UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

RESTRICTIVE COVENANTS – MODIFICATION – leasehold retail unit in Fitzrovia – covenant preventing medical use – whether obsolete – whether securing practical benefit of substantial value or advantage – s.84(1)(a) and (aa), Law of Property Act 1925 – modification granted

IN THE MATTER OF AN APPLICATION UNDER SECTION 84(1), LAW OF PROPERTY ACT 1925

BETWEEN:

SCHWARZSCHILD OCHS PTY LIMITED

Applicant

-and-

CONCERTO PROPERTIES LIMITED

Objector

Re: 208-210 Great Portland Street, London W1

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

Hearing date: 21-22 March 2022

Martyn Berkin, instructed by PCB Lawyers LLP, for the applicant
Greville Healey, instructed by Teacher Stern LLP, for the respondent

The following cases are referred to in this decision:

Ashworth Frazer v Gloucester City Council [2001] 3 WLR 2080

International Drilling Fluids v Louisville Investments (Uxbridge) [1986] Ch 513

Re Davies' Application (2008) LP/65/2006

Re Glevum Estates (Western Counties) Application (1973) LP/53/1972

Re Lloyds Bank Ltd's Application (1978) 35 P. C.R. 128

Stockport Metropolitan Borough Council v Alwiyah Developments (1986) 52 P & CR 278

SJC Construction Co Ltd v Sutton LBC (1975) 29 P & CR 322

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

Winter v Traditional & Contemporary Contracts Ltd [2007] EWCA Civ 1088

Introduction

1. London's Great Portland Street forms the boundary between Fitzrovia to the east and Marylebone to the west. Nos. 208-210 ("the Building"), at the northern end of the street on the eastern side, was built between 1905 -1908, when the immediate area was increasingly associated with the burgeoning motor car market. By 1911, it was reported that 'Great Portland Street continues to increase in popularity as a motor mart, and at the present rate of progress looks like being shortly devoted to the motor and allied trades exclusively'. 'Speedometer House' at Nos.179-185 anchored the trade at the north end of the street, while the Great Portland Street Motor Club (later the Motor Trade Association) was established at No.157. By 1921, Great Portland Street was claimed to be the 'Motor Market of the World' from which, it was said, the discerning motorist could obtain any make of car.

2. This golden era of motoring was not to last; with the Second World War the car trade collapsed, and by the 1950's the predominant use of premises in Great Portland Street had become the garment, or 'rag', trade, serving the department stores on nearby Oxford Street. The applicant in this reference, Schwarzschild Ochs Pty Limited ("Schwarzschild") was one such rag trade wholesaler. Having occupied the ground floor and basement of the Building ("the Premises") for some years on a conventional lease, in 1995 it acquired a long sub-underlease, which for convenience we shall refer to as "the Lease". The Lease contains a covenant by the tenant at clause 3(9) restricting the use of the premises to a shop and showroom or, with the qualified consent of the immediate landlord, for any business use within class B1 of the Town and Country Planning (Use Classes) Order 1987.

3. Schwarzschild vacated the Premises in 2015 and now wishes either to assign the Lease or to sublet. After a period of marketing, the only solid interest it has received has been from the medical sector. Since a medical use would be prohibited by the Lease, it now applies to the Tribunal under section 84, Law of Property Act 1925 for modification of the user covenant to permit the Premises to be used for medical purposes. Schwarzschild's immediate landlord, Concerto Properties Limited ("Concerto"), objects to the application.

4. Schwarzschild was represented at the hearing of the application by Mr Martyn Berkin. Its director, Mr Robin Alexander, gave evidence and Mr David Nesbit MRICS gave expert evidence. Mr Greville Healey represented Concerto and called the manager of the building, Mr Philip Mizon, as a witness of fact, and Ms Kathryn Sowter MRICS as an expert witness. We are grateful to them all for their assistance.

5. We conducted an inspection of the premises and the surrounding area before hearing the application.

Relevant statutory provisions

6. Section 84(12) of the Law of Property Act 1925 gives the Tribunal power to discharge or modify any restriction on the use of leasehold land held for a term of more than forty years of which twenty-five years have expired. It is agreed that the Lease falls within the scope of that power.

7. The applicant seeks the modification of clause 3(9) of the Lease, relying on grounds (a) and (aa) in section 84(1).

8. Ground (a) is satisfied where changes in the character of the property, or the neighbourhood, or other circumstances which the Tribunal deems material, have caused the restriction to become obsolete.

9. In summary, ground (aa) is satisfied where the restriction impedes some reasonable use of the land for public or private purposes, and the Tribunal is satisfied that, in so doing, the restriction secures "no practical benefits of substantial value or advantage" to the person with the benefit of the restriction, or the restriction is contrary to the public interest. The Tribunal must also be satisfied that money will provide adequate compensation for any loss or disadvantage which that beneficiary of the restriction will suffer from the proposed discharge or modification.

