, a few months later, in August 2015, the lease of No.46 was granted to Caprice Holdings by the respondent.

43. Lancer's late representation to the council on 8 December 2015 had confirmed that it "no objection to recommending that the freeholder consents to potential changes of use of buildings within Berkeley Square (indeed Lancer are supporting an application in the adjacent building) there are elements of this proposal that are questionable". Lancer were careful, however, to confirm that any change of use would require the freeholder's consent under the lease.

44. The applicant does not suggest, however, that the respondent's conduct, or that of its former advisers Lancer, was such as to give rise to a legitimate expectation on the applicant's part that the respondent would not only support the application for planning permission but also consent to a change of use from offices to private members' club. In our view, it was open to the respondent to permit a private members' club in one venue and not in another, as well as

to change its mind, and the fact that at different times it appeared to support different business ventures does not materially assist the Tribunal in its determination of the issues in this case.

The legal context to the application

45. In determining the application to modify the restriction, the Tribunal does not have a broad discretion such that it can make its decision simply by reference to what is fair in all the circumstances. The Tribunal must evaluate the evidence given against the statutory criteria that are set out in section 84 and decide whether the applicant has established proper grounds for modification of the covenant. To that we now turn.

46. Insofar as it is relevant to this application, section 84 of the Law of Property Act 1925 (as amended) provides:

> "(1) the Upper Tribunal shall … have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction on being satisfied –
>
> (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Upper Tribunal may deem material, the restriction ought to be deemed obsolete; or
>
> (aa) that (in a case falling within sub-section (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or
>
> …
>
> (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction:
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> and an order discharging or modifying a restriction under this subsection may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads, that is to say, either –
>
> (i) a sum to make up for any loss or disadvantage suffered by that person in consequence of the discharge or modification; or
>
> (ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
>
> …

(1A) Subsection (1)(aa) above authorises the discharge or modification of a restriction by reference to its impeding some reasonable user of land in any case in which the Upper Tribunal is satisfied that the restriction, in impeding that user, either –

(a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or

(b) is contrary to the public interest;

and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification.

(1B) In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

(1C) It is hereby declared that the power conferred by this section to modify a restriction includes power to add such further provisions restricting the user of or the building on the land affected as appear to the Upper Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and the Upper Tribunal may accordingly refuse to modify a restriction without some such addition…

…

(12) Where a term of more than forty years is created in land (whether before or after the commencement of this Act) this section shall, after the expiration of twenty-five years of the term, apply to restrictions affecting such leasehold land in like manner as it would have applied had the land been freehold…."

47. There is no dispute that the applicant's leasehold interest meets the criteria set out in section 84(12).

48. Applications in relation to leasehold restrictions such as this are "a comparative rarity" (*Re Phillips' Application* [2011] UKUT 346 (LC) at [27] per George Bartlett QC). The Court of Appeal indicated, in a decision which pre-dated the legislative enactment of (aa) above, that it should be more difficult to persuade the court to exercise its discretion in leasehold than in freehold cases: see *Ridley v Taylor* [1965] 1 WLR 611. Harman LJ explained further, at 617:

> "In [leasehold cases] 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 is prima facie entitled to preserve the character of his reversion."

49. Mr Rainey expressed some scepticism of this approach in the course of argument. We note, as this Tribunal has done very recently, in *Shaviram Normandy Ltd v Basingstoke & Deane Borough Council* [2019] UKUT 0256 (LC), a decision published subsequent to our hearing this application, that once the conditions of eligibility set out in section 84(12) are satisfied there are no separate criteria to be applied in relation to claims to discharge or modify leasehold covenants. We agree with the Tribunal when it states at [16] and [17] as follows:

> "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."

50. We emphasise, as the Tribunal did in *Shaviram Normandy*, that each case is factually highly sensitive, and that careful attention must be paid to the particular circumstances of the case, regard being had to the length and nature of the landlord's reversion. The principal focus must be on the statutory grounds, and whether the applicant has satisfied us, on the balance of probabilities, that one or more grounds for modification have been made out. The respondent has sought to resist the application by emphasising the importance of its management of its Mayfair estate: in simple terms, its "estate management". This has particular repercussions in relation to ground (aa), but first we intend to deal with ground (a).

Ground (a): should the restriction be deemed "obsolete"?

51. The applicant contends first of all that the restriction should be "deemed obsolete" as explained by Romer LJ in *Re Truman, Hanbury, Buxton & Co Ltd's Application* [1956] 1 QB 261 at 272:

> "It seems to me that if, as sometimes happens, the character of an 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)."

52. It is important to note, as we do, that section 84 requires the Tribunal to find that the restriction "ought to be deemed obsolete" by reason of material changes in the character of the property or the neighbourhood or other material circumstances. It is for the Tribunal to decide, with reference to the evidence that it has before it, what changes or circumstances it considers to be material.

53. Dealing first with the character of the property, we are not persuaded that there have been material changes, limited as they would be, and are, by the Grade I listed status, and we did not understand Mr Rainey to submit otherwise.

54. Turning to the neighbourhood, we do not consider that the applicant presents a strong case that there have been material changes rendering the restriction obsolete. It is clear to us that there remains a significant office presence in Berkeley Square, and that while there are private members' clubs in the Square and its immediate environs they can hardly be said to predominate.

