UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2020] UKUT 0104 (LC)
Case No: LP/21/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION - leasehold office premises – planning permission for change of use to hotel – hotel use prohibited by lease – whether covenants secure to freeholder practical benefits of substantial value or advantage – application refused – s.84(1), Law of Property Act 1925

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

BETWEEN:

EDGWARE ROAD (2015) LIMITED

Applicant

- and -

THE CHURCH COMMISSIONERS FOR ENGLAND

Objectors

Re: 127-175 Edgware Road
London W2

Peter D McCrea FRICS

Royal Courts of Justice

3-5 December 2019

Guy Fetherstonhaugh QC and *Nicholas Trompeter*, instructed by Simkins LLP, for the applicant
Edwin Johnson QC and *Greville Healey*, instructed by Charles Russell Speechlys LLP, for the objectors

The following cases are referred to in this decision:

Gordon v Church Commissioners (Lands Tribunal, unreported, LRA/110/2006) [2007] EWLands LRA_110_2006

Re: Forestmere Properties Ltd's Application (1981) 41 P&CR 390

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

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

Vertical Properties Limited v New Hampstead Garden Suburb Trust Limited [2010] UKUT 51 (LC)

Ridley v Taylor [1965] 1 WLR 611

Shaviram Normandy Ltd v Basingstoke and Deane BC [2019] UKUT 256 (LC)

The University of Chester's Application [2016] UKUT 457 (LC)

Re Martin (1988) 57 P&CR 119

Shephard v Turner [2006] 2 P & CR 28, [2006] EWCA Civ 8

Berkeley Square Investments Ltd v Berkeley Square Holdings Ltd [2019] UKUT 384 (LC)

Re James Hall & Co's Application [2017] UKUT 240 (LC)

Introduction

1. The Hyde Park Estate ("the Estate") covers some 90 acres to the north of Hyde Park, comprising about 2,300 residential and commercial properties arranged around a variety of garden squares. It is almost triangular in shape, bounded by Bayswater Road and Hyde Park Place to the south, Sussex Gardens to the north-west, and Edgware Road to the north-east. Paddington Station is a short distance to the north-west. The Estate came into the ownership of the monks of Westminster in the 12th century and, apart from the period following the dissolution of the monasteries during which it was vested in the Crown, it has been owned by the Church in one form or another ever since. It is now owned and managed by the Church Commissioners for England ("the Commissioners").

2. At the northern point of the triangle, fronting Edgware Road with a return to Sussex Gardens, there is a large 1960s development known as The Water Gardens. Within it, the long leasehold interest in the internal parts of the basement, ground floor, first floor and part second floor of 127-175 Edgware Road ("the application property") is held by Edgware Road (2015) Limited ("the applicant") under a lease dated 14 June 1991. The ground floor and part of the basement area comprise retail premises, sub-let to a variety of occupiers, while the first floor and part second floor are offices, currently vacant and stripped out.

3. The applicant wishes to change the use of the vacant first and second floors and part of the basement of the application property to a 117-bedroom "pod-type" hotel (i.e. having windowless bedrooms) for which it has planning permission, but it is prevented from doing so by covenants in its lease. The Commissioners have refused to modify the lease, so the applicant now applies to the Tribunal to discharge or modify the relevant restrictions under section 84 of the Law of Property Act 1925 ("the Act").

4. The parties described the application to the Tribunal as "round 1" of proceedings. If successful in its application to the Tribunal, the applicant might need to install plant on the roof of the application property or carry out other works. Whether it is permitted to do so under the provisions of the lease would need to be determined by the court, in "round 2", and the parties did not suggest that the determination of this application was dependent on the outcome of any such proceedings.

5. I inspected the application property and the Estate on 28 November 2019, accompanied by the parties. The application was heard between 3-5 December 2019 at the Royal Courts of Justice. Guy Fetherstonhaugh QC and Nicholas Trompeter appeared for the applicant; Edwin Johnson QC and Greville Healey appeared for the Commissioners. I am grateful to all of them for their helpful oral and written submissions.

6. Evidence of fact was given by Andrew Sell FRICS, Head of Asset Management at Criterion Capital Limited for the applicant; and for the Commissioners by three employees – Ms Joanna Love, Commercial Asset Manager; Mrs Rosemarie Jones, Deputy Surveyor; and Mr Andrew Brown, Secretary and Chief Executive. Expert evidence was given by Mr Ruaraidh Adams-Cairns FRICS for the applicant, and Mr Kevin Ryan FRICS for the Commissioners.

The relevant statutory provisions

7. The application is made under grounds (aa) and (c) of section 84(1) of the Act.

8. Ground (aa) requires that, in the circumstances described in subsection (1A), the continued existence of the restriction must impede some reasonable use of the land for public or private purposes. Satisfaction of subsection (1A) is also essential to a successful application based on ground (aa); it provides as follows:

> (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.

9. When considering whether sub-section (1A) is satisfied and a restriction ought to be discharged or modified, the Tribunal is required to take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission in the area (section 84(1B)).

10. Ground (c) permits the Tribunal to make an order modifying or discharging a restriction where it is satisfied that the proposed modification will not injure the person entitled to the benefit of the restriction.

11. Under subsection (1C), the Tribunal has the power to add such further provisions restricting the user of or the building on the land affected as it considers reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant; and may refuse to modify a restriction without some such addition.

12. Section 84(12) extends the Tribunal's jurisdiction to leasehold covenants after the expiry of 25 years of a term of more than 40 years. The Commissioners do not dispute that section 84 applies to the lessee's covenants in the lease of the application property.

The Locality

13. The Hyde Park Estate comprises some 2,300 residential and commercial properties, of which approximately 1,700 are owned by the Commissioners. They range from offices, shops, and hotels to the occasional pub, but the majority are houses and flats. The Estate was agricultural until the late 18th century, when the Bishop of London engaged the architect Samuel Pepys Cockerill to draw up a development scheme for the whole area. The first house was completed in 1807 on Connaught Place. In 1838, Cockerill's successor George Gutch produced his final plan for the Estate, which defines the streetscape that can be seen today.

14. The Estate has a number of traditional gated garden squares, including Sussex Square, Gloucester Square, and Hyde Park Square, while the early Victorian St John's Church forms a centrepiece visible along many of the internal spine roads. Like much of London, the Estate has a mix of elegant Regency terraces and more utilitarian creations of the 1960s – part of a

post-war plan by the architect Anthony Minoprio to replace "slum housing" with denser development to provide much needed housing.

15. One element of the Minoprio plan was the development of The Water Gardens. Situated at the extreme north-east of the Estate, the development was marketed as a luxury apartment complex designed in a (then) fashionable "American" style. The original brochure emphasised the residential amenities offered, including a play area, winter garden, communal sun terraces and a large communal garden with pond features. The development sought to insulate the residents from the busy Edgware Road. Some of the features have since been replaced, but the general concept remains the same.

16. The Water Gardens occupies a substantial block of property over 3.6 acres, comprising a collection of buildings arranged around a central landscaped area with a series of geometric ponds, walkways, staircases, terraces and seating areas. The Water Gardens has frontage to Edgware Road to the north-east, while Sussex Gardens, Norfolk Crescent and Burwood Place form the north-west, south-west and south-east boundaries.

17. The Edgware Road frontage is formed by a substantial three-storey building at 127-175 Edgware Road, with 18 retail units and restaurants at ground floor level, under a projecting concrete canopy, and two stories of offices and flats above. Rising above these are three high-rise apartment towers, one in the centre and one on each corner of the block.