10. In determining whether a restriction ought to be discharged or modified under ground (aa), the Tribunal is required to take into account the statutory development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the area. It must also have regard to the period at which and context in which the restriction was imposed and any other material circumstances.

11. The Tribunal may direct the payment of compensation to make up for any loss or disadvantage suffered by the person entitled to the benefit of the restriction, or to make up for any effect which the restriction had, when it was imposed, in reducing the consideration then received for the land affected by it.

The Building, the Premises and the restriction

12. The Building is located on the eastern side of the northernmost section of Great Portland Street, 150m south of Great Portland Street underground station and Marylebone Road. The junction with Carburton Street is a short distance to the south, and the junction with Devonshire Street is almost immediately opposite.

13. The Building comprises the Premises at ground floor and basement levels, and eight flats in four upper storeys known as Devonshire Mansions which has a separate entrance.

14. Originally used as a car showroom, the Premises comprise 6,865 sq ft, almost equally split between ground floor and basement, both of which have generous head heights. The main retail frontage is to Great Portland Street, with a secondary frontage to Bolsover Street at the rear. Owing to a change in street levels, the ground floor level of the Premises is about 3 feet higher at the back than at the front, and the ground floor is divided between the levels by four steps located about two thirds of the way from the main frontage. Part of the ground floor and most of the basement is also divided by internal partitioning, installed by a previous occupier to form numerous small treatment rooms.

15. The freehold interest in the Building has been held by Mount Eden Land Ltd since November 2005. Mount Eden was given notice of the application but indicated through its solicitors that it did not wish to participate.

16. The headlease of the whole building was acquired by Concerto in October 1996. It is for a term of 125 years from 6 April 1948, thus expiring on 5 April 2073. The annual rent is £150. In common with many leases from the mid-20th century, the headlease contains a long list of prohibited uses, many of which now seem arcane, including tallow chandler and tobacco

pipe maker; of more relevance to this application, at least as far as it was originally framed, the prohibited uses of the Building include use as a victualler, vintner, tavern, restaurant, or coffee house. Among other restrictions, the lessee also covenants not to install any heavy machinery in the Building.

17. There are two subleases. One comprises the Devonshire Mansions residential part of the Building and is held by a company belonging to the leaseholders of the flats. The other is the Lease of the Premises, which was granted on 31 May 1995 for a term expiring on 30 March 2073 at an annual rent of £75. Concerto's reversion is therefore for a period of only six days, which will not come in hand for another fifty-one years. Meanwhile, it enjoys a profit rent of £75 a year.

18. By clause 3(8)(d) of the Lease the tenant agrees not to suspend any excessive weight from the main structure, nor to overload the floors, roofs, or structure.

19. Clause 3(9) of the Lease is the covenant which Schwarzschild wishes to have modified, and by which it agrees:

> "Not at any time during the said term to use the Demised Premises other than for the purpose of a shop and showroom or with the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) for the purpose of any use within Class B1 of the Town and Country Planning (Use Classes) Order 1987."

20. Class B1 of the 1987 Use Classes Order, referred to in clause 3(9), comprised the following uses:

> "Business
>
> Use for all or any of the following purposes—
>
> (a) as an office other than a use within class A2 (financial and professional services),
>
> (b) for research and development of products or processes, or
>
> (c) for any industrial process,
>
> being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit."

21. In view of the way the application was framed, it is necessary also to refer to the more recent Town and Country Planning (Use Classes) (Amendment)(England) Regulations 2020 ("the 2020 Order"). This revoked Class B(1), and introduced a new Class E, which, in summary and as far as is relevant to this application, comprises the following commercial, business and service uses:

> (a) the retail sale of goods, other than hot food;
>
> (b) the sale of food and drink for consumption on the premises;
>
> (c) financial, professional and other services appropriate to a commercial, business or service locality;

(e) medical or health services, principally to visiting members of the public;

(g) office, research and development, or industrial process, in each case which can be carried out in a residential area without detriment to its amenity.

22. The new Class E brought together uses which had previously been found in different classes, meaning that a change from one to another would generally have required planning permission. Now, where a building is used for any of the uses within the new Class E, use for any other purpose within that Class is not taken to involve development and generally does not require planning permission. So far as concerns this application, while before the 2020 Order a retail shop within Class A1 would have required planning permission to change to a medical use within Class D1, both uses now fall within Class E, so planning permission will generally not be required for such a change.

23. The replacement of Class B1 of the 1987 Order by the new Class E of the 2020 Order did not cause any change in the meaning or effect of clause 3(9) of the Lease. Concerto continues to enjoy an absolute veto on uses which fall outside a shop, showroom, or the description in Class B1 of the 1987 Order, including medical uses.

The immediate locality

24. Upper Great Portland Street is on the fringe of the Harley Street area in which private medical practices and related services are concentrated. The section of the Street north of Carburton Street in which the Building is located falls within Westminster City Council's Harley Street Area Business Improvement District, which extends east from Paddington Street Gardens to Hallam Street, but also takes in the Royal National Orthopaedic Hospital on Bolsover Street. The designation of the area as a Business Improvement District is not found in the development plan and appears intended to promote professional and commercial activity, rather than to give it a particular status in planning terms.