55. In our view, the applicant's case on obsolescence is principally based upon "other material circumstances", that is circumstances other than changes in character of the property or of the neighbourhood, specifically changes in the demand for office properties in this locality. Mr Rainey did not dispute that the fundamental proposition about obsolescence is whether the original object of the covenant can be achieved. But, he submitted, in the case of a leasehold property it is necessary in considering the original object to take into account all the provisions of the lease, in particular a) the alienation restriction which permits only letting of the whole of 45 Berkeley Square, or the whole of 45 Hays Mews – but not floor by floor lettings, and b) the length of the term of the lease – which the experts agree is a disadvantage in the current market.

56. Ms Sowter, the applicant's expert, adopted Mr Bees' evidence on the modern specification now required by office occupiers with particular regard to cabling and open floor plates and she contends further that it is not possible to adapt the grand "state rooms" within this Grade I listed building in such a way as to provide the necessary specifications. In her view, the size of the property is relevant when considered in conjunction with the alienation provisions contained in the lease: the prohibition on sub-letting the premises as parts (with the single exception of sub-letting the main building separately from the mews) significantly restricts the means whereby office use can be achieved. She states that many period buildings in Mayfair of this size are let on a floor by floor basis, or by serviced office occupiers providing much smaller suites in line with market demand. In short, while there may have been a market in 1978 for what has been referred to as "a trophy HQ" (a market that led the leading firm of surveyors Cluttons to occupy the premises for a number of years prior to 2004) there is no longer any such demand.

57. Mr Powell, the respondent's expert, took the opposing view. He contended that the premises (at least on the second and third floors) are currently fitted out as offices and could be used as offices if the tenant, or a third party, wished to occupy them as such. He saw the "state rooms" as rooms to impress visitors and clientele, and it would not be necessary for those rooms to have the same degree of specification as the others. He accepted that it would be expensive to make the necessary adaptations to the cabling but noted that that is a relatively small sum to invest in the premises. He accepted that the demand for premises of this kind is limited but took issue with the notion that there is no demand.

58. Ms Sowter sought to support her argument on obsolescence with reference to changes in the neighbourhood since the grant of the lease, in particular that landlords in the locality have sought to change use away from offices in the direction of retail and leisure in order to attract tenants and to maximise the rental value of the properties. She contended that a number of properties that were once residences, and subsequently offices, are now used for retail or leisure, and that in particular "Mayfair, and particularly Berkeley Square, are [now] synonymous with private members' clubs."

59. Mr Powell did not accept this, as in his view while there may be fewer offices in Mayfair and Berkeley Square now than in the late 1970s, the dominant use in the Square remains that of offices. We agree, and find force in Mr Cowen's submissions on this point. The premises are currently used as offices, are laid out and fitted out (in the most part) as offices, and are capable of being upgraded – albeit at some cost. In our view there is no doubt that to comply with the current restriction would present challenges to the tenant. It would be necessary to incur some expenditure to update the cabling and to make other adaptations, but compared with the expense incurred in the years following the applicant's acquisition of the property this would be relatively insubstantial. We accept that the demand for office properties of this size and this kind, even in Mayfair, is limited, and that there are good reasons for this. Demand is not however non-existent, and Ms Sowter did not seek to contend otherwise.

60. Additionally, we note that for the last five years there has been no attempt whatsoever on the applicant's part to market the premises as offices. On the contrary, as Mr Bees clearly indicated, the applicant has pursued an entirely different objective, to open a private members' club in the premises: an objective which not only requires various permissions from regulatory authorities but also requires the consent of the landlord. In the absence of any attempt to assign or sub-let the premises as offices, either as a composite unit, or as two separate units as permitted by the terms of the lease, we have reached the view that it would be wholly wrong to deem the restriction to be obsolete and the application fails on this ground.

Ground (aa)

61. In *Re Bass Ltd's Application* (1973) 26 P&CR 156 Mr J.S. Daniel Q.C., sitting in the Lands Tribunal as it then was, adopted an approach to ground (aa) by setting out the questions to be asked by a Tribunal when faced with an application under this ground. The questions are as follows:

> (1) Is the proposed user a reasonable user of the land for public or private purposes?
>
> (2) Do the covenants impede that user?
>
> (3) Does impeding the proposed user secure practical benefits to the objectors?
>
> (4) If so, are those benefits of substantial value or advantage?
>
> (5) Is impeding the proposed user contrary to the public interest?
>
> (6) If the benefits are neither of substantial value nor of substantial advantage, would money be an adequate compensation?
>
> (7) If impeding the proposed user is contrary to the public interest, would money be an adequate compensation?

62. We can first dispose of questions (5) and (7): whether impeding the proposed user was contrary to "the public interest". This was not relied upon in the applicant's statement of case, and not pursued to any degree by Mr Rainey. Miss Sowter's evidence touched on there being a greater public interest in the maintenance of a Grade I listed building as a private members' club rather than as an office, but Mr Rainey confirmed in his closing submissions that the applicant relies upon this evidence in relation to question (3): whether there is any practical benefit to the objector in maintaining the office user covenant.

63. We now move on to consider the remaining questions in turn. We do so in the light of Carnwath LJ's articulation of the policy behind section 84, and in particular ground (aa), in *Shephard v Turner* [2006] 2 P & CR 28 at [58]:

> "The general purpose is to facilitate the development and use of land in the public interest, having regard to the development plan and the pattern of permissions in the area. The section seeks to provide a fair balance between the needs of development in the area, public and private, and the protection of private contractual rights. "Reasonable user" in this context seems to me to refer naturally to a long term use of land, rather than the process of transition to such a use. The primary consideration, therefore, is the value of the covenant in providing protection from the effects of the ultimate use, rather than from the short-term disturbance which is inherent in any ordinary construction project. There may, however, be something in the form of the particular covenant, or in the facts of the particular case, which justifies giving special weight to this factor."

