Landmark Chambers

Offices to Flats Development: Landlord and Tenant Issues

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Landmark Chambers

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1. This paper addresses landlord and tenant issues that arise in the context of a development of premises from office to residential use. In particular, it addresses:

   A. The tenant's need for landlord consent for development, change of use and alterations;

   B. The permissible and impermissible grounds for withholding consent; and

   C. Applications to modify covenants under s.84 of the Law of Property Act 1925.

(A) The tenant's need for landlord consent for development, change of use and alterations

Different types of covenants

2. A long lease will almost invariably contain a tenant covenant restricting the tenant's rights in respect of alienation, change of use from the permitted use and the tenant's ability to effect alterations and additions to the demised premises.

3. It is also relatively common for a lease to contain a tenant covenant that no application for planning permission will be made by the tenant without the landlord's consent: see the covenant in *Hautford Ltd v Rotrust Nominess Ltd* [2018] EWCA Civ 765 (discussed below).

4. These tenant covenants fall into three categories: absolute, partially qualified and fully qualified. An absolute covenant is one that prohibits outright the tenant from doing a certain action; for example, the tenant will not make structural alterations to the premises.

5. A partially qualified covenant is a covenant restricting the tenant from doing an action without the landlord's consent; for example, the tenant will not carry out structural alterations without the landlord's prior written consent.

6. A fully qualified covenant is a covenant restricting the tenant from doing an action without the landlord's consent, such consent not to be unreasonably withheld; for example, the tenant will not carry out structural alterations to the premises without the landlord's prior written consent, such consent not to be unreasonably withheld.

The statutory overlay

7. The tenant's covenants must be read subject to section 19 of the Landlord and Tenant Act 1927.

8. S.19(2) provides that where there is a qualified covenant against the making of improvements, the landlord's consent shall not be unreasonably withheld:

   (2) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement ***against the making of improvements*** *without a licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary,* ***to be subject to a proviso that such licence or consent is not to be unreasonably withheld;*** *but this proviso* ***does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord****, and of* ***any legal or other expenses properly incurred*** *in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.*

9. A qualified covenant against alterations therefore becomes a fully qualified covenant against alterations, insofar as the alterations amount to improvements.

10. Note the exceptions to the application of this provision. It does not apply to leases of agricultural holdings, mining leases, protected or statutory tenancies or secure tenancies.

11. Improvements include any change to the demised premises which is of benefit to the tenant and/or renders the demised premises more convenient and comfortable to the tenant, judged from the perspective of the tenant: *FW Woolworth and Co v Lambert* [1937] Ch 37.

12. Regarding a covenant against change of use, there does not exist the same statutory proviso. However, s.19(3) of the 1927 Act provides:

(3) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement ***against the alteration of the user*** *of the demised premises, without licence or consent, such covenant condition or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary,* ***to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent****; but this proviso does not preclude the right of the landlord to require payment of* ***a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and of any legal or other expenses incurred in connection with such licence or consent.***

Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the landlord shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

13. The effect is that where a qualified covenant against alterations or a change of use applies, the landlord cannot charge any sum in the nature of a fine. However, this does not affect the landlord's entitlement to charge a reasonable sum for costs it incurs in consenting to the proposal: *Dong Bang Minerva (UK) v Davina* [1995] 1 E.G.L.R. 41.

This entitlement exists regardless of whether the lease specifically provides for this or not: *Holding & Management (Solitaire) Limited v Norton* [2012] UKUT 1. The sum charged must itself be reasonable in order for the withholding of consent on the non-payment of the sum to be reasonable.

14. As to the amount that will considered reasonable, see the recent Court of Appeal decision in *No.1 West India Key Ltd v East Tower Apartments Ltd* [2018] EWCA Civ 250, in which the Court upheld the High Court's finding that a fee of £1,250 for landlord's legal fees for consent to assignment was unreasonable; £350 only was considered a reasonable sum.