25. There was a disagreement between the parties over the extent to which the immediate locality had been taken over by medical use and become dominated by hospitals and clinics, as suggested in Schwarzschild's statement of case. Mr Mizon, who manages the Building on behalf of Concerto, and who knows the area well, did not agree with the suggestion that eateries had gone, nor that few shops were left (he counted at least twenty retail/showroom units). There are also numerous residential flats and offices on the street, with ground floor reception areas, and the unit immediately adjacent to the Premises at 206 Great Portland Street is occupied by a bespoke design company as a showroom and offices. Mr Mizon also pointed out that sales particulars prepared by Schwarzschild's own agents painted a different story, describing the area as featuring 'an abundance of restaurant and retailers'.

26. This was not a particularly useful debate and could have been avoided altogether if the parties or their expert witnesses had agreed a plan showing the various ground floor uses for an agreed distance north and south of the Premises. That would have demonstrated that at the northern end of Great Portland Street the closer one gets to the Underground station the more frequently one is likely to find premises being used for a broad range of medical purposes. The mix of uses explain the inclusion of this part of the Street, including the Building, in the Harley Street Area Business Improvement District. Located diagonally across the road from the Building itself is the Portland Hospital and various medical consulting rooms which more or less monopolise the west side of the street between

Devonshire Street and Park Crescent Mews, before one reaches the immediate environs of the Underground station where pubs and restaurants predominate. On the eastern side of the street, the side on which the Building stands, medical uses are also very common, including the London Centre for Reproductive Health. Around and immediately opposite the Premises themselves the picture begins to become more mixed, with a greater variety of general retail uses and cafes as well as some medical uses.

The recent letting history of the Premises

27. Schwarzschild was a family business founded by Mr Alexander's father before the war. It began trading from the Premises in the mid-1980s and in 1995 it was offered the opportunity by its then landlord to take the Lease. A premium of £270,000 was agreed, which Mr Alexander recalled had been based on a multiple of 13 on the previous annual rent of £20,000. At that time the rag trade still dominated the area, as it continued to do until around 2010.

28. The company vacated the Premises at Christmas 2015 and put them on the market, originally with a view to sub-letting. A letting to Newway (Holding) Limited ("Newway") was achieved in August 2016 for a term of 25 years at an annual rent of £190,000. The permitted use was as a retail shop and showroom for the sale of health and beauty products or for the retail sale of other goods and products with Schwarzschild's consent. In fact, as Mr Alexander explained, and as was apparent from the fit out we saw on our inspection, the Premises were used for beauty treatments and therapies (a use which Mr Alexander described as "quasi-medical").

29. It is not clear how much Concerto was aware of the use to which the Premises were actually being put by Newway. Mr Alexander assumed that they had known what was going on and it appeared to him that they tolerated it without complaint. Mr Mizon, who manages the Building on behalf of Concerto, said that they were not aware that the Premises were being used otherwise than as a retail shop and showroom. In correspondence with Schwarzschild, which was copied to Newway, Concerto noted the use permitted by the Newway lease, and that it was consistent with Schwarzschild's own covenant. Mr Alexander did not suggest that he had informed Mr Mizon that the Premises were being used for beauty treatments or "quasi-medical" purposes, and it would not necessarily have been obvious to a passer-by. As the application is not being pursued on the basis that the user covenant in the Lease has ceased to be enforceable, it is not necessary for us to resolve this disagreement.

30. On 7 December 2018, Newway ceased trading and went into administration, but the Lease was not disclaimed by the administrators, nor was it forfeited by Schwarzschild. Instead, Mr Alexander had the Premises remarketed, and in May 2019 terms were agreed with Bader Medical Institute of London ("Bader"). The rent was now to be £200,000, and the proposed use was described as "medical within the D1/A1 ancillary definition" of the 1987 Use Classes Order.

31. Schwarzschild sought Concerto's consent to the proposed letting to Bader, and to the necessary change to the permitted use of the Premises. Fruitless negotiations ensued – in return for its consent Concerto required a premium of £50,000 and an annual rent of £90,000; Schwarzschild offered a premium of £50,000, later reduced to £30,000 but with an increase in the annual rent under the Lease from £75 to £10,000. Terms could not be agreed and the proposed letting fell through.

32. In October 2019, another prospective tenant was found. It wished to use the Premises as an event and exhibition venue, with studios, break out spaces, a small café, a members' lounge, and a private bar. The proposed rent was to be £170,000. Mr Alexander said that this proposal also fell through, but he could not recall any further details.

33. In February 2020, Schwarzschild changed tack and sought an assignee for the Lease; it also indicated to Concerto that it might consider a surrender but received no response.