64. It is important to remind ourselves that whenever the Tribunal contemplates the exercise of its jurisdiction under section 84 it must proceed with caution. To discharge or modify restrictions over land inevitably engages the property rights of the applicant and the respondents, and due cognisance must be paid to Article 1 of the First Protocol to the ECHR in considering whether, and if so to what extent, the statutory jurisdiction should be exercised.

Is the proposed user a reasonable user of the land for public or private purposes?

65. We have little difficulty in concluding that the proposed use of the premises as a private members' club is a reasonable user of the land, albeit for private rather than public purposes.

66. There are already a number of private members' clubs in Berkeley Square and its immediate vicinity, as outlined by Ms Sowter in her evidence which is not disputed in this regard. Within the Square are Morton's at No.28, the Clermont Club (itself currently closed) at No.44, and the new Annabel's at No.46. As we have noted earlier, No.44 and No.46 sandwich the appeal premises, and No.46 is viewed in heritage terms as a twin to No.45. In the immediate vicinity are the Lansdowne at 9 Fitzmaurice Place and the Mark's Club at 46 Charles Street, and within the larger locality of Mayfair there are at least eleven further such clubs. While we consider that Ms Sowter's view that Mayfair, and particularly Berkeley Square, are "synonymous with private members' clubs" might be overstating the point, we accept that the use of a property such as 45 Berkeley Square as a private members' club is by no means unusual in this location.

67. The premises have the benefit of planning permission, which was granted for the change of use to a private members' club on 7 March 2016, as well as a premises licence granted the following August for recorded and live music, dance, and film as well as the retail sale of alcohol. The respondent has sought to argue that there is significant doubt that if a planning application were to be made now (that is, at the time of the hearing before the Tribunal) it would be granted due to changes in the operative regime in the last three years, and that if that were the case then it could not be said that the use of the premises as a private members' club would be a reasonable use.

68. Mr Easter's evidence was that the respondent had concerns about how an additional club at the premises would affect the calibre and mix of offerings on Berkeley Square, particularly in light of the number of complaints, and the increasing perception of Berkeley Street (just off Berkeley Square and opposite the premises) as a less desirable night time location. He said that complaints had led to Westminster City Council commissioning the "Mayfair Evening and Night Time Economy Behaviour Study" by Dr Phil Hadfield ("the Hadfield Report"), which was published in May 2017, after the grant of planning permission for the premises referred to above. The Report concluded that Berkeley Street, Dover Street and Berkeley Square should be designated a Cumulative Impact Area ("CIA") – a control mechanism used by the council as part of their licensing policy. Mr Easter's evidence was that, had the Hadfield Report been published at the time the Council was considering the planning application to change the use of the premises to a private members' club, the outcome might have been different.

69. Mr Burley's expert written evidence, prepared in September 2018, was that when planning consent was granted, the council assessed the application against development plan policies, weighing other material considerations such as the Grade I listed status in the balance, and attached conditions to the consent to control future operations. The planning policies had not changed, nor had there been any draft planning policy released for consultation. There was no evidence pointing to a more restrictive regime – in fact it appears that the council may look to introduce greater flexibility for evening economy uses. As for the Hadfield Report, Mr

Burley's evidence was that this was a licensing, rather than a planning, document and would not be taken into account in determining a planning application.

70. After Mr Burley had written his expert report, the council launched its draft City Plan 2019-2040, which although at draft stage would now be a material consideration in determining a planning application. Mr Burley was cross-examined on the new policies in the draft City Plan, particularly relating to the Economy and Employment policy 18 relating to food, drink and entertainment uses, but when considered as a whole, with appropriate weighting, we are not persuaded that, in policy terms, the situation has changed to any notable degree.

71. It became apparent during the course of the evidence that the applicant wishes to add a new floor over the enclosed courtyard in the course of the process of redevelopment, and it seems clear to us that works of such a material nature would almost certainly require a further application to be made for permission. However, that does not detract, in deciding the question of reasonable user for the purposes of section 84, from the relevance of the existing consent, which has been implemented (albeit to an extent only to secure its permanence).

72. Mr Cowen pursued a line of questioning with Mr Burley concerning the effect of politics, and the proximity of local elections, on the likelihood of obtaining planning permission. We do not place any weight on this, since planning refusals on obviously political grounds can be challenged on appeal, particularly where there was a recommendation to grant when an application is in line with planning policy.

73. We were unconvinced by the respondent that were the issue of planning permission to be revisited by the planning authority at this time it would be likely to result in a refusal to grant. We acknowledge that the grant of planning permission is not decisive of the intended use being a reasonable use, as is made clear in a number of authorities. It is however a material matter for the Tribunal to take into account in determining this issue, and in certain circumstances it may be strongly persuasive: see *Re Hextall's Application* (1998) 79 P & CR 382 at 388. In this case, it can be assumed that the planning authority, when granting permission for Annabel's at No.46, was aware of the grant it had already made for the premises next door. It is difficult to see how, in these circumstances, taking into account the prevalence of private members' clubs in Mayfair in general and Berkeley Square in particular, that the use of the premises for such a purpose can be said to be anything other than "a reasonable use". It is not necessary for the use being proposed to be the *only* reasonable use (see *Shephard v Turner* at [16]), and that appears to the Tribunal to dispose of the argument of Mr Powell that the premises could still be used, in compliance with the restriction, as offices.