18. Along the Sussex Gardens frontage, behind a landscaped area, there is a low-rise apartment block with pedestrian and vehicular access from Sussex Gardens. On the Norfolk Crescent frontage, there is an eight-storey apartment building known as the West Block, beneath which there is vehicular access into the development and a pub called The Heron. Next to this is a curved terrace of 20 three-storey houses, each with a sunken rear patio. Along the Burwood Place frontage, there is a further vehicular and residential access to the development.

19. The basement of 127-175 Edgware Road was formerly an NCP car park, but is now let out as a self-storage facility, accessed via Burwood Place, together with extensive residents' car parking, accessed via a ramp behind The Heron, and a vacant area which has most recently been used in connection with the refurbishment of the gardens.

20. The applicant's lease of the interior of the majority of Nos.127-175 Edgware Road is subject to sub-leases of the 18 shops, each of which has basement storage. They include branches of Barclays, Holland and Barrett, and a variety of smaller retailers and restaurants. The first and second floors are accessed from two relatively narrow entrances between the retail units at what would be Nos. 131 and 157 Edgware Road. At 131, there is a passenger lift, but at 157 there is only stair access. Other than from fire doors, there is no access from the first and second floors to the Water Gardens to the rear.

21. The bulk of the proposed hotel would be located in the currently vacant first and second floors. The first floor comprises approximately 15,000 sq ft in a linear but irregular configuration, formed around elements of the three high-rise blocks and the entrances to the second-floor flats which I describe below. At the time of my inspection it was stripped back to a shell state. The second floor comprises 8,000 sq ft, located between the left hand and middle tower blocks. Like the first floor it is in a shell state, but with a lower head height. The remainder of the second floor, falling outside the application property, comprises four flats let

on long leases. Nos 148, 149, 248 and 249 The Water Gardens, the freeholds of which are owned by the Commissioners.

22. The first and second floor offices have rear windows facing the Water Gardens; the northern-most section of those on the first floor, between the entrances to the four flats, are above eye level, while the remainder and all of those on the second floor provide a view over the gardens. Forming part of the Water Gardens, to the rear of the first floor of the application property, but excluded from it, are two elevated "podium" terraces, each located between the high-rise apartment blocks and overlooking the main gardens. Access to the second floor flats is from the right-hand podium terrace, when viewed from Edgware Road.

23. The first and second floors of the application property were previously fitted out and occupied as offices, but between 2013 and 2017 were in part used as a school.

Planning history

24. For the purposes of this application there are three relevant planning permissions and one outstanding planning application.

25. Planning permission was granted to the applicant's predecessor (Central London Investments Ltd – see below) in November 2013 (13/03354/FULL) for change of use to a 108-bedroom hotel. The permission was not implemented and subsequently expired. The Commissioners objected to the application, as did the Hyde Park Estate Association, but they appear to have been the only objectors out of 317 adjoining owners or occupiers.

26. On 25 November 2016, the same company made a further planning application (16/11276/FULL) for a change of use to a hotel. The Commissioners again objected, on various grounds including the inappropriateness of hotel use, loss of employment, exacerbation of the Edgware Road Stress Area, the impact on residential amenity, highways issues and rooftop plant. On 19 September 2017, the Council refused permission, primarily on highway grounds connected to the size of the proposed hotel in terms of floorspace and number of rooms.

27. The applicants appealed, but in the meantime made a further application (18/01075/FULL), supported by a detailed planning statement. The Commissioners objected by way of a letter dated 16 March 2018, on the grounds of transport and highways, plant/louvres, and the low grade of the hotel provision.

28. On 1 May 2018 the planning inspector allowed the appeal and granted permission for "the use of part basement, ground, first and second floors as a hotel (Class C1), external alterations to install louvres to the front and rear elevations, and installation of mechanical plant within an enclosure on [the] flat roof above the second floor level" subject to conditions. The inspector identified the main issue in the appeal as the effect of the proposed development on highway safety; the inspector dealt with issues over service/delivery vehicles, taxi/private hire vehicles and coach parking by means of planning conditions. It is relevant to note the inspector's findings on other matters:

> "27. The appeal site is located within the Central Activities Zone as identified by the [Westminster City Plan 2016], and there is general policy support for hotel uses within such areas as part of the broad commercial offer within the [City Plan]

and [Westminster Unitary Development Plan 2007]. There is therefore no policy basis for refusal of consent in respect of concerns regarding the loss of office space or the concentration and type of hotels in this specific area. It is understood that a designated Stress Area along Edgware Road relates to entertainment uses, of which a hotel use is precluded.

28. I am satisfied that there would be no impact upon the amenity of neighbouring residents. The entrance and exit to the proposed hotel would be from Edgware Road adjacent to the existing retail units and away from the entrances to the residential accommodation within the development. Proposed changes to the building fabric itself would have no effect on privacy or outlook and enclosure. Construction noise could be dealt with by the imposition of a condition in respect of hours of operation and noise from mechanical plant to the roof can be dealt with in a similar way.

29. In terms of character and design, the hotel rooms would be in a 'pod' type form and would be windowless. It would provide budget accommodation designed to cater for short stays and thus is acceptable in this regard. Louvres are proposed externally, however these would maintain the existing symmetrical appearance of Water Gardens and I am mindful that details of the appearance and finish can be conditioned."

29. The conditions imposed by the inspector required that the development be in accordance with plans approved by Westminster, including details of the screen around the proposed mechanical plant on the third floor; a proposed café area at first floor level is only to be used by hotel guests and not by members of the public.

30. A third permission (the "minor material amendment") was granted by Westminster (18/05659/FULL) on 25 September 2018. It permitted the relocation of the plant from the roof level to within the envelope of the second floor, with louvres inserted into the southern end of the Edgware Road elevation. The proposed café was removed altogether, and the entrance was relocated from 157 to 131 Edgware Road.

31. A fourth planning application for the installation of internal plant machinery and associated louvres and removal of existing plant, and for the installation of plant and louvres on the roof above the second floor had not been determined by the Council at the date of the hearing.

The lease

32. The lease is dated 14 June 1991, and was made between the Commissioners and Marble Arch Gardens Ltd, for a term of 125 years from 25 March 1991 at a peppercorn rent. The premium paid was £12.475 million. In 2004 the leasehold interest was assigned to Quadrick Limited (renamed Central London Investments Ltd in 2007) a company in the Criterion Group in 2004. It was further assigned within the Criterion group to the applicant on 25 May 2017.

33. The lessee's covenants are contained in section 3 of the lease. In so far as relevant to this application clause 3.10.1 outlines generally prohibited uses, as follows (with my emphasis):

"3.10.1 User – Restriction of certain uses

… not to use the Premises or any part thereof for any of the purposes detailed in Part I of the Fifth Schedule hereto."

34. One of the prohibited uses in Part I of the Fifth Schedule is:

"(k) for residential premises and the Lessee will not allow permit or suffer any person to sleep in the Premises"

35. Clause 3.10.2 deals with permitted uses:

"3.10.2 Subject to the prohibitions contained in Clause 3.10.1 above not to use the Premises or any part thereof other than for any of the uses identified in Part II of the Fifth Schedule hereto."

36. Part II has a section A, which deals with the ground floor, and section B, which deals with the first and second floors. Section A has three subsections which allow uses broadly following the A1, A2 and A3 planning use classes in force at the time, thus allowing retail, financial and professional services, and food and drink uses. Section B permits office use on the first and second floors.

37. For the purposes of this application therefore, the lease prohibits certain uses across the whole demise, including for residential or sleeping purposes, and restricts the use of the first and second floors to offices.