34. In December 2020, Schwarzschild made its application to the Tribunal for the modification of the covenant. Marketing continued and in October 2021 terms were agreed for the underletting of the Premises to The London Hair Clinic for a term of ten years at a rent of £180,000. The proposed use was described in heads of terms as 'selling and performing hair transplants, hair replacement, and hair restoration to include cosmetic dermatology and permanent cosmetics directly related to hair restoration services, as well as salon services to include haircuts, perms, colour and the retail/merchandise sales in connection thereof.' Mr Alexander told us that the Hair Clinic is still interested in taking an underlease.

35. Mr Alexander pointed out that the significant change in levels between the front and the rear divides the ground floor of the Premises into two areas, the smaller of which comprises about a third of the total area. He suggested that this made the unit unsuitable for use as a convenience store, pharmacy or other large retail space because of the need to comply with disability discrimination legislation. When the Premises had first been marketed, he had had immediate interest from Boots, Waitrose and other substantial retailers, but when they visited the unit they told him they couldn't take it because of the presence of the stairs. He also suggested that the Premises are too large to be of interest to smaller retailers, which helped to explain why the only real interest he has received since putting the Premises on the market was from medical or quasi-medical users.

The application

36. In its original form, the application was for modification of clause 3(9) of the Lease, so that it would read:

> "Not at any time during the said term to use the Demised Premises other than for the purpose of a shop and showroom or with the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) for the purpose of any use within Class [E(a)/(b)/(c)/(e)/(g)] of the Town and Country Planning (Use Classes) Order 1987 [as amended]."

This formulation was very wide, and had it been granted it would, for example, have authorised the use of the Premises as a restaurant (Class E(b)).

37. At the start of the hearing Mr Berkin narrowed the scope of the application significantly by abandoning the former references to Class E(a)/(b)/(c) and confirming that the only additional uses which he sought were within Class E(e), (the provision of medical services) and Class E(g) (office). The previous apparent desire to extend permissible uses to the sale of food and drink on the premises or financial and professional services was abandoned.

38. Although Mr Healey complained in his closing submissions that it remained unclear what modification was being sought, we do not think that is the case. Mr Berkin's clarification

of the applicant's intentions cured the previous confusion created by the application. The omission of reference to Class E(a) simply removes an element of duplication and contradiction in the previous formulation, while the retention of Class E(g) is a modernisation exercise since it replicates the existing qualified right to use the Premises for former B1 uses.

39. We therefore understand the application to be for the modification of clause 3(9) of the Lease, so that the Premises may be used as a shop or showroom (as at present without the need for the landlord's consent) or, subject to obtaining the prior written consent of the landlord (which is not to be unreasonably withheld or delayed), for medical or health services, or as offices, or for research and development, or industrial processes, all such as can be carried out in a residential area without detriment to its amenity.

40. The essence of the reformulated application is to require Concerto to consider any application to permit the use of the Premises for the provision of medical or health services, principally to visiting members of the public, and to prevent it from withholding its consent to such a use unreasonably. If the application succeeds, Concerto will still be entitled to withhold its consent for a medical or health related use if it would be reasonable for it to do so.

Concerto's position

41. Mr Mizon explained Concerto's objection to the application. He first observed that any landlord relies on covenants in its leases to control the use of its property. The Lease granted in 1995 had been drafted with a view to the Premises being used as a showroom and for retail purposes and the other covenants which had been included had been drafted with that type of use in mind. Different covenants, allowing a greater degree of control, would have been included if Concerto had thought that the Premises might be occupied for medical purposes. Additionally, Concerto is very aware of its obligations under its own headlease, and is wary of the freeholder, Mount Eden, which, as Mr Mizon put it, is known to be a very active landlord, liable to take issue with the slightest breach of one of its leases and aggressively to pursue legal action against its tenants. Mount Eden had previously raised a number of potential breaches with Concerto in connection with actions of Concerto's residential tenants, including questioning the erection of satellite dishes, possible dilapidations, and the display of advertisements. Concerto was therefore concerned to avoid any inconsistency between the permitted use of the Premises under the Lease and the terms of its own headlease, which might expose it to the risk of allegations of breaches of its own obligations.

42. Some of Mr Mizon's concerns had been allayed by the clarification of the application to remove any suggestion that restaurant use was being pursued, but he remained unhappy about the proposed use of the Premises for medical purposes. He feared that, for instance, use as a Covid testing centre might lead to people congregating outside the premises; that use as an abortion clinic might attract unwanted attention; that the introduction of MRI or other scanning equipment might cause the floor of the Premises to be overloaded; or that the storage of hazardous materials or clinical waste might represent a risk to the residents of the Building or cause problems if it was not properly handled. The Lease did not contain restrictions specifically designed to address those sorts of issues, and a relaxation of the user covenant to make medical uses a possibility might therefore create problems for Concerto with the residential occupiers of the Building or with Mount Eden.