74. It is for these reasons that we find that the proposed user is a reasonable user of the land for private purposes.

Does the covenant (the "restriction") impede that user?

75. This is not a controversial issue. Clearly, a restriction to the effect that the premises may only be used as offices will, unless and until it is discharged or modified, impede use of the premises as a private members' club.

Does impeding the user secure practical benefits to the respondent?

76. As Mr Cowen observed in his closing submissions, in truth the real battleground between the parties is whether impeding the user secures practical benefits to the respondent, and if so whether those benefits are of substantial value or advantage.

77. In broad terms, the respondent contends that the restriction on use contained in the applicant's lease fulfils an important function in the implementation of its estate management policy and that were the restriction to be modified so as to allow use of the premises as a private members' club that would be to the detriment of the respondent's Estate as a whole and Berkeley Square in particular. The respondent submits that the restriction therefore confers practical benefits of substantial advantage.

78. We accept Mr Rainey's submission that the practical benefit test cannot be satisfied by reliance upon the very existence of the restriction (*Re Diggens' Application (No.2)* [2001] 2 EGLR 163, in which the Tribunal, P H Clarke FRICS, explained that a practical benefit is secured when it flows from the observance of the restriction).

79. Mr Easter gave evidence, drawing upon his experience in his role as Chief Executive Officer of Astrea in managing the assets comprised in the respondent company's Berkeley Square Estate since September 2017 (when Astrea superseded Lancer). In terms of beneficial ownership, Mr Easter indicated that the beneficial owners of his client company liked to keep a low profile as they were members of the Abu Dhabi royal family.

80. We note at the outset that the respondent has evinced considerable reluctance to reveal not only its beneficial ownership but also the detail of its investments. It should be said that in a case where a respondent seeks to rely upon adherence to an estate management policy it would normally be to the respondent's advantage to be as full and frank as possible in explaining the scope and extent of its property holdings.

81. In the absence of a definitive list of properties contained within the respondent company's portfolio, Mr Easter explained that the respondent is the freehold owner of (what it refers to as) that Estate, "a large and complicated beast" according to Mr Easter, situated in the heart of Mayfair with Berkeley Square as its focal point. He told us that the Estate comprises just over 90 buildings in the original Berkeley Square Estate, totalling something over 700,000 square feet, plus a further ten buildings in the vicinity. It is dominated by office premises but has a diverse range of buildings, businesses and occupiers, tenants (including finance and property companies, recruitment consultants, lawyers and leisure companies) being drawn from a wide range of sectors. Commercial tenants are complemented by occupiers including art galleries, up-market fashion houses, high class clubs, restaurants and public houses. The Estate also includes a number of residential properties, some being long leasehold, others being let on

assured shorthold tenancies. The Estate recognises, as it did whilst managed by Lancer, the importance of monitoring and maintaining its property portfolio and of making strategic acquisitions for the respondent and its associated companies.

82. Mr Easter denied having much knowledge of the dealings of the respondent company prior to his being appointed in September 2017, and claimed that he did not know of any defined "Estate-wide plan" being promoted by Lancer, but he understood that the primary focus has always been Berkeley Square, and that Lancer appreciated the importance of "tenant mix" within the Square and its immediate surrounds. As he put it in his statement:

> "The initial aim appears to have been to make Berkeley Square a destination by diversifying the one-dimensional offering of banks, offices and secondary retail tenants to an area with a vibrant mix of high end restaurants, retailers, novel gym concepts and multiple, varied office tenants."

83. Mr Easter explained further the advancement of estate management policy, making strategic acquisitions of properties such as Berkeley Square House and 50 Stratton Street, moving Bruton Street away from antique shops and art galleries in order to focus on designer fashion outlets, and adding a more varied offering in the form of catering, including the introduction of fashionable and high class restaurants around the Square itself. At the same time, he claimed that the Estate has sought to better the natural environment, by improving the garden facilities within the Square as well as pavements and cycling facilities.

84. The approach of Astrea to the management of the Estate, as articulated by Mr Easter, has been to enhance its "quality, reputation and value… through the strategic curation of the tenant mix." It views the Estate as a long-term investment; it sees the majority of its income and capital value being driven by office tenants (and therefore this forms the focus of its strategy); it seeks to protect the Estate and its capital value from "threats" such as enfranchisement, compulsory purchase, changes in planning policies, regulations, conservation and listed building policies; it aims to improve the local amenity available to those working living in and visiting Mayfair, the identity of Berkeley Square whilst maintaining its character and the quality of the building stock by identifying analysing and implementing capital investment projects; it wishes to preserve a wide range of offices in terms of style and size in order to attract a range of occupiers from large corporations to small family firms across a diverse range of industries and professions.

85. Mr Easter contended, and we accept, that the respondent has through Astrea and its predecessor Lancer "worked hard to cultivate a diverse and sustainable Estate for the benefit of the entire area. The importance of the ability to control this environment is key and the principal way… [the respondent] can do this is through the covenants in its leases."