The application

38. The applicant applies to modify the use covenants in the following ways. As regards Part I, the proposed modification narrows the prohibited use as follows:

"(k) for residential premises (provided always that hotel use shall not infringe this covenant) ~~and the Lessee will not allow permit or suffer any person to sleep in the Premises~~"

39. As for Part II, the application as drafted proposed three additions: in section A, a new subsection 4, permitting use of the ground floor "for entrances to a hotel for visiting members of the public and members of staff"; a replacement section B, allowing the basement to be used "ancillary to the use of the first and second floors", and a new section C, which would extend the permitted use of the first and second floors to office use and "hotel use".

40. At the hearing, Mr Fetherstonhaugh agreed that there is currently no restriction on the use of the basement, and so withdrew his proposed section B, which he said was only meant to be a crowd pleaser.

41. As a result, if modified, clause 3.10.1 would prohibit use as residential premises while providing that hotel use would not infringe that covenant, and would remove sleeping as a prohibited use; clause 3.10.2 would permit use of the ground floor for entrances to the proposed hotel for visiting members of the public and staff, and use of the first and second floor for offices and/or hotel use.

42. The proposed hotel is based on an integrated modular design, with 117 windowless but air-conditioned rooms. Storage space for bicycles, refuse and a disabled parking space would be located in the basement. The applicant has not yet decided whether it would implement the appeal decision or the minor material amendment. In his closing submissions, Mr Fetherstonhaugh QC submitted that should I be minded to order that any modification of the restrictions be limited to a planning permission, the applicant would request that the planning permission secured on appeal and the minor material amendment permission and/or any other minor material amendment to be included in any such limitation.

43. If the applicant implemented the minor material amendment, there would be no restaurant, café, or "food and beverage" offer at the hotel – guests would need to make their own arrangements, either dining elsewhere, or bringing in, or having meals sent to the hotel.

Preliminary point on jurisdiction

44. At the start of the hearing Mr Johnson QC submitted that I did not have jurisdiction to consider the application because the proposed changes to the user covenants go beyond modification, involving the addition of new covenants by inserting new categories of permitted use into Part II of the Fifth Schedule. The jurisdiction of the Tribunal to discharge or modify under Section 84 did not, he suggested, extend to the addition of new covenants to existing covenants.

45. Mr Johnson accepted that the Tribunal can add further restrictive covenants under subsection (1C), by using the "power conferred by this section to modify a restriction". The corollary of this was that, in the absence of specific jurisdiction, the Tribunal had no power to add further provisions to an existing covenant. The Tribunal's power to modify a restriction did not include power to add new covenants or provisions, either as additions to an existing set of covenants or as new stand-alone covenants.

46. He drew an analogy with section 57(6) of the Leasehold Reform, Housing and Urban Development Act 1993, relying on *Gordon v Church Commissioners* (Lands Tribunal, LRA/110/2006, dated 25 May 2007). *Gordon* concerned a property on the Estate. His Honour Judge Huskinson decided that the word "modified" was not wide enough to permit the introduction of a new term in a lease to be granted pursuant to the 1993 Act. Mr Johnson suggested that the same approach should be adopted in relation to section 84 of the Act.

47. Mr Johnson submitted that the Tribunal's power allowed it to add further restrictive provisions of its own, as a means of tempering the relaxation of existing provisions under section 84(1). There is nothing in section 84 which permits the applicant itself to propose the introduction of new provisions. Accordingly, the application sought changes which go beyond the jurisdiction of the Tribunal and should therefore be dismissed.

48. In response, Mr Fetherstonhaugh QC submitted that Mr Johnson's jurisdiction objection was without foundation. Section 84(1) confers on the Tribunal a broad and unfettered power, albeit exercisable in prescribed circumstances, "wholly or partially to discharge or modify" a restrictive covenant. Subsection (1C) declares that this power "includes" but is not limited to the power to add such further provisions as appear to the Tribunal to be reasonable. For an example of the exercise of the power, Mr Fetherstonhaugh referred to *Re Forestmere Properties Ltd's Application* (1981) 41 P&CR 390 where the Lands Tribunal removed controls relating to the use of land as a cinema but imposed new residential restrictions.

49. Mr Johnson accepted that his preliminary objection came down to an issue of construction of the lease, and that there was nothing objectionable (from a purely jurisdictional aspect) about the proposed modification of paragraph (k) of Part I of the Fifth Schedule. But he maintained that the proposed additions to sections A and the new section C of Part II were something which the Tribunal did not have jurisdiction to grant.

50. I do not accept Mr Johnson's submission, and agree with Mr Fetherstonhaugh that the addition of the extra wording in Part II simply reduces the ambit of the prohibition in clause 3.10.2 of the lease and that the proposed alterations to Parts I and II of the Fifth Schedule amount to the modification of the existing restrictions as the use of the premises. They are squarely within the scope of section 84(1), and there is no reason they cannot be the subject of an application.

51. The effect of the proposed modification of clause 3.10.1 together with paragraph (k) of Part I of the Fifth Schedule, would be that the premises are not to be used as residential premises, but hotel use is not to be taken to infringe that restriction, and the prohibition on sleeping on the premises would be deleted. Similarly, the modifications of clause 3.10.2 together with the additions suggested in Part II, would have the effect that the premises are not to be used other than for a series of uses on the ground floor which are widened to include entrances to the proposed hotel; and in respect of the first and second floors for office use and hotel use.

52. Nor is there any reason why an applicant may not invite the Tribunal to impose additional restrictions under section 84(1C) as a condition of relaxing others; after all, the Tribunal may not exercise its power to add restrictions without the concurrence of the applicant, and it does not seem to me to matter whether the applicant or the Tribunal first raises that possibility.

53. Mr Johnson accepted that there was no authority specifically concerning section 84 upon which he could rely, and I do not consider *Gordon* helps him. In that case, the appellant was seeking to insert a completely new clause into a new lease, under legislation which the Lands Tribunal considered restrictive. Judge Huskinson contrasted the limited power in section 57(6) with the wider provisions of certain other statutes including section 35 of the Landlord and Tenant Act 1954, or section 35 of the Landlord and Tenant Act 1987. The decision contains no principle which is capable of application to section 84 of the Act.

54. Accordingly, I dismiss the preliminary objection based on jurisdiction.

Evidence of fact

Mr Sell

55. Since April 2018, Mr Andrew Sell FRICS has been the Head of Asset Management at Criterion Capital Ltd ("Criterion"), the asset manager for the applicant and other companies within the same group.

56. The applicant acquired the long leasehold interest on 25 May 2017 specifically with a view to converting the first and second floors to hotel use. The applicant did not consider an office use to be feasible, owing to its layout, limited head height, and lack of demand, and therefore did not at any point offer it to the office market.

57. Mr Sell outlined the applicant's group structure and explained that the hotel would be operated by Assembly Hotels Group Limited, trading as "Zedwell", under a hotel management agreement with the applicant. He exhibited a draft agreement which would govern the operation of the hotel.

58. If successful, the proposed operation would be a "lifestyle" hotel – a room-only offer, with no food, bar or catering facilities on site. Mr Sell's evidence was that a room-only offer was perfectly sustainable – his group's research suggested that many hotel occupants do not take up the food and beverage offer within a hotel, but prefer to eat out, although he accepted that there may be some food deliveries from Deliveroo and similar operators.