43. Mr Mizon also complained that the application sought modification of clause 3(9) without Schwarzschild having identified a specific alternative use, or an intended occupier for that use. Instead of seeking modification to permit a hair restoration clinic, for example, it appeared to Mr Mizon that Schwarzschild sought a much wider variation intended to maximise the value of the Lease before selling it on. The breadth of the proposed modification would cause Concerto to incur additional statutory obligations to Schwarzschild when it was required to consider a request for assignment or underletting to a particular user (we understood this to be a reference to the statutory duties imposed on a landlord by the Landlord and Tenant Act 1988). It would be exposed to arguments and potential litigation about whether it was acting reasonably in refusing consent to a particular occupier. It was of practical benefit to Concerto, in Mr Mizon's view, for it to be able to refuse consent for potentially problematic uses without having to be concerned that its refusal would be criticised as unreasonable in subsequent legal proceedings.

Ground (a) – is the restriction obsolete?

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

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

45. The context of this application is obviously different because the only person who benefits from the restriction is Concerto, and the suggested change in the neighbourhood has come about for reasons unconnected to any express or tacit waiver of its rights.

46. There has been no relevant change in the character of the Premises themselves. Even if Concerto was aware that during the underletting to Newway the Premises were divided into numerous small treatment rooms and possibly used in breach of clause 3(9), that use ceased more than three years ago, and two years before the date of the application. The Premises are not currently being used in breach of covenant and in considering whether the restriction has become obsolete it is the position at the date of the tribunal's decision, or at the earliest at the date of the application, which is relevant.

47. As for changes in the character of the neighbourhood, both Mr Nesbit and Ms Sowter had reviewed the current uses along Great Portland Street. Mr Nesbit confined his research to those properties to the north of the Building on the eastern side, and the Devonshire Street

junction on the western side. He accepted that the predominance of medical uses generally stopped south of the Devonshire Street junction and the Building, with only the 'MRI centre' at 155-157 Great Portland Street falling into that category.

48. Mr Nesbit's decision to look only north from the Building gave him too narrow an appreciation of the character of the neighbourhood. A truer assessment for the purposes of ground (a) ought to encompass surrounding areas in all directions. Looking at the area both north and south of the Building, we accept that since the grant of the Lease in 1995 there has been a change in the character of Great Portland Street at its northern end, where it has been absorbed into the expanding Harley Street medical district. That change is more obvious on the western side of the Street and diminishes quite rapidly as one moves south, especially on the eastern side, with the Building itself currently occupying an area without a pronounced character. The Premises are empty and have been for more than three years; they adjoin an office or showroom with no connection to medical uses, which in turn adjoins a corner construction site.

49. In any event, it does not seem to us that a change merely in the character of the neighbourhood should be given particular weight when considering whether a leasehold covenant remains enforceable or has become obsolete (at least where the covenant relates to the use of the premises). The purpose of the restriction in clause 3(9) was not to secure the continuation of a particular style of trading in the district, or to guarantee that the Premises continued to be occupied; it was simply to prevent the Premises from being used other than as a shop and showroom (or, with the landlord's consent, for another B1 use). The fact that the Premises may no longer be suitable for use as a shop because of modern disability discrimination legislation (a proposition which we accept), the fact that they are poorly adapted to office use, and even the fact that no potential tenant is interested in occupying them for one of the permitted uses does not make the restriction obsolete. It still secures the negative outcome that the Premises are not used otherwise than for a shop and showroom. There is no question of Concerto no longer being in a position to enforce the restriction, and if Schwarzschild was to permit the use of the Premises for medical purposes or as a hair restoration clinic without obtaining Concerto's consent, the Lease would be liable to be forfeited. Clause 3(9) is not obsolete in the sense in which Romer LJ explained the concept in *Truman, Hanbury, Buxton & Co's Application* effectively as meaning that it is unenforceable.

50. We therefore dismiss the application brought under ground (a).

Ground (aa) – Practical benefits of substantial value or advantage

51. It is not disputed that clause 3(9) of the Lease prevents the Premises from being used for the provision of medical services. It is not strictly necessary to consider on which side of the boundary line a hair loss clinic or a beauty therapist might lie, but we have no reason to doubt that the former would be capable of falling within Class E(e) of the amended Use Classes Order which now forms the revised basis of Schwarzschild's application.

52. Mr Healey invited us to conclude that it was not possible to determine whether any relevant use of the Premises which is impeded by the restriction could be said to be a reasonable use (as ground (aa) requires) because Schwarzschild had not identified what he referred to as a "definite project". In other words, the modification which the Tribunal was being invited to

make would open up the possibility of such a variety of different uses that an assessment of whether they were reasonable uses or not could not begin.

53. The requirement that the applicant must have a "definite project" is not found in the statute. Section 84(1)(aa) instead requires that "some reasonable user of the land for public or private purposes" be impeded by the continued existence of the restriction. Ground (aa) was introduced by the Law of Property Act 1969 to widen the scope of the power to discharge or modify restrictions. Previously ground (a) had covered both deemed obsolescence and circumstances where "*the* reasonable user of the land" was impeded by the continued existence of the restriction. Ground (aa) widened this condition so that it now applies where "some reasonable user" is impeded.