86. We accept that the ability of the respondent to exercise a degree of control over its assets consistent with the terms of its leases is "key" from its point of view. The principal way in which the respondent can exercise any degree of control over its assets is through the covenants

in the leases. We are satisfied that the restrictions in the lease provide the respondent with the practical benefit of being able to exercise control over and manage its Estate for the benefit of the respondent and all the occupiers.

Is the practical benefit of substantial value or advantage?

87. There was common ground between the valuation experts that the tenant's proposed works to convert the property for private members' club use increases its current rental value, as tenant's alterations and additions are valued at rent review; when valued as offices, the existing hypothetical lease term of 25 years has a negative effect on the rental value whereas a 25-year lease term for a private members' club would not; and that the rental value and resultant reversionary capital value of the landlord's interest would, currently, be higher for private members' club use than for office use.

88. This agreed view did not cause Mr Cowen to abandon the ground of substantial value. His nuanced submission on this point was that the very fact that the respondent was prepared to forgo an increase in rent, agreed to be in the order of £100,000 per annum (putting aside for the moment any effect on the respondent's other properties, including Annabel's), in itself demonstrated some measure of value, or of the substantiality of the covenant – in that the respondent would rather keep the restriction in place and lose the rental increase on the subject premises.

89. However, Mr Cowen's primary submission was that the ability to resist the change of use amounts to a practical benefit of substantial advantage to the respondent. The respondent contended that the modification of the restriction to allow a private members club at the premises would have the following detrimental effects:

a) Having three private members' clubs in a row on the west side of Berkeley Square risks the location becoming synonymous with that type of use, and that would be detrimental to its estate management policy, specifically in ensuring tenant mix across the Estate. Moreover, the addition of a further substantial private members' club at No.45 would have a negative impact on Hays Mews causing further disruption to its owners and occupiers such that, in the words of Mr Easter, its "landscape… would be almost unrecognisable", with adverse consequences for the leasehold and freehold values in the immediate area.

b) Furthermore, the opening of a private members' club adjacent to Annabel's would introduce a competitor on its doorstep, potentially diminishing Annabel's profitability, and thereby reducing the turnover rent payable to the respondent under the terms of its lease of No.46.

c) The respondent submits that the Tribunal should have regard to recent breaches of covenant by the applicant, making the point that it is important that there is a ready means to enforce the terms of the applicant's lease in such a way as to ensure compliance with the general ethos of the locality.

d) Finally, there is the "thin end of the wedge": if the Tribunal modifies the covenant in the manner sought, it is more likely that other lessees on the Estate would be inclined to make similar applications with a view to financial gain, thereby endangering the respondent's careful management of the Estate as a whole.

90. Although we deal with those heads of objection in turn, in doing so we fully accept Mr Cowen's submission that they must be considered cumulatively.

Estate management

91. The respondent contended that, in the absence of a lease specifically dedicated to use as a private members' club, it would have little effective control not only over the activities in Hays Mews but also over the operation of the club as a whole, and this would (it is contended) have a deleterious effect on its ability to curate the Estate for the benefit and protection of its tenants as well as neighbouring owners. In the respondent's view, the applicant's project to develop No.45 as a private members' club is a "speculative" venture which has not been fully thought through, neither the applicant company nor Mr Halabi having any relevant experience, and the relative inability of the respondent to control the operation being carried on in No.45 would again be potentially detrimental to the interests of the Estate as a whole.

92. Mr Easter's evidence was that the respondent relied on all covenants in its leases, to enable it to take a holistic approach to the Estate and consider where changes may be necessary. The significance of the certainty provided by user provisions in leases should not be underestimated. They are an important tool to manage the Estate effectively.

93. Further, if the respondent were offering the premises on the market to a new tenant, the lease terms would be drafted and negotiated with the relevant use in mind. The modification in isolation would deprive the respondent of the opportunity properly to negotiate terms for this kind of use. Mr Easter gave examples of clauses in the new Annabel's lease which the respondent uses to control the use of the property.

94. It is relevant to mention at this point an open letter sent to the respondent on 31 May 2019, shortly before the hearing, indicating that the applicant would be willing for appropriate restrictions to be added to any modification of the lease, including tenant covenants not to operate any fast food or takeaway restaurant, not to place any tables, chairs or other items on the pavement outside the premises, and not to allow any rubbish to be stored outside the front entrance. The letter made clear that the applicant would consider any further proposal which the respondent may make in that regard. The respondent rejected this proposal the same day, commenting that it was the applicant's first open offer, made a day and a half before the hearing. The respondent maintained its position that the modification of the user covenant was not acceptable, and there was no form of wording or proposals which would make it acceptable.

95. Mr Easter emphasised that should the modification be permitted, there would be four licensed premises in adjacent buildings – the new Annabel's, the appeal premises, and 44 Berkeley Square where it was very likely that a similar operation would go into occupation in the upper floors, and there continued to be an offering from the Birley Group for private dining in the basement.

96. We have referred above to the evidence concerning the night-time economy. The respondent contended that it did not wish the Estate to experience what Mr Easter referred to as "Soho-isation", leading to damage to its reputation and attracting unfavourable media coverage.

97. We are not persuaded that much can be derived from the Hadfield Report. We accept Mr Rainey's submissions that it describes anti-social behaviour primarily in Berkeley Street rather than Berkley Square, and that when it was published Annabel's had not yet reopened in its new home – so the behaviour there described cannot be attributable to its members as such.