59. He provided a schedule of hotels within the group, of which four were (to be) "lifestyle" hotels. Of these, three were under construction and would trade under the "Zedwell" brand: the GRS Hotel at Great Russell Street (to be room-only); the London Trocadero at Coventry Street (to offer room, food and beverage); and the Greenwich Hotel in Creekside Village, Greenwich (to be room-only). The fourth, "The Assembly, London", is trading, with a "room, food and beverage" offer. Mr Sell accepted that no hotel was currently trading on a room-only basis under the "Zedwell" brand.

60. The applicant's original statement of case indicated that the hotel would be in a "pod" form and would be windowless. It would provide "budget accommodation designed to cater for short stays". In its amended statement of case, this description was altered to "based on an integrated modular scheme to provide bedrooms with ensuite bathrooms fitted out to a very high standard". The description of "budget accommodation" was adopted by the planning inspector in granting permission on appeal. Mr Sell said that the change to the statement of case was simply designed to withdraw an inaccurate and misleading description of the hotel as "budget" - the hotel would be of high quality, with fully trained staff and quality finishes.

61. He accepted that should the modification be permitted, and the applicant's project fail, the lease could be subsequently assigned to an operator of a "backpackers' hostel" which the Commissioners would be powerless to prevent.

Mr Brown

62. Mr Andrew Brown is the Secretary and Chief Executive of the Commissioners. His brief evidence made two points: first, that the Commissioners do not want a hotel in the application property, still less a hotel of the sort proposed; secondly, that there was a broader issue at stake – if the application were successful, it would threaten the Commissioners' Estate Control System ("ECS"), and adversely affect the value of the Commissioners' interest in the Estate and those of other owners and tenants.

Ms Jones

63. Ms Rosemarie Jones has worked for the Commissioners since 1988, and has been their Deputy Surveyor since 2009.

64. Ms Jones explained that the Commissioners' ECS is a system of control and estate management developed over time, rather than a single document. Control is exercised through the inclusion of restrictive user covenants in new leases, and through freehold covenants in

estate management schemes binding on newly enfranchised freehold properties. There are six such estate management schemes in the Estate, each centred on one of the garden squares.

65. She said that the key purpose of the ECS was to protect the value of the Estate by ensuring the enduring viability and vitality of the area as a place to live and work – to increase demand for, and therefore value of, the properties within the Estate. Asset management decisions are made with a long-term view. Tenant-mix is regulated, and new occupiers are aware that they are entering a controlled environment. In Ms Jones' experience, tenants are willing to pay more for premises on the Estate because they trust the Commissioners to maintain the ECS.

66. As part of the ECS, the Commissioners can and do take effective action against unlawful and undesirable uses of properties within the Estate; Ms Jones provided several examples where the Commissioners had successfully negotiated the surrender of residential leases or the enforcement of covenants through section 146 notices. The ECS is not only restrictive: the Commissioners have also allowed or promoted changes of use in the interests of estate management – for example converting 18,312 sq ft of former offices at "The Brassworks" at Connaught Village into residential flats, as the surrounding properties were entirely residential in character. As far as Ms Jones was aware, the Commissioners had never faced an application under section 84 of the Act, which in her view demonstrated the success of the ECS, and the willingness of the Commissioners to be reasonable as long as tenants' proposals aligned with the ECS and the Commissioners' long-term vision for the Estate.

67. As for the application property, Ms Jones explained that while the original file relating to the 1991 lease negotiations had been destroyed, notes on a general Water Gardens file specifically referred to the uses which were to be allowed, and prohibited, in the proposed lease. Ms Jones's strong suspicion was that the restriction to office use would have been imposed having regard to the adjoining residential units – to her knowledge the application property was the only building in the Estate where commercial and residential uses existed side-by-side – and the amenity of the residential occupiers. These concerns also underpinned the way in which the Commissioners dealt with the grant of an underlease to a school in 2013. The Commissioners were approached by the applicant's predecessor for permission to underlet the application property to the CET Primary School, Westminster, for a term ending on 31 March 2017, while the school's new permanent property was being built. The Commissioners initially refused, owing to concerns for the neighbouring residential tenants. The Department for Education confirmed to the Commissioners that there would be no designated musical or audio-visual rooms, and that assembly would take place at the southern end of the property – away from the neighbouring tenants. The Commissioners did eventually grant consent, but only on the receipt of an indemnity from the Secretary of State.

68. The Commissioners were concerned that a successful application in the Tribunal would encourage other tenants to make similar applications in the future leading to further weakening of the ECS and the Commissioners' control. She considered that a general relaxation of control would have a substantially adverse effect on the Estate in general, and on the Commissioners' ability to grant long leases or to achieve the return they hoped for from doing so.

69. In cross-examination, Ms Jones confirmed that there had been discussions between herself and her colleague Ms Love, concerning the future of the application property should the applicants' lease be surrendered. While residential use was a possibility, including affordable

housing in connection with other developments on the Estate, Ms Love's view that the property should be refurbished and re-offered to the market as offices had prevailed. On no account would the Commissioners entertain a hotel use.

70. Ms Jones accepted that the lease did not contain a keep-open clause, and that the Commissioners could not force the applicant to re-let the first and second floors as offices. She also agreed that there would be no general knowledge across the Estate that the lease included a particular restrictive user clause. However, she reiterated that the Commissioners are transparent with their leases, and that occupiers trust that the restrictions across the Estate will be maintained and enforced through the ECS.

Ms Love

71. Ms Joanna Love is the Commercial Asset Manager for the Commissioners. She provided an overview of the Estate, explaining that its clearly delineated boundaries are partly because the commercial properties which form those boundaries are immune from enfranchisement claims. The Commissioners are seeking to enhance the commercial offering on Edgware Road, to soften the barrier effect which acts as a disincentive to shoppers and tourists from the West End.

72. Ms Love explained that the commercial uses within the Estate are largely concentrated in distinct areas. Shops and restaurants, for instance, are located within four areas: Connaught Village; the Strathearn Place/Sussex Place junction; Bathurst Street and Mews, and Edgware Road.

73. Ms Love reiterated Ms Jones' evidence concerning the operation of the ECS, and gave examples of the Commissioners taking enforcement action against commercial tenants to stop or prevent unlawful or undesirable uses. During her time with the Commissioners, there had been very few applications for changes of use; the only application outstanding at the time of her statement was to change a gallery to a restaurant or a jeweller, which Ms Love said the Commissioners were likely to refuse since it breached their tenant-mix policy.

74. She explained that owing to the absolute covenants restricting use in many of the commercial leases, tenants benefit both from a discount from open market rental value at rent review, and from the knowledge that the Commissioners will not let a nearby unit to a competitor. There have been instances where changes of use have been agreed, for good estate management reasons and with the long-term view in mind. The Commissioners agreed the change of use of the former NCP car park in the basement to a self-storage facility. The reduction in use of the car park following the introduction of the Congestion Charge had resulted in anti-social behaviour in the service road. Since the change of use, which also allowed the Commissioners to remove some unsightly ventilation towers from The Water Gardens, reported crime had fallen by around 30%.

75. Ms Love emphasised the importance to the Commissioners of their ability to grant long leases which not only provide capital receipts, but also ensure greater control. Covenants enforced through the exercise of the ECS secure more control than can be achieved solely through the planning system which is subject to political pressures, works under broad definitions of uses, and does not differentiate between different uses within the same planning category.