54. In *Re Glevum Estates (Western Counties) Application* (1973) LP/53/1972, one of the first decisions under the new ground (aa), the President of the Lands Tribunal, Douglas Frank, made observations about the scope of the new provision. The application was being advanced on the basis that there was a general demand for land for housing which, in the public interest, ought to be satisfied. Having found that there was no such general demand as had been suggested, and having dismissed the application on that basis, the President went on:

> "Perhaps I should add that as a general proposition any applicant seeking to reply upon that paragraph [(aa)] should be armed not only with a planning permission but also with detailed plans of a kind which could be incorporated in an order. What the applicants are in effect asking for is a blank cheque, which I should not have been disposed to grant in any event. I adopt that decision."

55. Mr Healey referred to another early decision of the Lands Tribunal (J.D. Russell-Davis FRICS) concerning ground (aa), *Re Lloyds Bank Ltd's Application* (1978) 35 P. C.R. 128, in which a statement in the 5th edition of *Restrictive Covenants Affecting Freehold Land* by Preston and Newsom (published in 1971) was adopted. The application was to discharge a restrictive covenant binding freehold land to enable a new house to be constructed. The applicant had no particular idea of what sort of house might be built and had not obtained planning permission. The Member dismissed the application, quoting the textbook's suggestion that an applicant must show "that he has a definite project, that it is a reasonable one and that the unmodified restriction impedes it."

56. More recently, the same point was elaborated on in *Re Davies' Application* (2008) LP/65/2006 in which the Tribunal (Mr N J Rose FRICS) commented:

> "If the Tribunal is to assess the extent of the benefit to an objector of impeding a particular user of land, it is essential for the Tribunal to be provided with full details of that user. It is true that the applicants have provided a general description of the form of development which they have in mind, and I infer that they would be prepared to agree that any modification should be subject to those conditions being adhered to in any future development of the application site. But without the benefit of a formal planning permission any description of the proposed house or houses would be difficult to express satisfactorily…"

The Tribunal's concern in that case was with its ability to assess the consequences for the objector of the proposed use of the land (and therefore the extent of the benefit provided by

the restriction which impeded it) and its ability to describe the modified restriction in sufficiently clear terms.

57. Ground (aa) requires the Tribunal to assess whether, in restricting a proposed use, the covenant provides the objector with a benefit which is of substantial value or advantage. It is also necessary for the Tribunal to be satisfied that the proposed use is a reasonable one. It is for the applicant to establish those matters by evidence. If the Tribunal is unable to make that assessment because insufficient information has been provided about the proposed use, the applicant will be unable to prove what is needed and the application is likely to fail. But whether the applicant has or has not provided sufficient detail of the intended use to enable the necessary assessments to be made will depend on the nature of the variation sought in the particular application, and not on some principle that the applicant must have a "definite project" in mind. The same is true of the form of the proposed modification; whether it is sufficiently precise will depend on the circumstances.

58. The cases in which the Tribunal has commented on the need for clarity as to the intended use of the land have generally been cases where the use concerned involved a proposal to build something on the land – a new house or a housing estate. It is unsurprising that the details of what the proposed development will look like have been considered important in such cases, where issues concerning overlooking or the scale and visual impact of what is proposed often have to be considered. The modification sought by Schwarzschild in this case does not involve any physical change in the Premises (although no doubt there would have to be fitted out for the business of a new occupier, as is permitted by the Lease). It is in that context that we must assess whether the statutory conditions are satisfied in the case of the proposed use for medical or health services and we reject Mr Healey's suggestion that the absence of a more "definite project" is fatal to the application. Examples of such a use have been identified, including the hair loss clinic. Having heard Concerto's evidence about its concerns over the proposed use, we do not believe it will be difficult to determine whether, in impeding the use of the Premises for medical purposes, the restriction secures for Concerto some benefit of substantial value or advantage.

59. The use of premises in Great Portland Street for medical purposes is plainly a reasonable use and, subject to his point about a lack of specificity, Mr Healey did not suggest otherwise. The Building is situated in the general vicinity of Harley Street, close to several private hospitals and clinics and in an area where related medical uses are commonplace.

60. A modification to permit the use of the Premises for medical or health services will not affect the other restrictions in the Lease or the headlease (such as the prohibition on causing nuisance, overloading floors or installing any heavy machinery). After modification any use other than as a shop and showroom, including a medical or health use, will remain subject to the prior written consent of Concerto (which is not to be unreasonably withheld or delayed). If Concerto reasonably takes the view that occupation of the Premises for the provision of a particular type of medical service is prejudicial to its interests as landlord, or to the interests of other occupiers of the Building, it will have grounds to object.