98. As for Hays Mews, Mr Bees' evidence was that, during the six years that he was adviser to the applicant, and previously when he worked for the Annabel's group (between 1998 and 2007), deliveries for the Clermont Club and the original Annabel's were made via Hays Mews. Indeed, it was his belief that Hays Mews has been the site of deliveries for commercial operations for over 50 years.

99. Mr Bees said that following receipt of Mr Easter's first witness statement in which concerns were expressed about the use of Hays Mews, the applicant had monitored its CCTV footage. This indicated that there had been an intensification of pedestrian use since the relocation of Annabel's, but Mr Bees argued that this was attributable to the way in which Annabel's was operating, using multiple buildings (the former Annabel's at 44, where staff change and refuse bins are situated; 47 Hays Mews which is also used for staff changeovers, and the vaults beneath 1-4 Hays Mews which, in Mr Bees' direct experience, are used as a cellar and to where deliveries are made). His view was that the increase in traffic has been as a result of the spread of Annabel's operations. By contrast, as evidenced in its design and management plan, the proposed club in the premises would be entirely self-contained and deliveries would be made, by each supplier, once per day only.

100. Mr Bees accepted in cross-examination that he had no CCTV footage from the period before Annabel's relocated. He also accepted that compared with the former Annabel's (one restaurant and three bars in 5,865 sq ft, open 7pm to 4am), the new Annabel's comprises three (soon to be four) restaurants, two private dining rooms and six bars, all in 16,903 sq ft, open 7am to 4am. We have no doubt, as the respondent contended, that this expansion must inevitably have resulted in a greater number of deliveries being made, but as Mr Rainey submitted, the evidence on the point was scant. Additionally, in our view it is more likely than not that Annabel's, with its multiple locations around Hays Mews, would have a greater impact on that street than would a single club in the subject premises.

101. In any event, the only evidence before the Tribunal concerned the rear of the properties, Hays Mews. We heard no evidence about any form of anti-social behaviour or associated nuisance in Berkeley Square itself whether from members leaving Annabel's, in either of its locations, or from the Clermont when it operated. There was no evidence of concerns being expressed in the area Mr Rainey termed the "front of house".

102. We take into account that the applicant has passed sufficient hurdles to obtain a premises licence (granted by the licensing authorities whom one would expect to be aware of any local difficulties), and that the planning authority granted consent to Annabel's in the knowledge that consent had already been granted to the applicant next door.

103. It is necessary to consider what could be achieved without modification. We accept Mr Rainey's submission that it would be invidious to compare the effect of the proposed private member's club on the one hand with the effect of the premises being left vacant. The premises could, at least during office hours but occasionally outside them, be used for offices, and given their size could accommodate a significant number of people, all of whom would come and go, some of whom might smoke outside, and there would be necessary deliveries of supplies, equipment, consumables etc.

<u>The effect on Annabel's turnover</u>

104. Mr Easter confirmed that the turnover threshold under the Annabel's lease had not yet been reached, but pointed out that the club had only been open for just over a year in its new premises, during which time the profitability was being built up. He referred to the turnover rent at "Sexy Fish" of around £285,000 for smaller premises catering just to the lunch and evening trade, whereas Annabel's is a nearly 24-hour operation. But he had not, to date, estimated what the turnover rent for Annabel's would amount to. But there was no real evidence from the respondent on this point – Mr Easter's oral evidence amounted to not much more than hearsay. There was no written evidence from the respondent providing an analysis of its rents, turnover rents, and how they might be affected.

105. The only thing Mr Cowen could really rely on was an extract from the Financial Times in which, it was alleged by a journalist that the new Annabel's was "in fierce competition" with other exclusive London clubs. We note, in passing, that the £1,000,000 which Annabel's was apparently charging for corporate membership would not count towards the threshold over which a turnover rent would be payable.

106. In relation to the increase in rental income of around £100,000 (17.5% of an increase in rental value of £600,000) which would be generated by allowing the modification of the covenant, Mr Easter considered that this is *de minimis* when considered in the light of the rent roll of the estate of £40,000,000. But, in considering the effect on the turnover of Annabel's, this £100,000 or thereabouts must be taken into account. We note that for the respondent to be in a neutral position, i.e. that the increase in rent of around £100,000 cancels out the effect on the turnover rent of Annabel's, the effect on Annabel's turnover, excluding membership fees,

would have to be greater than £2 million. So, it is not until the Annabel's turnover would have reached greater than £20 million, but did not do so as a direct result of the proposed club in the premises, that the respondent would be out of pocket (£20m - £18m = £2m x 5% = £100,000).

107. This effect on rent also assumes that the proposed club in the premises would be able to generate sufficient interest and membership from a standing start to compete with one of the best known high-end private members' clubs in Mayfair. We are sceptical that this is the case.

108. While we accept, as we did in *Re Pendennis's Application* [2017] UKUT 0430 (LC), that it is necessary to consider the likelihood of future events, and not just consider the merits of the application at the present time, but by that we meant the foreseeable future. Mr Cowen submitted that there has to be at least a realistic possibility that at some point within the next 10-30 years the modification of the covenant would have such an effect on the Annabel's turnover rent as to compromise adversely the financial position of the Estate as a whole.

109. We are not persuaded by that submission. Whilst it is for the applicant to prove their case, we find it more likely than not that there would be little if any effect on the respondent's rent roll (of £40 million) as a direct result of the Annabel's turnover being adversely affected by the opening a new club next door.