15. In the absence of an express proviso that consent shall not be unreasonably withheld, either contractual or implied by statute, it will be difficult (if not impossible) to succeed in arguing that such a proviso can be implied at common law: *Pearl Assurance plc v Shaw [1985] 1 E.G.L.R. 92* and *Guardian Assurance Co. v. Gants Hill Holdings Ltd* [1983] 2 EGLR 36.

16. The Landlord and Tenant Act 1988 does not apply to applications for consent to alterations or change of use. Therefore, for these applications there is no statutory duty on the landlord sounding in damages and the burden of proving unreasonableness remains with the tenant.

(B) The permissible and impermissible grounds for withholding consent

General principles: when will a landlord be held to have unreasonably withheld consent?

17. The general principles applicable to assessing reasonableness are derived from the case law on alienation covenants in *International Drilling Fluids Ltd v Lousiville Investments (Uxbridge) Ltd* [1986] Ch. 513.

18. In *Iqbal v Thakrar* [2004] 3 E.G.L.R. 21 (CA) the principles were restated in the context of an application for consent to alterations:

1. *The purpose of the [covenant] is to protect the landlord from the tenant effecting alterations and additions that damage the property interests of the landlord.*
2. *A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests.*
3. *It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals that the tenant has put forward. Implicit in that is the necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord knows whether he should refuse or give consent to the alterations or additions.*
4. *It is not necessary for the landlord to prove that the conclusions that led him to refuse consent were justified, if they were conclusions that might be reached by a reasonable landlord in the particular circumstances.*
5. *It may be reasonable for the landlord to refuse consent to an alteration or addition to be made, for the purpose of converting the premises to a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances. For example, it may be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold.*
6. *While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.*
7. *Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.*
8. *In each case, it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons that impelled him to refuse consent, acted unreasonably.*

19. A mixture of good and bad reasons for refusal will not automatically invalidate the refusal: *No.1 West India Key Ltd v East Tower Apartments Ltd (above).* The decisions in *British Bakeries (Midlands) Ltd v Michael Testler & Co Ltd* [1986] 1 EGLR 64 (Peter

Gibson J) and *BRS Northern Ltd v Templeheights Ltd* [1998] 2 EGLR 182 (Neuberger J) were authority for that proposition. Good reasons will not be infected by bad reasons if the former are freestanding and not dependent on the bad reasons.

20. However, if the good reasons are merely "makeweights" and not of causative value, this will not be sufficient. The decision to refuse may become "infected" and therefore unreasonable. As Lewison J stated in *No.1 West India Key* at [42]:

the question is whether the decision to refuse consent was reasonable; not whether all the reasons for the decision were reasonable. Where, as here, the reasons were free-standing reasons each of which had causative effect, and two of them were reasonable, I consider that the decision itself was reasonable.

<u>What will amount to good reasons for withholding consent to alterations?</u>

21. Section 19(2) allows the landlord to request from the tenant a sum compensating him for damage or diminution in the value of the premises or neighbouring premises of his. The case law therefore centres on the reasonableness of the sum charged.

22. An objection by the landlord on the ground of pecuniary damage only is not a reasonable ground for refusing consent absolutely. If the landlord wishes to avail himself of his right to require as a condition of his consent the payment of a reasonable sum in respect of damage to or diminution in the value of premises, and expenses properly incurred, he must either ask for a particular sum or say that he would give his consent on the agreement by the tenant to pay what a tribunal might decide to be reasonable.

23. It has been held that a landlord may reasonably object to alterations on grounds based on aesthetic, artistic, historic or sentimental considerations: *Lambert v Woolworth & Co. [1938] Ch. 883.* However, this is subject to the need for the landlord to establish that the proposed alterations would damage his property interest – the reversion – which may be challenging.

24. In *Iqbal v Thakrar* (above), it was held that the landlord was entitled to refuse on the basis of concerns about the structural integrity of the proposed alterations. It was not for the landlord to have to grant consent subject to a condition about structural integrity. The landlord was required only to consider the application as made by the tenant.

What will amount to good reasons for withholding consent for change of use?