The Commissioners' Hotel Strategy

76. Ms Love also explained the Commissioners' Estate Hotel Strategy, ratified in early 2017. There are 24 hotels in 31 buildings on the Estate, mostly located in a distinct hotel zone along Sussex Gardens and Sussex Place. The Commissioners sought advice from Gerald Eve on how the hotel offering on the Estate might be improved and their Hotel Strategy gave effect to that advice. The hotels on Sussex Gardens are in converted houses, the successors to the original boarding houses and hotels that opened around the time of the development of Paddington Station. These were let on long leases and the lack of direct control by the Commissioners lead to problems including overcrowding, unsafe temporary cooking facilities and prostitution.

77. The thrust of the Strategy was to gain control of the hotels on the Estate by resisting the renewal of hotel leases on the grounds that the Commissioners intended to occupy and trade the properties themselves, through a special purpose vehicle created for that purpose. The Commissioners had also offered to purchase the long leasehold interest in another hotel. This policy of taking hotels in hand was increasingly common among the large estates in London. A further example of the Strategy in action was the refurbishment and enforcement of a parking system along the front of Sussex Gardens, where hoteliers had allowed their customers to park, creating an unattractive and slightly chaotic situation on one of the boundaries of the Estate. The Commissioners obtained planning permission to re-landscape the area and contributed £40,000 to the hoteliers' costs of the work, presenting a more attractive street scene.

The Commissioners' Office Strategy

78. The relatively few office buildings owned by the Commissioners are concentrated within two areas: Connaught Place, and around Burwood Place/Edgware Road. Most offices within the Estate are no longer in their ownership.

79. Following a review undertaken in the light of the changes by the Portman Estate in the management of its properties along the opposite side of Edgware Road, the Commissioners approved an Office Strategy in November 2018. The thrust of the Strategy is to increase the office provision within the Estate where asset management opportunities present themselves.

80. The Commissioners began to implement the Office Strategy by accepting a surrender of the lease of a car mechanics premises with residential accommodation above, at Portsea Mews. In May 2019 a pre-application meeting took place with the Council regarding a change of use to offices. Ms Love said that the Commissioners were looking to increase the existing office floorspace of 12,000 sq ft to around 25,000 sq ft, and currently had a team of professionals working on the project. Ms Jones said that her initial impression was that Portsea Mews would be ideally suited to residential use, but that Ms Love had made a strong argument in favour of the need to provide more offices on the Estate.

81. Ms Love said that the Commissioners wish to retain the application property in use as offices. They wish to have a certain amount of office use within the Estate, as evidenced by the Office Strategy; and office use is compatible with the location of the application property, on the edge of the Estate, above retail units. A number of developments nearby have made similar provision, including Marble Arch House (60,000 sq ft of office space within an eight-floor development), and Marble Arch Place (95,000 sq ft of office space over eight floors,

adjacent to residential use). These neighbouring developments are likely to increase the quality and presentation of Edgware Road. Office uses benefit other uses within the Estate, including retail outlets, restaurants and coffee shops, and an office use in the application property would not be disruptive to the adjoining residential occupiers – the use would begin or intensify when the residents were going out to work, whereas a hotel use would be in direct conflict.

The Commissioners' objections to the application

82. Ms Love outlined the Commissioners' concerns about the proposed hotel. In summary, the Commissioners believe that its long-term viability is questionable and that design has been compromised. While the current concept may well be of a high standard hotel, the type of guest and what they would be willing to pay is likely to affect the quality of the offering over time. The Commissioners believed that the high-density model the applicant proposes has resulted in compromised room sizes and layout; it is also compromised in its location, particularly compared to the group's other hotels located in established hotel areas; and it is compromised on its service offering by the lack of communal areas, the lack of add-on services and the lack of food and beverage offer. Finally, the proposed hotel is compromised because of the provision of windowless rooms. Whilst one of these adverse factors might be acceptable to a budget conscious traveller, the combination of so many gave the Commissioners cause for concern about the hotel's viability.

83. In the Commissioners' view the first and second floors are more suited to office rather than hotel use. They have a long and narrow layout, lack of natural light and low floor to ceiling heights, which are likely to be problematic for a hotel conversion especially under the current design proposals where there is going to be a large degree of compartmentation. Since the guests will not be able to open a window, the proposed hotel will also require a high level of plant and machinery to provide air conditioning and ventilation.

84. Ms Love commented that pod-style hotels started in Japan and have become popular throughout Asia. The lowest denominator of this style of hotel are priced at around 50 US Dollars a night, with "nap rates" for rooms that could be charged by the hour. This practice is particularly of concern to the Commissioners as the roads adjacent to the property and in particular Sussex Gardens have been a focus for prostitution. The Commissioners are working closely with the local residents' association, the Marble Arch Business Improvement District and the authorities to address the issue of soliciting and vice. The budget nature of the hotel suggests that the guests may not have local knowledge or large budgets leading to opportunistic on-street prostitution. The Commissioners were also concerned that the hotel may be used (on the basis of the Japanese model) by "salary men" too inebriated to make it home. The Commissioners did not want a concentration of this type of use in the current stress area of the Edgware Road.

85. Ms Love said that the Commissioners also have grave concerns about the potential impact of anti-social behaviour on neighbouring and nearby residents. They have encountered problems of this nature due to the increased use of "Airbnb" and other short-term holiday booking sites by lessees and other property owners across the Estate, and they are working with local residents, the council and local councillors to address this problem. Most of the Commissioners' long leases contain covenants preventing sub-letting of less than six months but when it does happen, issues such as the security of the building, short-term occupants causing damage, and rubbish being left in common parts all occur. Holidaymakers and short-term occupants demonstrate a consistent disregard for other residents of buildings.

86. To reduce the incidents of illegal sub-letting and anti-social behaviour in The Water Gardens, the Commissioners gated the development in 2009 enabling the implementation of a fobbed entry system with building managers within the residential blocks being primarily responsible for policing access. Where there is sufficient evidence of short-term lettings, the Commissioners will always take legal action.

87. Whilst Ms Love had read the applicant's hotel management plan and street management policy aimed at ensuring that the privacy and peace of the neighbouring residential community is not disturbed, in the light of historic issues experienced by the Commissioners and the applicant's management of the property, the Commissioners had little faith that these policies would be effectively implemented. Ms Love submitted a chronological schedule of issues at 127-175 Edgware Road, most of which involved sub-tenants' action without either the Commissioners' consent or that of the local planning authority. Some of the breaches pre-dated the ownership of the property by the current tenant but were during the ownership of the Criterion Capital Group. Ms Love said that the document was not exhaustive but just gave a flavour of the issues that had been experienced over time.

88. The Commissioners were concerned that the proposed use as a hotel was incompatible with nearby residential uses whereas office and residential uses are complimentary. The peak times for hotel and residential uses are the same and the density of rooms in the proposed hotel would exacerbate noise and other issues. There is also likely to be a high turnover of visitors coming and going at all times of day and night. The Commissioners also had concerns about fire risk.

89. The Commissioners did not consider the proposed hotel would bring any benefits to the Estate. The Edgware Road is a gateway to the Estate and the Commissioners considered that the proposed change of use would exacerbate the stress area. Whilst the applicant says that the absence of food and beverage on offer will direct the guests to the local food and entertainment options, it seemed more likely to the Commissioners that the hotel occupants would order takeaway food and that the property would be subject to frequent deliveries from fast food companies.

90. The Commissioners considered that staffing could be minimal and they are sceptical that the hotel could attract a 5* rating. It is not in the interest of the Estate or of the Commissioners' Hotel Strategy that any more "compromised" hotels should be created within it.

91. Finally, the Commissioners feared that if the application were successful, the ECS would be weakened by the risk of other tenants seeking short-term gain to make similar applications. This will in turn impact on the value of the Commissioners' interest in the Estate. They may well lose the trust of tenants and occupiers which would have an effect on rents and premiums and therefore long-term value. The Hyde Park Estate would become less attractive compared to neighbouring estates which had retained their estate control systems.