<u>Breaches of covenant</u>

110. The applicant accepts that it breached the covenants in the lease by converting and using the whole of the fourth floor for residential purposes, and by carrying out alterations in order to commence implementation of the planning consent for change of use – thereby rendering it immune from being time-barred.

111. We do not consider that much weight can be placed on this. In both cases there is circumstantial evidence that the respondent knew that the applicant was going to do the work and had given informal (but, we accept, not formal) consent. Secondly, it is not the case that the applicant has actually implemented, in breach of the restriction, the change of use that it seeks by way of modification. The circumstances are therefore materially different from those in *The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd & Anor* [2018] EWCA Civ 2679. It is right to say that Mr Cowen did not seek to suggest otherwise.

<u>"Thin end of the wedge"</u>

112. Mr Rainey emphasised that the application was for a limited modification, not for discharge. He made the point that nothing else would change – all of the covenants in other leases would remain. Mr Cowen submitted that this missed the point. The effect to be determined was that on all of the respondent's other properties, and in that way the application should be judged in the same way as objections relating to the preservation of the amenity of an estate, or the maintenance of a building scheme. The respondent was a commercial entity,

seeking to maximise its long-term value – not just make a profit in the short term on one property – which it might do on the appeal property should the use be changed.

113. This concept, sometimes called "the thin end of the wedge", or as Mr Rainey preferred, the "ratchet effect", normally refers to a situation where there are similar covenants on freehold titles, and that the discharge or modification of one might lead to a host of other applications. In a leasehold situation, the nature of the threat to the objecting respondent is different. In this case, we are not persuaded, for two reasons, that the respondent has a legitimate cause for concern.

114. First, there appear to be no other leases, of which the respondent is landlord, in the immediate locality (in what the respondent has referred to as its Estate) which would qualify under section 84(12) of the Act. Certainly, the respondent has not referred us to any despite having had ample opportunity to do so. Mr Rainey criticised the respondent, understandably in our view, for its reluctance to provide compendious evidence of the lettings on its estate, but submitted that such evidence as there is showed that, for the block which included the premises, there were no leases of over 40 years, and that the evidence provided by the valuers also showed no qualifying leases. So there was no evidence, or at any rate the respondent does not rely upon any evidence, of other leases which could give rise to applications to the Tribunal pursuant to section 84.

115. Secondly, as Mr Cowen submitted for other reasons, there is the unique nature of the premises. There was no evidence before us of similar buildings, that is buildings having a combination of "state-rooms" and what might be termed "backstairs" accommodation which were currently in office use but which would lend themselves to ready conversion to a private members' club.

116. Turning to the respondent's wish to retain the premises in office use, so that the Berkeley Square Estate maximises any opportunity to "land" office requirements, we think this is a bad point. The premises are not in hand to the respondent – they are let to the applicant on a long lease, and there is no "keep open" clause. In fact, on this particular aspect we do not consider the restriction secures to the respondent a practical benefit at all - see for instance *Re James Hall & Co's Application* [2017] UKUT 0240 (LC).

Summary

117. As we stated above, it is important that the Tribunal considers each and all of the factors not only individually but also cumulatively. When we do so, we are confirmed in the view we have reached that ground (aa) has been made out by the applicant.

118. We are not convinced by the respondent's submissions as to the effect of modification of this restriction on the Estate as a whole. To an outsider, it is difficult to identify the Estate. It is in effect a portfolio of diverse properties whose one common characteristic is their location within a relatively close geographic area. In truth, the Estate defines itself not by any physical

demarcation or by any commonalty of design but by the fact that its component properties have a common owner. We do not for a moment question the respondent company's motives in curating and promoting the area of Mayfair for the benefit of the local community (not simply those who inhabit or occupy the respondent's own properties) but ultimately the principal beneficiary of the respondent's efforts in this regard is the company itself.

119. It follows that the respondent has always had an uphill task to persuade the Tribunal that there is any real practical benefit in enforcing the restriction to office use in a lease which does not expire until 2070. Examining, as we have done, each of the arguments put forward by the respondent, and analysing the evidence that has been adduced, we have taken the view that any benefit there may be is of nebulous value or advantage. Looking at the matter in the round, and adopting a pragmatic approach, we are not persuaded, on the evidence, that any of the respondent's heads of objection have sufficient merit, to demonstrate that the practical benefit which it holds by impeding the proposed user is one of substantial advantage. Accordingly, the application under ground (aa) succeeds in principle, subject to the Tribunal's discretion.

120. We did not hear any evidence as to the compensation which should be considered adequate should we find that the benefits are not of substantial advantage, and we therefore make no determination as to compensation.

Ground (c)

121. It follows, from our finding above, that the application under ground (c) also succeeds, as there is no injury to the respondent caused by the modification of the restriction, subject to our determination of how the restriction should be modified.

Conclusions

122. We are therefore of the view that we should make an order for modification of the restriction. We have power, pursuant to section 84(1C) which is set out at paragraph 46 above, to add further provisions restricting the user of the land as appear to us reasonable in view of the modification being ordered. We consider that it is appropriate to exercise this power in the circumstances of this case, on the ground that, should a private members' club use be permitted, it is reasonable to insert additional clauses to protect the respondent's position.

123. Accordingly, when we issued the draft of this decision to the parties on 27 September 2019, we invited them to agree a series of further restrictions, and in the absence of agreement to make further submissions. We received such submissions in their final form on 8 November 2019.