25. Where a tenant cannot change the use of the premises without the landlord's consent, such consent not to be unreasonably withheld, the same general principles set out above will apply. The landlord cannot refuse consent in order to secure a collateral advantage for himself. In the following cases it has been held that the landlord reasonably withheld consent to change of use:

    A. where the reason for the refusal was the landlord's fear that the change of use would detract from the value of the property, might attract vandalism and detract from the economic fabric of the immediate area: *Tollbench v Plymouth City Council [1988] 1 E.G.L.R. 79*;

    B. where the proposed change of use to retail use would involve the loss of the right under the planning acts to use the property as offices, with no certainty that the property could revert to office use, and the property was not physically suitable for retail use, consent was reasonably withheld: *Warren v Marketing Exchange for Africa* [1988] 2 E.G.L.R. 247*;*

    C. where the proposed change of use would have resulted in "dead frontage" in a shopping centre: *OHS v Green Property Co* [1986] I.R. 39.

26. The landlord is entitled to consider its effect on his estate as a whole, and to his policies for the management and improvement of his estate, even though those policies were not extant at the date of grant of the lease: *Crown Estate Commissioners v Signet Group* [1996] 2 E.G.L.R. 200.

Can a landlord refuse consent to alterations/change of use/application for planning permission on the basis that the proposal would thereafter entitle the tenant to enfranchise?

27. In the context of an alienation covenant, the older cases hold that a landlord is acting reasonably in refusing consent to an assignment that would entitle the assignee to the statutory right to enfranchise. In *Norfolk Capital Group Ltd Capital v Kitway* [1977] 1 QB 506, the assignor was a company so was not entitled to enfranchise under the Leasehold Reform Act 1967. The proposed assignee was an individual and therefore would be so entitled after a sufficient period of residence. The Court accepted that the inevitable detriment that enfranchisement would have on the landlord's proprietary and financial interests made it reasonable to refuse consent.

28. Similarly, in *Bickel v Duke of Westminster* [1977] 1 QB 517, the assignor held the property as an investment and therefore did not occupy it as their residence so were not entitled to enfranchise under the Leasehold Reform Act 1967. The proposed assignment was to an individual who would consequently acquire the rights to enfranchise. Again, it was held that the landlord's refusal on the basis of this risk was reasonable. Reliance was placed by Lord Denning on the fact that "much financial loss" would be suffered by the landlord.

29. However, these authorities must be contrasted to the more recent cases on the point. In *Mount Eden Land Ltd v Bolsover Investments Ltd* [2014] EWHC 3523 (Ch), the current use was as an office building. The tenant proposed certain alterations to convert the office building into residential flats. Residential use was not prohibited by the lease. On an application to the landlord for consent for the proposed alterations, the landlord refused on a number of grounds including that the tenant would thereby become entitled to collectively enfranchise. The Court of Appeal agreed with the judge at first instance that this was not a reasonable basis of refusal. The possibility of enfranchisement was considered wholly speculative, dependent on whether long leases were granted or not and the requisite number of lessees coming together to make the enfranchisement claim.

30. The earlier authorities were distinguished. The Court reasoned that *Norfolk Capital* and *Bickel* had been decided under the 1967 Act under which landlords did not receive fair

compensation for enfranchisement. In contrast, the 1993 Act provided proper compensation. Further, the leases in those earlier cases were significantly shorter; the lease in *Mount Eden v Bolsover* was for 999 years from 1913 and therefore the reversion was of much less value.

31. The same conclusion was reached by the Court of Appeal in *Rotrust Nominees Ltd v Hautford Ltd* (above). In that case:

    A. The lease of a building commenced in 1985 for a term of 100 years. The building formed part of a terrace. The lease permitted residential use in addition to office use.
    B. The tenant covenanted not to apply for planning permission without the prior written consent of the landlord, such consent not to be unreasonably withheld. The landlord refused consent to the tenant's application to make a planning application for change of use of the first and second floors of the building from office use (or use ancillary to retail use) to residential use. Consent was refused on the basis that such change of use would increase the prospect of successful enfranchisement under the 1967 Act because the proportion of the building in residential use would increase from 25% to 52%.
    C. An additional reason given was that enfranchisement would damage the landlord's management of its estate.
    D. The tenant refurbished the first and second floors. They did not require landlord consent for this because the refurbishment required no structural alteration and the lease did not require landlord consent for non-structural alterations.