61. When considering whether the prevention of the use of the Premises for medical purposes confers some practical benefit of substantial value or advantage on Concerto, it is necessary to compare the degree of control over the use of the Premises which it would enjoy with and without the proposed modification. If the same benefit is also secured by some other provision of the Lease and will therefore continue to be available to Concerto after the

proposed modification of clause 3(9), it is difficult to see how that clause could itself be said to be of substantial value.

62. The concerns identified by Mr Mizon in his evidence, and by Mr Healey in his submissions, focussed on the issue of control.

63. Mr Mizon emphasised that, had the Lease been drafted with medical use of the premises in mind, different covenants would have been included which would have given Concerto greater control. He mentioned the control of medical waste, and the introduction of MRI scanners or x-ray equipment into the Premises.

64. Mr Healey submitted that the proposed modification would reduce Concerto's ability to control the use of the Premises and thereby protect other parts of the Building. It would permit the Premises to be used in a manner that might place Concerto in breach of the covenants in its own headlease, including the restriction on use and the obligation not to cause or permit a nuisance to its landlord or other users of the Building. It could also be liable for disturbance caused to the residential occupiers of the Building under the terms of the residential underlease.

65. Mr Healey also submitted that the ability to refuse consent to a use falling outside the current restriction without having to provide any reason, and without the need to justify the refusal as reasonable, was also a substantial practical benefit. Whether a particular use was reasonable or not was not always clear cut, and Concerto might be drawn into argument and expense which it would avoid altogether if it could simply refuse to consent to a change without qualification.

66. We are not persuaded that the proposed modification will cause Concerto to lose practical control over the use of the Premises. The Lease includes covenants on the part of Schwarzschild in standard terms which will be sufficient to enable Concerto to protect its own legitimate interests and those of the residents of the Building. These prohibit causing or permitting a nuisance, allowing rubbish to accumulate, discharging deleterious matter into the drains, overloading floors, displaying signs without the landlord's approval, or prejudicing insurance and requiring compliance with all relevant enactments and any reasonable regulations made by the landlord. The Lease may not include terms referring specifically to medical uses but the more general language in which it is drafted is amply wide enough to give Concerto all the control it could reasonably require over the manner in which the Premises are used. Neither Mr Mizon nor Mr Healey suggested any additional covenants which would be of assistance to Concerto and which the Tribunal might include in the Lease as a condition of allowing the modification. Nor will there be any inconsistency between the headlease and the modified user restriction in the Lease such as to create a risk of action against Concerto by its own landlord, Mount Eden. Had the application proceeded in its original terms, which were wide enough to enable the use of the Premises as a restaurant, then there would indeed have been such a risk, but that case is no longer pursued.

67. The current restriction does, of course, allow Concerto to bargain away the right to use the Premises for medical purposes in return for a financial benefit, either in the form of a premium or a substantial rent and periodic rent reviews, or both. But it is well established that the ability to relax a restriction in return for a payment is not a practical benefit for the purpose of ground (aa): *SJC Construction Co Ltd v Sutton LBC* (1975) 29 P & CR 322, *Stockport Metropolitan Borough Council v Alwiyah Developments* (1986) 52 P & CR 278,

and *Winter v Traditional & Contemporary Contracts Ltd* [2007] EWCA Civ 1088 EWCA 1008 (all decisions of the Court of Appeal which have been consistently applied by the Tribunal, most recently in *Father's Field Developments Ltd v Namulas Pension Fund Trustees* [2021] UKUT 169 (LC)). In the *Stockport* case Dillon LJ, giving the majority judgment, said that, in the context of section 84(1A):

> "I do not think that that sort of possibility of financial advantage is to be regarded as a "practical benefit" to the person entitled to the benefit of the restriction at all…. The subsection is concerned with practical benefits on the land in the nature of amenities and not with merely financial bargaining position which the person entitled to the benefit of the covenant could have used to extract money for his consent to a release or modification of the restriction even if the section had never been enacted." (p 284)

68. The same principle applies to the proposition that Concerto currently enjoys a substantial advantage because it is not constrained by the requirement to act reasonably when considering whether or not to grant consent to a use which falls outside clause 3(9) as currently drafted. The opportunity to grant consent in return for a premium and an increased rent, as Concerto has been willing to do, is not the sort of benefit with which ground (aa) is concerned.

69. The common law principles which are applied when the Court considers whether a landlord has refused its consent unreasonably have become well established by decisions concerning requests to assign or underlet; they are stated in *International Drilling Fluids v Louisville Investments (Uxbridge)* [1986] Ch 513, and were approved by the House of Lords in *Ashworth Frazer v Gloucester City Council* [2001] 3 WLR 2080. They include the principle that the purpose of such a covenant is to protect the landlord from having his premises used or occupied in an undesirable way or by an undesirable tenant; it is not necessary for the landlord to prove that the conclusion which led him to refuse to consent were justified, if they were conclusions which might be reached by a reasonable person in the circumstances. The same test of reasonableness applies to a qualified covenant against changing the use of premises (*Woodfall: Landlord and Tenant*, paragraph 11.195). The statutory duty which arises under the Landlord and Tenant Act 1988 in the case of alienation does not apply to covenants restricting use.