124. It should be said that we found the number of additional clauses sought by the respondent - 55 in total - surprising. We agree with the applicant's submissions to the effect that the power of the Tribunal to add further provisions is limited. First, the provisions must, as the words of the statute indicate, restrict the user of or the building on the land affected: in

short, they must themselves be restrictions, and attempts to insert positive obligations by way of covenant, or negative obligations which do not restrict user or building, are doomed to fail. Secondly, the provisions to be added must appear to the Tribunal to be reasonable 'in view of the relaxation of the existing provisions': the context, in terms of the modification being granted, is therefore a central consideration, and there must be a link, or nexus, between the modification and the additional clauses. The power contained in section 84(1C) is not intended, and should not be used, as a means whereby the whole lease can be re-written. In determining what is reasonable, the Tribunal should therefore consider the effect of the modification and the additional clauses on the lease as a whole.

125. Following the parties' receipt of our draft decision, they were able to agree a number of additional clauses which are set out in the Appendix to this decision. We note that clauses (b) and (l), at least in the form they have been drafted, amount to positive obligations which the Tribunal would not have jurisdiction to make, but we have included them since the applicant is content to include them in the lease. As for the other additional clauses which the respondent proposed, but the applicant resisted, having considered them in light of the principles set out above, we do not consider it reasonable to add them as ancillary to the modification.

Determination

126. We determine that the restriction set out in paragraph 36 above shall be modified as follows pursuant to grounds 84(1)(aa) and (c) of the Law of Property Act 1925, subject to the additional provisions outlined in the Appendix to this decision being inserted into the lease, pursuant to the Tribunal's power contained in section 84(1C):

> "3(12)(a) Not knowingly to use or permit the demised premises or any part therefore to be used for any illegal or immoral purpose nor for any noxious noisy or offensive trade or business not shall anything be done or permitted upon the demised premises which may be or grow to be a nuisance annoyance or disturbance inconvenience damage to the Landlord or its tenants or the owners or occupiers of other property in the neighbourhood nor which in the reasonable opinion of the Landlord shall prejudicially affect or depreciate any neighbouring premises belonging to the Landlord and that the demised premises shall be used only as offices or a high-class private members' club with ancillary residential accommodation on the Fourth Floor thereof shown edged green on the plan annexed hereto and for no other purpose and that no machinery or engine of any kind (other than normal mechanised office equipment and normal domestic machinery) shall be brought erected or set up in or upon any part of the demised premises and no auction shall take place thereon;

127. An order modifying clause 3(12)(a) of the lease, and inserting the additional provisions set out in the Appendix to this decision shall be made by the Tribunal provided that, within three months of the date of this decision, the applicant shall have confirmed their acceptance of the proposed modification and insertion of those additional provisions.

128. This decision is final on all matters except costs. The parties are now invited to make submissions on costs, and a letter giving further directions for the exchange of submissions accompanies this decision.

His Hon Judge Stuart Bridge Dated: 9 December 2019 Peter D McCrea FRICS

Appendix

Further restrictions to be inserted into the tenant's covenants

(a) Not to allow odours from the business carried on at the demised premises to enter any adjoining or neighbouring premises nor install or operate the Tenant's plant and equipment incorrectly with the result that such odours are permitted to escape to any adjoining or neighbouring premises.

(b) To place all waste matter in properly covered and secure dustbins, containers or compartments so that no rats, pests or vermin are attracted to the demised premises or any adjoining or neighbouring premises and to take all reasonable precautions to prevent rats, pests or other vermin from entering into the drains within the demised premises or any adjoining or neighbouring premises.

(c) Not to store, dispose or arrange for the collection of any waste or refuse of any nature whatsoever other than in compliance with the requirement of the local authority.

(d) Not to allow rubbish to be stored outside the demised premises.

(e) Not to allow litter (including food wrappings, remains of meals or other food and glasses, crockery and eating materials) left by customers of the business carried on at the demised premises to remain in the vicinity of the demised premises.

(f) Not to play any live or recorded music which is audible outside the demised premises.

(g) Not to use the demised premises for any commercial activity of a sexual nature (including but not limited to lap-dancing).

(h) Not to use the demised premises for sale of alcohol or food for consumption off the demised premises.

(i) Not to use the demised premises as a “fast-food type of operation” of a type characterised by “McDonald’s”, “Kentucky Fried Chicken” or similar outlets.

(j) Not to place any tables, chairs or other furniture or equipment on the pavements or other areas outside the demised premises or to allow patrons to take drinks or food onto those areas.

(k) Not to display any goods, materials or stock outside the demised premises for display, sale or any other purpose.

(l) To ensure that any restaurant and/or bar operated at the demised premises in accordance with the terms hereof is a high-class restaurant and/or bar (as the case may be).

(m) Not to solicit for customers outside the demised premises.

(n) Not to grant any private membership at the demised premises where the member can visit the demised premises at no cost and within 48 hours of commencement of the membership.

(o) Not without the prior consent of the Landlord, not to be unreasonably withheld, to make any changes to the exterior of the demised premises (including, but not limited to, the erection of signs, decorations, illuminations, advertisements, hoardings and notices).

(p) Not to place affix or display any sign advertisement notice poster or other notification whatsoever on the inside of the demised premises so as to be visible from outside the demised premises unless first approved by the Landlord, such approval not to be unreasonably withheld.