32. The Court of Appeal held that the landlord's refusal of consent was unreasonable, for the following reasons:

    A. The starting point is to ascertain the purpose of the covenant in issue. The question was whether the covenant requiring landlord consent to make a planning application included precluding the residential use of the first and second floors in order to prevent enfranchisement of the property.

B. The answer to that question was no. This was because the lease expressly permitted residential use of first and second floors.

C. It was inconceivable that the original parties intended to create a situation where the tenant would be precluded from applying for planning permission for change of use for the 100 years of the term, even though any third party could so apply and the tenant could take advantage of any permission obtained.

D. The fact that planning permission to change of use of the first and second floors would substantially enhance the prospects of success in an enfranchisement application by the tenant because of the increase in the residential floor area makes no difference to the analysis.

E. The decisions in *Bickel* and *Norfolk Capital* do not address the interaction between a tenant's user covenant expressly permitting residential use and tenant's covenant prohibiting applying for planning permission without landlord consent. The general observations that a landlord can unreasonably withhold consent to an application where the proposal would enhance the prospects of enfranchisement are therefore inapplicable.

F. In any event, the older cases arose in circumstances where the lease predated the 1967 Act.

G. Wider management considerations are sufficiently met by the provisions in section 10(4) of the 1967 Act for the insertion of restrictive covenants in the transfer of the freehold.

<u>Remedies where a landlord has unreasonably withheld consent</u>

33. A tenant has two possible remedies for unreasonable withholding of consent for alterations or change of use.

34. First, the effect of an unreasonable refusal is that the proviso is lifted so the tenant is entitled to assign or carry out alterations without the need for the consent. However, it can be risky to alter/change use without consent in this scenario. If the landlord is later found to have been reasonable in withholding consent, the tenant will be in breach.

35. Second, the tenant would be wise to seek a declaration that the landlord has unreasonably withheld consent before assigning without consent. A declaration can be sought by way of summary judgment. An expedited hearing might be preferable if there is doubt as to the ability to satisfy the summary judgment test. If there is minimal dispute of fact, a Part 8 claim would be appropriate. Declarations can be sought in the County Court – Landlord and Tenant Act 1954, section 53(1).

(C) Applications to modify covenants under s.84 of the Law of Property Act 1925

36. The Land Chamber of the Upper Tribunal's power under s.84 of the Law of Property Act 1925 applies primarily to freehold covenants.

37. In addition, a tenant who holds under a lease for a term (whenever created) of more than 40 years can, after the expiration of 25 years of the term, apply to the Lands Tribunal for the modification or discharge of a restrictive covenant: s.84(12).

38. Where the lease expresses the term as running from a date earlier than the date of the lease the 25 years which must have expired are to be reckoned from the date of the lease: *Earl of Cadogan v. Guinness* [1936] Ch. 515.

39. The Tribunal can wholly or partially discharge or modify any restriction if any of the following grounds are made out:

(a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete;

(aa) that (in a case falling within subsection (1A)) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user; or

(b) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or

any lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified; or

(c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction

40. Section 84(1A) provides:

(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.

41. An order discharging or modifying a restriction may direct the applicant to pay to any person entitled to the benefit of the restriction such sum by way of consideration as the Tribunal may think it just to award under one, but not both, of the following heads:

(i) a sum to make up for any loss or disadvantage suffered by the person in consequence of the discharge or modification; or
(ii) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by i

42. Section 84(1B) provides:

In determining whether a case is one falling within subsection (1A) above, and in determining whether (in any such case or otherwise) a restriction ought to be

discharged or modified, the Upper Tribunal shall take into account the development plan and any declared or ascertainable pattern for the grant or refusal of planning permissions in the relevant areas, as well as the period at which and context in which the restriction was created or imposed and any other material circumstances.