92. If the application succeeded the Commissioners are likely to lose their ability to grant long term leases because they would not be confident that the use restrictions would remain enforceable throughout the term. The Commissioners may have to change their strategy by granting shorter leases which would not be subject to the section 84 jurisdiction of the Tribunal. That would make it more difficult to raise capital sums out of properties on the Estate, other than by the sale of freeholds which would lead to the dissolution of the Estate.

93. In summary, Ms Love said the Commissioners had grave concerns about the impact of the applicant's proposal on the Estate, its interests and the interests of other tenants. The Commissioners had local concerns – they did not wish to see a hotel in this location, in particular a hotel of this kind and general concerns which arise in relation to the damage that would be done to the estate's control system and thus the Estate.

Expert Evidence

94. Mr Adams-Cairns FRICS and Mr Ryan FRICS are very experienced valuers of Central London residential property. Neither professed to be an expert on the valuation of hotels or offices. They were each instructed to provide an opinion on the questions posed in *Re Bass Ltd*'s *Application* (1973) 26 P&CR 156, including those which are matters of law, outside the expertise of the valuation experts. Of more relevance are their respective opinions on the extent to which the restrictions provide substantial benefits or advantages to the Commissioners.

95. The experts' opinions diverged markedly. In short, Mr Adams-Cairns considered that modification of the restrictions to allow hotel use would result in no material injury, loss or disadvantage to the objectors, and he found it impossible to identify a single consequence which might reasonably have an impact on value. Diminution in value usually relates to something which is visible, intrusive, overbearing or noisy – none of which applied in this case. Mr Ryan, in contrast, considered that the diminution in the value of the immediate Water Gardens development would be in the order of £900,000; and the long-term damage to the wider estate could be put at not less than £40 million.

96. In valuing the effect on The Water Gardens, Mr Ryan adopted a staged process. First, he took sales data for the recently reported sales of leasehold properties in the development and by using indices adjusted them to notional freehold sales at December 2018, being the last quarter available when he wrote his report. These calculations produced average sales prices of £970 per sq ft for a sixth floor flat, or £984 per sq ft for houses in Norfolk Crescent. For flats he then adjusted this rate by adding or subtracting 1% depending on whether the flat was at a higher or lower floor that the sixth. He then deferred by 5% to reflect the Commissioners' freehold reversion, depending on existing lease length. 11 properties were in hand to the Commissioners, and he made an adjustment of 30% for nine others which were let on Rent Act tenancies. Mr Adams-Cairns accepted these figures.

97. Mr Ryan considered that the minimum diminution to the least affected flats, should the hotel go ahead, would be 2% of value, while the most affected would have a 7% decrease. He therefore applied an average diminution figure of 4.5% to his aggregate of the individual property values, to arrive at a total diminution in value of £900,000 or thereabouts. This compared with Mr Adams-Cairns' opinion that the diminution in value was nil.

98. Mr Ryan also gave a view on what he termed the long-term cumulative loss in value to the Estate. In his opinion, a successful application to modify would result in a thin end of the wedge effect, with other occupiers encouraged to pursue their own applications, undermining the current ECS. It is a feature of Prime Central London that living or trading in an area owned by one of the large London Estates is beneficial, because the Estate landlord can exert a benign influence over the area and take long term beneficial measures without the need to yield a quick profit. This ability would be weakened should other lessees seek to discharge or modify covenants. He gave the example of Fitzrovia, formerly a large part of the Howard de Walden Estate, which was sold off in 1925 and subsequently broken up. It is no less central than the

Hyde Park, Portman and Howard de Walden Estates, but a lack of overall estate control has brought about a pattern of uses and development that has resulted in lower residential values than in those areas. The Pimlico area suffered similarly following its separation from the Grosvenor Estate in the 1950s.

99. In considering long-term diminution, Mr Ryan outlined how, on the rare occasions that large estates are offered to the market, the "book value" and subsequently marketing valuation are exceeded. For example, when the Commissioners sold their share in the Pollen Estate, Mayfair, the sale price of £381 million exceeded the "book value" and marketing valuations of £231 and £276 million respectively. The purchasers jointly owned the adjoining Regent Street portfolio so it could be argued that there was an overbid, plus a movement in values between the book valuation date and the sale date. Mr Ryan allowed 15% for each of these factors, leaving £267 million – broadly in line with the market valuation. He considered the market valuation uplift of just over 15% of the "book value" represented the premium value of buying an estate rather than scattered individual assets.

100. Applying this percentage to the latest "book value" of the Estate, of £503,931,208 as at December 2018, an uplift of £78 million would be secured. Mr Ryan's view was that the effect of modification of the restriction resulting in a thin end of the wedge erosion in values would reduce the uplift premium considerably. He accepted it was difficult to quantify but thought that the reduction would be not less than 50% of the uplift – so around £39 million. The Pollen Estate uplift was not an isolated occurrence – he was aware of the sale of the Berkeley Square Estate in 2001 at £345 million, which represented an 11.3% uplift on the "book value" of £310 million. He considered that this uplift in 2001 was a good sense check against his figure of 15% in 2018.

101. Applying an average of these, he considered the long-term loss to the Commissioners would be £37 million. Adding the immediate loss to The Water Gardens properties, Mr Ryan said that it was not unreasonable to come to a total diminution of say £38,000,000 should the restriction be modified to allow the hotel use.

102. But, having made this assessment, he did not think that money would be adequate compensation for the loss or disadvantage which the Commissioners would suffer. In money terms the loss could be unlimited, and the damage over time from a creeping loss of control was immeasurable.

103. Mr Adams-Cairns expressed understandable concern as to the discrepancy between his view and that of Mr Ryan. While, he felt, Mr Ryan had misunderstood the nature of the proposed hotel, this did not explain the gap in values.

104. As regards Mr Ryan's thin end of the wedge concerns, Mr Adams-Cairns said that most of the tenants on the Estate are likely to be unaware of the change of use to hotel; they are protected by their own leases; and any further application to the Tribunal would be treated on its merits. It therefore seemed fanciful to him to suggest that there would be a detrimental impact on the value of the Estate. Mr Adams-Cairns thought that it was illogical to equate the relaxation of the restriction on the application property with the total removal of the ECS, as had occurred on the Pimlico Estate. There would be nothing to stop the Commissioners from separating off and disposing of The Water Gardens from the rest of the Estate.

105. As for the immediate loss of £900,000 to the value of The Water Gardens, Mr Adams-Cairns pointed out that 95 of the flats were let on unexpired terms of over 99 years, paying no ground rent – the reversions to these would not suffer any diminution because they have little or no current value, and the Commissioners had the ability to buy in all the leasehold interests at the end of each term.

106. Mr Adams-Cairns said that the most likely candidates for any diminution in value would be the 11 flats in hand to the Commissioners, but he considered that in the main the application property could not be seen from the flats, or they were too far away, or were physically separated from it. He also thought it relevant that neither the planning officer nor the planning inspector had concerns about neighbouring amenity, and there were a very small number of objections from residents in the planning process.

The burden of proof and leasehold applications

107. In an application to the Tribunal under section 84 of the Act, the burden of proof is on the applicant to demonstrate that the grounds for discharge or modification exist, and to persuade the Tribunal to exercise its jurisdiction do so (*Re Truman, Hanbury, Buxton & Co Ltd* [1956] 1 QB 261 at 270, and *Vertical Properties Limited v New Hampstead Garden Suburb Trust Limited* [2010] UKUT 51(LC)).