70. The risk which Mr Healey identified, and against which he argued clause 3(9) provides protection, is that a reasonable refusal by Concerto of consent to a change of use to a particular form of medical or health services might be said by the tenant to have been unreasonable and Concerto might as a result become embroiled in litigation. We do not consider that protection from the possibility that a reasonable refusal of consent might put Concerto at risk of legal proceedings is the sort of advantage with which ground (aa) is concerned. It is not a practical benefit on the land in the nature of an amenity. But even if we are wrong in that we do not think the benefit or advantage of protection from such a risk is substantial. The Court has no jurisdiction to award damages to a tenant whose landlord has unreasonably withheld consent to a change of use, and the likely outcome of a dispute over such a refusal is that the prospective tenant will find alternative premises and walk away. The risk that Concerto will be drawn into proceedings is remote.

71. We are therefore satisfied that by preventing the Premises from being used for medical purposes clause 3(9) does not secure any practical benefit of substantial value or advantage

to Concerto. The likelihood is that the Premises will remain extremely difficult to let for the permitted shop and showroom use, while they could readily be let for use for some medical purpose. The policy underlying section 84(1)(aa) is that land should not be sterilised, and prevented from being used for reasonable purposes by restrictions which secure no real benefit for the person entitled to enforce them. We are satisfied that clause 3(9) is such a restriction and ought to be modified.

72. The remaining question is whether compensation ought to be paid to Concerto.

73. Mr Nesbit's view was that Concerto would suffer no loss or disadvantage from the proposed modification – which at the time of drafting his report was the wider proposal including restaurant use. He said that Concerto's reversionary interest was so minor to be de minimis.

74. Ms Sowter agreed, and offered no valuation of a sum to make up for any loss or disadvantage in consequence of the proposed modification. However, she considered that it was possible to make an assessment of the effect which the restriction had on the premium Schwarzschild paid at the time the lease was granted in May 1995. On that basis she suggested that compensation should be awarded under limb (ii) of s.84(1).

75. She did so by reference to medical and office rents payable in the locality at the time the Lease was granted to Schwarzschild. Unsurprisingly, the evidence was sparse. She did find a record of an October 1997 letting for medical use at 152-154 Harley Street (at the northern end of Harley Street at its junction with Marylebone Road). The part basement, ground and mezzanine floors, totalling 4,580 sq ft were let to the Molecular Imaging Centre at £80,000. Applying this pro-rata to the Premises, and allowing for rental growth between May 1995 and October 1997, she estimated the annual rental value of the Premises in May 1995 assuming they had been let for a medical use would have been £72,500. She compared that rent with the £20,000 which Mr Alexander had said that Schwarzschild were paying before they took the Lease in return for a premium of £270,000. Adopting the same multiple of 13 (or a yield of 7.5%), Ms Sowter suggested the premium which would have been paid for a medical use would have been £962,000.

76. While we found Ms Sowter a credible and experienced witness, with first-hand knowledge of the immediate area, we are not persuaded by her evidence, based as it is on only one transaction dating back 25 years, for a property which is in a more attractive medical location, with a Harley Street address. At the time of the letting Great Portland Street was dominated by the rag trade, and the encroachment of medical services which is now apparent was nothing like as marked as it now is. We question whether it would have been nearly as attractive to a medical user as the Harley Street address which was the basis of Ms Sowter's comparison.

77. We do have evidence, albeit more recent, of the levels of rent which different types of occupier were prepared to pay for the Premises. The 2016 proposed lease to Newway, with a retail user covenant, was to be at a rent of £190,000 per annum, while the proposed lease to Bader, with a quasi-medical covenant, was agreed at only a marginally higher annual rent of £200,000. Ms Sowter thought that had the Premises been fully marketed with an unconstrained medical user, rental offers would have been higher. There might be something in that, but in our view medical users would find the Premises more attractive now than in 1995, and the more recent evidence suggests that any difference is negligible.

That evidence is of two rental offers for the subject Premises from different parties, and we find it more persuasive than the evidence of one very historic transaction in a better location.

78. We conclude that a modification of the covenant on the limited basis now sought does not warrant the payment of any compensation to Concerto.

Determination

79. The application succeeds under ground (aa) and we will modify clause 3(9) of the Lease so that the tenant covenants:

> Not at any time during the said term to use the Demised Premises other than for the purpose of a shop and showroom or with the prior written consent of the Landlord (such consent not to be unreasonably withheld or delayed) for the purpose of any use within Class E(e) or E(g) of the Town and Country Planning (Use Classes) Order 1987 as amended.

Martin Rodger QC
Deputy Chamber President

Peter D McCrea FRICS FCIArb

20 June 2022

Right of appeal

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