43. Section 84(1C) gives the Tribunal the power to add such further provisions restricting the user of or the building on the land affected as appear to the Lands Tribunal to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant.

44. The power to discharge or modify restrictive covenants does not apply:

(a) to a mining lease;

(b) where the restriction was imposed on the occasion of a disposition made gratuitously or for a nominal consideration for public purposes;

(c) to restrictions imposed under statutory powers for the protection of any Royal Park or Garden;

(d) to restrictions created or imposed for naval, military or air force purposes, or for civil aviation purposes, so long as the restrictions are enforceable by the Crown;

(e) to a positive covenant;

(f) to a planning obligation (i.e. an obligation imposed by agreement under Section 106 of the Town and Country Planning Act 1990).

45. The applicant can be in difficulties if it is the original covenantor. In *Re Rudkin's Application* (1963) 16 P&CR 75, where the applicant was the original covenantor, the Tribunal expressed the view that it was "*justified in requiring from an original covenantor a somewhat higher proof of justification for the modification sought*." Similarly, it can be a struggle to establish that a covenant only recently imposed, albeit not agreed to by the applicant itself, has now become obsolete or no longer secures a practical benefit for the covenantee. S.84(1B) specifically directs the Tribunal to take into account "the period at which and the context in which the restriction was created

or imposed". In *Re Holden's Application* [2018] UKUT 21 the Tribunal took into account the fact that the covenant had only been imposed 4 years previously when the applicant purchased the property; the applicant could not show there had been changes to the property or the neighbourhood in that short period.

46. However, it is by no means impossible for an original covenantor to succeed in an application for discharge or modification, even where the covenant is relatively recent. In *Re Geall's Application* the Tribunal considered that a 30-year-old covenant was not recent and the application by the original covenantor succeeded. The Tribunal has reiterated that the recency of the covenant is not a decisive factor: *Re Barter's Application* [2017] UKUT 451.

47. Although the Tribunal does not have jurisdiction to modify easements, the knock-on effect of a modified or discharged covenant will often be that a connected easement is interpreted more permissively. A right of way used in connection with the property that is the subject of the application for discharge or modification is given a purposive interpretation so that the right of way can be used in connection with the new use, even if the literal words of the right of way seem not to permit it: *Hotchkin v McDonald* [2004] EWCA Civ 519. The right of way could serve any use permitted under the restrictive clause as modified by the Tribunal, or if the Tribunal were to discharge the restriction, the words referring to it in the grant of the right of way would become redundant.

Ground (aa)

48. Ground (aa) is the ground on which applications are most commonly granted. There are six questions that arise for determination under section 84(1)(aa) (see *Re Bass Limited's Application* (1973) 26 P & CR 156):

    A. Whether the restriction impedes some reasonable user of the land;
    B. if so, whether in so doing it secures to the objector any practical benefits;
    C. if so, whether those practical benefits are of substantial value or advantage to it;

and, if not,

D. whether money would be adequate compensation for any loss or disadvantage suffered;

E. whether, if ground (aa) has been made out, the Tribunal should exercise its discretion in favour of the modification; and, if so,

F. how much if anything should be awarded as compensation.

49. Where planning permission has been granted, it will be an unusual for the landlord/covenantee to succeed on an argument that the proposed use is not reasonable for the purposes of s.84(1)(aa): *Shephard v. Turner* [2006] 2 P&CR 28.

50. When relying on the 'limited benefit' test under s.84(1A)(a) the burden is on the applicant to show that the covenant does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them. The objectors can rely on any benefit. Even aesthetic considerations, such as the loss of a nice view of pretty trees (*Re Hopkins' application* [2008] 7 WLUK 196) whether for private individuals (e.g. *Re Vince's Application* [2007] 9 WLUK 250) or quasi-public bodies (e.g. *Zenios v Hampstead Garden Suburb Trust Ltd* [2011] EWCA Civ 1645) can count as practical benefits of substantial value or advantage for which in many cases money cannot compensate for such loss

51. In terms of quantifying a <u>substantial</u> practical benefit, the objectors need to adduce evidence on the expected diminution in value of their property if the covenant were discharged or modified; a diminution in value amounting to a few percent of the total value of the objector's property will usually not be regarded as substantial. In *Re Geall's* [2018] UKUT 154 a 2.5% diminution in value (amounting to £65,000) was not considered a substantial practical benefit despite being a significant sum.