108. Should applications to modify leasehold covenants be treated by the Tribunal any differently from those in freehold titles? Mr Johnson submitted that the burden is harder to discharge, relying on *Ridley v Taylor* [1965] 1 WLR 611, where at 617H Harman LJ said:

> "It seems to me that it should be more difficult to persuade the court to exercise its discretion in leasehold than in freehold cases. In the latter the court is relaxing in favour of a freeholder's own land restrictions entered into for the benefit of persons owning other land. In the former the land in question is the property of the covenantee who prima facie is entitled to preserve the character of his reversion."

109. The Tribunal (Martin Rodger QC, Deputy President and Paul Francis FRICS) has recently considered this point in *Shaviram Normandy Ltd v Basingstoke and Deane BC* [2019] UKUT 0256 (LC):

> "15. *Ridley v Taylor* concerned a 90-year lease of premises on the Duke of Westminster's estate in Mayfair with about 22 years of the term unexpired. The application was brought on ground (c) of section 84(1) before the 1969 amendment which introduced ground (aa). Those points of detail do not detract from the respect due to the views expressed in the Court of Appeal although, as the appeal turned on the assessment of the injury which would be caused by the proposed modification rather than on the exercise of any discretion, those views cannot be regarded as part of its essential reasoning.
>
> 16. It is clearly correct that in section 84(12) Parliament has recognised the special position of landlords and afforded them protection not available to freehold covenantees. The covenants in a lease granted for a term of 40 years or less are outside the scope of section 84 altogether, and no application may be made for the

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

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

110. I agree with that reasoning and I do not accept Mr Johnson's submission that, in principle, it should be more difficult for an applicant to discharge the burden of proof in a leasehold case.

Ground (aa)

111. Both parties formed their submissions around the questions posed by the Lands Tribunal in *Re Bass*. However, in my judgment, and as Mr Johnson submitted in closing, there is a significant overlap in the evidence relating to the questions. Whilst *Re Bass* provides a convenient list of the issues which may arise on an application under section 84(1)(aa), it is not always necessary, in my view, to answer the questions in a strictly sequential manner or to address them all in every case. What is required is an assessment of the issues which arise in a particular application by reference to the relevant parts of the section, and then a consideration as to whether the Tribunal should exercise its discretionary power to discharge or modify the restriction in question.

112. Accordingly while, for convenience, I deal with the questions as posed in *Re Bass* in order to consider the submissions of counsel, I do not find it necessary to deal with them sequentially, answering a specific question in a positive or negative fashion as a condition precedent to moving to the next.

113. For example, the questions whether a practical benefit is of substantial value, and whether money would be adequate compensation are sometimes best addressed together, since any difficulty in measuring the consequences of a modification in financial terms may demonstrate that money cannot adequately compensate for the proposed discharge or modification.

Is the proposed user reasonable?

114. Mr Fetherstonhaugh submitted that the proposed use had been approved by the planning inspector, and in the minor material alteration permission by the Council. It was in line with the Unitary Development Plan, the Westminster City Plan, the London Plan and the National Planning Policy Framework. The proposed use was clearly reasonable.

115. Mr Johnson disagreed, submitting that the proposed use is contrary to the established pattern of uses on the Estate; the hotel will breach the ECS, and fails to respect either the Commissioners' Hotel or Office Strategies; it will have a damaging effect on the adjoining properties and the Estate. In my view Mr Johnson's submissions are an example of how the evidence relates to several of the *Re Bass* questions.

116. In planning terms the application property is in a mixed residential and commercial area, on the busy Edgware Road. It is within the Central Activities Zone (CAZ), both in the current 2016 and emerging 2019-2040 Westminster City Plans. As the Inspector noted, there was no policy basis for the refusal of planning consent. The emerging plan, not yet in force and not required to be considered by the Inspector, does seek to retain office uses in the CAZ, but it also encourages "well designed and managed" hotel uses to support London's tourist economy. The application property is located in an area where there are 26 hotels. These are important considerations as section 84(1B) requires the Tribunal to have regard to the development plan and any ascertainable pattern of planning permissions in deciding whether the sub-section (1A) conditions are satisfied.

117. The application property has planning permission for the proposed use. The Council refused the 2016 application primarily on highway grounds, but those concerns were overturned by the planning inspector on appeal. But planning permission is not necessarily a passport to success under section84 (see, for instance, *The University of Chester's Application* [2016] UKUT 0457 (LC)). In *Re Martin* (1988) 57 P&CR 119, Fox LJ said that a planning permission in favour of the proposed development is merely a circumstance of which the Tribunal can and should take account.

118. In *Shephard v Turner* [2006] 2 P & CR 28 at [58], Carnwath LJ (as he then was) confirmed that "reasonable user" in ground (aa) referred to the long term use of the land. Whilst he was contrasting this with the period of development and the process of transition to such a use, it must also be right that the Tribunal should have regard to the length of the unexpired term – 96 years, and that any modification is, in effect, permanent.

119. While the Commissioners object to the general principle of a hotel, they object specifically to the type of hotel proposed by the applicant. There are two strands to the specific objection: the first is that the hotel is at the budget end of the market – which Mr Fetherstonhaugh disputed and characterised as snobbishness; the other is that the actual layout of the hotel makes it, in the end, unviable and, subject to "round 2", possibly unworkable.

120. For the purposes of assessing whether the proposed use is reasonable, however, it is unnecessary to descend to this degree of granularity. The proposed modification to the user covenants is for "a hotel", not any particular type of hotel. However, I can't entirely ignore the way in which the applicant intends to operate the premises, through its management agreement, nor can I assume necessarily that the proposed venture will exist for the duration of the lease. At the hearing Mr Fetherstonhaugh accepted that the Tribunal could, and often did, make a

modification conditional upon compliance with a specific planning consent. This is a further example of the inter-connection of issues arising under section 84. To my mind the question is whether the proposed user – in the layout and way in which it is intended to be implemented by the applicant – is reasonable. That is best considered after the other issues; for the purposes of proceeding I will assume for the moment that the user is reasonable, and return to the question later.

Do the restrictions impede that user?

121. It is common ground that they do.

Does impeding the user secure to the Commissioners practical benefits?

122. In *Berkeley Square Investments Ltd v Berkeley Square Holdings Ltd* [2019] UKUT 0384 (LC), a similar application to modify leasehold covenants, the Tribunal said this at [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)."

123. In my judgment, there are very similar circumstances here. In the absence of any "keep open" provision in the subject lease, the Commissioners' objections to the modification are at best an indirect means of promoting their Office Strategy. The application property may well remain vacant if the applicant, as it suggests, does not consider it financially viable to refurbish them for that use. The Commissioners' desire to see the application property *occupied* as offices, in compliance with their Office Strategy, is not a benefit which is secured by the restriction.

124. I accept Mr Fetherstonhaugh's submission that it is important to recognise other aspects which the restrictions *do not* secure: there is no regulation of the intensity of the use of the service road for example, nor of the hours during which the existing offices *could be* used, for instance as a call centre; nor is there any prohibition on fast food deliveries at any hour of day or night. However, it is necessary to consider how likely those activities are if the use remains restricted to offices – in my judgment they are far more likely to occur should the application prove successful. The avoidance of the adverse consequences foreseen by the Commissioners is a benefit in itself. I consider these below in greater detail.

125. Aside from their positive preference to see the property used as offices, there is the Commissioners' strongly stated desire to *not* permit a hotel use, by their insistence on compliance with the restrictions. In *Berkeley Square,* the Tribunal also said: at [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."