<u>Ground (aa) public interest limb</u>

52. The public interest test (s.84(1A)(b)) in the second portal is notoriously difficult to satisfy. The Court of Appeal recently overturned the Upper Tribunal's decision that

the public interest test was satisfied in *Alexander Devine Children's Cancer Trust v Millgate Developments Ltd* [2018] EWCA Civ 2679 because the Tribunal had given too much weight to the fact that the development in breach of the covenant (13 affordable houses) had the benefit of planning permission. The questions of whether planning permission should be granted and whether upholding a covenant was contrary to the public interest were different, arising in different contexts.

53. Further, it is not sufficient for the public interest test that the applicant, for example, is a charity seeking to develop land previously used as a care home into flats to release funds for other charitable purposes: *Re Thomas Pocklington Trust Ltd* [2018] UKUT 256.

Ground (a)

54. In respect of ground (a), threshold of obsolescence is high and rarely satisfied. For example, in *Derreb Ltd v Blackheath Cator Estate Residents Ltd* [2017] UKUT 209 it was held that a restrictive covenant requiring an area to be used as a sports ground or for the erection of detached houses was not obsolete despite the fact that the property had not been used as a sports ground since 1999 and the applicant contended that there was no prospect that planning permission would be granted for a scheme consisting wholly of detached houses. The Tribunal considered that the nature of the estate had not changed so as to make the restriction to detached houses obsolete.[1]

Costs

55. Unless an objector has acted unreasonably, unsuccessful objectors will not normally be ordered to pay any of the applicant's costs. Successful objectors will usually be awarded their costs, unless they have acted unreasonably.

Recent application in offices to flats context: Waggot v Yip [2017] UKUT 108

[1] The application succeeded on ground (aa) instead.

56. In this case, the Waggots applied for the discharge of a covenant restricting the use of their land to office use only. The property had once been in residential use (until 1978) but had since been converted. The objector's land had, at the time of the covenant, been used as a pub, but later as a Chinese restaurant. At the time of the application the objector's land was no longer being used as a Chinese restaurant. The objector contended that the covenant conferred on him a valuable benefit: office use is far less likely to give rise to complaints about noise and cooking smells from a restaurant. The application relied on grounds (a), (aa) and (c).

57. Under ground (a), the applicants contended that there had been a significant change of emphasis in respect of the use of buildings within the immediate vicinity and the town centre. The applicants demonstrated the extent of the residential use in nearby properties in the town centre and relied upon the encouragement for such conversions from the Local Plan. Even the floors above the objector's restaurant were in residential use. The Tribunal accepted that the nature of the area had changed. The Tribunal held that the purpose of the covenant was to protect the former pub's business- this was supported by other covenants in the relevant transfer - and the risk of complaints about pub-goers from residents. The Tribunal rejected the objector's concerns that residential use would give rise to more complaints. The location of the restaurant's kitchen was distant from the applicant's property so the risk of noise and smells from ventilation equipment was low. The Tribunal also accepted that residents who choose to live in town centres would have to expect some level of disturbance. In any event, the risk was not currently real because there did not seem any prospect that the objector's land would be used as a pub or restaurant again. The application succeeded on this ground.

58. Under ground (aa), the applicants argued that the objector's concerns about increased complaints from potential residential occupiers were illusory. The Tribunal accepted this and held that any practical benefit was minimal. The extent of physical proximity of the properties meant that nuisance from smells was unlikely. Complaints about noise would also be unlikely given that residents in town centres can be expected to tolerate a greater amount of noise. The objector's evidence had been that he had never had a complaint from a resident in any other building during the period the restaurant had been operating. The application succeeded under ground (aa) too.

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