126. In my judgment again there are similarities in this application. There was extensive evidence from the Commissioners that they almost always rely on lease restrictions as part of their wider estate policy. I accept that evidence, and I have no doubt that the user restriction is an important tool of estate management, and that by preventing hotel use in a location where for strategic reasons the Commissioners do not wish to see it, the restriction secures to the Commissioners the specific and practical benefit of control.

Whether any practical benefits are of substantial value or advantage

127. Mr Fetherstonhaugh focussed on two aspects of the Commissioners' objection – that modification would breach and weaken/damage the ECS; and the negative impact on The Water Gardens. In response Mr Johnson submitted that the Commissioners' objections were far broader, encompassing a composite objection relevant at several stages in the *Re Bass* analysis.

128. I begin with the impact on the physical environment of The Water Gardens. Access to and from the proposed hotel will be from Edgware Road, so The Water Gardens would be shielded from activity in the same way as they have been from the offices. Having walked around The Water Gardens, and inspected the application property, I find it difficult to envisage how the residents would be disturbed by hotel guests coming and going any more than they have been by previous office users, by patrons of the food establishments on the ground floor, or indeed from the general bustling noise of the Edgware Road. Office workers may keep more regular hours than hotel guests, although that could not be guaranteed, but the ground floor and street level activity is round the clock already. In any event, of course, the restrictions do not secure the peace and quiet of The Water Gardens.

129. As proposed, the internal configuration of the hotel would have the access corridor at the front, away from the residents, while the rear windows will effectively be blocked by the internal pods – any light spillage or overlooking would be less intrusive than under the existing office use. Access to The Water Gardens is gated, and I find it unlikely that hotel guests would be any more likely or able to trespass into the Gardens than office users.

130. As for noise, in principle a hotel use is more likely to be intrusive to adjoining flats than offices, but by design the pods themselves will be sound-proofed. There may be some to-ing and fro-ing in the corridors, but I am not persuaded, given the location of the property, that the majority of Water Garden residents are likely to be affected by this, although the four adjacent flats might be.

131. While I understood and accept the methodology that resulted in Mr Ryan's diminution figure of £900,000, I cannot accept it. Having inspected various flats in The Water Gardens, I find it difficult to see there would be any real loss of amenity to them, given my comments above. This mirrors the findings of the planning inspector, and was perhaps reflected by the strikingly low number of objections to the planning application by various residents.

132. There might be some diminution to the value of some flats but for very many there is likely to be no impact at all. The four that are within the same building as the proposed hotel might be affected to the extent suggested at the higher end of Mr Ryan's range, but even had

these been in hand to the Commissioners, Mr Ryan's diminution figure of 7% would not be considered substantial for the purposes of section 84. However these four flats are let on long leases with unexpired terms of 65 years in the case of three and 125 years for the fourth, reducing the present diminution to an even smaller amount. I do not accept Mr Ryan's view that there would be any substantial diminution in value to The Water Gardens as a result of modification of the covenants.

133. I now turn to the value of the wider Estate, dealing first with Mr Ryan's suggested diminution of £38 million over the longer term. Again, I understand the mathematics, and while I would not go as far as Mr Fetherstonhaugh in describing the approach as ludicrous, I find the exercise to be of no assistance. While there was little justification for arbitrary adjustments, in my opinion the basic premise is flawed. Value is what the market will pay for a property. How that relates to an internal "book value" is of little relevance, and Mr Ryan's method assumes that the asset valuers of one estate would be as cautious, or pessimistic, as the valuers of another. The fact that the "book value" in the case of the Pollen Estate was exceeded by so great a percentage may give surveyors giving opinions of "book values" more heart. One would imagine that those providing what was called a "marketing valuation" would have taken into account the likely uplift or premium that a purchaser with a special interest might be willing to pay. But I am now speculating since no evidence was given on these topics and I make no further comment on them.

134. In the absence of any supporting evidence, Mr Ryan's view of the amount by which a purchaser would reduce their bid is, with respect to him, entirely speculative, and I place no weight upon it. In my view, any diminution in value to the Commissioners' Estate is in truth immeasurable. For this reason, I make no criticism of Mr Ryan, nor indeed Mr Adams-Cairns. Both valuers gave an honest account of their views based on their considerable experience, and it is to Mr Adams-Cairns' credit that he was clearly troubled by the difference in their respective opinions.

135. The key to this application is whether the control which the Commissioners are able to exert over the nature and distribution of uses on the Estate through their ECS secures to them practical benefits of substantial *advantage* whether those benefits are capable of being reliably measured in financial terms or not. If it does, the application must be refused.

136. To return to and summarise the evidence, the ECS is not one single policy. It is an estate management strategy, founded on a collection of leasehold and freehold covenants, and supported by a collection of discrete freehold estate management schemes for specific areas (and the application property does not fall within one) and given direction by specific policies or 'strategies'. The Commissioners clearly have genuine concerns about the proposed modification of the restriction, which they see as inconsistent with their aspirations for Edgware Road, and they have provided a coherent and rational account of why they wish to control the location of hotels within the Estate. They have also demonstrated that they rely on covenants and use them to model and remodel the Estate in accordance with their commercial strategy. Where there have been breaches of covenant, they have actively insisted on compliance. Even in the application property, the Commissioners were patently concerned about the temporary change of use to a school, and have demonstrated concerns about breaches of covenants by sub-tenants of the applicant's predecessor in title.

137. The suggestion that nobody would know that the covenants had been modified by the Tribunal is unrealistic. This decision will be reported in the property press (as, for example,

were the *Shaviram* and *Berkeley Square* decisions). There will be blood in the water and other applications might well be the consequence. But the thin end of the wedge question is not whether others might seek to relax covenants elsewhere on the Estate, but whether the relaxation of these covenants to permit this development will make it more likely that other applications will succeed, so that the Commissioners' grip on the future shape of the Estate is diminished. This is not a purely residential estate protected by a uniform scheme of covenants. The issue in this case is about the value of control, and the ability to exert it, rather than about the preservation of a particular limited environment. In an Estate as diverse as this it is not possible to predict what future applications might be made, and it cannot be said that the weakening of control which would result from my acceding to this application will not be a consideration of significance when those applications come to be determined by the Tribunal.

138. In my judgment the effect on the wider estate of a relaxation of the Commissioners' ability to manage the Estate in accordance with their own strategy could be significant in the medium to long term. It would make the implementation of their Office Strategy more difficult and could, depending on the eventual form and success of the applicant's hotel concept, undermine their aspirations to improve the quality of Edgware Road. The impossibility of reliably measuring those impacts in financial terms is an indicator that the disadvantage that the Commissioners' would suffer by modification of the covenant cannot adequately be compensated by money. In my judgment the ability of the Commissioners to enforce the restrictive user clauses in the subject lease, and in doing so to impede the proposed user, does secure to them a practical benefit of substantial advantage.

139. It follows that the application under both grounds (aa) and (c) is refused. In those circumstances it is not necessary for me to resolve the question whether the proposed use is a reasonable one. For what it is worth I would decide that question in the applicant's favour, having regard in particular to the consistency of the proposed use with local planning policy. The application has failed not because it is unreasonable, but because the ability of the Commissioners to exert control over this corner of the Estate through these restrictions is of significant benefit to them in the management of their interests.

140. 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. The attention of the parties is drawn to paragraph 12.5 of the Tribunal's Practice Directions dated 29 November 2010.

Dated: 03 April 2020

P D McCrea FRICS FCIArb